MINERALS COUNCIL OF AUSTRALIA

SUBMISSION TO THE SENATE ECONOMICS LEGISLATION COMMITTEE

TAX LAWS AMENDMENT (CROSS-BORDER TRANSFER PRICING) BILL (NO. 1) 2012

JULY 2012

INTRODUCTION

The Minerals Council of Australia (MCA) welcomes the opportunity to comment on the *Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No.1) 2012.*

The MCA is the peak industry organisation representing Australia's exploration, mining and minerals processing industry nationally and internationally in its contribution to sustainable development. The MCA's strategic objective is to advocate public policy and operational practice for a world-class industry that is safe, profitable, innovative, environmentally and socially responsible and attuned to its communities' needs and expectations.

MCA member companies produce more than 85 per cent of the nation's annual minerals output and account for more than 50 per cent of Australia's exports. The minerals sector is Australia's most globalised industry and a key pillar of the national economy. It accounts for around 7% of GDP, upwards of 20% of national investment and directly employs 260,000 Australians, many in regional and remote areas. The industry is also a large and growing contributor to Federal and State Government revenues.

Australia is a net importer of capital in a period of tight global capital markets and diminished investor appetite for risk. A stable regulatory environment (including in relation to taxation laws) is critical to attracting and retaining investment in Australia which, in turn, can generate higher exports and national income, more high-wage jobs and, in the process, increased tax revenue.

The MCA has serious concerns with key changes being implemented by the *Tax Laws Amendment (2012 Measures No. 3) Bill 2012: Cross-Border Transfer Pricing.* These concerns are outlined in detail below.

GENERAL COMMENTS

In making this submission, the MCA wishes to underline at the outset the very strong opposition of our members to the retrospective effect of the legislation. As we have consistently argued, prospectivity is a fundamental principle of an equitable and efficient tax system. Hence, retrospectively 'clarifying' the role of tax treaties is a seriously flawed approach. Granting the Commissioner additional latitude beyond that which is prescribed in current domestic laws has the potential to change tax outcomes for businesses that have reasonably arrived at their transfer pricing position on the basis of the law as it has been interpreted by the courts.

The MCA, together with other Australian business organisations, has become increasingly concerned about the risks posed by retrospective legislation, noting that these measures come on top of other developments including retrospective Petroleum Resource Rent Tax amendments and retrospective amendments in relation to rights to future income. Instability in tax arrangements of this nature impacts on investment decisions and contributes to heightened sovereign risk, thereby making Australia a less attractive location for capital.

SPECIFIC COMMENTS

1. In the interest of transparency and fairness, the MCA contends that section 815-30(2) should be amended to require the Commissioner, when making an adjustment, to specify to the taxpayer which specific item is being adjusted. Adjustments to particular items of income, expenditure or capital gains and losses have clear consequences under both domestic tax law and in international jurisdictions which a taxpayer is reasonably entitled, if not obliged, to pursue. The unfair consequences of this lack of transparency is compounded by draft sections 815-30(7) and 815-35(7). Without amendment the reasonable question will remain: How does a taxpayer go about discharging the onus of proving its case without a full explanation of the assessment from the Commissioner?

2. The MCA shares concerns that have been expressed relating to the guidance material and the effect of section 815-20(4) to allow the inclusion of "different documents or parts of documents for different circumstances". It is the MCA's view that it would be very dangerous to give the ATO the authority to insert its own documents into the regulations when its role is law administrator, not lawmaker. Secondly, we hold the practical concern that the partial inclusion of documents may result in partial understanding of the relevant issues without reference to the full context of the complete document.

3. The MCA recommends that steps be taken to protect taxpayers from the most egregious practical consequences of the retrospective nature of the legislation. Specifically, the MCA supports a four year time limit for the amendments to ensure taxpayers are not additionally exposed to double taxation in jurisdictions such as the United Kingdom in which a six year statute of limitations applies; and advocates remitting to zero penalties imposed against taxpayers that made a genuine effort to correctly price transactions under existing ATO guidance such as TR 98/11.

4. The MCA recommends that Section 815-15(1)(a) be clarified to specify whether Australian residency is to be determined having regard to the domestic legislation or the treaty (Article 4). Article 4 contains a tie breaker rule wherein if the company is a resident of both countries, it is deemed a resident of the country in which its place of effective management is situated. However, under section 6(1) of ITAA36, if the company is incorporated in Australia, it is deemed resident without regard to place of effective management. Section 815-5(b) notes that an "Australian Permanent establishment" is within the meaning of the relevant "international tax agreement". But there is no such clarification for "Australian resident". This is important since section 815-15 relating to transfer pricing benefit applies only to Australian residents.

5. The MCA is concerned that Subdivision 815-A seems to give the Commissioner powers to determine arm's length profit on the whole of entity basis having regard to Articles 7 and 9 of the OECD Model Treaty. This exceeds the OECD's intent. Further, where the entity is dealing in several markets with various international related parties in different commodities, this may not be workable due to different pricing structures. Where the Commissioner makes arm's length adjustments at the whole of entity level, it is not certain how these will be identified against individual items of trading stock, services, assets etc for the application of other provisions of the Act. This issue is only partially addressed in the draft EM at paragraphs 1.110 to 1.125 and remains an issue of concern to MCA members.

Minerals Council of Australia
11 July 2012