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20 April 2017

Dear Sir / Madam

***RE: Treasury Consultation – Stapled Structures – March 2017***

We refer to the Treasury Consultation – Stapled Structures paper dated March 2017 (the "Paper"). The purpose of this letter is to provide some comments in respect of the Paper by the proposed feedback date of 20 April 2017.

**Background**

The Adani Group manages and operates the Abbot Point Coal Terminal which it acquired from the State of Queensland in 2012. In addition it proposes a substantial number of multi-user projects either in the pipeline or in the development phase in Australia including the Carmichael Coal Mine, North Galilee Basin Rail Project, the Abbot Point Coal Terminal expansion, water, airports, renewables and agriculture investments. All of these projects will contribute immensely to the growth in employment and the overall economy of Australia.

The Adani Group is in the process of committing substantial capital to Australia to fund its business plans in a number of different areas as outlined above. These investments are considered economically important and vital to the Australian economy.

In this regard, the Adani Group is in the final feasibility stage for many of the investments and this includes finalising organisation structures to be adopted, securing debt funding for the proposed projects and also reaching contractual terms with various parties for construction, and other commercial matters. The Treasury consultation on stapled structures is of major concern to the Adani Group given the uncertainty it creates and that it could potentially result in delays or deferrals of its projects.

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## Submission

We note that the Paper seeks stakeholder views on potential policy outcomes in relation to stapled structures, the taxation of real property investments and the re-characterisation of trading income. This submission does not address the issue of the taxation of real property investments (i.e. A-REITS).

As introductory comments, we wish to note that the timeframe to provide feedback and consider meaningful change is very short and does not provide sufficient time for comprehensive consideration. Further, the breadth of the issues raised do require detailed holistic review and there is great risk that changing one aspect could result in unintended and inequitable outcomes. In this respect, we consider there are a number of key guiding principles which should be observed in this consultation process. These are as follows:

- Needs to be a clear recognition that Australia requires access to capital from all sources to fund its future growth and prosperity.
- The laws must ensure Australia is an internationally competitive location for investment for both foreign and Australian investors.
- There must be a level playing field between foreign and domestic investors and the tax laws should not create a bias (i.e. the tax laws should not unnecessarily favour one type of investor over another).
- Sovereign risk issues are paramount in that Australia must maintain its reputation as a safe place to invest (particularly when this consultation can be seen as unwinding previously endorsed structures).
- There is a need for certainty both for past structures and any future investments. In this respect, the use of the general anti-avoidance rules in Part IVA as a "boundary keeper" is not sustainable.
- There is recognition that there needs to be protection and safe guarding of the Australian tax revenue base.



Having regard to the above introductory comments, we wish to outline our submission on the following matters:

1. There is an acute need to retain stapled structures in order to be able to attract capital to fund key infrastructure and other priority areas.
2. Any changes announced should include specific carve outs and in this respect there should be a specific carve out for privatisations (including privatisations of greenfield infrastructure).
3. Other specific carve outs.
4. If any changes are announced, then it is essential that there are appropriate transitional or grandfathering measures for existing structures.
5. The sanctions to be applied for non-compliant structures.
6. It is essential that any announcement made provides certainty for existing structures and certainty in respect of the treatment moving forward.

#### **Submission 1 – Need to Retain Stapled Structures**

Australia has actively supported both foreign and domestic direct investment into critical asset classes such as infrastructure through its tax policy for over 10 years. This policy manifests itself in the transparent taxation of trusts and the concessional MIT tax regime (where applicable). The policy has been hugely successful in achieving its intended purpose, with substantial foreign direct investments made over this period and substantial institutional investment in privatised government assets (\$60 billion in FY16 alone).

As other developed countries lower their corporate tax rates and offer incentives (e.g. the UK 17%, Singapore 17%) to attract this mobile capital to fund critical infrastructure assets, continuity and certainty in respect of this policy is now, more than ever, of the highest priority. In this respect, there is a large pool of strategic stakeholders and committed capital which are exposed to any policy changes. Importantly, for the Adani Group it is particularly impacted given its planning and modelling has been undertaken on the basis of the existing law. Any potential change in law has the potential to delay its proposed plans and commitments.

