

Beware the Land Tax changes

HARRY PATSIAS, WALLMANS LAWYERS AND GRANT FEARY, DEPUTY DIRECTOR, LAW CLAIMS

Most practitioners will be generally aware that there have been significant amendments¹ to the *Land Tax Act 1936* (SA) (the Act) which take effect from midnight 30 June, 2020. An overview of the changes together with an unofficial version of the Act may be found on RevenueSA's website.²

In the main, these amendments:

- Change the various threshold values upon which land tax applies;
- Change the land tax rates in respect of the various thresholds;
- To use the words of the Commissioner of State Taxation (Commissioner), introduce “*improved aggregation of ownerships for land tax purposes*”,³ whereby actual or deemed interests in land are aggregated; and
- Impose notification obligations on trustees and subject fixed, unit and discretionary trusts⁴ to the higher trust rates of land tax unless certain qualifying notices are lodged with the Commissioner.⁵

The amendments raise some interesting landlord / tenant issues including whether a trustee landlord is able to recover from their tenant the higher trust rates of land tax assuming no qualifying notices are lodged, or where, by virtue of such qualifying notices, tenants have some reason to complain that their payment of land tax is ultimately benefiting someone other than the landlord as a result of the way the credit system. Such matters are outside the scope of this article.

We expect most commercial landowners will have already sought advice as to how the amendments might apply to their circumstances and whether any action might be taken by them to manage any adverse financial outcomes of the same.

Actions that some landowners might take in managing any adverse financial outcomes may include:

- Restructuring their interests in land and landowning entities;
- In the case of fixed or unit trusts with interests in land, contemplating

whether the trustee voluntarily lodges a notice of beneficial / unitholding interests with the Commissioner;

- In the case of discretionary trusts with interests in land at 16 October, 2019 (preexisting land),⁶ contemplating whether the trustee voluntarily lodges a notice nominating a single designated (adult) beneficiary of the trust, which nominee consents by statutory declaration, with the Commissioner by 30 June, 2021.

RESTRUCTURING

In respect of advice involving the restructuring of interests in land and landowning entities, practitioners need to be mindful of various other matters arising from such restructure, including:

- Tax consequences such as stamp duty, goods and services tax, income and capital gains tax;
- Whether appointing a new trustee to a discretionary trust changes pre-existing land to non-pre-existing land (or is it measured by the trust rather than the trustee);⁷
- Triggering pre-emptive rights or defaults under commercial documents;
- Commercial risk exposure;
- Impact on succession / estate planning; and
- The possibility that the land tax avoidance provisions might apply.⁸

FIXED OR UNIT TRUSTS

Where the trustee is to lodge a notice of beneficial or unit holding interests (in the case of a fixed or unit trust) the general effect of such notice will be:

- The trustee will be liable to the general rates and not the higher trust rates of land tax on their aggregated land holdings;
- Each beneficiary or unitholder of the trust will:
- Be attributed with the value of land attributable to the trust in proportion to their interest in the trust, which value will be aggregated with any other

interest in land which that beneficiary or unitholder owns; and

- Receive a credit for the land tax otherwise paid by the trustee in proportion to their interest in the trust (so as to avoid double taxation);
- Once lodged, the trustee must inform the Commissioner of any changes to beneficial or unitholding interests within one month of such change;
- Once lodged, may be withdrawn noting the trustee may not avail itself of lodging any new notice in future.

In respect of advice involving the provision by the trustee of a notice of beneficial or unitholding interests, practitioners need to be mindful of various matters, including:

- Does the trustee have the power to make and lodge such notice?
- Is the lodgement of such notice by the trustee in the interests of all beneficiaries/unitholders?

In relation to these questions, the first is answered by reviewing the relevant trust deed and amending if required.⁹

The second is more fundamental, as there are likely to be situations whereby one or more beneficiaries or unitholders may be disadvantaged and others advantaged by the trustee's lodgement of such notice.

In that regard, practitioners will be well placed to advise trustees of their obligations to their beneficiaries / unitholders. As stated in *Cowan v Scargill*:¹⁰

“The starting point is the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust; holding the scales impartially between the different classes of beneficiaries. This duty of the trustees towards beneficiaries is paramount. They must, of course, obey the law; but subject to that, they must put the interests of their beneficiaries first. When the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are normally their best financial interests”.

The primary duty is to the beneficiaries as a whole, even where fulfilment of the duty disadvantages one beneficiary and favours another, however, as discussed in *Jacobs*, it is also a duty of a trustee to act fairly by/between all the beneficiaries.

How then does a trustee deal with a situation whereby the actions of the trustee may result in a benefit to the financial interest of one or more beneficiaries and a corresponding detriment to other beneficiaries?

An answer may be found under a general power of management of property (to be read subject to its terms) or a more express power enabling the trustee to make such choice for the purposes of any tax or impost in the trustee's uncontrolled and unfettered discretion (if it be stated in such terms), but otherwise such action would appear to require the consent of all beneficiaries / unitholders. Without such power or consent, the trustee may be found in certain circumstances to have failed in its duty to act impartially, for instance where it is in the interests of the majority but not the minority, to have the trustee lodge the relevant notice.

Further, where the power to amend the trust deed to provide for such action is held by the majority, query the ability to effect amendments to the trust deed to benefit that majority. There have, in some instances, been found to be duties owing as between beneficiaries themselves. *Scott and Ascher on Trusts*, a United States commentary often quoted favourably by the High Court, states:

"25.3 Beneficiary's Duty to Other Beneficiaries

In the preceding sections, we have seen that a beneficiary owes a duty to the other beneficiaries not to participate in a breach of trust. It would seem that a beneficiary also owes the other beneficiaries a duty not to attempt to obtain a priority over them. ... Although there is not the same fiduciary relationship between trust beneficiaries as there is between them and the trustee, there is enough of a fiduciary element in their relationship to make it inequitable for one to seek to obtain an advantage over another. ..."

DISCRETIONARY TRUSTS

Where the trustee is to lodge a notice nominating an adult designated beneficiary

(in the case of a discretionary trust) the general effect of such notice will be:

- The trustee will be liable to the general rates and not the higher trust rates of land tax on their aggregated land holdings they owed at 16 October, 2019 (interests in land they acquire after 16 October, 2019 will be assessed at the higher trust rates of tax);¹¹
- The designated beneficiary will:
 - Be attributed with the value of land attributable to the trust and assessed at the general rates, which value will be aggregated with any other land interest which that designated beneficiary owns;
 - Receive a credit for the land tax otherwise paid by the trustee at the general rates (so as to avoid double taxation);
- It will not be possible to substitute the designated beneficiary under the notice until such time as that designated beneficiary either dies, becomes incapacitated, suffers a relationship breakdown, or such other event as may be prescribed by regulation;