Law Council
OF AUSTRALIA
Business Law Section

Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600
Via Email: economics.sen@aph.gov.au

17 September 2015

Dear Sir / Madam

Inquiry into Tax and Superannuation Laws Amendment (Better Targetting the Income Tax Transparency Laws) Bill 2015 ('the Bill')

The Taxation Committee of the Business Law Section of the Law Council of Australia (the Committee) welcomes the opportunity to provide a submission to the Senate Economics Legislation Committee (the Senate Committee) in relation to the inquiry into the above Bill.

The Committee made two previous submissions to Treasury in relation to the tax transparency laws intended to be amended by the Bill. The first submission, dated 24 April 2013, was in response to the *Improving the transparency of Australia's business tax system* Discussion Paper issued in April 2013 (which pre-dated the introduction of these measures). The second submission, dated 3 July 2015, was in response to the exposure draft legislation released on 4 June 2015 ahead of the introduction of the Bill into Parliament. For convenience, we attach copies of those earlier submissions.

The Committee considers that the tax transparency laws in section 3C of the *Taxation Administration Act 1953* are harsh, unjust and discriminatory. The Committee supports the Bill as it will operate to alleviate that harshness, injustice and discrimination against a significantly adversely affected class of taxpayers – namely, private Australian companies.

The Committee submits that the Bill should be enacted as law.

It is considered that the provisions of section 3C will continue to be discriminatory and unjust, however the removal of that discrimination for Australian private companies is welcome and supported by the Committee.

Part 1 – Summary of Submissions

In addition to the cogent explanations set out in the Explanatory Memorandum to the Bill, and the detailed submissions of the Committee set out in the annexed submissions to Treasury dated 3 July 2015 and 24 April 2013, the Committee believes that the tax disclosure laws should be amended to exclude private Australian companies. The Committee restates and incorporates in this submission the detailed reasons and submissions made in response to the Exposure Draft of the current Bill, in its submission dated 3 July 2015. The Committee wishes to add the following observations to those earlier submissions, without restating all of them.

The fundamental and long-held right to privacy of the shareholders of Australian private companies is compromised

As noted in the Committee's earlier submissions, section 3C displaces the fundamental and long-held tenet of Australia's tax laws that a taxpayer's affairs must remain private between them and the Australian Taxation Office.

The publication of private taxation information of particular corporate tax entities discriminates against such affected companies and other corporate taxpayers. Trusts and partnerships which are not taxed as companies (the great majority of trusts and partnerships), and even individuals, are not subject to section 3C. This injustice is further exacerbated for private Australian companies by the fact that ASIC maintains a public register of companies and a simple ASIC search could identify the shareholders of the private companies that are subject to the tax disclosure laws. This does not apply to public companies or foreign companies.

The ability to identify the individuals or families associated with private companies not only draws further attention to such persons (and creates the types of risks discussed in the Explanatory Memorandum accompanying the Bill) but it will likely result in the general public falsely assuming that the income of those private companies is the income of the individuals or families behind those companies. The right to the privacy of those individual shareholders is therefore undermined.

This is particularly the case where, for example, ultimate taxation of particular types of income are borne by entities other than the particular private company, such as exempt and 'non-assessable non-exempt' items of income which will effectively be taxed as an unfranked dividend when ultimately distributed to shareholders; or tax has been paid by other entities or in other jurisdictions but which is credited in the Australian private company. In such instances the disclosure will suggest the company does not bear tax – and therefore lead the general public to assume the shareholders of the company have no further liability to tax. This is not the case, as companies and individuals are separate entities for tax purposes and the basis for determine tax liability for one type of entity will be different to the basis for determining tax liability for another type of entity. However the general public will not likely appreciate the complexities of the income tax laws and simply assume that the tax liability of a private company can more or less be attributed to its shareholders behind that company.

The risk of this false assumption not only creates misinformation and confusion in the public domain, but it undermines the privacy of those individual shareholder taxpayers. Further, the misleading nature of the selective publication required by section 3C will likely result in distorted public discussion around private Australian companies, rather than encouraging informed public debate about tax policy.

No evidence of widespread aggressive tax avoidance by Australian private companies

The disclosure laws were introduced in 2013 against a backdrop of discussion about base erosion and profit shifting by multinationals and efforts to discourage aggressive tax practices by large multinationals to ensure they “pay their fair share of tax” in Australia.

