KPMG submission

Implementing a Diverted Profits Tax

1 July 2016

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Executive Summary

KPMG is pleased to make a submission on the Consultation Paper titled *Implementing a Diverted Profits Tax* (DPT). We note that the DPT is part of a package of measures announced in the Budget aimed at building a more competitive tax system, while ensuring Australia plays its part in the global BEPS reform process. We support these objectives. We also recognise that the proposed DPT fits into a very complex world of domestic political and community expectations and a rapidly changing international tax environment. No response to these various competing concerns would be without difficulty.

That said, this submission questions whether the Consultation Paper has the equilibrium right and makes a number of recommendations which aim to restore the delicate balance in favour of principles up on which the rule of law is generally founded. They are that good taxation law should be clear, stable, prospective in nature, capable of guiding taxpayers, fairly enforced and open to independent judicial review and adjudication.

We note that the proposed DPT has given rise to a great diversity of views on the extent of its application. This should be construed as a warning bell. The consultation process should involve further consideration of specific examples which fall each side of the DPT divide.

The submission deals with perceived flaws in international transfer pricing rules and how the DPT may or may not address these. It also deals with the implicit discretion provided to the Commissioner which is embedded in the DPT. Against this high level background, 25 recommendations are made.

Recommendations

Recommendation 1: The DPT should apply to income years commencing on or after the later of (a) 1 July 2017, or (b) six months after the Bill changing the legislation receives Royal Assent.

Recommendation 2: There should be transitional carve-out for transactions entered into before 1 July 2017 until implementation of the proposed anti-hybrid rules.

Recommendation 3: The $25 million turnover threshold should be measured by reference to the sum of (a) Australian turnover plus (b) artificially booked offshore turnover.

Recommendation 4:	The DPT should exclude payments to and from pension and superannuation funds.
Recommendation 5:	The DPT should exclude payments to and from charities.
Recommendation 6:	The DPT should exclude payments to and from persons subject to sovereign immunity.
Recommendation 7:	The DPT should exclude Collective Investment Vehicles generally.
Recommendation 8:	The DPT should exclude payments in respect of loans.
Recommendation 9:	The DPT should exclude payments in respect of hedge instruments directly related to loans.
Recommendation 10:	The DPT should exclude intra-entity transactions (head office to branch and intra-branch).
Recommendation 11:	The DPT should exclude payments to an entity resident (for tax purposes) in a broad exemption listed country.
Recommendation 12:	The DPT should exclude payments where the income is attributable back to Australia under the CFC.
Recommendation 13:	The DPT should exclude payments of dividends on shares, including payments on deemed debt instruments.
Recommendation 14:	The 80% test should be the lower of an effective tax rate of 20% or the proposed 80% test.
Recommendation 15:	The drafting on the 80% test should cover payments to entities that are transparent (but taxed at the investor level) or are part of a consolidated group.
Recommendation 16:	There should be a carveout for payments which can be shown to be comparably taxed “up the chain” from the immediate recipient of the payment.
Recommendation 17:	There should be an additional condition that “the arrangement be artificial and contrived or contain material features that were artificial and contrived”.
Recommendation 18:	A note to the provision on the test that compares that tax benefits with non-tax financial benefits should contain an example that would show

	that the payment of a royalty of $100 which generated $100 of commercial benefit would not 'fail' this test where the tax reduction arising from the royalty payment was $30 ($100 x 30%).
Recommendation 19:	The DPT should be contained in Part IVA of the *Income Tax Assessment Act* 1936 and should be levied under the *Income Tax Act* 1986 and not a separate *Diverted Profits Tax Act.*
Recommendation 20:	That the ATO be required to notify the taxpayer that it intends to issue a provisional DPT assessment with a 90 day notice period.
Recommendation 21:	That the ATO be required to appoint an independent "DPT assessment arbitrator" (being a retired judge or equivalent) who must approve the issue either of the provisional DPT assessment or possibly the 90 day notice to issue the provisional DPT assessment.
Recommendation 22:	That the taxpayer be given the right to bring forward the end of the review period by up to 6 months and to commence court proceedings at this time. It would need to notify the ATO of its intention to do so within a notification period of 30 days.
Recommendation 23:	The taxpayer should have 60 days and not 30 days after the end of the review period to appeal to the courts.
Recommendation 24:	The taxpayer should be able to make representations on any matter (and not be precluded from discussing transfer pricing matters) in the 60 day period after issue of the provisional DPT assessment.
Recommendation 25:	That Treasury, the ATO and members of the tax community further consider examples where the DPT should and should not apply.

