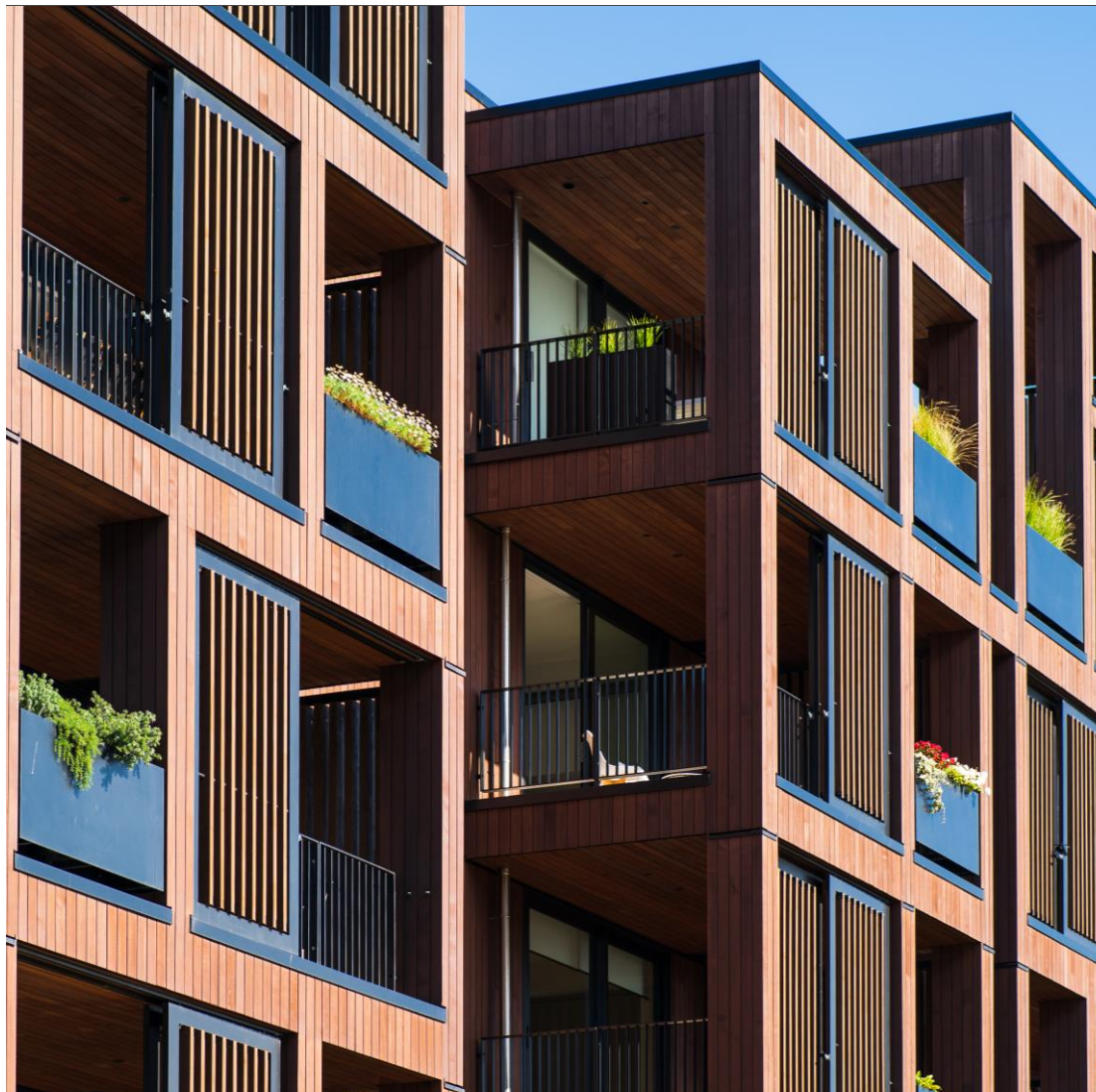


Build-to-rent in Australia – An evolving landscape

11 December 2024



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Introduction

The housing affordability crisis in Australia is at an all time-high and has spurred a range of recent tax measures targeting the build-to-rent (BTR) sector. These measures include reductions in income tax, stamp duty and land tax imposts for BTR investors, which are welcome changes that are clearly aimed at bringing investor returns on BTR projects in line with traditional commercial property asset classes such as office, retail, and industrial.

BTR can provide large-scale housing developments and build well-connected communities in locations which are close to transport and strategic centres, providing excellent opportunities for individuals and families to thrive. Whilst BTR may not be a complete solution to fixing housing affordability, it can allow Australians to live in locations they would not otherwise be able to afford. With rising cost of living pressures in Australia and the Australian dream of owning property becoming increasingly difficult to attain, we continue to encourage Federal and State Government investment and incentives to support growth in this area.

