
Chapter 1

Clean Building Managed Investment Trusts

Outline of chapter

1.1 The *Tax Laws Amendment (Clean Building Managed Investment Trust) Bill 2012* amends the *Income Tax (Managed Investment Trust Withholding Tax) Act 2008*, the *Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953*.

1.2 The amendments will provide for a final withholding tax rate of 10 per cent on fund payments from eligible Clean Building Managed Investment Trusts (MITs) made to foreign residents in information exchange countries.

Context of amendments

1.3 On 27 June 2012 the Assistant Treasurer, the Hon. David Bradbury MP, and the Parliamentary Secretary for Climate Change and Energy Efficiency, the Hon. Mark Dreyfus MP, announced that the Government will introduce legislation to reduce the MIT final withholding tax rate to 10 per cent for eligible fund payments made by MITs that only hold newly constructed energy efficient commercial buildings.

1.4 The *Tax Laws Amendment (Clean Building Managed Investment Trust) Bill 2012* gives effect to this announcement.

Summary of new law

1.5 The amendments in this Bill will provide for a final withholding tax rate of 10 per cent on fund payments from eligible Clean Building MITs made to foreign residents in information exchange countries.

1.6 To access the reduced withholding tax rate a Clean Building MIT must hold certain assets. These assets are energy efficient buildings on which construction began on or after 1 July 2012. These buildings

must comprise of office, hotel and retail space. Clean Building MITs will also be able to invest in other Clean Building MITs.

1.7 Clean Building MITs will not be able to receive assessable income from any other taxable Australian property (other than from cleaning buildings or from investments in other Clean Building MITs). This ensures that fund payments that are eligible to receive the concessional 10 per cent final withholding tax rate are not mixed with fund payments from MITs that receive a 15 per cent final withholding tax rate.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>The MIT final withholding tax rate applies to fund payments from a MIT to a foreign resident, including where made indirectly through one or more Australian intermediaries.</p> <p>Where withholding is required, fund payments made by a Clean Building MIT will be subject to a rate of the final withholding tax of 30 per cent.</p> <p>This rate will be reduced to 10 per cent where the recipient is in a foreign jurisdiction that is listed in Regulation 44E of the <i>Taxation Administration Regulations 1976</i>.</p> <p>A Clean Building MIT is a MIT that holds clean buildings that commenced construction on or after 1 July 2012, and/or invests in other Clean Building MITs.</p> <p>Clean Building MITs are not able to derive assessable income from any other taxable Australia property.</p> <p>The withholding tax treatment of any other MITs (other than Clean Building MITs) are not affected by these amendments.</p>	<p>The MIT final withholding tax rate applies to fund payments from a MIT to a foreign resident, including where made indirectly through one or more Australian intermediaries.</p> <p>Where withholding is required, the rate of the final withholding tax is 30 per cent, but is reduced to 15 per cent where the recipient is in a foreign jurisdiction that is listed in Regulation 44E of the <i>Taxation Administration Regulations 1976</i>.</p>

Detailed explanation of new law

1.8 The MIT final withholding tax rate applies to fund payments from a MIT to a foreign resident, including where made indirectly through one or more Australian intermediaries. A fund payment is a distribution of rental income and capital gains from taxable Australian property by an Australian MIT. The trustee of a MIT is required to withhold an amount from a fund payment it makes to an entity with an address outside of Australia (or which the payer is authorised to make outside Australia).

1.9 The concessional MIT final withholding tax rate is prescribed in paragraph 4(1)(a) of the *Income Tax (Managed Investment Trust Withholding Tax) Act 2008* and subsections 12-390(3) and 12-390(6) of Schedule 1 to the *Taxation Administration Act 1953*.

1.10 The reduced rate is only available in respect of 'fund payments' from a MIT as defined in sections 12-400 and 12-405 of Schedule 1 to the *Taxation Administration Act 1953*. Dividends, interest, royalties, capital gains and losses and foreign sourced income are specifically excluded.

