The Tax Institute

14 April 2023

Director
Corporate and International Tax Division
Treasury
Langton Cres
PARKES ACT 2600

By email: mnetaxtransparency@treasury.gov.au

Dear Director,

Multinational Tax Integrity – strengthening Australia's interest limitation (thin capitalisation) rules

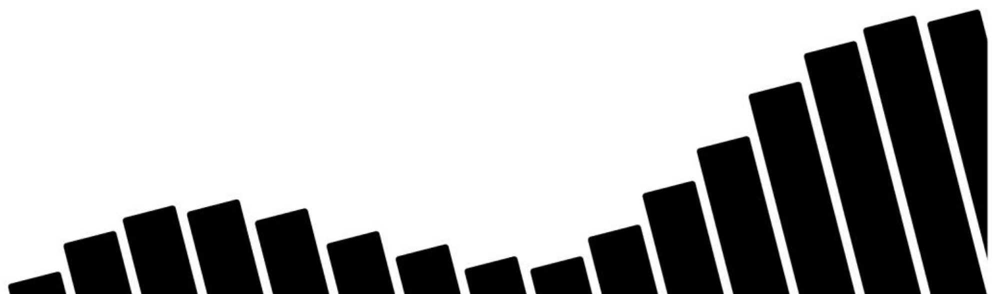
The Tax Institute welcomes the opportunity to make a submission to the Treasury in relation to the Treasury Laws Amendment (Measures for Future Bills) Bill 2023: Thin capitalisation interest limitation exposure draft legislation (**draft Bill**) and accompanying draft explanatory memorandum (**draft EM**).

In the development of this submission, we have closely consulted with our National Large Business and International Technical Committee to prepare a considered response that represents the views of the broader membership of The Tax Institute.

The draft Bill proposes to fundamentally change the thin capitalisation tax regime that has been well understood and applied by taxpayers. It is important to ensure that the changes do not result in unintended or unfair outcomes for taxpayers. We consider that the draft Bill requires clarification and amendments to achieve this balance. Suggested amendments include ensuring that:

- the choices taxpayers are required to make provide sufficient flexibility to account for changes in future economic conditions;
- new concepts are reflective of commercial realties and do not inequitably hinder common business practices;
- new definitions of 'Tax EBITDA', 'associate entity' and 'debt deduction' set appropriate perimeters and are supported by the draft EM with guidance that will assist taxpayers to understand and apply the new concepts;
- sufficient clarification and guidance is provided for new concepts, we suggest this should also be added to the draft EM; and

L37, 100 Miller Street
North Sydney, NSW 2060
T 1300 829 338
E tti@taxinstitute.com.au
taxinstitute.com.au



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- the proposed start date gives taxpayers enough time to understand the implications on their existing arrangements.

The Tax Institute also has concerns regarding the proposed amendments to section 25-90 of the *Income Tax Assessment Act 1997* (**ITAA 1997**). The proposed amendment intended to deny a deduction for interest expenses incurred to derive non-assessable non-exempt (**NANE**). The proposed amendments are also likely to have significant economic impacts, disincentivising Australian businesses seeking to expand offshore, reducing their competitiveness compared to businesses operating in more favourable conditions in overseas markets. Despite the significant impacts, this change was not part of Government's original consultation in August 2022 concerning 'Multinational tax integrity and tax transparency' and was not announced prior to appearing in the draft Bill.

The Tax Institute is of the view that Government should not proceed with the proposed amendments to section 25-90 of the ITAA 1997. The policy rationale for the measure is not supported by the original policy intent of the provisions, and the impacts on taxpayers and the economy are likely to outweigh any perceived benefit. If Government intends to introduce the measure, we consider that a separate consultation period is required to allow taxpayers and tax practitioners sufficient opportunity to notify Government of the practical impacts of this change, and provide views to allow for a better implementation of the measure.

Our detailed response to the proposed thin capitalisation amendments is contained in **Appendix A**. Our comments on the proposed amendment to section 25-90 are contained in **Appendix B**.

