



**Australian Government**  
**Australian Taxation Office**

# ATO Submission

## Inquiry into the PGPA Amendment (Tax Transparency in Procurement and Grants) Bill 2019

28 February 2020

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## Executive summary

1. The Australian Taxation Office (ATO) welcomes the opportunity to make a submission to the Inquiry into the Public Governance, Performance and Accountability Amendment (Tax Transparency in Procurement and Grants) Bill 2019 (the Bill).
2. It is important to note at the outset that there are often legitimate reasons for entities to have a presence in a 'tax haven', such as the need to ensure tax neutral pooling of investments involving multiple investors from different countries. The mere existence of a 'tax haven' in a business structure does not automatically suggest tax non-compliance or avoidance.
3. As a result of the recent introduction of a requirement for a Statement of Tax Record for large procurement contracts we observe high levels of engagement in the tax system by suppliers. Between 23 May and 31 December 2019, the ATO issued over 4,100 Statement of Tax Records demonstrating compliance with registration, lodgement and payment criteria.
4. Large corporate groups have also been shown to have high levels of tax compliance in Australia which has been further bolstered by the work of the [Tax Avoidance Taskforce](#).<sup>1</sup> Tax transparency has also increased in recent years with a number of initiatives increasing transparency of multinationals' global operations to both the public<sup>2</sup> and the Commissioner<sup>3</sup>.
5. As currently drafted, the Bill:
  - will make the ATO a shadow decision maker on procurement and grants based on its perspective of the tax law, which could adversely affect the business of entities prior to them having the opportunity to have a tax dispute decided by the court system.
  - raises a number of interpretative and administrative challenges for the ATO. In particular, it poses significant challenges in interpreting and administering the requirements related to determining 'tax havens', 'complied or complying with' and 'domiciled'.
  - requires the ATO to provide advice in relation to tax compliance in other taxing jurisdictions, whether domestic or international, which would require access to information that the ATO does not possess and may not be able to obtain.
  - requires the ATO to allocate material resources to determine whether jurisdictions are tax havens and the tax compliance of suppliers, grant applicants and their associates.

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<sup>1</sup> In 2016–17 the net tax gap for large corporate groups was estimated to be 4.0% of theoretical tax payable. This compared to an estimated net tax gap of 4.7% (of theoretical tax payable) in 2015–16 (see [We have confidence in the tax compliance of large corporate groups](#) and [Tax gap program summary findings](#)).

<sup>2</sup> For example, the Report of entity tax information, Significant Global Entities general purpose financial statements, voluntary corporate tax transparency code and Global Reporting Initiative Tax Standard.

<sup>3</sup> For example, Country by Country reporting, Reportable Tax Position schedule and Exchange of Information.

# Challenges posed by the Bill

## Definition of tax haven

6. There are no proposed objective statutory criteria for the Minister, or the Commissioner upon consultation, to consider when prescribing a country or part of a country as a 'tax haven'. The absence of such criteria also means there are no indicators as to when the status of a jurisdiction may warrant review (assuming the Bill allows for this).
7. Internationally, the concept of 'tax haven' has fallen out of use as tax transparency cooperation has progressed. International tax forums are focussed on promoting international cooperation to address tax avoidance and evasion. These forums and Australia use different concepts<sup>4</sup> to describe jurisdictions which present issues such as secrecy, unwillingness to cooperate with other jurisdictions in exchanging information, as well as harmful tax practices. Although assistance may be gained by looking to approaches used by these forums, we note that:
  - no one concept perfectly captures all the issues associated with 'tax havens'
  - jurisdictions of concern change based on the concept and the timing of an assessment (any jurisdiction can exhibit some of these characteristics at a point in time)
  - tax competition, that is, lowering the nominal rate of tax to attract investment differs from harmful tax practices where a taxpayer is provided a tax benefit without substantial activities in that jurisdiction
  - rather than headline tax rates it is the effective tax rate that is important.
8. The Commissioner would require detailed expertise in a jurisdiction's tax settings and rules in order to provide advice to the Minister on potentially prescribing a jurisdiction as a 'tax haven'. The ATO would need to invest to develop the requisite level of expertise. We also expect that this work would require a material resource commitment (depending on the number of jurisdictions to be considered).

## Compliance and tax transparency information

9. The Bill does not define what is meant by 'have complied, or are complying' as referred to in sections 49C, 49D, 49G and 49H.
10. This poses challenges for those that provide 'tax transparency information' and for the Commissioner in providing advice to the accountable authority. For example, it is unclear whether the ATO needs to provide positive assurance that a supplier is compliant (requiring significant investigation) or whether there is some lesser standard.
11. The Commissioner will not be able to provide definitive advice or positive assurance that a party and/or their associates have 'complied, or are complying with any applicable laws in Australia or elsewhere that relate to tax', or that the ATO will not subsequently audit them. This is due to the following reasons:
  - Depending on available information, the ATO may be unable to trace beneficial ownership and ascertain whether a supplier has a connection with a tax haven.

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<sup>4</sup> For example, OECD's [no or only nominal tax jurisdiction](#), the EU's [list of non-cooperative jurisdictions for tax purposes](#), the Financial Action Task Force on Money Laundering's [high risk and other monitored jurisdictions \(map\)](#) and the Australian OECD Hybrid mismatch rules, [where the rate of foreign income tax on the payment is 10% or less](#).

- Compliance is not necessarily a binary concept, particularly in the international tax sphere, where additional complexities often arise. A supplier may ultimately be found to be compliant (either on review within the ATO or through the court system), despite holding a different view to a tax authority at a point in time.
  - Information obtained under Australia's tax treaties and tax information exchange agreements cannot be used for non-tax related purposes, such as procurement.
  - Real time data on foreign tax compliance is unlikely to be available therefore the ATO will not be able to provide accountable authorities with meaningful assistance when they are considering compliance with laws outside of Australia relating to tax.
  - From a domestic perspective, the ATO's expertise and ability to assess compliance is specific to taxes administered by the Commissioner. This does not extend to taxes of Australian States, Territories or local Government taxes.
12. We estimate that as currently drafted, the Bill will require a material resource investment by the ATO. Although, the ATO already conducts comprehensive reviews of the largest multinationals not all suppliers will have a real time review (meaning additional work is required). Further, we note that the Bill is not limited to large multinationals and will impact small and medium enterprises or individuals that have international links, some of whom may not be the subject of current (or recent) compliance activities.

## Use of the term domiciled

13. The term 'domiciled' in connection with a 'tax haven' as referenced in sections 49C, 49D, 49E, 49G, 49H and 49J is not defined in the Bill or the Income Tax Assessments Acts. In this regard, the ATO would need to look to other areas for interpretative guidance. Furthermore, 'domiciled' may not capture all intended parties.
14. The defined term 'resident' may offer an alternative. It is commonly used to establish a connection with a particular jurisdiction, especially when determining liability to taxation. However, we note that 'resident', like 'domiciled', may not capture all the intended parties. For example, a permanent establishment in an overseas jurisdiction may not be within scope.

