THE TAX INSTITUTE

7 June 2013

Senator Mark Bishop
Chair
Senate Standing Committee on Economics
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

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

Dear Senator Bishop

TAX LAWS AMENDMENT (2013 MEASURES NO. 2) BILL 2013

The Tax Institute thanks the Senate Standing Committee on Economics (the "**Committee**") for this opportunity to make a submission in relation to the *Tax Laws Amendment (2013 Measures No. 2) Bill 2013* (the "**Bill**").

Our submission below is set out in two parts, relating to:

- **Part 1:** Section 3D, Part 1, Schedule 5 of the Bill which requires the Commissioner of Taxation (the "**Commissioner**") to report information about corporate tax entities with reported total income of $100 million or more; and

- **Part 2:** Schedule 7 of the Bill which removes the capital gains tax ("**CGT**") discount for foreign individuals.

Our submission does not address the remaining Schedules in the Bill.

We have also made a submission to the Joint Parliamentary Committee on Corporations and Financial Services in relation to former Schedules 3 and 4 of the Bill, which together create a regulatory framework for tax (financial) advice services.

SUMMARY

Tax transparency

Greater transparency as to the tax affairs of certain taxpayers may assist in informing a community debate on the appropriateness of our current tax policy settings. As such, we broadly support the objectives of the tax transparency initiative.

However:

- In order to allow disclosed information to be contextualised, we urge the Committee to recommend that the Government undertakes greater

consultation as to whether these objectives can be achieved via amendments to the *Corporations Act 2001*; and

- The tax transparency initiative should only apply to companies with total income of $250 million of greater in order to exempt as many small to medium sized closely held companies as reasonably possible. In this regard, the need to protect the actual and in principle privacy of individual taxpayers needs to be carefully balanced with the objectives of the tax transparency initiative.

Removing the CGT discount for foreign individuals

The Committee should recommend that the Bill be amended to delay the start date of this measure from 8 May 2012 to 1 July 2012 in order to reasonably reduce the compliance costs associated with this measure.

PART 1: TAX SECRECY AND TRANSPARENCY

Scope of submission

Our submission below relates only to section 3D, Part 1, Schedule 5 of the Bill which requires the Commissioner of Taxation (the "**Commissioner**") to report information about corporate tax entities with reported total income of $100 million or more.

Other parts of this Schedule require the disclosure of information in relation to taxpayers with a Minerals Resource Rent Tax or Petroleum Resource Rent Tax liability, permit the disclosure of aggregate tax information and permit greater taxation information sharing between Government agencies. Our submission does not address these other parts.

Tax transparency

Our taxation laws should reflect the values of the taxpaying community. As such, we welcome an informed debate about the appropriateness of current tax settings as well as the merits of any changes to our tax system being considered.

Transparency as to the tax affairs of certain taxpayers may assist in informing such a debate – if the information is meaningful, relevant and contextualised.

As such, we broadly support the objectives of the tax transparency initiative in section 3D, Part 1, Schedule 5 of the Bill.

If the Bill as currently drafted is legislated, we anticipate that taxpayers may seek to make additional disclosures in relation to their tax affairs to contextualise the disclosure required to be made by the Commissioner. Such voluntary disclosures may incorporate a comprehensive suite of taxes, levies and duties that a company is liable to pay both in Australia and in foreign jurisdictions.

While legally voluntary, such additional disclosures may, in effect, be necessary to counter potential reputational risk for companies that have complied with the law but nevertheless have tax disclosures that fall outside expected norms.

As such, efforts should be made to determine whether the objectives of the tax transparency initiative can instead be achieved via an extension of existing corporate

disclosure requirements under the *Corporations Act 2001*. Disclosure via financial statements may also allow greater contextualisation.

Reporting requirements

To date, the Government has not undertaken any public consultation on whether the objectives of this initiative may be better achieved via amendment of reporting requirements under the *Corporations Act 2001*.

These reporting requirements have historically and in the present day fulfilled a valuable function of keeping relevant stakeholders informed as to the present and planned activities of the relevant company or economic group.

The disclosure of additional information in this manner will allow tax information to be considered in context, allow greater transparency in relation to the economic substance of the transaction and could require additional disclosures deemed necessary via the notes to the financial statements.

Recommendation 1

The Committee should recommend that the Government further explores whether the objectives of this initiative may be better achieved via amendment of reporting requirements under the *Corporations Act 2001*.

