

Explanatory note

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

Overview of Bill

The objects of this Bill are as follows:

(a) to amend the Duties Act 1997:

(i) to make further provision for the valuation of land holdings of unit trust schemes, private companies and listed companies in connection with determining whether those unit trust schemes or companies are landholders for the purposes of landholder duty, and

(ii) to make further provision for liability for landholder duty in respect of an acquisition of an interest in a landholder that is made by a trustee or by a person acting in more than one capacity, and

(iii) to make persons who acquire or hold an interest in a landholder as a creditor liable for landholder duty in certain circumstances and to clarify the meaning of "interest" in a landholder, and

(iv) to prevent the use of terms contracts or other means to avoid liability for landholder duty, and

(v) to clarify the types of interests in land that are treated as dutiable property under that Act, and

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(vi) to make other changes to that Act as a consequence of the recent significant changes to landholder duty and mortgage duty provisions,

(b) to amend the Parking Space Levy Act 2009 to clarify the time within which the parking space levy must be paid in order to avoid penalty,

(c) to amend the Payroll Tax Act 2007 to establish a new test for determining whether wages are taxable in this jurisdiction, which is consistent with complementary legislation being adopted by other States and the Territories.

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.

Schedule 1 Amendment of Duties Act 1997

Valuation of land holdings for landholder duty

Schedule 1 [2] and [3] change the method by which the value of the land holdings of a unit trust scheme, private company or listed company is determined for the purposes of landholder duty. A unit trust scheme, private company or listed company is considered to be a landholder for the purposes of the landholder duty provisions if it has land holdings in New South Wales with an unencumbered value of \$2,000,000 or more.

Under the amendments, if a land holding consists of an estate in fee simple in land, the land value of the land (as determined under the Valuation of Land Act 1916), rather than the unencumbered value of the land, will be used for the purpose of determining the value of the land holdings of a unit trust scheme or company.

Schedule 1 [17] is a consequential amendment.

Charging of landholder duty on acquisitions made by trustees and others

Schedule 1 [7] provides that if a person who acquires or holds an interest in a landholder is a trustee for 2 or more trusts, any interests in the landholder acquired or held by the person for different trusts are to be treated as if they were acquired or held independently by separate persons. This means that the trustee may not be required to aggregate together acquisitions that are made for different trusts.

The amendment includes a similar provision in relation to life companies. Life companies may acquire interests in landholders for different statutory funds or for

purposes not related to the conduct of the business of a statutory fund. These acquisitions will be treated as if they were independent acquisitions by separate persons.

Schedule 1 [10] provides for liability for landholder duty where a person acquires or holds an interest in a landholder as bare trustee (including as custodian) for another person.

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person. The amendments require the duty payable in respect of an acquisition of an interest in a landholder to be paid by the ultimate beneficial owner of that interest. Under the amendments, if a person acquires or holds an interest in a landholder as bare trustee for another person, the other person is a beneficial owner of the interest in the landholder. If a person who is a beneficial owner of an interest in a landholder holds the interest as bare trustee for another person, that other person is also a beneficial owner of the interest. The ultimate beneficial owner of the interest is a beneficial owner of an interest in a landholder who does not hold the interest as bare trustee for another person (so that, if there is a chain of bare trustees, the ultimate beneficial owner is the last beneficial owner in that chain).

The amendment provides that if an interest in a landholder is acquired or held by a person (the legal owner) as bare trustee for another person, the interest is taken, for the purposes of landholder duty, to have been acquired by, or to be held by, the ultimate beneficial owner of the interest in the landholder, rather than the legal owner. As a result, the ultimate beneficial owner of an interest in a landholder, rather than the legal owner, will be required to lodge an acquisition statement and to pay duty chargeable in respect of an acquisition made in a landholder that is chargeable with landholder duty under the Act.

Schedule 1 [26] includes a transitional provision in relation to the new liability provisions. Generally speaking, the new liability provisions will apply to acquisitions made on or after the commencement of the amendments. Pre-commencement acquisitions may be aggregated with post-commencement acquisitions for the purpose of determining whether a relevant acquisition (an acquisition that is chargeable with duty) has been made by a beneficial owner. However, a beneficial owner will not, as a result of the amendments, become liable for duty in respect of those pre-commencement acquisitions.

Meaning of "interest" in a landholder

At present, a person does not become liable for landholder duty in respect of an acquisition of an interest in a landholder if the person's interest in the landholder arises merely because the person is a creditor or other person to whom the landholder is liable.

Schedule 1 [8] removes this exception to this rule. Instead, a person who has a debt interest (within the meaning of certain provisions of the Income Tax Assessment Act 1997 of the Commonwealth) in a landholder (or an interest that would be a debt interest if the landholder were a company under the relevant provisions of that Act) will not be treated as having an interest in the landholder. Accordingly, an acquisition of a debt interest will not be chargeable with landholder duty.

