



Tax Insights

Your tax affairs in the public spotlight

Snapshot

On 22 August 2017, the Senate Economics References Committee (the Committee) held a public meeting in Sydney to continue their long-running inquiry into multinational corporate tax avoidance (the Inquiry).

One of the principal purposes of the public hearing was to ascertain the impact of the Multinational Anti-Avoidance Law (MAAL) and Diverted Profits Tax (DPT) on the tax behaviours of 'significant global entities' (SGEs).

The Committee heard from representatives of Apple, Google, Facebook, Microsoft and IBM, together with the Uniting Church, the Australian Accounting Standards Board (AASB) and lastly, from representatives of the Australian Taxation Office (ATO).

The Inquiry's final report is due by 30 September 2017.

"We've had a clear strategy on both the MAAL and general transfer pricing arrangements, which is that you don't get a clearance on the future until you clean up the past."

Mark Konza, 22 August 2017

Background

Broadly, in the latest public hearing of the Inquiry, the Senators appeared to be pursuing four specific lines of inquiry:

- Seeking views as to whether more work needs to be done in Australia in respect of anti-avoidance and transparency measures.
- Seeking views from the major technology companies as to how the changes in law, specifically the MAAL, DPT and GST changes, have impacted upon their operational structures and tax paid in Australia.
- Asking whether companies had signed up to the Australian government endorsed tax transparency code and for views on linking government procurement practices to transparency.
- Following up on work to establish who should prepare and lodge general purpose financial statements (GPFS).

The developments to date are not 'white noise' – the Australian taxation authorities mean business and will seek to put the additional funding and weighty legislative tools now at their disposal to good use – regardless of how small the Australian operations are within an international supply chain context.

Foreign multinationals should remain in no doubt that the response of Australia's taxing authorities may well be different to responses of other tax authorities. In particular, cross-border finance and offshore hubs are firmly in the ATO's sights.

The legislative journey

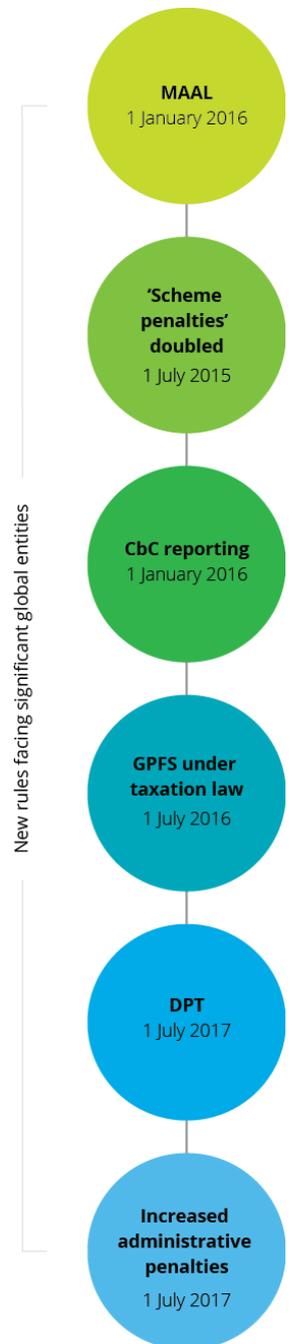
SGEs now face a vastly different tax landscape in Australia since the Inquiry commenced. This includes Country-by-Country (CbC) reporting, OECD transfer pricing guidelines, adoption of the multilateral instrument, the imposition of GST on offshore supplies of intangible products, increased penalties and requirements to lodge GPFS with the Commissioner of Taxation (the Commissioner).

