



10 November 2011

The Acting Secretary
Senate Standing Committee on Economics
PO Box 6100
Parliament House
CANBERRA ACT 2600

Tax Laws Amendment (2011 Measures No.8) Bill 2011 – Petroleum Resource Rent Tax provisions

The Australian Petroleum Production & Exploration Association Ltd (APPEA) is the peak national body representing the collective interests of companies engaged in petroleum exploration, development and production operations in Australia. The Association's membership comprises companies that account for an estimated 98 per cent of Australia's petroleum production and the vast majority of exploration. APPEA is pleased to make the following comments in relation to Tax Laws Amendment (2011 Measures No.8) Bill 2011 ('the Bill').

The comments outlined below are consistent with those that were lodged with the House of Representatives Standing Committee on Economics as part of the review of the Bill by that House. Further background on the operation of the PRRT regime is contained in APPEA's earlier submission to that Committee dated 21 October 2011.

Specific Comments

APPEA would like to make the following comments in relation to the revised definition to the 'taxing point' that is contained in the Bill.

- *Impact on Existing Taxpayers*

In Budget Paper No.2 (2011-12), it is stated that "*(t)his measure will confirm existing application of the PRRT in relation to the taxing point and will provide greater certainty for PRRT taxpayers.*" (p.40), while the Second Reading Speech to the Bill states that "*(b)ecause the measure serves only to clarify and affirm the current application of the PRRT, it does not impose any additional tax burden. Accordingly, these amendments have no revenue impact.*"

Until such time as the Australian Taxation Office (ATO) issues guidance or advice that their existing interpretation of the law has not changed as a result of the law change, all taxpayers with projects operating under the regime will have a heightened degree of uncertainty as to whether the application of the new provision will be

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different to the definition under the current law. In particular, taxpayers will seek assurance that the retrospective aspect of the amendment (see comment below) will not result in the Commissioner of Taxation amending past assessments which have been made earlier than 4 years from the date of Royal Assent.

Recommendation: APPEA recommends that the Committee seeks confirmation from the Australian Taxation Office that the current application of the law will be unchanged as a result of the proposed amendment for all existing projects covered by the scope of the PRRT regime.

- *Impact of New Petroleum Projects*

As indicated above, the Government has announced a desire to extend the scope of the PRRT to cover onshore petroleum operations and the North West Shelf project. This legislation is currently before Parliament. The new definition of the 'taxing point' proposed under the Bill will therefore apply to all future taxpayers operating under the regime (as well as existing taxpayers). APPEA is aware that the application of the current definition of the 'taxing point' has been raised (both directly and indirectly) in a number of submissions lodged in the Government's consultations associated with the Bills that seek to extend the PRRT regime.

Until such time as further clarification is provided by the ATO and Treasury about the way the 'taxing point' definition will apply onshore, APPEA cannot make a judgment as to whether the proposed new definition will be applied differently to the current definition, particularly as operations undertaken as part of onshore petroleum activities are often different to those encountered offshore.

Recommendation: The Committee seeks advice from Treasury as to the impact of the new definition on onshore operations, and whether it is Treasury's view that the revised definition will ensure that the recommendations of the Policy Transition Group report into the New Resource Taxation Arrangements will be fully implemented.

- *Impact on Existing Litigation*

APPEA notes that Esso Australia Resources Pty Ltd has appealed the 13 April 2011 decision of the Federal Court of Australia in relation to the application of the existing taxing point definition to the Bass Strait project. This legislation directly pre-empts the appeal rights of the litigants. The impact of the passage of the legislation will effectively be to deny the litigant the option to seek a full judicial review of the original decision, and impose a significant cost on the company for a case that may no longer be able to proceed.

Investors value a predictable, stable and simple tax system when making investment decisions. A predictable and stable tax system includes the ability for taxpayers to legitimately dispute the incidence of past taxation with executive government without the Parliament intervening to retrospectively favour the executive. Retrospectivity can damage the confidence of investors in the tax system and reduce the

attractiveness of Australia as a place to do business. This is particularly so in the above case where the matter is longstanding, and there is no suggestion of fraud or mischief on the part of the taxpayer. The retrospective amendment of tax laws some 21 years in arrears in these types of circumstances can impact on the confidence that legitimate taxation disputes can be ever settled.

- *Other Comments*

APPEA notes that there has been some suggestion that the amendments are not retrospective changes, but are merely a clarification to the operation of the existing law. In the 28 October 2011 judgment *Eso Australia Resources Pty Ltd v Commissioner of Taxation (No 1)* [2011] FCAFC 134, at paragraph 13, it was stated that “The bill is a retrospective taxing law operating over a 21 year period.” It would seem clear that in the view of the Courts, this is a retrospective law change.

Furthermore, support for the Government’s position seems to at least partially be based on the fact that the taxpayer lodged returns in accordance with the view put forward by the ATO and the matter was not litigated in 1990. The fact that the taxpayers have lodged returns on one basis (recognising the significant penalties associated with incorrect returns) and then chooses to dispute the amount of tax payable should be immaterial to judgements on the appropriateness (or otherwise) of the legislation.

Recommendation: The Committee recommend to Parliament that the amendments to PRRT contained in the Bill be amended to apply on a prospective basis only.

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Yours sincerely

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