

25 October 2011

Ms Julie Owens MP
Committee Chair
Standing Committee on Economics
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email: economics.reps@aph.gov.au

Dear Ms Owens

Tax Laws Amendment (2011 Measures No. 8) Bill 2011

The Taxation Committee of the Business Law Section of the Law Council of Australia (***the Committee***) welcomes the opportunity to make a submission in relation to the Tax Laws Amendment (2011 Measures No. 8 Bill) 2011 (***the Bill***).

The Committee notes that the Bill proposes a number of measures. This submission is confined to Schedule 2 of the Bill dealing with Petroleum Resource Rent Tax (***PRRT***) and is specifically concerned to address the retrospective nature of those amendments.

The PRRT amendments are said to be necessary 'to provide certainty regarding how the 'Taxing Point' is determined for the purposes of the Petroleum Resource Rent Tax'¹.

Presumption against retrospective application of laws

It is a fundamental principle that laws need to be certain, so that people are able to understand in advance the rules and principles that apply to their conduct and behaviour.

Parliament should be loath to apply changes made to the law retrospectively. Where Parliament does so it is not possible for citizens to know and understand in advance, the consequences of their behaviour, resulting in the potential for injustice.

This principle is reflected in the practice of the Senate's Standing Committee on the scrutiny of Bills which generally maintains an in principle objection to the practice of retrospective legislation '*as it operates to make life very uncertain for people who may be affected by this legislation*'². The OECD Committee on Fiscal Affairs, in *Taxpayers' Rights and Obligations - Practice Note* observes the taxpayers have a right to a high degree of

¹ See page 3 of the Explanatory Memorandum to the Bill and the comments of the Assistant Treasurer in the Second Reading at page 8 of Hansard dated 13 October 2011.

² The Honourable Senator Amanda Vanstone, 'The Five Principles: The Committee's Terms of Reference' (Speech delivered at the Tenth Anniversary of the Senate Standing Committee for the Scrutiny of Bills, Parliament House, Canberra, 25 November 1991)

http://www.aph.gov.au/senate/committee/scrutiny/10_years/index.htm. See also Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Tenth Report of 2005* (2005) 204-207.

certainty as to the operation of the tax laws in order to be able to anticipate the taxation consequences of their ordinary personal and business affairs.³

The PRRT amendment

While there may be limited exceptional circumstances in which it is appropriate to amend legislation retrospectively, beyond the date of an announced change it does not appear that such exceptional circumstances exist here. Legislation should only be amended retrospectively:

1. to resolve situations that have caused undue hardship, due to the unintended application of provisions to particular taxpayers;
2. to deal with major interpretative changes arising as a consequence of litigation, where the Court's decision is totally unanticipated by Government, the ATO or taxpayers.

In each of these circumstances, taxpayers are not prejudiced by the amendment.

Absent these special circumstances, legislation should not be amended retrospectively, particularly where the amendment is to be retrospective to a date earlier than the date of any announced change.

In the present case, it is suggested that the PRRT amendments merely confirm the long established application of the PRRT.⁴

The surrounding circumstances do however suggest that the retrospective nature of this change is not without some controversy, may well be unnecessary, and indeed can only really be necessary if the change has the effect of taking away a taxpayer's rights, in litigation which is as yet incomplete.

It is apparent that at least one taxpayer, Esso Australia Resource Pty Ltd has been in dispute with the Commissioner for Taxation about the interpretation of the law for a period in excess of 20 years⁵. It is understood that case is on appeal and that the courts have yet to make a final decision on the prior interpretation of the point. The existence of this legislation and the context of the proposed amendment suggests that it cannot be said that no taxpayer will necessarily be prejudiced by the amendment and nor can it accurately be suggested that the amendments confirm the long established application of the law.

If the law were clear, there would be no need for retrospective amendment.

The need for current and prospective taxpayers to obtain certainty about how the PRRT applies to their specific projects⁶ could be addressed by having the PRRT amendments effective either from the date of royal assent or from the date of the 2011/12 budget⁷. A prospective change would avoid the possibility of unfairness and provide certainty for current and prospective taxpayers.

³ OECD Committee on Fiscal Affairs, 'Taxpayers' Rights and Obligations – Practice Note' *Tax Guidance Series* (2003) 4.

⁴ See paragraph 2.3 at page 13 of the Explanatory Memorandum to the Bill and the first paragraph of page 9 of Hansard for the 13th October 2011.

⁵ See the reference at paragraph 2.18 of the Explanatory Memorandum to the Bill.

⁶ See the comments of the Assistant Treasurer in the Second Reading Speech on 13 October 2011.

⁷ Being the date of announcement. See paragraph 2.27 of the Explanatory Memorandum to the Bill.

Should you wish to discuss any aspect of this matter please do not hesitate to contact the Committee Chair, Ms Teresa Dyson on (07) 3259 7000.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'W Grant', with a stylized, cursive script.

Bill Grant
Secretary-General