New Zealand Market

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Committee Secretariat
Finance and Expenditure Committee
Parliament Buildings
WELLINGTON

BY EMAIL

SUBMISSION ON TAXATION (ANNUAL RATES FOR 2025-26, COMPLIANCE SIMPLIFICATION, AND REMEDIAL MEASURES) BILL

Overview

1. This letter sets out the Australian Securitisation Forum's (**ASF**) submissions on the Taxation (Annual Rates for 2025-26, Compliance Simplification, and Remedial Measures) Bill (**Bill**).[1]

2. Clause 184 of the Bill contains an amendment to correct the commencement date of amendments to the definition of securitisation trust contained in the Taxation (Annual Rates for 2024–25, Emergency Response, and Remedial Measures) Act 2025 (the **Emergency Response Act**). The ASF supports this amendment. The ASF also considers that further amendments relating to the tax treatment of securitisations should be included in the Bill. This will ensure that the Bill is comprehensive in addressing remedial matters relating to securitisations, and in addressing overreach of existing regimes that impact securitisations.

3. The further amendments that we submit should be made are necessary to reduce compliance costs for securitisation arrangements, and therefore to reduce the cost of borrowing money for New Zealand businesses and consumers. The further amendments:

   (a) would remedy what appear to be unintended consequences under existing law such as the "associated person" definition and certain anti-avoidance provisions, which officials in their Departmental Reports on recent tax bills have already acknowledged result in overreach when applied to trusts that are securitisation trusts;

   (b) should not give rise to fiscal costs (because in practice commercial parties respond to overreach in the relevant rules by structuring around the issue (with the cost

[1] Statutory references are to the Income Tax Act 2007.

being borne by transacting parties), or if the cost and uncertainty of doing so would be prohibitive, by not transacting at all) but would reduce the costs of undertaking securitisation transactions which in turn will reduce financing costs for consumers and businesses;

(c) have been raised in the ASF's submissions to the Finance and Expenditure Select Committee on three recent tax bills, and officials in their Departmental Reports on submissions have acknowledged the issues and recommended considering them in a later bill, subject to prioritisation on the Government's work programme.

4. We wish to be heard in support of this submission. We would also be available to discuss our submissions (and proposed drafting to reflect our submission points) with officials if that would be helpful.

Background

5. The ASF is the leading industry body representing participants in the securitisation and covered bond markets in Australia and New Zealand. A securitisation is a funding arrangement involving the transfer of receivables to a special purpose vehicle which then issues debt securities backed by the expected cash flows from those receivables.

6. Securitisation provides an important source of funding for a range of businesses by allowing them access to wholesale debt markets for their funding needs on competitive terms, thereby serving as an alternative to the provision of funding from the major banks. Tax or other impediments to securitisation transactions will therefore reduce competition in the financial sector, to the detriment of New Zealand businesses and consumers.

7. For funders/investors to be prepared to provide debt financing to a securitisation entity, it is critical that the securitisation entity has no unanticipated liabilities, including tax liabilities (i.e., that the entity is "tax neutral"). A confirmation of tax neutrality is always a condition precedent to draw down of funding by the securitisation entity, illustrating the commercial importance of the tax treatment.

Summary of submissions

8. We submit that remedial amendments should be made to address the following issues which adversely impact securitisation transactions:

(a) drafting errors arising out of amendments made in the Emergency Response Act (see section 1 of Appendix 1). These errors, which should be corrected in the Bill, relate to:

(i) section YB 16(3), which provides an exclusion from the association rules for security trusts and securitisation trusts; and

(ii) certain provisions in the debt funding special purpose vehicle (DFSPV) regime in sections HR 9 to HR 10B, HZ 9 and HZ 10.

(b) overreach of certain anti-avoidance rules (specifically, the restricted transfer pricing and thin capitalisation rules) (see section 2 of Appendix 1). These amendments should also be included in the Bill or, if that is not possible, should be included in the Tax Policy Work Programme or Public Remedials Log so that resource can be allocated to them in future amending legislation.

