

2022–2023–2024

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CAPITAL WORKS (BUILD TO RENT MISUSE TAX) BILL 2024
TREASURY LAWS AMENDMENT BILL 2024: BUILD TO RENT
DEVELOPMENTS

EXPOSURE DRAFT EXPLANATORY MATERIALS

Consultation preamble

Treasury seeks feedback on the effectiveness of this exposure draft explanatory material in explaining the policy context and operation of the proposed new law, including, but not limited to:

- how the new law is intended to operate;
- whether the background and policy context is sufficiently comprehensive to support understanding of the policy intent and outcomes of the new law;
- the use of relevant examples, illustrations or diagrams as explanatory aids; and
- any other matters affecting the readability or presentation of the explanatory material.

Feedback on these matters will assist to ensure the Explanatory Memoranda for the Bill aids the Parliament's consideration of the proposed new law and the needs of other users.

Treasury and the ATO work closely to identify aspects of new tax laws which may benefit from ATO public advice and guidance (PAG). Feedback is also sought on any aspects of the new law where ATO PAG should be considered, to support stakeholders' understanding and application of the new law. Stakeholder feedback on this question will be shared with the ATO.

Table of Contents

Glossary	iii
Chapter 1:	Build to rent developments	5

Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

Abbreviation	Definition
AMIT	Attribution managed investment trust
Bill	<i>Treasury Laws Amendment (Measures for Consultation) Bill 2024: Build to Rent Developments</i>
BTR	Build to rent
Commissioner	Commissioner of Taxation
Imposition Bill	<i>Capital Works (Build to Rent Misuse Tax) Bill 2024</i>
ITAA 1936	<i>Income Tax Assessment Act 1936</i>
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
MIT	Managed investment trust
MIT Tax Act	<i>Income Tax (Managed Investment Trust Withholding Tax) Act 2008</i>
TAA 1953	<i>Taxation Administration Act 1953</i>

Chapter 1: Build to rent developments

Table of Contents:

Outline of chapter	5
Context of amendments.....	6
Summary of new law.....	6
Comparison of key features of new law and current law.....	7
Detailed explanation of new law	7
Consequential amendments	21
Commencement, application, and transitional provisions	21

Outline of chapter

- 1.1 Schedule # to the Bill amends the ITAA 1997, TAA 1953, and ITAA 1936 to improve incentives for investors to invest in new BTR developments by:
- increasing the capital works deduction rate from 2.5 per cent to 4 per cent; and
 - reducing the final withholding tax rate on fund payments from eligible MIT investments from 30 per cent to 15 per cent.
- 1.2 Schedule # to the Bill provides that to access one or both concessions the BTR development must meet the following eligibility criteria:
- the development’s construction commenced after 7:30PM (AEST) on 9 May 2023;
 - the development consists of 50 or more residential dwellings made available for rent to the general public;
 - all dwellings in the development (and common areas that are part of the BTR development) continue to be owned together by a single entity, at any one time, for at least 15 years (although the BTR development can be sold to another single entity during the period and remain eligible for the concessions);

- dwellings in the BTR development must be offered for lease terms of at least 3 years (although a tenant can request a shorter period); and
- at least 10 per cent of the dwellings are available as affordable tenancies.

1.3 The Imposition Bill imposes a misuse tax when one or both tax concessions are claimed in circumstances where they are not available due to BTR development ineligibility.

Context of amendments

1.4 According to Australian Bureau of Statistics Census data for 2011, 2016 and 2021, there is a long-term trend of Australians renting and a decline in dwelling ownership. Incentivising construction of new BTR developments has the potential to increase housing supply at scale at a time when there is an acute shortage of new rental stock.

1.5 BTR developments are multi-unit buildings where the units, instead of being sold, are rented out. BTR is an established practice in the United States of America and the United Kingdom. BTR is still a nascent industry in Australia, meaning there is significant scope for BTR developments to contribute to increasing housing supply.

Summary of new law

1.6 Schedule # to the Bill makes amendments to the ITAA 1936, ITAA 1997 and TAA 1953.

1.7 To encourage investment and construction in BTR developments, Schedule # to the Bill:

- increases the rate of the capital works tax deduction from 2.5 per cent per year to 4 per cent per year for active BTR developments; and
- reduces the final withholding tax rate on eligible payments from managed investment trusts for active BTR developments from 30 per cent to 15 per cent.

