

## Chapter 3

### Maintaining the pressure

3.1 The committee is proud of the work that it has done in raising the public profile of issues related to corporate tax avoidance. In addition, it appreciates the work of investigative journalists and research organisations in exposing and reporting on corporations that appear to be engaging in tax avoidance and aggressive minimisation.

3.2 That said, the problem of multinational tax avoidance persists and while recent reforms are a good start, the committee is adamant that more needs to be done in the areas of transparency, transfer pricing and access to information by the tax administrator.

#### Recent reforms

3.3 Various Australian governments over many years have sought to strengthen the corporate income tax regime through introducing and amending laws in relation to transfer pricing, debt loading and other mechanisms by which multinationals can reduce their tax liabilities in Australia. These reforms may, over time, address some base erosion and profit shifting risks. However, the Commissioner of Taxation noted at Senate Estimates in early 2016 that a number of the more recent measures that have been enacted—including expanded general anti-avoidance provisions, new transfer pricing provisions, and thin capitalisation provisions—remain untested.<sup>1</sup>

3.4 As such, it will be important for the Parliament to be vigilant and examine the effectiveness of such measures as they take effect. For example, Australia has adopted new multinational tax laws in relation to the avoidance of permanent establishment which are not currently mirrored by any major economy except the United Kingdom.

3.5 It will also be necessary to closely monitor tax policy developments in other countries as the recommendations from the OECD and G20 Base Erosion and Profit Shifting (BEPS) Project are implemented to ensure that Australia takes a best-practice approach. Indeed, the integrity of Australia's tax system will increasingly rely on the implementation and enforcement of the recommendations and action plan on BEPS.

3.6 Of particular relevance to addressing base erosion was the introduction of the Multinational Anti-Avoidance Law. This legislation is intended 'to counter the erosion of the Australian tax base by multinational entities using artificial or contrived arrangements to avoid the attribution of business profits to Australia through a taxable

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1 Senate Economics Legislation Committee, *2015-16 Additional Estimates*, 10 February 2016, p. 69.

presence in Australia'.<sup>2</sup> In brief, it is designed to prevent multinationals operating in Australia from using these artificial arrangements to avoid paying tax in this country.<sup>3</sup>

3.7 The new legislation also recognised that information asymmetries between taxpayers and tax authorities make it difficult for tax authorities to enforce laws designed to prevent tax avoidance and profit shifting, such as transfer pricing rules. The country-by-country reporting requirements will provide the ATO with 'a global picture of how multinationals operate', which will allow the ATO 'to better assess transfer pricing risks and allocate audit resources more efficiently'.<sup>4</sup> That said, it is unclear whether country-by-country reporting will address access to information issues in relation to the implementation of global tax plans as outlined in chapter 2.

3.8 The recently introduced multinational anti-avoidance law also means that the penalty imposed for entering into a tax avoidance or profit shifting scheme is doubled for significant global entities that do not have a reasonably arguable position. The maximum penalty now is generally 100 per cent of the amount of tax avoided under the scheme but, according to the Explanatory Memorandum can 'be up to 120 per cent where aggravating factors apply'.<sup>5</sup>

3.9 The parallel legislation inquiry which examined the government's multinational tax avoidance bill last year recommended that a post-implementation review of the laws be undertaken within 3 years.<sup>6</sup> This recommendation should be incorporated into a broader review of Australia's progress in implementing the BEPS recommendations. This broader review of progress should be undertaken within the next three years.

3.10 Even so, and in light of the tenacious endeavours of well-resourced multinationals to resist disclosing their tax arrangements, the committee is of the view that more should be done to place stronger disclosure obligations on them. In this report, the committee has provided a few telling examples of the way in which these companies value secrecy and resist disclosure. BHP exemplified this approach when Mr Cudmore refused to answer a question in a public forum about the profit made on the Singapore marketing hubs and the tax paid on the hubs:

Mr Cudmore: As I mentioned before, I do not have the specific numbers.

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2 Tax Laws Amendment (Combating Multinational Tax Avoidance) Bill 2015, *Explanatory Memorandum*, p. 7.

3 Tax Laws Amendment (Combating Multinational Tax Avoidance) Bill 2015, *Explanatory Memorandum*, p. 8.

4 Tax Laws Amendment (Combating Multinational Tax Avoidance) Bill 2015, *Explanatory Memorandum*, p. 11.

5 Tax Laws Amendment (Combating Multinational Tax Avoidance) Bill 2015, *Explanatory Memorandum*, p. 54.

6 Senate Economics Legislation Committee, *Tax Laws Amendment (Combating Multinational Tax Avoidance) Bill 2015 [Provisions]*, 9 November 2015, p. 17.

Senator XENOPHON: But you will provide the answers or you will not?

Mr Cudmore: I mentioned before that we consider those to be competitively sensitive.

Senator XENOPHON: If it is competitively sensitive for you but not competitively sensitive for your competitor, who is sitting right next to you, doesn't that make a mockery of your arguments?

Mr Cudmore: I cannot speak for any other company than BHP Billiton.

Senator XENOPHON: Yes, but there is the fact that they are prepared to disclose that information and you are not. Doesn't that destroy your argument with respect to that?