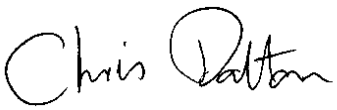
Concluding remarks

9. We understand that officials do not disagree that amendments to address the issues outlined above are appropriate. Officials' response to submissions made by the ASF in 2024,[2] echoing similar responses to the ASF's 2021 and 2023 submissions, in relation to proposals that include those detailed in this letter, was that:[3]

> Officials acknowledge the matter raised by the submitter. However, the issue is outside the scope of the proposals in the Bill. Further work on this matter would require prioritising and resourcing as part of the Government's tax and social policy work programme.

10. The ASF and other industry bodies have devoted significant time and resource to proposing targeted and actionable amendments to reduce tax compliance costs affecting business (and therefore consumers) in this sector. Given officials have acknowledged the overreach in the existing tax laws over some years now, the ASF considers that now is the time to finally resolve these issues.

Yours faithfully



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[2] See the *Departmental Report to the Taxation (Annual Rates for 2024–25, Emergency Response, and Remedial Measures) Bill* at page 264 and 265.

[3] See the *Departmental Report to the Taxation (Annual Rates for 2023–24, Multinational Tax, and Remedial Matters) Bill* at page 121, and at 241 to 243. See also the *Officials Report to the Taxation (Annual Rates for 2021-22, GST, and Remedial Matters) Bill* at pages 252, 254, 255 and 256.

Appendix 1: Detailed submissions

1. First submission: drafting errors arising out of amendments previously made in the Emergency Response Act

Submission

1.1 We set out in this section 1 our submissions on drafting errors arising out of amendments previously made in the Emergency Response Act to section YB 16 (the exclusion from the association rules) and the DFSPV regime. As noted above, these amendments should be included in the Bill.

Section YB 16(3) (exclusion from association rules)

Background

1.2 True third-party lenders to securitisation trusts can be inadvertently associated with the securitisation trust because of overreach in the association rules, which were designed with family trusts in mind. Security trusts are a particular risk area for inadvertent association. Security trusts are typically established to hold a security interest in the assets of the securitisation trust, for the benefit of lenders.

1.3 Section YB 16(3) was introduced by the Emergency Response Act to address the case where a person is a beneficiary of a security trust and is associated with a securitisation trust because the person: (i) is a settlor of the securitisation trust or the security trust, or (ii) has the power of appointment or removal of trustees of the securitisation trust or security trust. Section YB 16(3) was recently enacted, in the words of officials, to ensure that:

> … association should not arise in these situations solely because of the establishment of a security trust or as a result of lending to a securitisation trust.

1.4 The amendments to section YB 16(3) as enacted do not achieve their intended purpose, because they do not address:

(a) all possible scenarios in which association could arise because of the establishment of a security trust. For example, a person who is a beneficiary of a security trust may also be associated with the securitisation trust under the tripartite rule in section YB 14 (e.g. where the securitisation trust is associated with the security trust by virtue of having the same settlor);

(b) association that could arise for security trusts that are used in other contexts such as corporate bond issuances.

Proposed drafting solution

1.5 The drafting proposed in the ASF's October 2024 submission on the Emergency Response Bill, reproduced at paragraph 1.6 below, should be adopted. This would mean repealing section YB 16(3), and replacing it with two new provisions. The first (new section YB 16(3)) would

address security trusts (whether in the context of securitisations, or otherwise) and the second (new section YB 16(4)) would address securitisations. This separation (between security trusts and securitisation trusts) is important. As noted at paragraph 1.4 above, security trusts are used outside of the securitisation context, and overreach of the association rules for securitisation trusts could arise even if there was no security trust.

1.6 The amendments to section YB 16 proposed in the ASF's submission on the bill that became the Emergency Response Act (the **Emergency Response Bill**) were as follows:

> (3) A person (Person A) that is party to a financial arrangement with another person is not associated with that other person as a result of Person A being a beneficiary or settlor of, or having a power of appointment or of removal of the trustee of, a trust (a security trust) established for the main purpose of protecting and enforcing beneficiaries' rights under the financial arrangement.
>
> (4) For the purposes of sections GC 6 to GC 19, subpart FH and subpart RF, a person that is party to a financial arrangement with the trustee of a securitisation trust is not associated with the trustee of the securitisation trust if:
>
> (a) in the absence of this subsection, the person is associated with the trustee of the securitisation trust solely as a result of:
>
> (i) being a settlor of the securitisation trust:
>
> (ii) having a power of appointment or of removal of the trustee of the securitisation trust; and
>
> (b) the circumstances described in paragraph (a) above arise solely as an ordinary incident of the person becoming a party to the financial arrangement.