1.8 The creation of new BTR dwellings will expand Australia's rental housing supply.

1.9 These tax benefits are only intended to apply to BTR developments that remain continuously active throughout the 15-year period. If a BTR tax concession is claimed for a particular year, and the development subsequently becomes ineligible (during the 15-year period), then the tax benefit is neutralised.

1.10 Schedule # to the Bill introduces a specific reporting mechanism to enable the Commissioner to receive information from entities participating in active BTR developments.

Comparison of key features of new law and current law

Table 1.1 Comparison of new law and current law

New law	Current law
When a MIT or AMIT derives rental income from an active BTR development, this income is subject to a final withholding tax on a foreign resident, with a concessional rate of 15 per cent.	When a MIT or AMIT derives income from an active BTR development, this income is subject to a final withholding tax on a foreign resident, with a rate of 30 per cent.
Active BTR developments are specifically subject to a 4 per cent rate of deduction for capital expenditure incurred in constructing capital works, including buildings and structural improvements.	A 2.5 per cent rate of deduction applies for capital expenditure incurred in constructing capital works, including buildings and structural improvements. Such capital works could include BTR developments.
Entities who wish to participate in active BTR developments must use a specific reporting mechanism.	No comparison.
BTR development misuse tax applies to neutralise tax concessions which were obtained prior to the BTR development ceasing to be active BTR developments.	No comparison.

Detailed explanation of new law

1.11 Schedule # to the Bill amends the ITAA 1936, ITAA 1997 and the TAA 1953 to implement the improved incentives for investors to invest in new BTR developments. All references to Schedule # refer to Schedule # to the Bill.

1.12 The Imposition Bill implements the BTR development misuse tax to prevent abuse of the system.

Active build-to-rent developments

1.13 A BTR development will be an active BTR development if it fulfils the following conditions:

- the BTR development’s construction commenced after 7:30PM (AEST) on 9 May 2023;
- the BTR development consists of 50 or more dwellings made available for rent to the general public;
- all of the dwellings in the BTR development (and common areas that are part of the development) continue to be directly owned together by a single entity, at any one time, for at least 15 years;
- dwellings in the BTR development must be offered for lease terms of at least 3 years throughout the 15-year period (although the tenant can request a shorter term); and
- at least 10 per cent of the dwellings in the BTR development must be offered as affordable tenancies throughout the 15-year period.

[Schedule #, item 5, section 43-152 of the ITAA 1997]

1.14 There are additional conditions that relate to the supply of affordable tenancies in a BTR development. These are discussed at paragraphs to below.

1.15 A BTR development will cease to be an active BTR development if it fails to meet one of these conditions during the 15-year BTR compliance period, including the conditions that relate to affordable tenancies.

[Schedule #, item 5, subsection 43-152(6) of the ITAA 1997]

Commencement of construction

1.16 For a BTR development to be an active BTR development and eligible for the concessional tax treatment, its construction must have commenced after 7:30 PM (AEST) on 9 May 2023.

[Schedule #, item 16]

Number of dwellings

1.17 The BTR development must consist of at least 50 dwellings that are made available for rent to the public.

1.18 Active BTR developments include new developments as well as alterations and structural improvements that re-purpose an existing building into BTR (for example, the conversion of a warehouse to BTR apartments).

1.19 If a new building was initially commenced as a build-to-sell development but converted to BTR during construction, it can be an active BTR development.

1.20 A BTR development can be part of a building. For example, if the BTR development represents 90 per cent of a building’s floorspace, the development proponent can claim the MIT withholding tax concession in respect of 90 per cent of the rental income attributable to that building’s entire floorspace. This 90 per cent of the entire rental income would represent the amount of

rental income derived from BTR dwellings within the building is therefore subject to the MIT withholding tax concession.