Schedule 1 [11], [12], [14] and [19] are related amendments. The amendments ensure that the rules regarding the winding up of a company do not determine whether a person has an interest in a landholder. That is, the fact that a person who would otherwise be regarded as having an interest in a landholder is not entitled to participate in a winding up of a landholder will not prevent the acquisition of the interest being chargeable with landholder duty.

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Schedule 1 [20] prevents the acquisition of an interest from being regarded as an exempt acquisition merely because it is acquired as a result of the making of a compromise or arrangement under Part 5.1 of the Corporations Act 2001 of the Commonwealth. The exemption will be limited to the making of a compromise or arrangement with creditors. The amendment also removes an anti-avoidance function of the Chief Commissioner of State Revenue that has been made redundant by Chapter 11A of the Duties Act 1997. Schedule 1 [26] includes a transitional provision related to this amendment.

The amendment in Schedule 1 [21] is intended to prevent any argument that a person entitled to a payment of money from a landholder is not entitled to a distribution of property of a landholder. An entitlement to payment of money by a landholder can give rise to an interest in a landholder.

Point in time at which an interest in a landholder is acquired

Schedule 1 [16] is an anti-avoidance measure. At present the purchaser of a share or unit in a landholder or a person to whom a share or unit is to be issued is taken to have an interest in the landholder on completion of an agreement to purchase or issue the share or unit. Liability also arises in respect of the agreement if the necessary transfer or title documents are delivered or the consideration for the purchase or issue is paid. The amendment extends these provisions so that a purchaser or person to whom a share or unit in a landholder is to be issued under an agreement is taken to acquire an interest in the landholder 12 months after the date of first execution of the agreement. This prevents the use of a "terms contract", or any other means by which completion of an agreement is deferred indefinitely, to avoid liability for landholder duty. The Chief Commissioner of State Revenue is given the discretion to extend the 12 month period. In addition, provision is made for reassessment of any duty payable if the agreement is terminated before it is actually completed.

Schedule 1 [13] and [15] are consequential amendments. Schedule 1 [26] includes a transitional provision related to the amendments.

Interests in land

Under the Duties Act 1997 duty is chargeable on a transfer of land in New South Wales or of an interest in land in New South Wales. Schedule 1 [27] provides that mining leases and mining claims give the holder an interest in the land to which they relate. Accordingly, a transfer of a mining lease or mining claim will be chargeable with duty.

The amendment also clarifies that the following do not give rise to an interest in land:

(a) an assessment lease, exploration licence or opal prospecting licence under the Mining Act 1992,

(b) a carbon sequestration right within the meaning of Division 4 of Part 6 of the Conveyancing Act 1919,

(c) a petroleum title within the meaning of the Petroleum (Onshore) Act 1991,
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(d) a licence, permit, lease, access authority or special prospecting authority under the Petroleum (Offshore) Act 1982.

Schedule 1 [1] and [5] are consequential amendments. Schedule 1 [26] includes a transitional provision related to the amendments.

Other changes

Schedule 1 [6] is a law revision amendment that is consequential on the amendments made by the State Revenue Legislation Further Amendment Act 2009 which extended landholder duty to acquisitions of interests in public landholders, in addition to private landholders. The amendment clarifies that a reference to an arrangement under which a private landholder ceases to be a landholder is a reference to it ceasing to be a private landholder.

Schedule 1 [9] is also related to the extension of landholder duty to acquisitions of interests in public landholders. The amendment clarifies that if duty is chargeable on an acquisition by a person in a public landholder, no duty is chargeable in respect of any further acquisition in that landholder (whether the landholder is a public landholder or a private landholder at the time of the acquisition).

Schedule 1 [18] is a law revision amendment that is consequential on the amendments made by the State Revenue Legislation Further Amendment Act 2009 which provided for the charging of landholder duty on acquisition of interests in goods of a landholder. The amendment inserts an omitted reference to the goods of a landholder.

The amendment in Schedule 1 [22] makes further provision for goods held on trust by a landholder. The amendment deals with the circumstances in which goods held on trust (including goods held by a custodian) are treated as goods of a company or unit trust scheme (and included in duty calculations). The amendments (which are made to section 163K of the Duties Act 1997) will be similar to existing section 147 (2) and (3) of the Duties Act 1997 (which applies to land holdings of a landholder). Schedule 1 [4] substitutes section 147 (2) of the Duties Act 1997 so that an interest in land that is held by the custodian to a trustee of a unit trust scheme is treated as a land holding of the unit trust scheme. Together these amendments ensure consistency between sections 163K and 147 of the Duties Act 1997.

Schedule 1 [24] also relates to the extension of landholder duty to the acquisition of interests in the goods of a landholder. The amendment makes it clear that an interest in goods is not to be counted for the purposes of charging duty payable in respect of an acquisition made before 1 July 2009 (the date on which the charging of landholder duty was extended to an acquisition of an interest in goods of a landholder).

Schedule 1 [25] relates to the changes to mortgage duty made by the State Revenue Legislation Further Amendment Act 2009. The amendment clarifies the application of a concessional arrangement for certain mortgages first executed before 1 July 2009 (the date on which the relevant changes to mortgage duty commenced).

