

# *Dwyer Lawyers*

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Secretary  
Economics Legislation Committee  
The Senate  
Parliament of the Commonwealth of Australia  
CANBERRA ACT 2600

Dear Sir

### **“COMBATING MULTINATIONAL TAX AVOIDANCE”**

More in a spirit of resignation than hope, I offer some comments for the assistance of Honourable Senators on the *Tax Laws Amendment (Combating Multinational Tax Avoidance) Bill 2015*.

First, I must start by expressing regret that more time, ink and paper is being wasted on a problem which has been well known since Lord Edmund Vestey gave evidence to the UK inquiry on the matter nearly 100 years ago and instanced the raising of cattle in the Argentine to be shipped and sold to Great Britain and other markets and asked where was the profit made.

It is also regrettable that the dumbing down of this country continues apace. Could the Committee please request Parliamentary Counsel to tell the instructing Department that there is no such thing as a “dependant agent” (EM Example 3.10 4<sup>th</sup> paragraph)? The correct phrase is “dependent agent”, as the adjective is required, not the noun. People who cannot check their English grammar should not be permitted to draft laws to be imposed on anyone.

Turning to the title of the Bill, I note the word “combating”. Is it being proposed that the Commonwealth should declare war on the Republic of Ireland and the United States of America? Or upon the Kingdom of the Netherlands or the Grand Duchy of Luxembourg? If not, it were better that less hysterical language be used as a title for a Bill being submitted for consideration by the Parliament of the Commonwealth.

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As for the substance of the Bill, it may be considered under three aspects – legal, political and economic.

### *Legal Aspects*

It is obvious that the Bill cuts across legally-binding international taxation agreements to which the Commonwealth is a signatory and which have been enacted as law by the Parliament and received the Royal Assent. Doubtless, US corporations such as Apple and Google will be getting advice on the matter in due course.

It is perhaps less obvious that one is moving from taxation on the basis of income actually derived to a concept of deemed income. The extent to which the Parliament may delegate its legislative power to an unelected servant of the Crown may be a matter which will in the course of time receive some considered judicial attention.

One might have thought that if the rule of law means anything it is that one is taxed according to facts as to things done, not according to hypotheses formulated by tax collectors. If it be argued that this ideal has long been a lost cause, I can only say the ongoing erosion of the certainty of legitimate property rights evidenced by such tax laws is actually a reason why capital flees to tax havens.

### *Political Aspects*

As observed above, the Bill is a direct attack on the economic interests of other countries, most notable, the United States of America.

I owe no allegiance to the Great Republic. However, having studied there for more than 4 years (thanks to the Harkness Fellowships and the Commonwealth Public Service Board) and having lived in the same Harvard dormitory as Admiral Yamamoto, I have a healthy respect for a great country.

While you may oppress Ireland (as she often has been), you would be unwise to antagonise the United States of America. The blunt fact of *realpolitik* is that this country shelters under a US nuclear umbrella to protect it from the possibility of an expansionist Middle Kingdom. Anyone born in this country who grew up in the shadow of World War II understands that: those who do not might care to learn the facts of life from the Melian dialogue recounted by Thucydides.

Right or wrong, the Bill gives cause for offence to the United States, some of whose great financial and trading corporations are clearly in its sights.

In case the meaning has not escaped you, the Prime Minister and Treasurer should expect a good hard kick under the table from the US Treasury over this Bill and might be well advised to consider alternatives. The US Congress is also taking an active interest in these matters.

### *Economic Aspects*

These are the most depressing aspects of the Bill.

As I have remarked elsewhere (<https://www.linkedin.com/pulse/futile-oecd-beps-agenda-dr-terry-dwyer>), the whole discussion on “base erosion and profit shifting” is devoid of historical perspective. The international tax treaty system was designed to do just that.

The Bill is fundamentally misconceived.

The comprehensive mind of Adam Smith had seen the problem back in 1776 when he remarked that a tax on the profits would be futile as businesses or their owners would move to the protection of more benevolent sovereigns.

He also saw better options. He noted that the profits of monopoly, wherever they could be got at, represented an entirely suitable subject of taxation while urban land rents represented the value of doing business or living in a country and were thus altogether owing to the good government of the sovereign. What Google or Apple or any other multinational thinks of the value of doing business in Australia is reflected in the rents it is willing to pay for premises to assist it in selling its products or services in this country.

Adam Smith’s observations furnish two lines of attack on the problem.

First, one observes that a large part of the profit shifting complained of represents the right to charge for so-called “intellectual property”. But this “intellectual property” is very much a legal construct you have legislated into existence yourselves. Much of it does not exist at common law. As I observed in my submission to the Productivity Commission inquiry into compulsory licensing of patents, (<http://www.pc.gov.au/inquiries/completed/patents/submissions/submissions-test/submission-counter/sub01-patents.pdf>), the only redeeming feature of patent law in this country is that it does facilitate tax avoidance by the judicious holding of patents and other intellectual property.

Why therefore are you complaining of conduct which you are facilitating?

If you are not willing to abolish the monopoly rights you have created, there is nothing to stop you from taxing them, *without breaching any treaties*.

You could simply ask all owners of patents, computer programmes etc. registered in Australia to declare a value for the property rights protected by your laws.

You could then impose a “user pays” property levy of, say, 5%, on the value so declared.

Any property not so declared could be acquired by the Treasury for the Crown by paying the owner his declared price or one dollar (in the case on non-declared property).

Such a property tax breaches no international treaties on income taxation. It is territorial. It involves no trespassing on the sovereignty of other powers. It simply imposes a user charge on the monopoly rights you are protecting, regardless of who owns those rights. It therefore sterilizes any attempt to avoid a charge by moving the legal ownership of patents etc.

A second line of attack is to recall Adam Smith’s comments on land values reflecting the value of doing business in a country. You could use a Federal land value tax to capture surplus profits capitalized in land values through bidding for sites. No multinational can entirely avoid adding directly or indirectly to the land values of a country where its products or services are sold. Whether it operates through a permanent establishment, a subsidiary, a franchise or an independent agent, the surplus value of its business activities will be reflected in what it or its business associates or customers are willing to pay for sites to do business in this country.

There is nothing to stop you imposing a general Federal land value tax (whether limited to commercial or business sites or not) and using the proceeds to cut the corporate tax rate down to Ireland’s level.

You might even discover that Apple and Google etc. might want to relocate more of their activities here and add to the prosperity of this country. Rather than “combating” other countries or their corporations, would you not be wiser to entice them to come here on a mutually profitable basis?

You can cut their taxes here and indirectly charge them for the privilege of doing business here.

Rather than fearing tax competition, Australia should learn to embrace and profit from it. Australia could beat most countries if it really sat back and contemplated its own assets and its own interests instead of giving away and selling off everything it has been blessed with.

If the Committee is interested in learning more about the lack of intellectual underpinnings for the nearly 20 year old campaign by the OECD against tax competition, I attach for information an article written back in 2001 on *Is tax competition ever “harmful”?* - *The OECD dogma*.

Yours faithfully

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