Australia

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What the New CFC Amendments Mean for Australians Structuring Their Investments into the United States through LLCs

Structuring an overseas business investment raises questions on whether branches or separate entities should be established. Recent amendments to Australians investing into the United States via LLCs provide an opportunity for Australians to circumvent the United States' classical tax system and Australia's own CFC rules. After providing an overview of LLCs, this article will consider how the recent Australian tax amendments affect investments via LLCs. While welcomed, various problems are highlighted which may present problems for Australians utilizing LLCs.

1. Introduction

With any business investment overseas there are numerous considerations, one of which is whether to conduct via a branch or to create a separate foreign business form. For Australians investing into the United States (the US) there are a number of business forms, extending from corporations, limited liability companies (LLCs), limited liability partnerships (LLPs) to business trusts. Since their inception in the late 1970s, LLCs are growing in popularity in the US. This may be attributed to tax and non-tax reasons.

Recent amendments to Australia's income tax treatment of LLCs (the Controlled Foreign Corporation (CFC) hybrid amendments) may open the way for Australians to use LLCs when investing into the US. The LLC has been touted by some as providing improved governance compared to corporations, while still providing limited liability for members and separate legal entity status.[1] For Australians, LLCs provide an entity that can circumvent both the US classical tax system applying to corporations and Australia's own CFC and Foreign Investment Fund (FIF) rules.

This article will initially consider what the US tax treatment of corporations and LLCs is, and the extent of their utilization. The article will then consider what the implications for Australian residents investing into the US through LLCs are, and in particular how the CFC hybrid amendments affect this. It will be argued that while the CFC hybrid amendments are welcomed, there are some concerns with their operation and there continue to be some inconsistencies in treatment between the two jurisdictions. These inconsistencies may inhibit the ability of Australians to take full advantage of investment opportunities in the US.

2. US Tax System and Business Forms

When investing overseas it is important to have an understanding of the foreign jurisdiction's tax system and the available business forms. There are a number of reasons why an investor may opt to set up a separate business form rather than branch operations. The reasons include, firstly, that it may provide a better local image and profile, which could result in favourable trade and borrowing terms. Secondly, a separate business form may afford greater flexibility in the manner and timing of its profit repatriation; and provide limited liability.[2] Furthermore, a separate business form may allow access to local incentives and grants.[3]

Pursuant to the Internal Revenue Code (IRC) 1986 (US) the federal government of the US applies a global income tax on its citizens and residents. Taxation of foreigners largely depends upon whether such items are connected to a US trade or business.[4] In terms of business forms, the IRC 1986 (US) categorizes businesses as either sole proprietors, general partnerships,[5] C Corporations or S Corporations. All business forms, including corporations, business trusts, associations, limited partnerships, LLCs and LLPs, are taxed within one of these four categories.

Individuals trading as a sole proprietor or a member of a transparent entity are subject to marginal tax rates up to 35% on taxable income for the 2005 year, although the levels to which these apply vary depending upon a num-

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1. Hicks, A., Drury, R., and Smallcombe, J., Alternative Company Structures for the Small Business. In *ACCA Research Report No. 42* (London: Certified Accountants Educational Trust, 1995), p. 53.
2. Limited liability protection may be reduced if the member is required to give guarantees for the foreign entity.
3. Szekely, L., "Structuring for Outbound Investments", New South Wales Convention Papers for the Taxation Institute of Australia (May 2007), p. 312.
4. In addition, American states levying their own taxes as well. The basis of this does not necessarily mirror the federal legislation.
5. The four types of entities that may be taxed pursuant to Sub-Chapter K are general partnerships, limited liability partnerships, limited partnerships and LLCs.

ber of circumstances, such as marriage.[6] Most capital gains are taxed at a maximum statutory rate of 15%.[7]

The regulatory framework for US corporations is governed by the various corporation acts in each US state. There are many variations amongst the state corporation acts, although in an endeavour to provide some consistency there is the Revised Model Business Corporation Act 1994 (the Model Corporation Act) for states to base their legislation on.[8] There is also the Model Statutory Close Corporation Supplement (the Close Supplement), which can provide provisions perceived to be advantageous for closely held businesses.[9] However, much of the flexibility of the Close Supplement is now obtainable pursuant to the Model Corporation Act through a members' agreement.[10] Corporations in the US have a number of alternative ways to be taxed. A classical tax system can apply to corporations under Sub-Chapter C of the IRC 1986 (US) with profits taxed at the entity level at a maximum rate of 35%. Corporations assessed under this Sub-Chapter are known as "C Corporations". Another alternative is for a group of corporations to elect for consolidation tax treatment.

C Corporation members are not assessed on corporate profits until the profits are distributed via dividends to them. When dividends are paid, the member is assessable on the dividend, with no credit for tax paid at the corporate level. For an individual member normally marginal tax rates of up to 35% would apply. However, there is temporary tax relief for the receipt of dividends and a 15% rate applies until 2010.[11] Members are not assessed on the capital growth of their membership interests until there is an actual disposal of the interest.[12] When a disposal does occur, the resulting capital gain is taxed at the concessional rate of 15%, compared to the top marginal tax rate of 35%.[13]

The extent of "double taxation" for C Corporations and their members can be mitigated through a number of mechanisms. For example the payment of the following deductible amounts by C Corporations to members could also achieve a single layer of taxation: wages, royalties, rent and interest on loans.[14] Alternatively, C Corporations could retain profits and members could realize their increase in wealth as a capital gain through the sale of their membership interest, which facilitates deferral and potential concessional tax treatment.[15]

It is possible for some corporations to elect for flow-through (transparent) tax treatment pursuant to Sub-Chapter S, with such corporations known as "S Corporations". The eligibility requirements for a corporation to elect for S Corporation status that must be satisfied are that the corporation itself and its members are US residents, the corporation has only one class of membership interest, membership cannot exceed 100, and a valid election exists. Additionally, certain trading activities and asset holdings are prohibited for an S Corporation.[16] The requirement that members are US residents could exclude an Australian investor using this status to facilitate an investment into the US.

Another available business form is the LLC. The LLC is a recently introduced business form that is available in all the states and the District of Colombia in the US.[17] Similar to corporations in the US, LLCs are governed by the various LLC acts in each state. There has been an attempt to provide consistency between the states through a recently revised recommended uniform act, i.e. the Revised Uniform Limited Liability Company Act 2006 (Revised ULLC Act) replacing the previous Uniform LLC Act 1996.[18] In addition to the legislation, an LLC Operating Agreement (LLC Agreement) can be instrumental in governing the internal affairs of the LLC.[19]

The LLC provides members with the corporate characteristics of limited liability and separate legal entity status. However, its internal governance is more partnership/contractual based, allowing more flexibility.