We would be please to work with the Treasury to ensure that the draft Bill and draft EM best achieves its policy intent without resulting in inequitable outcomes for taxpayers.

The Tax Institute is committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all.

If you would like to discuss any of the above, please contact our Senior Tax Counsel, Julie Abdalla, on (02) 8223 0058.

Yours faithfully,

Scott Treatt

General Manager,
Tax Policy and Advocacy

Jerome Tse

Council Member

APPENDIX A

We have set out below our detailed comments and observations for your consideration in relation to the proposed changes to Australia's thin capitalisation regime. Our comments broadly follow the layout of the draft Bill.

Step 6A Adjustment

Subsection 705-60 of the draft Bill proposes to insert 'Step 6A' when entities are calculating their allocable cost amount (**ACA**). Section 705-112 of the draft Bill sets out the steps and states that fixed ratio test (**FRT**) disallowed amounts are transferred to a tax consolidated group head company under section 820-62 of the draft Bill. We consider that the head company should be given a choice to cancel transferred FRT disallowed amounts, thereby not incurring a Step 6A ACA adjustment. This approach would be consistent with the current operation of the ACA rules with tax losses in Step 6 of the calculations contained in sections 705-60 and 707-145 of the ITAA 1997.

Concept of debt deduction

We consider that the draft EM should contain a more detailed explanation, with accompanying examples, of the sort of costs that are to be covered by the proposed amended definition of 'debt deduction' in section 820-40 of the ITAA 1997. The draft EM currently only states that the amendment to the definition is intended to ensure that it captures amounts economically equivalent to interest in line with the Organisation for Economic Co-operation and Development's (**OECD**) best practice guidance. However, since determining the debt deduction and net debt deduction is a fundamental part of applying the new rules, it is important that taxpayers and tax practitioners have sufficient clarity on the extended concept. This area would also benefit from timely ATO guidance if the legislation is enacted.

Choice between group ratio test and external third-party debt test

Subsection 820-43(8) of the draft Bill proposes to make the choice to utilise either the group ratio test (**GRT**) or external third-party debt test (**ETPDT**) to be irrevocable for the relevant year. This potentially inequitably disadvantages taxpayers who may discover, at a later point in time, that they are unable to meet the requirements for one of the test due to broader circumstances or unexpected developments. From a policy perspective, we consider that taxpayers should retain the flexibility to utilise either test, subject to existing limitations to amendments.

Definition of 'Tax EBITDA'

Section 820-49 of the draft Bill proposes to introduce a definition for the term 'Tax EBITDA'. The proposed definition excludes NANE income. The policy rationale for this exclusion is not provided in the draft EM.

We consider that NANE income should be included in definition of ‘Tax EBITDA’ to the extent that financing costs incurred in deriving the relevant NANE income would be deductible (disregarding the debt limitation rule). If this NANE income is not included, the financing costs incurred in relation to NANE income would be included in the same test as financing costs incurred in relation to taxable income, however, the available limit would be determined by reference to 30% of taxable income only. If the proposed amendments to section 25-90 of the ITAA 1997 do not proceed, this would arbitrarily impair the deductions otherwise available in respect of the financing costs incurred in relation to NANE income.

For example, financing costs incurred in deriving income under section 23AI (**s 23AI income**) of the *Income tax Assessment Act 1936* (**ITAA 1936**) are deductible under section 25-90 of the ITAA 1997. If an entity had s 23AI income in a given year, but no taxable income, its deduction pursuant to section 25-90 of the ITAA 1997 would be wholly denied, even if the relevant financing costs were less than 30% of the s 23AI income. The same outcome would apply to financing costs incurred in deriving income pursuant to section 768-5 of the ITAA 1997 (**s 768-5 income**), if our submission regarding the proposed amendments to section 25-90 of the ITAA 1997 in Appendix B below are accepted. That is, if an entity has s 768-5 income in a given year, but no taxable income, its deductions under section 25-90 of the ITA 1997 would be wholly denied, even if the relevant financing costs were less than 30% of the s 768-5 income.

