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Submission on the *Tax Laws Amendment (Combating Multinational Tax Avoidance) Bill 2015* **13 October 2015**

The Tax Justice Network Australia (TJN-Aus) welcomes this opportunity to make submission to the *Tax Laws Amendment (Combating Multinational Tax Avoidance) Bill 2015*. TJN-Aus broadly supports the Bill and sees the measures within the Bill as progress towards addressing some of the actions needed to curb tax avoidance by multinational corporations. TJN-Aus does not believe this draft legislation on its own is enough to address the problem and encourages the government to continue to develop legislation, regulation and enforcement tools that will ensure “Profits should be taxed where the economic activities deriving the profits are performed and where value is created.”¹

Schedule 1 and 2

Under Subsection 960-555, TJN-Aus believes the definition of a “significant global entity” should apply to multinational enterprises (MNEs) that meet the ATO definition of a large business in terms of their global income, which would mean applying it to a MNE with global revenue in any particular year of \$250 million instead of the current threshold of \$1 billion. As the other criteria contained within the Bill in regards to Subsection 177DA for the determination of the MNE obtaining a tax benefit will limit the application of the Subsection to a limited number of MNEs anyway, broadening the income threshold for the Subsection to apply will allow the ATO to target more MNEs that may be engaged in this particular form of tax avoidance. It seems odd to allow a MNE to be able to engage in tax avoidance simply because its global income is less than \$1 billion.

MNEs caught under the changes to address arrangements that artificially avoid a taxable presence in Australia, may seek other methods to avoid paying taxes in Australia on their profits made here. Thus the Government must continue to analyse which tax avoidance measures are being used and, where necessary, further legislate to close off those loopholes in the law that remain.

Schedule 3

The TJN-Aus supports the increased penalties for “significant global entities” involved in tax avoidance schemes contained in Schedule 3 of the Bill. Again, the TJN-Aus believes the penalties should apply to significant global entities defined as those having more than \$250 million in global annual income.

¹ G20 Leaders’ Communique, Brisbane Summit, 15-16 November 2014, p. 2.

Schedule 4

The TJN-Aus supports the two-tier structure of master and local files as being very helpful because it simplifies documentation requirements for both tax administrations and firms.

Public Disclosure

However, the TJN-Aus is disappointed that the Bill fails to provide any public disclosure of the country-by-country reporting of large multinational companies. The TJN-Aus urges that the Bill be amended to allow for the disclosure of country-by-country reporting on the parts of the information that cannot be justified as commercially confidential. Corporations are creatures of statutory law and have no right to secrecy; on the contrary the privilege of incorporation should be subject to adequate disclosure to investors, stakeholders and the general public.

We appreciate that from that viewpoint, the main priority is to ensure disclosure of the information necessary for effective risk assessments by national tax authorities. However, there are wider concerns of corporate accountability both to stakeholders and the general public. This is also a question of good tax governance. As the OECD Base Erosion and Profit Shifting (BEPS) project has recognised, the public concern that large corporations are able to deploy BEPS techniques to minimise the taxes they pay also undermines the general legitimacy of taxation. This has already resulted in the development of international standards for country-by-country reporting for specific industry sectors, notably extractive industries and banking and finance, which are also legal requirements in the USA and the EU, as well as many other countries. There are also differing disclosure requirements on companies depending on where they seek a stock exchange listing. There are therefore many strong arguments for going beyond a merely sectoral approach, and establishing a general disclosure standard for all large transnational corporations. There is no justification for secrecy of aggregate information on items such as employees, assets, profits and taxes by country. In our view, the only valid reason for non-publication is commercial confidentiality. This test should be applied strictly in this context.

Public country-by-country reporting would save on time and resources for tax authorities (which would have no role in passing on data that is publicly available) by allowing for a simple query of the data instantly via a register, rather than their having to record and compile different sets of files sent by various transnational enterprises and other tax authorities. Making the country-by-country reports public would ensure that more sets of eyes, across different stakeholder groups, could help digest the mass of data filed by companies and flag any indicators of risk to appropriate tax authorities.

