Mr Brendan McKenna
Corporate and International Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

14 August 2018

By email: stapledstructures@treasury.gov.au

Exposure Draft Law: Stapled structures – Integrity conditions for transitional rules and infrastructure concession

Dear Brendan

PricewaterhouseCoopers (**PwC**) welcomes the opportunity to make a submission to Treasury on the Exposure Draft (**ED**) legislation and accompanying draft Explanatory Memorandum (**EM**) (*Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax and Other Measures) Bill 2018: Integrity Measures)* released for comment on 7 August 2018.

The intention of our submission is not to cover detailed technical points but rather to highlight a few key issues noted below. Note that we have already discussed some issues with you and your team subsequent to the release of the Integrity Measures Proposal Paper by Treasury on 28 June 2018 (the **Integrity Measures**). We would be happy to discuss any of our submission points with you further.

Submission 1: Make it clear that only the "excess" amount of excepted MIT CSA income will not benefit from the approved economic infrastructure facility exception or the 15 year MIT cross staple arrangement income transitional rule

Proposed section 12-451(2) of Schedule 1 of the *Taxation Administration Act 1953* provides that to the extent that the excepted MIT CSA income exceeds the concessional cross staple rent cap (the **Cap**), then the approved economic infrastructure facility exception or the 15 year MIT cross staple arrangement income transitional rule do not apply to "*the amount of the *managed investment trust's excepted MIT CSA income".*

As currently drafted the section implies that the entire amount of the excepted MIT CSA income will not benefit from the 15% MIT withholding tax rate for the relevant period. This outcome is inconsistent with the policy objective where only the excess rent should be subject to the higher MIT withholding tax rate (currently 30%).

The draft EM at paragraph 1.43 and 1.44 confirms that the intent of the proposal is that only the *excess* excepted MIT CSA income will not be able to benefit from the 15% MIT withholding tax rate and that only the *excess amount* will be subject to MIT withholding tax at the corporate tax rate (currently 30%).

We suggest that proposed section 12-451(2) be redrafted to make it clear that only the amount in excess of the Cap will not be able to benefit from the approved economic infrastructure facility exception or the 15 year MIT cross staple arrangement income transitional rule. This would be consistent with the policy intent, the draft EM and the language in the "Non-arm's length income rule" (**NALIR**) rules contained in Division 275 of the *Income Tax Assessment Act 1997 (Cth)*.

Submission 2: Updates to sublease pricing methodology between 27 March to 28 June 2018

The initial Treasury paper on staples was publicly released on 27 March 2018 with transitional relief applicable to investments held (or committed to) at that date. The details of the Integrity Measures, which were released for consultation on 28 June 2018 (i.e. approximately three months later), are also effective from 27 March 2018.

Some taxpayers have, as a result of the NALIR rules being applicable to them from 1 July 2018, repriced their cross staple rent during the period 27 March to 28 June 2018 (or 30 June 2018) to satisfy the NALIR requirements.

As the details of the Integrity Measures were unknown before 28 June 2018, those affected taxpayers should be allowed to retain that revised rental methodologies for the purposes of proposed section 12-452 of Schedule 1 of the *Taxation Administration Act 1953*.

Submission 3: Policy rationale for expense allocation

In the context of proposed section 12-454 of Schedule 1 of the *Taxation Administration Act 1953*, the policy rationale for requiring expenses to be firstly allocated to amounts of assessable income that are "*not* MIT cross staple arrangement income" (i.e. concessional MIT income) before any allocation to amounts of assessable income that are MIT cross staple arrangement income (e.g. the amount of rental income in excess of the Cap) is not clear.

The Attribution Managed Investment Trust (**AMIT**) regime (and the Asset Management industry more broadly) relies on a fair and reasonable allocation of expenses. The policy objective for having a statutory ordering rule is unclear to us.

If the policy is to ensure that there is statutory guidance on the expense allocation such that taxpayers cannot allocate all expenses first to MIT cross staple arrangement income, we suggest that a fair and reasonable basis is adopted.

Submission 4: For 15 year MIT cross staple arrangements subject to the transitional rules, the excepted MIT CSA income should be the higher of NALIR and the Cap or at least equal to the NALIR

As set out above, under the proposed rules, where the excepted MIT CSA income is calculated in accordance with the NALIR and the amount calculated under the NALIR is higher than the Cap, the amount in excess of the Cap will be subject to the MIT withholding tax at the corporate tax rate.

Taxpayers must essentially take the lower of the Cap and the NALIR for the purposes of determining the expected MIT CSA income. This would seem incongruous with the original policy intent and administrative guidance released by the ATO providing that all cross staple arrangements are required to be priced on arm's length terms.

In addition, given the range of different rent calculations in the market there is a risk that the Cap set by reference to a methodology in existence at a static historical date may disadvantage some taxpayers compared to others. For example, it will not be possible for taxpayers to increase the cross staple rent up to the NALIR (which as mentioned above is consistent with previous guidance administered by the ATO).

We suggest that the excepted MIT CSA income for 15 year MIT cross staple arrangements subject to the transitional rule should be the higher of the Cap and NALIR or be at least be equal to the NALIR. We also suggest that the ATO provide further guidance with respect to administration of the NALIR to MIT cross staple arrangements subject to the transitional rules.

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We look forward to the opportunity of discussing our submission with you in further detail. In the interim, if you have any questions please contact us.

Yours sincerely,

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Partner

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