Group ratio test exclusion of negative EBITDA entities

Subsection 820-55(3) of the ITAA 1997 excludes group entities with negative earnings before interest, tax, depreciation and amortisation (**EBITDA**) from the calculation of an entity’s group ratio (**GR**). We consider that this exclusion should be removed. Feedback from our members indicates that it would be practically very difficult for an Australian taxpayer to identify, within the requisite time to make a choice to apply the GRT, which of the overseas entities in its group may have a negative EBITDA. This can occur, for example, in instances where there are entities that are part of the consolidated group but are difficult to identify due to their immateriality to the funds or operations of the group.

Definition of ‘associate entity’ and the proposed 10% threshold

Subsection 820-53(5) of the draft Bill proposes to include entities with a thin capitalisation control interest of 10% or more in the modified definition of ‘associate entity’ contained in section 820-905 of the ITAA 1997. We consider that this would establish too low a threshold for complex groups with multiple non-controlling investments in separate entities, and may have the effect of requiring all entities across different economic groups to choose the ETPDT. It would be unreasonable and practically unworkable to expect different economic groups with separate management, shareholders, and income and debt profiles, to be expected to collectively choose the ETPDT. Doing so would likely disadvantage entities within such groups who have a genuine need to choose one of the other options. As a result, The Tax Institute is of the view that this proposed modification in subsection 820-53(5) of the draft Bill should be removed.

Carry forward rule for previously disallowed amounts

Interaction with the *de minimis* threshold and general class investor principle

Section 820-57 of the draft Bill proposes to permit a prior FRT disallowed amount to be deducted in future years if there is an excess of the entity's fixed ratio earnings limit over the sum of the entity's net debt deductions for an income year (**special carry forward deduction**). However, it is currently unclear if the special carry forward deduction may be claimed if the taxpayer subsequently falls under the *de minimis* threshold or ceases to be a general class investor, and is therefore not required to be subject to the thin capitalisation rules. We consider that in these circumstances taxpayers should be allowed to continue to claim the special carry forward deduction so long as they meet the test for recoupment of the previously FRT disallowed amounts. This will ensure that the amounts disallowed at an earlier time can be more equitably claimed in periods of future volatility, consistent with the policy rationale for the special carry forward deduction noted in paragraph 1.84 of the draft EM.

Interaction with group ratio test and external third-party debt test

Subsections 820-59(2) and (3) of the draft Bill propose to disallow a special deduction for FRT disallowed amount amounts if either the GRT or the ETPDT has been utilised in a prior intervening income year. For a policy perspective, we do not consider that a taxpayer should permanently lose the special carry forward deduction because they have chosen to apply an alternative test in the intervening 15-year period and later revert to the FRT. Those taxpayers should continue to be able to utilise losses within the 15-year period, for the years they have used the FRT. This approach would better recognise the challenges faced by impacted taxpayers and the changing economic nature.

Interaction with business continuity test

We are of the view that a company that seeks access to the FRT disallowed amount should be entitled to apply the business continuity test in addition to the proposed modified continuity of ownership test (**modified COT**). It would be an unfair outcome for taxpayers to not have a backup test to rely on in the event they do not meet the modified COT.

Attributing assets to an entity's Australian permanent establishments

Subsection 820-61(3) of the draft Bill intends to ensure the ETPDT only captures genuine third party debt which is used wholly to fund Australian business operations (as opposed to offshore business operations).[1] However, there are concerns over the lack of guidance provided to assist with determining the basis upon which assets should be attributed to an entity's Australian permanent establishments or overseas permanent establishments.

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[1] Paragraph 1.77 of the draft EM.

With the proposed repeal of section 815-215 of the ITAA 1997, any existing guidance on the concept of 'attributed to' presumably will also be repealed. However, some of these concepts assist taxpayers and tax practitioners apply the relevant standard. For example, and in particular, paragraph 820-215(3)(a) of the ITAA 1997 provides that the functions performed, the assets used, and the risks assumed by an entity, are relevant factors in determining whether assets are attributable to the Australian business.

