

Coalition Senators' Dissenting Report

1.1 Coalition Senators do not support the Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No.1) 2012 in its current form. Of primary concern to the Coalition is the proposed retrospective implementation of this bill. The Coalition is generally opposed to retrospective tax changes, particularly in instances such as this, where a retrospective implementation will impose a significant and detrimental tax change upon taxpayers. This bill is yet another poorly drafted piece of legislation from a Government that often attempts to shift the goal posts by introducing retrospective legislation into the Parliament.

1.2 Throughout this inquiry process the Senate Economics Legislation Committee heard from a number of stakeholders who all raised valid concerns in relation to the unjust implications this bill will impose on them, primarily as a result of its retrospective implementation. Many stakeholders are concerned with the issues they may encounter when applying this bill retrospectively including the burden of proof for assessments, time limits for adjustments and difficulties in applying multiple transfer pricing rules. However, submitters to the inquiry also raised concerns in relation to the effect this bill will have on our relationship with our international trading partners and our trading reputation in the global market.

1.3 The Institute of Chartered Accountant's submitted in relation to the retrospective nature of the bill, that a signal of the importance of freedom from retrospective laws has been held to be so critical to the basic rights of individuals and corporations that the constitutions of both the United States and Sweden have explicitly prohibited such a practice. Whilst Australia's constitution does not expressly prohibit the making of retrospective laws, the generally accepted practice of Parliament has been to only exercise those powers sparingly, often only in extreme and exceptional circumstances.¹

1.4 PricewaterhouseCoopers submitted that the proposed changes will increase the complexity of doing business in Australia by creating a 'patchwork' of cross transfer pricing rules that could apply to a particular transaction depending upon whether or not a treaty applies, which treaty applies and which period the relevant transaction occurred.²

1.5 The Law Council of Australia's submission to the inquiry outlined concern that no time limit has been specified for when adjustments can be made by the Commissioner, therefore creating uncertainty for taxpayers in relation to confirming their income for previous years.³

1 Institute of Chartered Accountants in Australia, *Submission 19*, p. 1.

2 PricewaterhouseCoopers, *Submission 17*, p. 2.

3 Law Council of Australia, *Submission 9*, p. 3.

1.6 Coalition Senators hold concerns in relation to the impact this bill will have on Australia's tax treaties and our relationship with our foreign trading partners and many submitters to the inquiry hold similar views.

1.7 Moore Stephens stated that they are exceptionally concerned at the likely adverse impact on the reputational damage to the Australian Taxation Office (ATO) (and Australia, as an investment destination) that can be expected to follow in the event that the legislation is back-dated as planned.⁴

1.8 The American Chamber of Commerce in Australia (AmCham) which is the peak organisation for representing the interests of American companies undertaking business in Australia, noted in its submission that 'the most significant source of foreign investment in Australia is the United States'. Additionally AmCham expressed concern that the retrospective nature of the bill creates 'unnecessary uncertainty and business risk, which in turn will negatively affect foreign investment in Australia.'⁵

1.9 Chapter eight of the majority report includes further quotes from other organisations which are also strongly opposed to this bill on the basis that it will impact on Australia's capacity to trade in the global market. These organisations include the Australian Private Equity & Venture Capital Association, RSM Bird Cameron, the Business and Industry Advisory Committee to the OECD and Deloitte.

1.10 The Coalition is concerned that the Government has not consulted with any partner countries to tax treaties with Australia, and whether or not those partner countries have raised concerns as to the perceived impacts this will have on the negotiated tax agreement, in addition to the consequences of this bill on trade and investment in the future.

1.11 Coalition Senators note with interest that the concerns raised above have been highlighted in detail in the majority report, despite the final recommendation made in that report of passing this bill.

1.12 Coalition Senators agree with the concerns raised by witnesses to the inquiry in relation to the retrospectivity of this bill and as the majority report states, the Senate Scrutiny of Bills Committee also highlighted that the retrospective provisions of the bill 'may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference'.⁶

1.13 Retrospective tax changes can change the substance of bargains struck between taxpayers who have made every effort to comply with the prevailing law at the time the agreement was entered into. Additionally, they can also expose taxpayers

4 Moore Stephens, *Submission 18*, p. 1.

5 American Chamber of Commerce in Australia, *Submission 14*, p. 1.

6 Senate Scrutiny of Bills Committee, *Alert Digest 6/12*, p. 94.

to penalties in circumstances where they could not possibly have taken steps at the earlier time to mitigate the potential for penalties to be imposed and they can alter a taxpayer's tax profile. Retrospective tax changes can also potentially cause significant damage to Australia's sovereign risk profile.

1.14 Coalition Senators are not convinced that the Government has adequately justified the need for the retrospective implementation of this bill nor has the Government sufficiently addressed the numerous stakeholder concerns highlighted throughout the inquiry process. Coalition Senators also hold concerns in relation to the impact this legislation will pose to heightening Australia's perceived level of sovereign risk.

1.15 The Coalition believes that Taxpayers have the right to rely on the law as it has consistently been interpreted by the courts for many years and as such, Coalition Senators do not support this bill.

Recommendation 1

1.16 That this bill not be passed in the Senate

Senator David Bushby

Deputy Chair