The most significant legislative measures include:

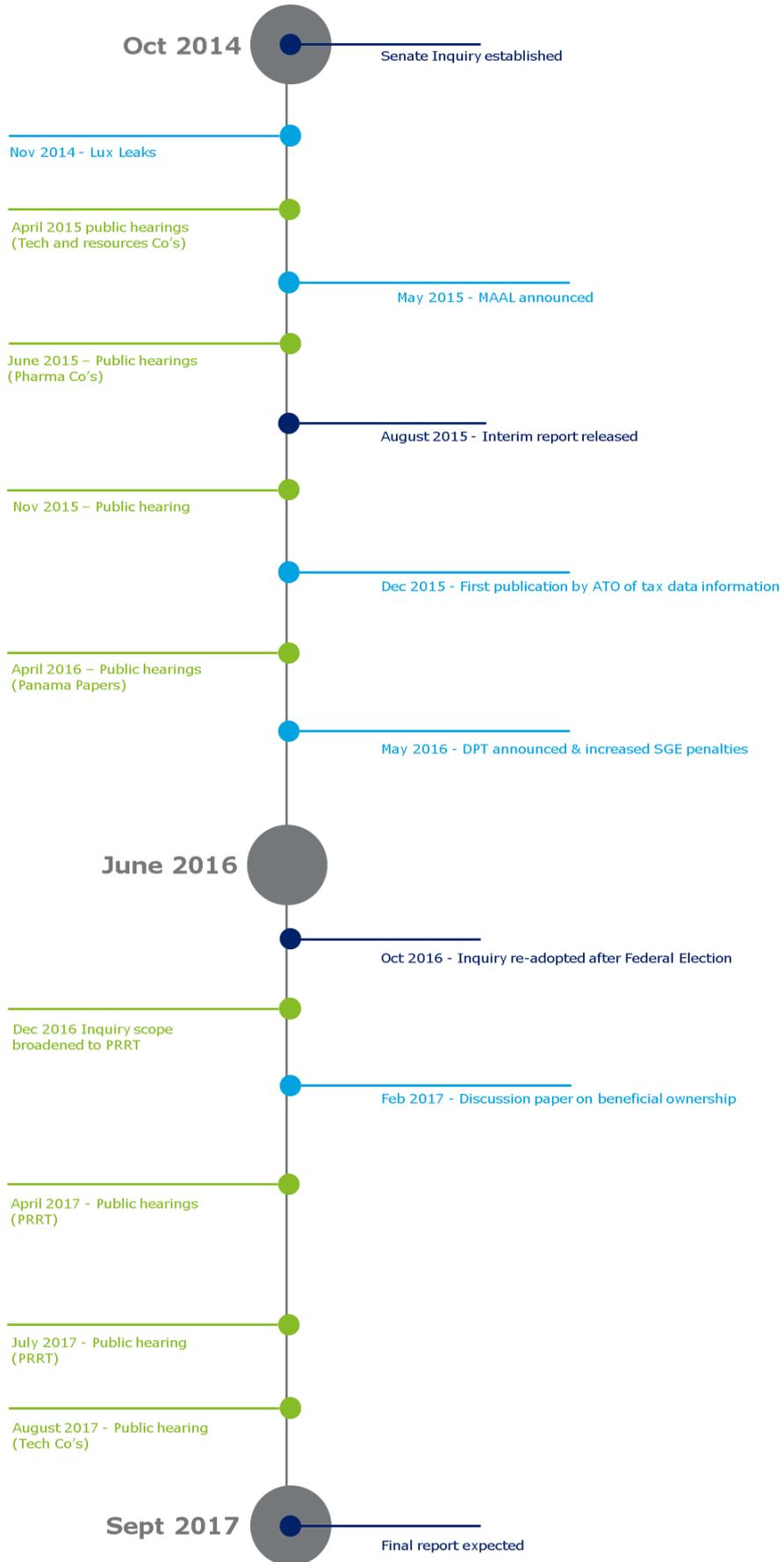
- The MAAL, which has allowed the ATO to proactively tackle the so-called artificial avoidance of Australian permanent establishments since the start of 2016; and
- The DPT, which now allows the ATO to target tax benefits in connection with schemes involving foreign associates and the diversion of profits to medium-to-low tax countries after 1 July 2017.

