



## THE TAX INSTITUTE

2 October 2019

The Hon Rob Lucas  
Treasurer – South Australia  
c/- RevenueSA  
GPO Box 1353  
ADELAIDE SA 5001

By email: [LTAConsultation@sa.gov.au](mailto:LTAConsultation@sa.gov.au), [treasurer.dtf@sa.gov.au](mailto:treasurer.dtf@sa.gov.au)

Dear Treasurer,

### **Consultation Draft – *Land Tax (Miscellaneous) Amendment Bill 2019***

The Tax Institute welcomes the opportunity to make a submission to the South Australian Government in relation to the *Land Tax (Miscellaneous) Amendment Bill 2019 (Draft Bill)*.

### **About the Tax Institute**

The Tax Institute is the leading forum for the tax community in Australia. We are committed to representing our members. Shaping the future of the tax profession and continuous improvement of the tax system for the benefit of all, through the advancement of knowledge, member support and advocacy.

The Tax Institute was established in 1943 with the aim of improving the position of tax agents, tax law and tax administration.

As a professional association dedicated to supporting the tax profession, we are uniquely positioned to provide input into this Review and look forward to contributing to this Review.

For further information, please refer to Appendix A.

### **Comments**

Our detailed comments on the Draft Bill are set out in Appendix B.

In general terms, The Tax Institute believes that:

- the proposed provisions (primarily those relating to trusts) are overly complex, and further effort should be put into simplifying the Draft Bill;
- some of the time periods referred to in the Draft Bill need to be clarified and/or extended;
- the provisions aggregating 'related corporations' are too broad and need to be restricted.

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Should you wish to further discuss any of our comments, please contact our representative, Mr Paul Ingram of Minter Ellison on 8233 5601 or [paul.ingram@minterellison.com](mailto:paul.ingram@minterellison.com) in the first instance.

Yours faithfully,



**George Hodson**

Chair – The Tax Institute's South Australian Technical Committee

## **Appendix A**

### **About the Tax Institute**

The Tax Institute is the leading forum for the tax community in Australia. We are committed to representing our members, shaping the future of the tax profession and continuous improvement of the tax system for the benefit of all, through the advancement of knowledge, member support and advocacy.

Our membership of almost 12,000 includes tax professionals from commerce and industry, academia, government and public practice throughout Australia. Our tax community reach extends to over 30,000 Australian business leaders, tax professionals, government employees and students through the provision of specialist, practical and accurate knowledge and learning.

We are committed to propelling members onto the global stage, with over 7,000 of our members holding the Chartered Tax Adviser designation which represents the international recognised mark of expertise.

The Tax Institute was established in 1943 with the aim of improving the position of tax agents, tax law and administration. More than seven decades later, our values, friendships and members' unselfish desire to learn from each other are central to our success.

Australia's tax system has evolved and the Tax Institute has become increasingly respected, dynamic and responsive, having contributed to shaping the changes that benefit our members and taxpayers today. We are known for our committed volunteers and the altruistic sharing of knowledge. Members are actively involved, ensuring that the technical products and services on offer meet the varied needs of Australia's tax professionals.

## **Appendix B**

### **Comments on the Draft Bill**

## APPENDIX B

Section	Topic	Comment
2(1)	Definition of 'Concessional Trust'	We note that section 3B(i)(b)(i) of the NSW Act does not feature in this definition, and should be added For example, a testamentary trust for beneficiaries, all of whom are under 18 years of age, should be a Concessional Trust (at least while that remains the position).
	Definition of 'Excluded Trust'	<p>We query why the following trusts are not included in this definition:</p> <ul style="list-style-type: none"> <li>• Administration Trusts</li> <li>• Child Maintenance Trusts</li> <li>• Implied Trusts</li> <li>• Constructive Trusts</li> <li>• Resulting Trusts</li> </ul> <p>Including Administration Trusts and Child Maintenance Trusts would allow both the definitions of 'trust', and section 8A(1b), to be simplified. In addition, if those categories of trusts are <u>not</u> Excluded Trusts, then they will need to be excluded from the definition of 'Fixed Trust'.</p> <p>The treatment of Implied Trusts and Constructive Trusts is currently uncertain. We assume that they should be excluded from the higher land tax rates applicable to trustees (<b>Trust Scale</b>), but could not find this in the Draft Bill. (Section 13F does not talk about rates).</p> <p>Resulting Trusts are not mentioned in the Draft Bill, but should be treated in the same manner as Implied Trusts and Constructive Trusts.</p>
	Definition of 'Unit'	This presumably means that mere 'income units' are not units as defined.
	Definition of 'Unit Trust Scheme'	We believe that this definition should also exclude 'discretionary trusts' as defined.

