

Chapter 2

General concerns with the bill

2.1 This chapter explores the general concerns raised by stakeholders in relation to the bill.

2.2 The views expressed by stakeholders were largely split between those that sought international consistency in the approach to base erosion and profit shifting (BEPS), and those that considered the bill did not go far enough to address the BEPS problem. A number of submissions also called for a post-implementation review.

Addressing multinational tax avoidance

The provisions of the bill do not go far enough

2.3 A number of stakeholders broadly supported the bill as a 'step in the right direction' but considered that it did not go far enough to address the risks posed by BEPS.¹ For example, the Tax Justice Network Australia did not believe that the bill by itself would be enough to address the problem of tax avoidance on its own.²

2.4 Mr Martin Lock, a former employee of the ATO, was more forthright in his analysis and concluded that:

Rather than confront the problem of tax base erosion by foreign and Australian multinational companies who increasingly exploit or circumvent our outdated and cumbersome tax regime...the Bill merely tinkers at the edge of the law by proposing insignificant changes to an inherently obtuse and uncertain anti-avoidance provision.³

2.5 Some stakeholders had concerns about the efficacy of the bill. For example, the CPSU indicated that its members:

...have expressed an expectation that there may be a range of new tax avoidance techniques that are adopted in response to the Commonwealth's package.⁴

2.6 And this view was supported by the Tax Justice Network Australia which contended that multinational enterprises:

...may seek other methods to avoid paying taxes in Australia on their profits made here [in Australia].⁵

1 See, for example, Greenpeace Australia Pacific, *Submission 2*; CPSU, *Submission 4*; and, Tax Justice Network Australia, *Submission 10*.

2 *Submission 10*, p. [10].

3 *Submission 9*, p. 6.

4 *Submission 4*, p. [2].

5 *Submission 10*, p. 1.

2.7 In addition, Greenpeace Australia Pacific believed the proposed laws would make already complex taxation laws more complex and still be vulnerable to new tax avoidance strategies.⁶

Overlap with the international base erosion and profit shifting project

2.8 Other stakeholders raised concerns about Australia implementing unilateral actions to address BEPS in advance of a coordinated response being agreed to by the G20/OECD BEPS Project.⁷ The Tax Institute noted that:

The Bill seeks to move ahead of the OECD process which has better prospects of effectively addressing deficiencies as it involves multilateral cooperation.⁸

2.9 KPMG indicated that, by acting alone, Australia may:

...create a harmful precedent—that of addressing international tax issues unilaterally, rather than adopting globally coordinated measures—and damage international consensus.⁹

2.10 The Commissioner indicated that the proposed bill was consistent with the direction of the G20/OECD BEPS Project:

When we talk about the MAAL [multinational anti-avoidance law] being superseded by the OECD rules, well, I do not agree with that, because whatever the rules are, whatever the OECD action item rules that become adopted are, this a good little safety net to have sitting there in the future.¹⁰

2.11 The Australian Financial Markets Association noted that the bill's scope may be wider than just the most egregious tax avoidance arrangements and, as such, may have unintended consequences that have:

...real potential to increase Australia's sovereign risk and undermine our attractiveness as [a] destination for foreign capital.¹¹

2.12 That said, the CPSU cited the European Network on Debt and Development which has concerns about the ability of the BEPS package to ensure that multinational corporations pay taxes in the jurisdictions where the economic activity takes place and value is created.¹²

6 *Submission 2*, p. [7].

7 See, for example, Australian Financial Markets Association, *Submission 6*; KPMG, *Submission 3*; Law Council of Australia, *Submission 14*; and, GSK, *Submission 11*.

8 *Submission 12*, p. 1.

9 *Submission 3*, p. 1.

10 Mr Chris Jordan, Australian Taxation Office, *Proof Committee Hansard*, Senate Economics Legislation Committee Supplementary Estimates 2015–16, p. 41.

11 *Submission 6*, p. 2.

12 *Submission 4*, p. [3].

Committee view

2.13 The committee believes that Australia has some of the strongest tax integrity rules in the world and that the measures in this bill, along with other budget measures, will strengthen the tax system even further. According to the Treasurer:

The strong measures already taken by the Australian Government are entirely consistent with the final OECD recommendations. The Government's measures attack the heart of multinational tax avoidance problem, whilst ensuring Australia remains an attractive and competitive place to do business.¹³

2.14 Accordingly, the committee considers that the provisions of the bill strike the right balance between addressing tax avoidance and not placing excessive compliance burdens on business, particularly small and medium enterprises. Further, the committee is satisfied that the measures are consistent with the G20/OECD proposals.

General provisions of the bill

Commencement date

2.15 The measures proposed in the bill are due to apply from 1 January 2016. Given that the bill is unlikely to be passed until very late in 2015, stakeholders were concerned that affected companies may not have sufficient time to organise their affairs, particularly in relation to Country-by-Country reporting, to facilitate compliance by 1 January 2016.