6. The maximum statutory marginal rate on taxable income of individuals is 38.6%; Sec. 1 of the US Internal Revenue Code 1986 (IRC 1986).
7. However, gain from the disposition of collectibles held for more than one year is taxed at a rate of 28%, and gain from the disposition of depreciable real estate held for more than one year is taxed at a rate of 25%, to the extent that the gain is attributable to depreciation previously deducted (Sec. 1(h) of the IRC 1986).
8. The Model is merely a form of legislation suggested by the American Bar Association and adopted by the Committee on Corporate Laws of the Section of Business Law with the support of the American Bar Foundation. States are free to adopt it in total, in part, or not at all. An alternative model which is adopted by some states is the Delaware Business Corporation Act.
9. Created in 1982, the Model Corporation Act has the Model Statutory Close Corporation Supplement (the Close Supplement) which was at that time more liberal in some respects. If adopted, the Close Supplement allows members to govern the corporation directly, without the necessity of appointing a Board of Directors (Sec. 20(b) of the Close Supplement).
10. Sec. 7.2 of the Model Corporation Act. Karjala argues that Close Supplement essentially has no positive virtues over a flexibly written general corporation law. Karjala states that these close "statutes do nothing more for parties who know what they want and who hire a competent lawyer to affect their desires in appropriate legal instruments"; Karjala, D.S., "An Analysis of Close Corporation Legislation in the United States", 21 *Arizone State Law Journal* 663 (1989), pp. 11 and 12.
11. Sec. 1(h)(11) of the IRC 1986 introduced by the Jobs and Growth Tax Relief Reconciliation Act (US) 2003 (passed May 2003). This reduced the top capital gains tax and dividend tax rate to 15% (or 5% for low-income families and 0% for the 2008 year only) for the period 1 January 2003 to 31 December 2008. Note dividends can be exempt when paid amongst corporate members. This has now been extended to 2010 through the Tax Increase Prevention and Reconciliation Act 2005 (US).
12. Sec. 302 of the IRC 1986.
13. Previously, the 1986 tax reforms had aligned the capital gains tax rate with the income tax rate, but this has now been changed.
14. Another alternative is the C Corporation contributing to a pension fund established for the member.
15. If this transfer of membership interest occurs through inheritance at death then tax can be avoided altogether as the heir is entitled to a step-up in the membership cost basis to the fair market value. Note it is possible for the heir of an LLC member to access a similar step-up at the date of death of the LLC member pursuant to the Estate Tax Act. Through the interaction of asset rollovers and death step-up, this means that it is possible that taxes are never paid provided there is continued reinvestment into real estate.
16. Sec. 1361 of the IRC 1986.
17. First introduced by Wyoming in 1977 but only since 1988 was there a ruling from Inland Revenue about its tax treatment as a general partnership (Revenue Ruling 88-76, 1988-2 C.B. 361). After the release of this Ruling there was a rapid development and legislation for LLCs across the US, from two states in 1988 to all fifty states and the District of Columbia only six years later; Ribstein L.E., "The Evolving Partnership", in McCahery, J., Raaijmakers, T., and Vermeulen, E. (eds.), *The Governance of Close Corporations and Partnerships: US and European Perspectives* (Oxford University Press, 2004), p. 162.
18. The Revised ULLC Act replaces the prior uniform act of 1996, the Uniform Limited Liability Company Act 1996 (ULLC Act). On 13 July 2006, the National Conference of Commissioner on Uniform State Laws approved the Revised ULLC Act.
19. Sec. 110 of the Revised ULLC Act (previously Sec. 103 of the ULLC Act).

Within the US an LLC could potentially have a number of different tax treatments.[20] From 1997, pursuant to the "Check-the-Box" regulations the default treatment for an LLC is now tax transparency, with it being taxed as general partnership pursuant to Sub-Chapter K of the IRC 1986 (US).[21] An LLC has this available provided it is not a state corporation (which by its nature it is not),[22] a publicly traded entity,[23] or certain foreign business forms.[24] Note that it is possible for an LLC to choose instead to be taxed as a C Corporation, or to have Sub-Chapter S apply.

For an LLC that has general partnership tax treatment, largely an aggregate rather than an entity tax approach applies.[25] However, at times an entity approach is utilized, such as the calculation and reporting of the LLC income on an information return. The LLC does not pay tax on this reported income, and instead the income and deductions are directly allocated to members who are potentially assessed on it.[26] This assessment of members, independent of any actual distributions to them by the LLC, is facilitated by the LLC providing a statement to their members detailing what they have been allocated for the year.[27]

There is some flexibility in allocations to members, as an LLC may allocate income (or loss) amongst members pursuant to the Operating Agreement.[28] This flexibility can facilitate streaming of different items to different members, although there are streaming rules that need to be satisfied.

This allocated income (or loss) is not generally reported to members as a single net amount. Instead, each item of gross income and deduction that, due to its nature, could affect the determination of an individual member's tax liability is segregated.[29] For example capital losses are determined at the entity level but are then separately allocated and quarantined to capital gains of the individual members.[30]

The tax assessment of the member depends upon the nature of the income or deduction allocated to them. For example if a member were allocated \$ 100 of sales income, the member would be assessed on this. If allocated \$ 100 of a capital gain, again the member is assessed, though the capital gain could be taxed at the concessional rate of 15%. Similarly the allocation of a deduction could decrease the member's assessable income for the year. If deductions exceed income, a loss is created and these losses also flow through to the members, thereby potentially allowing members to offset these losses against their other income amounts.[31]

The benefits of this tax transparency applying to LLCs, compared to C Corporation treatment, would be further enhanced if the entity had derived exempt income, as no tax would be assessable for the member. While a C Corporation would not pay tax on exempt income, as soon as it was distributed via a dividend or realized by a member through the disposal of their membership interest, there would effectively be tax assessed on the exempt amount.[32] Regardless of these tax benefits, LLCs may be problematic for tax-exempt bodies investing through them due to LLC allocations being potentially taxed as "Unrelated Business Taxable Income".[33] However, tax-exempt bodies can mitigate this impact through such devices as debt interests, equity options or interposing an opaque entity between the exempt body and the LLC.[34]

An additional benefit would be if deductions had exceeded income for the LLC. For a C Corporation these losses would have been trapped at the entity level and