Detailed comments

1.0 General

1.1 KPMG welcomes the opportunity to comment on the Consultation Paper titled *Implementing a Diverted Profits Tax* referred to below as the DPT.

1.2 It is recognised that the proposed DPT is one of a package of measures announced in the 2016-17 Budget. That package embraces three broad objectives which are to be applauded: (i) a more competitive tax system and in particular supporting a reduction in the company tax rate; (ii) clamping down on tax avoidance; and (iii) leadership in reform of the international tax framework through implementation of the agreed OECD BEPS Action Plan items.

1.3 KPMG supports these objectives. Moreover, we recognise the complex dynamics between each of them. Thus, in asking the community to accept a reduction in the company tax rate to promote investment in the long term, the community rightly should have an expectation that the payment of tax by corporates meets community standards. The public is also right to expect that Australia embraces reform of the international tax framework with other OECD & G20 countries. There are elements of a broad trade-off and the DPT can be seen as part of that trade-off.

1.4 But as one delves into greater specifics of the DPT, things become more difficult. The impression that the DPT lies outside the agreed OECD BEPS Action Plan items is a very strong one in the international tax community. This is, and should be, a very real concern. That concern partly lies in the detriment that Australia faces in being perceived to be a tax "outlier" on international norms. This potentially impacts inward investment. That concern also partly lies in the precedent our DPT rules create for other countries to also put in place rules outside the newly negotiated OECD international tax framework. This potentially impacts outward investment.

1.5 One response to this might be to say the decision of our government to embrace a DPT has been made and the responses from other countries and potential investors will fall where they may. Such a conclusion would miss the point that the shape and scope of the DPT will have a real bearing on the nature and extent of the international reaction. If it is considered to be supportive of a path that the international community is embracing, a negative reaction and response will be limited. If it is considered to

be an over-reach, there will be a quite different reaction, which could be counter-productive. That is, the mechanics and detailed content of the DPT impacts the international response.

1.6 KPMG has held a number of workshops with clients, both in Australia and in the US, to discuss this proposal. We have also spoken to a number of academics and others in the tax community. What is clear from those discussions is the wide variety of views on the scope of the proposed provisions as outlined in the Consultation Paper. This has at least two dimensions: (i) the number of transactions to which it could apply (large or small) and (ii) the extent that it deals substantially with transfer pricing, including the reconstruction power, or that it goes well beyond transfer pricing into other areas of tax structuring.

1.7 This large diversity of views on the scope of the provisions is the widest that the writer remembers seeing since the proposed introduction of the Consolidation regime. It provides three messages. Firstly, the future – months or years after the new legislation is passed – is likely to give rise to a potentially troublesome discourse on the 'real purpose' and 'intended scope' of the provisions. Reasonable minds may well be a long way apart on this question.

1.8 Secondly, if there are potential limitations or constraints that could appropriately be placed on the provisions through exemptions or tighter wording or more focused tests, they should be deeply considered. These would be perceived to benefit the taxpayer and clearly such constraints need to be reasonable. But a pre-disposition towards a wide and relatively unconstrained power being provided to the ATO may be an unfortunate path, grounded in our current times rather than good long term revenue law.

