

LI 2024/28 - Explanatory statement -

EXPLANATORY STATEMENT

Issued by authority of the Treasurer

Income Taxation Assessment Act 1997

Income Tax Assessment (Build to Rent Developments) Determination 2024

Section 43-153 of the *Income Taxation Assessment Act 1997* (the Act) outlines the requirements for a build to rent (BTR) development to be an active BTR development and eligible for tax concessions made available under the Act by virtue of Schedule 1 to the *Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Act 2024* (the Amendment Act). Among other requirements, the number of dwellings in the BTR development that are ‘affordable dwellings’ must be greater than or equal to 10 per cent of the number of total dwellings in the BTR development (subparagraph 43-153(1)(d)(i) of the Act).

Subsection 43-153(2) of the Act provides that a dwelling is an ‘affordable dwelling’ if the requirements determined under subsection 43-152(3) of the Act in relation to the dwelling are met. Subsection 43-153(3) of the Act provides that the Minister may, by legislative instrument, determine the requirements relating to a dwelling.

The purpose of the *Income Tax Assessment (Build to Rent Developments) Determination 2024* (the Instrument) is to determine requirements for a dwelling to be an affordable dwelling for the purposes of the BTR development receiving the tax concession. The Instrument requires:

- the rent payable under the lease for the dwelling must be 74.9 per cent or less of the market value of the right to occupy the dwelling under that lease (i.e. the rent otherwise payable for that dwelling in an open market); and
- the dwelling must be tenanted, or made available to be tenanted, only to a tenant or prospective tenant that satisfies the applicable income threshold.

Specifically for the second requirement, for a tenant or a prospective tenant to be eligible to rent an ‘affordable dwelling’ in an active BTR development, the taxable income of the tenant (or combined taxable incomes of the tenants, where relevant) for the most recent income year ending before the dwelling’s most recent assessing event for which the taxpayer has received a notice of assessment must be less than or equal to the following income thresholds, as applicable:

- if the tenant is a single adult: 120 per cent of average annual earnings; or
- if the tenants include two or more adults, but no dependent children of the adults reside in the dwelling: 130 per cent of average annual earnings; or
- if the tenants include one or more adults and one or more of their dependent children reside in the dwelling: 140 per cent of average annual earnings.

In this context, a tenant is an individual residing in the dwelling – it does not matter whether the individual’s name is on the lease.

Average annual earnings refers to the most recent figure for ‘full time adult average weekly ordinary time earnings - original’ as published by the Australian Statistician multiplied by 52. At the time this Instrument was made, the current release of the ‘full time adult average weekly ordinary time earnings - original’ figure could be found on the ABS website at <http://www.abs.gov.au/> (see <https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/average-weekly-earnings-australia/latest-release> for current release). This figure is typically released twice annually.

Assessing events for a dwelling are entry into the lease, renewal of the lease, and changes to household composition that could affect income or the applicable threshold (for example, a single adult household becoming a household of two or more adults) after the lease is entered into or renewed.

The requirement for an eligible BTR development to consist of at least 10 per cent affordable dwellings and the requirements for a dwelling to be an affordable dwelling imposed through this Instrument are intended to ensure that low- and middle-income households can access the long tenure leases available in active BTR developments. They are also intended to improve housing affordability in well-located areas for these groups as it is anticipated that active BTR developments will be located in areas that are proximate to employment opportunities, and public and private services such as schools and hospitals. Further, it is intended that the affordable dwellings made available in active BTR developments will support increasing the supply of affordable dwellings in Australia which, in turn, is expected to moderate increasing rents.

Consultation on an exposure draft Instrument and the accompanying Explanatory Statement was undertaken from 11 to 13 December 2024 with the Property Council of Australia, the Community Housing Industry Association, National Shelter, and the Urban Development Institute of Australia.

The Instrument is subject to disallowance under section 42 of the *Legislation Act 2003* (Legislation Act). The Instrument is also subject to the sunseting regime under section 50 of that Act.

The Instrument is a legislative instrument for the purposes of the Legislation Act.

The Instrument commences on the later of the day after the instrument is registered on the Federal Register of Legislation and the day Schedule 1 to the Amendment Act commences (which is 1 January 2025).

Details of the Instrument are set out in [Attachment A](#).

**Details of the Income Tax Assessment (Build to Rent Developments)
Determination 2024**

PART 1 – PRELIMINARY

Section 1 – Name

This section provides that the name of the instrument is the *Income Tax Assessment (Build to Rent Developments) Determination 2024* (the Instrument).

Legislative references in this attachment are to the Instrument unless otherwise stated.

Section 2 – Commencement

The Instrument commences on the later of the day after the instrument is registered on the Federal Register of Legislation and 1 January 2025 (the day Schedule 1 to the *Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Act 2024* (the Amendment Act) commences).

Section 3 – Authority

The Instrument is made under the *Income Taxation Assessment Act 1997* (the Act).

As explained in the note under the section, subsection 45-153(3) of the Act provides that the Minister, must, be legislative instrument, determine requirements relating to dwellings for the purposes of the definition of “affordable dwelling”.

Section 4 – Definitions

Section 4 defines key terms used in the instrument.

It defines ‘assessing event’, the definition of which is discussed in the context of the explanation of section 5.

