The Tax Institute

28 June 2024

Committee Secretariat
Senate Standing Committee on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

Dear Committee Secretariat,

Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024

The Tax Institute welcomes the opportunity to make a submission to the Senate Economics Legislation Committee (**Committee**) in respect of its inquiry and report on the Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024 (**the Bill**) and accompanying explanatory memorandum (**EM**).

In the development of this submission, we have closely consulted with our National Large Business & International Technical Committee to prepare a considered response that represents the views of the broader membership of The Tax Institute.

Our comments in this submission are limited to Schedule 4 and Schedule 7 to the Bill. Schedule 4 to the Bill amends the *Taxation Administration Act 1953* (Cth) to implement the public country-by-country (**CbC**) reporting measure. Schedule 7 to the Bill amends the *Income Tax (Transitional Provisions) Act 1997* (Cth) to extend the $20,000 instant asset write-off by 12 months until 30 June 2025.The Tax Institute generally supports the current version of Schedule 4 to the Bill. However, Schedule 4 to the Bill closely resembles the exposure draft released by the Treasury in February this year, and in our view, requires certain amendments. In this regard, our recommended amendments to the Bill and EM may be summarised as set out below.

We note some of these recommendations can be addressed either through legislative amendment or administrative guidance provided by the ATO. Those recommendations that require administrative guidance from the ATO are shared with you for transparency and in consideration of a holistic approach. As far as we are aware, the ATO has not yet commenced public consultation on its plans for administering these rules, though we look forward to working with the ATO in due course in this regard.

- Concerning Schedule 4 to the Bill, aligning the Australian requirements more closely with global reporting standards, including the Organisation for Economic Co-operation and Development (**OECD**) CbC regime (**CbCRs**), is a positive step toward reducing the

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compliance burden, and this is recognised in the EM. However, discrepancies in disclosure requirements between the Bill and other CbC reporting regimes create challenges for taxpayers. The Bill should allow information from the OECD CbCR or EU CbCR to be used if it overlaps with Australia's proposals, easing the transition for affected entities.

- Clarity is needed on the administrative aspects of this proposed measure, regarding how to submit information to the Commissioner, what constitutes a material error etc., with proactive engagement from the ATO. Prompt and detailed guidance from the Commissioner will facilitate and support taxpayers' compliance with their reporting obligations.
- The *de minimis* exclusion is welcome for entities with turnover below $10 million, but concerns arise about excluding entities with Australian-sourced income from related party transactions. Further guidance is needed regarding submitting information to the Commissioner, especially for foreign entities serving as CbC reporting parents.
- The Tax Transparency Code should be reviewed for consistency with the proposed measure.
- Also, as a matter of best practice, the Government should conduct a post-implementation review to address operational issues and technical amendments as they arise in practice. Real-time feedback and potential revisions within a year or two of the new rules coming into effect may be necessary.

In relation to Schedule 7 to the Bill, the proposed temporary increase in the instant asset write-off threshold for small business entities is an ongoing issue in our tax system and creates uncertainty for taxpayers, their advisers and indeed, the administrator. The recent debate between the Senate and the House regarding amendments to this measure in respect of the 2023-2024 income year brought greater attention to this issue. The Tax Institute is of the view that a permanent increase in the instant asset write-off threshold is needed.

Our detailed response and recommendations to further improve Schedules 4 and 7 to the Bill, and the relevant aspects of the EM, are contained in **Appendix A**.

The Tax Institute is the leading forum for the tax community in Australia. We are committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all.

If you would like to discuss any of the above, please contact The Tax Institute's Senior Counsel – Tax & Legal, Julie Abdalla, at [redacted].

Yours faithfully,

Scott Treatt
Chief Executive Officer

Todd Want
President

APPENDIX A

We have set out below our detailed comments and observations on the amendments proposed in Schedule 4 and Schedule 7 to the Bill for your consideration.

Schedule 4 to the Bill – Multinational tax transparency – country by country reporting

Reporting thresholds and disclosure divergences compared with other CbC reporting regimes

Increased alignment with international reporting requirements is a welcome step. We also acknowledge the comments in the EM (at paragraph 4.40) that the:

> inclusion of the OECD Transfer Pricing Guidelines is intended to reduce the compliance burden on entities as they are already familiar with its interpretation as it is used by these entities in meeting their existing obligations for confidential CbC reporting.

