The road ahead

The tax landscape of 2017 and beyond

February 2017

In recent years we have seen irreversible changes in the international tax landscape, which have set the scene for 2017 to be yet another landmark year from a global and Australian tax perspective.

What are the major themes that will influence Australian tax developments in 2017?

- A reinvented Australian Taxation Office (ATO) taking a harder line on aggressive tax positions, bolstered by high success rates in the Courts, a new philosophy of engagement with taxpayers, and the increased use of data and technology to combat tax avoidance.
- The OECD is moving into new territory with a focus on how tax can contribute to inclusive growth, and how to improve tax certainty. It has released the historic Multilateral Convention, and is revisiting aspects of the digital economy.
- Ongoing Australian implementation of the OECD base erosion and profit shifting (BEPS) recommendations. 2016 saw the commencement of the Multinational Anti-Avoidance Law (MAAL), announcement of a domestic diverted profits tax (DPT), consultation on the implementation of anti-hybrid rules, and a new BEPS compliant tax treaty with Germany entering into force. The local implementation of BEPS will continue apace in 2017.
- Complex tax transparency layers that keep on building. The 2016 Panama Papers and intense public interest mean that tax issues are a risk, brand and reputational issue for corporates.
- The return of the Senate Inquiry into corporate tax avoidance in 2017 potentially encompassing a review of the Petroleum Resource Rent Tax (PRRT).
- A pressing need for meaningful tax reform from a government under significant economic pressure amid an uncertain global outlook. Prospects look increasingly remote with a significant lack of bipartisanship and never-ending political negotiations (backpacker tax anyone?).

These themes, combined with a changing world of technology and data analytics, are creating sweeping transformational change to the tax system – a brave new world for taxpayers, tax advisers and tax authorities.

These changes are indisputably here to stay, given heightened public awareness assisted by ongoing media coverage, leaked data, and input from social justice groups.

It’s time to consider the detail of how these issues will influence tax policy in 2017 and beyond.

Tax issues are a risk, brand and reputational issue for corporates

Domestically: the ATO taking the high road

Recent years have seen dramatic changes at the ATO, both technological and philosophical, which have in turn shaped the modern tax landscape of Australia.

The reinvention of the ATO advanced considerably during 2016 with their blueprint for change being progressively delivered. This need for transformation is being driven by both a changing technological environment and expectations of the Australian community.

The ATO has devoted efforts to building community confidence in the tax system and the ATO's regulation of it. For example, in publishing the annual tax information about Australia's larger corporates, extensive explanatory commentary was prepared to address potential misperceptions. The 2016 speech from the Commissioner also emphasised their compliance efforts and oversight of multinationals.

Notable other milestones in the path of transformation include:

- Continuing success in the Courts, with 2016 seeing wins against corporates in the Cable & Wireless, Tech Mahindra, ElecNet and Hua Wang cases following on the heels of the 2015 wins against Orica and Chevron. The Chevron appeal is due to be heard in early 2017 and will be highly anticipated in Australia and beyond. There were also other substantial wins against individual taxpayers in the Binetter, Blank and Rowntree cases. It is possible such recent success derives from hard calls made by the Commissioner to settle cases with less prospect of success in the Courts, given the risks and costs of litigating.
- A continuing transformation in engaging with taxpayers. "Project Refresh" will modernise the existing stock of public rulings. Going forward, it seems that traditional guidance will be usurped by taxpayer alerts and practical guidelines on how to 'swim between the flags'.
- An ongoing digital transformation in engaging with taxpayers and stakeholders. The ATO continues to actively embrace social media and 2016 saw the first consultations take place by way of an online discussion board.
- Leading the efforts of global regulators to share data and intelligence, particularly in respect of the Panama Papers. The early 2017 meeting of regulators sharing intelligence about Panama Papers advisers and facilitators marks the beginning of regulators sketching an unprecedented global picture of multinationals.
- A growing capability to better analyse the sophisticated domestic and international intelligence obtained to target compliance and identify risks. 2016 heralded a new era of data analytics in matching exercises relating to lifestyle assets (boats, planes, racehorses), motor vehicle registrations, private school fees and electoral roll information. Along with the obvious compliance results, these efforts again aim to reassure the public that the tax system is being well monitored and enforced.

