PUBLISH WHAT YOU PAY AUSTRALIA

Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600
Phone: +61 2 6277 3540
economics.sen@aph.gov.au

Tuesday 25 July 2023

To the Committee Secretariat,

Re: Treasury Laws Amendment (Making Multinationals Pay Their Fair Share-Integrity and Transparency) Bill 2023 [Provisions]

We thank you for the opportunity to make a submission to the Australian Government's consultation on Treasury Laws Amendment (Making Multinationals Pay Their Fair Share-Integrity and Transparency) Bill 2023 (Provisions) (TLA Bill).

Publish What You Pay Australia is a civil society coalition of anti-corruption, human rights, faith-based, environment and union organisations campaigning for greater transparency and accountability in the oil, gas and mining sectors and a just energy transition.[1] We work with the global PWYP coalition, a network of over 1,000 organisations in more than 51 countries around the world, united in our call for an open and accountable extractive industries, so that communities can access the information they need about projects and share in the benefits of their local natural resources.

PWYP coalitions internationally are focused on the need for a just energy transition - having identified that we need to stop extracting and burning fossil fuels. We also need to hold the booming critical minerals sector to modern standards of environmental protection, cultural heritage protection, First Nations rights, greater accountability and a better share of benefits from mining for the public. PWYP Australia and our international partners are actively working on these issues.

As a civil society organisation concerned with transparency and accountability, we have a strong interest in public policy and mechanisms to hold extractive industries to account, and to ensure the greatest possible public benefit is achieved, now and for future generations.

The oil, gas and mining industries attract a high level of public interest because of the public and environmental impact of extraction and the sense of public ownership over commodities that are extracted. Australian environment and civil society organisations are increasingly attuned to the lack of taxes and royalties paid by extractive companies alongside the subsidies, excises, and grants awarded to mining, oil and gas companies.

Within the extractive industries there is a well known and understood use of profit shifting. We welcome the government taking steps to address and resolve some of these practices associated with the misuse of debt and deductions, the mis-valuation of commodities to minimise tax payments, and the use of subsidiaries and foreign related parties to facilitate this practice.

[1] For more information on the 30 organisations that make up the PWYP Australia coalition go to: www.pwyp.org.au

The minerals, oil and gas extracted by companies in Australia belong to all Australians and should be treated as a shared resource, and an inheritance for future generations. The same is true for the natural resources of other countries, especially resource rich but poor countries. We note that there are more than 700 extractive industries companies listed on the Australia Securities Exchange (ASX), operating in more than 80 countries, many of which are conflict or corruption prone.

To meet the challenges of the energy transition, Australia must grow critical mineral industries and phase out fossil fuel extraction. Additionally, Australia is the world's largest LNG exporter but still faces gas shortages in 2022. These examples further demonstrate the need for greater transparency and integrity from the Australian extractives sector.

Communities rightfully want to know how much companies pay in taxes, royalties and other payments, including at the level of a particular mining or gas project, and how they actually benefit from the extraction of our shared resources.

Enhancing tax transparency in the extractive industries is particularly important given that the sector is one of the world's most corrupt.[2] We welcome the government's moves to address multinational tax avoidance and transparency.

In an earlier submission to the Commonwealth's consultation on tax integrity and transparency, we made comments and indicated our support for Country by Country Reporting inline with the Global Reporting Initiative (GRI) standards.

Profit Shifting – Thin capitalisation and mis-valuation of commodities

The OECD has published advice[3] on the practice of using deductions to avoid tax in the oil, gas and mining sector and have identified that where companies are thinly capitalised, they are able to claim interest on debt as a deduction to pay less tax. This is even more of an issue where companies loan money as debt rather than equity to subsidiaries or related parties as a way to use the debt as a deduction. The OECD advocates host countries' set limits on deductions to minimise this type of profit shifting.

We welcome deduction limits applied through this Bill, though we suggest they could be lowered further. We also strongly advocate that there should be restrictions that prevent debt generated by related parties being a deductible form of debt. We also have concerns about the proposal in the Bill that debt can be carried over for 15 years, allowing companies to claim bits and pieces of debt as deductions over many years – which doesn't limit profit shifting, just distributes it over many years.

Another prominent form of profit shifting used by the mining sector is the mis-valuation of mineral exports and foreign trading hubs. Multinational extractive companies may lower the value of the raw material to sell and export to a subsidiary or 'foreign related party' in a low or no tax jurisdiction to lower the amount of export tax paid in the host country and increase the profits when sold from a

[2] See for example https://www.oecd.org/dev/Corruption-in-the-extractive-value-chain.pdf

[3] OECD, 2018. Limiting the Impact of Excessive Interest Deduction on Mining Revenue. chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.oecd.org/tax/beps/limiting-the-impact-of-excessive-interest-deductions-on-mining-revenue-oecd-igf.pdf

foreign trading hub. There have been well documented cases involving Australian companies[4],[5]. We are not aware of legislation that addresses this practice.

