20 April 2017

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

Email: Stapledstructures@treasury.gov.au

Stapled Structures Consultation Paper

AMP Capital Investors Limited (AMP Capital) welcomes the opportunity to respond to your request for comments on the Stapled Structures Consultation Paper published 24 March 2017.

AMP Capital is a leading global investment manager with approximately $165 billion in funds under management. Our investments traverse the spectrum from direct investments in real estate and infrastructure to fixed income, global equities and multi asset solutions. We have an extensive global investor base, comprising domestic institutional investors such as superannuation funds and life insurance companies as well as foreign institutional investors and sovereign funds.

One of our primary objectives as a fund manager is to achieve returns for our investors in line with our clients' mandates. A critical element of any investment decision is a risk assessment including consideration of certainty of outcomes in relation to investment structures and taxation. For this reason we are pleased to participate in this consultation process and view it as an opportunity to work collaboratively with Treasury towards enhanced certainty for our investors.

The case for reform

While Australia has well developed taxation laws, we acknowledge that in recent years some of the provisions in relation to the taxation of passive income may no longer provide the certainty investors seek. The application and administration of such provisions are presenting significant challenges to market participants as well as the ATO as regulator.

Whilst the broad scope proposed in the Consultation Paper is commendable, our experience is that the current law to date has provided an acceptable level of certainty for the property sector. In contrast, our experience in the infrastructure sector, particularly around some of the ATO's concerns and interaction with the FIRB approval process, has given rise to a level of uncertainty for all participants, and we would welcome this being addressed through the consultation process.

The consultation process

We thank Treasury for initiating this consultation process and are pleased to note the acknowledgement that once the public consultation process is concluded, further consultation may be necessary.

We are of the firm view that further consultation beyond 20 April 2017 is essential before any policy decisions are made, as the consultation covers a highly complex field touching many stakeholders. Any changes have the potential to have a significant impact on existing investments for both domestic and foreign investors and Australia's attractiveness as an investment destination in respect of potential future investments and investment allocations.

Our response

We would be pleased to work with Treasury during an extended consultation process and believe we can offer a balanced perspective arising from our mix of domestic and foreign investors and global funds management experience.

In the interim, we have summarised below our initial observations in response to the Consultation Paper.

More consultation required

Given the short timetable for the current consultation, it is essential that Treasury engage in further consultation in order to carefully evaluate the alternatives in light of policy objectives.

Whilst engaging in further consultation may prolong the current uncertainty which impedes investment, we believe a more comprehensive consultation over a 12 month period will provide a better outcome and reduce uncertainty in the longer term, while reducing the risk of any unforeseen consequences.

Current uncertainty in the market should be resolved through careful and deliberate evaluation of the policy objectives, the alternatives available and the impact on relevant stakeholders. The proposed implementation of such policies should be telegraphed in a deliberate manner so that investment decisions can take account of the current and proposed policies.

Grandfather existing structures

Grandfathering is required for existing stapled structures in respect of real property and infrastructure to provide the certainty that investors expect, and to maintain Australia's reputation as a stable investment destination. Whilst Treasury has noted potential concerns about potential future growth of grandfathered investments, such concerns could be addressed through limitations on future expansion.

Any change in taxation of existing investments, irrespective of whether there is a transitional period, will create instability in investment markets and may significantly impact all investors. There may be material reductions in asset values and impediments to existing financing and refinancing. Furthermore, the potential restructuring of existing assets is likely to be commercially infeasible due to the number of consents required from equity co-investors, financiers, a multitude of counterparties and significant transaction costs including stamp duty.

Prospective rules for property

The current framework and tax policy settings for the taxation of REITs should be preserved as they operate as intended and were only recently updated through a comprehensive consultation process. This includes retention of the use of stapled structures for REITs with active and passive operations, tax flow-through treatment of passive income, the existing integrity measures around cross staple arrangements including the MIT non-arm's length rule and s974-70/80 in the debt/equity rules, the ability to elect into the AMIT regime, and the MIT withholding regime for non-residents.

To the extent that additional consultation identifies enhancements to the current regime such as the refinement and modernisation of Division 6C we would welcome the opportunity to consider and comment upon such enhancements.

In response to the suggestion of introducing a REIT regime based on overseas models, we are of the view that this would not fit in the Australian market and should not be adopted. Australia's well developed REIT market allows value creation through the ability to operate an aggregated business within the existing framework which would not fit easily within overseas REIT models.

Prospective rules for infrastructure

There is currently uncertainty in the infrastructure sector around which assets the ATO considers are capable of being held in stapled structures and we would welcome legislative reform to increase certainty in this area.

It is important for Treasury to undertake a holistic review and make a clear policy decision about how infrastructure investments should be taxed. Once this is determined, there are a number of ways the law could be reformed to provide certainty and each should be carefully considered. For example, there could be a codified definition of infrastructure including:

- Traditional infrastructure such as water, electricity, gas, telecommunications or sewerage facilities, railway facilities, roads or other transport facilities, including privatised infrastructure and critical infrastructure.
- Infrastructure for public benefit such as health and education facilities, correctional facilities and waste processing facilities.
- New infrastructure assets which may arise as a result of technological developments, subject to approval by Treasury or another qualified body such as Infrastructure Australia.

Such infrastructure as defined could be specifically excluded from targeted integrity provisions (permitted staples) or included in the definition of eligible investment business in Division 6C.

Consider targeted anti-avoidance provisions

We acknowledge the ATO's concern with re-characterisation of income through inappropriate use of stapled structures, including the expansion of stapled structures to synthetic or royalty arrangements unconnected with real property or infrastructure. We consider that these could potentially be addressed through targeted anti-avoidance provisions.

Offshore comparisons may not be apt

The Consultation Paper draws on a number of examples from foreign jurisdictions in considering various policy options. Whilst of interest, we urge Treasury to use caution in assuming these are appropriate to apply in the Australian context given the differences between Australia and these foreign jurisdictions. Our needs in terms of future investment in real estate and infrastructure are unique and Treasury should have regard to this in forming policy designed to stimulate economic growth and job creation, rather than just having a potential focus on levelling the international playing field around taxation laws.

Based on our experience of investment in these locations, the international comparisons of available incentives do not appear to be comprehensive. For example, many jurisdictions have flow through Limited Partnership structures which are well understood and can often be used to hold both real property and infrastructure investments. If such comparisons are to be made, we recommend additional research be undertaken to avoid any inappropriate conclusions.

Consider the impact on foreign investment

The potential impact on foreign investment in Australia as a result of policy changes should be carefully considered, particularly as foreign investors have choices and foreign investment is mobile. Foreign investment in Australia affects not only the supply of foreign capital, but also the pricing for domestic assets which affects domestic investors, secondary markets, and the availability of suitable consortium members to invest along-side Australian investors.

Conclusion

We look forward to the outcome of this stage of the public consultation and in due course the additional consultation given the complexity of the issues. We view this as a welcome opportunity for Treasury to provide certainty where needed for both domestic and foreign investors in Australian real property and infrastructure assets.

If you have any questions in relation to our submission, please contact Kelly Heezen, Senior Tax Counsel, AMP Capital on +61 2 9257 1673 or at kelly.heezen@ampcapital.com.

Yours sincerely

Carmel Hourigan
Global Head of Real Estate
AMP Capital Investors Limited

Yours sincerely

Boe Pahari
Global Head of Infrastructure Equity
AMP Capital Investors Limited