Chapter 5

Potential areas of unilateral action to protect Australia's revenue base

5.1 This chapter explores the potential for Australia to undertake unilateral tax reform in specific areas that either will not undermine the work of the BEPS program or are not within scope of the OECD work. As this is only an interim report, the chapter does not explore all the areas of unilateral action that the committee considers are important.

Scope for unilateral action

5.2 As noted in the previous chapter, the committee supports the efforts of the OECD in developing a coordinated response to base erosion and profit shifting. However, Mr Saint-Amans highlighted one of the major shortcomings of the BEPS program:

> Countries are sovereign, so what is agreed at the OECD is morally binding but it is not legally binding.[1]

5.3 Consistent with this, the Treasury scoping paper, *Risks to the Sustainability of Australia's Corporate Tax Base*, noted that:

> There are some actions Australia can and has taken unilaterally; these are primarily focused on improvements that can be made without significant divergence from international tax settings.[2]

5.4 As such, there may be value in Australia proactively continuing to identify potential risks to the integrity of the corporate tax system and take assertive actions to address these risks. Indeed, Associate Professor Ting contended that it is unlikely that the BEPS project will be a complete success:

> …while Australia should continue its support of the OECD's BEPS Project which strives to achieve international consensus on solutions to address BEPS issues, it is doubtful if the Project will be a complete success. Therefore, Australia should consider appropriate unilateral actions to complement the international effort.[3]

Risks associated with unilateral action

5.5 A number of stakeholders warned the committee about the risks associated with taking unilateral action to address base erosion and profit shifting before the

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1 *Committee Hansard*, 9 April 2015, p. 64.

2 Treasury, *Risks to the Sustainability of Australia's Corporate Tax Base*, Scoping Paper, July 2013, p. 45.

3 *Answers to questions on notice received from Associate Professor Antony Ting*, 23 April 2015, p. 2.

finalisation of the BEPS project. For example, the Corporate Tax Association contended that Australia risks compromising its commodity revenue base if tax reform is not coordinated.

> Taking unilateral action invites reprisals and risks double tax outcomes, which is highly inimical for investment and jobs…
>
> Changing the source/residency rules in a more co-ordinated way would be far preferable, albeit challenging as it would essentially involve a negotiation between nation states over taxing rights. Australia in particular would need to tread carefully in case it jeopardises its revenue base relating to our huge volumes of commodity exports.[4]

5.6 The Business Council of Australia reflected on the potential effect of unilateral action on a coordinated response:

> Unilateral action outside of the BEPS project may encourage other countries to act alone and splinter international taxation norms, risking unintended consequences including double taxation and distortion of genuine commercial activity.[5]

5.7 Unilateral actions may not necessarily conflict with the BEPS program where they are outside the program's scope or where the proposed BEPS actions do not align with the problems facing Australia's corporate tax regime.

5.8 Australia has progressively strengthened its tax regime in a number of areas targeted by the BEPS project and these initiatives may not require substantial changes to bring them into line with the proposed BEPS actions. Mr Andrew Mills, Second Commissioner of the ATO, has noted the strength of Australia's corporate tax laws in relation to some of the BEPS action areas:

> Because of changes over recent years we [Australia] have probably the strongest anti-avoidance and transfer pricing rules in the world.[6]

5.9 A number of companies compared the strength of Australia's tax regime favourably with other jurisdictions in relation to multinational activities. For example, Brambles submitted that:

> …Australian tax laws are among the most stringent laws in the world, having regard to comprehensive rules on controlled foreign companies ('CFC's'), transfer pricing and anti-avoidance, thin capitalisation, debt vs equity, to name a few examples.[7]

5.10 These sentiments were echoed by BHP Billiton which considered that:

> …Australia comes to the international policy debate with a comprehensive suite of laws to safeguard the integrity of Australia's corporate tax system. These laws include general anti-avoidance rules, specific anti-avoidance

4 *Submission 59*, p. 11.

5 *Submission 87*, p. 5.

