

NSW: DUTY & LAND TAX INCENTIVES FOR BUILD-TO-RENT PROPERTIES

Date: 29 July 2020

Real Estate Alert

By: Matthew Cridland

OVERVIEW

The New South Wales government today introduced a bill which, if enacted, will provide new duty and land tax incentives for certain build-to-rent projects. As set out further below, for qualifying projects these incentives include:

- a 50% reduction in the taxable value of the land (reducing the land tax otherwise payable at general rates)
- an exemption from "surcharge land tax" (the foreign investor land tax surcharge on residential land)
- an exemption from "surcharge purchaser duty" (the foreign investor duty surcharge on residential related property).

These concessions may be later clawed back if certain conditions are not satisfied for a period of 15 years.

LAND TAX REDUCTION - ELIGIBILITY REQUIREMENTS

The value of the land on which a build-to-rent property has been constructed will be discounted by 50% if:

- a building is situated on the land
- construction commenced on or after 1 July 2020
- the Chief Commissioner is satisfied the building will be used and occupied as a "build-to-rent property" in accordance with the Treasurer's Guidelines.

It will be necessary for the land owner to apply to the Chief Commissioner for the reduction.

If the relevant land will only be used and occupied partly for a build-to-rent property, the concession may be available on a pro rata basis.

THE TREASURER'S GUIDELINES

At the time of writing, the Treasurer's Guidelines have not been released (and this would not be expected until after the legislation is enacted).

The guidelines will provide guidance on when a building is taken to be a "build-to-rent property". This may include guidance in relation to the:

- planning or development standards that must be met
- minimum lease conditions that must be offered to tenants
- nature of the ownership and management of the land and building.

The guidelines may also set out circumstances in which the land owner will be required to provide an undertaking to not:

- subdivide the land; or
- otherwise divide the ownership of the land.

Based on early media reports, it appears the requirements will be that:

- for Sydney metropolitan projects, the building must have at least 50 apartments
- there must be one owner.

SURCHARGE LAND TAX EXEMPTION - ELIGIBILITY REQUIREMENTS

The eligibility requirements for the land tax reduction outlined above act as a "gateway" for the surcharge land tax exemption. The owner must first be entitled to a land value reduction under those provisions before the surcharge land tax exemption can apply.

The exemption applies to land owned as at midnight on 31 December in a year (the "taxing date"), starting with land owned as at midnight on 31 December 2020.

The additional eligibility requirements for the surcharge land tax exemption are that:

- the owner of the land must be an "Australian corporation"
- there must be a building that is a build-to-rent property on the land
- that building must have been constructed by the owner or a related body corporate.

Note that the building can be constructed either before or after the taxing date (meaning a refund may become retrospectively available).

The exemption will apply for a maximum period of 20 years. It will not apply to land owned as at midnight on 31 December 2040.

SURCHARGE LAND TAX - REFUNDS

If surcharge land tax has been paid, and the eligibility requirements are satisfied, the owner may be entitled to a refund.

This refund must be applied for:

- within 12 months of the Australian corporation becoming entitled to the refund
- no later than 10 years after the land tax year concerned.

The refund may be for the full surcharge land tax amount paid or a lower amount as set out in an order made by the Treasurer.

SURCHARGE LAND TAX - EXEMPT PERSON

The Chief Commissioner may approve a "foreign person" as an "exempt person" for particular land if the Chief Commissioner is satisfied that person is likely to be entitled to a surcharge land tax refund. This allows the exempt person to claim the exemption without having to first pay the surcharge land tax and then seek a refund.

The approval may be subject to conditions.

SURCHARGE PURCHASER DUTY - ELIGIBILITY REQUIREMENTS

Once again, the eligibility requirements for the land tax reduction outlined above act as a gateway to the surcharge purchaser duty exemption. The transferee must be eligible for a land value reduction under those provisions before a surcharge purchaser duty exemption can apply.

The additional eligibility requirements are that:

- the owner of the land must be an "Australian corporation"
- the transfer must have been entered into on or after 1 July 2020 (but a transfer made after that date, in conformity with an agreement for sale or transfer entered prior to that date, will qualify).

