

9 December 2022

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Dear Sir/Madam,

## Improving the integrity of off-market share buy-backs

Deloitte appreciates the opportunity to comment upon the exposure draft legislation and draft explanatory materials (EM) in respect of *Treasury Laws Amendment (Off-Market Share Buy-Backs) Bill 2022*. This submission makes a small number of technical comments / suggestions only.

### 1 Drafting

#### Proposed amendment to s159GZZZQ(8), per Schedule 1, clause 6

Following the amendment, s159GZZZQ(8) would be as follows:

If:

(aa) the seller is a corporate tax entity (other than a listed public company); and.....

Section 159GZZZQ(8) applies to sellers which are corporate tax entities and which participate in a share buy-back. In this context the "seller" is the shareholder, not the company which is undertaking the share buy-back.

Are the underlined words intended to be included in section 159GZZZQ(8)(aa)?

#### Definition of selective reduction of capital

The EM at 1.28 states that "a 'selective reduction of capital' is intended to be broad and to take its ordinary meaning, so as to include reductions of capital effected through selective cancellations of non-share equity interests and other reductions of capital that in substance result in a disproportionate cancellation of membership interests".

For clarity it would be useful for the legislation to clarify that a selective reduction of capital specifically excludes buy-backs.

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## 2 Certainty

Companies contemplating share buy-backs typically apply for a class ruling. Some of the considerations taken into account include Subdiv 204-D ITAA1997 (dividend streaming); s45, s45A and s45B ITAA1936 (capital distributions) and s177EA ITAA1936 (franking credit schemes). This process is expensive and time consuming.

Section 45B includes schemes to provide certain benefits, such as certain payments, allocations and distributions made in substitution for dividends.

We are of the view that it would remove a significant amount of market uncertainty if the legislation or Explanatory Memorandum could clarify that Section 45B would not be applicable where a company chooses to debit a buy-back or selective capital reduction fully against share capital.

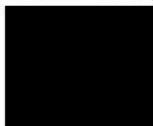
Whilst current ATO practice is broadly not to apply s45B in respect of on-market buybacks where a company chooses to debit a buy-back fully against share capital, there is limited recent authorities stating that the ATO will not apply S45B in this scenario<sup>1</sup>.

Clarification of the application of Section 45B would be helpful to the investment markets.

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If you would like to discuss further, please contact David Watkins on [REDACTED]

Yours sincerely



**David Watkins**

Partner, Tax & Legal

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<sup>1</sup> See ATO ID 2003/1094