Leading the efforts of global regulators to share data and intelligence

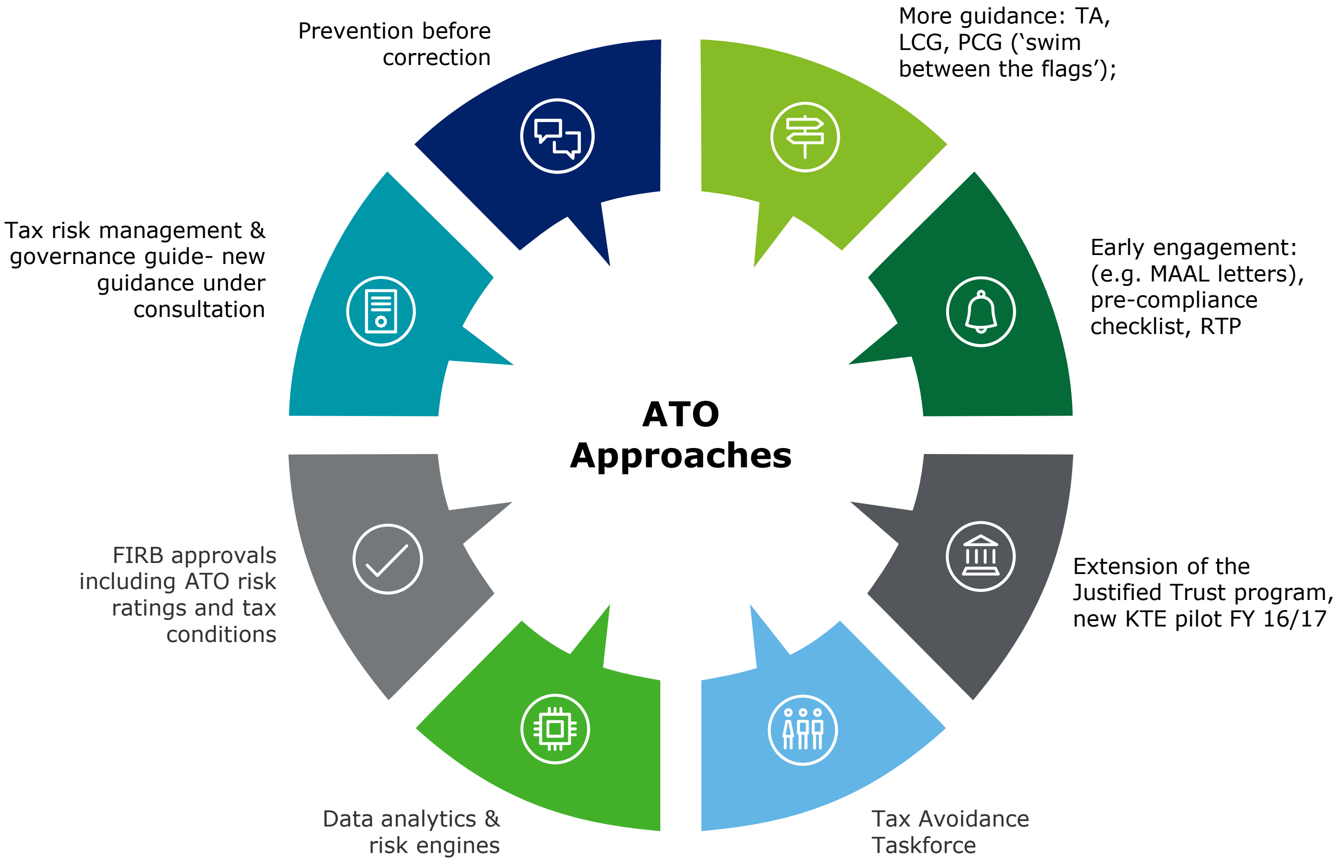
- Creating a new Tax Avoidance Taskforce to undertake enhanced compliance activities. Being specifically tasked to regularly report back to the community about their actions and results also aims to add another layer of community confidence in the system.
- Positioning itself to use improved analytics, and digital and electronic data, to assist the newly formed 'Black economy taskforce' and to extend the annual 'tax gap' analysis to the large corporate market.
- Expanding the scope of the Reportable Tax Position (RTP) schedule in 2017 to the next "1,000 largest public businesses" will provide the ATO with more real time data on issues of concern.
- Assembling the following interconnected large business programs, all intended to achieve 'justified trust' and build community confidence:

