THE TAX INSTITUTE

THE MARK OF EXPERTISE

21 December 2016

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**By email:** BEPS@treasury.gov.au

Dear Mr McKenna,

**Diverted Profits Tax**

The Tax Institute welcomes the opportunity to make a submission to the Treasury in relation to the *Treasury Laws Amendment (Combating Multinational Tax Avoidance) Bill 2017: Diverted profits tax Exposure Draft* (**Exposure Draft**) and accompanying Explanatory Memorandum (**EM**).

**Summary**

The Tax Institute has significant concerns with the proposed diverted profits tax, including:

- Questioning the utility of a diverted profits tax which, if included in Australia's tax system, will put Australia out of step with the majority of the OECD countries in relation to the collective action being taken to address base erosion and profit shifting in a co-ordinated manner;
- Questioning the need for a diverted profits tax given Australia's existing Transfer Pricing regime, the strong general anti-avoidance provisions in Part IVA of the *Income Tax Assessment Act 1936* (Cth) (**1936 Act**) and the various information gathering powers available to the Commissioner;
- The uncertainty arising from inserting the diverted profits tax into the general anti-avoidance provisions, without specifically providing that the tax will only apply as a 'provision of last resort'; and
- The restrictions on a taxpayer's rights to review of a DPT assessment which should be the same as the rights to review for an income tax assessment.

## Discussion

### 1. General

The Tax Institute maintains the view that it questions the utility of a 'diverted profits tax' being inserted into the Australian tax system as it means that Australia will become out of step with the majority of the OECD countries in relation to the collective action being taken to address base erosion and profit shifting in a co-ordinated manner. In addition, Australia's Transfer Pricing regime together with the general anti-avoidance rules in Part IVA of the ITAA 1936 and the various information gathering provisions available to the Commissioner should provide the Commissioner with sufficient power to address the risks the diverted profits tax is aimed at.

Notwithstanding the above view, we accept that the diverted profits tax is a priority measure for the current Government as contained in the 2016-17 Federal Budget. However, we consider that the provisions as currently drafted and contained in the Exposure Draft amount to a significant overreach and will not serve to significantly increase integrity in the tax system to the extent that the Government appears to be anticipating. Importantly, the Exposure Draft goes beyond the announcements made by the Government, and goes beyond the UK legislation on which this legislation is purported to be based. We consider this is the case, particularly given the strength of the legislative powers that the Commissioner already has paired together with the relatively new transfer pricing rules directed at ensuring the correct amount of income is allocated to Australia for the purpose of income taxation.

Further, and notwithstanding the final sentence of paragraph 1.8 of the EM, it is not without doubt that the Government may be intending through introduction of the diverted profits tax to increase Australia's tax base beyond that established by existing income tax laws which include the new transfer pricing rules in Subdivisions 815-B to D of the *Income Tax Assessment Act 1997* (Cth) (**1997 Act**) that apply on a self-assessment basis[1]. If this is the case, then this should be made clear. If the government is not intending to increase Australia's existing tax base, then the legislation should more clearly set out how the diverted profits tax is intended to interact with situations where the transfer pricing rules in Division 815 of the 1997 Act apply, in particular, when regard is given to the reconstruction provisions in section 815-130.

Further, we have numerous concerns with the EM, in particular, in that it appears in a number of places to be trying to address matters that should be reflected in the legislation itself. In some cases, while we may agree with the broad thrust of the Government's apparent intention as reflected in the EM, we do not feel that these policy objectives will be achieved unless such matters are clearly reflected in the words of the proposed legislation itself.

[1] Unlike the previous transfer pricing rules in Division 13 of Part III ITAA 1936, the new transfer pricing rules in Subdivisions 815-B to D apply on a self-assessment basis.

## 2. Amendments to Part IVA of the 1936 Act

a) General

As the diverted profits tax rules are to be inserted into the general anti-avoidance provisions in Part IVA of the 1936 Act, the legislation should make it clear that it will only apply as a 'provision of last resort'. We also note that the rules are drafted in broader terms than the rest of Part IVA and will apply if it is 'reasonable to conclude' (per draft paragraph 177H(1)(a)) there is a principal purpose of obtaining a tax benefit.

