Chapter 2

Views on the bills

2.1 The committee received a variety of views on the provisions of the bills from stakeholders. While some submissions supported the strengthening of laws to address multinational tax avoidance, other submissions considered the measures unnecessary and unfair. This chapter considers submitter's views in regard to each of the proposed measures.

Diverted profits tax

2.2 The majority of stakeholder comments related to the proposed implementation of the diverted profits tax—that is, schedule 1 of the Treasury Laws Amendment (Combating Multinational Tax Avoidance) Bill 2017 and the Diverted Profits Tax Bill 2017.

2.3 Submissions were mixed on the need for Australia to unilaterally impose a diverted profits tax (DPT) to strengthen the anti-avoidance tax provisions.

2.4 A variety of reasons were given by stakeholders as to why they did not support the introduction of a DPT. For example, the Institute of Public Affairs disputed the underlying premise of profit shifting by multinationals operating in Australia:

> …the case that firms operating in Australia are shifting profits overseas and reducing the corporate tax base is unsupported…
>
> A diverted profits tax is likely to increase investment uncertainty and sovereign risk in Australia…[1]

2.5 Similarly, the Australian Taxpayers' Alliance noted that the scale of the problem is unknown and remains unconvinced that the introduction of the DPT would not have a 'chilling' effect on investment.[2]

2.6 The Tax Institute questioned the value of a DPT in the Australian context and considered the objectives intended to be satisfied by the introduction of the DPT could be satisfied by provisions that already exist in the tax law:

> The Tax Institute has significant concerns with the proposed DPT. In short, we question the utility of a DPT being inserted into the Australian tax system as it means that Australia will fall out of step with the majority of OECD countries in relation to the collective action being taken to address base erosion and profit shifting. In addition, Australia's transfer pricing rules together with the general anti-avoidance rules and the various information gathering powers already afforded to the Commissioner under

1 Institute of Public Affairs, *Submission 1*, [p. 1].

2 Australian Taxpayers' Alliance, *Submission 4*, [pp. 2-3].

> the tax law should, together, provide the Commissioner with sufficient power to address the risks the DPT is aimed at.[3]

2.7 The Australian Taxpayers' Alliance considered that 'the proposed legislation was an unideal way to approach' the issue of aggressive tax avoidance schemes.[4]

2.8 Similarly, the Law Council of Australia noted that:

> At a high level, we are concerned about the introduction of this proposed legislation on the basis that we do not consider it appropriate in the global context.[5]

2.9 The Minerals Council of Australia were strident in their objection to the bill:

> The DPT is a punitive measure that departs significantly from the international tax standards. As the DPT currently stands, it will inject uncertainty and unpredictability into Australia's tax arrangements and impose ongoing compliance costs to taxpayers investing in Australia and for Australian based international companies.[6]

2.10 KPMG also cited uncertainty, among other issues, associated with any introduction of the DPT:

> …we note that the DPT is very uncertain in its scope, it does not deal with the real issues facing transfer pricing and gives significant implicit discretion to the ATO in an environment which can cause significant reputational and financial damage to MNEs [multinational enterprises].[7]

2.11 A number of submitters objected to the proposed legislation not addressing concerns raised previously through the exposure draft consultation process. For example, The Tax Institute submitted that:

> …there was little time to address legitimate concerns of stakeholders about the proposed legislation. As such, a number of aspects of the DPT have yet to be completely thought through, which currently represents a significant overreach that will not necessarily serve to achieved the desired policy outcomes.[8]

2.12 Similarly, the Corporate Tax Association (CTA) and the Group of 100 (G100) noted that:

> …despite the significant concerns raised by the CTA, the G100 and others with the proposed DPT and 100 fold penalties measures, those concerns remain largely unaddressed and are reflected in the bill.[9]

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3 The Tax Institute, *Submission 6*, p. 2.