The ATO's view in relation to the meaning of 'attributable' in Division 820 of the ITAA 1997 was for previously expressed in paragraph 6 of Taxation Ruling TR 2003/1W: *Thin capitalisation – applying the arm's length debt test* (**TR 2003/1W**) as follows:

> 'The ATO considers that the concept of "attributable" is essentially the same as that used under the principles in double tax agreements for attribution of business profits to permanent establishments and in other parts of domestic law. See for example Taxation Ruling TR 2001/11 paragraphs 3.15 – 3.19.'

TR 2003/1W has since been withdrawn and replaced by Taxation Ruling TR 2020/4: *Thin capitalisation - the arm's length debt test* which does not express a view as to how the words 'attributable to' should be interpreted. From a practical perspective, taxpayers and tax practitioners may continue to use the Commissioner's view, as expressed in TR 2003/1W, as guidance regarding the meaning of the phrase 'attributable'.

However, significant changes have taken place internationally in relation to the attribution of business profits to permanent establishments since Division 820 of the ITAA 1997 was introduced and TR 2003/1 was issued. In this respect, the OECD's 2008 and 2010 Attribution of Profits to Permanent Establishments reports use the concept of a 'functional analysis' discussed in the OECD's Transfer Pricing Guidelines to assist with attributing economic ownership of assets to particular parts of a single legal entity. The concept of a functional analysis has also been incorporated into the transfer pricing rules in Subdivision 815-B of the ITAA 1997[2] and in the profit attribution rules in Subdivision 815-C of the ITAA 1997.[3]

We note that significant changes were subsequently made to the OECD's Transfer Pricing Guidelines in 2017, including the introduction of the new concept of 'accurately delineating the controlled transaction'. This has materially impacted the concept of a functional analysis.

Without statutory guidance, significant uncertainty could arise in relation to determining the basis upon which assets should be attributed to an entity's Australian permanent establishments or to the entity's overseas permanent establishments. To minimise potential uncertainty, we consider that section 820-61 of the draft Bill should include a provision similar to paragraph 820-215(3)(a) of the ITAA 1997. This could be achieved by inserting a new subsection with words along the lines of:

> 'For the purposes of determining whether assets are attributable to the entity's *Australian permanent establishments in subsection (3), have regard to the functions performed, the assets used, and the risks assumed by the entity in relation to its Australian operations.'

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2 Paragraph 815-125(3)(a) of the ITAA 1997.

3 Paragraph 815-225(1)(b) of the ITAA 1997.

Conduit financier arrangements – same terms requirement

Paragraph 820-61(5)(e) of the draft Bill proposes to impose a requirement for the terms of each relevant debt interest to be the same as the terms of the ultimate debt interest, other than the amount of the debt. Feedback from our members indicates that this condition imposes significant practical challenges for taxpayers and does not reflect the reality of conduit financier arrangements. We have set out below examples of some of the challenges and impracticalities this condition will impose:

- Where the security provided by the conduit financier to the ultimate lender relates to an asset of the borrower that is being financed (for example, to purchase or construct real property), the borrower will not be able to provide the same security to the conduit financier. In these instances, the borrower may be able to provide different security over the same asset to the conduit financier, for example, a second lien or a second mortgage, but such security is not the same as that provided by the conduit financier to the ultimate lender.
- Where the parent entity of the MNE group provides a guarantee to the ultimate lender to facilitate or induce the ultimate lender to provide the funding to the conduit financier associated with the ultimate debt interest, the parent entity of the MNE group is unlikely to then also provide a guarantee to the conduit financier to facilitate or induce the conduit financier to provide the funding to the borrower associated with the relevant debt interest.
- Entities entering into United States Private Placement (**USPP**) arrangements often contain many terms and conditions that are not common in more common financing arrangements. These terms and conditions are often reflective of the specific market requirements for USPP debts. Requiring conformity with USPP arrangements to meet this condition would significantly impede commercial transactions and negotiations.
- It is common for financial arrangements to require currency conversions to practically fulfil obligations under the financial arrangement. However, not all financial arrangements will require the same currencies to be converted, or potentially any currency conversion.