20. For example an LLC could elect under Check-the-Box to be taxed either as a general partnership or a C corporation. Then for an LLC that has elected to be taxed as a C Corporation it could then make a valid election under Sub-chapter S provided the eligibility requirements are satisfied.
21. Technically by default a multi-member LLC would be classified as a general partnership (Secs. 301.7701-2(c)(1) and (2) of the Code of Federal Regulations (henceforth "Treasury Regulation")). A single-member LLC for tax purposes can be classified as a corporation (an association) or can elect for the LLC to be disregarded as an entity separate from its owner. In some states certain professionals are excluded from structuring as an LLC, for example Sec. 17375 of the California Corporations Code compared to Sub-Chapter S which governs the transparent tax treatment for an S Corporation.
22. A state corporation would be taxed under Subchapter C unless the entity qualifies and elects to be taxed under Subchapter S (Sec. 301.7701-2(b) of the Treasury Regulation). State law corporations are corporations formed under Corporation Acts such as based on the Model Corporation Act.
23. An example of a "publicly traded partnership" under Sec. 7704 of the IRC 1986 is one which has partnership interests that are either (i) traded on established securities markets, or (ii) readily traded on a secondary market. Regulations provide safe harbours for a partnership to avoid being classified as publicly traded (Sec. 1.7704 of the Treasury Regulation) including that (i) all interests issued in a transaction/s are not registered under the Securities Act of 1933, and (ii) there are not more than 100 members during the year. So for an LLC to ensure that it is not regarded as publicly traded partnership it is recommended that its members are restricted to 100 or less.
24. The US lists a restricted number of foreign entities which are always taxed as C Corporations. Normally, only one type of body is treated as a C Corporation in a particular country, for example, Australia (public limited company), Canada (corporation and company), France (SA and SAS), Germany (AG), Italy (*società per azioni*), Japan (*kabushiki kaisha*), Netherlands (NV), Sweden (*publikt aktiebolag*), Switzerland (AG), and the United Kingdom (Plc). Note if the foreign entity provides two or more members with limited liability it is automatically taxed as a C Corporation, unless it elects to be a disregarded entity (Sec. 301.7701-3(b)(2) of the Treasury Regulation). It is possible for an Australian private corporation to elect for tax transparency in the US pursuant to the Check-the-Box regulations.
25. Sec. 701 of the IRC 1986.
26. Sec. 706(a) of the IRC 1986 and Sec. 1.706-1(a)(1) (LLC) of the Treasury Regulation.
27. Sec. 702 of the IRC 1986.
28. Sec. 704(a) of the IRC 1986. In addition to the rules latter discussed, there are regulations to restrict the "shifting tax consequence rule" for foreign members (Sec. 1.704-1(b)(2)(iii)(b) of the Treasury Regulation). The Revised ULLC Act does not refer to the tax term of allocation, but instead the default rules specify for "distributions" to be in equal shares (Sec. 404 of the Revised ULLC Act).
29. Sec. 702(a)(1)-(7) of the IRC 1986, and Title 26, Sec. 1.702-1(a)(8)(ii) of the Treasury Regulation. For example items which flow through separately are net short-term and long-term capital gains, charitable contributions, portfolio income items and expenses, passive activity items, taxes paid to foreign countries, and tax-exempt income.
30. Sec. 11211 of the IRC 1986.
31. However, the availability of these losses to members is subject in the US to five restrictions, i.e. the cost basis restrictions, the at-risk restrictions, the passive activity restrictions, substantial economic effect and the profit motive.
32. Referred to as the claw-back of tax preferences.
33. Sec. 6104 of the IRC 1986. Referred to as UBTI.
34. The interposing of an opaque entity between the exempt body and the LLC is known as a "blocker". For a more thorough discussion of these techniques see Hugg, J., "Structuring private equity investments in LLCs", Testa Hurwitz and Thibeault (2004), available at www.altassets.com/knowledge bank/learningcurve/2004/nz4621.php (viewed 10 May 2008).

carried forward for a 20-year limit.[35] Whereas for an LLC the losses pass to the member, and if not used carried forward indefinitely by the individual.[36] Furthermore, the tax-transparent treatment of an LLC with international dealings may facilitate greater use of foreign tax credits, than would otherwise be available.[37] Also, the use of a wholly owned LLC as part of a corporate group can be beneficial in avoiding complex CFC and transfer pricing rules.[38] This is because a single-member LLC is categorized as a "disregarded entity" for US tax purposes, and thus its activities are allocated directly to its sole member.[39]

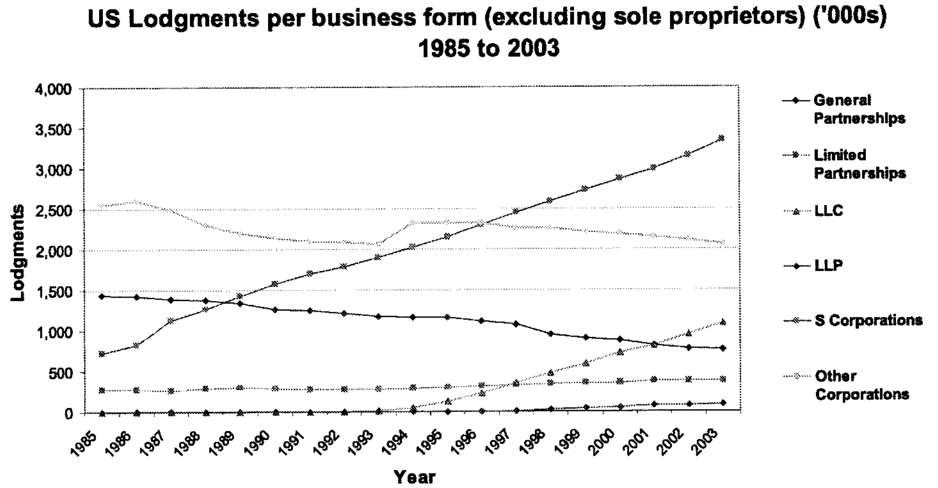
Another benefit of tax transparency is the overall level of taxation when there are distributions to non-resident members. Dividend distributions by a C Corporation to a non-resident would be subject to withholding tax, and pursuant to the tax treaty with Australia would, depending upon the precise circumstance, be limited to 0, 5% or 15%. The Australian member may be able to claim a foreign tax credit for the withholding tax but not for the underlying C Corporation tax of 35% that has been paid prior to the distribution. For allocations by an LLC to a non-resident member these would be subject to withholding tax at 35%.[40] The Australian member may be entitled to claim a foreign tax credit for this withholding tax.

However, the Australian member of an LLC may have to file a US tax return as they can be treated as engaged in trade or business in the US. To alleviate this when there are numerous foreign members, an offshore corporation may be established as the LLC member with foreign members investing into this 'feeder' corporation. It is then this feeder corporation who has the obligation to file a return in the US, rather than numerous members. While the use of a feeder corporation can ease administration burdens, it can impose greater tax cost, including the loss of being able to claim foreign tax credits directly.

To provide an understanding of the utilization of various business forms in the US, Figure 1 demonstrates that in the US the number of S Corporations up until the 2003 year exceeded the number of LLCs lodging tax returns.[41] The popularity of S Corporations might be expected given that they have been a well-established business form in the US for nearly 50 years,[42] compared to the relative recent introduction of LLCs. This data needs to be read cautiously, as, for example, the figures could under-report the number of LLCs. This is because single-member LLCs which have tax-transparent treatment are treated for tax purposes by the US Internal Revenue Services as "disregarded entities". Disregarded LLCs would not be reported in this tax data as LLCs, but would be included in the figures relating to the member's status.[43] A compounding factor is that, from 1997, LLCs may elect for transparency as S Corporation, and as such would be reported in the figures for these entities.

