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

By Email: economics.sen@aph.gov.au

Dear Sir/Madam

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

Chevron Australia ("Chevron") welcomes the opportunity to provide comments on the Bill. Our comments relate to Schedule 2 to the Bill: Modernisation of transfer pricing rules.

About Chevron
Chevron is currently developing two of Australia's largest resources projects in the North-west of Western Australia. The Chevron-operated Gorgon and Wheatstone Projects represent over $80 billion of investment and will position Australia as a leading liquefied natural gas (LNG) supplier in the Asia-Pacific region.

Gorgon and Wheatstone will create significant benefits for the Australian economy, including substantial revenues to the Australian Government throughout their operations – estimated to be at least forty years.

Resource security continues to underpin Chevron's investment in petroleum exploration and development. Strong investment in petroleum exploration and development in Australia has been facilitated to date by a legislative framework that provides taxpayers with a reasonable degree of certainty as to how the tax laws will apply.

Certainty with regard to the application of the transfer pricing framework is important to investment in LNG projects and in promoting ongoing exploration. Chevron is concerned that the transfer pricing provisions of the Bill will, however, create significant uncertainty for taxpayers. Our specific comments on the Bill are provided in Appendix 1.

Thank you for allowing us to submit our views on what we see as an extremely important matter. Please contact Michael Fenner – Tax Manager on if you would like to discuss any matters raised in the submission.

Yours sincerely

Peter Fairclough
General Manager Policy, Government and Public Affairs

Appendix 1 - Comments

Self-assessment

Whilst Chevron has a number of concerns about the substantive provisions of the Bill (which are outlined below), from a practical perspective Chevron considers that the self-assessment aspect of the Bill is unworkable, particularly in light of the uncertainty in how taxpayers and the Commissioner will apply the broad reconstruction provisions contained therein.

Specifically, in a self-assessment environment, the reconstruction provisions require taxpayers to: first, hypothesise, for a given arrangement, what conditions are purportedly not arm's length; second, then hypothesise the possible ways in which some hypothetical taxpayer might alternatively have structured that arrangement but for the hypothetical non-arm's length conditions; and finally, hypothesise which of the possible ways would align with the Commissioner's view as to what was most commercially appropriate in order to avoid future disputes.

It is difficult to conceive of how a taxpayer – who doesn't have access to information about other parties' arrangements as the Commissioner does – can determine what other independent entities might have done. Such an approach exposes taxpayers to significant uncertainty and complexity. On this basis, Chevron considers that self-assessment is unworkable and the proposed transfer pricing law should operate on a determination basis as the current transfer pricing law does, including the recently enacted Subdivision 815-A.

Amending the Bill to require a determination by the Commissioner would still preserve the additional powers in the Bill but would provide a far more appropriate and cost-effective compliance obligation on taxpayers.

Chevron notes for completeness that, even if reconstruction is limited to exceptional circumstances in line with the OECD Guidelines (discussed below), self-assessment remains problematic due to the inherent uncertainty surrounding reconstruction of transactions.

Chevron's concerns regarding the substantive provisions of the Bill are outlined below.

Reconstruction

Chevron is concerned that the reconstruction provisions contained in the Bill go beyond the exceptional circumstances prescribed in the OECD Guidelines, notwithstanding the intention is for them to be consistent.[1]

Whilst Chevron acknowledges that there has been an attempt to address concerns over the breadth of the reconstruction provisions in the Exposure Draft – namely by the inclusion of the heading 'Exceptions' in section 815-130 and by more closely aligning the language in that section with the language contained in the OECD Guidelines – in Chevron's view the reconstruction provisions in subsections 815-130(2) to (4) continue to provide for reconstruction of arrangements in circumstances broader than the exceptional circumstances prescribed in the OECD Guidelines.

