



## Investing in Australia

Detailed information about international tax for business and investing in Australia.

### **Amendments to the definition of Managed Investment Trust**



Information on amendments to the definition of 'managed investment trust'.

### **Withholding tax arrangements for managed investment trust fund payments**



This fact sheet provides a general overview of the withholding tax arrangements for the fund payment part of managed investment trust (MIT) distributions to foreign residents.

QC 28633

## **Amendments to the definition of managed investment trust (MIT)**

Information on amendments to the definition of 'managed investment trust'.

**Last updated** 12 May 2016



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Amendments in 2016

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Definition prior to 2010

The definition of a MIT was amended as part of the new tax system for MITs that came into effect in May 2016. There were also significant amendments in 2010.

## Amendments in 2016

As part of the new tax system for MITs in 2016, the definition of a MIT was moved from the withholding provisions in Subdivision 12-H of Schedule 1 to the *Tax Administration Act 1953* into Subdivision 275-A of the *Income Tax Assessment Act 1997* (ITAA 1997).

Some minor changes were made to the definition at the time of its relocation. Broadly, the changes:

- clarify the scope of the rule that allows a trust whose only members are specified widely held entities or managed investment trusts to qualify as a MIT
- expand the list of specified widely held entities to include foreign life insurance companies regulated under foreign law, certain limited partnerships and entities directly or indirectly wholly owned by specified widely held entities
- extend the start-up period during which trusts do not need to meet the widely held and not closely held requirements to qualify as a MIT
- clarify the operation of the rule that allows a trust to qualify as a MIT in some circumstances where no fund payment is made in relation to an income year.

## Amendments in 2010

In 2010 amendments were made to the definition of a MIT in Subdivision 12-H of Schedule 1 of the *Tax Administration Act 1953*

(TAA). The changes also applied to the capital treatment rules in Division 275 of the ITAA 1997.

Broadly, the key changes were:

- the extension of the definition to cover wholesale managed investment schemes (MISs) and government-owned MISs
- the exclusion of trading trusts and trusts that carry on a trading business
- the exclusion of closely held trusts
- the modification of the widely held requirements
- the inclusion of a requirement that a substantial proportion of the trusts' Australian assets are managed in Australia
- an expansion of the list of specified entities for the widely held requirements to include foreign government pension plans, sovereign wealth funds and widely held foreign equivalents of a managed investment scheme.

## Qualifying as a MIT in 2010

Under the 2010 amendments, for a trust to qualify as a MIT in relation to an income year, the following criteria (set out in previous subsection 12-400(1) TAA) had to be satisfied:

- Either the trustee had to be an Australian resident or the central management and control of the trust had to be in Australia at or before the time of the first fund payment in relation to the income year.
- The trust could not be:
  - a trading trust (in the case of a unit trust) in relation to the income year, or
  - carrying on or able to control a trading business (in the case of other trusts) at any time in the income year.
- A significant proportion of the investment management activities in respect of all [specified assets](#) of the trust had to be carried out in Australia throughout the income year.

At the time of the first fund payment, the trust had to be a MIS, as defined by section 9 of the *Corporations Act 2001* (Corporations Act):

- At the time of the first fund payment, the trust had to be either a registered MIS or a MIS that met additional requirements and was not required to be registered.
- The trust had to satisfy a relevant widely held requirement in relation to the income year.
- The trust could not be closely held at any time in the income year, and
- If the trust was an unregistered MIS, it had to satisfy [licensing requirements](#) at the time of the first fund payment.

### **Specified assets**

The specified assets are assets that, at any time in the income year, were:

- situated in Australia
- taxable Australian property, or
- shares, units or interests listed for quotation in the official list of an approved stock exchange in Australia.

### **Licensing requirements**

A trust satisfied the licensing requirements if it was operated or managed by:

- the holder of an Australian Financial Services Licence
- an authorised representative of the holder of an Australian Financial Services Licence
- an entity that would be required under the Corporations Act to hold a financial services licence but for subsection 5A(4) of that Act (about the Crown not being bound by certain requirements of that Act), or
- an entity that is a wholly-owned subsidiary of such an entity and that would be required to hold a financial services licence but for an instrument issued by ASIC.

