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Submission from the Tax Justice Network Australia on the *Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2018; Income Tax (Managed Investment Trust Withholding Tax) Amendment Bill 2018; and Income Tax Rates Amendment (Sovereign Entities) Bill 2018*

11 October 2018

The Tax Justice Network Australia (TJN-Aus) welcomes this opportunity to make submission on the *Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax and Other Measures) Bill 2018, Income Tax (Managed Investment Trust Withholding Tax) Amendment Bill 2018, and Income Tax Rates Amendment (Sovereign Entities) Bill 2018*. The TJN-Aus supports the Bills as a step forward on addressing some of the tax distortions caused by trusts in the Australia tax system. The Bills go some way to addressing the abuse of stapled structures to aggressively avoid paying the corporate income tax rate on certain profits.

Further, it is our understanding that there will remain tax advantages to unit holders of trusts in a stapled structure, which may mean that stapled structures will continue to be an attractive vehicle to set up artificial stapled structures for the purposes of avoiding the taxes that would otherwise be paid. For example, for an Australian that is a shareholder in a company, they will pay tax on dividends paid to them by the company at the personal income tax rate minus the tax the company has already paid on its taxable income (which is assessable income minus deductions). For an Australian that is a unit holder in a trust they are taxed on the taxable income of the trust (which is assessable income minus deductions) at their personal income tax rate.

Further, King & Wood Mallesons advise investors of the tax benefits of Managed Investment Trusts beyond simply the concessional withholding tax:¹

MITs can also make a “capital account election”, which allows them to obtain concessional capital gains tax (rather than ordinary income) treatment on gains made on the disposal of certain types of assets.

Obtaining capital gains tax treatment is valuable for:

- **foreign resident investors** who may obtain a foreign resident capital gains tax exemption upon distribution of the capital gain if the asset disposed of by the MIT is not “taxable Australian property” (i.e. not Australian real property)

¹ <https://www.kwm.com/en/au/knowledge/insights/investing-australia-real-estate-tax-concessions-managed-investment-trusts-20170821>

- **Australian investors** who can offset such capital gains against their capital losses, and may claim the capital gains discount to reduce the amount of their taxable capital gain.

Thus, TJN-Aus would question the need to maintain cross stapled structures, as it is not clear that a strong case has been made as to their benefit to the general Australian community. The Committee should seek concrete evidence from the Australian Treasury of the benefits derived from allowing for cross staple structures, against the likely government revenue loss they create. It is not enough to simply assert that such tax concessions attract foreign investment. It should be possible to back up such a claim with evidence that can be interrogated.

The TJN-Aus believes the transitional period of seven years for a cross staple arrangement that is not an economic infrastructure facility under section 12-440 of the *Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax and Other Measures) Bill 2018* seems excessively long for arrangements that often are tax avoidance schemes. A period of three years would seem more reasonable for the transition. This is especially the case as the Bill grants entities an exemption from the general anti-avoidance rule (Part IVA of the *Income Tax Assessment Act 1936*) for cross staple arrangements during the transition period to deductions for payments that give rise to excepted MIT CSA income of the asset entity, even though the ATO may regard many of the existing arrangements as being in breach of Part IVA as per its January 2017 Taxpayer Alert TA 2017/1 *Re-characterisation of Income from Trading Businesses*.

The TJN-Aus welcomes that an economic infrastructure facility is limited to transport, energy, communication and water infrastructure, noting that mining operations will not typically be considered economic infrastructure facilities.

The TJN-Aus supports the exemption so that income derived from affordable housing is taxed at the concessional rate. The TJN-Aus supports that in order for housing to be affordable housing it must be exclusively managed by an eligible community housing provider as an integrity measure to ensure the housing in question is genuinely affordable housing.

The TJN-Aus supports the non-arm's length income rule as a measure to safeguard against aggressive cross staple rent pricing for sectors that have readily available data on comparable Australian third party market transactions.

The TJN-Aus supports the concessional cross staple rent cap on economic infrastructure facilities.

The TJN-Aus supports that income will be treated as MIT trading trust income to the extent that a MIT receives distributions directly, or indirectly through interposed entities, from a trading trust (or another entity which would be a trading trust if it were a unit trust) because these amounts represent trading profits, and therefore are taxed at a rate of 30 per cent.

The TJN-Aus supports Schedule 2 of the *Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax and Other Measures) Bill 2018* to lower the associate entity threshold under the thin capitalisation rules from 50% or more to 10% or more (where they apply to determine associate entity excess amount) for interests in trusts and partnerships, as a means to address foreign investors using multiple layers of flow-through entities to convert trading income into favourably taxed interest income.

The TJN-Aus supports Schedule 3 of the *Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax and Other Measures) Bill 2018* that a superannuation

fund for foreign residents will be liable to withholding tax on amounts of interest, dividends and non-share dividends it receives if the fund has a non-portfolio-like interest in the entity that pays the interest, dividends or non-share dividends to it.

The TJN-Aus supports Schedule 4 of the *Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax and Other Measures) Bill 2018* to improve the integrity of the income tax law to limit access to tax concessions for foreign investors by codifying and limiting the scope of the sovereign immunity tax exemption.

Dr Mark Zirnsak
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Background on the Tax Justice Network Australia

The Tax Justice Network Australia (TJN-Aus) is the Australian branch of the Tax Justice Network (TJN) and the Global Alliance for Tax Justice. TJN is an independent organisation launched in the British Houses of Parliament in March 2003. It is dedicated to high-level research, analysis and advocacy in the field of tax and regulation. TJN works to map, analyse and explain the role of taxation and the harmful impacts of tax evasion, tax avoidance, tax competition and tax havens. TJN's objective is to encourage reform at the global and national levels. The Tax Justice Network aims to:

- (a) promote sustainable finance for development;
- (b) promote international co-operation on tax regulation and tax related crimes;
- (c) oppose tax havens;
- (d) promote progressive and equitable taxation;
- (e) promote corporate responsibility and accountability; and
- (f) promote tax compliance and a culture of responsibility.

In Australia the current members of TJN-Aus are:

- ActionAid Australia
- Aid/Watch
- Anglican Overseas Aid
- Australian Council for International Development (ACFID)
- Australian Council of Social Service (ACOSS)
- Australian Council of Trade Unions (ACTU)
- Australian Education Union
- Australian Manufacturing Workers Union
- Australian Nursing & Midwifery Federation
- Australian Services Union
- Australian Workers Union, Victorian Branch
- Baptist World Aid
- Caritas Australia
- Centre for International Corporate Tax Accountability and Research
- Community and Public Service Union
- Electrical Trades Union, Victorian Branch
- Evatt Foundation
- Friends of the Earth
- GetUp!
- Greenpeace Australia Pacific
- International Transport Workers Federation
- Jubilee Australia
- Maritime Union of Australia
- National Tertiary Education Union
- New South Wales Nurses and Midwives' Association
- Oaktree Foundation
- Oxfam Australia
- Save the Children Australia
- Save Our Schools
- SEARCH Foundation
- SJ around the Bay
- Social Policy Connections
- TEAR Australia
- The Australia Institute
- Union Aid Abroad – APHEDA
- UnitedVoice
- Uniting Church in Australia, Synod of Victoria and Tasmania

- UnitingWorld
- Victorian Trades Hall Council
- World Vision Australia