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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

EXPOSURE DRAFT EXPLANATORY MATERIALS

TREASURY LAWS AMENDMENT (MEASURES FOR FUTURE BILLS) BILL
2023: PRRT ANTI-AVOIDANCE RULES

EXPOSURE DRAFT EXPLANATORY MATERIALS

Consultation preamble

Treasury seeks feedback on the effectiveness of this exposure draft explanatory material in explaining the policy context and operation of the proposed new law, including, but not limited to:

- how the new law is intended to operate;
- whether the background and policy context is sufficiently comprehensive to support understanding of the policy intent and outcomes of the new law;
- the use of relevant examples, illustrations or diagrams as explanatory aids; and
- any other matters affecting the readability or presentation of the explanatory material.

Feedback on these matters will assist to ensure the Explanatory Memoranda for the Bill aids the Parliament's consideration of the proposed new law and the needs of other users.

Treasury and the ATO work closely to identify aspects of new tax laws which may benefit from ATO public advice and guidance (PAG). Feedback is also sought on any aspects of the new law where ATO PAG should be considered, to support stakeholders' understanding and application of the new law. Stakeholder feedback will be shared with the ATO.

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Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

Abbreviation	Definition
ATO	Australian Taxation Office
Commissioner	The Commissioner of Taxation
ITAA 1936	<i>Income Tax Assessment Act 1936</i>
PRRT	Petroleum Resource Rent Tax
PRRTA Act	<i>Petroleum Resource Rent Tax Assessment Act 1987</i>
PRRTA Regulations	<i>Petroleum Resource Rent Tax Assessment Regulation 2015</i>

Chapter 1: PRRT anti-avoidance rules

Outline of chapter

- 1.1 Schedule # amends the anti-avoidance provisions in the PRRTA Act so that they are consistent with the general anti-avoidance rules (GAAR) in the ITAA 1936. The anti-avoidance provisions in the PRRTA Act prevent entities from using contrived and artificial arrangements to minimise or escape paying PRRT.

Context of amendments

- 1.2 On 7 May 2023, the Government announced its final response to the Treasury Gas Transfer Pricing Review. The reforms will mean that offshore LNG projects pay more tax, sooner, while ensuring Australia remains a reliable international energy supplier and investment partner.
- 1.3 Schedule # implements Recommendation 9 of the Gas Transfer Pricing Review, which builds on Recommendation 12 of the PRRT Review undertaken by Michael Callaghan AM PSM in 2017.
- 1.4 This recommendation updates the PRRTA Act anti-avoidance provisions to be consistent with the ITAA 1936 GAAR. The GAAR was updated in 2013 to address weaknesses that were revealed due to a number of unfavourable court cases, where taxpayers successfully argued that a ‘tax benefit’ was not obtained on the basis that without the scheme, they would not have entered into an arrangement that attracted tax.
- 1.5 Corresponding amendments are made to the PRRTA Act to ensure the same argument cannot be used and to ensure consistency between the ITAA 1936 and the PRRTA Act.
- 1.6 The PRRTA Act anti-avoidance provisions apply to arrangements which artificially reduce assessable receipts or increase deductible expenditure. Assessable receipts and deductible expenditure are core components in working out a person’s PRRT liability under the PRRTA Act and the PRRTA Regulations. The PRRTA Act anti-avoidance provisions apply to the PRRTA Act and the PRRTA Regulations.