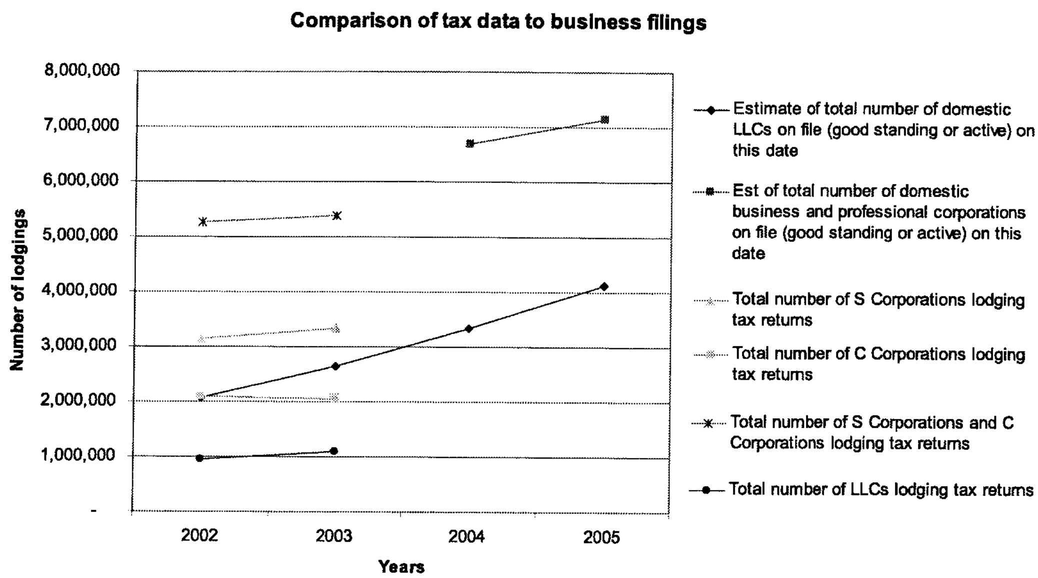
35. Sec. 172 of the IRC 1986. If corporations have net operating losses not absorbed by their taxable income in the two preceding years, the losses may be carried forward for up to 20 years to be applied against assessable income.
36. For the member to have been able to utilize the losses, the restrictions discussed later would need to be satisfied.
37. The Check-the-Box regulations could allow foreign tax credits, even though no foreign income was being assessed in the US; *Guardian Industries v. Commissioner*, 65 Fed. Cl. 50, Doc 2005-6900, 2005 TNT 64-15 (2005). See: Holland, D., "U.S. Check-the-Box Rules in the Cross-Border Context" *Tax Notes International* 1151 (September 2005), p. 1153.
38. Sec. 482 of the IRC 1986.
39. Munden, J.M., Zimmermann, A., and Eason, P., "Tax Planning for U.S. Multinationals and the Impact of the Check-the-Box Regulations", 28 *The International Tax Journal* 3 (2002), p. 51.
40. Sec. 1446 of the IRC 1986. Withholding tax at the highest rate for individuals and 35% for corporations is imposed on "effectively connected taxable income" of a US partnership which is properly allocable to a foreign individual or corporate partner.
41. Note the most popular business form for tax purposes was the sole proprietor with 19,710,079 (non-primary production) lodging tax returns in the 2003 year. Sole proprietors have been excluded from the Figure to enable better detail about the other forms to be demonstrated.
42. First introduced in 1958.
43. This could mean that the single-member LLC is included in the figures as a sole proprietor, C Corporation, trust, or holding LLC.

Figure 1: US business form tax return lodgements (excluding sole proprietors)



Source: Various Internal Revenue Service (1986–2003) Tax Statistics Returns Filed for Individuals, Corporations and Partnerships. Available at www.irs.gov/taxstats/index.html)

Figure 2: Comparison of LLC data sources



Sourced from the 2000-2006 Annual Reports of the Jurisdictions of the International Association of Corporation Administrators.

To ascertain what could be the correct number of LLCs, the tax filings have been compared to data compiled by the International Association of Corporation Administrators (the IACA) from the LLC filings in the individual American states. This comparison demonstrates that in 2003 the estimated number of LLCs formed is approximately 3 million, compared to the 1 million demonstrated in the tax data (refer to Figure 2).[44] There are inherent problems with the IACA's data collection, which have been previously detailed by Friedman.[45] Nevertheless the comparison of these two data sets would imply that around 2 million LLCs may have only one member and may each be a "disregarded entity" for tax purposes, or may have elected for S Corporation or C Corporation treatment.[46]

In terms of corporations, the IACA's data indicates that the total number of business and private corporations with good standing or active is approximately 6.6 million for 2004 and 7.1 million for 2005. These figures are greater than the tax data figures for all corporations of 5.4 million for 2003 but appear to support that the tax data for corporations is more comparable. The discrepancy could relate to corporations that do not have to lodge tax returns or that have failed to do so.

3. Australia's Treatment of Investments to the US

Australia's tax treatment of business investments to the US depends upon what business form has been adopted. When a corporation has been formed in the US, then the Australian investor would not be potentially assessable for Australian tax until actual distributions. As previously noted, such distributions would be subject to withholding tax in the US.

For an Australian investor that is a company itself, the receipt of non-portfolio dividends can be exempt income.[47] Also, prima facie, given the corporate characteristics of the LLC it would come within the tax definition of "company" for Australian tax purposes.[48] This can mean, subject to the CFC hybrid amendments, that Australia will apply an entity tax approach to an LLC even though tax transparency applies in the US.

The non-assessable and non-exempt nature of non-portfolio dividends has a number of implications for Australian corporate investors. Firstly, most expenses incurred in deriving the exempt dividend income would

44. In the 2004 and 2005 report there were figures for "Total number of domestic and foreign LLCs on file (good standing or actual) on this date", but the accumulative figure for all states of the Union for 2005 is: 5,043,336 and 2004: 4,116,394. These accumulative figures seem incongruent compared to the available tax data and have not been used by the author.
45. Friedman, H.M., "The Silent LLC Revolution – The Social Cost of Academic Neglect", 38 *Creighton Law Review* 1 (2004). Note for the 2004 and 2005 year domestic LLC filings are reported separately to foreign ones.
46. It is understood that single-member LLCs may be used to provide asset protection with the LLC holding assets such as the family home, as well as being used to try to mitigate the application of employment taxes.
47. Sec. 23AJ of the Income Tax Assessment Act 1936 (Cth) (henceforth "ITAA 1936 (Cth)"). A "non-portfolio" dividend is a dividend paid by a company to a shareholder which is a company itself, where the shareholder has at least 10% interest in the company. This exemption would not apply to investments made by Australian resident corporations via trusts or general partnerships. Note Sec. 23AH of the ITAA 1936 (Cth) provides an exemption for active foreign branch income.
48. Sec. 6 of the ITAA 1936 (Cth) defines "company" as including all bodies or associations corporate or incorporate, but does not include partnerships or non-entity joint ventures. Such foreign hybrids would not have previously come within the exclusion of a "partnership", as a partnership is defined for tax purposes as an association of persons carrying on business as partners or in receipt of income jointly, but does not include a company (Sub-section 6(1) of the ITAA 1936 (Cth)). While these definitions are circular, the considered opinion is that, since these transparent companies provide a separate legal entity, for Australian tax purposes they would be regarded as a company, and therefore excluded from being a partnership.