2.16 EY contended that it was not feasible to have a commencement date such a short time after the bill's enactment and suggested that the commencement date be no earlier than for income years commencing on or after 1 July 2016.¹⁴ Similarly, the Tax Institute submitted that the proposed application date should be deferred by at least 6 months but preferably no less than 12 months, or that penalties should not be imposed in the first year of application.¹⁵

2.17 The committee notes that the bill gives the Commissioner some flexibility in implementation. In relation to the MAAL specifically, the Explanatory Memorandum noted that:

The ATO has indicated that it can adopt a flexible approach to administering the law for companies that are in the process of restructuring but do not have their new arrangements in place on 1 January 2016. For multinationals that voluntarily approach the ATO, penalties can be waived and specific arrangements can be made regarding compliance.¹⁶

13 The Hon. Scott Morrison MP, *OECD report supports Australian Government action on multinational tax avoidance*, Media Release, 6 October 2015, <http://sjm.ministers.treasury.gov.au/media-release/003-2015/> (accessed 19 October 2015).

14 *Submission 5*, p. 4.

15 *Submission 12*, p. 4.

16 *Explanatory Memorandum*, p. 93.

Enforcement

2.18 The Australia Institute noted the OECD's concerns that tax avoidance is aggravated by limited enforcement resources. It questioned whether the forward estimates will be sufficient to cover court and other costs to counter litigious multinationals, and what would happen if there was a 'cost blowout'.¹⁷

2.19 The CPSU also raised concerns about staffing and resources, and, in their opinion:

If the Commonwealth is serious about tackling multinational tax avoidance, the ATO will require significantly higher levels of staffing and resourcing.¹⁸

2.20 In response, the ATO has repeatedly contended at Estimates hearings and hearings of the Senate Economics References Committee that it is able to discharge its duties adequately, including tackling multinational tax avoidance, with current resourcing levels. Indeed, the Commissioner has indicated previously that:

I am very proud of the ability, expertise and integrity of the people we have working on our large corporate cases and I am extremely confident of our capability moving forward.¹⁹

Post-implementation review

2.21 Given the overlap of the bill with the work of the OECD, a number of submissions called for a post-implementation review.²⁰ KPMG indicated that it will be important to align the implementation of Country-by-Country in Australia with the OECD Implementation Guidance in order to maximise the benefits and reduce the compliance costs of standardised global reporting.²¹

2.22 Chartered Accountants Australia and New Zealand noted the potential for double taxation to arise and looked to ensure consistency with other jurisdictions in approach taken for the MAAL. They went on to submit that:

...the Government should introduce the MAAL with a formal commitment to review the appropriateness of the law in say three years, when Australia's position on the planned multilateral instrument to amend double tax agreement is known.²²

17 *Submission 7*, p. 6.

18 *Submission 3*, pp. [3-4].

19 *Senate Economics References Committee Hansard*, 22 April 2015, p. 2.

20 See, for example, KPMG, *Submission 3*; and, Chartered Accountants Australia and New Zealand, *Submission 16*.

21 *Submission 3*, p. 2.

22 *Submission 16*, p. [3].

2.23 The Explanatory Memorandum noted that the ATO is well placed to monitor the effects of the proposed measures on the behaviour of corporate taxpayers. Treasury indicated previously that:

The Treasury and the ATO are continually examining our tax system to identify areas where tax payers are engaged in egregious tax avoidance, consider where new compliance initiatives might be best targeted and also advise government of how our laws could be improved to deal with these issues.²³

Committee view

2.24 The government is committed to taking the lead to address multinational tax avoidance and this bill begins the process of implementing the BEPS outcomes.

2.25 The committee notes the concerns that were raised in submissions relating to the general provisions of the bill. It believes, however, that these concerns can be adequately addressed through taking a flexible approach to implementation and ongoing policy development.

2.26 In addition, the committee notes that the government is providing the ATO with additional funding to ensure that it has the resources available to implement, oversee and enforce the provisions of the bill.

2.27 Finally, the government is satisfied that the ATO and Treasury are well placed to actively monitor implementation and advise the government if amendments or further legislation is required.

2.28 The committee recognises, however, that different jurisdictions may take different approaches to implementing the G20/OECD BEPS Action Plan. By taking a lead role and seeking to implement some actions early, there is a possibility that the enactment and implementation of the measures in this bill could create inconsistencies with the laws of other jurisdictions and/or result in unintended consequences for businesses and tax administrators.

Recommendation 1

2.29 The committee recommends the government undertake a post-implementation review of the measures contained in the bill within 3 years of enactment.

23 *Senate Economics References Committee Hansard*, 9 April 2015, p. 18.

