



## NSW Legislative Assembly Hansard Full Day Transcript

Extract from NSW Legislative Assembly Hansard and Papers Friday, 10 June 2005.

### Second Reading

**Mr BRYCE GAUDRY** (Newcastle—Parliamentary Secretary) [10.32 a.m.], on behalf of Dr Andrew Refshauge: I move:

That this bill be now read a second time.

The purpose of this bill is to make amendments to the Duties Act 1997, Fines Act 1996, Health Insurance Levies Act 1982, Pay-roll Tax Act 1971, Public Finance and Audit Act 1983, State Owned Corporations Act 1989 and the Taxation Administration Act 1996. The bill makes a number of amendments to these revenue Acts to ensure that the legislation remains consistent with current commercial practices, and is more equitable and certain in its application. The proposed amendments are the result of monitoring of business practices by the Office of State Revenue, ongoing liaison with industry and professional bodies, and consultation with revenue offices in other States. I will deal with the amendments to each Act in turn.

**Amendment of the Duties Act—Put and Call Options:** The amendments close two loopholes in the duties legislation which had the potential to allow duty to be avoided. The first relates to the use of put and call options. Simultaneous put and call options can have a similar effect to an agreement for sale of the property, so that an assignment of the call option is effectively a subsale of the underlying property. There is evidence that put and call options have been used to avoid duty on subsales of property, particularly in relation to purchases off the plan. The bill provides that an assignment of a call option over property in respect of which a put option is also in existence will be liable to duty as if it were an agreement for the sale or transfer of the property. This liability will fall on the assignor, as this would impose the same liability to duty as applies to the purchaser under an agreement prior to a subsale.

As the amendment only applies upon assignment of an option, it will not inhibit the granting of put and call options as a legitimate commercial practice. As a further safeguard, the provisions will not apply if the chief commissioner is satisfied that the options are being used solely for financing purposes or have been entered into under arrangements relating to the continuation of a business by its proprietors.

**Vendor Duty Avoidance:** The second area closes an opportunity to avoid vendor duty. There is an exemption from vendor duty if there is no more than a 12 per cent increase in value between the time the vendor acquired the land and the time of sale. An entity, being a member of a corporate group, may intend to sell land but transfers the land to another member of the group and obtains a corporate reconstruction exemption. If the new owner then sells the land for a price that is no more than 12 per cent above the value at the time of acquisition, they can utilise the exemption to avoid duty on the transaction. The bill closes this potential loophole by ignoring the corporate reconstruction exemption for the purpose of this vendor duty exemption.

**Exemption—transfer of property following a relationship breakdown:** The amendments made by the bill also clarify and expand on a number of exemptions from duty. It is not uncommon, following the breakdown of a marriage or de facto relationship, for arrangements to include the transfer of property to a trustee to hold in trust for the children, particularly where a non-custodial parent wishes to provide for his or her children's future without providing the former spouse with ownership and control of the property. The bill extends the exemption for transfers, which follow the breakdown of such relationships, to include a transfer of property to a trustee for the child or children of a party to a marriage or relationship.

**First Home Plus Scheme:** The amendments remove an anomaly in the First Home Plus Scheme. When determining eligibility for First Home Plus, the chief commissioner will be required to disregard a prior interest in a home or prior benefit received under the scheme if satisfied that the interest was held or acquired as trustee for a person under a legal disability, or as trustee of a resulting trust. This will further improve consistency between First Home Plus and the First Home Owner Grant Scheme.

**Intergenerational transfers of rural properties:** The bill redrafts the duty exemption for intergenerational transfers of rural properties. The transfer of a family farm to the next generation, or even between siblings, is exempt from duty. The exemption currently operates subject to guidelines, approved by the Treasurer, which primarily identify the nature of the relationship between the parties to the transfer. The amended provision will clarify the extent of the exemption and will remove the need for guidelines outside the Act.

**Minor amendments to other exemptions:** The bill makes minor amendments to other exemption provisions. These include exemption from transfer duty for certain transactions whereby property vests by statute, from lease duty for fit-out costs, and from mortgage duty for charges contained in contracts for the sale of land.

