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Dear Mr Maher,

The meaning of control within section 102N of the Income Tax Assessment Act 1936

The Taxation Committee of the Business Law Section of the Law Council of Australia (the ***Committee***) welcomes the opportunity to provide comments in response to the consultation on whether a veto power constitutes control for the purpose of section 102N of *the Income Tax Assessment Act 1936.*

As explained below, the Committee's view is that veto powers should not fall within the definition of control for the purpose of section 102N. Such an interpretation would lead to unintended consequences and would impose onerous requirements on a number of taxpayers to redraft constitutions and trust deeds.

To that end, the Committee is very keen to work with the ATO in developing this further.

1.1 Legislative background

Section 102N(1) of the ITAA 1936 provides that:

> *For the purposes of this Division, a unit trust is a trading trust in relation to a year of income if, at any time during the year of income, the trustee:*
> *(a) carried on a trading business; or*
> *(b) controlled, or was able to control, directly or indirectly, the affairs or operations of another person in respect of the carrying on by that other person of a trading business.*

'Control' is defined neither within the section nor in the accompanying Explanatory Memorandum. The Explanatory Memorandum to paragraph 102N(1)(b)[1] simply states that:

[1] Explanatory Memorandum to the *Taxation Laws Amendment Act (No 4) 1985*, at p. 81.

Paragraph (b) is a safeguarding provision against arrangements to circumvent the operation of Division 6C by having activities that would constitute a trading business of a public unit trust carried on by an associated entity. By taking income from the associate in the form of eligible investment income, the trustee could otherwise ensure that the relevant trust did not qualify as a trading business and so avoid the operation of Division 6C.

1.2 ATO view

The ATO, in ATO ID 2011/11, outlines its view that the power of veto in the circumstances outlined in that interpretative decision amounted to control over the affairs and operations of the company. The power was over matters described as:

> *Going to the structure, scope and management of [the company's] business … encompass[ing] matters which pertain to [the company's] capital structure, shareholder's rights, corporate governance as well as business scope and strategic directions*
>
> *[Delivering] persuasive control of the [the company's] affairs and operations" to the trustee*
>
> *[Concerning] matters that ordinarily fall within the responsibility of the Board of Directors independent of shareholder involvement and as such would be readily acknowledged as being 'in respect of' and indeed integral to [the company's] carrying on of trading business.*

Given that there is little detail provided in ATO ID 2011/11, it is unclear exactly what these matters were and it is therefore difficult to make an assessment as to whether they were significant enough to amount to a 'carrying on' of the business.

2. Law Council of Australia's view - veto powers should not constitute 'control'

Control is not defined in section 102N. Its ordinary meaning is "[t]o direct, regulate or command" (Butterworths Australian Legal Dictionary) or "(i) the power of directing, command; (ii) the power of restraining, especially self-restraint; and (iii) a means of restraint; a check (The Australian Oxford Dictionary (1999)).

The *Corporations Act 2001* defines control in section 50AA as the:

> *capacity to determine the outcome of decisions about the second entity's financial and operating policies*

The definition of 'control' has been addressed in a number of contexts. Analysis of the concept commonly arises in cases in areas such as:

- Broadcasting rights;
- Probate;
- Related companies;
- Takeovers; and

- Taxation.

In the context of section 102N, as a safeguarding provision it should not be construed broadly. It should be interpreted to prevent the identified mischief and no more. The identified mischief is, as set out clearly in the Explanatory Memorandum, arrangements that circumvent the operation of Division 6C by having activities that would constitute a trading business of a public unit trust carried on by an associated entity. The focus is placed on arrangements whereby the trustee is placed in a position to otherwise ensure that the relevant trust does not qualify as a trading business. That equity investors or consortium members wish to have in place some commercial protections or safeguards vis a vis their investment, and thus providing the necessary certainty required to make the investment, is not in any sense related to the specific mischief that is identified in the Explanatory Memorandum.

