

Duties Amendment (Land Rich) Bill 2004

New South Wales

Explanatory note

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

Overview of Bill

The object of this Bill is to amend the *Duties Act 1997* for the following purposes:

(a) to impose duty on certain disposals by persons in land rich entities, so that duty is chargeable in a similar manner to the vendor duty chargeable on a transfer of land-related property, and make other changes to the land rich provisions of the Act,

(b) to make other miscellaneous changes relating to the duty chargeable under the Act, in connection with the following:

- (i) premium property duty,
- (ii) the assessment of, and exemptions from, vendor duty,
- (iii) transactions by charitable and benevolent bodies,
- (iv) interim assessment of duty.

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.

Clause 3 is a formal provision that gives effect to the amendments to the *Duties Act 1997* set out in Schedules 1 and 2.

Schedule 1 Land rich amendments

Imposition of duty on land rich disposals

At present, the *Duties Act 1997* (the **Principal Act**) provides in certain circumstances for the imposition of duty on an acquisition of an interest in an entity, such as a private unit trust scheme, if the assets of the entity are principally land holdings. Such an entity is referred to as a **land rich landholder**. The duty (**acquisition duty**) is payable if a person acquires a significant interest in the land rich landholder or, having a significant interest, makes a further acquisition in the land rich landholder. The duty is charged at the same rate as purchaser duty on a transfer of land under Chapter 2 of the Act. The person making the acquisition is required to pay the duty. The *State Revenue Legislation Amendment Act 2004* made amendments to the Principal Act which provided for the imposition of an additional duty on a transfer of land (or other land-related property). This type of duty is payable by the vendor or transferor, rather than the purchaser, and is known as vendor duty.

The principal purpose of the amendments made by Schedule 1 is to extend the land rich provisions of the Principal Act so that duty is payable on a disposal of an interest in a land rich landholder by a person who has a significant interest in that landholder, in addition to any duty payable on the acquisition of that interest. The duty (**disposal duty**) is charged at the same rate as vendor duty. The person making the disposal is required to pay the duty.

The amendments repeal the current land rich provisions of the Principal Act and replace them with a new consolidated chapter (proposed Chapter 4A) which will cover both land rich acquisitions and land rich disposals. The provisions in proposed Chapter 4A relating to land rich acquisitions are substantially the same as the provisions currently contained in the Act relating to land rich acquisitions (with some changes that are explained below).

The new provisions relating to disposal duty are principally contained in Part 3 of proposed Chapter 4A. The provisions charge disposal duty on any disposal of an interest in a land rich landholder by a person who has a significant interest in the land rich landholder or who had such an interest within the period of 3 years before the disposal. A person disposes of an interest in a land rich landholder if the person

ceases to have an interest in the land rich landholder, or the person's interest decreases, regardless of how that happens.

The general principles that apply to acquisition duty (such as the meaning of key terms, and other principles relating to constructive ownership of land and valuation of property) will also apply to disposal duty. However, imminent public unit trust schemes and imminent wholesale unit trust schemes will be treated as private unit trust schemes and as landholders for the purposes of the new provisions relating to disposals. This differs from the treatment of those unit trust schemes under the provisions relating to acquisition duty. In addition, valuations that have been prepared within a 12-month period before a disposal may be used for the purpose of assessing disposal duty.

Disposal duty will be subject to the same exemptions as currently apply to acquisition duty.

In addition, some further exemptions and concessions apply to disposal duty. These exemptions and concessions are contained in Part 6 of proposed Chapter 4A and are similar to those that apply in relation to vendor duty. The exemptions and concessions relate to the following:

- (a) farms,
- (b) new and substantially new buildings,
- (c) land subject to conservation instruments,
- (d) land that has not significantly increased in value,
- (e) disposals for no consideration by charities and others not liable for vendor duty under the Principal Act.

There are also exemptions for passive disposals and disposals that would otherwise be subject to vendor duty as well as disposal duty.

