

## **Dissenting Report:**

# **Tax Laws Amendment (2011 Measures No. 8) Bill 2011 and Pay As You Go Withholding Non-Compliance Tax Bill 2011**

### **Schedule 2 - Taxing point for the Petroleum Resource Rent Tax**

#### **Background**

The Petroleum Resource Rent Tax (PRRT) is a profit based tax which is levied on a petroleum project in Commonwealth waters (except the North West Shelf project).

Schedule 2 of the Bill seeks to clarify the taxation point of the existing PRRT regime in two main respects:

- First, in amending the definition of a 'marketable petroleum commodity';
- Second, in applying that definition retrospectively from 1 July 1990.

The Bass Straits ExxonMobil project is the only project that will be affected by this change.

Since the Bass Straight project was brought into the PRRT regime in 1990-91, the taxation point, and other matters, have been the subject to an ongoing dispute between the Australian Taxation Office ('ATO') and Esso Australia Resources Pty Ltd ('Esso'), a wholly owned subsidiary of ExxonMobil Australia Pty Ltd (ExxonMobil).

Earlier this year, the Federal Court handed down a judgment in favour of the ATO.<sup>i</sup> The single judge decision is the subject of an appeal by Esso. A directions hearing of the Full Federal Court has been set for the week of 7 November 2011.

#### **Fiscal Position of the Government**

Before the Coalition lost office in 2007, the fiscal position of the government was strong. The Coalition left no net debt for the incoming Labor Government, having eliminated the \$96 billion of net debt it had inherited from the previous Labor Government. The Coalition instead left a surplus of \$20 billion and a \$60 billion investment in the Future Fund.

In the May Budget 2010-2011, the Treasurer announced a deficit of \$49.4 billion and net debt of \$107 billion.

At the time that the Treasurer announced his fourth deficit, he also announced his intention to legislate retrospectively on the disputed taxation point of the PRRT.

The government claims that there is no fiscal impact if the Bill is passed. This is only half correct. Evidence was provided to Committee that Esso has been paying the PRRT on a conservative basis, while pursuing its dispute with the ATO through the legal process.

Esso provided evidence that if the Bill is not passed and they are ultimately successful in their legal appeal there are very real fiscal implications for the government. That is, the ATO may be forced to refund up to \$323 million of paid tax to Esso.<sup>ii</sup> Esso's partner, BHP would also be entitled to a refund of a similar amount.

It concerns the Coalition members that the Government appears to be interfering in a long running legal dispute motivated by a need to shore up its fiscal position. The Coalition notes that the fiscal position of the government has deteriorated over the last four years due to the Government's poor economic management.

### **Retrospective Application of Tax Laws**

It is a longstanding principal in tax law that tax legislation should apply prospectively not retrospectively.

Mr Yasser El-Ansary, Tax Counsel of the Institute of Chartered Accountants in Australia (ICAA) stated in evidence that schedule 2 of the Bill "threatens the longstanding principle of protecting taxpayers from the need to introduce retrospective tax laws when they have attempted to comply in good faith with the spirit of the law that has been in existence."<sup>iii</sup>

Evidence was provided that while there are some examples of retrospective tax laws, they are unusual and generally fall into one of two categories:

1. blatant anti-avoidance cases; or
2. retrospective in so far as it applies from the date of announcement rather than the date of enactment.

The Chairman of ExxonMobil, Mr Dashwood stated in evidence that schedule 2 "effectively curtails ongoing litigation between the ATO and Esso. The 2011 budget announcement seeks to reach back 21 years and change the law retrospectively."<sup>iv</sup>

Neither the Law Council, nor the ICAA could point to an occasion in Australia's recent history where the parliament has sought to pass legislation that amends the law as far back as 21 years.

### **Sovereign Risk**

The Law Council, Business Council of Australia, Tax Institute, ICAA and the Australian Institute of Company Directors all provided evidence to the committee that the retrospective nature of the tax change, and the fact that the change goes back 21 years, is unprecedented.

A number of organizations and individuals, including the Australian Petroleum Production and Exploration Association, also gave evidence and provided submissions that significant retrospective tax laws, give rise to sovereign risk concerns.

This evidence is best summarized by Mr Dashwood from Esso who stated that schedule 2 of the Bill "disregards consistent advice received by governments past and present about retrospectivity in tax legislation and will damage Australia's international reputation and perceptions of sovereign risk in this country. It may well cause some investors to consider whether Australia is an appropriate

destination for the mobile capital, especially at a time when international capital markets are extremely tight.”<sup>v</sup>

This is not the first time that concerns have been raised about sovereign risk and tax legislation.

