



31 October, 2011

File:

The Hon Julie Owens MP  
Chair  
Standing Committee on Economics  
PO Box 6021  
Parliament House  
CANBERRA ACT 2600

Dear Ms Owens

**RE: TAX LAWS AMENDMENT (2011 MEASURES NO.8) BILL 2011 – PETROLEUM RESOURCE RENT TAX**

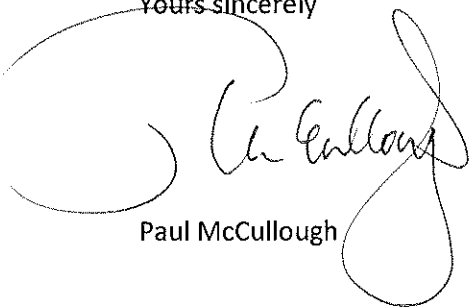
Thank you for the opportunity to appear before the Committee last Thursday to discuss Schedule 2 of the Tax Laws Amendment (2011 Measures No.8) Bill 2011. That Schedule would clarify the taxing point for the Petroleum Resource Rent Tax (PRRT), with effect from 1 July 1990.

During the hearing I undertook to provide the Committee with further information that it may find relevant to its consideration of this Schedule. In particular, I agreed to provide examples of previous amendments to tax laws which took effect prior to the date of their announcement. The Committee also indicated that it would find useful a detailed timeline of the dispute between the Commissioner of Taxation and the Bass Strait project participants. Please find enclosed this further material.

I note that the Committee has received evidence suggesting the Bass Strait companies might have been uncertain from time-to-time as to Tax Office's interpretation of this part of the PRRT law. I submit that the history of the dispute shows that the Tax Office has in fact maintained a clear and consistent view as to the location of the taxing point. In contrast, the companies' stated positions have changed over time.

The contact officer for this matter is Mr James O'Toole, who may be contacted on 6263 3112 should the Committee require further information.

Yours sincerely



Paul McCullough

## EXAMPLES OF AMENDMENTS TO THE TAX LAW TAKING EFFECT PRIOR TO THE DATE OF THEIR ANNOUNCEMENT\*

Issue	Timing	Comment	Legislative reference
<b>GST and representatives of incapacitated entities</b>	The Government announced on 6 February 2009 (Assistant Treasurer media release no. 5 of 2009) it would amend the GST law, with effect from 1 July 2000.	<p>The amendments ensured that representatives of incapacitated entities (such as liquidators and receivers) are liable for GST on post-appointment transactions.</p> <p>The amendments were in response to the Federal Court decision in <i>Deputy Commissioner of Taxation v PM Developments Pty Ltd</i> [2008] FCA 1886.</p> <p>Transitional provisions ensured that taxpayers who acted in good faith in accordance with the PM Developments decision were not adversely affected.</p>	<i>Tax Laws Amendment (2009 Measures No.5) Act 2009.</i>
<b>Remaining effective life of a mine</b>	The amendments were passed in June 2007. They applied to all income years commencing on or after 1 July 2001.	The amendment removed some unintended consequences in relation to the treatment of mining rights.	<i>Tax Laws Amendment (2007 Measures No. 2) Act 2007 (Schedule 1).</i>
<b>Research and Development (R&amp;D)</b>	The amendments were passed in June 2007. They applied to all income years on or after 1 July 2001. They applied to all income years commencing on or after 1 July 2001, which is the date of commencement for the R&D tax offset.	A series of 10 amendments were made to ensure that the R&D tax offset and the premium incremental concession reflected the original policy intent. They clarified the law in situations where the intended outcome did not occur. For example, the original provisions referred to 'taxpayers', which was too narrow to cover certain companies covered by the original policy intent.	<i>Tax Laws Amendment (2007 Measures No 2) Act 2007 (Schedule 3).</i>
<b>GST treatment of residential premises</b>	<p>The amendments received Royal Assent on 30 June 2006. They took effect from 1 July 2000 (the start date for the GST).</p> <p>The then Assistant Treasurer announced the measure (including the retrospective start</p>	The Government amended the GST Act to ensure that following the decision of the Full Federal Court in <i>Marana Holdings Pty Ltd v Commissioner of Taxation</i> [2004] FCAFC 307 supplies of certain types of real property (such as serviced apartments and strata title units leased to hotel operators) are input taxed and not taxable. This meant that acquirers of these types of real property	<i>Tax Laws Amendment (2006 Measures No.3) Act 2006.</i>

