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#	Provision	Summary	Detailed comments	Priority
#1	25-90(c) 230-15(3)	Inconsistency between TOFA and non-TOFA taxpayers for section 25-90 type deductions	It is not clear why the reference to "debt interest" is removed in subsection 230-15(3) but not in paragraph 25-90(c). The ATO should clarify if they intend to apply the rules differently for TOFA and non-TOFA taxpayers.	Low
#2	820-46(2)(b) 820-85(2) 820-185(2)	Previously, the thin capitalisation regime recognised entities as inward or outward investors for part of an income year if they met the conditions during that period. The new rules create confusion by not consistently addressing part-year periods, affecting the status of entities and ability to apply relevant exemptions. Under the new rules, an entity can be a general class investor only for an entire income year. However, inward/outward investing financial entities (non-ADI) are still tested by reference to part-year periods. It is unclear how an entity meeting these requirements for only part of the year (e.g. for one day, such as an Australian company incorporating a foreign subsidiary on 30 June 2024) affects their status as a general class investor for the full income year.	The thin capitalisation rules applying the 'balance sheet' method have rules that clearly explain how they apply to part-year periods, see sections 820-120, 820-225, 820-330 and 820-420. These complement the definitions of inward or outward investing entities which can have that status "for a period that is all or a part of an income year" (e.g. see s 820-85(2)). By way of contrast, s 820-46(2) states that an entity can only be a general class investor "for an income year". There is no part year rule that, for example, would require calculation of tax EBITDA modified so that it only takes into account amounts for part of an income year (e.g. debt deductions incurring only during that period). This may be a deliberate policy choice. However, it is not clear from reading the legislation or the explanatory memorandum whether an entity is in fact a general class investor for an income year or not if it only satisfies the inward or outward requirements for only part of the income year. Most relevantly, an entity needs to meet at least one of subparagraphs 820-46(2)(b)(i)-(ii) "for the income year". It is not clear whether this requires the entity to satisfy one of those subparagraphs for one day in the income year or for every day in the income year. There appears to be a disconnect between the language in s 820-46(2)(b) which uses the phrase "for the income year" but the concepts of outward/inward investing financial entity (non-ADI) are defined in sections 820-85(2) and 820-185(2) by reference to "a period that is all or part of an income year". This results in significant uncertainty as it is not clear whether being an outward investing financial entity (non-ADI) for a part-year period (on the assumption that the entity is a financial entity) means that the entity would be considered an outward investing financial entity (non-ADI) "for the income year". For example, an Australian company that incorporates a foreign subsidiary for the first time on 29 June 2024 should be able to understand whether they would therefore become a general class investor for the 2024 income year. Similarly, if the Australian company was first incorporated part-year through the income year (e.g. on 1 August 2023), it needs to be able to understand if it is a general class investor for that year. Similar issues arise if the entity or the "outward" investment ceases to exist before the end of an income year.	High
#3	820-37(1)(a)(ii)	Further to the item above, if it is determined or clarified that an entity can be a general class investor for the income year it satisfies the requirements for part of an income year (or that it can be considered a general class investor for part of the income year), this can lead to inappropriate outcomes for outbound	The revised exemption in s 820-37(1)(a)(ii) raises an issue on the interpretation "for all of that year". In order for an outward entity to avail themselves of the exemption for an income year, they would need to establish that it was an outward investing financial entity "for all of that year". This raises issues for (1) an entity that was created part-way through the income year and (2) an entity that first became "outward" part-way through the income year. It would seem illogical for such an entity to be able to satisfy the exemption in their second year but not their first because it cannot technically satisfy the outward requirement "for all of that year". It is noted that the previous iteration of the provision contained subsection 820-	Critical

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		investing entities which may be unable to satisfy the exception in section 820-37.	37(a) which only required that the entity be an outward entity "for a period that is all or any part" of the income year. It is not clear why the change was made to require this to be satisfied "for all of that year". While there is some room for interpretation of the phrase "for the income year" in s 820-46(2)(b), we are unclear as to the ATO's interpretation of the wording in s 820-37(1)(a)(ii) that the entity be an outward investing financial entity for the entire income year (i.e. due to the use of the word "all").	
