Chapter 2
Issues arising from submissions

2.1 The committee received a total of 16 submissions for this inquiry. The issues raised were:

- purpose built student accommodation;
- 'Build to Rent' property investment;
- agricultural investment;
- issues concerning sovereign immunity;
- the ongoing use of stapled structures;
- technical comments on the legislation drafting; and
- threshold for economic infrastructure facility exception.

Purpose built student accommodation (PBSA)

2.2 The issue most commented on by submitters was the effect of moving the tax rate from 15 per cent to 30 per cent for those foreign investors who chose to invest in purpose built student accommodation (PBSA) through Managed Investment Trusts (MIT).[1]

2.3 Humphreys Lawyers, acting for Urbanest Pty Ltd, GSA Australia Pty Ltd and Scape Australia Management Pty Ltd, argued a 30 per cent rate will significantly reduce returns to foreign investors:

> The issue we have with the new bill is that, by doubling the rate, we're effectively reducing the returns to this industry by about 20 per cent. The problem is they're in the market for capital from investors in commercial projects. These are essentially commercial buildings. You're going to have one equity provider or a small number of equity providers investing in these large buildings. They expect returns.[2]

2.4 Also, Asia Pacific Student Accommodation Association (APSAA) argued there may be an impact on Australian education export services:

> These provisions of the bill…will harm the higher education sector, reduce exports and employment, decrease availability of housing, increase pressure

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1 Scape Australia, *Submission 1*; King & Wood Mallesons, *Submission 2*; Humphreys Lawyers, *Submission 3*; PricewaterhouseCoopers, *Submission 4*; Asia Pacific Student Accommodation Association, *Submission 7*; IGen Funds Management, *Submission 8*; Property Council of Australia, *Submission 9*; Financial Services Council, *Submission 12*; and StudyPerth, *Submission 14*.

2 Mr Paul Humphreys, Managing Director, Humphreys Lawyers, *Committee Hansard*, 1 November 2018, p. 14.

> on infrastructure and damage Australia's reputation as a destination for investment.[3]

2.5 Pricewaterhouse Coopers (PwC) believed the bill should be modified to treat foreign investment in student accommodation consistently with other commercial residential premises such as hostels. PwC:

> …do not see a clear rationale for why foreign investment in student accommodation should be treated differently from investment in other commercial residential premises which qualify for the 15 per cent concessional rate. This inconsistent treatment has the potential to create economic distortions and investment bias, which is contrary to sound tax policy principles.[4]

2.6 Submitters argued that student accommodation cannot be considered in the same category as other residential investment[5] and argued for an amendment to the bill.[6]

'Build to Rent' property investment

2.7 Some submissions advocated giving foreign investors a low tax rate to encourage investment in the 'Build to Rent' sector.[7] The Property Council of Australia said:

> …we disagree with the decision to impose a 30 per cent withholding tax rate on investment in build-to-rent housing, which is double the rate of other asset classes where that investment is coming from eligible countries. This will inevitably make these investments less attractive for long-term, patient global capital and result in less build-to-rent housing being created than otherwise would be the case.[8]

2.8 The Housing Industry Association (HIA) raised concerns of a different type. While recognising that 'Build to Rent' is common in Europe and that such accommodation offers some advantages, it discourages home ownership which HIA, as an organisation, strongly supports. HIA concluded:

> In encouraging Built to Rent schemes in Australia, the government should consider the impact of such schemes on:

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3 Asia Pacific Student Accommodation Association, *Submission 7*, p. 1.

4 Ms Kirsten Arblaster, Partner, Pricewaterhouse Coopers, *Committee Hansard*, 1 November 2018, p. 2.

5 Scape Australia, *Submission 1*, pp. 1–2 and PricewaterhouseCoopers, *Submission 4*, p. 4.

6 Asia Pacific Student Accommodation Association, Submission 7, p. 3.

7 King & Wood Mallesons , *Submission 2*; PricewaterhouseCoopers, *Submission 4*; Property Council of Australia, *Submission 9*; Financial Services Council, *Submission 12*; Housing Industry Association, *Submission 11*.

8 Mr Ken Morrison, Chief Executive, Property Council of Australia, *Committee Hansard*, 1 November 2018, p. 7.

- Existing investors in the housing industry, principally individuals, who use investments in housing as a store of wealth;
- The impact on the changing incentives of home tenure away from ownership to long-term rentals on wealth generation; and
- The impact of providing financial incentives on the type of dwellings made available.[9]

Agricultural investment

2.9 Some submissions sought to maintain for foreign investors a low tax rate for their investments in agricultural land.[10]

2.10 These submissions largely came from the banking and financing industry, such as the Financial Services Council[11] and Rural Funds Management:

- It is not or should not be an objective of the proposed legislation to specifically target passive foreign investment in A-REITs that invest in agricultural assets; and
- The proposed changes are too broad and are inconsistent with the policy objectives of existing tax laws in other contexts and proposed tax laws in the Bill. In their current form the changes capture all foreign MIT investors even where they are passive investors and have no active control over the direct purchase of agricultural land and little influence over the MIT.[12]

Sovereign immunity

2.11 Two submissions sought clarification of the bill's impact on sovereign immunity. PwC raised a number of technical questions, for example PwC noted:

> …the Bill is intended to provide foreign government investors an exemption from Australian tax where they earn income or make gains on realisation of qualifying investments.
>
> However, because of the current legislative drafting, there is a risk the provisions could be interpreted in a manner such that gains would be taxable to these investors in many if not most cases.[13]

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9 Housing Industry Association, *Submission 11*, p. 4.