Both these factors contribute to uncertainty around how and when the diverted profits tax will apply.

b) When the diverted profits tax should apply

We consider that Treasury should include in the legislation signposts to indicate what action the Commissioner must take prior to applying the diverted profits tax regime. Guidance in the law should be included to indicate what steps the Commissioner is required to have taken before he is able to consider applying the diverted profits tax to a particular taxpayer (for example whether he has made certain inquiries or requested certain information before determining that it may be appropriate to apply the diverted profits tax in a particular situation or to a particular taxpayer).

*Use of existing information channels to request information before a reasonable conclusion can be formed that the diverted profits tax should apply*

For the purpose of proposed paragraph 177H(1)(a), it should not be the case that the Commissioner can reasonably conclude that a principal purpose of a particular scheme was to obtain a tax benefit without the Commissioner first having taken reasonable steps to:

i) obtain information from the significant global entity (**SGE**) that ought reasonably to be available; and
ii) obtain information from the SGE in relation to its review of a particular scheme falling within the scope of the diverted profits tax.

For example, the ATO should be required to attempt to obtain the following records from the taxpayer before it could be considered 'reasonable' for the Commissioner to conclude that a principal purpose of a particular scheme was to obtain a tax benefit:

- Records kept by the taxpayer for purposes of section 262A of the 1936 Act to show how it has self-assessed the new transfer pricing rules in Division 815 of the 1997 Act;

- Information that the Commissioner believes is relevant to the assessment that is kept outside of Australia for the purposes of section 264A of the 1936 Act;
- Records kept by the SGE for purposes of Subdivision 284-E of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (**TAA**); and
- The Country-by-Country report, Master File and Local File that the taxpayer is required to give to the Commissioner under Subdivision 815-E of the 1997 Act.

Further, the ATO should be required to have issued a Notice under section 353-10 of Schedule 1 to the TAA to the SGE for the purpose of obtaining information in relation to its review of a particular scheme falling within the scope of the diverted profits tax before it could be considered reasonable for the Commissioner to conclude that a principal purpose of a particular scheme was to obtain a tax benefit.

c) Interaction between the diverted profits tax rules and the transfer pricing rules

It is unclear how the diverted profits tax rules are intended to interact with the transfer pricing rules contained in Division 815 of the 1997 Act including the reconstruction provisions in section 815-130. In particular, this concern arises because the diverted profits tax is to become part of Part IVA, and presumably is therefore a 'provision of last resort' as is traditionally the case with the application of Part IVA of the 1936 Act. As such, how the two sets of provisions are intended to interact is of critical importance and needs to be made clear.

The diverted profits tax rules consider whether a taxpayer has entered a scheme for the principal purpose (or including a principal purpose) of obtaining a tax benefit and to reduce the taxpayer's liability to tax under a foreign law in connection with the scheme. Where properly applied, including application of the reconstruction provisions in section 815-130, the transfer pricing rules should ensure that no such tax benefit arises. In cases where the Commissioner asserts that the price paid for the good or service is too high (or too low), there are two possible outcomes:

i) the Commissioner's assertion is correct (or partly correct), and as a consequence, the taxpayer has incorrectly self-assessed their liability to tax under Subdivision 815-B (which does not require the exercise of the Commissioner's discretion). As a result, it is open to the Commissioner to issue an amended assessment. In that case, there is no room for the issue of a DPT assessment as there is no tax benefit;
ii) the Commissioner's assertion is incorrect, and the taxpayer has correctly assessed their liability to tax. In that case, there is no room for the issue of a DPT assessment as there is no tax benefit.

As a consequence, a DPT assessment cannot be upheld in either case, and it would be improper for the Commissioner to issue a DPT assessment, knowing that any such assessment must necessarily be invalid.

In our view, the diverted profits tax rules should apply as a 'provisions of last resort' consistent with how all other provisions contained in Part IVA apply. This should be clearly articulated in the legislation. In this respect, we recommend an amendment be made to section 177B to make the last resort nature of the diverted profits tax clear (as is already the case for Part IVA generally[2]).

Alternatively, there should be an explicit exclusion contained in the diverted profits tax rules[3] preventing the diverted profits tax from applying to a perceived tax benefit that may still exist where a taxpayer has otherwise appropriately complied with the transfer pricing rules.

d) Interaction with Division 15 1936 Act

It is also unclear how the diverted profits tax rules are intended to interact with Division 15 of Part III of the 1936 Act (Insurance with non-residents), in particular, section 143 and where an election is made under subsection 148(2).