#4	820-853	The part-year rules apply inconsistently to the head company of a tax consolidated group or MEC group (as compared to a non-consolidated entity). While the new rules allow a head company to be a general class investor for a part-year period, there are no supporting rules to determine how to apply the FRT or group ratio test for those part-year periods for non-consolidated entities.	Section 820-853 seems to permit the head company of a tax consolidated group or MEC group to be a general class investor for a part-year period, and this is supported by provisions in section 820-581 which covers situations where an entity does not exist for the entire income year. However, it is not immediately clear if and how a part year calculation is to be undertaken (e.g. what is the tax EBITDA for a part year, whether debt deductions incurred in the other part of the year are subject to denial under the general class investor rules). There should not be different outcomes for Australian groups in this regard merely because one is consolidated for tax purposes. Additionally, where the head company is a general class investor for only part of an income year, there are no supporting rules telling it how to apply the fixed ratio test or group ratio test for that part-year periods (e.g. such as the rules in Subdivision 165-B which require taxpayers to divide the income year into 2 or more periods).	High
#5	820-40(1)(a)(i)	Further clarification required regarding the concept of "economically equivalent to interest"	Potential wide scope of application of "economically equivalent to interest" in s 820-40(1)(a)(i) with no requirement for there to be a debt interest. Some examples to consider: - Short-term schemes otherwise excluded under section 974-25 (i.e. those with a term of 100 days or less). - Vendors may offer a discount for prompt payment for goods/services. Should the customer not pay the discounted price it is arguable that the difference is equivalent to interest. Any other costs of goods or services that reflect/pass on/embedded interest-like costs to another party (i.e. fees for service, certain leasing arrangements).	Medium
#6	820-48(3)	Where an entity makes a choice to use the TPDP, the choice is deemed to also be made to an entity that is part of a 'cross staple arrangement'. This definition is extremely broad and does not contain a reference to a MIT, merely common ownership of an asset entity and operating entity. This may inadvertently bring in private structures, for example, a family trust that holds an	The deemed choice for cross staple arrangements may apply to closely-held private structures. The definition of cross staple arrangement is contained in s 12-436, Sch 1 to the *Taxation Administration Act 1953*. This definition requires common (80%+) ownership of an asset entity and operating entity (i.e. one trading entity and one non-trading entity). While section 12-437 then makes certain income non-concessional MIT income ("**NCMI**") of an asset entity that is a MIT, the concept of cross staple arrangement as defined is broad and does not require any of the entities to be MITs or even trusts. Therefore, extending the deemed choice in section 820-48(3) may unintentionally capture private arrangements. For example, a family group may consist of a number of operating	Critical

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		investment property, financed by a bank, and leased to operating companies could be a cross-staple arrangement.	companies and a single unit trust that holds an investment property (that is leased to each of the operating companies). If the trust makes a TPDT election (e.g. because it is only financed by a bank loan) this may result in the operating companies also being deemed to have made a TPDT election despite not providing any security for the trust's borrowings. We do not believe that this is outcome is intended. The rule should be more appropriately targeted to widely-held entities such as managed investment trusts that were the target of the NCMI rules when the definition of cross staple arrangement was inserted into the Act. This is especially so given that an "asset entity" is defined by reference to the public trading trust provisions. Anomalous results may occur for an asset trust that hold only commercial properties (which would be classified as an asset entity) versus another trust whose assets are substantially (but not entirely) commercial property but holds insignificant other "ineligible investments" under section 102M.	
