June 28, 2024

Senate Standing Committees on Economics
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Re: Comment Letter on Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024-Country by Country Reporting

The National Foreign Trade Council (the "NFTC") is pleased to provide written comments on Schedule 4 of the Australian Government's *Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024,* published on June 5, 2024 ("the Introduced Bill"). NFTC previously provided comments on the prior iterations of the bill including *Treasury Laws Amendment Bill 2024: Multinational tax transparency—country by country reporting* ("CbCR") released February 12, 2024 ("February Draft"). As most of our suggestions to the Australian Treasury ("the Treasury") on the February Draft were not incorporated, the NFTC welcomes the Australian Parliament's Senate Standing Committees on Economics consultation and the opportunity to provide additional written or oral comments on the Introduced Bill. In addition to this submission, the NFTC requests a hearing.

The NFTC, organized in 1914, is an association of U.S. business enterprises engaged in all aspects of international trade and investment. Our membership covers the full spectrum of industrial, commercial, financial, and service activities. We value work that focuses on establishing and maintaining international tax and transfer pricing norms that provide certainty to enterprises conducting cross-border operations.

General Comments

In reviewing the Introduced Bill on public CbCR, NFTC has an array of concerns:

- The scope of the reporting is inconsistent and exceeds established international norms including the stated goal of better aligning with the EU public CbCR.
- The Introduced Bill lacks certainty and predictability by deferring without clear direction to arbitrary exemptions by the Australian Tax Office ("ATO") Commissioner.
- Without predictable and clear exemptions, disclosures could harm the competitive position of businesses, especially private industry, eventually resulting in market distortions and divestment, particularly when compared to competitors with no operations in Australia.
- The current framework does not offer a clear test or predictability for many industries, including defense and national security supply chains including those relating to critical infrastructure necessary to further our shared interest in protecting sensitive data from adversaries.
- The data required is not readily available to many in-scope businesses and will place an additional compliance burden at the same time Australia and other countries are implementing the Inclusive Framework's Pillar Two regime.
- It is inconsistent to exclude individual partnerships, but not also exclude foreign groups where the ultimate parent is a constitutional corporation treated as fiscally transparent in its country of organization (where the taxes paid by individual shareholders would not be reported in the CbCR).
- The "blacklist" countries do not have defined parameters as required by the World Trade Organization.

Impact

- The CbCR regime in the Introduced bill is a deterrent to increased investments and expansion by multinational firms in Australia. This is especially true for privately held corporations and those with sensitive data.
- The Introduced Bill disincentives investment by creating a reporting regime with elements not required in any other global jurisdictions and punishes investors. It will not create any revenue for the government as the ATO already has access to these data points.
- Many multinational companies, including various NFTC members are constantly analyzing future investments and where to "spend the next dollar", exceptionally burdensome policies with high compliance costs and little value such as the Introduced Bill deter future investment in Australia. During a cost-of-living crisis, compared to other countries with similar economic activity for a company, the compliance cost of doing business in Australia is as much as six times higher. Those costs are borne by Australian consumers.
- Some NFTC members are considering complete divestment of longtime investments and operating through distributors which would reduce employment and increase costs for Australian consumers.
- Companies concerned about global competitive advantages may withdraw from Australia or restructure operations.
- Some NFTC members have affirmatively decided not to permit global executives to be based in Australia due to many recently adopted regulatory and tax policies.
- For Defense companies and supply chains, (*i.e.,* companies engaged in defense industries including the provision of defense services and/or development of defense technologies) continuing to do business in Australia while having to disclose sensitive information related to the company's business with other allied nations will place the defense company in a difficult position with its defense customers outside of Australia. Australia should adopt the model already in place in the U.S. for defense companies that conduct a majority of their business with governmental departments of defense globally.

Specific Comments

Scope

The proposed scope of information requested in the Introduced Bill is still overly broad and is beyond what is included in Organization of Economic Co-operation and Development ("OECD") Confidential CbCR. The scope of CbCR was agreed at the OECD as 'appropriate' to enable tax authorities to make a confidential risk assessment of a multinational enterprise's ("MNE") tax affairs. While we understand the need for this data to conduct risk assessments, there seems to be no objective policy goal for publishing that information. Publicly listed companies have requirements and obligations to their shareholders. Private companies do not have an obligation to publicly release (also divulging to their competitors) their tangible investment and strategies. By forgoing equity markets, private companies should be entitled to reasonably protect their competitively sensitive information for a period of time no less than 5 years (in alignment with other public CbCR regimes).

