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OF AUSTRALIA

*Business Law Section*

The Treasury  
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30 June 2016

Dear Sir/Madam

**Treasury Consultation Paper, *Implementing a Diverted Profits Tax, May 2016***

The Taxation Committee of the Business Law Section of the Law Council of Australia (**Committee**) welcomes the opportunity to provide its submission on the Treasury Consultation Paper entitled *Implementing a Diverted Profits Tax (Consultation Paper)*.

As set out in the Consultation Paper, the diverted profits tax (**DPT**) will be based on the second limb of UK's DPT and will target arrangements that large multinational corporate taxpayers have with a related party where the transaction gives rise to an effective tax mismatch, and has insufficient economic substance.

The Committee considers that the introduction of DPT in Australia raises a number of issues. This letter contains our general observations on the new tax, and specific comments on the following technical and administrative aspects of the tax:

- a) Effective tax mismatch condition;
- b) Insufficient economic substance requirement;
- c) Calculation of the assessment;
- d) Income tax treatment of a DPT liability; and
- e) Administrative process and timeframes.

Our comments on the examples provided in the Consultation Paper are contained in Appendices B.1, B.2 and B.3 to this letter.

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**BLS**

## 1. General comments

### DPT and BEPS recommendations

- 1.1 The DPT is inconsistent with the recommendations made by the Organisation for Economic Cooperation and Development's (OECD's) Base Erosion and Profit Shifting (BEPS) project recommendations. A number of commentators have expressed concerns regarding the UK DPT, in particular that unilateral action by the UK government has contributed to international tax law becoming more uncertain and lacking consistency around the world, the exact issues which BEPS project was intended to address<sup>1</sup>. Similar criticisms apply in the case of Australia's DPT.

### Interaction with double tax treaties

- 1.2 The Budget Papers and the Treasury's Discussion Paper indicate that DPT will be a new tax (not an income tax). This creates uncertainty about the availability of tax relief to the taxpayers under Australia's double tax treaties.
- 1.3 In addition, while taxpayers will be allowed an offset for part of the Australian taxes paid on "diverted" profits while calculating the DPT payable, Australian DPT will not be reduced by the amount of foreign taxes paid, in contrast to the UK DPT. The argument behind this treatment is that it is "consistent with the application of penalties under Australia's existing transfer pricing rules". Our view that this is also inconsistent with Australia's treaty obligations.

### Certainty

- 1.4 The Corporate Tax Association has estimated that about 50% of related party transactions undertaken by companies operating in Australia would potentially be assessable under the proposed Australian DPT<sup>2</sup>. Given the large number of taxpayers who may be affected by the new rules, the need for certainty and clarity in the application of the DPT is apparent.
- 1.5 We are concerned that the rules are likely to be very complex and will include a number of subjective elements. The proposed measures involve reliance on "reasonable conclusions" and assessments based on the "best estimate" that can "reasonably be made", leading to further uncertainty in the application of tax laws which would have major financial implications for taxpayers.

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<sup>1</sup> See, for example, the comment made by the director of OECD's centre for tax policy and administration, Pascal Saint-Amans, when asked about his views on UK DPT: "It is an embarrassed view... Unilateral actions are not exactly in the sense of what we are trying to develop, which is: "Let's wait for a comprehensive package and then countries will decide". You are a sovereign; you will decide what to do. But you will be better informed with better instruments and with a lesser risk of having disruptive actions, which might push other countries... to take unilateral measures, which are not that great when you are negotiating a multilateral package.' From LexisNexis TaxJournal, "OECD 'embarrassed' by UK diverted profits tax", 16 April 2015, <http://www.taxjournal.com/tj/articles/oecd-embarrassed-uk-diverted-profit-tax-16042015>

<sup>2</sup> Parliament of Australia, Research Publications, Budget Review 2016-17: *Diverted Profits Tax (Google Tax)*, [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/BudgetReview201617/ProfitTax](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201617/ProfitTax)

- 1.6 We also note that it is not clear from the Consultation Paper whether taxpayers will be able to obtain private rulings on DPT and how the existing Advance Pricing Agreements will be affected.