4 Australian Taxpayers' Alliance, *Submission 4*, [p. 2].

5 Law Council of Australia, *Submission 9*, p. 1.

6 Minerals Council of Australia, *Submission 10*, p. 7.

7 KPMG, *Submission 5*, p. 1.

8 The Tax Institute, *Submission 6*, p. 2.

9 Corporate Tax Association and Group of 100, *Submission 11*, p. 1.

2.13 However, not all stakeholders were opposed to the introduction of the diverted profits tax. For example, the Tax Justice Network-Australia submitted that:

> …in dealing with tax cheating by multinational enterprises a mix of multilateral and unilateral measures are required. This is also the view of the OECD through the Base Erosion and Profit Shifting (BEPS) project, where for example it has recommended that countries take unilateral measures to deal with issues like hybrid mismatches…Reliance on only multilateral measures will ensure that greater levels of tax cheating will be maintained as there are foreign jurisdictions that have demonstrated that they are willing to design their tax laws to assist multinational enterprises in being able to carry out cross-border tax avoidance.
>
> …
>
> The Diverted Profits Tax (DPT) is necessary because of the inadequacy of the OECD BEPS Actions 8, 9 and 10 and proposals on transfer pricing, and the weak proposals of Controlled Foreign Corporations (CFC) rules in Action 3.[10]

2.14 Associate Professor Antony Ting also noted that current international tax rules are ineffective to address base erosion and profit shifting (BEPS) but:

> …the introduction of a DPT as a unilateral measure is a welcoming step in the right direction in the war against BEPS. The government should be commended for taking this course of action.[11]

Comparison with the UK DPT

2.15 A number of submissions drew comparisons between the proposed Australian DPT and its counterpart in the United Kingdom.

2.16 The Australian Taxpayers' Alliance was critical that similar legislation in the United Kingdom did not result in the application of the DPT on companies at which it was intended:

> The legislation was referred to as a "Google Tax" in the media as having the aim of making large corporations like Google change their tax structures and pay more tax. However, it is reported that Google does not pay the Diverted Profits Tax. Whilst Google has struck a deal to amend its past returns to pay more tax, this falls primarily outside of the timeframe of the Diverted Profits Tax.[12]

2.17 By contrast, other submitters considered that the UK DPT has already yielded some very public results. For example, Associate Professor Antony Ting believed that the UK experience had been successful in changing the behaviour of multinational enterprises.[13]

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10 Tax Justice Network-Australia, *Submission 8*, p. 1.

11 Associate Professor Antony Ting, *Submission 3*, p. 2.

12 Australian Taxpayers' Alliance, *Submission 4*, [p. 2].

13 Associate Professor Antony Ting, *Submission 3*, p. 2.

2.18 The Tax Justice Network-Australia cited an analysis of the UK DPT by Faccio and Kadet who conclude that:

> The initiation of DPT and the changes to royalty withholding announced in the 2016 U.K. budget have a major impact on the economics of profit-shifting structures that require on-the-ground sales, marketing, and other support activities in the U.K. The U.K.'s actions will be closely examined and may well be followed by numerous other countries feeling the effects of aggressive profit-shifting activities.[14]

2.19 Greenwoods & Herbert Smith Freehills, Herbert Smith Freehills and Professor Richard Vann (G&HSF, HSF and Vann) provided an analysis of 26 common issues between the UK DPT and the proposed Australian DPT. That analysis ranked the proposed Australian DPT as more onerous in 14 areas, the UK DPT as more onerous in three areas and there were nine areas which were comparable between the two schemes. They concluded that:

> The only important substantive issue where the UK is more onerous than Australia is the lack of a limitation of its DPT to significant global entities—all the UK eliminates is SMEs as defined in EU law. By contrast, on major structural issues…Australia is more onerous than the UK…
>
> On the procedural front the UK has an obligation on taxpayers to notify HMRC [Her Majesty's Revenue Customs] of the potential application of the DPT (with several exceptions) which Australia does not require. Otherwise, Australia has the longer limitation period for issuing assessments of 7 years, compared to 2-4years in the UK and worst of all prevents the taxpayer from producing evidence if it does not disclose the evidence to the ATO in the review period…[15]

Uncertainty in application

2.20 While uncertainty is associated with the introduction of many new laws, there would appear to be more unease than usual in some sectors about the proposed DPT. The concerns range from overlaps with existing transfer pricing rules, whether the DPT was a provision of last resort, and the number of multinational entities that may be within scope.

2.21 In the context of reconstructing transfer pricing arrangements, KPMG indicated that it considered the reconstruction power embodied in section 815-130 of the *Income Tax Assessment Act 1997* to be a much better power than the proposed DPT.[16]

2.22 Similarly, The Tax Institute submitted that the objects underlying the introduction of the DPT could be addressed by the application of transfer pricing rules and strengthening the Commissioner's power to gather relevant information that the

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14 Tax Justice Network-Australia, *Submission 8*, p. 2.