**Cost of obtaining a valuation of property:** The amendments clarify some administrative provisions that outline the powers and functions of the Chief Commissioner of State Revenue in relation to duty. Most notably, the bill will authorise the chief commissioner to recover the cost of obtaining a valuation of property in any case in which the liability for duty or the amount of that liability is determined by reference to the value of the property. To protect taxpayers from incurring unnecessary costs, the chief commissioner will not be able to recover the cost, and will have to refund any amount recovered, if the liability to duty is not determined by reference to the value of the property.

**Estimation of lease duty:** The bill also clarifies the provisions that allow the chief commissioner to estimate lease duty where the total amount is not ascertainable at the time of assessment.

**Partnership transactions:** The bill includes a provision to prevent double duty on some partnership transactions, an amendment limiting the concession for partitions of property to partitions of land, and an exemption for transfers to correct conveyancing errors. Some of the amendments I have referred to are based on similar provisions in the duties legislation of other States and Territories. The remaining duties amendments are essentially minor statute law revision. The combined effect of the amendments to the Duties Act is to improve the certainty of the legislation, making compliance and administration easier.

**Amendment of the Fines Act:** The bill makes amendments to the Fines Act to clarify enforcement and privacy provisions.

**Form of statutory declaration:** The bill clarifies the form of statutory declaration required under the Act to permit a wider range of people to witness declarations, thereby making it easier for fine recipients to find a witness when the need arises.

**Information protection and disclosure:** The bill also amends the Act to insert a general prohibition on the disclosure of personal information except with the consent of the individual or as required or permitted by law. The Act currently permits disclosure to prosecuting agencies and to agencies on whose behalf penalty notices were issued. The amendments extend the list of permitted collections and disclosures of personal information to include current and past employers, for the purposes of garnishment of wages. These amendments align with the information protection principles under the Privacy and Personal Information Protection Act 1998. The bill also makes a minor amendment to correct an incorrect reference to the Criminal Procedure Act 1986.

**Amendment of the Health Insurance Levies Act:** The Health Insurance Levies Act lists four health funds as prescribed organisations that may be appointed by the Minister for Health as authorised agents for the purposes of collecting contributions and performing other functions under the State Ambulance Insurance Plan. In addition, the Grand United Friendly Society Ltd is prescribed in the Health Insurance Levies Regulation 2003 and has also been appointed by the Minister for Health as an authorised agent. The bill adds the Grand United Friendly Society Ltd to the list of prescribed organisations of the Act. As the regulation does not deal with any other matter, it is repealed. The bill also deletes an obsolete definition of "New South Wales revenue law".

**Amendment of the Pay-roll Tax Act:** The bill incorporates provisions currently in the regulation into the Act to allow greater parliamentary scrutiny of any further changes to the relevant provisions. As a consequence, the Pay-roll Tax Regulation 1998 is repealed. The bill also makes a number of changes to the types of payments categorised as wages for the purpose of determining liability to payroll tax.

**Share scheme benefits:** The payroll tax definition of taxable wages was extended from 1 July 2003 to include benefits provided under share schemes for employees, contractors and company directors. The New South Wales legislation was based on similar legislation introduced in Western Australia and the Northern Territory. Employer groups have raised a number of issues with the administration and interpretation of the legislation. In particular, under several schemes it is difficult to determine precisely when an employer is deemed to have made a taxable contribution to the scheme, or to determine the taxable value. In some circumstances employers may incur a liability to pay tax on excessive values, or pay tax on both the contribution of shares to the scheme and the issue of the same shares at a later time to a particular director or employee. To overcome these problems, a number of amendments to the legislation have been developed in consultation with industry and employer bodies.

The bill provides that payroll tax liability will arise at a time determined at the election of the employer, being either when rights to the shares, or when the shares themselves, are granted to a director or employee. This will remove an anomaly whereby a liability arises when the employer contributes money or share scrip to a scheme, which can occur before a director or employee obtains any right to the shares. Instead of having to pay tax when options are granted, employers will be able to elect to pay tax at the time the options are exercised. If an employer chooses this option, the taxable value of the shares will be determined on the date of exercise, and not on the earlier date of the grant of the right.

