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Major land rich provisions changes

Recent amendments to stamp duty legislation in several Australian states will have a dramatic impact on how business is done and on the property investment industry, as Special Counsel Anthony Johnston reports.

Recent amendments to stamp duty legislation in several states have not been the usual round of amendments aimed at fine-tuning the legislation or eliminating anomalies. In two jurisdictions (New South Wales and Western Australia), the changes are quite dramatic. They will impact on how business is done in those jurisdictions and could have implications beyond that, if other states adopt similar approaches. These changes include abolishing lease duty in Victoria, WA and Tasmania.

The recent changes raise important questions about the current and future direction of state taxation, bearing in mind that the introduction of GST from 1 July 2000 was expected to involve the abolition of state taxes such as stamp duty. The latest changes indicate that state-based property stamp duty is certainly not going away.

Land rich provisions in NSW and WA

There have recently been significant changes to the land rich provisions in NSW and WA. The Northern Territory has also made changes to its provisions.

New South Wales

The NSW Government is changing its land rich provisions to make them broadly similar to those in Queensland, WA and SA. This is being done so that there will be no repeat of last year's \$26.2 million cut in Commonwealth Grants Commission funding, which resulted from the Commission's assessment that NSW was undertaxing its citizens and businesses, by comparison with those other three states.

The important difference now is that the NSW land rich provisions should no longer be regarded as merely anti-avoidance provisions, but as genuine revenue-raising provisions. This intention is clear enough when the individual changes are looked at.

The NSW changes may be summarised as follows.

| Land Rich Provision | Old Rules (from 21 November 1986) | New Rule (from 14 November 2003) |
|--|--|---|
| Entitles caught | <ul style="list-style-type: none"> private company private unit trust scheme | <ul style="list-style-type: none"> private company private unit trust scheme wholesale unit trust scheme |
| Threshold land value percentage | <ul style="list-style-type: none"> 80 per cent | <ul style="list-style-type: none"> 60 per cent, but 80 per cent if landholder is a primary producer and stays one for five years |
| Dutiable acquisition | <ul style="list-style-type: none"> majority interest (more than 50 per cent) | <ul style="list-style-type: none"> significant interest (20 per cent or more for private unit trust schemes, otherwise 50 per cent or more) |
| Aggregation of interests in landholder | <ul style="list-style-type: none"> with associates | <ul style="list-style-type: none"> with associates with others pursuant to 'substantially one arrangement' (since 13 November 2002) |
| Tracing through underlying entities | <ul style="list-style-type: none"> through 'subsidiaries' (threshold of more than 50 per cent) | <ul style="list-style-type: none"> through 'linked entities' (threshold of 20 per cent or more) |
| Widely-held threshold for public unit trust classification | <ul style="list-style-type: none"> 50 or more persons beneficially entitled to units, with more than 20 in respect of at least 75 per cent of units | <ul style="list-style-type: none"> not less than 300 unitholders, none of whom is beneficially entitled to more than 20 per cent of units |
| Explanation of introduction | <ul style="list-style-type: none"> anti-avoidance (to collect conveyance duty rather than share duty on certain share/unit transactions) | <ul style="list-style-type: none"> to 'protect the transfer duty revenue base' and to satisfy Commonwealth Grants Commission expectations |

More NSW revenue from land rich duty

The land rich provisions will now impact on a much greater range of transactions than before because:

- the land rich threshold has been dropped from 80 per cent to 60 per cent; and
- in the case of private unit trust schemes, the 'majority interest' threshold of more than 50 per cent has been replaced by a 'significant interest' threshold of 20 per cent or more .

Increasing the \$1 million threshold of NSW land holdings to \$2 million will make little difference. The more important test has always been the 80 per cent test, rather than the \$1 million test.

Other, more subtle, changes will also increase the scope of this tax, for example, by:

- changing the test from 'more than 50 per cent' to '50 per cent or more' (or '20 per cent or more', where applicable); and
- requiring aggregation where acquisitions take place under 'substantially one arrangement', even though the acquiring parties are not associated.

These two changes will bring what was a common scenario under the previous rules to an end, namely two independent, unrelated investors, each acquiring 50 per cent of the shares or units of a private company or trust that owns a valuable landholding.

Setting up such a structure now would be liable to stamp duty since a change to the old rules effective from 13 November 2002, to the extent that setting up the structure involves making acquisitions under 'substantially one arrangement'. Subsequent

transactions within such a structure have been caught since 14 November 2003 under the new rules, because acquiring a 50 per cent holding is now the acquisition of a 'significant interest'.

WA changes

WA has recently passed amendments that substantially change its stamp duty legislation by way of implementation of its Review of State Business Taxes policy review.

The more important changes may be summarised as follows.

- reducing the threshold for land rich companies from 80 per cent to 60 per cent;
- adopting new mortgage duty provisions comparable to those applying in other jurisdictions (and thereby narrowing its mortgage duty base);
- abolishing some taxes (lease duty, duty on unquoted securities, cheque duty, some insurance duties); and
- follows other jurisdictions by:
 - charging duty on intellectual property when sold with another business asset;
 - charging duty on chattels when transferred with any other dutiable property, not just land; and
 - adopting apportionment provisions to determine the WA proportion of intangible property such as goodwill and intellectual property.

In terms of policy trends, these amendments are significant for two reasons: first, they show a willingness by WA to conform more with approaches used in other states, rather than 'going it alone'; and, second, they set a new benchmark of 60 per cent for land rich companies.

Other State and Territory amendments

Northern Territory

As long ago as 1995, the Northern Territory Government reduced the land ownership threshold for land rich companies and trusts from 80 per cent to 60 per cent.

It went further in its last budget by removing the 60 per cent threshold altogether, with effect from 27 May 2003. This means that, in the Northern Territory, 'land rich' duty has effectively become a 'landholder' duty, similar to that charged in the ACT. However, a liability

will still only arise where a majority interest (50 per cent or more) is acquired or increased.

Australian Capital Territory

On 17 November 2003, the Commissioner for ACT Revenue issued a discussion paper inviting submissions on proposed changes to the ACT landholder provisions. The proposal involves the adoption of some of the changes made recently by NSW, namely:

- changing the 'over 50 per cent' majority interest threshold to '50 per cent or more';
- aggregating where acquisitions arise from 'substantially one transaction', even where not made by associated persons;
- increasing the minimum to satisfy the 'widely held' test for unit trust schemes from 50 members to 500 members; and
- reducing the ownership relationship for tracing through underlying entities from 50 per cent to 20 per cent.

These changes, if adopted, will not have dramatic consequences. The potential scope of the ACT landholder provisions has always been wide, because they have no 'land rich' requirement. However, they demonstrate that the recent tightening up in this area by WA and NSW is likely to be followed by others.

Property industry impact

For reasons mentioned above, the recent changes will significantly increase the range of transactions that will, in future, be caught by these provisions and the amount of duty that will be payable in those jurisdictions.

On the other hand:

- abolishing lease duty in Victoria, WA and Tasmania; and
- increasing the thresholds for exemption from lease duty on small leases in NSW, SA and the Northern Territory,

will be a bonus for the property industry, not only in reducing the tax costs of those affected, but also in reducing the administrative cost, since stamping leases is a troublesome, time-consuming process.



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