

2018

THE LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

LAND TAX AMENDMENT BILL 2018

EXPLANATORY STATEMENT

Presented By

Andrew Barr MLA

Treasurer

LAND TAX AMENDMENT BILL 2018

Summary

The Land Tax Amendment Bill 2018 amends the *Land Tax Act 2004* to implement two revenue initiatives:

- the extension of land tax to all residential dwellings that are not an owner's principal place of residence (announced in the 2017-18 Budget); and
- the introduction of a foreign ownership surcharge (announced in the 2017-18 Budget Review).

Overview

Extension of land tax – non-principal place of residence dwellings

Land tax is currently imposed under the *Land Tax Act 2004* (the Act) on:

- rented residential land; or
- residential land owned by a corporation or trustee.

This Bill changes the way land tax is imposed on residential land. It introduces a 'principal place of residence' test as the primary determinant of liability for land tax in place of a 'rented' test.

Residential land which is an owner's principal place of residence will be exempt from land tax. Any other residential land will be subject to land tax including properties left vacant by an owner. This acts as a financial incentive for owners to put their properties into the rental market rather than leaving them vacant for long periods of time.

Exceptions will be introduced in certain circumstances: for owners moving in or out of a principal place of residence; for deceased estates; and land unfit for occupation. Other exemptions currently within the Act will be retained including the exemption for nil or nominal rent arrangements.

A rented test will continue to apply to secondary, self-contained dwellings on a single lease, such as a granny flat, where the other dwelling on the parcel of land is the owner's principal place of residence.

The Commissioner will have regard to the common law meaning of principal place of residence. Facts and circumstances the Commissioner may consider in making this determination include:

- whether the residence is the only principal place of residence at the relevant time;
- the individual's actual use and occupation of the residence;

- the length of time of residence;
- an individual's postal and electoral address;
- where their personal belongings are kept; and
- where that individual's immediate family (partner, children) reside.

Foreign ownership surcharge

This Bill introduces into the Act a foreign ownership surcharge. The surcharge imposes an additional charge on residential land owned (or part owned) by a foreign individual, foreign corporation or trustee of a foreign trust. The surcharge applies to persons who are both non-Australian citizens and non-Australian residents. It will only apply to investment properties in the ACT held by foreigners and will not apply to anyone located in the ACT.

A foreign individual is someone who is not an Australian citizen, permanent resident, New Zealand citizen holding a Special Category visa (subclass 444), or an individual ordinarily resident in Australia or an external territory of Australia e.g. Norfolk Island.

A foreign corporation is a corporation incorporated outside Australia, or a corporation in which one or more foreign people holds a controlling interest of 50 per cent or greater. A controlling interest in a corporation is determined by shareholdings or voting power.

A foreign trust is a trust where a controlling interest of 50 per cent or greater of the beneficial interests in the fixed trust is held by foreign persons as beneficiaries or unit holders, and includes any interests held by associated persons of that foreign person. A foreign trust includes a discretionary trust if a foreign person is specifically named in the trust deed as a person to whom a capital distribution may be made.

The exemptions for land tax will also be applied to the foreign ownership surcharge, except for the nil or nominal rent exemption.

Other amendments

The Bill makes a number of minor and consequential amendments to the Act to improve its operation and facilitate the administration of the two revenue initiatives. A minor change is also being made to the *Rates Act 2004* to correct a typographical error.

Human rights

The changes to the manner in which land tax is imposed do not engage rights under the *Human Rights Act 2004* (the HRA).

Clause 29, which introduces the foreign ownership surcharge (the surcharge), however, may engage and limit the right of every individual to equal and effective protection against discrimination on any ground under section 8 of the HRA.

Discrimination under section 8 includes discrimination on the basis of race, which includes foreign nationality.¹ The United Nations Human Rights Committee notes discrimination as being “any distinction, exclusion, restriction or preference based on any ground that has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”²

The surcharge imposes a new taxation liability on the basis of foreign nationality and immigration status. These liabilities are not imposed on individuals of Australian nationality or domicile. As such, the surcharge will distinguish between individuals by reference to personal attributes and so would potentially qualify as a form of discrimination.