#7	820-50(3)(b)	Further clarification required for items of assessable income (i.e. interest-like and related amounts)	These amounts broadly correspond to the definition of debt deductions in s 820-40(1)(a). However, a notable difference is that there is no provision ins 820-50(3)(b) that corresponds to s 820-40(1)(a)(ii), being the difference between financial benefits received and provided under a debt interest. This could be the discount on a zero-coupon bond. It should be clarified whether a taxpayer who makes a gain from holding a discount security is able to reduce their net debt deductions by the amount of the gain (e.g. whether this is an about that is economically equivalent to interest). Clarity is also required for amounts received through a trust that represent interest income and whether it retains its character as interest income for these purposes. In particular, section 6B of the ITAA36 may achieve this outcome as subsection 6B(2) has a character retention rule for beneficiaries of trusts which applies for the purposes of the entire Act. ATO ID 2007/108 is an example of the application of this provision in a different context. For members of AMITs, "same circumstances" rule in s 276-80(2)(b) may more clearly achieve the effect that amounts of interest income attributed to the member should fit within the definition of s 820-50(3)(b).	Medium
#8	820-52(1)(c)(ii)	Further clarification required when a Division 40 deduction is available "for an entire amount of expense incurred" given the variety of mechanisms used in Division 40 to provide for capital allowances.	Division 40 provides deductions for some items based on the "decline in value" of depreciating assets via section 40-25 with some provisions deeming the decline in value to be the entire "cost" (e.g. section 40-80) or the entire amount of "capital expenditure" incurred (e.g. s 40-540, 40-548, 40-551). Note the use of "expenditure" rather than "expense". Section 40-335 is another example of a deduction being provided for a full amount incurred (for in-house software) where it is scrapped before ever being used. Other provisions directly provide deductions for capital expenditure (e.g. generally those in Subdivisions 40-G, 40-H, 40-I and 40-J). Within those Subdivisions, some expenditure is immediately deductible (e.g. 40-H items, some 40-G items) with others providing deductions over time (e.g. 40-I and 40-J).	Medium

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			Arguably any "decline in value" deductions aren't deductions for an amount of "expense". Other deductions such as s 40-880 (other than the full deduction under s 40-880(2A)) may also be considered deductions for the entire amount incurred (just spread over 5 years). There are also difficulties where some provisions have a "to the extent" test such as s 40-735. If the provision provides a deduction for 99% of an amount incurred due to a 99% nexus than it would not have provided a deduction for the "entire" expense and therefore would not be covered by this exclusion. Further interpretative difficulties arise due to: - The effect of rules that limit cost for Division 40 purposes to be less than the amount actually paid (such as the car limit in section 40-230). - The rules in sections 40-180 and 40-185 which include in "cost" amounts that go beyond amounts paid and liabilities incurred. - The effect of Subdivision 27-B which does not include the asset's cost or capital expenditure the amount paid that gives rise to an input tax credit. Arguably it is the GST-inclusive amount which is the relevant "expense incurred" by the entity and it is only ever 10/11ths of such amounts subject to GST which can be deducted under Division 40. We suggest adopting a term that is already used in FBT legislation, being "once-only deduction". Refer to sections 19, 24, 44 and 52 of the FBTAA 1986 where it is used and section 136 for its definition. TD 93/46 provides some ATO guidance on this concept and clarifies that the term "once-only deduction" means a deduction that is wholly or partly allowable in one year for the expenditure and not in any other year, with a deduction spread over more than once year, such as depreciation on equipment with a life of more than one year… would not be a once-only deduction. This existing concept may achieve the policy intention of the provision and provide more certainty as compared to the new phrasing "entire amount of expense incurred". In particular, tax legislation does not refer to "expenses" incurred and instead refers to losses, outgoings or expenditure incurred. TD 2023/6 considers what is an "expense incurred" in the context of the ESIC provisions and suggests this is an accounting concept. This may mean that depreciation is never "incurred" and also suggests that if for accounting purpose that capital expenditure is not full expense then it won't be an "expense incurred". This may mean the exclusion for "entire amount of expense incurred" is extremely limited, although it may be interpreted differently in a different context.	
