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American Chamber of Commerce in Australia

Response to the Treasury Issues Paper:

"Implications of the Modern Global Economy for Taxation of Multinational Enterprises"

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Comments from the American Chamber of Commerce in Australia (AmCham) regarding the issues paper, "*Implications of the Modern Global Economy for Taxation of Multinational Enterprises*".

AmCham refers to the issues paper entitled **"Implications of the Modern Global Economy for Taxation of Multinational Enterprises"**.

The issues paper invites comments including responses to three questions:

1. **Views are sought on whether there is evidence of Base Erosion and Profit Shifting in Australia. Where it is considered that insufficient data exists to reach a definitive conclusion on the extent and nature of the problem in Australia, comments are sought on how to identify and/or develop such data — including the benefits and costs of requiring companies to provide more detailed information to the ATO.**

There is very little evidence of base erosion of the Australian tax base, particularly in relation to transactions involving US investing into Australia. Australia is very well known internationally as having a highly effective set of tax laws to protect Australian Revenue. The Australian Taxation Office is widely known as being one of the more effective and skilful tax administrations within the members of the OECD.

Examples of the set of relevant laws and practice that creates a highly effective protection of the Australian Taxation Base include

a) Transfer Pricing including recent retrospective amendments in response to a court decision that brought into question the effectiveness of Australia's Transfer Pricing rules.

b) Thin Capitalisation rules which limit the amount of interest expense which can be borne in Australia including amendments arising from recently announced legislation reducing the debt to equity mix from 3:1 to 1.5:1 and also precluding deductions for interest incurred to derive foreign exempt income.

c) Withholding tax on interest to a related party at 10% which is never reduced by Double Tax Treaty.

d) Withholding tax on Royalties is commonly 10% and as high as 30%. It is only certain Treaties that have a reduced rate of 5%.

e) The General Anti Avoidance rules of Part IVA, as well as many targeted Anti Avoidance rules within other divisions of the Act, ensure that arrangements with the dominant purpose of reducing taxable income or increasing allowable deductions are ineffective.

f) The General Anti Avoidance rule is also being applied domestically to deal with the interpretation of Australia's double tax treaties, particularly in relation to the question of limitation of benefits, where no such article exists under the particular treaty.

g) Australia has special anti-hybrid debt rules that ensure interest on debt that performs economically like equity is treated as a dividend and non-deductible.

h) The ATO practice of issuing Taxpayer Alerts in relation to various tax related practices ensures that businesses aware of where the Australia Taxation Office sees future activity.

i) Rigorous processes of disclosure in tax returns of all related party transactions with a foreign party and the disclosure of all uncertain tax positions ensures that the Australian Taxation Office has information sufficiently relevant to determine whether any base erosion of Australia is occurring.

j) Australia's tax laws include a punitive tax penalty regime which is weighted in favour of the Revenue to discourage taxpayers taking a position for which there is not a reasonably arguable position under which the technical analysis is "as likely as not" of being correct.

k) The Australian Taxation Office has a widely known approach of aggressively pursuing matters through the courts rather than simply accepting settlements.

In the light of the above and the other examples, it would be difficult for any objective assessment to conclude that Australian tax base is materially endangered by the practices described in OECD report on base erosion and profit shifting.

2. Views are sought on whether the key pressure areas identified by the OECD represent the main priorities for action in the short term. If so, what should be the shape of measures to address these pressure areas? If not, what areas should be the focus of action?

For the reasons set out immediately above, most aspects of the OECD report's priorities are adequately protected by Australian tax law and practice. We comment upon two additional matters.

Digital Economy - The Chamber supports Australia participating in global initiatives to better analyse and understand the integral role that the digital economy plays in the daily life of Australians and the Australian economy. Any tax related response must be a coordinated global response as the internet is a global medium. Any approach that departs from a coordinated global approach will only create the uncertainty and double taxation so prevalent prior to the establishment of the OECD.

Right of Taxation - An element of the OECD discussion has sort to distinguish the difference between the right of taxing based upon residence and the right of taxing based upon source. Furthermore the OECD has identified alternate means of determining the right of taxation by reference to a formulaic approach that would allocate taxation rights not based upon profits but rather a set of criteria with significant emphasis placed upon the location in which a sale occurs.

Australia should take great care in any discussion that may lead to a formulaic approach that allocates the rights to tax to the country in which **a sale** occurs, rather than the country in which **value created** has occurred. While such an approach has been discussed in relation to the digital economy, the application of the same approach to the fundamental bases of the Australian economy would have grave risk upon the Revenue. This is because a significant proportion of the value of the Australian economy relying upon exports relates to the value added in Australia from extraction and treatment of raw materials. If the above alternative approach were to give the right to the country of importation to tax an element of the sale proceeds, this would lead to material risk of double taxation. Australia is unlikely to limit its right to fully tax the sale proceeds arising from the extraction of raw materials and the treatment thereof within Australia simply because another country seeks to tax based upon place of sale.

3. Views are sought on the extent to which another country not exercising its right to tax should be a matter of concern to Australia.

The extent to which another country exercises its right to tax an item of income for which Australia has granted a deduction should not be a determinative feature under Australian Law.

The sovereign right of a foreign nation to offer incentives to encourage economic activity in that country should not impact upon the taxation consequence of a transaction in Australia.

US tax law includes incentives for US companies in order for them to compete in international markets. While US tax law is highly effective in taxing on a current basis US sourced income, non US sourced profits that are derived and reinvested outside the US tend not to be taxed until ultimately remitted to the US. US Congress recently reaffirmed these policy principles by an extension to "look through" rules that facilitate the repatriation and reinvestment of foreign business profits without immediate US taxation.

The UK tax law has been amended in recent years to facilitate lowly taxed financing activities and the exploitation of intellectual property by UK based companies in order for the UK to compete, from a tax perspective, with other countries within the European economy.

Within our own region it is noted that interest income is not taxed in countries such as Malaysia, Singapore and Hong Kong including Hong Kong subsidiaries of Chinese companies.

The Chamber sees no reason whatsoever for Australian tax deductibility of a payment to be dependent upon the taxation treatment in a recipients hands. It is noted in this regard that the ability for an Australian Taxation Office to adequately enforce such an unnecessary provision would be significantly hampered by inability to determine the taxation treatment under the laws of the country outside Australia. Accordingly any proposal to amend the taxation in Australia of transaction based the taxation treatment in another country has neither technical nor practical merit.

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