As observed publicly by the Commissioner of Taxation Mr Chris Jordan, the introduction of section 3C into the Taxation Administration Act “was really for multinational companies operating here, disclosing quite low revenue” and was not intended to capture private Australian companies (AFR 20 March 2015, page 6). The Commissioner of Taxation has also stated that “most wealthy Australians and their private groups do the right thing” (ATO Media Release: ATO to start tax assurance talks with large private groups, 16 April 2015). Extensive information, significantly greater than the portion of information to be published under the corporate tax transparency obligations, is already provided to the ATO by affected companies. The ATO has significant powers to detect and deal with tax avoidance.

There has been no evidence provided of widespread aggressive tax avoidance practices by Australian private companies. Instead, such class of taxpayers will be subjected to misinformed public scrutiny simply because they are corporate entities which are successful enough to have gross turnover (not profit) which exceeds an arbitrary $100 million total income threshold.

Encouraging tax compliance and public debate

The stated rationales for the introduction of section 3C were to discourage tax avoidance by large taxpayers, and encourage public debate on tax policy.

As raised previously by the Committee, public disclosure of selected aspects of the income and taxation of a select group of companies does not provide any demonstrative information to explain tax policy or engage a debate about it, nor is there any indication that such information would discourage large companies from engaging in aggressive tax avoidance. Rather, the expected effect of those laws would be a “naming and shaming” in the press without any explanation as to the fundamental differences between gross income or accounting purposes, and net taxable income.

The compliance costs and reputational risks for such companies endeavouring to explain Australia’s highly complex corporate tax system in the press has no justification. To apply those laws, and that level of public scrutiny, to only one type of taxpayer entity – companies, and not trusts, partnerships, individuals, or otherwise – and only to those which exceed a certain threshold, creates a disproportionate and discriminatory rule which would be applied only against those companies who fall into the narrow class.

The public debate on tax policy has been extensive since the introduction of section 3C, and before the actual publication of taxpayer information pursuant to it. The Senate Economics References Committee held public hearings during its inquiry into corporate tax avoidance, issuing a report on 18 August 2015. Much has been written in the press about ‘multinational profit shifting’, ‘base erosion and profit shifting’, and the business and tax affairs of public, multinational companies. That level of discussion is already occurring and accordingly, the Committee considers it appropriate that the Bill be passed, to exclude private companies from unnecessary and harsh publicity that will likely follow.

An Australian owned private company with international operations would (apart from disclosing all relevant worldwide income, foreign companies and branch operations, transfer pricing details and so on to the ATO) see the details of their worldwide income published. A foreign owned Australian company which conducts relevant Australian business only would see only the Australian operating income disclosed. By their very nature private Australian companies are private, and not public, they do not have anonymous shareholders who require information.

The likely result of the publication may be restructuring of groups, creation of additional groups, deployment of funds overseas, and so on to avoid the publication.

As noted above, the Commissioner of Taxation has observed the generally good tax compliance of large Australian private companies. The ATO receives significant amounts of information from them, and has extensive powers to obtain further information and act where necessary. The Government has recently introduced the Tax Laws Amendment (Combating Multinational Tax Avoidance) Bill 2015 into the House of Representatives. That Bill enacts specific legislation to deal with multinational profit shifting – the secured premise for section 3C and the publication of corporate taxpayer information.

In circumstances where there is extensive public debate about tax policy now occurring, and new measures to address concerns over multinational profit shifting are being enacted, the Committee considers the publication of private corporate taxation information of specific companies, particularly private Australian and family companies, is not appropriate, unnecessary, harsh and unjust.

Accordingly the Committee supports the passage of the Bill.

Part 2 – Further Observations of the Bill

Drafting clarification

The proposed new section 3C(1) will limit the disclosures to exclude Australian resident companies which do not have a foreign ultimate holding company, or foreign shareholdings exceeding 50%. For this purpose Australian resident companies, private companies, and ultimate holding companies are defined by reference to the Income Tax Assessment Acts. However “foreign shareholding in the entity” (proposed section 3C(1)(b)(iii)) is not a defined term. It is not clear from that phrase whether direct as well as indirect shareholdings are taken into account.

The Exposure Draft Explanatory Memorandum states that the Commissioner of Taxation will determine this from company tax return disclosures, which are based on company tax return instructions.

The Committee submits it would be more appropriate to define in the Taxation Administration Act for this purpose rather than rely solely on the Commissioner’s tax return instructions, which are potentially liable to change and are not determined by the Parliament. The principles of the rule of law require the law to be known, readily ascertainable and available to taxpayers, and not subject to arbitrary change.

The tax disclosures laws would continue to be discriminatory

As set out in the Committee's first submission dated 24 April 2013, companies are legal entities and are entitled to the protections of the legal system just as any natural person is. Those provisions in the taxation laws that protect a taxpayer's right to privacy and confer taxpayer confidentiality entitlements should apply equitably to all taxpayers of whatever type of personality recognised by the law and in whatever capacity they may derive assessable income or otherwise make taxable gains.