#9	820-52(2), (3), (6)	The calculation of tax EBITDA for a beneficiary of a trust may inadvertently not disregard the entirety of a franked distribution, and may only disregard the franking credit component of	The definition of tax EBITDA only disregards Division 207 to the extent that Division results in a franking credit gross-up amount being included in the assessable income of the relevant	Medium

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		franked dividends flowing to the beneficiary through a trust. Currently, the definition of tax EBITDA disregards the "gross-up" portion of a franked distribution (i.e. the amount of additional income that is referable to the franking credit). However, for beneficiaries of a trust, Subdivision 207-B is also the mechanism by which the cash component of franked distribution itself is included in the beneficiary's assessable income. This is currently not excluded so that tax EBITDA may be greater than intended under the policy.	entity. This includes those as a result of direct franked distributions (under section 207-20) as well as franked distributions that flow indirectly (under subsection 207-35(4)). The franking credit gross-up amount is not included in tax EBITDA regardless of whether the franked distribution was made by, or flowed through, an associate entity. In contrast, subsection 820-52(3) only excludes the assessable dividend from tax EBITDA where it is paid to the entity by an associate entity. However, subsection 820-52(6), which deals with distributions flowing through trusts which are associate entities, only Subdivision 115-C (dealing with capital gains) and Division 6 of Part III of the ITAA 1936 is disregarded. No provision is made to disregard Subdivision 207-B which deals with franked distributions that flow indirectly through trusts. The consequence of this is that direct dividends received from associate entities do not appear to be included in tax EBITDA but indirect dividends received via an associate entity trust are. The ATO view on the operation of this section is required. Example – X Co pays a $70 franked dividend to the ABC Unit Trust of which ABC Co is the sole unitholder. In determining its tax EBITDA ABC Co includes the $70 amount (which forms part of its taxable income via section 207-35) but does not include the $30 share of franking credits that flows through to it. ABC Co also receives a $70 franked dividend from Z Co in which it holds 50% of the shares. Neither the $70 franked dividend nor the $30 franking credit gross-up from this Z Co dividend should be included in ABC Co's tax EBITDA.	
#10	820-52(2), (3), (6), (6B), (8)	Further clarification required regarding the effect of "disregarding" certain amounts relating to distributions and franking credits when calculating tax EBITDA, particularly where the entity is utilising tax losses.	It is noted that the word "disregarded" is used in contrast to "subtract" under s 820-52(10). It should be clarified how the use of tax losses interacts with the requirement to disregard certain amounts. For example, if current year taxable income (prior to the use of tax losses) would be positive, it should be clarified whether the disregarding of these amounts means that the amount (before adding back net debt deductions and tax depreciation) cannot be negative. A taxpayer may have $100 of ordinary business income, $100 assessable trust distribution and $100 of net debt deductions for the year, but also has prior year tax losses of $1,000. Prior to applying Division 820, taxable income is nil as a result of utilising $100 of tax losses. If the $100 trust distribution is disregarded, this amount should arguably stay at nil (i.e. $100 business income less $100 net debt deductions, without the need to use any tax losses) rather than become -$100 (i.e. if the $100 amount were subtracted from the nil taxable income after using $100 of tax losses). Following on from this, if net debt deduction of $100 are then added back, the tax EBIDTA should be $100 (i.e. nil plus $100) rather than nil (i.e. -$100 plus $100).	Medium
#11	820-52(6) 820-52(6B)	Unlike the rule in section 820-52(1A), there is no mandated way to apply capital losses and net capital losses for the purposes of working out a tax EBITDA of an entity where capital	It is not clear how disregarding Subdivision 115-C or Division 276 impacts on tax EBITDA as Subdivision 115-C and Division 276 only deem an extra capital gain that is then taken into account in the method statement in section 102-5. They do not directly include amounts in assessable income.	Medium

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		gains that arise via subdivision 115-C or Division 276 must be disregarded.	For example, if a taxpayer has a direct capital gain of $100 and an indirect capital gain (via Subdivision 115-C) of $100 and has $100 of capital losses, if the taxpayer actually chose to apply the capital loss against the 115-C gain under Step 1 in section 102-5, does the "disregarding" of 115-C then deem the application of the capital loss against the direct gain (i.e. because there would be no other gains to apply to the capital loss to) such that tax EBITDA is reduced by $100? Alternatively, because the actual net capital gain only consisted of the direct capital gain that remained after applying capital losses against the 115-C gain, the effect of the disregarding of Subdivision 115-C is that the $100 net capital gain remains and constitutes tax EBITDA. The same considerations arise if the capital gain flow through an AMIT under Division 276. The effect of disregarding Subdivision 115-C and Division 276 should be clarified. This could state that the taxable income or tax loss of an entity may need to be determined (for tax EBITDA purposes) by calculating a notional net capital gain where capital losses are applied to capital gains in a manner consistently with how they were actually applied by the taxpayer.	