1.11 Where withholding is required, the rate of the final withholding tax is 30 per cent, but is reduced to 15 per cent where the recipient is in a foreign jurisdiction that is listed in Regulation 44E of the *Taxation Administration Regulations 1976*.

1.12 Under the amendments in this Bill, fund payments from a Clean Building MIT will be subject to a final withholding tax rate of 30 per cent where withholding tax is required. However, where the recipient is in a foreign jurisdiction that is listed in Regulation 44E of the *Taxation Administration Regulations 1976*, this rate will be reduced to 10 per cent. [*Schedule 1, items 3 and 4, paragraphs 4(1)(a) and 4(1)(aa)*].

What is a clean building MIT

1.13 A Clean Building MIT is a MIT that must hold certain assets (on behalf of its beneficiaries) and cannot derive assessable income from any other taxable Australian property (other than from those assets).

1.14 A Clean Building MIT must satisfy the requirements of a MIT as specified in section 12-400 in Schedule 1 of the *Taxation Administration Act 1953*.

1.15 The intention of section 12-425 of the Bill is to ensure that Clean Building MIT fund payments only consist of (rental) income and capital gains from clean buildings. This includes income and capital gains derived from fund payments made from other Clean Building MITs in

which the Clean Building MIT holds an interest. For the purposes of these amendments, a clean building includes the land on which the clean building is a fixture.

1.16 A Clean Building MIT cannot receive any assessable income from any taxable Australian property, other than from clean buildings which it holds, or from fund payments made to it from its interests in other Clean Building MITs. Taxable Australian property is defined in subsection 855-15 of the *Income Tax Assessment Act 1997*.

1.17 This does not preclude a Clean Building MIT from holding taxable Australian property that is not producing assessable income. The basis of this is to allow Clean Building MITs to be able to hold land (from which no income is being derived) for the purpose of developing and constructing clean buildings. However, if a taxable Australian property asset, other than a Clean Building or interests in other Clean Building MITs, does produce assessable income then the entity will no longer be a Clean Building MIT and the normal MIT rules will apply. [*Schedule ?, items 2 and 18, section 995-1 of the Income Tax Assessment Act 1997 and section 12-425 in Schedule 1 of the Taxation Administration Act 1953*].

Meaning of clean building

1.18 Broadly, a building is a clean building if:

- The construction of its foundations began on or after 1 July 2012;
- the building is a commercial building that is used for office, hotel and shopping centre purposes; and
- the building meets and maintains at least a 5 Star Green Star rating as certified by the Green Building Council of Australia or a 5.5 star Energy Rating as accredited by the National Australian Built Environment Rating System (NABERS). [*Schedule?, items 1 and 18, subsection 995-1(1) of the Income Tax Assessment Act 1997 and section 12-430 in Schedule 1 of the Taxation Administration Act 1953*]

Construction began on or after 1 July 2012 requirement

1.19 In order for a building to be a clean building, the construction of the foundations of the building must have commenced on or after 1 July 2012. [*Schedule ?, item 18, paragraph 12-430(1)(a) in Schedule 1 of the Taxation Administration Act 1953*].

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

Building use requirements

1.21 In order for a building to be a clean building, it must be used as an office building, hotel or a shopping centre. Where a building is used for multiple purposes, it will still be eligible to be a clean building, provided it does not contain anything other than office, hotel or shopping space.

1.22 For the purposes of these provisions, the meaning of office building and shopping centre will take on their ordinary meanings.

1.23 The meaning of hotel is closely consistent with the meaning of hotel building as defined in paragraph 43-95(1)(b) of the *Income Tax Assessment Act 1997*. That is, a hotel wholly or mainly provides short-term accommodation for travellers. This will generally apply to all business hotels. Those buildings that provide non-commercial residential accommodation are not intended to fall within the scope of the meaning of a clean building.

1.24 The meaning of shopping centre is not intended to preclude associated facilities such as cafes and restaurants.

1.25 These provisions also include a regulation making power to allow the Government to modify the scope of buildings to which the measure applies, to align the operation of the law with intended policy outcomes should the scope of the measure be considered either too broad or too narrow.