The principal amendment is contained in **Schedule 1 [4]**. The amendments set out in **Schedule 1 [1]–[3], [5]–[9] and [12]–[15]** are of a consequential or ancillary nature. **Schedule 1 [10] and [11]** provide for savings and transitional matters. These provisions include an exemption for disposals made pursuant to agreements entered into before 7 May 2004.

Registration of unit trust schemes

Under the current provisions of the Principal Act relating to acquisition duty, a unit trust scheme may be treated as a public unit trust scheme or wholesale unit trust scheme if the Chief Commissioner is satisfied that it will become such a scheme within 12 months. The determination as to whether a unit trust scheme is a public unit trust scheme or wholesale unit trust scheme affects whether duty is payable on an acquisition of an interest in the unit trust scheme.

The new provisions require such imminent public unit trust schemes and imminent wholesale unit trust schemes, together with wholesale unit trust schemes, to be registered under the Act. In the absence of registration, the unit trust schemes will be treated as private unit trust schemes under the Act and, accordingly, an acquisition of an interest in such a scheme may be dutiable as an acquisition in a private unit trust scheme.

Imminent public unit trust schemes and imminent wholesale unit trust schemes do not receive any concessions in relation to disposal duty (that is, they are treated as private unit trust schemes), so registration under the new provisions will not affect liability for disposal duty. However, wholesale unit trust schemes (other than imminent ones) will need to be registered under the new provisions in order to receive the benefit of the concessions that apply in respect of wholesale unit trust schemes under the disposal duty provisions.

The Chief Commissioner of State Revenue will be required to keep a public register of wholesale unit trust schemes that are registered under the new provisions.

The provisions relating to this proposal are set out in **Schedule 1 [4]**, proposed Part 7 of Chapter 4A. The amendments set out in **Schedule 1 [16]–[18]** are of a

consequential or ancillary nature.

Schedule 1 [11] includes transitional provisions that provide for the phasing-in of the changes in respect of wholesale unit trust schemes, and other unit trust schemes that have been the subject of a previous assessment by the Chief Commissioner.

Definition of wholesale unit trust scheme

The amendments extend the list of qualifying investors who may hold units in a wholesale unit trust scheme to include certain public authorities and custodians and trustees of certain investor directed portfolio services. The provisions also make it clear that a listed trust is not considered to be a wholesale unit trust scheme. See **Schedule 1 [4]**, proposed section 163ZU and **Schedule 1 [18]**.

Concession for buy-back arrangements

The amendments introduce a concession for certain buy-back arrangements engaged in by widely held trusts that might otherwise render acquisitions or disposals in the trust scheme liable to duty. This concession is set out in **Schedule 1 [4]**, proposed section 163ZE.

Schedule 2 Other amendments

Premium property duty on large parcels of residential land

At present, when premium property duty (that is, the higher rate of duty on the purchase of residential land having a dutiable value that exceeds \$3,000,000) is charged on a large parcel of vacant residential land it is charged only on that proportion of the dutiable value of the land that is referable to 2 hectares of the land. The amendment applies this same apportionment rule to all large parcels of residential land, regardless of whether the land is vacant. Existing apportionment provisions will continue to apply to land that is used partly for residential and partly for non-residential purposes. See **Schedule 2 [1] and [2]**.

Calculation of dutiable value of land-related property for vendor duty

The amendments require that, when calculating the dutiable value of land-related property for the purpose of charging vendor duty, any amount payable by the purchaser for vendor duty that exceeds 2.25% of the monetary consideration is to be disregarded. In addition, any amount payable for GST in respect of a vendor duty transaction that exceeds 10% of the monetary consideration for the transaction is to be disregarded. As both vendor duty and GST are calculated by reference to the total consideration payable in respect of a transaction, the provisions are intended to prevent a cascading effect that is produced if the amount payable for the 2 taxes is added to the consideration payable, and each tax then increases by reference to the other. See **Schedule 2 [4]**, proposed section 158 (3).