SURCHARGE PURCHASER DUTY - REFUNDS

If surcharge purchaser duty has already been paid, and the eligibility requirements are satisfied, the owner will be entitled to a refund.

This refund must be applied for:

- within 12 months of the Australian corporation first becoming entitled to a land tax reduction
- no later than 10 years after completion of the transfer to the Australian corporation.

The refund may be for the full surcharge purchaser duty amount paid or a lower amount as set out in an order made by the Treasurer.

SURCHARGE PURCHASER DUTY - EXEMPT TRANSFeree

The Chief Commissioner may approve a person as an "exempt transferee" for a particular transfer (or class of transfers) if the Chief Commissioner is satisfied that person is likely to be entitled to a full surcharge purchaser duty refund. An exempt transferee does not need to pay the surcharge purchaser duty and then seek a refund.

The approval may be subject to conditions.

THE CLAW BACKS

As noted at the outset, all of the above exemptions and concessions may potentially be cancelled and clawed back if, within a period of 15 years after the land tax reduction first becomes available, the land is subdivided or the ownership of the land is otherwise divided.

Further, there may be claw backs if approvals were provided on a conditional basis, or undertakings were provided, and those conditions have not been satisfied or the undertakings were breached.

In addition to any tax or duty that may be payable as a result of a claw back, penalties and interest may apply.

WHAT ABOUT LAND ACQUIRED AND OWNED BY FOREIGN TRUSTS

As explained above, the surcharge land tax and surcharge purchaser duty exemptions require the land to be acquired and owned by an "Australian corporation".

It is not expressly addressed in the bill, but we expect that this requirement can be satisfied where the Australian corporation acquires and holds the land as trustee.

A similar issue may also arise where the land is held by an Australian corporation as bare trustee (nominee / custodian) for a foreign person. This is a common structure for REITs.

In relation to the surcharge land tax exemption, we note there is the additional requirement that the building be constructed by the Australian company or a related body corporate. This may suggest that the exemption won't be available where land is held by a bare trustee that does not itself (or via a related company) undertake the construction.

To provide certainty, it will be important for Revenue NSW to publicly set out its views on these issues.

WHAT ABOUT LANDHOLDER DUTY?

Surcharge duty may also be payable in addition to landholder duty if a "relevant acquisition" is made in a private landholder that has a residential land holding in New South Wales.

The surcharge purchaser duty exemption set out in the bill is limited to transfers of residential-related property. It does not extend to surcharge duty on a relevant acquisition in a private landholder.

This may be relevant if the investors in an Australian company that owns a qualifying build-to-rent property exit the project by selling their interests to foreign investors. The incoming investors may potentially be liable for both landholder duty and surcharge duty.

AND WHAT ABOUT...?

There are other unresolved issues where additional guidance will be needed from either Revenue NSW or the Treasurer (as the case may be). This includes the following:

- What is meant by "a building"? Is this be read strictly as meaning one building? Will the incentives be available if the residential units are spread across multiple buildings on the land?
- What is meant by the reference to "land"? Is this limited to on real property title, or can a building be constructed across two or more real property titles (which may be treated as a single "parcel" by the Valuer-General)?
- Will the land tax concession be available where land is leased on a long-term basis from the State or a local government agency (and the tenant is deemed the owner for land tax purposes)?

- How will the concessions work in the context of mixed use developments, where retail / office / commercial premises may be developed together with the residential premises? Can those non-residential parts be strata subdivided and sold without jeopardising the concessions?

CONCLUDING REMARKS

Individual investors that may own one residential investment property will generally be exempt from land tax on most (if not all) of the value of that property due to the tax-free threshold.

This benefit is not available to institutional investors that own multiple residential premises as part of a build-to-rent property. The proposed land tax reduction will go some way to addressing this imbalance and will be welcomed by institutional investors.

Of course, institutional investors will also need to take into account other tax obstacles for residential build-to-rent projects, including GST. For foreign investors, the lack of Managed Investment Trust concessions for residential rent may also be a factor.

KEY CONTACTS



MATTHEW CRIDLAND
PARTNER

SYDNEY
+61.2.9513.2359
MATTHEW.CRIDLAND@KLGATES.COM

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