SA land tax developments: aggregation avalanche

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The South Australian Marshall Government has committed itself to a significant, and what has proved to be controversial, reform of the state's land tax regime. Proposed to commence from 1 July 2020, the new measures will, if passed by the South Australian Parliament, introduce sweeping aggregation changes that seek to group related companies for land tax purposes and aggregate based on each owner's fractional interests in land. There will also be a shift towards imposing a surcharge on trust landowners in certain circumstances in common with some other states. This article considers the mechanics and planning issues associated with the proposed measures. It will be of relevance to advisers acting for landowners in South Australia and groups considering acquiring land in South Australia.

Reform agenda

The Marshall Government has committed itself to a significant reform of South Australia's land tax regime.

Following the unexpected Treasury announcement on the Budget night of 18 June 2019, the government moved swiftly to release an exposure draft of the proposed Bill to amend the land tax legislation, which had a minimal consultation period of one month.

If all goes to plan for the South Australian Government, the measures set out in the Land Tax (Miscellaneous) Amendment Bill 2019 (LTMAB) will have been introduced to parliament in the October 2019 sittings. At the time of writing, the LTMAB had not yet been introduced to parliament, and so this article is based on the LTMAB as released for consultation.[1]

This article considers the basic mechanics and planning issues associated with the LTMAB measures. It will be of relevance to advisers acting for landowners in South Australia and groups considering acquiring land in South Australia.

Existing land tax regime

Before considering the precise LTMAB measures, it is worthwhile revisiting the mechanics of the *Land Tax Act 1936* (SA) (LTA) in its current form.

Under the LTA, tax is assessed on an owner of land[2] in South Australia.[3] The tax is calculated on the site value in force at midnight on 30 June immediately preceding the commencement of each financial year (and on other circumstances that exist at midnight on 30 June).[4] However, the liability to land tax arises on 1 July of the following financial year.[5]

The basic workings of the LTA might be broadly summarised as follows:

- except as provided for explicitly in the legislation, land tax is calculated on the total or aggregated taxable value of all land (or interests in land) owned by the same taxpayer;[6]
- the taxable value of land is determined by its site value and is subject to progressive or marginal rates of tax, with the tax-free threshold currently being $391,000 and the highest threshold being $1,302,000 (see the table in the Appendix);
- grouping of commonly owned or controlled companies, trusts and other entities does not occur under the LTA except for some relatively limited provisions concerning land owned by a trustee of one or more trusts with the same beneficiary. In other words, each company and the trustee of each trust is treated as a separate person and a separate taxpayer;
- where two or more persons are the owners of land, the same amount of land tax is payable in respect of that land as if only one person were the owner,[7] however, each group of owners is treated as a separate taxpayer from any other owners of land which are comprised of some, but not all, of the same owners;[8]
- the Commissioner of State Taxation is empowered to disregard a "minor interest" for the purposes of determining the landowner and the person subject to tax. This will automatically apply where a person has an interest of 5% or less in land unless (in the unlikely event) the Commissioner is satisfied that there is no doubt that the interest was created solely for a purpose, or entirely for purposes, unrelated to reducing the amount of land tax payable;[9]
- the Commissioner may also disregard a minor interest where a person's interest in the land is greater than 5% but less than 50% and the Commissioner forms the opinion that the purpose, or one of the purposes, for the creation of the interest was to reduce the amount of land tax payable;[10] and
- in respect of trusts, there are a variety of existing (but relatively narrow) provisions that may group the trustees of trusts. Perhaps the most important is the provision that stipulates that where land is held on trust and the trustee is the taxpayer for the land, the taxable value of the land will not be aggregated with the taxable value of other land owned by the same taxpayer unless the land is held in trust for the same beneficiary.[11]

The last-mentioned rule has been subject to a controversial change in its administration by the Commissioner who has sought to use it as a basis for treating two or more discretionary trusts with the same trustee as grouped where the trusts have the same potential objects.

In the authors' view, this interpretation is unsupported by the existing law. It relies on treating the reference to a "beneficiary" as the same as a mere object or potential beneficiary of a discretionary trust, and there is considerable doubt as to whether a court would take this approach if the matter needed to be decided. Nonetheless, on the basis that the LTMAB is enacted, these issues are likely to be academic (see further below).

