Chapter 2

Views on the proposed changes

2.1 The bill proposes to amend the TAA 1953 to exempt Australian-owned private companies from the requirement for the Commissioner of Taxation (Tax Commissioner) publish certain tax information in relation to corporate entities that report a total income of at least $100 million for an income year. The exemption will only be available to companies that satisfy all of the following conditions:

- the company must be a resident private company;
- the company must not be a wholly-owned subsidiary of a foreign corporate group; and,
- the company must not have a level of foreign shareholding greater than 50 per cent.[1]

2.2 Submitters expressed a range of views on these changes to exempt Australian-owned private companies from the existing tax transparency disclosure laws. Most submissions raised issues of privacy and personal security; discrimination, fairness and equity; commercial disadvantage; public policy benefit; and compliance costs and reputational damage. Some submissions also covered the original intent of the existing legislation; potential for a company to restructure its tax affairs; and the effect on investment in Australia. Most of the issues raised reflected the concerns canvassed in the Explanatory Memorandum.

Support for the bill

2.3 Although there was a wide array of views with regards to the bill—ranging from support to opposition—on the whole, most submitters were supportive of the bill as drafted. A couple of submitters argued strongly in favour of the proposed amendments on the basis of equity principles. For example, the Law Council of Australia (LCA) contended that the tax transparency laws in section 3C of the TAA 1953 were 'harsh, unjust and discriminatory'. In support of the bill and its enactment, it reasoned that the proposed legislation would:

> …operate to alleviate that harshness, injustice and discrimination against a significantly adversely affected class of taxpayers—namely, private Australian companies. [2]

2.4 According to the LCA, the provisions of section 3C would 'continue to be discriminatory and unjust' and welcomed the removal of that discrimination for Australian private companies.[3] Likewise, the Council of Small Business Australia

1 Explanatory Memorandum, pp. 12–13.

2 Law Council of Australia, *Submission 6*, p. 1.

3 Law Council of Australia, *Submission 6*, p. 5 and Family Office Institute Australia, *Submission 8*, p. 5

(COSBOA) was of the view that the current disclosure laws in section 3C were 'discriminatory and unjust towards certain classes of taxpayers and inappropriately overturned fundamental rights of taxpayer privacy for certain taxpayers'.[4] The Family Office Institute Australia (FOIA) believed that the bill should be passed into law so as 'to protect Australian private companies from being burdened with the adverse consequences of public reporting of its turnover and tax information'.[5]

2.5 In contrast, submitters not in support of the bill's passage were concerned the bill would dilute the public policy benefit of the current tax transparency provisions in the TAA 1953. They also questioned the concerns raised by proponents for the bill. The Tax Justice Network Australia (TJNA) submitted:

> Such transparency [in the current section 3C of the TAA 1953] evens up the playing field between publicly listed domestic companies (whose financial reporting gives a clearer picture of the risks related to such companies) and private companies (whose lack of reporting may conceal the true risks associated with the entire company). Increased transparency also will boost confidence in the broader community that companies are being required to pay the taxes they should pay, and will require companies to have to explain their tax arrangements offering a significant deterrent to aggressive tax arrangements that might be legally contestable.[6]

Issues raised about the current income tax transparency laws

2.6 In the Explanatory Memorandum to the bill, the government raised a number of concerns with the current laws, including:

- privacy and security concerns for Australian owners of closely held companies where the disclosure of the companies' information effectively discloses information about the owners' financial affairs;
- the information disclosed may not be currently available to the private company's competition, customers and suppliers, and it's release may adversely affect smaller companies in commercial negotiations with larger firms;
- unintended consequences may result, such as the restructuring of a company's affairs in order to keep below the threshold. For example, private companies may be encouraged to restructure their affairs into trusts, which are not corporate tax entities, in order to minimise any commercial disadvantage; and,
- disproportionate costs could be associated with releasing additional information to provide context to the public about a company's tax affairs in order to avoid reputational damage.[7]

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4 Council of Small Business Australia, *Submission 4*, p. 2.

5 Family Offie Institute Australia, *Submission 8*, p. 7.

6 Tax Justice Network Australia, *Submission 7*, p. 1.

7 Explanatory Memorandum, pp. 11–12.

2.7 These issues were also canvassed by submissions to the committee's inquiry, as outlined below.

Original intent of the current legislation was to target multinationals' aggressive tax practices

2.8 The Explanatory Memorandum and several stakeholders emphasised that the introduction of section 3C was intended to address the issue of multinational companies reporting 'quite low revenue'.[8] It was not intended to target Australian-owned private companies but to capture multinational corporates' aggressive tax minimisation practices.