Even if the Bill were enacted, the tax disclosures laws would continue to discriminate against public companies that exceed the $100 million total income threshold, as well as foreign owned private companies.

The Bill, if enacted, will have the effect of excluding Australian private companies but not foreign owned private companies. Thus, the existing provisions would remain discriminatory against foreign privately owned companies, and public companies. The Committee considers section 3C should be repealed altogether.

Conclusion

Excluding Australian private companies from the public disclosure as proposed by the Bill is welcomed by the Committee, and commended as an important and fundamental requirement in the pursuit of equity for Australian taxpayers. The amendments proposed by the Bill are crucially important amendments to address concerns raised by the Committee in its earlier submissions and are considered a vital improvement to restore fairness, equity and basic principles of the rule of law for Australian private company taxpayers and their owners. The Bill alleviates those adverse effects for private Australian companies, and accordingly the Committee supports the enactment of the Bill.

Should the Senate Committee or the Government wish to discuss these views with the Committee, discussions can be initiated by contacting the Committee Chair, Adrian Varrasso on [redacted] or Committee member Daniel Appleby on [redacted]

Yours faithfully,

John Keeves, Chairman
Business Law Section

Law Council
OF AUSTRALIA
Business Law Section

24 April 2013

Mr Gerry Antioch
General Manager
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The Treasury
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PARKES ACT 2600

Via email: taxtransparency@treasury.gov.au

Dear Mr Antioch,

Improving the Transparency of Australia's Business Tax System

1. The Taxation Committee of the Business Law Section of the Law Council of Australia (**the Committee**) welcomes the opportunity to participate in the Government's process of reviewing whether there is sufficient transparency of tax payable by large and multinational corporate tax entities.

2. This submission responds to two of the three proposals (**the proposals**) outlined in the Discussion Paper titled *Improving the transparency of Australia's business tax system* issued in April 2013 by the Assistant Treasurer (**Discussion Paper**).

Outline of submission

3. In this submission, the Committee:

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(1) provides some introductory comments about the policy design features of the proposals, and in particular, the stated objects underpinning the proposals;

(2) comments specifically on proposals #1 and #2; and

(3) notes some of the issues canvassed in a report commissioned by the OECD Informal Task Force on Tax and Development and which it is submitted require further analysis in the Australian context before the government decides whether to proceed to implement the proposals.

Policy Design features

The need for the initiative is not apparent

4. The Assistant Treasurer announced the government's intention to increase the transparency of the business tax system in a Media Release on 4 February 2013. In his media release, the Assistant Treasurer said that:

> *Improving the transparency of Australia's business tax system will encourage enterprises to pay their fair share of tax and discourage aggressive tax minimisation practices. It will allow the public to better understand the business tax system and engage in debates about tax policy.*

5. The Committee notes that the Discussion Paper does not proffer any empirical evidence of the existence, and, if there be any, the extent of, aggressive tax minimisation practices among large or multinational corporations that conduct business in Australia. Nor is there any evidence proffered to the effect that corporate taxpayers, generally, are engaging in activities which are designed to minimise their payment of tax in a manner which is not authorised under the taxation laws.

6. In this regard the Committee notes the representations made by the Commissioner of Taxation to a recent Senate Estimates Committee to the effect that corporate Australia appears to be complying fully with the system designed by current and

prior governments and administrators.[1] The Australian taxation system is a highly robust and comprehensive system. Over several decades now there have been legislative and administrative measures introduced to ensure that "aggressive tax minimisation strategies" are identified and eliminated and those who promote them are sanctioned.

7. Further, the Discussion Paper does not provide any analysis or examples in support of its assertion that increasing transparency of tax payable by large and multinational corporate tax entities will result in increased compliance with the taxation laws.

8. The Committee submits that it is inappropriate policy design to require all companies to disclose information about their tax affairs simply because there is anecdotal evidence that a few large multinational companies utilise aggressive tax practices to avoid paying the amount of tax that is due in some of the countries in which they conduct business.

9. For these reasons, the Committee submits that it should not be assumed that measures requiring the disclosure of certain tax information by large and multinational businesses are necessary to ensure compliance with Australia's taxation laws.