15 Greenwoods & Herbert Smith Freehills, Herbert Smith Freehills and Professor Richard Vann, *Submission 13*, pp. 3-4.

16 KPMG, *Submission 5*, p. 8.

Commissioner believes is located outside Australia (through section 264A of the *Income Tax Assessment Act 1936*).[17]

2.23 The Tax Institute raised concerns about 'where the DPT sits on the hierarchy of tax law provisions that may apply to a significant global entity, such as the transfer pricing rules'.[18]

2.24 Raising similar concerns about when the DPT would be used, the Australian Financial Markets Association (AFMA) contend that the legislation should explicitly include the requirement to consider the operation of the ordinary provisions of the income tax law as an appropriate safeguard.[19]

2.25 Similarly, Chartered Accountants Australia and New Zealand (CAANZ) considered that the legislation 'should explicitly state that the DPT is a provision of last resort'.[20]

2.26 The CTA and G100 emphasised the need to provide certainty as to where the line between the two provisions sits:

> Ensuring the DPT is a provision of last resort is also crucial in the context of deterring the use of the DPT as leverage during transfer pricing disputes. The close resemblance between the proposed DPT and the transfer pricing provisions must not give rise to subjective assessments of a taxpayer's behaviour taking precedence over whether the taxpayer in fact has a reasonably arguable position under the existing law.[21]

2.27 The CTA and G100 also highlighted that compliant taxpayers may be unnecessarily caught up in the application of the DPT in its current form:

> Without any legislative safeguard, corporates will have no choice other than to seek clarity on whether the proposed DPT applies to such transactions, which will come with unnecessary compliance costs and the use of limited internal resources.[22]

2.28 KPMG raised concerns about the potential application of the DPT to many more significant global entities:

> We are told that the DPT could potentially apply to 1600 taxpayers with 8% or 128 being high risk…
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> What is interesting is the inherent greyness in its potential application—for 92% of the 1600, who do not fall into the high risk category, but are low or medium risk—one cannot simply determine that the rule does not apply.[23]

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17 The Tax Institute, *Submission 6*, p. 4.

18 The Tax Institute, *Submission 6*, p. 7.

19 AFMA, *Submission 7*, p. 3.

20 Chartered Accountants Australia and New Zealand, *Submission 12*, p. 3.

21 Corporate Tax Association and Group of 100, *Submission 11*, p. 2.

22 Corporate Tax Association and Group of 100, *Submission 11*, p. 2.

23 KPMG, *Submission 5*, p. 3.

2.29 Indeed, The Tax Institute noted that the introduction of the Multinational Anti-Avoidance Law (MAAL) resulted in 175 multinational entities having discussions with the ATO, compared to the initial estimate of 100 multinational entities flagged in the EM for that bill.[24] As such, the DPT may affect more multinational entities than indicated, thereby resulting in greater compliance costs for business than estimated in the 2016-17 Budget.

2.30 Noting the uncertainty associated with the introduction of the DPT, CAANZ proposed:

> …an extensive post-implementation review by relevant Parliamentary committees within three years of the DPT's effective implementation date.[25]

Tests for determining DPT application

2.31 A number of stakeholders commented on the tests for determining when the DPT should be applied.

$25 million income test

2.32 The Tax Justice Network-Australia noted that the UK DPT does not have a de minimis threshold and believed that the $25 million threshold of Australian turnover is on the 'high side'. However, they accepted that this threshold aligns with a number of existing thresholds.[26]

2.33 The Tax Justice Network-Australia welcomed that:

> …the $25 million turnover test will not apply if it is reasonable to conclude that the relevant taxpayer, or another entity is a significant global entity because it is a member of the same global group as the relevant taxpayer, has artificially booked turnover outside Australia.[27]

Foreign tax test

2.34 Competing views were expressed in relation to the 20 per cent tax reduction threshold. The CTA and G100 pointed out that:

> The sufficient foreign tax test, although intended to operate as a carve out, has the potential to impact all transactions involving a foreign related entity in a jurisdiction that imposes corporate income tax at a rate less than 24%. This essentially means that countries that are trading partners, rather than tax havens, will be tarred with the DPT brush.[28]

2.35 By contrast, the Tax Justice Network-Australia was concerned that the 20 per cent threshold was too high:

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24 The Tax Institute, *Submission 6*, p. 3.

