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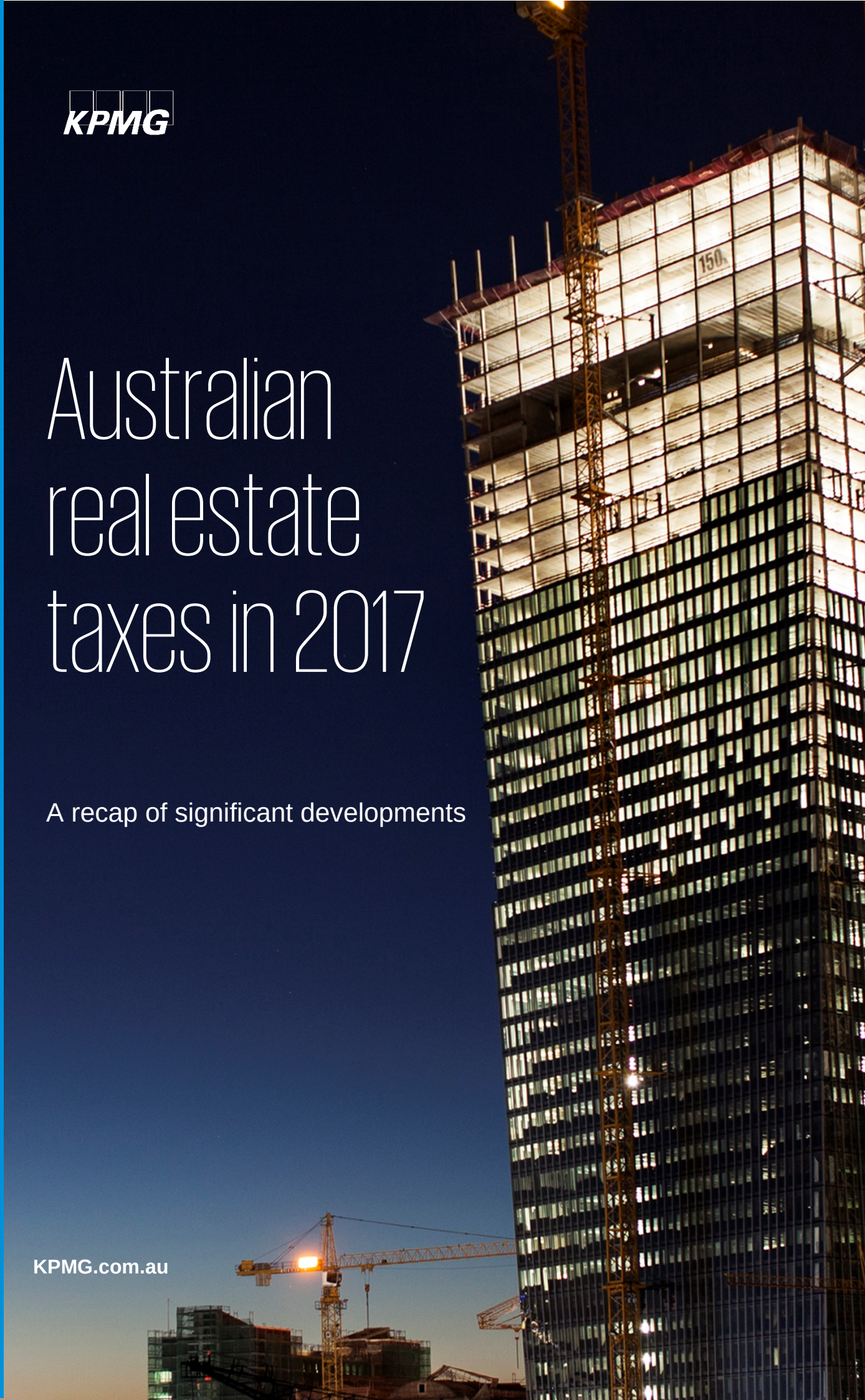
Australian real estate taxes in 2017

A recap of significant developments



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Introduction

2017 has seen significant developments in the Australian tax regime with potentially far reaching impacts for investors within the real estate sector.