#12	820-52(6)(b)	The exclusion of "distributions" from the tax EBITDA of the beneficiary of a trust may be interpreted as also disregarding the capital gains tax ("**CGT**") consequences that occur to the beneficiary directly. For example, the CGT that arises under CGT Event E4 where a unit trust distributes a non-assessable amount to a beneficiary.	Paragraph 1.16 of the Supplementary EM states that this amendment is to ensure distributions from trusts that are associate entities are disregarded in calculating tax EBITDA in the event they are considered ordinary income under section 6-5 in the hands of the beneficiary or member. We believe a broad interpretation of these provisions could also have the effect of disregarding the CGT consequences of trust distributions (e.g. capital distributions). A distribution by a unit trust could result in a taxable capital gain arising under CGT event E4 or E10 for the member. While the comment in the Supplementary EM is useful, we believe the operation of the provision should be clarified.	High
#13	820-52(6B)(a)	Generally, where an attribution MIT ("**AMIT**") makes a distribution to its members, those beneficiaries are treated as receiving this income in the "same circumstances" as the AMIT (for example, as a section 44 dividend rather than a general trust distribution). Where an AMIT holds more than 10% shares in a company, this rule may result in all AMIT beneficiaries, even those with only 1%, being treated as if they had received dividends from a company in which they held a greater than 10% interest. This would result in the dividend being inappropriately excluded from the members tax EBITDA. This may also result in significant compliance costs for AMITs who	The "same circumstances" rule in s 276-80(2)(b) has the effect of putting the member into the shoes of the AMIT. Refer to paragraph 8 of LCR 2015/6. Examples 2 and 4 of the LCR make it clear that section 276-80 does not assess members of AMITs and it is the underlying provision that would apply as if the amount was derived (e.g. section 44 for dividend income). For example, if an entity holds less than 1% of an AMIT and the AMIT holds a 10%+ shareholding interest in a company, the effect of the same circumstances rule could be interpreted to mean that the member of the AMIT may be treated as having received a dividend from a company in which it holds a 10%+ interest and result in that dividend income being excluded from the member's tax EBITDA under s 820-52(3). This outcome would appear to be inconsistent with the proposed amendments. This could also result in significant compliance costs for AMITs as they would have to track and report amounts referable to distributions from subsidiary trusts, companies and partnerships in which they hold an interest of 10% or more. Such amounts may become	Medium

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		would have to track and report a new category or 'character' of income.	"characters" that are required to be treated differently from other amounts due to the effect that they have on the tax treatment of its members. The ATO is requested to clarify the operation of the provisions in this circumstance.	
