



New South Wales

# State Revenue Legislation Further Amendment Bill 2019

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

## Overview of Bill

The object of this Bill is to make amendments to the *Duties Act 1997*, the *Land Tax Act 1956* and the *Land Tax Management Act 1956* for the following purposes—

- (a) to provide for exemption from and refunds of surcharge purchaser duty and surcharge land tax payable in respect of residential land by the trustee of a discretionary trust if the trust prevents a foreign person from being a beneficiary of the trust (so as to prevent a discretionary trust from inadvertently attracting liability for surcharge duty and tax payable by a foreign trustee),
- (b) to make it clear that the Chief Commissioner of State Revenue can approve a manner of stamping or endorsement of the payment of transfer duty and surcharge purchaser duty that removes the need for separate stamping or endorsement for each kind of duty,
- (c) to extend provisions that treat an assignment to a third person of an option to purchase dutiable property as a transfer of the property for duty purposes so as to include an arrangement for the relinquishment of the option with an agreement to sell to the third person,
- (d) to change the method of determining the value of the land holdings of a landholder for the purposes of the threshold for provisions that impose duty on the acquisition of an interest in a landholder so that unencumbered value is used instead of unimproved value (for consistency with the use of unencumbered value in calculating the duty payable on the acquisition of such an interest),
- (e) to provide that, for the purposes of duty payable on the acquisition of an interest in a landholder, land includes anything (whether or not a fixture) that is fixed to land,

- (f) to make a landholder jointly liable for the duty payable by a person when the person acquires an interest in the land and to provide for the liability of the landholder to be a charge on the land for which a caveat can be registered,
- (g) to enact consequential savings and transitional provisions (including provisions relating to the indexation of dutiable value thresholds consequent on the enactment of the *State Revenue and Other Legislation Amendment Act 2019*) and to make miscellaneous minor amendments.

The Bill also makes consequential amendments to the *Aboriginal Land Rights Regulation 2014*.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on the date of assent to the proposed Act.

## Schedule 1 Amendment of Duties Act 1997 No 123

### Foreign trustees of discretionary trusts

**Schedule 1[1]** (proposed section 104JA) makes special provision for the liability for surcharge purchaser duty of foreign trustees when the trust is a discretionary trust. A trustee of a discretionary trust is taken to be a foreign trustee (and so is liable for surcharge purchaser duty as the transferee of residential land) if the terms of the trust do not prevent a foreign person from being a beneficiary. If the terms of the trust prevent a foreign person from being a beneficiary, the trustee is not a foreign trustee for surcharge purchaser duty purposes.

**Schedule 1[8]** (amendment of Schedule 1) provides transitional arrangements for proposed section 104JA, including provision for surcharge purchaser duty exemptions and refunds when the terms of a discretionary trust have been amended before the end of 2019 to prevent a foreign person from being a beneficiary. The trustee of a discretionary trust arising under a will where the deceased dies within 2 years after the commencement of section 104JA will not be a foreign trustee if the deceased was not a foreign person.

### Acquisition of interests in landholders

**Schedule 1[4] and [5]** (amendment of section 146 and repeal of section 146A) change the method of determining the value of land that establishes the threshold for the application of provisions imposing duty on the acquisition of an interest in a landholder so that unencumbered value is used instead of unimproved value. Unencumbered value is the value that is currently used for calculating the duty payable on such an acquisition.

**Schedule 1[6]** (proposed section 147A) provides that for the purposes of provisions that impose duty on the acquisition of an interest in a landholder, land includes anything fixed to land whether or not a fixture.

**Schedule 1[7]** (substituted section 154) extends liability for the duty payable by a person when the person acquires an interest in a landholder so that the landholder will be jointly liable and to provide for that liability of the landholder to be a charge on the land in respect of which a caveat can be registered.

### Miscellaneous amendments

**Schedule 1[2]** (proposed section 104ZQ(4)) provides that the Chief Commissioner can approve a manner of stamping or endorsing the payment of transfer duty and surcharge purchaser duty that does not require separate stamping or endorsement for each kind of duty, so that a single stamping or endorsement is sufficient to indicate that both kinds of duty have been paid.

**Schedule 1[3]** (proposed section 107(2)(c)) includes, as another situation in which a person is to be treated as having assigned their right under a call option to purchase dutiable property to a third

party, the situation of an agreement or arrangement whereby the option holder relinquishes that right for valuable consideration and the owner of the property agrees to sell to the third party.