Headlining significant developments is the Australian Taxation Office Taxpayer Alert into stapled structures TA 2017/1 and Treasury's consultation into the use of stapled structures. The issues are complex. Issues to be considered by Treasury include whether all forms of investment in real estate should be permissible managed investment trust investments, and whether a discrete real estate investment trust regime should be developed in Australia as a potential replacement for stapled structures.

In addition, the debt funding of investments is an area that has received particular attention during 2017. For example, the significant decision of the Full Federal Court in *Chevron Australia Holdings Pty Ltd v Commissioner of Taxation* [2017] has provided the impetus for a systematic review by the ATO of shareholder loans in Australian structures. In addition, debt funding has been a focal point of attention for investors with the proposed anti-hybrid mismatch measures and increased ATO scrutiny of debt funding arrangements at an early stage in the investment lifecycle through its involvement in the FIRB approval process.

Investors should also consider, to the extent that they have not already done so, the implications of the new attribution managed investment trust regime and whether an election should be made into the regime by Australian unit trusts.

We have set out key measures within this briefing note that impact investment on tax structures into the Australian real estate sector together with our views on what investors can expect in 2018 and beyond.

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Stapled structures

Overview of developments

Early in 2017 the ATO released Taxpayer Alert 2017/1 raising concerns in relation to the misuse of stapled structures. This was followed by Treasury's announcement and consultation paper into the use of stapled structures by taxpayers. That consultation is ongoing and the outcomes will be closely watched by property sector participants. There appear to be many false starts and the timing of the proposed changes is still unclear.

The ATO and Treasury's key concern is the re-characterisation of trading income of an integrated business to more favourably taxed passive income of an entity (which may be a MIT) with common investors (usually stapled). The Taxpayer Alert specifically notes recently implemented arrangements which have the potential to significantly undermine future corporate tax revenues.

Stapled structures were first used in Australia by a listed Australian Real Estate Investment Trust ("A-REIT") in 1988 and have grown significantly. Stapled structures enabled real estate groups to have active / trading businesses carried on by a sister company of a landowning trust that would otherwise not be able to be carried on in the Australian unit trust due to public trading trust rules under Division 6C of the tax legislation. Staples enabled property groups to broaden their activities..

Whilst traditional real estate stapled structures were initially not the main focus of the ATO's concerns and Treasury's consultation, developments in relation to stapled structures are being carefully monitored by real estate sector participants given the scope of Treasury's consultation.

Key policy issues

In addressing any concerns around stapled structures, the policy response of government is expected to impact the real estate sector. Issues include:

- Will there be a specific carve out for real estate? For example, through a specific REIT regime for Australian real estate investments as an alternative to stapled structures. Additionally, if there is a REIT regime, it will be important to ensure that the parameters of this regime are appropriately and clearly defined. Stapled structures have a long and well established history in Australia, and consideration will need to be given to the significant cost to these established participants if they are required to restructure their arrangements.
- From a policy perspective, will all real estate investments continue to be appropriate for Managed Investment Trust ("MIT") investments? If not, what will be the permissible real estate sectors and how will these boundaries be defined? For example, build to rent investments, apart from those in the affordable housing sector, will not (based on the recent Federal Government announcement – refer below) be appropriate MIT investments.
- Will it be permissible to have a structure involving the lease of assets from a passive property trust (MIT) to a related entity that is carrying on an active business? If not permissible in all cases, how will the parameters of acceptable versus unacceptable arrangements be defined? For example, will the fact that there are established examples of trusts leasing hotel assets to third party hotel operators mean that the use of a trust to hold hotel assets will be acceptable even if the trust leases the asset to a related party?
- Will the definition of permitted passive real estate investments be amended? It will be important to balance the overall policy objectives of any amendments against the fact that the definition of eligible investment business in Division 6C is currently overly restrictive.

- If there is a form of income derived by a MIT that is not eligible to be qualifying MIT income under any new policy, will this prejudice the MIT status of the trust as a whole or would the impact of this only apply to the income in question (i.e. 30% corporate tax rate on such income with the concessional withholding rate of 15% available in relation to other fund payment amounts)?

There has been no clear policy guidance from Government at this stage on the future of stapled structures more generally and specifically within the real estate sector, nor on how the integrity concerns identified may be addressed. The timeline for any announcement by the Treasurer remains unclear, although it was originally hoped that announcements will be made by the end of the calendar year. We would expect there to be further consultation (potentially with the release of a new discussion paper) to occur prior to any draft legislation being released for consultation.

