Ref: AMK

17 November 2010

Mr Raphael Cicchini
General Manager
Business Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: SBTR@treasury.gov.au

Dear Raphael

IMPLEMENTATION OF A NEW TAX SYSTEM FOR MANAGED INVESTMENT TRUSTS

We welcome the opportunity to provide comments on the discussion paper titled "Implementation of a new tax system for managed investment trusts" (the Treasury Discussion Paper).

Pitcher Partners comprises five independent firms operating in Adelaide, Brisbane, Melbourne, Perth and Sydney. Collectively we would be regarded as one of the largest accounting associations outside the Big Four. Our specialisation is servicing and advising smaller public companies, large family businesses, small to medium enterprises and high wealth individuals (which we refer to as the "middle market" in this submission).

General comments

We are concerned that the principles outlined in the Treasury Discussion Paper will not provide sufficient clarity to achieve the two key objectives set out by both the Government and the Board of Taxation for this review - being the simplification of the existing provisions and an ultimate increase in certainty in applying such provisions (as compared to the current regime).

From the viewpoint of the (standard) single class of unit holder MITs that are prevalent in the middle market, we submit that the regime proposed must establish appropriate guiding principles that are both workable in practice and that will provide certainty to taxpayers. As compared to the operation of the current regime, we submit

that Treasury must aim to achieve both of these objectives. Accordingly, our submission has focused on recommendations that may help to achieve this purpose.

Specific comments

The attached Appendix sets out a number of specific comments on the Discussion Paper.

Should you have any queries, please contact Alexis Kokkinos on (03) 8610 5170.

Yours sincerely

A M KOKKINOS
Executive Director

Attach:

Glossary of terms

Key Term	Description
1936 Act	*Income Tax Assessment Act 1936* (Cth)
1997 Act	*Income Tax Assessment Act 1997* (Cth)
Board	Board of Taxation
Board Position Paper	The Board's report to the Assistant Treasurer, titled "Review of the Tax Arrangements applying to managed investment trusts", August 2009.
MIS	Managed investment scheme
MIT	Managed investment trust
TAA 1953	*Taxation Administration Act 1953* (Cth)
Treasury Discussion Paper	The Treasury Discussion paper, titled "Implementation of a new tax system for managed investment trusts", released in October 2010

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1 OVERVIEW

1.1 Outline of submission

1.1.1 We welcome the opportunity to provide our comments on the Treasury Discussion Paper on the implementation of a new taxation system for MITs.

1.1.2 The proposals contained in the Board's Position Paper and in the Treasury Discussion Paper are intended to codify generally what is currently considered industry practice. Provided the legislation is effective in this manner, we believe that compliance issues and transitional issues would be minimised in the implementation of the new regime.

1.1.3 However, we believe that this can only be achieved if the taxation reform proposals meet the two key objectives set out by both the Government and the Board of Taxation, being the simplification of the existing provisions and an ultimate increase in certainty in applying such provisions. We believe that Treasury need to ensure that the provisions drafted achieve these two key important objectives of the reforms.

1.1.4 We highlight that our main concern is that the proposed principles in the Treasury Discussion Paper leave room for significant interpretive issues. Where this is the case, we believe that the reforms will not achieve the stated objectives of simplification and will lead to an increase in certainty for MITs. Accordingly, it is our view that Treasury must seek to ensure that the legislation provides enough detail and clarity to enable the majority of standard MITs to apply these proposed provisions with certainty and in a simple manner.

1.1.5 This submission focuses on the key areas that we believe require further consideration by Treasury in order to help achieve these two key objectives – i.e. simplification and certainty for taxpayers.

