



New State Revenue and Fines Legislation Amendment Bill

Overview of the bill

On 23 March 2022, The *State Revenue and Fines Legislation Amendment (Miscellaneous) Bill 2022 (NSW) (Bill)* was introduced into the NSW Legislative Assembly. The Bill proposes to make ‘miscellaneous amendments’ to legislation relating to State revenues and fines, particularly the existing Duties Act 1997 (NSW). The Bill is expected to pass into law in May 2022.

What does this mean for you?

1. Imposition of a duty on changes in beneficial ownership

In NSW, there is currently scope to avoid paying duty through a change in beneficial ownership, as opposed to a change in legal ownership, which attracts duty. An example of a situation was considered to by Victor Dominello MP in the Bill’s second reading:

“[Imagine] a fixed trust holding land in New South Wales that has two beneficiaries, each with an equal interest and one of these beneficiaries disposes of their 50 per cent interest to the other beneficiary. There is no change in the legal ownership of the land, which is held by the trustee, but the remaining beneficiary has now acquired an additional 50 per cent beneficial interest in the land, without any duty being incurred. This is obviously contrary to the intentions of the Act”.

Similar to the provisions in Victoria, the Bill would insert Sections 8 and 8(2A), which have the effect that duty be charged on changes in beneficial ownership.

2. Imposition of a duty on acknowledgments of trust

The second major amendment addressed the uncertainty in law pertaining to the recent decision of *Benidorm v Chief Commissioner of State Revenue* [2020] NSWCA 285 (**Benidorm**) in the New South Wales Court of Appeal.

Prior to *Benidorm*, a declaration of trust was considered to be a **dutiable transaction** and was, therefore, always liable to duty under the *Duties Act 1997*. Uncertainty in the law arose after the Court of Appeal accepted the judgement of Ward CJ in *Benidorm*, being that the declaration of trust in question was not liable to duty because it did not affect a ‘transaction’.

Accordingly, the Bill proposes the insertion of section 8AA, which revokes the New South Wales Court of Appeal’s decision in *Benidorm*, by charging a duty on the making of a statement that purports to be a declaration of trust.

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3. Refund of foreign surcharge purchaser duty

In NSW, infrastructure programs are being impeded by unforeseen costs, particularly to international developers. This is because precincts with vacant land that have been rezoned for commercial or industrial use are still classified as 'residential' as they have a dwelling on them.

This means that lands acquired by Australian-based companies with **foreign ownership** face surcharges for purchases of residential land, which their Australian counterparts do not.

As such, the Bill proposes the insertion of a section which *'enables surcharge purchaser duty paid in relation to a transfer of land to be refunded if, after the transfer, the land is used by the transferee wholly or predominantly for commercial or industrial purposes'*.

Applications for a refund must be made within 12 months of the land being used for commercial or industrial purposes and no later than 10 years after completion of the transfer of the residential-related property to the Australian corporation.

4. Eligibility caps for first home owner grants

Under the *First Home Owner Grant (New Homes) Act 2000* (NSW), whether the total value of a transaction falls below the eligibility cap of \$750,000 is determined at the commencement date of the contract. The problem with the value being determined at the commencement date of the contract is that it is possible for parties to a contract to enter into post contract variations that take the total value of the transaction above the cap. Further, it is unclear whether in such situations grants paid in advance can then be required to be repaid.

The Bill seeks to insert a section 13A which provides that the total value of the building contract, for the purpose of determining eligibility for a first home owner grant, to be determined at the date the contract is **completed** (i.e. settlement), rather than the date when the **contract is made**. Further, the amendments ensure that if the total value of a contract exceeds the eligibility cap, the grant can be required to be repaid.

5. Anti-avoidance Provisions

The final amendments pertain to the replacement of the existing anti-avoidance rules in the *Duties Act 1997* (NSW) with a broader regime in the *Taxation Administration Act 1996* (NSW). These provisions seek to deter the making of, entry into or carrying out of tax avoidance schemes.

The current anti-avoidance rules hold individuals liable to pay duty as a result of a tax avoidance scheme that is of an artificial, blatant or contrived nature (s 284D of the *Duties Act 1997*).

The removal of this requirement and the insertion of the new provisions will broaden the duty avoidance provisions' application to schemes for the avoidance of all kinds of tax liability rather than only liability to pay duty.

The bill defines a tax avoidance scheme as a *"scheme that a person... enters into, makes or carries out for the sole or dominant purpose of enabling a tax liability to be avoided"*. The word *"avoided"* is taken to mean the action of postponing or reducing tax liability. Accordingly, this has implications for developers entering into Put and Call Option arrangements, who have historically paid duty upon exercising the option. The Bill may now require parties to a Put and Call Option arrangement to pay option fees when the option is created, when where those option fees are spread out over time.

6. Next Steps

Property developers who are in the process of entering into Put and Call Option agreements should be weary of when these agreements will be signed, since the new legislation will only apply to Put and Call Option Agreements made after the passing of the legislation.

If you wish to discuss further what the new legislation means for you, please contact [Construction Legal](#).

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