As with all state and territory land tax regimes, there are a variety of exemptions contained in the LTA. These fall into two major categories. First, outright exemptions from land tax.[12] Second, numerous exemptions (either in full or in part) which require proper grounds to exist and for such exemptions to be granted by the Commissioner and remain in force at the time of any land tax liability arising.[13]

The first category includes a long list of various exemptions, including primary production land situated outside a defined rural area. The second category of exemptions includes primary production land that is situated within a defined rural area (typically, land that is closer to metropolitan areas of South Australia). This exemption requires a number of additional criteria to be satisfied before the primary production exemption can be granted.[14]

Another common exemption is for land that is owned by a natural person which constitutes that person's principal place of residence. This exemption also requires that the buildings on the land have a predominantly residential character and that no part of the land is used for a business or commercial purpose (other than the business of primary production), or the part of the land so used is less than 25% of the total floor area of all buildings on the land. It should be noted that the natural person who owns land and uses it as his or her principal place of residence does not need to be the sole owner of the land.[15]

Aggregation or aggravation?

The South Australian Government originally announced incremental decreases to the land tax rates together with aggregation measures. These rate decreases have now been substantially brought forward by further Treasury announcements, which are to be effected by the LTMAB (see proposed rates for 2020-21 in the Appendix). This is seemingly in light of the Marshall Government remaining firmly committed to pursuing its aggregation agenda.

Importantly, the existing LTA not only uses the term "aggregation" several times in its provisions but, in fact, also defines the "aggregation principle". This is stated to mean "the principle under which the taxable value of all land owned by the same taxpayer is aggregated for the calculation of land tax".[16]

Interestingly, the now popular and commercial usage of the term "aggregation" appears to refer to any aspect of the legislation that groups two or more persons for the purposes of the group's overall land tax assessment. This shifting meaning of "aggregation" is significant given that there have been strong allegations from sectors of the media that the new measures are "fixing a loophole".

The existing provisions of the LTA suggest that, for a long period of time, aggregation has been a design feature of the legislation and the legislation only intended it to apply to one legal person (or group of legal persons where land is co-owned), except in very limited circumstances. In reality, what is occurring is a significant broadening of the concept of "aggregation" for the purposes of increasing the land tax liability of certain commonly controlled groups.

> *"What is occurring is a significant broadening of the concept of 'aggregation' for the purposes of increasing the land tax liability."*

LTMAB measures: overview

It is proposed that significant changes will be effected to the existing South Australian land tax regime with effect from 1 July 2020. The proposed changes are largely based on the Victorian and New South Wales land tax legislation.

Perhaps the most controversial change is to group "related corporations" for the purposes of aggregating land interests. Whether corporations are related will turn on, among other considerations, whether the same person has, or the same group of persons acting together have, a controlling interest in both corporations. This, in turn, depends on whether the same person, or group of persons acting together:

- hold more than 50% of the issued share capital of each company;
- are able to cast, or control the casting of, more than 50% of the votes at a general meeting of each company; or
- are able to control the composition of the board of each company.[17]

The notion of a group of persons "acting together" is not defined. This gives rise to some obvious conceptual challenges. For instance, if A and B together hold more than 50% of the share capital of Company 1 and A, B and C together (but not A and B together) hold more than 50% of the share capital of Company 2, will this be viewed as the same group of persons "acting together" to therefore have a controlling interest in both companies?

Significantly, while the above measures are proposed to apply to companies, the LTMAB measures do not aggregate land held by commonly owned or controlled trustees of trusts. Instead, the measures seek to apply surcharge rates on trusts (with some relief for unit trusts and fixed trusts — see below) and a "one-off" grandfathering measure for discretionary trusts.

The LTMAB deals with four major types of trusts, namely: unit trusts, fixed trusts, discretionary trusts and excluded trusts.[18] Excluded trusts include, among others, charitable trusts,

public and listed unit trusts and complying superannuation funds. Excluded trusts are not affected by the new trust surcharge measures but continue to be subject to land tax at standard rates. "Administration trusts" are also excepted from the surcharge measures. Curiously, testamentary trusts do not appear to fall within the definition of an "administration trust".[19]

For land owned in unit trusts, it is proposed that:

- trustees are subject to surcharge rates of land tax unless the Commissioner is notified of the unitholders, in which case the trustee will be assessed at standard rates on the whole of the taxable land subject to the trust;
- where the Commissioner has been notified of the unitholders, each unitholder will be assessed (in addition to the trustee) on their proportionate interest in the land held by the unit trust. This interest is then aggregated with all interests of the unitholder in other taxable land; and
- in this latter case, the unitholder will be subject to a reduction in its land tax liability on account of the land tax assessed to the trustee (so as to avoid double taxation). If this deduction would result in a negative amount payable, the unitholder does *not* receive a credit for that amount.[20]

Provisions mirroring the above also apply for fixed trusts.[21]

Land held by trustees of discretionary trusts will be subject to land tax at surcharge rates. This is subject to the ability of a trustee of a discretionary trust to nominate a beneficiary as the "owner" of existing land held in the trust for land tax purposes.

Significantly, the nomination must be made by no later than 30 June 2020 and can only be made in respect of "pre-existing trust land", being land already held by the trust on the day the LTMAB is introduced to the House of Assembly. Where such a nomination is made, surcharge rates will not apply to the land owned by the trust and the land will instead be taken to be owned by the nominated beneficiary. All subsequent land acquired in discretionary trusts will be subject to the surcharge rates.

Other aspects of the proposed measures include:

- taxing co-owned land at the co-owner level (as a single taxpayer) and also taxing each individual co-owner on their fractional interests in all co-owned land (aggregated with any other interests in land held by that co-owner), with a credit available at the individual co-owner level to avoid double taxation;[22]
- the abandonment of the "disregarded minor interest" provisions for aggregation purposes (they will no longer be necessary given the above shift to taxing fractional interests) but for their application for the purposes of granting a whole or partial main residence exemption;[23] and
- extensive obligations on trust taxpayers to notify the Commissioner of changes in circumstances (including the acquisition and disposal of all land held on trust).

Multiple landowners and crediting system

As noted already, where two or more persons own land, they will initially be assessed as if they were one taxpayer. Each person is then also assessed on their fractional interest in the land (which is aggregated with any other land that person owns), but with that person then receiving a credit for the initial tax assessed on their behalf. As already highlighted, a similar crediting system will also apply to unit trusts and fixed trusts.

The stated purpose of the crediting system is to avoid double taxation. However, it expressly does not allow for any amount to be refunded to the taxpayer where the credit exceeds the tax payable.[24]

The following is a worked example of how the crediting system may work:

- A and B each own a 50% interest in land (jointly held) with a site value of $600,000, giving rise to land tax of $750;
- A and B are therefore assessed jointly on the $750;
- A is then assessed on his fractional interest in the land giving rise to a separate assessment to A, which will include not only assessing A on his fractional interest in the jointly held land, but also on any other land owned by A. On the basis that A owns no other land, he will be assessed on land with a notional site value of $300,000 (being 50% of $600,000). Although A receives a credit of $375 for the tax already assessed to A and B jointly, this cannot be refunded to A. A will simply not be liable for any further land tax; and
- assuming now that A did own other land with a site value of $450,000, the combination of that land and the jointly owned land would give rise to an assessment based on a notional site value of $750,000 (being 50% of $600,000 plus $450,000), resulting in land tax of $1,500. A would then be able to apply the $375 credit from the jointly held land against A's $1,500 liability, resulting in $1,125 of land tax (in addition to A's joint liability for the $750 on the jointly held land).

On the basis that these processes mirror the Victorian land tax regime (which appears to be the case), all of these assessments are expected to take place simultaneously. That is to say, there will be no delay in paying tax upfront on one assessment before a credit can be received on another assessment. Instead, it is expected that the annual assessments imposed on landholders will be issued with credits immediately applying.

An issue arises where one of the parties is the trustee of a trust and the other is an individual. Should the surcharge rates apply to the joint assessment or only the trust's fractional interest assessment? This appears to be addressed by a provision in the LTMAB that states that if an owner of land is a trustee of a trust, no regard is to be had to the existence of the trust in relation to the joint assessment.[25] The same provision makes it clear that regard is to be had to the trust in relation to the separate assessment. In other words, when determining the trust's separate assessment on its fractional interest in the land, surcharge rates are to apply.

