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Dear Mr Dodshon,

Draft Practical Compliance Guideline PCG 2024/D3 – Restructures and the new thin capitalisation and debt deduction creation rules - ATO compliance approach

CPA Australia is Australia's leading professional accounting body and one of the largest in the world. We represent the diverse interests of more than 173,000 members in over 100 countries and regions. We make this submission in response to The ATO's **PCG 2024/D3 - Restructures and the new thin capitalisation and debt deduction creation rules - ATO compliance approach** (PCG) released on 9 October 2024 on behalf of our members.

We make the following summary comments and key points for your consideration:

- It is essential the ATO provides clear guidance and works constructively with taxpayers to ensure that genuine commercial restructures, undertaken to meet the requirements of the new regime, are not unfairly subject to ATO scrutiny and to support taxpayers through the transition to new legislative changes. The Commissioner of Taxation (Commissioner) should exercise his General Powers of Administration to disregard the application of the DDCR in purely domestic arrangements where there is no artificial increase in associate or third party debt in Australia.
- For purely domestic transactions with no evidence of debt dumping, smaller market taxpayers, especially those outside consolidated group structures, should not face integrity measures when restructuring related-party debt; these groups may suffer a competitive disadvantage relative to larger multinationals managing intragroup debt where tax consolidation applies.
- Consideration should be given on whether technical distinctions in some examples would be more appropriately addressed in a Taxation Determination, rather than providing broader principles to guide risk assessment under the PCG.
- As the examples are very specific, further examples to Schedule 1 and 2 should be considered to address potential outcome changes if the facts in the examples were varied.
- As a separate issue, the ATO have released the approved form for a third party debt test election. While not required by the legislation, the form suggests it is not possible to make an election if you are subject to DDCR by virtue of section 820-47. For taxpayers in the smaller and middle market, who legitimately would satisfy the third party debt test, would be at a significant disadvantage if they are not afforded this exception, while the exception is provided to large business. We recommend that if the ATO is not satisfied with the provision as drafted, Treasury should be made aware that the law should be amended rather than imposing a change through an approved form. We would like to discuss the ATO's approach on this issue as this may further demonstrate the differential treatment of middle market taxpayers as compared to large business who are provided this opportunity to make such an election.

Please refer to the Appendix for our detailed discussions. If you have any queries, contact me at jenny.wong@cpaaustralia.com.au or Bill Leung, Tax Technical Advisor at bill.leung@cpaaustralia.com.au.

Yours sincerely,

Jenny Wong
Tax Policy Lead

Appendix

Detailed discussion

General comments

During the Senate Committee hearings[1], the ATO committed to a collaborative and supportive approach in implementing the new thin capitalisation regime, particularly as taxpayers transition and restructure existing financing arrangements to comply with the new rules. This commitment reflects the ATO's recognition of the significant adjustments companies may need to make and acknowledges the potential application of the integrity rule, not just in the measure itself but also more generally. Given this, it is essential that the ATO provides clear guidance and work constructively with taxpayers to ensure that genuine commercial restructures, undertaken to meet the requirements of the new regime, are not unfairly subject to ATO scrutiny. This collaborative approach will help businesses achieve compliance without undue risk or uncertainty, aligning with the ATO's stated intention to support taxpayers through the transition to new legislative changes.

It appears that the ATO's position as set out in the Senate Committee hearings aligns with the approach taken in past guidance, such as PCG 2018/7 and PCG 2021/5 for foreign hybrid mismatch rules. These earlier PCGs provided a principles-based framework allowing taxpayers to self-assess risk levels based on specific criteria, which proved useful for determining when certain restructuring actions could be classified as low risk. For example, under PCG 2018/7, arrangements were generally considered low risk if they had previously not triggered anti-avoidance rules, were commercially motivated, and the restructured arrangements similarly avoided triggering anti-avoidance rules.

A similar framework within PCG 2024/D3 would provide valuable clarity on whether an entity's refinancing or adjustments to financing arrangements could qualify as low, medium, or high risk. Example 4, for instance, highlights an arrangement involving domestic entities in which a change to the arrangement structure could raise concerns about commercial justification. Here, a cash-pooling arrangement with banks paying interest directly could be treated as low risk if initially set up this way, yet may be viewed as higher risk if restructured. Further clarification on this scenario would help taxpayers assess restructuring decisions more confidently, especially where there is no debt dumping or tax base erosion involved.

