



AMERICAN CHAMBER OF COMMERCE IN AUSTRALIA

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Senate Standing Committees on Economics
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Sent via email: economics.sen@aph.gov.au

11 July 2012

Dear Sir

Inquiry into the Tax Laws Amendment (Cross Border Transfer Pricing) Bill (No. 1) 2012

The American Chamber of Commerce (AmCham) provides the following submission to assist the Senate Economics Legislation Committee (Committee) in its inquiry into the Tax Laws Amendment (Cross Border Transfer Pricing) Bill (No 1) 2012 (the Bill).

AmCham represents the interests of American companies undertaking business activities in Australia. The most significant source of foreign investment in Australia is the United States.

AmCham and a number of our members have significant concerns with respect to the Bill. The particular concerns that we and our members would like to highlight to the Committee can be summarized as follows:

- a. Retrospective law, especially when retrospective for so many years, creates uncertainty as to the business environment in Australia. Accordingly, retrospective amendments should be avoided in all but the most egregious of circumstances. Such circumstances do not exist on this occasion. The retrospective operation of the new law – going back to 2004 - is simply unjustified and creates unnecessary uncertainty and business risk, which in turn will negatively affect foreign investment in Australia.
- b. The proposed retrospective amendments solely relate to companies owned by residents of countries which have an agreement with Australia for the avoidance of double taxation. Accordingly, the proposed amendments would not affect any investor from a country with which Australia does not have such an agreement. This includes tax havens and foreign investors who choose to divert their investment through another jurisdiction. We consider that this element of the legislation is highly discriminatory against investors from countries such as the United States, which remains by far the most significant country of investment in Australia.

- c. The consequences of the proposed amendments are said to be in accordance with double taxation agreements signed. However, the double tax agreement with the United States specifically provides that the agreement cannot be used to increase taxation, only to ensure an appropriate allocation of tax between the two countries (Article 1(2)). Accordingly, the basis upon which retrospectivity has been justified by reference to interpretation of the agreement, is not sound for the purposes, at least, of the double taxation agreement with the United States.
- d. The consequences to investors from the United States is very significant. Australian taxes may occasionally be available as a foreign tax credit to these investors. However, in the circumstances of such material retrospectivity and where there is still grave concern as to whether the Internal Revenue Service will accept this retrospective tax, as validly imposed, there is considerable doubt as to whether investors from the United States will be confidently able to claim a foreign tax credit for this additional Australian tax that may be imposed.

These and other concerns in respect of the Bill have been raised by AmCham and our members previously - initially in response to the announcement of the proposed changes on 1 November 2011 by the then Assistant Treasurer and again in response to the exposure draft material released on 16 March 2012. We attach for the Committee's consideration these submissions.

AmCham requests that the Committee to consider and take into account the concerns set out above and in our previous submissions when reporting on the Bill. In particular, we strongly urge the Committee to consider and recommend against the retrospective operation of the Bill which is simply unjustified.

If required, we would be pleased to organize for a representative of AmCham to appear before the Committee to explain in greater detail our concerns and submissions.

Yours faithfully,

Ray Doyle
Acting National Director
On behalf of
The American Chamber of Commerce in Australia
12 July 2012

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