

MinterEllison

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BY EMAIL: startuptaxincentive@treasury.gov.au

Jonathan Malone
Principal Advisor
The Treasury
Level 5/100 Market Street
Sydney NSW 2000

Dear Jonathan

Policy Discussion Paper February 2016 - Tax incentives for early stage investors

Minter Ellison is grateful to have been given the opportunity to participate in the round table consultations with Treasury and various industry stakeholders on 19 February 2016 to discuss the Policy Discussion Paper – Tax incentives for early stage investors (**Paper**), as well as the opportunity to discuss the proposed tax incentives in the meeting on 19 January 2016 in our Sydney offices.

Background

I am the head of the Minter Ellison Alternative Investment Group and am a leading private equity, venture capital and financial services industry lawyer with wide experience in local and offshore hedge, private equity and other alternative investment funds. I have over 20 years of experience in the venture capital and private equity industry through working in the industry, advising the industry, as an investor and more recently as an innovator.

As one of Asia Pacific's leading law firms, the Minter Ellison Alternative Investments Group is a proud provider of legal capabilities to the venture capital industry, providing an integrated capability covering all aspects of alternative investments, including fund formation/structuring, offshore fundraising, tax structuring and local or offshore investments.

Submissions

On the whole, we believe that the announced measures to which the Paper related are positive for Australia's venture capital industry, which is an industry that we are passionate about due to the nature of our experience and focus.

We also strongly believe that the consultations that have or will be take place, whether informal, in person or in writing, are the best step towards the policy achieving its intended outcome.

As a result of our experience in advising venture capital and private equity clients, structuring investment funds and investments and both acting for and negotiating with investors, there are two areas of discussion that arise from the Paper on which we wish to submit:



1. No limits on eligible investors in innovation companies

Section 5 'Direct Investment into an Innovation Company' on page 7 of the Paper discusses whether the class of eligible investor into innovation companies should be limited to, as an example, 'sophisticated investors' as defined in the *Corporations Act 2001* (Cth) (**Corporations Act**).

We understand that Treasury is considering restricting eligible investors as a protection to "mum and dad" investors due to venture capital being a high risk investment class. The venture capital industry takes the view that all types of investors should have venture capital available to them as it is an important diversification asset and it is fair that tax credits should be available to all investors and not just wealthy investors. Otherwise, we are concerned that the regime would be seen as a wealthy person benefit.

However, in our view, the issue is self solving as typically the venture capital funds are only available to high net worth investors or institutional investors in any case. We are not aware of any retail investor venture capital focused funds.

Additionally, where "mum and dad" investors do invest, Chapter 6D of the Corporations Act sets out a number of disclosure requirements which aim to protect investors where an offer of securities in a company is made, such as the need to issue a prospectus or other disclosure document and the overriding premise that the issuer of the securities must not include in the disclosure document any misleading or deceptive statements.

Chapter 6D of the Corporations Act also provides some exemptions to the disclosure requirements where the offer is limited to certain persons, including 'sophisticated investors'¹ and 'professional investors'². In our experience the industry tends to self-regulate by structuring the offer to fall within an exemption to avoid the need to prepare a prospectus or other disclosure document which are time consuming and costly.

We submit that restricting eligible investors is unnecessary as the Corporations Act already has appropriate protections where non-'sophisticated investors' are concerned and venture capital companies tend to self-regulate by only making the offer available to limited persons in order to fall within a disclosure exemption. If the regime was limited to non-retail investors we believe it will create an impression that the regime is designed to benefit only the wealthy.

2. Greater flexibility for the permitted vehicles for Innovation Funds

Section 6 'Indirect Investment via an Innovation Fund' on page 8 of the Paper provides, amongst other parameters, that an innovation fund will be a company governed by the Corporations Act.

Based on our in depth experience of the market in Australia, most (if not all) of the investment vehicles used for venture capital funds and private equity funds are either unit trusts³ or incorporated limited partnerships (**Partnerships**).⁴ Both unit trusts and Partnerships offer flow through tax treatment if structured and operated appropriately.

Further, it is extremely rare for any pooled investment vehicle to be structured as a company, whether it is a venture capital, private equity or other fund. We believe this is because investment managers and investors find companies difficult and inefficient to operate for investment purposes as they are far less flexible than units trusts or partnerships given that any restructuring (such as capital raising, cancelling capital or buying back shares) is governed by the Corporations Act whereas with unit trusts and Partnerships, the investors and managers can tailor terms to their needs under the trust deed or partnership deed (as applicable).

Our strong view is that limiting innovation funds solely to companies will discourage investors from investing in those vehicles as they are not familiar with these and they are not suitable for pooled investments. This is because there are a number of complications and legal hurdles to the use of a company as a fund. For example, one cannot redeem shares without complicated buy-back and other procedures which create an administrative burden and in some cases unworkable funds.

¹ See *Corporations Act 2001* (Cth), s 708(8).

² See *Corporations Act 2001* (Cth), s 708(11).

³ Governed by the relevant trust law and case law in each state.

⁴ Governed by the relevant legislation in each state, such as the *Partnership Act 1892* (NSW) in New South Wales.

We submit that the eligible vehicle for an Innovation Fund not be restricted solely to companies in order to allow Innovation Funds to be structured as unit trusts or Partnerships as these vehicles are preferred by the industry due to their familiarity and ease of use. We so no benefit to the industry nor government in making such a restriction however if the restriction were to apply we could see it making the regime less useful and less used.

Further information

If you would like to discuss any aspect of our submission, please do not hesitate to contact me (nathan.cahill@minterellison.com; 02 9921 4933) or Robyn Coote (robyn.coote@minterellison.com; 02 9921 4289).

We also look forward to participating in consultations regarding the draft legislation and explanatory memorandum regarding the proposed tax incentives.

Yours faithfully
MinterEllison



Partner: Nathan Cahill
nathan.cahill@minterellison.com
T: +61 2 9921 4933