It also provides that:

- ‘average annual earnings’ means the amount of ‘full time adult average weekly ordinary time earnings (original) for the most recent period for which an amount has been published by the Australian Statistician, multiplied by 52. At the time this Instrument was made, the current release of the ‘full time adult average weekly ordinary time earnings - original’ figure could be found on the Australian Bureau of Statistics’ website at <http://www.abs.gov.au/> (see <https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/average-weekly-earnings-australia/latest-release> for current release). This figure is typically released for the May and November reference periods every year;
- an individual is a ‘dependent child’ of a second individual (the adult) if:
 - the adult is the individual’s parent (within the meaning of the Act); and

- either:
 - : the individual is a dependent child of the adult within the meaning of subsections 5(2) or (4) of the *Social Security Act 1991*; or
 - : the individual is in receipt of a disability support pension, within the meaning of the *Social Security Act 1991*, and lives with the adult; and
- the Act means the *Income Tax Assessment Act 1997*.

PART 2 – Build to rent developments

Section 5 – Requirements for affordable dwellings

Section 5 sets out the two requirements the Treasurer has determined under subsection 43-153(3) of the Act as the requirements for a dwelling to be an ‘affordable dwelling’ under subsection 43-152(2) of the Act.

Requirements relating to the rent payable under the lease for the affordable dwelling

Paragraph 5(a) sets out the first requirement for a dwelling to be an affordable dwelling, which is that the rent payable under the lease for the dwelling must be 74.9 per cent or less of the market value of the right to occupy the dwelling under that lease. Market value (within the meaning of the Act) is affected by Subdivision 960-S of the Act, where relevant.

For the purposes of determining what is the market value of the right to occupy the dwelling under that lease, regard must be had to the rent payable for a comparable dwelling. A comparable dwelling should be comparable to the affordable dwelling in terms of:

- general physical condition, including the number of rooms, floor area and the standard of the facilities available (for example, heating, cooling, cooking, etc.);
- the existence and condition of inclusions both in the dwelling (such as carpets, drapes, blinds, etc.) and also in the development (such as a gym, pool, etc) taking into account any fees or costs; and
- location and setting (for example, whether the dwelling is in an inner or outer suburb of a city or regional area, how far it is located from community amenities, whether it is affected by industrial noise and pollution, etc).

The onus is on the taxpayer to demonstrate that the rent payable under the lease is 74.9 per cent or less of the market value of the right to occupy the dwelling under that lease. This will require a valuation exercise similar to that undertaken by charities and certain other entities under Subdivision 38-G of the *A New Tax System (Goods and Services Tax) Act 1999* having regard to the factors discussed above.

Requirements relating to the income of the tenant or prospective tenant

Paragraph 5(b) sets out the second requirement for a dwelling to be an affordable dwelling, which is that a dwelling be tenanted, or available to be tenanted, only if the applicable income threshold is satisfied. Different income thresholds apply to:

- an adult living alone (single adult);
- two or more adults living together (two or more adults, no dependent children); or
- one or more adults living with one or more dependent children.

Specifically, the adult's taxable income (for a single adult, with or without dependent children) or the adults' combined taxable incomes (in the other cases) for the most recent income year that ended before the dwelling's most recent assessing event and for which the taxpayer has a notice of assessment must be less than or equal to the following income thresholds, as applicable:

- single adult: 120 per cent of average annual earnings;
- two or more adults, no dependent children: 130 per cent of average annual earnings;
- one adult with one or more dependent children: 140 per cent of average annual earnings; or
- two or more adults with one or more dependent children: 140 per cent of average annual earnings.

The tenant or prospective tenant's taxable income or the combined taxable incomes of the tenants or prospective tenants must not exceed the applicable income threshold after each assessing event. In this context, a tenant is an individual residing in the dwelling – it does not matter whether the individual's name is on the lease.

These assessment points are intended to ensure that affordable dwellings made available to low-income and middle-income households. The following are 'assessing events' for a dwelling:

- entry into the lease for the dwelling;
- renewal of the lease for the dwelling;
- after the lease is entered into or renewed, one or more of the following occurs:
 - an adult individual moves in or out of the dwelling;
 - there are no longer any dependent children of a tenant occupying the dwelling (where dependent children of an adult individual occupying the dwelling previously also occupied the dwelling).

Examples of assessing events that involve the owner of the dwelling being notified of specific changes in household composition (as described above) include, but are not limited to:

- where an adult was living alone in the dwelling and another adult moves in (in this scenario the adults' combined taxable incomes for the income year before the notification must be less than 130 per cent of average annual earnings);
- where an adult was living alone in the dwelling and an adult and a dependent child moves in (in this scenario, the assessing event is the adult moving in and the adults' combined taxable incomes for the income year before the notification must be less than 140 per cent of average annual earnings).
- where two adults were living together in the dwelling and one adult moves out and no other adults move in (in this scenario the remaining adult's taxable income for the income year before the notification must be less than 120 per cent of average annual earnings);
- where two adults were living together with a dependent child in the dwelling and one adult moves out, another adult moves in, and the dependent child continues to live in the affordable dwelling (in this scenario the combined taxable incomes (for the remaining adult and the adult moving into dwelling) for the income year before the notification is assessed must be less than 140 per cent of average annual earnings); and
- where an adult was living in the dwelling with two dependent children and both dependent children moved out (in this scenario the adult's taxable income for the income year before the notification must be less than 120 per cent of average annual earnings).