

Advisory report on the Tax Laws Amendment (2011 Measures No. 8) Bill and the Pay As You Go Withholding Non-compliance Tax Bill 2011

House of Representatives
Standing Committee on Economics

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Chair's foreword

The Tax Laws Amendment (2011 Measures No. 8) Bill 2011 and the Pay As You Go Withholding Non-Compliance Tax Bill 2011 propose four sets of changes to the tax laws. Two of these changes generated stakeholder interest and were pursued by the committee in the inquiry.

The first item of interest was changes to the Petroleum Resource Rent Tax (PRRT), which has been the subject of dispute between ExxonMobil and the Australian Taxation Office (ATO). The dispute revolves around the definition of a marketable petroleum commodity, which affects where the taxing point occurs. The later the taxing point, the more valuable the commodity being taxed. Since the PRRT is a tax on profits, a later taxing point involves more tax.

The issue about these amendments was that they apply back to 1990-91, which raises the question about whether this retrospectivity is warranted. Parliaments do legislate retrospectively from time to time. The important point is that retrospective legislation should be fair and provide certainty. In this case, the committee is confident that this applies. The Bills are implementing the original policy intent that applied 20 years ago and also reflect how the PRRT has operated since that time, including how ExxonMobil has been lodging its tax returns and paying tax. Further, Treasury provided the committee with a timeline of the dispute that demonstrates that successive Governments have consistently interpreted the legislation in this way.

The second aspect to the Bills was the changes to tax penalties for company directors for the superannuation guarantee charge, which have been motivated by phoenix operators. These companies build up debt, become insolvent, liquidate their debts, and then continue the business through a new company that will eventually go through the same process. The problem addressed in this Bill is that the companies are insolvent partly because they are carrying debts for their staff

entitlements, including superannuation. Millions of dollars of employees' superannuation is lost every year through this practice.

The ATO is on the record as stating that it has insufficient legal powers to enforce the superannuation guarantee charge. Recovering the amounts is also difficult in practice because of the long time delay in the ATO becoming aware of the non-payment. Phoenix operators enjoy an unfair competitive advantage against their competitors who do the right thing. The crude nature of this business model is reminiscent of the bottom of the harbour schemes in the early 1980s.

Broadly, the Bills make company directors liable for their companies superannuation guarantee debt. The Bills also remove the requirement for the ATO to issue a 21 day director penalty notice before commencing legal action on a company director. The 21 day period is problematic because phoenix operators promptly cause their company to go into voluntary administration shortly after receiving their notice, which prevents the ATO taking further action against them.

In general, the committee supports these provisions because they are taking penalties that already successfully apply to the PAYG system and extending them to superannuation. Employers' obligations in relation to super remain the same; what will change is that these obligations will now be more rigorously enforced.

However, at the hearing business groups expressed concerns about the provisions because they wanted to ensure that honest company directors would not be caught up in them by accident. The committee accepts that directors who act in good faith should have some comfort that they will not be subject to the provisions. The committee recommended that the Government investigate whether the Bills should specifically target phoenix operators and whether the defences in the Bill should be expanded.

Because of the work involved in this, the committee has recommended that Schedule 3 of the Tax Laws Amendment (2011 Measures No. 8) Bill 2011, which contains the phoenixing provisions, should be deleted so that the remainder of the Bill may pass. The Pay As You Go Withholding Non-Compliance Tax Bill 2011 should remain pending while the Government completes its investigations.

I would like to thank the organisations that assisted the committee during the inquiry through submissions or participating in the hearing in Canberra. I also thank my colleagues on the committee for their contribution to the report.

Julie Owens MP
Chair

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Membership of the Committee

Chair	Ms Julie Owens MP
Deputy Chair	Ms Kelly O'Dwyer MP
Members	Mr Scott Buchholz MP
	Mr Stephen Jones MP
	Dr Andrew Leigh MP
	Mr Tony Smith MP
	Mr Craig Thomson MP

Committee Secretariat

Secretary	Mr Stephen Boyd
Inquiry Secretary	Mr David Monk
Research Officer	Dr Phillip Hilton
Administrative Officer	Ms Natasha Petrovic



Terms of reference

On 13 October 2011, the Selection Committee asked the Committee to inquire into and report on the Tax Laws Amendment (2011 Measures No. 8) Bill 2011, and the Pay As You Go Withholding Non-Compliance Tax Bill 2011.

Under Standing Order 222(e), the House is taken to have adopted the Selection Committee's reports when they are presented.



List of abbreviations

AICD	Australian Institute of Company Directors
APPEA	Australian Petroleum Production and Exploration Association
ATO	Australian Taxation Office
COSBOA	Council of Small Business of Australia
ICAA	Institute of Chartered Accountants in Australia
IGT	Inspector-General of Taxation
PAYG(W)	Pay As You Go (Withholding)
PRRT	Petroleum Resource Rent Tax
SG	Superannuation Guarantee



Recommendations

Recommendation 1

The Government investigate whether it is possible to amend the Bills to better target phoenix activity.

Recommendation 2

The Government explore whether to expand and strengthen the defences for company directors available in the Bills.

Recommendation 3

The House of Representatives pass the Tax Laws Amendment (2011 Measures No. 8) Bill 2011 after deleting its Schedule 3 and associated provisions. The Pay As You Go Non-compliance Tax Bill 2011 should remain pending the Government's investigations detailed in recommendations 1 and 2.