



March 26, 2009

Via Email: geoff.weir@treasury.gov.au

Mr. Geoff Weir
Director
Australian Financial Centre Forum
Level 26
400 George Street
Sydney NSW 2000
Australia

**Re: Request for Legislative and Regulatory Relief Regarding Uncertainties
in Australian Tax Law for Certain Foreign Investment Funds**

Dear Mr. Weir:

Managed Funds Association (“MFA”)¹ submits this letter to request an opportunity to discuss with you and your staff the adverse consequences to foreign investors resulting from uncertainties in the application of certain Australian tax laws with respect to many foreign investment funds, including those managed by many MFA members. In particular, we would like to discuss with you how these uncertainties act as an ongoing impediment to foreign investment in Australian capital markets, and to respectfully request that the Australian Treasury support legislative and regulatory relief to eliminate the uncertainties.

We believe elimination of these uncertainties would promote two important policy objectives: (1) investment in Australian capital markets by foreign investment funds;² and (2) the establishment by those funds, or by the funds’ investment advisors on their behalf, of fund advisory operations in Australia. Conversely, the continuation of these uncertainties will likely cause foreign investment funds to withdraw from Australian capital markets, to the potential detriment of those markets and the Australian economy.

¹ MFA is the voice of the global alternative investment industry. MFA is a U.S.-based trade association with over 2,000 members who are professionals in hedge funds, funds of funds and managed futures funds, as well as industry service providers. Established in 1991, MFA is the primary source of information for policy makers and the media and the leading advocate for sound business practices and industry growth. MFA members include the vast majority of the largest hedge fund groups in the world who manage a substantial portion of the approximately \$1.5 trillion invested in absolute return strategies. MFA is headquartered in Washington, D.C., with an office in New York, N.Y. For more information on MFA, please visit: www.managedfunds.org

² It is important to note that resident Australian investors also benefit from investment by foreign investment funds. This investment in Australia improves market liquidity, reduces bid-ask spreads and contributes to overall market efficiency. In addition, it has a positive effect on the Australian dollar, as foreign investment funds have to use local currency in order to invest in the Australian markets.

MEMBERS OF MFA

Many MFA members manage funds that invest in Australian capital markets, to the benefit of those markets and other market participants. MFA's fund members are diverse and vary substantially in terms of their investment strategies. Some of the strategies employed by our members include traditional long-short strategies, strategies with longer term investment horizons, as well as "macro" strategies, which invest on the basis of economic themes and across several asset classes (*e.g.*, currencies, bonds, indices and rates, commodities, futures, derivatives).

Our members are also diverse with respect to their organizational structures, places of domicile and investor bases. Many MFA members have funds organized and established in the United States. A significant number of our members, however, also manage funds organized and established in jurisdictions that are not parties to comprehensive double-tax agreements with Australia (*e.g.*, Caymans, Bahamas). These members organize and establish those funds in non-treaty jurisdictions primarily to attract non-U.S. investors and U.S. tax-exempt investors. It is important to note that these non-treaty funds are not established or used to avoid or minimize income tax in Australia.

THE CONCERNS OF MFA MEMBERS

A considerable number of MFA members who manage funds in non-treaty jurisdictions have expressed concern regarding the longstanding uncertainty of the scope and application of certain Australian tax rules, which may adversely affect those funds that:

- Hold any investments in Australian listed shares, bonds, futures contracts, and exchange-traded or other listed securities; or
- Establish, or whose investment advisors establish on behalf of their funds, fund advisory operations in Australia.

Because of the significance of the concerns identified by a number of our members with respect to these issues, MFA has formed a special working group.

The problems posed by the uncertainties surrounding the Australian tax issues identified above have recently become even more acute for our members because of new financial reporting requirements in the United States.³ This and other concerns were noted in a letter submitted by the Australian law firm of Mallesons Stephen Jaques to the AFTS Secretariat and the Budget Policy Division of the Australian Treasury, as well as to the Australian Board of Taxation, on December 12, 2008 ("Mallesons' Letter"). Mallesons' Letter states that "a key impediment to most foreign funds investing in Australia, or

³ By the end of 2009, *Interpretation No. 48, Accounting for Uncertainty in Income Taxes of FASB Statement No. 109* ("FIN 48") will require that U.S. private enterprises account for uncertainties in their income taxes. The application of FIN 48 to the uncertainties regarding Australian tax law will likely act as an impediment to U.S. investment funds investing in Australia or establishing or maintaining an office in Australia.

establishing discretionary funds management operations in Australia, is their Australia tax treatment under Australia's current income tax regime."⁴

RECOMMENDED AUSTRALIAN TAX LAW CHANGES

We are supportive of the recommendations in Appendix 4 of the Mallesons' Letter, which we believe, if implemented, would remedy our concerns on a going-forward basis. In general, those recommendations would amend Australian tax law to clarify that trading and investing in types of assets listed above would not subject a foreign investment fund to Australian taxes on those activities.

Moreover, the proposed amendments would ensure that a foreign investment fund—which itself establishes, or whose investment advisor establishes on behalf of the fund, fund advisory operations in Australia for the purposes of trading such assets, regardless of whether such trading occurs inside or outside of Australia—also would not be subject to Australian taxes because of those activities.

In addition to these legislative changes, we believe that it is important for the Australian Tax Office to issue formal guidance, which clarifies that foreign investment funds are not subject to Australian taxes for conduct or activities that have already been undertaken by those funds; provided that, such conduct or activity would otherwise be within the scope of the exempted activities described in Appendix 4 of the Mallesons' Letter.

COMPARISON WITH OTHER MAJOR OVERSEAS JURISDICTIONS

The recommended changes also would bring Australian tax law in line with the tax treatment to which MFA members and their funds are subject when investing in many other jurisdictions around the globe, including the United States, the United Kingdom, Japan, Hong Kong and Singapore. More importantly, resolution of these issues in the manner discussed above would help promote investment in Australian capital markets by foreign investment funds, and their willingness to establish, or cause their investment advisor to establish on their behalf, fund advisory operations in Australia, while continued uncertainties regarding the application of Australian tax law, on the other hand, would limit such activity.

⁴ See Mallesons' Letter, Page 3. Mallesons' Letter is publicly available at:
http://www.taxboard.gov.au/content/managed_investment_trusts_review/Submissions/18_Mallesons_Stephen_Jaques.pdf.

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WILLINGNESS TO PARTICIPATE ON A VIDEO TELECONFERENCE CALL

Representatives of MFA would appreciate the opportunity to participate in a video teleconference call with representatives of the Australia Treasury to discuss these issues with you and to answer any questions that you or your colleagues may have regarding the positions stated in this letter. Feel free to contact my colleague, Carl Kennedy (at (ph.) (202) 367-1210, (fax) (202) 367-2140), or me (at (ph.) (202) 367-1140) in the United States, if you would be willing to participate in such a call.

Respectfully submitted,

\s\ Richard H. Baker

Richard H. Baker
C.E.O. & President

cc: Mr. Mark Johnson, Chairman, Australian Financial Centre Forum