PUBLISH WHAT YOU PAY AUSTRALIA

Via email (rule-comments@sec.gov) 16 March 2020

Vanessa L. Countryman

Secretary

U.S. Securities and Exchange Commission

100 F Street, NE,

Washington, DC 20549-1090

CC:

The Honorable Jay Clayton,

Chair Commissioner Robert J. Jackson, Jr.

Commissioner Allison H. Lee Commissioner Hester M. Peirce

Commissioner Elad L. Roisman

Dear Secretary Countryman:

Re: File No. S7-24-19, Proposed Rule 13q-1 to implement section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Publish What You Pay (PWYP) Australia welcomes the opportunity to make a submission on the Securities and Exchange Commission's proposed rule implementing Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

PWYP Australia is a coalition of humanitarian, faith-based, environmental, anti-corruption, research and union organisations campaigning for greater transparency and accountability in the extractive industries. PWYP Australia works with the global Publish What You Pay coalition, a network of over 700 member organisations in more than 50 countries around the world, united in their call for an open and accountable extractive sector, so that oil, gas and mining revenues improve the lives of women, men and youth in resource-rich countries.

Introduction

This submission will focus on the benefits for the Australian extractive industries reporting context and the impact on access to information of US listed companies operating in Australia should the

SEC introduce a strong rule aligned with the EU Accounting and Transparency Directives and the Canadian Extractives Sector Transparency Act (ESTMA) now operating in 30 countries.

Australia's Reporting Context

The OECD has identified the extractive industries as the world's most corrupt economic sector.[1] The High-Level Panel on Illicit Financial Flows from Africa found a clear relationship between countries that are highly dependent on extractive industries and the incidence of [illicit financial flows]'.[2] The starting point for tackling corruption, poor governance and tax non-compliance in the extractives sector is transparency.

Australia has taken recent legislative steps to begin addressing these issues. This includes the Tax Laws Amendment (Combating Multinational Tax Avoidance) Act 2015 which introduced Country by Country Reporting as outlined in Action 13 of the OECD/G20 Base Erosion and Profit Shifting (BEPS) Plan. However, while these measures are valuable, they are insufficient on their own to fully address the transparency of the system that multinational extractive companies in Australia can operate in. Australia does not have a law requiring the disclosure of payments to governments by companies and is not yet an EITI implementing country.

PWYP Australia believes that the opaque nature of the extractives sector in Australia is contributing to the difficulty of ensuring that the Australian public is getting a good deal from the extraction of its natural resources. This includes extractive project being operated by US listed companies. A lack of systematic data collection from the sector, and little publicly available data, is a primary contributor to this opacity. To address Australia's data issue and increase transparency in the extractive sector, PWYP Australia and its coalition members advocate for the introduction of a mandatory disclosure reporting regime aligned to the EU Accounting and Transparency Directives and the Canadian ESTMA. These laws require mining, oil and gas companies listed on the implementing country's stock exchange to annually and publicly publish their payments to government, domestically and internationally, down to the project level. **A strong section 1504 rule aligned to these laws will demonstrate US leadership and provide much needed momentum for Australia's law makers to follow the US, UK, EU and Norway.**

[1] Foreign Bribery Report, 2014, http://www.oecd.org/daf/anti-bribery/scale-of-international-bribery-laid-bare-bynew-oecd-report.htm

[2] https://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf, page 67

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The work of the Tax Justice Network Australia (TJN-A) and others in the recent investigate report 'Is Exxon Paying a Fair Share of Tax in Australia's and the previous work undertaken by TJN-A into the Petroleum Rent Resource Tax (PRRT) has evidenced that Australia is failing to get a fair deal from the extraction of our finite natural resources.[3] Further, it has been noted by PWYP Australia and TJN-A that **poor data quality, and a lack of disaggregated and publicly available data on extractive companies payments inhibits the ability of civil society to find or use the data required to verify the payments companies claim to be making**.[4]

Internationally, Australia's poor data collection and regulation of extractive industries has been highlighted by the Natural Resources Governance Institute (NRGI) in their 2017 Resource Governance Index. In ranking 89 countries, Australia (WA) finished 8th overall. However we dropped to 32nd when ranked solely on revenue management because we have no requirement for companies to publish their payments, our weak taxation leave us behind other equivalent high income countries, and our government does not report systematically, or on a granular level, on production, exports, and company payments disaggregated by company.[5]

There are two government methods of payment disclosure that happen in Australia, the Voluntary Tax Transparency Code (TTC), and the Corporate Tax Transparency Report (CTTR). These are relevant for US extractive companies operating in Australia and there are significant issues with the data released through both mechanisms.

The TTC is a voluntary measure that companies can choose to sign on for and is a set of principles and minimum standards to guide medium and large businesses on public disclosure of tax information. The little known or used TTC was announced as part of the 2015 Budget and the Board of Taxation was tasked with the development of a new code that was intended to provide greater public disclosure of tax information by businesses and large multinationals.[6] The Australian Taxation Office (ATO) is responsible for collecting and publishing the reports from businesses that have adopted the TTC. This list is an Excel spreadsheet that then links to a PDF document provided by the

[3] https://www.aph.gov.au/DocumentStore.ashx?id=500b420f-052b-48e8-9641-2b052c07c6d9&subId=509853
[4] https://www.theguardian.com/australia-news/2017/jul/03/coalition-accused-of-giving-in-to-oil-and-gas-industry-after-failure-to-overhaul-tax
[5] http://www.resourcegovernanceindex.org/country-profiles/AU-WA/mining
[6] http://taxboard.gov.au/current-activities/transparency-code-register/

company, or occasionally just to a company website. The ATO states on the TTC page that it 'does not review or provide any assurance on the accuracy of the information contained in these reports'.[7]