25 Chartered Accountants Australia and New Zealand, *Submission 12*, p. 3.

26 Tax Justice Network-Australia, *Submission 8*, p. 3.

27 Tax Justice Network-Australia, *Submission 8*, p. 3.

28 Corporate Tax Association and Group of 100, *Submission 11*, p. 2.

> …a multinational enterprise with profits of $100 million in Australia would be permitted to avoid up to $20 million before being caught by the DPT. Given the threshold test does not require the ATO to take action, but allows them to, provided they have cause to believe the test of the transaction lacking economic substance applies, a lower threshold allows the ATO more ability to take action.[29]

2.36 The Tax Justice Network-Australia contended that a 10 per cent tax reduction would be more suitable, given that the ATO would still need to assess the amount of revenue recovered against the cost of the ATO taking action.[30]

Economic substance test

2.37 The Minerals Council of Australia was concerned about the subjective nature of the 'economic substance' concept:

> The lack of a clear objective test to determine sufficient economic substance means that the DPT can apply to legitimate commercial transactions.
>
> The use of subjective and ambiguous terms such as 'reasonably reflects the economic substance' with minimal legislative or objective reference points or precedent will result in unrestrained application and will only create significant uncertainty, a large compliance burden and a potential impact that will affect the attractiveness of Australia as a place to invest.[31]

2.38 However, the Tax Justice Network-Australia indicated its support for the economic substance test:

> TJN-Aus agrees that the determination of whether there is insufficient economic substance be based upon whether it is reasonable to conclude based on the information available at the time to the ATO that the transaction(s) was designed to secure the tax deduction.[32]

DPT assessments and review process

2.39 A key issue for most stakeholders was the relative power provided to the Commissioner in raising DPT assessments and the limitations being placed on review mechanisms.

2.40 The Minerals Council of Australia were scathing in their assessment of the administrative process:

> The DPT's administrative arrangements are harsh and without precedent. It lacks procedural fairness by handing extraordinary new powers to the ATO without adequate oversight or protections for taxpayers. The DPT allows

29 Tax Justice Network-Australia, *Submission 8*, p. 2.

30 Tax Justice Network-Australia, *Submission 8*, p. 2.

31 Minerals Council of Australia, *Submission 10*, p. 5.

32 Tax Justice Network-Australia, *Submission 8*, p. 3.

> the ATO to effectively impose penalty assessments without meeting a reasonable standard of evidence before doing so.[33]

2.41 Concerns were also raised about ATO resourcing and the need to implement processes to give taxpayers clarification:

> …a process for "DPT clearance" with set timeframes enshrined in the law has some merit as an incentive for taxpayers and the ATO to accelerate resolution of matters or provide confirmation that the DPT does not apply to an arrangement.[34]

2.42 In relation to the proposed seven year timeframe to raise an assessment, the Tax Justice Network Australia agreed that a DPT assessment should:

> … be applied up to seven years after the taxpayer has lodged their income tax return for the relevant year, consistent with the current review period for transfer pricing matters.[35]

2.43 However, G&HSF, HSF and Vann noted that:

> …the DPT is not a transfer pricing measure *per se*…, and as the lapse of the general Part IVA limitation period of four years does not preclude the ATO making a transfer pricing adjustment within seven years under the transfer pricing rules, it is unclear why this particular provision in Part IVA requires a different period.[36]

2.44 The Australian Taxpayers' Alliance was critical of the proposed approach to make DPT assessments payable within 21 days and before any review was undertaken:

> …the pay up first then prove your innocent later approach risks hurting the operations of businesses acting legitimately within both the letter and the spirit of the law…[37]

2.45 Concerns were raised that this 'pay up first' approach might undermine the goodwill of the Australian Taxation Office.[38] However, a DPT is intended to only be raised after consideration has been given to the operation of the ordinary provisions of the income tax law. As such, significant global entities will only fall under the DPT in circumstances where they do not cooperate with the ATO.[39]

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33 Minerals Council of Australia, *Submission 10*, p. 1.

