MINERALS COUNCIL OF AUSTRALIA

SUBMISSION TO THE BOARD OF TAXATION: TAX TRANSPARENCY CODE CONSULTATION PAPER

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EXECUTIVE SUMMARY

Australia's minerals industry is committed to meaningful and globally-consistent tax transparency. To be both efficient and effective, the Minerals Council of Australia (MCA) considers that tax transparency measures accord with the following principles:

- Provide **meaningful** information to improve public understanding of the corporate tax system
- Be **consistent**, as far as possible, with overseas reporting requirements
- **Minimise compliance costs**.

The MCA supports the key objectives of the tax transparency code as proposed by the Board of Taxation (the Board); namely, to improve public understanding of the tax system, to improve community confidence in the tax system and to help to ground debates on Australia's tax system in more accurate information. A number of mining companies operating in Australia already release detailed tax payment information on a voluntary basis and are recognised as global leaders on tax transparency. In addition, the industry supported the successful Australian pilot of the Extractives Industry Transparency Initiative (EITI).

The Board has made a concerted effort to get the balance right between meeting public expectations for additional information on the corporate tax system and ensuring complex tax information is not subject to easy misrepresentation.

Critically, it recognises the distinction between tax information that is relevant for public disclosure and information relevant for tax compliance purposes provided to tax authorities. The Board appropriately does not recommend the publication of individual related-party transactions or country-by-country reporting. This information is already, or will be, provided to the ATO for tax compliance purposes and its disclosure would provide commercially-sensitive information to competitor companies.

The framework of the code sensibly avoids a prescriptive 'one-size-fits-all' approach. Setting a minimum transparency standard with the ability for businesses to provide additional disclosures will help encourage uptake of the code by business. Not prescribing the format and timing of release and not requiring audits of disclosures will help to reduce some of the compliance costs associated with the code.

In some areas, however, the code falls short of meeting the principles identified in this submission and changes are needed to reduce compliance costs imposed on businesses doing the right thing, and to ensure confidence in the integrity of Australia's tax system is not undermined.

The code goes further than existing and proposed measures internationally on a number of elements and, as such, will be more onerous for businesses operating in Australia. In particular, the proposed disclosure requirements for large companies on related-party dealings would impose onerous compliance costs, provide demands for disclosure on matters of questionable relevance and go beyond what other transparency codes require. Further account needs to be taken of other existing and proposed transparency initiatives, many of which apply specifically to the resources industry.

The MCA considers the code would benefit from a number of relatively minor changes:

- All businesses should have the option of publishing the minimum disclosures in a separate single taxes paid report; there should be no requirement to publish in financial statements
- Qualitative information on related-party dealings should only cover the largest dealings (by transaction size) as a minimum
- The code should more clearly recognise that disclosures under an equivalent transparency regime in other jurisdictions will meet the obligations under the code.

1. TAX TRANSPARENCY IN THE MINERALS INDUSTRY

The mining industry is subject to higher levels of tax transparency globally compared with most other industries and mining companies are recognised as leaders on tax transparency. Most industry tax transparency statements are made on a voluntary basis.

By way of example various MCA member companies are already, or will be, subject to the following tax transparency initiatives:

- Annual Report disclosures of tax expense and cash taxes;
- Annual Sustainability Report disclosures of taxes and mining royalties paid;
- Annual ATO disclosures of revenue, taxable income and tax payable;
- European Union tax disclosures;
- OECD and Australian country-by-country reporting;
- EITI tax disclosures; &
- Voluntary Taxes Paid reports.

A level of global consistency is desirable in transparency regimes to minimise compliance costs for multinational companies operating across jurisdictions and to allow the public to make meaningful comparisons between businesses and jurisdictions. Equivalency provisions should be formally made part of the code to prevent duplication of reporting and reduce compliance costs for businesses operating in Australia.

Voluntary disclosures

A number of mining companies operating in Australia release detailed tax payment information on a voluntary basis. Transparency International consistently ranks BHP Billiton and Rio Tinto, for example, near the top of its worldwide ranking of companies in its Transparency in Corporate Reporting analysis.[1] The Assistant Treasurer in the Gillard Government, David Bradbury (now Head of Tax Policy at the OECD) recognised in 2013 that Australia's largest mining companies disclose 'a vast array of information about the tax they pay and their tax affairs'.[2]

ATO transparency publications

The ATO publishes official company tax data as part of the annual Tax Statistics publication (detailed data at industry wide level) and under the recent corporate entity tax transparency measure ('total income', taxable income and tax paid on an entity basis). Standard tax confidentiality conventions are set aside to allow publication of tax details of entities under the new corporate entity tax disclosure measure.

