



Thursday, 11 October 2018

To Committee Secretary
Senate Standing Committees on Economics
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Committee Secretary,

Comments on the Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2018 (“Bill”)¹

1. Overview

Intergen Property Group as Investment Managers of Wee Hur Holdings Ltd (“**Wee Hur**”) and WH PBSA Trust, together with its wholly owned subsidiaries (“**WH Trust**”) welcome the opportunity to provide our comments on the Bill and its impact on the student accommodation sector.

We consider that the currently drafted Bill will have materially adverse consequences on the student accommodation sector as well as detrimental social and economic consequences for Australians more generally. The enactment of the Bill will create higher investment costs and risk for student accommodation assets, forcing foreign investors to seek alternative markets and asset classes. For Australians, the flow-on effects are detrimental. With a lack of affordable accommodation, foreign and domestic students will have no choice but to apply demand pressures on an already heated rental market, resulting in higher rents and ultimately reducing housing affordability.

To circumvent these outcomes, we encourage the Parliament to amend the current Bill so that

- (a) managed investment trusts² (**MITs**) that hold student accommodation assets are not subject to the higher 30% MIT withholding rate; or
- (b) in the alternative, ensure that the transitional rules apply to existing investments that have been committed to at the time the new Bill was introduced (20 September 2018).

Having regard to the impacts of the Bill, Wee Hur and the WH Trust have material concerns about these measures and the viability of continuing to invest in and develop student accommodation assets in Australia.

¹For completeness, we note that the *Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2018* referred to the Senate Standing Committees on Economics on 20 September 2018 with the *Income Tax (Managed Investment Trust Withholding Tax) Amendment Bill 2018* and *Income Tax Rates Amendment (Sovereign Entities) Bill 2018*. This submission will focus on the measures contained in *Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2018* so far as it impacts the student accommodation sector.

² As that term is defined in section 275-10 of the *Income Tax Assessment Act 1997*.



2. Introduction to Wee Hur and WH Trust

Wee Hur is a Singapore-based company with businesses in property development, construction, worker's dormitory and student accommodation. Wee Hur is listed on the Singapore Exchange Main Board.

In December 2016, Wee Hur set up an Australian-focused Purpose Built Student Accommodation ("PBSA") private trust, the 'Wee Hur PBSA Master Trust', for the sole purpose of collecting passive rental income by developing and owning PBSAs in major cities in Australia. The PBSAs will be operated by an independent third-party local operator. As a sign of its commitment to investing in Australia in this sector, in December 2016, Wee Hur pledged to develop \$700 million of student accommodation in Australia, across the major capital cities of Australia which will equate to c5,000 student accommodation beds.

In order to execute this investment strategy, an Australian resident trust (the WH PBSA Trust) was established to hold (indirectly) the PBSA assets to be developed. The units in the WH PBSA Trust are held by Wee Hur PBSA Master Trust. It was intended that the WH PBSA Trust would satisfy the requirements to be a MIT for the purposes of the Income Tax Assessment Act 1997. In accordance with this pursuit, Wee Hur engaged InterGen Property Group, an Australian boutique property funds management group based in Sydney, as their Investment Manager. The services of local design consultants, builders and other professional services firms have also been acquired, in order to satisfy this investment mandate. We note that Wee Hur does not have a permanent establishment in Australia.

WH Trust currently has developments underway in Queensland and South Australia, with a 1578-bed facility at Unilodge@Park Central in Buranda, Brisbane, with stage one completed and operational since July 2018, with expected stage two completion in 2019. Also under development is a 772-bed student accommodation facility in the Adelaide CBD, which is under construction currently and due for completion in 2019. WH Trust has also recently acquired a second site in the Adelaide CBD on which it plans to develop a further 721-bed student accommodation facility. In Victoria, WH Trust has acquired an interest in a property in Melbourne, with the development approval for a 900-bed student accommodation facility currently pending. Earlier this year, WH Trust also acquired an interest in a site in Redfern, Sydney, with plans to develop it into a 515-bed student accommodation facility (see Case Study below).