6 Economics Legislation Committee, *Estimates Hansard*, 22 October 2014, p. 149.

7 *Submission 68*, p. 2.

> rules, transfer pricing, thin capitalisation and controlled foreign company rules…
>
> Australia's controlled foreign company rules aim to prevent erosion of the Australian tax base through shifting income to jurisdictions that do not impose tax or that impose tax at low rates. Together the rules act as a deterrent to taxpayers engaging in unacceptable corporate tax avoidance.[8]

5.11 It also observed that during 2013, Australia had:

- strengthened its general anti-avoidance rules and specific anti-avoidance rules which are now considered amongst the most rigorous in the world; and
- made significant amendments to reinforce Australia's rigorous transfer pricing and thin capitalisation rules.[9]

5.12 While Australia has considerably strengthened rules around transfer pricing, debt loading and thin capitalisation, more can be done in the design of the tax system governing multinational corporations to reduce the opportunities for tax avoidance and tax planning arrangements that are not in keeping with the intention of Australia's tax laws. The committee notes the proposals announced as part of the 2015–16 Budget to implement some of the more advanced BEPS action items and the introduction of unilateral measures to counter the avoidance of permanent establishment.

5.13 That said, the committee was also presented with information that indicated some aspects of the corporate tax system could be strengthened without jeopardising multilateral efforts. The areas where the committee envisages scope for the Australian government to take unilateral action are:

- improving public transparency;
- addressing permanent establishment issues; and
- removing tax competition that disadvantages Australian businesses.

Improving public transparency

5.14 During the course of the inquiry, the committee was surprised to learn how little is known publicly about the potential size and scope of the aggressive tax minimisation measures and tax avoidance schemes used by large Australian corporations and multinationals operating in Australia. It was also taken aback by the reluctance of some companies to disclose information to the committee, or, of greater concern, where some companies seemed not to be in possession of what seemed important information about their company's operations in other countries.

5.15 Indeed, one of the main difficulties the committee faced was gathering and making sense of the information about business activities and tax obligations. This paucity of information meant that the committee was unable to determine the extent to which tax avoidance was a problem and what needed to be done to address it.

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8 *Submission 81*, p. 2.

9 *Submission 81*, p. 2.

Moreover, Treasury, as the main policy advice agency in this area, indicated in relation to base erosion and profit shifting that:

> This is a huge issue for us. As to how big an issue and to putting a figure on it, we just do not know.[10]

5.16 It is apparent that there are risks to the integrity of the tax system as a result of the changing composition of the economy and the increasing importance of multinational companies in delivering products and services. It is not apparent, however, the extent to which aggressive minimisation and avoidance are reducing the corporate tax revenue base.

5.17 There is no doubt that public confidence in multinational corporations 'paying their fair share' of tax would be increased by greater public transparency of financial information. Indeed, it may be the case that pubic exposure would put pressure on companies to conduct their affairs with regard to their public reputation. The Uniting Church of Australia, Synod of Victoria and Tasmania, highlighted research that indicated many companies were concerned about reputational risk associated with non-compliance with tax laws.[11]

How much is too much?

5.18 It can be difficult getting the balance right between public provision of information and ensuring that commercial operations are not jeopardised by the release of sensitive information.

5.19 The issue of how much information about companies' activities and tax obligations should be available in the public domain was fiercely debated, particularly at hearings. At stake is the right of corporations to have commercially sensitive information remain private versus the right of the public to be able to scrutinise a corporation's tax affairs.

5.20 Making more information available for public scrutiny is necessary to build and maintain confidence and trust in the integrity of the tax system among the broader community. By doing so, these actions would be a means to promote greater levels of compliance across all taxpayers where it could be seen that everyone was 'paying their fair share' and those that were not could be named and subject to the court of public opinion.

5.21 Greater transparency may also help to reduce the confusion surrounding corporate tax. As Mr Herefen explained to the committee:

> It is important that the community is well informed because we are dealing with complex issues that are easily confused.[12]

5.22 The committee would like to acknowledge the efforts of companies that publicly report the amount of tax paid in the jurisdiction where they operate. For

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10 Mr Rob Heferen, *Committee Hansard*, 9 April 2015, p. 25.