34 Corporate Tax Association and Group of 100, *Submission 11*, p. 4.

35 Tax Justice Network-Australia, *Submission 8*, p. 4.

36 Greenwoods & Herbert Smith Freehills, Herbert Smith Freehills and Professor Richard Vann, *Submission 13*, p. 5.

37 Australian Taxpayers' Alliance, *Submission 4*, [p. 3].

38 Australian Taxpayers' Alliance, *Submission 4*, [p. 3].

39 Explanatory Memorandum, pp. 13-14.

2.46 The CTA and G100 noted that the inclusion of the DPT within the Part IVA anti-avoidance provisions would essentially shield the DPT from being overridden by tax treaties, and, by association, access to mandatory binding arbitration:

> Allowing DPT assessments to be excluded from binding MAP [Mutual Agreement Procedure] arbitration will create a scenario under which the Australian Taxation Office (ATO) could challenge standard transfer pricing transactions under the DPT and circumvent the possibility of binding MAP arbitration to resolve the dispute…it is simply inappropriate for binding MAP arbitration not to be available in the context of what will essentially be cross border transfer pricing matters.[40]

2.47 The importance of tax treaties was also raised by CAANZ:

> The interaction of the DPT with tax treaties, in particular practical topics such as MAP processes, needs to be discussed in the DPT commentary considered by parliamentarians, not just in supplementary ATO guidance.[41]

2.48 The Minerals Council of Australia raised concerns about restrictions on the use of evidence:

> The DPT proposes to impose strict rules that would deny evidence being admitted to court in defence of a taxpayer – unless the Commissioner approves.[42]

2.49 On this issue, the Law Council of Australia submitted that:

> …the proposed restricted DPT evidence provisions…are inappropriate and should be limited, to align with section 262A of the *Income Tax Assessment Act 1936*, to application only where the ATO has sought information and the relevant party has not complied.[43]

2.50 G&HSF, HSF and Vann considered that the restricted evidence provision:

> …is another departure from normal practice internationally and will inevitably produce an unfair balance between tax administration and taxpayer contrary to the evident intent of the OECD Transfer Pricing Guidelines…[44]

2.51 Restrictions on the use of evidence seek to overcome, in part, the information asymmetry about profit shifting schemes between multinational enterprises and the ATO. While multinationals can choose how they structure their international arrangements and apply an arm's length analysis, sufficient information is required by the ATO to gain an understanding of why certain commercial arrangements have been entered into.

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40 Corporate Tax Association and Group of 100, *Submission 11*, pp. 3-4.

41 Chartered Accountants Australia and New Zealand, *Submission 12*, p. 4.

42 Minerals Council of Australia, *Submission 10*, p. 6.

43 Law Council of Australia, *Submission 9*, p. 3.

44 Greenwoods & Herbert Smith Freehills, Herbert Smith Freehills and Professor Richard Vann, *Submission 13*, p. 5.

Tensions between the ATO and multinational enterprises regarding the sharing of information have been highlighted publicly by the Commissioner at Senate Estimates:

> These companies have pushed the envelope on reasonableness. They play games. They string us along. They believe we can be stooged. However, enough is enough and no more of this. We will be reasonable with those that genuinely cooperate, but we will now take a much harder stance on those who do not.[45]

2.52 In its analysis of the information provision issue, KPMG concluded that:

> …the provision of information by an MNE in a transfer pricing dispute is complex and full of tensions. Sometimes a revenue authority will not appreciate what is readily available and what is not. Sometimes they will not have a clear understanding of what they want and why they want it. Sometimes there will be simply a quest for greater and greater detail to draw greater and greater distinctions or comparisons. That is not to say that MNEs will never undertake a deliberate strategy of obfuscation and a lack of cooperation, but the matter is not simple. The fear is that in the future the DPT will be used as an unfair strategic tool in this complex world.[46]

2.53 The ATO has sought to implement a more constructive and cooperative based approach to stakeholder engagement. Despite this, there would appear to be multinationals that are still reluctant to provide the information necessary for the ATO to verify their claims. In these circumstances, it is appropriate that, during an appeal following a DPT assessment, multinationals are only allowed to draw on evidence provided to the Commissioner before the end of the period of review.

