CPA Australia Ltd
ABN 64 008 392 452

Level 20, 28 Freshwater Place
Southbank VIC 3006 Australia

GPO Box 2820 Melbourne
VIC 3001 Australia

cpaaustralia.com.au

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Ann Palmer

Senate Finance and Public Administration Legislation Committee

Parliament House

Canberra ACT 2600

fpa.sen@aph.gov.au

Dear Ann

Public Governance, Performance and Accountability Amendment (Tax Transparency in Procurement and Grants) Bill 2019

CPA Australia represents the diverse interests of more than 164,000 members working in 150 countries and regions around the world. We make this submission on behalf of our members and in the broader public interest.

The *Public Governance, Performance and Accountability Amendment (Tax Transparency in Procurement and Grants) Bill 2019* (**the Bill**) which seeks to introduce tax haven disclosure requirements into government procurement and grants processes should be carefully considered to ensure that the benefit to government and the public outweighs the increased regulatory burden and potential conflict or overlap with existing reporting regimes.

The basis of the Bill is reflected in the final paragraph of the Explanatory Memorandum which states:

> *"Australian taxpayers have a right to know if any significant amount of taxpayer money is being given to entities with tax haven links. This law will achieve that objective, and the information that flows into the public domain will inform policy makers and public debate about further measures that may be required to strengthen Australia's efforts to reduce multinational taxation avoidance."*

It is recognised that Australia's tax laws are considered to be strong and our Government's commitment to the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS) ensures that our tax policy develops in alignment with fellow member countries. The BEPS policy agenda over the past decade has resulted in:

- application of certain tax measures to significant global entities (SGE) including the proposed extension of the SGE definition
- country-by-country reporting
- annual disclosure of corporate tax transparency
- corporate reporting under the Voluntary Tax Transparency Code
- the Reportable Tax Position Schedule for large business, and
- the multinational anti-avoidance laws and diverted profits tax.

Further, from 1 July 2019, the Commonwealth Government's Black Economy Procurement Connected Policy and Statement of Tax Record applies to contracts of $4 million or above. It should also be noted that many large suppliers to government are public companies and therefore already publicly disclose their financial information. Some also make separate disclosures of the taxes they pay.

As a result, the information sought to be legislated by the Bill is often already available to accountable authorities and the ATO is enabled through its information-gathering powers, including tax information exchange agreements with countries such as the Cayman Islands and Bermuda, and tax laws to ensure that the correct amount of tax is

paid. The greatest impact will be on suppliers that are not currently required to lodge financial statements under either the *Corporations Act 2001* or the significant global entities legislation.

Alternatives to the proposed legislated approach include:

- the development of a procurement connected policy that considers global corporate and tax structures without the need for new legislation, similar to the Black Economy Procurement Connected Policy.
- funding the ATO to specifically review the tax compliance of suppliers to government, both in terms of the specific tax structures associated with the contract or grant itself as well as the broader group.

If this Bill is to proceed, consideration should be given to a more centralised approach to tax haven disclosures given the complexities of multinational taxation and the challenges in assessing tax compliance. This may result in, for example, the establishment of a federal register managed by a lead agency with the capability to make objective assessments of tax compliance which can then be accessed by all accountable authorities. Alternatively, a product like the Statement of Tax Record could be developed which is then a single record that provides consistent information to all accountable authorities for their consideration. Such an approach mitigates the risks of poor or inconsistent decision-making by accountable authorities in relation to judgments of tax compliance by suppliers and ensures that suppliers are not overly burdened when applying for multiple contracts or grants across multiple authorities.

There should also be more detail provided on the prescription of countries, or parts of a country, as a tax haven. Australia's determinations should follow a transparent process that is consistent with existing approaches globally. The European Union process of determining its list of non-cooperative tax jurisdictions could be used as a template. However, we note that Australia is included on their list of potentially blacklisted countries, highlighting the challenges in establishing a fair and rigorous set of parameters to appropriately define and capture tax havens.