In each of these examples, the 'same terms' requirement cannot be met for wholly commercial reasons that are not driven by any tax avoidance purpose. In these instances, it would be unfair for taxpayers to not meet the requirements of the ETPDT.

We consider that the requirement in paragraph 820-61(5)(e) of the draft Bill should be reconsidered so it provides greater consistency with commercial practice and reality. This could be achieved by amending the requirements such that the debt interests are made in 'arms' length conditions'. In addition to resulting in more equitable outcomes, this condition would be well understood by taxpayers and tax practitioners given its frequent use throughout the taxation and superannuation legislation.

Alternatively, a more suitable condition may be achieved by amending the requirement so that debt interests need to contain 'similar conditions'. This approach would require further guidance with examples in the draft EM to ensure taxpayers and tax practitioners understand the intended outcome. Such an approach would also benefit from public guidance by the ATO.

Definition of ‘financial entity’

The draft Bill proposes to narrow the existing definition of ‘financial entity’ contained in subsection 995-1(1) of the ITAA 1997. However, the measure intends to allow ‘financial entities’ and authorised deposit-taking institutions to retain access to the current tests.[4] We consider that the narrowing of the definition may have unintended consequences and impose a significant compliance burden on a population of taxpayers who were not intended to be impacted by the changes. If the Government is concerned about integrity loopholes, we are of the view that a more lenient approach should be taken at this stage, with a review of the rules at a future date to ensure that they are operating as intended.

Proposed start date

The draft Bill is proposed to commence from 1 July 2023. However, the draft Bill marks a significant change in Australia’s approach to the thin capitalisation regime. Feedback from our members indicates that that taxpayers will not have sufficient time to understand the implications of the proposed changes and ensure that their internal reporting and systems are adequately prepared to manage the changes. These concerns are amplified given the absence of grandfathering of pre-existing arrangements.

The Tax Institute is of the view that if these measures are to progress, the start date of should be deferred until 1 July 2024. Alternatively, taxpayers with pre-existing arrangements affected by the change as at the time the draft law was released should not be impacted to the extent they are impacted by certain aspects, such as the narrowing of the definition of financial entity.

Comments regarding the draft explanatory memorandum

Operation of the fixed ratio test

We consider that the draft EM would benefit from further guidance and explanation regarding the broader range of costs taken into account under the term ‘debt deductions’ as used in paragraph 820-45(3)(a) of the draft Bill. It would also be useful to include further guidance about the costs that are to be taken into account for purposes of determining amounts included in an entity’s assessable income for purposes of paragraph 820-45(3)(b).

Operation of the external third party debt test

The last dot point in paragraph 1.76 of the draft EM broadly states that the ETPDT conditions will be satisfied if, along with the other conditions, the entity uses the proceeds of issuing the debt interest to wholly fund its investments that are attributable to its Australian permanent establishments or Australian business operations. We consider that the draft EM would benefit from further guidance and examples that illustrate what would be considered, and what would not be considered, an appropriate ‘use of the proceeds of issuing the debt interest’ by an entity to wholly fund:

- its investments that relate only to assets that are attributable to the entity’s Australian permanent establishments;

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[4] For example, see paragraph 1.25 of the draft ME>

- its investments that relate only to assets the entity holds for the purposes of producing assessable income; and
- its Australian operations.

Consequential amendments

Paragraphs 1.126 and 1.127 of the draft EM state that:

> 'Section 815-140 effectively disapplied the arm's length conditions in relation to the quantum of the debt interest.
>
> However, as the new thin capitalisation tests deny debt deductions on an earnings basis, the arm's length conditions should not be disapplied for entities using the new earnings-based tests."

We consider that these sentences may not accurately reflect the current operation of Subdivision 815-B and Division 820 of the ITAA 1997. The Tax Institute is of the understanding that section 815-140 of the ITAA 1997 only operates where Division 820 of the ITAA 1997 applies to an entity.[5] Many entities will not be subject to Division 820 of the ITAA 1997. For example, this can occur when the total debt deductions in an income year are $2 million or less.[6] However, these entities could still be subject to the transfer pricing rules.

