STATE REVENUE LEGISLATION FURTHER AMENDMENT BILL 2014

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Bill introduced on motion by Mr Dominic Perrottet, read a first time and printed.

Second Reading

Mr DOMINIC PERROTTET (Castle Hill—Minister for Finance and Services) [3.43 p.m.]: I move:

That this bill be now read a second time.

The State Revenue Legislation Further Amendment Bill 2014 is part of the Government's ongoing program of maintaining legislation governing taxes administered by the Office of State Revenue. This is the second bill on State taxes to be dealt with in the current session of Parliament. These taxes operate in the context of continually changing business practices and developments in the law arising from court and tribunal decisions. The Government has an obligation to respond promptly to protect the State's tax revenue and to ensure that tax liabilities can be clearly identified and operate fairly.

Some of the provisions in this bill were removed from the State Revenue Legislation Amendment Bill 2014 to allow further consultation with industry and professional bodies. The Government is reintroducing some of these provisions where appropriate consultation has occurred. These proposals have been the subject of consultation with the Law Society of NSW, Property Council of Australia, Taxation Institute of Australia and professional accounting bodies. The bill makes amendments relating to duties, land tax and payroll tax. I will deal first with the amendments to the Duties Act 1997.

The first amendment relates to options to purchase land being the right, but not an obligation, to acquire or sell something for a fixed price at some future date. The acquisition of an option by a third party should be subject to transfer duty regardless of the form of the transaction. The bill therefore clarifies that the acquisition of an option by way of nomination or novation is taken to be a transfer of the option. This is consistent with the policy of imposing duty on the change of ownership of options. The bill further provides that, for the purpose of calculating duty, the consideration paid for the transfer of the land includes the value of any consideration paid for the option with a credit for any duty paid on the acquisition of the option.

To prevent the possibility that the same taxpayer is effectively required to pay duty twice when the value of the option is included in the value of the land purchased, the bill also provides the ultimate purchaser with a credit for any duty paid on the acquisition of the option. The bill only applies to options granted and transferred on or after the commencement date of the provisions. The bill includes an amendment to prevent avoidance of duty by ensuring that duty is payable where a lease is novated rather than transferred. The bill provides for $500 duty to be imposed on declarations of trust by custodians of self-managed superannuation funds holding property on trust for the trustee of a self-managed superannuation fund.

These deeds are executed to comply with requirements of the Australian Taxation Office. Many deeds do not meet the requirements for the duties concession for a resulting trust. This is due to difficulties in establishing that the trustee of the fund provided the purchase monies when funds are provided by the vendor member of the fund as a contribution. This current

requirement for the concession will be relaxed. Imposing a fixed charge will reduce administrative costs for the Office of State Revenue. This will be, as we committed to do, another reduction in red tape for taxpayers.

The bill also clarifies the concession for transfers of property from a member of a self-managed superannuation fund to the fund of which they are the member. The amendment specifies that the duty concession will not apply where a transferor holds property in a trust. It will not apply to transfers from members of a super fund unless the fund is to hold the property for the benefit of those members in the same proportion as they held the property immediately prior to the transfer. Consistent with other superannuation concessions a $500 duty will be imposed.

Another amendment to the Duties Act is an exemption from duty for the transfer of heavy vehicle trailers from other jurisdictions to New South Wales. In the past, duty on new trailers had been a key factor in encouraging heavy vehicle operators to purchase and register their vehicles in other States. Since the abolition of duty on new trailers in October 2012 this trend has started to reverse. However, owners who transfer heavy vehicle trailers to New South Wales from other jurisdictions must show evidence that duty was paid in the other jurisdiction. Heavy vehicle operators that registered trailers in Queensland, for example, where no duty was payable on purchase, have never paid duty on that trailer.

The same applies for vehicles registered under the Federal Interstate Registration Scheme. As a result, an owner who wishes to transfer a heavy vehicle trailer from Queensland to New South Wales would be liable for duty. The bill will exempt transfers of heavy vehicle trailers that have been previously registered in another jurisdiction from paying duty upon establishment in New South Wales if the trailer is registered in the same name. Combined with the duty exemption for new heavy vehicle trailers, the "same owner" duty exemption continues to send the freight industry a strong message that the Government is determined to reduce red tape for New South Wales businesses.