The publication of a profit and loss account for a multinational enterprise on a country-by-country basis allows investors to assess:²

- The risk that the internal supply chains create for the company, most especially for governance. The use of secrecy jurisdictions has frequently been associated with governance failures leading in turn to corporate failure, as occurred with Enron and Parmalat as examples;
- The flow of finance charges within the group, and the particular impact these might have on an intragroup basis with regard to the reallocation of profits between jurisdictions, giving rise to risk of transfer pricing or thin capitalisation challenge from taxation authorities, prejudicing the potential quality of future earnings; and
- The rate of return on capital employed by jurisdiction, suggesting whether or not assets are efficiently allocated by group management to the locations in which the company trades.

² Richard Murphy, 'Country-by-Country Reporting. Accounting for globalisation locally', Tax Justice Network, 2012, pp. 33-34.

Business efficiency is dependent upon the availability of high quality information. Unless that information is available then sub-optimal decisions on everything from resource allocation within a company to capital allocation between companies will be inefficient at the cost to society as a whole. Public disclosure of country-by-country reporting may take away some of the advantages that the current opacity provides to certain multinational companies, but it is beneficial to business as a whole.³

In order to engender greater transparency of the financial flows between the resource sector and governments a growing number of jurisdictions have introduced, or are introducing, payment disclosure legislation for extractive industry companies:

- In 2010 President Obama signed into law Section 1504 of the *Dodd Frank Wall Street Reform and Consumer Protection Act*, which requires all extractive industry companies registered with the United States Securities and Exchange Commission to report payments made to governments on a country-by-country and a project-by-project basis. Rules implementing the law are expected to be issued in 2015.⁴
- In 2013 the European Parliament voted to adopt new Accounting and Transparency Directives that require all public and large private extractive and logging companies in the European Union to report their payments to governments on a project-by-project basis. The United Kingdom and France have since completed transposition of the Directives into national law. In both countries the first reports on payments made in 2015 will be published in 2016.⁵
- On 16 December 2014 the Canadian Parliament passed into law payment reporting requirements under the *Extractive Sector Transparency Measures Act*, which the Canadian Government has stated will come in to force no later than 1 June 2015.⁶
- Payment disclosure legislation for extractive industry companies came in to force in Norway on 1 January 2014.⁷
- In November 2014 the Swiss Government published for public consultation draft reporting rules that are in line with the United States and European Union laws.
- Since 2010 the Hong Kong Stock Exchange has required prospective mining and oil and gas companies to disclose payments to governments in their listing applications.

The EU Directives, which were written to align with the US legislation, and the Canadian legislation, allow for overseas reporting regimes to be considered equivalent. These clauses permit cross-listed companies to only have to report in one jurisdiction, as long as the other deemed its reporting regime equivalent, and pave the way for a truly global reporting standard.

If public country-by-country reporting is not possible at this stage, we support and commend the proposals to require filing of (i) the Master File, (ii) the Local File, and (iii) the country-by-country report by all entities with a taxable presence in Australia. The Bill allows the Commissioner to exempt entities from (iii), and the Explanatory Memorandum explains the proposed circumstances for such exemption as being that the local entity's worldwide parent entity is resident in another jurisdiction, and it provides country-by-country reports to a tax authority in that jurisdiction; and that there are arrangements in place for the automatic

³ Richard Murphy, 'Country-by-Country Reporting. Accounting for globalisation locally', Tax Justice Network, 2012, p. 56.

⁴ www.reginfo.gov/public/do/eAgendaViewRule?pubId=201410&RIN=3235-AL53

⁵ UK, The Reports on Payments to Governments Regulations and Early implementation of the Transparency Directive's requirements for reports on payments to governments, 2014
France, Projet de loi portant diverses dispositions d'adaptation de la législation au droit de l'Union européenne en matière économique et financière, 2014.

