



Law Council  
OF AUSTRALIA

*Business Law Section*

The Manager  
Corporate Tax Unit  
The Treasury  
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Email: [dividendwashing@treasury.gov.au](mailto:dividendwashing@treasury.gov.au)

17 June 2013

Dear Sir or Madam

### **Consultation – Preventing Dividend Washing**

1. The Taxation Committee of the Business Law Section of the Law Council of Australia (**the Committee**) welcomes the opportunity to provide a submission to Treasury concerning work toward preventing dividend washing arrangements outlined in the Discussion Paper dated June 2013 (**Discussion Paper**).
2. The Committee does not support any amendments to the current complex tax laws to deal with the permitted trading known as “dividend washing”.
3. The Treasury estimates indicate that the current risk to Commonwealth revenue is around \$20 million per year. This does not suggest a serious erosion of revenue for the Government.
4. *If* dividend washing arrangements are likely to pose a serious revenue risk for the Government, the most appropriate solution appears to be to adjust the institutional trading rules which permit cum-dividend trading after the ex-dividend date, rather than to amend further the already complex tax rules.
5. The Committee’s responses to the specific questions posed by the Discussion Paper are outlined below.

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6. The Committee is also concerned with the current trend of Treasury and Government to make announcements of proposed legislative changes that take effect from the date of such announcements before the actual legislation is introduced. In the Committee's view, such practice not only introduces uncertainty for taxpayers but more importantly results in the legislation (when introduced) having retrospective effect. Accordingly, to the extent that the Government proceed with amendments to the tax laws, the Committee submits that the legislation should only apply prospectively.

### **Legislative options to address dividend washing**

7. Amending the holding period rules to address the break in ownership achieved through dividend washing as outlined in section 3.2 of the Discussion Paper could achieve the outcome desired without creating uncertainty, provided that the proposed modification to the LIFO rule only applies in respect of consecutive trades between the ex-dividend date and the record date by the taxpayer.
8. It is perhaps the most appropriate method because it should provide certainty and is targeted in its approach.
9. In the absence of actual legislation, it is difficult to state definitively whether this method would give rise to unintended consequences for legitimate trading activities or undue compliance burden for the taxpayers. This is because a blunt measure such as this (which doesn't necessarily take into account the facts and circumstances of the trades) may unintentionally affect legitimate transactions. It may be that taxpayers undertaking legitimate trades during that limited period are willing to forego the entitlement to additional franking credits.
10. The Committee does not support any extension of the new rule beyond the limited period because of the potential additional compliance burden which that would impose and the absence of any clear benefit from doing so.
11. Hence, the Committee considers that the qualified person rules contained in former Part IIIAA of the *Income Tax Assessment Act 1936* that were repealed in 2002 and to be re-enacted in the *Income Tax Assessment Act 1997* should be a matter of priority.

12. The Committee does not support any amendment to the general anti-avoidance rules (whether within the current section 177EA or the wider Part IVA rules) or to introduce a specific double franking credit integrity rule to deal with this particular issue. The Committee considers that these options *will* result in further uncertainty and confusion regarding their operation particularly where the Commissioner is given any discretion to make a determination or form a view.
  
13. We should be glad to expand on the above or to meet with you. If you have any questions, please do not hesitate to contact the Committee Chair Mr Mark Friezer of Clayton Utz on (02) 9353-4227 in the first instance.

Yours faithfully,



**Frank O'Loughlin**