

Get up to speed on the latest developments in the investment funds space and ensure you are on top of the latest tax reforms that could affect your investment projects. In this edition we look at:

- Upcoming changes to managed investment trust rules (trusts which have advantageous withholding tax implications for foreign investors and may offer CGT concessions for domestic investors) commencing from 1 July 2016.
- New withholding requirements for purchasers of interests in Australian land, commencing 1 July 2016.
- New venture capital tax reforms to incentivise FinTech investment in Australia in response to the recent Commonwealth Government's Backing Australian FinTech publication.
- Comparing unit trusts, VCLP and ESVCLP funds, including a review of the current tax and regulatory differences.
- Significant changes to GST Cross Border Rules, commencing from 1 July 2016 or 1 October 2016.

Managed Investment Trust Rule Changes Commencing 1 July 2016

Fund managers offering investments in trusts with "managed investment trust" status (MITs) and investors seeking to invest in these structures should be aware of the new MIT rules which will be enforced from 1 July 2016 (with optional application for the 2015/2016 year). These new MIT rules will implement a special tax regime for "attribution managed investment trusts" (AMIT), which will apply to MITs which satisfy some additional requirements.

The main advantages of attaining MIT status is that non-resident investors' tax is limited to 15% on the distributable income where they are resident in a country with which Australia has an "exchange of information" treaty. MIT status also enables the MIT to elect capital account treatment, meaning that certain assets (including land and shares) are held on capital account, potentially enabling resident investors to use the CGT concessions.

The new legislation currently before Parliament creates a new type of MIT (called an "AMIT") which has some concessionary rules, mostly in relation to compliance issues such as allowing "unders and overs" adjustments to taxable income where minor errors are subsequently found. Where actual distributions are more or less than the taxable distributions, there will be adjustments to unitholders' cost base of the units. An AMIT with different classes of units will be able to elect for each class of units to result in a separate trust for tax purposes (e.g. where there are ring fenced assets). AMITs will also be automatically treated as a fixed trust without needing to satisfy all of the current strict requirements for fixed trust status.

One of the key requirements to be an AMIT is that the unitholders have clearly defined interests. There is a "safe harbour" for registered MIS or where there is a single class of units. These trusts will generally be considered to have clearly defined interests with the result that these MITs will be considered to be AMITs and will have fixed trust status. However, if there is an unregistered scheme with different classes of units, then it will be necessary to show that the unitholders of all classes have clearly defined rights.

Other proposed amendments will change the test for whether a trust is a public trading trust by no longer including superannuation funds or exempt entities with refundable franking credits holding over 20% of the trust. This change is proposed to apply from 1 July 2016. Some trusts which are currently taxed as companies due to failing the tests for being a public trading trust may now become flow through entities for tax purposes.

For advice regarding these new MIT rules, please contact Louise Boyce, Of Counsel or Michelle Segart, Partner.

New Withholding Requirements for Purchasers of Interests in Australian Land

From 1 July 2016, purchasers of direct and indirect interests in land in Australia could potentially be subject to an additional cost of 10% if they fail to include in their agreements the right to withhold an amount equal to 10% of the purchase price from payments made to vendors in circumstances where the vendor has not provided relevant clearance certificates or residency declarations. The new rules will apply to contracts entered into from 1 July 2016, but both purchasers and vendors will need to prepare for these changes well before any sale is executed in order to ensure they are not adversely affected.

The withholding provisions apply to require the purchaser to pay to the Commissioner of the Australian Tax Office (ATO) an amount equal to 10% of the purchase price (including the money paid and the market value of any property given) of the asset on or before becoming the assets' owner for assets acquired from a vendor which are:

- taxable Australian Real Property (TARP) such as land, fixtures, mining tenements in Australia;
- indirect Australian real property interests (for example more than 10% of the shares in a company where 50% or more of the assets of the company are TARP); or
- an option or right to acquire TARP or indirect Australian real property interests,

in circumstances where the vendor has not provided relevant clearance certificates or residency declarations.

There are a number of exceptions and exemptions, and the procedures are quite different for direct and indirect real property interests.

Direct Australian Real Property Interests (TARP)

The withholding provisions apply to real property located in Australia, including a lease of land, mining, quarrying or prospecting rights, and also include fixtures to the land and options or rights to acquire real property. This can include real property sold as part of the sale of a business, or the sale or grant of leases. Company title interests also fall under this category (even though technically they are indirect interests in land).