In conclusion, the Bill does not appear to enhance the information available to accountable authorities or the public, nor does the required information necessarily improve the decision-making process for government procurement. As such, it may not achieve the Bill's aims but instead burden accountable authorities, decision makers and the ATO for minimal to no public benefit. Further consultation should be undertaken to co-design a targeted and appropriate tax transparency process for possible inclusion into government procurement processes.

If you have any queries, please contact

Further comments are included in the Attachment.

Yours sincerely

Dr Gary Pflugrath CPA

Executive General Manager, Policy and Advocacy
CPA Australia

Attachment

Background

In 2018-19, 61 Commonwealth departments published 1412 notices of contracts worth $4 million or more, totalling almost $50 billion. Of these, 810 contracts with a total value of $37 billion were for the Department of Defence[1]. In that same period, 722 grants worth $4 million or more were awarded by 22 Commonwealth departments, totalling $11 billion[2], of which 383 grants with a total value of $5.1 billion were for the Department of Health.

Many of the larger contracts are awarded to multinational enterprises who often hold specific expertise or significant capital assets that are required to satisfy government procurement requirements. A cursory review of their consolidated financial statements shows subsidiaries and related entities in countries commonly considered to be tax havens. Many also have publicly reported or disclosed their Australian income tax liabilities.

For grants, many recipients are income tax exempt or non-profit entities including indigenous communities, religious groups and academic institutions. Financial information is available for larger organisations from the Australian Charities and Not-for-profit Commission and their tax compliance will tend to be related to indirect and withholding taxes rather than global income tax.

Definition of tax haven

There is currently no defined approach to defining a tax haven and the OECD states that "*no jurisdiction [of the 38 identified in 2000[3]] is currently listed as an unco-operative tax haven by the Committee on Fiscal Affairs"[4].* In 2017, the European Union identified 17 countries for failing to meet agreed tax good governance standards with a further 47 (including Australia) committing to addressing deficiencies in their tax systems to meet the required criteria[5].

The Minister and the ATO will need to develop a methodology to determine a tax haven for the purposes of subsection 49A(1). The approach should be designed with reference to existing approaches in other jurisdictions, recognition of the legitimate use of such vehicles in global commerce and be non-discriminatory in its application (e.g. territories of particular countries should not be subject to different rules than independent states). This process is likely to take more than the six months required in subsection 49A(3).

Administrative challenges

The Bill's provisions are quite general in nature and the accountable authority will require significant guidance and ongoing support from the Treasury and the ATO to ensure their decision to award contracts or grants duly consider the tax arrangements of the supplier's group.

Given the tax expertise required to assess the level of compliance and tax governance risk associated with cross-border taxation and global corporate structures, there is a risk that the accountable authorities may develop inconsistent and potentially subjective approaches to assessing the supplier and its associates' compliance with tax laws both in Australia and elsewhere.

The incorrect presumption that the existence of tax haven within a supplier's group structure is evidence of tax evasion may introduce cognitive bias into accountable authority decision making, while the ATO may not be able to provide full, detailed assessments due to privacy obligations or resourcing constraints.

Specific issues

The Bill raises the following specific issues:

1. Are the disclosures in consolidated financial statements of the global group sufficient for the purposes of subsection 49C(1)(a)?
2. Is a Statement of Tax Record from the supplier sufficient for the purposes of section 49C(1)(b)? Is a Statement of Tax Record required for all Australian associates of the supplier?
3. For overseas entities, does subsection 49C(1)(b) mean all associated entities of the associates or just those domiciled in tax havens?
4. What is required to satisfy subsection 49C(1)(b) in terms of '*have complied, or are complying, with any applicable laws in Australia or elsewhere that relate to tax'*?
5. How will the accountable authority be able to consistently interpret, and competently and objectively apply 49D(1)(b)?
6. How will the consultation with the Commissioner of Taxation as prescribed in 49D(3)(b) be governed to ensure impartiality and uphold taxpayer privacy?
7. What advice will the Commissioner of Taxation provide to the accountable authority and what rights of appeal will be available to the supplier?
8. What protections are available for information that is market or commercially sensitive, or is in relation to separate divisions or geographic operations?