Relevantly, WH Trust only own the interests in the properties for the purposes of deriving passive rental income – it has never used a staple structure and has no economic interest in the operating entities. Consequentially, prior to this legislation being introduced there was no indication that these measures would adversely apply to it.

WH PBSA Trust has also entered into other contracts to acquire land across Australia for the purposes of developing student accommodation facilities, which have yet to complete.



3. Executive Summary

The Bill put forth to the Senate Standing Committees on Economics on 20 September 2018 has been subject to a lengthy public consultation process since the release of the Stapled Structures Details of Integrity Package document on 27 March 2018 (“Integrity Package”).

The purpose of the Bill is to “improve the integrity of the income tax law for arrangements involving stapled structures and to limit access to tax concessions for foreign investors by increasing the MIT withholding rate on fund payments that are attributable to non-concessional MIT income to 30 per cent.”³

The Bill introduced to the House of Representatives includes two new and unannounced changes that, in our view, will have materially adverse consequences on the student accommodation sector. The changes are:

- (a) amending the meaning of a “residential dwelling asset” to include certain student accommodation such as tertiary student accommodation.⁴ This means that any income derived from a tertiary student accommodation asset will be characterised as “MIT residential housing income” (and therefore non-concessional MIT income), attracting a 30 per cent MIT withholding rate as compared to the 15% existing rate.

The inclusion of this measure was completely unexpected, particularly given that the publicly consulted exposure draft to the Bill had an exemption for assets comprising “commercial residential premises”⁵ (for example, student accommodation). As a matter of procedural fairness, we would have expected this to have been publicly consulted as the rest of the proposed amendments were, which went through a considerable consultation process; and

- (b) limiting transitional relief available for MITs who invest in student accommodation assets to circumstances where the MIT had entered into a contract for the acquisition, creation or lease of a facility that holds the student accommodation prior to 20 September 2018.⁶

We set out further details in relation to our key policy concerns for Wee Hur, WH Trust and the student accommodation sector at section 4 below, and provide our recommendations on the technical aspects of the Bill below at section 5.

4. Policy concerns

4.1 Foreign investment is at the forefront of the student accommodation sector

International education is Australia’s third largest export having surged to \$30.2 billion in 2017.⁷ With more than 626,288 international students with growth of 11% over last year of which 381,830 are currently studying in Australia’s universities with growth of 15.0% over last year, substantial investment in accommodating these students is required.

³ Explanatory Memorandum to, ‘Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2018’, page 3.

⁴ Subsection 12-452(1) in Schedule 1 to the TAA 1953 and the definition of ‘residential dwelling asset’ in subsection 995-1(1) of the ITAA 1997.

⁵ Refer subsection 12-470(2)(c) of the exposure draft to the Bill. Also refer definitions of “residential premises and “commercial residential premises” in section 195-1 of A New Tax System (Goods and Services Tax) Act 1999.

⁶ Subsection 12-451(7) in Schedule 1 to the TAA 1953.

⁷ Department of Foreign Affairs and Trade, ‘Australia’s Top 25 Exports, Goods & Services’ available at <https://dfat.gov.au/trade/resources/trade-statistics/trade-in-goods-and-services/Documents/australias-goods-services-by-top-25-exports-2017.pdf>



With very limited domestic capital, foreign investors have been at the forefront of developing the private Australian student accommodation sector and have taken on the risk and challenge to prove the viability of student accommodation as an asset class. To date, this investment has:

- (a) supplied over 71,000 vital beds for all domestic and international students who require affordable housing close to university and places of employment;⁸
- (b) created substantial local jobs in investment management, design, construction and the hospitality industry;
- (c) supported Australian universities through freeing up much needed capital (that would have otherwise been spent on student housing); and
- (d) engaged Australian businesses for the delivery of services relating to the acquisition, design, and operation of student accommodation assets.⁹

Relevantly, the risk profile and feasibility models of these investments were prepared, and the decisions relating to such investments were made, based on the current Australian tax legislation. That legislation provides that income derived from the operation of student accommodation housing is concessionally taxed as a MIT fund payment when distributed by a MIT to a non-resident unitholder. If passed, the Bill may deter foreign capital inflows resulting in a restriction of the future supply of much needed affordable student accommodation. This risks damaging the \$30.2 billion of export earnings made through the education sector, impacting employment and related services.