2.9 The transparency measures introduced in June 2013 were an initiative arising from an international effort to develop common standards of reporting to address the issues of base erosion of profits and profit-shifting between jurisdictions by multinationals. For example, EY and the FOIA referred to recent comments by the Commissioner of Taxation who was quoted as saying that if you look at the history of the tax publication law in section 3C, it was 'really for multinational companies operating here, disclosing quite low revenue'.[9] The FOIA explained further:

> The tax publication laws were introduced against a backdrop of measures to target base erosion and profit shifting by multinational corporations, and arguably there may be merit in having specific laws to deter aggressive taxpayers who do not 'pay their fair share of tax'. The Government has recently introduced legislation into Parliament for that purpose.[10]

2.10 The LCA noted that the measures contained in section 3C would place Australia out of step with other international tax jurisdictions and was:

> …particularly concerned that Australia will effectively be an outlier in respect of these measures. No other country in the world publishes information in this way, and those that have in the past have actually abandoned it because of the harm and the prejudice to affected taxpayers. The other concern we have is that in some ways it jumps ahead of what is happening elsewhere in the world. The OECD is due to come down shortly with proposals to deal with multinational tax avoidance. The current government introduced legislation into parliament just last week to deal specifically with multinational tax avoidance.[11]

2.11 Some stakeholders have referred to the experience of various international jurisdictions with similar income tax disclosure measures. EY drew attention to Japan's abolition of public reporting of tax information as a relevant example for Australia. In Japan, the disclosure rules which were introduced in 1950 'had effects outside [their] intended purposes'. These rules, which required the public reporting of corporate tax, individual tax and inheritance tax, were intended to 'impose a

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8 Attributed to the Tax Commissioner, and cited in Law Council of Australia, *Submission 6*, p. 3.

9 Ernst & Young, *Submission 9*, p. 1 and *Submission 8*, p. 3.

10 Family Office Institute Australia, *Submission 8*, p. 3.

11 Law Council of Australia, *Proof Committee Hansard*, p. 2.

restraining effect on tax practices by monitoring by the public'. EY contended that harassment and the misuse of the information by marketeers and fund-raisers could be some of the unintended consequences of releasing tax information.[12]

2.12 Proponents for the bill consider the carve-out of Australian-owned private companies will not affect the bill's pursuit of income tax transparency requirements for multinational and publicly held companies, and would not weaken the stated focus of the G20 and OECD's objectives in regards to multinationals' tax obligations.[13]

2.13 On the other side, the TJNA countered that it was unaware that similar tax transparency measures adopted overseas—Denmark, Finland, Sweden and Norway—had negatively affected the functioning of these markets or increased security concerns to high wealth individuals in these jurisdictions. On the contrary, the TJNA cited research which found that in Norway greater public disclosure of tax affairs have led to increased reporting by some companies.[14]

Privacy and personal security

2.14 Most submissions noted that section 3C displaces the fundamental and long-held tenet of Australia's tax laws that a taxpayer's affairs should remain private between them and the Australian Taxation Office.[15] Some proponents of the bill have also referred to the United Nations' Universal Declaration of Human Rights:

> No one shall be subject to arbitrary interference with his privacy, family, home or correspondence, nor attacks upon his honour and reputation.[16]

2.15 COSBOA upheld this view:

> …small businesses are people, they are not entities in the sense that a big business is an entity. Small business is personal.[17]

2.16 As most Australian-owned private companies are owned by families, and represent the majority of a family's wealth, these disclosure laws would allow for the identification of individuals or families associated with these affected private companies. As only aspects of income tax information will be disclosed in isolation and absent context, disclosure would likely lead to the incorrect assumption that the income of private companies is also the income of the individuals or families associated with these private companies. Accordingly, the identification of individuals connected with successful businesses could also expose them to personal safety risks.