not be deductible.[49] Secondly, any foreign tax paid (such as withholding tax in the US) would not be available as a foreign tax credit in Australia. However, a benefit of being regarded as non-assessable and non-exempt is that Australian tax losses would not be absorbed with this exempt income. If there were to be a disposal of membership interest, the capital gain or capital loss on the disposal of shares in a foreign company when it is a non-portfolio interest would be disregarded for Australian tax purposes.[50]

For Australian investors falling outside this non-portfolio dividend exemption, the distributions for a foreign "company" would be assessable, but only on actual distribution. To prevent Australian taxpayers deferring the taxation on the derivation of foreign income by establishing foreign companies, the CFC and FIF rules operate to apply more of an aggregate approach.[51]

The effect of the CFC rules, which have priority over the FIF rules,[52] applying is that the Australian taxpayer is required to include its share of "attributable" income in its assessable income, even though no dividend or profit payment has been made by the CFC. If there is subsequent payment by the foreign company, then dividends paid out of previously attributed income are exempt.[53]

For the CFC rules to apply there must be a foreign company regarded as a "CFC" and an "attributable taxpayer". There are three ways to determine whether a CFC exists. Firstly, a group of five or fewer Australian 1% entities has an associate-inclusive control interest in the foreign company of 50% or more.[54] Alternatively, an Australian entity has an associate-inclusive control interest of 40% or more in a foreign company, unless real control rests elsewhere.[55] The third possibility is that the foreign company is controlled by five or fewer Australian entities, either alone or together with associates.[56]

The second requirement is that there is an "attributable taxpayer". This term applies to those members with a 10% or greater associate-inclusive interest in the CFC.[57] There also needs to be an "attribution percentage" for that taxpayer.[58]

Broadly, the CFC rules apply to tainted income derived by CFCs resident in unlisted countries, although the application can be larger. For there to be CFC attribution the CFC must first fail the active income test,[59] when more than 95% of income of the CFC is not tainted income.[60] If the CFC fails the active income test then "eligible designated concession income", that is, passive income subject to preferential treatment, can be attributed even if from one of seven closely comparable countries.[61] Furthermore, tainted income derived by CFCs resident in an unlisted country is attributable. However, exempt non-portfolio dividends[62] are not attributable income for CFC purposes.

3.1. CFC hybrid amendments

There are complications with the application of the CFC rules if an Australian invests into the US via an LLC. This is because while the CFC rules apply a type of transparency, a number of its rules apply on the premise that an "entity tax" approach applies in the foreign jurisdiction. This means asymmetrical tax treatment could occur between the US, where tax transparency is applied, and Australia, with the LLC being taxed separately from its members as a corporation. Such asymmetrical treatment has been commonly referred to as "hybrid" treatment.[63]

This asymmetrical tax treatment led to a number of problems and the potential for double taxation. For example, the CFC and FIF provisions did not facilitate any credit for the foreign tax paid directly by the member, such as the US tax directly assessed to an LLC member.[64] Another problem with the CFC and FIF provisions was the allocation of a wider range of income, as the active income test and the allocation of comparably taxed income test could not be used due to the tax transparency applying in the US.[65]

49. Note Sec. 25-90 of the Income Tax Assessment Act 1997 (Cth) (henceforth "ITAA 1997 (Cth)") does, however, allow a deduction for interest in deriving foreign income.
50. Sec. 738-505 of the ITAA 1997 (Cth).
51. Other anti-deferral rules that operate in Australia include the transferor trust rules and the deemed present entitlement rules.
52. Sec. 494 of the ITAA 1936 (Cth).
53. Secs. 23AI and 23AK of the ITAA 1936 (Cth). Note: It may be possible to claim foreign tax credits in respect of the dividends paid (Sec. 160AFCD of the ITAA 1936 (Cth)).
54. Secs. 352 to 355 of the ITAA 1936 (Cth). This can be determined by tracing through interposed entities. An "Australian 1% entity" is one whose associate-inclusive control interest is at least 1% (Sec. 317 of the ITAA 1936 (Cth)).
55. Sec. 340(b) of the ITAA 1936 (Cth).
56. Sec. 340(c) of the ITAA 1936 (Cth).
57. Sec. 361 of the ITAA 1936 (Cth). Alternatively, has a minimum of 1% associate-inclusive control interest in the CFC and is one of five or fewer Australian entities that controls the CFC.
58. Note this percentage is calculated differently from "attributable taxpayer", and is the sum of the taxpayer's direct and indirect attribution interests.
59. Sec. 385(2) of the ITAA 1936 (Cth).
60. Tainted income covers passive income, tainted sales income and tainted services income.
61. The seven listed countries are Canada, France, Germany, Japan, New Zealand, the United Kingdom and the US.
62. Sec. 23AJ of the ITAA 1936 (Cth).
63. In Larking, B., ed.. *IBFD International Tax Glossary*, 5th ed. (Amsterdam: IBFD Publications, 2005). IBFD defines a "hybrid entity" as an "entity that is characterized as transparent for tax purposes (e.g. as a partnership) in one jurisdiction and non-transparent (e.g. as a corporation) in another jurisdiction". It is argued that this an unfortunate use of the term "hybrid" and is not an appropriate term given the English meaning of this word, given that the IBFD's circumstance describes the one entity treated differently in two jurisdictions, rather than the one entity that has characteristics of two different species. For a similar use of the term of hybrid to describe asymmetrical treatment of a business form see Barenfeld, J., *Taxation of Cross-Border Partnerships: Double Tax Relief in Hybrid and Reverse Hybrid Situations*. Doctor of Laws, Jonkoping International Business School, Jonkoping (2005), p. 130; Benson, David M., Rollinson, Marjorie A., O'Connor, Margaret M., Baik, Sunghak A. "Hybrid" Entities – Practical Application Under the Check-the-Box Regime", 26 *Tax Management International Journal* 8 (August 1997), p. 364, and Connors, P.J., and Femia, R.V. "Application of U.S. Treaties to Hybrid Entities", 35 *Tax Management International Journal* 3 (2006), p. 148.
64. Explanatory Memorandum accompanying Taxation Laws Amendment Bill (No. 7) 2003 (Cth), at Para. 9.10. This was because the CFC and FIF provisions were drafted on the premise that the business entity paid the foreign tax, not the member, and therefore no credit was provided for the member's own payment of foreign tax.
65. Explanatory Memorandum accompanying Taxation Laws Amendment Bill (No. 7) 2003 (Cth), at Para. 9.5.

