

Passed by both Houses



New South Wales

Pay-roll Tax Legislation Amendment (Avoidance) Bill 2002

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I certify that this PUBLIC BILL, which originated in the LEGISLATIVE ASSEMBLY, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney, , 2002*



New South Wales

Pay-roll Tax Legislation Amendment (Avoidance) Bill 2002

Act No , 2002

An Act to amend the *Pay-roll Tax Act 1971* and the *Taxation Administration Act 1996* to make further provision with respect to liability for pay-roll tax and the grouping of businesses; and for other purposes.

I have examined this Bill, and find it to correspond in all respects with the Bill as finally passed by both Houses.

Chairman of Committees of the Legislative Assembly.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Pay-roll Tax Legislation Amendment (Avoidance) Act 2002*.

2 Commencement

- (1) This Act commences on the date of assent, except as provided by subsections (2) and (3).
- (2) Schedule 1 [3]–[8] commence, or are taken to have commenced, on 1 July 2003.
- (3) Schedule 1 [1] and [9]–[12] and Schedule 2 commence on a day or days to be appointed by proclamation.

3 Amendment of Pay-roll Tax Act 1971 No 22

The *Pay-roll Tax Act 1971* is amended as set out in Schedule 1.

4 Amendment of Taxation Administration Act 1996 No 97

The *Taxation Administration Act 1996* is amended as set out in Schedule 2.

Schedule 1 Amendment of Pay-roll Tax Act 1971

(Section 3)

[1] Section 3 Definitions

Omit the definition of *group* from section 3 (1). Insert instead:
group has the same meaning as in Part 4A.

[2] Section 3 (6)

Insert after section 3 (5):

(6) Notes included in this Act do not form part of this Act.

[3] Section 3AA Wages

Insert after section 3AA (3):

(4) Wages includes any distribution to a person as beneficiary under a trust that is required to be included as wages by section 3AC.

[4] Section 3AA (5)

Omit “, subject to subsection (6),”.

[5] Section 3AA (6)

Omit the subsection.

[6] Section 3AB GST excluded from wages

Insert after section 3AB (1):

(1A) This section does not apply in respect of the value of wages comprising a fringe benefit.

Note. See section 9. The fringe benefits taxable amount of fringe benefits may include a GST component.

[7] Section 3AC

Insert after section 3AB:

3AC Inclusion of trust distributions as wages

- (1) A distribution to a person as beneficiary under a trust constitutes *wages* for the purposes of section 3AA to the extent that the distribution is in lieu of wages for work done for the trust by the person.
- (2) Work that constitutes the provision of services to the trustee of a trust or for the purposes of a business conducted by the trustee of a trust is *work done for the trust*.
- (3) This section applies in respect of a distribution to a person only if:
 - (a) there is a wages shortfall in respect of work done for the trust by the person, and
 - (b) the distribution is made in the financial year in which the work is done or in the following financial year.
- (4) There is a *wages shortfall* in respect of work done for the trust by the person if the total wages (if any) paid or payable to the person during the financial year in which the work is done is less than the wages that would be payable to the person for that work if wages were payable at the market rate for that work (with the difference constituting the *wages shortfall* for the purposes of subsection (5)).
- (5) If the distribution does not exceed the wages shortfall in respect of the work, the whole of the distribution is in lieu of wages for work done for the trust by the person. Alternatively, if the distribution exceeds the wages shortfall in respect of the work, the distribution is in lieu of wages to the extent of the shortfall.
- (6) For the purpose of determining whether a particular distribution is in lieu of wages for work done for the trust, the total wages (if any) paid or payable to the person during a financial year for the work is taken to include any previous distribution (whether made during that financial year or the following financial year) that, by application of this section, is a distribution in lieu of wages for the same work.

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- (7) For the purposes of this section, the *market rate* for work is the minimum wage rate applicable in respect of the work (or work that is comparable to the work):
- (a) pursuant to an industrial instrument in force under a law of the State, or
 - (b) if paragraph (a) does not apply, pursuant to an industrial instrument in force under a law of the Commonwealth, or
 - (c) if neither paragraph (a) nor (b) applies, pursuant to a determination of that minimum wage rate in accordance with the regulations.

[8] Section 9

Omit the section. Insert instead:

9 Taxable value of fringe benefits

For the purposes of this Act, the value of taxable wages, comprising a fringe benefit, is the value that would be the fringe benefits taxable amount of the employer for the purposes of the *Fringe Benefits Tax Assessment Act 1986* of the Commonwealth.

[9] Sections 16A–16C

Omit sections 16A–16H. Insert instead:

16A Definitions

In this Part:

business has the same meaning as in Part 10A of the *Taxation Administration Act 1996*.

group means a group constituted under Part 10A of the *Taxation Administration Act 1996*, but does not include any member of the group in respect of whom a determination under section 16B is in force.