12 Ernst & Young, *Submission 9*, p. 6.

13 The Tax Institute, *Submission 2*, p. 2.

14 Tax Justice Network Australia, *Submission 7*, p. 5.

15 Law Council of Australia, *Submission 6*, p. [1]; PricewaterhouseCoopers, *Submission 5*, pp. 1–2.

16 Family Office Institute Australia, *Submission 8*, p. 7.

17 Council of Small Business Australia, *Submission 4*, p. 3.

2.17 For example, EY contended that private companies were 'fundamentally different' from widely held public companies. The affairs of private companies related to family activities and thus:

> …the individuals who are the owners of private companies should be entitled to the same human rights of privacy as are individuals more generally.[18]

2.18 Likewise, PricewaterhouseCoopers (PwC) noted that, unlike many multi-national companies or large businesses, Australian-owned private companies were 'typically owned by families and, in most cases, represented the majority of their wealth'. In its view, without the proposed exemption, the privacy of these families and in some cases their personal security may be jeopardised.[19]

2.19 The LCA explained that the privacy of individuals associated with affected companies would be further compromised under current disclosure laws as they could be identified by a cross-reference using ASIC's public register of companies.

2.20 Indeed, Teys Australia Pty Ltd (Teys), the second largest beef processor and exporter in Australia, submitted that if section 3C of the TAA 1953 takes effect, the release of such information would likely 'adversely affect the privacy and personal security of the Teys family shareholders, and the market environments in which [its] business operates'.[20] Teys further noted:

> …public disclosure of taxation information creates the potential for serious impact on family shareholders, including…[b]eing the subject of criminal activity, as a result of disclosed personal information being used to target individuals on the basis of perceived wealth.[21]

2.21 The Tax Institute similarly raised disclosure concerns:

> The public disclosure for the tax affairs of private companies risks disclosing the tax circumstances of the ultimate individual owners (via searches of the ASIC public registers). If this concern is not addressed, private companies may be encouraged to put in place nominee shareholding arrangements to conceal their interests in a private company. This in turn will result in reduced overall transparency in the public information as to corporate ownership available in ASIC records.[22]

2.22 Conversely, TJNA did not believe the current income tax transparency laws would increase the risk to the personal safety of individuals, and reported it is not aware of any advice received from the Australian Federal Police (AFP) in relation to

18 Ernst & Young, *Submission 9*, p. 2.

19 PricewaterhouseCoopers, *Submission 5*, p. [1].

20 Teys Australia Pty Ltd, *Submission 2*, p. [1].

21 Teys Australia Pty Ltd, *Submission 2*, p. [2].

22 The Tax Institute, *Submission 1*, p. [1].

the increased risk of kidnapping and ransom if the new laws came into effect. The AFP confirmed it had not provided any such advice to Treasury.[23] The TJNA advised:

> We regard as bizarre public claims that disclosure of income of corporate entities with total incomes of $100 million or more will open up certain individuals to greater risk of kidnap for ransom. We wrote to the Minister for Finance and Acting Assistant Treasurer in December 2014 asking what advice the Australian Federal Police had provided on the likely increased risk of kidnapping for wealthy individuals based on the limited disclosures required under the *Tax Administration Act.* No reply has been received on that request. TJN-Aus notes that it has been reported in the press that the Transport Workers' Union made Freedom of Information applications to the AFP, the Attorney-General's department and the Australian Tax Office, that all came back saying no documents exist in relation to advice about the safety of individuals if the new regulations went ahead.[24]

2.23 TJNA further noted that the TAA 1953 does not disclose any personal information. However, in contrast, personal information on individuals—the names and addresses of all company directors—are already available for purchase through ASIC.[25]

Discrimination, fairness and equity

2.24 Several submissions in support of the bill argued that the current tax transparency laws in section 3C of the TAA 1953 are 'harsh, unjust and discriminatory' against a class of taxpayers—private Australian companies. The Law Council of Australia (LCA) stated:

> The publication of private taxation information of particular corporate tax entities discriminates against such affected companies and other corporate taxpayers. Trusts and partnerships which are not taxed as companies (the great majority of trusts and partnerships), and even individuals, are not subject to section 3C. This injustice is further exacerbated for private Australian companies by the fact that ASIC maintains a public register of companies and a simple ASIC search could identify the shareholders of the private companies that are subject to the tax disclosure laws. This does not apply to public companies or foreign companies.[26]

2.25 The LCA goes further and believes section 3C of the TAA 1953 should be repealed entirely. In its view, the current proposed provisions in the bill remain discriminatory against privately-owned foreign companies and public companies.[27] The LCA elaborated:

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23 *Proof Committee Hansard*, 22 September 2015, p. 16.