#14	820-52(7)	For partnerships, the references to the 'tax loss' in calculating tax EBITDA should be treated as being a reference to the 'partnership loss' of the entity instead, as a partnership does not have a tax loss.	For partnerships calculating tax EBITDA, this provision is missing a reference to ensure that a reference to a tax loss which should be treated as being a reference to the "partnership loss" of the entity. A partnership does not have a "tax loss" but has a "partnership loss" under section 90 of the ITAA36. We highlight that subsection 815-310(2) is an example where the modification for partnerships was expressly adopted. This can be contrasted with section 815-305 which only contains a modification for trusts in respect of its net income (i.e. because trusts do make tax losses and no modification for losses was required).	Low
#15	820-52(9)	Time to test associate entity relationship in unclear. For example, if a distribution or dividend is received from a subsidiary, it is excluded from tax EBITDA if the subsidiary is an associate entity. It is not clear whether this is tested only at the time of the distribution or at year end or at any time during the year.	The concept of associate entity in section 820-905 is tested "at a particular time". However, the rules in subsections 820-52(3), (6), (6B) and (8) do not specify when an entity must test whether a company, trust, AMIT or partnership is an associate entity. This may lead to uncertainty where a shareholder, beneficiary or partner is not an associate entity of a company, trust or partnership for the entire income year. For example, if the test is met for one day during the income year, clarity is required as to whether the test is satisfied for the entire income year or period. We also note other provisions in the current set of amendments which may require clarification as to when the associate entity relationship must be tested. These are the provisions that rely on: Section 820-48(2) Section 820-54(5) Section 820-427D	Medium
#16	820-54(2)	The treatment of capitalised interest expenses under the group ratio test is unclear.	Paragraph 134 of the OECD's BEPS Action 4 report states that capitalised interest is to be specifically adjusted for in the net third party interest expense and may be recognised "in the period where the interest is incurred, or as it is amortised over the life of the related asset". It is unclear if the current modifications in s 820-54(1) are intended to specifically include capitalised interest in the year they are incurred as "amounts that are economically equivalent to interest" despite the amounts not being recognised as expenses in the year they are incurred. If amounts of capitalised interest are not included in full in the year they are incurred they would not appear to be captured in later years as they would not be disclosed as interest expenses in those years. Rather, they may be treated as amortisation expenses and instead added back to increase the group EBITDA (denominator) and this reducing the group ratio without ever being including group's net third party interest expense (the numerator).	Medium

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			For example, $100 of capitalised interest expense in year 1 should result in $100 in the numerator and $100 added back to group EBITDA in denominator. When the $100 is amortised over its life it should NOT be added back to group EBITDA as this would unfairly reduce the ratio. Therefore, it should be clarified that net third party interest expenses should include amounts of capitalised interest incurred during the period. Further, the definition of amortisation expenses should thus be amended to specifically exclude amounts of amortisation of capitalised interest expenses.	
#17	820-60(1)-(2)	Registered schemes that hold their property via custodians may be unable to utilise the excess (unused) tax EBITDA of subsidiary trusts, as it requires the trust at each level to be either a unit trust or MIT. The custodian creates a further trust relationship which may itself not be a unit trust or MIT, thereby preventing a transfer of a trust excess tax EBITDA. Modifications should be made to ensure that such interposed custodians are disregarded for these purposes.	Many registered schemes hold their property via a custodian. These creates a further trust relationship. That custodian trust may not itself be a unit trust or managed investment trust. As a result, this may prevent a transfer of a trust excess tax EBITDA amount from a subsidiary trust through to a parent trust where the custodian is regarded as a trust. We note that section 276-115 covers this scenario for AMITs. It applies if "a trust that is a custodian is a member of an AMIT in respect of an income year". Where this is the case, section 276-115(3)(a) ignores the custodian and treats the underlying member as the relevant member of the AMIT. The ATO are requested to comment on the application of this provision.	Medium
