



Law Council
OF AUSTRALIA

Business Law Section

13 February 2024

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

By email: prrt@treasury.gov.au

Dear Director

PRRT amendments and retrospectivity

1. This submission relates to the measure set out in Part 2 of Schedule 1 to the exposure draft legislation *Treasury Laws Amendment (Measures for Consultation) Bill 2023: Capital allowances for mining, quarrying or prospecting rights and clarifying the meaning of exploration for petroleum (Draft Bill)*. This measure relates to the meaning of 'exploration for petroleum' for the purposes of the *Petroleum Resource Rent Tax Assessment Act 1987* (Cth) (the **PRRT Act**), and is referred to below as the **Exploration Amendments**.
2. This submission is made by the Taxation Committee of the Business Law Section of the Law Council of Australia (the **Committee**).

Key Points

3. The matter the Committee wishes to raise is the inappropriateness of the retrospective operation of the Exploration Amendments. In particular, we consider:
 - a. Retrospectivity is generally inappropriate. It should only be applied in exceptional circumstances, and the Draft Bill does not contemplate an exceptional circumstance which would justify retrospective operation.
 - b. The Exploration Amendments sit at the extreme end of retrospective law change—they apply not to the date of announcement, but to almost a decade prior to announcement.
 - c. Retrospectivity is especially inappropriate in circumstances where, as here, it is an offence for a taxpayer to fail to comply with relevant provisions of the PRRT Act dealing with 'exploration for petroleum'.

Retrospectivity is generally inappropriate

4. Consistent with the rule of law,¹ and as a matter of general policy, tax measures should apply prospectively as a general rule. This has been recognised both by Treasury,² and in case law.³ Prospective and certain laws are integral to the proper functioning of the tax system, allowing taxpayers to, for example, make investment decisions, and strike commercial bargains with certainty.⁴
5. Retrospective legislative change, on the other hand, raises the following key issues:
 - a. Such laws run counter to the general principle that a citizen has a right to determine the law applicable to them at any given date. If laws cannot be known ahead of time, individuals and businesses may not be able to arrange their affairs to comply with those laws. It potentially exposes individuals and businesses to sanctions and non-compliance.
 - b. Any retrospective change also has the potential to be unfair with increased potential for unintended consequences from greater regulatory complexity.
 - c. The process of imposing retrospective laws may create confusion and unpredictability, and goes against the principle of transparency in the process of lawmaking.⁵
6. Further, the Law Council of Australia has previously observed that retrospective laws can cause a ‘number of practical difficulties for business, and the wider economy’, including actual and reputational damage to the market (sovereign risk) and disruption to business planning processes resulting in high compliance costs (which may be passed onto innocent third-party investors and shareholders).⁶
7. The vice of retrospectivity is especially pronounced in this instance, as the Exploration Amendments apply retrospectively to payments made on or after 21 August 2013,⁷ almost a decade prior to the announcement.⁸

¹ Justice Michelle Gordon, ‘The Commonwealth’s Taxing Power and its Limit—Are we there yet?’ (2013) 36 *Melbourne University Law Review* 1037 at 1061, citing Chief Justice Murray Gleeson, ‘Courts and the Rule of Law’ (Speech delivered at the Rule of Law Series, the University of Melbourne, 7 November 2001).

² Treasury, *Report on Aspects of Income Tax Self Assessment* (August 2004) at 70.

³ See, e.g., *Stephens v R* [2022] HCA 31, which held in a non-tax context that ‘retrospective laws ... are capable of defeating reasonable expectations concerning rights’ at [29].

⁴ See Tax Institute of Australia, Submission to the Australian Law Reform Committee Inquiry ‘Traditional Rights and Freedoms—Encroachment by Commonwealth Laws’, *Submission 68* at [18].

⁵ Law Council of Australia, Submission to the Australian Law Reform Committee Inquiry ‘Traditional Rights and Freedoms—Encroachment by Commonwealth Laws’, *Submission 75* at [65].

⁶ Law Council of Australia, Submission to the Australian Law Reform Committee Inquiry ‘Traditional Rights and Freedoms—Encroachment by Commonwealth Laws’, *Submission 75* at [71], cited in Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachment by Commonwealth Laws*, Final Report 129 (December 2015) at [13.27].

⁷ Section 8 of the Draft Bill.

⁸ The Exploration Amendment was announced in the 2023–24 Budget on 9 May 2023.