In considering what is meant by ‘control' in the current context, a number of questions require analysis:

- *Legal vs. de facto control:* Does the section require that a trustee have ‘legal' control (ie. majority shareholding) or is ‘de facto' control sufficient?

- *Positive vs. negative control:* If de facto control is sufficient, must the trustee be able to positively control the direction of the company or is a power of veto enough?

- *Active vs. passive control:* Must the trustee actually control the company during the time of inquiry or is the mere ability to control sufficient?

Legal vs. de facto control

Control in the ‘strict' sense generally refers to control over shareholdings of 50% or greater. The notion has been largely settled in revenue cases.

In *Canwest Global Communications Corporation v Australian Broadcasting Authority* (1997) 24 ACSR 405 (‘*Canwest*') Hill J cited *WP Keighery Pty Ltd v Federal Commissioner of Taxation* [1957] 100 CLR 66 (‘*Keighery*'), among other cases, for the proposition that (at 435):

> *where the question of control of a company is at issue, and ‘control' is not defined, usually what will be intended is control in the sense of capacity to carry an ordinary resolution at a general meeting of shareholders*

In *Mendes v Commissioner of Probate Duties (Vic)* [1967] 122 CLR 152 (*‘Mendes'*) Windeyer J (at 169) stated that:

> *for the purposes of the revenue laws, a member of a company who holds enough shares to give a majority of votes at a general meeting has ‘control' of the company. That is the general rule. Control in that sense means the capacity to carry an ordinary resolution at a general meeting.*

More recently, however, courts have interpreted the meaning of control broadly where it is consistent with the wording and purpose of the provision. In *Re The News Corporation*

Ltd and Others (1987) 70 ALR 419 (‘*News Corp*’) the Federal Court defined control in a way described as a “modified version of what may be called the common law test”. Lockhart J stated that:

> *It is plain that questions of control, whether through voting power or financial interests, are to be determined by practical and commercial considerations rather than highly refined legalistic tests. The relevant provisions of the Act are not directed to or concerned with subtleties of company law.*

Hill J, in *Canwest,* similarly stated that:

> *The question whether a person is in a positon to exercise control of a license is not to be answered by reference to whether that person has an immediately enforceable right to control the license. The Act in question was not intended to be limited to general law tests of control discussed in cases such as Keighery*

The test of control was also relaxed in the UK case of *Bermuda Cablevision Limited and other v Colica Trust Company Limited* [1997] UKPC 44 (‘*Bermuda Cablevision*’), referred to extensively with approval by Beaumont J in *Canwest Global Communications Corporation v Australian Broadcasting Authority* [1998] FCA 115. The case required a determination of whether a company (Cablevision) was controlled by Bermudian residents. Bermudians held 64.45% of the shares in the company. Non-Bermudians (McDonald), however, had a power of veto by way of a by-law that required a special resolution (requiring 80% of votes) for a number of significant matters. Non-Bermudians also had control of the board of directors through a casting vote and an entitlement to 60% of the profits by virtue of an irrevocable profit share agreement. The Privy Council found that, despite the allocation of shares (at 10):

> *It is perfectly plain that the McDonald interests controlled Cablevision by the scheme constituted by the amended By-laws and the Consulting Agreement… In every relevant sense the McDonald interests had and have control of Cablevision.*

There have been no cases on whether paragraph 102N(1)(b) refers to legal or de facto control.

Other provisions of the Tax Act where control is not defined are clearly designed to refer to de facto control. For example:

(a) The value shifting provisions in Division 727 of the ITAA 1997 refer to a situation where “an entity either alone or with its associates in fact controls the company,” in addition to a legal test based on percentage of voting power. The Explanatory Memorandum to these provisions[2] states that:

> *An entity also controls a company if, alone or together with associates, it actually controls the company. Control here takes on its ordinary meaning and this test recognises that there are some circumstances in which control can exist in the absence of the tracing tests being satisfied. For example, an entity may own a 30% interest in a company whose board of directors is*

[2] Explanatory Memorandum to the *New Business Tax System (Consolidation, Value Shifting, Demergers and Other Measures) Act 2002,* at 11.96.

accustomed to acting upon that entity's instructions. Such an entity controls for value shifting purposes.