Whilst we agree that there may be certain limited arrangements that go beyond the scope of the original policy intention for stapled structures (e.g. royalty staples and



synthetic staples) and administrative action alone is insufficient to protect the tax base, we consider other traditional forms of stapled structures, such as rent from real property, to generally be within the original policy intention. Moreover, the risk to Australia's revenue base in respect of these arrangements is adequately protected through existing safeguards, such as the arm's length, thin capitalisation and transfer pricing rules.

It should also be appreciated that there are many non-tax reasons for the use of stapled structures which should not be ignored in consideration of the policy to be applied in respect of stapled structures. These include the financing benefits of flow through trusts (i.e. the debt sizing and covenants are improved), ensuring that there are no dividend or franking traps in the structure, ensuring that there is separation for potential future realisations and to limit legal liability and protect assets from third party claims.

### **Submission 2 – Specific Carve Outs for Privatisations**

Any changes announced should include specific carve outs and in this respect there should be a specific carve out from any changes for privatisations, including privatisation of greenfield infrastructure. This is because these areas are considered consistent with the original policy intent and in this respect, we note the following:

- Many of the privatised stapled structures involve very land intensive businesses which are commonly comprised of 80% or more land including improvements to land. In this regard, the income received is primarily some form of usage charge or payment for space/land/improvements with only a small "service charge" component.
- These investments are consistent with Government policy of encouraging private investment into infrastructure so as to ease the public funding needs, provide funds for further Government investment and improving the operation and efficiency of these assets. Therefore, there are long-term social and economic benefits for the Australian economy from the privatisation of these assets. The policy needs to be set to attract capital to meet the "infrastructure funding gap".
- These investments are made for long term periods (i.e. generally around 99-year leases), subject to specific assumptions being made and modelled and also those assumptions remaining applicable over the term of the investment. In this respect, the assets are acquired pursuant to a competitive bid process where prices are set to provide equity returns consistent with a low-risk investment and under the

assumption of a stable tax environment over the 99-year lease period, thereby minimising risks.

- These structures are previously endorsed structures for privatisations in Australia and to our knowledge the Australian Taxation Office (“ATO”) have consistently and proactively assisted with the adoption of stapled structures by investors in a privatisation context over an extended period of time. In this respect, sovereign risk issues are paramount in determining any changes in that Australia must maintain its reputation as a safe place to invest in order to continue to attract both foreign and domestic capital.

### **Submission 3 – Other Specific Carve Outs**

In addition to the proposed carve-out for privatisations, it is also considered that there should be a series of other carve outs. These include situations where there are land intensive businesses which are receiving a usage charge or payment for space, situations where there is an observable market for the renting of assets to third party operators and finally businesses which involve critical infrastructure. We consider each of these in turn below.

- A range of transactions should be carved out on the basis of a broader definition of “eligible investment business” than deriving rent from investing in land. That broader definition could be based on “a concept of deriving income from the use of space/land/improvements”. The types of activities that might then be a new class of eligible investment business should include rail infrastructure, renewables and similar transactions where the type of income derived is typically a licence fee income or other contractual payments for the use of land/improvements to land. In this respect, this would also overcome concerns that have been raised in respect of dealing with the statutory severance of assets affixed to land.
- Rental staples should be permitted for transactions where there is an observable market for the renting of those types of assets to third party operators. The examples of transactions that might fit this requirement might include agricultural land leased across a staple or renewable assets leased across a staple. In respect of its various assets in Australia, including various critical infrastructure (rail, ports, etc.) and renewables, we note that the Adani Group is as part of its plans in Australia considering the potential to ultimately separate the asset ownership of any assets from the operation of those assets (i.e. different economic owners).
- Critical infrastructure – it is not clear precisely how this should be defined, however it is suggested that the definition from section 93L of Development Allowance

Authority Act 1992 should be used or modernised to permit rental staples. That definition includes ports, rail, airports, roads, gas pipelines, electricity transmission/distribution/ generation, water, sewerage and waste water. However, as outlined, this definition should perhaps be modernised to include further categories. It is noted that the infrastructure to be constructed by the Adani Group is considered critical to the development and growth of Australia.

