CHARTERED ACCOUNTANTS
AUSTRALIA + NEW ZEALAND

6 March 2017

The Secretary
Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Email: economics.sen@aph.gov.au

Dear Committee Members,

Treasury Laws Amendment (Combatting Multinational Tax Avoidance) Bill 2017

Chartered Accountants Australia and New Zealand welcomes the opportunity to make a submission on the *Treasury Laws Amendment (Combating Multinational Tax Avoidance) Bill 2017* (**Bill**) and the associated explanatory memorandum (**EM**) to the Senate Standing Committees on Economics (**Committee**).

Chartered Accountants Australia and New Zealand is made up of over 100,000 diverse, talented and financially astute professionals who utilise their skills every day to make a difference for businesses the world over. Our members are known for professional integrity, principled judgment and financial discipline, and a forward-looking approach to business. We focus on the education and lifelong learning of members, and engage in advocacy and thought leadership in areas that impact the economy and domestic and international capital markets.

We are represented on the Board of the International Federation of Accountants, and are connected globally through the 800,000-strong Global Accounting Alliance, and Chartered Accountants Worldwide, which brings together leading Institutes in Australia, England and Wales, Ireland, New Zealand, Scotland and South Africa to support and promote over 320,000 Chartered Accountants in more than 180 countries.

Overview

Our submission on the Bill and EM concerns the following proposed measures:

- Schedule 1 – Introduction of a Diverted Profits Tax (**DPT**) by way of amendment to Part IVA of the *Income Tax Assessment Act 1936* (**ITAA 1936**) which aims to:
    - ensure that significant global entities (SGEs) pay the appropriate amount of tax based on the economic substance of their Australian activities;

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  - prevent profits being diverted overseas through contrived arrangements, and
  - encourage SGEs to provide the Commissioner of Taxation with sufficient information to allow resolution of tax disputes in a timely manner.

- Schedule 3 – Amendments to Division 815 of the *Income Tax Assessment Act 1997* (**ITAA 1997**) to incorporate the changes made to the Organisation for Economic Cooperation and Development's *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (**TP Guidelines**) following the 2015 final report on Actions 8-10 of the G20/OECD Base Erosion and Profit Shifting project.

1. Schedule 1 - Diverted profits tax

Introductory comments

Chartered Accountants Australia and New Zealand recognises that the government wishes to introduce a DPT into Australian tax legislation to target artificial, contrived arrangements used to reduce tax by diverting Australian profits offshore. As such, we generally do not comment in this submission on the government's policy.

Nor do we comment on what overseas countries may perceive to be the ramifications of Australia introducing a DPT on a unilateral basis.

We appreciate that the broad concept of a DPT is likely to enjoy bi-partisan support. However, we are pleased that the Bill and EM have been referred to the Committee for inquiry. Politics aside, this is an important piece of anti-avoidance legislation with ramifications beyond our borders.

The changing global tax environment – post implementation review

The global tax environment is undergoing substantial change as nations such as Australia embrace the OECD's initiatives to tackle Base Erosion and Profit Shifting by multinational enterprises. The tax policies of President Donald Trump will, if implemented, influence the tax planning of multinational companies headquartered in the USA and together with the new administration's other policies, could repatriate jobs and investment back to America.

Leading non-US companies may be enticed to re-domicile, not just to the USA but also to countries such as the United Kingdom, where a 17% rate is proposed by 2020. With regards to the United Kingdom, note that (unlike Australia it seems) it has been able to adopt a twin-track policy agenda of being tough on multi-national tax avoidance whilst successfully implementing a company tax rate reduction strategy.

Such global trends cannot be ignored simply because the DPT enjoys popular support within some parts of the community.

Anti-avoidance legislation such as the DPT combined with FIRB-imposed conditions and a high company tax rate can also have an economic impact in the sense that some affected taxpayers will seek professional advice along the lines of: "Tell me the minimum I have to do to undertake economic

activity in Australia without having a tax problem" (as distinct from: "Tell me the features of Australia that make it an attractive destination for regional investment").

It is for the above reasons that we believe the impact of the DPT – both in a tax and economic sense – needs to be closely monitored.

At the very least, our view is that the DPT should be subject to an extensive post-implementation review by relevant Parliamentary committees within three years of the DPT's effective date.

	Submission point 1 Chartered Accountants recommends that the DPT is subject to an extensive post implementation review within 3 years to assess its impact.

When will the DPT apply?

The EM (at paragraph 1.18) states:

> "… Although the DPT is not a provision of last resort, consistent with the operation of Part IVA, it is expected that the DPT will be applied only in very limited circumstances. It is intended that the Commissioner would apply the DPT only after he or she has given consideration to the operation of the ordinary provisions in the income tax law."

If this is the intention we see no reason why the law should not explicitly state that the DPT is a provision of last resort.

The EM (at paragraph 1.38) states that: "[t]he Commissioner's ability to make a conclusion is not prevented by a lack of, or incomplete, information provided by the taxpayer". This suggests that the DPT is intended to be used where taxpayers are uncooperative in responding to ATO information requests but this is not currently a prerequisite. In our view, this too should be explicit in the law.

	Submission point 2 Chartered Accountants ANZ submits that the law should specify that the DPT is a provision of last resort. A prerequisite for the DPT to apply should be where taxpayers are uncooperative in responding to requests for information by the ATO.

If our submission point 2 is not adopted these become topics where clear guidance will be required from the ATO. We strongly urge the Committee to explore with ATO officials their progress on drafting such guidance and the content of such guidance.

Tax treaty interactions

Committee members will be aware that Australia's double tax agreements do not override the operation of Part IVA[1].