1.9 Thirdly, there is the need for greater guidance and examples on when the provisions are intended to apply, and not, than would normally be the case. These examples may be difficult to obtain and appear to provide constraints at the edges of the rules, but that would be the purpose. It is recognised that Treasury welcomes those examples and the limitation here is to some extent in taxpayer representatives providing "at the borderline" illustrations. It would be useful for the consultation process to involve discussion based on "what if" variant scenarios from a series of baseline examples. We would be pleased to assist in this.

1.10 This submission, no doubt like many others, deals with specific issues raised by the proposed scope, wording and framework of the DPT. We hope our specific points will be of assistance to Treasury in taking the DPT forward. But it is also worth dealing with two high level issues in advance. The first concerns the very broad question of what problems the DPT is trying to solve. More specifically, we address perceived structural flaws in international transfer pricing provisions. The second concerns the difficult issue of the role of discretion in the design of our tax law, at least as it is relevant to the DPT. These issues provide a setting for discussion of the proposed DPT.

2. Perceived flaws in the international transfer pricing regime

2.1 There are four perceived flaws in the system of transfer pricing rules grounded in the arm's length principle that has developed over the last century. They are:

Problem 1: The ability to locate residual profit arising from the synergies of a MNE in a low tax jurisdiction;

Problem 2: The ability of the MNE to choose the specific transactions or structures;

Problem 3: The inherent drive for more and more elaborate detail in finding an appropriate price or arrangement; and

Problem 4: That there is no clear consensus on key elements of our international transfer pricing rules.

This may seem to be contradicted by the recent transfer pricing report on Actions 8, 9 & 10. Notwithstanding that report, China is developing strong and divergent views on the weight one gives to marketing in a transfer pricing analysis. There is a developing delineation between the value of an intangible legally located in one jurisdiction and the capacity to sell the product arising from the intangible in another jurisdiction.

Problem of the ability to locate residual profit arising from the synergies of a MNE

2.2 At the root of this problem is that the very nature of a successful MNE is that it is not acting as disparate arm's length parties do. Synergies arise from the co-ordinated activities of a MNE, which present a residual profit that would not arise for disparate parties acting at arm's length. Certain planning may lead to such a profit being

located in a low tax jurisdiction. This has been of concern in the OECD BEPS Action Plan. There are three main approaches to dealing with this problem.

2.3 The first is to replace the arm's length principle with a system that would allocate profits to various jurisdictions based on a defined formula. The recent international consensus has rejected this formulary apportionment approach on the basis that it creates greater problems than it solves. The second approach, which has been adopted by the OECD and G20, is to reformulate the guidelines surrounding the arm's length principle to enhance established risk and function tests to better determine where the profit actually lies. This path, which Australia has adopted, substantially reduces the problem. The third approach is to recommend changes to CFC rules. Australia's strong CFC rules mean that the issue does not arise for Australian MNEs, but could apply to foreign MNEs where the parent jurisdiction does not have CFC rules or they are not in accordance with the Action 3 recommendations. The question arises as to whether the DPT deals with this problem and, if so, in the most appropriate manner under the current formulation.

The ability of the MNE to choose the specific transactions or structures

2.4 Prima facie, a multinational can choose how it structures its international arrangements and an arm's length analysis is overlaid on that structure. In the OECD guidelines, this has been subject to an important exception which suggests that a Revenue Authority should be able to reconstruct those arrangements in exceptional circumstances only. Australian transfer pricing rules contain a reconstruction power which is relatively broad compared to the reconstruction power in the OECD guidelines. It can apply, amongst other circumstances, where independent parties would have entered into commercial or financial relations which differ in substance from the actual arrangements that the MNE has put in place. This is an extensive power for the Commissioner and was introduced not without some controversy.

2.5 It is noted that the UK does not have a similar power in its transfer pricing rules. The UK DPT acts as a reconstruction power, albeit more limited than Australia's broad power in Section 815-130.

2.6 A question arises as to whether the proposed Australian DPT has (a) a more limited, (b) a more extensive, or (c) an overlapping scope when compared with the Australian reconstruction power.