A vendor will be assumed to be a non-resident unless they supply a clearance certificate to the purchaser prior to settlement which has been issued by the Commissioner certifying that they are an Australian resident. In order for a vendor to obtain a clearance certificate they may be required to ensure all their tax returns are up to date. Clearance certificates will be valid for 12 months, so it is recommended that any vendors intending to sell property apply for a clearance certificate well before the proposed settlement date. If there are a number of vendors, a clearance certificate must be obtained for each vendor.

There are a number of exceptions from the withholding provisions, as follows:

- Where the value of the land is less than \$2,000,000 (where there are multiple purchasers it is the total value of the land, not just the purchaser's interest);
- Where every vendor has supplied a clearance certificate;
- Where the vendor is a company under administration or the transaction is part of the administration of a bankrupt estate or an arrangement with creditors, or
- Where another withholding obligation applies to the transaction (for example where withholding tax is required to be paid to the ATO for another reason, such as a supply in the course of an enterprise for which no ABN was provided).

If the vendor is not able to provide a clearance certificate, the purchaser must pay 10% of the purchase price to the ATO unless they receive a variation certificate issued by the ATO before settlement. The vendor can apply for a variation certificate if they believe the actual tax payable in respect of the sale will be less than 10%, such as if they have carried forward tax losses, or if there are multiple vendors with only one being a non-resident.

A secured creditor can also apply for a variation certificate if they consider the proceeds of sale will be insufficient to discharge the debt as well as pay the Commissioner.

Indirect Real Property Interests

The withholding provisions also apply to indirect Australian real property interests such as shares in a company or units in a trust where an interest of 10% or more is held in an entity where 50% or more of the assets of the entity are Australian real property. The potential exceptions from withholding for indirect interests in real property are quite different from direct interests. The AU\$2 million threshold does not apply to indirect interests in real estate, so interests of any value are potentially caught. However, there is no need for a vendor of indirect interests to provide a clearance certificate as "residency" can be established in other ways such as by the vendor making a declaration of "residency" which can be included as part of the warranties under the sale contract.

There are a number of exceptions from the withholding provisions for indirect interests, as follows:

- Where the vendor has made a declaration that they are an Australian resident.
- Where the vendor has made a declaration the assets are not indirect Australian real property assets.
- If the purchaser has reasonable grounds to believe every vendor is an Australian resident (the knowledge condition).
- If a variation certificate has been provided to the purchaser prior to settlement (by either the vendor or a secured creditor as outlined above).
- The transaction is conducted through an approved stock exchange or crossing system.
- The transaction is a securities lending arrangement.
- Where the vendor is a company under administration or the transaction is part of the administration of a bankrupt estate or an arrangement with creditors.
- An amount is already required to be withheld as withholding tax for some other reason.

Payments to the ATO

In the case of both direct and indirect interests of property, the purchaser should ensure that its relevant agreement allows it to withhold the required amount from the purchase price payable to the vendor, for the purpose of making the payment to the ATO. If the purchaser fails to withhold and there is an obligation to withhold, the obligation to pay to the Commissioner still exists and the purchaser will be required to make the payment and may also be liable for interest. These rules therefore place onerous obligations on the purchaser.

Inaccurate Declarations?

A purchaser is entitled to rely on a vendor's declaration of residency or declaration that the interest is not an indirect real property interest unless they know the statement to be incorrect. A purchaser is therefore able to rely on the declaration even if they have grounds to doubt the accuracy of the declaration, provided they do not have specific knowledge that the statement is false.

The vendor will have potential liability for penalties if the statements made are false or misleading.

Practical Points

This legislation raises a large number of important issues for purchasers, vendors and secured creditors in transactions involving the sale of direct and indirect land interests in Australia. These include:

1. All vendors who are considering selling direct interests in land which could have a value over \$2,000,000 should consider whether their tax affairs are in order and apply for a clearance certificate well before the proposed settlement date.
2. Vendors of shares or units in trusts should consider whether the stake would constitute an indirect real property interest in order to determine whether they are able to make an appropriate declaration to avoid having tax withheld.
3. If the vendor is not able to obtain a clearance certificate or make a relevant declaration, they should consider whether they would be entitled to a variation of the amount of tax withheld. They should allow plenty of time prior to settlement to obtain the variation certificate.
4. Secured creditors who become aware of a proposed sale should consider whether they should seek a variation certificate.
5. Purchasers of direct real estate need to ensure that a clearance certificate is provided on or before settlement.
6. Purchasers should ensure that appropriate provisions for their right to withhold 10% of the purchase price (if required) are included in all contracts involving a sale of direct or indirect land interests.
7. Purchasers should ensure relevant declarations (and warranties) are included in all contracts of sale of indirect interests in land.
8. If the purchaser is required to pay an amount to the ATO, they will need to complete an online "purchaser payment notification" form on or before settlement.

