

Chapter 2

The provisions of the bill

2.1 The provisions of the bill can be divided into the following areas:

- changing the rate of withholding tax for clean building managed investment trusts (MITs);
- defining a 'clean building MIT' and a 'clean building'; and
- consequential amendments to the *Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953*.

2.2 This chapter outlines these amendments.

Amending the rate of withholding tax

2.3 As discussed in chapter 1, the bill's amendments will provide for a final withholding tax rate of 10 per cent on fund payments from Clean Building MITs made to foreign residents in information exchange countries. To this end, 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 paragraphs 12-385(3) and 12-390(6) of Schedule 1 to the *Taxation Administration Act 1953*.¹

2.4 The Explanatory Memorandum clarifies how the bill would alter current MIT withholding tax arrangements. It is proposed that:

- fund payments that are not from a Clean Building MIT will be subject to a final withholding tax rate of 30 per cent. Where a recipient is in an information exchange country listed in Regulation 44E of the *Taxation Administration Regulations 1976*, the final withholding tax rate will be reduced to 15 per cent (see chapter 1); and
- fund payments that are from a clean building MIT will also be subject to a final withholding tax rate of 30 per cent. Where a recipient is in an information exchange country listed in Regulation 44E, the final withholding tax rate will be reduced to 10 per cent.²

1 Explanatory Memorandum, p. 7.

2 Explanatory Memorandum, p. 7.

Definition of a 'clean building managed investment trust'

2.5 Proposed section 12-425 of the Taxation Administration Act contained in the bill will add the following definition of a clean building MIT:

- (1) A trust is a clean building managed investment trust in relation to an income year if during the income year:
 - (a) it is a managed investment trust in relation to the income year; and
 - (b) it holds one or more clean buildings (including the land on which the buildings are situated); and
 - (c) it does not derive assessable income from any taxable Australian property (other than from the clean buildings or assets that are reasonably incidental to those buildings).

5% safe harbour for certain income reasonably incidental to a clean building

- (2) A trust is not a clean building managed investment trust in relation to an income year if the assessable income of the trust that is derived from assets that are reasonably incidental to clean buildings is greater than 5% of the assessable income of the trust that is derived from clean buildings.
- (3) The regulations may specify kinds of assets that are, or are not, reasonably incidental to clean buildings for the purposes of this section.³

2.6 In terms of the reference to 'reasonably incidental' in proposed subsection 12-425(2), the EM states:

Assets that could be considered 'reasonably incidental to' clean buildings include car parking facilities, telecommunications infrastructure attached to the building (mobile phone towers on top of a building) and advertising infrastructure (such as billboards).⁴

2.7 The EM also notes that a MIT will not be a 'clean building MIT' if it receives income from a non-clean building or non-incidental assets to the clean building it holds. It adds that this does not preclude a clean building MIT from holding and receiving income from assets that are not taxable Australian property, such as cash and shares. In this case, however, any income derived from these assets is not part of the clean building MIT's fund payment and therefore not subject to MIT withholding tax.⁵

3 Proposed section 12-425 of the *Taxation Administration Act 1953*

4 Explanatory Memorandum, p. 8.

5 Explanatory Memorandum, p. 8.

Definition of a 'clean building'

2.8 Proposed section 12-430 of the Taxation Administration Act will add the following definition of a 'clean building':

- (1) A building is a clean building if:
 - (a) the construction of the building commenced on or after 1 July 2012; and
 - (b) it satisfies the requirements in subsections (3) and (4).
- (2) For the purpose of subsection (1), the construction of the building is taken to have commenced at the time the works on the lowest level (including any basement level) of the building commence.
- (3) A building satisfies the requirements in this subsection if:
 - (a) the building is a commercial building that is any of the following (or is a combination of any of the following):
 - (i) an office building;
 - (ii) a hotel for use wholly or mainly to provide short-term accommodation for travellers;
 - (iii) a shopping centre; or
 - (b) the building satisfies the requirements prescribed by the regulations for the purposes of this paragraph.
- (4) A building satisfies the requirements in this subsection if:
 - (a) the building:
 - (i) has, and continues to maintain at all times during the income year, at least a 5 Star Green Star rating as certified by the Green Building Council of Australia; or
 - (ii) has, and continues to maintain at all times during the income year, at least a 5.5 star energy rating as accredited by the National Australian Built Environment Rating System (NABERS); or
 - (b) the building satisfies the requirements prescribed by the regulations for the purposes of this paragraph.
- (5) For the purposes of subsection (4), if:
 - (a) a building has previously satisfied the requirements in that subsection; and
 - (b) the building then fails to satisfy the requirements for a period (the non-compliance period); and