10. Division 355 of Schedule 1 to the Taxation Administration Act 1953 (**TAA)**) prohibits the disclosure of information about the tax affairs of a particular entity, except in certain specified circumstances. Those exceptions are designed having regard to the principle that disclosure of information should be permitted only if the public benefit derived from the disclosure outweighs the entity's privacy.[2] Further, the stated objectives of Division 355 are to strike a balance between:

    (1) protecting the confidentiality of taxpayers' affairs by imposing strict obligations on key persons not to disclose "protected information"; and

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1 A briefing paper prepared for the Commissioner and Minister when they appeared before the Senate Estimates Committee in October 2012: released by the ATO FOI Unit.

2 *Taxation Administration Act 1953* (TAA): Schedule 1 Section 355-1.

(2) facilitating effective government administration and law enforcement by allowing disclosure of tax information for appropriate purposes.[3]

11. The Discussion Paper does not identify what has transpired since the enactment of Division 355 that now requires the provisions to be amended to enable the Commissioner to publish information about a company's tax affairs. In particular, on what basis can it be said that the public benefit of disclosing a large or multinational corporation's tax affairs now outweighs the need for the corporation's privacy? In the Committee's view, a taxpayer's fundamental right to privacy about its tax affairs should not be displaced without first having undertaken a rigorous analysis of the public benefit based on empirical evidence.

12. It is submitted that further analysis is required before any additional reporting requirements are imposed upon companies conducting business in Australia. The analysis should include an assessment of whether there would be any public benefits of disclosure and if there would be any whether that benefit will outweigh the costs of disclosing that information. It is important that Australia not forget that it competes for inbound foreign investment with other jurisdictions and its competitiveness is affected by the views of large companies and multinational business as to the level of difficulty in doing business here.

13. In the Committee's view, the tax information that is currently available to the Commissioner of Taxation from individual company tax returns (including the International Dealings Schedule) and other statutory reporting requirements is sufficient to enable the Commissioner of Taxation (**Commissioner**) to administer the tax laws to ensure that large companies and multinational corporations conducting business in Australia are paying the amount of tax that is legally due. If, contrary to the Committee's view, this is not the case, we submit that other, more targetted measures should be considered to remedy the situation.

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[3] TAA: Schedule1 Section 355-10(a), (b)

Inequity between taxpayers

14. Companies are legal entities and are entitled to the protections of the legal system just as any natural person is. Those provisions in the taxation laws that protect a taxpayer's right to privacy and confer taxpayer confidentiality entitlements should apply equitably to all taxpayers of whatever type of personality recognised by the law and in whatever capacity they may derive assessable income or otherwise make taxable gains.

15. In the context of proposal #1, the Committee submits that there should be no distinction between a taxpayer that is a company and an individual taxpayer where the gross income derived by each taxpayer exceeds the $100 million threshold. While there may be specific provisions in the taxation laws which apply differently to a corporate taxpayer than to an individual taxpayer (for example, the rate of tax, the availability of capital gains tax concessions and the ability to access the grouping provisions), the fundamental right to privacy and confidentiality of taxpayer information contained within the taxation laws should apply equally to all taxpayers.

16. It should not be forgotten that Australia has self assessment systems of taxation and administration that have served, and continue to serve, the community well. There is substantial voluntary compliance with those systems. What is not known is the extent to which the current systems function well because they include the confidentiality regimes currently in place. More particularly, what is not known is whether, and if so to what extent, those systems function as well as they do as a product of taxpaying entities happy to disclose, comfort in the knowledge that their affairs will not be made public unless they choose to engage in a dispute with the Commissioner.

Specific comments on the proposals

Proposal #1: Transparency of tax payable by large multinational businesses and by entities that pay MRRT or Petroleum Resource Rent Tax (PRRT)

17. Proposal #1 is unlikely to provide meaningful information. To the contrary, it is most likely to confuse and stimulate unnecessary and, worse, ill-informed debate. The Discussion Paper identifies the biggest problem in the proposal:

> *Although the concept of an entity's 'total income' is not defined in the tax laws, it is envisaged that the Commissioner would use the information currently disclosed by corporate tax entities at question six of the company income tax return. This question aims to identify the entity's total gross income for accounting purposes. As such, total income may include amounts of exempt income, non-assessable and non-exempt income and foreign source income. It may also include extraordinary amounts of revenue such as net domestic or foreign source gains arising from events outside the ordinary operations of the entity. This means that an entity's total income is broader than the taxation concepts of ordinary income and statutory income, as referred to in section 6-1 of the Income Tax Assessment Act 1997. It is also broader than common notions of an entity's turnover.*

18. Total income can vary from taxable income for a variety of reasons. A company with mostly domestic operations may have the same aggregate income as a company with significant overseas operations. Taxable income may be wildly different on account of exemptions for foreign dividends and branch profits. As such, comparing two taxpayers' total income and taxable income can be meaningless in the circumstances and it would be an unfair imposition on companies to be forced to explain publicly or engage in public debate concerning explainable differences.