1.7 Officials did not indicate any specific concerns with the above drafting during the legislative process for the Emergency Response Bill. However, if there are specific concerns with the drafting as set out above, we would be happy to discuss these with you.

Drafting errors in DFSPV regime

1.8 There are drafting errors in the DFSPV provisions, many of which were introduced in the Emergency Response Act. We have summarised these in Appendix 2.

2. Second submission: Overreach of anti-avoidance (RTP and thin capitalisation) rules

2.1 We set out in this section 2 our submissions in relation to certain anti-avoidance rules that were not designed with securitisations in mind. These provisions can affect the availability of deductions for interest paid by securitisation entities (and therefore tax neutrality) and the withholding tax treatment of interest payments. The application of these anti-avoidance rules to securitisation entities is a case of overreach.

2.2 In particular, we submit that:

(a) Restricted transfer pricing rules: Section GC 18 can, subject to certain exceptions, require subordination of debt to be ignored, with the effect that mezzanine or junior notes held by related parties must be priced for interest deductibility purposes as if they ranked equally with senior notes. This rule was not developed with securitisations in mind and is not appropriate in this context. Subordination is fundamental to the structure and purpose of a securitisation, to allow different investors with different risk profiles to hold different classes of notes, priced differently to reflect their seniority. Notes issued by a securitisation entity should therefore be excluded from section GC 18.

(b) Thin capitalisation: It is not appropriate for the thin capitalisation rules to apply to a securitisation entity, which is a funding special purpose vehicle that is intended to be tax neutral. Where the securitisation entity's assets are financial arrangements (such as loans or finance leases), an existing "on-lending concession" addresses this issue. But where the securitisation entity's assets are not financial arrangements (such as where its assets are operating leases), the on-lending concession is not available, and ensuring there is no denial of deductions under the thin capitalisation rules is more complex and can require changes to the commercial funding structure that would otherwise be adopted. Securitisation entities should therefore be excluded from the thin capitalisation rules.

2.3 There is an opportunity to exclude securitisation entities from the restricted transfer pricing rules and the thin capitalisation rules in the Bill. Alternatively, these amendments should be included on the Tax Policy Work Programme or Public Remedials Log so that resource can be allocated to them in the next tax bill. We have not included detailed drafting for these submission points, but can do so if it would be helpful.

Appendix 2: Drafting errors in DFSPV rules (summary table)