Global transparency initiatives

A number of Australian mining companies are subject to extractives industry specific reporting initiatives globally including:

- The Canadian *Extractive Sector Transparency Measures Act*
- Chapter 10 of the EU Accounting Directive (including the UK reporting of extractive industry payments to governments) applicable to all UK listed companies, with initial reporting in mid-2016.

These initiatives aim to have a level of consistency in reporting.

In the United States, the Securities and Exchange Commission (SEC) is currently proposing new rules to require US listed resources companies to disclose payments made to governments on a

[1] Transparency International, *Transparency in Corporate Reporting: Assessing the World's Largest Companies*, November 2014.
[2] David Bradbury, Address to the Minerals Council of Australia's Biennial Tax Conference, 16 April 2013.

project-by-project basis. The Dodd-Frank Act, yet to come into force, requires disclosure of payments to the United States and to foreign governments.

In addition to these existing transparency initiatives, the UK Government and the European Commission are currently consulting on new transparency codes to apply to companies operating in those jurisdictions.

These initiatives generally focus on disclosing taxes paid. They do not extend to accounting reconciliations or commentary of related-party transactions. In that respect, the proposed TTC goes further than existing and proposed transparency initiatives globally.

The Extractive Industries Transparency Initiative (EITI)

Many Australian mining companies also participate in Extractive Industries Transparency Initiative (EITI) reporting processes around the world.

The EITI is a global initiative that aims to reconcile payments by resource companies with those received by governments. The Australian minerals industry supported the successful Australian pilot of the EITI, launched in 2011, in which a number of MCA member companies participated. The May 2015 Multi-Stakeholder Group report (comprising company, government and civil society groups) on the pilot confirmed a high degree of accuracy and integrity in company reporting and governance systems. The MCA is working with the Government on Australia's potential adoption of the EITI.

2. THE CODE'S FRAMEWORK

Objective and key principles

The MCA supports the key objectives of the tax transparency code to improve public understanding and improve community confidence in the tax system to help ground debates on Australia's tax system in more accurate information. To meet this objective, and minimise duplication with overseas initiatives, the MCA considers that tax transparency measures should:

- Provide **meaningful** information to improve public understanding of the corporate tax system
- Be **consistent**, where appropriate, with overseas reporting requirements
- **Minimise compliance costs**.

The Board's approach to the TTC broadly meets these criteria and balances the provision of a substantial amount of tax information to the public with the need to minimise compliance costs and encourage uptake of the TTC by business.

The proposed disclosures under the code are more onerous in certain aspects than those required under existing transparency codes in other jurisdictions and will involve compliance costs for businesses. However, the Board's approach to allow flexibility in reporting format, timing of release and no requirement for auditing of disclosures will reduce associated compliance costs and should be retained.

A flexible code will improve uptake by business

The MCA supports the Board's approach to set a minimum standard of disclosure with flexibility for taxpayers to provide additional disclosures. The proposed code appropriately avoids taking a prescriptive approach as to the format or timing of release of a 'taxes paid' report.

Allowing taxpayers to disclosure the required information in their financial statement or specific 'taxes paid' reports will minimise compliance costs and, importantly, allow taxpayers to provide additional tax information to the minimum set out in the code, including additional disclosures particular to their industry and business activities. This could include information on other tax payments, mining royalties and material government payments.

Flexibility in disclosure methods allows taxpayers to provide explanatory material which will usually be required to provide context for disclosed data. This may involve explanations of non-taxable income, such as foreign sourced income, carry forward of tax losses, the impact of non-recognition and re-recognition of tax losses on taxpayers' tax rates, timing differences and incentives such as the R&D Tax Incentive. This will be important to reduce the likelihood of misinterpretation of data. Disclosure of quantitative information would be vulnerable to misrepresentation and risk undermining the objectives of the TTC.

The MCA strongly supports the Board's proposal to not require information disclosed under the code to be audited and allowing companies to choose the timing of release of a 'taxes paid' report which will significantly minimise compliance costs for taxpayers. Reputational risk to taxpayers for inaccurate reporting will be more than adequate to ensure information disclosed provides a true and timely representation of a company's tax affairs and payments.

Disclosures should not be mandatory in financial statements

As currently drafted, it is unclear whether companies that prepare Australian general purpose financial statements have the option of disclosing information required under Part A of the code (tax and accounting reconciliations and effective tax rates) in taxes paid reports.

The inclusion of the TTC disclosures in general purpose financial accounts under Part A of the code would give rise to additional compliance costs and require information disclosed under Part A to be audited (in line with normal audit process for financial statements). This is despite the TTC specifically noting that the information is not required to be subjected to an audit.

To minimise compliance costs for businesses, the taxes paid report should operate as an alternative for Part A disclosures. Complying taxpayers should have the choice of disclosing as part of their financial statements or in a 'taxes paid' report.