Comparison of key features of new law and current law

Table 1.1 Comparison of new law and current law

New law	Current law
Provides clarity that the ‘would have’ and ‘might reasonably be expected to have’ limbs in the tax benefits definition represent alternative bases upon which the existence of a tax benefit can be demonstrated.	The ‘would have’ and ‘might reasonably be expected to have’ limbs may not clearly represent separate and distinct bases upon which the existence of a tax benefit can be demonstrated.
Clarifies that the ‘would have’ limbs operate on the basis of a postulate that comprises existing facts and circumstances minus the scheme.	There is uncertainty whether the ‘would have’ limbs involve a prediction about events or circumstances, as opposed to a mere deletion of the scheme.
Clearly shows that the ‘might reasonably be expected to have’ limb operates on the basis of postulates that are reasonable alternatives to the scheme, having regard to the substance of the scheme and the non-tax results and consequences achieved by the taxpayer from the scheme.	The operation of the ‘might reasonably be expected to have’ limb depends on an inquiry about what other courses of action were reasonably open to the participants in the scheme.
Whether the PRRT anti-avoidance provisions applies to a scheme starts with considering whether any person participated in the scheme for the sole or dominant purpose of securing for the taxpayer a tax benefit in connection with the scheme. This ensures that the examination of the tax benefit happens in the context of examining a participant’s purpose.	Whether the PRRT anti-avoidance provisions apply to a scheme starts with considering whether a taxpayer has secured a particular tax benefit in connection with the scheme.

Detailed explanation of new law

Operation of the anti-avoidance scheme

- 1.7 In determining whether the PRRT anti-avoidance provisions apply to an arrangement, the critical question is whether a person or persons who participated in the arrangement did so for the sole or dominant purpose of enabling the taxpayer to obtain a tax benefit. The relevant purpose must be

established objectively based on an analysis of various matters, including how the arrangement was implemented, the form and substance of the arrangement, what the arrangement achieved, as a matter of substance or reality, and any changes in financial position for the taxpayer or any person who has a connection with the taxpayer as a result of the arrangement.

The bases for identifying tax benefits

- 1.8 Section 52 is revised to make it clear the starting point on whether the PRRT anti-avoidance provisions apply is to consider whether a person participated in an arrangement for the sole or dominant purpose of securing a tax benefit. There is no change to the matters that must be considered when determining if the sole or dominant purpose test has been met.
[Schedule #, item 1, sections 51A(1) of the Act]
- 1.9 This mirrors the sole or dominant purpose test under section 177D of the ITAA 1936 such that the Commissioner considers whether a participant in the arrangement had the requisite purpose of securing a tax benefit for the taxpayer in connection with the arrangement, and whether a tax benefit was obtained in connection with the arrangement.
[Schedule #, item 1, sections 51A(1) and 52 of the Act]
- 1.10 Where it is determined that a tax benefit has been obtained in connection with the arrangement, the Commissioner may make an adjustment to cancel that tax benefit.
[Schedule #, item 2, subsection 53(1) of the Act]

Annihilation approach

- 1.11 The existing tax benefit scope in the PRRTA Act includes a reference to an amount that ‘would have’ been obtained in absence of the arrangement. The ‘would have’ criterion is made explicit, and it is now clear how alternative postulates are to be identified. This analysis is made on the basis of a postulate comprising all of the events or circumstances that actually happened or existed, other than merely those that form part of the arrangement.
[Schedule #, item 1, subsection 51A(2) of the Act]

Reconstruction approach

- 1.12 When postulating what ‘might reasonably be expected’ to have occurred in the absence of an arrangement, the postulate must represent a reasonable alternative to the arrangement, in the sense that it could reasonably take the place of the arrangement.
[Schedule #, item 1, subsections 51A(3) of the Act]
- 1.13 Consideration to what might be reasonably expected will necessarily require speculation about the state of affairs that would have existed if the arrangement had not been entered into or carried out.
[Schedule #, item 1, subsections 51A(4) of the Act]

- 1.14 Under either the annihilation or reconstruction approach, a taxpayer will have obtained a tax benefit in connection with an arrangement if it is demonstrated that:
- a tax effect would have followed from applying the provisions in the PRRTA Act to the facts once the arrangement is assumed away or reconstructed; and
 - the tax effect secured in connection with the arrangement is more advantageous than the tax effect without the arrangement.

Commencement, application, and transitional provisions

- 1.15 Schedule # to the Bill commences the day after Royal Assent.
- 1.16 The amendments apply to any arrangement that was entered into on or after 1 July 2023.