green building council australia

Building a sustainable future

13 September 2012

General Manager
International Tax and Treaties Division
The Treasury
Langton Crescent
PARKES ACT 2600

Via email: MHTWHT@treasury.gov.au

Dear Sir/Madam

RE: CLEAN BUILDING MANAGED INVESTMENT TRUSTS DRAFT LEGISLATION

Thank you for the opportunity to provide comment on the exposure draft legislation and explanatory material for Clean Building Managed Investment Trusts (MITs). The Green Building Council of Australia (GBCA) commends and supports the intention of legislation that encourages foreign investment in greener buildings by offering a lower withholding tax rate for investment in buildings that achieve at least a 5 Star Green Star rating or 5.5 Star NABERS Energy rating.

However, the GBCA and its members would like to express concerns that the draft format and requirements of the legislation may have implications which will mean the policy intent cannot be properly realised. Certain elements of the draft legislation may create barriers rather than incentives for investment of this nature and may lead to unintended perverse outcomes for green buildings and emissions reductions overall. The GBCA urges Government and the Treasury to consider carefully the recommendations made by industry for amendments to the draft legislation that will make this measure more effective and a true incentive for green building.

About the GBCA

The GBCA is Australia's leading authority on green buildings and communities, established in 2002 to develop a sustainable property industry in Australia and drive the adoption of green building practices. The GBCA promotes green building programs, technologies, design practices and processes, and operates Australia's only national voluntary comprehensive environmental rating system for buildings – Green Star.

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The GBCA has more than 850 member organisations, including government departments, which work together to support the Council and its activities. The GBCA is also a founding member of the World Green Building Council (WorldGBC), which was established to provide a federated 'union' of national green building councils with a common goal to support the sustainable transformation of the global property industry; there are now 92 such councils worldwide.

The Green Star rating tools

Green Star is a national, voluntary tool that encourages, recognises and rewards best practice and innovation. The first Green Star rating tool was released in 2003 in response to market demand for a rating tool that would evaluate the environmental design and construction of buildings as well as establishing a common language for green buildings.

There are currently nine Green Star rating tools which address a range of building types and more than 500 projects have achieved Green Star certification across Australia, with a further 520 projects registered. The Green Star rating system is designed to take an holistic approach within each class and building sector, addressing nine categories in total: Management, Indoor Environment Quality (IEQ), Energy, Water, Materials, Land Use and Ecology, Emissions, Innovation and Transport.

Comments on the Clean Building MIT legislation

1. **The meaning of *clean building MIT***

   The draft legislation states that a clean building MIT may only hold a clean building (including the land on which the building is situated) and/or an interest in another trust that is a clean building managed investment trust and that the MIT must not derive assessable income from any other taxable Australian property.

   In effect, this will mean that in order for investors to gain the benefits of the reduced withholding tax rate, they will need to quarantine clean building investments in MITs that are not 'tainted' with any form of ineligible income stream. Such income streams might include advertising hoardings, communications towers, parking arrangements, affordable housing or other units, or childcare centres; all elements of standard developments.

   Establishing and maintaining clean building MITs that meet these requirements will add unnecessary complexity and expense that may act as a barrier to investment. The GBCA urges Government to consider options such as tracing provisions, commonly in use under Australia's tax law, as a solution for ensuring that the correct tax arrangements applied are applied only to eligible income streams within an MIT vehicle.

2. **The meaning of *clean building***

   The draft legislation provides a number of eligibility requirements to define what will be considered a 'clean' building.

a) Commencement

The draft legislation states that to be considered a clean building, construction of the foundations of the building must have commenced on or after 1 July 2012. For the purposes of this legislation, the explanatory memorandum further states that construction will be considered to have commenced at the point when ground is broken for the purpose of excavating to establish the building's foundations.

The GBCA considers that this definition will disqualify a range of buildings that should reasonably be considered eligible. For example, the proposed definition will exclude projects where the ground may have been broken but significant works have not yet commenced. If the policy intention is to create an incentive to invest in newly-constructed energy-efficient buildings, this intention would still be met where significant works have not yet been undertaken and projects meet other requirements.

Since the tax implications of a managed investment trust are dependent upon an income stream being generated in the first place, the GBCA would recommend a change to the meaning of a 'clean building' to include those which achieve practical completion on or after 1 July 2012, or those which have achieved at least 5 Star Green Star certification or 5.5 Star NABERS Energy certification by 1 July 2012.

