

Via email: [financetax@treasury.gov.au](mailto:financetax@treasury.gov.au)

The General Manager  
Business Tax Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

10 August 2012

Dear Sir/Madam

### Clarifying the definition of limited recourse debt

BDO welcomes the opportunity to provide a submission on the *Discussion Paper: Clarifying the definition of limited recourse debt* (the Discussion Paper), released by Treasury for public consultation on 16 July 2012.

We are of the view that the proposal outlined in the Discussion Paper represents an overreaction to the Commissioner's loss in *Commissioner of Taxation v BHP Billiton & others* [2011] HCA 17 and provides insufficient guidance on the circumstances where the creditor's rights would be taken to be "*limited wholly or predominantly ... to certain rights in respect of the financed property or other property*" (see paragraph 35 of the Discussion Paper). Indeed, any company that sources its debt finance from a single financier could, on the basis of the broad language used in the discussion paper and the example (the Example) provided at paragraphs 36 - 38 of the Discussion Paper, be asserted to be funded by limited recourse debt. Such an assertion would be on the basis that such financier is limited, in the event of default (and in the absence of external guarantees), to seeking repayment from the assets of the borrowing company.

The breadth of the impact of the proposed change is acknowledged in the Discussion Paper. However the uncertainty created by, and consequential marked increase in compliance cost resulting from, the posited approach, is not acknowledged. Such an approach might lead to a circumstance where in respect of nearly all debt owed by a company there is a "wait and see" approach to determining whether or not its debt is indeed limited recourse.

Turning, in particular, to the Example in the Discussion Paper:

- Would the outcome be different if Company C had other assets?
- If so, what level of other assets would be necessary to change such outcome?
- If \$65 million in equity would be insufficient to cause the provisions not to apply, what level, if any, of equity funding would cause the provisions not to apply?
- Would the outcome be different if Company C received debt finance from multiple financiers?
- What would be the impact of a charge over a particular asset if recourse was not limited to such security?



As should be apparent from our questions the asserted "clarity" in respect of the definition of limited recourse debt does not appear to be provided by the contents of the Discussion Paper.

Should you have any questions, or wish to discuss any of the comments made in the attached submission, please do not hesitate to contact Lance on 02 9240 9736 or [lance.cunningham@bdo.com.au](mailto:lance.cunningham@bdo.com.au) or Matthew on 02 9240 9760 or [matthew.wallace@bdo.com.au](mailto:matthew.wallace@bdo.com.au)

Yours sincerely

A handwritten signature in black ink, appearing to read 'Lance Cunningham', with a stylized, cursive style.

Lance Cunningham  
National Tax Director

A handwritten signature in black ink, appearing to read 'Matthew Wallace', with a stylized, cursive style.

Matthew Wallace  
National Tax Counsel