Dear Director,

Thank you for the opportunity to submit a response to the consultation on the proposed legislation relating to Franked Distributions and Capital Raising.

I, Guy Mitchell object to the proposed legislation changes.

I believe the draft legislation is inequitable to Australian companies and shareholders and it could inadvertently impact situations of legitimate company operations that have been in place legally since December 2016.

The draft legislation fails to recognise the fundamental principle underlying the franking regime and the reason for its creation which amongst other matters is the avoidance of double taxation on company earnings and individuals.

Part of this change will stop Australian companies who issue new shares under a Dividend Reinvestment Plan (DRP) from paying franked dividends and significantly increase the cost of capital for all franked dividend paying Australian companies. It will also risk the stability and integrity of the Australian banking system by inhibiting effective capital raising during challenging economic periods such as the start of the coronavirus pandemic.

If passed, its application could potentially unfairly burden Australian investors with retrospective tax debts going back six (6) financial years and to be paid at a time of economic uncertainty due to current levels of high inflation and also the ongoing recovery from COVID-19 and with its full effects are still not apparent (eg the fact that National Cabinet is still making new rules and retaining others is reflective of this ongoing uncertainty). I note the retrospective application to 19 December 2016 would unfairly prejudice legal franked dividends paid out to shareholders of Australian companies and leave them with unexpected tax bills for dividends they have since received and most likely spent, would need to be paid at a time of economic uncertainty. This is particularly concerning for those who rely on fully franked dividends as income.

There is a great probability of unintended consequences arising based on the current drafting of the proposed legislation.

The proposed retrospectively going back to 19 December 2016 will create chaos and uncertainty in the Australian economy as people and business make financial decisions based on the current laws in place. No person or business would trust a government in the future if this approach is adopted. It is entirely plausible that this would have an ongoing negative impact on business and personal investment well into the future. Where is the 'fairness' for Australian taxpayers (ie people) as this will be the 'start of the thin end of the wedge' that will or can be applied 'willy nilly' into the future.

As mentioned above, the measure will apply retrospectively to distributions made on or after 19 December 2016. As I have read, the Tax Commissioner will have 12 months after the amending legislation receives Royal Assent to amend prior year assessments to give effect to the amendments. This could impact the position of shareholders. The Government has advised that it is unapologetic for this. The current Government points out that the December 2016 announcement made by the Government at that time made it clear that the measure, when introduced, would apply retrospectively. In fact, this Government says the retrospective application is necessary. At the same time, Treasurer Jim Chalmers is quoted as saying the measure is a ‘very minor change’. Quite logically, one can ask is going back six years a minor change? These statements are disingenuous and certainly don’t pass the ‘pub test’

The draft legislation appears to inadvertently target situations of legitimate company operation making. It is difficult to form a conclusive judgement as to the legitimacy of historical and future payments of fully franked dividends by Australian companies. Is there ‘mischief’ at play here between the explanatory memorandum accompanying the draft legislation and what was commenced by the ATO but not continued back in 2016. As I understand it via comments by a leading law firm, the ATO Tax Practitioner Advisory Group said it would provide an update at its meeting on 27th November 2015 in relation to this proposal. I understand this additional guidance was never issued.

Frankly, it’s extremely poor governance.

As drafted, the proposed legislation does not yet sufficiently distinguish between acceptable activities and the tax avoidance situations it intends to address. The proposed legislation would appear to inadvertently impact situations of legitimate company operations and could accordingly delay or discourage the normal processes of capital raising, investment and economic growth in Australia and interfere with the operation and the efficiency of the Australian capital markets and the structural integrity of our banking system.

Also, if the Treasurer is advising that this legislative change will only raise approximately $10 million per year, then is it worth the effort. Is the Australian public being told the truth?

Tax laws should not be allowed to change retrospectively when Australians have budgeted for and paid their lawful tax assessment based on existing tax law in place at that time. Like all previous changes especially those of some magnitude, if these changes have merit then apply then legislate them so there effective from July 2023. This is the most sensible and fair approach given then comments by the Treasurer that these of a ‘minor’ nature and will only raise an estimated $10 million per year.

Yours sincerely,

Guy Mitchell