(b) The controlled foreign company (CFC) provisions in section 340 of the ITAA 1936 refer to a situation where "the company is controlled by a group of five or fewer Australian entities." The Explanatory Memorandum to these provisions[3] describes the question of control as:

A question of fact to be answered according to the circumstances of the case' … 'irrespective of the extent of any interests in a foreign company'.

(c) The thin capitalisation provisions in paragraph 820-785(1)(c) of the ITAA 1997 refer to "not more than 5 foreign entities control[ling] the company". The Explanatory Memorandum to this provision[4] states that:

The third test concerning control by 5 entities does not require a calculation of TC control interests, but is instead directed towards an examination of facts relevant to the circumstances of each case. The term control is not defined for these purposes, but will include situations where foreign entities are capable of exercising control

(d) The trust loss provisions in subdivision 269-E of Schedule 2F to the ITAA 1936 state that a group controls a non-fixed trust if:

(a) the group has the power, by means of the exercise of a power of appointment or revocation or otherwise, to obtain beneficial enjoyment (directly or indirectly) of the capital or income of the trust; or
(b) the group is able (directly or indirectly) to control the application of the capital or income of the trust; or
(c) the group is capable, under a scheme, of gaining the beneficial enjoyment in paragraph (a) or the control in paragraph (b); or
(d) the trustee is accustomed, under an obligation or might reasonably be expected, to act in accordance with the directions, instructions or wishes of the group; or
(e) the group is able to remove or appoint the trustee; or
(f) the group acquires more than a 50% stake in the income or capital of the trust.

Some provisions in the Tax Act use a deemed test of control. Some, for example, deem that there is control when there is a 50% or greater shareholding interest. Others state that an entity will be deemed controller of a company if the entity is deemed to have a 40% interest in the company, unless it can be demonstrated that one or more other entities control that company.

There is a view that if the word 'control' was held to refer to the legal test, there would be little point in including it, as entities with greater than 50% shareholding would already be deemed controllers under the shareholding tests.

[3] Explanatory Memorandum to the *Taxation Laws Amendment (Foreign Income) Bill 1990.*
[4] Explanatory Memorandum to the *New Business Tax System (Thin Capitalisation) Act 2001* at 7.33.

The wording of paragraph 102N(1)(b) refers to 'control', and being 'able to control', both 'directly' and 'indirectly'. Paragraph 102N(1)(b) is a safeguarding provision, and thus should not be limited to only the strict, legal test of control.

Negative vs. positive control

If de facto control is sufficient to amount to 'control', the next question to be asked is what is sufficient to amount to de facto control. In relation to paragraph 102N(1)(b), a key question is whether negative control, in the form of a power of veto, will be sufficient.

Most provisions in the Tax Act seem to define control positively, or are not clear on the matter. The Explanatory Memorandum to Division 727 of the ITAA 1997, for example, states that:

> *An entity also controls a company if, alone or together with associates, it actually controls the company*

In *BW Noble Ltd v The Commissioners of Inland Revenue* (1926) 12 TC 911 (which was affirmed in *Barclays Bank Ltd and Inland Revenue Commissioners* (1960) AC 509) Rowlatt J stated that a "controlling interest":

> *[M]eans the man whose shareholding in the Company is such that he is the shareholder who is more powerful than all the other shareholders put together in a General Meeting.*

Windeyer J stated that:

> *The power to control the decisions of a general meeting can only amount to control of the company, in the relevant sense, when it is a power to carry a resolution on any topic which can come before a general meeting – or so it seems to me. It is a concept of control which assumes that there was no matter, or perhaps no substantial matter, on which the deceased could be outvoted at a general meeting.*