[Schedule #, item 5, subsections 43-151(1), (2) and section 43-152 of the ITAA 1997]

- 1.21 A BTR development can also consist of more than one building. For example, if there are two towers on one plot of land, and both are BTR, the two towers combined would be considered a single BTR development. In this circumstance, eligibility for the tax concessions can be met if the structures meet the eligibility criteria in aggregate. In other words, one of the structures can more than meet the eligibility criteria and another can less than meet the eligibility criteria. So long as between the structures the eligibility criteria are met, the BTR development is considered an active BTR development.
[Schedule #, item 5, paragraph 43-152(8) of the ITAA 1997]
- 1.22 ‘Dwelling’ has the same meaning as it has in section 118-115 of the ITAA 1997. At the time of circulation, this definition stated that a dwelling includes:
- a unit of accommodation that:
 - is a building or is contained in a building; and
 - consists wholly or mainly of residential accommodation; and
 - a unit of accommodation that is a caravan, houseboat, or other mobile home; and
 - any land immediately under the unit of accommodation, however, does not include any land adjacent to a building.
- 1.23 Some scenarios may arise during the 15-year period where the BTR development is no longer meeting this eligibility requirement (i.e., less than 50 dwellings either rented or available for rent). For example, some apartments may require renovation or repairs to be available for lease (e.g., fire damage to apartments). When dwellings are temporarily not being used as rentals or made available for rent because of the construction of an extension, alteration or improvement; or the making of repairs, these dwellings are deemed to be continuing to be used as rentals or available for rent.
[Schedule #, item 5, subparagraph 43-152(3)(a)(iii) of the ITAA 1997]
- 1.24 If new dwellings are added to a building which is an active BTR development, where the combined BTR development satisfies the requirements for an active BTR development, the existing BTR development expands to comprise the dwellings of the existing development and the new dwellings. The 15-year compliance period starts afresh for these dwellings, but the existing BTR development dwellings are still subject to the original 15-year compliance period.
[Schedule #, item 5, subsection 43-152(5) of the ITAA 1997]

Single entity

- 1.25 All dwellings (and common areas for the dwellings) in a BTR development must be owned by a single entity. The entity may sell to a new owner (or group of owners that invest via a single entity) and the development would still satisfy the single entity requirement so long as the dwellings (and common areas for the dwellings) in the BTR development continue to be owned as a whole by a single entity.
[Schedule #, item 5, paragraph 43-152(3)(c) of the ITAA 1997]
- 1.26 If the original entity sells the entire BTR development to another entity during the 15-year period, all dwellings in the BTR development (and common areas that are part of the BTR development) must continue to be owned by a single entity for the balance of the 15 years. This requirement ensures that the owner has control over the BTR development and is responsible for maintaining its eligibility for the MIT withholding tax concession and the accelerated capital works deduction.
- 1.27 The 15-year period commences when all dwellings under the BTR development are first made available for rent. The 15-year period does not reset if the BTR development is sold by an entity to another entity.

Minimum lease period

- 1.28 Dwellings in a BTR development must be either made available to the public to be tenanted for a lease term of at least 3 years or tenanted to tenants for lease terms of at least 3 years throughout the 15-year period.
[Schedule #, item 5, paragraph 23-152(3)(a) of the ITAA 1997]
- 1.29 This requirement does not apply where a tenant requests a shorter lease term (a tenanted dwelling in this circumstance remains a dwelling in a BTR development) or where the dwelling is temporarily not available to be tenanted to tenants for lease terms of at least 3 years as a result of repairs, construction of an extension, alteration or improvement to the dwelling or the building (in which the dwelling is located). For example, if repairs are being made to a dwelling with fire or water damage.
[Schedule #, item 5, subparagraph 23-152(3)(a)(iii) and note to subsection 23-152(3) of the ITAA 1997]

Dwelling type

- 1.30 All of the dwellings in a BTR development must be:
- residential premises (as defined in section 995-1 of the ITAA97); and
 - taxable Australian real property (as defined in section 855-20 of the ITAA97); and

- not commercial residential premises (with commercial residential premises defined in section 995-1 of the ITAA97).

1.31 To avoid doubt, dwellings in a BTR development cannot be commercial residential premises. Examples of commercial residential premises include hostels, boarding houses, hotels, motels, and inns.

[Schedule #, item 5, paragraph 23-152(3)(b) of the ITAA 1997]

Minimum affordable dwellings

1.32 At least 10 per cent of the dwellings in a BTR development must be offered as affordable dwellings throughout the 15-year period.

[Schedule #, item 5, paragraph 43-152(3)(d) of the ITAA 1997]

1.33 Dwellings will be considered affordable dwellings if the dwellings are made available for rent, or rented, at 74.9 per cent or less of comparable market rents and any requirements determined by the Minister by legislative instrument are met.