Equivalency recognition

Globally consistent disclosure regimes can minimise compliance costs for companies and allow meaningful comparisons across global regimes for members of the public. As noted above, many MCA member companies are already subject to multiple tax transparency initiatives globally. Australia's transparency code should seek to avoid duplication of disclosures already provided under existing overseas transparency initiatives.

To avoid duplication and further minimise compliance costs for companies operating in Australia, the MCA strongly supports the Board's position that similar disclosures by multinational businesses under overseas transparency codes will satisfy the minimum requirements of the Australian code (section 10.3 of the consultation paper).

The Board should clarify and provide further details on recognition of equivalent reporting under other transparency codes. Equivalency reporting should include disclosures made in financial statements or taxes paid reports or any another equivalent report prepared to comply with foreign jurisdiction reporting requirements. In many cases, a company may choose to provide all of the information required under the Australian code in a standalone document. However, the option should exist to not duplicate information where a company is complying with multiple transparency regimes to minimise compliance costs.

Timing of disclosures

The application of the TTC to 2015-16 annual reports or financial statements is appropriate. However, although the Board intends for there to be a level of flexibility in reporting timeframes, companies that are required to report information under Part A of the code will have the timing of publication of those elements dictated by general purpose account filing deadlines. As stated above, the minimum disclosures required under Part A of the code should be able to be published in financial statements **or** a taxes paid report.

3. CONTENT OF THE VOLUNTARY CODE

The MCA supports the Board's proposal to set out minimum disclosures applying to all medium and large businesses under Part A of the code (in financial statements) and require additional more detailed disclosures tailored to larger business under Part B of the code (in a taxes paid report). However, the code should clearly give large businesses complying with Parts A and B the option of providing all of the requirements disclosures in a single taxes paid report. It should not be a requirement that disclosures under Part A be made in financial statements potentially splitting disclosures between two reports.

Part A: Minimum disclosures for large and medium businesses

Reconciliation of accounting profit to income tax paid or income tax payable

Board of Tax recommendation

Expand tax disclosures in financial statements to include a reconciliation of accounting profit to income tax expense and income tax expense to income tax paid, and from income tax payable.

The reconciliation should identify material temporary and permanent differences.

Where general purpose financial statements are not prepared, this reconciliation can be made in a separate 'taxes paid' report.

MCA Position

The reconciliation of tax liability to accounting information should apply at the global level as suggested by the Board to minimise compliance costs for companies that already do this on a global basis.

Companies that lodge financial statements and publish separate taxes paid reports should have the option of providing the reconciliation information in the taxes paid report as an alternative to the financial statement. It should not be a requirement that the reconciliation be published in financial statements. To meet the objective of the code and ensure meaningful descriptive explanations can be made of how tax liabilities relate to accounting results, a taxes paid report may better facilitate the appropriate level of detail in many cases. This would minimise compliance costs, avoid duplication of published information and help ensure that all of the tax information required by the TTC can be published in the one document.

Without this option, 'large' companies as defined by the code (and subject to parts A and B of the code) that already prepare financial statements may have to amend their financial statements to comply with disclosures required by Part A of the code **and** prepare a taxes paid report to comply with disclosures required under Part B of the code. This would add unnecessary compliance costs and split disclosures between two reports.

Effective tax rates for Australian and global operations

Board of Tax recommendation

Businesses should disclose an Australian effective tax rate (ETR) and a global ETR for their worldwide consolidated accounting group. The ETR would be calculated as company tax expense divided by accounting profit.

MCA Position

While there is merit in developing a single, credible effective tax rate comparator, the requirement to calculate a global and an Australian ETR may not always provide an accurate comparison between a multinational company's effective Australian tax rate and their global tax rate. For foreign owned

groups the global ETR is often the combination of the different tax rates in which the global operations are conducted, which can have a range of tax rates, concessions, and treatments for deductions. Simply comparing the Australian ETR to the global ETR is relatively meaningless without a detailed description of the jurisdictions in which the group operates globally, the tax rates and tax adjustments for non-temporary differences. This would add to compliance costs.

Appropriate comparisons may not, therefore, always be able to be made between Australian and global rates of a company, but companies should have the option to allow explanations of any significant differences, where they arise, between Australian and global ETRs.

While the risk of misleading comparisons will exist under this proposal in some cases, the methodology proposed would provide a more meaningful figure for public transparency purposes than the ATO's proposed 'effective taxes borne' methodology – as acknowledged by the Board. The ATO's effective tax borne methodology is designed as a targeted internal ATO tax compliance tool for internal ATO use and is not appropriate for any possible public disclosure.

The MCA supports the Board's approach of allowing businesses to publish an additional ETR which incorporates other taxes to provide a more accurate reflection of the overall tax burden faced by a business. This is particularly relevant to mining which can face a number of additional taxes, fees and charges including mining royalties (which are a material impost) and licence fees. Where a business publishes an additional ETR, the methodology should be clearly articulated.