11 *Submission 74*, pp. 4–5.

12 *Committee Hansard*, 9 April 2015, p. 18.

example, Rio Tinto produces an annual report on taxes paid by tax type and jurisdiction. According to Mr Chris Lynch, Chief Financial Officer of Rio Tinto:

> Tax transparency…assists the fight against corruption and enhances the scope for communities and citizens to hold their governments to account.[13]

5.23 The committee, however, is dismayed by the ingenuity shown by some companies in avoiding answering questions posed by the committee. This reluctance verged on contempt for the committee process, exhibited disdain for Australian taxpayers and overall reflected poorly on those particular companies. There can be no doubt that transparency in the reporting of information relating to tax practices needs to be improved dramatically.

Recent initiatives to improve public disclosure

5.24 The committee notes that successive governments have been working toward increasing the public disclosure of company's tax information.

5.25 Legislative amendments were enacted in 2013 requiring the ATO to annually publish certain taxpayer information—name, Australian Business Number, total income, taxable income and tax payable—for large corporate entities with turnover of greater than $100 million in a financial year. The amendments were intended to discourage large corporate entities from engaging in aggressive tax practices and provide more information to inform public debate about tax policy.[14] The first report is due to be released in late 2015.

5.26 The committee notes that Treasury began a consultation process in June on an exposure draft to introduce a Bill to exempt private companies from this reporting regime,[15] but that this proposal has not been supported by evidence provided to the inquiry. The Uniting Church of Australia, Synod of Victoria and Tasmania supplementary submission states that:

> …a document obtained from the Australian Taxation Office (ATO) under freedom of information has revealed that the private companies linked to Australian high wealth individuals have average profit margins lower than the other categories of companies (foreign owned and Australian publicly listed) in the group that the legislation applies to. Almost half of these companies are foreign-headquartered and two-thirds have some form of international related party dealings. They account for most of all international related party dealings reported to the ATO, despite being only 21 per cent of the businesses caught under the tax transparency measures of

13 Rio Tinto, *Taxes Paid in 2013*, p. 1.

14 ATO, *Tax secrecy and transparency: administrative arrangements for reporting entity information—ATO consultation paper*, March 2015, https://www.ato.gov.au/General/Consultation/What-we-are-consulting-about/Papers-for-comment/Tax-secrecy-and-transparency--administrative-arrangements-for-reporting-entity-information---consultation-paper-March-2015/ (accessed 16 June 2015).

15 Treasury, *Better Targeting the Income Tax Transparency Laws*, http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2015/Better-targeting-the-income-tax-transparency-laws (accessed 13 August 2015).

> the *Tax Laws Amendment (2013 Measures No. 2) Act*. It is possible that the lower average profit is simply due to this category of companies performing worse on average than other categories of businesses. However, there is the possibility that the lower average reported profitability is due to aggressive tax practices.[16]

5.27 The committee considers that the relatively basic information which will be released by the ATO is a good first step to facilitating greater transparency and public awareness of corporate tax issues. That said, the turnover threshold could be reviewed after the first report is released with a view to adopting a lower threshold.

5.28 In addition, a public tax transparency code for large corporates was announced in the 2015–16 Budget. The development of this voluntary corporate disclosure code is being led by the Board of Taxation. According to the Treasurer, the Hon. Joe Hockey:

> The actions of a few high profile companies, particularly large multinationals engaging in aggressive tax avoidance, have tarnished the reputations of companies that are doing the right thing…
>
> The Government would like more companies to publicly disclose their tax affairs so as to highlight companies that are paying their fair share and to encourage companies not to engage in tax avoidance.[17]

5.29 The government has indicated that it will monitor the development and adoption of the code and will consider further changes to the law, if required.[18]

5.30 The committee recognises that companies may seek to delay the development and implementation of the public transparency code, or may simply refuse to comply where it is not in their interests. Rather than spending the next two years developing a voluntary disclosure code, the committee considers that the wider community has a right to know about tax affairs of all corporations operating in Australia.