Implications for investors

Investors should be closely monitoring developments and review existing positions adopted in current investments, including:

- Assessing what this means for current investments using stapled structures;
- Reviewing cross staple transactions and pricing of cross staple arrangements; and
- Identifying issues of concern that KPMG should raise in ongoing discussions with Treasury and the ATO.

Managed Investment Trusts

There have been a number of developments impacting managed investment trusts in 2017. Chief amongst these is the review into stapled structures as discussed above. However, other developments will be of significant interest including the attribution managed investment trust ("AMIT") regime as well as areas of ATO compliance focus in relation to MITs.

AMIT Regime

Though not strictly a development in 2017, the AMIT regime should be at or near the top of the agenda when considering recent developments in the taxation of real estate trusts in Australia in the current year given that many eligible MITs have not yet elected into the AMIT regime.

Importantly, the AMIT regime allows trusts to bring pre-AMIT under or over distributions into the AMIT regime provided that the trust becomes an AMIT for its first income year starting on or after 1 July 2017. We expect that this will encourage trusts to elect to become AMITs for the 30 June 2017 or 2018 income year (or substituted accounting period). The regime provides certain advantages for taxpayers that elect into the regime. These include the ability for an AMIT to attribute income rather than relying on the present entitlement regime, generally limit the ATO to a 4 year statutory amendment period in relation to income tax returns, enable trusts to formally carry forward unders and overs to future income years in respect of withholding tax payments and provide for uplifts in tax cost base as well as reductions in tax cost base (new CGT Event E10).

Therefore, investors should be assessing whether to elect in to the regime and considering any requirements for updates to trust deeds and other constituent documents.

MIT eligibility

Managed investment scheme requirement

The ATO has indicated within its 'Privatisation and Infrastructure – Australian Federal Tax Framework (January 2017 Draft)' ("Privatisation and Infrastructure Framework") that it will be dedicating compliance resources to ascertain whether MIT or withholding MIT's satisfy the requisite conditions, including whether the trust satisfies the requirements to be a managed investment scheme ("MIS"). This Framework applies equally to real estate investments in many instances.

Broadly, a trust will not be a managed investment trust (including a withholding managed investment trust) if it is not a MIS. The meaning of MIS is to be found in the Corporations Act which defines the term as very broadly meaning a scheme where investors contribute capital to be used by the scheme for the purposes of producing financial benefits for members.

In the Privatisation and Infrastructure Framework the ATO has stated that in its view the MIS requirement may be difficult to satisfy where there is a single beneficiary of a trust. This is generally

consistent with the view taken by many law firms. However, it is also important to recognise that arguably not all unit trusts with multiple investors will satisfy the requirements to be a MIS, for example, the MIS requirements may not be satisfied if the investors are related entities of the "promoter" of the scheme. Other issues will also commonly arise; for example, it will be important to ensure that the distributions to investors and other documentation in relation to the investment reflects the actual unitholdings of investors, including any nominal unitholdings.

For non-listed entities, Investors need to be reviewing their MIT structures to ensure that they were compliant with MIT requirements at establishment and continue to do so. Whether or not the MIS requirements will be satisfied is not always clear and even with single unitholder MITs there may be arguments to support satisfaction of the MIS requirements.

Investment management activities requirement

Within the Privatisation and Infrastructure Framework the ATO has also indicated that it would be dedicating compliance resources into whether withholding managed investment trusts meet the requirements to have a substantial proportion of investment management activities in Australia. Although the statements in the infrastructure framework are in the context of withholding MITs that are interposed between trusts that are not MITs and non-resident beneficiaries, the issue is relevant to all withholding MITs.

Whilst in our experience established managed investment trusts will have documentation to support investment management protocols, less attention may be given to whether the protocols have been complied with. This will require an examination of whether as a matter of substance a "substantial proportion" of investment management activities have occurred in Australia.

In addition, whether the investment management activities requirement has been satisfied in a particular year should be considered holistically over the life of the investment and not just in relation to a particular income year.