1.2 Summary of key submission points

1.2.1 The following table provides a summary of our submission points that are contained in this submission.

#	Submission point
1.	We recommend that an overarching objects clause be included within the drafting of the provisions. The objects clause should make it clear that the provisions are aimed at providing certainty to MITs as well as reducing complexity and compliance costs. It would be useful if each of the key Subdivisions in the regime make reference to the objects clause where interpretation of the key principles are required.
2.	We recommend that all core principles must include a sufficient level of supporting principles. These supporting principles must provide a base level of certainty for your typical MIT - which only has one class of units on issue.
3.	We recommend that the definition of a MIT, as used in Division 275 for the capital account election, be used for the purpose of the MIT regime generally. Such a proposition may therefore require certain aspects of Division 275 to be moved into the relevant provisions dealing with the MIT regime.
4.	Where it is possible for certain provisions to operate outside of the MIT regime, we recommend that Treasury consider amending existing provisions for all types of trusts. For example, (refer below) we believe that the proposed cost base amendments could be achieved by amending CGT event E4 for all types of trusts, rather than just MITs.

#	Submission point
5.	Treasury should consider providing a definition of "clearly defined rights" that can be applied practically by the majority of standard MITs. Due to references to both income and capital in the proposed definitions, we highlight that powers to accumulate or re-characterise amounts (which are contained in all deeds) would likely result in the proposed definition not being satisfied. Accordingly, we believe that the proposed definition in paragraph 39 should remove references to character where there is only one class of units on issue.
6.	We support the proposal to deem registered funds to satisfy the clearly defined rights provision. However, we believe that an appropriate deeming rule should also be developed for unregistered funds that are administered by a financial services licensee - for the purpose of providing certainty to this class of taxpayers.
7.	To cater for inadvertent breaches of the provisions, Treasury should consider including a Commissioner's discretion for the "clearly defined rights" provision.
8.	While a fair and reasonable test would be objectively determined, the current proposed test would likely be examined subjectively by the relevant parties (i.e. the trustee, the beneficiary or the ATO). We recommend criteria be introduced to support what is considered fair and reasonable to remove subjectivity in its interpretation. For example, we consider it appropriate for the provisions to state that an accumulation of income would not prevent the attribution of taxable income as being fair and reasonable if the deed allowed an accumulation.

#	Submission point
9.	A number of issues will arise where multiple classes of units are issued by a MIT. While we support the ability for this to occur, it is highlighted that this is not the common situation for most MITs. Accordingly, we request that MITs that have a single class of units (where beneficiaries have broadly similar rights) be exempt from applying certain proposed provisions that will only result in further compliance issues (e.g. anti-streaming provisions, value shifting provisions, etc).
10.	As the alternative de-minimis rule is intended to provide a cap on administrative costs in re-issuing distribution statements, we believe it appropriate to set the alternative threshold based on the number of distribution statements that would have to be re-issued to members of the MIT.
11.	We support a simple netting approach for dealing with unders and overs. We believe that Treasury should consult specifically with industry on this matter and that industry practice should be taken into consideration in developing this rule.
12.	We recommend that CGT event E4 be modified to deal with the cost base adjustment proposals. We believe that this would address the cost base issue for MITs and all respective units trusts. Furthermore, it would ensure that the provisions would be simple where a MIT moves out of the attribution regime.
13.	Consistent with the Board's report, and with CGT event E4, we believe that cost base adjustments should only be performed annually.

2 KEY OBJECTIVES OF THE REFORM

2.1 Simplification and certainty

2.1.1 On 22 February 2008, the (then) Assistant Treasurer outlined the following objective of the MIT review in the Government's press release No.010.

> The review will provide options for introducing a specific tax regime for managed investment trusts to reduce complexity, increase certainty and minimise compliance costs.

2.1.2 The same objectives were also contained in the terms of reference provided to the Board. On reviewing the proposed taxation regime for MITs, the Board's recommendations were also based on these key objectives. This was outlined in paragraph 2.11 of the Board's Position Paper.