The information requested goes beyond that required under the public CbCR EU Directive 2021/2101 ("EU Public Directive"). The statement on approach to tax included on CbCR filing, the disclosure of Tangible Assets, nor the reconciliation prepared by jurisdiction between income tax accrued and taxes due and paid are requirements in the EU Public Directive. The NFTC urges the removal of such requirements that go beyond the scope of the EU Public Directive.

NFTC recommends providing an exception from reporting for information that an entity does not possess or have reason to possess in the normal course of business. The exception should also include relief from reporting where the provision of the information would violate the law in any relevant jurisdiction (*e.g.*, due to confidentiality or privacy). This protection would be consistent with the approach taken in the EU Public Directive, where local entities must request data from a foreign parent and report whether the foreign parent provided the necessary data. However, local entities and employees are otherwise not subject to penalty for a related entity's refusal to provide data.

With regard to jurisdictions in-scope, the EU Public Directive identifies the Black and Grey list jurisdictions and requires separate reporting only for countries in these lists. We recommend alignment with the established international norms with a list of enumerated standards on the Black and Grey lists, instead of having a separate list of jurisdictions later promulgated by ATO. Any reporting of revenue in these jurisdictions should also be subject to a de minimis exemption. This will remove additional reporting burden and focus the information on "high risk" countries deemed to not meet tax transparency requirements, making such disclosure more meaningful to the interested parties. Furthermore, we encourage Australia to develop and communicate a formal and transparent set of standards by which a foreign country will be included or excluded from this list. **The World Trade Organization set precedent to require standards for black lists following a dispute put forth by Panama. The precedent provides that tax haven lists must be supported by objective criteria, or else it is considered discriminatory.**

We recommend that prior to adding a country to the list of jurisdictions in-scope, a mandatory notice period should be provided, which will allow MNEs to better forecast the potential costs of locating investments in various jurisdictions around the world while maintaining a presence in Australia. Australia should also review if it is necessary to have these countries on the list given that many of these markets have Pillar Two minimum tax in place from January 2024 onwards. Furthermore, after the introduction of the UTPR for taxable years beginning after January 1, 2025, no income in any of these jurisdictions will be subject to tax at a rate of less than 15 percent. We note that taxes paid under the UTPR are not included in the CbCR data as taxes paid in the jurisdiction that resulted in the payment of the UTPR, which would lead to distortions of the data with respect to that jurisdiction and the jurisdiction to which the UTPR was remitted.

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Type of Entity

The proposed tax transparency requirements only apply to certain types of entities that are country-by-country reporting entities in Australia - section 3D(1)(a) excludes partnerships in which any of the partners is not a constitutional corporation or trusts of which any of the trustees is not a constitutional corporation.

Consistent with these exclusions, the Introduced Bill should also exclude a foreign constitutional corporation that is treated as fiscally transparent in its country of organization such that the entity's income is subject to tax directly in the hands of its members or trustees on a current basis and those members or trustees are individuals.

Revenue

The disclosure of Revenue is required by the EU Public Directive, whereas the Introduced Bill requires splitting revenue into revenue from unrelated parties and revenue from related parties. The Introduced Bill defines related party revenue differently, whereby intra-country transactions are to be excluded in the Australian report, versus the existing Global non-public CbCR and EU Public Directive, which do not have the exclusion. This would potentially create five different definitions of Revenue within CbCR documents, which will create confusion, leading to less transparency and ultimately undermining any intended benefit from such disclosures. In addition, the split of related party intra-country vs inter-country is a very time-consuming exercise and may not be possible for some MNEs. This requirement will add a significant incremental compliance workload and economic burden to MNEs. Again, the lack of consistency with the EU Public Directive increases the potential for confusion amongst stakeholders and the compliance burden for taxpayers.

Explanation of Tax

The Introduced Bill includes a requirement to provide justification for the differences between income tax accrued (current year) and the amount of income tax due if the statutory rate of the jurisdiction is applied to the profit or loss before income tax. In general, the reasons for these differences are limited to a few reasons (*e.g.,* tax incentives, offset of tax losses), which are all normal business practices and inherent in a majority of developed tax systems including Australia. However, the reasons may not be easily understood and thus misinterpreted by readers of the document or be open to intentional misinterpretation. Furthermore, Pillar Two makes most of these differences less relevant. NFTC recommends that this information requirement be removed in order to align with the EU Public Directive. By removing this information, the appropriate level of data for public transparency that can be easily understood would be achieved.

