Tax Astute
TRAINING

Submission –*Treasury Laws Amendment (Making Multinationals Pay Their Fair Share-Integrity and Transparency) Bill* 2023

5 January 2024

Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Submission Uploaded via Parliament House Website Link Treasury Laws Amendment (Making Multinationals Pay Their Fair Share-Integrity and Transparency) Bill 2023 [Provisions] – Parliament of Australia (aph.gov.au)

RE: *Treasury Laws Amendment (Making Multinationals Pay Their Fair Share Integrity and Transparency) Bill* 2023

Tax Astute Training (established in 2010) is a national professional taxation training provider which provides practical and interactive technical tax training and CPD/CLE hours to tax professionals who are both self-employed and/or the owners and employees of large and small accounting, legal, financial planning and corporate employers. Our broad client base includes professional tax practitioners throughout every State of Australia and ranges from large corporates, law firms and international accounting firms and listed companies through to medium-sized and sole practitioner businesses in regional areas. Our role includes analysing and explaining the practical implications of all new Federal legislative developments of relevance to our client base, Treasury and ATO announcements, public rulings and similar and relevant taxation case law. We also aim to respond to our clients' practical queries and feedback on such developments.

We have researched in detail and presented numerous training sessions to (and received feedback from) our tax professional clients regarding the *Treasury Laws Amendment (Making Multinationals Pay Their Fair Share Integrity and Transparency) Bill* 2023 (**Bill**) including all amendments within the Government's RU 100 30 November 2023 Amendment Sheet (**Government RU 100 Amendment Sheet**) and the Bill's Supplementary Explanatory Memorandum (***EM***) of the same date.

While it was not possible to include every issue of potential relevance within this submission, we have included 5 diverse issues and, where relevant, some potential solutions in each case. We respect that the precise text of the final legislation will ultimately be a matter for Treasury and/or Parliament. Our examples are intended only to be illustrative of relevant issues in order to assist understanding of the issues and the potential for beneficial amendments to the Bill when finalised.

Issue 1 - Suggested option to defer the currently proposed Thin Capitalisation start date (currently applicable on a compulsory basis for income years commencing from 1 July 2023 per)

Given the timing of the Committee's Report deadline (i.e. 5 February 2024 assuming that no extension is required) in combination with:

- the complex technical nature of the recent Government RU 100 Amendment Sheet and Bill in its entirety;
- the Committee's associated complex consultation task; and
- the likelihood of further potential Parliamentary delays after the Committee's report is finalised (e.g. if additional technical amendments are required as a result of the Committee's consultation),

it is suggested that Royal Assent to the Bill prior to 1 March 2024 would arguably represent an ambitious timeframe for Australian and offshore entities alike to obtain certainty regarding the new Thin Capitalisation rules via Royal Assent. Assuming that Royal Assent is most likely to occur after 1 March 2024 then the only entities which may have the benefit of certainty before their 2023/24 income year begins would be late balancing Substituted Accounting Period (**SAP**) entities which are 31 March, 30 April or 31 May balancers for tax purposes under a best-case scenario. Even this limited category of SAP entities would have mere weeks to plan for application of the finalised version of the Thin Capitalisation Rules prior to commencement of their 2023/24 income year. For the many affected entities with a standard 30 June year end for tax purposes, they would be likely to be at least 75% of the way through their 2023/24 year by the time certainty was achieved regarding the Thin Capitalisation provisions, even under a best-case scenario for Royal Assent.

Given the volume and effect of technical changes proposed since the Committee's last Report was released in September and the time which has elapsed, it is suggested that Treasury Comments at paragraph 2.116 of the Committee's September 2023 Report (regarding application of the Thin Capitalisation provisions to income years commencing from 1 July 2023) have arguably now become obsolete. Instead, effective 2023/24 tax planning to manage the new Thin Capitalisation provisions has become a near impossibility (even for the limited number of late balancing SAP's noted above) given the likely timing of the legislative provisions being finalised and the uncertainty as to its precise form which will persist until Royal Assent.