### **Savings and transitional**

**Schedule 1[8]** (amendment of Schedule 1) provides for the transitional arrangements for proposed section 104JA and the other amendments referred to above.

## **Schedule 2 Amendment of Land Tax Act 1956 No 27**

**Schedule 2** (proposed section 5D) makes special provision for the liability for surcharge land tax of foreign trustees when the trust is a discretionary trust. A trustee of a discretionary trust is taken to be a foreign person (and so is liable for surcharge land tax as the owner of residential land) if the terms of the trust do not prevent a foreign person from being a beneficiary. If the terms of the trust prevent a foreign person from being a beneficiary, the trustee is not a foreign person for surcharge land tax purposes.

## **Schedule 3 Amendment of Land Tax Management Act 1956 No 26**

**Schedule 3** (amendment of Schedule 2) provides for the following transitional arrangements for proposed section 5D of the *Land Tax Act 1956*—

- (a) surcharge land tax exemptions and refunds if the terms of the discretionary trust have been amended before the end of 2019 to prevent a foreign person from being a beneficiary,
- (b) the trustee of a discretionary trust arising under a will where the deceased died within 2 years after the commencement of proposed section 5D of the *Land Tax Act 1956* will not be a foreign person if the deceased was not a foreign person.

## **Schedule 4 Amendments relating to indexation**

### **Aboriginal Land Rights Regulation 2014**

**Schedule 4.1** (substituted clauses 110 and 111 and repeal of Schedule 6) adjusts the method of calculating the amount of the community development levy payable by a Local Aboriginal Land Council for a dutiable transaction so that it aligns with the indexation of dutiable value thresholds under the *Duties Act 1997*. The amendment is consequent on the enactment of the *State Revenue and Other Legislation Amendment Act 2019*.

### **Duties Act 1997 No 123**

**Schedule 4.2** (amendment of section 78A) adjusts the method of calculating the rate of duty payable on a transaction that is subject to a duty concession under the First Home Buyers Assistance Scheme. The adjusted method of calculation ensures that the amount of the duty concession is not reduced by operation of the indexation of dutiable value thresholds for the purpose of calculating the general rate of duty. The amendment is consequent on the enactment of the *State Revenue and Other Legislation Amendment Act 2019*. **Schedule 1[8]** provides for the transitional arrangements for the amendment.



New South Wales

# State Revenue Legislation Further Amendment Bill 2019

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New South Wales

# State Revenue Legislation Further Amendment Bill 2019

No. \_\_\_\_\_, 2019

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## **A Bill for**

An Act to make miscellaneous amendments to certain State revenue legislation; and for other purposes.

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**The Legislature of New South Wales enacts—**

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**1 Name of Act**

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This Act is the *State Revenue Legislation Further Amendment Act 2019*.

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**2 Commencement**

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This Act commences on the date of assent to this Act.

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## Schedule 1 Amendment of Duties Act 1997 No 123

### [1] Section 104JA

Insert after section 104J—

#### 104JA Special provisions for discretionary trusts

- (1) The trustee of a discretionary trust is taken to be a foreign trustee for the purposes of this Chapter unless the trust prevents a foreign person from being a beneficiary of the trust.
- (2) If a discretionary trust prevents a foreign person from being a beneficiary of the trust, the trustee of the trust is not in that capacity a foreign trustee for the purposes of this Chapter.
- (3) A discretionary trust is considered to prevent a foreign person from being a beneficiary of the trust if (and only if) both of the following requirements are satisfied—
  - (a) no potential beneficiary of the trust is a foreign person (the *no foreign beneficiary requirement*),
  - (b) the terms of the trust are not capable of amendment in a manner that would result in there being a potential beneficiary of the trust who is a foreign person (the *no amendment requirement*).

**Note.** Under the transitional arrangements for this section in Schedule 1, the no amendment requirement does not apply to a trust that satisfies the no foreign beneficiary requirement immediately before the commencement of this section.
- (4) A person is a *potential beneficiary* of a discretionary trust if the exercise or failure to exercise a discretion under the terms of the trust can result in any property of the trust being distributed to or applied for the benefit of the person.

**Note.** A potential beneficiary is not limited to persons named in the trust instrument and extends to the members of any class of persons to whom or for whose benefit trust property can be distributed or applied pursuant to the discretions of the trust.
- (5) For the removal of doubt, a person is not a potential beneficiary of a discretionary trust if the terms of the trust prevent any property of the trust from being distributed to or applied for the benefit of the person.
- (6) In this section, *property* includes money, and a reference to the distribution or application of property includes a reference to the payment of money.