Section 28 of the HRA allows scope for laws to impose reasonable limits on rights provided those limits can be demonstrably justified in a free and democratic society.

The surcharge is designed to improve the affordability of housing for Australian citizens and residents, especially prospective owner-occupiers.

Annual reports of the Foreign Investment Review Board show a rise in approved foreign purchases of new ACT dwellings from 84 in 2013-14 to 166 in 2014-15 and 189 in 2015-16.

Demand for residential property from foreign investment contributes to higher house prices and hinders local home buyers, many of whom intend to live in the property rather than own it as an investment. The impact of such investment may increase in the ACT as other jurisdictions introduce or increase the rates of surcharges on foreign ownership.

The surcharge increases the cost of ownership for foreign owners who are absent from Australia (a strong indication that the home is owned as an offshore investment). Higher holding costs will mean foreign investors will be less likely to purchase and own ACT property. This reduction in demand from foreign buyers will favour home buyers based in Australia, allowing local buyers to compete in the housing market on relatively equal terms.

With declining levels of home ownership, the surcharge can be justified as home ownership provides long-term financial security and emotional wellbeing benefits. There is a direct relationship between the reasonable limitation imposed by the surcharge and the purpose of improving housing affordability for local residents.

The application of the surcharge is limited in several ways to address the potential for an unreasonably discriminatory impact:

- Foreign citizens who reside at the subject property are exempt from the surcharge. New section 11A exempts foreign citizens who live in a purchased ACT property as a principal place of residence.

¹ E.g. see *Discrimination Act 1991*, dictionary.

² UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, available at: <http://www.refworld.org/docid/453883fa8.html> [accessed 4 April 2018].

- Foreign citizens who reside anywhere else in Australia are exempt from the surcharge. The definition of ‘foreign individual’ exempts foreign citizens who are nevertheless ordinarily resident in Australia.
- The surcharge applies to all foreign individuals equally: no citizens of one particular country, or group of countries, are specifically targeted.

Financial incentives are considered the least restrictive means of providing the small advantage to domestic property owners described above.

Similar land tax surcharges have been recently introduced in NSW and Victoria, and most jurisdictions additionally impose a surcharge stamp duty on foreign purchases. The Commonwealth imposes limitations on investment in residential properties by foreigners and has recently introduced an annual vacancy fee on foreigner investors of residential properties.

Other feasible methods of achieving greater housing affordability, such as limiting the amount of foreign investment or banning purchase entirely, would likely have greater impacts on the right to equality.

Commencement

The amendments commence on 1 July 2018.

Details of the Land Tax Amendment Bill 2018

Clause 1 Name of Act

This clause provides that the name of the Act is the *Land Tax Amendment Act 2018*.

Clause 2 Commencement

This clause provides that the Act commences on 1 July 2018.

Clause 3 Legislation amended

This clause provides that the Act amends the *Land Tax Act 2004* and the *Rates Act 2004*.

Clause 4 Definitions for pt 2

Section 7, definition of rent

This clause inserts the word ‘residential’ before ‘tenancy agreement’ to clarify that the rent for which a tenant is liable is rent that is payable under a residential tenancy agreement.

Clause 5 Section 7, new definition of *residential tenancy agreement*

This clause inserts a new definition of *residential tenancy agreement* that refers to the definition in section 6A of the *Residential Tenancies Act 1997*. This ensures a consistency in definitions across ACT legislation.

Clause 6 Section 7, definition of *tenancy agreement*

This clause omits the definition of tenancy agreement given the insertion of a new definition of *residential tenancy agreement*.

Clause 7 Section 7, definition of *tenant*

This clause substitutes a new definition of *tenant* that refers to the definition in section 6 of the *Residential Tenancies Act 1997*. This ensures a consistency in definitions across ACT legislation.

Clause 8 Section 7, definition of *trustee*

This clause substitutes a definition of trustee so that the definition no longer excludes an executor or administrator of a will of a deceased person.

Clause 9 When is something rented for pt 2?