The inherent drive for more and more elaborate detail on transfer pricing

2.7 The provision of information is an important element in the ATO gaining comfort that the appropriate transfer pricing has been adopted. Some requests will be based on the need for the ATO to gain an understanding of the commercial drivers behind an arrangement. This is certainly reasonable and appropriate. For many significant transactions, there may be a large body of material contained in different departments and business units of an MNE, both domestically and internationally. Sometimes it is difficult to know where that information is located or whether it even exists. There will be a tension between an MNE wanting very precise and targeted requests for information and the Revenue Authority who wants to "see the whole picture" and indeed may be fishing for information. Dealing with this issue is one of getting the right balance.

2.8 There is a separate, but related issue. Given that transfer pricing is at its essence a "comparative project", where actual arrangements are compared with an abstract arm's length notion, there is a substantial drive to deal with more and more detail as one seeks to find greater and greater delineation or coalescence. This is structural and will not be solved unless a safe-harbour is put in place, or a common sense limit is set in place, by Revenue Authorities in dealing with an issue.

2.9 The information tensions on understanding vs fishing, available knowledge vs disparate knowledge and the drive to greater detail are real and practical. They are not circumstances where there is a clear delineation between the compliant and the non-compliant, between the recalcitrant and the amenable, and the willing and the unwilling. This is a grey area that requires a balanced approach.

Evolving differences in how transfer pricing is applied

2.10 The point here is that there are tensions within the current transfer pricing framework that are likely to grow in the future. The world in which the DPT is proposed to operate is not a simple one in which there is consensus on where value is located and how that value should be taxed.

2.11 The detail of the Chinese view of the role of the market in transfer pricing – capacity to sell – is not directly relevant to the DPT as such. What is relevant is that the transfer pricing world contains and will continue to contain incoherent rules based on different (but not incorrect, for the countries making them) value judgements. The extent of the future incoherence is unknown, but likely to grow as more developing

countries adopt the Chinese refocus on the market. This is particularly likely in the Asia-Pacific region, where countries like India, Indonesia, Philippines and Vietnam to name a few may well see value in the purchasing power of their respective rising middle classes rather than in intellectual property located in Australia, Singapore and Switzerland. MNEs will need to navigate that incoherence. It is likely that the claim of value by Revenue Authorities in the Asia Pacific region will be greater than 100% of that value, and that dispute resolution procedures (apart from those directly with Japan and New Zealand) will be time-consuming and problematic. The prospect of double taxation is very real.

2.12 What is the point here? It is that the DPT will apply in a setting of competing claims for value. Those competing claims are not artificial but will have a very strong intellectual foundation and represent deeply and soundly held views by different countries in different stages of development. For example, consider the transfer of intellectual property from Australia to Singapore which is then used to sell products in China, India, Vietnam, Indonesia and the Philippines. That is not simply a matter of Australia putting one's hand into a box of value located in Singapore, for example, and bringing it back home. The value in that box will be highly contested by other countries in the region – more so in the future.

Summary on transfer pricing and DPT

2.13 We make four points corresponding to the four problems identified above.

Firstly, the DPT is not a direct solution to finding and taxing residual profit of a MNE. Arguably, in its form and substance, it is not aimed at that, although it has the dangerous potential to be construed as such a panacea in the future. One could argue that it has the indirect consequence of limiting a MNE's residual profit to the extent that there is an inappropriate transfer of profit from Australia to a "residual profit bucket". But that problem is dealt with, and better dealt with, by the resetting of the transfer pricing rules embedded in the OECD BEPS Action Plan changes (something the writer thinks has been understated).

2.14 Secondly, our reconstruction power embodied in Section 815-130 is a much better reconstruction power than the DPT, notwithstanding the criticism of many that it provides the ATO with the ability to second guess how an MNE should have arranged its affairs. Section 815-130 compares actual conditions with hypothetical or postulated "independent" conditions. The DPT asks a different question. It is more

focused on an objective construction of what the MNE was *trying* to do – reduce Australian tax.