19. The complexity of Australia's tax laws is such that the public disclosure of information showing total income, taxable income and tax payable is unlikely to provide the general public with the level of information about whether a corporate taxpayer has paid "its fair share of tax". The concept of what constitutes a "fair share of tax" is a populist and an emotive one and what may be perceived by the public as being fair, will likely have no correlation with the way in which the actual amount of tax payable is calculated having regard to the taxation law. Public disclosure of such information may, therefore, lead to the demonization of a certain class of taxpayer for reasons which have no basis in law. This in itself is inefficient, counterproductive and unfair.

20. To redress the potential for information to mislead, it would be necessary for the Commissioner to be required to include, as part of the publication of the tax return information, an explanation about the corporate tax system in Australia, highlighting that there may be legitimate reasons as to why a company's taxable income may be substantially different from its accounting income. This will facilitate a more informed public debate and hopefully minimise unjustified attacks on large and multinational companies across the board. The need for such explanations tends to throw light on the usefulness of the initiative.

21. The Discussion Paper lacks significant detail. For example, it is not clear from the language used in the Discussion Paper, or the example, whether the information to be published by the Commissioner would be information about the consolidated tax group's taxable income and tax payable or parts of such a group or such a group and other companies.

22. Accordingly, the Committee submits that before proceeding to implement the proposal to require the Commissioner to publish certain tax information, the government should satisfy itself about whether public disclosure is likely to result in improved tax compliance. The ATO has substantial information gathering powers and other tools available to it to enable it to facilitate a high degree of tax compliance. Only if those powers and tools are found wanting, should consideration be given to implementing a proposal to require the public disclosure of a large or multinational corporation's tax information.

Proposal #2: Publish aggregate collections revenue for each Commonwealth tax

23. As noted above, companies enjoy rights under the law just as much as other types of entity do. There is no rationale for discriminating.

24. The Discussion Paper does not provide any real justification for wanting to create a distinction between a corporate taxpayer and an individual taxpayer in relation to the reporting of aggregate amounts of tax. In the Committee's view, a company taxpayer is entitled to privacy, in the same way that an individual is entitled to privacy.

25. Further, even if it is only the parties to an oligopoly who can decipher the implications of disclosures of particular types of taxation collections, such disclosures could reveal competitor information and tend against the behaviours sought from such market players in the policy underlying competition laws in Australia.

OECD's Informal Task Force on Tax and Development

26. The Committee draws your attention to the report commissioned by the OECD Informal Task Force on Tax and Development (**Task Force**) titled *Transparency in reporting financial data by multinational corporations* (**the Report**), July 2011, Oxford University Centre for Business Taxation.

27. The Report canvassed, and reached a broad consensus on, the issues involving transparency of financial reporting by multinational companies, in the context of tax and development. The Report is the result of a preliminary evaluation of the issues involved with the transparency in financial reporting and, importantly, the Report did not reach a conclusion on the way forward on whether multinationals should be required to report their financial (including tax data) on a 'country-by-country' basis.

28. One of the messages in the Report is that further study is required before a conclusion is reached about whether the disclosure of tax information to the general public has the effect of increasing compliance. Further, it is acknowledged in the Report that the effects on compliance may vary between developed and developing countries.

Accountability of government

29. The Report sets out and discusses a number of possible objectives for requiring multinationals to disclose information about the amount of tax they pay in a particular jurisdiction.

30. One possible objective discussed in the Report is the objective of holding governments to account with regard to the integrity of administration of tax

collection and the efficient administration of tax collection. The Committee submits that making information about an entity's tax affairs available to the public cannot replace the role of government in the enforcement of tax laws. While accountability is assumed to be a crucial element of increasing compliance with taxation laws in less developed countries, in developed countries, like Australia, there is little evidence to show that the benefit of public disclosure outweighs the importance of privacy laws which apply across the community as a whole.[4]

Public disclosure does not assist administration

31. The Report states clearly that even if the commercial profits of multinationals were made known, the complexity of the tax laws, the allowances and relief available and relevant timing issues make it very difficult for the general public to know the amount of tax due, and to understand that, for a variety of reasons, the tax paid in a particular year may not bear a strong relationship to the tax due with respect to the commercial profits earned that year. The Committee agrees with this view.

Do the benefits of disclosure outweigh the detriments?