POTENTIAL SOLUTION to Issue 1

For purposes of fairness to all affected entities it is suggested that:

- **The new Thin Capitalisation provisions in might apply on an optional basis for income years commencing from 1 July 2023 (allowing entities which have worked hard to anticipate application of the new rules to apply them if they wish) with compulsory application to follow for income years commencing from 1 July 2024; and**

- **The pre-existing Thin Capitalisation provisions in current Division 820 ITAA 1997 would be either the default rule or an available option for the income year commencing from 1 July 2023 (depending on which is viewed as the easiest option from a compliance perspective by the ATO perspective). This would allow entities which wish to continue application of the pre-existing rules (which they have applied in previous years) to use these familiar provisions for 1 July 2023, allowing at least some time to understand and apply and plan for the new provisions for income years commencing from 1 July 2024.**

It is recognised that this change to the commencement date will have a potential impact on the Government's Federal Budget revenue outcomes. However, given the complexity of the provisions and the substantial delays which have occurred, it is suggested that the above would represent the optimal solution for purpose of providing commercial and tax planning fairness to entities affected by the new provisions.

Issue 2 – the requirement for companies to prove s 336(c) ITAA 1936 '*Australian Entity*' status in order to access numerous Thin Capitalisation and Subdivision (Subdiv) 820-EAA Debt Deduction Creation Rule concessions

The proposed amendments in the Government's RU 100 Amendment Sheet require companies (and other entities) to be an '*Australian Entity' (*as defined in s 336(c) and 317 *ITAA* 1936) as opposed to the originally proposed (and more straightforward) Australian Resident requirement in order to access various Thin Capitalisation and Debt Deduction Creation Rule concessions. While the Supplementary EM is silent on the issue, para 1.31 of the October 2023 Treasury Consultation Draft Explanatory Memorandum (EM) suggests that the reason for replacing tax resident with '*Australian Entity*' was to improve access to relevant Third Party Debt Test concessions in Subdiv 820-EAB *ITAA* 1997 for trusts and partnerships (with special adjustments made to the '*Australian Entity*' definition to assist partnerships - e.g. proposed s 820-427E ITAA 1997).

Relevant concessions proposed to require a company (and some other entities) to have '*Australian Entity*' status in order to achieve eligibility include:

- the s 820-60(1)(a) *ITAA* 1997 ability to transfer an-Excess Tax EBITDA amount to another controlled entity.
- the s 820-423AA(1)(a) *ITAA* 1997 Debt Deduction Creation Rule exception for certain CGT Asset Acquisitions.
- the ability to meet the Third-Party Earnings Limit requirements under s 820-427A(3)(e) and the associated s 820-427A(4)(c) 'Australian Asset' Recourse condition if applying the proposed Third Party Debt Test (and the ability to meet corresponding Conduit Financing conditions under s 82-427AB(2)(a)(ii) ITAA 1997)

Various concessional adjustments to the '*Australian Entity'* definition have been made for the above purposes (e.g. the modified definition for partnerships under s 820-60(7), 820-423F and 820-427E *ITAA* 1997) and some carve-outs from the '*Australian Entity*' requirement for trusts (e.g. proposed ss 820-60(1)(a)(ii) and (iii) ITAA 1997).

For companies, however, no modification is present. As a consequence the existing s 336(c) Part X *ITAA* 1936 definition of '*Australian Entity*' (which requires a company to meet the existing s 317 *ITAA* 1936 definition of '*Part X Australian Resident*' applies to a company for purposes of accessing the above Thin Capitalisation and Debt Deduction Creation Rule concessions.

For a company which is a non-resident for domestic tax purposes, the enquiry as to '*Australian Entity*' status would be relatively simple because such a company would automatically not be an Australian Entity (this is the case because a s 317 ITAA 1936 '*Part X Australian Tax Resident*' must first meet the threshold requirement of being a Domestic Tax Resident under s 6 *ITAA* 1936).