[Schedule #, item 5, paragraph 43-152(3)(d) of the ITAA 1997]

1.34 In an active BTR development, there will likely be different types of dwellings with different sizes (i.e., total floorspace) and different amenities (i.e., number of bathrooms, number of bedrooms, etc.). The owner of the BTR development must make at least one of each apartment or dwelling types (i.e., dwellings of comparable size and amenities) available as an affordable dwelling. This is to prevent a BTR owner from allocating only the lowest standard dwellings in a development as affordable dwellings (i.e., lowest total floorspace, least number of bedrooms, least number of bathrooms, etc.).

1.35 As a simplified illustrative example only, an owner of a BTR development has 100 apartments where there are 3 types of apartments (based on size and amenities). The first type of apartment has 2 apartments (that have a floorspace of 300 square metres and 3 bedrooms and 2 bathrooms). The second type of apartment has 49 apartments (that have a floorspace of 250 square metres and 2 bedrooms and 2 bathrooms). The third type of apartment has 49 apartments (that have a floorspace of 100 square metres and 1 bedroom and 1 bathroom). The owner must make at least one of each of the three types of apartments an affordable dwelling. This requirement is in addition to the requirement that the owner makes available at least 10 per cent of the dwellings as affordable dwellings (i.e. the owner must ensure at least 10 dwellings are affordable dwellings).

[Schedule #, item 5, paragraph 43-152(3)(e) of the ITAA 1997]

Minister's determination

1.36 As noted in paragraph 1.33 of this Explanatory Memorandum, any requirements determined by the Minister via a legislative instrument must be satisfied for a dwelling to be considered an affordable dwelling. These

requirements can only relate to the income of the tenant or prospective tenant.
[Schedule #, item 5, subsection 43-152(4) of the ITAA 1997]

- 1.37 This is because access to the affordable dwellings in a BTR development is intended to be subject to an eligibility criterion based on the income of the tenant or prospective tenant.
- 1.38 This delegation of legislative power is appropriate as the income requirements may need to be varied depending on the state of wages at any given time. Providing for the income requirements via legislative instrument will enable responsive management of income requirements, which adds to the integrity of the measure by ensuring that limited affordable dwellings are not provided to those with adequate means to access normal market tenancies. The legislative instrument would be subject to disallowance and sunset after no more than 10 years and will therefore be subject to appropriate parliamentary scrutiny.

Accelerated capital works deductions for active BTR developments

- 1.39 Division 43 of the ITAA 1997 allows a taxpayer to claim a deduction for capital expenditure incurred in constructing capital works, including buildings and structural improvements. The Division sets the rules for working out those deductions.
- 1.40 Division 43 allows a deduction for construction expenditure for an income year. To be eligible for the deduction, the capital works must have a construction expenditure area for which there must be a pool of construction expenditure and the taxpayer must use the taxpayer's area in a deductible way (section 43-10 of the ITAA 1997).
- 1.41 A deduction is not allowable until after construction of the capital works is completed (section 43-30 of the ITAA 1997).
- 1.42 A deduction for construction expenditure is allowed to the extent that the deduction does not exceed the amount of the undeducted construction expenditure for the construction expenditure area (section 43-15 of the ITAA 1997).
- Calculation of the undeducted construction expenditure for an active BTR development that has ceased is provided for in section 43-237 of the ITAA 1997, which is a new provision inserted by Schedule # to this Bill. See paragraphs 1.70 to 1.71 of this Explanatory Memorandum for more information.
- 1.43 Section 43-140 of the ITAA 1997 provides that to work out if the taxpayer's area is used in a deductible way during the income year, reference must be made to when the capital works started being constructed and the type of capital works.

