

2019 UPDATE: KEY CHANGES TO AUSTRALIAN STAMP DUTY

22 August 2019 | Australia
Legal Briefings - By **Cassidy O'Sullivan**

Significant stamp duty changes have commenced in a number of Australian states and territories, with ramifications for property development, foreign investment and corporate restructures.

July 2019 heralded the commencement of a number of important stamp duty reforms. The most significant changes have occurred in Victoria and Western Australia.

This article canvasses the key reforms in each Australian jurisdiction, and also addresses proposed changes announced in the South Australian and Tasmanian Budgets.

The breadth of these reforms - and the continuing divergence between the respective Duties Acts across Australia - underscore the importance of seeking advice on duty risks well before entering into any transactions.

VICTORIA

The State Taxation Acts Amendment Bill 2019 (Vic) received Royal Assent on 18 June 2019, and has now commenced in its entirety. Key changes are summarised below.

THE CORPORATE RECONSTRUCTION EXEMPTION IS NOW A 10% CONCESSION

Under the previous regime, certain intra-group transactions involving Victorian 'dutiable property' were eligible for a 100% corporate reconstruction exemption (**CRE**) from Victorian duty. The exemption was subject to a 3 year post-transaction association requirement (with limited exceptions, such as for an IPO).

WHAT'S CHANGED?

From 1 July 2019, Victoria became the only Australian State or Territory without a 100% CRE exemption. The exemption has now been replaced with a 90% concession (ie eligible transactions are now subject to payment of 10% of the duty payable).

The eligibility or qualifying provisions have been expanded (including the addition of new eligible transactions relating to leases, and the removal of the 3 year post-transaction association requirement).

The old CRE provisions continue to apply to any CRE granted before 1 July 2019, any eligible transactions already completed but for which CRE has not yet been claimed, and eligible transactions from agreements entered into, but not to be completed, until after 1 July.

While more transactions will be eligible for the concession, valuations may now be required for intra-group transactions, and the prospect of paying 10% duty may hinder some corporate reorganisations.

SUBSTANTIAL CHANGES TO THE 'ECONOMIC ENTITLEMENT' PROVISIONS

Victoria was unique in imposing landholder duty on persons who have acquired certain economic entitlements of 50% or more in a private 'landholder' (ie an entity with land holdings in Victoria with a value of \$1M or more). These entitlements included the right to participate in:

- the proceeds of sale of the land holdings;
- dividends or income of a landholder;
- income, rents or profits derived from the land holdings;
- the capital growth of the land holdings; or
- amounts calculated by reference to the above.

The old provisions did not apply where the economic entitlement did not relate to *all* of the Victorian land holdings of the relevant landholder. Further, the old provisions did not apply to land holdings of individuals or discretionary trusts.

WHAT'S CHANGED?

The new provisions apply to arrangements made after 19 June 2019.

In the Explanatory Memorandum to the Amending Bill and Second Reading Speech, it was explained that the changes were intended to resolve 'technical issues', and close 'gaps' and 'tax loopholes' which were highlighted by the decision in [BPG Caulfield Village Pty Ltd v Commissioner of State Revenue \[2016\] VSC 172](#). However, the scope of the provisions has now been substantially broadened.

The new economic entitlement provisions have been moved from the 'landholder duty' chapter to the 'transfer duty' chapter of the Act. The provisions now apply if the arrangement to acquire an economic entitlement is made in relation to 'relevant land' (with a value of \$1M or more). Additionally, the 50% threshold has been removed, and the provisions now apply irrespective of the identity of the landholder.

It is of particular significance that any entity/person acquiring any economic entitlement (defined above) will now be deemed to have obtained 'beneficial ownership' (in percentages determined under the Act) of the relevant land. This can be up to 100% in certain circumstances (eg if the relevant arrangement does not specify the percentage of the relevant economic entitlement, or if the relevant arrangement includes any other entitlement or amount payable to the person or an associated person). Accordingly, profit sharing development agreements and joint ventures under which a developer receives a share of sales proceeds will now generally be dutiable.

