

Australian REITs - Regulation and market trends

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1 Introduction

Australia has a mature and increasingly sophisticated REIT market, which is characterised by strong but flexible regulation with a focus on disclosure. The Australian REIT market is the largest in Asia and the second largest in the world after the United States.² REITs (commonly referred to as “listed property trusts” or “LPTs” in Australia)³ play a very important role in the Australian market. LPTs are one of the largest sectors on the Australian Stock Exchange Limited (ASX) and now account for around 10% of total market capitalisation, a much higher level than other Asian markets.

Since the first LPT was listed in the early 1970s, the size of the market has steadily grown with 69 LPTs being listed on the ASX as at 30 June 2007. Australia has one of the highest levels of securitised property in the world. The growth and strength of the Australian LPT market is illustrated by the following statement recently published in an ASX newsletter:

“More recently, Australian LPTs have caught some of their overseas counterparts by surprise. In the 2004/05 year, Australians invested more than \$9 billion in commercial property assets in the US, making LPTs their largest foreign investor. The maturity of the Australian LPT environment combined with years of experience continues to put LPT managers at the forefront of property transactions.”⁴

A key driver of the market is the considerable capital accumulation created by Australia’s compulsory retirement savings scheme, known as superannuation. There is currently more than A\$1,010 billion invested in managed investments and life insurance products.⁵

The sophistication of the LPT market has also positioned Australia as an exporter of REIT product design, with LPT technology having a significant influence on the development of REITs in other Asian markets.

¹ The contribution of Susan Hilliard, Partner, Mallesons Stephen Jaques to an earlier jointly written article is acknowledged. Natalie Kurdian, Solicitor assisted with this article.

² The global REIT market was capitalised at over \$960 billion as at 30 April 2007. In market capitalisation, the USA has 51% of REITS followed by Australia with 15%: ASX Consultation Paper (August 2007).

³ It is currently planned to rename LPTs in Australia as A-REITs in early 2008: ASX consultation paper (August 2007)

⁴ Source: article from ASX Listed @ ASX newsletter, which may be accessed on www.asx.com.au.

⁵ Source: Australian Government Axiss Australia website: www.investaustralia.gov.au (figures as at June 2006).

2 Overview and trends

2.1 Trusts

In Australia, REITs have traditionally been structured as unit trusts. There are two main reasons for this:

- **Capital flexibility.** The rules governing return of capital from a trust are less cumbersome than the equivalent rules for companies.
- **Flow through tax treatment.** Trusts that only hold passive investments, rather than carrying on business activities within the trust, enjoy a 'flow through' treatment for income tax (if all the trust's income for the year is distributed to investors, the trust itself does not pay tax and only the investors are taxed).

The advantage of flow through taxation is that income and gains derived by the trustee retain their character in the hands of the investors. Therefore, any tax preferences will flow through to the investors. By contrast, a company is a separate taxpayer.

2.2 Other key features

Other key features of an LPT are similar to the features of REITs in other jurisdictions:

- **Property.** The LPT acquires property (either a diversified portfolio or one focused on a specific sector, such as offices, shopping centres or industrial properties).
- **Listed Securities.** Investors are issued with securities that are quoted on the ASX.
- **Management.** The LPT is typically managed by an external body, called the responsible entity, who provides professional management services for the portfolio (although there are also many instances of internal management).
- **Distributions.** The LPT generally distributes all of its income for each year to investors.
- **Gearing.** The LPT typically carries moderate levels of borrowing.

LPTs which operate hotels, car parks, development assets and other "active" businesses, or which have internal management, often have a 'stapled structure', which allows passive investment and active management to exist in a single stapled entity.

2.3 Trends in the LPT market

Looking forward, the Australian LPT market is likely to continue to be characterised by:

- **Global outlook.** Local and, increasingly, overseas players are establishing LPTs which invest in offshore property. Currently, more than 40% of LPT assets are offshore, mainly in the United States, Europe and Japan.
- **Growth.** The government's retirement savings laws should underpin continuing growth and new product development.
- **Sophistication.** Flexible regulation allows continuing innovation in the LPT market. Australia is also an exporter of REIT product design to other markets in Asia.
- **Stability.** The ASX offers local and foreign fund managers a sound and liquid market for raising capital.