Recommendation 3

5.31 The committee recommends that a mandatory tax reporting code be implemented as soon as practicable but no later than the current timeframe for the proposed voluntary public transparency code. Any Australian corporation or subsidiary of a multinational corporation with an annual turnover above an agreed figure would be required to publicly report financial information on revenue, expenses, tax paid and tax benefits/deductions from specific government incentives, such as fuel rebates and research and development offsets.

Recommendation 4

5.32 The committee recommends maintaining existing tax transparency laws which apply to both private and public companies.

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16 *Supplementary Submission 74*, p. 1.

17 *Consultation on tax integrity proposals*, Letter to Mr Michael Andrew, 12 May 2015.

18 Australian Government, *Fairness in Tax and Benefits*, Budget 2015–16, p. 8.

Increasing disclosure around tax disputes

5.33 In response to widespread concerns about the lack of transparency in disputes, a number of additional proposals to increase transparency were put forward to the committee. Increasing transparency, it was argued, would enable public scrutiny and potentially make some corporations consider the potential effect on their reputation before engaging in tax planning practices.[19]

5.34 Some participants urged the committee to adopt mandatory public reporting of significant tax disputes between the ATO and large corporations. For example, United Voice highlighted that:

> The lifting of privacy protections for corporations once a tax dispute is large enough to have a significant budgetary impact has the potential to deter tax avoidance practices. At some point, public interest concerns must override the privacy of corporate information.[20]

5.35 It went on to recommend that an automatic trigger be introduced so that the ATO was obliged to name companies who are under investigation for tax minimisation practices where the amount in dispute was in excess of $100 million. Doing so would put the onus back on the companies to satisfy the community that they were conducting their activities in a manner that was consistent with community expectations.[21]

5.36 Concerns were also raised about the dispute settlement process and the tendency for disputes to be settled for much less than was originally claimed. United Voice proposed that:

> …the ATO should be required to disclose in a public register those corporations who have agreed to settlements valued at over $5 million. A register would allow the public to see which companies had potentially breached Australian tax laws and to what extent. The disclosure of these corporations would be another deterrent to aggressive tax practices.[22]

5.37 United Voice highlighted that the ATO already publishes Private Binding Rulings but maintains the anonymity of the companies involved. Even if a similar approach were applied to the release of information about settlements, it would still allow for a greater level of transparency and public understanding about the process.[23]

5.38 The committee notes widespread concern in submissions about the lack of transparency concerning disputes between the ATO and large taxpayers and considers that improving public transparency is of utmost importance. The committee also notes

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19 See, for example, Community and Public Sector Union, *Submission 14*; United Voice, *Submission 78*; and Uniting Church of Australia, Synod of Victoria and Tasmania, *Submission 74*.

20 *Supplementary Submission 78*, p. 3.

21 *Supplementary Submission 74*, p. 3.

22 *Supplementary Submission 74*, p. 3.

23 *Supplementary Submission 74*, p. 3.

that no evidence was presented to the inquiry suggesting private companies engage in less corporate tax avoidance than publicly-listed companies.

Recommendation 5

5.39 The committee recommends establishing a public register of tax avoidance settlements reached with the ATO where the value of that settlement is over an agreed threshold.

Recommendation 6

5.40 The committee recommends that the government consider publishing excerpts from the Country-by-Country reports, and suggests that the government consider implementing Country-by-Country reporting based closely on the European Union's standards.

Informing parliament of shortcomings in the corporate tax system

5.41 The committee considers that the steps taken by both the current and former governments have the potential to improve transparency and public awareness about corporate tax. But the committee is concerned that parliament is not being afforded much of the information necessary to determine whether the integrity of the corporate tax system is being compromised, to what extent it is a problem and how it might be best addressed. This point was articulated by Mr Martin Lock:

> Arguably, it is Parliament's business to know how its enacted laws are working or not working, but despite legislation requiring the Commissioner to report annually to Parliament 'on the working of this act' his annual reports are essentially devoid of any information on the tax plans and schemes corporates and multinationals use to exploit tax laws…
>
> Secrecy over settlements raises very serious accountability and transparency issues…complete secrecy over settlement is unnecessary, denying Parliament valuable information it could otherwise use to decide how effectively its enacted laws are working.[24]

5.42 In the interests of enhancing the integrity of the tax system and maintaining community confidence, the committee considers it appropriate for the ATO and Treasury to publish an annual report on the aggressive tax minimisation activities of domestic and multinational corporations.

