



## THE TAX INSTITUTE

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The Treasury  
Langton Crescent  
PARKES ACT 2600

By email: [taxlawdesign@treasury.gov.au](mailto:taxlawdesign@treasury.gov.au)

Dear Ms Zanardo,

### **Managed Investment Trust – Allowing foreign pension funds access to the withholding tax regime – exposure draft legislation**

The Tax Institute welcomes the opportunity to make a submission to the Treasury in relation to the *Tax and Superannuation Laws Amendment (2014 Measures No. 4) Bill 2014: allowing foreign pension funds to access the MIT withholding regime (Exposure Draft)*.

We support the introduction of the Bill but consider that amendments are necessary to achieve its purpose. The purpose of the Bill is to amend the Managed Investment Trust (MIT) rules to ensure that foreign pension funds can access the concessional MIT withholding tax regime as originally intended. The Bill in its current form is limited to foreign government pension funds and should be broadened to cover foreign pension funds more generally.

### **Background**

The amendments in the Bill deal with the uncertain treatment for foreign pension funds structured as trusts which arose from the ATO Interpretative Decision 2012/71 *Income Tax: Managed Investment Trust Withholding Tax: foreign superannuation fund that holds an indirect interest in a Managed investment trust*.

In ATO ID 2012/71, the ATO interpreted section 840-805 of the *Income Tax Assessment Act 1997* in such a way that any foreign pension fund investor that was constituted as a trust would not be eligible to obtain the reduced rate of MIT withholding tax of 15% in relation to fund payments from an ordinary MIT. Instead these funds could be subject to a rate of up to 47% under the current general trust taxation provisions in Division 6 of the *Income Tax Assessment Act 1936*. The ATO's interpretation was based on section 840-805(4)(c) which excludes beneficiaries in the capacity of trustees from MIT withholding tax liability.

The policy underlying the amendments contained in the Bill and their effective date is to ensure those foreign pension fund investors that are constituted as trusts can benefit from the concessional MIT withholding tax rates.<sup>1</sup>

### **Definition of a “foreign pension fund”**

The proposed definition of a “foreign pension fund” in the Bill is limited to foreign government pension funds.<sup>2</sup> It does not appear to cover other relevant non-governmental foreign pension funds (e.g. industry, employer sponsored, personal or institutional pension funds).

Limiting the proposed amendments to foreign government pension funds is insufficient to address the uncertainty of treatment for other relevant foreign pension funds which directly arose from ATO ID 2012/71. The foreign pension fund considered in ATO ID 2012/71 was not a foreign government pension fund, but was a foreign superannuation fund. Therefore, we submit that the definition of a “foreign pension fund” in the Bill should be extended to cover foreign superannuation funds more generally.

### **Expanded definition**

The expanded definition of a “foreign pension fund” in the Bill could draw from the definition of a “foreign superannuation fund” in section 995-1 of the *Income Tax Assessment Act 1997*, with appropriate modifications. This definition is also adopted for the purpose of the existing MIT rules (see, for example, section 12-402(3)(b) of Schedule 1 to the *Taxation Administration Act 1953*) and the venture capital provisions in Subdivision 118-G of the *Income Tax Assessment Act 1997*.

The definition of a “foreign superannuation fund” in section 995-1 requires a modification for these purposes to include funds established for a fixed term. Under the existing definition of a “foreign superannuation fund”, the term “superannuation fund” is defined as having the meaning given by section 10 of the *Superannuation Industry (Supervision) Act 1993* which requires the fund to be an indefinitely continuing fund. The inclusion of foreign superannuation funds more generally in the definition of a “foreign pension fund” for the purposes of the proposed amendments to be contained in the Bill should not be confined to indefinitely continuing funds on the basis that a number of foreign pension funds are established for a fixed (albeit, very lengthy) term.

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If you would like to discuss any of the above, please contact either me or Tax Counsel, Thilini Wickramasuriya, on 02 8223 0044.

Yours sincerely



Michael Flynn  
President

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<sup>1</sup> Explanatory Memorandum to the Bill at paragraph 1.6.

<sup>2</sup> Proposed subsection 840-805(4B) of the Bill.