Lack of Safeguards for Commercially Sensitive Data

NFTC remains very concerned about the lack of safeguards to protect against the disclosure of commercially sensitive data regarding business operations. While the Introduced Bill contains a reference to allowing exemptions, there is no clarity on what might qualify for an exemption, and it appears to be at the discretion of the ATO Commissioner. Such disclosures could harm the competitive position of businesses, eventually resulting in market distortions, particularly when compared to competitors not subject to disclosure (*e.g.,* competitors with no operations in Australia).

As a result of the requirement to publish jurisdiction-by-jurisdiction information for the separately specified countries outside of Australia, this distortion could occur in other markets in the world (not just Australia) in which one business is required to publish as a result of the Australian legislation and a competitor is not. By failing to provide an exemption from the publication of commercially sensitive data, these requirements create a direct and significant disincentive for growing businesses to commence

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operations in Australia. Accordingly, information regarding a jurisdiction could reflect start-up operations, business costs with a single customer, or a single contract, any of which could be commercially sensitive.

A five-year deferral elected by the CbCR entity could allow time for the government and ATO Commissioner to better develop protections for competition. Additionally, there is no safeguard exempting the publication of data that is otherwise publicly available (*e.g.,* through a public stock exchange filing). It is also concerning that the proposal seems to create a "workaround" to the confidentiality requirements agreed to by Australia and other governments that ratified the Multilateral Instrument negotiated as part of the OECD BEPS project. Requiring companies to participate in the elimination of the confidentiality protections afforded by that instrument is a violation of those agreements. Furthermore, the ATO already possesses CbCR and other taxpayer data and is best placed to audit compliance with the law. Publishing this data risks undermining public trust in the ATO's ability to execute its statutory obligations, if those efforts are publicly questioned or second guessed by stakeholders relying solely on the public CbCR data.

The EU Public Directive permits reporting groups to withhold reporting of commercially sensitive information. This is also consistent with the OECD Model Tax Treaty and Commentary contained in Article 26. Consistent with the EU Public Directive and OECD Models, the Introduced Bill should be modified to specifically permit reporting groups to withhold reporting of commercially sensitive information. At a minimum, we recommend that Australia adopt a safe harbor allowing MNEs to defer publication of information that would be seriously prejudicial to the commercial position of the MNE for five years, in line with the EU Public Directive.

Exemptions

In our [April 2023 comments] on the 2023 Exposure Draft on public CbCR, we highlighted concerns around the sensitivity of data requested for companies in the defense industry, with customers (typically ministries of defense) objecting to the disclosure of information due to national security and intelligence considerations. Large defense contractors regularly participate in classified programs and projects with the U.S. Department of Defense and other government agencies around the world, including Canada, the United Kingdom, and Australia. The disclosure of classified equipment sales and associated service activities through revenue reporting metrics, tangible assets, and employee metrics provide information that, in the wrong hands, could also compromise each country's national security and defense.

We welcome the addition in the Explanatory Memorandum ("EM") of the factors that the ATO Commissioner would take into account in considering exemption requests. Specifically, the explicit reference to the aspect of national security is helpful ensuring that the interest of Australia and its allies could be safeguarded. In light of the paramount importance of protecting national security and information of military sensitivity, and in line with Australia's Safeguarding Australia's Military Secrets (SAMS) legislation, we urge the Australian Government to take one step further in exempting MNEs in the defense industry as a general class within the Introduced Bill and provide specific guidance as to the definition or qualification of MNEs falling within this class.

In administering the exemption request, there is currently an established exemption process for (non-public) CbCR submitted to the ATO, for instance related to matters of national security. To streamline these parallel processes under similar rationale and to reduce the administrative burden for both the ATO and the MNEs, we suggest the consideration of providing a mechanism to combine or substantially integrate the implementation of these exemption requests and approval, with each approval for a designated multi-year period.

We continue to be concerned that the Introduced Bill only contains a national security exemption mentioned in the EM and not explicitly in the legislative text. Furthermore, the language is vague and

does not adequately protect classified or sensitive national security information. The current framework does not offer a clear test or predictability for Defense Contractors from year-to-year. We recommend a clear exemption for defense-related data be included as part of the bill text so that sensitive information is not compromised and that taxpayers and the ATO are able to consistently apply the exemption in a straightforward manner.

