



Property Council of Australia ABN 13 00847 4422
A Level 7, 50 Carrington Street, Sydney NSW 2000
T +61 2 9033 1900
E info@propertycouncil.com.au
W propertycouncil.com.au
in Property Council of Australia

13 February 2025

Attn: Commissioner of Taxation
Australian Taxation Office
PO Box 3524
ALBURY NSW 2640

Thin Capitalisation Rules: Approach to timing for making and revoking Taxpayer Elections in respect of FY2024

Dear Commissioner

We refer to the changes to the thin capitalisation regime as enacted by the *Treasury Laws Amendment (Making Multinationals Pay Their Fair Share – Integrity and Transparency) Act 2024* (Cth) and the recent draft taxation ruling **TR 2024/D3** and updated draft practical compliance guidance **PCG 2024/D3** released on 4 December 2024 in respect of those changes.

This letter requests that the Commissioner publicly extend the timeframe for elections made by taxpayers under sections 820-46 and 820-47 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**) in the first year of the new thin capitalisation regime, and the period to revoke elections (where relevant), for a reasonable period following finalisation of TR 2024/D3 and PCG 2024/D3.

Background

Taxpayers may make the following elections for the first time in respect of the income year ended 30 June 2024:

the choice to apply the group ratio test (**GRT**) or third party debt test (**TPDT**) for the income year, which must generally be made on or prior to the date on which an income tax return is or is required to be lodged: section 820-46 and section 820-47(2)(a);

the choice to apply the GRT or TPDT on a later day, if allowed by the Commissioner: section 820-47(2)(b); or

the choice to revoke any such election if the Commissioner makes a decision permitting such a revocation: section 820-47(6).

The capacity to make a choice either by the lodgement date or to revoke such a choice is only available to taxpayers where the Commissioner permits.

The Commissioner may exercise these discretions in circumstances in which it is "fair and reasonable" to do so, noting in particular that:

- (a) while there are no prescribed limitations or considerations in respect of the Commissioner's ability to nominate a "later day" under subsection 820-47(2)(b), the Commissioner's practice in respect of other deferral requests is to grant lodgement deferral where it is fair and reasonable to do so (as articulated in Practice Statement Law Administration PS LA 2011/15, [45]); and
- (b) the Commissioner may only permit a revocation of a choice in circumstances in which it is "fair and reasonable" to do so under subsection 820-47(6)(d). The extrinsic materials suggests relevant matters may include whether the entity made the choice on a reasonable and genuine basis, and not as part of aggressive tax planning (Supplementary Explanatory Memorandum, paragraph 1.8).

While draft guidance has been released on certain substantive provisions of the new thin capitalisation regime, such guidance does not address the circumstances in which the Commissioner is likely to exercise such discretions.

It is submitted that:

- (c) accordingly, the Commissioner should publicly announce that he will exercise his discretion to grant extensions where it is "fair and reasonable" to do so, in the ordinary meaning of those words; and
- (d) in the present circumstances, it is fair and reasonable for the Commissioner to provide an extension for thin capitalisation elections in respect of FY 2024 in all but the most extreme circumstances.

Request for longer period to make choice

The new thin capitalisation rules remain an untested legislative regime. There remains considerable uncertainty as to the ambit of the rules, and in particular what in practice is required to satisfy the TPDT.

In the light of this uncertainty, and noting the emerging guidance on certain aspects of this regime, taxpayers may, in good faith and on a reasonable basis:

- (e) refrain from making elections on a conservative basis, notwithstanding that subsequent finalised guidance from the Commissioner confirms that the taxpayer's particular circumstances should satisfy the relevant tests; or
- (f) make a relevant election on the basis of tax advice and the draft guidance materials released to date, notwithstanding that subsequent materials (e.g., finalised guidance which may materially change) confirm that the taxpayer's particular circumstances should not satisfy that test.

It is acknowledged that draft guidance TR 2024/D3 has been released on certain aspects of the new thin capitalisation regime which may assist taxpayers in making the appropriate choice. However:

- (a) the guidance, being in draft form and open to public consultation, does not provide any certainty as to the concepts articulated within it. In particular, public comments on TR 2024/D3 are due by 7 February 2025, which is after the lodgement deadline of the FY24 income tax return for the majority of taxpayers and, even where not, it is highly unlikely that the ruling is finalised before the lodgement deadline in respect of FY2024;

- (b) there remains considerable uncertainty as to the ambit of criteria within the legislative regime. Certain key concepts, which are novel to the thin capitalisation regime, are either not addressed (e.g., the conduit financing conditions) or are addressed only in a manner that is general in nature (e.g., the classification of intangible assets as Australian assets or otherwise); and
- (c) the risk of this uncertainty is significant for taxpayers. In particular, where taxpayers do not satisfy the TPDT as a result of a failure of the conduit financing conditions (on which the ATO has released no guidance), the risk of debt deduction denials is considerably higher, as debt deductions may be denied both in respect of the ultimate debt interest and relevant debt interest.

In these circumstances, it is submitted that it would generally be "fair and reasonable" for the Commissioner to allow taxpayers to defer or revoke thin capitalisation elections up until a reasonable period following finalisation of TR 2024/D3 and PCG 2024/D3. This is on the basis that:

- (a) taxpayers are required to make choices in circumstances in which there is a considerable lack of certainty in respect of a new legislative regime that applies with retrospective effect, and that introduced wholly untested legislative concepts;
- (b) taxpayers are required to make choices prior to complete and finalised guidance from the ATO in respect of the material elements of these tests; and
- (c) adopting an inflexible approach to the exercise of discretions will lead to harsh and unreasonable consequences for taxpayers, particularly if a taxpayer elects, or refrains from electing, a particular test before further interpretative guidance is released.

Accordingly, it is requested that the Commissioner publicly confirms that he will exercise his discretion to allow the deferral or revocation of elections in respect of the 2024 income year up until a reasonable period following finalisation of TR 2024/D3 and PCG 2024/D3. If the Commissioner considers that there may be certain circumstances where he would have concerns with such an extension, the circumstances in which he would not allow it would need to be clearly defined (such as a taxpayer not taking reasonable care in making the election).

Should you or your office like to discuss this letter in more detail, please contact Matthew Wales, Policy Manager at mwales@propertycouncil.com.au to arrange a meeting.

Yours sincerely



Antony Knep
Executive Director – Capital Markets