2.15 Thirdly, the provision of information by an MNE in a transfer pricing dispute is complex and full of tensions. Sometimes a Revenue Authority will not appreciate what is readily available knowledge against what is disparate. Sometimes they will be fishing and will not have a clear understanding of what they want and why they want it. Sometimes there will be simply a quest for greater and greater detail to draw greater and greater distinctions or comparisons. This is not to say that MNEs will never undertake a deliberate strategy of obfuscation and a lack of co-operation, but the matter is not simple.

2.16 Finally, the transfer pricing world of the future is not a clear cut one, particularly in relation to intellectual property and markets. Underlying the DPT there may be an assumption that profit representing value can easily be pulled back home. That is simplistic for a future world with strongly competing notions of value.

3. Good taxation law and the role of discretion

3.1 Good taxation law should have the following six characteristics. It should be

- clear;
- stable;
- prospective in nature;
- capable of guiding taxpayers;
- fairly enforced; and
- open to independent judicial review and adjudication.

These elements are fundamental to a system based on the rule of law. It would be wrong to think that such an ideal should not have discretionary elements – whether explicit or implicit. Anti-avoidance rules have implicit discretionary features. However, those features should, as far as possible, abide by good taxation law principles.

3.2 An anti-avoidance law will be construed to be an objective test by the Explanatory Memorandum introducing it, by Rulings in providing guidance on it, and by the

Courts in applying it. Thus, it has been said in relation to the word "purpose" in the general provisions of Part IVA that it is about the 'what' and the 'how" and not the 'why'. While the concept of 'sole or dominant purpose', 'more than incidental purpose', 'one of the principal purposes' and now 'designed to secure' are construed to be objective tests, the practical reality is that the discourse between the Revenue Authority and taxpayers – emails, presentations and board papers – is about the subjective 'why'. At least on the question of purpose or design, the objective 'what' and 'how' is reconstructed from the subjective 'why'. At a practical level, the purpose and design element is all about a Revenue Authority's *construction* of why someone did something and, in particular, whether they tried too hard (to reduce their tax). The objectiveness of the *purpose* or *design* elements of an anti-avoidance provision is illusory. *What this means is that it is important to put in place as many truly objective features as possible in an anti-avoidance provision.*

3.3 To put this another way, the less an anti-avoidance provision is dependent on an implicit discretion (which goes to the savviness of the Revenue Authority Officers involved) and the more grounded the provision is on truly objective criteria, the better. We would like Treasury to expand the truly objective criteria as much as possible.

4. Pre-conditions

4.1 The proposed DPT involves certain pre-conditions. They are:

- that it applies to income years commencing on or after 1 July 2017;
- that it applies to a significant global entity; and
- that it does not apply to an entity with an Australian turnover of less than $25 million unless there is artificially booked offshore income.

4.2 On timing, we recommend that it should apply to income years commencing on or after the later of (a) 1 July 2017, or (b) six months after the Bill changing the legislation receives Royal Assent (Recommendation 1). This provides taxpayers with some time to change their structures based on the actual law and also provides additional respect to the Parliamentary process rather than law change by announcement.

4.3 Some of our clients have argued that current arrangements should be grandfathered. Such a position would sit comfortably with the proposition that good tax law should

not have retrospective elements. That said, we appreciate that such a rule, at least if applied indefinitely, would be hard to administer, may generate incentives to lock in structures and give rise to equity issues between taxpayers. An alternative may be to provide a transitional carve-out until implementation of the proposed anti-hybrid rules (Recommendation 2). This would (a) maintain the integrity of the Government's Budget announcement; (b) avoid the need to deal with the question of whether the DPT would apply to hybrid arrangements; and (c) allow certain taxpayers the comfort of being able to consider the relevant Australian rule changes together.

4.4 It is appropriate to use the concept of a "significant global entity" as a threshold requirement for the DPT to apply. See below, however, for suggested carve-outs.

