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TAX

Draft Land Tax (Miscellaneous) Amendment Bill 2019

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On 10 September 2019 the South Australian Government released the draft *Land Tax (Miscellaneous) Amendment Bill 2019* for public consultation. A copy of the draft Bill can be found here: <https://yoursay.sa.gov.au/decisions/land-tax-reform/about>

The draft Bill contains the proposed new legislation to implement the changes announced in the State Budget to introduce new aggregation rules to target, amongst other things, perceived tax avoidance or minimisation schemes involving the use of trusts to hold land.

The draft legislation is based heavily on the Victorian model, with trustees being taxed at higher rates in respect of land held in trust with trustees, in some instances, able to nominate beneficiaries who will also be assessed in respect of their share in the land, subject to a rebate for the land tax paid by the trustee.

A summary of the most significant aspects of the draft legislation is set out below.

Repeal of Sections

1. The existing aggregation principle, which operates to only aggregate land held by the same taxpayers and, where land is held in trust, to aggregate land only where it is held in trust for the same beneficiaries, will be repealed. So too will the existing “minority interest” provisions in s13A of the *Land Tax Act 1936* (SA). Which operate to allow the Commissioner to disregard the interest of any person that was less than 50% if the Commissioner determines that it was created for a purpose (which need not be the sole or

dominant purpose) of reducing land tax in respect of that land or any other piece of land.

Principal Place of Residence Exemption

2. The existing minority interest provisions will be reinstated in a modified form applicable only to interests held by natural persons where that interest would otherwise enable the person to claim the principal place of residence land tax exemption.
3. In essence, the provisions will allow the Commissioner to disregard the interest of a natural person who would otherwise be entitled to the principal place of residence exemption where that person has an interest of:
 - 3.1. 5% or less unless the Commissioner is satisfied that the interest was created solely for a purpose, or entirely for purposes, related to reducing the amount of land tax in respect of that land or any other piece of land; or
 - 3.2. More than 5% but less than 50% if the Commissioner forms the opinion that the interest was created for a purpose (which need not be the sole or dominant purpose) of reducing land tax in respect of that land or any other piece of land.
4. The effect is that the Commissioner may deny the principal place of residence exemption for that land where he determines that the interest of the resident has been created for the purpose of reducing land tax.

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Jointly held land

5. Where land is owned by 2 or more persons jointly, those persons will be jointly assessed on the land separately to any other land owned by any of those persons alone or with other persons.
6. In addition to this, each of the owners will be assessed on their proportionate interest in the land, which will be aggregated with the value of any other land (or interest in land) that the person owns, and will be entitled to rebate against this equal to a proportion of the land tax paid under the joint assessment.
7. While this offset may, on the face of it, appear to provide an equitable outcome - that it does not result in double taxation in respect of the land - the assessment of each individual owner's interest in the land and the aggregation of that interest with all other interests in land held by the owner can have a significant impact on the amount of land tax paid by that owner.

Community and Strata titled land

8. Where land is divided by a community plan, common property will either be assessed as part of a community lot where the use of the common property is reasonably incidental to the use of that lot or otherwise to the community corporation.
9. Where land is divided by a strata plan, no land tax will be assessed in respect of the common property.

Land held in trust

10. Where land is held in trust, the trustee will be assessed on all the land held in the trust as if that land was the only land owned by the trustee. A separate rates schedule will apply for these purposes with the effect that the land tax paid by a trustee will be higher than other taxpayers. This is achieved by lowering the tax free threshold for trust land to \$25,000, and imposing a higher rate scale, with rates of \$1.00, \$2.15 and \$2.40 for every \$100 value up to set thresholds as opposed to rates of \$1.00, \$1.65 and \$2.40 applicable to other taxpayers. Where the trust is a discretionary trust, there will be some grandfathering (as explained further below) for land held by the trust as at the date that the Bill is introduced to the House of Assembly.

