ExxonMobil Australia Pty Ltd
ABN 48 091 561 198
12 Riverside Quay
Southbank, Victoria 3006
GPO Box 400
Melbourne, Victoria 3001
61 3 9270 3333 Telephone

John R Dashwood
Chairman

ExxonMobil

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Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee

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

ExxonMobil Australia wishes to draw the Committee's attention to the serious matters of sovereign risk raised in the Tax Laws Amendment (2011 Measures No.8) Bill 2011. In addition to utilising sovereign powers to override legitimate, long-running judicial processes, the Bill also applies some 21 years retrospectively.

The Bill includes an amendment to the Petroleum Resources Rent Tax Assessment Act 1987 (the PRRT Act) which is to have retrospective effect from 1 July 1990. This amendment gives effect to an announcement by the Treasurer in the Federal Budget on 10 May 2011 and is specifically directed at curtailing ongoing litigation between the Australian Taxation Office ('ATO') and Esso Australia Resources Pty Ltd ('Esso'), a wholly owned subsidiary of ExxonMobil Australia Pty Ltd. This litigation was the subject of a recent decision of the Federal Court (Esso Australia Resources Pty Ltd v the Commissioner of Taxation [2011] FCA 360 [13 April 2011]). An appeal by Esso and cross-appeal by the ATO against this decision was heard earlier this week, with the Court reserving its judgment.

It was with great concern that we learned of the Government's intention to deny Esso's right to have its appeal heard in accordance with the law that has applied to the Bass Strait Project for the past 21 years. The dispute has been known to the ATO and the Treasury since shortly after this Project was brought into the PRRT regime in 1991. The 2011 Budget announcement seeking to change the law retrospectively to 1 July 1990, was completely unexpected. It seeks to impose a substantial and retrospective fiscal burden on Esso in addition to that which is, in our view, currently authorized by the law.

In recent years, there have been at least two Government commissioned enquiries into the administration of tax law in Australia. Both reviews counsel against retrospective legislation except in the most extreme circumstances, with one, commissioned by the current Government, stating that Parliament should clearly state why retrospective application of the law is necessary. In addition, Senate Standing Orders have a presumption against the passage of retrospective tax law. Previously, retrospective taxation legislation has primarily been used to deal with blatant anti-avoidance cases or to have laws apply from the date of announcement rather than the date of enactment of the relevant legislation. There is no

precedent for the introduction of retrospective tax law where, as in the current case, there is an ongoing, long standing, and well understood dispute between the ATO and an individual taxpayer involving a legitimate debate as to the meaning of the law.

The Second Reading Speech to the Bill states that "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." If indeed the proposed amendment does not change the law and does not impose an additional tax burden, the amendment is unnecessary. If that is the case there can be no justification for an amendment being made to operate retrospectively for a period of some 21 years.

The Government justifies the retrospective application of the Bill on the basis that it "remove[s] any uncertainty" (Para 2.45 Explanatory Memorandum). This is misleading as there is no past uncertainty – as the matter stands, the Court has concluded that the law is as the ATO asserts it to be. If this is held to be wrong on appeal, then the only uncertainty will be for the application of the PRRT into the future as it is extended to onshore projects. On the contrary, retrospectively amending the law after 21 years, in circumstances where a taxpayer is in a legitimate and well understood litigation with the ATO, creates uncertainty for all taxpayers by undermining confidence that they can rely on the law as written to structure their affairs. It introduces a new and unexpected element of sovereign risk into the Australian investment landscape.

Importantly, the retrospective nature of the Bill was confirmed by the Full Court of the Federal Court in a judgment of 28 October 2011, when it stated unequivocally that "The bill is a retrospective taxing law operating over a 21 year period. [2011 FCAFC 134, paragraph 13]"

Passage of the retrospective PRRT measures in these circumstances will constitute a grave interference by Parliament in a dispute between the Government and an individual taxpayer, and do lasting damage to investor confidence in Australia and to the nation's international reputation. The Committee should recommend to Parliament that it reject the retrospectivity of these measures.

Finally, Esso has incurred significant costs in engaging in litigation in the legitimate expectation that the Parliament would respect the judicial process. If it does not do so, Government should compensate Esso for these wasted costs. A timeline summarising relevant milestones is attached for the Committee's information (Attachment 1).

I would welcome the opportunity to appear before the Committee to discuss this issue further, and draw your attention to the attachment to this letter which provides a more detailed discussion of the issue (Attachment 2).

Yours sincerely

John R Dashwood
Chairman

Att.