4.2 Student accommodation helps housing affordability

Housing affordability has been a pressing issue for policy makers for the past ten years. With house and unit rents currently costing 26.9% of gross household income,¹⁰ low to moderate Australian income earners are unable to access secure and affordable housing.

The 2017-18 Federal Budget announced a number of measures to “address housing affordability” through “unlocking supply”, “creating the right incentives” and “improving outcomes for those in most need”.¹¹ Indeed, the Explanatory Memorandum to the Bill itself notes that several of the measures contained in the Bill “specifically address housing affordability for members of the community earning low to moderate incomes by providing incentives for investors to increase the supply of affordable housing.”¹²

There were 626,988 international students in Australia in July 2018.¹³ That is, 626,988 students that required accommodation in Australia. If the Bill is passed, the pipeline of student accommodation sector will come to a halt: the higher investment costs will cause foreign investors to divest and exit the Australian market in search for a lower cost (and regulatory stable) environment. With limited student accommodation available, students will have no choice but to seek housing in the rental market. This will cause rental prices to increase, ultimately reducing rental affordability in areas occupied by tertiary education institutions.

⁸ Savills report, ‘2017 Market Report’, page 2. Available from < <http://www.savills.com.au/publications-pdf/savills-student-accommodation-market-report-2017.pdf>>.

⁹ By way of example, Wee Hur has invested approximately AUD\$300 million on engaging Australian businesses in the development of student accommodation in Australia.

¹⁰ Core Logic, ‘Housing Affordability Report: September 2018’ available from <<https://www.corelogic.com.au/housingaffordability>>

¹¹ 2017-18 Federal Budget, ‘Reducing Pressure on Housing Affordability: Fact Sheet 1.1 - A Comprehensive Plan to Address Housing Affordability’ available from <https://www.budget.gov.au/2017-18/content/glossies/factsheets/html/HA_11.htm>

¹² Explanatory Memorandum to the *Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Bill* (2018), para 1.21.

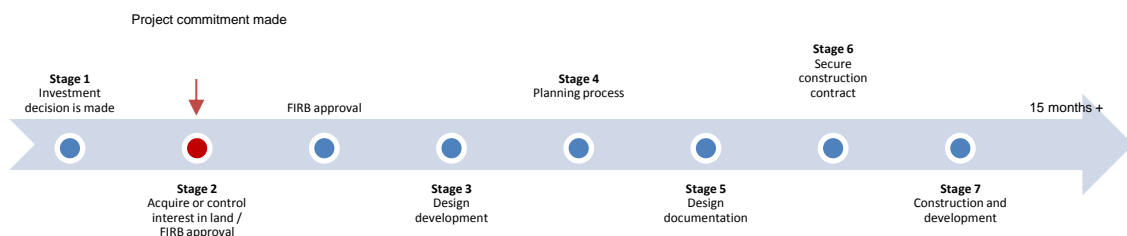
¹³ Department of Education and Training, International Student Data Monthly Summary, July 2018



4.3 The importance of legislative and policy stability on foreign investment integrity

The increase in the MIT withholding rate to 30% for student accommodation has not been previously announced, nor has it been subject to public consultation (unlike other parts of the Bill). As a result, the changes retrospectively (and adversely) impact pipeline investments that were entered into based on the current MIT withholding regime.

We appreciate that the Government has provided transitional relief to ensure that “existing investments at the time of the policy announcement are unaffected by the changes for the transitional period”.¹⁴ Whilst this policy objective is commendable and is in-line with investor expectations, the transitional provisions do not wholly achieve this outcome. This is because the transitional provisions do not factor in the time-lag between the time an investment decision is made, and the time by which a construction contract is secured, as illustrated below.



As currently drafted, the transitional provisions provide relief only for MITs that hold (directly or indirectly), or have entered into a contract for the acquisition, creation or lease of the student accommodation facility (directly or indirectly) prior to 20 September 2018. This means that only investments that have secured a construction contract (and passed stage six of the above process) will be grandfathered into the new rules.