	date) on 27 February 2006.	would not be entitled to input tax credits.	
<b>Consolidation</b>	<p>Certain amendments were passed in March 2005, and others were passed in June 2004.</p> <p>Both sets of amendments applied from 1 July 2002, which is the date of commencement of the consolidation regime.</p>	The consolidation regime has been subject to several tranches of amendments, designed to provide greater flexibility, clarify certain aspects of the consolidation regime and ensure that it interacts appropriately with other aspects of the income tax law.	<p><i>Tax Laws Amendment (2004 Measures No. 6) Act 2005 (Schedule 1).</i></p> <p><i>Tax Laws Amendment (2004 Measures No. 2) Act 2004</i></p>
<b>GST and retirement villages</b>	These amendments took effect from 1 July 2000.	The measure amended the GST Act to ensure that residents of serviced apartments in retirement villages who were receiving daily living or nursing assistance received their accommodation and services GST free. The measure also clarified the GST concessions provided to charitable retirement villages.	<i>Tax Laws Amendment (Retirement Villages) Act 2004 (Act No 143 of 2004).</i>

\* This table presents some examples of recent amendments to the tax law which took effect on a date prior to their announcement. This list does not attempt to be exhaustive.

## ATTACHMENT B

### TIMELINE OF THE BASS STRAIT PROJECT PRRT TAXING POINT DISPUTE

**17 May 1991** – The then Department of Primary Industries and Energy (DPIE) wrote to BHP Petroleum Ltd advising that ‘in the case of Bass Strait sales gas, the intention has always been that this would be regarded as being produced at the onshore facilities at Longford as no production occurs at the platform.’ (This letter is attached).

**Schedule 1 of Esso’s 1991 PRRT tax return** provided that it had filed its assessable petroleum receipts for sales gas on the basis that the taxing point was on leaving the Longford plant boundary. Esso states in Schedule 1 that ‘the taxation points used are those advised by the Australian Taxation Office (ATO) at a meeting on 26 November 1990 (attended by representatives of the Department of Primary industries and Energy (DPIE, the ATO, the Treasury and BHP Petroleum) and subsequently confirmed by the DPIE. (Esso’s return cited the 17 May 1991 letter from DPIE in support of this view).

Esso continued to lodge its PRRT returns (from 1992 until to at least 2006) on the basis that the taxing point for sales gas was at the exit of the Longford plant.

**6 March 1992** - Frank La Scala (an ATO Principal Advising Officer) provided a seminar paper an industry tax workshop with the ATO on the Petroleum Resource Rent Tax Legislation. This paper was for information purposes only and a common practice to explain early thinking on new legislation. It is well known that such presentations at seminars are done in good faith but are not binding technical ATO views (such as a binding ruling). It was in no way a fully considered general view and definitely not a fully considered view for the Esso/BHP particular fact circumstances.

**4 September 1992** - Esso made a submission to DPIE with respects to the Report to Parliament on the operation of the Petroleum Resource Rent Tax (PRRT). Esso made reference to the definition of sales gas and marketable petroleum commodity and submitted at page 8 of the submission that:

These provisions cause problems in practice. For example, the marketable petroleum commodities include sales gas which is itself defined in section 2 of the Act as meaning a mixture that includes methane where the methane comprises more than 50% by weight of the mixture. Gas at the well-head may strictly satisfy this definition even though at this point in the production cycle it is not yet marketable as it is subject to further processing onshore.

Such problems could be remedied by incorporating commercial reality into the definitions in the Act. For example, it could be provided that a marketable petroleum commodity is only produced when it is in a fully marketable state and is at a location where it is normally sold in arm's length transactions.

**November 1992** - A report was issued by DPIE on the operation of the *Petroleum Resource Rent Tax Assessment Act 1987*. Page 13 of the report states that:

**No practical problems have thus far emerged in the administration of the existing arrangements. The definition of an MPC clearly specifies that an MPC is a product produced from petroleum. Sales gas is not produced from petroleum at the platform and, therefore, concerns that the ringfence could in certain circumstances be at the platform are not warranted. The ringfence for sales gas produced from the Bass Strait project is established after initial stabilisation at the Longford plant.**

**21 July 1994** - The first objection in respect of the taxing point was lodged in respect of the 1991 assessment. Esso also requested that the Commissioner exercise his discretion and provide an extension of time for the objection to be lodged. [The tables at the end of this document summarise all of the relevant lodgement dates].