Further considerations

It is likely that section 49E will result in the majority of contracts being reported as having been procured from tax haven suppliers given the concentrated nature of tenderers and the continued legal use of such jurisdictions by many multinationals. For the largest contracts and suppliers, this information can already be deduced from existing public sources. This may restrict the intended impact of the annual reporting in sections 49E and 49J.

Grant recipients are often charities, non-profits and deductible gift recipients who are regulated by the Australian Charities and Not-for-profits Commission which imposes registration, reporting and governance obligations including external conduct standards for operations outside Australia. These entities may have some or no income tax obligations, but they may form part of a global association (e.g. Catholic Church) and may have other tax obligations (e.g. GST, withholding). We suggest that the requirements for ACNC-regulated suppliers are tailored to align with their existing regulatory framework.

Similarly, where supplier information is publicly available through financial reports, voluntary reporting and other transparency initiatives, this legislation should not impose further regulatory burden without demonstrable net benefits for the public, including the efficiency of the government's procurement process. For smaller suppliers who may not be required to prepare financial statements or whose tax information is not publicly available, the Bill will also raise costs. It may be more efficient for the Government to work with the Department of Finance and the Treasury to develop a procurement connected policy specific to tax havens, rather than to enact through legislation.

Given most contracts are related to Australia's defence capabilities and most grants are for delivery of health services, we suggest that tax haven information will have limited effect on the decisions of accountable authorities. National security and public health interests, as well as the obligation of government to efficiently use taxpayer funds, mean that contracts and grants are likely to continue to be given to suppliers with the reputation, expertise and scale to deliver effectively. This means that the ATO's role in ensuring these suppliers are correctly complying with their Australian tax obligations becomes critical in achieving the Bill's aim to reduce multinational tax avoidance, to complement the existing publicly available information on contract and grant recipients.

Consideration should also be given to the application of tax haven disclosure requirements to sub-contractors, or at least first-tier subcontractors.

Finally, while tax haven transparency is an important aspect of multinational tax compliance, suppliers or grant recipients are subject to a range of public expectations in relation to tax, worker rights, environment, sustainability and ethics. It is arguable that the government procurement policy should be designed to ensure compliance with a broader range of social and economic values, rather than a narrow focus on tax havens. Tax compliance should be considered on an equitable basis – that is, compliance with international and domestic taxation obligations should be the requisite standard to receive a contract or grant, rather than a narrow focus on disclosure of associates in tax havens.

Case study: BUPA – Department of Defence contract

- In 2018-19, BUPA Health Services Pty Ltd was awarded a $3.4 billion contract by the Department of Defence to provide comprehensive health services to the department[6].
- The BUPA ANZ Group Pty Ltd – one of its many Australian-based related undertakings – reported total income of $8.0 billion, taxable income of $582 million and tax payable of $173 million in 2017-18[7]. Global consolidated revenues were £11.9 billion in 2018[8].
- While the Government's Black Economy Procurement Policy was not in effect at the time of the tender, it is reasonable to assume that the tendering entity would have been able to receive a satisfactory Statement of Tax Record given the policy requirements.
- The 2018 Annual Report for the global Bupa group disclosed[9]:

  "An in-principle agreement has been reached with the Australian Taxation Office (ATO) to settle a number of disputed matters. Under the settlement, Bupa will pay a total of approximately £88m to the ATO, reflecting taxes, interest, penalties and an offset for overpaid withholding tax, for the 2007 to 2018 years."
- The 2018 Annual Report also discloses related undertakings as defined in Section 409 of the *Companies Act 2006* (United Kingdom) including entities in Bermuda, British Virgin Islands, Gibraltar, Guernsey, Jersey, Macau, Panama, Saint Kitts and Nevis, Bahrain and the United Arab Emirates[10].
- Bupa also publishes its approach to tax as required by Schedule 19 of the *Finance Act 2016* (United Kingdom)[11].