#18	820-60(1)(c)-(d) & (2)(c)-(d)	Application of excess tax EBIDTA where controlled entity is not subject to Division 820.	An entity must be a general class investor and not using the Group Ratio Test or Third Party Debt Test in order to be either a controlling or controlled entity for the purposes of the excess attribution rule. It is unclear whether such an entity needs to be subject to thin capitalisation also. The 820-35, 820-37 and 820-39 exemptions only apply to prevent certain disallow debt deductions, but do not generally provide that the Division does not apply to such entities. It should be clarified whether a controlling entity is able to utilise the excess tax EBITDA of a controlled entity that is otherwise able to apply one of the exemptions to Division 820.	Low
#19	820-60(3)	The calculation of a trusts' excess (unused) tax EBITDA does not deal with circumstances where a controlled entity has a substituted accounting period ("**SAP**") that does not align with the controlling entity's own income tax year.	The trust excess tax EBITDA does not specifically consider the situation of a controlled entity having a SAP that does not align to the controlling entity's income year. A notional calculation for the controlled entity might be necessary in such situations or it may be the case that the controlling entity's excess tax EBITDA amount is based on the controlled entity's tax EBITDA for the income year that ends during the controlling entity's income year. Clarification on the application of the provisions in this case is required.	Medium
#20	820-60(3) step 1(b)	Ambiguity in the excess tax EBITDA statement where the controlled entity has FRT disallowed amounts that are not able to be utilised (e.g. because loss tests not passed).	The method statement requires the controlled entity to reduce its FRT earnings limit by the total of its carry forward FRT disallowed amounts, as determined immediately before the end of the income year being tested. It is not clear how this applies where the entity's FRT	Medium

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			disallowed amounts could not be deducted under section 820-56 because it fails to pass the loss rules for companies or trusts (as appropriate). Section 820-59(3) deems the FRT disallowed amount to be zero if s 820-59(4) or (5) applies, but only for a limited purpose, being to determine the amount that can be deducted in that later year. The FRT disallowed amount still exists until the 15-year time period expires and may be deductible in a subsequent year. This "deemed zero" treatment may not extend to the application of section 820-60. Accordingly, Step 1(b) may be interpreted as requiring a subtraction for all prior year FRT disallowed amounts the controlled trust continues to carry forward, even where they may not be deductible. By way of contrast, section 820-58 deems those amounts to be zero for all later income years where a group ratio test or third party debt test choice is made. A sensible view is that the controlled entity is simply required to include in its Step 1(b) amount the deductions it is entitled to claim under 820-56 for the income year and not have to subtract amounts that cannot be deducted.	
#21	820-60(4)	The excess (unused) tax EBITDA of a trust can only be pushed up to 'controllers'. Where a controlled trust has no income (or a loss) for a year, the percentage control of unitholders in the trust may be considered to be nil because there is no income to which a beneficiary is entitled to acquire (the rules take the lower of the percentage rights to income or capital). The ATO is requested to provide its view on how the provisions operate in this case.	The modification to section 351 treating references to "greater of those percentages" to "lesser of those percentages" can result in an unintended outcome where a trust does not have actual income for the year (i.e. a loss year). If a trust has no income for the year of income, then the share of income to which beneficiaries are entitled may be considered to be nil. This type of risk is acknowledged in section 152-78(2) for the purpose of the small business CGT concessions. This may not ordinarily impact a section 351 calculation, as the provision ordinarily requires the greater of the income and corpus percentages to be calculated (thus allowing one to count the capital rights). Where a "lesser of those percentages" is adopted, the ATO is requested to consider how the provision should apply in this case.	High
#22	820-85	It is unclear how the definition of general class investor is satisfied due to the reference to "*outward investor (financial)" being retained.	Amendments were made to section 820-85 through Treasury Laws Amendment (Making Multinationals Pay Their Fair Share— Integrity and Transparency) Act 2024 to correct how one defines a "general class investor". Subjection 820-85(2) refers to a defined term "outward investor (financial)" and then refers to the table *in that subsection*. However, that term was changed and repealed in the same Act. It seems that there is no such term contained in the provisions.	High