⁶ Canada, Extractive Sector Transparency Measures Act, 2014.

⁷ Norway, Forskrift om land-for-land rapportering, 2013.

exchange of country-by-country reports between that authority and the ATO; and the ATO is, in practice, able to obtain country-by-country reports from that authority. In our view it is essential as a minimum that the ATO should be able to obtain a country-by-country report from any entity with an affiliate or a Permanent Establishment in Australia, and to be able to do so directly if the complex and cumbersome proposals for filing in the home jurisdiction and supply by exchange of information does not work in practice, for whatever reason.

It is also important that the data from country-by-country reports should be made available for analysis and research purposes. The inadequacy of existing data on corporate tax payments and their relationship to the real activities in each country has been recognised as a major obstacle to proper evaluation of the extent of tax avoidance and of the effectiveness of reform measures, in the report by the OECD under BEPS Action 11, *Improving the Analysis of BEPS*. Publication of the country-by-country reports would obviously be the easiest way to ensure this availability. However, even if it is decided that the reports should not be published, the data they contain should be made available to researchers, subject to protections to ensure that analyses which are published include data only in aggregate form. Tax returns of individuals and legal entities are already made available for research purposes by tax authorities in a number of countries subject to such protections. It is especially important that data relating to large corporations which have a major social and economic role should be available for this type of analysis and research.

Threshold

The TJN-Aus is disappointed the threshold for reporting in the Bill has been set at \$1 billion in global revenue (which is consistent with the OECD recommendation from the BEPS Action Plan). TJN-Aus would have preferred to see Australia apply a lower threshold for producing the reports. As noted in the Explanatory Memorandum (p. 12) only 30 to 50 Australian-headquartered MNEs will be required to produce a country-by-country report with the current threshold. Further, the Explanatory Memorandum (p. 82) notes that “the revenue threshold of \$1 billion will exclude 85 to 90 percent of multinationals operating in Australia from the requirement to file a Country-by-Country, local file and master file reports.”

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Background on the Tax Justice Network Australia

The Tax Justice Network Australia (TJN-Aus) is the Australian branch of the Tax Justice Network (TJN) and the Global Alliance for Tax Justice. TJN is an independent organisation launched in the British Houses of Parliament in March 2003. It is dedicated to high-level research, analysis and advocacy in the field of tax and regulation. TJN works to map, analyse and explain the role of taxation and the harmful impacts of tax evasion, tax avoidance, tax competition and tax havens. TJN's objective is to encourage reform at the global and national levels.

The Tax Justice Network aims to:

- (a) promote sustainable finance for development;
- (b) promote international co-operation on tax regulation and tax related crimes;
- (c) oppose tax havens;
- (d) promote progressive and equitable taxation;
- (e) promote corporate responsibility and accountability; and
- (f) promote tax compliance and a culture of responsibility.

In Australia the current members of TJN-Aus are:

- ActionAid Australia
- Aid/Watch
- Australian Council for International Development (ACFID)
- Australian Council of Trade Unions (ACTU)
- Australian Education Union
- Anglican Overseas Aid
- Baptist World Aid
- Caritas Australia
- Columban Mission Institute, Centre for Peace Ecology and Justice
- Community and Public Service Union
- Friends of the Earth
- Global Poverty Project
- Greenpeace Australia Pacific
- International Transport Workers Federation
- Jubilee Australia
- Maritime Union of Australia
- National Tertiary Education Union
- New South Wales Nurses and Midwives' Association
- Oaktree Foundation
- Oxfam Australia
- Save the Children Australia
- SEARCH Foundation
- SJ around the Bay
- Social Policy Connections
- Synod of Victoria and Tasmania, Uniting Church in Australia
- TEAR Australia
- Union Aid Abroad – APHEDA
- UnitedVoice
- UnitingWorld
- UnitingJustice
- Victorian Trades Hall Council
- World Vision Australia