5.43 As part of this process, a robust methodology should be developed to provide a framework for assessing the size and scope of the problem which could subsequently be refined as more data and information becomes available.

5.44 Initiatives to facilitate greater exchange and transparency of tax information and data both domestically and internationally have the potential to enable tax authorities and policy makers to estimate foregone revenue. In addition, the development and dissemination of such information can bolster public confidence of

24 *Submission 56*, pp. 5, 8.

the integrity of the corporate tax system and, as a result, continue to support relatively high rates of voluntary compliance.

Recommendation 7

5.45 The committee recommends that the ATO, in conjunction with Treasury and other relevant agencies, provide an annual public report on aggressive tax minimisation and avoidance activities to be tabled in Parliament. This report could include estimations of forgone revenue, evaluate the effectiveness of policy and propose potential changes.

Addressing the avoidance of permanent establishment status

5.46 The avoidance of permanent establishment (PE) status is specifically targeted in Action 7 of the BEPS Action Plan. It states that Action 7 is intended to develop:

> …changes to the definition of PE to prevent the artificial avoidance of PE status in relation to BEPS, including through the use of commissionaire arrangements and the specific activity exemptions. Work on these issues will also address related profit attribution issues.[25]

5.47 Although permanent establishment and harmful tax practices are action areas targeted by the BEPS program, some governments have decided that it is an issue important enough to implement unilateral measures in advance of the final BEPS actions being revealed.

Diverted profits tax (UK)

5.48 The Government of the United Kingdom (UK Government) announced plans in December 2014 to take unilateral action though the introduction of a diverted profits tax. According to HM Revenue and Customs, the diverted profit tax legislation is aimed at:

> Large multinational enterprises with business activities in the UK who enter into contrived arrangements to divert profits from the UK by avoiding a UK taxable presence and/or by other contrived arrangements between connected entities…
>
> The main objective of the diverted profits tax is to counteract contrived arrangements used by large groups (typically multinational enterprises) that result in the erosion of the UK tax base.[26]

5.49 The diverted profits tax will apply if either:

- foreign companies are deemed to exploit permanent establishment rules; or
- companies create tax advantages by using transactions or entities that lack economic substance.[27]

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25 OECD, *BEPS Action 7: Preventing the Artificial Avoidance of PE Status*, Revised Discussion Draft, 15 May 2015 – 12 June 2015, p. 1.

26 HM Revenue and Customs, *Diverted Profits Tax*, Consultation Draft, 10 December 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/385741/Diverted_Profits_Tax.pdf (accessed 6 May 2015).

5.50 The legislation was passed in March 2015—just before the tax was due to come into effect on 1 April 2015.

5.51 Rather than raise revenue, Professor Vann submitted that the purpose of the diverted profits tax was to change the behaviour of multinationals:

> The hope in the UK is that the diverted profits tax will collect exactly nil because Google will set up an office in the UK and pay ordinary corporate tax. The diverted profits tax is set at 25 per cent. The UK corporate rate is 20 per cent. The idea is that companies will give up their tax planning and just bring themselves into the system and pay the ordinary corporate tax.[28]

5.52 Associated with the underlying motive to change behaviour, the design of the diverted profits tax is such that it may not be supported by international treaties. As a result, corporations that incur the diverted profits tax may not have rights under tax treaties to seek relief from double taxation, thereby providing an incentive for companies to structure their tax affairs to be covered by the mainstream corporate tax system.[29]

5.53 While it is too early to evaluate the impact of the diverted profits tax, there may be lessons for the introduction of a similar tax in Australia, particularly in designing punitive laws to encourage compliance with the mainstream system.