4.5 It is also appropriate to apply a *de minimus* threshold and it would appear to be reasonable to align that threshold with simplified transfer pricing record keeping requirements and the threshold for exempting small proprietary companies from certain financial reporting under the Corporations Law. The Consultation Paper implies that the *de minimus* threshold should not apply where "(any) income is artificially booked offshore". A more preferable drafting would be a threshold of $25 million for the sum of (a) Australian turnover plus (b) artificially booked offshore turnover (Recommendation 3). On this basis, there should be no argument if there is a small amount of artificially booked offshore income, but if significant its inclusion will mean the threshold would not be met. This would be the common-sense application of a *de minimus* rule.

4.6 We recommend a number of additional exclusions. The rationale for these exclusions is that the tax base erosion risk, based on the nature of the payment and the payer and the recipient of the payment, is low compared to the reputational damage to Australia from "out of the norm" tax legislation, and the compliance costs on taxpayers of ensuring the rules do not apply. We note that some of these exclusions are contained in the UK DPT legislation. These exclusions are:

- payments to and from pension and superannuation funds (Recommendation 4);
- payments to and from charities (Recommendation 5);
- payments to and from persons subject to sovereign immunity (Recommendation 6);

- payments to and from Collective Investment Vehicles generally (Recommendation 7);
- payments in respect of loans (Recommendation 8) and directly related hedge instruments (Recommendation 9);
- intra-entity transactions (head office to branch and intra-branch) (Recommendation 10);
- payments to an entity resident (for tax purposes) in a broad exemption listed country (Recommendation 11);
- payments where the income is attributable back to Australia under the CFC rules (Recommendation 12); and
- payments of dividends on shares, including payments on deemed debt instruments (Recommendation 13).

5. Key Condition 1 – Effective tax mismatch requirement

5.1 A large number of clients have indicated that the proposed 80% threshold is too high considering the current Australian corporate tax rate of 30%. We agree with those sentiments. A better alternative would be the lower of 20% or the 80% test (Recommendation 14).

5.2 We appreciate that a rule that looked solely at the jurisdictional headline tax rate may be problematic, although it has the attraction of simplicity. That said, care will need to be taken in the drafting to cover payments to entities that are transparent (but taxed at the investor level) or are part of a consolidated group (Recommendation 15).

5.3 We also appreciate that it would introduce complexity if consideration were to be given to taxation "up the chain" from the immediate recipient of the payment. However, in circumstances where a taxpayer is able to show that a payment is "comparably taxed" on a timely basis in the offshore group, this should be deemed to be taxed at greater than the threshold requirement (Recommendation 16).

6. Key Condition 2 – Insufficient substance test – Part 1

6.1 The proposed Australian DPT test embraces the concept of "reasonable to conclude based on information available to the Commissioner… that the arrangement was

designed to secure…a tax reduction." This is superior to the "reasonable to assume" test contained in the UK DPT provisions.

6.2 It is noted that this test, if enacted, will give rise to four "bars" or "thresholds" in our anti-avoidance provisions: (a) sole or dominant purpose; (b) more than an incidental purpose; (c) one of the principal purposes; and (d) designed to secure a tax reduction. Some of our clients have argued that the "bar" for this test should be the same as the general anti-avoidance provision or at least the Multinational Anti-Avoidance Law or MAAL. This would sit with the desire to ensure our tax legislation is as simple and consistent as possible.

6.3 The history of the drafting of our anti-avoidance provisions has two key features on how the bar is set on the issue of purpose. The first is that it has been constantly lowered as noted above. The second is that while Ministerial statements, consultation documents and Explanatory Memoranda explain that the arrangements that are sought to be attacked are "artificial and contrived", such words have not appeared in the anti-avoidance legislation as enacted. This is presumably on the basis that it is believed that the Courts would interpret such words to limit the operation of the provisions. This does not sit comfortably with good taxation law.