9	Joint Ownership	<p>Providing for multiple assessments will create significant compliance costs (for both Revenue SA and taxpayers), but is perhaps unavoidable. However, the Government needs to consider how existing sections 16 and 17 apply to the individual assessments, and whether any legislative clarification is required in that regard.</p> <p>It is also our understanding that the credit available under section 9(5) can be applied against the land tax payable by the joint owner on all the land referred to in section 9(4), and not just on the joint owner's 'individual interest' in the jointly owned land. That would seem to be the natural reading of the provisions, and would also seem to be supported by Examples 1, 2 and 3 of the document 'Land Tax Consultation Summary' (<b>Treasury Summary</b>) recently published on the Commissioner's website. Any other approach would also involve an element of double taxation. Could the Commissioner confirm whether our understanding is correct?</p>
11	Contracts of Sale	<p>The application of the proposed provisions to the trust imposed upon a vendor of land (pre-settlement) needs to be clarified.</p>
12	Fixed Trusts	<p>As referred to earlier, the definition of 'Fixed Trust' may need to be amended to exclude:</p> <ul style="list-style-type: none"> <li>• Administration Trusts</li> <li>• Child Maintenance Trusts</li> <li>• Implied Trusts</li> <li>• Constructive Trusts</li> <li>• Resulting Trusts</li> </ul> <p>However, this will not be necessary if those types of trusts are treated as 'Excluded Trusts'.</p> <p>We understand that the nomination provided for in section 12 is intended to be 'ambulatory', in the sense that it will cover all beneficiaries of the Fixed Trust from time to time (unless revoked). Could the Commissioner confirm whether this is the case?</p> <p>There is no guidance as to how you measure the extent of a beneficiary's beneficial interest for the purposes of the ownership and deduction rules.</p> <p>As with section 9, clarification is required on the issue of whether the beneficiary's deduction can be applied against all of the land mentioned in section 12(5)(a), or only against its proportion of the trust land.</p>