Commencing 1 July 2003, the CFC hybrid amendments were introduced to address the asymmetrical tax treatment applying to Australian residents investing in certain foreign business forms. The Australian government appeared concerned that Australians were avoiding LLCs, which could have placed them at a competitive disadvantage to other investors. It was stated that Australian investors might have adopted an "alternative higher cost business structure" than the industry norm.[66]

To address this asymmetrical treatment, the CFC hybrid amendments specify that certain foreign transparent companies are to be taxed instead as "general partnerships" in Australia. This mechanism means that for certain recognized foreign hybrids (referred to as "CFC hybrids" in this Article) they will be subject to tax transparency in Australia, which is more aligned with their foreign treatment, but which is not necessarily identical.[67] Not all foreign transparent companies are eligible for the CFC hybrid amendments. Recognized CFC hybrids include a "foreign hybrid limited partnership"[68] and a "foreign hybrid company",[69] which are defined by statute and regulation.[70] Currently included as CFC hybrids are the US LLC and the United Kingdom's limited partnership.[71]

When the CFC hybrid is a "company", such as the LLC, rather than a "limited partnership",[72] the requirements are that at no time is the company resident of a foreign country that would impose tax on it as an entity, and at no time is the company an Australian resident. Furthermore, in relation to another taxpayer the company is a CFC with income attributable to the taxpayer at a percentage greater than zero, with the member making an election to treat as a foreign hybrid company. Furthermore, the company must be formed in the US and be treated as a partnership or as a disregarded entity if single membership.[73]

Accordingly, these CFC hybrid amendments do not eliminate asymmetrical treatment for a foreign hybrid with no Australian members with an income attributable percentage pursuant to the CFC measures. These businesses would be subject to transparency overseas and entity treatment in Australia. While this may only affect a small percentage of taxpayers it is argued that the CFC amendments should be extended to apply tax transparency to these forms as well, to reduce asymmetrical treatment.

When the CFC hybrid amendments do apply, then for Australian tax purposes the foreign transparent company calculates its "net income" as a general partnership,[74] and the members include their share of this net income amount (which may be positive or negative) in their own assessable income.[75]

Therefore, the application of the CFC hybrid amendments applies a tax transparency in Australia similar to that in the US. Thus, allowing the Australian member to claim foreign tax credits for taxes personally paid in the US. While this means the CFC rules do not apply, this is because there is no accumulation of income offshore, as income is being assessed annually in Australia. Also, it means that the non-portfolio dividend exemption would not apply as the LLC has lost its "company" status for Australian tax purposes.

Similar to other general partnerships in Australia, this net income would not include capital gains, as these are determined at the individual member level.[76] This is because in Australia members of a general partnership are treated as holding direct fractional interests in the assets of the general partnership.

The CFC hybrid amendments provide that "limited" members of recognized foreign hybrids can claim revenue and net capital losses only to the extent of their "loss exposure amount".[77] If revenue and capital losses are within this amount then either a deduction is allowable to the limited member or the limited member makes a capital loss under Sec. 104-270,[78] with the capital loss equivalent to the amount allowed.[79] If the loss exposure amount is exceeded then the amount of revenue and/or capital losses to be utilized for the year is reduced to the loss exposure amount.[80] The excess amount can be carried forward as an "outstanding loss"

66. Explanatory Memorandum accompanying Taxation Laws Amendment Bill (No. 7) 2003 (Cth), at Para. 9.177.
67. Sec. 830-20 of the ITAA 1997 (Cth), introduced by Taxation Laws Amendment Act (No. 7) 2003. However, whether the amendments will achieve the elimination of problems is questionable given that Australian members of the LLC will be treated as having fractional interests in the LLC's assets, although for US tax purposes this is not the case. This inconsistency is acknowledged as well as the potential for double tax that this could produce (Explanatory Memorandum accompanying Taxation Laws Amendment Bill (No. 7) 2003 (Cth), at Para. 9.46 to 9.48). This is discussed in Sec. 830-75(1) and (2).
68. Sec. 830-10 of the ITAA 1997 (Cth).
69. Sec. 830-20 of the ITAA 1997 (Cth).
70. Sec. 830-15(2)(b) of the ITAA 1997 (Cth). Broadly these require, apart from other things, that members be subject to tax and not the entity "as a partnership".
71. Also the German *Kommanditgesellschaft* is a recognized CFC hybrid (ATO ID 2007/47). The S Corporation in the US does not come within the term "foreign hybrid company". This is because tax transparency is not provided to this entity "as a partnership" and is instead achieved through special tax rules applying to them to exclude them from normal corporate tax treatment in the US.
72. To gain tax transparency as a CFC hybrid the requirements are that a "limited partnership" has been formed in a foreign country, with foreign tax imposed on income or profits by foreign law on members not the limited partnership, and at no time is the limited partnership resident of a foreign country that would impose tax on the entity. Additional requirements are that at no time is the limited partnership an Australian tax resident, there is an income attributable percentage greater than zero under the CFC provisions, and the member has elected for the entity to be a foreign hybrid limited partnership (Sec. 830-10(2) of the ITAA 1997 (Cth)).
73. Sec. 830-15(1), (2), (3) and (5) of the ITAA 1997 (Cth).
74. Sec. 830-20 of the ITAA 1997 (Cth) specifies to treat company as partnership. Technically a foreign hybrid limited partnership automatically has partnership tax treatment if conditions are met. Note such a foreign hybrid limited partnership is excluded from being a "corporate limited partnership" for Australian tax purposes (Sec. 94D(5) of the ITAA 1936 (Cth)).
75. Secs. 90 and 92 of the ITAA 1936 (Cth).
76. In the US the capital gain would be determined at the entity level and then allocated to members.
77. Sec. 830-45(1) of the ITAA 1997 (Cth). Defined in Sec. 830-60 of the ITAA 1997 (Cth) introduced by Taxation Laws Amendment Act (No. 1) 2004 (Cth) legislating Division 830 into ITAA 1997.
78. Sec. 104-270 of the ITAA 1997 (Cth): CGT event K12.
79. Sec. 830-50 of the ITAA 1997 (Cth).
80. Secs. 830-45(2) and 830-50(3) of the ITAA 1997 (Cth).

until the loss exposure rule is satisfied in the future.[81] If the loss exposure amount is not exceeded then the member may be entitled to a deduction.[82]

In terms of foreign losses, when the CFC hybrids were originally introduced the explanatory memorandum suggested that foreign losses of a CFC hybrid would not be subject to Australian loss restriction rules at all,[83] as a rule applied to restrict foreign losses to foreign income.[84] This rule is to be repealed and such foreign losses would now appear to be subject to the loss restriction rule, although this is a contentious issue.[85]

The "loss exposure amount" is defined to be the addition of amounts or market value of member contributions that at the end of the year have not been repaid or returned, and that have been contributed for at least 180 days.[86] From this calculation the following are subtracted:
- all limited recourse debts owed by the member at the end of the income year, to the extent that borrowings were for the purpose of enabling the member to make contributions and are secured by the membership interest in the foreign hybrid;[87]
- previous years' revenue losses claimed by the member;
- previous years' net capital losses claimed by the member; and
- subsequent deductions under outstanding revenue losses[88] or capital loss from previous years.[89]

The Australian loss restriction rules are in addition to and separate to the loss restriction rules in the US. For US purposes, the rules imposed on the LLC member would be:
- membership cost basis;[90]
- the at-risk rules;[91]
- the passivity rules;[92] and
- the streaming rules.[93]

These different rules can lead to different availability of losses between the two jurisdictions; a number of these rules are described below.

