

30 October 2023

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

Re: Exposure Draft: Treasury Laws Amendment (Making Multinationals Pay Their Fair Share – Integrity and Transparency) Bill 2023

The purpose of this submission is to highlight an unintended consequence of subparagraph 820-427A(3)(ca) and recommend an amendment to the proposed legislation.

ElectraNet owns and manages South Australia's critical infrastructure high voltage transmission network which transports electricity over long distances from traditional and renewable generators. ElectraNet has an important role in evolving South Australia's transmission infrastructure to facilitate the transition to net zero.

The consequence of the current drafting is that ElectraNet would not be able to access the third party debt test in respect of borrowings that would otherwise meet all of the criteria for third party debt. The resultant disallowance of interest under the fixed ratio test (as with many infrastructure companies, ElectraNet is able to obtain financing at a higher level of gearing that the 30% of EBITDA measure) will significantly impact ElectraNet's cash flows and therefore its ability to obtain and service the debt that funds the critical infrastructure. We believe this is an unintended consequence of the particular drafting of the amendments.

We set out below the specific concern with the drafting and why we believe it is unintended, as well as a recommended change to effect the purpose of the law.

Unintended consequences:

The consequences of the current drafting of the third party debt conditions contained within subparagraphs 820-427A(3)(c) and 820-427A(3)(ca) (emphasis added) are as follows:

- (c) the holder of the debt interest has recourse only to assets of the following kind for payment of the debt to which the debt interests relates:*
 - (i) Australian assets held by the entity;*
 - (ii) Australian assets that are *membership interests in the entity (unless the entity has a legal or equitable interest, whether directly or indirectly, in an asset that is not an Australian asset);*

ElectraNet.com.au

A 52–55 East Terrace, Adelaide
P PO Box 7096, Adelaide, South Australia, 5000
T +61 8 8404 7966 or 1800 243 853 (Toll Free)
E enquiry@electranet.com.au

A decorative graphic in the bottom right corner of the page, showing a stylized representation of high-voltage power lines and towers against a dark red background.

(iii) *Australian assets held by an *Australian entity that is a *member of the *obligor group in relation to the debt interest;*

(ca) none of the assets mentioned in paragraph (c) are rights under or in relation to a guarantee, security, or other form of credit support;

The policy intention of the third party debt conditions is outlined in paragraphs 2.96 to 2.104 of the explanatory memorandum to the *Treasury Laws Amendment (Making Multinationals Pay Their Fair Share—Integrity and Transparency) Bill 2023 (the Explanatory Memorandum)*.

The Explanatory Memorandum sets out that the aim of the third party debt conditions is to ensure that the third party debt test only captures genuine third party debt which is used to fund Australian business operations¹.

The Explanatory Memorandum goes on to clarify that²:

“Recourse to rights under or in relation to forms of credit support ... are generally prohibited to ensure that multinational enterprises do not have an unfettered ability to fund their Australian operations with third party debt. Given Australia’s relatively high corporate tax rate, multinational enterprises may seek to fund their Australian operations with high levels of debt relative to their operations in other jurisdictions.”

The Supplementary Explanatory Memorandum further clarifies that the purpose of subparagraph 820-427A(3)(ca) is to ensure that multinational groups are not able to ‘debt dump’ third party debt in Australia that is recoverable against the global group³.

We are concerned that based on the current drafting of the Bill, subparagraph 820-427A(3)(ca) could cause genuine third party debt to fail the third party debt conditions, as the exclusion for guarantees and other forms of credit support is not limited to those that support the relevant debt interest. As currently drafted, any rights under any kind of guarantee will prevent access to the test even where the guarantee has no connection to the debt interest.

Impact on ElectraNet

Through its operations ElectraNet frequently enters into long term transmission connection agreements with its customers. These contracts often have terms of up to 20 years. As a result of the long term nature of the contracts, customers often provide ElectraNet with a bank guarantee to cover their payment obligations under the contract. Note that this provides security *for ElectraNet over future income to be received* and *not* security for ElectraNet’s lenders under its borrowings.

In many industries, lenders commonly require a fixed and floating charge over all of the company’s assets, meaning that lenders have recourse to *all* of its assets. In ElectraNet’s case, its assets would include its right under the bank guarantees noted above. This means the lenders therefore have recourse to a *“right under or in relation to a guarantee”*.

Based on the current drafting of the proposed amendments, this alone would mean that all of ElectraNet’s genuine third party debt interests on issue would not satisfy the third party debt

¹ Paragraph 2.97 Explanatory Memorandum to Treasury Laws Amendment (Making Multinationals Pay Their Fair Share—Integrity and Transparency) Bill 2023

² Paragraph 2.99 *ibid*.

³ Paragraph 1.26 *ibid*.

conditions due to subparagraph 820-427A(3)(ca), and practically ElectraNet would not be able to access the third party debt test.

As outlined above, the policy intent of subparagraph 820-427A(3)(ca) is to preclude access to the third party debt test for debt interests that are issued by lenders on the basis that the lenders have recourse to credit support from outside the company. It does not appear that other types of “guarantees” such as bank guarantees from customers in relation to the taxpayer’s income were contemplated in the current drafting.

As illustrated by the above example, the broad drafting of subparagraph 820-427A(3)(ca) could cause genuine third party debt, taken out by an entity to fund its Australian operations to fail the third party debt conditions, despite it having a balance sheet that supports the level of debt issued, and it not having any form of credit support or guarantee that the lenders have relied upon to support the debt.

It is our view that this is not the policy intention of the proposed amendments, but rather an unintended consequence of the current drafting.

Recommended change

We believe the intended treatment under the law can be effected by limiting the credit support referred to in subparagraph 820-427A(3)(ca) to those that relate to the debt interest referred to in that section. For example, the subparagraph could be amended as follows:

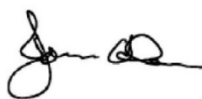
*(ca) none of the assets mentioned in paragraph (c) are rights under or in relation to a guarantee, security, or other form of credit support **that relate to the debt interest;***

Thank you for your consideration of the submission, we look forward to seeing the outcome of the consultation process. If you have any questions or seek further information please contact ElectraNet on Ph: (08) 8404 7966.

Yours sincerely,



Simon Emms
Chief Executive Officer



John O'Dea
Chief Financial Officer