These characteristics are illustrated by the key trends that have developed in the LPT market in recent years, which are outlined in annexure A.

2.4 Comparison with Hong Kong and Singapore

While LPTs are relatively highly regulated, the rules are more flexible and less prescriptive than some other jurisdictions. For example, as noted in Section 2.2, LPTs with stapled structures can accommodate "active" businesses as well as purely "passive" property management. A high level comparison of REIT regulation between Australia, Hong Kong and Singapore is provided in annexure B.

3 Regulatory framework

3.1 Overview of the regulatory regime

Most of the rules which are applicable to LPTs are contained in the *Corporations Act 2001* (Cth) (**Corporations Act**) and the Listing Rules of the ASX. LPTs are also subject to the general law of trusts.

3.2 Corporations Act regulation generally

The Corporations Act provides for a national framework of companies, securities, financial products and financial services legislation. The Australian Securities and Investments Commission (**ASIC**) is the regulator.

Since the mid 1990s, the laws governing unit trusts have changed substantially. New chapters have been introduced into the Corporations Act covering establishment and operation of unit trusts such as LPTs (Chapter 5C, 1998). There has also been an overhaul of the laws and regulations relating to licensing of financial service providers such as LPT managers, and disclosure of financial products such as LPT interests (Chapter 7, 2002).

3.3 More information

Section 4 below describes the main Corporations Act regulation as it applies to LPTs. Section 5 covers the ASX Listing Rules as they apply to LPTs.

4 Basic requirements of Corporations Act

4.1 Registration of the LPT

An LPT is required to be registered under the Corporations Act as a managed investment scheme. Registered schemes are heavily regulated. For an LPT to become a registered scheme, it must have the following:

- **Responsible entity.** There must be an Australian public company appointed as the responsible entity to operate the scheme. The responsible entity acts as both trustee and manager of the trust, but may appoint agents to assist it. It remains liable for the agent's acts.
- **Licence.** The responsible entity must hold an Australian Financial Services Licence (AFSL) covering the operation of the scheme. A minimum level of net tangible assets is a condition of this type of licence.
- **Constitution and compliance plan.** The responsible entity must lodge with ASIC a constitution containing the rules of the scheme, and a compliance plan which sets out measures to ensure compliance by the responsible entity with the Corporations Act and the constitution. Once the LPT is operating, the compliance plan is audited each year.
- **Compliance committee.** Unless at least half of the directors of the responsible entity are "external directors", the responsible entity must establish a compliance committee (with a majority of external members) to monitor the operation of the scheme and to report on its findings to the responsible entity and, in certain cases, to ASIC.
- **Arrangements for holding scheme property.** The Corporations Act requires the responsible entity to hold scheme property on trust for investors. It can fulfil its duty as trustee by holding the property of the scheme itself, if it complies with ASIC organisational capacity requirements for systems, procedures and net tangible assets (at least A\$5 million). Alternatively it can appoint an external custodian - an option which is adopted by many responsible entities.

The Corporations Act imposes a number of key ongoing duties on a responsible entity and its officers. These include:

- **Best Interests.** To act in the best interests of investors.
- **Prefer Investors.** To give priority to investors' interests if there is a conflict between the investors' interests and the interests of the responsible entity.
- **Proper purpose.** To act for a proper purpose.

Further, as an AFSL holder a responsible entity must have a system in place to manage conflicts of interest.

4.2 Disclosure - Offer Documents

Where interests in an LPT are issued to retail investors investing under an initial public offer, the responsible entity of the scheme must issue a product disclosure statement (**PDS**). This is similar to a prospectus. The PDS must comply with prescriptive statutory standards, including:

- **Specific content requirements.** The Corporations Act contains a list of mandated content requirements for PDSs on topics such as significant benefits, significant risks, costs, dispute resolution and significant taxation implications associated with investing.
- **Fee template.** The Corporations Regulations prescribe a form of fee disclosure (referred to as the “fee template”) which must be complied with when disclosing fees for investments in the LPT.
- **Clear, concise and effective.** The content must be written and presented in a clear, concise and effective manner. ASIC’s current policy is to encourage issuers to shorten documents where possible.
- **Forecasts and historical information.** There are specific rules about financial forecasts and historical financial information.
- **General content requirement.** The PDS must also include any other information which might reasonably be expected to have a material influence on the decision of a retail client to invest.