We also note the effectiveness of the de minimis rule in PCG 2021/5, which introduced a $2 million threshold for related-party payments within a group under Division 832. Although this threshold was not legislated, it provided a clear, practical guide for taxpayers, something noticeably absent from PCG 2024/D3.

In addition, we believe that the current structure of the risk zones presents significant practical challenges. As structured, it is unlikely that many, if any, arrangements will fall within the "white" zone, but a few arrangements will fall under the "yellow" risk zone. We recommend that the ATO revisits the criteria for the "white" zone to better reflect the type of arrangements where further risk assessment is not required.

Domestic arrangements and impact on SMEs

In cases of purely domestic transactions with no evidence of debt dumping, such as in Example 19, the ability to distinguish related party debt from bank debt remains crucial. If smaller market taxpayers outside a consolidated group structure cannot restructure to replace related-party debt with bank debt without triggering integrity measures, these groups may face a competitive disadvantage. In contrast, larger multinational groups can manage intragroup debt within a consolidated framework. For example, Division 7A illustrates the disadvantage faced by mid-sized taxpayers where a family trust group borrows from a company, compared to larger entities borrowing within a tax consolidated group or within a corporate structure that is not subject to Division 7A.

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[1] Senate Economics Legislation Committee Report, Government Amendments to Treasury Laws Amendment (Making Multinationals Pay Their Fair Share Integrity and Transparency) Bill 2023, paragraph 2.97

Tax determination vs PCG

Some of the examples (e.g., Example 1) highlight how a minor technicality can shift an arrangement from low to high risk, relying on a very narrow interpretive framework. These technical distinctions would be more appropriately addressed in a Taxation Determination, rather than providing broader principles to guide risk assessment under the PCG. This leaves room for misinterpretation and could inadvertently misclassify an arrangement as high risk.

We set out some comments for the examples noted below.

Specific comments on the examples

Example 1 - timing and the 'associate pairs' conditions

Example 1 illustrates conditions for associate pairs (subsection 820-423A(2)(b)) and the timing of arrangements. The example was assessed as a low risk arrangement in the PCG due to a technicality of timing. That is, the acquisition of a CGT asset (i.e., land) occurred before the borrowing when Aus Co and Third Party were not associate pairs (i.e., entered into a joint venture).

It is important for the PCG to establish a principle whether the DDCR would apply solely because there is borrowing between associate pairs in such acquisition cases.

In addition, that principle should be assessed against *Mylan's Case*[2], where the Federal Court concluded that Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936) did not apply on the basis that the taxpayer was able to successfully establish it had not entered into the relevant arrangement for the sole or dominant purpose of obtaining a tax benefit.

It is also important for the ATO to clarify in the PCG when a disposer must be an 'associate pair' of the acquirer – whether this relationship is tested at the time of the CGT asset acquisition, or when the relevant debt deduction occurs.

Furthermore, the ATO should clarify in Example 1 whether, if the arrangement was carefully stepped and planned in accordance with Example 1, this may be one that the ATO would regard as a higher risk that DDCR or Part IVA would apply to.

The absence of clear principles may lead to misinterpretation, potentially leading to low-risk assessments by taxpayers for arrangements that should be considered high risk.

Example 2 – funding capital expenditure only with related party debt

Example 2 illustrates associate pairs that facilitate funding of capital expenditure (subsection 820-423A(5)(b)(ii)). The ATO's view is that the related party debt specifically used to fund the development of the gold mine allows the group to continue to pay dividends. The example shows a clear outcome due to separate entities involved. The PCG should include an example with a single entity (i.e., Aus SubCo rather than separate Aus SubCo 1 and Aus SubCo 2) under the same facts, to confirm if the ATO's view would be consistent in this scenario.

Funding is generally easier to trace with separate entities, while a single entity with mixed working capital may potentially result in a different outcome. Group borrowing is often co-mingled, making it challenging to specifically trace the purpose of a borrowing - particularly when funds are used for routine commercial transactions. For example, a single bank account may support cash flow for multiple business activities, resulting in intermingled borrowings incurred as part of ordinary operations.

The PCG should offer clear guidance and practical examples on how businesses should determine their position under these rules when one bank account is used for various routine business transactions.