It will be important for investors to review actual investment management activities over the life cycle of the investment to ensure that these requirements are being satisfied.

Trading trust requirement

In order for a trust to qualify as a MIT the trust must also not carry on or control a trading business. This is on the basis that MIT treatment is only intended to apply to passive activities, including investing in real estate for the purposes of deriving rent. This requirement is also important for trusts that are not MITs as if a trust carries on or controls a trading business, and the trust is a public unit trust, the trust will be taxed as a company.

A working group has been developed by the ATO in relation to the application of the tests in Division 6C for determining whether a trust carries on a trading business. It is expected that this working group will result in the release of guidance from the ATO.

It is expected that this guidance would deal with many of the common issues faced by property trusts increasingly seeking to maximise returns from the highest and best use of property. The ATO has specifically been considering issues in the context of land sales, in particular when the sale of land is a mere realisation rather than a trading business (including for example in what extent the obtaining of development approvals and other activities to maximise sale value would be acceptable). Another focus of attention has been the question of what activities would be considered incidental and relevant to the renting of land, especially in the context of licensing arrangements (e.g. car parks) and activities carried on by shopping centres (e.g. digital advertising screens in shopping centres).

There has also been increasing attention given to the question of the "control" test in Division 6C, since a trust that controls a trading business will also be a trading trust and therefore not capable of being a MIT. The ATO's Privatisation and Infrastructure Framework also sets out the ATO's views on this issue, confirming that, in its view, control of a trading business will occur where the trading business is "negatively controlled"; that is, where the trust has a power of veto to restrain the activities of a trading business.

This will mean that a trust would be capable of controlling a trading business even where the trust has a minority interest in the underlying trading business. In this regard, the ATO has indicated that it would be likely to allocate compliance resources to testing whether such control exists where the trust holds an interest of 20% or more in the trading business.

Investors should be reviewing their investment structures, constituent documents and overarching investor agreements to ensure that there are no inadvertent control issues that may impact on MIT (or flow through) status.

Financing Arrangements

Developments in cross border financing arrangements

In April 2017, the Full Federal Court of Australia handed down its much anticipated transfer pricing decision in *Chevron Australia Holdings Pty Ltd v Commissioner of Taxation* [2017] FCAFC 62 ("Chevron") ruling in favour of the Commissioner.

At a high level, the case concerned the transfer pricing implications of an intercompany loan agreement between Chevron Australia Holdings Pty Ltd and a US subsidiary, and whether the interest paid to the US subsidiary exceeded an arm's length price for the borrowing. In both the Federal Court and the Full Federal Court on appeal, the Commissioner of Taxation was successful.

This decision has led to a systematic review by the ATO of international related party dealings including cross border loan arrangements in particular.

Of particular interest to the ATO has been the extent to which the interest rate on related party loan arrangements exceeds the cost of external debt funding of the group especially when that external debt funding is used to fund the intragroup debt. In these circumstances the ATO has indicated that it would view arrangements as low risk only where the intragroup debt was no more than 50 basis points above the cost of external debt.

The ATO have also indicated a preparedness to not only evaluate the pricing of loans at inception, but also whether arm's length parties may have sought to re-price or refinance shareholder loans. This will have particular implications for shareholder loans that have been priced using a fixed interest rate at a time when interest rates were relatively high.

Implications for loan structures

The ATO has released a draft Practical Compliance Guideline ("PCG") 2017/D4 which outlines how the ATO would practically approach cross-border related party financing arrangements. The PCG includes a risk matrix for determining the level of risk associated with particular loan arrangements.

Investors should be reviewing their existing international related party dealings and the documentation that is used to support the pricing of these arrangements and ensuring that the position is supportable (e.g. at least a reasonably arguable position exists in relation to existing loan arrangements) having particular regard to the PCG and areas of ATO compliance focus. The fact that arrangements may result in a medium or high risk rating according to the ATO risk matrix does not mean that a position is not supportable, however it does mean that the arrangement is likely to be subject to greater ATO scrutiny such that investors should be reviewing these arrangements in more detail.