As the BTR investment landscape continues to strengthen and evolve, the benefits to the Australian economy from the growth of BTR are clear. The housing crisis and increased costs of living have made it impossible to deny that the growth of the BTR sector is key to providing homes for current and future generations.

This report discusses the impact of the various income tax, land tax and foreign surcharge duty changes and encourages Australian Governments and investors to continue the conversation on BTR, as it is an important part of the solution to addressing housing affordability and easing the cost of living pressures in Australia.

We hope that the speed of reform in the past 12 months at the State and Federal Government levels continues to resolve the remaining commercial barriers to investing in the BTR sector and adjacent asset classes (such as co-living). Watch this space!



Federal taxes

Amendments to MIT withholding tax and capital allowances

In response to Australia's housing crisis and to encourage investment in this area, new law provides accelerated tax deductions for construction costs and reduces the managed investment trust (MIT) withholding tax rate in respect of eligible BTR investments.

Key points:

- From 1 July 2024, eligible BTR developments will qualify for the concessional withholding tax rate of 15% on distributions of rental income and capital gains from eligible MIT investments. This rate of tax is now consistent with the treatment of other concessional asset classes under the MIT regime (albeit with conditions that are only imposed on BTR investments). Consistent with the current withholding MIT rules, the concessional rate is only available to residents in exchange of information (EOI) countries.
- The 15% reduced MIT final withholding tax rate can continue to apply beyond the 15 year compliance period as long as a BTR development meets the eligibility criteria.
- Several notable changes were made to the original Bill as introduced, including permitting the 15% withholding tax rate to apply to income and gains referable to a property which is held through a chain of trusts.
- The capital works deduction rate will increase from 2.5% to 4% per year.
- Existing BTR developments that commenced prior to May 2023 are now eligible for the MIT 15% rate concession. However, these developments do not qualify for the increased capital works deduction.
- The amending law now requires that lease terms be offered for a minimum of five years, an increase from the original proposal of three years. Tenants, however, retain the option to request shorter lease terms.
- *The Capital Works (Build to Rent Misuse Tax) Act 2024* imposes a misuse tax when tax concessions are improperly claimed due to BTR development ineligibility so as to effectively claw back the concessions. The misuse tax is only applicable to non-compliance during the 15 year BTR compliance period. The misuse tax will now only apply to the owner of the development at the time of non-compliance.
- While there remains the requirement for a minimum of 10% of dwellings to be affordable, future regulations will allow moderate-income earners to lease these apartments. The extent of these regulations are not yet known but it is anticipated that these regulations will include requirements for the affordable units to be operated by a Community Housing Provider (CHP), which may prompt some BTR owners to establish their own CHPs.

Under the new legislation, eligible BTR developments are those which satisfy the following criteria:

1. Consist of 50 or more apartments/dwellings that are made available to the general public for tenancing, noting that the BTR development can be a whole building, part of a building, or more than one building.
2. Dwellings in the BTR development must be available for lease terms of at least five years (although a tenant can request a shorter period).
3. All dwellings in the development (and common areas that are part of the BTR development) continue to be directly owned together by a single entity, at any one time, for at least 15 consecutive years (although the BTR development can be sold to another single entity during the period and remain eligible for the concessions).

4. At least 10% of the dwellings are available as affordable tenancies, being a dwelling where the rent is discounted by at least 25.1% and offered to eligible tenants (i.e. tenants that meet certain income thresholds).
5. The dwelling cannot be commercial residential premises.
6. For each type of affordable dwelling available, there must be at least an equal number of comparable non-affordable BTR dwellings made available. At least one affordable dwelling must be comparable in size and amenities to each market-rate BTR dwelling.

The criteria demonstrate the intention of Government to balance the needs of all stakeholders with an underlying objective of providing long term stable accommodation for all. Criteria 1 and 2 broadly align with the requirements to access land tax and stamp duty concessions available for BTR projects in NSW and Victoria.

The 15% reduced MIT final withholding tax rate can continue to apply beyond the 15 year compliance period as long as a BTR development meets the eligibility criteria.

A specific reporting mechanism applies for entities participating in a BTR development whereby the Commissioner of Taxation must be notified of certain trigger events and receive information when required.

Thin capitalisation

In April 2024, the *Treasury Laws Amendment (Making Multinationals Pay Their Fair Share - Integrity and Transparency) Act 2024* (Cth) became law, introducing a new interest limitation regime. The new regime includes new thin capitalisation tests and a debt deduction creation rule that restricts the deductibility of debt deductions on related party debt used for particular purposes.