For advice regarding these new withholding requirements, please contact Louise Boyce, Of Counsel or Michelle Segart, Partner.

New Venture Capital Tax Reforms to Incentivise FinTech Investment in Australia

In March 2016, the Commonwealth Government released the publication "*Backing Australian FinTech*", setting out a number of tax and regulatory reforms to drive FinTech investment in Australia. This follows on from the Government's launch of the National Science and Innovation Agenda "Welcome to the Ideas Boom" in December 2015 (see www.innovation.gov.au for information as to how this agenda proposes to drive growth in Australia's venture capital industry).

In this article we look at some of the key tax and regulatory reforms applying to investments in early stage venture capital limited partnerships (ESVCLPs), which are expected to commence from 1 July 2016.

For information about what an ESVCLP is, we encourage you to read our next article "*Key Differences for Structuring your Fund as a Unit Trust, VCLP or ESVCLP*" and our article entitled "*The New SIV Requirements: What Does this Mean for Australia's Venture Capital Industry and Beyond?*" published in July 2015. The key advantage for investors investing into an ESVCLP is that all returns (income and capital) to investors are tax exempt. These new reforms provide further tax incentives to invest into an ESVCLP and broaden the investment parameters for an ESVCLP.

The major tax incentive coming into effect in the 2016–2017 financial year for investing in an ESVCLP is that limited partners will receive (broadly) a 10% investor tax offset on capital invested during the year (ESVCLP tax offset). In the proposed legislation, there is a transitional rule that investments in new ESVCLPs (unconditionally registered after 7 December 2015) will qualify for this offset. Investments made prior to 30 June 2016 may qualify but can only be claimed in the 2017 year. The proposed legislation includes the following terms for the ESVCLP tax offset:

- The ESVCLP tax offset is 10% of the lesser of:
 - the limited partner's contributions to the ESVCLP for the income year; and
 - the partner's investment related amount (broadly the proportionate share of the investments made by the ESVCLP during the relevant financial year and within two months after year end).
- The ESVCLP tax offset will only be available for those funds invested into the ESVCLP which are invested into eligible investee companies within the income year of the investment or within two months after year end.
- Investors should be aware that investments in convertible notes (or any other repayable investment) will not qualify for the tax offset, and nor will contributions which are voluntarily repaid by the ESVCLP to the limited partner within 12 months of a contribution being made.
- The ESVCLP tax offset can be carried forward to future years if the investor doesn't have sufficient tax payable to fully utilise the offset in the current year, but it is not refundable.

- If the investor in an ESVCLP is a trust (including a managed investment scheme) or partnership, the trustee, responsible entity or partnership must notify the beneficiaries or partners of their share of the ESVCLP tax offset within three months of the end of the relevant financial year to which the offset relates (or such further time as the Commissioner may allow in its discretion), otherwise the offset is lost.

Some of the other key regulatory reforms enhancing the flexibility of ESVCLPs are:

- The maximum fund size for new and existing ESVCLPs will double in size from AU\$100 million to AU\$200 million.
- An ESVCLP will no longer be required to divest an investment if the value increases to above AU\$250 million, however, if the investment is not disposed of within six months after the end of the income year in which the investment's market value exceeds AU\$250 million, the CGT exemption on returns to investors on disposal will be reduced (to the extent the value attained on disposal exceeds the value of the investment at 6 months after the end of the income year it exceeded AU\$250 million). Capital losses will not be able to be used to offset the capital gains.
- Trusts or managed investment schemes may hold investments in ESVCLPs without being considered to be a "trading trust", which would otherwise be contradictory to a managed investment scheme achieving [MIT status](#) as long as the relevant trust or scheme has provided 30% or less of the aggregate committed capital of the ESVCLP and is not a general partner.
- Small investee companies invested in by an ESVCLP no longer have to be audited (e.g. less than AU\$12.5 million assets).
- Eligible investments in ESVCLPs will be broadened to include investments in respect of finance and insurance-related activities (which were previously prohibited), to enable investment in FinTech. Further, a new mechanism will be introduced where Innovation Australia can provide binding rulings as to the eligibility or ineligibility of investments to provide certainty for investors.