Section 8 (1)

This clause omits the reference to ‘land tax’ in section 8 (1). This removes a nonsensical circular reference to ‘land tax’ in section 8 (1) which previously operated to exclude from land tax properties where payments only covered certain, limited expenses and hence land tax could not have been one of these expenses.

Clause 10 Section 8 (3) to (5)

This clause omits sections 8 (3) to (5) that provide for when a parcel of land or dwelling is taken to be rented on the first day of a quarter or at any time in the previous quarter. Under the revised system of calculating land tax, liability for land tax is determined on the first day of each quarter, irrespective of whether it was liable in the previous quarter. Also, whether a parcel of land is rented or not will no longer be the primary determinant of liability for land tax. Owners are still required to tell the Commissioner if their parcel of land becomes liable for land tax as per Section 14 which provides a clearer explanation of an owner's obligations to inform the Commissioner.

Clause 11 New section 8A

Clause 11 inserts a new section 8A that provides that in relation to Part 2 of the *Land Tax Act 2004*, land tax is payable for a quarter if it is payable on the 1st day of the quarter and it is not exempt under Part 2.

If an exemption applied to a parcel of land but ceases to apply during a quarter, land tax is payable on the 1st day of the quarter following the date the exemption stops applying.

Clause 12 Imposition of land tax

Section 9 (1)

Clause 12 substitutes sub-section 9 (1) with new sub-sections 9 (1) and (1A) to provide that land tax is imposed for a quarter on each parcel of rateable land that is residential land unless an exemption under section 10 or 11 applies.

This provision extends land tax to all residential land except where an exemption applies.

Clause 13 Section 9 (2) (a)

This clause notes that land tax applying to units in a unit subdivision is calculated in accordance with section 27, rather than section 9.

Clause 14 Section 9 (3)

This clause omits section 9 (3) of the *Land Tax Act 2004* as a consequence of new sub-section 9 (1A) which now contains the reference to land tax not being imposed if an exemption applies.

Clause 15 Land exempted from s 9 generally

New section 10 (1) (aa)

This clause inserts new section 10 (1) (aa) that lists new exemptions.

Clause 16 Land exempted from land tax

Section 11 (2)

Clause 16 omits section 11 (2) as a consequence of new sub-section 11I that exempts land tax if land becomes unfit for occupation. This removes the previous ‘builders exemption’ which provided that land owned by a corporation carrying on a business as a builder or land developer could be exempt from land tax for up to two years where new residential premises were being constructed.

This section is replaced by the exemption in section 11I, where land unfit for occupation is exempt from land tax – this includes land where buildings are being constructed.

Clause 17 Section 11 (3), definitions of *new residential premises* and *substantial renovations*

This clause omits the definition for new residential premises and substantial renovations as a consequence of the removal of section 11 (2).

Clause 18 New sections 11A to 11I

This clause inserts new exemptions in the *Land Tax Act 2004*.

New section 11A provides that if a parcel of land is occupied as the principal place of residence of one or more owners of that land on the 1st day of a quarter, the parcel of land is exempt from land tax.

For persons in a domestic partnership who own more than one parcel of land, only one parcel is eligible for this exemption (unless the Commissioner is satisfied the relationship has broken down).

New sections 11B and 11C provide that owners who either move out of a parcel of land or purchase a parcel of land are exempt from land tax for the quarter after the event occurs. This ensures owners are not liable for land tax while their parcel of land is vacant for short periods while they are moving in or out. These exemptions do not apply if the parcel of land is rented.

New sections 11D, 11E and 11F provide exemptions for a parcel of land which is the former principal place of residence of a deceased owner. In general, the exemption lasts for two years if the parcel of land remains registered in the name of the deceased owner or the personal representative, such as the executor of the will. Persons may apply to the commissioner to extend this two year period. Applications for an extension lodged after the two year period may be accepted by the commissioner if it is considered just and fair to do so.

New section 11G provides an exemption in situations where a person is granted a life tenancy to a parcel of land under the terms of a will. This exemption does not apply if the parcel of land is rented or if it is owned by a corporation or trustee.

