



21 May 2019

Ms. Tanya Canavan
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By email: tanya.canavan@ato.gov.au

Dear Tanya

Draft Taxation Ruling – TR2019/D3 – Income Tax: deductions for expenditure on environmental protection activities

1. This submission has been prepared by the Australian Environmental and Planning Law Group (**the AEPLG**) of the Law Council's Legal Practice Section.¹ The AEPLG welcomes the opportunity to provide some brief comments on the above draft Taxation Ruling (**draft Ruling**).
2. The AEPLG notes that the draft Ruling aims to explain the operation of subsection 40-755(1) of the *Income Tax Assessment Act 1997* (Cth) (**Income Tax Assessment Act**) which allows an immediate deduction for expenditure incurred for the sole or dominant purpose of carrying on an 'environmental protection activity'. The AEPLG supports such explanation by way of a Ruling.
3. The AEPLG also notes that the greater clarification provided by the draft Ruling may incentivise the carrying out of environmental protection activities that otherwise might not occur, thus producing a better outcome for the environment.
4. In this respect, the draft Ruling is consistent with one aspect of the principles of ecologically sustainable development that are defined in section 3A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), namely that 'improved valuation, pricing and **incentive mechanisms** should be promoted' (emphasis added).
5. However, the AEPLG makes two observations in relation to the draft Ruling.
6. First, it is not clear from the draft Ruling whether the costs of environmental protection activities that are undertaken as a result of the person being convicted of an offence in relation to the pollution, and thus being required to undertake the activities as a consequence of the enforcement and prosecution process, are capable of being

¹ The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

claimed as a deduction. While it is desirable to incentivise the undertaking of activities aimed at preventing, fighting or remedying pollution on a voluntary basis through the taxation system in the manner suggested, the AEPLG believes that there is no justification for applying such an incentive to a person who has been convicted of a pollution (or like offence) under environmental laws. Where other provisions in the Income Tax Assessment Act prevent such costs being claimed, it would be useful to reference such provisions in the draft Ruling.

7. Secondly, the AEPLG queries some of the examples set out at the end of the draft Ruling.
8. In particular, the AEPLG notes Example 3, which states that costs incurred in planting vegetation for visual effect and to prevent erosion would not be deductible expenditure as it 'does not involve an environmental protection activity'. There are many examples of prosecutions by environmental regulators where the failure to prevent erosion has given rise to a pollution offence. A simple example is where erosion leads to sediment entering a waterway and having substantial impacts on fish and vegetation dependent on that waterway. Undertaking works to prevent erosion of the site, on which the earning activity is undertaken, is an activity that prevents pollution as it is defined in state and territory environmental protection legislation. Some clarification of this example would be useful.
9. Another useful example to include in the draft Ruling would be one that considers the impact of undertaking environmental protection activities to remedy pollution that has occurred as a result of the activities of more than one person. For example, if a company decides to remedy soil and groundwater contamination on its site and the contamination has occurred both as a result of the company's own activities and the activities of a neighbouring company (i.e. the contamination has migrated onto the first company's site). In many cases, it is not physically possible to delineate the clean up activities along the lines of who is responsible for each particular element of the contamination. The AEPLG queries how such costs incurred by the first company would be treated.
10. The Law Council would welcome the opportunity to discuss this submission with the ATO. In the first instance, please contact AEPLG Chair, Robyn Glindemann, on robyn.glindemann@lantegy.com.au.

Yours sincerely



Jonathan Smithers
Chief Executive Officer