> Accordingly, the Board recommends that a separate taxation regime be applicable to certain trusts which it will refer to as Regime MITs. Regime MITs will be able to make an irrevocable election to apply the attribution model of taxation. Regime MITs will also access other recommendations to ease compliance and increase certainty, in particular, being deemed to be 'fixed trusts' for other purposes of the tax law, a simpler method for dealing with 'unders' and 'overs', measures to address double taxation, and being entitled to make an election to treat gains and losses arising on disposal of their investment assets on capital account. [emphasis added]

2.1.3 In order for the implementation of the new regime to be effective in achieving its purpose, we believe that it is critical that these two objectives be achieved in all aspects of the reform of the provisions. Accordingly, it is our view that Treasury must ensure that the provisions drafted are capable of operating simply and effectively. We understand that these objectives must be balanced with maintaining a level of integrity of provisions.

2.1.4 As a bare minimum, we believe that these two key objectives must be observed in an objects clause to the new regime. Furthermore, Treasury must ensure that each component of the reforms are capable of operating on their own in the majority of cases (without the need for ATO interpretative products). Accordingly, it is our view that the legislation must contain sufficient detail to achieve the stated objectives.

2.2 Key submission points

Submission point 1

2.2.1 We recommend that an overarching objects clause be included within the drafting of the provisions. The objects clause should make it clear that the provisions are aimed at providing certainty to MITs as well as reducing complexity and compliance costs. It would be useful if each of the key Subdivisions in the regime make reference to the objects clause where interpretation of the key principles are required.

Submission point 2

2.2.2 We recommend that all core principles must include a sufficient level of supporting principles. These supporting principles must provide a base level of certainty for your typical MIT - which only has one class of units on issue.

3 DEFINITION OF A MIT

This section addresses Question 1 of the Board's Discussion Paper

3.1 Single definition of a MIT

3.1.1 The Treasury Discussion Paper outlines the recent changes that have occurred to the definition of a MIT, as contained in Subdivision 12-H of Schedule 1 to the TAA 1953 and Division 275 of the 1997 Act. The paper also highlights the differences that exist between the definition as contained in these two Divisions as well as the transitional provisions.

3.1.2 We highlight that MITs have had to grapple with these new definition provisions, as recently introduced, in order to consider the capital account election in Division 275. Furthermore, due to the transitional provisions introduced in the withholding tax rules, MITs have also had to consider the effect of these new complex provisions.

3.1.3 We highlight that the new definition of a MIT is significantly more complex as compared to the prior definition. Accordingly, we would be somewhat concerned if a new definition of a MIT is used or introduced for the sole purpose of applying different aspects of the MIT regime.

3.1.4 We therefore support the proposition contained in the Treasury Discussion Paper, being that the definition of a MIT that is used for the capital account election be used for the wider MIT regime. We highlight that any deviations to this definition will create another distinct class of MIT for tax purposes. We believe that this outcome would not be in accordance with the key objectives, being to provide simplification and increased certainty.

3.2 Extension of certain rules

3.2.1 We highlight that there are aspects of the proposed MIT regime that would address general trust taxation issues. Accordingly, we believe it is possible for Treasury to modify the existing law for all types of trusts, rather than introduce a new concept solely for MITs.

3.2.2 For example, as outlined in Section 7 of this submission, the proposed modifications to the cost base rules could easily be extended to all unit trusts by way of an amendment to CGT event E4 (rather than by creating a new cost base rule solely for MITs).

3.2.3 Accordingly, where it is considered appropriate, we believe that this approach should be adopted. We believe that this approach would also be simpler for MITs to implement (i.e. as it should not involve a significant change to the systems and procedures already in place to deal with CGT event E4).

3.3 Key submission points

Submission point 3

3.3.1 We recommend that the definition of a MIT, as used in Division 275 for the capital account election, be used for the purpose of the MIT regime generally. Such a proposition may therefore require certain aspects of Division 275 to be moved into the relevant provisions dealing with the MIT regime.

Submission point 4

3.3.2 Where it is possible for certain provisions to operate outside of the MIT regime, we recommend that Treasury consider amending existing provisions for all types of trusts. For example, (refer below) we believe that the proposed cost base amendments could be achieved by amending CGT event E4 for all types of trusts, rather than just MITs.