#### Overlap with other rules

- 1.7 The existing transfer pricing rules, together with the anti-avoidance provisions in Part IVA of the *Income Tax Assessment Act 1936* (together with the *Income Tax Assessment Act 1997*, the **Tax Act**), are already in place to target artificial arrangements entered into by taxpayers to obtain a tax advantage, and already provide the ATO with broad reconstruction powers. Australia's transfer pricing rules will be in line with the latest OECD recommendations from 1 July 2016, following the latest amendments announced as part of the 2016-17 Budget. Our view is that all of the "artificial or contrived" arrangements illustrated in the examples provided in the Consultation Paper could be dealt with under the newly updated transfer pricing and anti-avoidance rules.
- 1.8 We understand that, as a number of commentators have noted, the main purpose behind the DPT appears to be not to collect revenue directly, but to strengthen the ATO's ability to enforce compliance and act as a strong deterrent, so that taxpayers restructure to bring themselves into the Australian tax net, rather than pay DPT at a higher rate of 40%. Strengthening the existing rules, however, could have achieved the same purpose in a more financially efficient manner, both for the government and for the taxpayers, particularly given the significant overlap between DPT and the existing anti-avoidance and transfer pricing rules.

#### Effect on foreign investment

- 1.9 It has consistently been the objective of successive Governments both to encourage foreign investment in Australia and encourage Australian companies to expand their operations outside of Australia. Introducing a DPT potentially counteracts these objectives.
- 1.10 If the Australian Government is concerned that transactions are being undertaken outside of Australia and Australia is not receiving its "fair share" of the tax from economic activities undertaken by a multinational group, implementing a DPT will not attract business to Australia. In fact, it may drive business outside of Australia. For most multinational groups, operations in Australia form a small component of their overall global footprint.
- 1.11 Our view is that it is highly likely that DPT will not influence behaviour in the manner expected by the Australian Government. In fact, it may hasten the exit of foreign multinationals from Australia. There becomes less incentive to continue to operate in Australia with this type of tactic.
- 1.12 It is also important to note that most tax jurisdictions are reducing their rates of tax and Australia (despite its small economy) continues to have one of the highest tax rates in the world. This position is unsustainable if it is to continue to be internationally competitive from a tax perspective. Utilising DPT will not assist in this regard.

## 2. **Effective tax mismatch condition**

2.1 The related party transactions that are proposed to be subject to the DPT satisfy the following requirements:

- (a) the transaction has given rise to an effective tax mismatch; and
- (b) the transaction has insufficient economic substance.

These conditions are based on the UK DPT.

2.2 It is stated at paragraph 23 that an effective tax mismatch will exist where:

“An Australian taxpayer (Company A) has a cross-border transaction, or series of cross-border transactions, with a related party (Company B), and as a result, the increased tax liability of Company B attributable to the transaction is less than 80% of the corresponding reduction in Company A’s tax liability.”

2.3 There are a number of issues that we have identified with this particular requirement. These issues are considered below.

### The transaction must be between **related parties**.

2.4 It is not clear what test would be applied to identify related parties. Nonetheless, it is our strong view that CFCs should be excluded from the scope of DPT. This is on the basis that:

- a) Listed countries have long been regarded as ‘good’ countries on the basis that entities in these jurisdictions are comparably taxed to companies in Australia and have comprehensive tax regimes. For DPT to apply to transactions between listed country CFCs and/or transactions with listed country CFCs would be entirely contrary to the established policy. In addition, application of DPT to CFCs could potentially result in double taxation, particularly where DPT is not an ‘income tax’ but is effectively a penalty.

Our view is that listed countries should be excluded from the scope of DPT.

- b) Passive income of unlisted country CFCs are subject to attribution under the Australian tax rules. In this context, there is no effective tax mismatch because such profits are effectively taxed at 30% (the current Australian corporate tax rate). In our view, there is no basis for inclusion of such CFCs within the scope of the DPT.

### The 80% threshold

2.5 It is our submission that the 80% threshold is too high.

2.6 Although the proposed DPT may be modelled on the UK regime, having the same threshold percentage as the UK DPT is inappropriate. This is because the UK corporate tax rate (at 20%) is significantly lower than Australia’s and application of this threshold requirement results in most of the tax jurisdictions in the world being caught under the proposed Australian DPT.

- 2.7 It is a difficult proposition to accept that undertaking related party transactions with entities in jurisdictions with tax rates of 24% or less is an attempt to reduce the overall tax in a significant way and therefore should be caught by the DPT.
- 2.8 We do not expect that the tax policy is for the DPT to be used to **force** Australian companies to do business only with unrelated parties. That is, it may be perceived that the DPT will have the practical result of encouraging Australian companies to choose to do business only with unrelated parties, which does not appear to be a valid tax policy setting or a desirable economic or commercial outcome.
- 2.9 If Australia intends to imitate the UK DPT and target similar jurisdictions, our view is that the threshold should be lowered to, say, 50%.