New section 11H replaces the previous exemption for nil or nominal rent (previously section 8 (1)). There is no liability for land tax if the owner does either not charge rent or charges only a nominal amount of less than the sum of the costs incurred for rates, repairs,

maintenance and insurance. This exemption does not apply if the parcel of land is owned by a corporation or trustee.

New section 111 provides an exemption for land unfit for occupation, such as when a residential building is in the process of being constructed, is undergoing substantial renovations or has been severely damaged.

Clause 19 Section 12 (1)

This section changes the wording in the compassionate case exemption to reflect that land tax is not no longer determined based on a parcel of land’s rental status.

Clause 20 Section 12 (4)

This amendment notes a reference to land tax includes a foreign ownership surcharge for the purposes of compassionate case exemptions.

Clause 21 Section 13 (6)

This amendment notes a reference to land tax includes a foreign ownership surcharge for the purposes of compassionate case exemptions.

Clause 22 Section 14

Section 14 has been updated and now requires the commissioner to be told of a change in circumstances which would result in a land tax or foreign ownership surcharge liability, instead of just being informed of residential land being rented.

The requirement to tell the commissioner “in writing” has been removed, allowing for other forms of communication.

Clause 23 Section 14A

Section 14A, which required the commissioner to be told if residential land owned by an individual as trustee, is being repealed. Trustee notifications can be dealt with by section 14 which require the commissioner to be notified if a parcel of land becomes liable for land tax.

Clause 24 Section 15 (1) (b)

Section 15 is to ensure that rented secondary dwellings on a single parcel of land, i.e. granny flats, remain liable for land tax by retaining a ‘rented’ test for these dwellings. The amendment broadens the application of section 15 so that it now applies if at least one of the dwellings is occupied:

- as the principal place of residence of 1 or more owners, including an owner who is a personal representative of a deceased person; or
- as the principal place of residence of a person having a life or term interest in the parcel of land under a will; or

- by a person who pays nil or nominal rent.

Clause 25 Section 15(5)

This section aligns the definition of a dwelling with that in the *Planning and Development Regulation 2008* to ensure a consistency in definitions across ACT legislation. A unit is excluded from the definition of dwelling for the purposes of section 15 due to the difference in calculation formulas between houses and units in relation to multiple dwelling properties.

Clause 26 Section 16

This amendment ensures corporations or trustees with either full or partial ownership of a residential parcel of land will continue to be liable for full or partial land tax provided they are not otherwise exempt. With the new exemptions in section 11, land tax will continue to be applied on land fully or partly owned by a corporation/trustee for land which meets one of these new exemptions (except for the exemption if land becomes unfit for occupation in section 10 (1) (aa) (iv) as this replaces a previous exemption). This is to ensure land tax is applied in the following cases, as examples:

- Land is partly owned by a company and partly by an individual who is using the land as their PPR;
- Land is fully or partly owned by a company and is being leased out under nil or nominal rent arrangements.

Clause 27 Section 17 (6) (b)

This section is being omitted as land tax will no longer be charged on part of a quarter.

Clause 28 Section 17 (7)

This clause ensures an assessment notice given under the Act can include an assessment for the foreign ownership surcharge. This allows for objection rights for taxpayer who receives a foreign ownership surcharge assessment.

Clause 29 Part 2A

This amendment inserts the foreign ownership surcharge into the Act.

Part 17A, 17B and 17C insert definitions into the Act to allow the imposition of the foreign ownership surcharge on non-citizen, non-residents. Foreign trusts and corporations are defined as those with controlling foreign interests or foreign beneficiaries of trusts.

Part 17D provides for the charging of the foreign ownership surcharge based on the status of the land on the first day of each quarter.

Part 17E provides for the imposition of the foreign ownership surcharge on land owned by a foreign person on the first day of a quarter unless the land meets on the exemption criteria in section 10 or section 11, other than section 10(1)(aa)(vi) – Exemption if nil or nominal rent paid.