4 CLEARLY DEFINED RIGHTS

This section addresses Question 2 to Question 4 of the Board's Discussion Paper

4.1 Uncertainty with the current proposition

4.1.1 The "clearly defined rights" rule, as proposed by the Treasury Discussion Paper, will be the key test that will allow MITs to access the "attribution" model. Furthermore, at paragraph 110, it is proposed that MITs satisfying this test would be treated as "fixed" for the purpose of applying certain taxation provisions.

4.1.2 At paragraph 27, the paper proposes that a MIT will satisfy the "clearly defined rights" requirement if a unit holder's rights to income and capital are clearly established at all times in the trust's constituent documents. The proposed test can be compared to the current definition of a fixed entitlement in section 272-5(1) of Schedule 2F, which requires a beneficiary to have "a vested

and indefeasible interest in a share of income of the trust that the trust derives from time to time, or of the capital of the trust".

4.1.3 We are uncertain how the proposed change in terminology will provide any degree of additional certainty for MITs and thus be consistent with the objectives of the reforms. That is, the proposition contained in the Discussion Paper would seem to suggest that the words "vested and indefeasible interest" would be replaced with "clearly defined rights".

4.1.4 Our concern in relation to this proposed modification is particularly highlighted by way of paragraph 33 of the Discussion Paper. The paragraph provides a summary of the numerous conditions that would need to be taken into account in determining whether the "clearly defined" rights test would be, *prima facie,* satisfied by a relevant MIT.

4.1.5 The paragraph lists considerations such as the ability to appoint income or capital to another beneficiary, the power to accumulate, the power to re-characterise receipts and expenses, the power to add beneficiaries at a discount or premium, the power to issue new classes of units with differing rights, and the power to amend the trust deed. We highlight that all of these items are issues that currently exist in determining whether a trust is a "fixed trust" for taxation purposes. Accordingly, we have significant reservations that the change in terminology will provide any level of certainty for a MIT.

4.1.6 Consistent with the objectives of the reforms, it is our view that Treasury needs to adopt a practical core principle that is capable of being applied by MITs with some degree of certainty – i.e. without the need to require guidance or a discretion to be applied by the ATO. Our comments in relation to this item are sent out further at Section 4.2 below.

4.1.7 Furthermore, we believe that appropriate supporting principles are required to deem certain MITs as always satisfying the clearly defined rights requirement – i.e. without further testing. This will provide a significant degree

of certainty for those funds that operate with such an acceptable structure. Our suggestion on this item is contained in Section 4.3 below.

4.2 Core principle – ensuring certainty of principle

4.2.1 We believe that the current proposed "clearly defined rights" rule, as contained in paragraphs 27 and 39 of the Discussion Paper, will present difficulties for MITs and the ATO - similar to those encountered in relation to the definition of a fixed trust.

4.2.2 Paragraph 39 presents a possible definition of "clearly defined rights". This proposed definition outlines that a trust could be deemed to satisfy the test if it is (a) possible to determine entitlements to income and capital at any time, and (b) unlikely that the trustee would materially affect entitlements to these amounts or their character.

4.2.3 While we agree with the general premise of this proposed core principle, we highlight that the principle proposed would provide a strict onus on the trustee to ascertain income or capital at a particular time. Furthermore, it would require the trustee to determine the entitlement of a beneficiary to such amounts and also the character of such amounts at any particular time.

4.2.4 We highlight that this, in itself, may be extremely difficult depending on the terms of the deed. For example, the simple accumulation of income at year end would likely result in income of the trust being considered capital. Accordingly, this right under the trust deed would likely provide the trustee with a power to materially change a beneficiary's entitlement to either income or capital at any point in time. *Prima facie*, we are therefore concerned that the power to accumulate income would seem to make it difficult for any trust to satisfy this clearly defined rights rule. Furthermore, a re-characterisation clause contained in the deed would seem to also present similar issues.

