Minerals Council of Australia

13 April 2012

The Manager
International Tax Integrity Unit
The Treasury
Langton Crescent
PARKES ACT 2600

Email: transferpricing@treasury.gov.au

RESPONSE TO EXPOSURE DRAFT TAX LAWS AMENDMENT (2012 MEASURES NO. 3) BILL 2012: CROSS-BORDER TRANSFER PRICING

The Minerals Council of Australia (MCA) welcomes the opportunity to comment on the exposure draft of the *Tax Laws Amendment (2012 Measures No. 3) Bill 2012: Cross-Border Transfer Pricing.*

The MCA represents Australia's exploration, mining and minerals processing industry, nationally and internationally, in its contribution to sustainable development and society. MCA member companies produce more than 85 per cent of Australia's annual minerals output and account for more than 50 per cent of Australia's exports.

In making this submission, the MCA wishes to underline at the outset the very strong opposition of our members to the retrospective effect of the proposed amendments. As we have consistently argued, prospectivity is a fundamental principle of an equitable and efficient tax system. Hence, retrospectively 'clarifying' the role of tax treaties is a seriously flawed approach. Granting the Commissioner additional latitude beyond that which is prescribed in current domestic laws has the potential to change tax outcomes for businesses that have reasonably arrived at their transfer pricing position on the basis of the law as it has been interpreted by the courts.

The MCA, together with other Australian business organisations, has become increasingly concerned in recent months about the risks posed by retrospective legislation, noting that these measures come on top of other developments including retrospective Petroleum Resource Rent Tax amendments and retrospective amendments in relation to rights to future income. Instability in tax arrangements of this nature impacts on investment decisions and contributes to heightened sovereign risk, thereby making Australia a less attractive location for capital.

In making this submission, the MCA endorses the submission made by the Corporate Tax Association (CTA) and makes a number of additional recommendations outlined below with the objective of seeking to ensure the most practical enactment of the Government's policy intent while also aiding taxpayer certainty.

1. In the interest of transparency and fairness, the MCA strongly supports the CTA recommendation that section 815-30(2) be amended to require the Commissioner, when making an adjustment, to specify to the taxpayer which specific item is being adjusted. Adjustments to particular items of income, expenditure or capital gains and losses have clear consequences under both domestic tax law and in international jurisdictions which a taxpayer is reasonably entitled, if not obliged, to pursue. The unfair consequences of this lack of transparency is compounded by draft sections 815-30(6) and 815-45(6) which raise the question reasonably posed by the CTA: how does a taxpayer go about discharging the onus of proving its case without a full explanation of the assessment from the Commissioner?

2. The MCA agrees with the CTA that section 815-22(5) should be deleted. If, as stated in the Assistant Treasurer's media release, it is the Government's intention to adopt the OECD Guidelines then that is what should apply – not an ATO interpretation of the Guidelines. As drafted, this section seeks to cement within the legislation a controversial and contestable ATO view. If the ATO's view is correct, then the section is redundant. However if, as the MCA believes the ATO view is incorrect, then clearly it should not be included. Further, as a point of principle, the MCA is concerned that inserting ATO interpretations exceeds the ATO's authority and sets a troubling precedent.

WALTER TURNBULL BUILDING LEVEL THREE
44 SYDNEY AVENUE FORREST CANBERRA ACT 2603
PO BOX 4497 KINGSTON ACT 2604
TELEPHONE: + 61 2 6233 0600
FACSIMILE: + 61 2 6233 0699
WEB: www.minerals.org.au
EMAIL: info@minerals.org.au
ABN 21 191 309 229

3. The MCA shares the two points of concern raised by the CTA relating to the guidance material and the effect of section 815-25(3) to allow the inclusion of "different documents or parts of documents for different circumstances". It is the MCA's view that it would be very dangerous to give the ATO the authority to insert its own documents into the regulations when its role is law administrator, not lawmaker. Secondly, we agree with the CTA's practical concern that the partial inclusion of documents may result in partial understanding of the relevant issues without reference to the full context of the complete document.

4. The MCA strongly endorses the CTA's recommendations to protect taxpayers from the most egregious practical consequences of the retrospective nature of the legislation. Specifically, the MCA supports a four year time limit for the amendments to ensure taxpayers are not additionally exposed to double taxation in jurisdictions such as the United Kingdom in which a six year statute of limitations applies; and advocates remitting to zero penalties imposed against taxpayers that made a genuine effort to correctly price transactions under existing ATO guidance such as TR 98/11.

5. The MCA recommends that Section 815-22(1)(a)(i) be clarified to specify whether Australian residency is to be determined having regard to the domestic legislation or the treaty (Article 4). Article 4 contains a tie breaker rule wherein if the company is a resident of both countries, it is deemed a resident of the country in which its place of effective management is situated. However, under section 6(1) of ITAA36, if the company is incorporated in Australia, it is deemed resident without regard to place of effective management. Section 815-10(b) notes that an "Australian Permanent establishment" is within the meaning of the relevant "international tax agreement". But there is no such clarification for "Australian resident". This is important since section 815-22 relating to transfer pricing benefit applies only to Australian residents.

6. The MCA is concerned that Subdivision 815-A seems to give the Commissioner powers to determine arm's length profit on the whole of entity basis having regard to Article 7 and 9 of the OECD Model Treaty. This exceeds the OECD's intent. Further, where the entity is dealing in several markets with various international related parties in different commodities, this may not be workable due to different pricing structures. Where the Commissioner makes arm's length adjustments at the whole of entity level, it is not certain how these will be identified against individual items of trading stock, services, assets etc for the application of other provisions of the Act.

7. The Note inserted at the end of subsection 136AB(1) says that the Division 13 is ***subject to*** Subdivision 815-A. It is not clear if the Commissioner has powers to apply both Division 13 and Subdivision 815-A. Division 13 talks about pricing the transaction at arm's length while Subdivision 815-A looks at arm's length profits resulting from dealings between related parties. The issue here is whether the Commissioner can exercise powers under both Division 13 and Subdivision 815-A to require not just the arm's length pricing of the transaction but also the profits from dealings between related parties. This again highlights the need for any determination under Subdivision 815-A to clearly state what underlying transaction the Subdivision is being applied to, in order to avoid any double assessment.

Should you require further explanation of any issues raised above, please contact me in the first instance (john.kunkel@minerals.org.au or 02 6233 0649). The MCA appreciates the opportunity to comment on the development of this legislation and looks forward to further consultation during the next stages of the Government's review of transfer pricing issues.

Yours sincerely,

John Kunkel
Director – Economics & Taxation
Minerals Council of Australia