- 1.44 Section 43-25 of the ITAA 1997 sets out the rate of deduction. Currently, the deduction is either 2.5 per cent or 4 per cent of the construction expenditure, depending on when construction started and how the area is used.
- 1.45 Post-26 February 1992 capital works (per subsection 43-25(1) of the ITAA 1997):
- If capital works on which construction started after 26 February 1992 are used in a deductible way (by reference to the Table in section 43-140) during an income year, there is a basic entitlement to a capital works deduction rate of 2.5 per cent of the construction expenditure.
- 1.46 However, capital works on which construction started after 26 February 1992 that are used in a manner consistent with the Table in section 43-145, qualifies for a capital works deduction rate of 4 per cent of the construction expenditure. This includes use of part of the area for the purposes of producing assessable income, and that part is:
- wholly or mainly used for:
 - industrial activities (as defined in section 43-150),
 - the provision of employee amenities for workers (or their immediate supervisors) carrying out industrial activities, or
 - office accommodation for the immediate supervisors of those workers; or
 - used wholly or mainly to operate a hotel, motel, or guesthouse where the buildings have at least 10 bedrooms that are for use wholly to provide short-term traveller accommodation (i.e., hotel buildings), or
 - consisting of at least 9 apartments, units or flats that are for use wholly to provide short-term traveller accommodation (i.e., apartment buildings). The 4 per cent rate is still available if the buildings also have facilities that are mainly for use in association with providing short-term traveller accommodation.
- 1.47 The amount of the deduction is calculated under section 43-210 or section 43-215 of the ITAA 1997 (depending on whether the capital works are pre-27 or post-26 February 1992 capital works).
- 1.48 The 4 per cent capital works deduction rates (as provided for in subsection 43-25(1) and section 43-145 of the ITAA 1997) now apply to active BTR developments.
- [Schedule #, item 4, section 43-145 of the ITAA 1997]***
- 1.49 The accelerated capital works concession applies during the compliance period, as well as after the compliance period has ended. It applies after the compliance period provided the taxpayer is the only entity that used the active BTR development (or any part of the active BTR development) for the purpose

of producing assessable income while it has been an active BTR development.
[Schedule #, item 4, section 43-145 of the ITAA 1997]

Reduced withholding rates for MITs and AMITs

- 1.50 A MIT is a type of trust in which members of the public collectively invest in passive income activities, including owning property.
- 1.51 An AMIT is a MIT that has elected to be subject to the AMIT regime.
- 1.52 Section 275-10 of the ITAA 1997 defines MIT by setting out the requirements for a trust to be a MIT for the purposes of Division 275 of the ITAA 1997 and Division 12 of Schedule 1 to the TAA 1953. The requirements are that:
- the trustee is an Australian resident, or the central management and control of the trust is in Australia;
 - the trust does not carry on or control an active trading business (this means that the MIT's investments must all be 'eligible investment business' (see section 102M of ITAA 1936));
 - the trust is a managed investment scheme (within the meaning of section 9 of the Corporations Act 2001);
 - the trust meets the widely held requirements (see subsections 275-20(1) and 275-25(1) of the ITAA 1997);
 - the trust meets the closely held restrictions (see subsection 275-30(1)); and
 - the trust is operated or managed by an appropriately regulated entity.
- 1.53 The first three requirements are general requirements that apply to all trusts in the same way. The last three requirements are specific requirements that apply in different ways to some trusts.
- 1.54 Section 840-805 of the ITAA 1997 provides that a foreign resident must pay income tax on certain amounts of Australian sourced net income – i.e. a 'fund payment' – of a 'withholding MIT' that the foreign resident is either paid or which they are presently entitled to. This tax is called a 'MIT withholding tax'.
- 1.55 A 'withholding MIT' is defined in section 12-383 of Schedule 1 to the TAA 1953. Broadly, a MIT or AMIT is a withholding MIT if it is a MIT in relation to the income year because of paragraph 275-10(1)(a) or subsection 274-10(2) of the ITAA 1997 and it carries out, in Australia, a substantial proportion of its investment management activities in relation to certain Australian assets, including assets situated in Australia and securities listed on an approved Australian stock exchange.
- 1.56 A 'fund payment' is a component of a payment made by the trustee of a MIT or AMIT that effectively represents a distribution of a MIT or AMIT's net income to the members of the MIT or AMIT. A fund payment specifically

excludes certain types of income such as dividend, interest or royalty income, capital gain and losses from a capital gain tax asset that is not taxable Australian property, amounts that are not from an Australian source, and deductions relating to these sources of income.