Example 3 – funding working capital and dividends with related party debt

The facts in Example 3 are unclear. Example 3 illustrates the funding of working capital and dividends with related party debt. In the example, an assumption is made that in a particular year, profits are insufficient to fund dividends

[2] **Mylan Australia Holding Pty Ltd v Commissioner of Taxation (No 2) [2024]** FCA 253.

and its continuing operations. The example states that related party debt is used to fund both dividend payments and operations. However, under paragraph 36 of *TR 2012/5*[3], the Commissioner's preferred view is that dividends can only be paid from profits and not from amounts other than profits for the purposes of the Corporations Act and company accounting.

We believe paragraph 87 of the example was intending to say "Cash reserves and other debt facilities are insufficient to fund the payment of dividends". However, we note that tracing funding and dividends is a significantly difficult question, especially where dividends have been historical.

In a domestic group context, we question whether the ATO could consider an administrative approach (based on TR 95/25[4]), in cases where there is little risk of debt dumping. That is, to the extent that:
(1) a dividend is paid out of a realised profit; and
(2) to the extent that the entity paying the dividend does not (directly or indirectly) pay the amount to a foreign entity; and
(3) to the extent that the entity does not (directly or indirectly) increase debt financing that is owed to a foreign entity;
whether the ATO would be willing to accept that this case is a lower risk case of "debt dumping".

If this were the case, we request the ATO to consider whether they would accept that the payment of the dividend is funded by working capital and that the new debt is simply a replacement of the working capital (which is consistent with TR 95/25, where the debt is used to finance the working capital of the business and thus why interest is deductible under section 8-1 – see paragraph 13 to 15).

We note that this safe harbour would significantly reduce the compliance for smaller and middle market in tracing the source of payment for dividends, especially in a transitional sense.

<u>Example 4 – cash pooling</u>

Example 4 illustrates cash pooling. The example could also apply to an arrangement that is purely between domestic entities. It is possible to structure a cash pooling case where the banks allow the ultimate borrowing entity to pay the interest directly to the bank, rather than indirectly to the cash pool leader who then repays to the bank. If the arrangement is established on day one with this condition, it would not appear to trigger the DDCR.

If the arrangement was refinanced or changed so that it had this condition, the PCG appears to be suggesting this may fall foul of the DDCR under s.820-423D, as the taxpayer may not be able to show the commercial reasons for the change. However, where there is no "debt dumping" and in line with the ATO comments at the Senate Economics Legislation Committee, we would have expected this to be a low risk restructure of an arrangement.

We recommend Example 4 of the PCG should clarify and provide examples of the Commissioner's position for transactions between purely domestic entities.

<u>Example 5 – bridging finance</u>

Example 5 illustrates bridging finance. The example would benefit from making it clear whether the foreign shareholders are associates or not under section 318 of the ITAA 1936. The PCG should also made it clear or provide an example the that the same outcome should occur for a trust due to subsection 820-423E.

Further, the example should also make it clear whether the DDCR does not apply because of the initial capital acquisitions that is funded by the debt. We highlight that if the example is "low risk" simply because the entities are not an associate or simply because the expenditure is excluded, then we submit that the example may have limited utility. It is important that the example is clear as to why it is low risk.

<u>Example 6 – related party finance of related party acquisition</u>

No response to the Example.

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[3] **TR 2012/5** Income tax: section 254T of the Corporations Act 2001 and the assessment and franking of dividends paid from 28 June 2010
[4] **TR 95/25** Income tax: deductions for interest under section 8-1 of the Income Tax Assessment Act 1997 following FC of T v. Roberts; FC of T v. Smith

Example 7 – related party transactions to recharge outcomes arising from swaps

Example 7 illustrates related party transactions to recharge outcomes arising from swaps. It appears to be saying that the debt deductions are not in relation to a prohibited transaction. That is:

- not in relation to an acquisition of an asset or obligation.
- not in relation to a distribution etc. for subsection 820-423A(5) purposes, i.e., payment/distribution case under the second limb of the DDCR.

As the internal swap relates to the bank debt which is an obligation, we highlight that subsection 820-423A(2) can apply where there is an acquisition of an obligation. There is no guidance on what this means at the moment and concern on the potential breadth of the term "obligation" for the purpose of this provision. It would be useful if the PCG make it clear in the example that the ATO do not regard the "debt" to be an acquisition of an obligation for the purpose of the DDCR in the example.