10 King & Wood Mallesons, *Submission 2*; PricewaterhouseCoopers, *Submission 4*; Rural Funds Management Limited, *Submission 10*; Financial Services Council, *Submission 12*.

11 Financial Services Council, *Submission 12*, p. 3.

12 Rural Funds Management Limited, *Submission 10*, p. 2.

13 PricewaterhouseCoopers, *Submission 4*, p. 5.

Ongoing use of stapled structures

2.12 The Tax Justice Network (TJN) expressed concern that there will remain tax advantages to unit holders of trusts in a stapled structure, which may mean that these will continue to be an attractive vehicle to avoid paying tax. Further, TJN argued that such stapled structures have not demonstrated an overall benefit to Australia or that they necessarily attract foreign investment:

> …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.[14]

Technical issues

2.13 Global Infrastructure Partners' submission raised questions about the drafting of the bill in terms of how it impacted.

- from the testing of the portfolio interest at the first level of investment in Australia; and
- to fund managers from the aggregation of common managed stakes for the purposes of the influence test.[15]

2.14 The Financial Services Council raised technical administration questions for non-agricultural primary production businesses.[16]

Threshold for economic infrastructure facility exception

2.15 The Northern Territory (NT) Government's submission was broadly supportive of the bills but raised that the approved economic infrastructure facility exception, as currently proposed with its $500 million project threshold, has the potential to impact smaller jurisdictions.[17]

Committee view

2.16 The committee notes that while submitters raised concerns about specific aspects of the bills and how these would affect their particular industry, many

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14 Tax Justice Network, *Submission 5*, p. 2.

15 Global Infrastructure Partners, *Submission 6*, p. 3.

16 Financial Services Council, *Submission 12*, pp. 3–4.

17 NT Government, *Submission 14*, p. 1.

generally agreed with the aims and substance of the proposed legislation.[18] There is certainly a view that the integrity of the tax system must be maintained and strengthened.

2.17 The issues raised with regard to specific concessions for particular sectors of the economy were canvassed during consultations conducted by Treasury. While some submitters disagreed with the final outcomes, they still supported the general thrust of the policy. Indeed:

> It's in the legislation [build-to-rent housing projects within an MIT], which we're happy about, but it's taxed at a higher rate, which we don't understand and we're not happy about.[19]

2.18 The committee recognises the need to strike balance and compromise with this and other proposed legislation, and regards the bills to be a suitable and balanced package. The Treasury observed:

> Broadly, the measures contained in this bill limit the scope of concessions for passive income to sectors for which they were originally intended and prevent active income from being converted into passive income. In the case of sovereign immunity and pension funds, the measures bring our tax treatment more into line with Australia's treaty practice and with tax settings in other countries. The package maintains concessions for affordable housing and nationally significant economic infrastructure, reflecting explicit policy decisions of the government. There are also quite generous transitional provisions.[20]

2.19 Given that the most commented on aspect of the bills were those provisions that apply to PBSA, and that submitters have argued that student accommodation is more of a commercial venture than a residential venture, the committee notes the explanation from Treasury as to why foreign investors in PBSA should be required to pay the 30 per cent tax rate:

> When you add significant services to accommodation, it starts to look an awful lot less like bare rent and more like running a business of accommodation. It's similar to a hotel rather than a bare rent situation. Commercial activities were not supposed to be accessing the concessional rate in the first place. And then the government announced that it was

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18 Mr Stuart Landsberg, Pricewaterhouse Coopers, *Committee Hansard*, 1 November 2018, p. 5; Mr Ken Morrison, Property Council of Australia, *Committee Hansard*, 1 November 2018, p. 6 & p. 7; Mr David Bryant, Rural Fund Management Ltd., *Committee Hansard*, 1 November 2018, p. 18; Dr Mark Zirnsak, Secretariat, Tax Justice Network Australia, *Committee Hansard*, 1 November 2018, p. 22.

19 Mr Ken Morrison, Property Council of Australia, *Committee Hansard*, 1 November 2018, p. 10.

20 Mr Paul McCullough, Division Head, Corporate and International Tax Division, Department of Treasury, *Committee Hansard*, 1 November 2018, p. 31.

> excluding residential accommodation, so you don't get out of the residential accommodation exclusion, in my view, by arguing that it's commercial.[21]

2.20 Despite there being some objection by a few stakeholders to aspects of the final package, it remains the committee's view that the package as presented strengthens and protects the integrity of Australia's corporate tax base and does so by finding the right balance between taxation rates, concessions and transition periods. Accordingly, the committee recommends the bills be passed.

Recommendation 1

2.21 The committee recommends that the bills be passed.

Senator Jane Hume
Chair

21 Mr Paul McCullough, *Committee Hansard*, 1 November 2018, p. 34.