If you would like further information about the package of reforms for incentivising investment in the Australian Fintech sector, please contact Michelle Segart, Partner, or Louise Boyce, Of Counsel.

Comparing Unit Trusts, VCLP and ESVCLP Funds

Clients often ask us "what are the key differences for using a unit trust compared to a regulated venture capital fund (either a VCLP or ESVCLP) as the fund vehicle for venture capital investments?"

With all of the current focus on innovation and venture capital investing in Australia arising since the launch of the Commonwealth Government's National Innovation and Science Agenda (see www.innovation.gov.au), we thought this may be a helpful and timely reminder of the key structural, regulatory and tax differences between these three structures.

Background

The VCLP regime was introduced in 2002 (under the *Venture Capital Act (Cth) 2002* and the *Taxation Laws Amendment (Venture Capital) Act (Cth) 2002*) to support investment in eligible venture capital investments that would otherwise have difficulty attracting investment through normal commercial means. The VCLP regime provides for registration of a VCLP with Innovation Australia which must meet certain requirements (including size of fund and eligible investment criteria) in order to receive tax concessions for investors and fund managers.

The ESVCLP regime was introduced in 2007 (under the *Tax Laws Amendment (2007 Measures No.2) Act 2007*) as an extension to the VCLP regime, but for early stage investments providing greater tax concessions for investors (with a different set of criteria as to fund size, threshold investment levels and eligible investments). For an overview of the key differences between the VCLP and ESVCLP programs, the Department of Industry and Science's paper "[Comparison of VCLP and ESVCLP](#)" is helpful.

"Tax flow-Through" Structures in Australia

Each of a unit trust, a VCLP and an ESVCLP are the main "tax flow-through" structures available for collective investments under Australian tax laws.

In this table we assume that the unit trust structure is a wholesale unregistered managed investment scheme (and therefore not a regulated registered scheme for retail investors under Chapter 5C of the Corporations Act) and we are therefore comparing these investment structures for wholesale, professional or sophisticated investors (i.e. not retail investors).

In respect of the information provided about ESVCLPs, this should be read in conjunction with our previous article "[New Venture Capital Tax Reforms to incentivise FinTech investment in Australia](#)", which gives an overview of the key proposed tax and regulatory reforms for ESVCLPs coming into effect later in 2016.

Feature	Unit Trust	VCLP	ESVCLP
1. Structure	<p>A unit trust is a relationship between a trustee and the beneficiaries of a trust (i.e., the investors or unit holders).</p> <p>The trustee is the legal owner of any unit trust property and is responsible for managing the unit trust.</p> <p>A unit holders' equity investment is units in the unit trust.</p>	<p>A VCLP is usually an incorporated limited partnership (ILP).¹</p> <p>An ILP consists of at least one general partner (as manager) and at least one limited partner (as investor).</p> <p>The general partner of the VCLP is responsible for managing the operation of the VCLP. The partnership property is owned by the VCLP.</p> <p>A limited partner's equity interest in the VCLP is a limited partnership interest in the VCLP.</p>	<p>An ESVCLP is usually an ILP.</p> <p>An ILP consists of at least one general partner (as manager) and at least one limited partner (as investor).</p> <p>The general partner of the ESVCLP is responsible for managing the operation of the ESVCLP. The partnership property is owned by the ESVCLP.</p> <p>A limited partner's equity interest in the ESVCLP is a limited partnership interest in the ESVCLP.</p>
2. Constituent documents	<p>The trust relationship is based on the terms of the trust deed. This may be a negotiated document between the trustee and investors (including through side letter arrangements). However, a trustee must be careful in entering into separate agreements with different unit holders to ensure it acts in accordance with: (i) its common law fiduciary duties of good faith and honesty; (ii) the terms of the trust deed; (iii) its fiduciary obligation to act in the best interests of unit holders as a whole; and (iv) its licensing (under the Australian Financial Services Licence (AFSL) regime) obligations to act honestly, efficiently and fairly and to appropriately manage any conflicts of interest.</p> <p>Upon an investor subscribing for units, paying the subscription price for the units and becoming a unit holder, the unit holder becomes bound by the terms of the trust deed.</p>	<p>The terms of the VCLP are set out in the limited partnership deed entered into by the general partner and the limited partners. This may be a negotiated document between the general partner and the limited partners (including through side letter arrangements).</p> <p>A general partner does not have common law fiduciary obligations of a trustee and the limited partnership deed may or may not (although it typically will) include a contractual obligation of good faith and honesty.</p> <p>An investor typically enters into an accession deed to become a limited partner, commit capital and thereby becomes bound by the terms of the limited partnership deed.</p>	<p>The terms of the ESVCLP are set out in the limited partnership deed entered into by the general partner and the limited partners. This may be a negotiated document between the general partner and the limited partners (including through side letter arrangements).</p> <p>A general partner does not have common law fiduciary obligations of a trustee and the limited partnership deed may or may not (although it typically will) include a contractual obligation of good faith and honesty.</p> <p>An investor typically enters into an accession deed to become a limited partner, commit capital and thereby becomes bound by the terms of the limited partnership deed.</p>
3. Establishment of the structure	<p>A unit trust typically has a corporate trustee.</p> <p>A unit trust is created on the declaration of trust by the trustee entering into the trust deed or when unit holders are first issued units in the unit trust in accordance with the terms of the trust deed.</p>	<p>The VCLP must be structured as an ILP and established in Australia or a country with which Australia has a double tax agreement.</p> <p>The VCLP must be a new venture capital fund.</p>	<p>The ESVCLP must be structured as an ILP and established in Australia or a country with which Australia has a double tax agreement.</p> <p>The ESVCLP must be a new venture capital fund.</p>