Example 8 – debt deductions in relation to an acquisition from an associate pair

Example 8 illustrates debt deductions in relation to an acquisition from an associate pair. As we understand, Example 8 appears to expand and to clarify Example 7. Example 8 makes it clear that the debt relates to the acquisition of an asset. However, it is unclear why the interest rate swap has a nexus to the asset. This view may seem inconsistent with *Federal Commissioner of Taxation v Visy Industries USA Pty Ltd* [2012] FCAFC 106. In this case, the nexus was not to the asset, it was to a profit-making undertaking or scheme.

We note that the Example does not state that the DDCR would apply in this case, i.e., it simply says that the case would not be a low-risk case and that you may dedicate resources to examine the appropriate application of the DDCR to this case. However, we believe that this is the type of case that requires further guidance from the ATO so that taxpayers are able to understand the ATO view in relation to how the DDCR may apply. We believe it is therefore important that the ATO outline why a case may not be considered low risk in a certain circumstance, taking into account related case decisions, and that where the views consist of highly technical issues that such matters be further explored by the ATO (for example in a Taxation Determination or Ruling).

Example 9 – acquisition from a related trust

Example 9 illustrates an acquisition from a related trust, i.e., between domestic entities. Division 7A of the ITAA 1936 requires interest to be charged at the benchmark interest rate. Where interest is not charged and minimum loan repayments are not made, a deemed dividend will accrue under section 109E.

However, as outlined in the PCG, the DDCR will treat interest charged on a Division 7A loan as being non-deductible.

As an example, a company (A Co) with say $1000 of retained earnings in the group. The company lends to the operating trust (Trust A) an amount of $1,000. Under section 109E, approximately 1/7 needs to be repaid each year. Section 109E(7) ensures that this must comprise of interest and principal. Section 109P then excludes such loans from being a dividend. However, that then takes you to section 109N which requires the loan to be on terms that charges minimum interest at the benchmark rate. Accordingly, if this is not done then a deemed dividend occurs under section 109D.

This in turn does not allow the loan to be interest free (otherwise a deemed dividend unfranked) may occur. Note that the loan is from after tax dollars (at 30%) so a deemed dividend on the $1000 will result in an effectively tax rate of 62.9% on the pre-tax dollars of $1429.

It is not possible to refinance this via another company as it would trigger the rule in section 109R(2). [Note the ATO applies section 109T with 109R making it even more difficult to refinance via another company]. Accordingly, this leaves the single option of looking to refinance using an individual family member. To accommodate this, the company would pay a dividend of $1000 that would in turn be paid to the individual. The individual will receive a franking credit of $429 and pay topup tax of $242. The individual would have a receivable of $1000 from Aco which would be used to refinance the loan to Trust A.

Accordingly, this option would have a cost of $242, being the top up amount, resulting in a cost of financing of 47% on the $1429 of intragroup profits. As the profits are only being used in the business, this compares to a corporate group that can retain and use after tax profits at a 30% rate, putting trust taxpayers at a significant disadvantage.

Therefore, in such a case, the group in Example 9 will not have the option to turn off interest and make the loan interest free. In addition, as the corporate entity is the entity with the excess cash reserves, the only option to repay the debt would be to pay a fully franked dividend to an ultimate individual. This would result in total tax payable of 47% (corporate tax of 30% and top-up of 17%) in order to repay the loan back to the company to remove the DDCR exposure. This option will result in a significant cost to middle market taxpayers trying to fund their business operations.

Although the law as passed provides no exclusion for purely domestic debt arrangements, entities which are not subject to the thin capitalisation rules may still be subject to the DDCR as illustrated in this Example. This example on Division 7A demonstrates the competitive disadvantage that would occur for a small or middle market taxpayer that borrows from a company in the Family Trust Group, as compared to a multinational that borrows from a member in the tax consolidated group.

We submit the DDCR lacks a purpose test or other safeguards to ensure that it targets only transactions of particular concern to the OECD, for example, those that 'reduce the level of interest income subject to tax in the country', reflecting the OECD's concerns about residual base erosion and profit shifting risks. Therefore, the Example illustrates a very harsh and unfair outcome, and we submit such an application of the DDCR is unjustified and unnecessary. That being said, we understand that changing the law is an issue for Treasury. However, we welcome the opportunity for the ATO to discuss this matter with Treasury. We also welcome the opportunity for the ATO to outline other options for taxpayers to be able to comply with the DDCR in these circumstances. The lack of safe harbour rules in the PCG for middle market taxpayers will result in a significant cost to middle market taxpayers.