Student accommodation investments held by MITs (directly or indirectly) that have not yet reached construction contract execution (for example, stage one through to five above) as at 20 September 2018 will not have access to transitional relief. This is the case notwithstanding that:

- (a) the decision to invest in the student accommodation asset (stage 1) was made prior to 20 September 2018, based on the regulatory environment at that time;
- (b) the initial investment in the project (stage 2) was made prior to 20 September 2018;
- (c) significant capital is expended in the lead up of securing a development consent and the relevant construction contract (stages 3, 4 and 5); and
- (d) the development of student accommodation was the sole purpose of the investment, when the project commitment was made.

In our view, transitional relief should be available from the time that the relevant entity is committed to the investment. That is, the time the land has been acquired, or the relevant interest in the land was acquired (whether that be a contract to acquire the relevant land, or an option in respect of such land was executed) and the deposit was paid (i.e., stage two of the above process).

We discuss the technical aspects of the transitional provisions below at 5.

¹⁴ Explanatory Memorandum to the *Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Bill (2018)*, para 1.242.



4.4 Student accommodation should have the same playing field as other property assets

Just like other property assets, student accommodation is a passive income asset that generates rental income for investors. The operation and management of the student accommodation is generally undertaken by an operating company, which is taxed in Australia at the corporate rate of 30%.

Student accommodation (which is an emerging asset class in Australia) as a property investment class is no different to other mature property assets that generate passive rental income (for example, office buildings, retail, hotels or other assets classes where rental income is derived). By way of example, hotels, motels, inns, hostels and boarding houses are properties that are generally held by a MIT and operated by an operating company pursuant to a management agreement with the MIT that earns active business income. Under the Bill, this asset class would be excluded from the proposed amendments, on the basis that they are explicitly excluded from the definition of “residential dwelling asset” as they are “commercial residential premises” under the GST Act.

However, the Bill will disrupt the existing playing field of these assets by applying a higher MIT withholding rate (of 30%) for passive income derived from a student accommodation asset as compared to these other asset classes (which will retain access to the concessional 15% withholding tax rate).

Furthermore, it should be noted that a number of other asset classes utilise stapled structures, which Wee Hur and WH Trust have not used.

From an investor perspective, the non-concessional treatment of student accommodation sends a market signal that the Government is unwilling to support foreign investment into emerging property asset classes. If passed, we expect that this decision will trickle through to other infant asset classes and may ultimately deter foreign investors from investing in to other newly emerging markets (that have yet to demonstrate market returns). It may also impact established asset classes through the associated risk of unannounced legislative change.

Case study: WH Buranda Trust

UniLodge@Park Central located in Buranda, 5 km south of the Brisbane CBD opened in September of this year and is the largest PBSA facility in Australia with 1578 beds.

Featuring a combination of purpose-built studio apartments as well as four, five and six-bedroom multi-share apartments with large state of the art communal spaces to cook, study, exercise or be entertained. The facility is located close to the University of Queensland, Griffith University and QUT with excellent transportation options being adjacent to the Buranda train and bus interchange.

This substantial \$200m development by Wee Hur represents a commitment to its investment strategy of developing 5,000 PBSA beds in the Australian market.



4.5 What is the future of student accommodation in Australia?

Going forward, foreign investors will have very limited options to investing in student accommodation in Australia.

With a number of pipeline investments being excluded from the transitional rules it is expected that a number of the major foreign investors will need to divest their interests in new projects and exit the Australian market given the adverse impact on returns resulting from these changes. Furthermore, the higher MIT withholding tax will mean lower asset values. In other words, divestments will be expected to result in significant losses for foreign investors.

As an example, we illustrate how this will impact WH Trust below.

Case study: WH Gibbons Trust

On June 2018, WH Trust, through its wholly owned sub-trust, WH Gibbons Trust, signed a 12 month put and call agreement on the proposed acquisition of a residential block at 13-23 Gibbons Street, Redfern, Sydney for A\$52 million. The WH Trust intends to redevelop the property into a PBSA of approximately 515 beds. The WH Trust priced the investment based on the 15% MIT withholding rate.

