

Australia: "Build to Rent" investment concessions

In brief

Recent changes to income tax, stamp duty and land tax rules will reduce the tax costs of "Build to Rent" projects. These changes are part of a trend in government policy to encourage "Build to Rent" developments, with a view to increasing the supply of rental accommodation in Australia. However, unrecoverable GST on development costs remains a significant cost to developers on "Build to Rent" projects.

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Introduction

Australia is moving quickly towards a tax regime that incentivises build to rent (BTR) developments. Though there has been some activity in the BTR space for many years, actual BTR projects have been limited in number. Tax policy settings have not, in the past, favoured BTR. This, however, is changing, with important developments in 2023, both in the sphere of income tax and State taxes to introduce new tax concessions with the object of encouraging BTR.

Historically, home ownership has been the dominant paradigm in the Australian housing market, with 66% of Australian households owning their own homes as at 2019-20.¹ With a trend of declining home ownership rates in Australia as a result of rapidly increasing house prices,² the trend is now one of the proportion of people renting their homes increasing. Against this background, policy settings are now shifting to encourage a greater supply of rental accommodation through BTR developments. These changes include:

- Confirmation in the 9 May 2023/24 Federal Budget of previously announced income tax concessions
- Stamp duty concessions
- Lower land tax rates.

Income tax

There are two changes proposed (legislation is yet to be released).

The first is focused on foreign BTR investment, the second relates to all BTR investment.

Foreign investment concessions

To set the scene, Australia has a concessional tax regime for foreign investment in Australian property held in a specified type of Australian pooled investment entity called a "withholding managed investment trust" (often referred to as a "withholding MIT").

Under this regime, foreign investors located in a select list of 137 "Information Exchange Countries" qualify for either a 10% or 15% tax rate on their Australian property investment returns held through a withholding MIT. The reduction from 15% to 10% is

¹ <https://www.abs.gov.au/statistics/people/housing/housing-occupancy-and-costs/latest-release>

² <https://www.aihw.gov.au/reports/australias-welfare/home-ownership-and-housing-tenure>

available where the investment is in a "clean building": defined by reference to the 5 star energy rating of the Green Building Council of Australia or the 5.5 star rating by NABERS.

In 2019, investments in residential property (other than affordable housing or housing used in the disability sector) and agricultural property were excluded from these 10%/15% concessions. This meant that returns on residential property investments were potentially subject to the standard Australian tax rates (usually 30%, but possibly higher).

These 2019 measures are to be refined.

While details are limited, the following was set out in the 2023/24 Budget:

This measure will apply to build-to-rent projects consisting of 50 or more apartments or dwellings made available for rent to the general public. The dwellings must be retained under single ownership for at least 10 years before being able to be sold and landlords must offer a lease term of at least 3 years for each dwelling. The reduced managed investment trust withholding tax rate for residential build-to-rent will apply from 1 July 2024. Consultation will be undertaken on implementation details, including any minimum proportion of dwellings being offered as affordable tenancies and the length of time dwellings must be retained under single ownership

Consultation continues, but these reforms are intended to apply from 1 July 2024 in respect of new BTR projects where construction commences after 7.30pm (AEST) on 9 May 2023 (when the Budget was released). The outcome should be that returns made by foreign investors on BTR investments held through a withholding MIT should qualify for the 10%/15% tax rate.

While the details are yet to be ironed out, if foreign investment is intended to be part of the Australian Federal Government's policy mix to increase housing affordability, some reform is necessary as the threshold tax rates faced by foreign investors are not competitive by reference to international standards (or even other classes of property investment in Australia).

Depreciation concessions

Also announced in the Federal Budget were proposed measures increasing the capital works tax deduction depreciation rate for eligible new BTR projects from 2.5% to 4% per year. This measure will also apply to projects where construction commences after 7.30pm (AEST) on 9 May 2023 and will shorten the period that construction costs of eligible buildings are depreciated from 40 to 25 years. There would not seem to be any logical reason to limit these concessions to investments held through a MIT.

Stamp duty

Stamp duty applies in all States and Territories of Australia on transfers of land. Effective standard rates vary between 4.5% and 6.5%, calculated on the GST-inclusive consideration paid or the unencumbered value of the land, whichever is greater. Higher rates may apply in respect of residential land and land acquired by foreign persons. It follows that where an owner buys land for development, an upfront acquisition cost needs to be factored into the cost structure.

However, for BTR projects, certain concessions apply that reduce the upfront cost of the duty.

NSW

In NSW, the effective rate of duty, applying ordinary rates, is 5.5%. Rates can go up to 7% for residential land. A foreign purchaser may pay an additional 8% in surcharge duty.

NSW allows no reductions in duty for the ordinary rate. However, where the owner is a foreign person, exemption from the surcharge duty (8%) may apply, subject to satisfaction of certain conditions.