Exempting small to medium enterprises

In order to protect the confidentiality of tax information of individuals and small businesses as per the Assistant Treasurer's media release of 4 February, 2013, the tax transparency threshold be set so as to exclude as many closely held companies as possible, and at total income (as per the relevant income tax return tab) of $250 million.

We consider it important to exclude as many closely-held companies as possible because:

- The disclosure of tax information of closely held, potentially wholly-domestic companies is inappropriate and risks inadvertently disclosing details of some of the tax circumstances of the ultimate individual owners. In implementing the tax transparency objective, the need to protect the actual and in principle privacy of individual taxpayers needs to be carefully considered;

- It is unnecessary to include many small to medium enterprises in the transparency initiative in order to fulfil the Government's stated policy intention/s; and

- Many large multinationals that have no significant Australian tax presence (because, for instance, the enterprise makes significant sales into Australia but has no permanent establishment here) are unlikely to be included on the list unless the threshold is significantly lower than $100 million of business income.

The most appropriate threshold

We are cognisant of the many varying definitions of "small", "medium" and "large" businesses that exist from the perspective of tax laws (including with respect to *de minimis* carve outs), the Australian Taxation Office ("**ATO**") (including in the ATO's *Taxation Statistics* publication) and the Australian Securities and Investment Commission.

In this context, we recommend that the ATO's classifications for the purposes of its internal administrative arrangements[1] be relied upon (see table below). These thresholds reflect the ATO's experience in relation to the tax issues that are prevalent in each market segment.

Classification	**Turnover**
Micro-enterprises	Less than $2 million
Small-medium enterprises	$2 million to $10 million (S1)
	$10 million to $50 million (S2)
	$50 million to $100 million (S3)
	$100 million to $250 million (S4)
Large businesses	Greater than $250 million

Furthermore, the Inspector-General of Taxation relevantly noted recently in the Report on his *Review into the ATO's compliance approaches to small and medium enterprises with annual turnovers between $100 million and $250 million and high wealth individuals* (i.e. the S4 market segment):

> *The Australian Taxation Office (ATO) identifies small and medium sized enterprises with annual turnovers between $100 million to $250 million (larger SMEs) as a particular compliance focus. There are approximately 1400 larger SMEs, over half of which are controlled by individuals with more than $30 million in net wealth. …*
>
> *Even within the S4 market segment and of the SME business line's work, there are a variety of taxpayers. Around 50 per cent of the S4 market segment is part of a CHPG [closely held private group], around 30 per cent are foreign controlled groups, around 15 per cent are public groups, around six per cent are other widely held groups (such as limited partnerships, managed investment schemes, etc.) and around two per cent are non-profit making groups.*

In this regard, the concepts of "total income" and "turnover", and "company" and "enterprise" are sufficiently similar to allow these observations to be relevant to the tax transparency initiative.

In light of the significant percentage of companies in the $100 million to $250 million total income bracket that are likely to be part of a closely held private group, we recommend that the relevant threshold be raised to $250 million, to align with the threshold at which the ATO's internal definition of "large businesses" commences.

[1] As set out in the ATO's 2012-13 Compliance Program

Recommendation 2

The Committee should recommend that the Bill be amended to only require disclosure in relation to the tax affairs of companies that have total income greater than $250 million, in order to exempt as many closely-held companies as reasonably possible.

PART 2: REMOVING THE CGT DISCOUNT FOR FOREIGN INDIVIDUALS

The legislation to implement this measure is complex. This is especially the case as the rules also apply to indirect interests in Australian CGT assets held through trusts and there is usually a significant knowledge and ease of access to information gap between trustees and non-resident beneficiaries of the capital gain.

In order to reasonably reduce the compliance costs associated with this measure, the Committee should recommend that the start date of this measure be deferred from 8 May 2012 to 1 July 2012.

Such a slightly delayed start date will cater for non-residents and trustees who will have already lodged 2012 income tax returns including gains calculated based on the current rules prior to the details of the rules being released. A start date of 1 July 2012 will save these taxpayers from having to amend previously lodged returns incorporating gains made to 30 June 2012 and will ensure all gains made from 1 July 2012 will be properly accounted for under these new rules.

Recommendation 3

The Committee should recommend that the Bill be amended to delay the start date of this measure from 8 May 2012 to 1 July 2012 in order to reasonably reduce the compliance costs associated with this measure.

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If you would like to discuss this matter, please contact me or Senior Tax Counsel, Robert Jeremenko on (02) 8223 0011.

Yours sincerely

Steve Westaway
President