Specifically, Chevron notes that, if the policy intention is for the reconstruction provisions to be consistent with the exceptional circumstances discussed in the OECD Guidelines, this could be achieved by directly referring to paragraphs 1.64 and 1.65 of the Guidelines. Currently, the Bill attempts to rewrite the language used in the OECD Guidelines *and* fails to explicitly refer to exceptional circumstances. Attempting a restatement of the reconstruction

[1] See paragraph 3.94 of the Explanatory Memorandum to the Bill

provisions in the legislation may result in a position that differs from the OECD Guidelines. As taxpayers must have regard to both, a different interpretation between the legislation and the Guidelines would result in significant uncertainty for taxpayers. Chevron's concerns are not allayed by section 815-135, which requires taxpayers to interpret arm's length conditions so as best to achieve consistency with the Guidelines. It still remains for the taxpayer to interpret two conflicting provisions regarding reconstruction.

Chevron does not consider the sub-heading "Exceptions" in section 815-130 as limiting the operation of subsections 815-130(2) to (4) to exceptional circumstances.

Record keeping and penalties

Chevron remains concerned about the manner in which record keeping has been linked to whether the taxpayer has a reasonably arguable position ("RAP") for the purposes of determining administrative penalties. This is largely because the record keeping requirements impose an extremely onerous compliance burden on taxpayers which many – including Chevron - will find difficult to satisfy.

This difficulty is driven largely by the reconstruction provisions. That is, the taxpayer has to not only consider all the ways in which a hypothetical taxpayer might alternatively have structured its arrangements, but also has to document those considerations in a manner that is considered by the Commissioner to be satisfactory. This approach is both compliance-heavy and uncertain.

Chevron also considers that the time limit for preparing records as provided in the Bill is insufficient given the onerous compliance burden, and as such may contribute to rushed and poorer quality documentation. That a RAP could not be obtained in these circumstances is, in Chevron's view, a harsh consequence.

Accordingly, Chevron considers that a RAP should not be linked to record keeping. Rather, whether a RAP exists should be an objective inquiry of the transfer pricing position taken as is the case with other areas of income tax law.

Chevron does acknowledge that the record keeping requirements are voluntary. However the penalty for failing to keep records – i.e. failing to establish a RAP – means that in practice good corporate governance will leave a taxpayer with little choice but to attempt to satisfy the onerous record keeping requirements within a compressed timetable.

In addition, Chevron notes that as per current ATO guidance contained in *Taxation Ruling TR 98/11*, where a taxpayer is found to have transfer pricing documentation of at least a medium-high quality, that taxpayer would generally not be subject to penalties.[2] However, under the Bill a taxpayer's best outcome is to attain a RAP, in which case penalties still apply.

Time limits

Chevron considers that the time limit for amending assessments should be aligned with the four year period applicable to general income tax assessments. Whilst transfer pricing may be complex and cross-jurisdictional in nature, many other developed countries have a period of review of less than seven years. This would also facilitate a more efficient process where corresponding transfer pricing adjustments (to mirror the Commissioner's adjustments) are requested or required (through the Mutual Agreement Procedure or otherwise).

[2] At paragraphs 4.19 and 4.21

Chevron also notes that the Inspector General of Taxation in his 'Review into improving the self assessment system' recommended the Government should consider providing the same period of review for transfer pricing matters as exists for the general period of review.[3]

Repealing legacy law

Division 13 will be repealed when the new subdivisions are enacted[4]. In Chevron's view, Subdivision 815-A should also be repealed at the same time in order to make clear which subdivision applies at any one time. As the Bill is presently drafted and despite proposed section 815-1(2) of the Income Tax (Transitional Provisions) Act 1997, arrangements involving treaty countries will still be subject to Subdivision 815-A if, for any reason, Subdivisions 815-B or 815-C do not apply. Chevron considers this would lead to discrimination against residents of countries that have signed double tax agreements with Australia.

[3] See Recommendation 3.10

[4] See item 1 of Part 1 of Schedule 2 of the Bill and paragraph 2.13 of the Explanatory memorandum