Aggregation of transactions for vendor duty

The amendments provide that aggregation principles that apply to dutiable transactions under Chapter 2 of the Act do not apply to vendor duty transactions. See **Schedule 2 [4]**, proposed section 158 (4).

Principal place of residence exemption for vendor duty

At present, the Principal Act provides for an exemption from vendor duty in respect of land that is used and occupied by the vendor as his or her principal place of residence.

The amendments make it clear that to obtain the benefit of the principal place of residence exemption in relation to vendor duty the vendor must be a natural person who owns, or partly owns, the land concerned (or the land use entitlement to which the land is subject). If land is owned by 2 or more persons, the person or persons occupying the land as a principal place of residence must have a significant interest in the land.

The amendments also make it clear that a part owner of land (including a corporate part owner) may claim the principal place of residence exemption in respect of land if the land is used and occupied as a principal place of residence by another part owner who is a natural person and who holds a significant interest in the land.

At present, the Act allows the Chief Commissioner of State Revenue to apply the principal place of residence exemption in relation to a vendor duty transaction in circumstances where the Chief Commissioner considers it fair and reasonable to do so. The amendments remove that broad discretion. Instead, the amendments will specifically extend the principal place of residence exemption to the following situations:

- (a) where a person was unable to occupy land as a principal place of residence for the required period because the vendor's residence was being constructed on the land during part of that period (provided that the vendor has actually used and occupied the land as a principal place of residence for at least 6 months),
- (b) where a person who marries or enters a de facto relationship disposes of a residence he or she started to occupy before the marriage or relationship, and the principal place of residence exemption has already been claimed by his or her spouse in respect of a residence that the spouse started to occupy before the marriage or relationship (that is, as an exception to the general rule that only one principal place of residence can be claimed by members of the same family),
- (c) where land is used and occupied by a person under a legal disability who does not own the land.

Other amendments to the principal place of residence exemption:

- (a) clarify that the principal place of residence exemption applies in respect of land that has been owned and occupied by a person for a period of less than 2 years only if the person has not, during that period, occupied other land for residential purposes, and
- (b) extend an existing concession for land used primarily for residential purposes that is also used for incidental business purposes, so that it is no longer required, in order to obtain the benefit of the principal place of residence exemption, to establish that the business conducted at the residence is primarily conducted elsewhere, and
- (c) transfer various existing provisions that restrict the operation of the principal place of residence exemption so that those provisions appear in the same part of the Act as the exemption itself.

The relevant amendments are set out in **Schedule 2 [5]–[7] and [30]–[34]**.

Concession for land-related property that has not significantly increased in value

A vendor duty exemption applies to the sale of land-related property if the dutiable value of the land-related property has not increased, since it was acquired, by more than 12%. A concession applies for increases in value of not more than 15%.

The amendments make it clear that if a vendor acquired a beneficial interest in land-related property before acquiring a legal interest in the property, the vendor is considered to have acquired the property when the vendor acquired the beneficial interest. An example of this situation is where a person acquires a beneficial interest in land-related property by entering into an agreement for sale or transfer of the land-related property as purchaser or transferee, and subsequently acquires the land-related property by transfer. In such a case, the person will be taken to have acquired the land-related property when the agreement for sale or transfer was entered into. The dutiable value of the land-related property at that date will be the relevant value for the purpose of applying the vendor duty exemption provision.

The amendments provide that if a vendor otherwise acquires separate interests in land-related property on separate occasions, the vendor acquisition date in relation to that property is considered to be the earliest date on which the vendor acquired any interest in the property, other than an interest that has already been transferred by the vendor. However, if the vendor disposes of the vendor's entire interest in the land-related property, the vendor duty transaction may be assessed as if the vendor

had disposed of separate interests in separate transactions.

Amendments also make it clear that if a person acquires land, and the form or description of the person's title to the land changes (for example, because of a subdivision), that change in the title is to be disregarded. That is, the date on which the person acquired the land is to be determined as if the vendor's title had not changed.

