The Tax Institute

9 February 2024

Director
Special Tax Regimes Unit
Corporate and International Tax Division
Treasury
Langton Cres
Parkes ACT 2600

By email: prrt@treasury.gov.au

Dear Director,

**PRRT – anti-avoidance provisions and clarifying treatment of 'exploration' and MQPRs**

The Tax Institute welcomes the opportunity to make a submission to the Treasury in respect of its consultation on the exposure draft legislation and explanatory materials proposing to clarify the tax treatment of 'exploration' and 'mining, quarrying and prospecting rights' (**MQPRs**) in the *Petroleum Resource Rent Tax Assessment Act 1987* (Cth) **(PRRT Act)** and the *Income Tax Assessment Act 1997* (*Cth*), respectively.

Our comments in this submission are limited to the proposed start date of the 'exploration' amendments, and the implications of applying the law retrospectively.

We recommend deferring the proposed start date to apply on a prospective basis so that taxpayers have sufficient time to adapt to the proposed changes and manage their tax affairs efficiently and are not unfairly disadvantaged for historically having complied with the law as it then stood. If retrospective law change is required to ensure taxpayers are not adversely impacted by the decision Full Federal Court in *Commissioner of Taxation v Shell Energy Holdings Australia Limited* [2022] FCAFC 2 (***Shell***), this should be limited to changes that are necessary to achieve this outcome. The amendments should not go further so as to leave taxpayers in a potentially non-compliant historical position, particularly where they have managed their tax affairs consistent with pre-existing guidance. Our detailed response is contained in **Appendix A**.

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The Tax Institute is the leading forum for the tax community in Australia. We are committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all.

If you would like to discuss any of the above, please contact The Tax Institute's Senior Counsel – Tax & Legal, Julie Abdalla, at (02) 8223 0058.

Yours faithfully,

**Scott Treatt**
Chief Executive Officer

**Todd Want**
President

**APPENDIX A**

We have set out below our detailed comments and observations for your consideration.

## Proposed start date and retrospective application

The amendments related to the meaning of 'exploration for petroleum' will apply to all expenditure incurred from 21 August 2013. This impacts PRRT years starting on or after 1 July 2013.

The exposure draft explanatory materials in respect of these changes provide that the retrospective application ensures that the meaning of 'exploration expenditure' is not affected by the decision in *Shell*. It also aligns with the date of effect of the ATO's views on the application of the law as set out in ATO Taxation Ruling TR 2014/9: *Petroleum resource rent tax: what does 'involved in or in connection with exploration for petroleum' mean*? (**TR 2014/9**), and is intended to align with the administrative treatment set out in the ATO Decision Impact Statement issued following the Administrative Appeals Tribunal decision in *ZZGN v Commissioner of Taxation* [2013] AATA 351 (***ZZGN***).

The exposure draft explanatory materials also suggest that the proposed application provides certainty for taxpayers from the ambiguity created by the decision in *Shell* from the 2014 year of tax.

We note that these changes are intended to apply retrospectively from 21 August 2013, being when the Commissioner first issued a draft ruling as TR 2013/D4 for comment following the decision in *ZZGN*.

Our understanding from our members is that the proposed revisions to the definition of 'exploration' extend even beyond legislating the Commissioner's view in TR 2014/9 (which we understand has been contested by some taxpayers), and instead, impose a narrower interpretation of the term 'exploration', that also contradicts aspects of the decision in *ZZGN.* This could potentially deny taxpayers deductions to which they may be entitled to consistent with the decision in ZZGN and TR 2014/9.

One of our concerns is that this retrospective change could potentially invalidate transfer notices issued by affected taxpayers, which may give rise to an offence under the PRRT Act (see subsections 45A(5) and 45B(5) of the PRRT Act) and impact contractual rights between private parties. In addition, it is likely to exacerbate uncertainty regarding the proper classification of all exploration-related expenses since 2013.

The Tax Institute maintains its strong view that the passing of legislation prior to its start date is a crucial feature of a properly functioning legislative process. Traditionally, the retrospective application of law has been the exception rather than the rule. It has generally been limited to unique circumstances, and often has been coupled with grandfathering or transitional provisions.

A strong, trusted government-taxpayer relationship is a crucial element in effective tax policy, and fairness and equity are essential to maintaining this relationship. The ability to rely on the law is a fundamental pillar of our legislative system, and taxpayers should be confident that they are making informed decisions based on existing law that is not subject to sudden or retrospective change that may jeopardise their economic viability or put them in a historically non-compliant position that is difficult and costly to rectify.

Further, it is crucial to have a predictable tax framework in place to ensure Australia's appeal as an investment destination. Retrospective changes can exacerbate investment risks and can dissuade investors from venturing into business in Australia, including in offshore LNG projects. This can lead to a decline in economic activity, hinder foreign investment and capital-intensive operations, reduce opportunities for job creation, and put Australia at a disadvantage in intense international competition in the industry.

Accordingly, we are of the view that this proposed change should commence on a date after the law is enacted, to allow time for taxpayers to respond to the implications of the proposed changes. Any retrospective changes that are required to ensure taxpayers are not adversely impacted by the decision in *Shell*, should be limited to changes that are strictly necessary to achieve this outcome. Consideration should be given to the appropriateness of grandfathering or transitional provisions.