At the recent Commonwealth Business Forum in Perth the Chief Executive of South African Goldminer AngloGold Ashanti, Mark Cutifani was the latest business figure to voice concern stating that Australia is “one of the top sovereign-risk countries in the world on the basis of government policy and its demonstrated behavior in terms of taxation policy and its inconsistency in policy.”<sup>vi</sup>

The Coalition notes that a perception that Australia is subject to sovereign risk concerns will damage our ability to attract capital investment, thus damaging our economy.

### **Legal action on foot**

It is highly unusual for a government to intervene in an ongoing legal dispute when that dispute is in the final stages of appeal.

The ICAA argue that this is clearly “usurp(ing) the role of the judiciary by amending tax laws partway through a major litigation that is seeking to test certain key concepts embedded in the PRRT regime.”<sup>vii</sup>

The ICAA also noted in its submission,

“the separation of powers as between the legislature and the judiciary is a fundamental doctrine embedded within the constitutional arrangements that underpins the integrity of Australia’s governance arrangements. For the most part this separation doctrine has been adhered to by parliaments, the judiciary and the executive for many decades.

In order to protect the separation doctrine, it would be more appropriate for the Government to allow the current litigation to be concluded and then to determine what course of action may be appropriate at that point in time. Not allowing the judicial process to reach its natural conclusion is seen by the Institute as an inappropriate interference in due process, which we believe would set a problematic and perilous precedent for further action of a similar nature in the future.”<sup>viii</sup>

The Business Council of Australia cautioned that such an intervention would create a “grave precedent.”<sup>ix</sup>

Given that no explanation has been provided by the Government as to why it has intervened in this way, at this time, the Coalition shares the concerns that have been expressed.

### **Recommendation 1**

**The Coalition believes that schedule 2 of the bill violates a long standing principal in tax law, namely that tax laws should, with few exceptions, be prospective rather than retrospective.**

**The Coalition is concerned that capital investment in Australia may be impacted by sovereign risk concerns as a result of the Bill’s retrospective application of the tax law going back 21 years.**

**Finally, the Coalition believe that the long running legal dispute between Esso and the ATO should be allowed to run its course through the court process.**

**For the reasons outlined above, the Coalition recommends that schedule 2 be removed from the Bill.**

### **Schedule 3 - Directors to be personally liable for unpaid superannuation and PAYG withholding tax**

#### **Background**

The Coalition Members agree with the government members that fraudulent phoenix activity is abhorrent, as is the deliberate non-payment of employee superannuation entitlements.

The Coalition Members also agree with government members that the Bill as currently drafted may result in unintended consequences and requires further work to address concerns raised by the Council of Small Business of Australia, the ICAA and the Australian Institute of Company Directors in particular.

#### **Recommendation 2**

**For the reasons outlined above, the Coalition recommends that schedule 3 be removed from the Bill to allow the Government to address the issues raised by stakeholders, after which a changed schedule can be brought forward.**

**Ms Kelly O'Dwyer MP, Deputy Chair**

**The Hon Tony Smith MP**

**Mr Scott Buchholz MP**

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<sup>i</sup> *Esso Australia Resources Pty Ltd v the Commissioner of Taxation* [2011] FCA 360 (13 April 2011)

<sup>ii</sup> Mr Stuart Brown, ExxonMobil, Committee Hansard, Canberra, 27 October 2011, p.10.

<sup>iii</sup> Mr Yasser El-Ansary, Institute of Chartered Accountants, Committee Hansard, Canberra, 27 October, p.18

<sup>iv</sup> Mr John R Dashwood, ExxonMobil, Committee Hansard, Canberra, 27 October, p.8

<sup>v</sup> Mr John R Dashwood, ExxonMobil, Committee Hansard, Canberra, 27 October, p.8

<sup>vi</sup> 'Carbon Tax raises sovereign risk says mine chief' by Damon Kitney, *The Australian*, 26 October 2011

<sup>vii</sup> Mr Yasser El-Ansary, Institute of Chartered Accountants, Committee Hansard, Canberra, 27 October, p.18

<sup>viii</sup> ICAA, Submission 10, p.2

<sup>ix</sup> BCA, Submission 2, p.2