24 The Tax Justice Network Australia, *Submission 7*, p. 3.

25 The Tax Justice Network Australia, *Submission 7*, p. 3.

26 Law Council of Australia, *Submission 6*, p. 2.

27 Law Council of Australia, *Submission 6*, p. 5.

> To apply those laws, and that level of public scrutiny, to only one type of taxpayer entity—companies, and not trusts, partnerships, individuals, or otherwise—and only to those which exceed a certain threshold, creates a disproportionate and discriminatory rule which would be applied only against those companies who fall into the narrow class.[28]

2.26 The Tax Justice Network Australia (TJNA), which does not support the bill, believes that Australian-owned private companies should not be exempted from the current income tax transparency disclosure laws. The laws requiring the ATO to publish limited tax return information of companies with total income of at least $100 million—total income, taxable income and income tax payable—should remain predicated on fairness, equity and transparency. The TJNA considers:

> Such transparency evens up the playing field between publicly listed domestic companies (whose financial reporting gives a clearer picture of the risks related to such companies) and private companies (whose lack of reporting may conceal the true risks associated with the entire company). Increased transparency also will boost confidence in the broader community that companies are being required to pay the taxes they should pay, and will require companies to have to explain their tax arrangements offering a significant deterrent to aggressive tax arrangements that might be legally contestable.[29]

Commercial disadvantage

2.27 Most submissions to the inquiry raised the concern that commercially sensitive information will be made available to a company's competitors, or to other participants in the supply chain, which would disadvantage the affected company in commercial negotiations and in its customer or supplier relationships.[30] For example, PwC stated simply that 'market sensitive information may be publically released which could adversely affect the competitiveness and profitability of these private companies'.[31] The FOIA explained this concern in detail:

> Very often, private Australian family companies specialise in the supply of a particular good or service rather than have a diversified business structure which is more common in public companies. As such, the financial information of such a private company will reflect its whole and sole business whereas the financial information of a public company may reflect its diversified businesses with its various business lines and investments. If a private company only has one business line, the gross income and taxable income of that company could potentially be used to estimate the profit margins of that business.
>
> The disclosure of gross turnover and sales income and the net taxable income under the current disclosure laws therefore presents significant

28 Law Council of Australia, *Submission 6*, p. 3.

29 The Tax Justice Network, *Submission 7*, p. 1.

30 Teys Australia Pty Ltd, *Submission 2*, p. [2].

31 PricewaterhouseCoopers, *Submission 5*, p. [1].

> commercial risk to private companies because stakeholders and competitors could potentially use such information to determine profit margins or other pricing information. This information could then be used to exert pressure or leverage when undertaking commercial negotiations with the private company, to target their now public total sales and undercut their perceived margin, or drive down prices to lower the net margin now published.[32]

2.28 The Tax Institute agreed with this assessment:

> The current transparency law results in private companies having to publicly disclose information which can be used to determine their net profit margin. Such information can be highly sensitive for businesses and can impact on their business dealings. For example, the disclosure of this information in relation to a privately owned agricultural business supplying produce to large supermarket chains, may result in their significant customers using the information as leverage in commercial negotiations.[33]

2.29 Council of Small Business Australia (COSBOA) advanced a similar case:

> Small businesses focus on key objectives of supplying goods and services at competitive prices and in accordance with the value proposition. Overwhelmingly, small businesses offer a single good or service. In comparison larger businesses offer multiple goods and services, often in different geographic markets. Consequently, it is difficult in relation to large companies to discern from their financial and tax data their profit and margins and mark ups on particular line items.
>
> Therefore, policies which expose the gross revenue and taxation details of smaller business will damage the viability of smaller businesses by allowing large companies to engage in pricing and other incentive arrangements which will effectively eliminate competition. This will be to the detriment of small business in Australia.[34]

2.30 Further, the current tax transparency laws will disadvantage Australian-owned private companies with international operations vis-a-vis a foreign-owned Australian company with business operations in Australia. For this reason, The Tax Institute considered the exclusion of entities with an ultimate foreign parent company, or majority-owned by foreign shareholders from the bill's exemption an appropriate measure.[35] The LCA explained:

> An Australian owned private company with international operations would (apart from disclosing all relevant worldwide income, foreign companies and branch operations, transfer pricing details and so on to the ATO) see the details of their worldwide income published. A foreign owned Australian company which conducts relevant Australian business only would see only the Australian operating income disclosed. By their very

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32 Family Office Institute Australia, *Submission 8* pp. 5–6.