The Victorian State Revenue Office (**SRO**) recently published [guidance](#) on the arrangements which will not be caught by the economic entitlement provisions. In brief, any person providing a service in relation to land who receives 'ordinary fees for service' (ie 'genuine industry fees' within industry parameters) will not be considered to be receiving an economic entitlement. This will be the case even where the fees are calculated on a commission basis or tied to the proceeds of a development. The examples given by the SRO include fee arrangements relating to:

- real estate agents;
- project managers;
- architects;
- planning consultants; and
- private advisory firms.

A number of caveats apply. The service provider must be unconnected (ie not an associated person) to any other person who has an economic entitlement to the land. If this is the case, the service agreement does not need to be disclosed to the SRO. If, on the other hand, the service provider is an associate of a person acquiring an economic entitlement, the fee for service needs to be disclosed to the SRO. Evidence must then be provided that the service fee is genuine and not a 'profit-sharing mechanism' – otherwise, the fee will be taken into account when determining the duty payable on the acquisition of the economic entitlement.

'FOREIGN RESIDENT' SURCHARGES HAVE INCREASED

The stamp duty surcharge for certain transactions involving the acquisition of Victorian 'residential' land by 'foreign' entities has increased from 7% to 8% for contracts entered into on or after 1 July 2019.

CERTAIN FIXTURES AND ITEMS FIXED TO LAND WILL BECOME DUTIABLE

An interest in certain fixtures and items fixed with a total value of \$2M or more acquired independently of land (including tenants' fixtures) are now also dutiable property. This affects a sale and leaseback of fixtures.

Duty is phased in if the value of the fixtures (taken as a whole) is between \$2M and \$3M. If the value is \$3M or more, full duty will be payable.

The new provisions only apply to arrangements made after 19 June 2019.

REFORMS FOCUSED ON REGIONAL VICTORIA

New reforms have been designed to encourage businesses to establish operations in, or relocate to, regional locations in Victoria.

One such reform is a 10% stamp duty concession that will apply for contracts signed from 1 July 2019 in respect of the transfer of eligible commercial and industrial property located in regional Victoria to be used for a 'qualifying use'. This concession will incrementally increase by 10% annually to 50% by 1 July 2023.

As explained in the Second Reading Speech to the Amending Bill, to ensure that only 'genuine regional businesses' have access to the concession, there will be a requirement for purchasers to use the land solely or primarily for commercial or industrial purposes for a continuous period of at least 12 months, commencing within 2 years of the transfer.

OTHER AMENDMENTS

Other miscellaneous changes have also been made, including:

- An increase in the duty rate for certain motor vehicles (in the 'super-luxury' bracket).

- The amendment of the definition of 'public trust scheme' so as to effectively remove the restriction on unit trust schemes that were at any time eligible for registration as wholesale unit trust schemes being considered public unit trust schemes.

WESTERN AUSTRALIA

The *Revenue Laws Amendment Bill 2018* (WA) received Royal Assent on 12 June 2019, and has now come into effect in its entirety.

Some of the key changes are summarised below.

CORPORATE RECONSTRUCTION RELIEF (CRE)

Unlike Victoria, which has expanded its eligibility requirements and removed its post-transaction association condition, Western Australia has tightened its eligibility requirements and introduced a 3 year post-transaction association requirement.

The Commissioner may now only grant CRE relief if satisfied that:

- the relevant members of the corporate group (referred to as a 'family') will remain part of the same corporate group for 3 years (subject to a limited public float or listed demerger exception);
- no member of the corporate group has an outstanding tax liability; and
- the transaction is not part of a tax/duty avoidance or reduction scheme.

To qualify for CRE, the consideration for the transaction must be provided by a group member, or by way of loan to be repaid by a group member.

Additionally, CRE will now be automatically revoked if the transferee leaves the corporate group within 3 years after the transaction whilst holding some of the dutiable property acquired under the exempt transaction. Once CRE is revoked, the Commissioner will issue a duty assessment. However, a 'duty deduction' will apply if:

- the transferee no longer holds all of the property which was the subject of the relevant

reconstruction transaction for which CRE was granted; or

- landholder duty was payable, to the extent it relates to land and chattels that were the subject of the relevant reconstruction transaction.