Mr Cudmore: I really cannot speak on behalf of Rio Tinto, Fortescue or any other company. I can only speak on our behalf and only convey our perspective.<sup>7</sup>

3.11 Such attitudes, particularly from Australian multinationals that see themselves as good corporate citizens and taxpayers, are particularly disappointing.

### **Recommendations from the interim report**

3.12 In order to ensure that relevant information is available in order to maintain public pressure on aggressive tax practices, the committee wishes to reinforce a number of the recommendations made in the interim report.

#### ***Mandatory tax transparency code (Recommendation 3)***

3.13 While the committee notes that the government has asked the Australian Board of Taxation to design a voluntary tax transparency code, the committee does not believe that this initiative will suitably incentivise companies that push the letter and spirit of the law to publish tax information. As such, the committee restates its recommendation that a mandatory tax transparency code be implemented. This code would require Australian corporations and subsidiaries of multinationals with annual turnover above an agreed figure to publicly report financial information on revenue, expenses, tax paid and tax benefits/deductions from specific government incentives.

#### ***Tax transparency laws (Recommendation 4)***

3.14 The tax transparency laws for private companies with turnover over \$100 million were repealed in 2015, but reinstated later that year with a threshold of \$200 million. The committee believes that the original threshold of \$100 million is more appropriate and that tax transparency laws for all public and private companies with turnover greater than \$100 million in a financial year need to be reinstated.

#### ***Public register of settlements, annual report to Parliament and ATO resourcing (Recommendations 5, 7 and 11)***

3.15 The committee notes that the government has not acted on any of the recommendations aimed at improving public and Parliamentary access to important

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7 *Committee Hansard*, 10 April 2015, pp. 74–76.

information about the operation of the tax system as it relates to multinational tax practices.

3.16 To allay concerns about the tax dispute resolution process, the committee considers that a public register of tax avoidance settlements should be established to record settlements reached with the ATO where the value of that settlement is over an agreed threshold.

3.17 Reflecting concerns that the Parliament is not being afforded the information necessary to determine whether the integrity of the corporate tax system is being compromised, the committee is adamant that the ATO, in conjunction with Treasury and other relevant agencies, be required to provide an annual public report to be tabled in Parliament on aggressive tax minimisation and avoidance activities.

3.18 In the general interest of the government and the wider community, the committee considers that the ATO be required to report to Parliament, at least annually, on:

- the number of audits or disputes launched concerning multinational corporations;
- the number of cases settled with multinational corporations;
- the number of successful legal proceedings concluded against multinational corporations; and
- the staff resources allocated to tax compliance of multinational corporations.

### ***Grandfathered proprietary companies (Recommendation 13)***

3.19 In line with the recommendations proposed by the Australian Securities and Investments Commission (ASIC) and government inaction on this issue, the committee contends that the concept of 'grandfathered large proprietary companies' be removed from the Corporations Act, and these companies be required to lodge financial reports with ASIC.

### **Areas for further action**

3.20 Consistent with the issues raised in chapter 2, the committee considers there is scope for further action in a number of areas.

### ***Special purpose accounts***

3.21 As a result of this inquiry, the committee has found it increasingly frustrating to access even basic information about the tax affairs of many multinationals operating in Australia. Many multinationals, regardless of the size of their operations, are not required to provide the same level of disclosure as public companies. The committee doubts that the proposed voluntary tax transparency code will provide the level of transparency that is required to hold multinationals to account.

3.22 The Australian Accounting Standards Board (AASB) has recognised that the reporting entity concept, which determines reporting requirements, is not working well in practice. The committee agrees with the AASB and considers it in the broader public interest for significant global entities to be required to file general purpose accounts. It urges the government to amend the accounting standards and make

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significant global entities file general purpose accounts for their Australian activities which would be publicly available.

### ***Transfer pricing***

3.23 The evidence presented over the course of this inquiry indicates that transfer pricing provisions do not serve Australia well. The committee appreciates that there are no easy solutions to reforming internationally accepted principles as they relate to transfer pricing. That said, the committee considers that the current transfer pricing principles need to be fully explored, and, where necessary, redrafted to ensure that transfer pricing cannot be manipulated to the detriment of Australian tax revenue.

### ***Stronger penalties to encourage information provision***

3.24 The ATO has noted that it faces difficulties in accessing information relating to tax plans, including supporting correspondence about tax plans and related contracts. The committee faced similar frustrations when questioning representatives of Australian subsidiaries. In addition to the proactive approach of the ATO to levy tax assessments based on the best available information, the committee urges the government to consider implementing stronger penalties to provide an additional incentive for companies to provide this information in a timely manner.

### ***The Panama Papers***

3.25 Throughout the course of this inquiry, more and more evidence emerged to suggest that tax avoidance is widespread among both individuals and corporations. In light of the most recent release of the 'Panama Papers', the committee has resolved that it should explore the wider implications of this new information on tax avoidance and assess initiatives by the ATO to combat tax avoidance and aggressive minimisation by individuals as well as corporations.

### **Recommendation 1**

**3.26 The committee recommends that the inquiry be extended until 30 September 2016 to explore the implications arising from the Panama Papers.**

**Senator Chris Ketter**

**Chair**