Further, under section 143 (where the actual profit or loss is not established) and where an election is made under subsection 148(2), the non-resident insurer and non-resident reinsurer respectively are assessed on a taxable income of 10% of the total amount of such premiums and are assessed and liable to pay tax as agent on an amount equal to 10% of the sum of the gross amounts of the reinsurance premiums. In such cases, it would not be appropriate, in our view, for the proposed diverted profits tax rate of tax of 40% to apply as this would represent a 300% increase above the tax rate that applies to such premiums compared with the 33 1/3 % increase where the current corporate tax rate of 30% would apply to such tax benefits.

e) Interaction with the tax consolidation provisions

It is unclear from the Exposure Draft legislation and EM how the new diverted profits tax rules interact with the tax consolidation regime. Two issues arise:

i) whether consolidation is respected for the purposes of determining whether a tax benefit exists, but not respected for the purposes of assessing that liability, or assigning it to a particular taxpayer; and

ii) whether the diverted profits tax is a group liability capable of being covered by a tax sharing agreement.

[2] See subsections 177B(3) and (4).

[3] The UK diverted profits tax contains a similar exclusion.

Under the tax consolidation regime, wholly owned groups are treated as a single taxpayer for income tax purposes and the head company is liable to pay tax for the group's income.

The tax consolidation provisions make each subsidiary member of the consolidated group jointly and severally liable for the group income tax liability. These liabilities are listed in section 721-10 of the 1997 Act. However, a group that has a valid tax sharing agreement in place can be exempt from joint and several liability for each group liability. The diverted profits tax does not appear to be a tax liability covered under section 721-10. Could the diverted profits tax apply to transactions between Australian entities that are part of the same consolidated group? We request further clarity on this issue.

f) Matters affecting the calculation of the tax mismatch

*Preventing double taxation*

The Consultation Paper on the diverted profits tax released in May this year (**May Consultation Paper**) considered allowing an offset for Australian withholding taxes and Australian tax paid on income attributed under the Controlled Foreign Company (**CFC**) rules[4]. It was also contemplated in the May Consultation Paper that losses available affecting the calculation of the foreign tax liability would be excluded.[5]

If no offset for foreign tax paid is given and no consideration is given to how income has been attributed under the CFC rules, there is a risk that double taxation may occur. Treasury should ensure that these matters, and any others relevant to preventing double taxation, are taken into account when determining the application of the diverted profits tax rules.

*Deferral of tax liabilities*

For the purpose of subsection 177H(3), deferral of foreign tax liabilities is considered to be a reduction of those liabilities (rather than merely being an element to be taken into account in determining purpose). As a result, a Court will be compelled to treat a one year deferral of a liability as a permanent reduction in that liability, even though the net present value (**NPV**) of the reduction may be quite small by comparison. We suggest that this provision either:

i) be deleted; or
ii) be amended to refer only to the expected NPV of the deferral; or
iii) be added as a further 'factor', rather than forming part of the calculation of the reduction; or
iv) allow for the reversal of the DPT assessment when and if the foreign taxes are later paid.

[4] Refer to Paragraph 37.1 of the May Consultation Paper
[5] Refer to Paragraph 26 of the May Consultation Paper

*Compensating adjustments*

It appears that the compensating adjustment provisions in subsection 177F(3) cannot apply to a DPT assessment (because no determination will be made under subsections 177F(1) or (2A)).

We recommend that the draft legislation be amended to provide for the Commissioner to make compensating adjustments where a DPT assessment is issued. Such compensating adjustments should be made at the 40% rate, rather than the 30% rate, to reflect the true tax benefit derived by the taxpayer.

For example, if the taxpayer is denied an interest deduction on an amount of $100, on which $10 withholding tax has been paid, the net result for the taxpayer should be that the DPT applies to 'gross-up' the $20 difference between the deduction and the withholding tax, rather than the $30 deduction being 'grossed up' to the 40% rate, and the $10 withholding tax left unchanged.

g) Draft section 177K – 'Sufficient foreign tax' test

Setting the threshold amount of foreign tax liability at 80% or more of the Australian tax liability as a sufficient amount of foreign tax paid where Australian tax is not paid will be a difficult threshold for entities potentially subject to the diverted profits tax to achieve. In our view, this threshold is too high given the corporate tax rates of Australia's current trading partners are lower or are likely to be lower than Australia's corporate tax rate in the near future[6].