If the grant of shares is subject to a condition, such as a performance target or a minimum length of service, but

the right expires, is withdrawn or is cancelled due to a failure to satisfy the condition, the employer will be entitled to claim a reduction in taxable wages. Currently there is no provision for refunds or offsetting reductions in tax in such circumstances. In view of the administrative difficulties and inequitable treatment afforded by the current provisions in the Act, employers were advised last year that they could choose to pay tax on the basis outlined above for the 2003-04 financial year. Consequently, the bill contains transitional provisions that give effect to this concession without penalties or interest being imposed for late payment.

The bill also makes a number of other amendments to clarify and simplify aspects of the share scheme legislation. Contributions to a share scheme which relate to the grant of rights or options made prior to 1 July 2003 will be exempt, to avoid imposing retrospective liability. The valuation rules for listed options and shares will be made consistent with the Commonwealth's capital gains tax provisions.

**Exemption of financial planners:** In a September 2002 report, two special advisers, Associate Professor Neil Warren and Penny Le Couteur, recommended an exemption for remuneration paid to financial planners who are not common law employees. The bill implements this recommendation, thereby extending an existing exemption that applies to insurance sellers. This exemption recognises that there have been changes in the financial planning industry since the 1980s which have seen the role of independent life insurance sellers expand into sales of other forms of investments. These salespeople are required to act in the interests of the investors, and are therefore working for those investors rather than the investment house.

The criteria for the exemption were developed in consultation with representatives of professional and employer bodies, including the Financial Planners Association and the Investment and Financial Services Association, and are based on the Commonwealth exemption from the alienation of income legislation for certain agency arrangements. In order to remove uncertainty about the application of the current legislation to financial planners, holders of Australian financial services licences under the Commonwealth Corporations Act 2001 were granted approval to apply the exemption from 1 July 2003, pending the passage of retrospective legislation to confirm the exemption. The bill contains transitional provisions giving effect to this approval.

**Termination payments to deemed employees:** Legislation was implemented from 1 July 2003 to include eligible termination payments in the definition of wages for payroll tax purposes where the payment is subject to income tax. However, eligible termination payments are generally limited to payments to employees whereas similar payments to contractors are subject to income tax under other provisions. It is therefore proposed to apply payroll tax to the income taxable component of termination payments paid to contractors who are deemed employees for payroll tax purposes. This will remove any tax benefit that might be gained by employing contractors in place of common law employees.

**Indirect payment to directors and deemed employees:** Payroll tax is payable when an employee's wages are paid by an employer to someone other than an employee or deemed employee, such as to a spouse. Payments are taxable also if the employee's wages are paid by someone other than the employer, such as a related company. These provisions do not currently extend to directors and trust distributions made in lieu of wages. For example, directors of companies may be paid the director's fee or may receive benefits such as superannuation or share scheme benefits from another member of the company group. In the case of a beneficiary it provides unpaid services to a trust, payroll tax on trust distributions provided in lieu of wages may be potentially avoided by channelling the trust distribution through another trust. The bill extends the deeming provisions relating to indirect payment of wages to ensure that these arrangements are subject to tax.

**Motor vehicle and overnight accommodation allowances:** Allowances for work-related use of a worker's own motor vehicle and overnight accommodation allowances are exempt from payroll tax if paid in accordance with an award rate or in any other case as specified by the regulations. The prescribed rates are currently 53.5 cents per kilometre for a car used for work-related travel and \$130 per night for an overnight accommodation allowance where the travel was work related. These rates were last adjusted in 1998. It is proposed to incorporate the prescribed rates and the related and administrative provisions in the Act, enabling the regulations to be repealed. It is also proposed to increase the rate to reflect increases in costs since 1998 and to provide for automatic future adjustments. This will be achieved by linking the motor vehicle rate to the rate prescribed for a large car for income tax purposes and by linking the overnight accommodation allowance to the New South Wales public sector award rate based on reasonable benefit limits approved by the Commonwealth Commissioner of Taxation for income tax purposes. In relation to motor vehicle allowances the rate applicable for payroll tax purposes in 2005-06 will be 63 cents per litre while the rate applicable to overnight accommodation allowances will be \$191.55.