The Land Tax Management Act 1956 contains land value thresholds below which tax is not payable. The general tax-free threshold is $412,000 and tax is calculated at 1.6 per cent of the taxable land value above the threshold, plus $100. The premium rate threshold above which the higher rate of 2 per cent applies is $2.519 million. The Act also contains provisions that groups companies that are owned or controlled by the same directors or shareholders, or the same beneficiaries in the case of a trustee company. The grouping provisions prevent tax minimisation by providing that a group of companies can only claim one general tax-free threshold and one premium rate threshold. This ensures that the splitting of ownership of multiple parcels of land among companies that are owned or controlled by the same person or persons cannot obtain the benefit of multiple tax-free thresholds.

The amendments in this bill make it clear that companies will not necessarily be grouped when the person who has a controlling interest in each company is acting in the capacity of trustee or nominee. In such cases the companies will be grouped only if the trusts concerned are fixed trusts and those trusts have the same beneficiaries. This is consistent with the interpretation that has been applied to the current provisions by the Chief Commissioner of State Revenue, and the amendments therefore confirm existing assessing practice. The bill makes amendments to the "relevant contracts" provisions of the Payroll Tax Act 2007, which tax remuneration paid to contractors who provide services on a similar basis to ordinary employees but who are regarded at law as independent contractors. The practice of using

contractors is often intended to avoid administrative and on-costs associated with long-term employment contracts, including charges and taxes such as payroll tax.

The relevant contracts provisions have applied to payroll tax since 1985 to combat arrangements that avoided payroll tax. There had been at that time a significant growth in three types of arrangements which resulted in the avoidance of payroll tax. First, an employee became an "independent" contractor, but continued to work exclusively for the former employer. For all intents and purposes, the working relationship remained the same. Second, when additional staff were required, "independent" contractors were employed for extended periods to avoid the longer term commitment and cost of permanent employees. The "independent" contractors worked under similar conditions and often alongside permanent employees.

Third, an existing employee formed a private company, sometimes at the insistence of the employer, and the employer contracted with the private company instead of the employee. The private company did not have a payroll tax liability because it only employed one person—the former employee—and therefore its annual wages were below the payroll tax threshold. The employer-employee relationship was effectively severed. Payroll tax liability on payments to the private company as well as to the former employee was avoided entirely.

There are a number of exclusions in the relevant contracts legislation which exempt payments to genuine independent contractors. These exemptions include: contractors who provide services that are ancillary to the supply of goods, contractors whose services are ordinarily required for less than 180 days in a financial year, contractors whose services are provided for no more than 90 days in a financial year, contractors who usually provide services to the public generally, and contractors who employ two or more workers to perform the services.

In addition, there are general exemptions applying to contractors who are owner-drivers, insurance sellers and door-to-door sellers. Contracts under which services are provided by a subcontractor who employs at least two workers to fulfil the contract are excluded from payroll tax liability because the subcontractor is an employer in its own right, not an individual employee disguised as an independent sole trader. This ensures that genuine small businesses do not lose their entitlement to the small business tax-free threshold.

However, an anti-avoidance provision authorises the Chief Commissioner to ignore an arrangement under which a subcontractor provides services using two or more workers if the arrangement was intended to avoid payroll tax. The amendments in this bill extend this anti-avoidance provision so that it can be applied when an employer enters into arrangements to avoid tax using any of the other exemptions in the relevant contracts provisions. This is necessary because of the use of various contrived arrangements that avoid the contractor provisions.

The relevant contracts provisions currently provide an exemption from payroll tax for remuneration paid to an owner-driver for services that are ancillary to the conveyance of goods. The exclusion applies to contracts under which the driver provides a vehicle to transport goods. The reason for the exemption is that a large proportion of the consideration paid to owner-drivers is for the provision of a vehicle and its running costs. The value of the personal services of the driver represents a relatively small proportion of the payments to owner-drivers.

The bill makes it clear that the exemption for owner-drivers is limited to a contract that provides solely for the conveyance of goods, and ancillary services such as loading and unloading the vehicle. The legislation has been administered by the Chief Commissioner on this basis since 1986. However, recent decisions of the New South Wales Supreme Court and Court of Appeal indicate the exemption can be claimed for contracts under which other types of services or other kinds of work are provided. This has opened up significant tax avoidance opportunities.

In an overwhelming proportion of cases, owner-driver contracts relate solely to the provision of the vehicle and ancillary services, including the driver's services in driving the vehicle as well as loading and unloading. Therefore the amendments will not have a significant effect on current industry arrangements, but they will prevent the manipulation of contracts that are not specifically for the conveyance of goods but which may require the incidental use of a vehicle.