33 The Tax Institute, *Submission 1*, p. 2.

34 Council of Small Business Australia, *Submission 4*, p. 2.

35 The Tax Institute, *Submission 1*, p. 2

> nature private Australian companies are private, and not public, they do not have anonymous shareholders who require information.[36]

2.31 Submissions received in support for the current tax transparency laws questioned the extent of commercial disadvantage suffered by Australian resident private companies, since the same disadvantage would apply to domestic publicly listed companies with regards to their competitors, customers and suppliers who may even be privately listed companies.[37] The TJNA added:

> Further, it is the understanding of TJN-Aus that when a private company is a supplier to a large company they are normally required by the customer company to disclose their financial details. The customer company will often want the certainty they are not entering into a contract with a company that is financially unstable.[38]

Public interest benefit

2.32 Proponents for the bill have reasoned that there is very little public benefit to disclosing the income tax information of a class of taxpayers with income over a certain threshold. Some have reiterated that any public benefit in publicly releasing confidential taxation information of privately owned Australian companies is trivial compared to the disproportionate burden on family shareholders to preserve their reputation and the impact on the affected company.[39]

2.33 As the business tax system in Australia is complex, selected information released without context could easily result in reputational damage to a narrow class of taxpayers.[40] Many stakeholders, including EY, LCA and FOIA have elaborated on this theme. EY argued that the ATO's public reporting would add 'unnecessary cost pressures for private companies and an additional regulatory cost and deadweight cost'. In its view, there was the potential for these companies to face queries relating to perceived low level of taxable income and low level of tax payable compared with their turnover. It stated further:

> That information in the public arena will not explain the drivers of low taxable income which might include adverse trading conditions, or low yield capital assets, or large capital allowances or other incentives which reduce tax payable.[41]

2.34 The additional costs borne by private companies to provide explanatory materials within an environment of increased media attention would more likely impair public policy debate than enhance it. The FOIA noted the difficulties facing

36 Law Council of Australia, *Submission 6*, p. 4.

37 Tax Justice Network Australia, *Submission 7*, p. 4.

38 Tax Justice Network Australia, *Submission 7*, p. 4.

39 Teys Australia Pty Ltd, *Submission 2*, p. [2].

40 Law Council of Australia, *Submission 6*, p. 3.

41 Ernst & Young, *Submission 9*, p. 2.

privately-owned companies in explaining their tax position compared to public companies:

> Public companies, being public entities with disparate and anonymous shareholders, are accustomed and required as a private company to disclose financial information under the corporations law and listing rules. Often, large public companies have public relations and public media support and other measures in place to explain their financial positions and performances to their shareholders and other stakeholders.[42]

2.35 Several submitters have articulated that the damage arising from misinformation would be detrimental to public trust and confidence in the tax system. EY explained that:

> …public reporting of 'total income', 'taxable income' and the 'income tax payable' of named corporate taxpayers whose total income is over $100 million, may lead to information being misused and misinterpreted, thereby eroding public confidence in the integrity of the current tax system. The enacted tax transparency measures also have the potential to tarnish the reputation of Australian businesses—even if they have good standing and relations with the ATO or other countries' revenue authorities…
>
> ATO consultation about the public reporting has already identified the concern that the public reporting might actually be misleading, because it does not outline the many legitimate reasons for a company in business to have low tax payable. Causes, such as companies recovering from and using prior year losses, companies in challenging markets with low profit margins, companies with large capital allowance and R&D and other expenditures giving rise to tax deductions, companies receiving dividend income, etc. So the ATO is, we understand, to develop an extensive disclaimer or warning message to casual readers of the proposed public reports (but query whether any such ATO information will be reported by the media).[43]

2.36 The LCA was similarly concerned that the publication of taxation information would likely be highly misleading—a comparison of gross accounting turnover to net taxable income is comparing apples to oranges because it is 'a subset of incomplete and unconnected information'. The LCA stated further:

> …a comparison of gross turnover to net taxable income, whilst misleading, has the great problem, as we see it, of actually lowering the public confidence in the taxation system rather than raising it. The reason for that is that legitimate deductions, ordinary losses and legitimate exemptions that can exist in the act—credits, taxes paid at different levels of a corporate group—all reduce the net tax payable compared with gross turnover, and year after year of seeing that the public may well think that the system is broken when it is not.[44]

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42 Family Office Institute Australia, *Submission 8*, p. 4.