¹ An incorporated limited partnership is a special type of limited partnership primarily used by businesses engaged in venture capital projects.

Feature	Unit Trust	VCLP	ESVCLP
4. Registration	<p>A unit trust must be established in a State or Territory in Australia.</p> <p>The trust deed is usually required to be stamped in the State or Territory where the unit trust is established. Stamp duty (if any) can vary from one State or Territory to another.</p> <p>Trustees should understand in which State or Territory jurisdictions, the keeping of the unit trust register will impose a stamp duty liability being payable on a transfer of units in the trust.</p>	<p>Innovation Australia will register an ILP as a VCLP if it qualifies under the Venture Capital Act 2002 (Cth).</p> <p>Certain requirements must be met such as:</p> <ul style="list-style-type: none"> • The general partner must be a resident of Australia or a country with which Australia has a double tax agreement. • The VCLP must have capital commitments of at least AU\$10 million from its limited partners (or can be conditionally registered on the basis it will accumulate this committed capital in 12 months). • The general partner must provide a plan which outlines the VCLP's future intended investment activities. • The VCLP must have an eligible ILP agreement. 	<p>Innovation Australia will register an ILP as an ESVCLP if it is satisfied that the ESVCLP has an appropriate investment plan, has the relevant skills and it qualifies under the Venture Capital Act 2002 (Cth).</p> <p>Similar requirements must be met as for a VCLP (see the preceding column).</p>
5. Size of fund	<p>There is no limit on the size of the fund if structured as a unit trust.</p>	<p>There is no limit on the size of the fund if structured as a VCLP.</p>	<p>An ESVCLP must not exceed AU\$100 million in committed capital (although see our previous article "<i>New Venture Capital Tax Reforms to incentivise FinTech investment in Australia</i>", as proposed reforms will double this to AU\$200 million later in 2016).</p>
6. Who is the "investment manager" and how are investment management fees earned	<p>The trustee of the trust may act as the "investment manager" (and have dual roles as trustee and investment manager) or may contract with a separate investment manager. A trustee or investment manager may also sub-contract certain investment management functions to other parties (including associates).</p> <p>Both structures are common for wholesale unregistered trusts in the Australian market.</p> <p>The management and performance fees earned by the trustee and/or investment manager are earned on revenue account.</p>	<p>The general partner of the VCLP is the "investment manager" of the limited partnership and responsible for managing the operation of the VCLP. A general partner may also sub-contract certain investment management functions (including associates).</p> <p>The general partner is typically a venture capital management partnership (also a limited partnership)(a "VCMP") or a unit trust to provide for tax "flow-through" of the carried interest (i.e. performance fee) to the individual managers, which is earned on capital account and subject to CGT concessions.</p>	<p>The general partner of the VCLP is the "investment manager" of the limited partnership and responsible for managing the operation of the VCLP. A general partner may also sub-contract certain investment management functions (including associates).</p> <p>The general partner is typically a venture capital management partnership (also a limited partnership)(a "VCMP") or a unit trust to provide for tax "flow-through" of the carried interest (i.e. performance fee) to the individual managers, which is earned on capital account and subject to CGT concessions.</p>