Unit trust scenarios

A unit trust scheme is defined under the LTMAB to mean "an arrangement made for the purpose, or having the effect, of providing facilities for participation by a person, as a beneficiary under a trust, in any profit or income arising from

the acquisition, holding, management or disposal of property under the trust".[26] Broadly, a unit in a unit trust scheme gives its owner a right or interest that entitles the beneficiary to participate proportionately with other unitholders in a distribution of property of the trust.[26]

As noted already, the trustee of a unit trust will be assessed at surcharge rates unless it gives notification of the unitholders to the Commissioner. The effect of the notification is that the trustee of the unit trust is no longer assessed at surcharge rates, however, the unitholders are then assessed on their fractional interest in the underlying unit trust land (in proportion to their unitholdings in the unit trust). The unitholders will receive a credit for the amount of land tax paid by the trustee on their behalf.

It is worthwhile contemplating how these basic scenarios might work in practice.

Example 1

Two discretionary trusts (DT1 and DT2) each hold 50% of the units in a unit trust (UT). UT owns land with a site value of $700,000.

DT1 and DT2 do not own any land in their own right, nor do they have any other interests in land.

The trustee of UT is assessed at surcharge rates on the land giving rise to an assessment of $4,750. No land tax payable arises to DT1 and DT2 on the basis that DT1 and DT2 do not own land.

Example 2

Assume that, on the same facts, UT makes a notification. This would mean UT pays tax at standard rates, giving rise to an assessment of $1,250, but now DT1 and DT2 are assessed on their fractional interest in the land owned by the UT (ie $350,000 per discretionary trust). Importantly, because they are the trustees of trusts (and as discretionary trusts, they cannot make a notification), DT1 and DT2 should be subject to land tax at surcharge rates.[27] Therefore, $1,750 of land tax arises per trust.

That said, each discretionary trust receives a credit of $625 for the tax already assessed to UT (proportionate to their interests).[28] Therefore, DT1 and DT2's respective land tax liabilities are reduced to $1,125.

Example 3

Assume that DT1 happens to own land in its own right with a site value of $500,000.

This would mean that the land owned by DT is now aggregated with the fractional interest in the UT land assessed to it — all at surcharge rates. This would result in DT1 being assessed on the land held in its own right ($500,000) plus DT1's fractional interest in the underlying UT land ($350,000). This gives rise to a total land tax liability for DT1 of $7,342.50. Again, DT1 would be entitled to offset the $625 credit (arising from its proportionate share of the UT assessment) against

Example 3 (cont)

the $7,342.50 amount. This would result in land tax of $6,717.50 being assessed to DT1.

Therefore, in this scenario, UT is liable for $1,250, DT1 for $6,717.50 and DT2 $1,750.

Example 4

Now assume that all units in UT are instead held by two self-managed superannuation funds (SMSF1 and SMSF2) in the same proportions as DT1 and DT2 previously. Also assume that the site value of the UT land remains at $700,000 and SMSF1 owns land with a site value of $500,000. SMSF2 owns no land.

If UT gives notification, UT will be assessed at standard rates and a land tax liability of $1,250 would arise. Importantly, as both SMSF1 and SMSF2 are excluded trusts, they are assessed at standard rates.

Therefore, SMSF1 is assessed on its total land interests, being $850,000 (ie $500,000 in its own right plus the fractional interest of $350,000). Land tax of $3,092.50 arises, however, this is reduced to $2,467.50 after the application of its credit received from UT.

SMSF2 is assessed on $350,000 of land, giving rise to a nil land tax liability at standard rates. Importantly, SMSF2 cannot apply its credit to create a land tax refund.

It should be noted that, if SMSF2 was a company or an individual rather than an SMSF, it would obtain the same result since companies and individuals are not subject to the surcharge.

Given these relatively basic examples, one can readily see some complex issues and significant planning opportunities arising in practice. In particular, decisions on whether the trustee of a unit trust makes the notification are likely to be affected by:

- the difference in outcomes for surcharge and standard rates for the trustee of the unit trust;
- whether the unitholders themselves own land (which will be aggregated with their fractional assessments); and
- the tax profile of unitholders (whether they are subject to surcharge rates or not).

Discretionary trusts and pre-existing trust land

Like unit trusts and fixed trusts, discretionary trusts will also have an ability to overcome the surcharge rates. However, this will be restricted to "pre-existing trust land".

