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The Treasury  
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Our ref: 11457/15702

Dear Chief Advisor

## **Exposure Draft of the Tax Laws Amendment (2013 Measures No. 1) Bill 2013**

We refer to the Exposure Draft of the *Tax Laws Amendment (2013 Measures No. 1) Bill 2013: General anti-avoidance rules (Exposure Draft)*, which seeks to amend the provisions of Part IVA of the *Income Tax Assessment Act 1936 (1936 Act)*, and to the invitation to make submissions on the Exposure Draft.

We have had the opportunity to review a draft of the submissions prepared by the Law Council of Australia and we provide our endorsement of those submissions.

We also wish to provide some additional observations on a technical aspect of the proposed new section 177CB that has been brought to our attention.

It is submitted that introducing the phrase "liability to tax (or withholding tax)" in section 177CB potentially adds further complexity to Part IVA, and the purposes of the section would be better served by instead defining the term "non-tax effect" by reference to the list of "tax benefits" in section 177C.

The reasons for this submission are briefly set out as follows:

1. The definition of "non-tax effect" hinges on the phrase "liability to tax (or withholding tax)". That phrase is also used in section 177CB(1)(a).
2. The use of the phrase "liability to tax (or withholding tax)" introduces an additional concept into the Part IVA analysis - that is, it becomes necessary to consider a person's "liability to income tax (or withholding tax)" as a step in determining whether a person has obtained a tax benefit.
3. A person's "liability to tax (or withholding tax)" will be affected by many factors, and will not always be limited to a consideration of those "tax benefits" listed in section 177C. As such, in ascertaining an alternative postulate in accordance with section 177CB, the tax effects that are disregarded under section 177CB(1)(a) and the tax effects relevant to the definition of "non-tax effect" may include tax matters that are not "tax benefits" as defined in section 177C.
4. An example of this is in relation to tax offsets. The only tax offset that can give rise to a "tax benefit" is a foreign income tax offset. However, a range of other tax offsets may be relevant to a person's "liability to tax".
5. This difference between the concepts of "liability to tax (or withholding tax)" and "tax benefit" may mean that an alternative postulate based upon the assumptions in section 177CB will not necessarily be appropriate. That is, tax matters that cannot give rise to a "tax benefit" (and that

may not relate to or be incidental to a "tax benefit") are taken into account in applying section 177CB to identify an alternative postulate.

6. This may lead to the proposed section 177CB not serving the purposes for which it is included. In particular, whilst it appears that the policy intent behind the definition of "non-tax effect" is to identify those effects other than section 177C "tax benefits", the definition, as currently drafted, can also result in other tax matters becoming relevant to the Part IVA analysis. The Exposure Draft and the accompanying Explanatory Memorandum are silent on this point, which suggests that this not an intended result.
7. If the purpose of the definition of "non-tax effect" is to allow an alternative postulate to focus on those effects that do not give rise to section 177C "tax benefits", then this would be better achieved by the definition being limited to those effects that do not relate to "tax benefits".

We also note that whilst the terms "tax" and "withholding tax" are defined in the 1936 Act, the phrase "liability to tax" is not defined. There is therefore some potential for uncertainty in the interpretation of this phrase, which would add unnecessary complexity to Part IVA.

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Yours faithfully



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