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Dear Board members

A Tax Transparency Code: Consultation Paper (2015)

Greenwoods & Herbert Smith Freehills thanks the Board for the opportunity to comment on the consultation paper, *A Tax Transparency Code* (**the Consultation Paper**).

Greenwoods & Herbert Smith Freehills is Australia's largest specialist tax advisory firm, with offices in Sydney, Melbourne and Perth. We advise ASX-listed and other large Australian businesses, as well as international investors and financiers with interests in Australia. As a result, many of our clients will be within the scope of the proposed Tax Transparency Code (**TTC**).

Summary

We wish to acknowledge at the outset our view that, while we have minor reservations about some of the detail, the recommendations proposed in the Consultation Paper reflect for the most part appropriate and sensible compromises which accommodate the competing positions of the disparate parties interested in this aspect of tax administration. The Board deserves to be commended for its work.

However, there are three important areas where we submit the current recommendations can be improved:

1 The Board should take the opportunity to remind the Government that Australia is already much more ambitious in the public disclosure of corporate tax information than other most countries are (or are likely to be, even after implementing all of the BEPS recommendations), and Australia should, therefore, be very cautious in venturing too far down this path while ever our main competitors continue to be unwilling to adopt similar practices.

2 Further, the start date currently proposed for the regime (2015-16 reports) is too soon and should be delayed for one year, and phased in for the first reports, to allow sufficient time for accurate data-collection systems to be put in place. It is in no-one's interest to have this handled in a rushed and potentially misleading fashion.

3 Finally, with regard to cross-border related-party transactions, we strongly support the Board's proposal for a qualitative rather than quantitative explanation of related dealings, but this recommendation should extend to require qualitative reporting only on transactions that are likely to have a material effect on Australian tax payable.

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Detailed comments

The Board has correctly defined its objective as being to design a system that provides meaningful information for 'interested users' and 'general users' [ch 5]. Having this audience firmly in mind is critical in selecting the information to be reported and the manner in which it is presented. We agree with the implicit conclusion behind the Board's recommendations that such an audience is best served by selecting a few key ratios and emphasising qualitative data.

The Board should be commended for developing a set of recommendations that reflects considered and sensible compromises to accommodate the competing interests in greater transparency of corporate tax information. There are many places in the Consultation Paper where one can see competing claims at play.

The 6 new items of information which large companies will be required to report [ch 9] are clearly more extensive than is required under the current rules in s.3C of the *Taxation Administration Act 1953*. Because that information will not exist in the required form (especially the Part B document) the proposals will mean new information will have to be generated, gathered and presented just for the purpose of this project.

The TTC will necessarily add to the compliance burden of Australian businesses. While the Board has clearly tried to moderate the extent of the additional cost and effort involved in generating special purpose information by having at least the Part A recommendation rely on information that exists in financial statements, the Board also acknowledges that 'the tax disclosures in general purpose financial statements [will need to be] expanded ...' [page 13]. We note that there is no attempt to rely on information that already has to be produced for the International Dealings Schedule, Advance Pricing Arrangements or Country-by-Country reports, and we think this is the right balance: while it would make data collection somewhat cheaper and easier, this would require the public disclosure of information that is appropriate for disclosure only to the ATO.

We also support the implicit approach of building on existing industry best practices such as the self-generated reports by companies which have extensive disclosures in corporate social responsibility documents or have signed on to the EITI regime. However, we doubt the claim that, 'upon commencement of the operation of the code, there will already be a core group of industry leaders that can demonstrate compliance with most of its principles ...' [page 7]. In part, the suggestion that the AASB will need to be involved 'to establish a common definition of the term 'effective tax rate' (**ETR**) to ensure consistency' [page 4] acknowledges that a key part of recommendations is probably not met by anyone in a uniform manner. We doubt anyone can be confident that they report an Effective Tax Rate calculation in the way that the AASB will eventually settle on. Indeed, rather than have the AASB embark upon finding a new definition, and then requiring it to substitute for existing practice, the Board should give some consideration to allowing companies to report their ETR in the way that seems most accurate to them, accompanied by an explanation of the methodology.

Finally, the Board has chosen sensible settings with regard to enforcement, audit and penalties.