### [2] Section 104ZQ Stamping and endorsement of surcharge duty transactions

Insert after section 104ZQ(3)—

- (4) The Chief Commissioner may approve a manner of stamping or endorsement that does not require separate stamping or endorsement of an instrument for purchaser duty and surcharge purchaser duty so that stamping or endorsement by means of a single unique transaction identifier or reference number or a single endorsement is sufficient to indicate payment of both purchaser duty and surcharge purchaser duty.

### [3] Section 107 Assignment of rights under call option dutiable as transfer

Insert at the end of section 107(2)(b)—

- , and
- (c) if A enters into an agreement or arrangement under which A, for valuable consideration, relinquishes the right under a call option to

	require B to sell dutiable property and B agrees to sell the dutiable property to a third person (C), A is to be treated as having assigned that right under the call option so that the option is exercisable by C.	1 2 3
<b>[4]</b>	<b>Section 146 Meaning of “landholder”</b>	4
	Omit “a threshold value” from section 146(1). Insert instead “an unencumbered value”.	5
<b>[5]</b>	<b>Section 146A Threshold value of land holdings</b>	6
	Omit the section.	7
<b>[6]</b>	<b>Section 147A</b>	8
	Insert after section 147—	9
<b>147A</b>	<b>What does “land” include?</b>	10
	(1) For the purposes of this Chapter, <i>land</i> includes anything fixed to the land, whether or not the thing—	11 12
	(a) constitutes a fixture at law, or	13
	(b) is owned separately from the land, or	14
	(c) is notionally severed or considered to be legally separate from the land as a result of the operation of any other Act or law.	15 16
	(2) Land does not include anything excluded under section 163K from the definition of <i>goods</i> in this Chapter.	17 18
	(3) The Chief Commissioner may determine that land does not include a thing fixed to land if—	19 20
	(a) the thing is owned by a person who is not the person who owns the land or an associated person of the person who owns the land, and	21 22
	(b) the thing is not used in connection with the use of the land.	23
	(4) For the removal of doubt, anything that is land because of this section is not goods for the purposes of section 163G (Significant holdings in goods).	24 25
<b>[7]</b>	<b>Section 154</b>	26
	Omit the section. Insert instead—	27
<b>154</b>	<b>Who is liable to pay the duty?</b>	28
	(1) The following persons are jointly and severally liable to pay duty chargeable under this Part—	29 30
	(a) the person who makes the relevant acquisition,	31
	(b) the landholder or, if the landholder is a unit trust scheme, the trustee of the landholder,	32 33
	(c) if the relevant acquisition results from an aggregation of the interests of the person referred to in paragraph (a) and other persons—each of those other persons.	34 35 36
	(2) A person who pays an amount of duty chargeable under this Part is entitled to recover as a debt the amount paid (together with any penalty or interest paid by the person in respect of that duty) from another person who is jointly and severally liable to pay the duty, as follows—	37 38 39 40
	(a) the landholder or trustee of the landholder is entitled to recover from a person referred to in subsection (1)(a) or (c),	41 42



- (b) the person who makes the relevant acquisition is entitled to recover from the other persons referred to in subsection (1)(c) (but not from the landholder or trustee of the landholder) with recovery from each of those other persons limited to an amount that is proportionate to the interest of the other person, 1
- (c) a person referred to in subsection (1)(c) is not entitled to recover. 2
- (3) Any liability of a landholder, or the trustee of a landholder, to pay duty chargeable under this Part (together with any interest or penalty tax payable) is a charge on the land holdings of the landholder or trustee. 3
- (4) A charge created by this section gives the Chief Commissioner an interest in the land and, accordingly, the Chief Commissioner may lodge a caveat in respect of the land under the *Real Property Act 1900* to protect that interest. 4
- (5) A caveat must be withdrawn when the amount of the duty for which the landholder or trustee is liable (together with any interest or penalty tax payable) has been paid. 5
- (6) Section 45(3) of the *Taxation Administration Act 1996* (which relates to rights of contribution or indemnity between persons who are jointly and severally liable for duty) does not apply to joint and several liability under this section. 6

**[8] Schedule 1 Savings, transitional and other provisions** 19  
Insert at the end of the Schedule, with appropriate Part and clause numbering— 20

**Part Provisions consequent on enactment of State Revenue Legislation Further Amendment Act 2019** 21

**Definition** 23

In this Part— 24  
**amending Act** means the *State Revenue Legislation Further Amendment Act 2019*. 25