	Section and issue	Explanation	Solution
1.	Sections HR 9 to HR 10B, HZ 9 and HZ 10: Use of the term "special purpose vehicle".	The terms "debt funding special purpose vehicle" and "special purpose vehicle" are used interchangeably, but the term "special purpose vehicle" is not defined. This raises the question whether the term "special purpose vehicle" has a different meaning to "debt funding special purpose vehicle", and what that meaning might be.	The term "special purpose vehicle" should be deleted and replaced with, or defined to mean, "debt funding special purpose vehicle".
2.	HR 9BA: Method for electing to be an originator of "attributed assets".	Section HR 9BA(1) does not state the date by which an election to be an originator for attributed assets should be made (subsection (1)(b) refers only to the "first transfer of assets").	Section HR 9BA(1)(b) should refer to the first transfer of assets, or the first date on which DFSPV has attributed assets of the originator.
3.	Section HR 9BAA: Attributed assets recorded in consolidated financial statements prepared by the person.	A beneficiary or shareholder that prepares the consolidated financial statements for a group is ineligible to elect to be the originator of "attributed assets" under section HR 9BAA(3). That is because section HR 9BAA(3)(b) refers only to consolidated financial statements prepared by "another person" (i.e., a person other than the originator). By contrast, section HR 9BAA(2)(b) refers to consolidated financial statements prepared by "the person or by a member of a wholly-owned group of companies that includes the person". This is anomalous.	Section HR 9BAA(3)(b) should be amended by inserting, at the beginning of the paragraph, the words "prepares consolidated financial statements that include the assets referred to in paragraph (a) or".
4.	Section HR 10B: Application to liabilities and other arrangements.	Section HR 10B provides a form of rollover relief where there is a deemed transfer of assets between originators. It should (consistently with section HR 10, which applies on an exit from the DFSPV regime) also apply to a deemed transfer of liabilities or other arrangements (e.g., swaps) between originators. Further, the operation of the provision where an originator changes part way through an income year should be clarified.	Section HR 10B should be amended to apply to liabilities and other arrangements, and to clarify the effective date where the originator changes part way through an income year.
5.	Section HZ 9: Timing of election.	Section HZ 9 (the transitional rule for existing trusts) requires the DFSPV election to be made when the income tax return is filed, whereas section HR 9BA permits an election to be made prior to filing the return. This is anomalous, and creates uncertainty for trusts which (before filing their income tax return) need to adopt GST and withholding tax filing positions. Section HZ 9 should (like section HR 9BA) permit earlier notifications.	Section HZ 9 should be amended as shown in Appendix 3.
6.	Section HZ 10: Application to liabilities, tangible property, attributed assets and assets held at the start of the income year.	Section HZ 10 is intended to provide rollover relief where there is a deemed transfer of assets as a result of an existing trust electing into the DFSPV regime. However, section HZ 10 as drafted does not achieve its purpose because it: • applies only to financial arrangements and excepted financial arrangements that are assets (i.e., it does not apply to liabilities, or to property that is not a financial arrangement or an excepted financial arrangement, such as a motor vehicle or other tangible property to be held by the trust in cases where the receivables are leasing arrangements); • applies only to "transferred assets" and not to "attributed assets". Accordingly, although eligible to elect under section HZ 9 (which expressly refers to "attributed assets"), an existing trust with assets acquired (e.g.) from a third party, may incur an unintended tax cost on entry into the regime. This is anomalous; and • applies only to assets held immediately prior to the election being made (which under current law is at the time the income tax return is filed), rather than to assets held prior to the election taking effect, which will be at the start of the relevant income year.	Section HZ 10(1)(b) should be amended as shown in Appendix 3.

Appendix 3: Proposed drafting (sections HZ 9 and HZ 10)

1. The following amendments should be made to section HZ 9(2) (see row 5 of the summary table):

> An originator makes an election referred to in section HR 9 (Debt funding special purpose vehicles are transparent if election made by originator) for an income year starting on or after the date on which the Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Act 2019 receives the Royal assent by:
>
> (a) before the return of income referred to in paragraph (b), notifying the Commissioner that the originator chooses to have the liabilities and obligations referred to in section HR 9 that the special purpose vehicle would have in the absence of the election; or
>
> (b) returning income derived and expenditure incurred by the special purpose vehicle in their return of income for the ~~an~~ income year ~~starting on or after the date on which the Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Act 2019 receives the Royal assent~~.

2. The following amendments should be made to section HZ 10 (see row 6 of the summary table):

> HZ 10 What happens when election is made under section HZ 9?
>
> *When this section applies*
>
> (1) This section applies when—
>
> (a) an originator makes an election under section HZ 9 that relates to a debt funding special purpose vehicle; and
>
> (b) immediately before the election ~~is made~~ has effect, the special purpose vehicle holds ~~a financial arrangement or an excepted financial arrangement that was transferred to the special purpose vehicle by 1 of its originators~~ property or is party to an arrangement that, immediately after the election has effect, the originator is treated as holding or being party to.
>
> *Originator: stepping in*
>
> (2) For the purposes of calculating the income tax liability of the special purpose vehicle and its originators for the income year ~~in~~ for which the election is made and later income years (the post-disposal periods),—
>
> (a) the relevant originator is treated for the post-disposal periods as if they had acquired and held the ~~financial arrangement or excepted financial arrangement~~ property, or been party to the arrangement, not the special purpose vehicle:
>
> (b) the relevant originator is treated for the post-disposal periods as if they had paid any consideration originally paid by the special purpose vehicle for or under the property or arrangement ~~financial arrangement or excepted financial arrangement~~, and the special purpose vehicle is treated as not having paid that consideration:
>
> (c) the relevant originator is treated for the post-disposal periods as if they had received any consideration originally received by the special purpose vehicle for or under the property or arrangement ~~financial arrangement or excepted financial arrangement~~, and the special purpose vehicle is treated as not having received that consideration:
>
> (d) the special purpose vehicle is, for the financial arrangement, a party that is not required to calculate a base price adjustment, despite section EW 29 (When calculation of base price adjustment required).