2.54 Concerns about the discretion to undertake DPT assessments and the review process were not shared by all stakeholders. The Tax Justice Network-Australia supported the proposed approach to issuing DPT assessments and the review process:

> TJN-Aus supports that the DPT will impose a liability when an assessment is issued by the ATO (so it will not operate on a self-assessment basis) and that it will require upfront payment, which can only be adjusted following the successful review of the assessment. We also support that the DPT will put the onus on taxpayers to provide relevant and timely information on onshore related party transactions to the ATO to prove why the DPT should not apply.[47]

Implementation by the Australian Taxation Office

2.55 A number of stakeholders discussed the implementation of the DPT and the development of guidance material by the ATO.

2.56 CAANZ argued more guidance and examples were needed than provided for the MAAL:

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45 *Committee Hansard*, Additional Estimates, 10 February 2016, p. 66.

46 KPMG, *Submission 5*, p. 9.

47 Tax Justice Network-Australia, *Submission 8*, p. 3.

> Some practical examples of what transactions the ATO think might be 'DPT out of scope' would also be helpful….
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> Given that the DPT is more about changing behaviours than raising tax revenue, practical guidance on how long affected taxpayers have to restructure would be most welcome.[48]

2.57 KPMG noted the development of a Law Companion Guide would reduce the potential gap between how the law is intended to apply when first legislated and how it is actually applied by the ATO. They also noted, however, that the manner in which the law could be applied may change over time and advocated for the Law Companion Guide to articulate the process of evaluation of whether the ATO should apply the DPT or not in a particular circumstance.[49]

2.58 To counter the uncertainty contained within the DPT provisions and improve the process of evaluation, KPMG advocated for the establishment of a specific DPT Review Panel consisting of a combination of ATO and independent experts:

> Such a DPT Panel would make an evaluation of whether a DPT assessment should be issued, before the issue of such an assessment. This would take away the ability of the ATO to use the DPT as a strategic or tactical instrument in an unreasonable manner without emasculating the provision from an administrator's perspective.
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> …
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> This would give appropriate gravity to a DPT assessment. It would contribute to undermining both the argument and fear that the DPT was being used in an unreasonable strategic manner by the ATO.[50]

2.59 In making this suggestion, KPMG recognised that embodying the establishment of a dedicated DPT review panel in legislation is difficult.[51]

2.60 The Minerals Council of Australia also supported the establishment of an independent DPT panel to provide procedural fairness:

> An independent panel of taxation experts should be established to determine whether an arrangement ought to be subject to the punitive treatment under the DPT. This is critical to ensuring that there is some form of procedural fairness in the application of the law.[52]

2.61 The Minerals Council of Australia went on to advocate for the embedding of such a panel into legislation, as the UK has done with the General Anti-Avoidance Rules (GAAR) Advisory Panel.[53]

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48 Chartered Accountants Australia and New Zealand, *Submission 12*, p. 5.

49 KPMG, *Submission 5*, p. 5.

50 KPMG, *Submission 5*, p. 5.

51 KPMG, *Submission 5*, p. 12.

52 Minerals Council of Australia, *Submission 10*, p. 6.

53 Minerals Council of Australia, *Submission 10*, p. 6.

2.62 Similarly, CAANZ recommended that:

> …the ATO establishes a limited life DPT sub-group within its General Anti-Avoidance Rules (GAAR) Panel to provide assistance on the administration of the DPT to ensure applications are objectively based and there is a consistency in approach.[54]

Committee view

2.63 The committee acknowledges that submissions raised a number of concerns about the extent of Australia's multinational tax avoidance provisions and, in particular, the potential ramifications arising from the unilateral implementation of a DPT in Australia.

2.64 Stakeholders advocated for the explicit incorporation of the DPT as a provision of last resort to be included in the legislative instrument. While this approach would give comfort to multinationals, the committee considers that this may reduce the flexibility that the Commissioner could use in the application of the DPT, especially where significant global entities are not being compliant and not providing the information required to properly assess their tax obligations.

2.65 While extensive discretionary powers have been afforded to the Commissioner in relation to undertaking DPT assessments, the committee feels that this is a necessary step to promote greater compliance and deter significant global entities from gaming the system. The committee has confidence that the Commissioner will take a measured approach in exercising these powers and will not use them unnecessarily nor burden significant global entities with excessive compliance costs.

2.66 In regards to concerns raised by stakeholders about possible uncertainty in the implementation phase, the committee believes that it is up to the ATO to consider whether establishing a DPT review panel might provide assistance in the application of the DPT.