- 1.57 Section 3 of the MIT Tax Act imposes the MIT withholding tax on the fund payment part of income paid to a foreign resident member of a MIT or AMIT.
- 1.58 Section 4 of the MIT Tax Act sets out the rate of income tax imposed:
- if the entity is a resident of an information exchange country, the rate is 15 per cent for fund payments except:
 - to the extent they are, or are attributable to, fund payments from a clean building MIT (and are not attributable to non-concessional MIT income) – in which case the rate of tax imposed is 10 per cent; or
 - to the extent they are attributable to non-concessional MIT income – in which case the rate of tax imposed is 30 per cent.
 - if the entity is not a resident of an information exchange country, the rate of tax imposed is 30 per cent.
- 1.59 Withholding obligations at these same rates are imposed by section 12-385 of Schedule 1 to the TAA 1953.
- 1.60 Currently, fund payments to a foreign resident that represent rental income from a BTR development is taxed at 30 per cent as it is treated as non-concessional MIT income due to the operation of section 12-435 of Schedule 1 of the TAA 1953 which includes MIT residential housing income as non-concessional MIT income.
- 1.61 The definition of MIT residential housing income in Schedule 1 to the TAA 1953 (which is incorporated into the ITAA 1997 and the MIT Tax Act) is therefore adjusted to exclude all amounts that are attributable to a payment of rental income under a lease of a dwelling that is part of an active BTR development during the BTR compliance period for that dwelling. This income is then subject to the concessional 15 per cent rate of tax.
[Schedule #, item 10, subsection 12-450(5) of Schedule 1 to the TAA 1953]
- 1.62 Unlike the accelerated capital works concession, this concessional treatment only applies during the compliance period.
[Schedule #, item 10, paragraph 12-450(5)(b) of Schedule 1 to the TAA 1953]

Specific reporting mechanism

1.63 Entities participating in BTR developments must notify the Commissioner of events and information when required. Events that trigger the requirement to notify the Commissioner are:

- the BTR development commences to be an active BTR development (as this determines the start date of the minimum ownership/operational period and the scope of the BTR development is known with certainty);
- expansion of an active BTR development during the minimum period of ownership/operation;
- change of the direct ownership interest in an active BTR development;
- a BTR development ceases to be an active BTR development.

[Schedule #, item 5, subsection 43-153(1) of the ITAA 1997]

1.64 The notification must be given within 28 days of the trigger event. This notification must occur by way of a form approved by the Commissioner.
[Schedule #, item 5, subsection 43-153(2) of the ITAA 1997]

1.65 The entities that must notify the Commissioner of these events are:

- the owner of the development at the time immediately before the event happens;
- an entity, if for the income year in which the event happens, the entity is a trustee of a MIT and is required to report under the specific reporting provisions relating to MIT fund payments (described below).

[Schedule #, item 5, subsection 43-153(3) of the ITAA 1997]

Specific reporting for MIT fund payments

1.66 Further, a trustee of a MIT must notify the Commissioner prior to making a fund payment where all or part of that fund payment consists of rental income under a lease of a dwelling that is part of an active BTR development during the BTR compliance period for that dwelling. This supersedes existing reporting requirements under section 16-150 of Schedule 1 to the TAA 1953.
[Schedule #, items 11 and 12, subsections 16-150(1) and (4) of Schedule 1 to the TAA 1953]

1.67 This notice must be in the approved form and must be notified on or before the day provided in a determination made by the Commissioner. This determination would be made by legislative instrument. If no determination has been made, such notice must be provided on or before the day on which the amount is due to be paid. The legislative instrument would be subject to disallowance and sunset after no more than 10 years and will therefore be subject to appropriate parliamentary scrutiny. This delegation of legislative

power is appropriate as it is of a minor administrative nature.

[Schedule #, item 11, subsection 16-150(4) of Schedule 1 to the TAA 1953]

Cessation of being an active BTR development

1.68 An active BTR development will cease to be an active BTR development if any of the dwellings fail to meet an eligibility criterion during the compliance period.

[Schedule #, item 5, subsection 43-152(6) of the ITAA 1997]

Compliance period

1.69 The BTR compliance period for a dwelling of an active BTR development is 15 years beginning on:

- the day on which the development commenced being an active BTR development; or
- if a dwelling was incorporated into an active BTR development through expansion, the date on which the dwelling was incorporated into the development through expansion.