A PDS is defective if it is misleading or deceptive or fails to include required content. If a PDS is defective, the responsible entity and others involved in its preparation can be liable to investors and subject to prosecution for a criminal offence. There is a defence, in some cases, of the person having taken reasonable steps to ensure the PDS is not defective, which is similar to a “due diligence” defence.

In some limited circumstances, such as secondary sales by controllers, a PDS must be prepared for sales of units to retail investors.

Substantially similar, but technically different, disclosure requirements apply to the issue and sale of shares to retail investors where a prospectus is required. If a stapled entity consists of a trust and a company, it must comply with both the PDS and the prospectus regime (which can be achieved in one document - a combined prospectus and PDS).

Issuing interests in an LPT to retail investors under a secondary offer has also historically required an offer document. However, the Corporations Act has recently been amended to give issuers the flexibility to carry out “rights issues” without a formal offer document if they meet certain requirements.

A PDS or prospectus for an LPT needs to be lodged with ASIC.

4.3 Continuous disclosure and periodic reporting

Under the Corporations Act and ASX Listing Rules, the responsible entity is obliged to prepare annual and half-yearly accounts, and file them with ASIC and ASX.

It is also subject to continuous disclosure rules under which it must notify ASX of information which may have a material effect on the price or value of interests in the LPT.

The rules require immediate disclosure of price sensitive information subject to limited carve-outs for confidential information, while the information remains confidential. An example is incomplete negotiations in relation to an asset acquisition.

4.4 Licensing

Managing an LPT requires the responsible entity to obtain an AFSL. There are two key regulated activities: the marketing of financial products (advice) and the issue of financial products (dealing). In addition, there are a number of related activities - eg, the provision of custodial services - for which an AFSL may be required.

The process of applying for an AFSL is extensive and requires the applicant to provide detailed information and documentary evidence of its organisational expertise (including risk management procedures) and the qualifications and experience of its key personnel.

4.5 Promotional activities

Advertising by LPTs is permitted with certain restrictions. The key restrictions for LPT interests under the PDS provisions are as follows:

- **Misleading and deceptive conduct.** The advertising material must not be misleading or deceptive.
- **Mandatory disclosure.** The advertising material must contain certain mandatory statements, which identify the issuer, refer to the PDS and where and when it will be available, and indicate that the investor should consider the PDS.

The position is more restricted for a stapled structure involving a company. This is because under the prospectus regime (which is relevant to shares), essentially only 'tombstone' announcements can be made prior to the lodgment of the offer document. Post lodgment, the advertising restrictions are similar to those set out above for PDSs.

"Roadshows" to generate interest in LPTs are common. It is important that people preparing material for and speaking at such "roadshows" hold an AFSL or are representatives of a licensee, or are covered by an exemption.

4.6 Takeovers and substantial holder regulation

Unlike in other Asian jurisdictions (such as Hong Kong and until recently, Singapore), there is takeover legislation for LPTs which applies similarly to

companies. The takeover rules were introduced for LPTs in Australia in 1999 after a series of regulatory enquiries, becoming effective in March 2000. During the 1980s and 1990s, the absence of takeover legislation had been dealt with by LPTs including provisions in trust deeds that replicated the takeover provisions applicable to companies. A number of high profile takeovers which were reviewed by the Courts showed the difficulties with lack of regulation.

The basic legislative requirements are:

- **20% takeover threshold.** Broadly, a person and their associates are prohibited from acquiring more than 20% of the interests in an LPT without being required to make a formal takeover offer or to obtain investors' approval to the acquisition.
- **Substantial holder disclosure.** There are also mandatory disclosure requirements which oblige investors holding an interest of more than 5% in an LPT to disclose their interest to the market.

As part of the consolidation of the LPT market in recent years, there has been a large number of takeover offers, and several high profile takeovers.

4.7 Mergers and schemes of arrangement

Merger by scheme of arrangement is another common way of effecting a control transaction. Where the LPT is a trust, the legal mechanism is typically an informal trust scheme involving an amendment to the trust's constitution. Where the LPT is a stapled entity comprising a trust and a company, the merger also involves a formal Court approved scheme of arrangement under the Corporations Act in respect of the company.

