CK Infrastructure Holdings Limited
(Incorporated in Bermuda with limited liability)
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Power Assets Holdings Ltd.
電能實業有限公司
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30 October 2023

International Tax Unit
Corporate and International Tax Division
Treasury
Langton Crescent
Parkes ACT 2600

By email: MNETaxIntegrity@treasury.gov.au

Dear Sir / Madam

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

CK Infrastructure Holdings Ltd ("**CKI**") and Power Assets Holdings Limited ("**PAH**") welcome the opportunity to comment on Treasury's exposure draft ("**Exposure Draft**") and supplementary explanatory memorandum ("**Supplementary EM**") on the proposed amendments to the Treasury Laws Amendment (Making Multinationals Pay Their Fair Share – Integrity and Transparency) Bill 2023 ("**the Bill**") containing reforms to the thin capitalisation rules in Division 820 of the *Income Tax Assessment Act 1997* (Cth). Unless noted otherwise, all legislative references in this submission are to the *Income Tax Assessment Act 1997* (Cth) and we refer to the *Income Tax Assessment Act 1936* (Cth) as the "**ITAA 1936**".

CKI and PAH are two of the world's leading global infrastructure and energy companies, with businesses in the UK, Continental Europe, North America, Australia, New Zealand, Hong Kong and mainland China. CKI and PAH are members of the CK Hutchison Holdings Limited group and CKI and PAH are listed on the Hong Kong Stock Exchange.

CKI and PAH have specific concerns regarding the impact of the new drafting of the third party debt test, specifically, the inclusion of the modified definition of "Australian entity" in the Exposure Draft on SA Power Networks, the primary electricity distribution business for the state of South Australia. SA Power Networks employs approximately 2,500 employees in Australia.

SA Power Networks is a general law partnership between five companies as follows:

- Two companies jointly owned by CKI and PAH, which together have a 51% interest through CKI Utilities Development Limited ("**CKIUD**") (25.5%) and PAI Utilities Development Limited ("**PAIUD**") (25.5%). Both CKIUD and PAIUD have taxable permanent establishments in Australia and pay tax in Australia by virtue of their partnership interests in SA Power Networks; and
- Three Australian companies unrelated to CKI and PAH (49%) ("**the Partners**").

Our detailed comments and specific concerns are set out below and relate to the proposed definition of an "Australian entity" in relation to partnerships:

1. Based on the drafting of the Bill prior to the Exposure Draft, a partnership could not benefit from the third party debt test on the basis that a partnership cannot be regarded as a resident. We commend Treasury for the proposed amendments to include trusts and partnerships to be able to benefit from the third party debt test.

2. However, the current drafting of the third-party debt test and, in particular, the inclusion of the modified definition of "Australian entity" in the Exposure Draft appears to prevent certain partnerships with Australian business operations funded by genuine, commercial debt arrangements from satisfying the criteria under the third party debt test. In particular, a partnership with partners that are regarded as Australian residents or Australian trusts (as defined at section 338 of the ITAA 1936) with less than 50% direct participation interests in a partnership cannot be regarded as an Australian entity and access the third party debt test.

3. This is wholly inconsistent with the intended policy outcomes as stated under the explanatory memorandum to the Bill at paragraph 2.92, which was to design the third party debt test to accommodate genuine commercial arrangements relating to Australian business operations.

4. The policy intent as provided in the Supplementary EM at paragraph 1.31 notes that the modification to the definition of an "Australian entity" for partnerships was aimed at ensuring that the "term reflects partnerships with a strong connection to Australia and does not allow avoidance behaviour". However, we submit that this policy intent is already satisfied through the requirements in the third party debt conditions that:

    a. the holder of the debt interest has recourse only to Australian assets (that are held by the entity, membership interests in the entity or held by a member of the obligor group in relation to the debt interest) (section 820-427A(3)(c)); and

    b. the entity uses all, or substantially all, of the proceeds of issuing the debt interest to fund its commercial activities in connection with Australia that do not include any business carried on by the entity at or through its overseas permanent establishments and the holding by an entity of any associate entity debt, controlled foreign entity debt or controlled foreign entity equity (section 820-427A(3)(d)).

5. As these concerns regarding partnerships with strong connections to Australia and avoidance are already sufficiently addressed by the above conditions, we are not aware of any other policy reason to include an additional requirement that the partnership needs to be an "Australian entity". In this regard, we note that SA Power Networks carries on business solely in Australia and all of its partners are either tax residents of Australia or are foreign residents that hold their partnership interests at or through an Australian permanent establishment and based on the proposed legislation, SA Power Networks appears, upon an initial analysis, to be unable to deduct all of its interest expenses in respect of third party debt.

6. We note that:

    a. in order for a trust to be regarded as an "Australian trust", section 338 broadly requires the trustee of the trust to be an Australian resident or the central management and control of the trust is in Australia. It follows that a trust can be regarded as an Australian trust where all of its beneficiaries are non-residents. This appears to be inconsistent with the proposed treatment of partnerships; and

    b. similarly, a company where all of its shareholders are non-residents can also quality for the third party debt test. This appears to be inconsistent with the proposed treatment of partnerships.

7. As an alternative if Treasury maintains its view on the treatment of partnerships in the definition of Australian entity, section 820-427E(a) (about modified meaning of "Australian entity") should include an Australian taxable permanent establishment of a foreign resident company when considering if a partnership can be regarded as an "Australian entity" with reference to the owners of the direct participation interests in the partnership.

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CKI and PAH would welcome the opportunity to discuss the above matters with you and provide further input to consultation. Please contact Ms. Jennie Cho on +852 2122 3958 or at jennie.cho@cki.com.hk should you wish to discuss.

For and on behalf of
**CK Infrastructure Holdings Limited**

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Andrew John HUNTER
***Executive Director***

For and on behalf of
**Power Assets Holdings Ltd.**

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Loi Shun CHAN
***Executive Director***