5.54 Ms Rosheen Garnon, KPMG's National Managing Partner Tax, questioned the efficiency of implementing a unilateral measure designed to push corporations back into the conventional tax system:

> What the UK are doing is they are going through a process of introducing a brand-new tax, all the administration that goes with that, having companies work out their compliance with it, only to be pushing people back into the tax net. To my mind, there is a lot of administration and costs associated with doing that.[30]

5.55 When questioned about unilateral action taken by the UK Government, Mr Saint-Amans indicated that the OECD had sympathy for the need to move:

> …the [UK] government, which has been very instrumental in supporting the BEPS in raising the profile of this project, wanted to show that it was acting very, very quickly—even before the timeline of the BEPS project, which is after a very important electoral date in the UK…
>
> We tend to think that unilateral measures will be better after we have completed the action plan...[31]

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27 HM Revenue and Customs, *Diverted Profits Tax*, Consultation Draft, 10 December 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/385741/Diverted_Profits_Tax.pdf (accessed 6 May 2015).

28 *Committee Hansard*, 8 April 2015, p. 16.

29 Mr Mark Konza, ATO, *Committee Hansard*, 8 April 2015, p. 32.

30 *Committee Hansard*, 9 April 2015, p. 7.

31 *Committee Hansard*, 9 April 2015, p. 65.

5.56 Even though a diverted profits tax was raised as a possibility for Australia following the G20 Leaders Meeting in December 2014, the committee notes that the government has decided not to introduce such a tax.

Strengthening anti-avoidance rules in Australia

5.57 Although strongly supporting measures agreed to as part of the OECD's BEPS program, the Australian Government has taken a different approach to the UK and opted to strengthen the existing anti-avoidance rules. In the 2015–16 Budget Speech, the Treasurer announced his intention to introduce a multinational anti-avoidance law to stop multinationals artificially avoiding a taxable presence in Australia and to force them to pay tax in Australia on profits from economic activities undertaken in Australia.[32]

5.58 Proposed changes to Part IVA of the *Income Tax Assessment Act 1936* were announced in the House of Representatives immediately following the 2015–16 Budget speech and, if enacted, would take effect from 1 January 2016.[33]

5.59 An exposure draft of the proposed legislative amendments has been released and submissions called for by 9 June 2015. Twenty submissions were received, of which three are confidential.

5.60 The proposed amendments seek to extend the general anti-avoidance rule in Part IVA of the existing legislation to negate certain tax avoidance schemes used by large multinational corporations to shift profits to low or no tax jurisdictions. The measure will only apply to 'global groups' that have an annual global revenue that exceeds A$1 billion in the year in which they operated the scheme and where the no or low tax jurisdiction condition is satisfied.[34]

5.61 It is anticipated that, if enacted, the measure would capture approximately 30 large multinational companies that the ATO suspects of diverting profit using artificial structures to avoid a taxable presence in Australia.[35]

5.62 Under the proposed legislation, where a tax avoidance scheme is found to be captured by the measure, the Commissioner of Taxation has the power to apply the tax rules as if the non-resident entity has been making a supply through an Australian permanent establishment.[36] Where a corporation is found to have a scheme that is captured by the measure, penalties of up to 100 per cent of the tax owed plus interest may also be applied in addition to the tax owed.[37]

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32 Australian Government, *Budget 2015: Fairness in Tax and Benefits*, May 2015, pp. 7–8.

