The Secretary
Economics Committee
House of Representatives

Sent via email: economics.reps@aph.gov.au

22 February 2013

Dear Secretary

## *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013*

## *Schedule 2: Modernisation of transfer pricing rules*

Thank you for the opportunity to provide a submission in respect of Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013 ("the bill"). Our submission relates to the transfer pricing aspects of the bill.

This submission should be considered together with our earlier submission to Treasury in respect of the transfer pricing Exposure Draft released in November 2012, a copy of which is attached.

We acknowledge and appreciate that a number of issues and concerns with respect to the drafting of the Exposure Draft have been addressed and, as a result, the bill is an improved piece of proposed legislation.

There are, however, a number of areas that in our view are not adequately addressed. These are outlined below.

1. Time limits

We are strongly of the view that time limits for amendment should be four years and not seven. Our reasons for this are set in at pages 3 and 4 of our submission to Treasury.

Our view is also supported by the Inspector General of Taxation. His report into improving the self assessment system [1] was released by the Assistant Treasurer on 13 February 2013. The Inspector General recommended a time limit of four years for transfer pricing adjustments (recommendation 3.10 of the report).

[1] Review into improving the self assessment system. A report to the Assistant Treasurer. Inspector General of Taxation, August 2012 ("the report").

***PricewaterhouseCoopers, ABN 52 780 433 757***
*Darling Park Tower 2, 201 Sussex Street, GPO BOX 2650, SYDNEY NSW 1171*
*T: +61 2 8266 0000, F: +61 2 8266 9999, www.pwc.com.au*

The report refers directly to a survey performed by the OECD's Forum on Tax Administration that revealed that the average resolution for transfer pricing cases (amongst 43 OECD and non-OECD countries) was 540 days. The proposed time limit of seven years is more than four times this average.

A reasonable time limit on assessment allows taxpayers certainty and will encourage a more efficient approach to its audit work on the part of the Commissioner. In our view this is in the interest of both taxpayers and the nation in general.

We also recommend that time limits be introduced for adjustments under Division 13[2] and Subdivision 815-A[3]. There can be no compelling policy reason for allowing the amendment period for adjustments under these provisions to remain unlimited.

2. Reconstruction of dealings

The bill retains the requirement for taxpayers to disregard the form of the actual commercial or financial relations in certain circumstances. These circumstances are outlined in Sections 815-130 (2), (3) and (4). We retain the position that this requirement should be removed, or alternatively should not be subject to self assessment but retained only as a power of determination by the Commissioner. Our concerns about the reconstruction requirement are outlined at pages 11 to 15 of our submission to Treasury and remain unchanged in relation to the bill.

3. Documentation

The removal of the ability to establish a reasonably arguable position for taxpayers that have not prepared transfer pricing documentation by the time of lodgement of the tax return is onerous and inequitable. It does not take account of the fact that many taxpayers may form a reasonable view on the arm's length nature of their dealings without formally preparing documentation. Our alternative suggestion that documentation be provided within 90 days of request by the Commissioner should be considered as it achieves an equitable balance between compliance costs and the need for the Commissioner to understand and evaluate the facts and position adopted by taxpayers.

4. Urgent need for public guidance from the Commissioner

Although not directly related to the bill itself, there is an urgent need for the Commissioner of Taxation to provide clear guidance on how he will apply the transfer pricing provisions, if the bill passes. We recognise the current limitations on the Commissioner in providing comments or guidance in respect of proposed law. However, with such a significant change in the legislative landscape for transfer pricing, taxpayers should be entitled to know the Commissioner's position early enough to enable appropriate review of their financial arrangements under self assessment. We have no doubt that a review of the existing transfer pricing rulings issued by the Commissioner over the past 20 years will be forthcoming should the bill be passed as law; however, this review and advice needs to be timely.

Guidance from the Commissioner on how he will assess whether a taxpayer's transfer pricing documentation meets the requirements of the proposed s284-255 of the Tax Administration Act is

[2] Division 13 of the Income Tax Assessment Act 1936
[3] Subdivision 815-A of the Income Tax Assessment Act 1997

required as a priority, so that taxpayers have a clear understanding of what will be required from them in order to establish a reasonably arguable position in respect of their transfer pricing arrangements.

The report by the Inspector General recommended the ATO synchronising its public binding advice with the enactment of substantial new tax law. The ATO response was that this was a matter for Government. In this regard we note that the Government has responded that it agrees in principle with this recommendation. In our view, such a significant change in transfer pricing law is a perfect example of where this synchronisation should occur.

5. Insufficient public consultation process

The bill has been rushed into Parliament without adequate time allowed for thorough public consultation on the proposed changes. Treasury received 24 submissions on the Exposure Draft in late December 2012 and the bill was then introduced into Parliament on 13 February 2013 without any further consultation taking place. The transfer pricing rules form an important part of Australia's tax regime and given that this is the first substantial overhaul of the transfer pricing rules in more than 30 years, time for proper consultation should be taken in order to ensure the new transfer pricing rules strike the right balance between robustly protecting Australia's revenue and not imposing a disproportionate compliance burden on taxpayers.

We recommend that further time be allowed for stakeholders to provide input into the proposed changes before the bill is debated in Parliament.

We would be pleased to discuss any aspect of our submission with you further.

Yours sincerely

Nick Houseman
Partner
Transfer Pricing
nick.p.houseman@au.pwc.com
T: +61 2 8266 4647

Pete Calleja
Partner
Transfer Pricing, National Leader
pete.calleja@au.pwc.com
T: +61 2 8266 8837

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