These rules apply for income years commencing on or after 1 July 2023, except for the debt deduction creation rules, which commence one year later. The regime introduces three new thin capitalisation tests for interest limitation: the fixed ratio test (the default test), the group ratio test, and the third party debt test, each with specific features and conditions.

Broadly speaking, for investors in the real estate industry (including BTR), unless taxpayers can avail themselves of the third party debt test, it is likely that a significant amount of debt deductions in a given year may be denied under the fixed ratio test, particularly during the early construction phases of a BTR project. Although these denied deductions may be eligible to be carried forward for 15 years, taxpayers considering investments into BTR projects in Australia will need to consider the potential impact of these rules on a project-by-project basis which may have a negative impact on the IRR (Internal Rate of Return) of each investment.

See also our detailed [Tax Alert](#) on the thin capitalisation rules for more information.

Goods and services tax (GST)

One of the continued challenges facing investment in the BTR industry is current GST laws. At present, BTR developers cannot claim GST credits on the land and construction costs incurred to develop BTR stock, whereas such credits are available for build to sell developments. Therefore, irrecoverable GST of 10% generally arises on the costs incurred by BTR developers on BTR projects.

Despite the recent changes to reduce the MIT withholding tax rate (discussed above), there does not appear to be an appetite to change the GST treatment of BTR projects to align it with the treatment of other asset classes. This still remains a significant barrier to the underwriting of BTR investments.

State taxes

At a State level, there are broadly two types of costs that investors are typically focused on land tax and stamp duty. Many States now also impose additional surcharges for land acquired or held by foreign residents, which must be factored into BTR projects with foreign investors.

A summary of the current top general rates of duty, land tax and surcharges in each State and Territory (as at 1 July 2024) are set out below:

	Stamp duty		Land tax	
	General rate	Foreign purchaser surcharge	General land tax rate	Land tax surcharge
QLD	5.75%	8%	2.75%	3%
NSW	5.5% (or up to 7%) ¹	8% (9% from 1 January 2025)	2% ²	4% (5% from the 2025 land tax year)
VIC	6.5%	8%	2.65%	4%
SA	5.5%	7%	2.4%	N/A however Trust Surcharge land tax may apply
WA	5.15%	7%	2.67%	N/A
ACT	5%	N/A	1.26%	0.75%
NT	5.95%	N/A	N/A	N/A
TAS	4.5%	8%	1.5%	2%

In recent years, many States have introduced concessions for BTR projects. The following table compares the various relief available between the relevant States (subject to satisfying relevant eligibility criteria, and successful application). At this stage, other Australian states and territories do not have land tax or foreign surcharge relief that could apply to BTR projects.

	Land tax relief or reduction	Surcharge land tax relief	Surcharge stamp duty relief
New South Wales	✓ Post-construction only.	✓	✓
Victoria	✓ Post-construction only.	✓ Specific BTR relief post- construction only however, general exemption for significant contribution to economy may be available during construction.	No specific BTR relief, however, general exemption for significant contribution to economy may be available where BTR development proposed/undertaken.

¹ For a direct acquisition of NSW land, the highest rate of duty at the general rate can be 7% (i.e. where 'premium property duty' applies).

² 2% reflects rate applicable to high value properties over premium threshold.

	Land tax relief or reduction	Surcharge land tax relief	Surcharge stamp duty relief
Queensland	✓ Post-construction only.	✓ General exemption may be available during construction.	✓
Western Australia	✓	N/A (no surcharge applies).	No specific BTR relief, however, residential development exemption may be available where criteria are met.
South Australia	✓	N/A (no surcharge applies).	No specific BTR relief, however, significant development ex gratia relief may be, available where criteria are met.

Each of the above relief measures are discussed in further detail below.

New South Wales

Land tax 50% reduction on BTR developments

A 50% land tax discount is available to NSW developers who invest in eligible BTR schemes which will go towards making this more acceptable to developers. The New South Wales Government has released [Treasurer's Guidelines](#) and a [revenue ruling](#) outlining the eligibility requirements for such reduction. To be eligible for this concession, an application must be made and the following requirements must be met:

- A building must be situated on the land.
- Construction of the building must have started on or after 1 July 2020.
- The Chief Commissioner must be satisfied that a significant proportion of the labour force hours (a minimum of 10% over the life of the construction) spent on the construction of the building involves or involved work performed by persons whom the Chief Commissioner considers belong to any or more of the following classes of worker:
 - Apprentices or trainees
 - Long-term unemployed workers
 - Workers requiring upskilling
 - Workers with barriers to employment (such as persons with disability)
 - Aboriginal jobseekers; and
 - Graduates.
- The Chief Commissioner must be satisfied that the building is being used and occupied for a 'BTR property', in accordance with the Treasurer's Guidelines. Some notable requirements in order for this requirement to be met include:
 - The buildings on a parcel of land must contain at least 50 self-contained dwellings used specifically for the purpose of BTR. (Note: This requires the issuance of an occupation certificate).
 - BTR properties must comply with any relevant affordable housing policies that may be imposed under the *Environmental Planning and Assessment Act 1979 (NSW)*.
 - BTR properties must be managed by a single management entity with on-site access to management for tenants, unless the dwellings located on the property are made available for use as affordable housing or social housing for a continuous period of 15 years.

- BTR dwellings must be made available to the general public, without restriction, apart from restrictions necessary to ensure public health and safety, to promote announced Government policy, or to ensure dwellings designated for affordable or social housing are used for that purpose.
- The dwellings and common land that comprise the BTR property must be held within a unified ownership structure, which can include a group of entities holding joint ownership.
- 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 and each tenancy must be subject to a Residential Tenancy Agreement under the *Residential Tenancies Act 2010 (NSW)*.

Where only part of a parcel of land is being used and occupied for BTR property, there is an ability for the land tax reduction to apply on a proportionate basis.

A clawback of the reduced land tax will apply if, within 15 years, the land is subdivided or the ownership of the land is otherwise divided. Reassessment will occur for the year in which the land is subdivided or the ownership of the land is otherwise divided, as well as for each preceding year the land tax was reduced, limited to 15 years preceding.

For completeness, in certain circumstances it may be possible to sell the BTR development within 15 years and for the new owner to continue to get the benefit of the concession. This may arise if the new owner continues to use the developer for BTR purposes in accordance with the Treasurer's Guidelines. Confirmation of this outcome should be obtained from Revenue NSW as necessary.

Foreign surcharge stamp duty and surcharge land tax relief

The New South Wales rules also extend to providing an exemption from foreign investor surcharges (additional 8% for surcharge stamp duty (9% from 1 January 2025), and an additional 4% for surcharge land tax – 5% from 1 January 2025) until 2040, and integrity measures have been included to ensure discounts are not used for tax avoidance (similar to those referred to above in the clawback of reduced land tax).

For both the surcharges, the land must be acquired and held by an Australian corporation (i.e. incorporated or taken to be incorporated under the *Corporations Act 2001 (Cth)*) and the construction of the BTR development (i.e. in accordance with the above Treasurer's Guidelines and eligibility requirements) must be carried out by that corporation or a related body corporate on or after 1 July 2020.

For the surcharge stamp duty exemption, construction must occur after the land has been transferred to the Australian corporation, and the land must have been transferred on or after 1 July 2020.



For completeness, the 'Australian corporation' requirement should be satisfied where a corporate trustee acquires and holds the land in its capacity as trustee of a trust, noting this point has been confirmed (privately) by Revenue NSW.

Generally, the surcharge stamp duty and surcharge land tax exemption require the constructed BTR property to be eligible, meaning that the starting assumption under the provisions is that the surcharges would be paid and an application for a refund would be made (within certain time limits set out below):

- Surcharge stamp duty - generally requires an application for the refund to be made within 12 months after the owner of the land first became entitled to a reduction in the value of the land for land tax purposes, and no later than 10 years after completion of the transfer of the residential-related property to the Australian corporation.
- Surcharge land tax - generally requires an application for a refund to be made within 12 months after the owner of the land became entitled to the refund, and no later than 10 years after the land tax year concerned.

However, there is the ability for the Chief Commissioner to approve a person as an 'exempt transferee'/'exempt person' if the Chief Commissioner is of the opinion that the person is likely to *become* entitled to a refund of the full amount of surcharges.

Interaction with international tax treaties

It was previously determined that foreign persons from New Zealand, Finland, Germany, South Africa, India, Japan, Switzerland and Norway would no longer be required to pay New South Wales surcharge purchaser duty or surcharge land tax, on the basis the New South Wales Government had determined that the New South Wales surcharge provisions were inconsistent with international tax treaties entered into by the Federal Government with the above listed countries.

However, in April 2024, new law amended the *International Tax Agreements Act 1953 (Cth)* purportedly to clarify the uncertainty associated with interaction between the international tax agreements and State foreign surcharges. Accordingly, foreign persons and entities resident in the above countries will remain liable to pay surcharge purchaser duty when they acquire residential property in New South Wales and surcharge land tax on residential property they own in New South Wales.

