

Issue 8—November 2005

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In this month's Update ...

We are pleased to announce that **Scott Stewart** and **Grant Levy** have joined our Property Law team.

Scott is an Accredited Environmental & Planning Law Specialist and has taken on the role of Team Leader for our Planning & Environment practice. **Grant** is a litigator with vast experience in property, retail lease disputes and Trade Practices.

We are also pleased to announce that **Pam Morton** has been promoted to Senior Associate. Pam's expertise spans property, local government and native title law.

Jennifer Lawrie has become an Associate. Her expertise covers property and commercial leasing matters.

For assistance or advice on any of the topics in this Update, please contact our Property Group lawyers on (03) 9321 7888.



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Land Tax – No aggregation of unit holders’ interests

By David Krolikowski with Caroline Conlan

CPT Custodian Pty Ltd v Commissioner of State Revenue; Commissioner of State Revenue v Karingal 2 Holdings Pty Ltd [2005] HCA 53

In a judgment impacting upon the entitlement of the Commissioner of State Revenue (“Commissioner”) to assess land tax upon unit holders in a unit trust, one decision of the Victorian Court of Appeal was upheld and one decision was reversed by the High Court of Australia in the above case.

The High Court determined on the basis of the particular unit trust deeds that holders of units in unit trusts were not the owners of land held by the unit trust for the purposes of assessing land tax in Victoria, including where the relevant unit holder held all of the units in that unit trust. Accordingly the Commissioner was not entitled to aggregate the unimproved value of the land holdings of the relevant unit holders pursuant to the related corporations provisions of the *Land Tax Act 1958* (Vic) (“the Act”).

Under the Act, each year’s land tax is based on the total unimproved value of all land of which the taxpayer is the “owner” at midnight on 31 December of the preceding year. The Act defines the owner as including every person entitled to any land for any estate of freehold in possession.

The Commissioner had issued amended assessments and claimed additional land tax on an aggregated basis from CPT Custodian Pty Ltd and Karingal 2 Holdings Pty Ltd and related corporations due to their status as trustees of various trusts, given the common identity of some of the unit holders.

The Court of Appeal had found that unit holders holding 100% of units were entitled to the freehold estate in possession in any land held as an asset of the unit trusts, and that a unit holder holding less than 100% of units had no such equitable interest.

The High Court found that ownership of units in the relevant unit trusts of itself was not sufficient to give rise to land tax in respect of the land held in those unit trusts. It also found that the Court of

Appeal erred in its distinction between unit holders holding 100% of units and unit holders holding less than 100% of units.

Contrary to the Court of Appeal’s approach, the High Court made it clear that the starting point for the consideration of whether a unit holder was an “owner” of an assessable interest in land was the **terms of the relevant unit trust deed itself**, rather than an analysis of trust law.

The High Court affirmed that the only right of the unit holder was to a proportionate share of the income of the fund for the year. The fact that the manager and trustee of the unit trusts were entitled to be paid fees out of the unit trusts meant that the unit holders were not the only persons in whose favour the trust property might be applied. On that basis the unit holders could not be considered to be “owners” of the land held in the trusts.

Given that the Commissioner has in practice assessed land tax in a manner contrary to the decision by the High Court, this decision is significant to taxpayers that own units in land holding unit trusts and trustees of such trusts.

Land tax refunds may be available depending on the provisions of the unit trust deeds. Applications for refunds of land tax are generally required to be made within three years of the payment of that land tax.

If you think that you may be entitled to a land tax refund as a result of this High Court decision, or you are considering structuring your interests in land using a unit trust, please contact us for advice.

Land Tax surcharge and notification obligations for trusts

By David Krolikowski

The Victorian government has revised its model for land tax on trusts. The new model is not as drastic as the previous proposals as the government has apparently responded to some of the negative feedback received in relation to its initial proposal.

The revised measures currently before Parliament impose a 0.375% surcharge on top of standard land tax rates, phased out at the upper end of the land tax scale. The surcharge will have the greatest impact (over \$1,600 per annum) upon non-exempt trusts with aggregate land holdings with an unimproved value of between \$500,000 and \$2,400,000.

The provisions also end the aggregation of trusts for the purpose of land tax and provide exemptions from the **surcharge** for a variety of trust types and for existing discretionary trusts, fixed trusts and unit trust schemes through nomination elections. In addition, a range of administrative obligations are imposed in respect of all land holding trusts.

The changes will reduce some of the previously anticipated land tax burdens upon trusts, but will still mean that land holdings arranged in trusts may attract greater land tax than if those land holdings were held by individuals or companies. They may also mean people with land held in trusts will need to make decisions regarding the manner in which they wish to have their interests assessed in the future and advise the Commissioner of State Revenue accordingly. (See the comparative tables on the next page.)

Trustees of existing "fixed trusts", "unit trust schemes" and "discretionary trusts" (as defined in the new provisions) may nominate a beneficiary as owners of land in the relevant trust for the purpose of assessment of land tax. Furthermore, trustees of unit trust schemes and discretionary trusts may identify a beneficiary as a "nominated PPR beneficiary" and, if land is the trust is being used as a principal place of residence by the nominated PPR beneficiary, then the land will not be subject to the surcharge.

Nominations must be made before **30 June 2006** to have effect for the purpose of 2006 land tax and in respect of discretionary trusts are irrevocable.

The nominated beneficiary is deemed the owner of the trust land in the proportion of their trust interest in the land (except a nominated beneficiary for a discretionary trust who is assessed as owner of the entire land) for land tax purposes and therefore all other land (except a principal place of residence) of that beneficiary will be aggregated with that trust land to determine the land tax rate.