Thin capitalisation

Recent ATO activity has suggested an increased scrutiny on financing arrangements entered into by joint ventures investors, which effectively increase the level of debt within an investment structure without breaching thin capitalisation provisions. This can occur where, for example, the joint venture investors are not 'associate entities' of the relevant asset vehicle from a thin capitalisation

perspective, potentially giving rise to 'double gearing' within an investment structure and enabling investors to access the safe harbour debt limit more than once.

We note that there have been recent transactions where the ATO have closely scrutinised such arrangements. For example, we are aware of circumstances where the ATO has sought to consider attacking such arrangements on the basis that Part IVA (dealing with anti-avoidance) could potentially apply to these arrangements even where the level of gearing may be technically within safe harbour levels as noted above.

Given the ATO's evident concerns with double gearing structures, we would expect consideration may be given to the appropriateness of the existing thin capitalisation provisions in relation to double gearing structures. Such developments should be closely monitored by investors in relation to their financing arrangements.

Hybrid mismatches

On 24 November 2017, the government released Exposure Draft legislation to counteract "hybrid mismatches". This follows from its commitment in the 2016 Federal Budget to adopt the key recommendations set out in Action 2 of the Organisation for Economic Co-operation and Development's (OECD) Base Erosion and Profit Shifting (BEPS) project following a review by the Board of Tax. Australia now joins the United Kingdom (UK), which released equivalent rules last year and New Zealand, which released draft legislation in September 2017.

The anti-hybrid measures attempt to combat hybrid financial instruments where cross-border tax arbitrages arise for either hybrid financial instruments that are debt in one jurisdiction and equity in another, or hybrid entities that are treated as taxable in one jurisdiction but tax transparent in another jurisdiction.

Such structures can give rise to double deductions (deductions in more than one jurisdiction) or deduction/non-inclusion outcomes (payments are deductible in one jurisdiction but not assessable in the other). Therefore we expect financing instruments such as mandatorily redeemable preference shares, profit participating loans and convertible loans to be potentially impacted. In addition to financing payments, the hybrid mismatch rules can apply to royalties, rents and service payments.

There are also financing arrangements that will be less obviously impacted. One example is where an Australian group has borrowed under a vanilla loan from a foreign group entity, which is taxable on the interest income, but where that foreign group entity is itself is financed by a hybrid arrangement. In this case, the Australian deductions may be denied under the "imported mismatch" rules.

The Exposure Draft is open for consultation until 22 December 2017, although we expect the key principles will not be altered and, with bipartisan support, the resultant Bill is likely to experience a smooth passage through Parliament early next year. The key question then is the likely start date – which we expect would be in the latter half of 2018.

With the release of Exposure Draft legislation, investors should be scrutinising existing financial arrangements and identifying alternative refinancing or restructuring options. This should occur as part of a review of the pricing of these arrangements given the ATO's focus on financing arrangements (and transfer pricing more broadly) in the context of *Chevron* discussed above.

Build to rent

Historically, property developers in Australia have undertaken residential developments only under a 'build to sell' model, due to low rental yields associated with holding such properties for the purposes of deriving rental income.

However, over recent months, institutional investors have been contemplating the 'build to rent' model within the 'Multi-Family' sector, an emerging asset class in Australia, although an already established investment model in the US and Europe. Multi-family refers to the ownership of residential property, typically in the form of apartment blocks, by a single entity owner. The properties are held over the medium / long term for the derivation of rental income and capital growth.

There has been emerging interest in relation to the use of Managed Investment Trusts ("MITs") by investors, given the concessional 15percent withholding tax rate on rental income derived from holding such properties.

Whilst in the May 2017 Federal Budget, the Government announced amendments to the MIT provisions to encourage investment in build to rent affordable housing by MITs, in its subsequent release of exposure draft legislation the Government surprisingly included an integrity measure to prevent MITs investing into residential property (other than commercial residential property), except where it is affordable housing.

The draft legislation defines affordable housing as broadly residential premises that is not commercial residential premises (such as hotels, hostels and caravan parks) and the tenancy of the dwelling is exclusively managed by an eligible community housing provider. Accordingly, if enacted, a MIT will be unable to invest in a multi-family asset and will likely limit the attractiveness of the 'build to rent' sector to foreign investors.

This development is in addition to existing higher tax costs in relation to investment in the sector including Goods and Services Tax ("GST").