Energy efficiency requirements

1.26 In order for a building to be a clean building it must have received and maintained at all times during the income year a minimum efficiency rating.

1.27 Prior to and at the time the building starts producing assessable income, the building must have at least a 5 Star Green Star rating as certified by the Green Building Council of Australia or a 5.5 star Energy Rating as accredited by NABERS.

1.28 For the purposes of a new building accessing the regime under the Green Building Council of Australia certification, the building must have received at least a 5 Star Green Star rating '*by Design*' under the applicable rating tool. The building must also obtain a 5 Star Green Star

rating 'as Built' within 24 months of practical completion of the project in order to maintain its eligibility.

1.29 For the purposes of a new building accessing the regime under the NABERS accreditation, the building must have received a NABERS 5.5 star Energy Rating Commitment Agreement. As soon practically possible, an actual NABERS Energy rating must be undertaken and 5.5 star Energy Rating will be required to maintain eligibility as a clean building.

1.30 Furthermore, as the NABERS accreditation uses multiple tools where the building has mixed uses (for example, a building with 5 floors of shopping centre with 5 floors of offices above), each area that can be rated under any of the NABERS Energy Rating tools must be rated and must have received a NABERS 5.5 star Energy Rating.

1.31 Only accredited NABERS ratings will be accepted, self-assessed ratings will not be accepted for the purposes of these amendments. As NABERS accreditations are valid for 12 months, buildings must maintain a NABERS 5.5 star Energy Rating for each yearly assessment.

1.32 These provisions also include a regulation making power to allow the Government to update the minimum required ratings, to ensure operation of the law is in line with intended policy outcomes. This may also include adding ratings tool from other providers, as they become available.

Consequential amendments

1.33 Consequential amendments have been made to allow for the current MIT withholding tax obligations and liability provisions to apply to Clean Building MIT payments. That is, the same withholding tax obligations and liabilities apply to both MIT fund payments and Clean Building MIT fund payments, albeit at a different rate provided the recipient is in an exchange agreement country.

1.34 In accordance with subsection 12-385(1) of Schedule 1 of the *Taxation Administration Act 1953*, a Clean Building MIT is required to withhold an amount from fund payments paid to an entity whose address or place of payment is outside Australia. Where the address or place of payment of the recipient is in an information exchange country, the final withholding tax rate will be 10 per cent. [*Schedule ?, items 7,8 and 9, subsection 12-385(3) of Schedule 1 of the Taxation Administration Act 1953*].

1.35 In accordance with subsection 12-390(1) of Schedule 1 of the *Taxation Administration Act 1953*, a custodian must withhold an amount

from a payment representing or reasonably attributable to a fund payment paid by a Clean Building MIT, to an entity whose address or place of payment is outside Australia. Where the address or place of payment of the recipient is in an information exchange country, the final withholding tax rate will be 10 per cent. *[Schedule ?, items 10,11 and 12, subsection 12-390(3) of Schedule 1 of the Taxation Administration Act 1953].*

1.36 In accordance with subsection 12-390(4) of Schedule 1 of the *Taxation Administration Act 1953* an entity, that is neither a trustee of a MIT nor a custodian, must withhold an amount from a fund payment it receives when a foreign resident is, or becomes entitled, to all or part of the payment. Where the recipient is a resident of an information exchange country, the final withholding tax rate will be 10 per cent. *[Schedule ?, items 13,14 and 15, subsection 12-390(6) of Schedule 1 of the Taxation Administration Act 1953].*

1.37 The notice requirements in section 12-395 of Schedule 1 of the *Taxation Administration Act 1953* have also been amended to accommodate for Clean Building MIT fund payments. These requirements are, in practice, the same as those required for MIT payments. *[Schedule ?, items 16 and 17, subsections 12-395(3) and (6) of Schedule 1 of the Taxation Administration Act 1953].*