In particular, the trustee of a discretionary trust will have the ability to nominate one beneficiary as the owner of all of the trust's land. As a result:

- the trustee will no longer be assessed at surcharge land tax rates;
- the beneficiary will include the whole of the trust land in its own assessment (and will need to aggregate this land with any other land owned by the beneficiary); and

– the beneficiary will receive a credit for the tax assessed to the trustee which will be deducted from the beneficiary's total land tax liability.[29]

Significantly, this nomination will be a "one-off" opportunity for trustees as the nomination must be made on or before 30 June 2020.[30] Importantly, where the designated beneficiary dies or becomes incapacitated, the trustee is able to nominate another beneficiary of the trust to become the designated beneficiary in the first beneficiary's place.[31] The nomination will then continue to prevent the trustee from being assessed at surcharge rates on pre-existing land.[32]

It should be noted that a "beneficiary" for the purposes of the nomination effectively refers to any potential object of a trust that can receive a capital distribution and who is 18 years of age or above. The beneficiary must sign a statutory declaration accepting their nomination.

It is worth noting that a nomination can be withdrawn after it is made. However, if this occurs, the trustee can never lodge another nomination and the trust will always be subject to land tax at the surcharge rates. An important decision therefore looms for trustees of discretionary trusts — the nomination can be revoked, but it can never be made if the 30 June 2020 deadline is missed.[33]

Advisers should be aware that if a discretionary trust owns pre-existing land for which a trust nomination is in force and then acquires further land after the LTMAB has been introduced to parliament (subsequent trust land), a formula applies in calculating the tax at the trustee level. This formula has the effect of apportioning the standard rates against the value of the pre-existing trust land and the surcharge rates against the value of the subsequent trust land.

Example 1

Assume that a discretionary trust (DT) owns land with a site value of $1,000,000 that was acquired before the LTMAB was introduced to parliament. Such land is therefore pre-existing trust land.

DT chooses not to make a nomination on or before 30 June 2020.

DT is assessed on the land at surcharge land tax rates, giving rise to a liability of $10,567.50 for the 2021 income year (which is $5,000 higher than the standard rates). DT will be assessed at surcharge rates for all future years.

Example 2

Instead, assume that, on or before 30 June 2020, DT nominates an individual, A, who is a potential beneficiary of DT as to capital. A is now the designated beneficiary of DT.

DT is assessed on the land at standard rates, giving rise to a liability of $5,567.50 for the 2021 income year. DT will be assessed at standard rates for all future years while the nomination remains in force.

A does not have any other interests in land (except an interest in a main residence) but is now assessed on the land owned by DT for the 2021 income year. This gives rise to approximately $5,567.50 of land tax.

A obtains a credit for the tax paid by DT which can now be applied against A's liability. As a result, A will have no additional tax to pay.

Example 3

Assume that A dies in the 2022 year.

Also assume that DT makes a new nomination of A's surviving spouse, B, who is a potential beneficiary of DT. B is now the designated beneficiary of DT.

Also assume that DT acquired another property on 30 June 2021, with a site value of $600,000.

The trust now has pre-existing trust land and subsequent trust land, with a total site value of $1.6m. Applying the formula contained in proposed s 13A(7)(d) LTA, land tax is assessed to DT and a liability of approximately $21,291.25 arises.

B owns no other land (except the main residence) and is therefore assessed on the pre-existing trust land owned by DT for the 2022 year, giving rise to approximately $5,567.50 of land tax.

B obtains a credit for the land tax paid by the trustee of $21,291.25, which can now be applied against B's liability.[34] However, B cannot obtain a refund for the additional $15,723.75 paid by DT.

Example 4

Assume the same facts as example 3 but the property DT bought on 30 June 2021 was in fact purchased in B's name.

If all other facts remain the same, DT will still be assessed on its pre-existing trust land giving rise to a liability of $5,567.50 at standard rates.

When B is assessed, B will need to aggregate the property B owns personally with the property DT owns that is assessed to B. B will be assessed at standard rates giving rise to a liability of $19,232.50.

B will then be able to deduct the $5,567.50 assessed to DT from the $19,232.50 assessed to B, giving rise to a liability for B of $13,665.

It can be seen that in the lead up to 30 June 2020, the trustees of discretionary trusts will need to carefully consider whether to simply bear the surcharge or make a nomination of a designated beneficiary.

It should be noted that because the standard and the surcharge rates each have the same top threshold, the impact of surcharge rates is limited where each parcel of land with high values is held in separate trusts. In other words, the surcharge effectively "caps out" at site values equivalent to the highest threshold. Therefore, some groups holding separate parcels of high value land in each trust may be better off simply paying the surcharge rates in each trust. Groups of this kind will still have the benefit of

non-aggregation since each trust will be a separate taxpayer for land tax purposes.