Objectives	Who	When
Justified trust program		
Better ATO understanding of tax governance and effective tax borne (ETB) of taxpayers – ATO seeking information	40 public groups of varying size	Late 2016
	100 mostly higher consequence taxpayers	First half of 2017
'Next 1,000' program		
Next phase of justified trust – providing evidence that the top 1,000 are paying right amount of tax	Top 1,000 multinationals and public companies	2016-2020
Corporate tax governance program		
Seeking evidence that corporate tax governance systems of public business are operating effectively (based on new ATO materials issued in January 2017)	40,000 public businesses	2016-2020
Reportable Tax Positions (RTP) extension program		
Formalising RTP as an ongoing assurance product – part of justified trust initiative (disclosure of most contestable and material tax positions)	Higher consequence taxpayers not in income tax ACAs	July 2016 onwards
	Next 1,000 largest public businesses	July 2017 onwards
Key Taxpayer Engagement (KTE) program		
Single, continuous, whole of tax engagement approach – platform for initiatives above	130 largest public groups	Gradual deployment 2016-17

Comments in 2013 from the then-new Commissioner focused on the reinvention of the ATO, with attention on community engagement and improvements in dispute resolution. Subsequent developments and community pressure mean that the focus has swung towards an increased resolve to scrutinise the tax affairs of multinationals, with the additional resources of the Tax Avoidance Taskforce.

The ATO is arguably now seen as one of the most sophisticated and robust tax administrations in the world. The resulting rapid change of tax administration philosophy and service delivery in Australia has been facilitated by the ATO's concentrated focus on data analytics, digital and technology.

2017 and beyond will only see further developments.



BEPS: Australia still in 'pole position'

Back in late 2015, the Treasurer observed that Australia has long been "ahead of the curve" in its commitment to taxing multinationals. 2016 saw Australia continuing to stay in pole position when it comes to implementing the BEPS recommendations. Alongside us at the starting line is the UK – also a first wave BEPS implementer – but doing so whilst also looking to reduce the corporate tax rate to sub-20% and demonstrating that it is still "open for business".

The government intends to give early effect to the 2015 OECD transfer pricing recommendations (Actions 8-10), and during 2017, GST will start to be imposed on the offshore supply of intangible products to Australian consumers (Action 1). Australia is in the first wave of adopters of country-by-country (CbC) reporting (Action 13).

2017 will also see final consultation on anti-hybrid rules (Action 2) and Australia's deliberations on the OECD multilateral convention (Action 15). Initial indications from the government is that Australia will adopt almost all of the measures in the multilateral convention. This can be contrasted with the likely UK approach of adopting a much more limited number of measures. Australia will also likely incorporate all OECD treaty-related recommendations into future bilateral negotiations.

In addition Australia has adopted a number of significant unilateral measures, which go beyond the BEPS measures. The MAAL has allowed the ATO since the start of 2016 to proactively tackle the so-called artificial avoidance of Australian permanent establishments. Reinforcing this focus on multinational companies, 2017 will see the passage of the DPT.

No changes are expected to Australia's current CFC regime (Action 3) and thin capitalisation rules (Action 4) which are seen to already meet or exceed minimum BEPS standards.

The BEPS journey for Australia is already well underway. The recurring themes of targeting multinational tax avoidance and tougher penalties will continue well into the future. Increased community expectations and political pressures will necessitate that both the Government and regulators persist in taking a hard line in dealing with tax avoidance.

The challenge for the government, and for the country, will be to get a better balance between "tough on multinationals" and at the same time, achieving "jobs and growth".

The BEPS journey for Australia is already well underway

Tax transparency rolls on

The public and political pressure on large companies to disclose and report their tax performance and tax governance information grew in 2016 and will continue into 2017.

The resulting interwoven layers of domestic and international transparency requirements are complex. By the close of 2016, a mixture of mandatory and voluntary reporting requirements already had far reaching tentacles:

- December 2016 saw the second annual publication of Australian large corporates' gross income, taxable income and tax paid, albeit seeming to attract less notoriety than the inaugural publication a year earlier.
- 2016 also witnessed the start of a voluntary tax transparency code (TTC) applying to businesses with $100m+ turnovers. Most of the major taxpayers have indicated that they will adopt the code. Nonetheless, the Senate inquiry into corporate tax avoidance has been critical of a voluntary code, and has recommended a mandatory one in its place.
- CbC reporting is now in place with SGEs required to collect and share information with the ATO about their global tax affairs and supply chains from 1 January 2016 – new fodder for the data analytics teams at the ATO and other tax authorities.
- Uncertainties around the tax expansion of the general purpose financial reporting regime from 1 July 2016 abounded, with final guidance expected in early 2017.
- Measures are now in place for Australia to exchange foreign resident financial account information with other regulators, with the first exchange of information anticipated to occur in 2018.
- The FATCA exchange of information with the US is already underway.