#23	820-905(2B)	We believe there may be technical errors in the modifications to the associate rules may result in inadvertent errors. For example, conflicting modifications (i.e. more than one provision) apply to treat associate interest tests	Subsection 820-905(2B) was modified to include a reference to Subdivision 820-AA. The EM to the Amending Act relating to this modification (made under item 100 of the Amending Act) refers to this at paragraph 2.181 as being a part of updating references and definitions throughout Division 820.	Medium

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		as both 10% and 20% at the same time (with one being a TC control interest test and the other being an associate interest test). ATO requested on how these inconsistent provisions are to be applied.	We believe this may be a drafting error. Subsection 820-905(2B) (and (2C)-(2D)) was included in the 2019 amendments to deal with the specific double gearing issue for flow-through entities and therefore only made modifications for specific purposes (broadly, the definition of associate entity debt and associate entity equity) rather than for the purpose of Division 820 more broadly. For example, it did not change the definition of associate entity for the purpose of working out whether an entity is subject to the thin capitalisation rules in the first place (e.g. due to being an associate entity of an outward investor). We do not believe that it is necessary to extend the application of 820-905(2B) to Subdivision 820-AA as that Subdivision does not refer to associate debt or equity. Further, Subdivision 820-AA refers to associate entities in three specific parts, being s 820-48(1)(c)(i) (about which entities are deemed to make a third party debt test choice), subsections 820-52(3),(6) and (8) (about disregarding distributions from tax EBITDA from certain related entities) and subsections 820-54(3)-(4) (about disregarding certain related party transactions in calculating the group ratio). In each of those three parts, there are specific overrides or modifications to the meaning of associate entity, at subsections 820-48(2), 820-52(9) and 820-54(5). Given that these specific modifications are made, we are not sure if there is any purpose to the general modification to Subdivision 820-AA that is made by the proposed amendment to subsection 820-905(2B). This modification causes inconsistencies to arise. For example, subsection 820-905(2B) overrides ss 820-905(1)(a) and (2A)(a) to make the 50% associate interest test a 10% associate interest test, but then subsection 820-54(5) also overrides ss 820-905(1)(a) and (2A)(a) to make the 50% associate interest test a 20% TC control interest test. As there are two potential modifications to the same provision, this will raise questions as to whether the general override applies and then the specific override applies on top of that. Alternatively, the specific override may be the only one that applies. This raises difficult questions of statutory interpretation which lead to unintended outcomes. It is uncertain as to which override is considered more specific. It may be argued that the subsection 820-905(2B) override is more specific that the ones contained in Subdivision 820-AA as they apply specifically to trusts and partnerships, while the other overrides can apply to other kinds of entities. There may be some uncertainty as to how far the subsection 820-905(2B) modification goes. For example, it may unintentionally it affect which entities are subject to thin capitalisation. There could be a taxpayer that is an outward investor that holds 10% in an Australian unit trust. This modification may result in that unit trust now being subject to thin cap because it is considered an associate entity of its 10% unitholder. The definition of general class investor is contained in Subdivision 820-AA, and the extension of subsection 820-905(2B) to Subdivision 820-AA could result in this outcome which does not appear to be intended.	

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			We note that Subdivision 820-AA only has three sections that refer to an associate entity (outlined above) which all contain their own specific modification. In summary, we believe that the amendment in item 100 in the Bill should not have been made, given the specific modifications to the meaning of associate entity contained in the recent amendments and this amendment should be reversed. However, given there may now be competing rules, the ATO are requested to comment on how such competing rules are to apply to any given case.	
#24	820-590	FRT disallowed amounts should be able to be transferred to a MEC group.	No reference is made to "MEC groups" for transfers of FRT disallowed amounts. Section 719-2 only modifies the references to tax consolidated group in Part 3-90 (so that it refers to MEC Groups also) rather than the whole Act. As such, the ability to transfer amounts currently does not apply to MEC Groups. As an example, refer to section 110-35(10)(a) which contains a specific reference to MEC Groups. This is required as it is a provision outside of Part 3-90. This could be corrected by either (1) moving section 820-590 into Part 3-90 (and renumbering it) so that the modification in section 719-2 works properly or (2) modify section 820-590 to ensure that it applies where an entity becomes a subsidiary member of a MEC group in addition to a consolidated group.	Low