The nominations are apparently intended to be for the purpose of assessment of land tax only. However, such nominations could have unintended consequences for trusts and beneficiaries under trust and taxation laws and accordingly any nominations should be carefully considered.

Importantly the provisions require **all** persons holding land in Victoria on trust at the date the new provisions receive Royal Assent to lodge a written notice with the Commissioner in the form required by the Commissioner on or before **31 December 2005**. As at the date of this Update, Royal Assent has not been given and no notice has yet been prescribed by the Commissioner.

In addition, any person who becomes trustee of land or disposes of land as trustee must provide written notice to the Commissioner within one month of that event. Trustees also have other obligations to notify the Commissioner in respect of changes to trusts of which they are trustee.

Failure to provide the required notices could make the trustee liable for double land tax or other penalties being payable under the penalty provisions of the *Land Tax Act*.

Whether the Commissioner will use the information provided by trustees in respect of trusts to trace duty and other obligations remains to be seen.

We strongly recommend that if you act as trustee for a land holding trust, are a beneficiary of such a trust or advise such trustees or beneficiaries you seek our advice regarding the manner in which the new provisions may impact upon you, your business or your clients.

Land Tax surcharge and notification obligations for trusts *cont*

Land Tax rates

Total unimproved value	Standard Land Tax rates in 2006	Trust Land Tax rates in 2006 (with surcharge)
\$0 - \$20,000	Nil	
\$20,000 - \$200,000	Nil	\$75 + 0.375c for each \$1 over \$20,000
\$200,000 - \$540,000	\$200 + 0.2c for each \$1 over \$200,000	\$750 + 0.575c for each \$1 over \$200,000
\$540,000 - \$900,000	\$880 + 0.5c for each \$1 over \$540,000	\$2,705 + 0.875c for each \$1 over \$540,000
\$900,000 - \$1,190,000	\$2,680 + 1c for each \$1 over \$900,000	\$5,855 + 1.375c for each \$1 over \$900,000
\$1,190,000 - \$1,619,999	\$5,580 + 1.5c for each \$1 over \$1,190,000	\$9,843 + 1.875c for each \$1 over \$1,190,000
\$1,620,000 - \$2,699,999	\$12,030 + 2.25c for each \$1 over \$1,620,000	\$17,905 + 1.706c for each \$1 over \$1,620,000
\$2,700,000 and over	\$36,330 + 3.5c for each \$1 over \$2,700,000	

Sample comparisons

Total unimproved value	Non Trust Land Tax in 2006	Trust Land Tax in 2006 (with surcharge)	Difference (Impact of surcharge)
\$50,000	Nil	\$187.50	\$187.50
\$100,000	Nil	\$375.00	\$375.00
\$250,000	\$300.00	\$1,037.50	\$737.50
\$500,000	\$800.00	\$2,475.00	\$1,675.00
\$750,000	\$1,930.00	\$4,542.50	\$2,612.50
\$1,000,000	\$3,680.00	\$7,230.00	\$3,550.00
\$1,500,000	\$10,230.00	\$15,655.50	\$5,425.50
\$2,000,000	\$20,580.00	\$24,387.80	\$3,807.80
\$2,250,000	\$26,205.00	\$28,652.80	\$2,447.80
\$2,500,000	\$31,830.00	\$32,917.80	\$1,087.80
\$2,700,000	\$36,330.00	\$36,330.00	Nil

Contact **Tom Callander** or **David Krolikowski** for advice and/or assistance with land tax matters.

Only a few days left to make adverse possession claims against Council owned land

In November 2004, the Victorian Parliament introduced significant amendments to the *Limitation of Actions Act* to give land owned by Municipal Councils the same protection against adverse possession claims as granted to Crown Land and Victorian Rail Track Land.

However, the legislation enables applications for an adverse possession claim to still be made for any Council land until 26 November 2005. An exception is also made where adverse possession has occurred over Council land for a period in excess of 15 years. It is important to note that only land "owned" by a Council is affected by these changes.

If you consider that you have a claim for adverse possession against a local government Council, we

would suggest that you immediately obtain advice from Rigby Cooke's property team to clarify the position.

It will be possible to make such a claim in the remaining time, but survey plans and supporting evidence would need to be finalised and lodged with the Registrar of Titles before 26 November 2005.

Contact **Pam Morton** of this office on (tel) 03 9321 7887 or pmorton@rigbycooke.com.au if you require assistance with an adverse possession claim.

Mortgages

Rigby Cooke provides a small mortgage service for both lenders and borrowers.

We arrange to place funds which lenders have available into first registered mortgages secured over titles to properties owned by borrowers in Victoria.

The maximum loan to value of property ratio is two-thirds, with the current value of the property being established by an independent written valuation by a valuer of our choice. The maximum term of any loan is three years, and interest is payable quarterly in arrears, by direct debit if requested. The rate of interest is fixed for the term of the loan, and is set at the beginning of the loan to reflect prevailing rates at the time.

In addition to obtaining a valuation of the security property, we ask borrowers to provide evidence of their ability to make the interest payments, but otherwise the paperwork required is minimal. Rigby Cooke manages the loan and receives a small fee for this service.

This service has proved attractive to many of our clients, both lenders and borrowers, over many years and has proved to be a secure way for lenders to achieve higher rates of interest than they may otherwise be able to, and for borrowers to have access to funds with a minimum of formality.

As a further service, lenders who have smaller amounts of money available can be put together and amalgamated in a contributory mortgage, and we will arrange for the interest to be distributed to each lender at the end of each quarter.

If you are interested in participating – either as a lender or a borrower – and would like to have more information, please contact **Peter Byrne** or **Narelle Kervin** on (03) 9321 7888.