This can be seen in the following case study.

A family group owns five properties in separate discretionary trusts, each with a site value of $1m. If the group does not make beneficiary nominations for any of the discretionary trusts, each trust will be taxed at surcharge rates giving rise to a collective land tax liability of $52,837 (see table below).

However, a collective land tax liability of $27,837.50 can be achieved in the unlikely scenario where each trust has the ability to nominate a different beneficiary. A more realistic option is reflected in scenario D where, for example, Mum is nominated for one discretionary trust, Dad another, and then the three remaining trusts are left to incur the surcharge. Table 1 outlines five scenarios available to the group and the resulting tax liability for each scenario.

As always, it will be important to check the relevant trust deeds and, in particular, the capital beneficiary clauses to ensure the desired nominees are able to be nominated.

Other issues impacting on whether or not to make a nomination include:

- how many family members might be appropriate to nominate against a group of trusts since each trust can only nominate one designated beneficiary;
- whether a nomination is necessary in circumstances where the trust has a main residence; and
- the long-term consequences of nominating given that it will allow for a succession of new nominations as each designated beneficiary dies or becomes incapacitated.

Corporate groups

As noted already, unlike trusts, corporate groups may be subject to aggregation and assessed as a single corporation where the companies are "related corporations".

In addition to being assessed to land tax on an aggregated basis, related corporations that own land will also be jointly and severally liable for the land tax payable in respect of the group.[35]

The following basic examples highlight some observations regarding the potential application of the company grouping provisions in the LTMAB.

Example 1

Assume that Husband holds 100% of the share capital in Company 1 and his spouse, Wife, holds 100% of the share capital in Company 2.

Unlike other tax and revenue legislation, the LTMAB does not appear to automatically group associates (such as spouses) for the purposes of determining whether the same person, or group of persons, has a controlling interest in more than one company.

As such, it might be expected that Company 1 and Company 2 are not grouped in this scenario on the basis that the same person or persons do not have a controlling interest in each corporation.

If, however, Husband and Wife each held 50% of the share capital in Company 1 and 50% of the share capital in Company 2, the outcome would likely be different. Although neither Husband nor Wife holds or controls the rights associated with *more* than 50% of the shares in each company, in this latter example, it could be said that the same persons have a "controlling interest" in each of the corporations when acting together, resulting in Company 1 and Company 2 being aggregated.[36]

Example 2

Building on example 1, assume that:

- Husband and Wife each hold 50% of the issued share capital in Company 1; and
- Husband, Wife, Daughter and Son each hold 25% of the issued share capital in Company 2.

In this case, Companies 1 and 2 are unlikely to be grouped under the LTMAB on the basis that Husband and Wife acting together do not hold *more* than 50% of the issued share capital in Company 2. The mere fact that all four individuals have a familial relationship should not result in Companies 1 and 2 being grouped.

Of course, it is important in this circumstance to ensure the governing documentation for Company 2 does not confer any special rights or powers on Husband or Wife. For example, if the constitution of Company 2 allowed

Table 1. Discretionary trust nomination permutations

Scenario	Nomination/s	Trust tax	Top-up beneficiary tax	Total
A	Nil — all trusts incur surcharge rates	$52,837	–	**$52,837**
B	Nominate same beneficiary for five trusts	$27,837	$72,995	**$100,833**
C	Nominate one beneficiary for three trusts Nominate another beneficiary for two trusts	$27,837	$53,828	**$81,655**
D	Nominate one beneficiary for one trust Nominate another beneficiary for one trust Three trusts incur surcharge rates	$42,837	–	**$42,837**
E	Nominate different beneficiary for each trust	$27,837	–	**$27,837**

Example 2 (cont)

Husband and Wife to appoint or remove directors, this may be sufficient to make the companies "related corporations".[37]

Example 3

Assume the same facts as in example 2, however, that the shareholding in Company 2 is instead as follows:

- Husband, Wife and Daughter as to 1,000 A class shares each (ie 25% each of the total issued share capital); and
- Son as to 1,000 Z class shares (ie 25% of the total issued share capital).