By contrast, under the definition of Part X Australian Resident & Australian Entity, to the extent that a company is a s 6 *ITAA* 1936 domestic tax resident of Australia then significant complexity may arise to the extent that the company:

- is also a (domestic) tax resident of any other country; and
- that other country is one with which Australia has a Double tax Agreement (**DTA**) in force (see the current Treasury [Income Tax Treaties] home page to view the lengthy list of Australia's DTA's) ; and
- that DTA contains a dual residence tie-breaker or similar Article (usually Article 4 of most DTA's) under which the company may be deemed solely to be a resident of the other country for purposes of the DTA.

To the extent that DTA article deems the company to solely be a resident of the other country then the company would not be an Australian Entity (despite meeting the s 6 ITAA 1936 requirements to be an

Australian domestic tax resident). If, however, one or all of the above Part X Australian Resident dot points were inapplicable then the domestic tax resident company could achieve Australian Entity status.

While it is acknowledged some scenarios may be more easily dealt with than others, when determining whether or not a particular Company is a s 317 ITAA 1936 '*Part X Australian Tax Resident*' (and therefore an '*Australian Entity*' as defined) particular difficulties in determining Australian Entity status may arise if, for example:

- An entity is a tax resident of another country with which Australia has a DTA and needs to apply the potentially complex tie-breaker Article despite having no commercial or other dealings in that jurisdiction which would otherwise require the DTA to be applied. For example, a company might be:
    - an Australian domestic tax resident for reasons such as Central Management and Control in Australia;
    - incorporated in a foreign country (potentially causing domestic tax residence in a given foreign jurisdiction); but
    - not otherwise involved in the foreign country in a manner that requires the DTA to be reviewed (e.g. aside from the historical incorporation in the foreign jurisdiction, there may be no cross-border transactions, assets owned or income or costs which occur in that jurisdiction).
- To the extent that the relevant DTA is modified by the Multilateral Instrument (**MLI**) (see the ATO's Multilateral Instrument Home Page for a current list of potentially affected foreign jurisdictions) then the dual residence Article may be affected by the MLI and complex requirements such as the need to apply for a '*Competent Authority determination'* may become necessary (see the ATO's Article 4 Dual Resident Entity heading on their MLI home page).

In addition to the above issues:

- some companies with the type of complex international dealings which give rise to the application Thin Capitalisation and similar provisions may be domestic tax residents of more than one foreign DTA jurisdictions, requiring multiple applications of the dual residence DTA tie-breaker rule to determine status.
- Mismatches in access may apply due to the differences between the many DTA's Australia has entered (e.g. the United States of America (USA) DTA appears not to contain the type of residence tie-breaker article to which s 317 ITAA 1936 refers whereas the Canadian DTA, for example, would generally require more complex further work due to application of the MLI).

POTENTIAL SOLUTION to Issue 2

It is understood that the replacement of s 6 ITAA 1936 Australian tax residence status with '*Australian Entity*' status for purposes of accessing the concessions listed above was most likely to have been added with the intention of assisting access for certain trusts and partnerships. However, given the potentially substantial compliance requirements for some Australian domestic tax resident companies (and indeed the ATO) to correctly determine whether or not those domestic tax resident companies are also

'*Australian Entities'* (as defined) it is suggested that the terminology (for companies at least) should remain or revert to '*Australian Resident*' for tax purposes instead of '*Australian Entity*'.

Issue 3 – Proposed s 820-52(1A) *ITAA* 1997 deeming rule for subtracting carry forward corporate tax entity losses in the Tax EBITDA calculation

Proposed s 820-52(1A) *ITAA* 1997 broadly provides that, when undertaking the Tax Earnings Before Interest Tax Depreciation and Amortisation (**Tax EBITDA**) calculation for purposes of calculating the new Thin Capitalisation Fixed Ratio Earnings Limit, a corporate tax entity/company should be deemed to have chosen to deduct all carry forward tax losses to the maximum extent possible (broadly to the extent of the corporate tax entity's current year taxable income before deducting any available carry forward tax losses). In addition, proposed s 820-52(1A)(b) *ITAA* 1997 proposes that the usual s 36-17(5) *ITAA* 1997 excess franking offset restriction (which limits the amount of loss a corporate tax entity may deduct in a given year to ensure that a prior year loss deduction cannot generate excess franking credits).