Feature	Unit Trust	VCLP	ESVCLP
7. Rights of investors	<p>Unit holders have certain obligations (to pay up the subscription price for their units) and may or may not be given certain voting rights (to vote on certain corporate or structural matters, including the removal and replacement of the trustee) under the trust deed.</p> <p>Unit holders will typically be entitled to receive distributions equal to the net income of the trust each financial year (which if not distributed, becomes taxable in the hands of the trustee).</p> <p>Unit holders may or may not be given redemption rights to redeem their units on request or on certain trigger events (such as sale of assets or winding up of the trust). A unit trust can have a specified term or be open-ended.</p> <p>Unit holders, however, acting unanimously may direct the trustee to transfer the property and wind up the trust under the laws of equity at any time.</p>	<p>Limited partners have certain obligations (to fund committed capital) and are typically given certain voting rights (to vote on certain corporate or structural matters, including the removal and replacement of the general partner) and economic rights (to receive distributions) as set out in the relevant limited partnership deed.</p> <p>Limited partners are typically invested for a specified period, after which time the general partner will wind up the partnership.</p> <p>A VCLP's investment term must be between five years and 15 years.</p>	<p>Limited partners have certain obligations (to fund committed capital) and are typically given certain voting rights (to vote on certain corporate and structural matters, including the removal and replacement of the general partner) and economic rights (to receive distributions) as set out in the relevant limited partnership deed.</p> <p>Limited partners are typically invested for a specified period, after which the general partner will wind up the partnership.</p> <p>An ESVCLP's investment term must be between five years and 15 years.</p>
8. Trustee/ investment manager's role and authorities	<p>The trustee (and investment manager, if applicable) is typically given broad discretions and powers to raise capital, manage the fund's investments, make decisions with respect to distributions (subject to being required to distribute "distributable income" in each financial year) and disposals of investment and earn management fees and performance fees.</p> <p>There are no restrictions on the trustee or investment manager as to the types of eligible investments, other than in respect of any investment mandate which may be stated in the terms of the trust deed (or applicable investments management agreement).</p>	<p>The general partner is given certain authorities under the limited partnership deed for the VCLP to raise capital, manage the fund's investments, make decisions with respect to distributions and disposals of investments and earn management fees and carried interest (i.e. a performance fee).</p> <p>The general partner must acquire, manage and dispose of eligible investments in accordance with the criteria in the Venture Capital Act 2002. See section 10 below.</p>	<p>The general partner is given certain authorities under the limited partnership deed for the ESVCLP to raise capital, manage the fund's investments, make decisions with respect to distributions and disposals of investments and earn management fees and carried interest (i.e. a performance fee).</p> <p>The general partner must acquire, manage and dispose of eligible investments in accordance with the criteria in the Venture Capital Act 2002. See section 10 below.</p>
9. Ownership of property	<p>Legal ownership of trust property vests in the trustee of the unit trust.</p> <p>The trustee is required to hold the trust property for the benefit of unit holders (in accordance with the terms of the trust deed).</p>	<p>Partnership property must be held and applied exclusively for the purpose of the VCLP (in accordance with the terms of the limited partnership agreement).² The general partner is given contractual powers and rights to deal in the partnership property.</p>	<p>Partnership property must be held and applied exclusively for the purpose of the ESVCLP (in accordance with the terms of the limited partnership agreement).³ The general partner is given contractual powers and rights to deal in the partnership property.</p>

² See the Partnership Act of each State and Territory (section 20A, New South Wales; section 24, Victoria; section 23A, Queensland; section 20A, South Australia; section 30, Western Australia; section 25 Tasmania; 24A, Australian Capital Territory; and section 24, Northern Territory)

³ See footnote above.