It is to be seen the outcome of any challenges to this new federal legislation.

Victoria

Land tax 50% reduction and land tax surcharge on completed BTR developments

In Victoria, eligible BTR developments are entitled to a 50% reduction on the taxable value of the land used for the BTR development for up to 30 years from the 2022 land tax year onwards. Eligible BTR developments are also exempt from any land tax absentee owner surcharge during that time.

To be eligible for the BTR benefits, an application must be made and the following requirements must be met:

1. It must be on land or a parcel of land with a new or substantially renovated building/s fixed to it.
2. The building(s) were constructed or renovated for the purpose of providing dwellings for lease under residential tenancy agreements.
3. The building(s) provide at least 50 self-contained dwellings which form the BTR development.
4. The development is owned collectively and held within a unified ownership structure.
5. The development is managed by a single entity.
6. The dwellings must have an occupancy date (i.e. when the dwellings are first suitable for occupancy as evidenced by an occupancy permit) on or after 1 January 2021 and before 1 January 2032.

7. The dwellings must be made available for rent under residential rental agreements as defined in the *Residential Tenancies Act 1997* (Vic).
8. A lease term of at least three years must be offered for each dwelling (a tenant may choose a lesser period).
9. The rental agreement must not be subject to any restrictions except those required to ensure public health and safety or to provide social affordable housing.

As set out above, each eligible BTR development is entitled to the land tax concession and surcharge exemption for up to 30 years, however this is subject to the requirement that the development continues to satisfy the above eligibility criteria for a continuous period of at least 15 years from the occupancy date.

If the relevant land (or part of land) ceases to meet the above eligibility requirements within the 15 years period, a claw-back of the reduced land tax liability will be triggered (i.e. also known as 'BTR Special Land Tax').

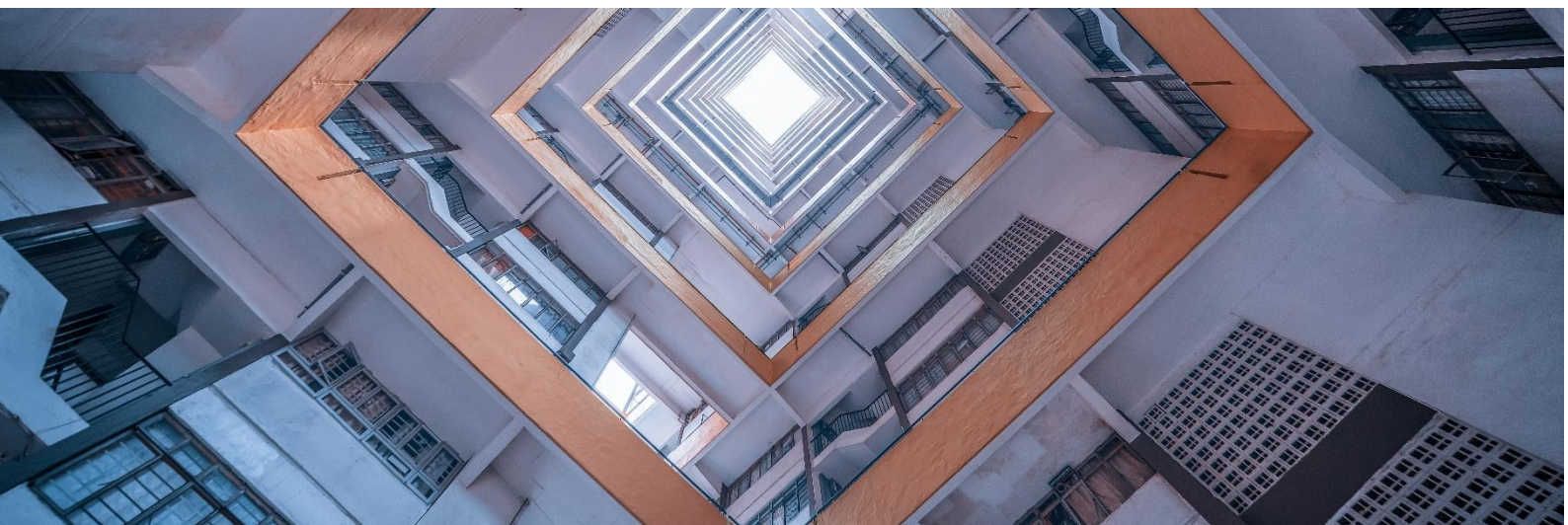
Similar to New South Wales, where only part of the land is used and occupied solely for a BTR development, the land tax concession can still apply on a proportionate basis.