Part 17F provides the calculation methodology for the foreign ownership surcharge. The rate of the surcharge will be determined by the Treasurer through a disallowable instrument and will be a percentage of the average unimproved (land) value (AUV) of a parcel of land. The formulas for the foreign ownership surcharge for land owned wholly by an entity liable for the foreign ownership surcharge are as follows:

- For a unit in a unit subdivision, the AUV of the residential component of the unit subdivision, multiplied by the determined rate, multiplied by the unit entitlement percentage of the unit.
- For a house, the AUV of the parcel of land multiplied by the determine rate.

For a parcel of land partly owned by an entity liable for the foreign ownership surcharge and partly owned by an entity not liable for the surcharge, the surcharge is calculated using the formulas for a unit/house described above multiplied by the percentage of foreign ownership.

Clause 30 Section 18

This section is being omitted as land tax will no longer be charged on part of a quarter.

Clause 31 Section 18A

Section 18A is a new section inserted to ensure references to land tax also include the foreign ownership surcharge for Part 3 of the Act which deals with enforcement.

Clause 32 Section 19A (1) (b)

This clause updates the language of the enforcement provisions to reference the revised section 14 which refers to the commissioner to be told of a change in circumstances, which would give rise to a land tax liability, rather than being told that a property is rented.

Clause 33 Section 19A (4)

This section is being omitted as land tax will no longer be charged on part of a quarter.

Clause 34 Section 19A (5)

References to section 19A (4) have been omitted as this clause has been omitted.

Clause 35 Section 27 (4) Unit subdivisions

In line with section 15 (see clause 24), section 27 (4) is being amended so that it now applies if at least one of the dwellings is occupied:

- as the principal place of residence of 1 or more owners, including an owner who is a personal representative of a deceased person; or
- as the principal place of residence of a person having a life or term interest in the parcel of land under a will; or

- by a person who pays nil or nominal rent.

Section 27 (5) is being amended to remove the reference to rented. Land tax will apply on a parcel of land jointly owned by an individual and a company or trustee, in proportion to the level of company or trustee ownership, in situations where the individual is exempt from land tax. If the parcel of land is exempt under section 10 (1) (aa) (vii) – Exemption if land becomes unfit for occupation, no land tax will apply.

Clause 36 Section 27 (7)

This clause updates the definition of dwelling to match the definition in the *Planning and Development Regulation 2008*.

Clause 37 Section 27 (7)

This clause corrects a typographical error and inserts ‘total’ into the definition of total unit entitlement.

Clause 38 Section 33

Section 33 is a new section inserted to ensure references to land tax also include the foreign ownership surcharge for Part 3 of the Act which deals with exemptions, remissions and certain interest payments.

Clause 39 Section 38 Objections

Section 38 is being updated to reflect the new decisions by the commissioner which may be objected to in light of the changes to the Act.

Clause 40 Section 39 (1)

This clause updates the references to decisions which are not reviewable by the ACT Civil and Administrative Tribunal in light of the revised list of objections in section 38.

Clause 41 Section 41 (5)

Section 41 (5) is being inserted to ensure references to land tax also include the foreign ownership surcharge for Section 41 of the Act. Section 41 allows for persons, such as potential purchasers of a parcel of land, to apply to the commissioner for a certificate showing the amount of land tax and foreign ownership surcharge payable for that parcel.

Clause 42 Dictionary

Clause 42 inserts new notes into the dictionary to note the Legislation Act defines the following terms which have been introduced into the Act by this Bill:

- Australia
- Domestic partnership
- External territory
- Territory law

Clause 43 Dictionary, new definitions

A number of new definitions are being inserted into the Act as a result of the changes contained in this Bill.

Clause 44 Dictionary, definition of land tax

The definition of land tax is being amended as a result of changes to other sections in the Act. The sections have now been referenced in the definition for clarity.

Clause 45 Dictionary, new definitions

A number of new definitions are being inserted into the Act as a result of the changes contained in this Bill.

Clause 46 Dictionary, definition of *tenancy agreement*

Tenancy agreement has been removed from the dictionary as it has been defined elsewhere in the Act (see clause 5).

Clause 47 *Rates Act 2004*, definition of total unit entitlement

This clause corrects a typographical error and inserts 'total' into the definition of total unit entitlement in the *Rates Act 2004*.