At this time there was a commercial dispute between Esso/BHP and its buyers (including Victorian State Authorities) dealing with whether the PRRT imposed on Esso/BHP in respect of the gas sold to the buyers, could be passed on to the buyers (the 'pass-on' dispute).

At the arbitration the State Government raised the taxing point issue in its submission, arguing that the amount of PRRT, if it could be passed on, was incorrectly calculated as the appropriate Taxing Point was at an earlier point than that contended for by Esso. Esso contended (in contrast to their position in the recent Federal Court case) that the appropriate taxing point was at the exit from Longford and had lodged its PRRT returns on that basis. This contention is consistent with the long-standing ATO view.

**4 October 1994** - The interim arbitration decision was handed down in relation to the 'pass-on' dispute. It found, amongst other things, that Esso had *not been incorrectly* calculating its assessable receipts. There was no error to be rectified, as the arbitrators confirmed that the method that Esso had been using to calculate its assessable receipts was correct.

**16 October 1995** BHP lodged an objection for the 1992 year. BHP also requested that the Commissioner exercise his discretion and provide an extension of time for the objection to be lodged.

**1997** - A commercial settlement to the 'pass-on' dispute was reached in 1997.

**May 1997** - At a meeting between the ATO, Esso and BHP representatives, Esso indicated they wished to pursue their taxing point objections.

**October 1997** - Esso indicated in a telephone conversation with the ATO that their 'taxing point' objections were protective. The ATO formed a view (from discussions with Esso) that Esso felt compelled to continue with the 'taxing point' objections so as to avoid being accused of not acting in good faith with respect to other involved parties (including the Victorian Government).

Esso requested that the ATO not rule on its objections at this time.

**October 1997** - BHP indicated that they were intending to withdraw their objections. BHP had previously reached agreement with DPIE relating to the taxing point of natural gas.

**May 1998** - BHP indicated that it would be pursuing their objections after all.

**February 1999** - Esso requested that the ATO issue determinations on the taxpayers' initial objections. This was now 5 years after the first objection was lodged.

**August 2003** - At a meeting with the ATO, Esso stated that they were experiencing staff shortages which would affect their dealing with the litigation and compliance matters. The ATO indicated that they were looking to litigate the dispute for ultimate resolution. Esso also stated that they were having difficulty with gathering the required evidence. The taxing point dispute needed further internal work to determine the economic impact/benefits in pursuing the matter and determining what path to take. A well analysis was required to determine where ethane and methane were being produced.

**May 2004** - The ATO wrote to Esso informing them that in the absence of further information required the objections would be determined on the information at hand.

**June 2004** - The determination for the 1991 to 2002 taxing point objections were issued to Esso.

**September 2006** - BHP lodged an objection for the 2003 year. BHP also requested that the Commissioner exercise his discretion and provide an extension of time for the objection to be lodged.

## Esso Australia - Date of lodgement of objections for the taxing point issue\*

Year of tax	Assessment	Date of Taxing Point Objection	Extension of time to lodge objection	Period Late	Date Objection determined
30 June 91	22 July 91	21 Jul 94	21 Jul 94	3+yrs	30 Jun 04
30 Jun 92	24 Jul 92	14 Aug 95	14 Aug 95	3 Yrs	30 Jun 04
30 Jun 93	10 Aug 93	10 Sep 04	10 Sep 04	11 yrs	5 Oct 04 <sup>#</sup>
30 Jun 94	19 Aug 94	10 Sep 04	10 Sep 04	10 yrs	5 Oct 04
30 Jun 95	18 Sep 95	17 Nov 95	N/A	0	30 Jun 04
30 June 96	15 Aug 96	11 Oct 96	N/A	0	30 Jun 04
30 Jun 97	27 Aug 97	16 Oct 97	N/A	0	30 Jun 04
30 Jun 98	17 Aug 98	24 Sep 99	24 Sep 99	1 yr	30 Jun 04
30 Jun 99	12 Aug 99	24 Sep 99	N/A	0	30 Jun 04
30 Jun 00	16 Aug 00	3 Oct 00	N/A	0	30 Jun 04
30 Jun 01	21 Sep 01	20 Nov 01	N/A	0	30 Jun 04
30 Jun 02	30 Aug 02	29 Oct 02	29 Oct 02	3 yrs	30 Jun 04
30 June 03	22 Aug 03	14 Jun 06	14 Jun 06	3 yrs	Undetermined
30 Jun 04	20 Aug 04	14 Jun 06	14 Jun 06	2 yrs	Undetermined
30 Jun 05	26 Aug 05	14 Jun 06	14 Jun 06	1 yr	Undetermined
30 Jun 06	22 Aug 06	2 Nov 06	2 Nov 06	13 days	Undetermined

\* The reasons for the delay in determining the objections are outlined earlier in this document. Note that Esso initially requested that the ATO wait until the Pass On litigation was finalised before determining the objections.