Relevantly, citizens of most foreign countries who are not ordinarily resident in Australia and companies and trusts subject to the *Foreign Acquisitions and Takeovers Act 1975* (Cth) are generally treated as foreign. To obtain removal of the surcharge duty otherwise applying to a foreign person, the following requirements need to be satisfied.³

- The owner needs to be an Australian corporation (i.e., a local corporation that is treated as foreign because of relevant foreign ownership).
- The land transfer must be made on or after 1 July 2020 and any agreement for the transfer must also have been entered into on or after 1 July 2020.

³ *Duties Act 1997* (NSW), s 104ZJB

- A BTR property must be constructed or must have been constructed on the land by the corporation in question or a related corporation after the transfer.
- Construction commenced on or after 1 July 2020 and in any case the building must be constructed no later than 10 years after completion of the land transfer.⁴
- A significant proportion of the labour force hours spent on the construction of the building involved work performed by persons whom the Chief Commissioner considers belongs to any one or more of the certain classes of worker, including apprentices or trainees, long-term unemployed workers and Aboriginal job seekers.
- The Chief Commissioner is satisfied that the building is being used and occupied for a BTR property in accordance with guidelines approved by the Treasurer.⁵ The guidelines contain various stipulations including those described below.
- All requirements of the relevant development consent must be complied with.
- The land must contain at least 50 self-contained dwellings used specifically for the purpose of build-to-rent.
- BTR properties must comply with any relevant affordable housing policies that may be imposed under the *Environmental Planning and Assessment Act 1979* (Cth).
- Specific dwellings may need to be made available for use as affordable housing or social housing for a continuous period of 15 years.
- BTR dwellings must generally be made available to the general public, without restriction.
- The dwellings and common land that comprise the BTR property must be held within a unified ownership structure.
- The corporation has become entitled to a reduction in the value of land for land tax (see below).
- The dwellings that comprise the BTR property must be managed by a single management entity, with on-site access to management for tenants (although this requirement need not be satisfied if the 15 year ownership test described above is satisfied).
- Each tenant must be provided a range of lease term choices, including a genuine option to enter into a fixed term lease of at least 3 years.
- Each tenancy must be subject to a Residential Tenancy Agreement under the *Residential Tenancies Act 2010* (NSW). The landlord must comply with all obligations under that Act.
- The land cannot be subdivided or the ownership of the land otherwise divided within 15 years of the exemption application.

Victoria and South Australia

Obtaining exemption from surcharge duty in Victoria depends on claiming exemption on an ex gratia by application to the Treasurer. Under guidelines provided by the Treasurer, exemption, for example, may be allowed where a development significantly adds to the supply of housing stock in Victoria.⁶

Ex gratia relief may also be available in South Australia on acquisitions of residential land for the purpose of undertaking significant developments of new residential homes which contribute to the supply of housing in South Australia, either through new developments or through redevelopment.⁷

⁴ The timing requirement is stated at paragraph 14 of *Revenue Ruling G014 – Build to Rent* <https://www.revenue.nsw.gov.au/help-centre/resources-library/rulings/general/g014>.

⁵ *Treasurer's Guidelines for the Reduction in Land Value for Certain Build-to-rent Properties, for Land Tax Purposes* <https://www.treasury.nsw.gov.au/sites/default/files/2021-02/Treasurer%20E2%80%99s%20Guidelines%20for%20the%20Reduction%20in%20Land%20Value%20for%20Certain%20Build-to-rent%20Properties%2C%20for%20Land%20Tax%20Purposes.pdf>

⁶ *Guidelines Issued Under Section 3E of the Duties Act 2000*, 1 October 2018 <http://www.gazette.vic.gov.au/gazette/Gazettes2018/GG2018S450.pdf#page=5>

⁷ *Revenue Ruling SDA012 Foreign ownership surcharge ex gratia relief guidelines for significant developments* <https://www.revenuesa.sa.gov.au/forms-and-publications/information-circulars-and-revenue-rulings/revenue-rulings/sda012v2>

Queensland

In support of BTR projects with a minimum affordable housing component of at least 10%, the Queensland budget for 2023/24 announced tax concessions to eligible BTR developments of 100% on any additional foreign acquirer duty (AFAD) charged on future acquisitions or transfer of the identified site for development.

These changes are yet to be legislated but are expected to take effect from 1 July 2023.⁸

Western Australia

A refund of foreign transfer duty may apply if the property in question will consist of at least 10 dwellings (whether by way of construction or refurbishment) under legislated relief.⁹

Tasmania, NT and ACT

No relief from duty presently applies in Tasmania, NT or ACT for BTR projects.

Land tax

Land tax concessions or full exemptions may apply for BTR in most States and Territories.