4.8 Requirements on issue price of units in LPTs

The Corporations Act requires the constitution of an LPT to make adequate provision for the consideration payable to acquire an interest in the LPT. Under ASIC policy this requires that the consideration must be capable of being objectively verified, and cannot be dependent on the exercise of a discretion by the responsible entity.

To cater for pricing arrangements that are typical for LPTs, ASIC has provided class order relief which permits discretionary pricing in some circumstances. The main situations that are catered for by the class order include:

- **Placements.** Where the discount does not exceed 10% of the current market price of the interests, and the placement is not made to the responsible entity or an associate.
- **Rights issues and distribution reinvestment plans.** Where the discount may not exceed a maximum percentage specified in the constitution.

The placement relief has a cap. Only 15% of the interests in an LPT can be issued under it in a 12 month period, unless investor approval is obtained. The ASX has separate anti-dilution rules described in paragraph 5.3.

4.9 Removal or appointment of responsible entities

A responsible entity can only be appointed or removed with the approval of investors. Under the Corporations Act, investors in an LPT have a right to remove the responsible entity by ordinary resolution. The responsible entity of an LPT and its associates are expressly permitted to vote their interests on any resolution for the removal or appointment of the responsible entity.

4.10 Relief from Corporations Act requirements

In some circumstances, the basic requirements for LPTs outlined above are not required to be complied with. In particular, there is some relief for collective investment schemes authorised in other jurisdictions, that wish to offer interests in Australia. This can include conditional relief from registration, disclosure and licensing requirements.

In addition, if the LPT is part of a stapled structure, then relief from some Corporations Act provisions is required.

5 Requirements for Listing on the Australian Stock Exchange Limited (ASX)

5.1 Benefits of listing

The obvious advantage of listing is to provide liquidity through the use of the stock exchange to provide a market for investors to sell or purchase securities. LPTs also provide investors with an opportunity to gain exposure to a diversified portfolio of property.

5.2 Listing requirements

For an LPT to become listed, it must satisfy the following ASX Listing Rule requirements:

- **Spread test.** The LPT must have a minimum of 400 investors, with holdings of at least A\$2,000.
- **Assets test.** The LPT must satisfy either a prior profit test or an assets test. As most LPTs are established shortly prior to listing, it is usually the assets test which is applied. To satisfy this requirement, the LPT must have assets of at least A\$15 million, at least half of which are committed to investments.
- **Managed investment scheme.** The LPT must be a registered managed investment scheme.
- **No withdrawal.** The responsible entity of the LPT must not be under an obligation to allow an investor to withdraw from the trust (ie have its interest redeemed).

- **Structure and Operations.** The LPT's structure and operations must be appropriate for a listed entity. In particular, ASX will look closely at co-ownership arrangements (with pre-emptive rights) and management arrangements, when they are assessing the suitability of an LPT for listing.
- **Co-ownership arrangements.** Where assets of the LPT are co-owned, very clear disclosure of the arrangements will be required in the PDS, and rights of the co-owner to acquire the assets in certain circumstances must be exercisable at market value (evidenced by independent valuations).
- **Separate manager.** Where the LPT has a separate manager (which is common where the promoter brings substantial assets or expertise to the initial public offering), ASX has historically imposed limitations on the management arrangements particularly the duration. ASX has recently proposed a shift towards a more disclosure based approach.⁶ This proposal will give managers more flexibility, but it will be balanced by increased disclosure requirements.

Additional requirements apply if a stapled structure is used, including relief from certain listing rules.

5.3 Key ongoing listing rules

The key requirements that apply to an LPT while listed are:

- **Anti-dilution rules.** LPTs are subject to restrictions on the issuance of securities without investors' approval. Apart from a range of permitted exemptions under the ASX Listing Rules, such as for pro rata issues or issues under a distribution reinvestment plan, an LPT may not issue more than 15% of its securities during any 12 month period without investors approval.
- **Issue of interests to directors / associates.** Unless an exemption applies, the LPT may not issue interests to a related party (including directors and their immediate family) without investor approval.
- **Related party transactions.** An LPT may not acquire or dispose of a substantial asset to or from related parties, substantial holders and certain other persons in a position of influence without investor approval. The categories of persons affected are widely defined. An asset is substantial if its value exceeds 5% or more of the equity interests of the LPT in its last accounts given to ASX.
- **Significant transactions.** The LPT cannot make a significant change to the nature or scale of its operations without notifying ASX. Depending on the circumstances, ASX may require investor approval to be obtained. Similarly, the LPT may not dispose of its main undertaking without investor approval.

