Minerals Council of Australia

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INCOME TAX: CROSS BORDER PROFIT ALLOCATION REVIEW OF TRANSFER PRICING RULES

The Minerals Council of Australia (MCA) welcomes the opportunity to comment on *Income Tax: Cross Border Profit Allocation - Review of Transfer Pricing Rules.*

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.

The MCA has reviewed and endorses the submission made by the Corporate Tax Association (CTA). Specifically, the MCA wishes to underscore the following key points articulated in the CTA submission.

1. The MCA agrees that there is merit in making prospective changes to our domestic transfer pricing rules to align them more closely with international norms – in particular, the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations as revised in July 2010 (the OECD Guidelines). The MCA cautions, however, that if this step is taken the actual OECD Guidelines should be adopted and not a modified version thereof. In addition, the MCA agrees that while the inclusion of OECD Guidelines should go some way to ensuring consistency, the Government should be mindful of dealings with non-OECD countries with which Australia has entered into a Double Tax Agreement. In such a case, the MCA supports the use of the arm's length principle as the appropriate method for establishing prices for international related party transactions (which is the OECD position) and not allocating group profits between parties. The avoidance of double taxation is critical and must not be overlooked in dealings with non-OECD treaty partners.

2. The MCA further submits that if the OECD Guidelines are adopted, the Australian Tax Office (ATO) should not require any additional discretion to re-characterise a transaction other than as set out in the two limited circumstances outlined in the OECD Guidelines. We share the CTA's view that such discretion would be inconsistent with a full self-assessment system.

3. On the issue of time limits for making transfer pricing amendments, the MCA agrees with the CTA that the current open-ended system constitutes poor administration and should be aligned with the general tax law and set at four years. The MCA notes the current trend for the ATO to carry out its risk review process in "real time" and respectfully suggests that the ATO would find itself able to conclude major cases within four years if it had only four years in which to make adjustments.

4. The MCA submits that there should be an annual statutory threshold of at least $10 million gross in related party cross border dealings before taxpayers become liable to transfer pricing adjustments. The compliance costs associated with mandatory record keeping are likely to be significant and would constitute an unreasonable administrative burden on our member companies – and indeed on the ATO – for the limited revenue return on dealings below this threshold. As set out in the CTA submission, this recommendation will be of benefit mainly to SME taxpayers.

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5. The MCA endorses the CTA recommendation that the ATO and Customs aligned their view on the arm's length price of imported goods. As the CTA notes, it is unreasonable for a business to be required to satisfy two arms of government, one demanding a higher price and the other a lower price.

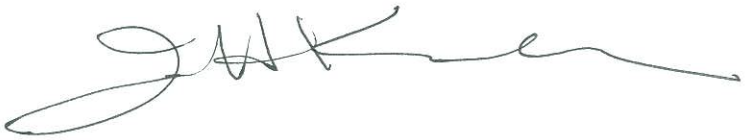
6. The MCA strongly agrees with the CTA that retrospectively 'clarifying' the role and power of tax treaties is a seriously flawed approach and should be reconsidered. Prospectivity is a fundamental principle of an equitable and efficient tax system. Granting the Commissioner additional latitude beyond 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.

In addition to the issues outlined above, the MCA submits further that:

7. In the interests of maintaining a fair and reasonable balance between compliance costs imposed and revenue earned, a de-minimus level on a transaction basis should be applied for any compulsory documentation requirement. The MCA suggests a threshold to be determined based on a percentage of international-related party dealings or as a percentage of total taxpayer revenue.

The MCA looks forward to working with you on the review of transfer pricing rules. If you would like us to provide further explanation of any issues raised above, please contact me in the first instance (john.kunkel@minerals.org.au or 02 6233 0649).

Yours sincerely,



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