33 Tax Laws Amendment (Tax Integrity Multinational Anti-avoidance Law) Bill 2015, Explanatory Memorandum, p. 22.

34 Tax Laws Amendment (Tax Integrity Multinational Anti-avoidance Law) Bill 2015, Explanatory Memorandum, p. 6.

35 Australian Government, *Budget 2015: Fairness in Tax and Benefits*, May 2015, p. 7.

36 Tax Laws Amendment (Tax Integrity Multinational Anti-avoidance Law) Bill 2015, Explanatory Memorandum, p. 5.

37 Australian Government, *Budget 2015: Fairness in Tax and Benefits*, May 2015, p. 7.

5.63 The committee notes that the potential revenue benefits from this measure were not quantified in the Budget papers.[38] When questioned about this at the budget estimates hearing, Minister Cormann indicated that:

> The reason there is no revenue estimate is that it is very difficult to quantify the likely revenue collected, and the government has decided to take a conservative approach.[39]

5.64 It may be that, as with the diverted profits tax in the UK, the intention of the multinational anti-avoidance law is to encourage large multinationals to change their behaviour and structure their activities so that profits from Australian activities are brought into the mainstream tax system and are taxed at the company tax rate. If such a behavioural change occurs, the revenue benefits may not accrue to this measure but broader company tax receipts.

5.65 This intention to change behaviour was confirmed by Mr Olesen, Second Commissioner of the ATO, at the budget estimates hearing in June:

> The other thing to look out for when there are amendments to Part IVA is how taxpayers change their behaviour. The best outcome from anti-avoidance provisions is that you never apply them because the entities at which they are targeted change their set-ups and structures in ways that mean they are not subject to those provisions. So exactly what the outcomes might be in the long haul will depend a lot on how entities respond to those new provisions.[40]

5.66 As described by Mr Heferen, the mark of success should be measured by behavioural change:

> At the end of the day what will be a mark of success will be the behavioural change from firms as opposed to the ATO actually utilising the new power. Often the success is not in applying the anti-avoidance provisions; the success comes in firms who would otherwise be the target of the anti-avoidance provisions who change their behaviour to pay tax in Australia so it is not triggered. And given the small number of companies that would be effected here we should be able to see that, hopefully, in a relatively short period of time after enactment.[41]

5.67 The proposed legislation, due to be introduced to the Parliament in the Spring Session, will provide the committee with the opportunity to look more closely at the provisions. As such, the committee considers that the bill, when introduced, will be explored in the final report.

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38 Australian Government, *Budget 2015–16: Budget Measures—Budget Paper No. 2*¸ pp. 14–15.

39 Economics Legislation Committee, *Estimates Hansard,* 2 June 2015, p. 42.

40 Economics Legislation Committee *Estimates Hansard,* 2 June 2015, p. 39.

41 Economics Legislation Committee *Estimates Hansard,* 2 June 2015, p. 42.

Competitive disadvantages arising from inconsistent application of tax laws

5.68 The provision of goods and services from overseas jurisdictions raises concerns on both competition and taxation grounds.

5.69 Competition issues arise where an advantage is gained by some foreign and multinational companies that provide services to Australians from outside Australia. As such, domestic corporations can be disadvantaged because foreign companies are not subject to the same tax regime (not just income tax but also GST, payroll tax, et cetera). According to Mr Heferen from the Australian Treasury:

> …if people are operating off a different cost base, and that is tax driven…then prima facie that is a concern.[42]

5.70 The concerns raised by stakeholders generally fell into two categories—those related to the differences in the level of corporate tax paid on profits, and those related to the levying of GST.

5.71 Not only can foreign firms gain a competitive advantage but these actions also have the potential to reduce Australian tax revenue when they avoid permanent establishment and do not contribute to the tax base in the same way as an Australian domiciled company.

Lower rates of corporate tax

5.72 The committee also received submissions highlighting the fact that foreign companies could bid for government and non-government contracts at lower rates than Australian companies because of differences in corporate tax rates.

5.73 While this may not be a concern for corporations that have to act in the best interests of shareholders, it may provide government agencies with an opportunity to show leadership and even the playing field. For example, Macquarie Telecom voiced concerns about technology contracts and sought to neutralise the competitive disadvantage it faces as an Australian taxpayer:

> …we face a perverse situation where the Government, while increasingly concerned on behalf of taxpayers at the avoidance of tax by international technology giants, is in fact providing taxpayers' money to these same companies under these same questionable arrangements…[43]

5.74 It noted that the committee has discussed how consumers in the UK exercised their collective power against Starbucks by boycotting and occupying Starbucks stores until that business changed its conduct.[44] According to Macquarie Telecom:

> …the Government (and concerned businesses) can similarly exercise their buying choices in a way that discourages arrangements that artificially

42 *Committee Hansard*, 9 April 2015, p. 36.