A further amendment in relation to relevant contracts will remove the general exemption applying to commissions paid to insurance agents, and instead apply the same exclusions that apply to other types of contracts. This means remuneration paid to insurance agents will be exempt only if the selling agent is a genuine, independent contractor rather than a disguised employee. The exclusion applying to insurance sellers has applied since 1986, and was largely directed at exempting commissions paid to insurance agents who traditionally operated as independent life insurance sellers.

The financial planning market has changed significantly since the exclusion was adopted, mainly due to Commonwealth reforms to the financial services industry. Life insurance policies are now sold by financial planners who also sell other investment products and services, and there are very few sellers of insurance who only sell insurance policies. The current exemption therefore has limited application, and provides an unfair advantage for insurance brokers who use so-called independent subagents and compete with others in the financial services industry. Its removal will therefore restore a level playing field.

The bill also removes the contractor exemption for commissions paid to door-to-door sellers. Like the removal of the general exemption for insurance sellers, this means remuneration paid to door-to-door sellers will be exempt only if the selling agent is a genuine, independent contractor rather than a disguised employee. In the past, door-to-door sellers predominantly sold goods, such as encyclopaedias, and doorknocked residential premises without having made prior contact with the potential consumer.

There have been numerous changes to consumer protection legislation since the exemption was introduced, applying to unsolicited consumer agreements. This has had the effect of extending application of the payroll tax exemption for door-to-door sellers to a broader range of door-to-door sellers who do not make "cold calls" at the consumer's door. As a result, businesses that use sales methods that are not door-to-door sales in the traditional sense may now qualify for the exemption. Such methods include retailers and wholesalers of goods using marketing techniques such as telephone call centres, emails or internet marketing techniques to attract customers. When a customer makes contact, the business sends a salesperson to the customer's premises to provide a quote and enter into a contract at the customer's residence.

Contracts with door-to-door sellers will remain exempt if the salesperson is employed as an

"independent" contractor and not as an employee. A 2012 report prepared for the Australian Competition and Consumer Commission [ACCC] which provided an analysis of the door-to-door sales industry found that there was an average of around 3,400 individuals engaged as door-to-door sellers at any one time throughout Australia in 2011. Most door-to-door salespeople sell services such as energy, 76 per cent; telecommunications, 10 per cent; and solar panels, 4 per cent. Most sellers use labour hire companies to obtain sales staff, who are employed as independent contractors rather than employees.

Recent audits conducted by the Office of State Revenue have disclosed that a number of payroll taxpayers have failed to pay tax on contract sales staff. These payroll taxpayers claim they are exempt door-to-door sellers, even though in most cases the sales staff concerned do not engage in doorknocking but instead arrange appointments with the initial contact arranged by telephone, email or internet marketing. In most cases the selling agents work wholly or mainly for one employer. This demonstrates that the door-to-door sellers exemption is a potential payroll tax avoidance loophole and unless it is closed off such practices may spread with a potential revenue loss of several million dollars per year. Payroll tax legislation, including the contractor provisions, have been harmonised in all States and Territories except Western Australia. The payroll tax amendments contained in this bill have been developed in conjunction with revenue authorities in other harmonised States and territories.

The Victorian Payroll Tax Act has already been amended and will take effect from 1 July 2013 to give effect to the changes to the anti-avoidance and owner-driver provisions proposed in this bill. The provisions removing the door-to-door and insurance seller exemptions will take effect on a date to be proclaimed to enable time for employers to be advised and also to allow for commencement of the amendments to be coordinated with other harmonised jurisdictions.

This Government introduced the Jobs Action Plan in 2011.The scheme currently provides rebates of up to $5,000 over two years for employers who take on new employees and increase their total employment. In order to prevent contrived arrangements where rebates could be obtained by transferring employees from one part of a corporate group to another, the Jobs Action Plan legislation prevents an employer from claiming a rebate if the new employee was previously employed by a member of the same group of employers, or the new employee was employed as a result of a takeover of another business or undertaking or a merger with another entity.

The bill relaxes these restrictions in cases where a new employee is appointed by one employer who is eligible to register for the rebate but the employee is transferred to another employer as a result of a takeover or merger or is transferred to another member of the same group. The bill will enable the Chief Commissioner to approve payment of the rebate if the new employer satisfies the rebate criteria and the Chief Commissioner is satisfied that the former employer would have been eligible for the rebate if the employment had continued with that former employer. I commend the bill to the House.

Debate adjourned on motion by Mr Michael Daley and set down as an order of the day for a future day.