Further developments are also expected on the following:

- Draft anti-hybrid rules which are expected to be released later this year (BEPS Action 2)
- The development of a beneficial ownership register for companies is in progress
- Consideration is being given to a mandatory reporting regime in respect of aggressive tax arrangements
- Measures to target the black economy are being developed by the Black Economy Taskforce
- Guidance on the GPFS measure, now expected for some time



The journey to here – a timeline:



The ATO response

Over the course of the Inquiry, the increasingly reinvented ATO has been taking a harder line on aggressive tax positions and “correcting the record”. The ATO has been bolstered by new legislation, increased funding, 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.

A significant part of the new ATO approach is to shore up general community trust and engagement in the tax system via the justified trust program. Justified trust is a concept from the OECD and involves the tax regulator seeking objective evidence that would lead a reasonable person to conclude a particular taxpayer has paid the right amount of tax.

As such, large taxpayers are now being asked to proactively engage with the ATO and show evidence of their structures, pricing regimes, profits earned in Australia and compliance with Australia's tax laws. A failure to fully engage or provide an appropriate level of transparency will typically result in some level of deeper ATO intervention in the taxpayer's affairs.

The Commissioner, Chris Jordan, when asked whether the current government needs to do more to collect the right amount of taxes from multinationals, commented:

"I think we've got it about right. We've got the MAAL, we've got the DPT, we've got the expanded transfer pricing – which hasn't been fully tested yet—and we've got a stronger Part IVA, which hasn't been fully tested."

It may be that this signals the end of further substantial legislative changes – at least under the current government. But it is also clear that the ATO will make strong use of the tools now at their disposal – the ATO evidence suggests that a high number of taxpayers have changed the structure of their operations due to the MAAL, and it is also evident that the ATO is as yet, still on the starting blocks in respect of applying the DPT.

The Commissioner confirmed that the ATO Tax Avoidance Taskforce is now fully formed with more than 1,000 officers. The Taskforce was established in 2016 with funding of AUD 679 million over four years, and in 2017 it was estimated that it will collect AUD 2.9 billion. The ATO confirmed in the hearing that to date in the e-commerce area, over AUD 1 billion of assessments have been issued with AUD 800 million already collected.

Critically the ATO considers that the big success of its work to date has been the ability to lock in future arrangements with multinationals to safeguard future tax collections such as revised operating structures and transfer pricing.

ATO engagement with taxpayers on the MAAL is reported to have resulted in at least 32 groups seeking to restructure their operations, with a further 75 companies still under audit.

The ATO anticipates that additional sales returned in Australia as a result of the MAAL will amount to over AUD 7 billion each year.

The recent Chevron litigation and settlement on transfer pricing dealing with related party loans is, according to the Commissioner, "one of the most important decisions ever in corporate tax in Australia".

The decision will have significant continuing implications for cross-border financing arrangements involving Australia, with the ATO already pursuing a number of cases in relation to related party loans. The ATO estimates that the decision will bring in more than AUD 10 billion dollars of additional revenue over the next ten years in relation to the transfer pricing of related party financing alone.

Engaging with the ATO in the future

Extension of Reportable Tax Position scheme

The Reportable Tax Position (RTP) schedule will be rolled out to more than 1,000 taxpayers with revenues over AUD 250 million, as part of the company income tax return for the 2017-18 income year onwards.

The existing RTP schedule has been expanded significantly, and now includes a section for issues of specific ATO concern such as transactions covered by any Practical Compliance Guidelines (PCGs) and Taxpayer Alerts.

The aims of the RTP schedule are to ensure that the tax positions undertaken by a company are communicated to the wider executive team and the Board, and to allow the ATO to target and engage with those companies with riskier tax profiles.

Advance Pricing Arrangements

The ATO has said that it remains committed to Advance Pricing Arrangements (APAs). However multinationals seeking to enter into or renew an APA will find APAs to be a much more intensive process and will be required to disclose much more of their global dealings before the ATO will consider granting an APA.

The Commissioner considers the granting of an APA to be a privilege, rather than a right, and taxpayers will be expected to put substantially more work into proving their bona fides to be granted this form of certainty in the future.

Global Assurance Program ahead

October 2017 will see the commencement of a pilot program for a new multilateral risk assessment process, the OECD International Compliance Assurance Program (ICAP). The global tax administrations that are participating in the pilot are currently determining the multinationals that that will be invited to participate.