<sup>#</sup>This is the second objection which was lodged after the objection decision on the other years was issued. The first objection lodged for this year was invalid.



### BHP - Date of lodgement of objections for the taxing point issue

Year of tax	Assessment	Date of Taxing Point Objection	Extension of time to lodge objection	Period Late	Date Objection determined
30 June 91	6 Aug 91	17 May 07	17 May 07	15+yrs	4 Oct 07
30 Jun 92*	24 Jul 92	16 Oct 95	16 Oct 95	3+yrs	30 Jun 04
30 Jun 92*	24 Jul 92	17 May 07	17 May 07	14+yrs	4 Oct 07
30 Jun 93	10 Aug 93	17 May 07	17 May 07	13+yrs	4 Oct 07
30 Jun 94	19 Aug 94	17 May 07	17 May 07	12+yrs	4 Oct 07
30 Jun 95	12 Sep 95	17 May 07	17 May 07	11+yrs	4 Oct 07
30 June 96	15 Aug 96	17 May 07	17 May 07	10+yrs	4 Oct 07
30 Jun 97	15 Aug 97	17 May 07	17 May 07	9+yrs	4 Oct 07
30 Jun 98	18 Aug 98	17 May 07	17 May 07	8+yrs	4 Oct 07
30 June 99	12 Aug 99	17 May 07	17 May 07	7+yrs	4 Oct 07
30 June 00	17 Aug 00	17 May 07	17 May 07	6+yrs	4 Oct 07
30 Jun 01	21 Sep 01	17 May 07	17 May 07	5+yrs	4 Oct 07
30 Jun 02	30 Aug 02	17 May 07	17 May 07	4+yrs	4 Oct 07
30 June 03	29 Aug 03	14 Sep 06	14 Sep 06	2+yrs	4 Oct 07
30 Jun 04	28 Sep 04	17 Dec 08	17 Dec 08	4+yrs	Undetermined
30 Jun 05	12 Aug 05	17 Dec 08	17 Dec 08	3+yrs	Undetermined
30 Jun 06	1 Sep 06	17 Dec 08	17 Dec 08	2+yrs	Undetermined

\* BHP had two separate objections for 1991-92, relating to two different commodities.

8 May 1991

Mr Alan Howell  
Financial Controller - Australia  
BHP Petroleum Ltd  
GPO Box 1911R  
MELBOURNE 3001

Dear Mr Howell

I refer to recent representations made by BHP Petroleum regarding the definition of "marketable petroleum commodity" (MPC) in the Petroleum Resource Rent Tax Assessment Act (1987).

The policy basis of the PRRT legislation is outlined in the Joint Statement on greenfields RRT released by the Treasurer and the Minister for Resources and Energy in June 1984. The statement makes it clear that a project is to include the production licence area and any facilities and operations which are essential for the production and initial on-site storage of MPCs. The Minister for Resources, Alan Griffiths, has indicated that the relevant policy announced in the Joint Statement should continue to be the basis for administration.

MPCs are defined on a product basis in the Act to reflect the fundamental principle that the RRT is a resource tax and should not extend to downstream processes such as refineries and facilities for transporting marketable products. The definition also refers to products produced from petroleum. In the case of Bass Strait sales gas, the intention has always been that this would be regarded as being produced at the onshore facilities at Longford as no production occurs at the platform.

Accordingly, the appropriate taxation points for the Bass Strait project would be: for sales gas and stabilised crude oil, at the respective exit points from the Longford plant; and for ethane, propane and butane, at the respective exit points from the fractionation plant at Long Island Point.

Expenditure on the transport and storage of stabilised crude oil from Longford to Long Island would not be an allowable deduction for RRT purposes on the basis of the existing policy.

I am confident that the policy intention is accurately reflected in the RRT legislation. However, administration of the Act remains the responsibility of the Australian Taxation Office.

Yours sincerely

RR Alderson  
Assistant Secretary  
Petroleum Policy Branch