#### Specific tax exemptions

- 2.10 The differences in tax outcomes that arise as a result of specific tax exemptions under a particular tax jurisdiction should be disregarded for the purposes of the ETMR. It is conceivable that specific tax exemptions may be introduced from time to time in other tax jurisdictions based on the policy objectives of that jurisdiction. For DPT to be potentially triggered as a result of such changes in policy would be undesirable in circumstances where transactions between the relevant companies are long-standing.
- 2.11 Certain entities should also be excluded from the scope of the ETMR where the tax mismatch arises because of their tax exempt status (such as charities, pension schemes, persons exempt from tax by reason of sovereign immunity) and where specific tax concessions are available to certain entities (e.g. complying superannuation funds). Exemptions should also be afforded for investment vehicles, such as insolvency remote special purpose vehicles (i.e. securitisation funds) and real property investment trusts (i.e. MITs) – consistent with the recommended exclusions under the anti-hybrid rules.

#### Series of transactions

- 2.12 Further clarity is required regarding the reference to “series of transactions”. In particular, this should be confined only to transactions in which an Australian company is a party and not to transactions which have no connection with Australia. To do otherwise would effectively be extending Australia’s right to tax beyond its borders.

### **3. Insufficient economic substance requirement**

- 3.1 It is stated at paragraph 29 of the Consultation Paper that:

“Similar to the UK approach, where the non-tax financial benefits of the arrangement exceed the financial benefit of the tax reduction, the arrangement will be taken to have sufficient economic substance.”

- 3.2 Conceptually, it will be difficult to measure the ‘non-tax financial benefits’ of the arrangement and then determine whether these exceed the financial benefits from the tax reduction. If for example, a group financing entity is established in one jurisdiction (ex-Australia), how would the synergies and benefits achieved by

having a centralised financing function be measured? The reasons for this arrangement could have nothing to do with “diverting” Australian tax.

- 3.3 What if the benefits are intangible (such as simplicity of the arrangement for the group, ease of funding flows, lower regulations to be satisfied in a particular jurisdiction)? It is unclear how such benefits would be measured and how a dollar value would be placed on such benefits for the purposes of comparison.
- 3.4 In our view, it is unreasonable to require groups of companies to undertake an extensive assessment in order to satisfy the ATO that ‘non-tax financial benefits’ exceed the financial benefits of the tax reduction. We also query whether the ATO would have the resources or whether they would have the information to be able to measure such ‘non-tax financial benefits’ before forming a view that this requirement is failed and issuing an upfront assessment for the DPT.
- 3.5 At what level would this requirement be tested? Would it be tested by reference to the transaction or the entity with which the transaction is executed? As a de minimis, a transaction between fully operational related companies should be exempted from this requirement or deemed to have sufficient economic substance.
- 3.6 In addition, an assessment of whether this requirement is satisfied or failed may require a high degree of judgement. Where a taxing provision depends on the subjective judgement of a revenue authority as represented by its officials, it is highly undesirable from a policy perspective.
- 3.7 Accordingly, it is our submission that there be specific factors against which this requirement should be assessed. For example, if the transaction is priced on arm’s length terms (having regard to the TP type analysis, e.g. KERT analysis), then the transaction should be deemed to have sufficient economic substance.

#### **4. Calculation of the Assessment**

##### Commissioner’s discretionary power to assess

- 4.1 The Commissioner is to be given discretion to issue a DPT assessment. In particular, it is said that “[t]he Commissioner will have a broad discretion to not apply the DPT where the Commissioner considers the transaction or arrangement to be low risk.”
- 4.2 The grant of discretion to the Commissioner to apply tax provisions is not uncommon (for example Part IVA). It appears that if the relevant transaction has an effective tax mismatch and meets the insufficient economic substance test, then the DPT would in the ordinary course apply.
- 4.3 It is therefore not clear how an assessment of risk is to be determined by the Commissioner, once it is considered that the elements are satisfied.