The A class shares confer usual voting, dividend and capital rights, while the Z class shares confer on the holder a right to a fixed dividend and also preferred capital rights on a winding-up (ie preference shares).

On its face, Husband and Wife hold only 50% of the issued share capital in Company 2 and therefore it might be suggested that, as this is not more than 50%, Company 1 and Company 2 are not grouped.

However, the LTMAB provides that a reference to the issued share capital of a corporation does not include a reference to any part of it that carries no right to participate beyond a specified amount in a distribution of either profits or capital.[38] The Z class shares, carrying fixed dividend rights, appear to fall within this category.

As such, it is likely that Company 1 and Company 2 will be grouped in this scenario on the basis that the Z class shares held by Son will be disregarded when determining whether Husband and Wife together have a controlling interest in both companies (ie Husband and Wife's shareholding in Company 2 will be 66% rather than 50%).

Example 4

Husband and Wife still each hold 50% of the issued share capital in Company 1, however, assume now that the shareholding in Company 2 is as follows:

- Husband and Wife as to 20% each; and
- Trustee Pty Ltd (TrusteeCo) as trustee for a discretionary trust (DT) as to 60%.

Husband and Wife are also the directors and equal shareholders of TrusteeCo.

There is considerable uncertainty as to how the controlling interest provisions are intended to operate in this situation. While on its face, Husband and Wife might be seen as having a controlling interest in Company 2 by virtue of being able to control TrusteeCo's voting rights in Company 2, the position may be impacted by proposed s 13J(1)(c) LTA.

Proposed s 13J(1)(c) provides that any shares held or power exercisable by a person or corporation as a trustee or nominee for another corporation:

Example 4 (cont)

- are to be treated as exercisable by that other person or corporation, if the trust is a fixed trust or a unit trust; and
- are to be treated as not held or exercisable by the trustee or nominee (whether or not the trust is a fixed trust or a unit trust).

This provision appears to suggest that where shares in a company are owned by the trustee of a discretionary trust, the trustee of that trust cannot be treated as holding the shares or exercising any powers. If this is the case, arguably, no persons have a controlling interest in Company 2 because Husband and Wife could only be taken to control the rights associated with more than 50% of the issued share capital in Company 2 if TrusteeCo did in fact hold shares for the purposes of the test.[39]

The authors have sought clarification on this issue from Treasury and RevenueSA.

The path ahead …

Once the LTMAB is introduced to the South Australian Parliament, the Marshall Government will most likely need the support of the State Labor Opposition to see it passed into law.

At the time of preparation of this article, the Labor Opposition has not publicly committed itself to a position on the new measures. With significant lobbying against the aggregation measures by the Property Council of Australia and Business SA, at the time of writing, the LTMAB still has a way to go before it can be guaranteed a safe passage through parliament.

There will be a need to carefully monitor the position as the situation progresses.

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References

1 Further, the figures used in this article are based on the thresholds and rates in the LTMAB released for consultation, together with RevenueSA's projections for indexation of the land tax thresholds for the 2020-21 financial year.

2 S 14 of the *Land Tax Act 1936* (SA) (LTA).

Appendix

SA land tax rates 2019-20

Total taxable site value	Amount of tax
Does not exceed $391,000	Nil
Exceeds $391,000 but not $716,000	$0.50 for every $100 or part of $100 above $391,000
Exceeds $716,000 but not $1,042,000	$1,625.00 plus $1.65 for every $100 or part of $100 above $716,000
Exceeds $1,042,000 but not $1,302,000	$7,004.00 plus $2.40 for every $100 or part of $100 above $1,042,000
Exceeds $1,302,000	$13,244.00 plus $3.70 for every $100 or part of $100 above $1,302,000

SA land tax rates for 2020-21 as proposed in SA state Budget 2019-20

Total taxable site value	Amount of tax
Does not exceed $450 000	Nil
Exceeds $450,000 but not $755,000	$0.50 for every $100 or part of $100 above $450,000
Exceeds $755,000 but not $1,098,000	$1,525.00 plus $1.65 for every $100 or part of $100 above $755,000
Exceeds $1,098,000 but not $1,372,000	$7,184.50 plus $2.40 for every $100 or part of $100 above $1,098,000
Exceeds $1,372,000 but not $5,000,000	$13,760.50 plus $2.90 for every $100 or part of $100 above $1,372,000
Exceeds $5,000,000	$118,972.50 plus $3.60 for every $100 or part of $100 above $5,000,000

