Australian Government
Department of Finance

Submission to the Senate Finance and Public Administration Legislation Committee

Public Governance, Performance and Accountability Amendment (Tax Transparency in Procurement and Grants) Bill 2019

March 2020

The Department of Finance (Finance) welcomes the opportunity to comment on the Public Governance, Performance and Accountability Amendment (Tax Transparency in Procurement and Grants) Bill 2019 (the Bill).

Introduction

1. The *Public Governance, Performance and Accountability Act 2013* (PGPA Act) provides a framework to enable Commonwealth entities to manage public resources in a streamlined and collaborative way. The principles-based framework underpinned by the PGPA Act allows accountable authorities of Commonwealth entities to tailor their internal processes so that they are appropriate to the operating context of their entity and to minimise unnecessary congestion in undertaking their functions.

2. The Commonwealth's procurement and grants activities are subject to the PGPA Act.

Purpose of the PGPA Act

3. The objects of the PGPA Act are:
    a. to establish a coherent system of governance and accountability across Commonwealth entities; and
    b. to establish a performance framework across Commonwealth entities; and
    c. to require the Commonwealth and Commonwealth entities:
        i. to meet high standards of governance, performance and accountability; and
        ii. to provide meaningful information to the Parliament and the public; and
        iii. to use and manage public resources properly; and
        iv. to work cooperatively with others to achieve common objectives, where practicable; and
    d. to require Commonwealth companies to meet high standards of governance, performance and accountability.

4. Finance considers that the proposed amendments to the PGPA Act fall outside the objectives and purpose of the PGPA Act. The PGPA Act is concerned with general governance and financial management issues. The current Bill, however, is concerned with specific instances and subjects not covered by the PGPA Act. In particular, the Bill seeks to incorporate reporting on tax compliance arrangements for companies and related entities that have contracts for procurement and grants; where these companies are domiciled in tax havens. This would require the accountable authorities of entities engaging in procurement to assess the tax arrangements and compliance of suppliers with domestic and international taxation laws. Such obligations are well beyond the scope and objectives of the PGPA Act.

5. The proposed Bill would also place a significant regulatory burden on Commonwealth entities engaging in procurement by requiring entities to assess the specific technical compliance of companies and associated entities with domestic and international tax laws. This would require procuring entities to maintain specialist knowledge of domestic and international taxation regimes, including through the engagement of additional professional services.

6. The proposed Bill further seeks to have the Minister for Finance, as the Minister responsible for the administration of the PGPA Act, prescribe certain countries as tax havens. As the Minister for Finance is not responsible for taxation matters, taxation matters should be addressed by the Treasurer.

Commonwealth Procurement Framework

7. The Commonwealth Procurement Rules (CPRs) are a legislative instrument made by the Finance Minister under section 105B of the PGPA Act. The CPRs underpin the broader Commonwealth Procurement Framework. All non-corporate Commonwealth entities and prescribed corporate Commonwealth entities listed in section 30 of the Public Governance, Performance and Accountability Rule 2014 must comply with the CPRs.

8. The Commonwealth Procurement Framework is non-discriminatory, meaning that all potential suppliers are required to be treated equitably based on their commercial, legal, technical and financial abilities and not be discriminated against due to their size, degree of foreign affiliation or ownership, location, or the origin of their goods and services. The Procurement Framework is underpinned by Free Trade Agreements, which promote reciprocal benefits to the various parties.

Existing mechanisms

9. There are a number of mechanisms that are already in place to facilitate accountability and transparency in Commonwealth procurement:
    a. On 1 July 2019, the Government introduced the *Black economy – increasing the integrity of government procurement policy*, requiring tenderers for procurements valued over $4 million to obtain a statement of satisfactory tax record from the Australian Taxation Office;
        i. The policy is intended to prevent businesses who do not comply with their key tax obligations, and therefore gain an unfair price advantage over their competitors, from being awarded high-value government contracts. Compliance with tax obligations are a policy matter for Treasury, not Finance;
    b. The CPRs require entities undertaking procurement to ensure that they do not benefit from supplier practices that may be dishonest or unethical (paragraph 6.7);
    c. The CPRs require entities to report contracts and amendments on AusTender within 42 day (paragraphs 7.18 and 7.19); and
    d. It is common practice for Commonwealth contracts to include a clause enabling the contract to be terminated in the event of non-compliance with the law in any jurisdiction, including in relation to tax fraud.