⁶ Source: ASX Exposure Draft Paper dated 20 June 2007

- **Fees paid in Units.** The constitution of an LPT may provide that management or performance fees are payable in units. Arrangements of this nature require an ASX waiver.
- **Delisting.** The LPT may not be voluntarily delisted by the responsible entity without ASX and investor approval.
- **Corporate Governance.** ASX has issued Corporate Governance Principles and Recommendations⁷ as a means of promoting good corporate governance practices by all listed entities. These cover matters such as board composition (including director independence), financial reporting, continuous disclosure, and internal controls and compliance. The principles are not mandatory. However, entities must include a statement in their annual report disclosing the extent to which they have followed the recommendations, and if not, giving reasons for not doing so.

5.4 More information

More information can be found at the following internet sites:

Australian Securities and Investments Commission (ASIC)

www.asic.gov.au

Australian Stock Exchange (ASX)

www.asx.com.au

Commonwealth Attorney General (legislation including the Corporations Act and Regulations)

www.comlaw.gov.au

Mallesons Stephen Jaques

www.mallesons.com

⁷ ASX released revised Corporate Governance Principles and Recommendations on 2 August 2007, to take effect from 1 January 2008.

Annexure A - Key trends in the Australian LPT Market

Dynamic industry

There is continuing dynamic development of both listed and unlisted property funds in Australia with innovative structures and products constantly evolving. The relatively high level of regulation of the LPT market has not been an impediment to the establishment and ongoing liquidity of LPTs. In fact, it might have been beneficial as it has contributed to the confidence of investors to invest in this type of vehicle. The flexible nature of Australian regulation has also assisted.

Stapling

A number of LPTs use 'stapled structures' which comprise two or more entities whose securities are jointly quoted on ASX and may not be traded separately. Each of the entities in the staple is owned by the same investors in the same proportions.

The advantage of a stapled structure is that it provides investors with the benefits of a 'pass-through' vehicle by investing in a unit trust which is a flow-through vehicle for tax purposes, while the non-eligible activities are undertaken by a separate entity (such as a company or trading trust) which is stapled to the unit trust. Importantly, where a unit in a trust is stapled to a share in a company, it will involve complying with two regulatory regimes which are similar in policy but slightly different in detail.

Internal management / external management

Stapling allows for the internalisation of the LPT's management. While LPTs were traditionally externally managed (with the manager not being owned by investors) there has been a strong trend since the 1990s towards internalisation of management, with the managing entity being stapled to the trust so it is owned by the investors.

More recently, there has been a countervailing trend for responsible entities to appoint external managers, particularly where a promoter of the LPT has contributed the initial assets and has particular expertise in relation to those assets. This trend has been seen most where the underlying assets are offshore.

Development exposure

Stapled structures have also been used by many LPTs to accommodate development exposure within the vehicle.

Hybrids

The increasing sophistication of the Australian securities market and the desire to optimise capital management structures to reduce equity costs has led to the development of highly structured 'hybrid' products. Hybrids are often designed to provide equity for accounting purposes while simultaneously offering certain debt features. Convertible debt securities, reset securities or units with preference share features issued by a subsidiary of the LPT are examples of such hybrids.

It is common for LPTs to have an attached funding vehicle issuing hybrids. The hybrid vehicle traditionally appeals to a different investor base than the LPT. Hybrid securities have been issued into Australian and more recently international capital markets.

International expansion

Australian LPTs increasingly operate on a global scale and invest and attract investment from around the world. The strong supply of capital generated by Australia's compulsory superannuation scheme combined with a scarcity of investment grade properties available for purchase has led to a search for offshore assets by Australian fund managers. There are now many cross border LPTs. Currently, more than 40% of LPT assets are offshore, and more than 20% of funds invested in LPTs are from overseas investors.⁸ The sophisticated capital markets in Australia have also attracted foreign fund managers, including several who have listed Australian vehicles on the ASX to enable Australian investors to gain exposure to offshore investments managed by the foreign fund manager.