Increased transparency is a permanent feature of the tax landscape. Yet more developments will be in the spotlight for 2017:

- Australia will adopt some of the recommendations of BEPS Action 12 which will likely result in a form of tax agent mandatory disclosure of defined aggressive tax arrangements. Early discussion papers indicate that the ATO would have broad discretion in setting which tax arrangements should be disclosed, and will likely model the scheme on taxpayer arrangements similar to those issues identified in the current Taxpayer Alerts program
- The extension of the ATO Reportable Taxpayer Position schedule to more taxpayers and incorporating more tax arrangements will see an increase in transparency between large taxpayers and the ATO.
- 2017 will bring the success, or failure, of the voluntary tax transparency code, Although some companies are meeting or exceeding community expectations, the code must be widely adopted to work, or will likely be made mandatory.
- The benefits of whistleblowing were brought sharply into focus across the world by Lux Leaks and the Panama Papers. 2017 will also see consultation on the development of new arrangements in Australia to protect whistle-blowers disclosing tax avoidance information to the ATO.
- The annual tax information published by the ATO may prove to be only the start. There has been speculation that either the disclosure thresholds or the amount of information released in the ATO annual tax information report could be revisited in the future. The 2016 Review of the R&D tax incentive also urged further public disclosures on the extent of R&D claims.

2017 will bring the success, or failure, of the voluntary tax transparency code

The never-ending Senate story

Seven public hearings. One interim Report. A so-called Final Report extending the inquiry following the release of the Panama Papers. Two years and counting. And the Senate Economics Reference Committee Inquiry into corporate tax avoidance continues.

The early days of the inquiry saw intense media coverage and taught both the politicians and the public much about the shortcomings of the global tax rules.

Household name businesses were exposed to public scrutiny as never before, with the ATO unprecedentedly moving to correct the public record.

The OECD, Treasury and the ATO had already been taking actions on many of these fronts, but the inquiry heaped further pressure on both the ATO and the government.

The timing of the Panama Papers leak coinciding with the delivery of the final report meant that public and political interest has not yet waned. Post-election, the inquiry was quickly re-adopted and 2017 is expected to see the public hearings swing back into action.

In many ways the Senate inquiry has already had a significant impact with legislative developments having already picked up on a number of the recommendations made by the Committee.

Since the start of the inquiry, we have witnessed new transparency initiatives, the introduction of the MAAL, the DPT and many BEPS related measures.

It is to be hoped that the Committee will recognise the substantial developments that have occurred, rather than dwell on issues that have already been tackled effectively.

Intense political and public interest will ensure that the Senate Inquiry will continue to attract headlines in 2017.

The Senate Inquiry will continue to attract headlines in 2017

The road to tax reform is paved with good intentions

Tax reform. A term worn out with usage. Fatigue kicked in early in 2016 with the process effectively put to bed with the May 2016 Federal Budget.

After early optimistic consensus turned into ever-changing debates, U-turns and political wrangling, it transpired that significant tax reform was too difficult.

Using a broad definition of tax reform, the May 2016 Federal Budget proposed three measures: corporate tax cuts, minimalistic response to bracket creep and limiting some of the concessional treatment of superannuation.

The superannuation reforms attracted much political heat and noise, including some "friendly fire" for the government.

And what of the decade-long plan to reduce the corporate tax rate? Well, after almost a year, the government has yet to submit the legislation to the cauldron of political debate, and there is little prospect of the government being able to legislate its plans in full.

Tax reform is not a debate that Australia can afford to put off. A comprehensive approach to getting the tax mix and tax policy settings right is essential.

However unless 2017 sees an increase in political bipartisanship, it seems likely that our main political parties will continue to kick any bold tax reform platforms down the road.