NSW

In NSW, where a land acquisition satisfies the relevant conditions described above for duties, relief as to 50% of the land tax payable should apply until 2040.¹⁰ Full exemption from surcharge land tax may also apply.¹¹

Victoria

Victoria also allows a 50% reduction in land tax for BTR developments for up to 30 years.¹² The requirements for claiming exemption are comparable with those in NSW but not identical. The concession applies where one or more buildings that are constructed or substantially renovated for the purpose of providing multiple dwellings for lease under residential rental agreements. The requirements are as follows. The development must comprise of dwellings that are:

- At least 50 self-contained dwellings
- Fixed on the same parcel of land
- Owned by one owner or owned collectively i.e., co-owned
- Generally managed by a single management entity
- Suitable for occupancy on a date that is on or after 1 January 2021 and before 1 January 2032
- Rented or available for rent under a residential rental agreement, generally for a fixed term of 3 years or more
- An eligible BTR development must satisfy these requirements for a continuous period of at least 15 years from the occupancy date of the eligible BTR development.

The higher rates of land tax applying to absentee owners generally do not apply for eligible BTR developments.¹³

⁸ *Alleviating Housing Pressure*, <https://budget.qld.gov.au/overview/alleviating-housing-pressures/#:~:text=Build%20to%20Rent&text=As%20part%20of%20the%202023,commence%20from%201%20July%202023>.

⁹ *Duties Act 2008* (WA), s 205ZA

¹⁰ *Land Tax Management Act 1956* (NSW), s 9E

¹¹ *Land Tax Act 1956* (NSW), s 5CA

¹² *Land Tax Act 2005* (Vic), s 70J

¹³ *Land Tax Act 2005* (Vic), s 70K

Queensland

The Queensland budget for 2023/24 announced tax concessions to eligible BTR developments of:

- 50% of the total land tax payable on the development site up to a maximum term of 20 years
- 100% of any foreign investor land tax surcharge payable on the development site up to a maximum term of 20 years, where the development is owned and operated by a foreign entity.

These measures are yet to be enacted but are expected to take effect from 1 July 2023.

Western Australia

Western Australia will also allow land tax concessions for BTR developments for up to 20 years.¹⁴ The concession is a half rate of land tax. The requirements that need to be satisfied to obtain the concession are as follows. The relevant development must be:

- On land owned by 1 owner or joint owners
- A development for the purpose of providing 40 or more self-contained dwellings for lease under residential tenancy agreements (whether or not the building or buildings are used for other purposes)
- Consisting of the construction of a building or buildings on the land, or the substantial renovation of the whole or a substantial part of a building or buildings on the land, that are not used for residential purposes (including aged care)
- A development where all of the dwellings become able to be lawfully occupied as dwellings on or after 12 May 2022 and before 1 July 2032 and within a 5-year period
- A development where generally each of the dwellings is rented or available for rent under a residential tenancy agreement with a term of at least 3 years
- A development where generally there is no direct or indirect restriction on the class or classes of persons who may occupy those dwellings
- The same management entity is responsible for the provision of management services to the whole of the development.

These concessions are in a bill, yet to be enacted.

South Australia

The 2023/24 State Budget introduced a land tax reduction for eligible BTR properties on South Australian land, where construction commences on or after 1 July 2023.

This will apply as a 50% reduction in the land value of relevant parcels of land, where the land is being used as an eligible BTR project.

The land tax reduction will be available from the 2023/24 financial year up to, and including, the 2039/40 financial year.

Legislation is yet to be enacted to give effect to these measures.

Tasmania, ACT and NT

No concessions are available in Tasmania or the NT.

The ACT appears to be moving towards a regime for concessional tax for BTR although no legislation has yet been enacted.¹⁵

Observations

Under the current regime for goods and services tax (GST) in Australia, a significant GST cost arises for BTR developments, namely the inability to recover GST on land acquisition, construction and other development costs incurred by a developer of BTR

¹⁴ *Land Tax Assessment Amendment (Build-to-Rent) Bill 2023* (WA)

¹⁵ *What does Build-to-Rent look like for the ACT?* <https://www.treasury.act.gov.au/infrastructure-finance-and-reform/build-to-rent>.

projects. This means that an amount equal to 10% of these costs being the unrecoverable GST becomes a sunk cost of development. No proposal to remove these costs is contemplated at this stage.

However, the clear trend in tax policy appears to be to encourage BTR with newly introduced concessions in income tax, stamp duty and land tax. Whether these shifts in policy are sufficient to incentivise BTR developments remains to be seen. Early indications are positive.

Authors



John Walker

Partner

john.walker@bakermckenzie.com



Simone Bridges

Partner

simone.bridges@bakermckenzie.com



Miles Hurst

Partner

miles.hurst@bakermckenzie.com



Amrit MacIntyre

Senior Adviser

amrit.macintyre@bakermckenzie.com



Sebastian Busa

Partner

sebastian.busa@bakermckenzie.com



Dora Stilianos

Partner

dora.stilianos@bakermckenzie.com



Janet Cho

Special Counsel

janet.cho@bakermckenzie.com



Peter McMahon

Consultant

peter.mcmahon@bakermckenzie.com

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