This proposed legislation restricts the ability of MITs to invest in foreign build to rent assets, which is likely an unintended consequence of the measure given no obvious policy rationale for this position. However, we expect this issue to be addressed in the near future.

The draft legislation has caused concern amongst key industry stakeholders, noting that implementation of these rules may impede the establishment of the build to rent sector in Australia, given the sector is not currently financially viable to many institutional investors.

Corporate Collective Investment Vehicles

In August 2017, Treasury released for consultation Exposure Draft legislation to implement the core provisions of the Corporate Collective Investment Vehicle (CCIV) regime. On the same day, Treasury also released for consultation Exposure Draft legislation relating to the Asia Region Funds Passport (ARFP), a multi-lateral framework allowing certain funds to be marketed across member Asian countries with limited additional regulatory requirements.

A key feature of a CCIV is that it can be divided into sub funds with different share classes, allowing multiple investment strategies to be held within a single entity without cross-liability between classes. This may suit a portfolio real estate fund adopting different investment strategies, such as those in the office, core plus or retail sectors.

These measures are the first stage of a new Collective Investment Vehicle (CIV) regime that will be expanded to limited partnerships in 2018. The Limited Partnership CIV is likely to be of greater interest to wholesale private equity, real estate and infrastructure structures, however as legislation for that expansion is likely still some time away the CCIV may be an attractive interim measure.

The draft legislation does not contain any tax-specific provisions relating to the new regime, beyond noting that CCIVs should be taxed in a similar manner to a Managed Investment Trust (MIT) such that investors would generally be taxed as if they held the underlying investment directly. We expect that the CCIV tax exposure draft will be released for public consultation imminently.

The MIT regime is well-established as the preferred structure for investment into many Australian asset classes, and aligning the CCIV to the MIT requirements will provide taxpayers greater flexibility when structuring their Australian investments. However, there are limitations to the MIT regime that will not be mitigated by a corporate vehicle.

In particular, MITs are unable to control trading businesses which limits their attractiveness to investors seeking active businesses investments. The suitability of the CCIV for investment into certain real estate assets will also be complicated by Treasury's ongoing review into stapled structures.

With current debate around the taxation of staple arrangements, real estate investors would need to consider whether the CCIV regime is beneficial for their requirements. Whilst the real estate sector is not the initial focus of the CCIV regime, KPMG will provide comments on the taxation of CCIVs, and potential application to the real estate sector, once further information is issued by Treasury.

GST

There have been a number of recent developments in relation to GST and relevant to the Real Estate Sector, as set out below:

Newly constructed residential properties

The Government has announced that purchasers of newly constructed residential properties or new subdivisions remit the GST directly to the ATO as part of settlement. We note that consultation papers and draft legislation have yet to be released, however, the changes are to take effect from 1 July 2018.

Vendors should consider practical implications (i.e. settlement processes, standard form contracts, arrangements under development management agreements), financial implications (i.e. GST cash flow consequences) and tax risk implications (i.e. how will margin scheme calculations be disclosed to the ATO and the likelihood of greater ATO scrutiny on margin scheme calculations).

Residential and home care

The ATO has been undertaking consultations in relation to the GST-free treatment of residential care and home care. Specifically, the ATO is proposing to issue updated guidance on:

- When supplies of care services are GST-free;
- When supplies of services that are related to care services are GST-free and
- How GST applies when certain services are subcontracted.

KPMG will provide further comment on release of the guidance.

Retirement villages

There has been significant ATO activity in relation to the construction, development, operation and sale of retirement villages. The ATO is scrutinising whether and to what extent input tax credits are claimable (either on an apportionment basis or where a developer has a dual intention to lease and then sell) and whether owners of retirement villages are correctly accounting for any GST adjustments.

GST in transaction agreements

The case of MSAUS Pty Ltd as the Trustee for the Melissa Trust and Commissioner of Taxation, shows that significant care must be taken in the drafting of GST clauses as any ambiguity in the drafting could adversely affect the GST treatment of the supply, for example as a taxable supply under the margin scheme or a GST-free going concern.

Accordingly, taxpayers should ensure GST clauses are drafted clearly to ensure the desired GST outcomes from transactions are achieved.