- For critical infrastructure this should include business to business transactions as well as privatisations in order that there is competitive neutrality and it does not depend on who the infrastructure is acquired from as this is not considered a valid distinction. Further, as relevant to the Adani Group, we also submit that greenfield projects which qualify as critical infrastructure (whether a privatisation or not) should also be eligible for carve out from any announced changes.

#### **Submission 4 – Transitional Measures**

If any changes are announced and there is no carve out for privatisations and/or critical infrastructure, then it is essential that there are appropriate transitional or grandfathering measures for existing structures. In this respect, it is considered that for privatisation and other critical infrastructure transactions, they should be grandfathered indefinitely. This test would be a sufficient safeguard to ensure that no new assets other than routine expansions are acquired in the existing structure.

In this regard, we note that this is considered an appropriate outcome for the following reasons:

- The owners of these assets have effectively paid away the structure benefits to the government as part of the competitive bid process.
- This outcome would be consistent with the long-term nature of infrastructure investments which were made on the assumption of a stapled tax environment over the period of investment being for a 99 year lease period.
- Bidders for these assets have adopted structures which have been subject to significant ATO involvement and agreement including rulings.
- Treasury should take into account that investors will, on a future exit, be subject to Australian capital gains tax on disposal of their interest in the asset trust in the staple.

#### **Submission 5 – Sanctions to be applied for non-compliant structures**



It is considered essential that if there are non-compliant structures (i.e. not eligible for a carve-out or grandfathering) that any impact on project and funding economics is limited. In particular, it should be ensured that the Asset Trust in any staple remains a flow through vehicle for tax purposes and that any impost is borne at the investor level.

To achieve this result it is suggested that the appropriate sanction should be to apply an additional withholding tax from stapled asset trusts or holding trusts investing in those trusts. This withholding tax rate (e.g. MIT rate) would apply at the investor level.

This will ensure that any changes are outside of the asset trust in any staple and will not impact on banking or financing arrangements. This should alleviate any need for substantial restructuring of the investment. It should also ensure that any Australian tax paid will possibly be subject to foreign tax credits for non-resident investors.

It is not considered that any of the other suggestions for sanctions outlined in the Treasury consultation document involving limiting the definition of 'eligible investment business', requiring tax consolidation of the entities in a stapled structure, or denying deductions for cross staple charges are appropriate or workable solutions.

#### **Submission 6 – Certainty for Existing Structures & Future Position**

It is essential that any announcement made provides certainty for existing structures and certainty in respect of the treatment moving forward. In particular, we note the following:

- Given the short timeframe to provide feedback to Treasury, we do not believe that it is possible to make any comprehensive Federal Budget announcement. Therefore, we suggest that any announcement by the Treasurer should only be to recommend a more detailed review post Budget.
- It is however important that the Treasurer quantify any obvious carve outs and/or the outcome of any transitional rules pre-30 June 2017 for existing investments such that there is certainty for the past transactions undertaken for all stakeholders (i.e. investors and financiers).
- Given the need to ensure that delayed or potentially impacted pending transactions are not stopped the Treasury should provide on an interim basis any clear areas of carve out from the review so that these transactions are not unnecessarily delayed or stopped. This is a key request of the Adani Group.

- Treasury should confirm that as part of the outcome of this review of stapled structures that the ATO will administer the law consistent with Treasury policy rather than seeking to raise new issues or the potential application of the general anti-avoidance rules in Part IVA.

**Conclusion**

We thank you for your time in considering this submission. In this submission, we have outlined our views on the six matters noted above and request that these be considered by Treasury in framing any response and potential changes.

As you will appreciate, the matters raised by the Paper are of the utmost importance to the Adani Group and its stakeholders who have significant concerns in respect of the potential impacts of the Treasury consultation process and we request that due consideration is given to our submission before any changes are announced.

We would be happy to discuss further any of the matters raised above and can be contacted on phone: (07) 3223 4800.

Yours sincerely



Jeyakumar Janakaraj  
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