However, there are still some discrepancies in the disclosure requirements proposed under the Bill compared to other mandatory CbC reporting systems such as the OECD CbCR and the EU CbCR. For example, as currently proposed under the Bill, there are additional requirements for public disclosure which go beyond the OECD CbCR and EU CbCR. These include the disclosures of:

- revenue from unrelated parties and revenue from related parties that are not tax residents of the jurisdiction. The OECD CbCR requires disclosures of related party revenues, unrelated party revenues and total revenues. The EU CbCR requires disclosures of total revenues only;
- the group's approach to tax or tax strategy; and
- explanations for differences between income tax accrued (current year) and the amount of income tax due if the income tax rate applicable in the jurisdiction were applied to the amount of profit or loss before income tax.

These departures from the OECD CbCR and the EU CbCR impose an additional compliance burden on the taxpayers and go beyond internationally accepted best practice models.

If Australia's proposal is intended to align with the OECD CbCR (or EU CbCR), the legislation should explicitly state that the information already prepared for these frameworks can be used. This will assist to avoid a duplication of efforts on the part of taxpayers who are already required to report under these regimes.

Additionally, there may be cases where an entity meets the relatively low revenue threshold of A$1 billion as a CbC reporting parent (as defined in Subdivision 815-E of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**)) but does not meet the CbC reporting threshold in the parent company's jurisdiction. For example, the EU CbCR has a threshold of EUR 750 million, which is currently higher than A$1 billion. This means that there could be multinational taxpayers that are not required to report under the OECD CbCR or EU CbCR due to falling below that threshold, but would still need to compile and prepare the relevant information solely to meet their Australian reporting obligations. While addressing this issue in the legislation is preferable, if this is not feasible, the ATO should consider granting annual exemptions taking into account material currency fluctuations, or at least allowing a transitional period for any entities that become subject to the reporting requirement for the first time (under the proposed regulation-making power). An alternative approach would involve the ATO issuing guidance similar to that provided in Law Companion Ruling - *Subdivision 815-E of the Income Tax Assessment Act 1997: Country by country reporting* (**LCR 2015/3**), which addressed the issue of existing CbC reporting obligations

under Subdivision 815-E of the ITAA 1997. Such guidance would help alleviate the compliance burden associated with this situation.

De minimis exclusion

The introduction of the *de minimis* exclusion is a positive development as it reduces the compliance burden for entities with an aggregated turnover that includes Australian-sourced income of less than $10 million. However, it appears that this exclusion may inadvertently not apply to entities whose only Australian-sourced income comes from related party transactions involving connected entities or affiliates (noting the exclusion from aggregated turnover in paragraph 328-115(3)(a) of the ITAA 1997). This result seems to be inconsistent with the intended purpose of the exclusion. For instance, if Australia serves as an intermediary or conduit hub for global operations, where products are sold from Australia to a connected offshore entity that then distributes them worldwide, the income generated by the Australian entity would be considered Australian-sourced ordinary income, but would not be included in the aggregated turnover due to its derivation from a connected entity.

Corrections

According to subsection 3DB(1) of the Bill, the reporting entity is required to inform the Commissioner of any 'material error' within 28 days of discovering it, while in other cases, the entity has the choice to notify the Commissioner. More specific guidance is required to determine what constitutes a 'material error' in the report originally lodged. For example, it is not clear whether changes made to financial statements after an audit require notification of corrections, or if failing to report an error in one operational jurisdiction, such as inaccurately reporting employee numbers, would be considered material. It is preferable for this guidance to be included in the EM. Otherwise, it will be important for the ATO to provide clear guidance in this regard to prevent taxpayers from being penalised for overlooking or misunderstanding the need to report such errors.

Information provided to the Commissioner

Guidance from the ATO regarding how to submit information to the Commissioner as specified in paragraph 3D(3)(b) of the Bill, including details on data format and any additional documentation required, like unique identification numbers for potential registration on the Government database is necessary to support taxpayers. Consideration also needs to be given to the lodgement process of a foreign entity serving as the CbC reporting parent, especially if it otherwise has no other interactions or dealings with the ATO. This includes determining who is authorised to submit and make necessary declarations. For example, a question arises as to whether an Australian entity or one with a permanent establishment in Australia could lodge the information on behalf of the foreign parent entity.

In addition, the Commissioner must consider the software requirements, such as XML schema translation tools, necessary for lodgment purposes. Given the previous challenges in implementing the OECD CbCR and enforcing penalties for late submissions or non-compliance by foreign entities, it is necessary for the Commissioner to establish the essential infrastructure and promptly provide guidance to support taxpayers' compliance with their reporting obligations.

Exemptions

Subsections 3DB(5) and 3DB(6) of the Bill authorise the Commissioner to exempt an entity by way of a notice in writing from complying with subsection 3D(3). However, the legislation does not specify the criteria or parameters for granting such exemptions. We consider that detailed

guidance on the parameters for granting an exemption in accordance with the Bill is required, and, at the very least, the exemption granted should be by way of a legislative instrument.