One issue is the treatment of unpaid profit allocations to members.[94] Such an unpaid allocation could be regarded as a member loan, a further equity contribution or something else. For US LLCs, unpaid profit allocations automatically increase the membership cost basis, as they are seen to be increasing the amount of retained profits in the business form.[95] This is even though members with unpaid allocations might technically rank equally with unsecured creditors upon winding up.[96]

For CFC hybrids, if the entity is a limited partnership, as opposed to an LLC, the Explanatory Memorandum clearly indicates a member's access to losses will be increased by a member's share of undrawn profits in the foreign hybrid.[97] However, the explanatory memorandum is silent as to whether this would extend to a CFC hybrid that is a company, such as the LLC.

It is argued that, in addition to equity, debt contributions (member loans) should also be included in the Australian membership cost basis when the member ranks below unsecured creditors of the transparent company for payment. Such a "member-subordinated loan" is at greater risk and is more akin to equity due to requiring satisfaction of unsecured creditors. In determining the ranking of a member loan, all of the relevant regulatory provisions would need to be considered, particularly the capital protection rules, although it is acknowledged that such ordering could be complicated and add to tax compliance costs. The idea of including members' subordinated loans in the membership cost basis is supported by the Explanatory Memorandum accompanying the CFC hybrid amendments. The Explanatory Memorandum specifies that other amounts considered to have contributed to a limited members' liability to loss in the for-

81. Sec. 830-65 of the ITAA 1997 (Cth), for outstanding revenue losses and 830-70 for outstanding capital losses.
82. Sec. 830-50 of the ITAA 1997 (Cth).
83. Explanatory Memorandum accompanying Taxation Laws Amendment Bill (No. 7) 2003 (Cth), at Para. 9.54. It is argued that provided there was sufficient foreign income then for foreign losses to be able to offset it, an Australian member would still have to consider the loss restriction rules.
84. Sec. 79D of the ITAA 1936 (Cth).
85. Tax Law Amendment (2007 Measures No. 4) Act 2007 (Cth), Act 143 of 2007, from 1 July 2008 repeals Sec. 79D.
86. Or intended to remain contributed for at least 180 days. Sec. 830-60 of the ITAA 1997 (Cth): Step One.
87. The term used is "limited recourse debt" and this is defined in Sec. 243-20 ITAA 1997 (Cth) to mean "an obligation imposed by law on an entity (the debtor) to pay an amount to another entity (the creditor) where the rights of the creditor against the debtor in the event of default in payment of the debt or of the interest are limited wholly or predominately to any of the following: (a) rights (including the right to money payable) in relation to any or all of the following: (i) the debt property or the use of the debt property; (ii) goods produced, supplied, carried, transmitted or delivered, or services provided, by means of the debt property; (iii) the loss or disposal of the whole or a part of the debt property or of the debtor's interest in the debt property; (b) rights in respect of a mortgage or other security over the debt property or other property; (c) rights that arise out of any arrangement relating to the financial obligations of an end-user of the financed property towards the debtor, and are financial obligations in relation to the financed property".
88. Sec. 830-50(2) or (3) of the ITAA 1997 (Cth).
89. Sec. 830-60 of the ITAA 1997 (Cth): Step Two. CGT event K12, Sec. 104-270 of the ITAA 1997 (Cth): foreign hybrid loss exposure adjustment. CGT event K12 refers to carried forward capital losses that previously could not be used because of the loss exposure amount. CGT event K12 occurs when these carried forward losses are subsequently made available in a future income tax year.
90. Commonly known as the "outside cost basis" in the US. Compared to the term "inside cost basis" referring to the business's own cost basis for assets held by it.
91. Sec. 465(b)(4) of the IRC 1986.
92. The passive activity loss rules apply to individuals, a corporation in which five or fewer individuals own more than 50% of the membership interest or to corporations or a corporation engaged in rendering certain professional services and in which the employees of the corporation own more than 10% of the membership interest (Sec. 469(a)(2) of the IRC 1986).
93. Sec. 704 of the IRC 1986. The "substantial economic effect" is elaborately defined in the regulations promulgated (Sec. 1.704-1 of the Treasury Regulation). If an allocation lacks substantial economic effect then it is modified to conform to the economic arrangement.
94. That is, the transparent company has allocated profit to the members which the member has been assessed on but currently the profit remains within the transparent company.
95. Joint Committee on Taxation, *Present Law and Background Relating to Selected Business Tax Issues*, Washington DC: Senate Committee on Finance (2006), p. 8: "The distinction between debt and equity depends on a number of factors. This determination requires an examination of the substance of the instrument. Generally, debt requires a promise to pay a fixed sum by a date certain, with a reasonable expectation that payment is made."
96. Sec. 6.40(f) of the Model Corporation Act and Sec. 405(d) of the Revised ULLC Act.
97. Explanatory Memorandum accompanying Taxation Laws Amendment Bill (No. 7) 2003 (Cth), at Para. 9.59.

eign hybrid include "subordinated debt" contributed by the member, which is not a debt interest issued by the foreign hybrid and which, in the event of liquidation, ranks after claims by all other creditors (both secured and unsecured).[98]

Another inconsistency is that US LLC members can increase their membership cost basis through outside loans by third parties to the LLC.[99] This appears to be the case, because LLCs are granted transparency through the general partnership tax provisions that provide for a business form where traditionally members could have joint and several liability for debts.[100] While the US LLC could be an entity treated as a CFC hybrid, it does not appear that Australia allows the Australian membership cost basis to be increased by outside loans. Therefore, an Australian member of an LLC could have a different membership cost basis in the US to that for Australian tax purposes. It is argued that outside loans should not be part of the membership cost basis as the US treatment is later reversed through the application of the at-risk rules.