**Surcharge purchaser duty—discretionary trusts** 27

- (1) Section 104JA extends to a surcharge duty transaction that occurred before the commencement of that section. 28
- (2) If the trustee of a discretionary trust is liable as a foreign trustee for surcharge purchaser duty on a transfer of dutiable property that occurs before the commencement of section 104JA, or after that commencement but before midnight on 31 December 2019— 29

  - (a) the trustee is exempt from that duty if the terms of the trust have been amended, before midnight on 31 December 2019 and before the due date for payment of duty, so that the trust prevents a foreign person from being a beneficiary, or 30
  - (b) if that duty has been paid, the trustee is entitled to a refund of that duty if the terms of the trust have been amended, before midnight on 31 December 2019, so that the trust prevents a foreign person from being a beneficiary. 31

- (3) A trust that satisfies the no foreign beneficiary requirement under section 104JA immediately before the commencement of that section is considered for the purposes of that section to prevent a foreign person from being a beneficiary of the trust (without having to satisfy the no amendment requirement under that section). 32

- (4) Despite section 104JA, the trustee of an Australian testamentary trust is not in that capacity a foreign trustee for the purposes of Chapter 2A if the deceased died before, or within 2 years after, the commencement of that section (even if the trust does not prevent a foreign person from being a beneficiary of the trust). 1  
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- (5) The Chief Commissioner may in a particular case extend the due date for payment of surcharge purchaser duty by a trustee so that the trustee qualifies for exemption from that duty under this clause if the terms of the trust have been amended before midnight on 31 December 2019 (but after the date that would otherwise be the due date for payment) so that the trust prevents a foreign person from being a beneficiary. 6  
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- (6) In this clause— 12  
*Australian testamentary trust* means a discretionary trust arising from a will or codicil or the administration of an intestate estate (or as a result of an order of a court varying the application of the provisions of a will or codicil or of the rules governing the distribution of an intestate estate) where the deceased was not a foreign person immediately before his or her death. 13  
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*due date* for payment of duty means the date that is 3 months after the liability for duty arises. 18  
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- (7) Expressions in this clause have the same meanings as in section 104JA. 20
- Assignment of rights under call option** 21
- Section 107(2)(c) does not apply to an agreement or arrangement referred to in that paragraph that is entered into before the commencement of that paragraph. 22  
23  
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- Acquisition of interests in landholders** 25
- The amendments made by the amending Act to Part 1 of Chapter 4 do not apply to a relevant acquisition (within the meaning of that Chapter) made before the commencement of those amendments or made after that commencement pursuant to an agreement entered into before that commencement. 26  
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- Liability for landholder duty** 31
- Section 154 (as substituted by the amending Act) extends to duty chargeable under Chapter 4 before the section is substituted. 32  
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- First Home Buyers Assistance Scheme** 34
- The amendment made by the amending Act to section 78A applies to the following— 35  
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- (a) agreements for sale or transfer entered into on or after 1 December 2019, 37  
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- (b) transfers that occur on or after 1 December 2019, other than transfers made in conformity with an agreement for sale or transfer entered into before 1 December 2019. 39  
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## Schedule 2 Amendment of Land Tax Act 1956 No 27

### Section 5D

Insert after section 5C—

#### 5D Surcharge land tax—discretionary trusts

- (1) The trustee of a discretionary trust is taken to be a foreign person in that capacity for the purposes of section 5A if the trust does not prevent a foreign person from being a beneficiary of the trust.
- (2) If a discretionary trust prevents a foreign person from being a beneficiary of the trust, the trustee is not in that capacity a foreign person for the purposes of section 5A.
- (3) A discretionary trust is considered to prevent a foreign person from being a beneficiary of the trust if (and only if) both of the following requirements are satisfied—
  - (a) no potential beneficiary of the trust is a foreign person (the *no foreign beneficiary requirement*),
  - (b) the terms of the trust are not capable of amendment in a manner that would result in there being a potential beneficiary of the trust who is a foreign person (the *no amendment requirement*).

**Note.** Under the transitional arrangements for this section in Schedule 2 to the Principal Act, the no amendment requirement does not apply to a trust that satisfies the no foreign beneficiary requirement immediately before the commencement of this section.
- (4) A person is a *potential beneficiary* of a discretionary trust if the exercise or failure to exercise a discretion under the terms of the trust can result in any property of the trust being distributed to or applied for the benefit of the person.