We suggest that there could be amendments made to the proposed Bill that would provide a greater visibility on mis-valuation of commodities when traded between foreign related companies.

The OECD[6] highlights that where a product is sold to a subsidiary or foreign related party – there is a greater opportunity to undervalue the commodity to avoid paying tax upon export compared to when the product is sold to a third party.

The OECD recommends two options for policy mechanisms and a third hybrid option. This advice is designed for developing countries but should not be discredited in an Australian context, where the mis-valuation of minerals has occurred from some of the biggest companies and is quite likely occurring within smaller companies. These policy options are:

1. Direct measurement and valuation of mineral exports, including sampling, sample preparation and testing
2. Monitoring mining companies own internal export valuation process to ensure reliability of results

The EITI Standard also makes important recommendations on accounting for the true product valuation – section 3.2 and 3.3 of the EITI Standard – included in the section below on the EITI.

We haven't been able to identify where or how the **Treasury Laws Amendment (Making Multinationals Pay Their Fair Share-Integrity and Transparency) Bill 2023 [Provisions]** might address the mis-valuation of mineral exports but strongly advocate that it should.

We are of the view that within the financial reporting there could be additional requirements to report on sales and contracts between foreign related parties and that this could include a requirement to report on the valuation of commodities with assurances. This could be a supply chain reporting requirement.

The Extractive Industry Transparency Initiative

We would also like to take this opportunity to advocate for the implementation of the Extractive Industries Transparency Initiative (EITI) which Australia has been a long time supporter of.

The Department of Foreign Affairs and Trade describe the EITI as "the global standard for the good governance of oil, gas and mineral resources." We welcome Australia's ongoing commitment and support for the EITI and look forward to Australia implementing an adapted EITI Standard in Australia as committed to in 2016.

In 2023 the EITI released an updated Standard[7]. The 2023 Standard includes requirements which address tax avoidance and beneficial ownership which crossover with the TLA Bill.

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[4] SMH, 2022. Rio Tinto pays nearly $1 billion in tax avoidance settlement https://www.smh.com.au/business/companies/rio-tinto-pays-nearly-1-billion-in-tax-avoidance-settlement-20220720-p5b37x.html

[5] Reuters, 2016. BHP readies for tax fight as Australia cracks down on offshore hubs. https://www.reuters.com/article/us-bhp-billiton-australia-tax-idUSKCN11R127

[6] OECD, 2018. Monitoring the Value of Mineral Exports: Policy Options for Governments chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.oecd.org/tax/beps/monitoring-the-value-of-mineral-exports-oecd-igf.pdf

[7] Extractive Industries Transparency Initiative – 2023 Standard https://eiti.org/collections/eiti-standard

In a 2016 Regulation Impact Statement on the EITI the problem was explained "*If Australia does not implement the EITI, there is a substantial risk that it will lag behind its international partners in a growing transparency and anti-corruption agenda, thus damaging its reputation and credibility. International and domestic efforts to improve transparency, address tax avoidance and profit shifting by multi-national corporations are increasing. Given Australia's large natural resource base and the high level of confidence placed in the governance frameworks that support resource development, there is significant pressure to demonstrate leadership in this area.*"

It is well known and documented that Australian companies in an Australian context use profit shifting within our relatively robust regulatory setting. So we welcome this action, but urge that it is done within the EITI framework to support our capabilities to implement the EITI and that the improvements we make to domestic policy to prevent profit shifting can be shared internationally.

We have collated a small selection of the EITI standards that may overlap with the proposed Bill, and we are of the view that parts of the **Treasury Laws Amendment (Making Multinationals Pay Their Fair Share-Integrity and Transparency) Bill 2023 [Provisions] are a stronger and more detailed that some of the standards in the EITI.**

We recommend the Committee review the new EITI 2023 Standard and we advocate that the Committee report comment on how the proposed new laws meet and improve on the EITI Standard requirements. Comment from the Committee on this will assist in any future movement towards Australia implementing the EITI Standard.

Australia's new laws are setting a new and improved international standard on preventing profit shifting which should be framed in the context of the EITI so other countries may adopt similar standards.

Other comments and recommendations:

Many extractive companies are multinational corporations with complex structures and subsidiaries. We welcome the requirement for disaggregated reporting requirements for subsidiaries.