Consistent with the reconciliation of tax liability to accounting profit, disclosure of an ETR or ETRs should be able to be made in a 'taxes paid' report as an option for all companies complying with the code.

Part B: Large business 'Taxes Paid' reports

Tax policy, strategy and governance

Board of Tax recommendation

The taxes paid report should include information on the operations of the business and the approach to tax strategy and governance.

MCA Position

Inclusion of a company's approach to tax compliance may help to provide practical information to demonstrate how a company complies with tax obligations and how it operates in a transparent manner with the ATO. This may, at the discretion of a company, include details of a business's relationship with the ATO including the existence of pre and post lodgement compliance review processes, Advance Compliance Agreements, and ATO risk rating.

The code should not seek to be overly prescriptive on the type of information companies need to provide on internal policies. Individual businesses have the incentive to provide meaningful and relevant qualitative information to the public to demonstrate their credentials as a good corporate citizen via a commitment to tax compliance.

Tax contribution summary

Board of Tax recommendation

The taxes paid report should include a tax contribution summary disclosing corporate income tax paid with the option of including other imposts paid (including state and local taxes) or collected by the company on behalf of others (such as GST and PAYG withholding taxes).

MCA Position

The disclosure of corporate tax paid in Australia as a minimum 'core' standard with optional additional disclosures will provide relevant information to the public and flexibility for taxpayers. The optional elements will allow taxpayers to supplement corporate tax payments with additional tax contributions on a voluntary basis. Such flexibility will allow taxpayers to tailor their disclosures to their industry and business activities and provide a clearer picture of total tax contributions. For example, mining companies may wish to publish details of mining royalties paid to state and territory governments and licence fees.

Importantly, the code is flexible enough to allow businesses to explain the numbers disclosed to add context and explain the data to the public where necessary.

International related-party dealings, financing and tax concessions information

Board of Tax recommendation

The taxes paid report should provide a qualitative, not quantitative, explanation of 'key' categories of related party dealings, the nature of 'material' categories of dealings and the country in which the related party is located.

MCA Position

Related-party transactions are part of the normal course of business for multinational enterprises. The number (or size) of related-party transactions, on their own, do not indicate any tax mischief.

The code's requirement for large companies to disclose qualitative information on 'key categories' of related-party dealings, their nature and the jurisdictions of related parties would require a significant amount of detail that goes well beyond what any other transparency code currently requires.

As stated at the outset, a measure of success of the code includes the provision of meaningful information to the public that can be interpreted. The detailed information on related party transactions proposed by the Board would provide the public with limited useful information from which conclusions could be drawn on company compliance with tax laws. Publication of this material will be liable to misrepresentations and unfair reputational risk simply for the existence of legitimate transactions. The Board acknowledges the risks of this information in the consultation paper.

To minimise compliance costs, the code should set a minimum requirement of the most material dealings with international related parties to be covered in the description. Businesses should be able to meet this requirement of the code with explanations of the commercial reasons for these transactions.

Quantitative information and country-by-country reporting

It is appropriate that the code does not require the inclusion of the quantum of related-party transactions. Such disclosures would disclose commercially sensitive information on company structure, margins and sales information that could be unpicked by competitors. No other tax transparency code in operation or proposed code under development includes public disclosures of this level of detail.

There would be no clear purpose for the disclosure of quantitative information on related-party dealings. Australia's transfer pricing regime targets compliance issues and detailed information on dealings between international related parties are already provided annually to the ATO in the International Dealings Schedule. Country-by-country reporting will provide a significant amount of new data to the ATO and global tax authorities to identify transfer pricing risks.

The Board is correct to clearly state that any component of country-by-country reporting should not be disclosed, consistent with OECD recommendations. Collation of country-by-country data (which come into effect in Australia this year) will add to ATO compliance tools, and is designed to be shared

by tax authorities for the purpose of tax compliance. It is not designed as a transparency measure. The OECD specifically considered the merits of disclosing the country-by-country data publicly and concluded that it would not be appropriate to publicly disclose such information. Senior OECD representative Pascal Saint-Amans has made the point that if governments were to publish such information, it 'may be misleading and it could do big damage unfairly'.[3]

'Tax concessions' and other items

The codes make a reference to taxes paid reports providing disclosures about 'tax concessions'. No detail is provided. It should be noted that any tax 'concessions' available to a business would be reported in the reconciliation of accounting profit to income tax paid under Part A of the code. For example, claims under the R&D Tax Incentive would necessarily be described as part of the reconciliation requirements.

The MCA also agrees with the Board that disclosures should be made subject to materiality concepts, and that it is not necessary to disclose any tax disputes - noting that accounting or listing requirements will already report these where they are material.

[3] Australian Financial Review, OECD cool on mandatory disclosure of tax bills, January 30, 2014.