### **MISs that are not required to be registered (wholesale trusts)**

A trust that was not registered in accordance with section 601ED of the Corporations Act had to meet additional requirements at the time of the first fund payment in order to be a MIT.

The additional requirements were:

- the trust was not required to be registered in accordance with section 601ED of the Corporations Act because of subsection 601ED(2) of that Act (whether or not it is registered)
- no more than 20 members of the trust were 'retail clients', and
- 'retail clients' had a total 'participation interest' in the trust of no more than 10%.

Retail clients are members that became members because a financial product or a financial service was provided to, or acquired by, them as a retail client (within the meaning of sections 761G and 761GA of the Corporations Act).

A trust that met these requirements (irrespective of whether the trust was registered) is a 'wholesale trust'.

### **Participation interest**

An entity's 'participation interest' in a MIT is the greatest of the following percentages:

- the percentage of the value of the interests in the trust that the entity, directly or indirectly holds, or has the right to acquire
- the percentage of the rights attaching to membership interests in the trust that the entity, directly or indirectly has the control of, or the ability to control, and
- the percentage of any distribution of income that the trust may make that the entity, directly or indirectly has the right to receive.



### **Widely held rules**

The widely held rules introduced in 2010 have not been amended (see Widely held requirement).

### **Closely held restriction**

The closely held restriction introduced in 2010 has not been amended (see Closely held restriction).

**See also:**

- [Tax Laws Amendment \(2010 Measures No.3\) Act 2010 \(PDF 71KB\)](#) 
- [Revised Explanatory Memorandum \(PDF, 172KB\)](#) 

## Definition prior to 2010

Prior to the 2010 amendments, a trust was a MIT if:

- at or before the time of the first fund payment in relation to an income year, the trustee was an Australian resident or the central management and control of the trust was in Australia
- at the time of the first fund payment, the trust was a MIS as defined by section 9 of the *Corporations Act 2001* (Corporations Act)
- the trust was operated by a financial services licensee as defined by section 761A of the *Corporations Act 2010*, and
- the trust met one of the widely held requirements.

However, genuine collective vehicles that were not registered under the Corporations Act, and were not required to be registered (certain wholesale MISs and government-owned MISs), could not satisfy that MIT definition.

The 2010 amendments extended the definition of MIT to enable certain wholesale MISs and government-owned MISs to qualify as MITs. This was to ensure that the MIT withholding tax rules applied consistently to all widely held collective investment vehicles undertaking passive investments.

The changes also included an 'Australian management' requirement in the MIT definition to enhance the competitiveness of the Australian managed funds industry, and more closely aligned the trusts covered by the MIT withholding tax regime with the trusts eligible to apply the MIT capital treatment rules.

# Withholding tax arrangements for managed investment trust fund payments

This fact sheet provides a general overview of the withholding tax arrangements for the fund payment part of managed investment trust (MIT) distributions to foreign residents.

**Last updated** 25 February 2020

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Background to the final MIT withholding tax regime

Here you will find a general overview of the final withholding tax arrangements for the fund payment part of managed investment trust (MIT) distributions to foreign residents. Broadly, a fund payment represents the Australian source net income (other than dividends, interests and royalties) of the trust.

If the fund payments are made to a foreign resident in a country which has an effective exchange of information agreement with Australia, the final withholding tax rate is 15%. In all other cases, withholding is required at the rate of 30%.

A concessionary rate of 10% applies to fund payments by a clean building MIT, that is an MIT that holds only energy efficient commercial buildings constructed on or after 1 July 2012.

#### **See also**

- The list of information exchange countries contained in **Regulation 34 of the Taxation Administration Regulations 2017**.

## **Who is affected?**

The MIT final withholding tax regime affects Australian MITs, Australian custodians and any other interposed Australian entities used by foreign investors to invest indirectly in Australian MITs.

Foreign residents, other than foreign resident trustee beneficiaries, are also affected by this legislation.