So, for the most part, we think the compromises reached by the Board are sensible and appropriate. Two matters that do strike us as deserving further thought are:

- the proposed threshold for 'medium businesses' is currently set at companies with turnover greater than AUD 100m [ch 6.2]. The AUD 200m threshold for privately-held companies now reflected in s.3C of the *Taxation Administration Act 1953* is, in our view, a more sensible threshold given that the Board's recommendations do not differentiate between widely-held and privately-held companies. Requiring disclosure by private companies with turnover exceeding AUD 100m raises the same concerns which saw the recent amendments in Parliament. It seems more appropriate to build a model based on the Parliamentary compromise; and

- the Consultation Paper makes no explicit recommendation for repealing (or even adjusting) the current mandatory legislative regime in s.3C of the *Taxation Administration Act 1953.* It is hard to see any need for the existence of the mandatory regime for companies that comply with the TTC recommendations. It is also likely to add to public confusion if both the current disclosure and the new TTC information are in the public domain since they will not coincide. We suggest that the Board's final recommendations to the Government should direct the ATO to not publish information for any company which has provided the TTC documents / links to the ATO as responsible authority for the TTC by an appropriate date.

(a) Unilateral unreciprocated actions

This part of our submission discusses our three main substantive reservations about the Consultation Paper.

We appreciate that the Board is not a position to challenge the mandate given to it by the Government. Treasurer Hockey stated in May 2015 that, 'the Government would like more companies, particularly large multinationals operating in Australia, to publicly disclose their tax affairs' and declared the Government's commitment to 'greater transparency in the commercial dealings of large multinationals.' The Board's commission was to 'to develop a code on greater public disclosure of tax information by large corporates.' The wisdom of the Government's position was thus not an issue which the Board was asked to assess.

Nevertheless, in our submission, the Board should take the opportunity to remind the Government that Australia is already much more ambitious in the *public* disclosure of corporate tax information than most other countries are (or are likely to be, even after implementing all of the BEPS recommendations). Australia should, therefore, be very cautious in venturing too far down this path while ever our main competitors continue to be unwilling to adopt similar practices.

In this respect, we think section 3.3 of the Consultation Paper gives the misleading impression that Australia is just one among many countries which require the public disclosure of corporate tax information. We doubt the claim that, 'the Government's commitment to implementing the TTC reflects an international trend of countries mandating or encouraging increased transparency of tax information' [page 1]. While it may be strictly correct that, 'a number of other countries and organisations are also *looking at* increasing the transparency of tax information of large businesses' [page 5] it is most certainly ***not*** the case that they have done much beyond looking.

For example, the proposal being considered in the UK has made little progress since its release in July 2015 (the UK now appears to be waiting to see if anything happens with the European Commission work) and, even if the UK proposal were fully implemented, it is far less intrusive than the Board's proposal requiring only that 'large businesses' (undefined) publish a 'tax strategy' explaining the entity's 'attitude to tax risk' and 'appetite for tax planning.'

Moreover, some countries are decidedly antagonistic to the idea of greater disclosure of the tax affairs of their companies. For example, for the foreseeable it is extremely unlikely that the US will increase transparency *even with regard to disclosing information to other tax administrations.* In June 2015, Senate Finance Committee Chairman Orrin Hatch and House Ways & Means Committee Chairman Paul Ryan wrote to the Obama Administration and declared publicly that:

> *Congress is tasked with writing the tax laws of the United States, including those associated with cross-border activities of U.S. companies. Regardless of what the Treasury agrees to as part of the BEPS project, Congress will craft the tax rules it believes work best for U.S. companies and the U.S. economy …*
>
> *[We] are troubled by some positions the Treasury Department appears to be agreeing to as part of this project. For example, we are concerned about the country-by-country (**CbC**) reporting standards that will contain sensitive*

> *information related to U.S. multinational's group operations. We are concerned that Treasury has also appeared to agree that foreign governments will be able to collect the so-called 'master file' information directly from U.S. multinationals without any assurances of confidentiality or that the information collected is needed. The master file contains information well beyond what could be obtained in public filings and that is even more sensitive for privately-held multinational companies…*
>
> *Some recent press reports have indicated that the Treasury Department believes it has the authority under the Internal Revenue Code to require CbC reporting [but] we believe the authority to request, collect, and share this information with foreign governments is questionable… Therefore, we request that … the Treasury Department and IRS provide the tax-writing committees with a legal memorandum detailing its authority … [and] in the event we do not receive such information, Congress will consider whether to take action to prevent the collection of CbC and master files.*

The message could not be clearer, and it is instructive to note that, unlike Australia, the US is not one of the 31 countries which signed the Multilateral Competent Authority Agreement for the automatic exchange of country-by-country reports.