[Schedule #, item 5, subsection 43-152(7) of the ITAA 1997]

Consequences of ceasing to be an active BTR development during the compliance period

1.70 If an active BTR development ceases to be an active BTR development during the compliance period, the imposition and application of the BTR development misuse tax will apply to approximately neutralise the tax benefits obtained both through the reduced MIT withholding rates, and the accelerated capital works deduction. As discussed above, the entities participating in BTR developments must notify the Commissioner when the BTR development ceases to be an active BTR development, so the timing of the BTR development misuse tax can be determined.

1.71 If an active BTR development ceases to be an active BTR development during the compliance period, then the development is treated as having been subject to the 2.5 per cent deduction rate for the time when it had been subject to a 4 per cent deduction rate. This is to ensure the BTR development is depreciated over 40 years instead of 25.

[Schedule #, item 6, section 43-237 of the ITAA 1997]

1.72 If a person claims BTR development tax benefits after the BTR development ceased to be an active BTR development, then the Commissioner may amend these erroneous assessments, regardless of the provisions of section 170 of the ITAA 1936 relating to limitations on time for amending assessments. The modification of the time limit also applies to assessments of BTR development

misuse tax.

[Schedule #, item 1, subsection 170(10AA) of the ITAA 1936]

Example 1.1

An entity's BTR development commences being an active BTR development in 2026. The entity claims the accelerated capital works deduction from 2026 to 2035.

In 2031, that entity rents a dwelling for a one-year term, contrary to paragraph 43-152(3)(a) of the ITAA 1997. This occurs during the 15-year compliance period, and the BTR development ceases to be an active BTR development through the operation of subsection 43-152(6) of the ITAA 1997. The entity only notifies the Commissioner of this in 2035.

The BTR development misuse tax will apply to the entity for the period while the BTR development was an active BTR development (i.e., from 2026 to 2031). Under subsection 170(10AA) of the ITAA 1936, the Commissioner may amend the entity's assessments for the period after the BTR development ceased to be an active BTR development, clawing back any tax benefits wrongfully claimed during that time (i.e., between 2031 and 2035).

The build to rent development misuse tax

- 1.73 The BTR development misuse tax is a key integrity feature of the BTR scheme. The BTR misuse tax approximately neutralises tax benefits claimed by entities where the BTR development ceases to be an active BTR development during the 15-year BTR compliance period.
[Schedule #, item 7, sections 44-1 and 44-5 of the ITAA 1997]
- 1.74 Schedule # to the Bill inserts new Division 44 into the ITAA 1997, which together with the Imposition Bill, imposes BTR development misuse tax for an income year.
[Schedule #, item 7, section 44-15 of the ITAA 1997, and section 4 of the Imposition Bill]
- 1.75 This tax is imposed under section 4 of the Imposition Bill. It is calculated based on the sum of an entity's BTR capital works deduction amounts and that entity's BTR withholding amounts. The sum of these two amounts is the BTR misuse amount. An entity is not liable to pay BTR development misuse tax for a year if that person has no BTR misuse amount for the year.
[Schedule #, item 7, sections 44-15 and 44-20 of the ITAA 1997, and section 5 of the Imposition Bill]

- 1.76 The BTR misuse amount is the sum of the BTR capital works deduction amount and 10 times the BTR withholding amount.
[Schedule #, item 7, section 44-20 of the ITAA 1997]
- 1.77 This amount is subject to a tax rate of 1.5 per cent. The total amount of tax is roughly equal to the tax benefit gained, increased by 8 per cent, which represents interest and costs associated with the tax shortfall.
[Schedule #, item 7, sections 44-25 and 44-30 of the ITAA 1997, and section 5 of the Imposition Bill]

BTR capital works deduction amount

- 1.78 The method statement in section 44-25 instructs how to calculate a BTR capital works deduction amount. This amount is roughly equal to the accelerated capital works tax benefit plus 8 per cent. This process is summarised below.
- Step 1: identify each income year in which (at any time during that year) the BTR development was an active BTR development.
 - Step 2: for each of these years, identify the portion of construction expenditure attributable to the active BTR part that was used in the 4 per cent manner, and multiply that by the proportion of days of the income year that the person owned, was lessee of, or was holder of, the active BTR part.
 - Step 3: reduce the amount previously calculated by the extent to which the active BTR part was used only partly for the purpose of producing assessable income in the year. This only applies if part of the income from the active build to rent part of the construction expenditure area is exempt income; part of the active build to rent part of the construction expenditure area was not used for the purpose of producing assessable income or was not available for that use; or the active build to rent part of the construction expenditure area was not used for such a purpose during a part of the days used period.
 - Step 4: for each year, add up the amounts calculated in Step 3 for each construction expenditure area.
 - Step 5: add up the amounts worked out under Step 4 for each year.
 - Step 6: Multiply the Step 5 amount by the applicable tax rate. The applicable tax rate is:
 - for a company (other than in the capacity as trustee): the corporate tax rate for the year in which the BTR development ceases to be an active BTR development (the ‘cessation year’);
 - in any other case: the maximum rate specified in the table in Part I of Schedule 1 to the *Income Tax Rates Act 1986* for the cessation year. At present, this rate is 45 per cent.