## **Overview of withholding obligations of Australian entities**

Trustees of Australian MITs and custodians may be required to withhold an amount from a fund payment, or an amount reasonably attributable to such payment, where they are authorised to make payment to a place outside Australia or the recipient has an address outside Australia.

Other Australian entities may also be required to withhold an amount where both of the following conditions are satisfied:

- the other entity receives a payment, all or part of which is a fund payment that is covered by a notice or information made available on a website
- a foreign resident (recipient) is or becomes entitled to an amount attributable to the fund payment received by the other entity.

If any of these entities are not required to withhold an amount from the fund payment (or an amount reasonably attributable to such payment) either because the place of payment or address of the recipient is not



outside Australia or the person that becomes entitled to the payment is not a foreign resident, they may be required to notify the recipient of details of the payment (in order to give the recipient sufficient information to withhold if required).

An entity that is required to withhold or to notify a recipient will be subject to a penalty if it fails to withhold or notify the recipient as required.

## **What is a fund payment?**

A fund payment is a component of a payment made by the trustee of an MIT that, in effect, represents a distribution of its net income of the MIT, but excludes:

- dividend, interest or royalty income
- capital gains and losses from a capital gains tax asset that is not taxable Australian property
- amounts that are not from an Australian source
- deductions relating to any of the above amounts.

A payment is a fund payment in relation to an income year only if it is made:

- during the income year, or
- within three months after the income year, or
- within a longer period if agreed to by us but not exceeding six months from the end of the income year.

## **When is an entity required to give a notice?**

An MIT, custodian or other entity that is not required to withhold still may be required to:

- provide a notice to the recipient of a fund payment, or
- make information available on their website

at or before the time the amount is paid to the recipient.

Information on a website must be made available for five continuous years.

## **What information is required in the notice or to be published on a website?**

The notice or website must specify the:

- parts of the payment withholding would have been required from
- whether the payment is, or is attributable to, a fund payment from a clean building MIT
- income year of the MIT each of the parts of the payment relate to.

## **What is an MIT?**

The definition of an MIT was amended as part of the new tax system for MITs that came into effect in May 2016. There were also significant amendments in 2010. Where a trust satisfies the criteria for being an MIT, it is an MIT for the whole of the income year.

A trust is an MIT in relation to an income year if it:

- makes a fund payment in the income year
- has an Australian resident trustee or its central management and control is in Australia at the time of the first fund payment or earlier in the income year
- is a 'managed investment scheme' as defined by section 9 of the *Corporations Act 2001* at the time of the first fund payment
- is not a trading trust (in the case of a unit trust) or is not carrying on or able to control a trading business (in the case of other trusts) at any time in the income year
- carries out a significant proportion of its investment management activities in Australia throughout the income year
- meets the 'widely held' test in relation to the income year
- is not 'closely held' at any time in the income year
- is an unregistered wholesale trust that is managed by a financial services licensee or by an authorised representative of such licensee.

The 'widely held rules' vary depending on whether a trust is a registered retail trust, a registered wholesale trust or an unregistered wholesale trust. Similarly, the 'closely held rules' vary depending on whether a trust is a retail or wholesale trust.

**See also**

- Amendments to the definition of managed investment trust

## **What is a clean building MIT?**

An MIT is a clean building MIT if:

- it holds one or more clean buildings, including the land in which the buildings are situated
- 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.

A clean building MIT is allowed to hold and receive income from any assets reasonably incidental to clean buildings provided that the income received from those assets is less than 5% of the total income received from clean buildings.

A building is a clean building if:

- the construction of the building commenced on or after 1 July 2012
- the building is a commercial building that is an office building, hotel or shopping centre, or a combination of these
- the building meets 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 a 5.5 star energy rating as accredited by the National Australian Built Environment Rating System.

A building is taken to have commenced construction when the works on the lowest level, including the basement level, of the building begins.

Site preparation for construction and works undertaken below the lowest level of the building such as excavation or site stabilisation works do not amount to commencement of construction.