4.2.5 Broadly, we understand that the reference to character in paragraphs 27 and 39 would reflect concerns where there are more than one class of units on issue. However, where there is only one class of unit holder, whereby each unit

holder has broadly the same rights under the constituent documents, we are unsure why Treasury would require one to determine separate income and capital rights for the purpose of the clearly defined rights provision.

4.2.6 In our view, we believe there is a significant benefit in simplifying this proposed core principle, as contained in paragraph 39, where there is a single class of units on issue in the relevant MIT. We believe that the principle in paragraph 39 could easily be adapted so that the character of the amounts would not be required to be determined where the MIT only has only one class of units on issue.

4.2.7 Finally, we also highlight that the second test in paragraph 39 currently only allows one to consider the trusts constituent documents when determining whether it would be highly unlikely that a discretionary power will be exercised. We believe that this test should also refer to other factors, such as the Corporations Law requirements, that may also (commercially) prevent the relevant discretionary powers from being exercised.

4.2.8 Should Treasury accept the propositions outlined in this section, the test contained in paragraph 39 could effectively establish a more commercial "clearly defined rights" principle for a MIT that has a single class of unit holders as follow:

- **Test 1:** It is possible to determine at any point in time (for example, on redemption) the entitlements of beneficiaries to an amount of a distribution.

- **Test 2:** Having regard to the trust's constituent documents (as well as other factors relevant to the MIT, such as the Corporation Law requirements), it is highly unlikely that the trustee would exercise a power to materially affect the beneficiary's entitlement to that amount from period to period.

4.2.9 We believe that a more refined "clearly defined rights" rule, for single class MITs, would provide greater certainty in relation to the ability to satisfy this provision for the majority of standard MITs. Consistent with the objectives of the reforms, we believe that it is imperative that the provisions be drafted with a view to certainty and simplification.

4.3 Supporting principles – deeming provisions

4.3.1 The Discussion Paper outlines that it may be considered appropriate for some types of MITs to be treated as automatically satisfying the clearly defined rights requirement.

4.3.2 We support this proposal. We believe that this proposal is in line with the key objective of the reforms. However, the Treasury Discussion Paper only canvasses proposals that deal with registered and/or listed funds. The Discussion Paper does not provide any acceptable deeming rule (or shortcut) that could be used by an unregistered wholesale fund that satisfies the definition of a MIT.

4.3.3 We believe that it is critical for an appropriate rule of thumb to be developed for both registered and unregistered funds. These rules of thumb will provide MITs with a base level framework in which they can operate with certainty, without seeking further guidance from the ATO.

Registered MIS

4.3.4 We support the Treasury proposition contained in paragraph 41, that a registered MIS be treated as automatically satisfying the clearly defined rights test. We agree that the Corporations Law requirements, as contained in Chapter 5C, provide appropriate safeguards to ensure that members' interests in trusts are not adversely affected by a discretion otherwise contained in the trust deed.

Unregistered MIS

4.3.5 We highlight that the Treasury Discussion Paper only provides possible shortcuts for either a registered or listed MIS. As there are a significant number

of unregistered funds within the funds management industry (that qualify as MITs under Division 275), we believe it is imperative for Treasury to consider a rule that would allow some unregistered funds to automatically be deemed to have clearly defined rights. We make the following observations for Treasury's consideration.

4.3.6 The majority of unregistered funds covered in the current definition of a MIT, for Division 275 purposes, must be operated by a financial services licensee (or an authorised representative). Accordingly, it is common for the same licensee to operate both registered and unregistered funds. Where this is the case, unregistered funds would generally be administered in exactly the same fashion as a registered fund (i.e. in accordance with Chapter 5C). We believe that extending a deeming rule to an unregistered fund operated in these circumstances should be considered by Treasury. This proposal could be coupled with additional safeguards.

4.3.7 For example, additional considerations could include, (a) whether the trust has a single class of units on issue and (b) whether there are restrictions on issuing new classes of units (e.g. by way of special resolution). We also believe that a market value test (as outlined in Example 2 of the Discussion Paper) could also be incorporated into a test to be considered for unregistered funds.

