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Law Council
OF AUSTRALIA
*Business Law Section*

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Mr Robert Raether
Division Head
Corporate and International Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

**By email:** CIVwithholdingtax@treasury.gov.au

Dear Mr Raether,

**Collective Investment Vehicle Non-Resident Withholding Taxes**

The Tax Institute and the Business Law Section of the Law Council of Australia (together the **Joint Bodies**) welcome the opportunity to make a submission to the Treasury in relation to the *Collective Investment Vehicle Non-Resident Withholding Taxes Consultation Paper* (**Consultation Paper**).

**Summary**

Our submission below contains a proposal for Treasury to consider in designing the non-resident withholding tax regime for collective investment vehicles

**Discussion**

1. Overview

Over the past decade, the Australian government has taken steps to implement the policy settings to make Australia a 'financial services hub' in the Asia Pacific region. This has included implementation of a number of tax and revenue policy initiatives as detailed in Appendix B of the Consultation Paper, to drive foreign investment into the Australian funds management industry[1].

To further attract foreign investment into the funds management industry, there should be an internationally competitive, fully-transparent investment vehicle offered by Australia which foreign investors can utilise for the purpose of foreign investment into the Asia Pacific region.

[1] Including establishment and management of funds in Australia

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Ideally, the vehicle should offer equitable tax treatment in Australia for foreign assets held on behalf of foreign investors with no (Australian) tax leakage comparable with similar tax treatment for foreign investors in foreign assets via vehicles available in other jurisdictions. Foreign investors should not be disadvantaged by choosing to invest in an Australian fund compared with an offshore fund investing in the same assets. Where foreign investors are able to use a foreign fund or investment vehicle to obtain a better tax outcome than what is achievable using an Australian vehicle then they will simply do so.

It is particularly important that the withholding tax regime eliminate any bias between how investors will be taxed in Australia on investments made through a foreign fund and through a domestic fund. As noted in the Consultation Paper, the Investment Manager Regime (**IMR**) currently provides tax exemptions for widely held foreign funds investing in certain Australian portfolio investments.

Foreign investors in such Australian tax resident vehicles should also be able to access tax relief under Australia's double tax treaties (where applicable) on distributions from the vehicle if required.

Complicating factors such as the treatment of certain classes of income and reconciling the differing applicable rates of tax should be addressed in the withholding tax system to apply to non-resident investors in Australian collective investment vehicles (**CIV**).

2. Design of the CIV non-resident withholding tax regime

The design of the CIV non-resident withholding tax regime should be as simple as possible, leverage off the existing system to the extent possible rather than creating an additional regime, and should address (and if possible resolve) any existing areas of complexity.

a) Nature of the investment vehicle

The nature of the investment vehicle offered by Australia should have similar characteristics to a vehicle that is regarded as a "Passport Fund" for the purpose of the Asia Region Funds Passport. However, simply restricting eligibility to funds that qualify as a Passport Fund is problematic because it would be unnecessarily restrictive. Rather than requiring the relevant CIV to qualify as a Passport Fund, we suggest that Treasury require the new vehicle to make only the same types of investments that a Passport Fund can make as a precondition to accessing the tax concessions[2]. This will ensure the Australian CIV is a comparable fund to a Passport Fund and will avoid any unintended consequences of directly linking the two concepts.

This is likely to require a new definition of 'CIV eligible investments[3]' to be inserted into the Australian tax law. This will serve as an integrity measure to ensure that the investments of the Australian vehicle, which may be allowing foreign investors to access favourable tax treatment under the CIV withholding regime, are restricted in scope.

[2] We suggest as an alternative that vehicle would get the concessions only for the specified investments and would be taxed normally for any other investment. However, this would likely create complexities (for example in relation to allocation of expenses).

[3] Which will be limited to cash, deposits, equities, derivatives and bonds

b) Applicable rates of tax

The Joint Bodies consider that a withholding rate of tax of zero per cent could apply on distributions from the Australian CIV to foreign resident interest holders, except to the extent that the distribution from the CIV is comprised of unfranked dividends and interest[4]. In the case of the former categories, the withholding rates specified under current Australian law should apply - 30% for unfranked dividends and 10% for interest (as reduced by any applicable treaty). The current MIT withholding rates should apply to income and gains from real property.

c) Integrity measures

Certain integrity measures should be put in place to ensure the relevant CIV meets certain requirements before a foreign investor is able to access the favourable (zero) withholding rate. We suggest these requirements include:

i) that the Australian CIV be an Australian tax resident; and
ii) that substantial management of the Australian CIV occur in Australia ensuring a certain level of management fees will be derived by the Australian CIV and retained in Australia. This may require a specific transfer pricing rule to be put in place to assist taxpayers to determine an appropriate level of management fees in order to satisfy this requirement.

The Joint Bodies would be more than happy to discuss this submission further with Treasury in due course.

If you would like to discuss any of the above, please contact either Clint Harding on (02) 9226 7236 for the Business Law Section of the Law Council of Australia or Tax Counsel, Stephanie Caredes, on 02 8223 0059, for The Tax Institute in the first instance.

Yours sincerely

**Arthur Athanasiou**
President
The Tax Institute

**Teresa Dyson, Chair**
Business Law Section
Law Council of Australia

[4] Unfranked conduit foreign income sourced dividends should get a zero rate. Also the 10% interest withholding tax should apply only where interest withholding tax would normally apply i.e. to payments by an Australian enterprise as in current section 128B of the *Income Tax Assessment Act 1936* (Cth)