## **What obligations does an MIT have?**

A trustee of an MIT must withhold when it makes a fund payment if:

- the recipient of the payment has an address outside Australia
- it is authorised to make a payment to a place outside Australia, except where the recipient is carrying on business at or through an Australian permanent establishment and the payment is attributable to that establishment.

Where a trustee of an MIT is not required to withhold from a payment, it has an obligation to give a notice to the recipient or to publish information on a website in respect of the payment if both:

- the recipient has an Australian address
- the trustee of the MIT is only authorised to make payment to an Australian address.

**Note:** Withholding would have been required if the payment was made to an address outside Australia.

## What is a custodian?

An entity is a custodian if it has an Australian financial services licence and carries on a business that predominantly consists of providing custodial or depository services (as defined by section 766E of the *Corporations Act 2001*).

## What obligations does a custodian have?

A foreign resident may invest in an MIT through a custodian. The custodian will receive payments from the MIT and will make payments to the foreign resident.

A custodian is required to withhold tax from a payment it makes if the following conditions are satisfied:

- the payment is reasonably attributable to a fund payment received by the custodian that was covered by a notice or information made available on a website by the payer
- the payment is made to an entity that has an address outside Australia or the custodian is authorised to make the payment to a place outside Australia (except where the recipient is carrying on business at or through an Australian permanent establishment and the payment is attributable to that establishment).

Where a custodian is not required to withhold from a payment, it has an obligation to give a notice to the recipient or to publish information on a website in respect of the payment if both:

- the recipient has an Australian address
- the custodian is only authorised to make payment to an Australian address.

**Note:** Withholding would have been required if the payment was made to an address outside Australia.

## What is an 'other entity'?

The expression 'other entity' refers to any entity, for example, a trust, partnership or individual, which is not an MIT or a custodian.

## What obligations does an 'other entity' have?

Foreign residents may also invest in an Australian MIT through other entities.

The other entity is required to withhold where both of the following conditions are satisfied:

- the other entity receives a payment, all or part of which is a fund payment that is covered by a notice or information made available on a website
- a foreign resident is or becomes entitled to, an amount attributable to the fund payment received by the other entity.

This may occur for example, where a trust has a foreign resident beneficiary, a partnership has a foreign resident partner, or an individual acts as an agent for a foreign resident.

Where an entity is required to withhold, it must register for PAYG withholding. The other entity is required to withhold at the time the foreign resident is entitled to the payment, not when the actual payment is made to the foreign resident.

Where the other entity is not required to withhold from a payment, it has an obligation to give a notice to the recipient or to publish information on a website in respect of the payment if:

- an Australian resident recipient becomes entitled to receive an amount attributable to the payment, or to have such an amount

dealt with on their behalf, and

- withholding would have been required if that recipient was a foreign resident.

#### **See also**

- Registering for PAYG withholding

## **What is required in a payment summary?**

Entities that are required to withhold under the MIT withholding tax regime must provide a payment summary at year end to recipients. The format of the payment summary is not prescribed by us, but it must contain, as a minimum:

- names of the payer and recipient
- the recipient's tax file number or Australian business number (ABN) (if provided)
- total of the withholding payments that it covers, and the total of the amounts withheld by the payer from those withholding payments
- income year of the relevant MIT.

If the information statement, or distribution statement, covers payments made for the whole income year and contains the above information, we will accept these statements as constituting a payment summary and they can be labelled as such.

## **What are the penalties?**

An MIT, custodian or other entity that fails to withhold the required amount, is liable for a penalty equal to that amount.

An MIT, custodian or other entity that is required to provide a notice to a recipient of a payment or make information available on a website, but does not do either, is generally liable for a penalty equal to the amount that would have been required to be withheld by a subsequent recipient of the fund payment.

## **What are the reporting requirements?**

Under the MIT withholding regime, an entity which is required to withhold, must report annually to us on the amounts withheld by completing the Annual investment income report (AIIR).

The AIIR is due six months and 14 days after the end of the MIT's income year. For example, where the end of the MIT's income year is 30 June 2013, the MIT's annual report is due by 14 January 2014.