A new [Fact Sheet](#) was also published on 13 June 2019, which provides guidance on when CRE will be granted or revoked by way of helpful examples.

LANDHOLDER DUTY

The 'linked entity' provisions in the landholder duty chapter have been expanded. New 'look through' rules now operate to link an entity to an unlisted entity where the first entity has a total (direct *or indirect*) interest of at least 50 per cent in the other entity.

Further, new aggregation provisions have commenced, whereby transactions or acquisitions that result from *substantially one arrangement* will be dutiable. Transactions will also be aggregated where two or more transactions result in the acquisition of interests in land with a value of \$2M or more. A 'one arrangement' deeming provision has been introduced, whereby unless the Commissioner is satisfied otherwise, the following transactions are deemed to be part of one arrangement if they occur within 12 months:

- a. acquisitions in two or more entities by the same person; or
- b. a transfer of chattels and a landholder acquisition by the same person.

Duty will also apply to relevant acquisitions made between related persons. However, persons may be treated as unrelated where the acquisitions result from a public float (as defined) or other prescribed circumstances (no other circumstances have been prescribed so far). Notably, this discretion will not extend to persons who are related because they were acting in concert or acquired their interests as part of one arrangement.

ITEMS FIXED TO LAND

The definition of 'land' has been expanded to include *anything fixed to land* regardless of whether the items are common law fixtures, or whether they are owned separately from the land.

The transfer, grant or surrender of a right in relation to the control, access or operation of *fixed infrastructure* is now dutiable. Fixed infrastructure is defined as meaning, broadly, an item fixed to land – regardless of whether the item would be considered a fixture at common law, or whether it is owned separately from the land. Importantly, however, there will be no duty if:

- it has been agreed that the item is to be permanently removed from the land within 90 days of the transfer (provided it is indeed so removed); or
- the item is only temporarily fixed to land for construction purposes; or
- the item is not a fixture at common law and is used in a primary production business; or
- the item is a relocatable home or similar on a residential park site, as defined.

DERIVATIVE MINING RIGHTS

The transfer, grant or surrender of a *derivative mining right* is now dutiable. Broadly speaking, these are rights which arise when a person is authorised by the holder of a mining tenement (ie the holder of a prospecting licence, exploration licence or mining lease) to explore for and mine certain minerals on that tenement. As derivative mining rights will also be included as 'land' for the purposes of landholder duty, a transfer of shares in a company that owns derivative mining rights may now attract duty.

OTHER AMENDMENTS

Other changes include:

- The broadening of the *family farm duty exemption* so that it better accords with modern succession planning arrangements. For example, the exemption will apply where a farmer transfers farming property to a discretionary trust that is related to the farmer.
- Nominal duty will now apply if the Commissioner is satisfied that a transfer is for the sole purpose of *facilitating a subdivision* (excluding multi-level strata subdivisions), and that each person will get back the same 'dirt' they contributed to the subdivision. This is subject to a five year 'clawback' if the land is not transferred back as required.

QUEENSLAND

The *Revenue and Other Legislation Amendment Bill 2019* (Qld) received Royal Assent on 17 June 2019, and has now come into effect in its entirety.

The Queensland reforms are less dramatic than those in Victoria and Western Australia. The changes are as follows:

LANDHOLDER DUTY AND PARTNERSHIP PROPERTY

A new deeming provision has been introduced to deem all property held by a landholder pursuant to a *partnership* to be taken as the landholder's property for the purposes of calculating landholder duty – regardless of the landholder's interest in the partnership.

CLARIFICATION OF WHAT IS 'CONSIDERATION'

A provision has now been inserted to ensure that any references to *consideration* in the *Duties Act 2001* (Qld) is taken to refer to both monetary and non-monetary consideration.

NSW

New provisions introduced by the *State Revenue and Other Legislation Amendment Bill 2019* (NSW) commenced from 1 July 2019.