43 Ernst & Young, *Submission 9*, p. 3.

44 *Proof Committee Hansard*, 22 September 2015, p. 1.

2.37 Further, some submissions argued that the publication of taxation information does not change a company's legal obligations to the ATO, nor does public disclosure increase compliance to taxation obligations in Australia.[45] The ATO already has a more comprehensive picture of a company's tax affairs and the release of selected aspects of tax information would not add to an informed debate about tax policy and obligations. For example, the LCA maintained that the ATO obtains much more information than that required under the existing section 3C—'they see the full picture as they should'.[46] FOIA detailed the reporting obligations to the ATO:

> Private companies the subject of section 3C are required to provide very detailed information to the Australian Taxation Office (ATO), setting out all items of income, type of income, expenses, deductions, exemptions, credits, overseas activities, transfer pricing details, restructures, capital gains and so on. What is provided to the ATO is the full picture of the company's tax affairs. The tax publication under section 3C will be a public disclosure of only very small and unconnected parts of that information: gross accounting turnover or income, net taxable income and tax payable. This comparison has been described by Treasury and the ATO themselves as "comparing an apple with an orange and not being about fruit" as well as being confusing and misleading to the public.[47]

2.38 EY also highlighted the fact that the ATO has 'ample sources of information' about private companies. This includes their taxable income, assets, gross income, deductions, structures, the income they pay to associates and 'all relevant information, supplemented by ATO queries about any issues of interest'. In EY's opinion, there is 'no value added to the ATO compliance supervision of private companies from any public reporting'.[48] This same argument was supported by the LCA during the committee's public hearing.[49]

2.39 Those who oppose the exclusion of Australian resident companies from the existing transparency measures believe 'increased transparency would boost confidence in the broader community that companies are being required to pay the taxes they should pay'. According to such a view, the potential that all companies with revenue over $100 million may have to explain their tax arrangements would act as significant deterrent to aggressive tax minimisation.[50] Such a public interest benefit would therefore warrant extension of tax disclosure measures to companies under Australian tax law.[51]

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45 Teys Australia Pty Ltd, *Submission 2*, p. [2].

46 *Proof Committee Hansard*, 22 September 2015, p. 1.

47 Family Office Institute Australia, *Submission 8*, p. 3.

48 Ernst & Young, *Submission 9*, p. 8.

49 *Proof Committee Hansard*, 24 September, p. 1.

50 Tax Justice Network Australia, *Submission 7*, p. 1.

51 Tax Justice Network Australia, *Submission 7*, pp. 1–2.

2.40 Submissions in support of keeping the existing legislation raised concerns that the dilution of income tax transparency disclosure measures would represent an opportunity lost for the public benefit from the pressure on companies to 'comply fully with their tax obligations'.[52] The TJNA asserted that increased transparency would lead to better functioning of markets, with the most efficient and innovative companies rewarded by the exposure of efficiencies and risks.[53] The TJNA added:

> Where a private company is paying little or no tax, it is not unreasonable to expect the company to explain why that is the case. There are plenty of companies that should explain their tax paying. Documents obtained under freedom of information revealed that 2,168 businesses identified by the ATO had a total annual income of more than $100 million. Of these, the number of Australian-headquartered businesses that did not pay tax had increased to 29% in 2009. In 2012 this position had improved slightly with 26% Australian head-quartered companies with over $100 million in income paying no tax.[54]

2.41 Further, the TJNA reported:

> 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 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% of the businesses caught under the tax transparency measures of the *Tax Administration 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.[55]

2.42 The Community and Public Sector Union (CPSU) also shared this view. In its submission, the CPSU emphasised the importance of increased disclosure and scrutiny as the 'best way' to strengthen public confidence.[56] The CPSU was concerned that the proposed amendments could potentially exempt 700 private companies from scrutiny and has cited ACOSS's calculation of '$1 billion a year in revenue gained if the use of private companies to avoid income tax was curbed'.[57]

2.43 The CPSU cited the results of the 2015 Per Capita Tax Survey, which reported that 'more than three-fifths (61.1 per cent) of Australians believe that the tax system most favoured the wealthy and that nearly three-fifths (59.7 per cent) believe

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52 Tax Justice Network Australia, *Submission 7*, p. 3.