We recommend therefore that ATO provide two defined exceptions in the legislation. A bright line test allowing multinational enterprise groups that conduct a majority of their business with the Department of Defence or government intelligence or security agencies (including Foreign Military Sales and direct military sales to allied governments) to claim an automatic exemption from reporting any data other than identifying information (company name, jurisdiction of incorporation, identifying number, address) should be included. There is already precedent for such an exemption from existing CbCR in the United States issued by the Internal Revenue Service in Notice 2018-31. Further, a second exemption for affiliated groups that conduct significant business (but not a clear majority) with the Department of Defence or government intelligence or security agencies (including Foreign Military Sales and direct military sales to allied governments) should be allowed, with the approval of the ATO, to claim a similar exemption from reporting.

NFTC urges the Australian Government to obtain feedback from the ministries of defense of its ally nations (*e.g.,* the U.S.) regarding the implications of requiring the disclosure of sensitive information by its defense contractor companies and to take concrete steps in exempting the public disclosure of information that would undermine Australia's national security in line with the objectives of Australia's SAMS legislation. Such an exemption could be modeled off the U.S. exemption for certain defense contractors for the disclosure of specific non-public CbCR data that has existed for more than six years. Failure to provide such an accommodation would effectively sanction the release of significant information with potentially high intelligence value to geopolitical competitor states and harm Australia's interests and its relations with allies.

<u>Compliance Burden</u>

The Introduced Bill, while more limited than the 2023 Exposure Draft, is still extremely broad and will impose a disproportionate administrative burden on taxpayers. Such disclosure increases the compliance burden at a time when large MNEs are already facing the complex implementation of Pillar Two this year and preparing for Pillar One amid the ongoing work at the Inclusive Framework. The information requested in the Introduced Bill continues to exceed the data included in OECD Confidential CbCR under BEPS Action 13. As a result, many in-scope businesses will not have this data readily available. Much of the information required is not data ordinarily prepared or retained by many companies in the ordinary course of business at present.

In order to mitigate some of the compliance burden, NFTC recommends adopting the same standard format as the EU Public Directive or delaying the effective date of these requirements by 12 months. This will support the stated transparency objective while reducing the administrative burden for this reporting. A consistent format will avoid the unintended consequence of multiple versions of public CbCR, which may create confusion and undermine transparency. NFTC further recommends adoption of a de minimis exception for revenue below $50 million (AUD) in other jurisdictions and instead allow that income to be aggregated in the parent jurisdiction.

<u>Publication of Data</u>

The Introduced Bill states in section 3D (3) & (4) that the taxpayer provides the data to the ATO Commissioner, who then publishes the information on the Australian government website. The EM further clarifies that "The CBC reporting parent will fulfill its requirement to publish the selected tax information by providing the information in the approved form to the Commissioner, for the purpose of

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the information being made public. The Commissioner will then make the information available on an Australian government website as soon as practicable.” The direct publishing of the information without allowing the taxpayer to view or review it prior to publication is concerning. As contemplated, the taxpayer will have no opportunity to confirm that it is the correct data or provide any further context or explanations about the data that may assist the reader's understanding.

NFTC reiterates our prior recommendation that companies should have the option to publish the data in the prescribed format on their own website. Many companies will want to provide additional context around the data or include the data within a wider ESG report. Additionally, clarification on the details of the Maintenance of information on the Australian government website would be helpful. For example, the legislation should make clear how long the data will be maintained on the ATO website. We note that the EU Public Directive provides for a five-year visibility period at which point the data can be removed. We recommend Australia adopt a similar approach.

Conclusion

NFTC has previously expressed its concerns with publicly available CbCR data and appreciates the incremental revisions made to the Introduced Bill. Notwithstanding our previously expressed concerns, if Australia chooses to pursue public CbCR as suggested by the EM, we recommend a more measured approach to disclosure that closely aligns with international standards, including the EU Public Directive. We recommend that the restriction on entity types in scope and safeguards against commercially sensitive data be adopted. We further recommend that the commencement date be delayed 12 months from enactment to allow time to meet this requirement. Finally, jurisdictions should not be deemed an in-scope jurisdiction to the extent that the jurisdiction has implemented or is committed to implementing a domestic minimum tax of at least 15 percent. NFTC appreciates the opportunity to provide written comments and looks forward to continuing opportunities for constructive engagement including a hearing.

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