32. The Report states that:

> *... there needs to be a real expectation that the benefits of any further disclosures will outweigh the costs; otherwise the case for further disclosure is weak.*

33. The Committee agrees. In the Committee's view, further analysis is required before the proposals in the Discussion Paper are implemented to determine whether the costs imposed upon large and multinational corporations and the ATO are likely to outweigh any public benefit associated with the increased disclosure. It is submitted that the costs of greater disclosure include:

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[4] Finland, Norway, Sweden and Iceland all currently require some type of public disclosure of taxable information. CESifo Working Paper Series No. 4170, *Taxes on the Internet: Deterrence Effects of Public Disclosure*, by Slemrod, Thoresen, Bo found at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220132; and *The Effect of Public Disclosure on Reported Taxable Income: Evidence from Individuals and Corporations in Japan,* Makoto Hasegawa, Jeffrey L. Hoopes, Ryo Ishida and Joel Slemrod found at http://www-personal.umich.edu/~makotoh/research_files/Japan_disclosure.pdf

(1) reputational risk for Australia as a place for doing business, particularly in the Asia Pacific region;

(2) a greater imposition upon administrative resources and increased administration costs for multinationals and the ATO who will be charged with reporting the amount of tax payable; and

(3) the social cost of public disclosure of a large or multinational corporation's financial information, for example, revealing commercially sensitive information which may jeopardise the entity's competitive position. As the Report indicates, this could lead to the redeployment of the firm's business activities to other countries which do not require the same level of transparency in the publication of tax information to the general public.

34. The only benefit for public disclosure identified in the Discussion Paper is to increase public confidence in Australia's tax system. The Committee submits that this is unlikely to be the case for the reasons identified above.

35. Finally, in the Committee's view, public confidence in Australia's tax system could be enhanced through the provision of greater information by government and the ATO as to the measures which have been implemented to ensure that Australia's tax base is not being eroded by corporate taxpayers shifting taxable profits offshore.

Conclusion

36. Should the Treasury and the Government wish to discuss these views with the Committee, discussions can be initiated by contacting the Committee Chair, Mark Friezer of Clayton Utz, on [redacted]

Yours sincerely

Frank O'Loughlin

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General Manager
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3 July 2015

Dear Sirs

Better Targeting the Income Tax Transparency Laws

The Taxation Committee of the Business Law Section of the Law Council of Australia (**the Committee**) welcomes the opportunity to participate in the Government's consultation in respect of the Exposure Draft Tax and Superannuation Laws Amendment (Better Targeting the Income Tax Transparency Laws) Bill 2015 (Draft Bill).

This submission responds to the policy of the provisions referred to in the Draft Bill and the specific amendments it proposes to the Taxation Administration Act 1953. Those provisions were inserted into that Act in 2013 following the release of the Improving the Transparency of Australian Business Tax System discussion paper issued in April 2013 (**Discussion Paper**) by the then Assistant Treasurer. The Committee provided a detailed submission to the Treasury in response to the Discussion Paper (**Previous Submission**). This submission builds on the Previous Submission, specifically in response to the amendments proposed by the Draft Bill.

Outline of Submission

The Committee welcomes the amendments contained in the Draft Bill, as they will alleviate distinctly discriminatory provisions which inappropriately overturn fundamental rights of taxpayer privacy for private Australian companies and their shareholders.

The proposed amendments go a significant way to addressing specific issues with the income and tax publication provisions commented on in detail in the Committee's Previous Submission. The Committee's support for the Draft Bill is discussed in more detail in Part 1 of these Submissions.

The Committee also submits that the Draft Bill should be introduced as a Bill and passed with only minor amendment to clarify aspects of drafting in the proposed new section 3C(1) of the Act. This is discussed in Part 2 below.

Finally, in Part 3, the Committee notes the lack of public benefit arguments that have been raised since the introduction of the new disclosure laws in 2013 and maintains that despite the efforts of the Draft Bill, the disclosure laws continue to manifestly discriminate, produce unjust results and will not likely achieve the intended policy objectives.

Part 1 – Support for the Draft Bill

The explanatory memorandum (EM) to the Draft Bill outlines four main reasons why the changes to the current tax disclosure laws are necessary for private companies:

1. The disclosures can reveal commercial information of a private company and undermine its ability to engage in proper commercial negotiations;
2. The disclosures may compel private companies to restructure their corporate groups in order to fall below the disclosure threshold;
3. The disclosures would lead to additional costs and compliance burden to private companies in having to justify the tax information to the public; and
4. The disclosures can negatively impact on the personal privacy and security of the shareholders of private companies.