Key issues

10. As drafted, the Bill raises a number of challenges related to Government Procurement.

11. Section 49C would require suppliers making submissions in response to relevant procurements to provide specific details, including whether the supplier or any associated entities are domiciled in a tax haven and, if so, how the supplier or associated entities have complied with, or are complying with any relevant Australian or overseas tax laws. The section raises two potential issues:
    a. the term “domiciled” is not defined in the Bill; and
    b. this requirement is likely to have a disproportionate cost and compliance impact on small and medium enterprises, noting that many larger publicly listed suppliers are already required to publicly report relevant tax information.

12. Section 49D (1) requires the accountable authority to consider, for relevant procurements, a range of matters in determining whether to accept a submission from a supplier. Matters to be considered include whether a supplier is domiciled in a tax haven and, if so, whether they have complied, or are complying, with any applicable laws in Australia or elsewhere that relate to tax.

13. In practice, while section 49D (3) would require the accountable authority to have regard to the tax transparency information provided by the supplier and to consult the Commissioner of Taxation, section 49D (1)(b) could require officials undertaking relevant procurements to form an independent view on the level of compliance of the supplier and potentially multiple associates with both Australian and overseas tax law.

14. Finance notes that domestic tax law is a specialised field and that matters relating to domestic tax compliance can be highly contested, sometimes requiring lengthy analysis and argument by legal specialists working through the court system. The tax legislation of other jurisdictions is similarly complicated, requiring further specialised expertise. It may be uneconomic for many entities to retain that expertise in-house, meaning that the additional requirements would be filled by professional services firms, including accounting and legal services firms. This would particularly be the case where there were multiple submissions to a procurement process, and would increase the cost and timeframes for those procurement decisions.

15. The effect of section 49D (1) would be to create, for a relevant procurement, a new condition for participation under paragraph 10.15 of the CPRs. That is, if a supplier or one or more associated entities was determined not to be compliant with the relevant domestic or overseas tax legislation, the supplier's tender would have to be excluded from consideration, without being evaluated against the relevant tender evaluation criteria.
    a. Noting the complexities and specialist judgement necessary to determine issues of tax compliance, a decision to exclude a submission from consideration under section 49D (1) could be challenged under the *Government Procurement (Judicial Review) Act 2018*, potentially delaying important procurements while complicated matters of tax compliance are considered by the courts.

16. The interaction with the Commissioner of Taxation under section 49D (3) may create bottlenecks, potentially further delaying relevant procurements:
    a. Finance notes that over 1,400 of the contracts listed on AusTender in 2018-19 exceeded the $4 million threshold proposed in the Bill. Many of the procurement processes leading to the awarding of these contracts would have included multiple suppliers, some of whom would have had multiple associated entities; and
    b. This could require the Commissioner of Taxation to provide advice each year regarding the tax compliance status of potentially several thousand business entities, both domestically and overseas. This would involve the Commissioner of Taxation in allocating resources on a non-discretionary basis, rather than a risk adjusted basis.

International agreements

17. Australia is party to a number of free trade agreements and other international obligations. These promote reciprocal benefits to all the related parties. Specific advice should be sought to determine whether the provisions proposed by the Bill are consistent with these agreements.

Conclusion

18. The Bill would place a disproportionate burden on small and medium enterprises relative to larger entities. It would delay relevant procurements due to bottlenecks and legislative challenge and increase costs to Government and business through the likely engagement of additional professional services. Given the existing transparency and accountability measures outlined in paragraph 8 above, it is unclear that the additional benefit would outweigh the potential costs and risks.

Grants

Key Issues

19. The provisions of the Bill relating to 'grants' appear to extend beyond the scope of the PGPA Act by imposing requirements on applicants in receipt of financial assistance under other legislative frameworks such as the *Australian Education Act 2013* and the *Local Government (Financial Assistance) Act 1995*.
    a. The definition of 'grant' under the Bill's Section 8 includes 'its ordinary meaning', which is intentionally broader than the definition in Section 49F;
    b. Provisions of financial assistance seemingly excluded by Section 49F(2) of the Bill appear to be recaptured under Section 8, due to the inclusion of the 'ordinary meaning' of grants; and
    c. This means that the Bill will impose disclosure, consideration and/or publication requirements on accountable authorities and 'grant' applicants under legislation external to the PGPA Act;
        i. For example, there is a risk that the use of its 'ordinary meaning' could lead to a State or Territory being considered a 'grant applicant' under the Bill when in receipt of a 'grant' of financial assistance under the *Federal Financial Relations Act 2009.* This could then lead to a requirement to provide information on third parties in receipt of this money and their tax status. Payments made to a State or Territory under the *Federal Financial Relations Act 2009,* and how States and Territories apply those payments, are governed by the *Federal Financial Relations Act 2009*, not the PGPA Act; and
        ii. However, under the *Commonwealth Grant Rules and Guidelines 2017* (CGRGs), payments to a state or territory, made for the purposes of the *Federal Financial Relations Act 2009*, are not taken to be a grant.