43 *Submission 94*, p. [1].

44 *Submission 94*, p. [2].

> avoid the establishment of a permanent entity in Australia for tax purposes.[45]

5.75 Macquarie Telecom went on to propose to the committee that government agencies should use their purchasing leverage and discretion to discourage the avoidance of Australian company tax. Squiz, an Australian owned and based technology company, noted that:

> As an Australian taxpayer, we operate on an uneven playing field when competing with overseas businesses who have arranged themselves to artificially avoid establishing contracting entities in Australia.[46]

5.76 Squiz supported the proposal put forward by Macquarie Telecom in principle and believed that it would signal the seriousness with which Australia views the issues of tax avoidance.[47]

Levying of GST

5.77 Various stakeholders outlined concerns that GST was not being charged by some companies on goods and services purchased through the internet. For example, Mr Julian Clarke, Chief Executive Officer of News Corp Australia, outlined his concerns about the need for a consistent application of GST in relation to video on demand services and advertising services:

> The playing field is not level when two of the companies, ours [Presto] and the other joint venture [Stan], have to apply the GST to the selling price, whereas a company [Netflix] can walk in from overseas and not have that…
>
> If the GST were applied to them as it is to us, there would be a level playing field. If they choose to have a price cheaper than us given they are paying all the costs, then that is a different decision, but clearly they are not. They have an advantage that is unfair.[48]

5.78 The committee is also aware that some companies sell advertising in Australia but invoice from a foreign jurisdictions and, as such, are not required to charge GST. For example, a small business owner wrote to the committee to highlight that Facebook invoices Australian companies from Ireland and does not charge GST.

5.79 In the 2015–16 Budget, the Australian Government announced that GST will be extended to cross border supplies of digital products and services imported by consumers from 1 July 2017. According to the Budget Papers:

> This measure will result in Australia being an early adopter of guidelines for business-to-consumer supplies of digital products and services being

45 *Submission 94*, p. [2].

46 *Submission 98*, p. [1].

47 *Submission 98*, p. [1].

48 *Committee Hansard*, 8 April 2015, pp. 63, 68.

developed by the Organisation for Economic Cooperation and Development (OECD) as part of the OECD/G20 base erosion and profit shifting project.[49]

5.80 This approach is consistent with that taken by a number of other countries, including Japan, Norway, South Africa, South Korea, Switzerland and member countries of the European Union.[50]

5.81 As this is a GST measure, it will require agreement from the states and territories prior to its implementation, and all revenue raised from the measure will be transferred to the states and territories.

Committee view

5.82 The committee supports efforts to remove disadvantages for Australian companies when competing with foreign-based entities that arise because of differences in taxation between jurisdictions.

5.83 The proposed action of the Australian Government to close GST loopholes is a first step to improving the integrity of the tax system by levelling the playing field. However, the committee considers that more could be done to ensure that domestic companies are not disadvantaged and that taxes on profits earnt from Australian sources are paid in Australia.

5.84 As a role model for the community, the committee considers that the Australian Government should evaluate tenders for the goods and services it procures using a comparable tax benchmark and not disadvantage Australian companies that have higher tax burdens than competitors from other jurisdictions.

Recommendation 8

5.85 The committee recommends that the Australian Government tender process require all companies to state their country of domicile for tax purposes.

Recommendation 9

5.86 The committee recommends mandatory notification by agencies to the relevant portfolio Minister when contracts with a dollar value above an agreed threshold are awarded to companies domiciled offshore for tax purposes.

49 Australian Government, *Budget 2015–16: Budget Measures—Budget Paper No. 2*¸ pp. 20–21.

50 Australian Government, *Budget 2015: Fairness in Tax and Benefits*, May 2015, p. 5.