Schedule 1 [23] enables regulations of a savings and transitional nature to be made as a consequence of the amendments.

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Schedule 1 [26] provides for transitional matters. In general, the amendments apply to dutiable transactions occurring on or after the commencement of the amendments and to interests that are acquired in landholders on or after the commencement of the amendments.

Schedule 2 Amendment of Parking Space Levy Act 2009

The Parking Space Levy Act 2009 imposes a levy on certain parking spaces on 1 July in each year. Schedule 2 [1] amends that Act to make it clear that the levy does not have to be paid until 1 September in that year. A failure to pay the levy by that date means that a tax default occurs, and interest and penalty tax can be charged under the Taxation Administration Act 1996.

Schedule 2 [2] provides that the amendment described above applies from the year 2009 and onwards.

Schedule 3 Amendment of Payroll Tax Act 2007

Schedule 3 provides for a new method of determining the jurisdiction in which wages are liable for payroll tax. The amendments implement an agreement between the States and the Territories to adopt complementary nexus provisions in relation to the imposition of payroll tax.

At present, the question of whether wages paid or payable by an employer are taxable in New South Wales under the Payroll Tax Act 2007 is determined chiefly by

reference to the place in which the wages are paid or payable. Generally speaking, wages that are paid or payable in New South Wales are taxable in New South Wales (unless the wages are paid or payable for services performed wholly outside New South Wales). Wages are also taxable in New South Wales if they are paid or payable for services performed wholly or mainly in New South Wales (regardless of where they are paid or payable).

Under the new provisions, the question of whether wages are taxable in New South Wales will be determined chiefly by reference to the place where the services of the employee were performed. The jurisdiction in which an employee or employer is based is also relevant to determining whether wages are taxable in New South Wales. The new provisions provide that wages are taxable in this jurisdiction (that is, liable for payroll tax in New South Wales) if:

(a) the wages are paid or payable by an employer for or in relation to services performed by an employee wholly in this jurisdiction, or

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(b) the wages are paid or payable by an employer for or in relation to services performed by an employee in 2 or more Australian jurisdictions, or partly in one or more Australian jurisdictions and partly outside all Australian jurisdictions, and:

(i) the employee is based in this jurisdiction, or

(ii) the employer is based in this jurisdiction (in a case where the employee is not based in an Australian jurisdiction), or

(iii) the wages are paid or payable in this jurisdiction (in a case where both the employee and the employer are not based in an Australian jurisdiction), or

(iv) the wages are paid or payable for services performed mainly in this jurisdiction (in a case where both the employee and the employer are not based in an Australian jurisdiction and the wages are not paid or payable in an Australian jurisdiction), or

(c) the wages are paid or payable by an employer for or in relation to services performed by an employee wholly outside all Australian jurisdictions and are paid or payable in this jurisdiction.

An employee is based in this jurisdiction if his or her principal place of residence is in this jurisdiction. In cases where the employee is a company, the test for whether the employee is based in this jurisdiction is the same as it is for an employer.

An employer is based in this jurisdiction if the employer's registered business address (for ABN purposes) is in this jurisdiction. If the employer does not have a registered business address, or has a registered business address in more than one Australian jurisdiction, the employer is based in this jurisdiction if the employer's principal place of business is in this jurisdiction.

The question of where services were provided is determined by reference to services provided by the employee in the month in which the wages are paid or payable or, if no services were provided in that month, in the most recent prior month in which services were provided. If wages are paid or payable to an employee before services are provided, the question of whether they are taxable in this jurisdiction is determined by reference to the place where it may be reasonably expected that services will be provided.

Provision is also made for the circumstances in which wages will be treated as being paid or payable in this jurisdiction.

The principal provisions, as described above, are set out in Schedule 3 [2].

Schedule 3 [1] provides for definitions of expressions used in the new provisions.

Schedule 3 [3] is a related amendment to ensure that when the expression

“employee” is used in the new provisions (and elsewhere in the Payroll Tax Act 2007) this includes any person to or in relation to whom amounts treated as wages
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under the Act are paid or payable. For example, some payments to company directors are treated as wages under the Act. The new provisions will apply in relation to those payments in the same way as they apply to wages paid to employees.

Schedule 3 [4]–[6] are consequential amendments which remove provisions made redundant by the new provisions.

Schedule 3 [7] relocates an existing exemption from payroll tax for wages paid or payable for or in relation to services performed in other countries to the part of the Payroll Tax Act 2007 dealing with exemptions.

Schedule 3 [8] enables the making of savings and transitional regulations as a consequence of the amendments.

Schedule 3 [9] provides for the application of the amendments. The amendments apply in respect of wages paid or payable on or after 1 July 2009, so that the new provisions will apply to the financial year commencing on that date. An annual adjustment will be made in respect of each employer at the end of the payroll tax year to reflect any changes in liability arising as a result of the new provisions.