The justification for retrospectivity does not hold

8. The explanatory materials to the Draft Bill assert that the Exploration Amendments will 'clarify' the meaning of 'exploration for petroleum', and give effect to Government policy and the Commissioner's practice and advice set out in TR 2014/9, which applied from 21 August 2013.⁹ This is said to be necessary in response to ambiguity created by the decision of the Full Federal Court in *Commissioner of Taxation v Shell Energy Holdings Australia Limited* [2022] FCAFC 2¹⁰ (**Shell Energy Holdings**).
9. The assertion that the retrospective change is appropriate because it restores the law and taxpayers to the position that existed under the Commissioner's earlier administrative practice and advice does not hold. A retrospective law change can only have that result if the retrospective law change is a perfect substitute for the earlier administrative practice and advice. That is not the case here, for two key reasons.
 - a. First, the Exploration Amendments do not state what 'exploration for petroleum' means, only what it is not: i.e. they introduce a negative limb only. Therefore, it does not address the Commissioner's articulation of the meaning of 'exploration for petroleum' in TR 2014/9,¹¹ the correctness of which is now called into question by the decision in *Shell Energy Holdings*.
 - b. Second, the Exploration Amendments introduce a series of purpose tests that have not previously existed. Under the Exploration Amendments, expenditure will not fall within 'exploration for petroleum' if it relates to activities engaged in for the purpose of determining whether the recovery of petroleum is commercially viable, economically feasible or technically feasible, or for the purpose of determining how to recover petroleum. These new purpose tests do not feature in TR 2014/9. If the Exploration Amendments are enacted, taxpayers will be required to examine their prior treatment of exploration expenditure, dating back to 21 August 2013, to determine whether they complied with or failed these new purpose tests. The purpose test statement in paragraph 4 of TR 2014/9 is generally inappropriate. It should only be applied in exceptional circumstances, and the Draft Bill does not contemplate an exceptional circumstance which would justify retrospective operation. The uncertainty created by these new purpose tests is exacerbated by the reality that a commercial entity does not embark on investigations to discover a petroleum resource without there being an ultimate purpose of determining whether exploiting the resource is a commercially viable venture, a matter that was acknowledged by Justice Colvin, at first instance, in *Shell Energy Holdings Australia v Commissioner of Taxation* [2021] FCA 496 at [233] and [234].

⁹ Paragraph 1.7 of the Exposure Draft Explanatory Materials to the Draft Bill.

¹⁰ Paragraph 1.5 of the Exposure Draft Explanatory Materials to the Draft Bill.

¹¹ See, for example, paragraph 4 of TR 2014/9.

Retrospectivity is especially inappropriate in this instance

10. Retrospective law change is especially inappropriate in light of relevant offence provisions in the PRRT Act.
11. Under the exploration expenditure transfer provisions in Division 3A of Part V of the PRRT Act:
 - a. a taxpayer must transfer the correct quantum of 'transferrable exploration expenditure' to a petroleum project in the relevant circumstances covered by those provisions; and
 - b. it is a strict liability offence if the taxpayer fails to do so other than in a circumstance where the taxpayer has a reasonable excuse.¹²
12. The Committee considers that it is manifestly undesirable for there to be retrospective amendment of provisions of the law for which non-compliance attracts an offence of strict liability.
13. The Committee acknowledges that, as the decision in Shell Energy Holdings has bearing on the meaning of 'exploration for petroleum', the risk of there being past non-compliance with the exploration expenditure transfer provisions already exists as a consequence of that decision. However, this position is not cured by, and is made worse by, the Exploration Amendments having retrospective effect because the Exploration Amendments raise new and different questions as to past compliance with the transfer provisions. For example, how do the new purpose tests in the Exploration Amendments work? Are they determined based on a taxpayer's subjective purpose, or on an objectively observed purpose? What is the meaning of 'economically feasible', and how is it different from 'commercially viable'? Taxpayers will need to address these questions of interpretation, in respect of the period from 21 August 2013, in the context of provisions for which non-compliance is an offence.

Date of application

14. There is widespread acceptance of taxation laws applying retrospectively where they commence from the date of announcement, where the period of retrospectivity is short, and where the announcement is clear.¹³
15. In the case of the Exploration Amendments, the period of retrospectivity is clearly not short, and the meaning of 'exploration for petroleum' has been a matter of controversy between taxpayers and the Commissioner for many years.¹⁴ If the Exploration Amendments are to apply retrospectively, they should only apply at the earliest from the date of its announcement in the 2023–24 Budget, being 9 May 2023.
16. Where a retrospective measure does apply, it is usually coupled with grandfathering or transitional provisions. There are no such grandfathering or transitional provisions in the Draft Bill, exacerbating the issues set out above.

¹² Sections 45A and 45B of the PRRT Act.

¹³ See Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachment by Commonwealth Laws*, Final Report 129 (December 2015) at [13.6], [13.90].

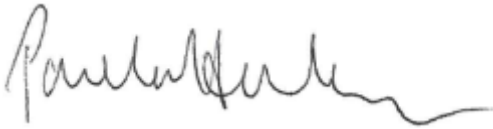
¹⁴ See *ZZGN and Commissioner of Taxation* [2013] AATA 351, and *Shell Energy Holdings*.

17. Should the measures introduced in the Draft Bill apply retrospectively, there should be protections for taxpayers against any penalties or interest which would not have arisen but for these amendments.

Further contact

18. The Committee would be pleased to discuss any aspect of this submission.
19. Please contact the chair of the Committee, Mr Justin Byrne, on (02) 9230 3235 or justin.byrne@qldbarr.asn.au if you would like to do so.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Pamela Hanrahan', with a long horizontal flourish extending to the right.

Dr Pamela Hanrahan
Chair
Business Law Section