

26 April 2024

Committee Secretariat  
Senate Standing Committees on Economics  
PO Box 6100  
Parliament House  
Canberra ACT 2600

By email: [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

Dear Committee Secretariat,

### **Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Bill 2024**

The Tax Institute welcomes the opportunity to make a submission to the Senate Economics Legislation Committee (**Committee**) in respect of its inquiry and report on the Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Bill 2024 (**Bill**) and accompanying explanatory memorandum (**EM**).

Part 1 of Schedule 3 to the Bill clarifies 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. Part 2 of Schedule 3 to the Bill proposes to amend the meaning of the phrase ‘exploration for petroleum’ in section 37 of the PRRT Act. The proposed amendments to section 37 of the PRRT Act will have a retrospective effect, affecting expenses incurred from 21 August 2013 and PRRT years starting on or after 1 July 2013.

Our comments in this submission are limited to the proposed start date of the Part 2 of Schedule 3 amendments, and the consequences of retrospective application of the law.

The Tax Institute welcomes the new provision (Item 10 of Part 2 to Schedule 3) in the Bill that safeguards taxpayers against retrospective criminal liability, ensuring that such liability does not arise due to the retrospective nature of the amendments to section 37 of the PRRT Act. Also, the EM now includes examples to explain the concepts further.

Our main concerns relate to the proposed amendments to section 37 of the PRRT Act. In summary:

- the proposed amendments narrow the interpretation of the phrase ‘exploration of petroleum’ compared to the previous widely accepted understanding, resulting in the denial of deductions that were previously available for the taxpayers since 2013;

- while the EM suggests that the revision to section 37 of the PRRT Act aligns with the Commissioner's view in *Taxation Ruling 2014/9 – Petroleum resource rent tax: what does 'involved in or in connection with the exploration of petroleum' mean?* (TR2014/9), and there is evidently a common theme between the two, the amending provision (Item 8 Part 2 Schedule 3) does not use the same language as the ruling. This creates uncertainty and the risk that a different test will be enacted to that which is contained in the ruling;
- the proposed retrospective change may result in the nullification of transfer notices issued by impacted taxpayers, resulting in strict liability offences under the PRRT Act for non-compliance with the exploration loss transfer provisions. This could also lead to increased uncertainty surrounding the classification of exploration-related expenses since 2013. Although relief from retrospective criminal liability is potentially provided, taxpayers bear the burden of proving their eligibility for such relief; and
- overall, the proposed retrospective amendment to section 37 of the PRRT Act may result in a multitude of complex legal and financial issues for affected taxpayers, potentially diminishing Australia's appeal as an attractive investment destination in the resource sector.

If retrospective law change is required to ensure taxpayers are not adversely impacted by the decision of the 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 law and guidance.

Our detailed response is contained in **Appendix A**.

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 on the amendments proposed in Part 2 of Schedule 3 to the Bill for your consideration.

### Retrospective application of changes to the meaning of 'exploration for petroleum'

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 EM attempts to clarify the basis for the retrospective application of changes to the definition of 'exploration for petroleum'. The stated intention is broadly to clarify the meaning of this term, and address ambiguity arising from the decision in *Shell*, in line with the policy intent and established practice (based on guidance provided in TR 2014/9 and the ATO's administrative treatment following the decision in *ZZGN v Commissioner of Taxation* [2013] AATA 351 (**ZZGN**)).

The EM states that the proposed changes aim to address the ambiguity caused by the *Shell* decision and provide certainty for taxpayers. The revisions are proposed to apply retrospectively from 21 August 2013, being when the Commissioner first issued for comment a draft ruling as TR 2013/D4 following the decision in *ZZGN*.

However, we have concerns that the proposed amendments to the definition of 'exploration for petroleum' go beyond the scope of TR 2014/9. This could potentially result in restrictions on deductions for taxpayers, for which they were previously eligible based on the decision in *ZZGN* and TR 2014/9.

Feedback from our members indicates 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). Instead, the proposed changes narrow the scope of what qualifies as 'exploration expenditure', by introducing a narrower interpretation of the term 'exploration' that also contracts aspects of the decision in *ZZGN*. This could result in the potential disallowance of certain deductions that are allowed under the existing framework consistent with the decision in *ZZGN* and TR 2014/9. This could have significant implications for taxpayers who have relied on the existing interpretation of 'exploration expenditure' and may result in unexpected tax liabilities.

It is important for the Government to carefully review the proposed changes to ensure that any potential unintended consequences are addressed. Any changes should be measured so as to strike an appropriate balance between providing clarity and certainty for taxpayers and ensuring that the changes do not inappropriately limit deductions or create additional compliance burdens.

## Further complexities arising from retrospective application of proposed amendments

Given our views stated above, that the proposed amendments go beyond even the Commissioner's currently published views, the proposed retrospective amendment could also have significant financial implications for affected taxpayers, as they may be required to pay additional taxes or penalties for expenses that are currently considered deductible. This could lead to adverse financial outcomes for some taxpayers, and may also have broader economic implications, such as discouraging investment in the resource sector.

Also, we are concerned that this retrospective change could potentially invalidate transfer notices issued by affected taxpayers, which may result in a strict liability offence under the PRRT Act (see subsections 45A(5) and 45B(5) of the PRRT Act), and affect contractual rights between private parties. This could have far-reaching consequences for affected taxpayers, potentially resulting in financial losses and legal disputes. If the proposed change proceeds, taxpayers will be required to carefully review their historical transactions and seek professional advice to navigate the complexities of the retrospective change and ensure compliance with the law. This will undoubtedly be a time-consuming and resource intensive process for affected taxpayers.

In addition, it is likely to exacerbate uncertainty regarding the proper classification of all exploration-related expenses since 2013. This may create challenges for taxpayers in complying with their tax obligations and may lead to disputes with tax authorities. This could result in costly and time-consuming legal proceedings for taxpayers, further adding to the financial burden and uncertainty they face.

While the Bill now provides some relief against retrospective criminal liability, this is not automatic. The burden falls on the taxpayer to demonstrate their eligibility for relief. This process can be time-consuming and complex, requiring taxpayers to carefully approach the legal requirements and provide a compelling case for why they should be granted relief.

This is all the more reason why we are of the view that these proposed changes should be effective only after the law is enacted. Applying the changes on a prospective basis will allow time for taxpayers to respond and adapt to the implications.

## Broader potential consequences of retrospective law changes

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 and trusted relationship between the government and taxpayers is crucial for effective tax policy, with fairness and equity being key factors in 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.

To secure Australia's appeal as an attractive investment destination, it is essential to have a predictable tax framework in place. 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.

In this regard, 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. It is deeply concerning to us that retrospective measures are becoming more commonplace in recent times. If retrospective changes are necessary to ensure taxpayers are not adversely impacted by the decision in *Shell*, they should be limited to what is strictly required to achieve this outcome. Consideration should be given to the appropriateness of grandfathering or transitional provisions.

### Minor comments

We have noted below typographical and other minor errors in the EM that would benefit from correction:

- Paragraph 3.26 of the EM is missing a dash and refers to subsection 4030(6) instead of subsection 40-30(6);
- Paragraph 3.32 of the draft EM is missing the clarification that this amendment applies to PRRT years starting on or after 1 July 2013; and
- Paragraph 3.34 of the EM refers to Item 9 of Part 2 of Schedule 3 to explain the concept of criminal liability relief but instead should refer to Item 10 of Part 2 of Schedule 3.