Whilst effectively an audit program, the ATO considers that multinationals can benefit from having a single tax administrative point of contact which will co-ordinate communication and risk assessment activities across multiple jurisdictions. Multinationals can also benefit by obtaining assurance on international tax matters in a speedier and more efficient manner than could be achieved unilaterally in each jurisdiction.

ATO 'hot' topics

The ATO key areas of focus include cross-border shareholder debt, outbound supply chains, inbound supply chains and domestic fragmentation (splitting trading income into active and passive income).

- January 2017 saw the release of a final PCG documenting the ATO's proposed compliance approach to transfer pricing issues relating to 'offshore hubs' used by Australian resident multinational enterprises.

"We are very committed to the APA program as being the most cost-effective way to ensure taxpayers are compliant with the law..... a number of taxpayers are reporting that when they went to get their APA renewed, what they got instead was an audit. That has been quite a widespread experience amongst taxpayers, but it's a short-term process to get everyone recalibrated to the right position, get the past sorted out. We anticipate that APAs will be a very significant part of the future."

Mark Konza, 22 August 2017

- The ATO has released a draft PCG on cross-border related party debt under which businesses can self-assess their risk profile against pre-determined ATO criteria. A matrix can be used to determine the likelihood of an ATO review based on the system which allocates points to particular features of the arrangements.

The final version of the PCG is expected to be released soon. Additional schedules will follow addressing other aspects of cross-border loans.

Accounting recognition of uncertain tax positions

The treatment of uncertain and disputed tax positions in financial reports has also recently become a focus area for the Australian Securities and Investments Commission (ASIC), including whether there is a need to recognise a tax liability or disclose a contingent liability. The ATO has also been pushing for more consistency in the threshold for disclosures of uncertain and disputed tax positions under continuous disclosure obligations.

New guidance from the IFRS Interpretations Committee (IFRIC) was released in June 2017 which could result in more tax liabilities being recognised in financial statements. Whilst the guidance is not effective until 1 January 2019, the AASB has recommended that all companies should reassess whether to record a tax liability in earlier reporting.

The ATO also considers that in applying the new rules, companies should have regard to ATO public guidance as to what is likely to be disputed, as well as to the ATO's success in disputed matters in determining the likely resolution when there is a dispute.

Conclusions

Undoubtedly, since the inception of this long-running Inquiry in 2014, Australia's tax landscape has changed – permanently.

The significant developments in tax transparency and tax avoidance measures have been the product of both the international OECD BEPS Actions, and the increasing domestic media and political attention paid to multinational tax affairs over recent years.

The recurring themes of multinational tax avoidance, transparency and tougher penalties are expected to continue well into the future. Increased community expectations and political pressures will require that both the Government and regulators persist in taking a hard line in dealing with the tax affairs of multinationals.

The ATO says that as a consequence of the release of the draft PCG, it has been working with companies to move cross-border financing into the low risk "green zone".

Cross border loans amount to approx. AUD 420 billion.

The ATO has reviewed 10 per cent (AUD 42 billion) as being low risk, and has another 25 per cent (AUD 105 billion) currently under review. The remaining 65 per cent is yet to be examined.

Contacts



Brett Greig

Partner
Tel: +61 3 9671 7097
bgreig@deloitte.com.au



David Watkins

Partner
Tel: +61 2 9322 7251
dwatkins@deloitte.com.au



Greg Janes

Partner
Tel: +61 3 9671 7508
grjanes@deloitte.com.au



Mark Hadassin

Partner
Tel: +61 2 9322 5807
mhadassin@deloitte.com.au



Jonathan Schneider

Partner
Tel: +61 8 9365 7315
joschneider@deloitte.com.au



Megan Field

Partner
Tel: +61 8 8407 7109
mfield@deloitte.com.au



Jacques Van Rhyn

Partner
Tel: +61 7 3308 7226
jvanrhyn@deloitte.com.au



Kamlee Coorey

Partner
Tel: +61 2 9840 7030
kcoorey@deloitte.com.au

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