13	Unit Trusts	<p>We understand that the nomination provided for in section 13 is intended to be 'ambulatory', in the sense that it will cover all unitholders of the Unit Trust from time to time (unless revoked). Could the Commissioner confirm whether this is the case?</p> <p>Nothing would seem to be lost by allowing for further nominations to be made following a revocation of the original nomination (eg. by subsequent purchasers of the units in a unit trust).</p> <p>Both the ownership and deduction provisions rely on the concept of 'proportion', but that concept is not defined. One possibility may be that the 'proportions' are to be calculated by reference to the definition of 'unit', which refers solely to entitlements to capital on vesting. This would ignore the entitlements of unitholders that have rights to income only, but perhaps this was intended?. Query also how the 'proportion' concept is intended to apply where some units are fully paid, and some are partly paid, and the relevant Trust Deed takes this into account on vesting?</p> <p>As with section 9, clarification is required on the issue of whether the beneficiary's deduction can be applied against all of the land mentioned in section 13(5)(a), or only against its proportion of the trust land.</p>
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13A	Discretionary Trusts	<p>Section 13A(1) requires the nomination to be lodged no later than 30 June 2020, and yet the bulk of the provisions (including section 13A itself) only came into effect on that day. We presume that the transitional provision in Part 1(2) of Schedule 1 is intended to deal with this, but the drafting is unclear. (In particular, it would seem a strange result to require the trustee of a discretionary trust to nominate by 30 June 2020, when it only has to give notice that it holds the property on trust by 30 July 2020 under section 13E(2). Should section 13E(2) refer to the period of one month after Assent, rather than Commencement? In this regard, we note that the Treasury Summary refers to one month after 'the legislation has passed', which is likely to be closer to the date of Assent.</p> <p>Section 13A appears to allow only one nominee. The Tax Institute believes that this should be expanded to allow at least two nominees (even if their proportions are to be fixed at 50/50).</p> <p>We would also query why section 13A(6) only allows a nomination to be withdrawn, rather than being replaced. Why can this not be done a number of times (albeit on a prospective basis only)?</p> <p>The ability to replace the nominee in the event of death or incapacity is welcome, but is this facility only available once, or can it be exercised a number of times?</p> <p>There is a clear need for section 13A to contain a mechanism providing for marriage breakdown. If this is not done, there will be situations where a spouse is nominated, the marriage then breaks down and the spouse continues to have a land tax liability even though he or she has no ongoing control/interest in the trust.</p> <p>Section 13A(8) may need to be amended to ensure that only land tax paid by the trustee in respect of its Pre-Existing Trust land is relevant to the deduction?</p> <p>As with section 9, clarification is required on the issue of whether the beneficiary's deduction can be applied against all of its land, or only against its proportion of the trust land.</p> <p>Where a replacement nomination is made in the event of death, incapacity or (hopefully) marriage breakdown, it is submitted that the references to 'prescribed day' in section 13A(11) should be read as references to the date of death, incapacity or marriage breakdown (as applicable).</p> <p>The definition of 'beneficiary' in clause 13A(12) is unnecessary and should be deleted.</p>
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13B	Beneficiary/trustees	The intention behind this provision needs to be clarified. While sections 12(8), 13(8) and 13A(10) all say that the relevant beneficiary assessments do not apply, section 13B seems to provide for the same assessments? We understand that the purpose of the section may be to prevent use of the Principal Place of Residence Exemptions at the beneficiary level. But could this not be accomplished in a simpler way?
13C	Excluded Trusts	As set out earlier, it is submitted that the definition of 'Excluded Trust' should cover a range of further trusts. Section 13C could then just refer to 'Excluded Trusts'.
13D, 13H	Trustee Companies	Sections 13D and 13H should be amended to make it clear that the trust provisions of Division 6 do not apply to trustee companies. The Draft Bill does not purport to aggregate the land held in different trusts (subject to whatever aggregation occurs at beneficiary level under sections 12, 13 and 13A). This policy would be completely negated if Division 6 were used to aggregate the trusts because of their trustees.
13E	Notification	<p>Section 13E(2) requires trustees of existing discretionary trusts to notify the Commissioner of that fact 'within 1 month after the commencement of this section' (which we understand will be 30 June 2020). We note that this is inconsistent with the Treasury Summary, which refers to 1 month after the 'legislation has passed' (which will be a different date).</p> <p>The Tax Institute submits that all of the time periods referred to in section 13E should be extended to two months.</p> <p>It is unclear whether section 13E applies to implied or constructive trusts. They are not 'trusts' as defined, but their trustees are presumably still 'trustees' for the purposes of sections 13E(1), (2) and (3).</p>
13H	Related Corporations	The Tax Institute believes that the definition of 'related corporations' is too wide. In particular, sections 13H(4) and 13H(5) are very broad. The Commissioner should have a general discretion to relieve taxpayers from unfair consequences of the definition (particularly where circumstances change without a voluntary act of the relevant parties).

Schedule Part 3	3	<p>We understand (from reading the 'Overview' document recently published on the Treasury website) that once the land of the trust exceeds \$25,000 in value, there <u>is</u> duty (of \$125) on the first \$25,000. In those circumstances, the second threshold in the table should read:</p> <p><i>'\$125 plus \$0.50 for every \$100 or fractional part of \$100 <u>over \$25,000</u>'.</i></p> <p>We would query whether the \$25,000 threshold is really needed. Perhaps it would be preferable to delete it, and just increase the amount referred to in proposed section 6 (which is essentially just a rewrite of existing section 11) to \$100.</p>
N/a	Exemption	<p>The Draft Bill contains various references to the Principal Place of Residence Exemptions, but does not refer to any other exemptions. Where there are to be multiple assessments under the provisions introduced by the Draft Bill, is it intended that the availability of an exemption at the joint ownership/trustee level will negate any assessment against the joint owner/beneficiaries? For example, how would section 4(1)(j) apply to a land owned by a unit trust in which one (but not all) unitholders are charities?</p>