Commissioner's discretion

4.3.8 It is our view that a Commissioner's discretion is required in the proposed legislation, however it is imperative that taxpayer's should only need to revert to such a discretion for inadvertent breaches. We highlight that this was not the case in relation to the fixed trust definition, as contained in section 272-5, and accordingly significant pressure was placed on the Commissioner's discretion.

4.3.9 In the first instance, it is our view that the provisions must be drafted in a manner that provide sufficient clarity and detail to ensure that the objectives of reducing complexity and compliance costs are achieved - a Commissioner's discretion would then only need to be provided for inadvertent breaches.

4.4 Key submission points

Submission point 5

4.4.1 Treasury should consider providing a definition of "clearly defined rights" that can be applied practically by the majority of standard MITs. Due to references to both income and capital in the proposed definitions, we highlight that powers to accumulate or re-characterise amounts (which are contained in all deeds) would likely result in the proposed definition not being satisfied. Accordingly, we believe that the proposed definition in paragraph 39 should remove references to character where there is only one class of units on issue.

Submission point 6

4.4.2 We support the proposal to deem registered funds to satisfy the clearly defined rights provision. However, we believe that an appropriate deeming rule should also be developed for unregistered funds that are administered by a financial services licensee - for the purpose of providing certainty to this class of taxpayers.

Submission point 7

4.4.3 To cater for inadvertent breaches of the provisions, Treasury should consider including a Commissioner's discretion for the "clearly defined rights" provision.

5 ATTRIBUTION

This section addresses Question 5 to Question 9 of the Board's Discussion Paper

5.1 Supporting principles

5.1.1 The proposed move to an attribution model is intended to address uncertainties that currently exist for MITs in applying Division 6 of the 1936 Act. This key concern was highlighted in the Board's Position Paper at paragraph 5.1.

> 5.1 … Uncertainty as to the meaning of key terms in the legislation such as 'income of the trust', 'share of income of the trust' and 'present entitlement' were highlighted as major areas of concern.

5.1.2 In general, we support modifications to the present entitlement provisions in Division 6 where they provide a more commercial and practical outcome for funds and beneficiaries (which are line with industry practice).

5.1.3 However, we are concerned that the move to a concept of a "fair and reasonable" allocation or attribution (by itself) would be subjective and thus would give rise to different interpretations – i.e. depending on the point of view of the beneficiary or the trustee.

5.1.4 Accordingly, we are concerned that an attribution model, without supporting principles, would result in significant levels of uncertainty. Furthermore, we are concerned that this would also lead to greater disputes between a trustee and member of the trust.

5.1.5 We therefore believe that it is critical for Treasury to ensure an appropriate minimum level of certainty exists for standard MITs. Accordingly, we request that Treasury consider whether the following recommended supporting principles may be used to facilitate the determination of whether an allocation of an amount is fair and reasonable.

<u>Possible supporting principle 1 – one class of units</u>

5.1.6 We believe that Treasury should consider providing a principle that states that taxable income allocated on a pro-rata basis (based on units held) would be considered fair and reasonable where the MIT has one class of units on issue (in the case where the rights between unit holders are broadly the same).

<u>Possible supporting principle 2 – attribution on a daily basis</u>

5.1.7 Where the previous shortcut principle is satisfied, Treasury should also consider providing that an attribution of taxable income on a daily basis for

incoming and outgoing beneficiaries (i.e. redemptions and new issues of units), provided this approach is not inconsistent with the deed in respect of a distribution of cash entitlements.

Possible supporting principle 3 – attribution on a sale of units

5.1.8 We highlight that there may be some uncertainty as to whether attribution of an amount should occur for unit holders that dispose and/or acquire their units during an income year.

5.1.9 For example, if attribution is to be consistent with the rights under the deed, it would seem that outgoing beneficiaries (that dispose of their units during an income year) would not have an entitlement to cash distributions under the deed (which may only be determinable if the unit holder is a beneficiary at year end). Accordingly, it may be questionable whether an allocation to such beneficiaries would be fair and reasonable.