Consolidation

Since the mid 1990s the LPT sector has experienced considerable consolidation. This has happened both by on-market takeovers and off-market schemes of arrangement. There is considerable competition and ongoing consolidation within the LPT market, as managers seek to counter pressure on margins with economies of scale.

Broader asset classes including infrastructure

Flexible regulation has allowed the LPT market to flourish in a range of property classes outside the traditional sectors of offices, shopping centres and industrial parks. LPTs have also been used to securitise hotel, tourism and retirement village assets.

Further, for several years there has been a trend to establishment of listed infrastructure funds, focussing on assets such as toll roads, pipelines and utility assets. At 30 June 2007, there were 23 infrastructure funds listed on ASX. The funds are structured like LPTs and are a good example of innovation in the Australian market.

Unlisted property trusts

There is also a large unlisted property trust sector in Australia comprising both large wholesale funds aimed at institutional investors and smaller property syndicates targeting retail investors.

In addition, there has recently been a trend towards the establishment, by LPTs, of subsidiary wholesale funds. In many cases, the assets of the subsidiary fund are 'mature' assets from the existing LPT portfolio that are 'spun-off' to create a new portfolio appropriate for investment by the wholesale market. The regulatory advantages of limiting an offer to wholesale clients include reduced disclosure requirements and removal of the need for scheme registration. Australian licensing issues will, however, still need to be addressed.

⁸ Source: ASX Consultation Paper (August 2007)

Annexure B - REIT regulation comparison - Australia, Hong Kong and Singapore

Regulatory Requirements	Hong Kong	Singapore ¹	Australia
First REIT listed	2005	2002	1971
Number of REITS/capitalisation	7 / US\$8.7Bn	15 / US\$16.5Bn	69 / US\$115Bn
Main regulatory body	Securities and Futures Commission	Monetary Authority of Singapore Singapore Stock Exchange	ASIC/ASX
Main Regulation	Securities and Futures Ordinance and Code on REITS	Securities and Futures Act and Property Fund Guidelines	Corporations Act
Legal structure	Unit trust	Unit trust	Unit trust
Management	External	External	External or internal
Manager licensing requirements	Yes	Being introduced	Yes
Single responsible entity	No, trustee and manager	No, trustee and manager	Yes
Local residency requirement	Yes	Yes	No
Spread requirement	25% units held publicly	25% units held by at least 500 holders and assets of S\$20m	400 holders with holdings of at least A\$2,000 and assets of A\$15m
Partial ownership of properties allowed	Yes (majority interests only)	Yes through special purpose vehicles (no minimum)	Yes (no minimum)
Real estate investment requirement	100% in real estate	70% in real estate and related assets (of which 35% should be real estate)	Must invest in land primarily to derive rent or can invest in certain financial instruments

¹ Singapore has a separate business trust regime which is designed to cater for “active” businesses and operates in parallel to REIT regulation.

Regulatory Requirements	Hong Kong	Singapore¹	Australia
Real estate income requirement	Must generally be real estate income generating assets	No ²	As above. No “active” business (except within stapled entity)
Investment in property developments allowed	Yes, but only 10% of assets	Yes, but only 10% of assets (including development activities with REIT)	Yes, where properties to be held by LPT
Development activities allowed within REIT	No	Yes, where properties to be held by REIT	Yes, but only within stapled vehicle
Investment outside real estate allowed	No	Yes	Yes
Leverage restrictions	45% of gross asset value	35% of deposited property (60% if REIT is rated)	Unrestricted
Tax flow-through to investors	Profits/property tax on HK property	Yes	Yes
Mandatory distributions under REIT Code or tax law	Yes (at least 90% of annual net income after tax)	Yes (at least 90% of taxable income)	No, but typically 100% of taxable income is distributed (as penal tax rates apply otherwise)
Substantial unitholder notification requirement	Yes (5%)	Yes (5%)	Yes (5%)
Takeover regulation applicable	No	Being introduced	Yes
Performance fees permitted	Yes	Yes	Yes

² Singapore’s MAS is currently undertaking consultation on certain enhancements to the Property Fund Guidelines. In particular, real estate investment requirements may increase to 70% from 35% and a real estate income requirement may be introduced.