The table on page xx below illustrates one of the examples we have used in our recent client training sessions to explain the application of this rule (the example was adapted from existing Example 2 of the ATO document '*Utilising franking tax offsets and effect on losses – corporate tax entities*').

The information provided in columns 1 and 2 of the table below illustrates the relevant amounts provided in the ATO Example, including the fact that:

- As illustrated in **Column 2** of the page xx table below, the corporate tax entity will be only be able to deduct a maximum $50,000 out of its available $200,000 carry forward losses (shown at E below) because existing s 36-17(5) *ITAA* 1997 requires the loss deduction to be limited to the current year tax payable of $15,000 (see C below) divided by the corporate tax rate (30% in this case per D below). As a consequence, the entity's actual taxable income for the income year would be at least $100,000 in column 2 (possibly a higher amount if the company chose to deduct less than the maximum $50,000 allowed).

- By contrast, **Column 3** of the page xx table below provides the result for tax EBITDA calculation purposes under proposed s 820-52(1A) *ITAA* 1997. In column 3, because the usual s 36-17(5) *ITAA* 1997 excess franking offset restriction (from Column 2) is deemed not to apply for the tax EBITDA calculation, then the corporate tax entity would be deemed to deduct $150,000 (its entire current year taxable income shown at B) out of its available $200,000 carry forward tax loss (from item E below). This results in the taxable income starting point for the Tax EBITDA being deemed to be NIL (an adverse tax EBITDA result compared to the actual taxable income result in Column 2). This tax EBITDA treatment would arise notwithstanding that the $150,000 deemed loss deduction exceeds the amount the corporate tax entity is actually allowed to deduct for tax payable purposes.

It is assumed that the reasons behind the s 820-52(1A) *ITAA* 1997 Tax EBITDA adjustment deeming rule are similar to the '*double benefit*' reasoning behind the s 820-52(10) *ITAA* 1997 Notional R&D Deduction subtraction explained in para 1.17 of the Supplementary EM. However, unlike a notional R&D Deduction (which will have been claimed as a tax offset in the year in question) a carry forward tax loss of a company may be restricted from deductibility on a temporary or permanent basis (e.g. due to the s 36-17(5) ITAA 1997 restriction shown in Column 3 or due to adverse application of the Continuity of Ownership or the Same or Similar Business Tests and more). For this reason an equivalent treatment to the R&D Offset Tax EBITDA subtraction may not be appropriate for a carry forward loss which may not ever be claimed as a deduction. In addition, given that the aim of the R&D Offset is to act as an incentive towards R&D activity in Australia, there is not necessarily any particular mischief in the R&D offset being more concessionally treated under the Thin Capitalisation rules in comparison to a simple current year deduction which forms part of and reduces actual taxable income.

<table>
<tr><th colspan="4">Actual Taxable Income vs Deemed Tax EBITDA Taxable Income under proposed s 820-52(1A) ITAA 1997
Adapted from Example 2 of ATO Document 'Utilising franking tax offsets and effect on losses – corporate tax entities'</th></tr>
<tr><th></th><th>Column 1</th><th>Column 2</th><th>Column 3</th></tr>
<tr><td>A</td><td>Exempt Income = NIL</td><td rowspan="5">Actual taxable income (including effect of s 36-17(5) ITAA 1997 Excess Franking Offset Restrictions)</td><td rowspan="5">Proposed s 820-52(1A) ITAA 1997 Deemed amount for Thin Capitalisation Tax EBITDA Calculation (ignoring s 36-17(5) excess franking offset restrictions)</td></tr>
<tr><td>B</td><td>Taxable Income (Current Year Amounts)
= $150,000</td></tr>
<tr><td>C</td><td>Current Year Tax Payable
(net of $30,000 franking credits)
= $15,000</td></tr>
<tr><td>D</td><td>Tax Rate = 30%</td></tr>
<tr><td>E</td><td>Available Carry forward tax losses =
($200,000)</td></tr>
<tr><td>F</td><td>Actual or Deemed
PRIOR YEAR LOSS Deduction</td><td>$15,000 ÷ 30% (i.e. C ÷ D)

($50,000) maximum deduction
(if chosen)</td><td>DEEMED ($150,000)
deduction (per B)

(i.e. ignore maximum cap)</td></tr>
<tr><td>G</td><td>Taxable Income after Prior Year Losses
(B – F)</td><td>$100,000 actual taxable income</td><td>NIL for Tax EBITDA</td></tr>
</table>

The above example illustrates the effect of the proposed s 820-52(1A) *ITAA* 1997 Tax EBITDA deeming rule for losses during a single year even where the failure to deduct the carry forward loss was beyond the control of the corporate tax entity.