Foreign surcharge stamp duty and surcharge land tax relief

In Victoria, the acquisition of residential property by a foreign purchaser may attract an additional stamp duty surcharge of 8% on the value of the property acquired, and an additional surcharge of 4% in land tax. However, foreign corporations and foreign trusts may be eligible for an exemption from surcharge stamp duty and/or surcharge land tax.

The Victorian Treasurer issued gazetted [guidelines](#) on 1 October 2018 outlining the general principles and circumstances which will be considered in deciding whether an exemption should be granted. BTR developments must meet certain criteria to be eligible, including that the commercial activities of the corporation or trust must significantly add to the supply of housing stock in Victoria, either through new developments or through redevelopment, where such development is primarily residential.

The Victorian general surcharge land tax exemption is only available during the period of construction and is not available once construction is completed (noting at this point, the BTR specific exemption should apply). Compare this with New South Wales where the land tax surcharge exemption for BTR developments is generally only available after construction has been completed. Similarly, once construction is completed, the specific Victorian BTR benefits discussed above may be applied for.



It should also be noted that Victorian foreign surcharge stamp duty should not apply if the sole or primary use of the property is 'commercial residential premises' (or there is an intention, at the time of the acquisition, for the land to be used in that way) as defined in the GST law and if it is consistent with the guidance released by the Victorian revenue authority for interpreting some premises which are not defined in the GST law. This is because such property would not be considered 'residential property' and therefore not subject to any foreign surcharge stamp duty that requires exempting.

Where the foreign purchaser acquires shares or units in a landholder undertaking a residential development (i.e. rather than acquiring the development directly), a surcharge stamp duty exemption may still apply in certain circumstances. However, the development activities of the landholder entity may not be taken into account in determining whether the foreign person is significantly adding to the supply of housing stock in Victoria, unless evidence supporting this fact can be shown. For example, the activities may be taken into account where the foreign person is providing funding for the development, either through consideration paid for:

- the issue of shares/units in the landholder/developer to the foreign person; or
- under an agreement that requires all security holders to provide funding for the development based on the number of shares/units held.

In practice, applications for exemptions from foreign surcharge stamp duty may have long turnaround times for consideration by the Victorian State Revenue Office (i.e. up to 12 months). Accordingly, the imposition of surcharge will generally need to be modelled as part of acquisition costs, even if relief is expected to ultimately apply.

Queensland

50% land tax concession, foreign surcharge land tax and foreign surcharge stamp duty relief for BTR developments

Effective from 1 July 2023, Queensland has introduced the following relief for eligible BTR developments:

- 50% reduction in the taxable value of land for land tax, for land used solely or primarily for an eligible BTR development
- 100% reduction in the taxable value of land for land tax foreign surcharge, for land used solely or primarily for an eligible BTR development; and
- 100% discount on any additional foreign acquirer duty (AFAD) for land used – or to be used – for an eligible BTR development.

Where the relevant requirements are met, the land tax relief is available for a maximum of 20 years or until 30 June 2050 (whichever comes sooner). Relevantly, to be eligible for relief the relevant land must be solely or primarily used for an eligible BTR development, which in turn generally must:

- Be operational (however, please see comments below regarding AFAD relief for land to be used for eligible BTR developments)
- Be solely or primarily used for residential purposes
- Become operational (i.e. suitable for occupation) after 1 July 2023 and before 30 June 2030, and meet all of the eligibility requirements by the end of the second full financial year after becoming operational
- Provide at least 50 self-contained dwellings which are constructed or substantially renovated for the purpose of being occupied under residential tenancy agreements
- Be owned under a unified ownership structure and managed by a single entity
- Provide at least 10% of dwellings as affordable housing at discounted rents (i.e. at least 25% below market rents of similar dwellings in the BTR development) to eligible tenants for the 12 months prior to the relevant 30 June

- In respect of the land tax concessions, have maintained eligibility continuously, regardless of any changes in ownership of the land; and
- In respect of the AFAD relief, maintain eligibility for the land tax concessions for at least five years continuously to be able to retain the concession.

AFAD relief is also available for eligible land which is acquired for the purposes of constructing a BTR development. At a high level, to be eligible for this AFAD concession, the acquirer will need to:

- Construct a BTR development on the land on or before 30 June 2030
- Use the land/BTR development in such a way that it would be eligible for the BTR land tax concessions (having regard to the eligibility requirements set out above) for at least five consecutive financial years; and
- Not transfer or subdivide the land before the acquirer obtains the BTR land tax concession in relation to the land for at least five consecutive financial years.

The requirements for an exemption from AFAD arising on the acquisition of an existing BTR development are largely similar to the above, with the added requirement that the transferor must have obtained a BTR land tax concession in relation to the land for the financial year preceding the acquisition year.