- The BTR capital works deduction amount is the Step 6 amount multiplied by 1.08.

BTR withholding amount

1.79 The method statement at section 44-30 instructs how to calculate a BTR withholding amount. The BTR withholding amount is equal to 1.08 times the sum, over each year in which the BTR development was an active BTR development, of the total sum of fund payments made where:

- the BTR development was an active BTR development,
- the fund payments were subject to the 15 per cent rate of tax, and
- those payments were attributable to rental income under a lease of a dwelling that is part of an active BTR development.

[Schedule #, item 7, section 44-30 of the ITAA 1997]

Power to make an assessment

1.80 The amount of BTR development misuse tax is defined as an assessable amount. This enables the Commissioner to make an assessment for BTR development misuse tax.

[Schedule #, item 13, paragraph 155-5(2)(o) of Schedule 1 to the TAA 1953]

1.81 However, a person cannot force the Commissioner to make an assessment of the BTR development misuse tax. This is to minimise administration requirements for the Commissioner because the BTR development misuse tax is used to roughly neutralise tax benefits incorrectly claimed and will not apply to all taxpayers.

[Schedule #, item 14, paragraph 155-30(3)(e) of Schedule 1 to the TAA 1953]

When is tax payable

1.82 The BTR development misuse tax is due and payable at the end of 21 days after the Commissioner gives a person notice of assessment of the amount of BTR development misuse tax payable.

[Schedule #, item 7, section 44-40 of the ITAA 1997]

1.83 If the Commissioner amends a person's assessment, the extra assessed amount of BTR development misuse tax is due and payable at the end of 21 days after the Commissioner gives the person notice of the amended assessment.

[Schedule #, item 7, section 44-45 of the ITAA 1997]

General interest charge

1.84 Similar to most taxes (which are listed in subsection 8AAB(4) of the TAA 1953), the general interest charge applies, calculated daily based for each

day on the unpaid amount, starting on the day the assessed BTR development misuse tax was due to be paid, and ending at the end of the last day where any of the following remains unpaid:

- the assessed BTR development misuse tax;
- general interest charge on such assessed BTR development misuse tax.

[Schedule #, items 7 and 9, section 44-50 of the ITAA 1997 and subsection 8AAB(4) of the TAA 1953]

1.85 The amount of general interest charge is worked out in accordance with Part IIA of the TAA 1953.

[Schedule #, item 7, note to section 44-50 of the ITAA 1997]

No deduction available for BTR development misuse tax

1.86 No deduction is available for an amount of BTR development misuse tax that an entity pays.

[Schedule #, items 2 and 3, sections 12-5 and 26-99C of the ITAA 1997]

Consequential amendments

1.87 References to terms newly defined for these amendments are included in the Dictionary of the ITAA 1997.

[Schedule #, item 8, subsection 995-1(1) of the ITAA 1997]

1.88 An amendment is made to the TAA 1953 to identify that the build to rent development misuse tax is a tax-related liability.

[Schedule #, item 15, subsection 250(2) of the TAA 1953]

Commencement, application, and transitional provisions

1.89 The Imposition Bill commences on the first 1 January, 1 April, 1 July or 1 April to occur after the day the Imposition Bill receives Royal Assent.

[Section 2 of the Imposition Bill]

1.90 Schedule # to the Bill commences at the same time as the Imposition Bill. However, the provisions of the Bill do not commence at all if the Imposition Bill does not commence.

[Section 2 of the Bill]

1.91 The amendments in Schedule # to the Bill apply to capital works that begun after 7:30 pm, by legal time in the Australian Capital Territory, on 9 May 2023.