16B Exclusion of persons from groups

- (1) The Chief Commissioner may, by order in writing, determine that a person who would, but for the determination, be a member of a group is not a member of the group.

Note. Section 16C sets out the circumstances in which a determination may be made under this section.

- (2) The Chief Commissioner must give notice in writing of a determination to the person in respect of whom the determination is made and to each member of the group.
- (3) A determination takes effect:
- (a) on the date on which notice under subsection (2) is given to the person excluded from the group, or
 - (b) if another date of effect (including an earlier date) is specified in the notice—on that other date.
- (4) A determination continues in force until it is revoked and notice of the revocation has been served on the person in respect of whom the determination was made.
- (5) The Chief Commissioner may revoke a determination if satisfied the circumstances referred to in section 16C do not apply to the person.
- (6) Notice of the revocation of a determination must be given by the Chief Commissioner:
- (a) to the person in respect of whom the determination was made, and
 - (b) to each other member of the group of which the person is a member, as a result of the revocation, by virtue of Part 10A of the *Taxation Administration Act 1996*.

16C Grounds for excluding persons from group

- (1) A determination may be made by the Chief Commissioner under section 16B in respect of the following persons only:
- (a) a person who would, but for the determination, be a member of a group arising under section 106H (Primary groups arising from the use of common employees) of the *Taxation Administration Act 1996*,

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- (b) a person who carries on a business as trustee of a trust and would, but for the determination, be a member of a group arising under section 106I (Primary groups of commonly controlled businesses) of the *Taxation Administration Act 1996*.
- (2) In the case of a person referred to in subsection (1) (b), the determination may be made only if the Chief Commissioner is satisfied that the person would, but for the determination, be a member of a group with a person who carries on another business because of the application of one (but not more than one) of the following grouping principles:
- (a) the exclusive ownership grouping principle (section 106I (2) (a) and (b) of the *Taxation Administration Act 1996*),
- (b) the corporate grouping principle (section 106I (2) (c) and (d) and (3) of the *Taxation Administration Act 1996*),
- (c) the common beneficiary grouping principle (section 106I (2) (e) and (f) and (5)–(8) of the *Taxation Administration Act 1996*).
- (3) The Chief Commissioner must not make a determination under section 16B unless satisfied that the person who is the subject of the determination has continuously carried on the business concerned, and will continue to carry on that business, substantially independently of the other members of the group.
- (4) In determining whether a person carries on business substantially independently of the other member or members of a group, the Chief Commissioner is to have regard to the nature and degree of ownership or control of the business of each member of the group, the nature of each of those businesses and any other matter that the Chief Commissioner considers relevant.

[10] Section 25 Liquidator to give notice

Omit section 25 (7). Insert instead:

- (7) Nothing in this section limits the liability of a liquidator under section 42 or his or her liability, as a trustee, under Part 10A of the *Taxation Administration Act 1996* and Part 4A of this Act.

[11] Part 5B

Insert after Part 5A:

Part 5B Recovery of tax from principal contractors

31G Liability of principal contractor for pay-roll tax payable in respect of employees of subcontractor

- (1) This Part applies if:
 - (a) a person (referred to in this Part as the *principal contractor*) has entered into a contract for the carrying out of work by another person (referred to in this Part as the *subcontractor*), and
 - (b) employees of that subcontractor (referred to in this Part as the *relevant employees*) are engaged in carrying out the work, and
 - (c) the work is carried out in connection with a business undertaking of the principal contractor.
- (2) If, at the end of the period of 60 days after the end of a financial year, any pay-roll tax payable by the subcontractor in respect of wages paid or payable to the relevant employees during the financial year for work done in connection with the contract has not been paid, the principal contractor is jointly and severally liable with the subcontractor for the payment of the pay-roll tax.
- (3) Section 45 of the *Taxation Administration Act 1996* (subsection (3) excepted) applies to an amount payable under this section.

Note. Section 44 of the *Taxation Administration Act 1996* provides that the amount of tax payable may be recovered by the Chief Commissioner as a debt to the Chief Commissioner. Section 45 of the *Taxation Administration Act 1996* provides that if parties are jointly and severally liable for the payment of an amount under a taxation law, the Chief Commissioner may recover the amount payable from any of the parties. It also provides for the recovery of interest, penalty tax and costs from the parties who are jointly and severally liable for the payment of the tax.

31H Written statement relieves principal contractor of liability

- (1) The principal contractor is not liable under this Part for the payment of any pay-roll tax payable in respect of wages paid or

payable to the relevant employees during a period if the principal contractor has been given a written statement by the subcontractor in respect of that period.

