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Director
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Dear Director

Deloitte submissions
Build-to-rent tax concessions

We write in response to the request for submissions in respect of the exposure draft legislation and explanatory materials issued in April 2024 in relation to implementing the Government's proposed Build-to-rent tax concessions (**Exposure Draft Materials**).

We welcome the development of income tax concessions for the build-to-rent (**BTR**) sector following the 2023 Federal Budget announcement. The comments in our submission are made in good faith with the intention of identifying some of the key issues in applying the Exposure Draft to give effect to the policy objectives (as we understand them), seeking to avoid unintended consequences, and help to facilitate the administration of the law and compliance with the law.

As set out in the table below, we have provided submissions across the following key areas:

- The limitations on the concessions proposed (both in terms of period and types of income it extends to) as compared to the current treatment of affordable housing, and the potential to make BTR assets unattractive once the initial 15-year BTR concession period has expired;
- The potentially damaging impact of the proposed BTR misuse tax and the potential to put BTR assets in a worse position than under the current law; and
- Technical changes that would better ensure outcomes consistent with policy.

Limitations on the concessions

Issue	Suggested change	Justification
15-year period to access the 15% managed investment trust (**MIT**) withholding tax rate	15% MIT withholding tax rate should apply for an unlimited period where underlying requirements continue to be met.	• No reason to distinguish between affordable and active BTR projects • Will create significant disincentive to invest in projects towards the end of the 15 year concession

Issue	Suggested change	Justification
		• Where property only held for 15 years, BTR will offer a lesser solution than where the investment continues to benefit from key tax incentives
No extension of 15% MIT withholding tax rate to capital gains	Allow for 15% MIT withholding tax on capital gains on disposal of active BTR developments / membership interests in entities holding active BTR developments	• MIT rules already require property to be held primarily for purposes of deriving rent so arguably no additional holding requirement is necessary • Existing affordable housing rules allow for capital gains tax (**CGT**) concession once property held for 10 years
'One out all out' rule	The concessions should continue to apply where, after excluding non-compliant dwellings, there remains 50+ dwellings that qualify. BTR development misuse tax should only apply to the non-compliant dwellings in this case (see below).	Consistent with the policy, the concessions should continue to be available for an active BTR development consisting of the remaining 50+ compliant dwellings. If all dwellings cease to qualify this removes any incentive to continue to offer the remaining 50+ dwellings as an active BTR development where the remaining dwellings would otherwise qualify.
Application to existing projects	The concessions should extend to projects that have already commenced construction as at 9 May 2023.	This should better allow for a level playing field between new and existing BTR and should minimise market distortion.
Application to refurbished or repurposed assets	Clarify that the measures apply to assets where refurbishment or repurposing work is carried out on or after 9 May 2023, regardless of when the structural works etc. commenced.	The EM makes it clear that refurbished or repurposed assets should qualify however it is not clear how this would work if the measures only apply to capital works begun on or after 9 May 2023. This will otherwise significantly impact repurposed projects, which are an important aspect of the housing solution provided by BTR.

BTR misuse tax

Issue	Suggested change	Justification
Imposition of the tax	The BTR development misuse tax should be removed or substantially redesigned. At a minimum: • The tax should be proportionate based on the extent of the breach (i.e. if there are more than 50	The current design requires an investor to conduct up to 15 years of due diligence to assess whether a minor breach may result in a highly material tax charge (i.e. clawback of all concessions claimed, plus 8%).

Issue	Suggested change	Justification
	dwellings remaining after taking into account a failure to qualify in respect of certain dwellings, the tax should only apply to the extent of the breach); and • The clawback should be limited to the normal four-year amendment period.	
Use of trustee taxation rate where BTR development misuse tax applies	Tax on investors should be levied at their respective marginal rates (for non-MITs) or at the 30% MIT withholding rate (for MITs). This could be achieved by including an additional amount in assessable income, rather than imposing a separate misuse tax on the trustee.	MIT investors should be taxed at a maximum of 30%. This is the rate that applies to residential housing income in the absence of the concession.
Gross up rate	Gross up rate should be linked to the average across the relevant period of interest rates implemented in other sections of tax law.	The current 8% flat rate could diverge significantly from the prevailing interest rates in the specific period to which the BTR misuse tax applies.
No cost-base uplift where BTR development misuse tax applies	If the BTR development misuse tax proceeds and the accelerated 1.5% capital works deduction is reversed, cost base should be reinstated to ensure that the 2.5% capital works rate is available on all qualifying capital works expenditure.	Double tax would otherwise arise, i.e. the "clawback" puts the taxpayer in a worse position than if the accelerated capital works claims had not been made

Other technical amendments

Issue	Suggested change	Justification
Single entity ownership requirement	Rather than requiring a single asset owning entity, the rules should also allow properties to be owned as tenants-in-common provided there is a single asset manager.	This approach is consistent with a number of State-based concessions and should not give rise to inappropriate access to the concessions.
Loss of 4% capital works rate after 15 years where there has been a transfer of the asset	The ability to apply the 4% rate should be based on the BTR compliance period being met and should not be impacted by a transfer of the asset during that period to another entity.	If a transfer from one single entity owner to another is permitted while continuing to access the concessions during the BTR compliance period, the concession should continue to be available for the new owner once that period ends. Otherwise this will create a further disincentive to transact these assets close to the end of the BTR compliance period.
No allowance for minor breaches or temporary circumstances outside trustee's control that lead	Similar to MIT rules, temporary circumstances outside the trustee's control should not cause BTR misuse tax to arise or impact the availability of the tax concessions. Examples would	This concession should ensure that the significant penalties for non-compliance do not arise where a breach is temporary and outside the trustee's control.

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to certain conditions not being met	include a tenant ceasing to meet income requirements (as notified to the owner at the end of a period). Minor breaches should also be permitted where rectified within a short period after discovery.	
Notification requirements	Requirements to notify the Commissioner of events during the BTR compliance period should be extended beyond 28 days.	To allow sufficient time for the owner to tend to administrative requirements following the occurrence of a relevant event without being unduly penalised.

Separate to the above, while we welcome changes to the income tax law, we note that these changes would be more effective if complemented with GST reform. In particular, we submit that to make the law more fit-for-purpose for BTR projects it would be of great benefit to implement the following:

- A specific federal definition of BTR (noting the inconsistency in State definitions and the existing affordable accommodation; commercial residential premises; residential premises definitions already in the A New Tax System (Goods and Services Tax) Act 1999 (the GST Act));

- Consideration of an extension of the operation of Division 87 of the GST Act to attract the concessional GST output tax rate of 5.5% with accompanying recovery of input tax credits for BTR projects that meet the federal definition of BTR; and

- In the alternative, consideration of extension of the operation of Division 129 of the GST Act to extend the change of use adjustment provisions to allow for an up-front claim of input tax credits during Land Acquisition, Design and Construction phases of eligible BTR and repay the input tax credits through the Operational and Rental phases of eligible BTR projects (potentially subject to a version of the 'misuse' rules for GST also).

We would be happy to further discuss any of these matters, and in the first instance, please contact David Watkins on 0498 344 000.

Yours sincerely

David Watkins
Partner, Tax & Legal