We also strongly advocate that all subsidiaries should be disclosed, not just those in low or no tax jurisdictions. We also see benefit in disaggregating reporting further to a project by project level.

In the interest of improved transparency, we advocate that there should be **public** reporting requirements of financial statements of unlisted private companies – specifically private extractives companies. Mining of any kind attracts public interest because it involves extracting minerals which are publicly owned and have costs and impacts on the public through impacts to natural systems and communities. Private companies do not have the same level of transparency as publicly listed companies despite the level of public interest and impact. We strongly advocate that the public should be able to have access to information about company's financial records to have visibility over their taxes, royalties and other payments.

In summary

- We support the introduction of this Bill and its intent
- We welcome increased disclosure on subsidiaries – and advocate that all subsidiaries should be disclosed
- We advocate that the amendments should include a mechanism to prevent profit shifting through the mis-valuation of mineral exports
- We advocate that debt generated through loans between related parties should not be considered debt for the purpose of deductions

- We support calls from the Tax Justice Network (TJN) and the Centre for International Corporate Tax Accountability and Research (CICTAR) that the provision that allows excessive debt deductions of 15 years being carried forward should be removed, as it does not curb profit shifting losses from government tax revenue but instead spreads those losses into future years.
- We also support calls from the TJN and CICTAR for robust Country by Country Reporting (CbCR) for all multinationals operating in Australia and urge the government to advance the CbCR amendments with priority.
- We support the new requirements for financial reporting – but advocate that some types of unlisted companies (oil, gas and mining companies) should be required to release financial statements publicly
- We also advocate that the Australian Government assure the proposed Bill is aligned with requirements in the EITI in preparation for the potential implementation of the EITI standard.

We welcome this government commitment to address multinational tax transparency and commend the efforts made to secure greater public benefit through revenue collection.

Mia Pepper
National Director
Publish What You Pay
mia@jubileeaustralia.org
www.pwyp.org.au
0415 380 808

EITI Standard 2023 requirements that apply to the intent of the Treasury Laws Amendment (Making Multinationals Pay Their Fair Share-Integrity and Transparency) Bill 2023 [Provisions]

The full suite of EITI requirements would create a broader system of transparency and greater mechanisms for holding companies to account

An important component of the EITI Standard is that countries may implement an adapted version suitable for their country. The value of EITI is the requirement that the Standard be developed and agreed between industry, government and civil society through a Multi Stakeholder Group. We are eager that there be a convening of the Multi Stakeholder Group to discuss how to adapt the EITI Standard for an Australian context.

BENEFICIAL OWNERSHIP

Requirement 1.2

b) Reporting companies are expected to publish an anti-corruption policy setting out how the company manages corruption risk, including their use of beneficial ownership data. In addition, companies in the multi-stakeholder group are expected to engage in rigorous due diligence processes.

Other reporting companies are also encouraged to engage in rigorous due diligence processes.

Requirement 2.5 Beneficial ownership

The objective of this requirement is to enable the public to know who ultimately owns and controls the companies operating in the country's extractive industries, particularly those identified by the multi-stakeholder group as high-risk, to help deter improper and corrupt practices in the management of extractive resources and to help monitor the ownership of politically exposed persons.

a) Implementing countries are encouraged maintain a publicly available register of the beneficial owners of the corporate entity(ies) that apply for or hold a participating interest in an exploration or production oil, gas or mining license or contract, including the identity(ies) of their beneficial owner(s); the level of ownership; and details about how ownership or control is exerted. Where possible, implementing countries are encouraged to incorporate beneficial ownership information in existing filings by companies to corporate regulators, stock exchanges or agencies regulating extractive industry licensing. Where this information is already publicly available, the EITI Report must include guidance on how to access this information.

b) The multi-stakeholder group is required to document the government's policy and its discussion on beneficial ownership disclosure. This must include details on the relevant legal provisions; actual disclosure practices; and any reforms that are planned or underway related to beneficial ownership disclosure.

c) Implementing countries are required to request, and companies are required to publicly disclose, beneficial ownership information. This applies to corporate entity(ies) that apply for or hold a participating interest in an exploration or production oil, gas or mining license or contract and must include the identity(ies) of their beneficial owner(s); the level of ownership; and details about how ownership or control is exerted. The multi-stakeholder group must disclose any significant gaps or weaknesses in reporting on beneficial ownership information, including any entities that failed to submit all or some beneficial ownership information.

d) Information about the identity of the beneficial owner must include the name of the beneficial owner, their nationality, and their country of residence, as well as identifying any politically exposed persons.

e) Implementing countries are also encouraged to disclose beneficial owners' national identity number, date of birth, residential or service address, and contact information.