In *Mendes,* the Court rejected the notion of joint control. A deceased person had a majority of the votes in most matters, whereas his son had a majority of votes in respect of four specific matters (reduction of capital, the sale of the company's main undertaking, the winding-up of the company, and the variation of rights in his shares). The Commissioner argued that the deceased had controlled the company because he held the majority of votes at a general meeting on matters that were not of an exceptional nature. Kitto J rejected this argument. He stated that each shareholder only controlled the matters over which they had voting power. He further stated that divided control of the company did not amount to control, saying that:

> *The relevant provisions are expressed to apply, not where a company was partially controlled by the deceased, or was controlled by him in respect of most topics, or in respect of the most important topics or those of most common occurrence or even all topics that might relate to the ordinary operation of the company as a going concern but where it was controlled by the deceased.*

In *Adelaide Motors Ltd,* as described in *FCT v West Australian Tanners & Fellmongers Ltd* [1945] HCA 21 ('*West Australian Tanners*'):

> *There was no group which exercised control, although there were many groups of persons who, by combining together, might have done so*

West Australian Tanners endorsed this approach. One issue in the case was whether a company was ‘under the control of not more than seven persons’. The Commissioner identified the seven largest shareholders, whose aggregate shareholdings gave rise to a majority shareholding. The High Court rejected this, essentially rejecting the notion that two persons who act apart from one another can jointly control a company. It stated that:

> *A reading of [the relevant provisions] suggests very strongly that these provisions were framed upon the view that there could be only one control, and that there could be only one group of seven or less possessing the major portion of the voting power or the majority of the shares.*

Importantly, we note that none of the cases outlined above were referred to in ATO ID 2011/11.

We submit that the above line of authority applies in the interpretation of section 102N.

We acknowledge that cases on foreign ownership have taken a broader view of control. They have found that a power of veto can give rise to de facto control in specific circumstances. We do not, however, consider that they have application in the interpretation of section 102N.

The ATO relied heavily on the *News Corp* case in ATO ID 2011/11. It cited Bowen CJ’s statement, finding that it “was made and meant, on its face and in its context, as a statement of general principle”. The ATO did not, however, discuss the context in which the decision was made.

There are a number of problems with applying the reasoning in foreign ownership cases directly to paragraph 102N(1)(b):

a) It is arguable that the rationale behind the *Broadcasting and Television Act 1942* discussed in *News Corp* (ensuring that the benefit derived from the ownership of media should be spread widely through the national community) is markedly different to the purpose of section 102N (ensuring that trustees who essentially operate businesses are taxed appropriately).

b) In *News Corp*, the legislation expressly defined legal control as shareholdings at the relatively low level of 15%. This is comparable to the common law test of 50%. The Court found that this informed the application of the de facto test, as the de facto test should not be stricter than the legal test.

c) In *News Corp,* the wording of the legislation referred to whether a person “was in a position to exercise control, directly or indirectly, of the company.” This included control “as a result of, or by means of, trusts, agreements, arrangements, understandings and practices, whether or not having legal or equitable force and whether or not based on legal or equitable rights,” which the Court found “convey[ed] a wider concept of control.”

d) The circumstances in *News Corp* were quite different from the circumstances in ATO ID 2011/11. They concerned a foreign entity being able to appoint half of the licensee’s board, independently being able to prevent changes to its articles of association, and

> independently being able to prevent the issue of shares, options and rights to unissued shares by the licensee.

We also acknowledge that there has been a broader view of control adopted in decisions around share acquisitions. A power of veto over the disposal of shares has been held to amount to 'control' in these instances, however these decisions are highly influenced by the purpose of takeover and share acquisition codes.