The ATO also provides disclosures through the CTTR which provides information on public and foreign owned corporate tax entities with Australian income exceeding $100 million and Australian private companies with income exceeding $200 million. However, only information on a company's total income, taxable income, and tax payable is published. The publication of only this part of a company's receipts creates a distorted data set, unusable by civil society or any other stakeholder to properly observe a company's tax position or contributions. Indeed, even the Australian Government acknowledges these limitations on the hosting page stating: 'There are, however, a number of limitations with the data contained in the CTTR that ultimately limit its usefulness as a public transparency tool.'[8]

These limitations include that the CTTR does not disclose operating profits, tax losses or tax offsets, does not allow for ATO amendments, and acknowledges that 'it may be difficult to identify a business which comprises several taxable entities, or where its tax information is not disclosed under their trading or business name.'[9] All these issues are exacerbated by the protracted nature of publication, the most recent data set available is for the financial year 2017-18, and the aggregated disclosure of the data. This has resulted in an annual cycle in which the media reports on the companies who did not report tax payments, the companies dispute the reporting due to the limitations of the data, and everyone is left confused on if companies have actually paid a fair share or not, without resolution.[10]

An example of what reporting looks like under both mechanisms, and what information is available to Australians from US companies operating Australia, can be seen by looking at the reports on Newmont Mining Corporation (Newmont). Newmont operates in Australia as Newmont Australia Group, which outlines its operational structure as 'the group of Australian companies that are controlled directly or indirectly by Newmont. The Newmont Australia Group is comprised of one

[7] https://www.ato.gov.au/Business/Large-business/In-detail/Tax-transparency/Voluntary-Tax-Transparency-Code/
[8] Ibid
[9] Ibid
[10] ATO data reveals almost a third of big companies still not paying tax in Australia: https://www.theguardian.com/australia-news/2019/dec/12/ato-data-reveals-almost-a-third-of-big-companies-still-not-paying-tax-in-australia

income tax consolidated group headed by Newmont Australia Holdings Pty Limited (NAHPL) and a standalone entity, Saddleback Investments Pty Limited (SIPL).'[11] They own and operate two gold mines in Australia; the Boddington mine in Western Australia, Australia's largest open pit gold mine, and the Tanami mine in the Northern Territory. It is unclear from publicly available data how their company structure relates to these two projects. Newmont is large enough that it is required to report to the CTTR and they are one of the few companies that voluntarily reports to the TTC. They report both as NAHPL and SIPL in the CTTR, and just as NAPHL to the TTC. For the 2017-18 financial year, under the CTTR, NAPHL reported a tax payable amount of $266,474,855 AUD and SIPL a tax payable amount of $0 AUD on a taxable income of $531,418,180 AUD[12]. As such **annual disaggregation of data project-by-project is important as it demonstrates the financial flows between projects**, which is what communities and governments require to know if an extractive project is benefiting their community, and which aggregate tax figure cannot accurately reflect.

Conclusions

Corruption risks are often most present at the contract level. Government and civil society need project level data based on a contract level definition to improve governance and reduce corruption risks in resource-rich countries. **The US can be a leader in fighting corruption by adopting a strong 1504 rule that is aligned with similar laws in place in the EU, UK and Canada.** This would level the playing field with reporting for companies cross-listed on the European member states, London and Toronto's exchanges and demonstrate US leadership for Australia law makers.

A 1504 rule that includes publicly available contract level disclosure will support Australia and other nations where US listed companies operate efforts in promoting transparency and tackling corruption in our extractives industries.

The UK mandatory disclosure law was created with benefits to multiple stakeholders. It provides crucial data to citizens of resource-rich countries to hold their governments to account for payments received by companies for the right to extract; it builds knowledge amongst citizens to understand the contribution of an extraction through project-level reporting and it lifts the global standards of transparency in the extractives sector.

[11] https://www.newmontgoldcorp.com/document/australia-tax-transparency-report/
[12] https://www.theguardian.com/australia-news/ng-interactive/2019/dec/12/tax-transparency-which-companies-pay-the-least-tax-in-australia

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Beyond civil society, mandatory disclosure has been championed by companies, peak industry groups and politicians from across the political spectrum. BHP has been a long time for advocate for mandatory disclosure and voluntarily released their first PtG report one year before the UK law required. Andrew Mackenzie, BHP CEO said in a 2015 speech to the Minerals Council of Australia "Countries that transparently and effectively allocate the wealth from mining for the benefit of its citizens have the potential to attract greater, more responsible and longer-term business investment. Conversely corruption erodes economic and social development and denies millions of people their rights to an education, basic health services and to essential infrastructure".[13]

Pierre Gratton, President and CEO of the Mining Association of Canada (MAC) said in his statement when ESTMA passed that "This legislation places Canada at the forefront of international efforts to eliminate corruption and promote transparency. The Mining Association of Canada and its members are proud to have played an active role in collaboration with the Government of Canada and civil society in the promotion and design of this important legislation."[14]

I trust you take on board the points made in our submission when deciding on the final section 1504 rule. Please contact PWYP Australia National Director, Clancy Moore to discuss or clarify anything that's included in this submission.

Clancy Moore
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[13] http://www.minerals.org.au/news/speech_to_the_minerals_council_of_australia_-_minerals_week_2015
[14] http://mining.ca/news-events/press-releases/mining-industry-welcomes-enactment-transparency-legislation