The multi-stakeholder group must assess any existing mechanisms for assuring the reliability of beneficial ownership information and agree an approach for corporate entities within the scope of Requirement 2.5(c) to assure the accuracy of the beneficial ownership information they provide. This could include requiring companies to attest the beneficial ownership declaration form through sign-off by a member of the senior management team or senior legal counsel, or to submit supporting documentation.

f) Definition of beneficial ownership:

i. The term “beneficial owner” in respect of a company means the natural person (s) who directly or indirectly ultimately owns or controls the corporate entity.

ii. The multi-stakeholder group must agree an appropriate definition of the term “beneficial owner”. The definition must be aligned with Requirement 2.5 (f)(i) and take international norms and relevant national laws into account. The definition must also include ownership thresholds(s), which should be informed by the country context and the type and level of risk that the country aims to address.

Implementing countries are encouraged to adopt an ownership threshold of 10% or lower for beneficial ownership reporting.

The definition must also specifically reporting obligations for politically exposed persons (PEPs). Implementing countries are required to request full disclosure of PEPs beneficial ownership regardless of their level of ownership.

iii. Publicly listed companies, including wholly-owned subsidiaries, are required to disclose the name of the stock exchange and include a link to the stock exchange filings where they are listed to facilitate public access to their beneficial ownership information. The multi-stakeholder group is encouraged to review the comprehensiveness and reliability of ownership information disclosed in the stock exchange filings.

iv. In the case of joint ventures, each entity within the venture must disclose its beneficial owner(s), unless it is publicly listed or is a wholly-owned subsidiary of a publicly listed company. Each entity is responsible for the accuracy of the information provided.

v. State-owned enterprises (SOEs) are required to disclose the name of the state(s) owning or controlling the SOE, the level of ownership and details about how ownership or control is exerted. If the SOE is not fully owned by the state, beneficial ownership information must be disclosed in accordance with Requirement 2.5(c).

g) Implementing countries are required to disclose the legal owners and of the corporate entity(ies) defined in Requirement 2.5(c), including share of ownership. Companies are encouraged to disclose their ownership structure, including the full chain of legal entities leading to the beneficial owner.

Requirement 2.6 State participation

e) Where feasible, SOEs are encouraged to disclose the identity and beneficial ownership of their agents or intermediaries, suppliers or contractors for material transactions.

MIS - VALUATION OF PRODUCT

Requirement 3 Exploration and Production

3.2 Production data

The objective of this requirement is to ensure public understanding of extractive commodity(ies) production levels and the valuation of extractive commodity output, as a basis for assessing expected government revenues from the extractive industries and the potential for government revenue leakages linked to under-reported production.

a) Implementing countries are required to disclose timely production data, including production volumes and values by commodity. Data must be further disaggregated by project, where available. An estimate of production resulting from artisanal and small-scale activities must be disclosed where applicable and available.
b) The sources of and the methods for calculating production volumes and values must be disclosed. Implementing countries are required to disclose existing mechanisms to monitor and verify the accuracy of production data and document findings, including any weaknesses related to the comprehensiveness and reliability of publicly available production data.
c) Implementing countries are expected to present production data using national and international commodity classification standards.
d) Companies are encouraged to disclose realised sales volumes and values by project

Requirement 3.3 Export data

The objective of this requirement is to ensure public understanding of extractive commodity(ies) export levels and the valuation of extractive commodity exports, as a basis for assessing expected government revenues from the extractive industries and the potential for government revenue leakages linked to under-reported exports.

a) Implementing countries are required to disclose timely export data, including export volumes and the value by commodity and by exporting company.

Implementing countries are expected to disaggregate export data by transaction. An estimate of exports resulting from artisanal and small-scale activities must be disclosed where applicable and available.

b) The sources of and the methods for calculating export volumes and values must be disclosed. Implementing countries must disclose existing mechanisms to monitor and verify the accuracy of export data and document findings, including any weaknesses related to the comprehensiveness and reliability of publicly available export data. This could involve analysing possible deviations between export values and market prices and/or import values reported by the destination country.

c) Implementing countries are expected to present export data using national and international commodity classification standards.

d) Exporting companies and buyers of commodities, including commodity traders, are encouraged to disclose realised sales volumes and values by project.

e) Implementing countries are encouraged to present export data by region, destination and buyer. Exporting companies and implementing countries are encouraged to disclose whether the buyer is a related party.