Reduction in highest rate as proposed in SA state Budget 2019-20

2019-20	2020-21	2021-22	2022-23	2023-24	2024-25	2025-26	2026-27	2027-28
3.7%	3.6%	3.5%	3.4%	3.3%	3.2%	3.1%	3.0%	2.9%

Land tax bracket for 2020-21 as amended by LTMAB (standard rates)

Total taxable site value	Amount of tax
Does not exceed $450,000	Nil
Exceeds $450,000 but not $755,000	$0.50 for every $100 or part of $100 above $450,000
Exceeds $755,000 but not $1,098,000	$1,525.00 plus $1.65 for every $100 or part of $100 above $755,000
Exceeds $1,098,000	$7,184.50 plus $2.40 for every $100 or part of $100 above $1,098,000

SA land tax bracket for 2020-21 as amended by LTMAB (trust surcharge rates)

Total taxable site value	Amount of tax
Does not exceed $25,000	Nil
Exceeds $25,000 but not $450,000	$125 plus $0.50 for every $100 or part of $100 above $25,000
Exceeds $450,000 but not $755,000	$2,250.00 plus $1.00 for every $100 or part of $100 above $450,000
Exceeds $755,000 but not $1,098,000	$5,300.00 plus $2.15 for every $100 or part of $100 above $755,000
Exceeds $1,098,000	$12,674.50 plus $2.40 for every $100 or part of $100 above $1,098,000

3 S 4(1) LTA.

4 Ss 4(3) and 7(2) LTA.

5 S 4(2) LTA.

6 "Taxpayer" is each person liable to pay tax under the LTA: s 2(1) LTA.

7 S 12(1) LTA. Note that s 12(2) does not affect the operation of other provisions of the legislation under which the value of land is aggregated for the purposes of a land tax assessment.

8 S 13(3)(a) LTA.

9 S 13A(2) LTA.

10 S 13A(3) LTA.

11 S 13(3)(b) LTA.

12 S 4(1) LTA.

13 S 5 LTA.

14 S 5(10)(g) LTA.

15 S 5(10)(a) LTA.

16 S 2(1) LTA.

17 Proposed ss 13H and 13I LTA (as amended by the LTMAB).

18 All defined in proposed s 2(1) LTA except unit trusts that are defined by reference to a unit trust scheme.

19 This is on the basis that an administration trust will exist where the assets of a deceased are held by a personal representative only until the completion of the administration of the estate or the third anniversary of the death of the deceased (whichever is earlier): proposed s 2(1) LTA.

20 Proposed s 13 LTA generally.

21 Proposed s 12 LTA.

22 Proposed s 9 LTA.

23 Proposed s 5AA LTA.

24 Proposed s 9(6) LTA.

25 Proposed s 9(7) LTA.

26 Proposed s 2(1) LTA.

27 There is some ambiguity as to whether discretionary trusts will pay land tax at standard or surcharge rates on land imputed to the trust pursuant to a unit trust notification. In the authors' view, based on the current draft LTMAB, the discretionary trust would pay surcharge rates.

28 Applying the formula in proposed s 13(6) LTA.

29 Proposed s 13A(9) LTA.

30 Proposed s 13A(1) LTA.

31 Proposed s 13A(3) LTA.

32 Proposed s 13A(7)(c)(ii) LTA.

33 Proposed s 13A(6) LTA.

34 Pursuant to proposed s 13A(9), it seems that the credit received by the nominated beneficiary is equal to the *whole* of the amount of tax assessed to the DT trustee (as opposed to the amount of land tax assessed to the trustee on pre-existing land only). This appears to be an anomalous result and has been ignored for the purpose of these calculations.

35 Proposed s 13K(2) LTA.

36 Proposed s 13I LTA.

37 The tests relating to controlling the composition of the board, controlling the casting of more than 50% of the votes and holding more than 50% of the issued share capital are alternative tests and therefore satisfying only one of those in respect of Company 2 would be sufficient to group Company 1 and Company 2 in the example given.

38 Proposed s 13J(1)(b) LTA.

39 This interpretation is broadly consistent with the interpretation adopted by the Chief Commissioner of State Revenue in NSW, which has an identical deeming provision to proposed s 13J(1)(c)(ii): para 15 of Revenue Ruling LT 003v2 (NSW).