For a large multinational supplier such as Bupa, the information disclosures proposed in the Bill are already publicly available to the accountable authority. Almost 40 per cent of Bupa's global income is generated in Australia and New Zealand, reflecting significant economic presence and an investment in the Australian market. The corporate structure reflected in the consolidated accounts is not dissimilar to other similar businesses and the information on the in-principle agreement indicates that Bupa is working with the ATO to comply with Australian tax laws.

However, a procurement officer with limited or no expertise in cross-border taxation may face challenges in determining the level of tax compliance. If the Bill proceeds, the procurement officer would receive a statement from Bupa stating:

- Yes, multiple associates are domiciled in tax havens per subsection 49C(1)(a)
- Yes, supplier and its associates are in compliance with applicable tax laws in Australia and elsewhere per subsection 49C(1)(b)
    - In-principle agreement with ATO reached on audit issues spanning 11 years and not considered to have a significant adverse impact on the financial condition of the Group
    - Statement of supplier provided.

The ATO would not be able to provide any further detail about the tax affairs of the Australian Bupa group due to privacy laws, and the accountable authority holds insufficient evidence for its officers, even if supported by general advice from the ATO, to assess tax compliance for the supplier and its associates.

If the accountable authority decides that no suppliers can have tax haven links, the risk exists that the contract is awarded to a less experienced and more expensive supplier. In an extreme situation, there may be no other suitable supplier without associates in tax havens. This raises other public accountability issues and may, in fact, lead to poorer health outcomes for Department of Defence healthcare recipients.

Alternatively, if the Department of Defence awards the contract, the information published under section 49E will show 42 per cent of the department's contract budget is accounted for by this tax haven supplier. This will be close to 100 per cent once the Department's other largest contracts are included (Rheinmetall Defence Australia Pty Ltd, ASC Shipbuilding Pty Ltd, Boeing Defence Australia Ltd).

Using the Bupa contract as a case study, the Bill in its current form does not appear to enhance the information available to accountable authorities or the public, nor does the required information necessarily improve the decision-making process. As such, it may not achieve the Bill's aims but instead burden accountable authorities, decision makers and the ATO for minimal to no public benefit. Further consideration should be given to the intended objects of the Bill and consultation should be undertaken with relevant parties to co-design a targeted and appropriate tax transparency process for government procurement.

ENDNOTES

[1] AusTender, Contract Notice and Amendments Published, Australian Government, downloaded 3 January 2020
Four other agencies published contracts worth $4 million or more totalling more than $1 billion: Department of Human Services (93 contracts totalling $2.5 billion); Australian Taxation Office (53 contracts totalling $1.7 billion); Department of Home Affairs (83 contracts totalling $1.7 billion); Department of Health (43 contracts totalling $1.2 billion).
[2] GrantConnect, Grant Award Published, Australian Government, downloaded 3 January 2020
Two other agencies awarded grants worth $4 million or more totalling more than $1 billion: Department of Infrastructure, Transport, Cities and Regional Development (79 grants totalling $1.1 billion); National Disability Insurance Agency (36 grants totalling $1.1 billion).
[3] OECD, Jurisdictions committed to improving transparency and establishing effective exchange of information in tax matters, viewed 6 January 2020
[4] OECD, List of uncooperative tax havens, viewed 6 January 2020
[5] European Commission, Fair Taxation: EU publishes list of non-cooperative tax jurisdictions, 5 December 2017, viewed 6 January 2020
[6] AusTender, Contract Notice and Amendments Published, Australian Government, downloaded 3 January 2020
[7] 2017-18 Report of Entity Tax Information, data.gov.au, downloaded 3 January 2019
[8] Global consolidated revenues were £11.9 billion in 2018. Source: Bupa Annual Report 2018
[9] P.147, (iii) Contingent assets and contingent liabilities, *Note 26: Commitments and contingencies*, Bupa Annual Report 2018, Bupa
[10] Pp. 160-166, Related undertakings, Bupa Annual Report 2018, Bupa
[11] Bupa's Approach to Tax, December 2019, downloaded 3 January 2020