Administrative Burden

20. The proposed provisions will impose additional administrative burdens on applicants typically individuals and community organisations, their associates, accountable authorities and the Commissioner of Taxation. Finance notes that there are no thresholds or limits to the disclosure or consideration requirements of 'tax-transparency information'. For example:
    a. there are no apparent limits to the information sought under the Bill by 'grant applicants' on their associates, such as limiting the 'tax-transparency information' relevant to that grant application or by value of the grant; and
    b. the accountable authority must consult the Commissioner of Taxation (section 49H(3)(b)) in considering any grant, regardless of merit, value, number of grants, or the information provided in reporting the domicile of the applicant or associates.

21. In 2018-19, the Commonwealth awarded over 30,000 grants, as defined by the CGRGs. Noting the issues raised above, the total number of grants made by the Commonwealth under the 'ordinary meaning of a grant' will likely be higher. Grants extend from low-value one-off payments under $100 to grants valued at hundreds of millions of dollars. Given that the 'grants' captured by the Bill are not restricted or limited in any way, any individual or entity (including states and territories) that seeks to receive a grant from the Commonwealth government, would be captured by this amendment Bill.

Comments on specific 'grants' provisions of the Bill

22. The Bill (Item 2 Section 8 of the Bill refers) extends to 'grants' outside the CGRGs, including the financial arrangements 'taken not to be grants' under paragraph 2.6 of the CGRGs, due to the definition of 'grant' in Section 8 including 'its ordinary meaning'. The Bill also captures 'grants' administered by corporate Commonwealth entities and Commonwealth companies that are not covered by the PGPA Act or CGRGs.

23. The definition of 'non-Commonwealth entity' uses wording not otherwise defined in the PGPA Act, such as 'body corporate'. It is unclear what applicants are meant to be captured by 'body corporate':
    a. for example this definition does not cover the range of applicants that apply for grants, such as 'incorporated associations', 'an Aboriginal and/or Torres Strait Islander Corporation registered under the *Corporations (Aboriginal and/or Torres Strait Islander) Act 2006*'.

24. There is an apparent inconsistency between section 49F to that of the proposed definition of 'grant' in Section 8 of the Bill.
    a. Section 49F(1), as drafted, appears to exclude the provision of financial assistance to certain applicants (i.e. 'non-Commonwealth entity(s)'), such as incorporated associations and Aboriginal and/or Torres Strait Islander corporations; and
    b. Section 49F(2) precludes provisions of financial assistance seemingly to mirror paragraph 2.6 of the CGRGs. However, noting a 'grant' in section 8 is to include 'the ordinary meaning' of grant, which is broader than the CGRGs and section 49F(1) of this Bill. It is not clear whether it is the intention to also have section 49F(2) precluded from the 'ordinary meaning' captured by section 8. As drafted, matters under section 49F(2) may be captured by the broader definition of 'grant' in Section 8.

Grant applicant must provide tax-transparency information

25. The Bill, at section 49 G, does not make clear the relationship of the 'associate(s)' to the 'grant applicant' that must be disclosed. It is not clear if an organisation applies for a grant, they must also report the tax-transparency information for:
    a. any and all 'associate(s)' it has had in its history of operating; or
    b. all current 'associate(s)' it has regardless of their relevance to the grant application; or
    c. 'associate(s)' only relevant to the grant application.

Matters to consider in awarding grants

26. The Bill, as drafted at section 49H, requires the accountable authority to consult with the Commissioner of Taxation (49H(3)(b)), regardless of whether the applicant or the applicant's associates provide information that they are domiciled in a tax haven, or whether the application for the grant has merit or not. It would be an unreasonable burden on the Commissioner of Taxation and accountable authorities to be consulted on each and every application for a grant.

27. Additionally, the accountable authority is not always involved in the consideration of a grant. There are a range of approvers of grants other than accountable authorities including, for example, Ministers, Ministerial panels and boards.

Annual reports for accountable authorities must include information about tax haven grantees

28. It is not clear what is meant by grants 'awarded that relate to a Commonwealth entity' in section 49J and whether this provision is intended to capture third parties who undertake grants administration on behalf of a Commonwealth entity.