The Queensland Revenue Office has published guidelines on the meaning of [eligible BTR developments](#) and the [AFAD concession](#).



Foreign surcharge stamp duty and surcharge land tax relief

In Queensland, from 1 July 2024 the acquisition of residential property by a foreign purchaser may attract an additional surcharge stamp duty of 8% on the value of the property acquired (referred to as additional foreign acquirer duty or AFAD), and an additional 3% of surcharge land tax. However, foreign corporations and foreign trusts may be eligible for an exemption from such surcharges.

Similar to Victoria, [rulings](#) have been issued providing guidance as to when ex gratia relief will be available. One of the main [eligibility](#) criteria for the [surcharge land tax](#) relief is that they must make a significant contribution to the Queensland economy and community. However, unlike Victoria, stamp duty ex gratia relief is generally not available in Queensland on indirect dealings in the shares or units of entities undertaking developments.

In practice, applications for ex-gratia relief may have long turnaround times for consideration by the Queensland Revenue Office (i.e. between 12 and 24 months). Accordingly, the imposition of AFAD will generally need to be modelled as part of acquisition costs, even if relief is expected to ultimately apply.

South Australia

The South Australian 2023-24 State Budget introduced a land tax concession available for eligible BTR developments where there is a building situated on the land and construction commenced on or after 1 July 2023. The concession operates as a 50% reduction in the taxable value of the relevant land parcel and is available from the 2023-24 financial year up to, and including, the 2039-40 financial year.

A building will form an eligible BTR property if:

- The building, and the use of the building as a build-to-rent property, complies with all requirements applicable under the Planning, Development and Infrastructure Act 2016 (SA)
- Each tenant of the build-to-rent dwellings or units in the property is offered (on a genuine basis) a lease of a term not less than three years (and any shorter lease may only be entered into at the option of the tenant); and
- Any other requirements prescribed by the regulations are complied with. We note such regulations have not yet been released but are empowered to include specific provisions with respect to the minimum number of dwellings and affordable housing requirements.

In respect of relief for any given financial year, the taxpayer must apply to the Commissioner for a reduction in the approved form either before, or during, that financial year.

If the Commissioner is satisfied only part of a parcel of land is being used for an eligible BTR property, the reduction in land value will be proportionately decreased in accordance with regulations. The South Australian Government has indicated further information regarding the eligibility requirements (likely by way of regulations) and the application process are still to be released.

Separately, South Australia has further land tax relief for certain affordable housing developments.

Ex gratia relief from surcharge stamp duty may be available in South Australia for land which is acquired for the purpose of undertaking a significant development of new residential homes which contribute to the supply of housing in South Australia either through new developments or through redevelopment. A [ruling](#) has been issued providing guidance as to when such relief will be available. One of the main requirements for the grant of ex-gratia relief is that the land is acquired for the purposes of undertaking a development or redevelopment of 20 or more allotments to be used for residential purposes, or the development or redevelopment will otherwise make a significant contribution to the region in which it is occurring.

Western Australia

From the 2023-24 land tax assessment year, Western Australia offers a 50% land tax concession for eligible BTR developments for up to 20 years. The key requirements to access this relief are as follows:

- The land containing the development is owned by the same owner or group of owners and managed by one management entity
- The development has been constructed or substantially renovated for the purpose of providing at least 40 self-contained dwellings for lease under a residential tenancy agreement
- The dwellings in the development are able to be lawfully occupied between 12 May 2022 and 30 June 2032 and become occupiable within five years of each other
- The dwellings are available to rent for a term of at least three years, although residents can choose a shorter lease term
- The dwellings are not restricted to certain classes of person unless it is necessary to ensure public health or safety, if the dwellings are social housing, or in prescribed circumstances; and
- The land consistently qualifies for the relief for a period of at least 15 years. Where the land ceases to qualify for relief during the first 15 years of it being applied, the Commissioner will retrospectively apply tax for the years the land received the concession.

Where parts of a BTR development are used for unrelated purposes, such as commercial activities or unrelated residential accommodation, the exemption will be proportionally reduced.

In Western Australia, a general exemption may also be available to obtain a refund of surcharge purchaser duty where construction of ten or more residential dwellings commences or completes construction within five years of acquisition, or subdivision of the land for the purpose of construction 10 or more dwellings of the land commences or is completed within five years of the acquisition.

Australian Capital Territory

The Australian Capital Territory Government commenced a [BTR pilot project](#) in 2022-23 with a mandatory minimum affordable rental component. In the 2023-24 Budget, the ACT Government announced commitment to release a second site for BTR in 2024-25, again with a minimum affordable rental component. This project is expected to inform future policy considerations. In the interim there are various Government incentives (unrelated to foreign surcharges and rates) that may be available for BTR projects.