In *North Sydney Brick & Tile v Darval & Anor* (1986) 10 ACLR 837 ('*North Sydney*') a right of refusal over the sale and transfer of shares was held to amount to control of those shares, despite the fact that it was not 'absolute.' The decision came down to the wording of the relevant section of the legislation in question which referred to a "power to exercise control" and expressed this as including "control that is indirect or is capable of being exercised as a result of, or by means of, an agreement, whether or not that agreement is enforceable." Beach J compared this to paragraph 7(2)(b) of the Probate Duty Act which was discussed in the *Mendes* case, which referred to "a company which was controlled by the deceased." As outlined above, the Court in *Mendes* considered that that section required positive control. Beach J was also highly influenced by purpose. Beach J stated that "the decision in the *Mendes* case is not of great assistance to me in resolving the present issue". He considered that the purpose of the section was "to enable members of the public and other shareholders to know whether there is in existence a small group able to control the destiny of the company in question," and thus a broad test of control was appropriate.

We submit that *Mendes* and related decisions outlined above are more relevant than share acquisition cases in determining the meaning of 'control' in paragraph 102N(1)(b), due to the vastly different purpose and subject matter of share acquisition legislation.

While courts in decisions such as *Canwest* have accepted in particular circumstances that vetoes can constitute control, the judgments in each of these cases draw a distinction between the concept of control in a broadcasting or takeover context and the concept of control in revenue law. The revenue meaning is directed at the capacity of the person to direct the actions of the company and in particular to command a majority of votes at a general meeting.

In *Canwest* the court makes this clear by distinguishing the revenue cases and in particular *Equiticorp* in the following manner:

> In *Equiticorp* (later reported at [1987] VicRp 44; [1987] VR 485), the question was whether registration of a transfer of shares would result in a "foreign person", as defined by the Foreign Takeovers Act 1975 ("the FAT Act"), having a "substantial interest" in more than 15 per cent of the issued shares of a company through the application of elaborate tracing provisions in the legislation and in the company's Articles of Association. For our purposes, it will suffice to note that the Articles deemed a "substantial interest" to exist if a person is "in a position to control" not less than 15 per cent of the company's voting power. The FAT Act also contained a provision (s 8) in terms similar to the description of "control" in s 6(1) of the Act. Having referred to Keighery and Sidney Williams, the Full Court (Murphy, Fullagar and Gobbo JJ) said (at 489):
>
>> *"The above authorities lend strong support to the proposition that when one speaks of a company capable of being controlled in terms of voting power, or, to use the language of s. 9(1), of being in a position to control a certain voting power, one looks for an enforceable and presently and immediately existing right enabling the voting power to be controlled. It must be more than control in certain eventualities. In addition, the voting control is that to be exercised by the majority of votes at a general meeting: see Mendes v. Commissioner of*

> *Probate Duties [1967] HCA 23; (1956) 122 C.L.R. 152; James Bibby & Sons v. Inland Revenue Commissioner [1945] 1 All E.R. 667; Barclays Bank Ltd. v. I.R.C. [1961] A.C. 509."*
>
> It must follow that the Full Court proceeded upon the footing that the essential scheme of the legislation in the tax cases and the FAT Act were, in all relevant respects, identical. But the same comparison cannot be made of the Act and the revenue legislation applied in the revenue cases. As a matter of form, and of substance, there are significant differences. For that reason alone, I would distinguish Equiticorp.

Therefore the weight of authority does not support the view that a power of veto of itself is sufficient to give the holder of the veto control.

We acknowledge that paragraph 102N(1)(b) goes beyond actual control and includes having the ability to control, though submit that the analysis above applies equally. Having the ability to control does no more than allow for a position which requires a step to be taken before actual control is assumed. It still requires that once the ability is exercised, actual control occurs. A power of veto is not sufficient for the reasons explained above.