TAX

Requirement 4 – Revenue Collection

4.1 Comprehensive disclosure of taxes and revenues

The objective of this requirement is to ensure comprehensive disclosures of company payments and/or government revenues from oil, gas and mining as the basis for detailed public understanding of the contribution of the extractive industries to government revenues.

a) Implementing countries are required to disclose all material payments by oil, gas and mining companies to governments ("payments") and/or all material revenues received by or on behalf of governments from oil, gas and mining companies ("revenues") to a wide audience in a publicly accessible, comprehensive and comprehensible manner.

Implementing countries and/or companies are expected to routinely disclose the requisite information through government and corporate reporting (e.g. websites, annual reports), and to collate this information and address any concerns about gaps and data quality in EITI Reports.

b) Unless there are significant practical barriers, the government is required to disclose the amount of total revenues received from oil, gas and mining companies, disaggregated by revenue stream.

c) The multi-stakeholder group is required to agree which payments and revenues are material and must therefore be disaggregated in accordance with Requirement 4.7. The multi-stakeholder group must agree appropriate materiality definitions and thresholds for revenue streams and reporting entities. Payments and revenues are considered material if their omission or misstatement could significantly affect the comprehensiveness of the disclosures. All revenue streams and one-off payments by oil, gas and mining companies must be included in the materiality consideration. The multi-stakeholder group must document the options considered and the rationale for establishing the definitions and thresholds.

d) Implementing countries are required to ensure that all government material revenues from oil, gas and mining companies comprehensively disclose these revenues in accordance with the agreed scope. All oil, gas and mining companies making material payments to the government are required to comprehensively disclose material payments in accordance with the agreed scope. A company or a government entity should only be exempted from disclosing material payments or revenues if the multi-stakeholder group has agreed to unilateral disclosure by the government or companies in accordance with Requirement 4.9.

Requirement 4.10 Project Costs

The objective of this requirement is to increase public understanding about exploration and production costs in the country's extractive sector and about government policies and practices to monitor companies' costs.

a) Implementing countries are required to disclose government policies and practices for monitoring oil, gas and mining project costs and managing revenue loss risks. This must include the disclosure of relevant laws, regulations and policies, as well as actions undertaken to monitor costs.

b) Implementing countries are expected to disclose final cost and tax audit reports, or summaries of those reports, including costs deemed as non-recoverable and costs deemed non-deductible and any additional revenues to be collected as a result.

c) Companies and implementing countries are encouraged to disclose declared costs disaggregated by project, and by costs related to operating and capital expenditures.

Operating expenditures declared in the reporting year may include amortisation or depreciation of costs incurred in prior years. Companies and implementing countries are encouraged to disclose costs incurred since the commencement of the project.

Requirement 4.1 Comprehensive disclosure of tax and revenues

The objective of this requirement is to ensure comprehensive disclosures of company payments and/or government revenues from oil, gas and mining as the basis for detailed public understanding of the contribution of the extractive industries to government revenues.

a) Implementing countries are required to disclose all material payments by oil, gas and mining companies to governments ("payments") and/or all material revenues received by or on behalf of governments from oil, gas and mining companies ("revenues") to a wide audience in a publicly accessible, comprehensive and comprehensible manner.

   Implementing countries and/or companies are expected to routinely disclose the requisite information through government and corporate reporting (e.g. websites, annual reports), and to collate this information and address any concerns about gaps and data quality in EITI Reports.

b) Unless there are significant practical barriers, the government is required to disclose the amount of total revenues received from oil, gas and mining companies, disaggregated by revenue stream.

c) The multi-stakeholder group is required to agree which payments and revenues are material and must therefore be disaggregated in accordance with Requirement 4.7. The multi-stakeholder group must agree appropriate materiality definitions and thresholds for revenue streams and reporting entities. Payments and revenues are considered material if their omission or misstatement could significantly affect the comprehensiveness of the disclosures. All revenue streams and one-off payments by oil, gas and mining companies must be included in the materiality consideration. The multi-stakeholder group must document the options considered and the rationale for establishing the definitions and thresholds.

d) Implementing countries are required to ensure that all government entities receiving material revenues from oil, gas and mining companies comprehensively disclose these revenues in accordance with the agreed scope.

   All oil, gas and mining companies making material payments to the government are required to comprehensively disclose material payments in accordance with the agreed scope.

   A company or a government entity should only be exempted from disclosing material payments or revenues if the multi-stakeholder group has agreed to unilateral disclosure by the government or companies in accordance with Requirement 4.9.

e) Companies are expected to publicly disclose their audited financial statements, or the main items (i.e. balance sheet, profit/loss statement, cash flows and effective tax rates) where financial statements are not available at country level.

   Companies are encouraged to disclose tax deductions and incentives in the period under review.