Stamp duty

There have been a number of recent developments for stamp duty and land tax which impact the property sector. Some of the key developments are outlined below.

Stamp duty and land tax surcharges

The Western Australian and South Australian governments have announced in their recent budgets that they will be introducing a foreign purchaser duty surcharge similar to those that are already in place in the eastern seaboard States.

The Western Australian duty surcharge of 4% will be imposed on the purchase on an interests in residential property by foreign individuals, trusts or corporations. The surcharge is proposed to commence from 1 January 2019. "Commercial residential properties" such as hotels, motels and some student accommodations and developments of 10 or more residential properties should be excluded from the surcharge. No legislation has been released to date to provide any further details.

The South Australian duty surcharge of 4% on acquisition of residential properties by foreign individuals, trusts or corporations will commence on 1 January 2018. Commercial residential properties such as hotels, motels and retirement villages are excluded from the duty surcharge. Unlike NSW, Victoria and Queensland, there is no power for the Commissioner to exempt the surcharge. However, a purchaser can obtain a refund of any surcharge paid if they cease to be a foreign person within 12 months of the acquisition. The Commissioner has powers to impose the surcharge if the purchaser becomes a foreign person within 3 years of the acquisition of residential property.

From 1 July 2017, New South Wales have increased their duty surcharge rate from 4% to 8% and from 2018 land tax year, there will be an increase to the land tax surcharge rate from 0.75% to 2%. The New South Wales government have also introduced amendments (although the legislation has not come into effect) to provide an exemption or refund from the surcharges for "reputable developers" when they sell the developed property. Commercial residential properties will exempt from the duty and land tax surcharges effective from 21 June 2016.

Queensland have introduced a land tax surcharge for absentee owners (applying only to individuals) of 1.5%.

Victoria has introduced a land tax surcharge of 1% for vacant residential land located in inner city and middle suburbs of Melbourne.

Other amendments or changes coming into effect

The South Australian duty rates on the transfer of commercial properties have reduced by two thirds (of 5.5%) from 1 July 2017 and will be abolished altogether from 1 July 2018.

The ACT has introduced a new rate of duty applying to the transfer of commercial properties. The rate for properties under $1.5 million will be half the normal transfer duty rate and for properties with a value of $1.5 million or more a flat rate of 5% will apply. No duty will be payable on the transfer of commercial properties under $1.5 million from 1 July 2018.

The Northern Territory have increased the transfer duty rate to 5.75% for transfer of properties with a value of between $3 million to $5 million. The rate will increase to 5.95% for properties above $5 million. The new rates came into effect on 1 July 2017.

Other developments

We have set out below further tax developments that may be of interest to investors in the real estate sector:

Significant Global Entities ("SGEs")

There have been a number of recently implemented Australian tax measures that are required to be considered by those entities that meet the definition of SGEs from an Australian tax perspective. Broadly, an SGE is a (global) head entity or member of an accounting consolidated group where the annual global income of the parent entity is AU$1 billion or more.

Where entities within a group are considered SGEs for Australian tax purposes, they would need to consider the application of recently implemented tax measures as follows:

- Reporting: there are requirements for additional Australian reporting in the form of country-by-country reports, master file and local file, with these new requirements applicable for income years commencing on or after 1 January 2016. In addition to this SGEs are required to prepare general purpose financial statements (applicable for income years commencing on or after 1 July 2016). The ATO has recently confirmed these statements need to be prepared in accordance with Australian accounting standards (with some transitional relief provided).
- Penalties: There are significant penalties for SGEs that do not meet their lodgement obligations (including for late lodgement of returns). Specifically, from 1 July 2017, SGEs will be subject to increased penalties (by at least a factor of 100) where they fail to lodge certain tax statements on time. Such statements include income tax and fringe benefit returns, Business Activity Statements, Country by Country reports and general purpose financial statements.
- Diverted Profits Tax and Multinational Anti-Avoidance Law: Much publicised measures have been introduced in relation to the Diverted Profits Tax and Multinational Anti-Avoidance Law. However, it is unlikely that these measures will have application in relation to most real estate investment structures in Australia.

Investors that consider their groups to be SGE's under the above definitions should contact KPMG to consider how the above measures may impact their groups.