Another inconsistency relates to streaming. For LLCs, their Operating Agreement could allow for special allocations[101] of income, deductions, losses or tax credits to different members.[102] However, for special allocations to be recognized for US tax purposes they must satisfy the substantial economic rule.[103] This is a two-part test requiring that the allocation have economic effect, and that this effect is substantial.[104]

In terms of the CFC hybrids there appears to be some ability for streaming since the provisions indicate that the allocations are primarily made pursuant to the business form's constitution.[105] However, the streaming of precise items of income and/or deductions to individual members appears to be precluded, as each member needs to calculate their overall percentage of profits for the year and then apply this to the net income.[106] This is similar to New Zealand's rules for its new limited partnerships.[107] Also, CFC hybrids have the 180-day component of the "loss exposure amount", which would appear to prevent short year-end increases in member's contributions to boost up the membership cost basis in order to access losses.[108] The issue of "streaming" is something that is currently under consideration by the Australian Tax Office.[109]

Therefore while tax transparency can apply to LLCs in both the US and Australia, there are inconsistencies that may undermine Australians realizing the full benefit of the LLC form in structuring their investments into the US. These inconsistencies relate to the treatment of unpaid allocations to members, outside loans and ability to stream precise amounts to different members. These inconsistencies mean that full symmetry has not been achieved between the two jurisdictions and this is adversely affecting the goal of tax neutrality. Additionally, there are practical implications that can add to the complexity and uncertainty for Australian investors investing in such CFC hybrids. These practical implications can include the requirement for the CFC hybrid to lodge a general partnership return with the Australian Tax Office,[110] which in practice can prove difficult because of problems in obtaining the information. This can be complicated if the CFC hybrid has a different tax year to that of the Australian members, requiring a substituted accounting period to be applied for.[111] Furthermore, complications can arise about what are the correct allocations and membership cost basis when there has been a part year disposal of a membership interest.

98. Explanatory Memorandum accompanying Taxation Laws Amendment Bill (No. 7) 2003 (Cth), at Para. 9.59.
99. Which are shared among members pursuant to their profit sharing ratios (Sec. 1.752-3(a)(3) of the Treasury Regulation). Non-recourse debt is allocated in three stages. First, an amount of debt equal to the amount of minimum gain is allocated to partners who share in minimum gain. Second, the amount of non-recourse debt equal to the remaining pre-contribution gain under Sec. 704(c) is allocated to the partner who contributed the property and debt to the partnership. Third, any remaining non-recourse debt is allocated to the partners in accordance with one of several different allocation methods. The partnership agreement should specify which allocation method is chosen. Most often, the profit sharing ratio is used, although this initial increase in cost basis is subsequently reversed when an LLC repays the outside loan, with each member treated as receiving a distribution of money equal to the member's share of the extinguished liability (Sec. 752(b) of the IRC 1986).
100. Although given the business reform in the US over the last 20 years, the entities eligible for general partnership tax treatment have expanded to include such entities as LLCs, LLPs and LLLPs.
101. For example special allocations could allow for capital gains or depreciation deductions to be allocated disproportionately to one member whose tax profile results in a more effective utilization of them; Friedman, H.M., "The Silent LLC Revolution – The Social Cost of Academic Neglect", 38 *Creighton Law Review* 1 (2004), p. 23.
102. There are regulations to restrict "shifting tax consequence rule" for foreign members (Sec. 1.704-1(b)(2)(iii)(b) of the Treasury Regulation).
103. Sec. 704 of the IRC 1986. The "substantial economic effect" is elaborately defined in the regulations promulgated: (Sec. 1.704-1 of the Treasury Regulation). If an allocation lacks substantial economic effect then it is modified to conform to the economic arrangement. Yin, G.K., and D.J. Shakow, "Taxation of Private Business Enterprises", *Federal Income Tax Project* (Philadelphia: The American Law Institute, 1999), p. 80. The regulations interpret "substantial economic effect" as encompassing two requirements, i.e. the allocation must have "economic effect" and must pass a "substantiality" test.
104. Essentially this rule requires that there be economic impact associated with the allocation.
105. Sec. 830-30 of the ITAA 1997 (Cth). For a hybrid company, the interest of a member in its net income or loss is equal to the percentage of the company's profit distributed at the end of the year in accordance with its constitution (or if none as dividends) what the member could reasonably expect to receive. A member's interest in a hybrid company's assets is equal to the percentage that the member could reasonably be expected to receive of the total distribution on the winding up of the company at the end of the income year (Sec. 830-35 of the ITAA 1997 (Cth)). This is supported by the example provided in the Explanatory Memorandum accompanying Taxation Laws Amendment Bill (No. 7) 2003 (Cth), at Para. 9.43, example 9.1.
106. Sec. 830-30 of the ITAA 1997 (Cth).
107. New Sec. HG 2(2) of the Income Tax Act 2007 inserted by Taxation (Limited Partnerships) Act 2008 (New Zealand), "The amount of income...is calculated by multiplying the total income ... of the partnership ... by the partner's partnership share in the partnership income".
108. Sec. 830-60 of the ITAA 1997 (Cth): Step One. The "loss exposure amount" requires that member contributions have been contributed for at least 180 days or are intended to remain contributed for at least 180 days.
109. Australian Taxation Office, "Foreign Source Income Sub-Group Issues Register", item 6 Foreign Hybrids – FSISC1104/05, available at: http://ato.gove.au/print.asp?doc=/content/00130341.htm (viewed 10 May 2008).
110. Sec. 91 of the ITAA 1936 (Cth). See also Australian Taxation Office, "Foreign Source Income Sub-Group Issues Register", item 36 Foreign Hybrids – FSISC1104/05, available at: http://ato.gove.au/print.asp?doc=/content/00130341.htm (viewed 10 May 2008).
111. Remembering that the US income year ends 31 December, whereas Australia's is 30 June. See also: Australian Taxation Office, "Foreign Source Income Sub-Group Issues Register", item 7 Foreign Hybrids – FSISC1104/05, available at: http://ato.gove.au/print.asp?doc=/content/00130341.htm (viewed 10 May 2008).

4. Conclusion

With these CFC hybrid amendments, Australians investing into the US have greater choice of business forms. As well, the use of LLCs gives them the choice to circumvent the application of Australia's CFC and FIF rules, which have been criticized as complex.[112] However, this option does come with its own problems. Firstly, this will mean that tax transparency will apply, therefore allocating income and losses directly to members, and therefore not facilitating the accumulation of income overseas. However, it may enable Australian members to access foreign losses to offset other income, subject to the loss restriction rules. Furthermore, even though the amendments bring greater alignment between the treatment in the US and Australia of LLCs, there are still inconsistencies, such as the tax treatment of capital assets and the ability to utilise allocated losses.

Nevertheless, the CFC hybrid amendments do allow Australians to use a new business form rather than the corporation, which may both provide them with greater flexibility for internal governance and reduce the potential for double taxation (both domestically and internationally) to occur. This may allow Australians to access the US market through a business form that is increasing in popularity there, and that may eventually spark calls for the availability of an LLC domestically in Australia.

112. Burns, L., *Recent developments in International Tax*, New South Wales Convention Papers, Taxation Institute of Australia (May 2007), p. 321.