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Dear Mr Bryant

Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013

Schedule 2: Modernisation of transfer pricing rules

Thank you for the opportunity to provide a submission in respect of Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013 (“the bill”). Our submission relates to the transfer pricing aspects of the bill.

The points raised in this submission are consistent with our earlier submissions to the House of Representatives Economics Committee in February 2013, and to Treasury in December 2012 (in relation to the Exposure Draft of the transfer pricing provisions of the bill). We can provide copies of these earlier submissions if you wish to see further details.

In this submission, we will focus on:

1. Areas of concern we have raised previously that we do not believe have been adequately addressed
2. Responding to comments made in Treasury’s submission to the House of Representatives Economics Committee.

At the outset, we would like to emphasise that we are not opposed to modernising Australia’s transfer pricing rules. We agree there is a need for Australia to have robust transfer pricing rules to protect Australian revenue and, given the number of years that have elapsed since Australia’s existing transfer pricing regime was introduced, updating the rules to reflect current international best practice is a worthy exercise.

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The concerns we raise in this (and earlier) submissions are aimed at ensuring the rules can be implemented practically without creating an undue compliance burden on taxpayers. It is in the national interest to have a transfer pricing regime that is both simple to interpret and apply, and consistent with the regimes of our major trading partners.

We have summarised what we consider to be the contentious aspects of the bill in the table below.

Issue	Treasury view	PwC view
Time limits: is a seven year amendment period required?	<p>A seven year time limit is needed because transfer pricing audits:</p> <ul style="list-style-type: none"> • Are complex and require substantial time and resources • Often require the examination of dealings that take place over a number of years • Sometimes require information from overseas, which takes time to obtain. 	<p>Four years should be an adequate amendment period because:</p> <ul style="list-style-type: none"> • Other OECD countries are able to enforce their transfer pricing rules within shorter time limits. • A shorter time limit would encourage the ATO to conduct transfer pricing audits more efficiently. • Taxpayers will be required to self assess their compliance with the transfer pricing rules on an annual basis. • If taxpayers are required to do this, then the Commissioner should also be required to conduct its compliance activities without needing to review multiple year periods. • Taxpayers will be expected to obtain and consider all necessary information to form a view on their compliance with the transfer pricing rules by the time of lodging the income tax return (which is due six and a half months after the end of an income year). • Again, if taxpayers are expected to apply the rules within this timeframe, it is unclear why the Commissioner would require years longer to obtain information.
Time limits: application to prior years.	<p>We are not aware of Treasury expressing a view on the application of a time limit for amendments to transfer pricing issues for years covered by the old regime.</p>	<ul style="list-style-type: none"> • Whatever time limit is introduced for income years subject to the new rules should also be applied to prior years. • The provisions in the bill do not appear to be effective in applying a time limit for amendments to prior years. • Since this does not appear to be contrary to the policy intentions of Treasury or the Government, the bill should be amended to ensure that the new time limit for transfer pricing assessments will apply to all income years.

Issue	Treasury view	PwC view
Reconstruction of dealings	Reconstruction provisions are a key feature of modern transfer pricing regimes and are consistent with OECD guidelines.	<p>The OECD guidance on reconstruction of dealings only discusses these in the context of a tax authority reconstructing a taxpayer's dealings. If reconstruction provisions are to be included, these should not be subject to self assessment.</p> <p>The scope of the reconstruction provisions in the OECD Guidelines are not clearly and commonly agreed on.</p>
Documentation and penalties	<ul style="list-style-type: none"> • Preparation of transfer pricing documentation will not be mandatory. Taxpayers will be able to risk-assess their dealings and prepare documentation only where there is a risk of adjustment. • Failure to prepare documentation will not prevent the Commissioner for exercising a general discretion to remit penalties. • The proposed record keeping rules are consistent with current ATO administrative practice and guidance in Taxation Ruling (TR) 98/16. 	<ul style="list-style-type: none"> • We agree in principle; however, a strict requirement to prepare documentation by the time of lodging the tax return in order to establish a RAP will leave taxpayers exposed to penalties where their self assessment of potential risk of adjustment is different from the ATO's. This will be a common practical issue due to the inherent complexity of transfer pricing. • Taxpayers should not be precluded from establishing a RAP where they produce documentation after lodging the tax return which demonstrates that their transfer pricing arrangements were reasonably arguable. • When a taxpayer is determining the level of documentation it needs to prepare, and the amount of resources that it should allocate to transfer pricing compliance, it cannot rely on the possibility that the Commissioner may exercise a general discretion to remit penalties. • There are subtle differences between the proposed record keeping requirements and the guidance in TR 98/16. This will leave uncertainty as to whether complying with earlier guidance from the ATO will be considered satisfactory under the new record keeping rules.
Urgent need for ATO guidance	Treasury has expressed the view that it is the ATO's role to provide detailed guidance on the application of the proposed provisions, such as detailed guidance on what is required in a taxpayer's transfer pricing documentation to be eligible to establish a RAP.	<ul style="list-style-type: none"> • We understand that Parliament's role in introducing legislation and the ATO's role in administering it are fundamentally different; however, here is a perfect case where the ATO could synchronise its public advice with the enactment of substantial new law.¹ • Delays in issuing ATO guidance will increase the risk of non-compliance. • We encourage the Committee to exert whatever influence it can to ensure the ATO issues timely guidance on how it will apply the new transfer pricing rules.

¹ As recommended by the Inspector-General of Taxation in his August 2012 review into improving the self assessment system. This recommendation has also been agreed to in principle by the Government.



The Committee's review of the bill provides an opportunity for some of these important issues to be considered carefully before the new transfer pricing rules are introduced. We trust that the Committee will give these matters due consideration in preparing its report on the bill.

Yours sincerely

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