Fixed trusts and Unit trusts

11. For fixed trusts and unit trusts, the new provisions

contain nomination procedures whereby the trustee may notify the Commissioner of the beneficiary (or beneficiaries) for whom the land is held. That beneficiary (or those beneficiaries) will then be assessed on their interest in the land in addition to any other land (or interests in land) that the beneficiary owns and is entitled to a rebate for a proportional share of the land tax paid by the trustee.

Discretionary trusts

12. Where the trust is a discretionary trust, the provisions operate differently in respect of trusts in existence and holding land on the day that the Bill gets introduced into the House of Assembly (pre-existing trust) and trusts either not in existence on that day or that do not hold land on that day.

12.1. Where a trust is a pre-existing trust:

- 12.1.1. the trustee of the trust can nominate a single beneficiary in respect of the trust. This nomination must be made on or before 30 June 2020 and will only apply to the land in the trust that was held on the day that the Bill gets introduced into the House of Assembly (**prescribed day**). The nomination does not apply to land acquired after that day;
- 12.1.2. provided the trustee has made a valid beneficiary nomination, the trustee of the trust will be assessed in respect of the land held by the trust on the prescribed day (**pre-existing land**) at the same rates as other taxpayers (i.e. not at the higher trustee rates). If the trustee fails to make a valid beneficiary nomination, all land held by the trust including pre-existing land will be taxed at the higher trustee rates;
- 12.1.3. where a valid beneficiary nomination has been made, the beneficiary nominated will also be assessed (in addition to the trustee) in respect of the pre-existing land with the value of the beneficiary's interest in that land being aggregated with the value of other land (or interests in land)

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held by that beneficiary. To avoid double taxation, the beneficiary will be entitled to a rebate for the land tax paid in respect of the pre-existing land by the trustee;

- 12.1.4. if the pre-existing trust also owns land acquired after the prescribed day, that land will be assessed to the trustee at the higher trustee rates and is not assessed to the nominated beneficiary;
- 12.1.5. if the pre-existing land constitutes the principal place of residence of the nominated beneficiary and would be exempt from land tax if owned by the nominated beneficiary instead of the trust, the beneficiary is deemed to be the owner in respect of the land in place of the trustee thereby allowing the principal place of residence exemption to apply;
- 12.1.6. if land held in the trust is the principal place of residence of the trustee, the principal place of residence exemption can apply to the land.

12.2. Where the trust is not a pre-existing trust:

- 12.2.1. the trustee is assessed on the land held in the trust at the higher trustee rates;
- 12.2.2. the trustee has no ability to nominate a beneficiary, meaning that the trustee is the only taxpayer who bears tax on the trust land.

Nominations

13. The trustee can revoke a nomination at any time, however once revoked the trustee is precluded from making any further nomination in respect of trust.
14. Where beneficiaries under the fixed trust or unit holders under the unit trust change, the trustee is required to notify the Commissioner of these changes within 1 month of the change occurring. This is not considered a revocation of the previous nomination.

15. In respect of nominations made by discretionary trusts with pre-existing land:

- 15.1. the nominated beneficiary must be a natural person who is a potential beneficiary under the trust;
- 15.2. the beneficiary must be over 18 on the prescribed day and must acknowledge their nomination by way of a statutory declaration. There is no requirement that they be an Australian resident;
- 15.3. if the nominated beneficiary dies or becomes incapacitated, the trustee must notify the Commissioner and can nominate a different beneficiary;
- 15.4. the trustee can revoke a nomination, however once revoked the trustee is not able to make any further nomination in respect of that trust.

Land held in related corporations

16. The draft legislation contains provisions for grouping corporations that are related corporations.

17. Corporations will be related corporations if:

- 17.1. one of the corporations:
 - 17.1.1. Controls the composition of the board of the other corporation; or
 - 17.1.2. Controls, or has the ability to control, more than 50% of the maximum number of votes able to be cast at a general meeting of the other corporation; or
 - 17.1.3. Holds more than 50% of the issued share capital of the other corporation (excluding shares capital that does not carry any right to participate beyond a specified amount in the distribution of either profits or capital); or

17.2. the same person has, or the same persons together have, a controlling interest (explained further below) in each of the corporations; or

17.3. all of the following are met:

- 17.3.1. more than 50% of the share capital in one of the corporations (corporation 1) is held by the other corporation (corporation 2) together with shareholders of corporation 2;
 - 17.3.2. the shareholders of Corporation 2 also hold shares in Corporation 1;
 - 17.3.3. the percentage of share capital in Corporation 1 held by the shareholders of Corporation 2 is at least equal to the difference between 50% and the percentage of shares held by Corporation 1 in Corporation 2; or
 - 17.4. a chain of related corporations can be traced through the above provisions.
18. A person or set of persons has a controlling interest in a corporation if that person or those persons together:
- 18.1. Can control the composition of the board of the corporation; or
 - 18.2. Can cast or control the casting of more than 50% of the maximum number of votes able to be cast at a general meeting of the corporation; or
 - 18.3. Hold more than 50% of the issued capital of the corporation (excluding shares capital that does not carry any right to participate beyond a specified amount in the distribution of either profits or capital).
19. Where related corporations own land, those land holdings will be aggregated and assessed as one joint holding. That assessment may be issued to the corporations jointly, or to any one or more of the corporations.
20. Each of the related corporations is not also assessed separately in respect of its land.

Exclusions

21. The higher trustee rates will not apply to trusts that are “excluded trusts”, which is defined to include (amongst others) charitable trusts, special disability trusts, public unit trust schemes, complying superannuation funds and trusts established solely

for the purpose of a non-recourse borrowing arrangement that complies with s67 of the *Superannuation Industry (Supervision) Act 1993*.

Practical impact

22. Undoubtedly the biggest impact of the changes is in relation to trusts.
23. For people that currently hold land in a discretionary trust or that acquire land in a discretionary trust before the Bill is introduced to the House of Assembly, the grandfathering of the rates in respect of this land means that the impact is limited to the increase in land tax that may arise as a result of the aggregation of the trust land with the other land held in the name of the nominated beneficiary. This is demonstrated further in Examples 1 and 2 below.
24. For any land that is acquired in a discretionary trust after the Bill is introduced to the House of Assembly, however, the new provisions will effectively result in a surcharge being paid in respect of the land simply because of the mode of holding via trust. This is demonstrated further in Example 3 below.
25. It is worth noting, however, that the new provisions do not aggregate land held in different trusts, and therefore in situations where land held in different trusts may otherwise have been aggregated under the existing provisions, the new rules may have less of an impact on the tax assessed, but only if the land is pre-existing land, each of the trusts nominate a different beneficiary, and the beneficiaries nominated do not hold other land which will then be aggregated with the trust land.
26. However, the impact where persons hold land jointly and the grouping of land held by related corporations should not be overlooked, as demonstrated by Example 4 below.

Example 1 – pre-existing land, no other land

27. The Jones Family Trust currently holds land with a site value of \$600,000. The trustee of the trust nominates Mr Jones as the beneficiary in respect of the trust. Mr Jones owns no other land in his own name.
28. Under the existing provisions, the trustee would pay \$1,155 land tax.
29. Applying the new provisions but using the current thresholds and rates (as the new thresholds are currently unknown), the amount paid by the trustee

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would not change, given that the land is pre-existing land and a valid beneficiary nomination has been made in respect of the trust (and therefore the non-trustee rates will apply).

30. In addition, Mr Jones would be assessed on the land. As Mr Jones does not own any other land, the land tax payable by him in respect of the land would be the same as that paid by the trustee (as Mr Jones and the trustee will be subject to the same rate schedule). As Mr Jones is entitled to a rebate for the land tax paid by the trustee, this would reduce his liability down to nil.

Example 2 – pre-existing land, multiple land holdings

31. Assume instead that, in addition to the Jones Family Trust, Mr Jones is also the nominated beneficiary of the Jones Investment Trust, which holds land with a site value of \$1.5M, and he holds land in his own name with a site value of \$300,000.
32. Applying the existing provisions (using the current thresholds and rates and assuming that the trust holdings would not have been aggregated under the existing provisions), the land tax assessments would be:
- 32.1. Trustee of the Jones Family Trust - \$1,155
 - 32.2. Trustee of the Jones Investment Trust - \$22,479
 - 32.3. Mr Jones – nil (site value is under the tax free threshold)

The total land tax liability would therefore be \$23,634.