**Note.** A potential beneficiary is not limited to persons named in the trust instrument and extends to the members of any class of persons to whom or for whose benefit trust property can be distributed or applied pursuant to the discretions of the trust.
- (5) For the removal of doubt, a person is not a potential beneficiary of a discretionary trust if the terms of the trust prevent any property of the trust from being distributed to or applied for the benefit of the person.
- (6) In this section, *property* includes money, and a reference to the distribution or application of property includes a reference to the payment of money.
- (7) Chapter 11A (Tax avoidance schemes) of the *Duties Act 1997* applies in respect of the avoidance of surcharge land tax in connection with the operation of this section in the same way as that Chapter applies in respect of the avoidance of duty under that Act, and for that purpose—
  - (a) a reference in that Chapter to duty is to be read as including a reference to surcharge land tax, and
  - (b) a reference in that Chapter to “this Act” is to be read as a reference to the *Land Tax Act 1956* and the *Land Tax Management Act 1956*.



- (7) Expressions in this clause have the same meanings as in section 5D of the *Land Tax Act 1956*.

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**Schedule 4 Amendments relating to indexation** 1

**4.1 Aboriginal Land Rights Regulation 2014** 2

**[1] Clauses 110 and 111** 3

Omit the clauses. Insert instead— 4

**110 Amount of community development levy** 5

For the purposes of section 42T of the Act, the prescribed percentage of the duty that would be chargeable under the *Duties Act 1997* for a dutiable transaction to which a threshold range specified in Column 1 of the table to this clause applies is the percentage specified for that threshold range in Column 2. 6  
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Column 1	Column 2
Threshold range	Amount of community development levy
4 or 5	100% of amount of duty
6	150% of amount of duty

**Note.** See Part 3 of Chapter 2 of the *Duties Act 1997*, which contains the threshold ranges of dutiable value used to calculate the amount of duty chargeable under that Part on a dutiable transaction. 10  
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**111 Transactions to which community development levy does not apply** 13

The community development levy does not apply to a dutiable transaction if the dutiable value of the land concerned is the minimum threshold amount specified for threshold range 4, or less. 14  
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**Note.** See Part 3 of Chapter 2 of the *Duties Act 1997*, which contains the threshold ranges of dutiable value used to calculate the amount of duty chargeable under that Part on a dutiable transaction. 17  
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**[2] Schedule 6 Community development levy payable in respect of dutiable transactions** 20

Omit the Schedule. 21

**4.2 Duties Act 1997 No 123** 22

**Section 78A Duty payable if application approved** 23

Omit section 78A(2). Insert instead— 24

- (2) If an application concerning an eligible agreement or transfer is approved in respect of property that has a private dwelling built on it and subsection (1) does not apply to the agreement or transfer, the rate of duty chargeable in respect of the agreement or transfer is to be calculated in accordance with the following formula— 25  
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$$N - \left( \frac{\$800,000 - V}{\$150,000} \times D \right)$$

where— 30

*N* is the amount of duty (calculated in accordance with section 32) that would otherwise be payable in respect of the agreement or transfer. 31  
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*V* is the dutiable value of the dutiable property that is the subject of the agreement or transfer. 33  
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**D** is the amount of duty (calculated in accordance with section 32) that would otherwise be payable in respect of an agreement or transfer relating to property that has a private dwelling built on it and has a dutiable value of \$650,000.

**Note.** An agreement or transfer in respect of property that has a private dwelling built on it is not an eligible agreement or transfer if the dutiable value of the property is \$800,000 or more. See section 74(3).

- (2A) If an application concerning an eligible agreement or transfer is approved in respect of property that comprises a vacant block of residential land and subsection (1) does not apply to the agreement or transfer, the rate of duty chargeable in respect of the agreement or transfer is to be calculated in accordance with the following formula—

$$N - \left( \frac{\$450,000 - V}{\$100,000} \times D \right)$$

where—

**N** is the amount of duty (calculated in accordance with section 32) that would otherwise be payable in respect of the agreement or transfer.

**V** is the dutiable value of the dutiable property that is the subject of the agreement or transfer.

**D** is the amount of duty (calculated in accordance with section 32) that would otherwise be payable in respect of an agreement or transfer relating to property that comprises a vacant block of residential land and has a dutiable value of \$350,000.

**Note.** An agreement or transfer in respect of property that comprises a vacant block of residential land is not an eligible agreement or transfer if the dutiable value of the property is \$450,000 or more. See section 74(3).