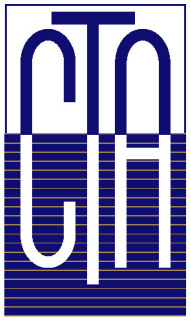

CORPORATE TAX ASSOCIATION
of Australia Incorporated

Senate Economics Legislation Committee

Enquiry into Tax Laws Amendment (2011 Measures Bill No 8) Bill 2011

Submission by

Corporate Tax Association of Australia Inc.

November 2011

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CORPORATE TAX ASSOCIATION of Australia Incorporated

Senate Standing Committee on Economics
Parliament House
CANBERRA ACT 2600

By email economics.sen@aph.gov.au

The Corporate Tax Association (CTA) would like to make a brief submission on the retrospective aspect of certain amendments to the Petroleum Resource Rent Tax Act 1997 proposed under Tax Laws Amendment (2011 Measures No 8) Bill 2011.

We have little to add to the submission we made last month to the House Committee enquiring into the same matter, although we hope the outcome this time will be different – a copy of that submission is attached as Appendix A.

We note that the House of Representatives Committee's majority report seems to rely on the assurance that the proposed amendment to the PRRT laws merely clarifies what was always intended by the government. In other words, the proposed amendment isn't imposing a fresh liability but is merely clarifying that this is the way the law was always intended to apply. Intention can be an elusive concept, and is often in the eye of the beholder. Assurances regarding intention are generally no more that unsubstantiated assertions or wishful thinking, and should be vigorously tested – particularly where they are made by the revenue authority as is the case here.

It is the role of the courts to interpret what was intended by the parliament by looking at the words of the legislation in their context. Sometimes extraneous material such as explanatory memoranda or second reading speeches can assist the courts in this process, but usually the words of the legislation are paramount.

We note also that the majority report observes that Exxon and BHP Billiton filed their PRRT returns and made payments on the basis of the ATO's view about the taxing point. The strong but erroneous implication here is that by reason of their conduct the taxpayers were somehow legitimising the ATO view of the law, notwithstanding they had lodged objections against the relevant assessments and eventually litigated the issue.

Such a view reflects a lack of understanding about the way in which taxpayers manage their affairs in taxation disputes. Many taxpayers, particularly taxpayers who are conservative and risk averse, will lodge their tax return on the basis of what they know to be the Commissioner's view of the law about a particular issue – even though they disagree with that view. Typically, they will pay all of the tax assessed, including the amount in dispute, and then lodge an objection in relation to the matter in dispute. Until now, nobody has ever suggested that such conduct should be taken as compromising the positions taxpayers subsequently take in pursuing their case.

To the extent the majority report has relied on implications to be drawn from the conduct of the taxpayers, its conclusions are seriously flawed.

There has been a disturbing recent trend in retrospective tax announcements, including one involving the transfer pricing rules that was made last week. In the past, retrospective tax law changes that are adverse to taxpayers have been used very sparingly, and mainly in cases involving egregious tax avoidance and/or clearly unintended consequences. Taken together, these changes will ultimately be seen by some investors as representing a regulatory risk of the kind we have not previously seen in Australia.

The Exxon/Mobil dispute is a legitimate argument about how the law applies in a particular situation and it has always been the role of the courts to arbitrate on such matters. If the government is unhappy with the outcome it is free to amend the law on a prospective basis.

The CTA urges the Senate Committee to reject the retrospective element of the proposed PRRT amendment.

Yours Faithfully,

(Frank Drenth)

Executive Director
Corporate Tax Association

11 November 2011

Appendix A – CTA October 2011 Submission to House of Representatives Standing Committee on Economics

INTRODUCTION

The Corporate Tax Association (CTA) wishes to express its concerns about the retrospective nature of an amendment to the *Petroleum Resource Rent Tax Assessment Act 1997* (the PRRT Act) included in the *Tax Laws Amendment (2011 Measures Bill No 8) Bill 2011* (the Bill) and which has been referred to the House Standing Committee on Economics.

The practice of governments over the years has been to avoid introducing tax laws that retrospectively impose new obligations except in very unusual circumstances.

Such restraint is well justified, as citizens and corporations should be able to structure their affairs in the expectation that their rights will not be retrospectively diminished by a change in the law that goes back as far as 21 years, as in the present case. It is vital for a small capital importing country like Australia to avoid creating concerns among international investors about the stability and fairness of its tax laws.

A report commissioned by the former government on the review of self-assessment in 2004 suggested circumstances that warrant retrospective change might include:

- correcting unintended consequences where the ATO or taxpayers have applied the law as intended;
- addressing a tax avoidance issue; or
- preventing undesirable behavioural changes (such as bringing forward or delaying the disposal of an asset)

It is not entirely clear what was meant by the first dot point, but the context of the report and the wording used suggest there is a shared understanding about what was intended under the law. In spite of the assertion in the Explanatory Memorandum that the recent Federal Court decision involving and Exxon/Mobil subsidiary confirms “the long-established application of the PRRT” in relation to the taxing point, the fact is that the joint venturers engaged in Australia’s oldest major off-shore oil and gas operation have a different view, and this different view has been known about by the Tax Office for many years. The second and third dot points have no application to the circumstances of Exxon/Mobil and its joint venture partner either.

More recently, the 2008 *Better Tax Law Design and Implementation* report by the Tax Design Panel also expressed the view that retrospective tax law changes are undesirable. However, where they are unavoidable any announcement should clearly explain the reasons for their retrospective application.

The Panel also commented (at para 3.21) that retrospective legislation might be appropriate to rectify a technical deficiency or to address "a serious risk to the revenue". The issue here is not a technical deficiency but a legitimate dispute about the interpretation of the PRRT legislation. On the revenue aspect, any dispute that justifies taxpayers pursuing a matter in the Federal Court is likely to involve material amounts of revenue, but nothing in the Bill or the Explanatory Memorandum justifies the conclusion that this dispute presents "a serious risk to the revenue".

It is unprecedented for a corporation to have its appeal rights in a legitimate tax dispute to be nullified in the way envisioned under the Bill. The Tax Office has had more than a decade and a half to resolve this matter. Its failure to do so, and the failure of successive governments to introduce prospective changes to clarify the issue much earlier does not justify compromising Australia's reputation as a safe and predictable investment destination.

The CTA urges the committee to reject the retrospective element of the proposed PRRT amendment.

Yours Faithfully,

(Frank Drenth)

Executive Director
Corporate Tax Association

26 October 2011