Feature	Unit Trust	VCLP	ESVCLP
10. Eligible investments	<p>A trustee's investment mandate may or may not be set out in the trust deed.</p> <p>If it is not set out in the trust deed, it may be disclosed in the offer document for the trust, which is typically an information memorandum.</p> <p>In a unit trust structure, the trustee may dictate its own investment mandate and types of eligible investments, which may include the making of loans to investee companies.</p>	<p>Eligible VCLP investments include: shares, convertible notes (that are equity interests), units or options in Australian businesses with assets of not more than \$250 million. A VCLP is restricted from making loans to investee companies other than in respect of short-term limited loan arrangements.</p> <p>A VCLP cannot invest in businesses where the predominant activity is: property development, banking, financing, leasing, factoring, securitisation, insurance, making investments or construction.</p> <p>The limited partnership deed must include the investment plan for the VCLP which may specify broadly or narrowly the types of eligible investments (within the scope of the Venture Capital Act 2002).</p> <p>The offer document for the VCLP, which is typically an information memorandum will describe the range of eligible investments</p>	<p>Eligible ESVCLP investments include: new shares (limited provision for pre-owned), convertible notes (that are equity interests), new units or options in Australian businesses with assets of not more than AU\$50 million. An ESVCLP is restricted from making loans to investee companies other than in respect of short-term limited loan arrangements.</p> <p>An ESVCLP cannot invest in businesses where the predominant activity is: property development, banking, financing, leasing, factoring, securitisation, insurance, making investments or construction</p> <p>In addition, ESVCLPs must divest once an investee has grown to AU\$250 million in assets.</p> <p>However see our previous article "New Venture Capital Tax Reforms to incentivise FinTech investment in Australia" which describes certain reforms to ESVCLP investments coming later in 2016.</p> <p>The disclosure of an investment plan and the range of eligible investments in the limited partnership deed and any offer document (i.e. typically an information memorandum) is similar as to in a VCLP.</p>
11.Can an investor make a loan into the investment vehicle?	<p>A unit holder may make a loan to the trustee for the unit trust. If it is an unsecured loan, the unit holder's rights to be repaid are as against the trustee (and not against the trust assets) and the lender relies on the trustee being entitled to strictly rely on its indemnification rights against trust assets to make repayment. An unsecured lender should therefore be aware of the risks relating to its subrogation rights against trust assets.</p>	<p>A limited partner may make a loan to a VCLP. Any such loan is a debt owed by the VCLP to the limited partner (and a lender may claim against and sue the partnership for repayment).</p>	<p>A limited partner may make a loan to a ESVCLP. Any such loan is a debt owed by the ESVCLP to the limited partner (and a lender may claim against and sue the partnership for repayment).</p>

Feature	Unit Trust	VCLP	ESVCLP
12. Contractual and liability position	<p>The trustee contracts on behalf of the trust assets. The trustee is typically given broad powers and discretions to transact on the trust assets as would apply to a natural person owning the trust assets.</p> <p>The trustee must comply with the terms of the trust deed in administering the trust and applicable common law, equity and statutory trust laws.</p> <p>The trust deed will typically include a provision that the trustee is indemnified out of the assets of the trust for the proper performance of its duties and it is not liable to unitholders, except if it is fraudulent or acts with wilful default. Under trust law, the trustee also has a lien over trust assets in respect of its indemnification right in respect of amounts owing to it, including its fees.</p> <p>The trust deed will typically state that a unitholders' liability to the trust is limited to the amount paid up on the units (but not always and this should be checked). Also, under the laws of equity, in certain limited circumstances (in particular where a beneficiary or beneficiaries may direct the trustee's actions and where there is no contractual limitation of liability), a beneficiary may be liable for the liabilities of the trust.</p>	<p>The general partner contracts on behalf of the VCLP. The general partner is typically given broad powers and authority to transact on the partnership property as would apply to a natural person owning the partnership property, subject to specified restricted activities.</p> <p>The general partner must comply with the terms of the limited partnership deed or otherwise be at risk of a claim for contractual breach (and damages) by limited partners.</p> <p>The limited partnership deed will typically include a provision that the general partner is indemnified out of partnership assets for its proper exercise of its duties and powers.</p> <p>The liability of a limited partner is generally limited to the limited partner's agreed partnership contribution amount.</p>	<p>The general partner contracts on behalf of the ESVCLP. The general partner is typically given broad powers and authority to transact on the partnership property as would apply to natural person owning the partnership property, subject to specified restricted activities. The general partner is indemnified out of partnership assets for its proper exercise of its duties and powers.</p> <p>The general partner must comply with the terms of the limited partnership deed or otherwise be at risk of a claim for contractual breach (and damages) by limited partners.</p> <p>The liability of a limited partner is generally limited to the limited partner's agreed partnership contribution amount.</p>
13. Reporting	<p>The trustee's reporting requirements (to unit holders) may be determined by the trustee (subject to requirements as negotiated of investors) and are usually set out in the trust deed.</p>	<p>The general partner is required to provide:</p> <ul style="list-style-type: none"> • quarterly reports to Innovation Australia on the VCLP's investment activities; and • an annual report to Innovation Australia on the VCLP's structure and portfolio. 	<p>The general partner is required to provide:</p> <ul style="list-style-type: none"> • quarterly reports to Innovation Australia on the ESVCLP's investment activities; • an annual report to Innovation Australia on the ESVCLP's structure and portfolio; and • an annual report to Innovation Australia on the ESVCLP's progress in implementing its approved investment plan.