Finally, we submit the PCG must provide an example clarifying how unpaid present entitlement (UPE) cases would be treated under the DDCR in this example. We believe that this is a critical example that needs to be included in the PCG, due to how common this arrangement is. An unpaid entitlement example involves a distribution from a trust to a corporate entity, say $1,000, which is unpaid. The amount owing to the company is converted to a Division 7A loan from the company to the trust (i.e. a $1,000 loan) with the unpaid entitlement being treated as being paid. There is a residual question as to whether the new loan is taken to fund the distribution. We would submit that the loan does not fund the distribution and that subsection 820-423A(5) should not apply. Should the ATO disagree with this view, we request that the ATO to consult on this example with the professional bodies and members of the tax profession before finalising the PCG. We stress the importance of understand the ATO's view on this example as a matter of urgency.

Example 10 – loan funding distribution by trustee

Example 10 illustrates loan funding distribution by trustee. We note that in practice at present, it is more common for the unpaid present entitlement (UPE) to the individual to first be converted to a loan with the trust (in the trust minutes) and then for it to be refinanced. In such a case, this should not attract subsection 820-423A(5) as the loan is not financing the distribution. The ATO should clarify in the PCG whether this is considered to be a refinancing of a "bad" arrangement under subsection 820-423A(5).

As outlined above in our comments to Example 9, this example also does not cover the situation where the distribution is to the corporate beneficiary. That is, the ATO have not commented on the example provided where the distribution is to the company and it is then refinanced (with the same company) as a Division 7A loan in order to comply with the ATO view contained in *TD 2022/11*[5]. This is a very common scenario in practice and we request the ATO to consult their view on this with the professional bodies and members of the tax profession prior to releasing a final PCG on the matter.

[5] TD 2022/11 Income tax: Division 7A: when will an unpaid present entitlement or amount held on sub-trust become the provision of 'financial accommodation'?

Example 11 – related party lending between multinational subsidiaries.

Example 11 illustrates related party lending between multinational subsidiaries. The use of the word "acquire" in paragraph 134 suggests it is not new debt. However, the example has it treated as new debt. The ATO should review and correct this juxtaposition. Furthermore, paragraph 137 is too open. the example in the PCG needs to define and provide examples where the DDCR would apply under “indirect” circumstances. As it currently stands, as an example, it suggests that if the underlying entity then buys a new asset funded by other proceeds, this may be an indirect transaction. More clarification of the ATO’s position is required in the PCG so that the risk can be properly understood by tax practitioners.

Example 12 – repaying debt interest

Example 12 illustrates repaying debt interest. We believe that a correction may be required in this example as ‘no debt deduction’ appears to be a no risk case and not a low risk case (unless the ATO is suggesting that repaying debt could have some risk of Part IVA applying).

Example 13 – repaying bridging finance

Example 13 illustrates repaying bridging finance. Assume that the facts are changed such that this is a transitional arrangement, and that it is not bridging but refinancing and using third party debt, and the remaining facts are exactly the same otherwise. We would like to understand whether the ATO would consider the case to continue to be low risk. We note that it would be common for an arrangement to be corrected in this manner in practice. To the extent that the change in facts does not materially change the overall financing of the group (as compared to the existing Example 13), we believe it should be reasonable for the ATO to outline that the additional example is also a low risk case.

Example 14 – disposing of foreign assets

Example 14 illustrates disposing of foreign assets. We are unclear why the example of liquidating a dormant entity is in the PCG.

We have a question in relation to paragraph 181, specifically, why is this "in anticipation of the DDCR applying" and whether the ATO could explain this statement? If instead, the taxpayer identifies the DDCR applying and disposes of the asset, could the ATO confirm in the PCG that this is still a low risk case. If this is the case, the example could simply be changed to outline that the disposal occurs in “anticipation of DDCR applying” or “at a time that the DDCR applies”.

Example 15 – repaying debt interest, terminating swaps, recapitalisation subsidiary

Example 15 illustrates repaying debt interest, terminating swaps, recapiltailising subsidiary. What happens to the outcome in this example if:

- a new loan and new swap are entered into with a bank; and
- if this occurs immediately or one year later?

Would this alternative restructure be considered a low risk arrangement? We believe it is important for taxpayers to understand whether alternative restructures in a similar circumstance may have a different risk weighting.