Tax reform is not a debate that Australia can afford to put off

A fork in the road for SGEs

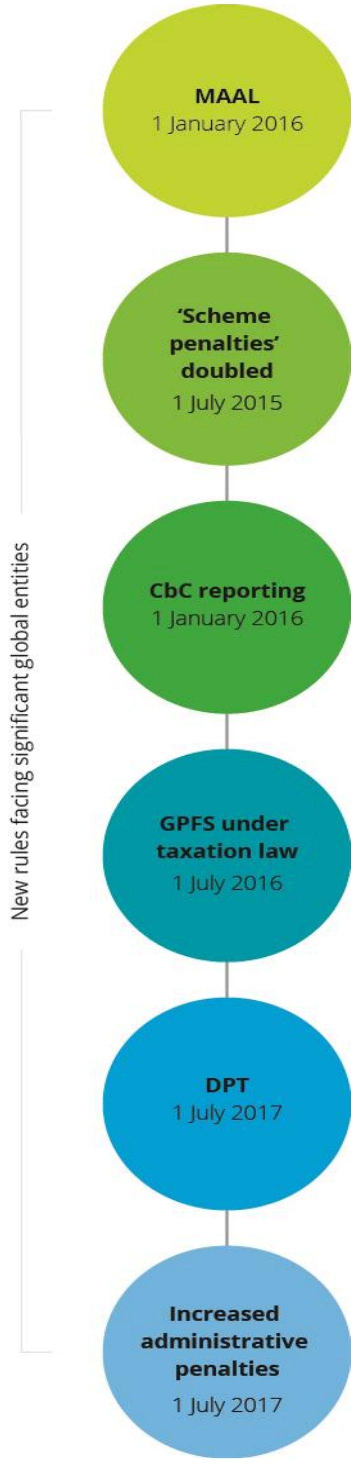
Only a year on from the creation of the term "significant global entity" (SGE) it is timely to summarise how these groups have become increasingly affected by a wide range of tax measures.

A SGE is broadly an entity that is part of a group with an annual global income of AUD 1 billion or more.

SGEs now all need to assess the impacts and scope of the following measures:

- The MAAL, which has applied from 1 January 2016, targeting multinational entities that seek to avoid having a taxable presence in Australia
- The doubling of penalties from 1 July 2015 in respect of tax avoidance schemes and profit shifting activities where there is no "reasonably arguable position"
- CbC reporting from 1 January 2016
- The need to lodge general purposes financial statements with the ATO if not already required with Australian Securities and Investments Commission (ASIC); applicable from 1 July 2016
- The proposed DPT which from 1 July 2017 will target tax benefits in connection with schemes involving foreign associates and the diversion of profits to medium-to-low tax countries
- Significantly increased administrative penalties where tax documents are lodged late, or false or misleading statements are made, from 1 July 2017.

All in all, a lengthy, complex (and no doubt, expanding) list for SGEs to contend with.



How else will the rubber hit the road in 2017?

Parliament will reconvene in February 2017 with little of new substance on the tax reform agenda. Rather, the political effort will be expended on seeking to deliver previously announced proposals.

The ongoing political negotiations on cuts to the corporate tax rate are likely to play out in a diverse Senate and with the prospect of reduced US rates.

The government's response to the R&D recommendations is also expected in early 2017, part of the second wave of the Prime Minister's National Innovation & Science Agenda (NISA).

This response will be closely watched given that in late 2016, at least one large and successful Australian company publically acknowledged the possibility of relocating its R&D programs overseas due to some of the proposed measures. Such an outcome would result in economic losses that could well exceed any of the short-term cost savings measures proposed.

As well as the ongoing consultations on the DPT, anti-hybrid rules and OECD multilateral instrument, a number of other House or Representatives and Senate tax related inquiries are in progress which are due to report back in early to mid-2017, on topics of the black economy, whistle-blowers, the PRRT system and the scope of tax deductions.

May 2017 will also see the handing down of the second Federal Budget under Treasurer Morrison, the first since the 2016 federal election result, and a difficult task in the current political and economic environment.

Overall, the list of 'announced but unenacted measures' has been diminishing in recent years from the 92 outstanding in late 2013. However it is starting to edge upwards again, and could blow out further if 2017 sees more announcements and slow Parliamentary progress.

Finally it is also understood that a number of cross-border tax issues are priority targets for the ATO in 2017, including the selective use of tax valuations, supply chains and offshore hubs, inappropriately wide R&D tax claims, and shareholder debt.

Undoubtedly, further developments in data analytics and risk profiling will continue to play a significant part in tax compliance in 2017 and beyond.

Data analytics and risk profiling will continue to play a significant part in tax compliance

2016 – A year in tax

- "There is a new divide: the taxed, and the taxed-not"
- "The budgets we hand down wash their face"
- "These are the most exciting times to be alive"
- "Investing in the ideas boom"
- "Enough is enough"

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