If an entity is an investment body that is already required to lodge an AIIR by 31 October following each income year, it can include the information about the fund payments in the AIIR.

However, if amounts withheld under the MIT withholding regime are not able to be reported in the AIIR by 31 October each year, reporting of fund payments and amounts withheld will need to be provided by submitting a second AIIR at the later date.

If it is not possible to lodge a second AIIR with only the fund payments and amounts withheld, the second AIIR should be clearly identified as a replacement AIIR.

The following labels are to be used in the 'Investment account data record' in the AIIR:

- MIT fund payments
- amounts withheld from MIT fund payments.

If you require assistance, email [ato-dmi@ato.gov.au](mailto:ato-dmi@ato.gov.au) or phone **13 28 66**.

## **What are the implications for foreign residents?**

MIT withholding tax is a final tax imposed on foreign residents in respect of fund payments (or an amount reasonably attributable to such payments) from Australian MITs.

A foreign resident's liability for MIT withholding tax will generally be met by an amount being withheld by the trustee of an Australian MIT, custodian or other entity.

A foreign resident investor whose only Australian income is a fund payment from an MIT is not required to lodge an Australian tax return.

However, mismatches may occur in certain situations where the address of the recipient of a fund payment (such as a global custodian), is different from the address of the ultimate foreign investor. As a result, the MIT withholding tax paid to us could be greater (or less) than the foreign investor's actual MIT withholding tax liability.

Foreign resident recipients will need to apply for a refund if the amount of withholding tax paid to us is greater than their liability or make a top-up payment of MIT withholding tax if the amount paid to us is less than their liability.

Foreign resident recipients requesting a refund must provide a copy of the payment summary that accompanied the fund payment made by the Australian payer.

## **Interaction with other provisions of Assessment Acts**

Where an amount is subject to MIT withholding tax, it is non-assessable non-exempt income of an entity. It therefore is not subject to income tax on an assessment basis, either in the hands of the foreign resident liable to MIT withholding tax or the trustee of a trust.

Where an amount is not subject to MIT withholding tax, for example because a trust does not meet any of the widely-held tests or the payment is not a fund payment, the rules about the taxation of trusts in Division 6 of the *Income Tax Assessment Act 1936* will apply, rather than the withholding tax rules.

## **Background to the final MIT withholding tax regime**

Under the former withholding tax regime, trustees of Australian MITs and certain intermediaries (financially licensed custodians), were required to withhold at a single, non-final rate of 30% on the fund payment part of managed fund distributions to foreign resident investors. Those investors were then subject to the normal Australian income tax rules on their distributions. As the amount withheld was of a non-final nature, the foreign resident recipients of the payments were still required to lodge Australian tax returns.



## Changes in 2008

The final MIT withholding tax regime replaced the former non-final withholding arrangements, with effect from 1 July 2008. As this is a final tax on the relevant distributions, foreign investors are relieved of the compliance burden of filing Australian tax returns on those distributions.

## Further rate changes in 2012

In 2012, the government amended the law to increase the MIT final withholding tax rate for fund payments from MITs to a resident of an information exchange country made on or after 1 July 2012.

The government also introduced a concessionary 10% final withholding tax rate for eligible fund payments from clean building MITs.

**Table 1: MIT final withholding tax rate applicable from 1 July 2008 – residents of information exchange countries**

<b>MIT final withholding tax rate for residents of information exchange countries</b>	<b>Application</b>
22.5%	Income years commencing on or after 1 July 2008.
15%	Income years commencing on or after 1 July 2009.
7.5%	Income years commencing on or after 1 July 2010 and before 1 July 2012.
15% or 10% – on eligible fund payments made by MITs that hold only investments in energy efficient commercial buildings.	Income years commencing on or after 1 July 2012.

**Table 2: MIT final withholding tax rate applicable from 1 July 2008 – residents of non-information exchange countries**

MIT final withholding tax rate for residents of non- information exchange countries	Application
30%	Income years commencing on or after 1 July 2008.

QC 37278

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