Feature	Unit Trust	VCLP	ESVCLP
14. Taxation implications	<p>A unit trust usually receives flow-through tax treatment.</p> <p>However, if the trust is widely held and carries on or controls a trading business, it is likely the unit trust will be a public trading trust and will be taxed similarly to a company. It should always be confirmed upfront whether the structure of the trust and its investments may classify it as a public trading trust and lose "flow-through" status.</p> <p>If it is a flow-through structure, there may be certain taxation benefits for unit holders, such as CGT concessions for capital gains arising from the disposal of assets held for more than 12 months.</p> <p>If the unit trust is structured as a MIT (see our previous article <i>"Managed Investment Trust Rule Changes commencing from 1 July 2016"</i>), foreign investors may benefit from reduced withholding tax of 15% on certain returns.</p> <p>A unit trust must be a fixed trust in order to flow through franking credits and satisfy various tests to utilise tax losses.</p>	<p>A VCLP receives flow-through tax treatment.</p> <p>Foreign limited partners of a VCLP are exempt from tax on their share of profits (whether on capital or income account) made by a VCLP on eligible investments.</p> <p>Domestic investors will be eligible for CGT concessions for capital gains arising from the disposal of eligible investments held for more than 12 months.</p> <p>The carried interest (i.e. performance fee) earned on the disposal of assets may be earned on capital account and subject to CGT concessions in the hands of investment managers, where the general partner is a VCMP or unit trust.</p>	<p>An ESVCLP receives flow-through tax treatment.</p> <p>Partners (both domestic and foreign) of an ESVCLP are exempt from tax on their share of profits (whether on capital or income account) made by an ESVCLP on eligible investments.</p> <p>The carried interest (i.e. performance fee) earned on the disposal of assets may be earned on capital account and subject to CGT concessions in the hands of investment managers, where the general partner is a VCMP or unit trust.</p>

For further information or assistance with structuring your fund, please contact Michelle Segart, Partner, Louise Boyce, Of Counsel or Amma Owusu, Associate.

GST – Cross Border Rules Amended

The Government has proposed significant amendments to the GST cross border rules. The start date for the new rules depends on when the bill receives Royal Assent, but will most likely be 1 October 2016 or 1 January 2017.

The amendments to business to business cross border transactions will result in major changes and are likely to impact almost every business to business cross border transaction. Every inbound and outbound arrangement will need to be reviewed in light of the new rules, and many cross border contracts will need to be updated, particularly if businesses want to take advantage of the concessional amendments contained in the bill.

The current GST cross border rules are very broad, requiring many non-residents to register for GST and many Australian businesses to charge GST to non-resident customers. Many non-residents and Australian businesses with non-resident customers do not understand the rules and are unaware they have a GST exposure.

The amendments are designed to limit the circumstances where GST needs to be charged in cross border business to business transactions. There are many circumstances which will no longer result in a GST liability.

The amendments should reduce the number of non-residents in the GST system and limit the circumstances where Australian suppliers need to charge GST to non-residents. However, the cross border provisions will become more complex as a result of the amendments, since the proposed amendments generally operate by way of exceptions to the existing rules.

The transitional provisions in the bill also mean that most existing arrangements will continue to be governed by the previous rules unless the parties agree otherwise. It is recommended that every cross border arrangement is reviewed if businesses want to take advantage of the concessional amendments.

For assistance with understanding the proposed changes, please contact Louise Boyce, Of Counsel.

4 Note: ESVCLPs cannot claim tax losses.

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The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations nor should they be considered a substitute for taking legal advice.

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