In light of this, we suggest it may be appropriate for Treasury to develop a list of countries[7] of Australia's main trading partners where the diverted profits tax would not apply if foreign tax was paid in the listed country even though the amount of foreign tax did not meet or exceed the 80% threshold. For example, the 'Listed countries' contained in Regulation 19 of the *Income Tax Assessment (1936 Act) Regulations 2015* (Cth) could be used for this purpose. Seven countries are currently listed in Regulation 19: Canada, France, Germany, Japan, New Zealand, United Kingdom and the United States. Such an approach would make the diverted profits tax provisions more workable and take into account corporate tax rate trends around the world.

*Examples*

We also suggest the EM include more examples to illustrate when Treasury would consider that sufficient foreign tax has been paid in a variety of circumstances.

[6] For example, the UK corporate tax rate is currently 20% and is intended to be lowered to 17% by 2020 (https://www.gov.uk/government/news/autumn-statement-2016-some-of-the-things-weve-announced). The US Federal corporate tax rate is currently 35% with speculation President-elect Donald Trump may lower the rate to 15%.

[7]

h) Draft section 177L - 'Sufficient economic substance' test

There is no clear guidance regarding what matters should be taken into account in determining whether the income derived from the scheme 'reasonably reflects the economic substance of the entity's activities in connection with the scheme' (draft subsection 177L(1)).

The EM at paragraph 1.59 indicates that the guidance contained in the *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* should be taken into account (**OECD TP Guidelines**). However, there is nothing on the face of the text of section 177L that would require the OECD TP Guidelines to be used for this purpose or to be the only point of reference for determining whether there is sufficient economic substance.

In our view, it is preferable if the matters to taken into account in determining economic substance are referred to in the legislation, similar to the approach taken in sections 815-135 and 815-235 of the new transfer pricing rules for the purpose of determining the arm's length condition.

The legislation should also specifically state that the 'economic substance' is only related to 'active' activities and not 'passive' activities, rather than relying on the statement in the EM at paragraph 1.58 to capture this.

Also, if the matters to be taken into account are only to be drawn from the OECD TP Guidelines and the application of these guidelines in the context of the diverted profits tax is limited to this purpose only, that should also be made clear in the legislation rather than being left to a statement in the EM[8].

We question the appropriateness of the inclusion of the extract from paragraph 1.36 of the report '*Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 – 2015 Final Reports*', published by the OECD on 5 October 2015 (**OECD report**) in paragraph 1.60 of the EM as an apparent indication of factors to which regard should be had for the purpose of determining whether sufficient economic substance exists. This is because paragraph 1.36 of the OECD report has, in our view, been taken out of context. Paragraph 1.36 of the OECD report forms part of a section of the OECD report relating to '*Identifying the commercial or financial relations*'. As noted in paragraph 1.33 of the OECD report, this section provides guidance on identifying the commercial or financial relations between the associated enterprises and on accurately delineating the controlled transaction.

We note further that this is distinct from considerations relating to the pricing of controlled transactions under the arm's length principle which are discussed in Chapters II and III of the OECD TP Guidelines. As such, this section of the OECD

[8] Paragraph 1.62 of the EM

report is not directed at the proposed test in subsection 177L(1) – which is directed at considerations relating to whether the income derived by an entity from the scheme reasonably reflects the economic substance of the entity's activities in connection with the scheme – and is therefore an inappropriate point of reference.

*Existing information channels should be used to request information before a reasonable conclusion can be formed about insufficient economic substance*

Similar to our comments in relation to paragraph 177H(1)(a) above, for the purpose of paragraph 177H(1)(e), it should not be the case that the Commissioner can reasonably conclude that section 177L does not apply to the relevant taxpayer without the Commissioner first having taken reasonable steps to obtain information from the SGE that ought reasonably to be available and to obtain information from the SGE in relation to its review of a particular scheme falling within the scope of the diverted profits tax. For example, the Commissioner should be required to attempt to obtain the same records from the taxpayer as mentioned previously before it could be considered 'reasonable' for the Commissioner to conclude that the income derived by one of the entities in a scheme does not reasonably reflect the economic substance of the entity's activities in connection with the scheme.

Further, the Commissioner should be required to have issued a Notice under section 353-10 of Schedule 1 to the TAA 1953 to the SGE for the purpose of obtaining information in relation to its review of a particular scheme falling within the scope of the diverted profits tax before it could be considered 'reasonable' for the Commissioner to conclude for the purpose of paragraph 177H(1)(e) that the sufficient economic test contained in section 177L is not satisfied.