WH Gibbons Trust has paid a 10% deposit (i.e. \$5.2 million) in relation to the acquisition. At this point, the WH Gibbons Trust became fully committed to the development. To further support this, the development has since received FIRB approval (with a condition to develop the student accommodation within five years). The project is currently undertaking planning approvals.

Under the currently drafted transitional rules, the WH Trust will not be eligible for relief on the basis that the WH Trust did not secure a construction contract by 20 September 2018. At this stage, WH Gibbons Trust's options are limited. The land could be divested to another foreign purchaser, who would likely price the land at a higher price to factor in the higher MIT withholding. Or, WH Gibbons Trust could pursue the investment and provide a lower return to its investors (an outcome which will inevitably cause investors to lose appetite for Australian assets).

Had WH Gibbons Trust been aware of the increase in the MIT rate (or the scope of the transitional rules), the decision to invest would have factored in the 30% MIT withholding rate into pricing the investment (the likely outcome being that the investment would not have gone ahead).



5. Recommended technical amendments

From a technical perspective our main concerns (and recommendations to address these concerns) are set out below.

	Technical concern	Recommendation
(a)	<p>The exclusion of student accommodation as a residential dwelling asset</p> <p>The Bill introduces the concept of a ‘residential dwelling asset’. Broadly, under the Bill any income attributed to a ‘residential dwelling asset’ is characterised as non-concessional MIT income and subject to the higher 30% MIT withholding rate.</p> <p>Section 12-452 of the Bill defines a “residential dwelling asset” as an asset that is:</p> <ul style="list-style-type: none"> a) is a *dwelling; b) is *taxable Australian real property; and c) is any of the following: <ul style="list-style-type: none"> i. *residential premises (other than * commercial residential premises); ii. premises used primarily to provide accommodation for students (other than in connection with a school (within the meaning of the *GST Act)). <p>Under the current drafting, student accommodation (excluding school accommodation) will satisfy the meaning of a ‘residential dwelling asset and will be subject to a higher 30% withholding tax rate.</p> <p>Comparison to other property asset classes</p> <p>The Bill does not target other property asset classes that similarly hold passive investments. For example:</p> <ul style="list-style-type: none"> • Hotels, motels, inns, hostels or boarding houses: the property is generally held by a MIT and operated by an operating company (that earns active business income). A management agreement between the MIT and the operating company is usually in place. <p>Under the Bill, this asset class is explicitly excluded under the definition of a “residential dwelling asset” as it is a “commercial residential</p>	<p>Replace subsection 12-452(c) with:</p> <p><i>(c) is *residential premises (other than *commercial residential premises).</i></p>



	Technical concern	Recommendation
	<p>premise” under the GST Act. As a result, the MIT withholding rate for this asset class is 15%.</p> <ul style="list-style-type: none"> • Other non-residential asset classes: traditional property assets (such as shopping centres, commercial office buildings and industrial buildings) are usually subject to stapled arrangements. In these staples, the MIT owns the land and buildings and is in receipt of rental income. The rental income passing through the MIT is subject to a concessional 15% MIT withholding rate. The Bill does not increase the withholding rate for these assets (unless there is MIT cross staple arrangement income). <p>In our view, the character of the income derived from student accommodation assets are no different to the aforementioned asset classes.</p> <p>For this reason (and reasons previously discussed), rental income derived from student accommodation assets should not be subject to a higher MIT withholding rate.</p>	
(b)	<p>The transitional period should be referenced to the date the interest in the land has been contracted to be acquired</p> <p>The transitional provisions in section 12-451 of the Bill apply to <i>not</i> treat an amount as non-concessional income where:</p> <ol style="list-style-type: none"> an amount is included in the assessable income of the MIT; and the relevant amount would be MIT residential housing income (disregarding this section) of the MIT because it is attributable to a facility that consists of or contains a residential dwelling asset; and the MIT derived, received or made the relevant amount before 1 October 2027; and the MIT derived, received or made the relevant amount because the MIT held the facility: <ol style="list-style-type: none"> just before the transition time; or 	<p>If the drafting at (a) is not adopted, we recommend replacing subsection 12-451(1)(d) as follows:</p> <p><i>(d) if the managed investment trust derived, received or made the relevant amount because the managed investment trust held the facility:</i></p> <ol style="list-style-type: none"> <i>the managed investment trust held the facility just before the time mentioned in subsection (7); or</i> <i>before the time mentioned in subsection (7), the managed investment trust entered into:</i> <ol style="list-style-type: none"> <i>a contract for the acquisition,</i>