Other matters to consider for BTR projects

Co-living as commercial residential premises

Co-living has emerged as burgeoning asset class within the BTR market segment. Broadly, co-living involves a community focused approach to living with individual rooms but communal bathrooms and shared common spaces. The co-living model is aimed at providing a viable, lower-cost alternative for professionals who are seeking convenience and proximity to employment and major cities. The distinctive features of co-living, such as shared amenities and flexible (often short term) lease terms necessitate careful consideration of specific issues, some of which are noted below. As the co-living sector continues to expand, addressing these unique challenges will be crucial to its sustained success.

Co-living may be considered 'commercial residential premises' as defined in the GST law. Factors that support the classification of the co-living investments as 'commercial residential premises' for GST purposes include:

- The property is run on a commercial basis
- The property has the capacity to provide accommodation to several unrelated residents at once
- Accommodation is offered to the public
- The main purpose of the property is providing accommodation
- There is central management to accept reservations, allocate rooms and arrange services for guests
- The operator of the property supplies accommodation in their own right
- Management provides or arranges services and facilities for guests; and
- Occupants usually have the status of guests.

Where co-living projects qualify as 'commercial residential premises', a raft of implications follow, including the ability to obtain credits for GST on construction costs, and potentially MIT benefits for income tax purposes (depending on whether the arrangement with the end user is considered to be a lease (and not a licence)). Also, in Victoria and Western Australia, foreign surcharge stamp duty may not apply if the sole or primary use of the property is "commercial residential premises" (or if there is an intention for the property to be solely or primarily used in this way). For Victoria, the use of the property should also be consistent with the guidance released by the Victorian revenue authority for interpreting some premises which are not defined in the GST law.

As the definition of commercial residential premises requires a detailed consideration of the nature and benefits offered by the investment, a co-living facility with services would likely require a ruling from the Commissioner of Taxation to confirm the treatment of a co-living investment as commercial residential premises. Note that to date, the Commissioner has taken a narrow view of what qualifies as commercial residential premises. Investments that currently qualify for commercial residential premises include some student accommodation and serviced apartments.

Foreign Investment Review Board (FIRB)

In the context of the FIRB and investment by foreign persons into BTR projects, it is necessary to distinguish between 'commercial land' and 'residential land'. Residential premises that qualify as commercial residential premises, applying the same GST Act definition, are treated as 'commercial land' for FIRB purposes and therefore normally attract the higher monetary threshold of \$330m (or \$1.427bn for foreign investors from free trade agreement (FTA) partner countries) unless the land is vacant commercial land in which case there is a \$0 threshold. Residential land acquisitions normally attract a \$0 threshold and all investments from foreign government investors also attract a \$0 threshold. Investment by foreign persons acquiring an interest in Australian land such as a BTR project that meet the relevant thresholds require FIRB approval prior to making that investment. Slightly different tests apply to foreign government investors.

FIRB application fees are based on the purchase price of the land or premises. On a purchase price between \$9m and \$10m, the residential land application fee (assuming no established dwellings) will generally be up to \$253,800. Fees for commercial land are materially lower, generally up to \$14,100 if the purchase price is \$50m or less.³

It is also worth noting that in the absence of an applicable exemption, certain changes in the upstream structures for an investor who is a foreign person investing in the BTR project may require FIRB approval before that change can occur.

Community Housing Providers (CHPs)

CHPs have historically played a role in holding land and providing social and affordable housing. Whilst this form of investment is a different market to the BTR investments discussed in this alert (as is NDIS housing), it can fall under the broader umbrella of 'build-to-rent housing'.

Broadly speaking, CHPs have access to lower taxes (including specific land tax, stamp duty and GST concessions) and council rates, density bonuses, and even access to cheaper land through collaborations with Government, significantly lowering the cost of entry to BTR investments. There are many affordable and social housing charities in Australia that are registered as CHPs. As a result of the lower cost of entry, CHPs are a natural gateway to stimulate the growth of the BTR sector in Australia, and they can play a role in bringing together private investors into BTR.

There is a clear emphasis from Government and not-for-profits to increase the pipeline of affordable housing projects and we would expect this trend to continue. However, it is unclear whether further concessions would be made available to affordable housing projects given that the concessional MIT withholding tax rate (being 15%) now aligns for BTR and affordable housing projects.

³ FIRB application fees are as at 30 June 2024 and are expected to increase from 1 July 2024 in accordance with annual indexation.

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PWC200995028