

Changes to Stamp Duty: What You Need to Know

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Key Takeaways

- The scope of stamp duty is expanding, with declarations of trust and changes in beneficial ownership potentially becoming dutiable.
- Australian based developers that are foreign persons may be able to apply for a refund of stamp duty where residential land has been used for commercial or industrial purposes.
- Tax avoidance provisions have been broadened to include the promotion of tax avoidance schemes.
- The rate of penalty tax will move from 25% to 50% for any tax defaults for significant global entities.

Back in November 2020, the NSW Government identified stamp duty as being one of the biggest financial barriers to home ownership. However, stamp duty also plays a vital role as a source of revenue to pay for public services. In an attempt to find a middle ground between these competing interests, the NSW Government has proposed changes to the property tax system. The proposed changes gives prospective home owners the choice to either pay stamp duty at the time of purchase or pay a smaller annual property tax instead. Consultation for the proposed property tax reform is still ongoing and full policy details are not yet known.

In the interim, on 23 March 2022, *The State Revenue and Fines Legislation Amendment (Miscellaneous) Bill 2022* (NSW) was introduced into the Legislative Assembly proposing to amend the Duties Act 1997 (NSW) (**Act**) and change the operation of stamp duty in a number of ways.

New types of dutiable transactions

The proposed bill would introduce new types of dutiable transactions not previously within the scope of the Act including acknowledgments of trusts and changes in beneficial ownership which are discussed below.

Acknowledgements of trusts

Duty will be charged on the making of a statement that amounts to a declaration of trust over dutiable property where it has the effect of acknowledging that the property is already held, or to be held, in trust for a person or purpose mentioned in the statement. This amendment could impact transactions involving a testamentary trust or resulting trust where a trust has been entered into and references the existence of a previous undisclosed trust.

This change is a response to the decision made in *Commissioner of State Revenue v Benidorm Pty Ltd* [2020] NSWCA 285. In this case, the Court of Appeal held that an acknowledgement of an existing trust over an apartment was not dutiable as a declaration of trust over dutiable property, despite the appeal from the Chief Commissioner. The primary judge had previously ruled that a declaration of trust must have a legal consequence beyond merely acknowledging what already exists. This amendment would remove the need for a legal consequence in the statement.

Changes in beneficial ownership

Duty will be imposed on a transaction that changes the beneficial ownership of a dutiable property other than an excluded transaction. Many previous non-dutiable transactions would now be dutiable due to the wide provisions. The exact parameters of how this amendment would be interpreted and applied is not yet known.

The definition of land as dutiable property has been expanded, allowing some transactions previously classified as excluded from stamp duty to be dutiable where the arrangement was made for the purpose of reducing the duty payable. The Chief Commissioner of State Revenue's opinion would determine what purpose the arrangement is made for.

The changes would commence from the date that the new provisions are implemented.

Foreign surcharge duty and land tax refund

A foreign purchaser who is an Australian based developer may apply for a refund of stamp duty or land tax where the residential land has been used wholly or predominantly for commercial or industrial purposes. The refund would need to be applied for within 12 months of the entitling event or within 10 years from the date of purchase of the residential related property.

Expanding anti-avoidance rules

Tax avoidance schemes in the Act (Chapter 11A) will be removed and replaced with broader anti-avoidance provisions that covers promotion of tax avoidance schemes. Those marketing or promoting a tax avoidance scheme would now be captured by the new rules.

These provisions apply to schemes from the date that the new provisions commence and may broadly capture attempts to reduce or avoid liability for duty. An individual who engages in conduct considered to be promotion of a tax avoidance scheme could be liable to pay up to \$1,109,900.00 or \$5,549,500.00 for a company.

Increase to penalty tax

The rate of penalty tax will move from 25% to 50% for any tax defaults for significant global entities. Voluntary disclosure rates of penalty tax will also double for significant global entities.

The term significant global entities refers to an entity (or consolidated entities) refers to entities that have a global income of at least \$1 billion AUD.

Conclusion

Stamp duty is clearly here to stay for a while longer and it is important to be aware of these new obligations when entering into dutiable transactions.

If you would like any further information or would like to discuss your legal obligations please contact Greg Lee on 02 8235 1254 or your usual ClarkeKann contact.