In addition, of particular concern is the application of s 820-52(1A) *ITAA* 1997 to a multi-year scenario. For example:

- if we assume for simplicity that the above amounts largely remained identical during the next 3 income years (aside from the **item E** carry forward loss which would be $150,000 after $50,000 was deducted in the above example and that no carry forward losses were deducted for **item G** purposes during the next 3 income years); but
- the corporate tax entity chose NOT to (or was unable to) deduct any of its remaining $150,000 carry forward tax loss in each of those 3 subsequent years (i.e. remaining carry forward tax loss after actually deducting the $50,000 shown in column 2 above),

then in each of those 3 subsequent years:

- the actual taxable income would be $150,000 per **Column 2** (i.e. assuming no carry forward loss was deducted from item A in each of those subsequent years); and
- the tax EBITDA deemed taxable income starting point would be NIL each year in Column 3 under proposed s 820-52(1A) *ITAA* 1997 because the undeducted carried forward tax loss would continue to reduce the Tax EBITDA to nil each and every year as shown in Column 3.

This multi-year outcome means that the deductible (but unused) $150,000 carry forward tax loss provides a continuing disadvantageous tax EBITDA result in multiple years (even if the reason it was not deducted was because the corporate tax entity was not allowed to deduct it – e.g. due to the operation of s 36-17(5) ITAA 1997). By contrast, if the $150,000 had been deducted in a single year, it would only have adverse implications for the Tax EBITDA calculations in that single year.

In addition, whether a single year or multi-year scenario is involved, there may be circumstances where the carry forward loss deduction may not ever be able to be used as a tax deduction in practice (for reasons including but not limited to future year failure of the continuity of ownership or same or similar business tests). This would also produce an arguably unfair outcome without any ability to amend the prior year Tax EBITDA calculation or otherwise obtain some form of compensatory adjustment for tax and/or Thin Capitalisation purposes. There are numerous tax and commercial reasons why a corporate tax entity/company may choose not to or be unable to (including for the reasons in column B above) which need to be managed in practice for purposes of the Tax EBITDA calculation.

POTENTIAL SOLUTION to Issue 3 - Proposed s 820-52(1A) *ITAA* 1997 deeming rule for subtracting carry forward corporate tax entity losses in the Tax EBITDA calculation

It is requested that the Committee carefully consider whether the proposed s 820-52(1A) ITAA 1997 Tax EBITDA deeming rule for carry forward tax losses goes too far In light of the potential adverse multi-year counting of a single deductible amount. This is particularly the case given that there may be good commercial and/or tax reasons for an entity choosing not to deduct (or in fact being unable to deduct the amount) for more than one year.

Furthermore, if the proposed s 820-52(1A) *ITAA* 1997 rule is to remain for Tax EBITDA calculation purposes, then some concessional amendment or other tax adjustment mechanism is suggested to manage scenarios where a carried forward loss amount is ultimately unable to be deducted (for reasons including, but not limited to, the future application of the Continuity or Ownership Test or Same or Similar Business Test).