2.67 Given the importance that the government has placed on combating multinational tax avoidance, the committee considers that the DPT, in conjunction with other anti-avoidance measures, is a welcome and necessary addition to the suite of measures available to tax administrators. Indeed, the purpose of many of the anti-avoidance measures introduced recently, including the DPT, is to encourage multinational firms to structure their activities and be captured by the ordinary income tax framework, rather than be subject to the punitive arrangements set out in anti-avoidance provisions.

Increased penalties for significant global entities

2.68 Relatively few submissions discussed increased penalties for significant global entities.

54 Chartered Accountants Australia and New Zealand, *Submission 12*, p. 5.

2.69 The CTA and G100 considered that the proposed 100 fold penalty increase for significant global entities should be limited to multinational companies that opt out of their reporting obligations.[55]

2.70 AFMA was concerned about the discretion given to the Commissioner regarding the remission of FTL penalties. In particular, AFMA noted that there may be circumstances where taxpayers are not aware of their compliance obligations and should be protected from the imposition of material penalties. In these circumstances, the taxpayer should be offered a reasonable period to lodge an outstanding form:

> For example, where the SGE [significant global entity] has lodged accounts with ASIC that the SGE believes qualifies as "general purpose financial statements" then the SGE may have formed the reasonable view that there is no further requirement to lodge accounts with the ATO. To the extent that the ATO takes a differing view…then technically the SGE has failed to lodge. A positive notification of the compliance obligation, coupled with a reasonable timeframe to remediate, is an appropriate safeguard in such a circumstance.[56]

2.71 AFMA also raised concerns about the discretion given to the Commissioner for the remission of FTL penalties, particularly given the material nature of FTL penalties for significant global entities and there is no compulsion on the Commissioner to adhere to the relevant Practice Statement and no remedy available for affected taxpayers. In addition, AFMA contended that the amount of the penalty should be a relevant factor in considering whether a penalty should be remitted.[57]

2.72 The Tax Justice Network-Australia was supportive of ensuring that the penalties are adequate to remove the profit from the crime:

> Given the resources that significant global entities usually have at their disposal, they have less excuse not to lodge accurate documents to the Commission of Taxation on time than smaller businesses do…[58]

2.73 Some submissions argued that the increase in penalties should only apply to documents relevant to tax affairs, not those which assist the efficient operation of the tax system. AFMA, for example, said:

> …the compliance obligations to which the enhanced penalties could potentially apply should be split between those which are indicative of obfuscation/non-cooperation…and those which do not relate to the taxpayer's own obligations but rather enhance the operation of the tax system.[59]

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55 Corporate Tax Association and Group of 100, *Submission 11*, p. 5.

56 AFMA, *Submission 7*, p. 4.

57 AFMA, *Submission 7*, p. 4.

58 Tax Justice Network-Australia, *Submission 8*, p. 5.

59 AFMA, *Submission 7*, p. 3.

Committee view

2.74 While noting the issues raised by submitters, the committee considers that the proposed level of penalties for significant global entities will address concerns about the inadequacies of the current regime and ensure that penalties are commensurate with the gravity of reporting offences. No matter how large or important a business is, there can be no excuse for inaccurate or delayed tax reporting and administration by large multinationals.

Transfer pricing guidelines

2.75 Only two submissions mentioned the updated transfer pricing rules.

2.76 KPMG supported the government's adoption of the OECD BEPS Action Plan changes that reset the transfer pricing rules.[60]

2.77 CAANZ considered the proposed commencement of the new transfer pricing rules in relation to income years starting on or after 1 July 2016 to be retrospective. CAANZ advocated for a prospective application of the new guidelines given that ATO guidance would need to be developed on how the OECD's principles would be implemented in an Australian context.[61]

Committee view

2.78 The committee considers that it is important to keep Australia's transfer pricing guidelines in line with best international practice by adopting the latest OECD recommendations. Given that the recommendations were released in 2015, the committee also considers that the application date from 1 July 2016 is appropriate and should be maintained.

Recommendation 1

2.79 The committee recommends that the bills be passed.

Senator Jane Hume
Chair

60 KPMG, *Submission 5*, p. 7.

61 Chartered Accountants Australia and New Zealand, *Submission 12*, p. 6..