Guidance from the ATO explains the interaction between the transfer pricing rules in Subdivision 815-B of the ITAA 1997 and Division 820 of the ITAA 1997 as follows:[7]

> '[s 815-140] requires that the rate is worked out **on the basis that the arm's length conditions operated** and that arm's length rate is then applied to the debt interest actually issued by the entity; instead of the debt interest that would have been issued had the arm's length conditions operated.'
>
> *(emphasis added)*

That is, the arm's length conditions in relation to the quantum of the debt interest are used for purposes of determining an arm's length interest rate which is then applied to the debt interest actually issued. We consider that the draft EM should be updated to reflect this interpretation.

Minor comments

We have noted below typographical and other minor errors in the draft EM that would benefit from correction:

- Paragraphs 1.30 and 1.31 of the draft EM misspell the acronym 'EBITDA';
- Paragraph 1.124 of the draft EM appears to contain an unfinished sentence at the end of the paragraph; and
- Paragraphs 1.98 to 1.105 of the draft EM refer to section 820-62 of the draft Bill instead of section 820-61 of the draft Bill.

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5 Paragraph 815-140(1)(a) of the ITAA 1997.

6 Section 820-35 of the ITAA 1997.

7 Paragraph 55 of Taxation Ruling TR 2014/6 *Transfer pricing - the application of section 815-130 of the Income Tax Assessment Act 1997.*

APPENDIX B

We have set out below our detailed comments and observations for your consideration in relation to the proposed changes to section 25-90 of the ITAA 1997.

Previous consultations and submissions

In May 2013, the Treasury released a proposals paper titled 'Addressing profit shifting through the artificial loading of debt in Australia' (**2013 Consultation**) which proposed to repeal the special rule that allows tax deductibility for interest expenses incurred in deriving exempt foreign income in section 25-90 of the ITAA 1997. The proposal to amend section 25-90 of the ITAA 1997 arose as part of broader reforms at the time to the thin capitalisation rules. In considering the following comments, we recommend Treasury review the various proposals, submissions, parliamentary discussions, etc. relating to the 2013 Consultation.

We consider that the concerns and views expressed at the time by The Tax Institute, other professional bodies, industry experts, taxpayers and advisers are still highly relevant today. We attach a copy of the relevant sections of our previous submission in relation to the 2013 Consultation (**2013 Submission**), which included expansive comments on the (then) basis for the non-repeal of section 25-90. Please refer section 3 at page 8 onwards of that submission. Our comments outlined below complement those made in The Tax Institute's 2013 submission and, in some cases (for example, in relation to anti-hybrids), update them to reflect the current Australian and international tax environment.

Key economic considerations with current proposal

The Tax Institute has significant concerns regarding the introduction of this proposal, which has caught taxpayers and tax practitioners by surprise as it was not part of the 'Multinational tax integrity and tax transparency' consultation paper released for public comment in August 2022 and was otherwise not announced before appearing in the draft Bill. The proposed amendments to section 25-90 of the ITAA 1997:

- has been the subject of significant review and consultation in the past where strong opposition to the amendment was raised by many stakeholders;
- was not at all consulted on during the August 2022 consultation process;
- was not included in any of the pre- or post-election communications by the Government; and
- does not appear to have been included in the costing of the thin capitalisation announcement in the October 2022–23 Federal Budget.

We consider that, if the proposal is enacted, there will be a material and adverse economic impact that will significantly impact businesses. These will impact a large and diverse number of Australian taxpayers who have structured their existing financing arrangements in accordance with the well established section.

The proposal will also impact the international competitiveness of Australian taxpayers expanding and/or operating overseas while reducing the use and attractiveness of Australia for regional investments by foreign multinationals (for example, as Asia-Pacific/Oceania headquarters). The underlying rationale and scope of the impact is discussed below, and in detail in our 2013 Submission.

Recommendation for non-enactment

Consistent with our views in the 2013 Submission, The Tax Institute is of the view that the proposed changes to section 25-90 of the ITAA 1997 should not proceed. If the Government intends to implement the proposed changes, we consider that a specific consultation process is required to ensure that the underlying impacts are better understood and managed in the law design process.