Reforms in NSW were relatively minor but, importantly, included an indexation of transfer duty thresholds to align with the Consumer Price Index (**CPI**) for Sydney. This reform will gradually increase thresholds over time, and in turn decrease the amount of transfer duty paid on property purchases. This is the first change to stamp duty brackets since 1986.

Other changes are as follows:

- *Premium threshold*: The threshold for premium rate (7%) for residential land has increased from \$3M to \$3,040,000.
- *Surcharge purchaser duty*: Holders of retirement visas who meet residency requirements will now be exempt from surcharge purchaser duty when purchasing a principal place of residence.
- *Aggregation*: A provision has been inserted clarifying that where two dutiable transactions are aggregated, the duty will be calculated at the rate applicable at the time at which the earliest of the transactions took place.

NORTHERN TERRITORY

The *Revenue Legislation Amendment Bill 2019* (NT) and the *Property Activation Bill 2019* (NT) were passed on 20 June 2019, and all changes have commenced. Two Orders also took effect on 5 June 2019.

The NT changes are relatively minor, and include:

- Changes made to certain grants, incentives and concessions as part of the Territory's *home owner assistance scheme*, including a limited 'BuildBonus' grant for new homes.
- The introduction of a *property activation levy* (of between 1-2%) for vacant land and unoccupied buildings (including those with a 50% or greater vacancy rate on the ground level) in the Darwin CBD to stimulate the revitalisation of the city.

The NT Government has published a [guide](#) to encourage property owners to consider innovative ideas to 'activate' their vacant land or buildings, including using the space for car parks, temporary pop up shops or restaurants, or for the creation of parks, markets, outdoor dining spaces.

ACT

The *Revenue Legislation Amendment Bill 2019* (ACT) passed on 21 March 2019. All changes under that Bill, which were minor amendments, have commenced.

Two such minor amendments to the *Duties Act 1999* (ACT) are as follows:

- The correction of an omission in the exemption for the surrender and re-grant of *Crown leases*, so as to include certain university land subleases.
- The only persons who may now apply for a *rates, land tax and other charges certificate* are the owner, the purchaser or the mortgagee of a parcel of land. This limitation has been put in place to better protect the privacy of property owners.

TASMANIA

Tasmania's 2019-20 State Budget was delivered on 23 May 2019. A formal Bill has not yet been introduced to implement the proposed changes.

The key duty changes which have been [announced](#) are:

FOREIGN SURCHARGES

- From 1 January 2020, the *Foreign Investor Duty Surcharge (FIDS)* rate will increase from 3% to 7% on the purchase of residential property, and from 0.5% to 1.5% on the purchase of primary production land. The increase to the surcharge on residential land will bring Tasmania in line with the other Australian jurisdictions (other than NSW, where the surcharge is 8%). The primary production land surcharge is unique to Tasmania.
- The definition of *foreign person* will be 'reviewed' and 'enhanced' to ensure it remains consistent with the Government's original policy intent. It is presently unclear how this definition will be altered.

HOUSING AFFORDABILITY INITIATIVES

- The \$20,000 *First Home Owner Grant* will be extended for a further 12 months to 30 June 2020, and the *duty concession* for first home buyers of established homes and eligible pensioners downsizing their home will be extended to 30 June 2020.

SOUTH AUSTRALIA

While measures were [announced](#) on 18 June 2019 as part of the South Australian Budget for 2019-20, no formal Bill has as yet been introduced.

Although a number of changes to duty were introduced in last year's *Statutes Amendment and Repeal (Budget Measures) Act 2018 (SA)*, which came into effect on 31 January 2019, the 2019 Budget measures were focussed on land tax reforms.

For more information on the application of these reforms to your business or any future transactions, please contact Jinny Chaimungkalanont or Tuyet Nguyen on the details below.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



**JINNY
CHAIMUNGKALANO
NT**
PARTNER, SYDNEY

+61 2 9322 4403
Jinny.Chaimungkalanont@hsf.co
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