6.4 Ideally, it would be beneficial if an additional key condition was put in place which required that "the arrangement be artificial and contrived". An alternative may be a condition that requires "the arrangement be artificial and contrived or contain material features that were artificial and contrived" (Recommendation 17). Such a provision would help to dissipate international concern of the scope of the provisions.

7. Key condition 3 – Insufficient economic substance test – Part 2

7.1 This proviso – put broadly, that the tax benefits should exceed non-tax financial benefits for the DPT to apply – is welcome. The issue that arises is how to value this. If the tax benefit of a deduction in relation to a payment is to be compared with the value of the benefit obtained for the payment, then the insufficient economic substance test would only be met in limited circumstances. Example 3 is an example where a valuable asset (which could generate $50 million in income which was foregone) was transferred for a nominal sum.

7.2 Importantly, the payment of a royalty of $100 which generated $100 of commercial benefit would not 'fail' this test where the tax reduction arising from the royalty

payment was $30 ($100 x 30%). This should be made clear by a note in the legislation (Recommendation 18).

8. Assessment and administration of the tax

8.1 The DPT should be contained in Part IVA of the *Income Tax Assessment Act* 1936 and should be levied under the *Income Tax Act* 1986 and not a separate *Diverted Profits Tax Act* (Recommendation 19). This enhances the argument that the DPT is not a subversion of the tax treaties Australia has negotiated with other countries and reduces the risk of retaliation.

8.2 The administration and timing of the proposed provisions is not without difficulty. It is intended to change the balance of negotiating power "to discourage multinationals from delaying the resolution of transfer pricing disputes". As noted above, such power would exist in a highly complex environment where at times reasonable people can hold different views and those views can be strongly and passionately held. The other point to be made is that independent judicial review is one of the cornerstones of a good taxation system.

8.3 The Consultation Paper provides for a 7 year period for notification by the ATO of a provisional assessment to accord with the transfer pricing rules; a short representation period of 60 days to correct factual (only) matters in a provisional assessment; and a proposed privative clause which provides no right of appeal against a final DPT assessment until after the 12 month review period (and then only for 30 days). On any measure, this process strongly favours the Commissioner over taxpayers. This is in the context of an upfront payment of tax at a penalty rate.

8.4 We make a number of suggestions which seek to ensure that the process is only used in exceptional circumstances by the Commissioner and provides some protection for taxpayers.

8.5 The first is that the ATO be required to notify the taxpayer that it intends to issue a provisional DPT assessment. We recommend a 90 day notice period, given the likely complexity of the matters involved and the difficulty that is often apparent in finding information (Recommendation 20).

8.6 The second is that the ATO be required to appoint an independent "DPT assessment arbitrator" (being a retired judge or equivalent) who must approve the issue either of

the provisional DPT assessment or possibly the 90 day notice to issue the provisional DPT assessment (Recommendation 21).

8.7 The third is that the taxpayer should have the right to bring forward the end of the review period by up to 6 months and to commence court proceedings at this time. It would need to notify the ATO of its intention to do so within a notification period of, say, 30 days. This would effectively reduce the privative clause period (on-judicial review period) by up to 6 months (Recommendation 22).

8.8 The fourth is that the taxpayer should have greater than 30 days after the end of the review period to appeal to the courts. A period of 60 days is more appropriate (Recommendation 23).

8.9 The fifth is that the taxpayer should be able to make representations on any matter (and not be precluded from discussing transfer pricing matters) in the 60 day period after issue of the provisional DPT assessment (Recommendation 24)

8.10 While slightly more complex than the process outlined on page 7 of the Consultation Paper, we believe that these measures provide a better balance, as between the Commissioner and taxpayers, than the current assessment and administrative proposals.

9. Assistance and further consideration by examples

9.1 We believe it would be useful for Treasury, the ATO and members of the tax community to further consider examples where the DPT should and should not apply. The time taken now, is likely to reduce the risk of the enactment of a provision with many unintended consequences later (Recommendation 25).