Neither the ED nor EM mention tax treaties. Tax treaties are an important feature of the commercial relationship that exists between nations and Australia's tax treaty partners (and the commercial enterprises based in treaty partner countries) need to have confidence that the DPT that will be administered fairly and will not result in drawn-out disputes between national tax regulators.

In our view, the DPT commentary presented to parliamentarians (Second Reading speech and EM) should not be silent on this important issue. A government official – the Commissioner of Taxation – is being granted powers which, if exercised unwisely, has the potential to undermine the collaboratively developed bi-lateral policies currently reflected in each double tax treaty. We believe Parliament should at least be giving the Commissioner some general instructions as to the practical ways in which his new DPT powers should be exercised.

In particular, parliament's insights on the role of mutual agreement procedures (**MAP**) in DTAs is needed. That is, do the MAP processes allow for potential transfer pricing adjustments to go to arbitration but not DPT assessments? If so, what safeguards are proposed to limit the Commissioner's ability to apply the DPT rules and thus avoid arbitration?

	Submission point 3 The interaction of the DPT with tax treaties, in particular practical topics such as MAP processes, needs to be discussed in the DPT commentary considered by parliamentarians, not just in supplementary ATO guidance.

ATO guidance – Communicating the ATO's work

We understand that the ATO is currently preparing a Law Companion Guideline (**LCG**) on the DPT. It would be highly desirable for the ATO to commence consultation on this material as soon as possible.

We note that the Multinational Anti-Avoidance Law (**MAAL**) LCG had an example of a low risk and high risk transaction plus a series of 'framing questions' to guide taxpayers on what they

[1] Section 4(2) International Tax Agreements Act 1953.

needed to consider. Some practical examples of what transactions the ATO think might be 'DPT out of scope" would also be helpful. Given the broader scope of DPT and the UK experience with that country's DPT, there will need to be more guidance/examples than MAAL.

As pre-existing transactions can be in the ambit of the DPT, it will be necessary for the ATO to be ready to adopt a process similar to the MAAL Roadmap and have in place appropriate transitional arrangements to allow for the *restructuring* of those arrangements. Given that the DPT is more about changing behaviours than raising tax revenue, practical guidance on how long affected taxpayers have to restructure would be most welcome.

We also expect that some inbound investors will seek additional certainty by applying for private binding rulings from the ATO that the DPT will not apply. It is important for taxpayers to understand the extent to which the ATO will be open to such private ruling requests on the DPT.

We recommend that the ATO establishes a limited life DPT sub-group within its General Anti-avoidance Rules (GAAR) Panel to provide assistance on the administration of the DPT to ensure applications are objectively based and there is a consistency in approach.

Finally, there is a need to discuss with the ATO how exactly it intends to report to parliament and the broader community (e.g. though publications, media releases, speeches and the Commissioner's Annual Report) the results of its work on new anti-avoidance measures such as the MAAL and the DPT. We are not just talking about revenue here: the tax profession needs to develop an understanding (perhaps by way of de-identified case studies) of the types of egregious structures and transactions which have attracted the ATO's attention.

As has been noted, these anti-avoidance measures are designed to change behaviours and we have put to the Commissioner our view that he should develop reporting models which identify the *future revenue benefit* resulting from the application of these new laws and other compliance interventions[2].

There will of course also be great interest in the amount of actual revenue raised by way of amended assessments which apply the MAAL or DPT. There are two points to make in this context:

- We are concerned that such interest may create a perception that ATO officials are under pressure to issue large amended MAAL or DPT assessments and "deliver" on the investment the government has made in the ATO's Multinational Tax Taskforce, and that this could lead to complaints of procedural unfairness and litigation. The likelihood of such perceptions developing can be mitigated from the outset by detailed ATO explanations of the internal review and quality control processes for making such amended assessments.

[2] Future revenue benefit reports have been used by HMRC since 2011, and enhancements to such reporting were implemented by HMRC as a result of a National Audit Office report in 2014-15. Refer: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537622/HMRCs_Compliance_Revenues-how_HMRC_will_change_how_it_reports_Future_Revenue_Benefit_web_.pdf

- We would be interested to learn more about the ATO's proposed approach to *publicly* reporting that it intends to, or has, issued MAAL or DPT amended assessments to unnamed multinational companies. In an accounting sense, we note also that the issue of a large amended tax assessment may trigger the need for disclosure by the affected company (or parent company) in its financial reports and\or disclosures to other regulatory bodies. Tax disputes can be detrimental to a company's brand and reputation, and it is important that taxpayers are also afforded an opportunity to put their side of the story into the public domain.

	Submission point 4 We ask Committee members to raise these topics with ATO officials appearing before the inquiry and seek detailed responses.

2. Schedule 3 – Transfer pricing guidelines

The application of the amendments in Schedule 3 to update the TP Guidelines following the 2015 final report on Actions 8-10 of the G20/OECD Base Erosion and Profit Shifting project is in relation to income years commencing on or after 1 July 2016. As such, the proposed amendments have a *retrospective* element.

In our submission of 3 March 2016[3] on Treasury's February 2016 consultation paper, "Income Tax: cross-border profit allocation – Review of transfer pricing rules", we recommended that these amendments should apply prospectively for income years commencing on or after 1 July 2017. Our reasons included that there would be a need for ATO guidance to be developed on how the OECD's principles would be implemented in an Australian context.

We remain of this view.

The Regulation Impact Statement in the EM (at paragraph 4.104), on the other hand, concludes there is "no substantial impediment" to adopting the proposals from 1 July 2016.

	Submission point 5 We recommend that the amendments to update the TP Guidelines should apply prospectively for income years commencing on or after 1 July 2017.

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[3] Our submission is available on request.

We consent to publication of our submission.

Should you have any queries concerning the matters discussed in our submission, or wish to discuss them in further detail, please contact me via email at: or telephone .

Yours sincerely,

Michael Croker
Tax Australia Leader