

CONSULTATION – TREASURY LAWS AMENDMENT (MAKING SURE FOREIGN INVESTORS PAY THEIR FAIR SHARE OF TAX AND OTHER MEASURES) BILL 2018: INTEGRITY MEASURES

1. INTRODUCTION

Perpetual Corporate Trust (“PCT”) thanks Treasury for the opportunity to provide an additional submission in relation the *Treasury Laws Amendment (Making sure foreign investors pay their fair share of tax and other measures) Bill 2018: Integrity Measures* (“the Integrity Measures”).

Our submission represents the views of PCT only and should not be taken to be indicative or representative of the view of the broader Perpetual Group. Our comments are provided from the perspective of PCT’s role as Trustee for a portfolio of Attribution Managed Investment Trusts and Managed Investment Trusts (“MITs”) that represent some \$55 billion in property and infrastructure assets acquired by the Trustee, on behalf of some of the largest global institutional investors, including sovereign wealth funds and foreign pension funds.

We have a number of concerns with the Integrity Measures as currently drafted, which we address in Section 2 below.

2. OUR CONCERNS

As we have noted in our previous submissions in relation to the broad suite of integrity measures that have been proposed to address Treasury’s concerns regarding the use of stapled structures to recharacterise trading income as passive income, objective evidence as the nature and extent of this issue has not been tendered. Additionally, we have submitted that Australia is a net importer of foreign capital and must remain a jurisdiction that welcomes foreign investment, as it cannot be assumed that domestic investors will substitute for foreign investors if the latter deem Australia as a less stable and reliable jurisdiction in relation to the tax rules applicable to foreign investment. Whilst Australia does indeed offer access to well developed capital markets and opportunities to invest in diverse assets, it should not be assumed that the nature of underlying exposures on offer are unique to Australia and that similar opportunities are not available in other jurisdictions.

The availability of comparable opportunities offshore can be illustrated with reference to the third Global Infrastructure Investment Index¹. Australia’s relative ranking out of 41 jurisdictions has consistently declined since the first index was published, ranked 11th most attractive in 2016 compared to 8th most attractive in 2012. Jurisdictions that are consistently rated more highly than Australia include Singapore, Canada, Qatar, the UAE, Norway, Sweden, Malaysia, UK, USA and the Netherlands, some of which offer infrastructure investment opportunities that are comparable to Australia; at a similar or lower country risk profile.

It should also be noted that, according to the *International Tax Competitiveness Index 2017* (ITCI), whilst Australia ranked seventh out of 35 countries in terms of overall tax competitiveness, Australia ranked 17th out of 35 for competitiveness of its International Tax System and 31st out of 35 in relation to the relative competitiveness of withholding taxes. The proposed changes are likely to further undermine the relative competitiveness of Australian withholding taxes. Moreover, the authors of the ITCI make the following observation, which PCT believes is particularly pertinent when considering the Integrity Measures and the Bill.

¹ Arcadias (2016) *Third Global Infrastructure Investment Index Bridging the Investment Gap*

International tax regulations often have the effect of making countries with uncompetitive tax structures even less competitive. These regulations place substantial burdens on companies and require them to shift valuable resources away from production and toward accountants and tax lawyers².

PCT believes that reliance on existing arm's length income rules that are applicable to MITs and AMITs, coupled with the existing broad anti-avoidance mechanisms available to the Commissioner are sufficient to mitigate the risk that stapled structures are being used to recharacterise trading income as passive income and submits that this approach is vastly preferable to the complicated set of requirements that have been articulated in the Integrity Measures and the draft Bill.

In the context of the Integrity Measures as currently drafted, PCT believes:

- i. Only the arm's length income rule should be imposed as a condition for accessing the grandfathering provisions, recognising that all existing arrangements would have been struck with the general anti-avoidance provisions already in mind and, for MITs, would have assessed or established arrangements for compliance with the arm's length income rules at the time that these were explicitly introduced.
- ii. The qualified grandfathering that is contemplated raises the spectre of sovereign risk, with attendant reputational damage on the Australian economy as a stable and reliable jurisdiction for foreign investors. That certain tax rules are being changed mid-stream is substantially magnified based on the conditional nature of grandfathering concessions.
- iii. PCT is concerned with the progressive release of the proposed changes. The release of multiple legislative packages for consultation within a short timeframe has made it challenging to establish an end to end holistic overview in relation to the integrity measures. We are also concerned that the short timeframes have not provided Treasury with sufficient time to fully explore concerns put forward by market participants, or to appropriately establish the true costs and benefits to the Australian economy that are likely to arise if the proposed measures are implemented in their current form.
- iv. Each round of legislative package exposed has resulted in escalation of tax administration complexity, which will come at considerable increases in cost to market participants and the increased requirement to rely on third party experts to ensure tax compliance obligations are satisfied. The complex interactions and the introduction of additional tax character types to apply at calculation stage, but not apparently at reporting stage renders these changes particularly difficult and costly to operationalise in Fund Administration systems, leading to manual workarounds and a heightened requirement for support from professional tax advisers. PCT believes the approach that has been articulated in the draft integrity framework does not facilitate economic efficiency and is inconsistent with the stated policy objectives of reducing red tape that impedes the efficient operation of the Australian economy.

3. CONCLUSION

PCT believes that the Measures provide for 'conditional grandfathering' and in doing so, are layering up on complexity and cost in relation to tax administration for stapled structures. PCT submits that these requirements as currently drafted impose significant administrative costs, which is inconsistent with the Federal Government's commitment to reducing red tape. We contrast this approach with the changes that were implemented to the MIT withholding eligibility requirements in 2010, where existing structures were provided with a seven-year grandfathering period and believe that existing structures that were established in reliance of professional tax

² Pomerleau K, Hodge S & Walczak J (2017) *International Tax Competitiveness Index* Tax Foundation, Washington DC, p25.
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advice in relation to compliance with existing laws should not be subject to complex grandfathering rules.

More concerning is the proposed conditional grandfathering magnifies issues of sovereign risk, given the proposed rules apply retrospectively to existing arrangements, with no opportunity provided to restructure existing arrangements to introduce an objective method for determining annual rent if this is not already addressed in lease or related documents. Moreover, PCT challenges the notion that an objective test can be formulated in these instances, recognising that privatised infrastructure facilities for all intents and purposes are regional monopolies and outputs produced by one facility are not substitutable for outputs produced by another.

Finally, PCT believes that the complete framework in relation to application of the integrity measures should be exposed for Consultation once Treasury has articulated the final legislative package, so as the end impacts can be assessed from an end to end perspective. In exposing the complete framework, PCT also encourages Treasury to explicitly publish and assess the costs to comply, recognising the changes proposed are not straightforward, lack clarity in drafting and work contrary to the stated objective of Government to reduce red tape that works counter to the efficient and effective operation of the Australian economy.