The Committee strongly agrees with the very legitimate concerns raised by the Government in the EM, and adds the following reasons.

a) Taxpayer's fundamental right to privacy

As noted in the Previous Submission, the fundamental right to privacy of taxation affairs for those companies affected by section 3C should not be displaced without first having undertaken a rigorous analysis of the public benefit, based on empirical evidence. No such rigorous analysis has been performed, and no such empirical evidence obtained or discussed. The effect of section 3C is to unfairly and inequitably target only those companies which exceed the arbitrary income threshold, and not other taxpayers (such as trusts, partnerships or otherwise) and not those companies which fall below the arbitrary threshold. Without amendment, section 3C discriminates against company entities which fall within it.

The fundamental issues with a reversal of Australia's long-held principles of taxpayer privacy are amplified for private Australian companies, where simple ASIC searches will usually reveal the individuals or families associated with those companies. This is contrasted with public and foreign multinational corporations with potentially many thousands of shareholders and/or no public disclosure of who those persons are.

For Australian private companies the disclosure of their private taxation affairs is likely to lead to many of the key issues and concerns identified in the Exposure Draft Explanatory Memorandum accompanying the Draft Bill. The Committee considers the issues with such disclosure identified in the Exposure Draft Explanatory Memorandum are cogent and genuine concerns.

b) Misinformation and confusion

The current disclosure laws would also result in substantial misinformation in the public regarding the taxation affairs of the individuals and families behind those companies, where the income of a company is presumed to be the income of those individuals. This is particularly the case where, for example, ultimate taxation of particular types of income are yet to be borne by those persons, such as exempt and 'non-assessable non-exempt' items of income which will effectively be taxed as an unfranked dividend when ultimately distributed to those individuals; or tax has been paid by other entities or in other jurisdictions but which is credited for the Australian private company, but disclosure suggest the company does not bear tax. Private Australian companies will be put to inappropriate expense to attempt to explain the inherently complex corporate taxation system, or to attempt to reduce the impact of competitors, suppliers and customers seeing that highly commercially sensitive information. To avoid this outcome, many companies will likely restructure affairs to avoid the public disclosure where feasible.

This is a fundamental reversal of the long enshrined principle of taxpayer secrecy in Australia, reversing a longstanding tenet of Australia's taxation laws but only for companies which exceed the arbitrary income threshold, and exacerbated in respect of private companies with identifiable shareholders and owners. The Committee welcomes the removal of this outcome for private Australian companies and their owners.

c) Purpose of the tax disclosure laws

The explanatory memorandum to the Bill which first introduced section 3C in 2013 stated the rationale for publication of the specified confidential income and taxation information of companies meeting the $100 million 'income' threshold as being "to discourage large corporate tax entities from engaging in aggressive tax avoidance practices" and "to provide more information to inform public debate about tax policy, particularly in relation to the corporate tax system". As observed publicly by the Commissioner of Taxation Mr Chris Jordan, the introduction of section 3C into the Taxation Administration Act "was really for multinational companies operating here, disclosing quite low revenue" and was not intended to capture private Australian companies (AFR 20 March 2015, page 6).

The disclosure laws were introduced in 2013 against a backdrop of discussion about base erosion and profit shifting by multinationals and efforts to discourage aggressive tax practices by large multinationals to ensure they "pay their fair share of tax" in Australia. The consequence of the very broad blanket of the tax disclosure laws as enacted was that they capture private Australian companies that have total accounting income exceeding an arbitrary threshold.

d) No evidence of widespread aggressive tax avoidance

As the Committee set out in its Previous Submission, there has been no evidence provided of widespread aggressive tax avoidance practices by companies in Australia which exceed the $100 million threshold test, and there is certainly no evidence that publication of isolated aspects of the income and taxation affairs of such companies would properly inform public debate about tax policy.

e) Arbitrary $100 million total income threshold

There is a misalignment between the Australian Tax Office's (**ATO**) categorisation of large multinationals or similar (being companies with total income of $250 million and above) and large corporations under the current tax disclosure laws (being companies with total income of $100 million or greater). This mismatch inevitably captures private Australian companies that would otherwise traditionally be considered "small and medium enterprises" under the ATO's classification. Based on a policy of publication of the affairs of "large" companies, many companies affected by the current law were not intended to be caught by the disclosure laws, on the ATO classifications.