(c) within 180 days after the first day of that failure, the building again satisfies the requirements;

treat the building as having satisfied the requirements during the non-compliance period.⁶

2.9 In terms of proposed subsections (1) and (2) above, the EM notes that existing buildings that are retrofitted or extended are not clean buildings.⁷

2.10 In terms of proposed subsection (3) above, the EM clarifies that 'incidental uses, such as a child care centre, limited retail and food outlets will not exclude the building from being an office building'.⁸ Further:

- to be eligible as a hotel, a building must wholly or mainly provide short-term accommodation for travellers; and
- to be eligible as a shopping centre, a building must be predominantly used for retail purposes.⁹

2.11 In terms of proposed subsection (4) above, the EM states that only accredited NABERS ratings will be accepted. Given that these ratings are valid for 12 months, buildings must maintain a 5.5 star rating for each yearly assessment. However, a building may still be classified as a 'clean building' for a particular income year if it satisfies all of the relevant provisions, even if it has not had or maintained the minimum energy efficiency ratings required under the provisions in previous income years.¹⁰

2.12 The EM also states that:

- where the building is an office building, it will need to achieve a 5.5 star energy NABERS rating for the base building only, in order to be eligible as a clean building; and
- where the building is a shopping centre or a hotel, the building will be required to achieve a 5.5 star energy NABERS rating, as base building ratings do not currently exist for these buildings.¹¹

2.13 In terms of proposed subsection (5) above, the EM notes that where an MIT re-establishes its energy efficiency requirements within the 180 day grace period, the trust will be considered to have been a clean energy building for the entire period.

6 Proposed section 12-425 of the *Taxation Administration Act 1953*

7 Explanatory Memorandum, p. 9.

8 Explanatory Memorandum, p. 10.

9 Explanatory Memorandum, p. 10.

10 Explanatory Memorandum, p. 11.

11 Explanatory Memorandum, p. 11.

Where the minimum standard is not met within the 180 day period, the MIT trust will be considered ineligible as a clean building MIT from the date that it first failed to meet the efficiency requirement (not the 180 day expiry date).¹²

Consequential amendments to the Income Tax Assessment Act 1997

2.14 Division 995 of the *Income Tax Assessment Act 1997* (ITAA) sets out various definitions relevant to the Act. The bill proposes to insert subsection 995-1(1) into the ITAA defining clean building according to the meaning given by section 12-430 of Schedule 1 to the Taxation Administration Act (see paragraph 2.8). It also inserts the meaning of 'clean building MIT' into subsection 995-1(1) of the ITAA according to the meaning given by section 12-425 in Schedule 1 of the Taxation Administration Act (see paragraph 2.5).

2.15 The bill amends the *Income Tax (Managed Investment Trust Withholding Tax) Act 2008* to give various terms the same meaning as in the ITAA. These terms are: clean building managed investment trust; entity; fund payment; income year; and information exchange country.

Consequential amendments to the Taxation Administration Act 1953

2.16 The bill proposes amendments to section 12-375 of Schedule 1 of the Taxation Administration Act. Firstly, the bill would add the following italicised words to the end of the last paragraph in this section:

Where there is an obligation to withhold, the applicable withholding rate is determined by the nature of the country or territory in which the recipient's address, place for payment or residency is located *and whether the trust is a clean building managed investment trust.*

2.17 Secondly, the bill would insert the following sentence at the end of section 12-375:

A managed investment trust is a clean building managed investment trust if it is a managed investment trust that holds one or more clean buildings and does not derive assessable income from any other taxable Australian property (other than certain assets that are reasonably incidental to a clean building).

2.18 The final chapter of this report examines stakeholders' views on the bill's provisions, particularly proposed sections 12-425 and 12-430 of the Taxation Administration Act.

12 Explanatory Memorandum, p. 12.