See **Schedule 2 [9]–[14]**.

Schedule 2 [8] makes an amendment by way of statute law revision.

Exemption for sale of new or substantially new buildings

At present, a sale or transfer, or transfer, of land on which there is a vendor constructed building that is new or substantially new is exempt from vendor duty. Restrictions apply if the land has previously been occupied or transferred. The amendments make it clear that, if the building contains strata lots, those restrictions apply if the strata lot the subject of the sale or transfer has previously been occupied or transferred. That is, it does not matter if other parts of the building have been occupied or sold.

Additional amendments are made to ensure that a reference to the completion date in respect of a building is, in relation to a building containing strata lots, a reference to the completion date of the strata lot the subject of the sale or transfer.

The relevant amendments are set out in **Schedule 2 [15] and [35]**.

Exemption for improved vacant land

The sale or transfer of improved vacant land is exempt from vendor duty. The amendments provide that rehabilitation works (in addition to remediation works) required under a development consent and carried out at the vendor's expense are considered to be an improvement to vacant land. The amendments also define **rehabilitation works** and **remediation works**. See **Schedule 2 [16] and [18]**.

The amendments make it clear that the continuing presence on land of certain structures that have been preserved for their heritage significance does not prevent the land from being regarded as vacant land, if the Chief Commissioner is satisfied that the land is substantially vacant. See **Schedule 2 [17]**.

Exemption for compulsory acquisitions of land

A vendor duty transaction that gives effect to an acquisition of land by compulsory process in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991* is exempt from vendor duty. The amendments extend this exemption so that vendor duty is not chargeable on the following:

- (a) a transaction that gives effect to an acquisition of land by agreement, if the *Land Acquisition (Just Terms Compensation) Act 1991* applies in respect of the acquisition,
- (b) a transaction that gives effect to a dedication of land required by a consent authority under section 94 (Payment towards provision or improvement of amenities or services) or 94F (Conditions requiring land or contributions for affordable housing) of the *Environmental Planning and Assessment Act 1979*,
- (c) an agreement for the sale or transfer, or transfer, of land that is intended to be used for affordable housing, if the transaction is of a kind approved by the Minister administering Part 4 of the *Environmental Planning and Assessment Act 1979* after consultation with the Treasurer.

See **Schedule 2 [19]**.

Exemption for land subject to conservation agreements

An exemption from vendor duty applies to the sale or transfer of land if the land is subject to a conservation agreement under the *National Parks and Wildlife Act 1974* or a trust agreement under the *Nature Conservation Trust Act 2001*. An amendment restricts this exemption to an agreement that is expressed to remain in force in perpetuity. See **Schedule 2 [20]**.

Interim payment of duty

The amendments extend to vendor duty transactions existing arrangements for the interim payment of duty in cases where the Chief Commissioner is unable to immediately ascertain the duty payable in respect of a transaction. The relevant amendments are set out in **Schedule 2 [21], [22] and [28]**. **Schedule 2 [3]** is a consequential amendment.

Exemptions for charitable and benevolent bodies

At present, certain transactions in favour of charitable and benevolent bodies are exempt from duty under the Principal Act. The amendments extend this exemption to certain trust instruments relating to unidentified property and non-dutiable property. See **Schedule 2 [23] and [25]**.

In certain cases in order for the exemption to apply the property that is the subject of the transaction must be used or intended to be used by the charitable or benevolent body for certain exempt purposes. The amendments allow a partial exemption to be claimed in respect of land that is used or to be used partly for an exempt purpose and partly for other purposes. See **Schedule 2 [27]**.

Schedule 2 [24] and [26] make amendments, by way of statute law revision, which ensure all the relevant exemption provisions are consistent.

Premium property duty—options entered into before mini-Budget

An amendment provides that premium property duty will not apply to a dutiable transaction that results from an option granted before 7 May 2004. See **Schedule 2 [29]**.