33. Applying the methodology under the new provisions (but applying the current thresholds and rates to the new methodology¹), the following land tax liabilities would arise:
- 33.1. Trustee of the Jones Family Trust - \$1,155
 - 33.2. Trustee of the Jones Investment Trust - \$22,479
 - 33.3. Mr Jones - \$32,145 (being \$55,779 land tax calculated on an aggregated land value of \$2.4M less a rebate of \$23,634 for tax paid by the trustees).

¹ As the proposed new thresholds are unknown at this stage.

The total land tax liability would therefore be \$55,779. It is noted that the proposed reduction in the top marginal rate of tax to 2.4% and changes in the thresholds will result in the actual liability under the new provisions being lower than that calculated above, however the example clearly demonstrates that the methodology under the proposed new provisions will result in a significantly increased land tax liability when compared to the current provisions.

Example 3 – trust holding, land acquired after prescribed day

34. The Smith Family Trust acquires land after the prescribed day with a site value of \$500,000.
35. As the land is not pre-existing land, the trustee cannot nominate a beneficiary to be assessed in respect of the land.
36. Under the existing provisions (using current thresholds and rates), the land tax payable by the trustee would be \$655.
37. Applying the new provisions, but applying current thresholds to the proposed new rate structure for trusts, the land tax payable by the trustee would be \$3,170.
38. Taking into account the proposed increase in the tax free threshold to \$450,000, the tax payable under the existing provisions would be \$250, and under the new provisions would be \$2,875.

Example 4 – jointly held land

39. Assume the following property holdings:
- 39.1. Mr Brown – site value \$300,000
 - 39.2. Mrs Brown – site value \$450,000
 - 39.3. Mr Brown and Mrs Brown jointly (50/50) – site value \$600,000
 - 39.4. The Brown Family Trust – site value \$500,000 (pre-existing land)
40. Under the existing provisions (using current thresholds and rates), the following land tax liabilities would arise:
- 40.1. Mr Brown – nil (land below the tax free threshold)

- 40.2. Mrs Brown – \$405
- 40.3. Mr Brown and Mrs Brown jointly – \$1,155
- 40.4. The Brown Family Trust – \$655

If you want any further information or wish to discuss any aspects of the draft bill further, please contact Briony Hutchens or John Tucker.

The total land tax payable would be \$2,215.

41. Assume the land held by the Brown Family Trust is pre-existing land and that the trustee of the Brown Family Trust nominates Mr Brown as the beneficiary in respect of the trust. Under the proposed new provisions (but applying the current thresholds and rates to the proposed new methodology), the following land tax liabilities would arise:

- 41.1. Mr Brown and Mrs Brown jointly - \$1,155
- 41.2. The Brown Family Trust - \$655
- 41.3. Mr Brown – \$8,149.50 (being land tax of \$9,382 (calculated on an aggregated land value of \$1.1M²) subject to a rebate of \$577.50 (for 50% of the land tax paid on the jointly held land) and \$655 (for the land tax paid on the trust land))
- 41.4. Mrs Brown – \$2,167 (being land tax of \$2,744.50 (calculated on an aggregated land value of \$750,000³) subject to a rebate of \$577.50 (for 50% of the land tax paid on the jointly held land))

The total land tax payable would be \$12,126.50. It is noted that changes to the thresholds that will accompany the new provisions will result in the actual liability under the new provisions being slightly less than that calculated above, however the example clearly demonstrates that the methodology under the new provisions will result in a significantly higher land tax liability than under the current provisions.

² Being \$300,000 referable to the land owned by Mr Brown solely, \$300,000 referable to Mr Brown's 50% interest in the jointly held land, and \$500,000 referable to the trust land.

³ Being \$450,000 referable to the land owned by Mrs Brown solely and \$300,000 referable to Mrs Brown's 50% interest in the jointly held land.



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