Non-resident capital gains withholding tax

Purchasers entering into the acquisition of taxable Australian property from foreign resident vendors are required to withhold an amount from the purchase price and remit this amount to the ATO. From 1 July 2017, this withholding tax amount increased to 12.5% of the acquisition price on disposals where the contract price is $750,000 and above.

Accordingly, investors should ensure compliance with this regime where acquiring or disposal of tax Australian property assets.

Foreign Investment Review Board ("FIRB")

Tax remains one of five national interest factors FIRB will consider when assessing foreign investments into Australian property. The ATO is actively involved throughout the FIRB process, during which they provide a risk rating with regard to the investment for FIRB to consider. We have

recently seen a significant increase in the questions being posed by the ATO as part of the FIRB process.

Other noteworthy developments

Other developments have included:

- Finalisation of PCG 2016/16 which provides guidance in relation to the circumstances in which the ATO will consider that a trust is a fixed trust for income tax purposes, including a proposed safe harbour for taxpayers;

- Release of the ATO's Decision Impact Statement in relation to *Bywater Investments Ltd & Ors v. Commissioner of Taxation* (2016) and subsequent TR 2017/D2 in relation to the ATO's views on the central management and control test of residency, emphasising the importance of paying attention to substance over form in relation to the central management and control test of residency;

- Release of accounting guidance issued by the Australian Accounting Standards Board, AASB Interpretation 23 Uncertainty over Income Tax Treatments. This will apply to annual reporting periods beginning on or after 1 January 2019 and will have an impact on investors in relation to accounting for uncertain tax liabilities – given the need for SGEs to lodge GPFS, questions regarding disclosure of a tax related liability are likely to come into sharper focus; and

- New similar business test in relation to company tax losses incurred in income years beginning on or after 1 July 2015 and the release of ATO published Law Companion Guide LCG 2017/D6 should make it easier for companies to recoup company tax losses, noting that KPMG has well developed data analytics capabilities and KPMG has worked with a number of clients in using these capabilities in similar business (and same business) testing.

- The ATO has withdrawn its ruling, IT 2450, which relates to the tax treatment of income derived from long term construction contracts, i.e. where contracts extend beyond one year of income. The Commissioner has issued a draft ruling TR 2017/D8 which is effectively a re-write of IT 2450. Taxpayers are required to calculate their assessable income using either the 'basic approach' or an estimated profits basis, noting the impact of the new accounting revenue recognition standard AASB 15 which applies to years commencing on or after 1 January 2018). Whilst IT 2450 was not binding, TR 2017/D8 will be binding once finalised.

Looking ahead to 2018 ...

Whilst 2017 has been eventful, investors can anticipate further significant developments for 2018. Subject to any significant developments that may happen between now and the end of the year, significant developments for 2018 include:

- The outcome of Treasury's consultation into stapled structures is likely to headline the list of anticipated developments. We expect there to be further consultation in this regard including the potential issuance of a further consultation paper.
- Investors can expect at least draft legislation in relation to the proposed tax treatment for CCIVs and limited partnership CIVs. It will be important to understand some of the details of the proposals from a tax perspective, including income tax, GST and stamp duty treatment given significant uncertainty as to how the proposed regime would apply.
- Further developments can be expected in relation to cross-border financing including ATO guidance on the treatment of guarantee fees and quasi-equity / interest free loans. With the increased ATO scrutiny regarding gearing into Australian financing structures, there is the potential for some form of legislative amendments in this area. This could include amendments to the thin capitalisation regime to deal with ATO concerns in these areas as well as interest withholding tax exemptions that have been of concern to Australian based investors.
- Further ATO guidance is expected from the ATO working group in relation to Division 6C (public trading trusts) which it is expected will resolve some of the long standing uncertainties arising as a result of its drafting. The consultation is expected to result in the release of some form of ATO guidance or ruling although the likely timing is unclear given competing ATO priorities.
- Expected developments in relation to stamp duty for 2018 include the South Australian duty rates on the transfer of commercial properties will be abolished from 1 July 2018 and no duty will be payable on the transfer of commercial properties under $1.5 million located in the ACT from 1 July 2018.
- The announced changes to GST being payable by purchasers on the sales of new residential premises are expected to come into effect from 1 July 2018.

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