Issue 4 – Suggested technical changes to assist clarity remove future requirements for judicial and/or ATO interpretation

While not necessarily an exhaustive list of provisions which would arguably be assisted by clarification, we have identified the following two provisions which would particularly benefit from clarification amendments to the text of the legislation as follows:

- **Item 4(a)** - S 820-49 *ITAA* 1997 - the definition of Obligor Group and the inclusion of Creditor Entities; and
- **Item 4(b)** - S 820-60 *ITAA* 1997 Clarification that the ability to transfer excess Tax EBITDA amounts is a *'choice'*

Item 4(a) - The s 820-49 ITAA 1997 'Obligor Group' Definition

Obligor Group member status is proposed to be tested on a per debt interest basis and is important when applying the proposed Third Party Debt Test because it may be either:

- a disadvantage which requires all other members of a borrower's obligor group(s) to make a deemed choice to use the Third Party Debt Test for Thin Capitalisation purposes (due to a borrower entity's actual or deemed choice to use the Third Party Debt Test itself); or
- an advantage for purposes of meeting the Third Party Debt conditions in relation to recourse over Australian assets owned by '*Australian Entity'* members of the obligor group regarding the relevant debt interest.

Paragraph 1.10 of the Supplementary EM clearly states an intention for a creditor entity (regarding a particular debt interest) to be an '***obligor entity'*** regarding that debt interest.

By contrast, proposed s 820-49 ITAA 1997 currently reads as follows (emphasis added via highlighted text):

S 820-49 Meaning of obligor group etc

(1) Subsection (2) applies if:

*(a) An entity (the **borrower**) has issued a *debt interest to another entity (the **creditor**); and*

*(b) The creditor has recourse for payment of the debt to which the debt interests relates to assets of one or more other entities (each of which is an **obligor entity**)*

*(2) Each obligor entity and the borrower is a **member** of an **obligor group** in relation to the debt interest.*

Arguably s 820-49(1)(b) *ITAA* 1997 in its current form may potentially suggest that only the *'other entities'* (which hold the assets subject to recourse regarding the debt interest) are '*obligor entities*'. If s 820-49(1)(b) *ITAA* 1997 received this interpretation in a future judicial decision, then a flow on effect would involve the creditor not being a member of the obligor group under s 820-49(2) *ITAA* 1997 as currently drafted. An example of a minor change to the text of s 820-49(2) *ITAA* 1997 which could definitively remove any uncertainty is as follows (see proposed addition in **'red'** underlined text)

*(2) Each obligor entity and the borrower **and the creditor** is a **member** of an **obligor group** in relation to the debt interest.*

Alternatively, subsection 820-49(1)(b) *ITAA* 1997 could be adjusted to clarify the inclusion of creditor entities as obligor group members.

Item 4(B) - The s 820-60 *ITAA* 1997 Excess Tax EBITDA Transfer Rule

The Fixed Ratio Test expansion under the proposed 30 November 2023 RU 100 changes to potentially allow excess (i.e. unused) Tax EBITDA amounts to be transferred to eligible controlled entities regardless of entity type (instead of the original proposal to only allow a s 820-60 ITAA 1997 Excess Tax EBTIDA transfers between controlled trusts) is undoubtedly a welcome development, particularly as it is additional to the s xx??XX ability to transfer in to a consolidated group which was previously the only proposed excess Tax EBITDA transfer option for entities other than trusts.

Paragraph 1.17 of the Supplementary EM provides that s 820-60 *ITAA* 1997 should

*'**allow** eligible entities to transfer their excess tax EBITDA to other eligible entities'*

thereby suggesting that application of s 820-60 *ITAA* 1997 should be a choice or election made by he relevant controlling entity. Given the relative complexity of applying the s 820-60 *ITAA* 1997 method statement, direct control interest modifications and more applying s 820-60 ITAA 1997 on a choice or election basis is clearly a common-sense outcome.

Upon reviewing the text of s 820-60 ITAA 1997 as currently drafted, however, there is no reference to the controlling entity making a choice or election such that the provision may be judicially interpreted in future as requiring automatic application.

It is suggested that this issue may be addressed through replacing the following current text of s 820-60(1)

> *'This section applies to an entity (the controlling entity)…'*

with words to the effect of …

> *'An entity (the controlling entity) may **choose** to apply this section…'*

together with details regarding the revocability (or otherwise) of the choice (and any other relevant choice requirements).