- (2) The written statement is a statement comprising the following statements:
- (a) a statement by the subcontractor that the subcontractor is registered as an employer under this Act or is not required to be registered under this Act (whichever is applicable),
 - (b) a statement by the subcontractor that all pay-roll tax payable by the subcontractor in respect of wages paid or payable to the relevant employees during any period of the contract for work done in connection with the contract has been paid,
 - (c) a statement by the subcontractor as to whether the subcontractor is also a principal contractor in connection with that work,
 - (d) if the subcontractor is also a principal contractor in connection with that work, a statement by the subcontractor as to whether the subcontractor has been given a written statement under this section in the capacity of principal contractor in connection with that work.
- (3) The written statement may include any statement made by the subcontractor for the purposes of section 127 of the *Industrial Relations Act 1996* or a similar provision under any other Act.
- (4) The written statement is to be in a form approved by the Chief Commissioner.
- (5) The subcontractor must keep a record of a written statement given to a principal contractor under this section.
- Note.** Section 53 of the *Taxation Administration Act 1996* requires the record to be kept for not less than 5 years after it was made.
- (6) The principal contractor may withhold any payment due to the subcontractor under the contract until the subcontractor gives a written statement under this section for any period up to the date of the statement. Any penalty for late payment under the contract does not apply to any payment withheld under this subsection.

- (7) The written statement is not effective to relieve the principal contractor of liability under this Part if the principal contractor had, when given the statement, reason to believe it was false.
- (8) A subcontractor who gives the principal contractor a written statement knowing it to be false is guilty of an offence.

Maximum penalty: 100 penalty units.

31I Right of recovery

The principal contractor is entitled to recover from the subcontractor as a debt in a court of competent jurisdiction any payment made by the principal contractor as a consequence of a liability arising under this Part.

31J Application of Part

- (1) This Part does not apply in relation to a contract if the subcontractor is in receivership or in the course of being wound up or, in the case of an individual, is bankrupt and if payments made under the contract are made to the receiver, liquidator or trustee in bankruptcy.
- (2) To avoid doubt, this Part extends to a principal contractor who is the owner or occupier of a building for the carrying out of work in connection with the building so long as the building is owned or occupied by the principal contractor in connection with a business undertaking of the principal contractor.

[12] Section 42 Agents and trustees

Omit "Part 4A" from section 42 (2).

Insert instead "Part 10A of the *Taxation Administration Act 1996* and Part 4A of this Act".

[13] Schedule 6 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

Pay-roll Tax Legislation Amendment (Avoidance) Act 2002

[14] Schedule 6, Part 8

Insert after Part 7:

**Part 8 Provisions consequent on enactment of
Pay-roll Tax Legislation Amendment
(Avoidance) Act 2002**

13 Eligible termination payments and other benefits

The repeal of section 3AA (6) by the *Pay-roll Tax Legislation Amendment (Avoidance) Act 2002* does not apply in respect of a payment referred to in section 3AA (5) or (6B) that is paid or payable in a financial year (or any part of a financial year) that commenced before 1 July 2003.

14 Exclusionary orders

An order made by the Chief Commissioner under section 16H before the repeal of that section by the *Pay-roll Tax Legislation Amendment (Avoidance) Act 2002*, and in force immediately before that repeal, is taken on that repeal to have been made under section 16B, as substituted by the *Pay-roll Tax Legislation Amendment (Avoidance) Act 2002*.

15 Liability of principal contractors

- (1) Part 5B extends to a contract entered into before the commencement of that Part.
- (2) However, Part 5B does not apply in respect of any pay-roll tax that is due and payable, or becomes due and payable, in respect of wages paid or payable for work done before the commencement of that Part.

Schedule 2 Amendment of Taxation Administration Act 1996

(Section 4)

[1] Part 10A

Insert after Part 10:

Part 10A Business groups

106E Definitions

In this Part:

business means:

- (a) a profession or trade, or
- (b) any other activity carried on for fee or reward, or
- (c) the activity of employing persons to perform duties in connection with another business, or
- (d) the carrying on of a trust,

whether carried on by 1 person or 2 or more persons together.

primary group means a primary group constituted under section 106G, 106H, 106I, 106J or 106K.

106F Membership of groups

A *group* is constituted by all the persons or bodies forming a primary group that is not a part of any larger primary group.

Note. Groups are used for the purpose of the *Pay-roll Tax Act 1971*. See Part 4A of that Act.

106G Primary groups of corporations

- (1) Corporations constitute a primary group if they are related corporations within the meaning of the *Corporations Act 2001* of the Commonwealth.
- (2) For the purpose of assessing whether corporations are related under that Act, they are taken to carry on a business and not to be trustee companies.

106H Primary groups arising from the use of common employees

- (1) If 2 persons have an agreement under which an employee of 1 of them works solely or mainly in connection with a business carried on by:

- (a) the other, or
- (b) both of them,

then the 2 persons constitute a primary group.

