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The Parliament of the Commonwealth of Australia

# **Advisory Report on the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013**

House of Representatives  
Standing Committee on Economics

March 2013  
Canberra

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## Chair's foreword

The Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013 makes a number of amendments to the tax law. Schedule 1 amends Part IVA of the *Income Tax Assessment Act 1936* with the aim of ensuring that the Act continues to counter schemes that comply with the technical requirements of the tax law but which, when viewed objectively, are conducted in a particular way mainly to avoid tax.

Schedule 2 of the Bill aims to modernise Australia's transfer pricing rules and provide a new, comprehensive and robust transfer pricing regime that is aligned with internationally accepted principles. The objective of these new transfer pricing rules is to ensure that an appropriate return for the contribution of Australian operations of a multinational group is taxable in Australia for the benefit of the broader community.

Both schedules were the subject of prior public consultation by the Treasury.

On 1 March 2012, the Government announced that it would introduce amendments to ensure Part IVA continued to be effective in countering tax avoidance schemes. The Government's announcement was made after reviewing a number of judicial decisions. The Government was concerned that some taxpayers had argued successfully that they did not get a tax benefit because, absent the scheme, they would not have entered into an arrangement that attracted tax, because they would have entered into a different scheme that also avoided tax, because they would have deferred their arrangements indefinitely, or because they would have done nothing at all.

Schedule 1 amends Part IVA to address weaknesses that have come to light as a result of judicial decisions in determining whether there is a tax benefit in connection with a scheme and what that tax benefit is. Schedule 1 provides that the Commissioner of Taxation may use either of two alternative approaches to cancel a tax benefit obtained by a taxpayer in connection with a scheme that was entered into for the sole or dominant purpose, objectively ascertained, of avoiding tax.

These alternative postulates are an annihilation approach, whereby the scheme must be assumed not to have happened but all other events that actually happened must be incorporated; and a reconstruction approach which must represent a reasonable alternative to the scheme but disregard any potential tax costs. The result of either of these postulates will be that the tax effect is less advantageous to the relevant taxpayer than that secured by the taxpayer in connection with the scheme.

It was claimed in some of the submissions that the amendments in Schedule 1 are unnecessary as the court decisions are reasonably unique and of limited application. There are further claims in some submissions that it is not clear how the alternative postulates will operate.

However, it is the Committee's view that the amendments in the Bill are a measured response to exposed weaknesses in the operation of the tax benefit concept.

The Treasury emphasised in its submission to the committee that the annihilation and reconstruction approaches are clearly intended to operate as alternative bases for identifying tax benefits and will not lead to more income tax being payable than results from the ordinary operation of the tax law.

Schedule 2 of the Bill is vital to modernise Australia's transfer pricing rules and bring these into line with accepted international arm's length principles recommended by the OECD. Transfer pricing refers to the prices at which an enterprise transfers physical goods and intangible property or provides services to associated enterprises in different tax jurisdictions.

The arm's length principle is the international standard that OECD member countries have agreed should be used for determining transfer prices for tax purposes. This principle is that each enterprise within a multinational enterprise should be treated as a separate entity and it should be determined what independent entities would have done in the place of the parties. This provides a broad parity of tax treatment for members of multinational groups and independent enterprises.

The committee notes claims in some of the submissions it received that the Bill is not consistent with OECD transfer pricing guidelines and that Schedule 2 goes beyond the exceptional circumstances specified by these guidelines for a tax administration to disregard the structure adopted by a taxpayer for a controlled transaction.

It is also proposed in several submissions that the seven year limit for a transfer pricing adjustment to be made by the Commissioner of Taxation is too long and should be four years only, as applies to general income tax assessments.

However the application and effect of the proposed reconstruction rules are clearly based on the language used in the OECD guidelines and that the Bill also contains a guidance provision that requires the relevant rules to be interpreted consistently with these guidelines. The Treasury also asserts that a four year limit to conduct transfer pricing adjustments would not provide the Commissioner with adequate time to conduct transfer pricing audits.

It is clear that the OECD transfer pricing guidelines are currently the 'best thinking evident in transfer pricing'. The committee considers that reconstruction powers in exceptional circumstances are a core part of modern transfer pricing regimes and that the Bill implements these powers consistently with the OECD guidelines.

In conclusion, the Bill will enable the Commissioner of Taxation to objectively and reasonably enforce tax avoidance measures and collect revenue to which the Commonwealth is entitled under the law. The Bill should pass.

On behalf of the committee, I thank the organisations that assisted the committee during the inquiry through submissions. I also thank my colleagues on the committee for their contribution to the report.

**Julie Owens MP**  
**Chair**



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## **Membership of the Committee**

<b>Chair</b>	Ms Julie Owens MP
<b>Deputy Chair</b>	Mr Steven Ciobo MP
<b>Members</b>	Mr Scott Buchholz MP Mr Stephen Jones MP Hon Joel Fitzgibbon MP Dr Andrew Leigh MP Ms Kelly O'Dwyer MP Mr Craig Thomson MP

### **Committee Secretariat**

<b>Secretary</b>	Mr Stephen Boyd
<b>Inquiry Secretary</b>	Dr Kilian Perrem
<b>Inquiry Staff</b>	Ms Samantha Mannette
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## **Terms of reference**

On 14 February 2013 the Selection Committee referred the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013 to the committee for inquiry and report.

Under Standing Order 222(e), the House is taken to have adopted the Selection Committee's reports when they are presented.



## List of abbreviations

ATO	Australian Taxation Office
CPA	CPA Australia
CTA	Corporate Tax Association
ICAA	Institute of Chartered Accountants Australia
ITAA 1936	<i>Income Tax Assessment Act 1936</i>
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
MNE	Multinational enterprise
OECD	Organisation for Economic Cooperation and Development
OECD TPGs	<i>OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations</i>
PE	Permanent establishment
TAA 1953	<i>Taxation Administration Act 1953</i>
the Bill	Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013



# **Recommendation**

## **2 Issues in the Bill**

### **Recommendation 1 (Paragraph 2.133)**

The House of Representatives pass the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013 as proposed.