With regard to other countries, our research can find little to challenge our view that Australia is far ahead of world opinion on this matter. See T Sprackland, Privacy Concerns May Hinder Transparency Movement, *Tax Notes International* (23 November 2015) 667. Even the Scandinavian countries, which are sometimes said to require significant public disclosure of sensitive taxpayer information, appear not to do so on closer inspection. See P Baker and P Pistone, Taxpayer Rights - General Report (2015) vol 2 *Cahiers de Droit Fiscal*, para 3.10.

Moreover, by requiring *public* disclosure of tax information, Australia is moving far beyond the positions that other countries were prepared to accept in the OECD/G20 BEPS project. The BEPS Action Items which involve greater collection and dissemination of tax information – Action 5 (harmful tax practices), Action 11 (measuring and monitoring BEPS), Action 12 (mandatory disclosure rules) and Action 13 (country-by-country reporting) – are all limited just to the provision of information to tax authorities and in some instances the exchange of information between tax administrations. As the Consultation Paper notes, the BEPS project only involves requirements that multinational enterprises supply information to, 'relevant governments and tax authorities' [page 5]. The countries involved in BEPS were unwilling to agree to 'minimum standards' which would involve the public disclosure of tax information.

Australia should be very cautious about pursing what is currently a unilateral experiment with only speculative support from other countries.

(b) Start date and transition

Paragraph 10.4 of the Consultation Paper proposes that, the 'TTC should be in operation in time for the reporting period for 2015-16 financial statements or annual reports.' In our view, this is too soon and should be delayed for one year to allow computer systems to be put in place to collect this data and ensure it is accurate. Moreover, the system should begin with a soft-start – the reports for the 2016-17 year should be regarded as a trial so that companies can fine-tune their processes.

Starting these kinds of new reporting regimes is neither straightforward nor cheap. In this respect, one place to look is to observe the start of the US FATCA system. The assumption that the regime would be simple and cheap to start because financial institutions already held this data under their AML/CTF 'know your customer' rules was illusory. It was enacted in 2010, had to be re-designed by creating inter-governmental agreements, has been delayed many times already and is still not fully operational. In 2014, Treasury estimated that complying with FATCA had already cost Australian financial institutions almost AUD 500m [see Regulation Impact on Business, *Tax Laws Amendment (Implementation of the FATCA Agreement) Bill 2014*]. While the TTC does not impose the same level or extent of additional data collection, its objects are more

numerous. The cost and difficulty of complying with an economy-wide TTC should not be under-estimated.

The existing obligations in s.3C of the *Taxation Administration Act 1953* mean there will not be an information vacuum from a delayed start. That regime can continue to operate unaffected for a further year to avoid this project being handled in a rushed and potentially misleading fashion.

The project should be handled at a deliberate and measured pace.

(c) Cross-border related-party transactions

Finally, we wish to commend the Board for the way it has framed the recommendation that the Part B report contain, 'a qualitative explanation of the nature of related dealings and measures that have been put in place to manage the associated tax risks' [page 16]. We support the Board's judgment that a quantitative approach to the disclosure of related party dealings is not appropriate.

Having said that, we submit that even the qualitative report should be limited just to those transactions which are likely to have a material effect on Australian tax payable. Materiality could be defined in terms of a percentage of total revenue or an absolute amount (either of revenue or tax), but some concept of materiality should be part of the Board's final recommendation.

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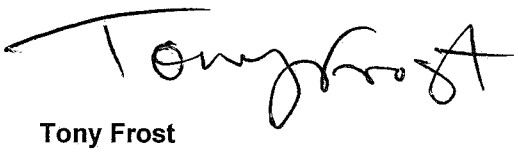
We trust that this submission is helpful to your deliberations. Please contact the writer if anything in the document is unclear or you would like to discuss its content further.

Yours sincerely



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