##### Diverted profits amount

- 4.4 Two scenarios will apply to determine a Diverted Profits Amount:

- (a) where the deduction claimed is considered to exceed an arm's length amount ('inflated expenditure' cases), the provisional Diverted Profits Amount will be 30 per cent of the transaction expense; and
  - (b) for all other cases, the provisional Diverted Profits Amount will be based on the best estimate of the diverted taxable profit that can reasonably be made by the ATO at the time.
- 4.5 The 'inflated expenditure' scenario is dealt with in Appendix B.1. The relevant example involves an expense of \$50m. The DPT would operate to be 30% of the expenses as a whole (30% of \$50m, or \$15m). The Appendix then recognises a case where the arm's length price is determined by the ATO to be \$45m, such that the Diverted Profits Amount is changed to \$5m.
- 4.6 It is not clear why the Commissioner should prima facie apply 30% to the entire transaction expense, recognising that at that time it may be accepted that at least part if not most of that expenditure would be deductible under ordinary transfer pricing (arm's length) principles.
- 4.7 Rather, the focus should be on the relevant mischief, ie the inflated expenditure. That seems to be accepted as the ultimate position – page 10 confirms that the DPT Reassessment Amount for an inflated expenditure would be the pricing that would have occurred between unrelated parties, ie the arm's length price.
- 4.8 As set out in the Consultation Paper, the process on inflated expenditure establishes a system which could facilitate early large provisional or final DPT assessments which the Commissioner would expect to be ultimately incorrect, even at the DPT Reassessment stage. We submit that this be reconsidered as it does not in our view reflect sound tax policy.
- 4.9 The other test involves the best estimate of the diverted taxable profit. Page 10 suggests this is the reduction in taxable income from the arrangement with reference to the arrangement that would have been undertaken if tax was not a motivation. As stated, this test involves a prediction or hypothesis of the position absent the tax motive. Such a test has been the subject of extensive consideration in the context of Part IVA. It is not clear how that consideration would be applied in the context of the DPT.
- 4.10 We note that under both scenarios, the test for the DPT Reassessment Amount is different from that for the Provisional Diverted Profits Amount. This would tend to lead to a case where the provisional assessment is substantively provisional, i.e. known to be likely to not be sustained, rather than a best estimate of the ultimate liability.
- 4.11 We note for completeness that the examples provided do not include all kinds of diversion. For example, the DPT appears to leave out other categories of cases, for example, where a payment is characterised as one not subject to withholding tax rather than as an interest, dividend or royalty. Further, it may also not apply to cases where there is no taxable profit made, eg loss scenarios.
- 4.12 It is stated that where debt levels are within a thin capitalisation safe harbour, only the pricing of the debt and not the amount of the debt will be taken into account in

determining any DPT liability. Presumably, it is implied that if the debt is not within a safe harbour, then the pricing *and* amount of the debt will be taken into account. It is not clear how this will occur – if the thin capitalisation rules operate, they would deny the excess of debt deductions above the relevant safe harbour. In that case, there would then be a further question as to the interplay of debt and pricing. That issue has been the subject of considerable comment in the context of the existing thin capitalisation rules/transfer pricing rules. It is submitted that the interplay should be clarified in relation to the DPT.

#### Diverted profits rate

- 4.13 The DPT rate is said to be 40%, set “to encourage taxpayers to pay the lower corporate tax rate through complying with Australia’s tax rules.” The Consultation Paper then acknowledges that it is a “penalty tax rate”.
- 4.14 It is not clear why the approach of adopting a “penalty tax” rate has been adopted. A penalty is not a tax and a tax should not be a penalty. The Taxation Administration Act deals with the imposition of administrative penalties. It is not clear why a different regime should apply instead of the DPT.

#### DPT assessment

- 4.15 As noted above, the Consultation Paper states that “an offset will be allowed for any Australian taxes paid on the diverted profits”. However, the DPT due and payable will not be reduced by the amount of tax paid in a foreign jurisdiction on the diverted profits, consistent with the application of penalties under Australia’s existing transfer pricing rules.
- 4.16 This approach is inconsistent with Australia’s Double Tax Agreements. Thus, the DPT would lead directly to double taxation.
- 4.17 It is contemplated that on an ATO Review, the ATO may increase or decrease a DPT assessment to reflect additional information received from the taxpayer, including on compliance of the arrangement with transfer pricing rules. Further, at any point during the review period, the taxpayer will have the option to amend their relevant income tax return to reflect transfer pricing outcomes, with the diverted profits amount correspondingly reduced (potentially to nil).
- 4.18 Presumably, consistent with established practice, the taxpayer could amend its return and then object to its return. Adopting this method, the effect of the DPT would only be to invert the common process for the conduct of tax audits: rather than the conventional process of the ATO conducting an audit followed by an assessment and objection, the process will be to have a provisional DPT assessment followed by an amended return and objection, with the substantive audit taking place following the provisional DPT assessment and in circumstances where the Commissioner has received the amount under assessment.
- 4.19 If this is the policy intent, then that is unstated and we submit that its implications need to be considered more fully.
- 4.20 The Consultation Paper notes that after the 12 month review period is completed the taxpayer has the right of appeal against any DPT assessment through existing

court processes. Presumably these would be under Part IVC of the Taxation Administration Act. Such a mechanism is required to ensure the DPT is not unconstitutional by reason of it being uncontestable.

