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Economics Legislation Committee
Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Via Email: economics.sen@aph.gov.au

RE: Treasury Laws Amendment (Making Multinationals Pay Their Fair Share-Integrity and Transparency) Bill 2023 [Provisions]

Dear Secretariat,

INPEX appreciates the opportunity to make a submission to the Economics Legislation Committee on the '*Treasury Laws Amendment (Making Multinationals Pay Their Fair Share-Integrity and Transparency) Bill 2023'* (the **Bill**) and associated Explanatory Memorandum (**EM**).

This submission is limited to the 'Third Party Debt Test' and the 'Debt Deduction Creation Rules' contained within the Bill.

1 Third Party Debt Test

INPEX has a demonstrated history of investing in energy and infrastructure projects in Australia. Notably, INPEX's financial expertise was demonstrated in the project financing to fund the construction of the Ichthys LNG Project. At the time, this was the world's largest project financing facility. Separately, INPEX recently announced that it has entered into an agreement for the acquisition of a 50% interest in Enel Green Power Australia, representing a significant investment in, and commitment to, the Australian renewable energy market.

In our experience, infrastructure funding for both gas projects and renewable energy projects are inherently tied to project financing from third party lenders (and not corporate borrowings), which require parent company guarantees or letters of credit.

The exclusion of debt interest from satisfying the third party debt conditions where there is recourse to forms of credit support[1] is not reflective of commercial project financing arrangements. The strict security requirements are placed on borrowers by lenders, who often require credit support as a condition to the project financing arrangement. This commercial requirement is to manage the construction risk period for the lender. That is, the lender has recourse to the credit support to enable construction milestones or completion, such that it then has an asset that it can sell to recover any amount lent in the event of a

[1] Proposed s 820-427A(3)(c)(ii)

default on the loan by the borrower during construction (such as the borrower goes into administration).

The current drafting would see these arrangements fail the Third Party Debt Test, despite debt being issued from a third party. There is no tax rationale for this requirement, and no multinational tax avoidance issue. Absent any credit support, often the response of commercial lenders is to increase the cost of borrowings, reduce the quantum they can offer, or withdraw lending commitments entirely.

We would like to ensure the Senate Economics Legislation Committee is fully aware of the impact the proposed Third Party Debt Test limitation will have on project financing activities, which will impede infrastructure investment. If this limitation is not removed it will likely negatively impact the ability for companies to obtain project financing and undermine Australia's ability to finance infrastructure investment, including renewable energy infrastructure. This appears to be an unintended consequence of the Bill, but its effect is concerning.

2 Debt Deduction Creation Rule (DDCR)

The introduction of the DDCR was unexpected, as it was not part of the Treasury consultation on the *Multinational Tax Integrity – strengthening Australia's interest limitation (thin capitalisation) rules* and was introduced to Parliament without prior consultation. The proposed DDCR goes beyond its intent to disallow debt deductions to the extent that they are incurred in relation to debt creation schemes that lack genuine commercial justification[2]. If legislated as drafted, there is a risk the DDCR applies much more broadly to ordinary commercial debt arrangements that should not fall within the scope of the DDCR.

INPEX CORPORATION, like many global companies, utilises a global Cash Management System (**CMS**) for its subsidiaries. Under a CMS or zero balancing arrangement, INPEX's global Financial Services Entity (**FSE**) receives funds from various companies within the INPEX global group so that they can be pooled together for efficient cash and liquidity risk management purposes. There is nothing novel or unusual about companies such as INPEX managing cash and liquidity risk in this way.

A CMS works such that if an entity has an account in a positive balance at the close of a business day, it will automatically be transferred to the FSE's account and will either offset any borrowings with the FSE or will be deemed an ordinary deposit (whichever is applicable). Conversely, where an entity has an account in a negative balance at the close of a business day, the FSE will transfer an amount to the entity so the balance is equal to zero and this will either reduce any ordinary deposit held by the FSE or be deemed a loan (whichever is applicable).

These funds facilitated under the CMS are used to fund the day-to-day operations of entities globally, including the purchase of trading stock, depreciating assets and can include payments to associates for related party services. A negative balance will also arise if dividends are paid.

A CMS arrangement benefits the local entity by maximising interest income for deposits and minimising interest expense for borrowers due to the daily sweeping and offsetting of cash balances with the FSE.

As currently drafted, CMS arrangements would most likely be captured under the DDCR, as the funding may be used to make payments or distributions to an associate.[3] While INPEX

[2] Explanatory Memorandum, *Treasury Laws Amendment (Making Multinationals Pay Their Fair Share-Integrity and Transparency) Bill 2023* (Cth), p 2.146

[3] Proposed s 820-423A)(5)(c)

acknowledges the DDCR has intentionally been drafted broadly to capture schemes of varying complexity[4], it will also result in entities requiring to be in a no net debt position before dividends are able to be paid, where there are also related party borrowings on their balance sheet. The DDCR clearly goes beyond modernising the debt creation rules contained in the now repealed Division 16G of the *Income Tax Assessment Act 1936* and Chapter 9 of the OECD's BEPS Action 4 Report[5] and would therefore deny debt deductions for any arrangements involving associates. Division 16G contained a number of exceptions to limit the impact to what can be considered to be non-genuine commercial arrangements.

These outcomes, appear to be unintended. The DDCR is clearly meant to target non-genuine arrangements that trigger tax benefits. The impact from these rules remaining as is will be significant, and are highly likely to cause major capital funding impediments to future investment. No investor can be in a position where it cannot procure trading stock, or assets, nor be in a position where it must have no net debt before it can pay out a dividend. Furthermore, CMSs are normal banking arrangements facilitated by external lenders. It seems counter intuitive that these are impacted by the introduction of the DDCR, when the general anti-avoidance rule would be capable of applying to non-commercial arrangements.

2.1 Retrospective application of the DDCR

Due to a lack of transitional rules or grandfathering of current arrangements, the DDCR appears to apply to debt deductions on transactions entered into before the proposed application date of 1 July 2023. Additionally, the 'Principal Purpose' test[6] prevents taxpayers from restructuring out of these arrangements and may also capture commercial refinancing arrangements involving related parties. It seems counter intuitive to have an anti-avoidance rule (Principal Purpose Test) to what is effectively an anti-avoidance rule (the DDCR), such that a taxpayer can never modify its practice to ensure it complies with a country's intended legislated outcome.

INPEX strongly recommends the intended scope of the DDCR be clarified and narrowed and that further consultation be undertaken to address its unintended outcomes, including those we have identified in this submission. We note this was the approach taken with section 25-90 of the *Income Tax Assessment Act 1997*, which has now been taken to subsequent further consultation and is not part of the current Bill.

If you wish for a further discussion, please contact me on (08) 6213 6736.

Yours sincerely,

Bill Townsend
Senior Vice President Corporate

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[4] Explanatory Memorandum, *Treasury Laws Amendment (Making Multinationals Pay Their Fair Share-Integrity and Transparency) Bill 2023* (Cth), p 2.153

[5] Explanatory Memorandum, *Treasury Laws Amendment (Making Multinationals Pay Their Fair Share-Integrity and Transparency) Bill 2023* (Cth), p 2.147

[6] Proposed ss 820-423D(1)