The $100 million total income threshold is an arbitrary gateway which will cause private Australian companies with gross income exceeding this amount to suffer the potentially very damaging consequences of having their sensitive taxation information disclosed publicly.

f) The disclosure laws are inequitable and lead to unjust results

Finally, as noted by the Committee in the Previous Submission, the current tax disclosure laws are inequitable as they breach the fundamental right to privacy and confidentiality of tax information in respect of some taxpayers only – those specifically targeted by section 3C of the Act. Further, the Committee submits there is no public benefit of disclosing such income and taxation information as it would not stimulate genuine public debate on tax policy. This is addressed further in Part 3. Instead, it would add costs both to the Government and the affected taxpayers of disclosing that information, as well as waste time and resources of companies in having to justify their tax position to the public, or restructure their corporate affairs in order to avoid the disclosure laws altogether.

For these reasons, the amendments to the Draft Bill are strongly supported by the Committee in protecting private Australian companies from these discriminatory and unjust disclosure laws, and is a significant improvement to the provisions of the Act enacted in 2013.

Part 2 – Clarification to the Draft Bill

The proposed new section 3C(1) will limit the disclosures to exclude Australian resident companies which do not have a foreign ultimate holding company, or foreign shareholdings exceeding 50%. For this purpose Australian resident companies, private companies, and ultimate holding companies are defined by reference to the Income Tax Assessment Acts. However "foreign shareholding in the entity" (proposed section 3C(1)(b)(iii)) is not a defined term. It is not clear from that phrase whether direct as well as indirect shareholdings are taken into account.

The Exposure Draft Explanatory Memorandum states that the Commissioner of Taxation will determine this from company tax return disclosures, which are based on company tax return instructions.

The Committee submits this would be more appropriate to define in the Taxation Administration Act for this purpose rather than rely solely on the Commissioner's tax return instructions, which are potentially liable to change and are not determined by the Parliament. The principles of the rule of law require the law to be known, readily ascertainable, and available to taxpayers.

Part 3 – Further commentary on the current disclosure laws

Despite the amendments in the Draft Bill, the Committee's view is that the disclosure laws continue to be discriminatory and unjust. Public disclosure of selected aspects of the income and taxation of those companies – the gross accounting income, net taxable income and Australian tax payable, would not likely "discourage large corporate tax entities from engaging in aggressive tax audit practices", nor "provide more information to inform public debate about tax policy" as was the stated policy of section 3C. The information which would be published does not provide any demonstrative information to explain tax policy or engage a debate about it, nor is there any indication that such information would discourage large companies from engaging in aggressive tax avoidance. Rather, the expected effect of those laws would be a "naming and shaming" in the press without any explanation as to the fundamental differences between gross income for accounting purposes, and net taxable income.

Since the Discussion Paper was released in April 2013, both the Treasury and the ATO, as well as numerous industry bodies, have acknowledged the lack of ability in such a disclosure law generating meaningful public tax debate. The Treasury and the ATO themselves have noted that comparison of accounting and net taxable income is fundamentally different and potentially dangerous. At a Senate Estimates Hearing on 22 October 2014, ATO Second Commissioner Mr Neil Olesen said that comparing accounting profit to taxable income was "meaningless to the extent that taxable income and accounting profits are two fundamentally different concepts, so you cannot draw a conclusion". He also stated that such comparison creates incorrect perceptions of effective tax rates, which is "an unfair impression to leave, and a damaging one from a tax administrator's view".

Executive Director Revenue Group of the Treasury Mr Rob Heferen stated at that Hearing that comparing accounting profit and taxable income is like "comparing an apple with an orange and it not being about fruit". He also stated that discussion focused solely on the comparison between gross accounting income and net taxable income "is fundamentally a misunderstanding of what taxable income in Australia ought to be about".

ATO Second Commissioner Mr Andrew Mills went further to give examples of key and fundamental differences between accounting and tax, and of tax credits, and tax policies which without detailed technical explanation would be entirely misleading.

The compliance costs and reputational risks for such companies endeavouring to explain Australia's highly complex corporate tax system in the press has no justification. To apply those laws, and that level of public scrutiny, to only one type of taxpayer entity – companies, and not trusts, partnerships, individuals, or otherwise – and only to those which exceed a certain threshold, creates a disproportionate and discriminatory rule which would be applied only against those companies who fall into the narrow class.

Conclusion

Excluding Australian private companies from the public disclosure as proposed by the Draft Bill is welcomed by the Committee, and commended as an important and fundamental requirement in the pursuit of equity for Australian taxpayers. The amendments proposed by the Draft Bill are crucially important amendments to address concerns raised by the Committee in the Previous Submission for Australian private companies, and are considered a vital improvement to restore fairness, equity and basic principles of the rule of law for those taxpayers and their owners.

Should the Treasury or the Government wish to discuss these views with the Committee, discussions can be initiated by contacting the Committee Chair, Adrian Varrasso on [redacted]

Yours faithfully,

John Keeves, Chairman
Business Law Section