- 4.21 Typically, the presence of a taxation mismatch should not be in dispute. Therefore, the focus of such an appeal or review would be on:
- (a) whether it is reasonable to conclude based on the information available at the time to the ATO that the transaction(s) was designed to secure the tax reduction; and
  - (b) potentially, the size of any Diverted Profit (ie the arm's length pricing for a deduction case or the reduction in income).
- 4.22 However, it should be clarified that review would be based on, in relation to the insufficient economic substance test:
- (a) whether it is reasonable to conclude that the transaction(s) was designed to secure the tax reduction, with the taxpayer being able to rely on all information in can product to satisfy the onus of proof; or
  - (b) whether it is reasonable to conclude based on the information available at the time to the ATO at the end of the review period that the transaction(s) was designed to secure the tax reduction.
- 4.23 Those matters should not be based on the information or estimate initially at the time of the first DPT assessment. Further, it should be made clear that the test is one of an objective matter for the Court, not for the opinion or satisfaction of the Commissioner.

## 5. Income Tax Treatment of a DPT Liability

- 5.1 It is stated that the DPT will not be deductible or creditable for income tax (or petroleum resource rent tax) purposes.
- 5.2 We query whether this could be explained further. We submit that it is not entirely clear whether a taxpayer would be liable for both the DPT and corporate tax.

If you have any questions in relation to this submission, in the first instance please contact the Committee Chair, Adrian, Varrasso, on 03-8608 2483 or via email: [adrian.varrasso@minterellison.com](mailto:adrian.varrasso@minterellison.com)

Yours faithfully,



**Teresa Dyson, Chair**  
Business Law Section

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## **Appendix B.1: Example of an ‘Inflated Expenditure’ Scenario**

1. The scenario in this example illustrates that it is inappropriate to use an arbitrary amount of 30% of the relevant expenses to calculate the DPT assessment in an ‘inflated expenditure’ case.
2. In the example, the ATO has reviewed the marketing and administration services fee and decided that it is inflated compared to an arm’s length amount. Applying the formula for an ‘inflated expenditure’ case, the DPT assessment is based on a Diverted Profits Amount of \$15 million, calculated as 30% of the \$50 million fee, with the taxpayer liable to pay DPT of \$6 million. That is, applying the formula for an ‘inflated expenditure’ case, the correct arm’s length price is taken to be \$35 million. Subsequently, during the 12 month review period, the ATO determines that the correct arm’s length price is in fact \$45 million. However, in order to make a decision in the first place that the fee was inflated compared to an arm’s length amount, the ATO must have had a clear view as to what the amount of the fee ought to have been as a matter of fact, based on information available to the ATO supporting the appropriate transfer pricing methodology for determining an arm’s length fee.
3. Whilst the revised DPT assessment results in the correct DPT amount being levied and a refund to the taxpayer of the residual \$4 million DPT previously collected, the \$4 million is still an amount that the taxpayer is required to fund from the time that the Commissioner makes his initial DPT assessment to the time of the revised DPT assessment, which may be a period of 12 months.
4. That being the case, in circumstances where the ‘inflated expenditure’ according to the ATO analysis is less than 30% of the relevant expenses, it is appropriate that the initial DPT assessment be calculated by reference to that lower amount.