Example 16 – repaying debt interest

Example 16 illustrates repaying debt interest. As mentioned above on Example 4, the ATO should clarify in the PCG the outcome if Aus Co uses bank finance to fund the dividend and/or repays the debt to finance operations in Example 16 instead. This alternative example would be useful so that taxpayers understand the ATO’s view in respect of the term “facilitate the funding of” where the debt does not directly fund a transaction.

Example 17 – cash pooling

Example 17 illustrates cash pooling. As in Example 16, what if we change the facts so that interest is paid direct to the bank instead? Could the ATO clarify in the PCG what the treatment would be in this situation?

Example 18 – contending to change the character of costs incurred

No response to the Example.

Example 19 – replacing related party debt with third party debt

Example 19 illustrates replacing related party debt with third party debt. We note that small and medium-sized enterprise (SME) groups generally do not have offshore debt. In these cases, as was in Example 4 and Example 9, there appears to be no debt dumping in Australia in transactions between purely domestic entities. The mischief stated in the example would not appear to be applicable in these circumstances. All intragroup debt in Australia is deductible and assessable in Australia and there is no overall increase in net debt in Australia in many cases.

We are therefore concerned where arrangements are purely domestic and there is no "debt dumping" as outlined in Example 19. Where an arrangement simply changes "related party" debt to "bank debt" which would be excluded by 820-423A(2)(e) (i.e., not the third party debt test, but rather that interest payments are not being made to associate pairs). If SME taxpayers cannot form a tax consolidated group and also cannot restructure debt with banks to comply, essentially SME groups will be treated differently to large multinational groups (where such intragroup Australian debt is masked within the tax consolidated group) for tax purposes.

The recently enacted legislation lacks an exclusion for purely domestic debt arrangements, meaning that entities outside the thin capitalisation rules can still fall within the scope of the DDCR. This approach creates an unjust burden on domestic businesses engaging in standard financing arrangements without "debt dumping" characteristics. We submit that the Commissioner should exercise his General Powers of Administration to exclude the application of the DDCR to purely domestic arrangements in cases where no mischief is present. This discretion would better align the ATO's application of the DDCR with the underlying policy intent, ensuring that only those arrangements that are of concerns are subject to compliance action.

Thin capitalisation test choice approved form

While not directly related to the PCG, we would like to highlight the discrepancy between the ATO's **Thin capitalisation test choice approved form**[6] and the thin capitalisation legislation. To make a choice to apply the group ratio test or the third party debt test pursuant to Division 820 of *the Income Tax Assessment Act 1997* (ITAA 1997), the ATO approved form refers to satisfying three requirements (as extracted):

> "**Who can use this form**
>
> Use this form to make a thin capitalisation test choice if all of the following apply:
>
> - You want to make a thin capitalisation test choice for an income year.
> - You are a general class investor, outward investing financial entity (non-ADI) or inward investing financial entity (non-ADI) for the income year.
> - You do not meet the requirements in section 820-37 of the ITAA 1997 (the 90% Australian asset threshold exemption) for the income year.
>
> Outward investing financial entities (non-ADI) and inward investing financial entities (non-ADI) can only make a thin capitalisation test choice to apply the third party debt test."

Unlike the ATO approved form above, section 820-47 of the ITAA 1997 does not stipulate satisfying a third requirement as a prerequisite in making the choice, i.e., not meeting the requirements in section 820-37 (the 90% Australian asset threshold exemption) for the income year.

This third requirement refers to an exemption from the application of the new thin capitalisation regime for certain outward investing entities that hold more than 90 per cent Australian assets on an associate-inclusive basis. It is correct to include this requirement in the ATO's approved form.

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[6] ATO, Thin capitalisation test choice approve form (NAT 75623-10.2024)

We would like to understand how the ATO has made this a condition of the election and why a taxpayer that legitimately satisfy the third party debt test would be excluded from making this election for DDCR purposes. This exclusion again prejudices smaller and middle market taxpayers as opposed to large business.

To the extent that there is an error in the legislation, the ATO should consult with Treasury for an amendment. However, we believe it is unacceptable to include a legislative-type amendment in an approved form. We would welcome the opportunity to discuss this further with you. Ultimately, a correction to the legislation by parliament should be made to the extent there is an error in the legislation, as the ATO should not be creating the law in its approved form to overcome deficiencies or flaws in the legislation.