5.1.10 From a compliance perspective, we highlight that it is would be more simple to attribute a whole years worth of distributions to unit holders who are beneficiaries at year end (but for those cases dealt with under suggested policy principle 2). We mote that this is generally the current practice for MITs under Division 6.

5.1.11 That is, under the current law, no amount of taxable income would be attributed to the unit holders where they are not presently entitled to the income at the end of the year of income (i.e. where they have sold their units during the year).

5.1.12 Accordingly, we believe that Treasury should consider this issue further. It is believed that further certainty should be provided as to which approach would be considered fair and reasonable having regard to the deed. Treasury should consider providing a supporting principle within the legislation that provides some certainty on this issue.

Possible supporting principle 4 – attribution on a redemption

5.1.13 Treasury may also need to consider whether a supporting principle is required to provide some certainty as to whether the allocation of an extra-ordinary capital gain to a redeeming unit holder is fair and reasonable (where this approach is consistent with the deed).

Possible supporting principle 5 – allocation of expenses

5.1.14 We highlight that a capitalisation of costs (in the cost base of CGT assets) may give rise to a larger amount of taxable income that is attributable to the beneficiary. Accordingly, it may be open for the beneficiary to argue that the attribution of the larger component of taxable income would not be fair and reasonable where the trustee could have (alternatively) deducted such costs.

5.1.15 Where an allocation of expenses is done on a reasonable basis, we don't believe that this should be a ground for contesting the attribution on a "fair and reasonable" basis. Accordingly, we believe that Treasury should consider stipulating a provision that provides some certainty on this issue.

5.2 Multiple classes of units

5.2.1 A number of complications are raised in the Discussion paper in respect of MITs with multiple classes of units on issue. This includes (a) dealing with losses of each class, (b) streaming issues, and (c) value shifting issues.

5.2.2 We highlight that these issues should be limited (only) to those funds that have multiple classes of units on issue. Accordingly, where a MIT is created with only one class of units on issue, we submit that no special rules are required. While we do not oppose provisions that deal with multi-class trusts, we highlight that these funds are not as common and accordingly, we would be concerned if the rules were over-engineered in dealing with these more complicated issues.

5.2.3 Furthermore, while paragraph 64 highlights certain integrity issues that may be of concern to Treasury, we do not believe these issues should be a concern if the fund has only a single class of units on issue.

5.3 Key submission points

Submission point 8

5.3.1 While a fair and reasonable test would be objectively determined, the current proposed test would likely be examined subjectively by the relevant parties (i.e. the trustee, the beneficiary or the ATO). We recommend criteria be introduced to support what is considered fair and reasonable to remove subjectivity in its interpretation. For example, we consider it appropriate for the provisions to state that an accumulation of income would not prevent the attribution of taxable income as being fair and reasonable if the deed allowed an accumulation.

Submission point 9

5.3.2 A number of issues will arise where multiple classes of units are issued by a MIT. While we support the ability for this to occur, it is highlighted that this is not the common situation for most MITs. Accordingly, we request that MITs that have a single class of units (where beneficiaries have broadly similar rights) be exempt from applying certain proposed provisions that will only result in further compliance issues (e.g. anti-streaming provisions, value shifting provisions, etc).

6 UNDERS AND OVERS

This section addresses Question 10 to Question 16 of the Board's Discussion Paper

6.1 Alternative de-minimis test

6.1.1 We understand that Treasury is considering a number of alternative de-minimis tests for the under and over provisions. We highlight that, in our view, the alternative tests should be both easy to administer and to apply.

6.1.2 We believe that one approach that can be considered by Treasury is to set a total dollar threshold based on the number of direct unit holders in the fund. As a fund is required to prepare distribution statements to each unit holder, we believe that this information would be readily available. A prescribed total dollar value could be provided (in the legislation or by way of regulation) based on the number of unit holders rather than units on issue.