53 Tax Justice Network Australia, *Submission 7*, p. 4.

54 Tax Justice Network Australia, *Submission 7*, p. 1.

55 Tax Justice Network Australia, *Submission 7*, p. 1.

56 Community and Public Sector Union, *Submission 3*, p. 2.

57 Community and Public Sector Union, *Submission 3*, p. 1.

tax avoidance by business affects the fairness of the system a lot'. In their view, the proposed changes will only 'undermine rather than strengthen public confidence in [the] tax system'.[58]

2.44 Opponents of the bill maintained that transparency was not aimed at 'naming and shaming' taxpayers but rather used to 'determine how and why some taxpayers comply with the law but pay very little in tax'.[59]

Compliance costs and reputational damage

2.45 Most submissions in support of the bill shared the view that a disproportionate cost would be placed on affected companies to explain their tax affairs in the context of a complex business tax system. As previously canvassed by proponents of the bill, the likely misinformation and false assumptions from the disclosure of partial tax information of a select group of companies would not provide any 'demonstrative information to explain tax policy or engage a debate about it'.[60] It would only place additional costs on to Australian-owned private companies, and with no indication that these measures would discourage large companies from engaging in aggressive tax practices.

2.46 The additional costs to businesses, particularly smaller businesses, would likely result in the inefficient allocation of resources that would otherwise be invested in the business. The FOIA cited the observation that because the 'private company sector had generally lower profits than public companies, private companies in Australia do not have the same access to capital as public companies, and usually do not have the scale and other resources'.[61]

2.47 The Tax Institute supported this view. It expanded on the disadvantage to private companies:

> Public companies are more accustomed to disclosing financial affairs due to the strict requirements imposed on such companies under the corporations law. Such companies are better equipped to deal with public enquiries in relation to their financial affairs than private companies who would likely face significant additional costs in preparing to deal with such enquiries.[62]

2.48 Further, the LCA does not believe there is evidence of widespread tax avoidance by Australian private companies with total income of at least $100 million. The LCA cited the Tax Commissioner's comment that 'most wealthy Australians and their private groups do the right thing' and added:

> Extensive information, significantly greater than the portion of information to be published under the corporate tax transparency obligations, is already

58 Community and Public Sector Union, *Submission 3*, p. 2.

59 Community and Public Sector Union, *Submission 3*, p. 2.

60 Law Council of Australia, *Submission 6*, p. 3.

61 Family Office Institute Australia, *Submission 8*, p. 4.

62 The Tax Institute, *Submission 1*, p. 3.

> provided to the ATO by affected companies. The ATO has significant powers to detect and deal with tax avoidance.[63]

2.49 Opponents of the bill emphasised the benefits of changed behaviour as a result of increased tax transparency. The TJNA claimed:

> Research has shown that increased transparency increases the pressure on companies to comply fully with their tax obligations. Increasingly, a sense of social responsibility is seen as important to business and creates an expectation that company decision makers should also act in a broader social context in making business decisions including their tax paying practices.[64]

2.50 In this regard, it is worth noting Mr Jeremy Hirschhorn's, ATO, views on public transparency and behaviour. He observed:

> …in terms of dramatic changes in people's behaviour because their affairs are published, we would say that people are fundamentally compliant so it will not change their behaviour. We say that most of the system is fundamentally compliant. Perhaps there are some behavioural aspects at the margin—perhaps.[65]

2.51 On a number of occasions during the committee's public hearing, the ATO representatives made the point that the carve out of Australian private-owned companies would not inhibit the ATO's compliance work.[66]

Restructuring of tax affairs to avoid the threshold

2.52 Several submissions have raised the unintended consequence of these disclosure laws having the effect of encouraging private companies to restructure their tax affairs to keep below the $100 million threshold. As pointed out by The Tax Institute, this would encourage the establishment of additional companies and complex structures which would add inefficiency to the tax system.[67] The Tax Institute stated:

> If this concern is not addressed, private companies may be encouraged to put in place nominee shareholding arrangements to conceal their interests in a private company. This in turn will result in reduced overall transparency in the public information as to corporate ownership available in ASIC records.[68]

2.53 As noted earlier, several submissions have observed that the original intention of the current income tax transparency disclosure initiative, as outlined in the

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63 Law Council of Australia, *Submission 6*, p. 3.

64 Tax Justice Network Australia, *Submission 7*, p. 3.

65 *Proof Committee Hansard*, 22 September 2015, p. 21.