- (2) In this section:

agreement means an agreement, arrangement or undertaking, whether formal or informal, whether express or implied, and whether or not the agreement, arrangement or undertaking includes provisions in respect of the supply of goods or services.

person includes a set of persons.

Note. Section 16B of the *Pay-roll Tax Act 1971* allows the Chief Commissioner, for pay-roll tax purposes, to exclude persons from a group constituted under this section in certain circumstances.

106I Primary groups of commonly controlled businesses

- (1) If a person or set of persons has a controlling interest in each of 2 businesses, the persons who carry on those businesses constitute a primary group.

Note. Section 16B of the *Pay-roll Tax Act 1971* allows the Chief Commissioner, for pay-roll tax purposes, to exclude persons from a group constituted under this section in certain circumstances.

- (2) For the purposes of this section, a person or set of persons has a controlling interest in a business if:

- (a) in the case of 1 person—the person is the sole owner (whether or not as trustee) of the business, or
- (b) in the case of a set of persons—the persons are together the exclusive owners (whether or not as trustees) of the business, or
- (c) in the case of a business carried on by a corporation:
 - (i) the person or each of the set of persons is a director of the corporation and the person or set of persons is entitled to exercise more than 50% of the voting power at meetings of the directors of the corporation, or

- (ii) a director or set of directors of the corporation that is entitled to exercise more than 50% of the voting power at meetings of the corporation is under an obligation, whether formal or informal, to act in accordance with the direction, instructions or wishes of that person or set of persons, or
 - (d) in the case of a business carried on by a corporation that has a share capital—that person or set of persons can, directly or indirectly, exercise, control the exercise of, or substantially influence the exercise of, more than 50% of the voting power attached to the voting shares issued by the corporation, or
 - (e) in the case of a business carried on by a partnership—that person or set of persons:
 - (i) own (whether beneficially or not) more than 50% of the capital of the partnership, or
 - (ii) is entitled (whether beneficially or not) to more than 50% of the profits of the partnership, or
 - (f) in the case of a business carried on under a trust—the person or set of persons (whether or not as a trustee or trustees of another trust) is the beneficiary in respect of more than 50% of the value of the interests in the first mentioned trust.
- (3) If:
 - (a) 2 corporations are related to each other within the meaning of the *Corporations Act 2001* of the Commonwealth, and
 - (b) 1 of the corporations has a controlling interest in a business,
the other corporation has a controlling interest in the business.
- (4) If:
 - (a) a person or set of persons has a controlling interest in a business, and

- (b) a person or set of persons who carry on the business has a controlling interest in another business,

the person or set of persons referred to in paragraph (a) has a controlling interest in that other business.

- (5) If:

- (a) a person or set of persons is the beneficiary of a trust in respect of more than 50% of the value of the interests in the trust, and

- (b) the trustee of the trust (whether alone or together with another trustee or trustees) has a controlling interest in a business of the trust,

the person or set of persons has a controlling interest in the business.

- (6) A person who may benefit from a discretionary trust as a result of the trustee or another person, or the trustee and another person, exercising or failing to exercise a power or discretion, is taken, for the purposes of subsection (5), to be a beneficiary in respect of more than 50% of the value of the interests in the trust.

- (7) If:

- (a) a person or set of persons has a controlling interest in the business of a trust, and

- (b) the trustee of the trust (whether alone or together with another trustee or trustees) has a controlling interest in the business of a corporation,

the person or set of persons is taken to have a controlling interest in the business of the corporation.

- (8) If:

- (a) a person or set of persons has a controlling interest in the business of a trust, and

- (b) the trustee of the trust (whether alone or together with another trustee or trustees) has a controlling interest in the business of a partnership,

the person or set of persons is taken to have a controlling interest in the business of the partnership.

- (9) Subsection (1) does not apply in relation to a person or set of persons that has a controlling interest in 2 businesses if:
- (a) in the case of 1 person—the businesses are wholly owned by the person, whether as trustee or otherwise, or
 - (b) in the case of a set of persons—the businesses are wholly owned by the persons as trustees.

Note. Under the *Pay-roll Tax Act 1971*, if 2 businesses are owned by the same employer then the employer would provide a single return in relation to all wages paid in respect of those businesses. There is no need to apply the grouping provisions. This also applies where the trustee is answerable under that Act as an employer (see section 42 of that Act).

106J Grouping of government departments

The persons, groups of persons and bodies specified for the time being in Column 1 of Schedule 3 to the *Public Finance and Audit Act 1983* together constitute a primary group.

106K Smaller primary groups subsumed by larger groups

If a person is a member of 2 or more primary groups, the members of all the groups together constitute a primary group.

106L Grouping provisions to operate independently

The fact that a person is not a member of a primary group constituted under a provision of this Part does not prevent that person from being a member of a primary group constituted under another provision of this Part.

[2] Schedule 1 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

Pay-roll Tax Legislation Amendment (Avoidance) Act 2002