6.1.3 In our view, we believe that this de-minis alternative (set dollar threshold) would help to address the administrative and compliance cost that would otherwise be incurred on re-issuing distribution statements. Accordingly, a direct link to the number of such statements would seem to be a more appropriate mechanism to test the "de-minimis" threshold as opposed to units on issue.

6.1.4 While the Board rejected a de-minimis based on the number of beneficiaries, we understand that it was considered in the context of a prescribed dollar value per beneficiary. Our suggestion is, instead, a total dollar value based on the number of beneficiaries or unit holders in the fund. For example, where the MIT has between 0 and 50 direct members, regulations could prescribe a total dollar de-minimis value of $50,000 (i.e. a total amount rather than a per unit amount). A different total dollar value could be prescribed for funds with over 50 unit holders (whereby the value could be increased incrementally for each additional member).

6.2 Simple approach for netting unders and overs

6.2.1 At paragraph 82, Treasury has welcomed a simple approach to netting unders and overs carried forward to the following year. We also support this proposition. Generally, any approach adopted by Treasury should be consistent with current industry practice.

6.2.2 We note that, due to the nature and size of the error (i.e. that they are below the de-minimis amount), this area should not present a significant integrity concern to the revenue. Furthermore, the proposal at paragraph 93 would help to ensure the integrity of this provision. Accordingly, we believe that Treasury should take into account current industry practice in relation to such amounts and should consider an approach consistent with this practice.

6.3 Key submission points

Submission point 10

6.3.1 As the alternative de-minimis rule is intended to provide a cap on administrative costs in re-issuing distribution statements, we believe it appropriate to set the alternative threshold based on the number of distribution statements that would have to be re-issued to members of the MIT. We submit that a total dollar value could be prescribed for funds with members within a certain range.

Submission point 11

6.3.2 We support a simple netting approach for dealing with unders and overs. We believe that Treasury should consult specifically with industry on this matter and that industry practice should be taken into consideration in developing this rule.

7 COST BASE ADJUSTMENTS

This section addresses Question 17 to Question 19 of the Board's Discussion Paper

7.1 Minimal changes required

7.1.1 The proposed amendments to the cost base provisions are aimed at addressing one main problem with CGT event E4, being that there is no "increase" in the cost base of units where an amount of taxable income is distributed to a taxpayer.

7.1.2 Accordingly, the cost base amendment provisions (as currently contained in CGT event E4) may only require slight modifications to bring those provisions in line with the suggestions provided by the Board.

7.1.3 Therefore, we believe that Treasury should consider whether it would be a better approach to correct the operation of CGT event E4 - rather than develop a new cost base provision for MITs only.

7.1.4 Furthermore, we highlight that this alternative option would help to ensure a reduction of double taxation, without an increase in compliance costs for funds wishing to comply with the amendments.

7.1.5 In simple terms, CGT event E4 could be modified so that downward cost base adjustments are made on "payments" and upward cost base adjustments are made on distributions or attributions of taxable income. This approach would also make it easier for beneficiaries to determine their cost base if a MIT flips out of the attribution provisions.

7.2 Timing of adjustments

7.2.1 We highlight that the Board suggested that cost base adjustments occur annually under the MIT regime. That is, at paragraph 7.24, the Board stated

> The Board recommends that beneficiaries continue only to be required to make such adjustments on a yearly basis.

7.2.2 As CGT event E4 only happens "just before the end of an income year" (unless units are disposed of whereby the event happens just before the other CGT event), we believe it is only appropriate that the new cost base adjustment provisions operate in a similar fashion.

7.3 Key submission points

Submission point 12

7.3.1 We recommend that CGT event E4 be modified to deal with the cost base adjustment proposals. We believe that this would address the cost base issue for MITs and all respective units trusts. Furthermore, it would ensure that the provisions would be simple where a MIT moves out of the attribution regime.

Submission point 13

7.3.2 Consistent with the Board's report, and with CGT event E4, we believe that cost base adjustments should only be performed annually.