66 See Mr Michael Cranston, Deputy Commissioner, ATO, *Proof Committee Hansard*, 22 September 2015, pp. 14, 15 and 16 and Mr Jeremy Hirschhorn, ATO, p. 20.

67 The Tax Institute, *Submission 1*, p. 3.

68 The Tax Institute, *Submission 1*, p. 2.

Explanatory Memorandum and above, was to 'better inform the public about the taxation of multinationals, including the nature and scope of base erosion and profit shifting'.[69] The inclusion of private-owned Australian companies was not the intention of the tax transparency initiative.

2.54 The FOIA cited a study which reported that the contribution to the Australian economy by family groups was approximately $226 billion in 2011 and likely to be more in 2015. The FOIA claimed a large proportion of those family groups would likely be captured by the current tax disclosure laws, and has cautioned the current measures could compel private companies not only to restructure their corporate tax affairs (under multiple companies and trust structures), but also to transfer their operations in entities outside Australia. This would have an adverse effect on the Australian economy.[70] FOIA stated:

> …with favourable economic conditions, such as improved currency in other jurisdictions, there is a growing trend to move resources offshore and imposing public tax reporting obligations on family groups would only encourage this. The Institute anticipates that many family offices have already been obtaining advice to move their corporate affairs or significant investments offshore as a result of the current tax publication laws.[71]

2.55 Submissions in favour of keeping the current tax transparency laws held the view that the threat that disclosure could encourage companies to restructure their affairs in order to remain below the threshold should not be a valid reason for exempting Australian companies from disclosure requirements. Instead, such behaviours should alert the ATO 'to take a closer look at the tax practices of the companies involved'.[72]

Other issues raised

Drafting clarification

2.56 Finally, the LCA has raised concerns that section 3C of the bill, which limits the disclosure laws to foreign ultimate holding companies, or companies with foreign shareholding above 50 per cent, is not clear on whether it also applies to indirect shareholdings. The term 'foreign shareholding in the entity' as proposed in subsection 3C(1)(b)(iii) is not a defined term in the Income Tax Assessment Acts. The Explanatory Memorandum leaves the assessment to the Tax Commissioner based on the company's tax return information.[73]

2.57 The LCA believes this should be clarified in the TAA 1953 through Parliament and not left to the Tax Commissioner, which could potentially be subject to change. In its view, it was important that the 'principles of the rule of law require

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69 The Tax Institute, *Submission 1*, p. 3.

70 Family Office Institute Australia, *Submission 8*, pp. 1 and 5.

71 Family Office Institute Australia, *Submission 8*, p. 4.

72 Tax Justice Network Australia, *Submission 7*, p. 4.

73 Explanatory Memorandum, p. 13.

the law to be known, readily ascertainable and available to taxpayers, and not subject to arbitrary change'.[74]

Committee's view

2.58 Evidence to this committee has identified a number of strong reasons to support the bill. First, section 3C as currently drafted would or has the potential to:

- offend the fundamental principle and long-standing tenet of Australia's tax laws—a taxpayers' affairs must remain private between the taxpayer and the ATO;
- disclose market sensitive information that could place a company at a competitive disadvantage;
- result in the publication of taxation information of privately-owned companies that could be misused, misinterpreted or mislead due to poor understanding of relationship between gross accounting turnover and net taxable income;
- place an unfair burden on companies that may be required to expend resources on clarifying such public misunderstanding; and
- lead to a lessening of confidence in the taxation system because of the potential for the tax information to be misinterpreted.

2.59 Second, the main driver for the introduction of 3C was concern over base erosion and profit shifting by multinational corporations and not necessarily Australian-owned private companies. These companies are typically owned by families and, without the proposed exemption, the privacy of these families and in some cases their personal security may be jeopardised. Importantly, these companies already provide very detailed information to the ATO and, as clearly stated by the ATO, the proposed exemption would not inhibit its work.

2.60 The committee is satisfied the proposed amendments will alleviate the disproportionate costs of compliance and remove the opportunities for unnecessary reputational damage and commercial disadvantage for Australian-owned private companies. The proposed amendments will restore the long-held general principle of the fundamental rights of taxpayers' privacy, a right that extends to Australian-owned private companies.

Recommendation 1

2.61 The committee recommends that the Senate pass the bill.

Senator Sean Edwards

Chair

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74 Law Council of Australia, *Submission 6*, p. 4.