Penalty for failing to publish information on time

Section 288-140 of the Bill proposes to impose an administrative penalty for failure to publish information on time. The amount of penalty proposed is 500 penalty units to a maximum of 2,500 penalty units. Feedback from our members indicates a widespread perception that recently the ATO has become stricter in enforcing penalty measures for existing CbC reporting, making it challenging to manage late submissions or obtain extensions, even when the local Australian entity has no control over the delays caused by the head office's failure to provide the necessary documentation. The burden of meeting lodgement requirements falls on the CbC parent entity, yet the Australian subsidiary faces the consequences of penalties, making it more difficult to navigate the ATO's strict approach to penalties, even when taxpayers try to proactively engage with the ATO. In this regard, The Tax Institute is of the view that the ATO should consider adopting a more flexible approach towards taxpayers that are genuinely trying to comply with regulations, as the complex nature of CbC reporting obligations and the potential penalties faced by Australian subsidiaries already present significant challenges.

Tax Transparency Code

The Tax Transparency Code is a set of voluntary principles and basic requirements created by the Board of Taxation to guide medium and large businesses in disclosing their tax information to the public. The Tax Institute is of the view that these guidelines should be reviewed in light of the proposed mandatory public CbC measures to ensure better consistency and mitigate duplication of efforts.

Post-implementation review

Given the significant impact of this proposed measure, The Tax Institute emphasises the importance of the Government committing to conducting a post-implementation review. Stakeholders have been engaged in providing timely feedback since the proposed changes were first announced. However, we recognise that, once enacted, the Bill may require clarifications and other technical amendments based on its operation in practice, and as tax advisers start to apply the law to taxpayers' circumstances. It would be preferable that such a post-implementation review be conducted in real time and in any case, within a year or two of the commencement of the new rules.

Schedule 7 to the Bill – Instant asset write-off for small business entities for the 2024–25 income year

Schedule 7 to the Bill contains the proposed extension of the instant asset write-off measure announced in the Federal Budget 2024–25 to apply to the income year 2024–25. The small business instant asset write-off (**IAWO**) is part of the simplified depreciation regime for small business entities (**SBEs**) in Subdivision 328-D of the ITAA 1997.

Recent historical context

As part of the Federal Budget 2023–24, the Government proposed a temporary increase in the IAWO threshold to $20,000 for the 2023–24 income year, which would apply to eligible assets first used or installed ready for use from 1 July 2023 to 30 June 2024. Without this change, the threshold would have reverted to the standard legislated threshold of $1,000 from 1 July 2023.

This threshold applies to each eligible asset, allowing SBEs to deduct the cost of multiple eligible assets.

The measure is contained in Schedule 1 to the Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023 (**Small Business and Charities Bill**) which was passed on 25 June 2024, mere days before the end of the 2023-24 income year. Some of the key events surrounding the passage of the Small Business and Charities Bill are summarised below:

- Small Business and Charities Bill was introduced into the Parliament on 13 September 2023.
- On 27 March 2024, the Senate proposed amendments to the Small Business and Charities Bill to increase the asset threshold to $30,000 and the aggregated turnover threshold to $50 million for 2023–24 only, expanding the measure to medium-sized businesses.
- On 15 May 2024, the House of Representatives (**House**) disagreed with the Senate's amendments, stating the need to prevent any delay in small businesses receiving the promised tax benefits as part of Tax Time 2024.
- On 16 May 2024, the Small Business and Charities Bill returned to the Senate for reconsideration. The Senate maintained its position on its proposed amendments, and the Small Business and Charities Bill again returned to the House.
- On 28 May 2024, the House again disagreed with the amendments proposed by the Senate and once again the Small Business and Charities Bill returned to the Senate for reconsideration.
- The Small Business and Charities Bill was finally passed by both Houses on 25 June 2024.

The lengthy debate between the Senate and the House regarding the amendments raised significant concerns among taxpayers and their advisers as the end of the 2023–24 income year approaches. The uncertainty that surrounded the passage of the Small Business and Charities Bill was exacerbated by the Government's announcement in the Federal Budget 2024–25 to extend the $20,000 IAWO for SBEs by 12 months until 30 June 2025.

While the increase in the IAWO threshold is welcome, The Tax Institute is of the view that a permanent increase in the IAWO is required. A permanent solution is required for the benefit of Australian businesses and the Australian tax system overall. We consider that continually extending the threshold on a year-by-year basis is an inefficient policy design. Taxpayers need stability and certainty in the tax system to make informed decisions based on the law as it stands, rather than pending announcements. Further, we support the Senate’s position and consider that the IAWO should be available for businesses with an aggregated turnover of less than $50 million for assets costing less than $30,000.