Using the date of practical completion, or of Green Star or NABERS Energy certification, is more likely to create an incentive to invest in newly-constructed energy-efficient buildings without creating an additional layer of bureaucracy connected to the date on which foundation work was started. Whilst Government has indicated that a change of this nature is 'not within the scope', changes to the draft legislation can still, and should still, be made in order to ensure that the best outcomes can be achieved and that the policy intent is met.

There are also a number of building projects where separate buildings will share common foundations. While those foundations may have been under construction or completed prior to 1 July 2012, it is not reasonable to consider that the construction of the building itself has commenced. For example, the Barangaroo South project in Sydney will be a large-scale mixed-use urban development that will provide accommodation, retail and recreation space as well as three commercial towers. A shared basement has been designed to sit below the entire precinct and while the ground was broken prior to 1 July 2012 to begin work on the basement, construction of the commercial towers has not yet commenced.

Also excluded will be new buildings that are constructed on top of existing structures (such as other buildings, railways stations, bus interchanges etc). While these projects are recognised as separate and discrete buildings, if they do not break ground for the construction of foundations, they are not considered eligible under the draft legislation.

To be eligible for Green Star assessment, projects must meet all four provisions of the Green Star Eligibility Criteria detailed below:

1. Space Use
2. Spatial Differentiation
3. Conditional Requirements
4. Timing of Certification

To meet the Spatial Differentiation criterion, the project must be ‘clearly distinct’. A Green Star rating must provide a meaningful result, and send a clear message to the marketplace, about a distinct project. Only distinct projects are eligible for assessment; project components are not eligible. Shared building services (e.g. HVAC plant or water treatment) or amenities (e.g. waste rooms or bicycle facilities) do not affect the building's eligibility for Green Star assessment. The Green Star ‘Guidelines for Interdependent Projects’ provide more information on this issue, and can be provided for the purposes of this consultation.

Projects that meet this Eligibility Criterion include functionally autonomous buildings that are:

- Freestanding; or on top of public infrastructure (e.g. transport hubs); or
  connected to other buildings for secondary access only; or
  laterally adjacent to other functionally autonomous buildings; or
  buildings that are being extended
- Building extensions (eligible for a BUILDING EXTENSION Rating, e.g. Green Star - Education As Built BUILDING EXTENSION)
- Multiple building developments
- Whole fitouts.

In addition to this consideration of functionally autonomous buildings there are two options available for an assessment of a building extension:

1. The building extension and the initial building are rated as one building under the relevant Green Star tool
2. The building extension is rated separately and will receive a Green Star BUILDING EXTENSION rating if successful.

The Green Star rating achieved by the extension will only relate to and can only be marketed for the extension, as will be made evident on the Certificate and logo (i.e. Green Star - Office Design v3 BUILDING EXTENSION), and will not extend to the remainder of the building or any part thereof. The primary building does not need to have, or qualify for, a Green Star Certified Rating in order for the extension to be eligible.

In addition, a project can qualify for assessment as a building extension if it meets all of the following criteria:

- The extension has full, functional independence from the initial building;
- The extension has a distinct address or name, e.g. 'West Wing';
- The initial building's main function is not to service the extension;
- If the project scope includes work to the initial building, it only includes refurbishment or modification to the initial building's spaces/structures that support the extension. If the modifications affect primary spaces/structures in the initial building, the entire development will be deemed one building;
- There is a clearly defined 'Project site' used consistently throughout the submission;

i. for a vertical extension, the 'site' will be defined as the area occupied by the extension's footprint only;
ii. for a lateral extension, the 'site' will be defined as the area occupied by the extension's footprint plus adjacent area extending to the boundary of the site of the initial building;

- All services and incoming mains supplies are separated or sub-metered (or the entire system(s) must comply with the Credit Criteria); and
- Either of the following attributes is achieved:
  i. It has a different street address from the initial building; OR
  ii. It accounts for at least 20 per cent of the total GFA and is no smaller than 1,000m2 Gross Floor Area (GFA).

The GBCA would recommend consideration of these eligibility requirements in order that building extensions and developments on top of public infrastructure or shared facilities can be included within this legislation. More details on these criteria are found at:
http://www.gbca.org.au/green-star/certification/green-star-eligibility-criteria/2982.htm

Finally, the GBCA is aware of many examples of projects that initially had no commitment to achieve a Green Star or high-level NABERS Energy rating, but during the early stages of construction, a decision has been made by project stakeholders to aim for a rating. The clean building MIT could be a powerful incentive for projects in their early stages to consider how they might achieve better environmental outcomes and commit to a 5 or 6 Star Green Star rating or 5.5 star NABERS Energy rating, but under the current requirements, would not qualify for the tax concession if construction had commenced prior to 1 July 2012.