**Distributions to beneficiaries:** The payroll tax definition of wages was amended from 1 July 2003 to include distributions from trusts to beneficiaries when the beneficiaries perform work of less than the market rate specified in the relevant State and Federal award. This closed a loophole under which beneficiaries may be remunerated for work performed without attracting payroll tax, and achieved greater consistency between the payroll tax and workers compensation legislation. Where there is no relevant award the regulation specifies that the market rate is based on a full-time adult ordinary time earnings for New South Wales published by the Australian Bureau of Statistics. As the rate determines the amount of tax payable by employers the bill transfers

the relevant provisions from the regulator to the Act.

Amendment of the Taxation Administration Act—tax equivalent regime: The bill clarifies the application of the tax equivalent regime to government businesses. The regime and nationally applies the Commonwealth income tax law to designated government businesses. The regime arose under commercial and competition policies of the State, Federal and Territory governments as they relate to State-owned entities and other government businesses. The intention is that such entities will operate on a commercial basis to the extent that they are able to do so in the market in which they operate. There are two components to the tax equivalent regime, the National Tax Equivalent Regime, which applies to those government businesses that are State-owned corporations or others which are fully commercial in their operations and the State Tax Equivalent Regime, which applies to government trading entities that are not yet operating on a commercial basis.

To date the State regime has operated under eight administrative agreements and guidelines. Whilst it is has worked well, the environment in which government businesses operate is now more sophisticated and so it is appropriate that the State regime is fully supported by appropriate legislation.

The amendments will link the State regime to the New South Wales Taxation Administration Act 1996.

However, as the State regime applies solely to government businesses the amendments include provision for review by the Treasurer rather than through an independent review process. The amendments will align the administration of the New South Wales State regime with that of the national regime and also with the regimes of other jurisdictions that have specific legislation—Victoria, the Northern Territory and the Australian Capital Territory. The bill makes consequential amendments to the Public Finance and Audit Act and the State Owned Corporations Act.

I refer to the definition of "decision". The bill also confirms that the type of decision from which a taxpayer may seek a formal review is the same as that defined in the Administrative Decisions Tribunal Act 1997. This will ensure that rights of review are consistent at all stages in the process. I refer to disclosure of information. The bill further provides for the disclosure of information to States and Territories for the purposes of the administration of their respective First Home Owner Grant Act. This aligns with current provisions that allow disclosure for the purposes of administration of the scheme in New South Wales and is appropriate as the scheme is a national regime. The bill also allows disclosure of information to the Independent Commission Against Corruption consistent with current permitted disclosures to such organisations as the Ombudsman and the Auditor-General.

The bill also incorporates tracing provisions into the company grouping provisions of the Act, which apply for payroll tax purposes to allow a persons interest in a business to be calculated by combining two or more interests held indirectly via different legal entities. This will combat complex business structures that result in avoidance of the current grouping provisions, whether intentionally or unintentionally. I refer to matters to be considered by the Legislation Review Committee. Under section 8A of the Legislation Review Act 1987 the Legislation Review Committee is required to consider each bill and report to both Houses of Parliament on the impact of the bill on certain matters affecting personal rights, liberty and obligations, and parliamentary scrutiny of delegated legislation.

I am pleased to say that even though the bill relates to revenue and tax matters it contains provisions that are reasonable and necessary to protect the revenue without unduly trespassing on personal rights or liberties. The amendments do not create non-reviewable decisions. Additional regulation-making provisions will be incorporated in the Pay-roll Tax Act, but these powers will be applicable only if the relevant provisions in the Act become inoperative. The bill transfers certain matters affecting the payroll tax liability of employers from the payroll tax regulations to the Act in order to improve transparency and taxpayer awareness of the provisions. These relate to exemptions for motor vehicle and overnight accommodation allowances, and taxable trust distributions made in lieu of ordinary wages. I table a summary of the bill for the assistance of honourable members. I commend the bill to the House.