The Committee further submits that a definition of 'control' which could be satisfied by a power of veto alone could be inconsistent with the purpose of section 102N. It could mean that minority shareholder investors, who have a power of veto only to ensure that the company cannot take certain actions that are inconsistent with their interests, are viewed as having control. Given that these types of provisions are common in shareholder agreements, it could be easy for a trust to inadvertently control a trading entity through this type of agreement. This could have an adverse impact on investment in Australian infrastructure.

To take this approach has the potential that any shareholder with at least a 25% shareholding in a company could be said to have control (at least through the ability to veto a change in the constitution of the company, or any other action requiring a special majority resolution).

The Committee supports the view of the Australian Private Equity & Venture Capital Association (**AVCAL**) which submits that an interpretation where a 25% shareholder, with the same rights as 3 other shareholders, is considered to be able to control the company is unrealistic and uncommercial. AVCAL states that this should be limited to situations where the trustee actually controls the company through an ability to appoint a majority to the board of directors, with veto rights held by a minority investor being insufficient. A collective investment vehicle (**CIV**) might hold the majority of shares, and may carry sufficient voting rights to potentially control the board, but AVCAL believes that merely holding such interests should not be the hallmark of an active business. For further discussion of the policy considerations in relation to CIVs, see AVCAL's Response to the Board of Taxation's Discussion paper on Taxation Arrangements Applying to Collective Investment Vehicles.[5]

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[5] Australian Private Equity and Venture Capital Association Limited, 'Response to Board of Taxation Discussion Paper December 2010, Review of Tax Arrangements Applying to Collective Investment Vehicles' (submission in response to the Board of Taxation's discussion paper: *Review of tax arrangements applying to collective investment vehicles (CIVs)*), pp. 7- 8 <http://www.avcal.com.au/documents/item/248>.

Conclusion

A power of veto should not be sufficient to amount to ‘control’ in section 102N. Looking at its interpretation in revenue law cases and the wording of explanatory memoranda associated with current provisions, the Committee submits that this is the necessary conclusion.

Consistent with relevant policy considerations, paragraph 102N(1)(b) should be read to refer only to powers which allow the trust to ‘carry on’ the business. Section 102N has to be interpreted in a manner consistent with the specific mischief the section was designed to address. Veto powers are negative powers that provide no active control over a business. Therefore, they cannot be considered to amount to control for the purpose of section 102N, which we submit requires both *positive* and *active* control (or the ability to assume both positive and active control).

3. Alternative analysis – only limited veto powers should constitute control

Without prejudicing the analysis in section 2 above, the Committee outlines an alternative view (which the Committee does not submit is the correct view) on the assumption that veto powers can amount to control for the purpose of section 102N.

If a power of veto can give rise to ‘control’ of a company (which we do not submit is the case), the relevant question is how broad the power must be.

Paragraph 102N(1)(b) requires that there is control over the ‘affairs and operations’ of the business. This could potentially refer to any ‘affair’ related to the company. This result would potentially be inconsistent with the purpose of the provision.

As outlined in the previous section, the purpose of section 102N is to safeguard against the circumvention of Division 6C if taxpayers have *'activities that would constitute a trading business of a public unit trust carried on by an associated entity'*.

The ramifications of an extension could be widespread and unintended.

By extending the meaning of control to encompass any veto power, a unit trust acting as a minority shareholder could conceivably be captured by the section when, for example, it exercises its rights to stop a dilution of its interest. Such an action has no bearing on the activities of the company and should have no bearing in the application of section 102N.

Applying the reasoning in ATO ID 2011/11 could lead to a situation where unrelated minority shareholders are found to hold control over an entity, despite the fact they have no plan to act in concert, and therefore cannot in substance influence the trading activities of an entity.

Such an interpretation would deter investors from choosing to invest in Australian infrastructure projects, as they would be aware that any exercise of minority veto rights could lead to them being deemed to be a trading trust and taxed accordingly. This would cause an adverse impact on investment in Australia's infrastructure.