Broadly, paragraph 1.118 to 1.120 of the draft EM outline the underlying policy of the proposed change as being necessary to:

- ensure consistency with the move to an (Australian taxable) earnings model; and
- prevent a 'double benefit', i.e., an exemption on the dividend and deduction for the interest, from arising.

The Tax Institute is of the view that a 'double benefit' as described in the draft EM does not arise. Page 11 of our 2013 Submission sets out all the reasons that the exclusion in section 25-90 of the ITAA 1997 is appropriate.

The proposed changes to section 25-90 of the ITAA 1997 also extend well beyond the original policy intention as well as the principles underpinning the OECD earnings based approach as part of the Base Erosion and Profit Shifting (**BEPS**) project. We consider that if the Government intends to alter the underlying policy rationale of section 25-90 of the ITAA 1997, it should form part of an appropriate consultation process as discussed below.

The Tax Institute is of the view that need for the proposed changes is unclear given the existing mechanisms in Australia's tax system. These include:

- the balance of Australia's (existing or proposed) tax rules (including but not limited to the proposed changes to the thin capitalisation regime) already limiting the ability for perceived 'aggressive tax planning' using locally funded interest-bearing debt;
- Australian corporate income tax payable under the existing imputation regime being, in effect, reflected as a prepayment of personal income tax for Australian resident shareholders in that company. Where underlying earnings which have been impacted by a deduction under section 25-90 of the ITAA 1997 are on-paid to the shareholder as an unfranked dividend, that dividend will be subject to tax in the hands of the shareholder at their applicable tax rate; and
- the proposed exclusion of section 768-5 income (amongst other categories) from the definition of 'Tax EBITDA' in the proposed FRT (at least partly) capping the ability for outbound taxpayers to claim interest deductions on funds used to subscribe for equity in foreign entities.

From a practical perspective, the proposed changes to section 25-90 of the ITAA 1997 will also:

- increase the material compliance burden associated with the need for tracing; and
- discourage the use of Australia as a headquarter location and/or a leading source of local external debt.

Need for further consultation

If the Government intends to proceed with the proposed amendment to section 25-90 of the ITAA 1997, The Tax Institute is of the view that further and extensive consultation should be undertaken on the issue. Although the 2013 Consultation sought views on the proposal, there have been significant changes to the domestic and international tax landscape which will impact the analysis. Further consideration is also required regarding key aspects of the design and implementation of the proposed change. Examples of issues that would benefit from consultation include:

- the need to consider whether the amendment should be prospective so that it only applies to debt incurred on or after the commencement of the rules;
- the appropriate application date, for example 1 July 2024 or later, better allowing taxpayers and tax practitioners to understand the consequences and implement necessary changes to reporting or systems;
- the potential need for transitional provisions to ensure existing arrangements entered into before an agreed date and in accordance with current Australian tax law (including the current section 25-90) are respected and not subject to the revised rules;
- further clarity and supporting guidance regarding the practical impact of the amendment, including clarity on:
    - the basis for apportionment and/or tracing of funds borrowed by affected taxpayers;
    - potential exceptions to the proposed amendment for taxpayers, including, for example, those:
        - with annual 'debt deductions' of less than AUD $2 million per annum, consistent with the *de minimis* exemption in the thin capitalisation rules;
        - who do not qualify as Significant Global Entities; or
        - who qualify as small business taxpayers;
    - the interaction with Australia's anti-avoidance rules such as Part IVA of the ITAA 1936 on taxpayers who restructure in response to the proposed amendments;
    - the potential need for a corresponding imposition of interest withholding tax on any interest denied as a result of the amendment; and
    - the potential need for recognition that where an amount of prima facie NANE income is treated as assessable as a result of various Australian tax laws (such as the anti-hybrid rules), that amount is excluded from the impact of the proposed amendment as it is otherwise assessable.

The Tax Institute is of the view that it is not practical or feasible to address these issues before the proposed commencement date of 1 July 2023.