



September 11, 2012

Mr. Tony McDonald  
General Manager  
International Tax and Treaties Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Email: [MITWHT@treasury.gov.au](mailto:MITWHT@treasury.gov.au)

Dear Mr. McDonald,

**RE: Clean Building Managed Investment Trusts (MITs) 10% Concessional Tax Rate**

The Canada Pension Plan Investment Board ("CPPIB") welcomes the opportunity to comment on the draft legislation and explanatory material for the Tax Laws Amendment (Clean Building Managed Investment Trust) Bill 2012 ("the Bill").

CPPIB is an international investor that has invested in a number of Australian infrastructure and property projects. This includes the decision on July 7, 2012 to commit to invest in the Barangaroo South office development together with Lend Lease and other investors. As previously stated in correspondence to the Deputy Prime Minister and Treasurer and other Ministers, CPPIB continues to urge the Government to reconsider the increase in withholding tax implemented following the 2012-2013 Budget.

#### **Definition of "Newly Constructed" Buildings**

CPPIB appreciates the Bill is intended to reflect the Agreement reached between the Government and the Australian Greens on June 27, 2012 that:

*From July 1, 2012, managed investment trusts that only hold newly constructed energy efficient commercial buildings will be eligible for a 10% withholding tax rate.*

*The concession will be available in relation to office buildings that have obtained a 5-star Green Star rating or a predicted 5.5 star NABERS rating, and retail centres and non-residential accommodation that meet equivalent standards.*

CPPIB is concerned that the definition of "newly constructed" in the Bill as set out in the proposed section 12-430 of Schedule 1 to the Taxation Administration Act 1953 is too narrow. In particular:

1. the requirement in sub-section (1)(a) that:  
*the construction of the foundations of the building commenced on or after July 1, 2012; and*

2. the further clarification provided in paragraph 1.20 of the Explanatory Memorandum which states:

*For the purposes of these provisions the commencement of the construction of the foundation occurs when ground is broken for the purpose of excavating to establish the building's foundation.*

In CPPIB's view, it is the clarification in the Explanatory Memorandum that is particularly restrictive and is likely to result in a number of anomalies that would preclude worthwhile 'clean building' projects from qualifying including:

- "newly constructed" buildings that form part of ongoing or planned urban renewal projects, especially where the proposed building is to be situated on reclaimed land requiring remediation;
- projects that are developed in stages and where some of the stages of the development occur entirely after July 1, 2012;
- otherwise eligible new buildings that are constructed after July 1, 2012 above existing structures;
- a "newly constructed" building that is constructed on a common basement, built as part of a phased development of a precinct; and
- projects where only preparatory works were undertaken before being abandoned prior to July 1, 2012 - for example, due to the financial crisis. If new owners were to commence to start construction of a new energy efficient building after July 1, 2012, the project would not qualify.

We appreciate that the Government is seeking to strike a balance between crafting legislation to reflect the policy intent of the Agreement without undermining the effective date from which the legislation is intended to apply. We suggest that balance may be achieved by (1) removing paragraph 1.20 in the Explanatory Memorandum and (2) amending section 12-430 by inserting a new sub-section, sub-section 12-430 (4), being as follows:

(4) Construction of the foundations excludes all preparatory work to the site (including excavation, environmental remediation, site stabilization) and all work below what will be the floor surface of the lowest basement level.

In CPPIB's view, this amendment to the definition is entirely consistent with the letter and spirit of the Agreement reached between the Government and the Australian Greens and would help ensure that genuinely post July 1, 2012 "newly constructed" buildings in urban renewal precincts or where phased development of a precinct is taking place are not precluded from eligibility for the concession.

This approach would assist in clarifying that construction does not commence, for example, where a project is situated on reclaimed land, for work that is designed to prepare and stabilise the site so as to make it suitable to commence construction of a new building.

CPPIB would be happy to discuss the proposed drafting of the above definition if this option is considered suitable.

## **Eligible MITs Should Be Able to Hold Other Assets**

CPPIB also believes that the legislation should be amended to remove the requirement that the concessional rate apply to MITs that only hold energy efficient buildings. Income that is generated from clean energy efficient buildings should retain its character and be subject to the 10% withholding rate.

Existing tax rules allow different types of income distributed by trusts to be traced and subject to differential rates of withholding. These principles should apply to the net income from clean energy efficient buildings that are distributed by a MIT.

Funds managers have implemented accounting systems and processes which allow them to differentiate between different types of income (including dividends, interest, capital gains and other income). These systems would enable such fund managers to identify the net income arising from clean energy efficient buildings, as opposed to the net income arising from other buildings.

This proposal unnecessarily restricts property funds from investing in a property portfolio that includes clean energy efficient buildings as well as other buildings. We believe that the requirement to hold clean buildings in a separate vehicle will create undue complexity and additional administrative costs. This concern would be even more acute if funds feel that the need to isolate each building in its own separate MIT to avoid any tainting risk. That is, the risk that if a project that is otherwise intended to meet the 'clean building' standards does not meet certification on a timely basis, it could taint the taxation of income from another building in the same MIT that has otherwise met the standards.

While this change would require a variation of the Agreement reached between the Government and the Australian Greens, CPPIB notes that it is consistent with current widely applied tax practice that is adopted in the fund management industry.

### **Conclusion**

Should you require clarification of any of the matters raised in this submission or CPPIB's view on any other matters, please do hesitate to drop me a line at [rspindler@cppib.ca](mailto:rspindler@cppib.ca).

Sincerely,



Rob Spindler  
Vice President, Tax