Similarly, there are many examples of projects that have committed to a 4 Star Green Star rating at the design phase but which have improved their rating during construction, and achieved 5 or 6 Star Green Star ratings upon completion. Such projects would surely be classed as 'newly-constructed energy-efficient buildings' and should be included within this legislation.

The GBCA believes that the commencement and eligibility requirements should be adjusted to allow for a reasonable range of scenarios as outlined above. We agree that it is important to preserve the integrity of the legislation and would welcome the opportunity to discuss the different ways in which a date relating to the project's construction can be included as an eligibility requirement for the purpose of this legislation.

b) Encouraging new buildings at the expense of retrofits
The GBCA believes that applying the tax concession only to new buildings may have the unintended consequence of discouraging the retrofit and refurbishment of existing buildings in favour of making way for new construction projects. The demolition of existing buildings will result in the loss of embodied energy, the waste of materials and resources, and is in conflict with government policy such as the National Strategy on Energy Efficiency where upgrading buildings to improve energy efficiency is one of four key themes around which the strategy is based.

Green Star and NABERS ratings can be attained for retrofitted buildings, and there are many case studies of effective and energy-efficient refurbishments of heritage and existing buildings around Australia. In addition, GST law recognises a substantially retrofitted building as new. The GBCA believes that making the clean building MIT legislation more stringent than other tax law will create an unnecessary barrier and negatively impact the outcomes that this measure is trying to achieve. We would encourage the use of the same principles as used in GST law in recognising substantial retrofits as new buildings for the purposes of this MIT legislation.

3. Building use requirements

A building is deemed to satisfy the requirements if it is a commercial building that is used as an office building, a hotel, a shopping centre or a combination of any of these three.

The GBCA believes that in addition to the issues discussed in **1. The meaning of *clean building MIT***, limiting the eligibility to these three building types will mean that many significant investment opportunities will be lost.

Many offices, hotels and shopping centres include a range of other facilities and mixed uses that would render them ineligible under the draft legislation. For example, projects that include social and community amenities either voluntarily or as a requirement of development approval will be disqualified should those amenities generate any income that will contaminate the 'clean' MIT. Many office, shopping centre and hotel projects are required to include amenities such as car parking, community facilities and affordable housing that would render them ineligible under the draft legislation.

To meet the Green Star Space Use criterion, 80 per cent of a building's GFA (measured to exclude internal car parks) must be comprised of space types stated as being able to be assessed by the particular Green Star rating tool; for example buildings with a minimum of 80 per cent of the building's GFA (measured to exclude internal car parks) comprised of BCA Class 5 are eligible to register for Green Star – Office certification. The GBCA would suggest that, in line with the Green Star Eligibility Criteria, the legislation be amended to include offices, hotels and shopping centres which can demonstrate that at least 80 per cent of their Gross Floor Area is comprised of the space type relevant for that use. The GBCA is happy to work with Government to help define the method of measurement or use existing certification processes in order to demonstrate eligibility.

4. Requirements for energy efficiency

The legislation requires that buildings must achieve at least a 5 Star Green Star rating or 5.5 Star NABERS Energy rating to be eligible for the withholding tax concession. The GBCA looks forward to working with Government and The Treasury and the Department of Climate Change and Energy Efficiency to ensure that all stakeholders have access to the information and support that they need to understand the requirements of Green Star and to achieve certification.

5. **Clean building terminology**
Given the array of terms already in use in the property and construction industry to convey messages about the green, sustainable or energy efficiency credentials of buildings, the GBCA believes that the introduction of the terminology 'clean building' may add further confusion to the market. While we understand that the naming of this legislation will have been based on sound rationale and is not a topic for negotiation, we encourage Government to consider issues of consistency and clarity wherever possible.

The GBCA encourages Government to embrace the industry consultation process to ensure that this legislation will deliver on the policy intent as effectively as possible. The GBCA has been disappointed by the lack of thorough consultation on the range of issues so far, and the extent to which the 'scope' of this legislation was predetermined without the involvement of industry experts or proper analysis.

The GBCA together with its members, and with industry associations such as the Property Council of Australia, would like to work with the Australian Government to achieve the best outcomes for the Australian property and construction industry, the Australian economy, and our environment.

The GBCA welcomes the opportunity to provide further consultation on this matter, and supports the policy intention of the Clean Building Managed Investment Trust legislation. Please do not hesitate to contact me if there is any further information that you require.

Yours sincerely,

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