Where it does not detract from an actual investment, taking a view that a power of veto gives rise to control has the potential to force investors to accept lesser protection of their interest than would otherwise be desirable from an economic viewpoint simply to ensure an unintended taxation outcome does not arise.

To the extent that the existence of vetoes causes the application of section 102N with the result that a trust is taxed as a company, this is likely to have various consequences beyond the immediate taxation issue, for example it is likely to increase the earnings multiples for debt coverage and existing projects may have covenants breached.

In the event that veto powers were to be considered to fall under the scope of *control* (which we do not submit is the case), the Committee considers that this would have to be limited to vetoes that relate to carrying on *activities that would constitute a trading business.*

That is, *veto* powers should only be deemed to constitute control in a narrow set of circumstances, namely where the veto power allows the shareholder to directly influence the trading operations of the company – for example, where a shareholder has the power to veto day-to-day decisions of the company.

To fulfil this criterion, the Committee submits that the vetoes would at a minimum need to exhibit the following:

(a) The veto rights must go to the trading business of the entity, rather than corporate governance or capital structure;

(b) The veto rights must be exercisable by one entity, or a number of entities formally acting in concert; and

(c) The veto rights must, as a collective, be sufficient to control a majority of the trading decisions and activities and not only a small number of matters.

We provide further comment on these factors as follows.

Veto rights that go to the trading business of the entity

Vetoes that only affect the corporate governance of an entity (e.g. the issue of additional debt) or only protect shareholder rights (e.g. the veto of issuing additional equity) are too remote and cannot affect the *activities of a trading business*.

Some constitutions or trust deeds could conceivably provide to shareholders or unit holders the power to veto day-to-day activities of the entity. Such activities would be more likely to fulfil the definition of control.

Veto rights that must be exercisable largely or exclusively by one individual

In addition to a power of veto having to affect day to day activities, it would also be necessary for the veto power to be exclusive (that is, not one exercised in concert with others). It must be that only one person ‘control’.

A veto power that is exclusive is more likely to fulfil the definition of control, *provided* that it sufficiently affects the day-to-day activities of the entity.

A veto power which was only effective when exercised alongside a sufficient number of other shareholders (e.g. supermajority provisions) should not fulfil the definition of control, *even if* the veto power is in respect of day-to-day activities. This is because a shareholder cannot reasonably be said to have negative control over an entity if that control is ineffective without the involvement of other third parties.

Not only do we submit that certain criterion would need to be met for veto rights on matters related to the trading business to be able to constitute control, there would need to be some consideration of sensible limits to veto rights.

For example, we submit that while a veto right in relation to the purchase of assets may be considered to go to the day to day trading of the business, it should not be a veto right that gives rise to control where that veto could only be exercised in relation to the acquisition of an asset or in relation to capital expenditure in excess of an agreed financial threshold that is considered significant in the context of the business. This is only one of many examples that will arise if the ATO is seeking to reach a position of providing guidance on veto rights that it does or does not consider suggests control exists.

If the ATO is to adopt the alternate view that veto rights can, in the context of section 102N, give rise to control and is seeking to develop a list of veto rights that it considers to be of the sort that do or do not give rise to control, this example above should clearly highlight the difficulty with this approach. In practice, it is not the case that veto rights are drafted in a standard form. They are drafted having regard to the specific business, the risks, the positions of the investor.

We acknowledge that the ATO has requested examples of veto rights be provided for consideration. We understand that other bodies and organisations have provided a large number of examples and so have not sought to add to those. As lawyers, we would be best placed to work with the ATO in considering example veto rights and expect that this will form part of the continued consultation.

The Committee would be happy to provide further assistance, or discuss any of the above submissions, if that would assist the ATO. In the first instance please contact Committee Chair, Mr Adrian Varrasso on 03 8608 2483 (email. adrian.varrasso@minterellison.com).

Yours sincerely,

John Keeves, Chairman
Business Law Section