Issue 5- Subdivision 820-EAA ITAA 1997 Debt Deduction Creation Rules (DDCR)

It is recognised that various significant improvements are proposed to be made to the Subdiv 820-EAA *ITAA* 1997 DDCR non-deduction provisions including:

- The deferred commencement of the Subdiv 820-EAA 1997 *ITAA* 1997 non-deduction rule for income years from 1 July 2024 in all cases; and
- Improvements to the operation of some exception rules (e.g. the more limited definition of '*payment'* in proposed s 820-423(5A) *ITAA* 1997 replacing more complex previously proposed DDCR exception provisions relating to payments or distributions).

Importantly, however, as an integrity rule with very broad application (and without a specific purpose test) the following aspects of Subdiv 820-EAA *ITAA* 1997 arguably require further consideration:

- **Item 5(a) -** Continuing retrospectivity issues affecting pre 1 July 2024 asset acquisitions, assets held or payments made under Subdiv 820-EAA ITAA 1997.
- **Item (5)()** - The very narrow application of various available Subdiv 820-EAA *ITAA* 1997 DDCR exceptions.

Under the Government's proposed 30 November 2023 RU 100 amendments the entirety of the Subdiv 820-EAA ITAA 1997 DDCR will now apply:

> *'in relation to assessments for income years starting on or after 1 July 2024'*

While this revised start date is clearly a welcome development, there is currently nothing in ss 820 -423A(2) or (5) *ITAA* 1997 which would prevent the potential application of the Subdiv 820-EAA ITAA 1997 DDCR to:

- assets acquired or held pre 1 July 2024;
- payments/distributions made pre 1 July 2024; or
- financial arrangements entered into pre 1 July 2024.

There may therefore be:

- current or pre-existing asset acquisitions (or assets already held); and/or
- payments/distributions already made/financial arrangements already entered into,

which are funded by debt interests in circumstances where Subdiv 820-EAA ITAA 1997 DDCR may commence to apply to deny deductions for income years commencing from 1 July 2024. This retrospective application could occur notwithstanding that there was no ability to plan for the impending DDCR at the time when the asset was acquired or similar. Particularly in light of the very broad timing rule in s 820-423A(3A) *ITAA* 1997 (which is explained in the example within that subsection) the retrospectivity issue is even more problematic.

It is suggested that ensuring application of the Subdiv 820-EAA ITAA 1997 DDCR non-deduction provisions is also limited only to:

- assets acquired from 1 July 2024;
- payments/distributions made from 1 July 2024; and/or
- financial arrangements entered into from 1 July 2024,

would remove this retrospectivity. In addition, further practical clarification is likely to be required regarding the potential application of anti-avoidance provisions to taxpayers seeking to restructure arrangements for legitimate reasons in order to prevent unintended non-deductibility under the DDCR

Item 5(b) - The very narrow application of various available Subdiv 820-EAA *ITAA* 1997 DDCR exceptions

In relation to the proposed s 820-423AA *ITAA* 1997 DDCR exception for '*acquisition of certain CGT assets'* the requirements that (emphasis added):

- '*The membership interest **has not previously been held by any entity***' (see s 820-423AA(1)(b) ITAA *1997*)
- '*at the time of the acquisition, the CGT asset **has not been installed ready for use or previously used for a taxable purpose*** [by any of the acquirer or its associate disposer or associate pair']' (see s 820-423AA(2)(d) ITAA 1997)
- '*the debt* interest ***has not previously been held by any entity***' (see s 820-423AA(3)(d) ITAA 1997),

are potentially overly restrictive, given the broad application of the DDCR. For example, the above proposed '*brand new'* asset or interest restrictions would arguably prevent application of the DDCR asset acquisition exception to a wide variety of genuine commercial asset transfer, group restructure, debt assignment and similar scenarios. Given the broad nature of the DDCR it is suggested that the above restrictions are removed or at least reduced in their application.

Concluding comments

Thank you for the opportunity to make this submission. As noted above, while it was not possible to provide in-depth coverage of every identified issue in this submission, the above examples and potential solutions are intended to highlight specific practical issues likely to be of importance to a range of taxpayers.

If you seek any clarification regarding the submission issues raised above, please do not hesitate to contact me using the contact details included in our online submission.

Yours sincerely,

[redacted]

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