	Technical concern	Recommendation
	<p>ii. the MIT entered into a contract for the acquisition, creation or lease of the facility just before the transition time.</p> <p>The relevant transition time is defined in subsection 12-451(7)(b) for student accommodation to be the date the Bill was introduced into the House of Representatives (20 September 2018). See discussion below at (c).</p> <p>From a drafting perspective, the Bill relies on the 'contract for the acquisition, creation or lease of the facility just before the transition time' as an indicator of the time the MIT is committed to developing the residential dwelling.</p> <p>In our view, the "contract" to develop a facility does not reflect the point by which a MIT is definitely committed to developing a facility. As discussed above, the commitment to develop a student accommodation asset is formed once all feasibilities have been concluded, and the land is acquired for the purpose of developing student accommodation. Given the long lead time associated with these type of investment decisions, significant costs would be incurred prior to the time that the contract to acquire, create or lease the facility would be entered into.</p> <p>Accordingly, the transitional relief should extend to the entry into of a contract to acquire land, in circumstances where it can be established that the relevant entity has made an investment decision to enter into a contract for the acquisition, creation or lease of the facility.</p>	<p><i>creation or lease of the facility; or</i></p> <p><i>(B) an agreement to acquire land or an interest in land under an instalment option or other such arrangement upon which a facility for the purposes of paragraph (A) will be acquired, created or leased, where a relevant investment decision has been made to enter into an arrangement referenced in subparagraph (A) prior to the time mentioned in subsection (7);</i></p> <p><i>(e) if the managed investment trust derived, received or made the relevant amount because another entity (the second entity) held the facility:</i></p> <p><i>(i) the second entity held the facility just before the time mentioned in subsection (7); or</i></p> <p><i>(ii) before time mentioned in subsection (7), the second entity entered into a contract for the:</i></p> <p><i>(A) a contract for the acquisition, creation or lease of the facility; or</i></p> <p><i>(B) an agreement to acquire land or an interest in land</i></p>



	Technical concern	Recommendation
		<p><i>under an instalment option or other such arrangement upon which a facility for the purposes of paragraph (A) will be acquired, created or leased where a relevant investment decision has been made to enter into an arrangement referenced in subparagraph (A) prior to the time mentioned in subsection (7);</i></p>
(c)	<p>No requirement to be a MIT at the time that the contract to acquire, create or lease the land / facility is entered into.</p> <p>The transitional relief should also make it clear that it is not a requirement that the trust was a MIT at the time of entering into the relevant contract, but instead, when the relevant payments are made.</p>	<p>Insert as a new section 12-451(1A):</p> <p><i>This section applies if the managed investment trust satisfies the conditions in section 275-10 at the time that the relevant amount is derived, received or made, regardless of whether these conditions were satisfied at the time the contract referred to in subsection (1) was entered into.</i></p>



Concluding comments

The Bill, as currently drafted, will have dire consequences to the student accommodation sector (and the Australian public more broadly). In our view, the Bill should be amended to ensure that MITs holding student accommodation assets remain subject to a MIT withholding rate of 15% on fund payments made to an investor who is a resident of a country that has an exchange information agreement with Australia. In the alternative, the transitional provisions in the Bill should be amended to ensure that the current legislation continues to apply to student accommodation assets where the interest in the land was acquired (whether that be the date a contract to acquire the relevant land is entered into, or an option in respect of such land was executed) prior to 20 September 2018.

We would welcome the opportunity to discuss these matters and our recommendations with the Senate Economics Legislation Committee and, in particular, to assist with any drafting to give effect to recommendations.

In the first instance, please contact Trevor Hardie on [REDACTED]

Yours faithfully

Trevor Hardie
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Intergen Property Group