*Non-tax financial benefits*

The May Consultation Paper also contemplated adoption of a test where, if the non-tax financial benefits exceeded the financial benefit of the reduction in tax in Australia, the arrangement would be taken to have 'sufficient economic substance'[9].

Consideration is given to the non-tax financial benefits of a scheme for the purpose of determining the 'purpose of the scheme' under the test in draft section 177H. However, they are not considered in determining the 'sufficient economic substance' test. In our view, non-tax financial benefits should be a factor in determining the 'sufficient economic substance' test, rather than merely being one of 11 factors to be taken into account by a Court.

i) Financing concession

The May Consultation Paper contemplated a 'financing concession' such that where the debt levels of the significant global entity fall within the thin capitalisation safe

[9] Paragraph 29 of the May Consultation Paper

harbour, only the pricing of the debt and not the amount of the debt would be taken into account in determining liability to the diverted profits tax [10].

We note this has not been considered in the Exposure Draft. We recommend Australia adopt a similar position to the UK and exclude all debt from the diverted profits tax. If this is not an acceptable outcome, we recommend the position contemplated in the May Consultation Paper, where the debt falls into the thin capitalisation safe harbour, be adopted.

*Draft section 177J – '$25 million turnover' test*

The May Consultation Paper stated that the diverted profits tax was "not intended to target entities that do not pose a significant compliance risk, including significant global entities with small operations in Australia"[11]. Consistent with that intention, the diverted profits tax would contain a de minimis threshold "to help provide certainty for lower risk entities".

While the drafting of proposed section 177J is consistent with the comments in the May Consultation Paper, it does not provide any certainty for so called 'lower risk' entities. The 'bright-line' turnover test provides a clear objective criterion for excluding from the diverted profits tax members of a significant global group that pose no significant revenue risk. However, the availability of that 'bright-line' exclusion is subject to the vague condition that no income has been "artificially booked" outside Australia.

In addition to being imprecise, this caveat to the de minimis test – that no income has been "artificially booked" outside Australia – again raises the unresolved question of the relationship between Division 815, the existing provisions of Part IVA (including the recently enacted multinational anti-avoidance rules) and the proposed diverted profits tax.

We would suggest that the reference to "artificially booked income" be removed and that the de minimis test be redrafted to truly provide the promised "certainty for lower risk entities".

If the Government is concerned that the aggregated $25 million turnover, by itself, does not adequately protect the revenue, one possible approach to resolve this might be to expand the de minimis test so as it only applied where:

- the aggregate turnover of the relevant taxpayer and the entities covered by proposed subsection 177J(2) for the relevant year does not exceed $25 million; and
- the aggregate value of the gross assets of the relevant taxpayer and the entities covered by proposed subsection 177J(2)at the end of the relevant year of the company does not exceed $12.5 million, and

[10] Paragraph 34 of the May Consultation Paper
[11] Paragraph 20 of the May Consultation Paper

- the relevant taxpayer and the entities covered by proposed subsection 177J(2) have fewer than 50 employees at the end of the relevant year.

We note that this approach is consistent with that adopted by the UK.

j) Specific exemptions

In its recommendations in relation to hybrid mismatch arrangements, the Board of Taxation recommended exemptions for certain investment vehicles, including securitisation vehicles and managed investment trusts, as the policy of the tax law is for such vehicles to remain tax neutral – consistent with the OECD's recommendations. We submit that any of these recommendations which are adopted by the Government in relation to the announced hybrid mismatch arrangements should also be replicated in relation to the diverted profits tax for the same reason, that is to preserve tax neutrality of these vehicles.

k) Other matters

i) We query whether a specific exclusion for foreign pension funds and sovereign wealth funds should be excluded from the provisions.
ii) A principal purpose test is proposed. It appears that Treasury contemplates that a taxpayer may have more than one principal purpose. This is something of a strain on the ordinary English meaning of the word 'principal'.

## 3. Amendments to the *Taxation Administration Act 1953* (Cth)

a) Review of a 'DPT assessment'

The process to review a DPT assessment appears to operate such that a taxpayer has no recourse to the Administrative Appeals Tribunal should it wish to dispute an assessment and must instead apply directly to the Federal Court for review.

In our view, the review process applicable to a DPT assessment should be the same as for an income tax assessment. Therefore, we query why certain inconsistencies exist, such as why the Commissioner should have 7 years in which to make a DPT assessment, rather than the usual 4 years in which an assessment may be amended.