## Appendix B.2: Example of a Reconstruction Scenario

1. The scenario in this example illustrates that there is considerable uncertainty regarding the proper scope of application of the DPT that appears to cover some of the same territory as other anti-avoidance rules, relevantly in this case, the general anti-avoidance rules in Part IVA of the Tax Act.
2. In the example, Parent Co (a foreign resident) injects \$300 million equity funding into Foreign Co (also a foreign resident) which uses the funds to purchase an asset that it leases to Australia Co (an Australian resident). The ATO considers the arrangement “artificial and contrived” and that the “relevant alternative scenario” (i.e. in Part IVA terms the most reasonable alternative postulate to the scheme) would have been for Parent Co to provide equity funds to Australia Co to purchase the asset for its own use (thereby not incurring lease payments).
3. The assessment of whether an arrangement is “artificial and contrived” in the sense of being impermissibly directed to obtaining a tax benefit for a taxpayer is the very thing that the provisions of Part IVA address. In the event that an application of Part IVA leads to the conclusion that the scenario in the example is a scheme to which Part IVA applies, there is no warrant or need for the DPT to apply. Conversely, in the event that an application of Part IVA leads to the conclusion that the scenario is not a scheme to which Part IVA applies, then it must also be properly viewed as an arrangement that is not “artificial and contrived” and so one to which the DPT ought not to apply.
4. In summary, the DPT ought not to apply to scenarios the efficacy of which from an Australian tax perspective can already be determined under the application of an existing anti-avoidance provision or regime such as Part IVA. More generally, if a DPT is introduced, then there needs to be clarity on its scope of application, particularly in the context of the operation of existing anti-avoidance rules which may potentially cover some or all of the same territory as the DPT.

### Appendix B.3: Example of an Understated Income Reconstruction Scenario

1. The scenario in this example illustrates that in some circumstances, the DPT will result in double taxation that may not be capable of remedy under double tax treaties.
2. In the example, the ATO “reconstructs” the scenario such that Australia Co is taken to have remained the owner of the intellectual property asset. Under an application of the DPT, the taxation outcomes are that Australia Co is taxed in Australia as if it had received the \$50 million royalties on the use of the intellectual property (but at the DPT rate of 40% rather than the corporate tax rate of 30%) and presumably Foreign Co A (as actual owner of the intellectual property) continues to be taxed on the \$50 million royalties in its home jurisdiction (at the rate of 12.5%). As such, there is potential for double taxation of the royalties. Even in the event that Australia and the home jurisdiction of each of Foreign Co A and Foreign Co B have concluded a double tax treaty, there may be no relief from the double taxation under a treaty because there is no licence of the intellectual property (which gives rise to the royalty income) between Australia Co and either of Foreign Co A or Foreign Co B. The only potential for appropriate relief is if, under an application of transfer pricing principles in the OECD’s guidelines, the transaction would be reconstructed for the purposes of the tax rules of each of the home jurisdictions of Foreign Co A and Foreign Co B in the same way as it is under the DPT, with Australia Co being treated as having remained the owner of the intellectual property.
3. The example in Appendix B.3 illustrates then, in stark terms, why Australia ought not introduce the DPT which has the potential to deliver double taxation outcomes.
4. At [1] of its paper, The Treasury comments that the Australian Government has been working determinedly, in partnership with the OECD and through its leadership role in the G20, to ensure multinationals are paying their fair share of tax. At [3], The Treasury comments that the Government’s corporate tax proposals in the 2016-17 Budget are guided by three objectives, one of which is to continue to lead reform of the international tax framework, including implementation of the agreed OECD BEPS Action Items. At [3] of the Explanatory Statement to the OECD’s 2015 Final Reports of the OECD/G20 Base Erosion and Profit Shifting Project, the OECD warns that it is imperative to move quickly to address BEPS in order to limit the risks of countries “taking uncoordinated unilateral measures which might weaken key international tax principles which form a stable framework for cross-border investments”. In addition, the OECD states (again at [3]) that:

“BEPS can result in double non-taxation but addressing BEPS should not result in double taxation. Double taxation would harm [multinational enterprises] which have contributed to boosting trade and investment around the world, supporting growth, creating jobs, fostering innovation and providing pathways out of poverty. Double taxation would also increase the cost of capital and could deter investment in the economies concerned.”
5. Contrary to the statements in [1] and [3] of The Treasury’s paper, the introduction of a DPT in Australia represents the Australian Government working alone rather than in cooperation and coordination with the OECD and constitutes the type of

“uncoordinated unilateral measure” resulting in double taxation and damage to economies that the OECD warned of in its 2015 Final Report.

6. The Australian Government ought not to introduce a DPT as such action is counterproductive to the aims of the OECD in addressing BEPS. However, in the event that the Australian Government proceeds with a DPT, it needs to articulate how it will eliminate the double taxation arising from its unilateral action warned of by the OECD. One possible approach to eliminate double taxation is for the calculation of the DPT to allow for an offset for any foreign tax paid on the diverted profits (i.e. contrary to the current proposed approach in [37] of The Treasury paper).