The combination of limiting the rights of appeal under Part IVC of the TAA in subsection 145-20(4) (by removing the right to object and removing the right to appeal to the Administrative Appeals Tribunal and limiting the appeal period to 30 days from the usual 60 day period), the removal of the rights to seek judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (para 1.107 of the EM), and the introduction of extensive evidentiary exclusion rules in section 145-25 severely deny taxpayers the right to a fair hearing.

It was the availability of these very safeguards that the High Court in *FCT v Futuris Corporation Ltd* [2008] HCA 32 relied upon in accepting that the operation of section 175 (the no invalidity rule) (section 155-85 Schedule 1 of the TAA in this context) to limit the grounds of judicial review to 'bad faith' or 'conscious maladministration'. As there is a risk that, due to the burdens placed on the appeal process in relation to DPT assessments that a court could find that *Futuris* is distinguishable and therefore a judicial review application can be entertained under section 39B of the *Judiciary Act 1903* (Cth), the rules need to be altered to allow similar appeal and review rights that are available to every other taxpayer.

b) Restricted DPT evidence

The Exposure Draft introduces the concept of 'Restricted DPT Evidence' in draft section 145-25. In our view, the provision is unclear regarding the nature of the information that an entity would likely have had 'in its custody or under its control' during a period of review that would not have been made available to the Commissioner during the period of review.

The provision is also very broad and unduly captures information that a taxpayer may obtain after the period of review (including expert reports prepared for Court proceedings) (draft paragraph 145-25(2)(a)). We are unclear what sort of information Treasury envisages that a taxpayer may obtain after the period of review that would be appropriate to bar from being introduced into evidence in the event a taxpayer appeals a DPT assessment under Part IVC proceedings. This also has the effect of 'penalising' a taxpayer for not supplying information to the Commissioner they were not made aware that the Commissioner sought for the purpose of the DPT assessment. It also prevents taxpayers from introducing evidence which they could not possibly have had access to prior to the commencement of Court proceedings, such as evidence obtained on subpoena from third parties.

The provision imposes a severe limitation on the taxpayer regarding the information they will be able to submit into evidence where they choose to dispute a DPT assessment. It is not an appropriate outcome for taxpayers to prevent them from tendering as evidence information they were not aware the Commissioner sought.

From a commercial viewpoint, a taxpayer is likely to be willing to provide information to ensure they receive the correct assessment in the first place and are unlikely to withhold information from the Commissioner and risk triggering a DPT assessment at a penalty rate of tax.

In our view, draft section 145-25 should operate in the same way that section 264A[12] of the 1936 Act operates where if the Commissioner has reason to believe that a person

[12] Section 264A is subject to review in an exposure draft proposed to make miscellaneous amendments to the tax and superannuation laws (http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2016/Miscellaneous-amendments-to-taxation-and-superannuation-laws-2016)

outside Australia has information relevant to the assessment of the taxpayer, the Commissioner should request that information from the taxpayer. Where the taxpayer does not comply with the Commissioner's request, broadly the information becomes inadmissible in proceedings disputing the taxpayer's assessment. If section 145-25 were to operate in the same way, a taxpayer would have notice regarding what information the Commissioner sought for the purpose of a DPT assessment and what would likely be barred from being admissible in proceedings should the taxpayer decide to dispute the DPT assessment. This would provide clarity to taxpayers regarding the Commissioner's expectations of the taxpayer in terms of the information he expects a taxpayer to provide for the purpose of a DPT assessment.

Finally, as a minor point which requires clarification, the provisions do not seem to acknowledge that provision of *copies* of documents to the Commissioner will suffice for the purposes of draft section 145-25. We suggest that a reference to copies be explicitly included.

c) Administrative practice

Consistent with the application of Part IVA more broadly, we strongly suggest that the Commissioner refer all cases to which he is considering applying the diverted profits tax to the General Anti-Avoidance Rules (**GAAR**) Panel before issuing a DPT assessment.

## 4. Interaction between the diverted profits tax and the proposed Multi-Lateral Instrument

We query how the diverted profits tax will interact with the Multi-Lateral Instrument[13] to be signed by over 100 countries, including Australia, to prevent base erosion and profit shifting. We also query how the proposed diverted profits tax is consistent with Australia's treaty obligations.

If you would like to discuss any of the above, please contact either me or Tax Counsel, Stephanie Caredes, on 02 8223 0059.

Yours sincerely

**Arthur Athanasiou**
President

[13] http://www.oecd.org/ctp/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm