

# *Review of the State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022.*

LEGISLATIVE REVIEW AS REQUIRED BY SECTION 317 OF  
THE *DUTIES ACT 1997* AND SECTION 128 OF THE  
*TAXATION ADMINISTRATION ACT 1996*

To be tabled prior to May 19, 2025.

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## Acknowledgement of Country

The NSW Department of Customer Service acknowledges the Traditional Custodians of the lands where we work and live. We celebrate the diversity of Aboriginal peoples and their ongoing cultures and connections to the lands and waters of NSW.

We pay our respects to Elders past and present and acknowledge the Aboriginal and Torres Strait Islander people that contributed to the development of this legislative review.

Review of the State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022.

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## Statement by the Minister for Finance

The attached report details the results of a review of the amendments to the *Duties Act 1997* and *Taxation Administration Act 1996* made by the *State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022*. The review is required by section 317 of the *Duties Act 1997* and section 128 of the *Taxation Administration Act 1996*.

The principal objectives of the amendments as at the time of their introduction were to:

- strengthen the integrity of the taxation laws including closing potential tax avoidance loopholes;
- ensure that duty concessions and exemptions operate equitably and as intended;
- respond to court decisions; and
- address anomalies.

Stakeholders with whom Revenue NSW regularly interacts were invited to make submissions to the review. A total of four submissions were received.

The Government thanks the relevant stakeholders for their submissions. We appreciate the time taken in considering, preparing and submitting the relevant feedback in relation to the amendments.

Overall, the review has confirmed the validity of the policy objectives of the amendments and that the terms of the amendments remain appropriate for securing those objectives.

The review has identified some potential refinements warranting further consideration as part of the NSW Government's program of regularly updating its revenue legislation.



**Hon Courtney Houssos MLC**

**Minister for Finance**

15 May 2025

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# 1. Executive Summary

The review examined the amendments made by the *State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022* to the:

- *Duties Act 1997*; and
- *Taxation Administration Act 1996*.

The review received four submissions from the Law Society of New South Wales, the Property Council of Australia, the Tax Institute and Herbert Smith Freehills. The submissions largely related to the following amendments:

- Imposition of duty on a change in beneficial ownership of dutiable property (section 3.1 below);
- Imposition of duty on a declaration of trust to respond to the decision of *Benidorm*<sup>1</sup> (section 3.2 below); and
- The introduction of general anti-avoidance provisions and promoter penalties (sections 4.1-4.2 below).

Overall, the review found that the policy objectives of the amendments remain valid and that the terms of the amendments remain appropriate for securing those objectives.

Nonetheless, the review identified potential refinements which warrant further consideration, including:

## *Duties Act 1997*

- Clarifying the interaction between the existing duty exemptions, including the corporate reconstruction concession, and changes in beneficial ownership;
- Aligning the duty treatment between a lease granted for a premium and a lease granted for consideration other than a premium which is caught by the change in beneficial ownership provisions;
- Clarifying that the provisions addressing the *Benidorm* decision do not capture wills and testamentary trusts; and
- Clarifying the policy intent of the exemption for transfers of family farms which is to support the transfer of control of a family farm to another family member.

## *Taxation Administration Act 1996*

- Introducing a time limit on the Chief Commissioner's power to revoke an exemption from surcharge purchaser duty and surcharge land tax.

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<sup>1</sup> *Benidorm Pty Ltd v Chief Commissioner of State Revenue* [2020] NSWSC 471; *Benidorm Pty Ltd v Chief Commissioner of State Revenue* [2020] NSWSC 471

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## 2. Introduction

### 1.1 Purpose of the Review

The *State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022* amended nine legislative instruments including the *Duties Act 1997* and *Taxation Administration Act 1996*. The Act was part of the Government's program of regularly updating revenue, fines and state debt legislation to maintain revenue integrity, address loopholes and improve the experience of taxpayers. The Act received assent on 19 May 2022.

The purpose of this review is to review the amendments made to the *Duties Act 1997* and the *Taxation Administration Act 1996* and determine:

- Whether the policy objectives of those amendments remain valid, and
- Whether the terms of those amendments remain appropriate for securing the policy objectives.

This review is required to be conducted under section 317 of the *Duties Act 1997* and section 128 of the *Taxation Administration Act 1996*.

### 1.2 Process of the Review

This review was conducted by Revenue NSW.

The review considered:

- Internal data, analytics and feedback
- Feedback and submissions from key stakeholders

Submissions were invited from key stakeholders including the Law Society of New South Wales, Tax Institute, Institute of Chartered Accountants Australia and New Zealand, Small Business Combined Association, Property Council of Australia and CPA Australia.

Revenue NSW received four submissions (see Appendix A) from the Law Society of New South Wales (Law Society), the Property Council of Australia (Property Council), the Tax Institute and Herbert Smith Freehills (HSF).

### 3. Duties Act 1997

#### 3.1 Section 8 (1) – change in beneficial ownership

Schedule 1 [1]-[3], [5]

**Amendment:** Section 8 imposes duty on certain transactions concerning dutiable property (for instance, an agreement for the sale or transfer of dutiable property, a declaration of trust over dutiable property). The amendment inserted a new transaction: “another transaction that results in a change in beneficial ownership of dutiable property, other than an excluded transaction” (section 8(1)(b)(ix)).

**Objective:** To make a change of beneficial ownership (other than a change of beneficial ownership occurring by way of one of the existing heads of duty listed in section 8(1)(b)(i - viii)) liable to duty, except for an “excluded transaction”. In so doing, the reforms help to ensure that the broad policy underpinning the Act - to impose duty on changes in ownership of dutiable property (be they changes in legal ownership or beneficial ownership) - continues to be met. Over time, the duties base has been eroded by transactions that do not fall within traditional heads of duty. Such transactions include the granting of options for the purchase of land and granting of leases for non-monetary consideration.

Stakeholder Feedback	Findings
<p>The <b>Law Society, Property Council</b> and <b>HSF</b> provided feedback.</p> <p>The following common themes emerged:</p> <p><u>Expansion in duties tax base</u></p> <p>The change in beneficial ownership provisions expand the duties base by taxing transactions that used not to be taxed. As such, the provisions go beyond the Government’s stated objective of ensuring the integrity of the duties laws and appear to be motivated by revenue raising.</p> <p>The provisions should be repealed. Industry and tax professionals should instead be consulted on the introduction of:</p> <ul style="list-style-type: none"><li>• Specific identified dutiable transactions which do not adversely impact the Government’s housing development objectives (Property Council); or</li><li>• Bespoke anti-avoidance provisions (HSF).</li></ul>	<p><b>Do the policy objectives remain valid?</b></p> <p>The policy objective of enhancing the integrity of the duties legislation remains valid. Duty is a key source of revenue for the NSW Government and the duties legislation needs to be fit for purpose to protect the revenue. There appeared to be no dispute amongst stakeholders who contributed to the review that the objective remains valid.</p> <p><b>Do the terms of the amendments remain appropriate for achieving the objectives?</b></p> <p>On this question, some stakeholders expressed the view that the amendments went beyond what was appropriate for achieving the objectives. The Government disagrees for the reasons set out below. However, the Government will give consideration to clarifying the application of exemptions, including the corporate reconstruction concession, to changes in beneficial ownership.</p>

Uncertainty in what is intended to be caught, increasing administration costs

The provisions are broad and do not clearly state what transactions are dutiable. Instead, they operate by excluding certain transactions from their reach, which has led to uncertainty and red tape in the form of multiple Commissioner's Practice Notes. The scope of the provisions should be clearly articulated and not left to the Executive's power to make regulations or to Revenue NSW's administrative guidance.

The current list of excluded transactions is inadequate and standard commercial agreements and transactions, which presumably are not intended to be caught, are not listed. For example, while transactions for no consideration are listed, this does not cover off on nominal consideration transactions.

The amount of duty collected under the new provisions (\$14.2 million from May 2022 to September 2024) does not justify the additional administration for taxpayers and Revenue NSW in administering the provisions (Property Council).

Existing exemptions do not apply to changes in beneficial ownership

The amendments introduce a change in beneficial ownership as a new 'dutiable transaction'. However, many of the existing duty exemptions only apply to a 'transfer' or 'agreement to transfer'. Thus, the exemptions require updating to ensure they apply to changes in beneficial ownership.

HSF specifically suggested that the corporate reconstruction concession in section 273C be updated in this way.

Risk of double duty

There is a risk that transactions could be dutiable under the change of beneficial ownership provisions as well as other heads of duty (Property Council).

The imposition of duty on the grant of an option to acquire land results in double duty because the duty paid on the grant of the option is not

Expansion in duties tax base

The argument that the change of beneficial ownership provisions go well beyond the objective of strengthening the integrity of the duties legislation is not accepted. The duties legislation requires periodic updating to protect the revenue base. Over time, techniques for acquiring interests in property have evolved and become more sophisticated, with certain transactions falling outside traditional heads of duty and thereby eroding the duty base. The revenue collected over 2 years from the commencement of the provisions (\$14.2 million) is indicative of the revenue leakage that was occurring as a result of the duties provisions not being fully fit for purpose.

In keeping with the broad policy objectives of the legislation, the reforms help to ensure that a range of transactions that result in changes in property ownership are brought to duty.

The suggestion that the provisions be repealed and replaced with more transaction-specific provisions is not supported as it would ultimately undermine the policy. While such specific provisions are often useful in the short-term to address specific transactions or arrangements falling outside the duty base, they are prone to redundancy in the long term, resulting in yet further amendments having to be made periodically. This is not in the interests of taxpayer certainty.

Uncertainty in what is intended to be caught, increasing administration costs

As above, the Government considers the overall design of the provisions to be operating effectively and as intended. Revenue NSW and the Government continues to work with key stakeholders to consider whether any further transactions should be prescribed as an excluded transaction.

The suggestion that the provisions have led to significant red tape is not accepted. The introduction of new provisions is often followed by a period of transition as taxpayers and practitioners become acquainted with the provisions.

<p>credited when duty is imposed on the exercise of the option (i.e. when the contract is entered into to acquire the land). It is suggested either making the grant of an option an ‘excluded transaction’ unless it is part of an avoidance arrangement, or providing a credit for the duty paid on the exercise of the option (HSF).</p>	<p>Revenue NSW has provided appropriate detailed guidance in relation to the changes. A Commissioner’s Practice Note (CPN 025) has been in effect since 19 May 2022 providing scenarios on the types of liable transactions and when a change in beneficial ownership liability may be triggered. Additionally, CPN 027 addresses leases and changes in beneficial ownership, and CPN 037 addresses grants of options. Revenue NSW has undertaken significant education in this space to ensure practitioner understanding and compliance.</p> <p><u>Existing exemptions do not apply to changes in beneficial ownership</u></p> <p>The Government considers that the exemptions do generally apply to changes in beneficial ownership. However, the Government will give further consideration to the suggestion that the interaction between the exemptions, including the corporate reconstruction concession, and the changes in beneficial ownership provisions be reviewed and clarified.</p> <p><u>Risk of double duty</u></p> <p>There is no risk that transactions could be dutiable under the change of beneficial ownership provisions as well as other heads of duty. The language of section 8(1)(b)(ix) (“another transaction.....”) makes clear that, if the transaction is caught by one of the preceding heads of duty, it cannot also be caught by the change of beneficial ownership provisions.</p> <p>The suggestion that duty on the grant of an option results in double duty (HSF) is also rejected. The grant of an option is a transaction in and of itself, which confers an ownership interest on the grantee. It is not simply a component of a larger transaction. The grant of an option effectively postpones the duty liability that would otherwise be payable to the State if the purchaser simply signed a contract for the acquisition of land. It is not unreasonable that the State be compensated for this postponement of liability.</p>
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<p>HSF also provided feedback specifically in respect of the grant of leases. Prior to the amendments, the grant of a lease was only dutiable if a premium was payable for its granting. Duty would be assessed on the premium. Following the amendments, the grant of a lease for consideration (other than consideration in the form of a premium) is dutiable under the change in beneficial ownership provisions.</p> <p>However, the duty treatment of a lease granted for a premium is different from that for a lease granted for another kind of consideration and which is captured by the amendments. For example, in the case of the lease of a windfarm, the lessee may provide an upfront premium of \$50,000. Alternatively, the lessee agrees to provide the lessor a discount valued to \$50,000 on purchases of electricity generated by the windfarm. For the former, duty would be charged on the lease premium of \$50,000. For the latter, the discount would not be a lease premium but would be consideration and caught by the change in beneficial ownership provisions. Duty would be charged on the greater of the consideration given (\$50,000) and the unencumbered value of the lease. Thus, for substantially the same lease circumstances, there can be differing duty outcomes depending on whether the consideration is structured as a 'premium' or not.</p> <p>It is suggested that amendments be made to ensure consistency in the duty treatment between a lease granted for a premium and a lease caught by the change in beneficial ownership provisions.</p>	<p>The amendments ensure that the grant of a lease for consideration is liable to duty, even if that consideration has not been structured as a 'premium'.</p> <p>The Government will give consideration to the suggestion that amendments be made to align the duty treatment of a lease granted for a premium and a lease granted for another kind of consideration, which is now caught by the change of beneficial ownership provisions.</p>
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## 3.2 Section 8AA – acknowledgements of trusts

Schedule 1 (1[4])

**Amendment:** Section 8AA was inserted imposing duty on acknowledgments of trust (i.e. declarations of trust that do not effect a transaction but merely acknowledge an existing trust).

**Objective:** To respond to the decision of *Benidorm* which set the precedent that a declaration of trust was not dutiable unless it effected a transaction. This overturned a long-held interpretation of the provisions that a declaration of trust was liable to duty irrespective of whether it effected a transaction, and opened up the potential for significant duty avoidance activity, uncertainty and disputation. The amendment was intended to affirm the approach taken to declarations of trust prior to the *Benidorm* case.

The Law Society, Tax Institute and Property Council provided feedback.

The following common themes emerged:

- While it was understood that the amendment was designed to respond to the *Benidorm* court decision, it was felt that the duty base was expanded by creating a new category of transactions.
- Recommendations were made that there be amendments made to section 8AA, from carve-outs to ensure that testamentary instruments (which normally do not incur duty) are not captured (the majority view), to full removal of the section. It was also suggested that there could be changes to the double duty provisions to refer to an acknowledgment of trust that is the subject of a deceased estate.
- Some feedback expressed the belief that there was a significant increase in administrative burden for a small quantity of revenue. They did not believe that this was proportionate.

### **Do the policy objectives remain valid?**

Similar to the introduction of the change of beneficial ownership provisions, section 8AA was introduced to preserve the integrity of the duties provisions. That objective remains valid.

### **Do the terms of the amendments remain appropriate for achieving the objectives?**

The Government believes that the terms of the amendments remain appropriate, particularly as there would be a significant revenue risk if changes were made to this amendment.

The argument put forward by some stakeholders that the duty base has been expanded is not accepted. Section 8AA merely affirmed the well-accepted approach prior to the *Benidorm* case, which is that a declaration of trust is a dutiable transaction irrespective of whether it effected a transaction. Although the insertion of a new section 8AA imposing duty on 'acknowledgements of trust' may appear on its face as a new dutiable transaction, this only seeks to recapture those declarations of trusts that *Benidorm* had deemed to be not dutiable. However, the amendments have not changed any substantive element of the duties regime in this regard as it was understood prior to *Benidorm*.

The suggestion that the section be repealed is also not supported. This would negate the purpose of the amendments to address *Benidorm* and potentially lead to increased disputation.

Revenue NSW has issued guidance on section 8AA including a Revenue Ruling issued in May 2022 and updated in November 2022 (DUT031v2) and will continue to assist practitioners where appropriate. Interactions between Revenue NSW and its stakeholder liaison committees over the last 18 months do not suggest that the new provisions are a major concern.

However, the Government will give further consideration to clarifying that the amendments do not capture wills and testamentary trusts.

### 3.3 Section 274 – family farm transfers

Schedule 1 [25] – [27]

**Amendment:** Section 274 exempts from duty the transfer of primary production land between family members including where the transferor is an entity directed by a family member. The amendment extended the exemption to where the *transferee* is a company or other entity directed by a family member.

**Objective:** To make the exemption fairer and in line with the structures commonly used by farming families. Modern family farms often use business structures involving a partnership, trust or company, rather than operate under an individual name.

Only the **Law Society** provided feedback suggesting further amendment to the section to clarify that the policy intent is to provide relief for intergenerational transfers of primary production land. With the amendment, there may be misapprehension that the exemption applies to the reorganising or restructuring of a family farm that does not include an intergenerational transfer.

#### Do the policy objectives remain valid?

The policy objective of making the section 274 exemption fairer and in line with the structures commonly used by farming families remains valid. There were no submissions disputing the ongoing validity of this objective.

#### Do the terms of the amendments remain appropriate for achieving the objectives?

It is agreed that there appears to be some misunderstanding amongst taxpayers and advisors that the exemption extends to transfers between entities controlled by the same family members. For example, from a trust with a corporate trustee controlled by a couple to a company with the same couple as majority stakeholders. Such transfers are essentially restructures and undertaken for estate planning purposes, rather than the original policy intent of the exemption (i.e. to transfer control of the farm to another family member). When this exemption was introduced, the second reading speech specified that ‘This will allow older members of a family to retire and a younger generation to take care of the farm’.

While the amendments remain generally appropriate for achieving the policy objective, the suggestion to amend the section to clarify that this section only applies to intergenerational transfers will be given further consideration.

### 3.4 Section 104ZJA – Australian based developers

Schedule 1 [13] - [16]

**Amendment:** Section 104ZJA provides a refund or exemption from surcharge purchaser duty for Australian-based developers purchasing residential-related property for certain purposes. The amendment:

- Extended the section to land later used for wholly or predominantly for commercial or industrial purposes.
- Clarified that a reassessment under this section is authorised to be made more than 5 years after the initial assessment.

**Purpose:** To support participation by foreign owned Australian based developers in the redevelopment of previously rural-residential areas to commercial and industrial (particularly in areas planned by the Government for significant economic investment such as the Western Sydney Aerotropolis). To allow surcharge purchaser duty to be reassessed where the exemption is revoked (which can occur more than 5 years after the initial assessment as the provisions generally allow the taxpayer 10 years to fulfil certain obligations to receive the exemption).

Only the **Law Society** provided feedback as follows:

1. Extension to land used wholly or predominantly for commercial or industrial purposes

The policy objective remains valid and the terms of the amendment remain appropriate.

2. Allowing reassessments beyond 5 years.

The power to make a reassessment for an indefinite period is not good tax policy as it creates substantial uncertainty for taxpayers. The feedback suggests an upper statutory limit on the period during which a reassessment may be made, such as 10 years, to align to the timeframe to fulfil the conditions of an exemption or apply for a refund of surcharge purchaser duty.

**Do the policy objectives remain valid?**

The policy objective of extending the surcharge duty concession for Australian-based developers to land that is to be used for wholly or predominantly commercial or industrial purposes remains valid. Non-residential land does not incur surcharge purchaser duty. The amendment addressed an anomaly whereby the acquisition of land, which is designated for commercial or industrial use, could still incur surcharge purchaser duty because it is technically residential at the time of purchase (eg there is a solitary house on it).

**Do the terms of the amendments remain appropriate for achieving the objective?**

While the terms of the amendments remain appropriate for achieving the policy objective, the Government will give further consideration to the issue raised by the Law Society in relation to reassessments beyond 5 years. However, a time limit may be more appropriately applied to the Chief Commissioner's power to revoke an exemption, rather than the reassessment which is simply the consequence of a revocation.

Under section 104ZJA, the taxpayer may be approved to be exempt from surcharge purchaser duty if the Chief Commissioner is of the opinion that they are likely to become entitled to a refund of surcharge purchaser duty.

	<p>A refund may only be claimed within 12 months after the entitlement to a refund arises and within 10 years of the taxpayer's purchase of the property. The approval may be subject to conditions and may be revoked <i>at any time</i>. The revocation may be backdated to when the transfer occurred and, if so, surcharge purchaser duty is payable and is to be assessed or reassessed as if the approval for an exemption had never applied.</p> <p>While the amendment clarified that such a reassessment arising from a revocation can be given made, despite the general 5-year time limit on reassessments under section 9 of the <i>Taxation Administration Act 1996</i>, it is substantively the power to revoke the exemption which is unlimited in time.</p> <p>While, administratively, Revenue NSW is unlikely to revoke an exemption beyond the 10-year period or indeed several years after its expiry, it is noted that, absent a legislated time limit, this is left open as a possibility.</p> <p>Any amendment in this respect would necessitate changes to the equivalent provisions providing a refund/exemption from surcharge land tax.</p>
<h3>3.5 Section 76 – First Home Buyers Assistance Scheme</h3> <p>Schedule 1 – [11]</p>	
<p><b>Amendment:</b> Section 76 sets out the residence requirement for the First Home Buyers Assistance Scheme. Subsection 76(2A) was inserted to allow the Chief Commissioner to give an approval or an exemption from the residence requirement at any time, even if the period of 12 months after completion of the agreement or transfer has expired, or where the first home owner's occupation of the home as a principal place of residence has already ceased.</p>	
<p><b>Objective:</b> To provide consistency between the First Home Buyer Assistance Scheme and the First Home Owner Grant in the Chief Commissioner's discretion to waive the residence requirement. Prior to the amendment, the provisions for the former required the discretion to be exercised prior to the 12 month period expiring or the home owner's occupation ceasing.</p>	
<p>Only the <b>Law Society</b> commented: that the amendment is operating as intended, and that it fulfils the best interests of homeowners, as well as being equitable and consistent with other concessions and exemptions.</p>	<p>The policy objectives remain valid and the terms of the amendments remain appropriate for achieving the policy objectives.</p>

### 3.6 Sections 68, 163B and 267 – transfers resulting from relationship breakdown

Schedule 1 – [10],[17], [21]

**Amendment:** Sections 68, 163B and 267 provides a duty exemption for transfers of dutiable property occurring as a result of the breakdown of a marriage, de facto or domestic relationship. The transfer must be effected in a certain way, including via a financial agreement or family court order. The amendment inserted an additional way in which a transfer could be effected for de facto relationships: an agreement that the Chief Commissioner is satisfied has been made for the purpose of dividing the relationship property.

**Objective:** To provide consistency between marriages and de facto relationships in how transfers resulting from their breakdown may be effected. Prior to the amendment, the provisions for marriage breakdown were more flexible than those for de facto relationships and permitted an agreement that the Chief Commissioner was satisfied is for the purpose of dividing the matrimonial property.

No feedback received.

The policy objectives remain valid and the terms of the amendments remain appropriate for achieving the policy objectives.

### 3.7 Section 49A(1D) – deferral for off-the-plan purchases

Schedule 1 – [9]

**Amendment:** When purchasing off-the-plan property, transfer duty can be deferred for 12 months after the agreement to purchase is signed or until the property is completed (whichever is earlier). The purchaser must occupy the property as their main residence for at least 6 months continuously within 12 months of completion ('the residence requirement'). This amendment allowed defence force employees to be exempted from the residence requirement.

**Objective:** To harmonise with the First Home Buyer Assistance Scheme and the First Home Owner Grant to exempt defence force personnel from the residence requirement due to the nature of their employment.

No feedback received.

The policy objectives remain valid and the terms of the amendments remain appropriate for achieving the policy objectives.

### 3.8 Dictionary, Clause 1, Definition of ‘livestock insurance’

Schedule 1 – [32]

**Amendment:** Livestock insurance is exempt from duty. This amendment clarified the definition of ‘livestock insurance’ to exclude ‘insurance covering loss in relation to a pet’.

**Objective:** To address confusion about whether pet insurance was included in the definition.

No feedback received.

The policy objectives remain valid and the terms of the amendments remain appropriate for achieving the policy objectives.

### 3.9 Section 259(1)(i)(i) – insurance of a floating vessel

Schedule 1 – [19]

**Amendment:** Section 259 exempts certain insurance from duty. This amendment expanded the exemption for ‘insurance of a floating vessel’ to the entire vessel, rather than only the hull.

**Objective:** To simplify administration by removing the need to apportion insurance between the hull of the vessel and remainder of the vessel.

No feedback received.

The policy objectives remain valid and the terms of the amendments remain appropriate for achieving the policy objectives.

### 3.10 Dictionary – stock exchanges

Schedule 1 – [31]

**Amendment:** The amendment modernised the references to stock exchanges to include a stock exchange declared by the Chief Commissioner. This was intended to streamline administration and ensures the list of stock exchanges can be kept updated without requiring a Ministerial Order.

**Objective:** To update stock exchange references in the *Duties Act 1997*.

No feedback received.

The policy objectives remain valid and the terms of the amendments remain appropriate for achieving the policy objectives.

## 4. Taxation Administration Act 1996

### 4.1 Part 10 A Divisions 1-2 – tax avoidance schemes

Schedule 8 [1], [6]

**Amendment:** Inserted general anti-avoidance provisions which hold a person liable for tax avoided as a result of a tax avoidance scheme.

**Objective:** To strengthen the Government’s capacity to address tax avoidance schemes. Prior to the amending legislation, only the *Duties Act 1997* contained comprehensive anti-avoidance provisions. The amending legislation introduced general anti-avoidance provisions into the *Taxation Administration Act 1996*, thereby ensuring that all taxation laws were supported by anti-avoidance provisions. The new provisions were modelled on those within the *Duties Act 1997*, but were strengthened to deter avoidance schemes and improve the State’s capacity to recover tax avoided having regard to provisions contained in the *Commonwealth Income Tax Assessment Act 1936* and *Taxation Administration Act 1953*.

Stakeholder Feedback	Findings
<p>Both the <b>Law Society</b> and <b>Property Council</b> expressed concern that the provisions are broader than those in the <i>Duties Act 1997</i>, creating uncertainty for legitimate commercial decision-making. Three key concerns were raised:</p> <p>1. <u>Artificial, blatant or contrived</u></p> <p>Under the <i>Duties Act 1997</i>, for a scheme to be a tax avoidance scheme, it had to be of an “artificial, blatant or contrived” nature. This required the Chief Commissioner to provide reasons as to why a scheme was ‘artificial, blatant or contrived’ to avoid tax. The limiting words “artificial, blatant or contrived” are removed by the amending legislation.</p> <p>2. <u>Avoiding tax is defined to include “postponing payment of tax”</u></p> <p>This creates significant uncertainty for taxpayers and advisors in relation to the use of put and call options. If it is intended to tax</p>	<p><b>Do the policy objectives remain valid?</b></p> <p>The amendments were designed to support the integrity of the taxation laws by ensuring that, if tax avoidance is detected in respect of any tax, the State is in a strong position to deal with it. This objective remains valid and no stakeholders suggested that combating tax avoidance was not meritorious.</p> <p><b>Do the terms of the amendments remain appropriate for achieving the policy objectives?</b></p> <p>The terms of the amendments remain appropriate for achieving the policy objective. Strong anti-avoidance provisions are required to deter avoidance schemes which can undermine confidence in the revenue laws.</p> <p>Some stakeholders criticised aspects of the amendments. These criticisms are addressed below.</p> <p>1. <u>Artificial, blatant or contrived</u></p> <p>The words “artificial, blatant or contrived” were removed because they add an unnecessary layer of complexity to the term “tax avoidance scheme” when</p>

such transactions, then provisions should be introduced to tax them, rather than relying on the anti-avoidance regime.

It may be difficult for a taxpayer to prove that a transaction was for legitimate commercial reasons, rather than for the sole or dominant purpose of enabling deferment of a tax liability. It is appropriate for tax to be deferred until a transaction is certain. Otherwise, this puts strain on industry as it may not be able to access funding until the satisfaction of conditions precedent, or it may create unnecessary administrative complexity in having to lodge and pay tax, and then seek a refund if conditions precedent are not satisfied.

If tax is charged under these provisions for a deferral of tax, it should be ensured that no multiple taxation of the same transaction occurs and that the amount recovered is limited to interest and penalties.

### 3. Scheme is defined to include a scheme “whether implemented or not”

The definition of scheme to include a scheme “whether implemented or not” restricts businesses in planning transactions for legitimate commercial reasons.

According to the **Property Council**, the definition also “discourages thought leadership”. Although the Commissioner has indicated that a practice note will be issued to clarify that the words “whether implemented or not” only applies in relation to the promoter penalty provisions, this will not assist a tribunal or court interpretation of the legislation.

section 106G already sets out 8 matters to be taken into account in determining a tax avoidance scheme. As the key issue is whether the scheme is carried out *for the sole or dominant purpose of avoiding tax*, it is irrelevant whether the scheme is also blatant, artificial or contrived.

### 2. Avoiding tax is defined to include “postponing payment of tax”

The argument that arrangements, such as put and call options entered into for legitimate commercial reasons, are potentially at risk of being considered tax avoidance schemes is not persuasive. Put and call options are also subject to specific taxation provisions in the *Duties Act 1997 – generalia specialibus non derogant*.

The concept of tax avoidance including a postponement of tax ensures that schemes that are designed to delay the payment of tax are not rewarded at the expense of other taxpayers. Such schemes allow the taxpayer, for a period, to retain the use of funds that would otherwise have been payable to the State at an earlier time, without incurring penalty tax and interest. In some cases, a postponement of tax may even reduce or avoid a tax liability by postponing a liability to a subsequent period where there are more favourable tax rates or thresholds, or an exemption or benefit is available.

The Property Council’s observation that the provisions may be read to allow a taxpayer who has postponed but ultimately paid tax to be held liable again for the same amount of tax (in addition to interest and penalty tax avoided) is not accepted.

### 3. Scheme is defined to include a scheme “whether implemented or not”

The primary purpose of defining a scheme to include a scheme which may not have been implemented is to ensure that promoters of schemes do not escape penalty simply because a scheme has not been implemented (see further below under *Promoter Penalties*).

The Property Council appears to be concerned that a tax avoidance scheme that is not implemented may still attract a liability for avoided tax. However, if a tax avoidance scheme is not implemented and no tax has been avoided, *ipso facto* a taxpayer cannot be found liable for avoided tax.

	<p>The new provisions are modelled on avoidance provisions contained in the <i>Duties Act 1997</i>, and taxpayers and practitioners are familiar with those provisions.</p> <p>Nonetheless, guidance will be provided on particular aspects of the provisions, with a Commissioner's Practice Note on promoter penalties and internal guidance on the anti-avoidance provisions being prepared.</p>
<p>The <b>Property Council</b> also suggested that section 106M should retain the existing wording in section 284I of the Duties Act relating to 'innocent participants' to reflect actual knowledge rather than the new 'could reasonably be expected to have known' test.</p>	<p>The Government believes that the policy objectives have been met and that the current terms of the legislation are sufficient to achieve the objectives.</p> <p>The Government does not agree with the suggestion raised by the Property Council.</p> <p>Section 106M provides that a person is not liable to pay tax avoided as a result of a tax avoidance scheme if the Chief Commissioner is satisfied that they did not know <i>and could not reasonably be expected to know</i> that the scheme was a tax avoidance scheme. This change from the anti-avoidance provisions in the <i>Duties Act 1997</i> was to address the following issues:</p> <ul style="list-style-type: none"> <li>• Requiring actual knowledge uses a subjective test which risks greater disputation and the effectiveness of the anti-avoidance provisions being negated entirely.</li> <li>• The subjective test can create inequity between taxpayers in the same or similar circumstances. For example, a taxpayer who has actual knowledge that the scheme was the tax avoidance scheme would be held liable; however, a taxpayer who has no knowledge because they failed to make reasonable enquiries into the scheme, whether deliberately or innocently, would not be liable.</li> </ul> <p>The objective test used in section 106M allows the provisions to operate more fairly, predictably and consistently across similar transactions, without dependence on the actual awareness of the taxpayer.</p>
<p><b>Other suggestions:</b></p> <ul style="list-style-type: none"> <li>• The provisions should continue to be monitored beyond the statutory review period (Law Society).</li> </ul>	<p>The Government notes that legislation is regularly reviewed to consider whether the provisions are operating effectively and as intended.</p> <p>A general amnesty from penalties or interest pending the issuing of any practice notes or rulings is not supported. This would undermine the policy intent of the provisions which is to deter tax avoidance schemes (and their promotion).</p>

<ul style="list-style-type: none"> <li>Any practice notes/rulings should explain the application of the provisions to each tax, with amnesty from interest and penalties until they are published (Property Council).</li> </ul>	
<b>4.2 Part 10A Division 3 – promoter penalties</b> Schedule 8 – [6]	
<b>Amendment:</b> Inserted ‘promoter penalty’ provisions which prohibit a person or entity from promoting tax avoidance schemes (i.e. if they ‘market the scheme or otherwise encourage the growth of the scheme or interest in it’). The Division provides for civil penalties for breaches of the provisions, injunctions and enforceable voluntary undertakings.	
<b>Objective:</b> To deter the promotion of tax avoidance schemes through laws modelled on those in the Commonwealth.	
<p>The above concerns by the <b>Law Society</b> and <b>Property Council</b> in relation to the breadth of the tax avoidance scheme provisions also relate to the promoter penalty provisions, which refer to the concepts and definitions in the tax avoidance scheme provisions.</p> <p>The <b>Law Society</b> also expressed concern that the provisions, although modelled on the Commonwealth promoter penalty laws, are broader and may result in advisors innocently providing taxation advice being captured. Specifically, for the Commonwealth provisions to apply:</p> <ul style="list-style-type: none"> <li>The promoter must have received a <i>benefit</i> in respect of the marketing or encouraging of the scheme; and</li> <li>The promoter must have taken a <i>substantial</i> role in marketing or encouraging its uptake.</li> </ul> <p>These elements are not in the provisions introduced by the amending legislation.</p>	<p><b>Do the policy objectives remain valid?</b></p> <p>As a deterrent to bad-faith promotions of tax avoidance schemes, the policy objective of the amendments remains valid. No stakeholders appeared to question the validity of this objective.</p> <p><b>Do the terms of the amendments remain appropriate for achieving the policy objectives?</b></p> <p>The terms of the amendments remain appropriate because they are an effective measure to combat tax avoidance.</p> <p>The concerns raised by some stakeholders are noted, but it is considered that the promoter penalty provisions are functioning as intended to deter the promotion of tax avoidance schemes.</p> <p>When considering the introduction of promoter penalty provisions for State taxes, Revenue NSW consulted with the Australian Taxation Office (ATO) to understand its experience with the Commonwealth promoter penalty laws which had been introduced in 2006. The ATO’s feedback on the efficacy and operation of the Commonwealth laws informed the design of the promoter penalty provisions that were introduced by the amending legislation. Thus, while modelled on the Commonwealth laws, the provisions differ slightly to better achieve the intended policy outcome.</p>

	<p>When the amendments were first introduced, Revenue NSW received a number of questions from practitioners. Practitioners are aware of what may constitute avoidance and have received education in respect of this.</p> <p>To date, no penalties have been imposed under Part 10A, which suggests that the penalties are operating as intended to deter bad faith actors.</p>
<h3>4.3 Sections 27, 30 and 33A – penalty tax</h3> <p>Schedule 8 – [2]-[4]</p>	
<p><b>Amendment:</b> Section 27 imposes penalty tax of 25% generally. The amendment increased the penalty tax rate for a ‘significant global entity’, as defined in the Commonwealth <i>Income Tax Assessment Act 1997</i>, to 50%. The amendment also inserted section 33A for penalty tax relief where the Chief Commissioner may publish guidelines for determining that no penalty tax is payable.</p>	
<p><b>Objective:</b> To provide more effective deterrence against non-compliance for significant global entities, who have more resources and acumen available to them to comply with their legal and taxation obligations. To provide penalty tax relief for genuine inadvertent errors by individuals or small businesses.</p>	
<p>Only the <b>Law Society</b> commented: that the amendments mirror changes to the Commonwealth taxation system and is consistent with their view of significant global entities and enhancement to the integrity of the taxation system.</p>	<p>The policy objectives remain valid and the terms of the amendments remain appropriate for achieving the policy objectives.</p>
<h3>4.4 Section 83B and 83C – permitted disclosures</h3> <p>Schedule 8 – [5]</p>	
<p><b>Amendment:</b> Inserted new provisions enabling the Chief Commissioner to disclose information obtained in relation to a tax matter:</p> <ul style="list-style-type: none"> <li>• to an investigative or law enforcement agency to assist the agency to perform their investigative, complaint handling, or law enforcement functions.</li> <li>• to provide taxation clearance checks to other NSW government agencies.</li> </ul>	
<p><b>Objective:</b> To support disclosure for law enforcement and investigations, and to enable agencies to obtain assurance about a potential supplier’s tax compliance and thereby encourage tax compliant for those who wish to do business with government.</p>	

Only the <b>Law Society</b> stated that the policy objectives remain valid and terms of amendments are still relevant to achieve the objectives.	The policy objectives remain valid and the terms of the amendments remain appropriate for achieving the policy objectives.
<b>4.5 Section 116 – methods of service</b> Schedule 8 – [9]	
<b>Amendment:</b> Section 116 provides for the methods of service by the Chief Commissioner. The amendment added a method, ‘in an approved electronic manner’, which was defined as ‘sending the document to a telephone number or email address provided by the person, via an online notification system if consented to, or in another electronic manner as prescribed by the regulation.	
<b>Objective:</b> To allow for digital service methods to improve customer service, and to allow customers to ‘opt-in’ to digital communications if this is their preference for convenience.	
Only the <b>Law Society</b> provided feedback suggesting a further amendment to allow the taxpayer to withdraw their consent to electronic service at any time (a right to ‘opt out’) and revert to other forms of notification.	The policy objectives remain valid and the terms of the amendments remain appropriate for achieving the policy objectives, particularly in the face of a changing technological landscape.  The suggested change is not required. Administratively, customers may update their preference for service at any time.

## 5. Appendices

### 5.1 Appendix A – Submissions received

#### Law Society of New South Wales



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: BLC/RNLSL:JBgl030225

3 February 2025

Scott Johnston  
Deputy Secretary  
Chief Commissioner of State Revenue  
Revenue NSW

By email: [Krystelle.Fitzpatrick@revenue.nsw.gov.au](mailto:Krystelle.Fitzpatrick@revenue.nsw.gov.au)

Dear Chief Commissioner,

#### **STATE REVENUE AND FINES LEGISLATION AMENDMENT (MISCELLANEOUS) ACT 2022 REVIEW**

Thank you for the opportunity to contribute to the statutory review, of the amendments made by the *State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022* (NSW) (**Amendment Act**), to the provisions of the *Taxation Administration Act 1996* (NSW) (**TAA**) and the *Duties Act 1997* (NSW) (**Duties Act**). The Law Society members of the Revenue NSW/Law Society Liaison Committee and Business Law Committee contributed to this submission.

The statutory review specifically seeks feedback on the amendments in relation to:

- whether the policy objectives of the amendments remain valid, and
- whether the terms of the amendments remain appropriate for securing the policy objectives.<sup>1</sup>

The reforms introduced by the Amendment Act, were described in Parliament as falling into three broad categories, which effectively provides the policy objectives of the Amendment Act:

1. Amendments to **State taxation and grant legislation** to enhance revenue integrity, ensure the equity of exemptions and concessions, address anomalies, respond to court decisions, close tax avoidance loopholes and reduce red tape;
2. Amendments to **State debt legislation** to enhance Revenue NSW's role in delivering an end-to-end payment collection and debt recovery capability for the State; and
3. Amendments to **finances legislation** to improve customer service and strengthen enforcement of overdue fines.<sup>2</sup>

The first policy objective outlined above is the only policy objective relevant for the purposes of the current statutory review. Broadly speaking, we support this first policy objective, and in our view, the objective remains

<sup>1</sup> The terms of this review reflect the provisions in [section 128](#) of the *Taxation Administration Act 1996* (NSW) and [section 317](#) of the *Duties Act 1997* (NSW), which were inserted by the Amendment Act.

<sup>2</sup> New South Wales, *Parliamentary Debates, Second Reading Speech*, Legislative Assembly, 23 March 2022, 8865 (Victor Dominello, Minister for Customer Service and Digital Government), <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-123267>.

valid. However, we submit that some of the amendments made to the Duties Act and the TAA by the Amendment Act are not appropriate for securing the first policy objective. In our view, a number of the substantial changes made by the Amendment Act go materially further than the stated objectives, and the stated objectives arguably do not correctly describe some of the changes that were implemented. We set out our detailed comments below on whether the policy objectives of the amendments remain valid, whether the terms of the amendments remain appropriate for securing the policy objectives, and some further matters for consideration.

## 1. Amendments made to the Duties Act

Schedule 1 of the Amendment Act made a number of changes to the Duties Act. Our comments below relate to the more significant changes from our members' experience.

### 1.1. Imposition of duty on changes in beneficial ownership (sections 8(1)(b)(ix), 8(2A), 8(3) of the Duties Act)

A significant amendment made by the Amendment Act is the imposition of duty on transactions which result in a 'change in beneficial ownership' of dutiable property. The amendments established the meaning of 'beneficial ownership', 'change in beneficial ownership' and 'excluded transaction'. The person liable to duty is the person who obtains the beneficial ownership or whose beneficial ownership is increased.

In our view, the imposition of duties on changes in beneficial ownership does not 'enhance revenue integrity' or 'close tax avoidance loopholes', and should not be described as such. Rather, it is the broadening of the existing revenue base by the inclusion of a new and broad head of liability, which aligns the Duties Act with equivalent Victorian law.<sup>3</sup> The Second Reading Speech<sup>4</sup> specifically refers to 'revenue integrity' and 'to prevent avoidance' as the basis for introducing the change in beneficial ownership provisions, and gives an example about the disposal of a beneficiary's 50% interest in a fixed trust holding land to the other beneficiary without any duty being incurred. However, these provisions have been interpreted and administered broadly by Revenue NSW so as to impose duty on transactions previously not liable to duty, such as the grant of call options, and the grant of leases for non-monetary consideration. Expanding the duty base did not appear to be the stated policy intent, yet in practice this is a significant impact of the amendments. We also note that 'reducing red tape' is one aspect of the first policy objective, which is strongly supported, however in our view the introduction of the change in beneficial ownership provisions has had the overall effect of increasing, not reducing, administrative and tax compliance obligations.

<sup>3</sup> The alignment of the NSW provisions with equivalent Victorian provisions was acknowledged in the Second Reading Speech, and the Explanatory Note, State Revenue and Fines Legislation Amendment (Miscellaneous) Bill 2022 (NSW), 1, [https://www.parliament.nsw.gov.au/bill/files/3950/XN%20State%20Revenue%20and%20Fines%20Legislation%20Amendment%20\(Miscellaneous\)%20Bill%202022.pdf](https://www.parliament.nsw.gov.au/bill/files/3950/XN%20State%20Revenue%20and%20Fines%20Legislation%20Amendment%20(Miscellaneous)%20Bill%202022.pdf).

<sup>4</sup> New South Wales, *Parliamentary Debates, Second Reading Speech*, Legislative Assembly, 23 March 2022, 8865 (Victor Dominello, Minister for Customer Service and Digital Government).



We note that the 'change in beneficial ownership' provisions create an additional 'dutiabale transaction'. However, many of the existing exemptions in the Duties Act do not apply to any 'dutiabale transaction', but only to 'transfers' or 'agreements to transfer', for example the change of trustee concession (section 54), or the corporate reconstructions concession (Chapter 11, Part 1). We suggest that for completeness, and to ensure the equity of exemptions and concessions (consistent with the first policy objective), consideration should be given to introducing a provision that deems a 'transfer' in these exemptions to include a 'change in beneficial ownership'. Alternatively, this clarification could be made in a Revenue Ruling, confirming that Revenue NSW will administer the Duties Act on that basis.

As a practical matter, we are also aware that practitioners are encountering difficulties when seeking an interim assessment from Revenue NSW for a change in beneficial ownership, such as an option transaction, where an element of the consideration is unascertainable.

### 1.2. Imposition of duty on acknowledgement of trust (section 8AA of the Duties Act)

The Amendment Act extended duties to the acknowledgement of trust over dutiable property by deeming that acknowledgement to be a declaration of trust over dutiable property. This amendment was a 'response to the judgement of the Court of Appeal in *Chief Commissioner of State Revenue v Benidorm Pty Ltd* [2020] NSWCA 285<sup>5</sup> (*Benidorm*), consistent with the first policy objective. In *Benidorm*, the Court of Appeal held that a declaration of trust that does no more than declare an existing trust was not subject to duty. The Chief Commissioner's application for leave to appeal the decision to the High Court was refused, hence the perceived need for a legislative response. The fact that the decision in *Benidorm* was unanimous, and that the High Court rejected the Chief Commissioner's application for special leave, is relevant, in our view, to the appropriateness of the amendments.

In *Benidorm*, the Court noted that the focus of the Duties Act is now on 'transactions' rather than 'instruments'. The Court held that the relevant Deed, to which the Chief Commissioner argued duty applied, had limited effect and did no more than acknowledge the existing position between the parties following the grant of probate and resealing of the will. Further, there was no suggestion that a mere acknowledgement of trust was intended to avoid payment of duty.

In our view, the Amendment Act signals a shift to widen the revenue base to capture instruments as well as transactions, which we submit is contrary to the original policy intention of the Duties Act. In *Benidorm* at [119], Payne JA observed that:

On 12 November 1997, in the second reading speech, Mr Debus, the Minister responsible for the Duties Bill in the Lower House said (New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), 12 November 1997 at 1612):

"The bill replaces all existing stamp duties with the following duties: transfer duty, including special anti-avoidance provisions; marketable securities duty; lease duty; hire of goods duty; mortgage duty; insurance duty; motor vehicle registration duty; and a limited number of general instrument

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<sup>5</sup> Explanatory Note, State Revenue and Fines Legislation Amendment (Miscellaneous) Bill 2022 (NSW), 2.



duties. In contrast to the current law the new bill is structured in such a manner that each duty head is contained in a discrete chapter. I will now comment on some of the new and special features of the bill. The transfer duty chapter continues to impose duty on dutiable transactions such as agreements, transfers and declarations of trust. **However, for the first time a list of dutiable property is provided, giving taxpayers and their advisers certainty in regard to property transactions that attract duty.**" (Emphasis added.)

Following the *Benidorm* decision, Revenue NSW released guidance on acknowledgement of trusts in *Revenue Ruling DUT031v2 - Declaration of trust in agreement for sale (Ruling)*.<sup>6</sup> The Ruling notes the position in *Benidorm* that 'words merely referring to an existing trust or to an existing trust deed will not amount to a declaration of trust or acknowledgement of trust'.<sup>7</sup> The Ruling then notes the introduction of section 8AA following *Benidorm*, and contains three examples which give rise to duty in addition to the duty charged on the contract for sale of a property. The effect of section 8AA is that there will be ad valorem duty on the declaration of trust or acknowledgement of trust *in addition to* the contract, unless a duty concession applies (section 18(6), section 55 or section 62B of the Duties Act).

We submit that section 8AA, while 'respond[ing] to a court decision', consistent with the first policy objective, also undermines the well-established purpose of the *Duties Act*, which focuses on transactions, not instruments. Section 8AA is not merely a response to *Benidorm*, in that the provision does not simply clarify existing legislation, rather it again widens the duty base by creating a new category of dutiable transactions, potentially exposing a trust to ad valorem transfer duty of rates up to 5.5% of the dutiable value of the trust. It imposes additional duties and risks duplication of duties. In our view, consideration should be given to the repeal of section 8AA.

If section 8AA is to remain, we suggest that it be amended to provide a specific carve out such that the section does not apply to an 'acknowledgement of trust' made by a will or testamentary instrument. The intent of the Amendment Act was not, as we understand it, to potentially levy double duty on a transaction in these circumstances. The duty chargeable under section 63 for deceased estates, where fixed duty of \$100 is payable on a transfer made under and in conformity with the trusts contained in the will, is not available for an acknowledgement of trust by a will or testamentary instrument. Instead, under section 8AA, an acknowledgement of trust by will or testamentary instrument can give rise to ad valorem transfer duty under section 8AA. The acknowledgements/declarations we refer to are separate to a 'declaration by an executor of a will' for an appropriation transaction.

We note that a transfer of land and an acknowledgement of trust are separate 'dutiable transactions' under section 8(1). However, where a deceased estate is involved, in our view, section 8AA should not apply to the acknowledgement of trust/declaration transaction. This could be achieved by inserting a definition of acknowledgement of trust in section 8AA which mirrors the approach to the definition of 'declaration of trust' in section 8(3):

<sup>6</sup> NSW Government, Revenue NSW, *Revenue Ruling DUT031v2 - Declaration of trust in agreement for sale*, online: [Revenue Ruling DUT031v2 - Declaration of trust in agreement for sale](#).

<sup>7</sup> *Ibid* [16].

**"declaration of trust"** means any declaration (**other than by a will or testamentary instrument**) that any identified property vested or to be vested in the person making the declaration is or is to be held in trust for the person or persons, or the purpose or purposes, mentioned in the declaration although the beneficial owner of the property, or the person entitled to appoint the property, may not have joined in or assented to the declaration. (Emphasis added.)

Alternatively, we suggest that the 'no double duty' provision under section 18 could also be amended to refer to an 'acknowledgement of trust' the subject of a deceased estate. Section 18 only refers to a 'declaration of trust' at present.

As a practical matter, we understand that some financial institutions are, understandably, requiring some 'declaration' or 'confirmation' from an executor/trustee identifying the particular property that may be held under a trust pursuant to a will. When identifying which property is held in testamentary trusts, taxpayers are entering into 'declarations' which may now be liable to ad valorem transfer duty under section 8AA. We submit this was unlikely to have been part of the policy intent of section 8AA and should be addressed.

### **1.3. Transfer of certain business property between family members (amendment of section 274 of the Duties Act)**

Section 274 of the Duties Act provides an exemption from duty on primary production land transfers between family members. The Amendment Act extended the exemption so that it is available where the transferee is an executor of a deceased estate, trustee of a trust, superannuation fund, or private unit trust scheme or a proprietary limited company, provided that the entity is directed by a family member who maintains control of the transferee entity for at least three years.

The purpose of amendment was described in the Second Reading Speech as to: 'make the exemption fairer and bring it into line with the structures commonly used by farming families'.<sup>8</sup> We agree, and note that this is consistent with the first policy objective of ensuring the equity of exemptions and concessions.

We suggest that consideration be given to further amending section 274 to capture the policy intent that the exemption is to provide relief for intergenerational transfers of primary production land. We understand from Revenue NSW that the broadening of the terms of the exemption may have caused a misapprehension that the section can be used for a reorganisation or restructuring of a family farm business that does not involve an intergenerational transfer. This misapprehension may be further compounded by the fact that the section is no longer headed 'Intergenerational rural transfers' as it was originally, under the Duties Act. If, as we understand it, the exemption is only intended to be available in the context of an intergenerational transfer, we suggest consideration be given to amending section 274 to clarify the position.

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<sup>8</sup> New South Wales, *Parliamentary Debates, Second Reading Speech*, Legislative Assembly, 23 March 2022, 8866 (Victor Dominello, Minister for Customer Service and Digital Government).

#### **1.4. Certain development by Australian-based developers that are foreign persons (amendment of section 104ZJA of the Duties Act)**

The Amendment Act introduced an additional category for the refund of surcharge duty for Australian-based developers where the residential land purchased was subsequently wholly or predominantly used for commercial or industrial purposes (section 104ZJA(1)(c)). This amendment may be regarded as addressing an anomaly, consistent with the first policy objective. As stated in the Minister's Second Reading Speech:

The foreign owner surcharges were not intended to impose additional costs on Australian-based, foreign-owned companies that want to develop land which, for all intents and purposes, is not residential and is clearly intended for commercial or industrial use.<sup>9</sup>

In our view, the policy objective of the amendment remains valid, and the terms of the amendment remain appropriate for securing the policy objectives.

Section 104ZJA was also amended to insert a new subsection (6A), which expanded the reassessment powers of the Chief Commissioner to reassess a surcharge liability after a surcharge purchaser duty concession granted in respect of certain development by Australian-based developers that are foreign persons has been revoked. The Chief Commissioner can now make such a reassessment more than five years after the original assessment. Section 9(3) of the *Taxation Administration Act 1996* (NSW) limits reassessment of a tax liability to five years after the initial assessment unless expressly authorised by another taxation law.

Section 104ZJA(6A) of the Duties Act states:

For the purposes of the *Taxation Administration Act 1996*, section 9(3)(c), a reassessment under this section is authorised to be made more than 5 years after the initial assessment.

The rationale for the amendment is provided in the Second Reading Speech as follows:

This five-year limitation on reassessments is problematic in the context of the various surcharge relief provisions about which I have just been speaking. This is because those provisions often require the taxpayer to fulfil certain obligations within 10 years of acquiring the land or meet other conditions imposed by the Chief Commissioner when surcharge relief is granted. For example, the provisions relating to new home development require the Australian-based developer to sell the new homes within 10 years of the developer acquiring the land.

If, for example, the Chief Commissioner decided to revoke a surcharge concession seven years after the land was acquired by a developer, the Chief Commissioner's ability to issue reassessments would be significantly constrained because of the five-year limitation on making reassessments.

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<sup>9</sup> New South Wales, *Parliamentary Debates, Second Reading Speech*, Legislative Assembly, 23 March 2022, 8867 (Victor Dominello, Minister for Customer Service and Digital Government).

The proposed amendments will expressly permit reassessments to be made more than five years after an initial assessment when a surcharge concession is revoked. This will encourage taxpayers to adhere to their obligations, thereby supporting the integrity of the provisions.<sup>10</sup>

While we understand the basis for the amendment, the power to make a reassessment for an *indefinite period of time* is not good tax policy as it creates substantial uncertainty for the taxpayer. By comparison, Commonwealth taxes for more complex taxpayers generally have a four-year limitation period on reassessment,<sup>11</sup> with narrow exceptions for serious matters involving fraud or evasion (reassessments on either of those bases can be made at any time).<sup>12</sup>

We suggest that it would be appropriate to have a statutory upper limit on the period of time during which a reassessment can be made, such as 10 years, to align with the timeframe in section 104ZJA(6)(b) of the Duties Act.

#### **1.5. First Home Buyers Assistance Scheme residence requirement (section 76(2A) of the Duties Act)**

The Amendment Act inserted a clarifying provision, section 76(2A), with respect to the First Home Buyers Assistance Scheme residence requirement. This change granted the Chief Commissioner further discretionary powers to approve an owner's satisfaction of the terms of the scheme. The amendment is in the best interests of first home owners and is consistent with 'ensuring the equity of exemptions and concessions' under the first policy objective.

## **2. Amendments made to the TAA**

Schedule 8 of the Amendment Act made several significant changes to the TAA, particularly in relation to anti-avoidance provisions and penalty tax. The amendments were described in the Second Reading Speech as follows:

Collectively, these reforms represent one of the most significant enhancements to the integrity of the New South Wales taxation system in its history and make New South Wales a leader in promoting tax compliance.

These amendments consist of three core elements:

1. New general provisions relating to tax avoidance schemes;
2. Penalties to deter the promotion of tax avoidance schemes; and
3. New penalty tax provisions.<sup>13</sup>

<sup>10</sup> Ibid.

<sup>11</sup> For example, items 3A and 4 of the table to section 170 of the *Income Tax Assessment Act 1936* (Cth).

<sup>12</sup> For example, item 5 of the table to section 170 of the *Income Tax Assessment Act 1936* (Cth).

<sup>13</sup> New South Wales, *Parliamentary Debates, Second Reading Speech*, Legislative Assembly, 23 March 2022, 8868 (Victor Dominello, Minister for Customer Service and Digital Government).

While we acknowledge the need for robust anti-avoidance provisions, and support the underlying policy objective of such provisions, we have some concerns about the nature of some of the amendments made, and whether the terms of the amendments remain appropriate for securing the policy objectives.

## **2.1. Tax avoidance schemes (Part 10A of the TAA)**

The Amendment Act brought State tax avoidance legislation under a single umbrella by widening the application of the anti-avoidance provisions, drawn from the Duties Act, to include all taxes administered by the Chief Commissioner. That is, the anti-avoidance provisions in Chapter 11A of the Duties Act were repealed, and replaced with anti-avoidance provisions in the TAA which apply to all revenue laws the subject of the TAA, including duties. Not only did the Amendment Act broaden the reach of the anti-avoidance provisions, but it also made substantive changes to the nature of the provisions.

Former section 284D(1) of the Duties Act (which was repealed by the Amendment Act), required that the tax avoidance scheme be of an 'artificial, blatant or contrived nature':

A person is liable to pay the amount of duty avoided by the person as a result of a tax avoidance scheme that is of an artificial, blatant or contrived nature.

In contrast, the Amendment Act inserted section 106J(1) of the TAA, which provides:

A person is liable to pay the amount of tax avoided by the person as a result of a tax avoidance scheme.

Section 106I, inserted by the Amendment Act states:

### **106I Meaning of "avoid"**

In this Part—

- (a) a reference to avoiding tax, or payment of tax, includes a reference to postponing payment of tax, and
- (b) a reference to avoiding tax liability includes a reference to reducing or postponing tax liability.

These provisions provide a very broad definition of the amount of tax avoided. We also note that section 106F inserts a broad definition of a 'tax avoidance scheme', and section 106G sets out the matters that must be taken into account in determining whether a scheme is a tax avoidance scheme.

Without the limiting factor that the scheme be of an 'artificial, blatant or contrived nature', together with the broad meanings of 'avoid' and 'tax avoidance scheme', the new anti-avoidance provisions have a wide reach, extending what may be construed as a tax avoidance scheme by the Chief Commissioner.

One consequence of the broad meaning of 'avoid' to include 'postponing payment of tax' is the significant uncertainty this has created for taxpayers and their advisors in relation to the use of put and call options, which may not have been intended. It may be difficult for a taxpayer to substantiate that a transaction was

structured as a put and call option for legitimate commercial reasons, rather than for the sole or dominant purpose of enabling a tax liability to be deferred.

In our view, the former approach to tax avoidance under the Duties Act afforded a level of responsible practice in that the Chief Commissioner was required to provide reasons as to why such a scheme was 'artificial, blatant or contrived', with an intention to avoid tax. The current wording places a difficult evidentiary burden on the taxpayer. We suggest that the operation of these provisions is monitored beyond the current statutory review period given the short timeframe after commencement of the provisions.

## **2.2. Promoter penalty provisions (Part 10A, Division 3 of the TAA)**

Separately, the Amendment Act also introduced tax promoter penalty provisions (Part 10A, Division 3 of the TAA), modelled on the Commonwealth provisions, which include substantial penalties of up to 10,090 penalty units for an individual. The intention to deter the promotion of tax avoidance schemes is supported, however we are concerned about the potential for overreach of the provisions.

The breadth of the provisions, in part, arises from the broad definition of 'scheme' in section 106H of the TAA. For instance, the advice to incorporate a company could be considered a 'scheme'. The promoter penalty provisions in NSW are also broader than the Commonwealth equivalent provisions in other ways. For example, under section 106N(2) of the TAA, a person will be a promoter of a tax avoidance scheme if the person 'markets the scheme or otherwise encourages the growth of the scheme, or interest in it'. By contrast, section 290-60 of Schedule 1 of the *Taxation Administration Act 1953* (Cth) requires that, for liability to arise, the promoter (or associate) must have received a *benefit* in respect of the marketing or encouraging of the scheme; and that the promoter must have taken a *substantial role* in marketing or encouraging the uptake of the scheme.

We are concerned that the promoter penalty provisions may capture advisers quite innocently providing services, such as the establishment of companies or trusts. Again, we suggest that the operation of these provisions is monitored beyond the current statutory review.

## **2.3. Penalty tax (section 27(1) of the TAA)**

Section 27(1) was amended to include an additional penalty tax of 50% for taxpayers that are significant global entities (**SGEs**). The penalty tax otherwise remained the same at 25%. This amendment mirrors changes across the Commonwealth tax system in respect of SGEs, those entities being subject to greater tax penalties than other categories of taxpayers. This is consistent with policy views that SGEs, being large entities with substantial resources, should be well positioned to comply with tax laws and correctly manage their tax affairs. This is consistent with enhancements to the integrity of the taxation system.

#### **2.4. Disclosure of information by the Chief Commissioner of State Revenue (sections 83B and 83C of the TAA)**

The Amendment Act inserts a list of 'permitted disclosures' of information about a taxpayer in circumstances involving investigations and law enforcement (section 83B) and tax clearance checks (section 83C).

These amended provisions were described by the Minister in the Second Reading Speech as follows:

The amendments will support law enforcement and investigative activities and ensure that there is no undue delay in providing information for such purposes. They are also consistent with New South Wales privacy law, which provides an exemption from the limits on disclosure of personal information where the disclosure is for law enforcement purposes.

In our view, the policy objective of the amendments remains valid, and the terms of the amendments remain appropriate for securing the policy objectives.

#### **2.5. Electronic service of documents (amendment of section 116 of the TAA)**

The Amendment Act expands the methods of approved electronic service under tax law, including an online notification system advising that a taxpayer can access certain documents via a link or portal. This is in keeping with the broad policy objective of the digitisation of customer services.

The important provision for protecting customer interests is section 116(5) of the TAA, which requires the person to opt in (provide 'consent') to any system of online notification for the purpose of the Chief Commissioner serving a document.

For clarity and completeness, we suggest consideration be given to amending the TAA to establish the right for a taxpayer to withdraw at any time their consent for the Chief Commissioner to serve documents electronically via an online notification system, that is, establish a right to opt out and revert to some other form of notification such as by email or post.

Please contact Gabrielle Lea, Senior Policy Lawyer, on (02) 9926 0375 or [gabrielle.lea@lawsociety.com.au](mailto:gabrielle.lea@lawsociety.com.au) if you have any questions in relation to this letter.

Yours sincerely,



**Jennifer Ball**  
President



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Scott Johnston  
Deputy Secretary  
Chief Commissioner of State Revenue  
GPO Box 4042  
Sydney NSW 2001

31 January 2025

Via email: [Krystelle.Fitzpatrick@revenue.nsw.gov.au](mailto:Krystelle.Fitzpatrick@revenue.nsw.gov.au)

Dear Mr Johnston,

I thank Revenue NSW for the invitation to provide a submission to the legislative review of *State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022* (the Act). On behalf of our members, the Property Council is able to provide evidence-based analysis of the Act in practice, and demonstrate its broader impact on the property industry, the NSW economy, and the government's housing delivery mandate.

Our members include the nation's major investors, owners, managers, developers, designers and builders of property of all asset classes. They create landmark projects, environments, and communities where people can live, work, shop, and play. The property industry shapes the future of our cities and has a deep long-term interest in seeing them prosper as productive, sustainable, and safe places.

We note the context surrounding this review is considerably different to when the bill was first drafted. Our concerns in 2022 have only been amplified by the backdrop of critical housing supply shortages.

All levels of government have now agreed on a mandate to deliver more homes under the National Housing Accord, with NSW committing to deliver 377,000 new well-located homes by 2029. To reach this target, the property industry will have to develop more homes over the next five years than ever before. Policy settings must be right to relieve the pressure of high costs of construction and interest rate increases which impact development feasibility.

We note the government's commitment to unlocking housing with planning reform focused on diverse, infrastructure-supported homes in urban areas. Improving the efficiency and effectiveness of the planning system is one vital piece of the puzzle, but this must be supported by a holistic look at all policies impacting development to ensure they support our shared goal.

We are concerned that this piece of legislation, in conjunction with other recent changes in the NSW tax regime, has created a punitive operating environment, rather than one that supports housing delivery.

We remain supportive of the Act's intention to improve the integrity of state revenue statutes but are not satisfied that the provisions support this outcome. When the bill was introduced the government, then in opposition, shared these concerns and noted this review would be critical in assessing whether the provisions had met the Act's objectives.

We have observed more complexity and confusion for industry as a result of the introduction of this Act. Fortunately, some of these issues can be amended with drafting changes to better integrate the Act with other legislation and provide clarity to NSW taxpayers.

Pending clarification, industry has been reliant upon non-binding guidance from the Commissioner to comply with these rules, for example, private rulings, website guidance, or discretion issued by assessing officers on a case-by-case basis. As a result, we query if there is increased compliance and an improvement in the integrity of revenue measures, a contradiction to the key policy objective of the Act. This is particularly true for duty on leases.

The Act created a new dutiable transaction, for change in beneficial ownership (Section 8(1)(b)(ix)), a material expansion of the tax base that covered a number of previously non-dutiable transactions, including the grant of an option, lease or security interest. We recommended that these transactions, not intended to be covered, be made explicit in the legislation. Two years later, we continue to encounter types of common commercial transactions which are now impacted by this new provision, which were previously not dutiable and could not be said to be affecting the integrity of the state revenue statutes.

The Act introduced another new dutiable transaction, capturing acknowledgement of trusts (section 8AA). We remain of the view that there was no need for this to be introduced following the High Court's refusal to grant special leave to appeal *Chief Commissioner of State Revenue v Benidorm Pty Ltd* [2020] NSWCA 285 (13 November 2020).

Section 8AA is inconsistent with the changes in beneficial ownership rules that were introduced. This provision should be removed from the Act, on the basis that it applies unnecessary administration and complexity to transaction that was not previously an issue. Revenue NSW has advised that there have only been two transactions assessed under this provision, for a total of \$66,005 duty, from 19 May 2022 to 30 September 2024. This is evidence that the provision is unequal to the administrative disruption it creates and that amendment is warranted.

The following submission has been produced under the guidance of the state's leading tax experts and outlines the issues of the Act in its current form, impact on industry and our proposal for amendments.

We urge the NSW Government to consider this submission and recommendations as an opportunity to realise the initial intention of the Act and in doing so, improve industry's ability to improve housing supply in NSW. At this critical time, all legislation that impacts housing delivery should be considered as a lever that can be pulled by government. In doing so, we can incentivise investment in the sector and streamline the pathways to development that are necessary to improve the critical housing shortage being experienced across NSW.

Thank you for the opportunity to provide a submission to this important review. If you have any questions about this submission, please contact NSW Policy Advisor, Nikki Allen at [nallen@propertycouncil.com.au](mailto:nallen@propertycouncil.com.au) or by phone at 0428 663 633.

Yours sincerely,



**Katie Stevenson**  
NSW Executive Director  
Property Council of Australia

## Imposition of duty on changes in beneficial ownership

### Issue

This amendment created a new category of dutiable transaction which is too broad and vague in its scope.

### Problem/impact

- The new head of duty represents a significant expansion of the NSW tax base. Imposing a tax on the creation and extinguishment of any interest in dutiable property goes beyond the original scope of transfer duty.
- The scope of the new head of duty is too ambiguous and open to interpretation, such that it is not clear what transactions are intended to be taxed. This problem is exacerbated by the integration of the new drafting with the existing legislation more generally, including for example:
  - o the meaning of 'any other transaction' is unclear, particularly with respect to leases which the Commissioner now regards as dutiable even if they are not for a premium;
  - o common exemptions have not been updated for this new head of duty, such as changes of trustee where the custodian retains legal title.
- The current excluded transactions list is inadequate and standard commercial agreements/transactions (such as leases, security interests) may still be unintentionally caught. For example:
  - o changes of beneficial interests in trusts that hold security interests, i.e. as a result of a change in lenders under a syndicated facility agreement or sale of secured notes;
  - o the qualification that excluded transactions must be for 'no consideration' is too narrow, and industry is reliant on Commissioner's guidance to exclude nominal consideration transactions.
- There is multiple ad valorem duty risk if a particular arrangement falls within both the 'change in beneficial ownership' head and another head of duty on entry and completion.
- The scope and purpose of legislation should be clearly articulated, particularly if it is intended to create a new head of tax. The power to determine the scope of a new tax should not be left to the executive's power to make Regulations, or to the Commissioner's public statements.
- Revenue NSW has advised that a total of 2766 transactions have been assessed under the new head of duty from 19 May 2022 to 30 September 2024 with a total of \$14,225,135 assessed. This represents \$6,322,282 per annum over the 2.25 years period.
- The revenue collected from this new head of duty does not justify the unnecessary administration created for taxpayers and revenue officers, particularly when the new head of duty is slowing entry into transactions.
- 'Collateral purpose' wording in section 8(2A) of the Duties Act introduces a specific anti-avoidance provision within the new head of duty, conflicting with the 'sole or dominant purpose' test in the general anti-avoidance provisions in Part 10A of the Taxation Administration Act 1996.

### Recommendations

- Repeal the 'change in beneficial ownership' provisions and consult with industry and tax professionals for the introduction of specific identified dutiable transaction provisions consistent with transfer duty that do not adversely impact the government's housing development objectives, and which directly capture the behavior the Act intends to circumvent

- Ensure all dutiable transaction provisions effectively interface with 'no double duty' provisions.
- Ensure all current exemption and concession provisions in the Duties Act relevantly extend to all dutiable transactions.
- Amend legislation to make clear in the Act what transactions are dutiable.

### **Imposition of duty on acknowledgement of trust**

#### **Issue**

This amendment has created a new dutiable transaction, capturing acknowledgement of trusts, creating unnecessary costs and risks for taxpayers.

#### **Problem/impact**

- There was no gap in the policy framework or integrity of the Duties Act following the Benidorm decision.
- Risk of full ad valorem duty charged on mere statements in documents which do not amount to an actual transaction.
- The new provision creates a practical minefield and potential traps for the poorly advised - in many contracts and other legal documents involving custodians and trustees, there are statements which refer to capacity or seek to limit trustee liability. We then query, do these then amount to a 'statement' which expressly or implicitly acknowledges the trust? And if the Commissioner accepts that under section 58, a trust can be established for \$500 duty without identifying dutiable property, and then land can be purchased by the trustee without there being double duty, why should a subsequent acknowledgement then be subject to ad valorem duty? There should at least be a double duty exception which should cover where \$500 was paid under section 58. However, this would still not address the burden created by section 8AA.
- The new provision has created delays and increased costs with documents having to be scoured for acknowledgements of trust in circumstances where there is no 'transaction' or any change in beneficial ownership.
- This provision is further red tape and administrative costs for stamping. As mentioned earlier, the low revenue collected is evidence that the provision is not worth the disruption it creates.

#### **Recommendation**

The Property Council recommends this provision be removed from the legislation.

### **Anti-avoidance provisions**

#### **Issue**

- Significantly broadened definition of 'scheme' and removal of existing 'artificial, blatant or contrived' requirement under Duties Act;
- Avoidance of tax defined to include postponement or deferral of tax; and
- Introduction of a promoter penalties regime for advisers (imposing personal liability) who market tax avoidance schemes.

### Problem/impact

- The new anti-avoidance regime has created further confusion for tax practitioners.
- Introduces uncertainty for legitimate commercial decision making and planning.
- Expanding avoidance to include postponement or deferral of tax may catch ordinary commercial transactions such as put and call options. If the intention is to tax such transactions, then provisions should be included to tax them rather than relying on anti-avoidance regime.
- Expanding 'scheme' to include 'whether implemented or not' will have the effect of restricting discussion and consideration of commercial proposals and discourage thought leadership. The Commissioner has verbally indicated to the Property Council that the reference in section 106H(1)(b) to a scheme, plan or proposal 'whether implemented or not' is intended to apply only in respect of the promoter penalties regime, and steps such as a practice note can be taken to clarify this. However, a practice note will not be relevant to an NCAT or Court interpretation of the Act.

### Recommendations

- The Commissioner has undertaken to issue appropriate Practice Notes/Rulings to clarify intended approach to administration of the new regime (covering both the general anti-avoidance and promoter penalties regime). Any relevant publications should explain the application in the context of each tax to be covered. An amnesty from interest and penalties should apply until such time as the relevant guidance is published.
- In relation to arrangements intended to defer tax, we submit that it is appropriate for tax to be deferred until such time as a transaction is certain. This otherwise places strain on industry as it may not be able to access funding until the satisfaction of conditions precedent, or creates unnecessary administrative complexity and cost in having to lodge and pay tax and then seek a refund when conditions precedent are not satisfied.
- In relation to 'whether implemented or not' wording, we recommend these words be removed from the definition of 'scheme' in section 106H(1)(b) and instead include a definition of 'tax avoidance scheme' in section 106J which incorporates the 'whether implemented or not' concept. In this way, the concept will apply only to the promoter penalty regime and not definition of scheme for avoidance purposes.
- Ensure that if tax is charged under Part 10A due to deferral, ensure no multiple taxation of the same transaction and clarify that amount to be recovered is limited to interest charges and any applicable penalties.
- In section 106M, retain existing wording in section 284I of Duties Act relating to 'innocent participants' to reflect actual knowledge rather than new 'could reasonably be expected to have known' test.

### **Other issues**

The Act in context of this review exists as part of the NSW tax regime and the matrix of legislation that governs dutiable transactions. Our concerns and recommendations above are further exacerbated by the issues of other pieces of legislation. Below we have highlighted these concerns for Revenue NSW's review, either as part of, or separate to the statutory review of *State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022*.

## Corporate reconstructions and consolidation – Section 273B of the Duties Act

### Issue

The introduction of the 10 per cent concession (as opposed to the full exemption) has led to corporate groups choosing not to restructure and retain inefficient structures.

### Problem/Impact

- The imposition of a 10 per cent concessional duty for each transaction is, in our experience, not viable and results in the restructure not proceeding.
- The failure to effectively amend the legislation to permit transfers to or from custodians is causing inequitable outcomes. It is quite common for large property groups to have custodians in their structure. Limiting the use of custodians in this context to registered managed investment schemes results in an inability for property groups to restructure their arrangements effectively. Such restructures are often necessary to fund development in the property sector.
- The provisions do not adequately accommodate common foreign entities within corporate groups, such as limited liability companies and limited partnerships.

### Recommendation

- Return to a full exemption from duty for corporate restructures, or in the event that the 10 per cent is retained, introduction of a '30-day rule' similar to that introduced by the Victorian Government.
- Amend the corporate reconstruction provisions such that a custodian is not limited to a registered managed investment scheme and is treated in the same way as if they were a trustee of the relevant unit trust.
- Ensure that the provisions extend to any entity that forms part of a corporate group. For example, a limited liability company or partnership should be acceptable (whether that be as transferor, transferee or a linking entity in the group) if all of the members are members of the corporate group. For many years the corporate reconstruction provisions were practically applied in this way.

## Build-to-rent land tax concession and surcharge duty issues

### Issue

*Land tax:* Delays in the grant of land tax concession until development application approval.

*Surcharge stamp duty:* Imposition of surcharge duty on sales of completed build-to-rent (BTR) developments.

### Impact

*Land tax:* The imposition of the full rate of land tax on project land, even for one year, adversely affects the internal rate of return on BTR projects to the extent that they may no longer be economically feasible. The policy intent is that BTR projects are (subject to the Chief Commissioner of State Revenue being satisfied criteria will be met) subject to a concessional rate of land tax from the commencement of the project. However, notwithstanding all relevant information being provided to prove the BTR project, the Commissioner's practice is to not grant the concession until development approval (allowing for a BTR development) is provided. This delay drives unnecessary cost.

*Surcharge stamp duty:* The imposition of surcharge stamp duty on sales of completed BTR developments directly affects the valuation of BTR assets, and the consequence is that lower end valuations affect overall feasibility. The carrying and sale value is effectively decreased by 8 per cent (the amount of surcharge duty).

Currently, almost all the capital to fund the development and ownership of BTR is foreign capital (Australian Superannuation Funds are disincentivised from investing in BTR, despite many investing in BTR/Multi-family overseas), and so it is likely that any future purchaser will be foreign.

Whilst an exemption is available for the initial acquisition of BTR land for development, as BTR is classified as residential land, it is subject to surcharge duty.

#### Solution

*Land tax:* The Commissioner should change assessing practices and guidelines to immediately grant BTR concessional status upon being provided sufficient information to form a view that a BTR project will be undertaken. There should be no delay pending the grant of development approval.

If ultimately a BTR project does not proceed, there are appropriate provisions to allow the Chief Commissioner to claw-back any benefit, so there is no risk to the revenue.

*Surcharge stamp duty:* The solution is to recognise that BTR is a commercial investment grade asset, and it should not be treated as residential land. Instead, given the extensive commercial operation and provision of services, it should be treated on the same basis as purpose-built student accommodation or a hotel, or any other commercial land asset, and should not be subject to surcharge stamp duty.

If BTR is treated as commercial residential land and not subject to surcharge duty, then this also solves any issues in relation to the availability of developer exemption. This characterisation would not result in any change to the provisions relating to land tax concessions.

In addition to BTR, other forms of commercially operated institutional investment grade residential projects such as retirement villages and land lease (manufactured home estate) assets should also be treated as commercial residential land and not subject to surcharge duty.

## The Tax Institute

On behalf of The Tax Institute, thank you for the opportunity to make a submission in respect of the legislative review of the amendments made by the *State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022 (NSW)* (**the Act**) which received Royal Assent on 19 May 2022.

Please find below our brief comments in relation to the Section 8AA amendments made by the Act to the *Duties Act 1997* (NSW). Our comments below take into account feedback provided by The Tax Institute's NSW State Taxes Committee.

- Section 8AA introduces a potential duty liability. However, our understanding is that the changes post 19 May 2022 were not intended to double tax transactions. A transfer of land by the legal representative of a deceased person is assessed under [section 63](#) if it satisfies the requirements. However, following the amendments made by the Act, an 'acknowledgment of trust' may trigger *ad valorem* transfer duty under section 8AA.
- An acknowledgment of trust that does not aim to avoid tax, when accompanied by a copy of the Will and the Transfer of Land for section 63 deceased estates, can be subject to *ad valorem* transfer duty under section 8AA. While we acknowledge that the transfer of land and an acknowledgement of trust are separate transactions, where a deceased estate is involved and there is no tax avoidance, in our view, section 8AA should not apply.
- We note that the current approach is in contrast to the change in the beneficial ownership provisions that do not change how duty is assessed. For example, in respect of a contract, if the duty is *ad valorem*, it is not then also reassessed as a change in beneficial ownership.
- We also note that financial institutions are increasingly requiring some form of 'declaration' or 'confirmation' from trustees, identifying the relevant property and holding trust under a Will. In the process of identifying properties held in testamentary trusts, taxpayers are entering into 'declarations' that may now incur *ad valorem* transfer duty under section 8AA. This outcome appears contrary to the intended policy of section 8AA.
- A potential solution may be to introduce a carve out to section 8AA, akin to that which features in the definition of 'declaration of trust' (**emphasis added**):

"declaration of trust" means any declaration (**other than by a will or testamentary instrument**) that any identified property vested or to be vested in the person making the declaration is or is to be held in trust for the person or persons, or the purpose or purposes, mentioned in the declaration although the beneficial owner of the property, or the person entitled to appoint the property, may not have joined in or assented to the declaration.

Please let me know if you would like to discuss any of the above.

Kind regards

Julie

**Julie Abdalla**  
Head of Tax & Legal

 **The Tax Institute**



Ms Krystelle Fitzpatrick  
Policy Officer  
Policy & Legislation  
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7 February 2025  
Matter 80154701  
By Email

Dear Ms Fitzpatrick

**Legislative Review of the State Revenue and Fines Legislation  
Amendment (Miscellaneous) Act 2022**

**1 Introduction**

Herbert Smith Freehills (HSF) welcomes the opportunity to make a submission in response to the legislative review of the *State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022* (NSW) (**Amendment Act**) coordinated by Revenue NSW pursuant to s 128 of the *Taxation Administration Act 1997* (NSW) (**TAA**).

HSF is a leading global law firm which provides stamp duty advice to many of Australia's largest corporations and property developers and provides specific stamp duty advice on the largest corporate and real estate transactions in New South Wales. HSF has a large team of stamp duty specialists who exclusively practice in stamp duty law across each Australian jurisdiction.

All legislative references are to the *Duties Act 1997* (NSW) (**Duties Act**) unless otherwise stated.

**2 Summary and Recommendations**

**2.1 Summary**

Section 128 of the TAA requires that the amendments made by the Amendment Act be reviewed to determine (a) whether the policy objectives of the amendments remain valid; (b) whether the terms of the amendments remain appropriate for securing the policy objectives.

This submission is directed to a subset of the amendments known as the "change of beneficial ownership" provisions.<sup>1</sup> In respect of those provisions, we submit that they are not appropriate for securing the policy objectives of the Amending Act as they substantially expand the scope of the Duties Act in ways which were not intended and not required to achieve the policy objectives.

**2.2 Recommendations**

Given the material issues which arise from the "change of beneficial ownership" provisions, we submit that the most appropriate path forward is to repeal the provisions and replace them with bespoke anti-avoidance provisions which address particular avoidance concerns. The present approach results in significant impacts on ordinary conveyancing practice and commercial transactions with no avoidance purpose, which is wholly inconsistent with the stated purpose of the reforms.

<sup>1</sup> Being, the amendments introduced by the Amendment Act in Schedule 1, clauses [1] (s 8(1)(b)(ix)); [2] (s 8(2A)); [3] (s 8(3)); [5] (s 9).

Doc 2062650479.2



## Annexure 1

### Detailed Submission

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#### 1 Overview

This submission is structured as follows:

- **Section 2:** analyses the "change of beneficial ownership" provisions and the explanatory material which accompanied the introduction of the Amendment Act to demonstrate that the policy objectives underpinning the introduction of those provisions are combating avoidance structures and ensuring revenue integrity.
- **Section 3:** identifies and explains several significant examples which demonstrate that the provisions have overstepped this policy objective as the provisions in their application either:
  - result in the imposition of duty on transactions which should not be dutiable at all given the stated policy objectives; or
  - generate unexpected or perverse duty outcomes due to the significant reach of the provisions and their inconsistency with the structure of the broader Duties Act.
- **Section 4:** makes recommendations for reform to the "change of beneficial ownership" provisions to ensure they achieve their policy objectives without also giving rise to the above issues.

#### 2 Policy Objectives of the Amendment Act

##### 2.1 Explanatory Material

Explanatory material accompanying the introduction of the Amendment Act is instructive in ascertaining the policy objectives underpinning the introduction of the "change of beneficial ownership" provisions.

The explanatory note to the Amendment Act relevantly provides that the objects of the Amendment Act are "to make miscellaneous amendments to legislation relating to State revenue and fines". In respect of the "change of beneficial ownership" provisions, the explanatory note provides:

***"Imposition of duty on changes in beneficial ownership"***

*Schedule 1[1] and [2] charge duty on transactions that result in a change in the beneficial ownership of dutiable property.*

*Schedule 1[3] defines terms used for the purposes of the duty and Schedule 1[5] makes a consequential amendment.*

*The provisions are modelled on similar provisions of the Duties Act 2000 of Victoria, section 7.*

*Schedule 1[29] exempts transactions from the duty if they occur in accordance with agreements or arrangements entered into before the imposition of the duty."*

The explanatory note was made available concurrently with Mr Victor Dominello (Ryde—Minister for Customer Service and Digital Government) delivering the second reading speech in support of the Amendment Act (then Bill). The critical aspect of that speech provides:



*"The State Revenue and Fines Legislation Amendment (Miscellaneous) Bill 2022 amends the provisions of a number of Acts as part of the Government's ongoing program of maintaining the effectiveness and integrity of the revenue statutes.*

*The reforms in this bill fall into three broad categories:*

*1 Amendments to State taxation and grant legislation to enhance revenue integrity, ensure the equity of exemptions and concessions, address anomalies, respond to court decisions, close tax avoidance loopholes and reduce red tape;*

*[...]*

*[...]*

*Duty is chargeable on certain transactions of dutiable property. The broad intention of the Act is that changes in ownership of property—be they changes in legal or beneficial ownership—will, subject to some exceptions and concessions, attract duty.*

*Currently, however, there is scope to avoid duty by structuring affairs such that, while there is no change in the legal ownership of dutiable property, the beneficial ownership changes.*

*I will give you one example: a fixed trust holding land in New South Wales that has two beneficiaries, each with an equal interest and one of these beneficiaries disposes of their 50 per cent interest to the other beneficiary. There is no change in the legal ownership of the land, which is held by the trustee, but the remaining beneficiary has now acquired an additional 50 per cent beneficial interest in the land, without any duty being incurred. This is obviously contrary to the intentions of the Act.*

*This bill will clarify that a change in beneficial ownership of land is a dutiable transaction, aligning our provisions with Victoria. This will help to prevent avoidance of duty."*

## 2.2 Text and Structure of the Change of Beneficial Ownership Provisions

The text and structure of the "change of beneficial ownership" provisions is of itself instructive in ascertaining the relevant policy objectives. Section 8(1)(b)(ix) of the Duties Act provides:

*"(1) This Chapter charges duty on—*

*(a) a transfer of dutiable property, and*

*(b) the following transactions—*

*[...]*

*(ix) another transaction that results in a change in beneficial ownership of dutiable property, other than an excluded transaction." (emphasis added)*

Including the "change of beneficial ownership" as the final category of dutiable transaction and including the word "another" at the beginning of the sub-section demonstrate that the provision plays a subordinate role to the earlier categories of dutiable transaction. This is demonstrative of a parliamentary intent that the "change of beneficial ownership" provisions would play a secondary role where one of the long-standing primary heads of duty liability did not apply.



## 2.3 Policy Objectives

Drawing the above matters together, we submit that the policy objectives underpinning the introduction of the “change of beneficial ownership” provisions are categorised as combating avoidance structures and ensuring revenue integrity. That is, the purpose of the reforms was to impose duty on transactions which were in substance transfers (or another kind of pre-existing dutiable transaction), but due to the way the transaction was structured, the transaction fell outside of the duty net eroding the proper duty base. The example regarding fixed trusts in the second reading speech is an example of this. The purpose in this regard was also said to align the duty treatment of such transactions with the equivalent provisions under the *Duties Act 2000* (Vic).

Critically however the explanatory material and the text and structure of the “change of beneficial ownership” provisions are not supportive of a parliamentary intent of general revenue raising. There is nothing which supports a policy objective of generally raising revenue through “change of beneficial ownership” provisions or otherwise capturing any possible transaction in connection with dutiable property. There remains a fundamental revenue integrity component which only has meaning when the provisions are applied consistently with the pre-existing scope of the duty base.

For the purpose of the present review, it is therefore appropriate to consider whether the “change of beneficial ownership” provisions are effective to achieve these avoidance and revenue integrity objectives.

## 3 Change of Beneficial Ownership Provisions

### 3.1 Overview

We submit that the “change of beneficial ownership” provisions are not appropriately drafted to achieve their revenue integrity objective. The effect of the provisions in practice is significantly broader than required to achieve their policy objective and instead their application:

- results in the imposition of duty on transactions which should not be dutiable at all given the stated policy objectives; and
- generates unexpected or perverse duty outcomes due to the significant reach of the provisions and their inconsistency with the structure of the broader Duties Act.

We have explored a number of examples below which illustrate these issues.

### 3.2 Options to Purchase Land in New South Wales

Section 8(3) defines a “change in beneficial ownership” as including “the creation of dutiable property”. Section 11(1)(k) provides that an “option to purchase land in New South Wales” (**Land Purchase Option**) is dutiable property. Accordingly, one of the effects of the Amendment Act was to cause the grant of a Land Purchase Option to be subject to duty for the first time. Section 21(1) provides that the dutiable value of the grant of a Land Purchase Option is the greater of the consideration given for its grant and the unencumbered value of the Land Purchase Option.

Land Purchase Options are a common conveyancing instrument and the mere fact of entering into a Land Purchase Option was never suggested to be an avoidance instrument,<sup>2</sup> given that full duty is payable when the option is exercised. Indeed, s 22(4) provides that the consideration for a transfer of land pursuant to an option includes “the amount or value of the consideration provided by or on behalf of the transferee for the

<sup>2</sup> To the extent that a Land Purchase Option is viewed as an avoidance instrument through delaying when duty is payable (i.e. if the appropriate counterfactual is entering into a contract for sale rather than a Land Purchase Option), then the anti-avoidance provisions in the TAA address this. The “change of beneficial ownership” provisions have no bearing on this issue.



option (whether for its grant, transfer, exercise or otherwise)". This means that any consideration paid for a Land Purchase Option is assessed with duty when the Land Purchase Option is exercised.

The effect of the introduction of the "change of beneficial ownership" provisions is to materially penalise the use of Land Purchase Options by imposing "double duty" as any duty assessed on the grant of a Land Purchase Option (such as where a material option fee is paid) is not credited against the duty paid when the contract / transfer is entered into pursuant to the Land Purchase Option. At no point in the Amendment Act or its surrounding material was it stated that the purpose of the reforms was to levy "double duty" by reference to the same consideration.

Other jurisdictions which impose duty on the grant of a Land Purchase Option have legislated regimes to ensure double duty is not payable (see e.g. *Duties Act 2001* (Qld) s 23(2)-(3); *Duties Act 2008* (WA) s 35). The purpose of these regimes is to ensure that taxpayers are not charged with duty twice in respect of what is in substance a single transaction.

Given this, we submit that the imposition of double duty as a consequence of the "change of beneficial ownership" provisions is a clear example of a perverse duty outcome and is plainly out of step with the approach in other jurisdictions. The imposition of duty on the grant of Land Purchase Options is also inconsistent with the stated revenue integrity objectives of the Amendment Act, as the existing legislative scheme (through the pre-existing s 22(4)) sufficiently addressed any potential avoidance concerns (with consideration for the Land Purchase Option assessed to duty on the consequent transfer / contract for sale). It is also worth noting that Revenue NSW requires lodgement with Revenue NSW directly (i.e. not via EDR) for all contracts entered into pursuant to Land Purchase Options which further reduces avoidance risk.

### 3.3 Grant of a Lease of Land in New South Wales

#### (a) Leases prior to the Amendment Act

Since the abolition of lease duty, the grant of a lease was only chargeable with duty in New South Wales if it fell within s 8(1)(b)(viii), namely "a lease in respect of which a premium is paid or agreed to be paid". A "premium" is a monetary sum paid for the grant of a lease, rather than for the ongoing use of the land (the latter being rent).<sup>3</sup>

The effect of this was to narrow the circumstances where leases were dutiable to those limited circumstances where a monetary payment was paid for the grant of the lease. This was consistent with the general abolition of lease duty. Section 21(5) also explicitly provided that the dutiable value of such a transaction is the amount of premium paid or payable in respect of the lease; that is, the market value of the lease was irrelevant for the purpose of assessing duty which was confined to the monetary premium.

#### (b) Leases post the Amendment Act

The effect of s 8(3) in including "the creation of dutiable property" as a dutiable change in beneficial ownership is that the grant of a lease (being, dutiable property as an interest in land) is subject to duty. Section 21(1) provides that the dutiable value of a lease which is dutiable under the "change of beneficial ownership" provisions is the greater of the consideration given for its grant and the unencumbered value of the lease.

To mitigate the very wide reaching implications of this, s 8(3) included within the definition of an "excluded transaction" (being, a transaction which is not subject to the "change of beneficial ownership" provisions subject to the avoidance rider in s 8(2A)), the "grant, renewal, or variation of a lease for no consideration".

<sup>3</sup> *Frazier v Commissioner of Stamp Duties (NSW)* (1985) 17 ATR 64.



(c) **Complexities and Inconsistencies**

The effect of the Amendment Act is to create two very different taxing regimes for the same transaction depending on whether the consideration given for a lease (other than rent) is a premium or not. For example:

- **Lease 1:** A grants B a lease of a windfarm where B agrees to pay A an upfront cash premium of \$50,000. The lease is for a term of 10 years and the rent payable under the lease is below the market rate.
- **Lease 2:** Y grants Z a lease of a windfarm where Z agrees to provide Y a discount valued at \$50,000 on purchases of electricity generated by the windfarm. The lease is for a term of 10 years and the rent payable under the lease is below the market rate.

Lease 1 is chargeable with duty under the pre-existing lease for a premium provision (s 8(1)(b)(viii)). Duty is assessed on the dutiable value prescribed by s 21(5) being the \$50,000 premium. It is irrelevant to the duty analysis whether the lease is on market terms.

Lease 2 is chargeable with duty under the change of beneficial ownership provisions as the contractual right to receive a discount on future electricity purchases is not a premium. Duty is assessed on the dutiable value prescribed by s 21(1) being the greater of the consideration given (i.e. the value of the future discount) and the unencumbered value of the lease. In order to ascertain the duty payable, consideration has to be given to the terms of the lease and whether its unencumbered value exceeds the non-monetary consideration given for the grant of the lease.

The material difference in approach and outcome is absurd and in fact undermines the revenue integrity objectives of the Amendment Act as different outcomes can be achieved in different circumstances depending on whether consideration is structured to be a "premium".

A related issue is that the definition of "excluded transaction" as it applies to the grant of a lease is very narrow. The requirement that the lease be granted for "no consideration" in order to be insulated from the application of the "change of beneficial ownership" provisions can also result in harsh outcomes due to the market value test which applies under s 21(1).

Take for example a public-private partnership where the NSW Government grants a lease to a private entity for that entity to undertake a development of both public and private utility for no monetary consideration. If any of the promises made under the comprehensive arrangement between the NSW Government and the private entity can be viewed as consideration given by the private entity (arguably, even if the consideration is nominal), the relevant lease in question will lose the protection of being an "excluded transaction" and be liable for duty. In some circumstances, leases granted under these arrangements may carry material value and therefore be subject to material duty even though the consideration given by the lessee which caused the transaction to become dutiable may not be material. As illustrated above, the outcome would be materially different if s 21(5) applied as the focus would be on the quantum of consideration only.

### 3.4 **Breakdown in Structure and Effect of the Duties Act generally**

We submit that the overreach of the "change of beneficial ownership" provisions and their general unfitness to achieve their revenue integrity objective can be seen in the breakdown in structure and effect of a number of provisions in the Duties Act in the context of the "change of beneficial ownership" provisions. Specifically:

- **Aggregation:** section 25(1) of the Duties Act requires identity between the transferors and transferees (or their associated persons) in order for the general aggregation of dutiable transactions rule to apply. We are aware of differences



of approaches between assessors in applying these rules to changes in beneficial ownership. In two recent matters:

- (1) three transfers granting easements by the same grantor to the same grantee were aggregated and treated as a single transaction pursuant to section 25;
- (2) a transfer granting an easement and an option to purchase land were not aggregated pursuant to section 25 as it was determined that section 25 does not apply to the "change of beneficial ownership provisions" that are the "creation of dutiable property" as these transactions do not involve the "transfer" of something that already exists and section 9 does not deem a grantor to be a "transferor".

It is also worth noting that Revenue NSW publications are inconsistent on approach to the application of section 25 in relation to the grant of options. The general Revenue publication on options notes that more than one grant of an option between associated persons may be considered one arrangement under section 25<sup>4</sup> and the recently published options CPN provides that the Chief Commissioner does not consider that the aggregation provisions in section 25 apply in calculating the duty payable on the grant of options.

- **Corporate Reconstruction Relief:** the definition of "corporate reconstruction transaction" in s 273C does not include dutiable transaction which is a change in beneficial ownership under s 8(1)(b)(ix). The effect of this is that transactions between members of the same corporate group which trigger the relevant provisions are subject to full duty. Although the existing drafting of s 273C does not capture all possible kinds of dutiable transactions, given the breadth of s 8(1)(b)(ix), the corporate reconstruction provisions ought to apply.
- **Proliferation of Commissioner's Practice Notes and Duties Regulations:** the "change of beneficial ownership" provisions have led to three CPNs (with the third on options only recently published) and the introduction of a comprehensive regulation (*Duties Regulation 2022* (NSW)) all of which operate to explain and limit the broad operation of the "change of beneficial ownership" provisions. This is clear evidence that the revenue integrity objective is not being achieved as it is necessary to curtail the operation of the provisions with regulations and CPNs (noting the latter does not have force of law).

An example worth noting in this regard is the extensive provision in CPN027 in respect of leases granted for a term of more than 50 years and the circumstances where the value of non-monetary consideration is taken to be nil. Those provisions, although very welcome as they limit the operation of the "change of beneficial ownership" provisions, have no legislative basis and require taxpayers to place their faith in Revenue NSW's administration of the relevant provisions in entering into long term lease arrangements which would otherwise attract significant duty (which can be departed from without consequence to Revenue but material consequence to taxpayers). It is obvious that the better way to address the relevant issues in the context of long term leases is through curtailing the drafting of the "change of beneficial ownership" provisions directly, rather than putting out the fires of their incredibly broad effect through CPNs which can be changed at any time and without notice to taxpayers.

### 3.5 *Duties Act 2000* (Vic): Inappropriate Comparison

We note that the "change of beneficial ownership" provisions were expressly modelled on their equivalents under the *Duties Act 2000* (Vic) (*Vic Duties Act*). However, due to

<sup>4</sup> <https://www.revenue.nsw.gov.au/taxes-duties-levies-royalties/transfer-duty/options>



significant differences between the New South Wales and Victorian duties legislation, the impact of the provisions in Victoria are materially different and not as far reaching. Specifically, as the definition of dutiable property in Victoria is significantly narrower, the issues identified above do not arise. For example:

- a lease is only considered to be dutiable property where it meets the requirements under s 7(1)(b)(v) or (va) of the Vic Duties Act (s 10(1)(ac)(iii)). Consistently with the published Revenue Rulings (see DA-052v2), this essentially requires the lessee to acquire rights akin to freehold ownership before duty is imposed. A lease on ordinary commercial terms where some non-monetary consideration was given for its grant would not attract duty.
- an "option to purchase [land in Victoria]" is specifically carved out of the definition of dutiable property by s 10(1)(ac)(ii).

As a result of this, the issues identified above in respect of options and leases do not arise.

#### 4 Recommendations

Given the material issues which arise from the "change of beneficial ownership" provisions, we submit that the most appropriate path forward is to repeal the provisions and replace them with bespoke anti-avoidance provisions which address known avoidance outcomes. The present approach results in significant impacts on ordinary conveyancing practice and transactions with no avoidance purpose, which is wholly inconsistent with the stated purpose of the reforms.

More specific reforms of a more limited nature which would ameliorate some of the adverse impacts of the "change of beneficial ownership" provisions include:

- **Land Purchase Options:**
  - **Primary Recommendation:** amend the definition of "excluded transaction" to include the grant of a Land Purchase Option to ensure that the grant of a Land Purchase Option is not dutiable unless it is part of an avoidance arrangement (in which case s 8(2A) would apply). This would remove the double duty implications explored above and reduce red tape given s 22(4) already ensures all consideration given for an option is dutiable.
  - **Secondary Recommendation:** amend the Duties Act to include a crediting regime similar to Queensland and Western Australia so that any duty paid on the grant of a Land Purchase Option is credited against the duty payable on the contract / transfer entered into pursuant to the Land Purchase Option.
- **Leases:** amend s 21(5) to include all leases (whether dutiable under s 8(1)(b)(viii) or (ix)) so that the duty payable on a lease is limited to the sum of any premium and non-monetary consideration. This removes the differential outcomes which arise between the two provisions due to the inclusion of a market value test of the lease under the "change of beneficial" ownership provisions.
- **Corporate Reconstruction Relief:** amend s 273C to include a change of beneficial ownership where the person who obtains the beneficial ownership or whose beneficial ownership in dutiable property is increased is a member of the same corporate group as the person whose beneficial ownership in dutiable property ends or is decreased.
- **Aggregation:** amend s 25 to clarify the operation of the aggregation provisions in the context of the "change of beneficial ownership" provisions.

## 5.2 Appendix B – Duties Act 1997 sections referenced

### 8 Imposition of duty on certain transactions concerning dutiable property

(1) This Chapter charges duty on —

(a) a transfer of dutiable property, and

(b) the following transactions —

- (i) an agreement for the sale or transfer of dutiable property,
- (ii) a declaration of trust over dutiable property,
- (iii) a surrender of an interest in land in New South Wales,
- (iv) a foreclosure of a mortgage over dutiable property,
- (v) a vesting of dutiable property by or as a consequence of an order of a court of this or another jurisdiction, whether inside or outside Australia,
- (vi) the enlargement of a term in land into a fee simple under section 134 of the Conveyancing Act 1919,
- (vii) a vesting of land in New South Wales by, or expressly authorised by, statute law of this or another jurisdiction, whether inside or outside Australia,
- (viii) a lease in respect of which a premium is paid or agreed to be paid,
- (ix) another transaction that results in a change in beneficial ownership of dutiable property, other than an excluded transaction.

(c) (Repealed)

#### **Note.**

There are other provisions in this Act that deem certain transactions to be a transfer of dutiable property under this Chapter, for example —

- (a) section 9A, which provides for certain circumstances in which a transfer of a partnership interest is taken to occur, and
- (b) section 9B, which provides for certain circumstances in which a transfer of an option to purchase land is taken to occur, and
- (c) section 9C, which provides for circumstances in which a novation of an agreement for the lease of land in New South Wales is taken to be a transfer of dutiable property, and
- (d) Part 2 of Chapter 3, which treats a transfer or assignment of an option to purchase dutiable property as a transfer of the dutiable property in certain circumstances.

(2) Such a transfer or transaction is a dutiable transaction for the purposes of this Act.

(2A) Despite subsection (1)(b)(ix), an excluded transaction that results in a change in beneficial ownership of dutiable property is a dutiable transaction if it is part of a scheme or arrangement that, in the Chief Commissioner's opinion, was made with a collateral purpose of reducing the duty otherwise chargeable under this Chapter.

(3) In this Chapter —

**beneficial ownership** includes ownership of dutiable property by a person as trustee of a trust.

**change in beneficial ownership** includes the following —

- (a) the creation of dutiable property,
- (b) the extinguishment of dutiable property,
- (c) a change in equitable interests in dutiable property,
- (d) dutiable property becoming the subject of a trust,
- (e) dutiable property ceasing to be the subject of a trust.

**declaration of trust** means any declaration (other than by a will or testamentary instrument) that any identified property vested or to be vested in the person making the declaration is or is to be held in trust for the person or persons, or the purpose or purposes, mentioned in the declaration although the beneficial owner of the property, or the person entitled to appoint the property, may not have joined in or assented to the declaration.

**excluded transaction** means the following —

- (a) the purchase, gift, allotment or issue of a unit in a unit trust scheme,
- (b) the cancellation, redemption or surrender of a unit in a unit trust scheme,
- (c) the abrogation or alteration of a right relating to a unit in a unit trust scheme,
- (d) the payment of an account owing for a unit in a unit trust scheme,
- (e) the grant, renewal or variation of a lease for no consideration,
- (f) the grant of an easement for no consideration,
- (g) the grant of a profit a prendre for no consideration,
- (h) the provision of a security interest within the meaning of the Personal Property Securities Act 2009 of the Commonwealth,
- (i) a change in a trustee's right of indemnity,
- (j) the creation of an interest in dutiable property by statute,
- (k) a transaction of a kind prescribed by the regulations,
- (l) a combination of the transactions referred to in paragraphs (a)–(k).

**lease** means a lease of land in New South Wales or an agreement for a lease of land in New South Wales.

**premium**, in respect of a lease entered into pursuant to an option, includes an amount paid or payable for the grant of the option.

**transfer** includes an assignment, an exchange and a buy-back of shares in accordance with Division 2 of Part 2J.1 of the Corporations Act 2001 of the Commonwealth.

## **8AA Imposition of duty on acknowledgment of trust**

(1) This Chapter also charges duty on the making of a statement that —

- (a) purports to be a declaration of trust over dutiable property, but
- (b) merely has the effect of acknowledging that identified property vested, or to be vested, in the person making the statement is already held, or to be held, in trust for a person or purpose mentioned in the statement.

(2) For the purpose of charging the duty —

- (a) the making of the statement is taken to be a declaration of trust over dutiable property and, accordingly, is a dutiable transaction, and

- (b) the property vested, or to be vested, in the person making the statement is taken to be the property transferred, and
- (c) the person making the statement is taken to be the transferee, and
- (d) the transfer is taken to occur when the statement is made.

## 9 Imposition of duty on dutiable transactions that are not transfers

(1) The duty charged by this Chapter on a dutiable transaction referred to in section 8 (1) (b) is to be charged as if each such dutiable transaction were a transfer of dutiable property.

(2) Accordingly, for the purpose of charging duty under this Chapter, in relation to a dutiable transaction specified in Column 1 of the following Table —

- (a) the property specified opposite the dutiable transaction in Column 2 is taken to be the property transferred (and a reference in this Act to property transferred includes a reference to such property), and
- (b) the person specified opposite the dutiable transaction in Column 3 is taken to be the transferee of the dutiable property (and a reference in this Act to a transferee includes a reference to such a person), and
- (c) the transfer of the dutiable property is taken to have occurred at the time specified opposite the dutiable transaction in Column 4 (and a reference in this Act to the time at which a transfer occurs includes a reference to such a time).

**Table**

Column 1	Column 2	Column 3	Column 4
Dutiable transaction	Property transferred	Transferee	When transfer occurs
agreement for sale or transfer	the property agreed to be sold or transferred	the purchaser or transferee	when the agreement is entered into
declaration of trust	the property vested or to be vested in the declarant	the person declaring the trust	when the declaration is made
surrender	the surrendered property	the person to whom the property is surrendered	when the surrender takes place
foreclosure	the mortgaged property	the mortgagee	when the foreclosure order is made
vesting by court order	the vested property	the person in whom the property is vested	when the order is made
enlargement of a term in land into a fee simple	the estate in fee simple	the person who acquires the estate in fee simple	when the term is enlarged
vesting by statute law	the vested land in New South Wales	the person in whom the land is vested	when the vesting by statute law occurs

lease	the leased property	the lessee	when the lease is entered into
another transaction that results in a change in beneficial ownership of dutiable property	the property the beneficial ownership of which is changed	the person who obtains the beneficial ownership or whose beneficial ownership is increased	when beneficial ownership changes

## 26 Certain transactions concerning goods and other property

(1) If a dutiable transaction involves goods and other dutiable property, the Chief Commissioner may disregard the value of the goods in the transaction if the dutiable value of the other property does not exceed 10% of the dutiable value of all the dutiable property in the transaction.

(2) (Repealed)

## 49A Purchases “off the plan”

(1) Liability for duty on an off the plan purchase agreement arises —

- (a) on completion of the agreement, or
  - (b) on the assignment of the whole or any part of the purchaser’s interest under the agreement, or
  - (c) on the expiration of 12 months after the date of the agreement,
- whichever first occurs.

(1A) This section applies in relation to an off the plan purchase agreement only if the Chief Commissioner is satisfied, when assessing liability for duty after the agreement is lodged for stamping, that the purchaser or transferee under the agreement (or, if there is more than one purchaser or transferee, at least one of them) intends to use and occupy the residence to which the agreement relates as a principal place of residence in accordance with the residence requirement.

(1B) The residence must be used and occupied by the purchaser or transferee (or, if there is more than one purchaser or transferee, at least one of them) as the purchaser or transferee’s principal place of residence for a continuous period of at least 12 months, with occupation commencing no later than 12 months (or such longer period as the Chief Commissioner may approve) after completion of the agreement for the sale or transfer. This requirement is referred to as the residence requirement.

(1C) If the residence requirement is not complied with in relation to the residence, this section is taken never to have applied in relation to the off the plan purchase agreement, including for the purposes of the Taxation Administration Act 1996.

(1D) The residence requirement does not apply to a purchaser or transferee if, on the date of the agreement or transfer —

- (a) the purchaser or transferee or, if there are 2 or more of them, at least 1 of the purchasers or transferees is a member of the Permanent Forces of the Australian Defence Force within the meaning of the Defence Act 1903 of the Commonwealth, and
- (b) the purchaser or transferee or, if there are 2 or more of them, each of the purchasers or transferees is enrolled to vote in State elections under the Electoral Act 2017.

(2) This section applies despite section 12.

(3) Nothing in this section prevents the Chief Commissioner from accepting payment of duty and stamping an off the plan purchase agreement at any time after the agreement has been executed.

(3A) This section does not apply in relation to an off the plan purchase agreement if any purchaser or transferee under the agreement is a foreign person (within the meaning of Chapter 2A).

(4) In this section —

**off the plan purchase agreement** means an agreement for the sale or transfer of dutiable property, being land on which a residence is to be erected or developed before completion of the agreement for the sale or transfer.

## 76 Residence requirement

(1) The home must be occupied by the first home owner or one of the first home owners who is acquiring it as a principal place of residence for a continuous period of at least 12 months, with that occupation starting within 12 months (or such longer period as the Chief Commissioner may approve) after completion of the agreement or transfer. This requirement is referred to as the residence requirement.

(2) The Chief Commissioner may, if satisfied there are good reasons to do so in a particular case —

(a) modify the residence requirement by approving a shorter period of occupation by a first home owner, or

(b) exempt a first home owner from the requirement to comply with the residence requirement.

(2A) The Chief Commissioner may give an approval or exemption under this section at any time, even if —

(a) the period of 12 months after completion of the agreement or transfer has already expired, or

(b) the first home owner's occupation of the home as a principal place of residence has already ceased.

(3) In the case of an agreement or transfer for the acquisition of a vacant block of residential land, it is sufficient that the Chief Commissioner is satisfied that the vacant block is intended to be used as the site of a home to be occupied by the first home owner or one of the first home owners who is acquiring it as a principal place of residence.

(4) (Repealed)

(5) For the purpose of this section, an agreement or transfer is completed when a purchaser or transferee becomes entitled to possession of the home and, if the interest in the land acquired by the purchaser or transferee is registrable under a law of the State, the interest is so registered.

(6) The residence requirement does not apply to an application under the scheme if, on the date of the agreement or transfer —

(a) the applicant or, if there are 2 or more of them, at least one of the applicants is a member of the Permanent Forces of the Australian Defence Force (within the meaning of the Defence Act 1903 of the Commonwealth), and

(b) the applicant or, if there are 2 or more of them, each of the applicants is enrolled to vote in State elections (under the Electoral Act 2017).

## 104ZJA Certain development by Australian-based developers that are foreign persons

(1) An Australian corporation that is the transferee under a transfer of residential-related property is entitled to a refund of surcharge purchaser duty paid by the transferee that is chargeable on the transfer if the Chief Commissioner is satisfied that —

(a) a new home has been constructed on the land concerned by the transferee or a related body corporate after completion of the transfer to the transferee and then sold by the transferee to a person who is not an associated person of the transferee without the home having been used or occupied for any purpose (other than as a display home) before the completion of that sale, or

- (b) the land concerned has been subdivided by the transferee for the purpose of its use for new home construction and then sold by the transferee after the issue of a subdivision certificate (as referred to in the Environmental Planning and Assessment Act 1979, section 6.4) for the subdivision, or
  - (c) the land has been used by the transferee or a related body corporate, after completion of the transfer, wholly or predominantly for commercial or industrial purposes.
- (2) The amount of the refund to which a transferee is entitled under this section is the amount that is determined in accordance with an order made by the Treasurer for the purposes of this section and published in the Gazette. The amount of the refund may be the full amount of duty paid or a lesser amount (as determined in accordance with the order).
- (3) The Chief Commissioner may approve a person as an exempt transferee for a particular transfer or class of transfers if the Chief Commissioner is of the opinion that the person is likely to become entitled under this section to a refund of the full amount of surcharge purchaser duty chargeable on a transfer to which the approval applies.
- (4) No surcharge purchaser duty is chargeable on a transfer of residential-related property if the transferee under the transfer is approved as an exempt transferee for the transfer at the time liability for duty would otherwise have arisen.
- (5) The approval of a person as an exempt transferee is subject to the following provisions —
- (a) an approval may be given subject to conditions and the approval operates subject to any such conditions,
  - (b) the conditions of an approval may be varied by the Chief Commissioner at any time by notice to the person,
  - (c) an approval remains in force until it is revoked and can be revoked by the Chief Commissioner at any time by notice to the person,
  - (d) the revocation of an approval can be backdated to extend to a transfer in respect of which liability for surcharge purchaser duty would (but for the approval) have arisen before the revocation is notified (an exempted transfer),
  - (e) if the revocation of an approval is backdated to extend to an exempted transfer, surcharge purchaser duty is payable and is to be assessed or reassessed as if the approval had never applied to the transfer and as if liability for duty arose when revocation of the approval was notified.
- (6) Surcharge purchaser duty may be refunded under this section only if an application for the refund is made —
- (a) within 12 months after the entitling event, and
  - (b) no later than 10 years after completion of the transfer of the residential-related property to the Australian corporation.

(6A) For the purposes of the Taxation Administration Act 1996, section 9(3)(c), a reassessment under this section is authorised to be made more than 5 years after the initial assessment.

(7) This section does not apply to a transfer of residential-related property that is a surcharge duty transaction referred to in section 104L (1) (b) except an agreement for the sale or transfer of residential-related property.

(8) In this section —

**Australian corporation** means a corporation that is incorporated or taken to be incorporated under the Corporations Act 2001 of the Commonwealth.

**entitling event** means —

- (a) for a refund under subsection (1)(a) — the completion of the sale of the new home, or
- (b) for a refund under subsection (1)(b) — the issue of the subdivision certificate, or

- (c) for a refund under subsection (1)(c) — the start of the use of the land wholly or predominantly for commercial or industrial purposes.

**new home** has the same meaning as in the First Home Owner Grant and Shared Equity Act 2000.

### **163B Exemption—break-up of marriages and other relationships**

- (1) An acquisition by a person of an interest in a landholder is an exempt acquisition —
  - (a) if the interest was acquired by the parties to a marriage that is dissolved or annulled, or in the opinion of the Chief Commissioner has broken down irretrievably, or by either of them, or by a child or children of either of them or a trustee of such a child or children, as a result of a transfer made in accordance with —
    - (i) a financial agreement made under section 90B, 90C or 90D of the Family Law Act 1975 of the Commonwealth that, under that Act, is binding on the parties to the agreement, or
    - (ii) an order of a court made under that Act, or
    - (iii) an agreement that the Chief Commissioner is satisfied has been made for the purpose of dividing matrimonial property as a consequence of the dissolution, annulment or breakdown of the marriage, or
  - (b) if the interest was acquired by the parties to a de facto relationship that has, in the opinion of the Chief Commissioner, broken down irretrievably, or by either of them, or by a child or children of either of them or a trustee of such a child or children, as a result of a transfer made in accordance with —
    - (i) a financial agreement made under section 90UB, 90UC or 90UD of the Family Law Act 1975 of the Commonwealth that, under that Act, is binding on the parties to the agreement, or
    - (ii) an order of a court made under that Act, or
    - (iii) an agreement that the Chief Commissioner is satisfied has been made for the purpose of dividing relationship property as a consequence of the breakdown of the relationship, or
  - (c) if the interest was acquired by the parties to a domestic relationship that has, in the opinion of the Chief Commissioner, been terminated, or by either of them, or by a child or children of either of them or a trustee of such a child or children, as a result of a transfer made in accordance with —
    - (i) an order of a court made under the Property (Relationships) Act 1984, or
    - (ii) a termination agreement within the meaning of section 44 of the Property (Relationships) Act 1984 that has been certified in accordance with section 47 of that Act, or

#### **Note.**

Domestic relationship (defined in the Dictionary) has the same meaning as in the Property (Relationships) Act 1984.

- (d) to the extent that —
  - (i) for purposes of or ancillary to the acquisition of an interest referred to in paragraph (a), (b) or (c), the acquisition consists of the transfer of a share that is matrimonial property or relationship property to a person not a party to the relevant marriage or relationship, in order to comply with a requirement of or prescribed under the Corporations Act 2001 of the Commonwealth, or
  - (ii) the acquisition consists of a declaration of trust by the transferee of a share transferred as referred to in subparagraph (i) for the benefit of a party to the marriage or relationship.
- (2) If —

- (a) duty was paid on the acquisition of matrimonial property by the parties to a marriage or by either of them, or by a child or children of either of them or a trustee of such a child or children, and
  - (b) the interest acquired was acquired as a result of a transfer made in accordance with an agreement or order referred to in subsection (1) (a), and
  - (c) the marriage has been dissolved or annulled or has broken down irretrievably,
- the person who paid the duty is entitled to a refund of it.
- (3) If —
- (a) duty was paid on the acquisition of relationship property by the parties to a de facto relationship or by either of them, or by a child or children of either of them or a trustee of such a child or children, and
  - (b) the interest acquired was acquired as a result of a transfer made in accordance with an agreement or order referred to in subsection (1) (b), and
  - (c) the de facto relationship has broken down,
- the person who paid the duty is entitled to a refund of it.
- (4) If —
- (a) duty was paid on the acquisition of relationship property by the parties to a domestic relationship or by either of them, or by a child or children of either of them or a trustee of such a child or children, and
  - (b) the interest acquired was acquired as a result of a transfer made in accordance with an order or agreement referred to in subsection (1) (c), and
  - (c) the domestic relationship has been terminated,
- the person who paid the duty is entitled to a refund of it.
- (5) A party to a marriage, de facto relationship or domestic relationship may provide a declaration, in an approved form, to the Chief Commissioner to the effect that —
- (a) in the case of a marriage —
    - (i) the party intends to apply for a dissolution or an annulment of the marriage, or
    - (ii) the parties to the marriage have separated, and there is no reasonable likelihood of cohabitation being resumed, or
  - (b) in the case of a de facto relationship or domestic relationship, the relationship has broken down or been terminated.
- (6) The Chief Commissioner is required to have regard to any such declaration in exercising his or her functions under this section.
- (7) Subsection (6) does not limit the functions of the Chief Commissioner under section 72 of the Taxation Administration Act 1996.
- (7A) This section applies in respect of vested bankruptcy property (within the meaning of the Family Law Act 1975 of the Commonwealth) of a party to a marriage or de facto relationship in the same way as it applies to matrimonial property or relationship property.
- (8) In this section —
- marriage** includes a void marriage.
- matrimonial property** means property in relation to the parties to a marriage or of either of them (within the meaning of the Family Law Act 1975 of the Commonwealth), including any property treated as property in relation to the parties or of either of them as a result of an order made under that Act.

**party to a marriage** includes a person who was a party to a marriage that has been dissolved or annulled, in Australia or elsewhere.

**relationship property—**

- (a) in relation to a de facto relationship, means property in relation to the parties to the de facto relationship or of either of them (within the meaning of the Family Law Act 1975 of the Commonwealth), including any property treated as property in relation to the parties or of either of them as a result of an order made under that Act, or
- (b) in relation to a domestic relationship, means property of the parties to the relationship or of either of them.

## **259 What insurance is exempt from duty?**

(1) The following insurances are exempt from duty under this Chapter —

- (a) insurance covering only property of the Crown in right of New South Wales (including a statutory body representing the Crown in right of New South Wales),
- (b) insurance effected by a separate policy in a distinct sum against loss by fire on the tools, implements of work or labour used by any working mechanic, artificer, handcrafter or labourer,
- (c) insurance taken out by or on behalf of a non-profit organisation having as one of its objects a charitable, benevolent, philanthropic or patriotic purpose,
- (d) insurance taken out by or on behalf of a society or institution for the time being approved for the purposes of this paragraph by the Chief Commissioner whose resources are, in accordance with its rules or objects, used wholly or predominantly for —
  - (i) the relief of poverty, or
  - (ii) the promotion of education, or
  - (iii) any purpose directly or indirectly connected with defence or the amelioration of the condition of past or present members of the naval, military or air forces of the Commonwealth or their dependants or any other patriotic object, or
  - (iv) such other purpose as, in the opinion of the Chief Commissioner, warrants the society or institution being taken to be a charitable society or institution,
- (e) insurance covering mortgages or pools of mortgages acquired for the purpose of issuing mortgage-backed securities,
- (f) insurance effected by a contract of insurance issued by a private health insurer, within the meaning of the Private Health Insurance Act 2007 of the Commonwealth, that covers the provision of —
  - (i) hospital benefits or medical benefits or both, whether or not other benefits are also provided, or
  - (ii) ambulance services, being services relating to the work of rendering first aid to, and the transport of, sick and injured persons,
- (g) insurance effected under the Workers Compensation Act 1987 or the Workplace Injury Management and Workers Compensation Act 1998,
- (h) insurance effected under the Motor Accidents Act 1988, the Motor Accidents Compensation Act 1999 or the Motor Accident Injuries Act 2017,
  - (i) insurance of —
    - (i) a floating vessel used primarily for commercial purposes, or
    - (ii) goods or merchandise, or the freight of goods or merchandise, carried by land, sea or air, or both,

- (j) redundancy insurance in respect of a housing loan where the sum insured does not exceed \$124,000,
  - (k) reinsurance (being a contract or contracts between two parties by which one party indemnifies the other against liability or payment under a contract or contracts of insurance or reinsurance),
  - (l) an annuity —
    - (i) issued, created or sold by a life company,
    - (ii) purchased by a person from a life company,
  - (m) policies of life insurance, being group superannuation investment policies owned by the trustee of a superannuation plan for the benefit of more than one member of the superannuation plan,
  - (n) lenders mortgage insurance, being insurance taken out by a lender against loss arising from a default by a mortgagor, if the premium in relation to the insurance is paid on or after 1 July 2017,
  - (o) crop insurance that is effected or renewed on or after 1 January 2018,
  - (p) livestock insurance that is effected or renewed on or after 1 January 2018.
- (2) For the purposes of subsection (1) (l) a contract is an annuity if it satisfies the following requirements —
- (a) the contract provides for the periodic payment of money to the annuitant in fee for life or for a specified term of years as an annual or more frequent entitlement,
  - (b) the periodic payment is a sum certain expressed as a dollar amount, but may be varied according to a predetermined formula,
  - (c) the periodic payments are not derived from the money paid for the contract but are derived solely from the contract and comprise income and not the repayment of capital.

## 267 Exemptions

- (1) **Ownership by devolution** of title Duty under this Chapter is not chargeable on an application to register a motor vehicle made by a person who is beneficially entitled to the vehicle following the death of the person in whose name the vehicle was registered in New South Wales.
- (2) **Charities** Duty under this Chapter is not chargeable on an application to register a motor vehicle if the applicant is a non-profit organisation having as one of its objects a charitable, benevolent, philanthropic or patriotic purpose.
- (3) **Local Land Services** Duty under this Chapter is not chargeable on an application to register a motor vehicle if the applicant is Local Land Services.
- (4) **Repossessed motor vehicles** Duty under this Chapter is not chargeable on an application to register a motor vehicle if —
  - (a) the applicant is in the business of financing the purchase or use of motor vehicles, and
  - (b) the vehicle was repossessed by, or voluntarily surrendered to, the applicant, and
  - (c) the applicant, in the course of that business, does not dispose of any such vehicles except by public tender or public auction or through a motor dealer licensed under the Motor Dealers and Repairers Act 2013.
- (5) **Ambulances** Duty under this Chapter is not chargeable on an application to register —
  - (a) a motor vehicle that weighs not more than 250kg when unladen and is specially constructed to be used, and while on a road is used, solely for conveying an invalid, or
  - (b) a motor vehicle specially constructed for —

- (i) the work of carrying sick and injured persons, or
- (ii) mines rescue functions in accordance with the Coal Industry Act 2001 and the regulations under that Act,

if the vehicle while on a road is used solely for purposes connected with that work.

**(6) Vehicles transferred by certain court orders — parties to a marriage** Duty under this Chapter is not chargeable in respect of an application to transfer the registration of a motor vehicle registered in the names of the parties to a marriage that has been dissolved or annulled, or is proved to the satisfaction of the Chief Commissioner to have broken down irretrievably, or in the name of either of them to the extent that the vehicle was, at the time the application was made, matrimonial property, if the application was made as a result of or in accordance with —

- (a) a financial agreement made under section 90B, 90C or 90D of the Family Law Act 1975 of the Commonwealth that, under that Act, is binding on the parties to the agreement, or
- (b) an order of a court under that Act, or
- (c) an agreement that the Chief Commissioner is satisfied has been made for the purpose of dividing matrimonial property as a consequence of the dissolution, annulment or breakdown of the marriage.

**(6A) Vehicles transferred by certain court orders — parties to a de facto relationship** Duty under this Chapter is not chargeable in respect of an application to transfer the registration of a motor vehicle registered in the names of the parties to a de facto relationship that is proved to the satisfaction of the Chief Commissioner to have broken down, or in the name of either of them to the extent that the vehicle was, at the time the application was made, relationship property, if the application was made as a result of or in accordance with —

- (a) a financial agreement made under section 90UB, 90UC or 90UD of the Family Law Act 1975 of the Commonwealth that, under that Act, is binding on the parties to the agreement, or
- (b) an order of a court under that Act, or
- (c) an agreement that the Chief Commissioner is satisfied has been made for the purpose of dividing relationship property as a consequence of the breakdown of the relationship.

**(6B) Vehicles transferred from trustee in bankruptcy** Subsections (6) and (6A) apply in respect of vested bankruptcy property (within the meaning of the Family Law Act 1975 of the Commonwealth) of a party to a marriage or de facto relationship in the same way as they apply to matrimonial property or relationship property.

**(7) Vehicles transferred by certain court orders — parties to a domestic relationship** Duty under this Chapter is not chargeable in respect of an application to transfer the registration of a motor vehicle registered in the names of the parties to a domestic relationship or in the name of either of them (but to no other person) to the extent that the vehicle was, at the time the application was made, relationship property, if it is proved to the satisfaction of the Chief Commissioner that —

- (a) the domestic relationship ceases, and
- (b) the application was made for the purposes of or in accordance with an order of a court under the Property (Relationships) Act 1984.

**(7A) Vehicles purchased by war veterans** Duty under this Chapter is not chargeable in respect of an application to register a motor vehicle in the name of a veteran who is —

- (a) eligible for 70% or more of the general rate of pension specified in section 22 (3) of the Commonwealth Veterans' Entitlements Act 1986, or
- (b) eligible for the rate of pension determined in accordance with section 22 (4) of that Act, or
- (c) eligible for the rate of pension determined in accordance with section 23 of that Act, or

(d) eligible for the rate of pension under section 24 of that Act.

**Note.**

The rates of pension referred to in subsection (7A) (b), (c) and (d) are known, respectively, as the extreme disablement adjustment rate of pension, the intermediate rate of pension and the special rate of pension for total and permanent incapacity.

(7AA) Duty under this Chapter is not chargeable in respect of an application to register a motor vehicle in the name of a member or former member (within the meaning of the Military Rehabilitation and Compensation Act 2004 of the Commonwealth) who suffers from an impairment assessed under that Act to constitute at least 50 impairment points, and who is eligible for, in receipt of, or has at any time received compensation or a special rate disability pension under that Act.

(7B) **Conditional registration** Duty under this Chapter is not chargeable in respect of an application to register a motor vehicle if the motor vehicle is to be registered conditionally under the statutory rules under the Road Transport Act 2013.

(8) **Equity** Duty under this Chapter is not chargeable in respect of an application to register a motor vehicle if the Chief Commissioner considers it would not be just and reasonable to require payment of the duty.

(9) **Evidence of exemption — break-up of relationship** A party to a marriage, de facto relationship or domestic relationship may provide a declaration, in the approved form, to the Chief Commissioner to the effect that —

(a) in the case of a marriage —

- (i) the party intends to apply for a dissolution or an annulment of the marriage, or
- (ii) the parties to the marriage have separated, and there is no reasonable likelihood of cohabitation being resumed, or

(b) in the case of a de facto relationship or domestic relationship, the relationship has broken down or been terminated.

The Chief Commissioner is required to have regard to any such declaration in exercising his or her functions under subsections (6)–(7).

(10) **Power to require other evidence of exemption** Subsection (9) does not limit the functions of the Chief Commissioner under section 72 of the Taxation Administration Act 1996.

(11) In this section —

**marriage** includes a void marriage.

**matrimonial property** means property in relation to the parties to a marriage or of either of them, within the meaning of the Family Law Act 1975 of the Commonwealth, including property treated as property in relation to the parties or of either of them as a result of an order made under that Act.

**party to a marriage** includes a person who was a party to a marriage that has been dissolved or annulled, in Australia or elsewhere.

**relationship property** —

(a) in relation to a de facto relationship, means property in relation to the parties to the de facto relationship or of either of them, within the meaning of the Family Law Act 1975 of the Commonwealth, including property treated as property in relation to the parties or of either of them as a result of an order made under that Act, or

(b) in relation to a domestic relationship, means property of the parties to the relationship or of either of them.

## 274 Transfer of certain business property between family members

(1) Duty under this Act is not chargeable in relation to a transfer of land used for primary production, together with other property that is an integral part of the business of primary production, if the Chief Commissioner is satisfied of all the matters specified in subsections (2)–(4).

(2) Firstly, the Chief Commissioner must be satisfied that the transferor, or the person directing the transferor, is a member of the family of —

- (a) the transferee, or
- (b) the person directing the transferee.

(3) Secondly, the Chief Commissioner must be satisfied that the land was, immediately before the transfer or the date of first execution of the instrument of transfer, land used for primary production in connection with a business carried on, whether alone or with others, by —

- (a) the transferee, or a member of the family of the transferee, or
- (b) the person directing the transferee, or a member of the family of the person directing the transferee.

(4) Thirdly, the Chief Commissioner must be satisfied that the business will continue to be carried on, whether alone or with others, by —

- (a) the transferee, or
- (b) the person directing the transferee.

(4A) For the purposes of this section, the person directing a transferor or transferee is —

(a) for a transferor or transferee acting in the capacity of —

- (i) executor of a deceased estate — the deceased person, or
- (ii) trustee of a bare trust — a person who is a named beneficiary of the trust, or
- (iii) trustee of a self managed superannuation fund — a person who is a member of the fund, or

(b) for a transferor or transferee acting in the capacity of trustee of a discretionary trust — a person or persons who are entitled, as takers in default of appointment, to not less than a 25% interest in the capital of the trust, being an entitlement —

- (i) for a transferor — that existed for at least 3 years before the date of the transfer or that existed from the date of establishment of the trust, or

(ii) for a transferee — that exists for at least 3 years after the date of the transfer, or

(c) for a transferor or transferee acting in the capacity of trustee of a private unit trust scheme — a unit holder or unit holders in the unit trust scheme who hold the units beneficially and are entitled, as unit holders, to not less than 25% of the assets of the unit trust scheme on winding up, being an entitlement —

- (i) for a transferor — that existed for at least 3 years before the date of the transfer or that existed from the date of establishment of the trust, or
- (ii) for a transferee — that exists for at least 3 years after the date of the transfer, or

(d) for a transferor or transferee that is a proprietary limited company — a shareholder or shareholders in the company who —

- (i) are beneficially entitled to the shares in the company, and
- (ii) are entitled to vote at meetings of the company, and
- (iii) are entitled as shareholders to not less than 25% of the assets of the company on winding up, being an entitlement —

(A) for a transferor — that existed for at least 3 years before the date of the transfer or that existed from the date of incorporation of the company, or

(B) for a transferee — that exists for at least 3 years after the date of the transfer.

(4B) For a transfer involving a proprietary limited company or unit trust scheme (a subsidiary entity) that is owned by another proprietary limited company or unit trust scheme (the parent entity), a person is taken to be a person directing the subsidiary entity if the Chief Commissioner is satisfied that, had the parent entity been the transferor or transferee, as the case requires, the person would be the person directing the parent entity under subsection (4A).

(5) Except as provided by subsections (4A) and (4B), there are no other cases in which a person is considered to be a person directing a transferor or transferee.

(5AA) A reference in this section to a business carried on by a person includes a reference to a business carried on by a company, or under a trust, that is controlled by the person.

(5A) (Repealed)

(6) In this section —

**member**, of a transferee's family, means each of the following persons —

- (a) the transferee's spouse,
- (b) a parent of the transferee or the transferee's spouse,
- (c) a grandparent of the transferee or the transferee's spouse,
- (d) a brother, sister, nephew, niece, uncle or aunt of the transferee or the transferee's spouse,
- (e) a child or grandchild of the transferee or the transferee's spouse,
- (f) the spouse of anyone mentioned in paragraph (b), (c), (d) or (e).

**spouse** includes a former spouse, a de facto partner and a former de facto partner.

**transfer of land** includes the following —

- (a) an agreement for the sale or transfer of the land,
- (b) a lease of the land,
- (c) a transfer or assignment of a lease or permit in relation to the land.

**Note —**

The Dictionary also defines transfer to include an assignment and an exchange.

**transferee** includes lessee and assignee.

**transferor** includes lessor and assignor.

**Note.**

**Land used for primary production** is defined in the Dictionary.

### **317 Review of amendments by State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022**

(1) The Minister must review the amendments made to this Act by the State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022 to determine —

- (a) whether the policy objectives of the amendments remain valid, and
- (b) whether the terms of the amendments remain appropriate for securing the policy objectives.

(2) The review must be undertaken as soon as possible after the period of 2 years from the date of assent to the State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022.

(3) The Minister must table a report on the outcome of the review in each House of Parliament within 12 months after the end of the period of 2 years.

Part 53 Provisions consequent on State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022

## 145 Duty on changes in beneficial ownership

Section 8(1)(b)(ix) does not apply to a transaction that occurs on or after the commencement of the subparagraph if the transaction occurs in accordance with an agreement or arrangement entered into before the commencement.

### Dictionary

**Chief Commissioner** means the Chief Commissioner of State Revenue under the Taxation Administration Act 1996.

**declared stock exchange** means a stock exchange declared for the purposes of this definition by an order, published in the Gazette and in force, of the Minister, or of the Chief Commissioner as the Minister's delegate.

### Note —

Power to make an order includes power to amend or repeal the order — see the Interpretation Act 1987, section 43(2).

**listed company** means a company whose shares are quoted on —

- (a) the Australian Securities Exchange, or
- (b) the London Exchange, or
- (c) the New York Exchange, or
- (d) the New Zealand Exchange, or
- (e) a stock exchange that is a member of the World Federation of Exchanges, or
- (f) a declared stock exchange.

**listed trust** means a unit trust scheme whose units are quoted on —

- (a) the Australian Securities Exchange, or
- (b) the London Exchange, or
- (c) the New York Exchange, or
- (d) the New Zealand Exchange, or
- (e) a stock exchange that is a member of the World Federation of Exchanges, or
- (f) a declared stock exchange.

**livestock insurance** means insurance covering —

- (a) loss due to the death of, or physical damage to, any animal, whether domesticated or wild,  
or
- (b) loss due to the death of, or physical damage to, any genetic material of any such animal,  
or
- (c) loss due to the theft of any such animal or genetic material,

but does not include insurance covering loss in relation to a pet.

**private company** means —

- (a) a company that is not limited by shares, or
- (b) a company that is limited by shares and whose shares are not quoted on —
  - (i) the Australian Securities Exchange, or
  - (ii) the London Exchange, or
  - (iii) the New York Exchange, or
  - (iv) the New Zealand Exchange, or
- (v) a stock exchange that is a member of the World Federation of Exchanges, or
- (vi) a declared stock exchange.

## 5.3 Appendix C – Taxation Administration Act 1996 - sections referenced

### 7 Purpose of Act and relationship with other taxation laws

- (1) The purpose of this Act is to make general provision with respect to the administration and enforcement of the other taxation laws.
- (2) The other taxation laws include provisions with respect to —
  - (a) the imposition of tax and its payment, and
  - (b) exceptions to and exemptions from liability to the tax, and
  - (c) entitlements to refunds.
- (3) This Act includes general provisions with respect to —
  - (a) assessment and reassessment of tax liability, and
  - (b) obtaining refunds of tax, and
  - (c) imposition of interest and penalty tax, and
  - (d) approval of special tax return arrangements, and
  - (e) collection of tax, and
  - (f) record keeping obligations of taxpayers and general offences, and
  - (g) tax officers and their investigative powers and secrecy obligations, and
  - (h) objections and reviews, and
    - (h1) tax avoidance schemes, and
    - (h2) the prohibition on the use of confidential tax information, and
  - (i) miscellaneous matters such as service of documents, corporate criminal liability and evidence.

### 27 Amount of penalty tax

- (1) The amount of penalty payable for a tax default is, subject to this Division —
  - (a) 25% of the amount of tax unpaid, or
  - (b) if the taxpayer is a significant global entity within the meaning of the Income Tax Assessment Act 1997 of the Commonwealth — 50% of the amount of tax unpaid.

(2) The Chief Commissioner may increase the amount of penalty tax payable in respect of a tax default to 75% of the amount of tax unpaid if the Chief Commissioner is satisfied that the tax default was caused wholly or partly by the intentional disregard by the taxpayer (or a person acting on behalf of the taxpayer) of a taxation law.

(3) The Chief Commissioner may determine that no penalty tax is payable in respect of a tax default if the Chief Commissioner is satisfied that —

- (a) the taxpayer (or a person acting on behalf of the taxpayer) took reasonable care to comply with the taxation law, or
- (b) the tax default occurred solely because of circumstances beyond the taxpayer's control (or if a person acted on behalf of the taxpayer, because of circumstances beyond either the person's or the taxpayer's control) but not amounting to financial incapacity.

### 30 Increase in penalty tax for concealment

(1) The amount of penalty tax determined under section 27 is to be increased by 20% if, after the Chief Commissioner has informed the taxpayer that an investigation is to be carried out and before the investigation is completed, the taxpayer took steps to prevent or hinder the Chief Commissioner from becoming aware of the nature and extent of the tax default in whole or part.

(2) For the purposes of this section, a taxpayer takes steps to prevent or hinder the Chief Commissioner if the taxpayer —

- (a) deliberately damages or destroys records required to be kept under the taxation law to which the investigation relates, or
- (b) refuses or fails (without reasonable excuse) to comply with a requirement made by the Chief Commissioner under Division 2 of Part 9 for the purposes of determining the taxpayer's tax liability, or
- (c) hinders or obstructs an authorised officer exercising functions under that Division for that purpose.

#### Note.

This Table contains a summary of the provisions of sections 27–30.

Penalty category	Prime rate %	Voluntary disclosure		Concealment or hindrance in establishing underpayment %
		Before investigation %	During investigation %	
Failure to take reasonable care but no intentional disregard of the law	25	5	20	30
Failure to take reasonable care, but no intentional disregard of the law, by significant global entity	50	10	40	60

### 33A Penalty tax relief

- (1) The Chief Commissioner may, in a way the Chief Commissioner thinks fit, publish guidelines on the circumstances in which, or the grounds on which, the Chief Commissioner may determine that no penalty tax is payable in relation to a tax default (penalty tax relief guidelines).
- (2) If the Chief Commissioner publishes penalty tax relief guidelines, the Chief Commissioner may determine that no penalty tax is payable in relation to a tax default after considering the guidelines.
- (3) This section does not affect section 27(3).

### 83B Permitted disclosures— investigation and law enforcement

- (1) The Chief Commissioner may disclose information obtained under or in relation to the administration of a taxation law to an investigative or law enforcement agency to assist the agency to exercise its investigative, complaint handling or law enforcement functions.

- (2) In this section —

**investigative or law enforcement agency** means a government agency, or a government official, of a State, a Territory or the Commonwealth that has investigative, complaint handling or law enforcement functions.

**investigative, complaint handling or law enforcement functions** include functions that may result in the agency taking or instituting disciplinary, criminal or other formal action or proceedings against a person or body under investigation.

### 83C Permitted disclosures— tax clearance checks

- (1) The Chief Commissioner may disclose information about a taxpayer, obtained under or in relation to the administration of a taxation law, to a NSW public agency in connection with the procurement by the NSW public agency of goods or services from the taxpayer.

- (2) In particular, the Chief Commissioner may disclose the following information about a taxpayer, as current at the time of disclosure, to assist the NSW public agency in assessing whether the taxpayer is an appropriate person from whom the NSW public agency should procure goods or services —

- (a) information about a return that is required to be lodged by the taxpayer with the Chief Commissioner but has not been lodged,
- (b) information about the taxpayer's liability to pay tax under a taxation law,
- (c) without limiting paragraph (a) or (b), information about a return, or tax liability, that is the subject of a special arrangement under section 37,
- (d) the following information for the previous 5 years —
  - (i) the amount of penalty tax imposed on the taxpayer,
  - (ii) the amount of tax payable by the taxpayer and written off by the Chief Commissioner.

- (3) For the purposes of this section —

- (a) information about, or in relation to, a taxpayer includes information about, or in relation to, an associated person of the taxpayer, and

(b) a person is an **associated person** of a taxpayer if the person is an associated person of the taxpayer for the purposes of the Duties Act 1997.

**Note —**

See the Duties Act 1997, Dictionary, clause 2.

(4) In this section —

**NSW public agency** means the following —

- (a) a government sector agency within the meaning of the Government Sector Employment Act 2013,
- (b) a NSW Government agency,
- (c) another public authority that is constituted by or under an Act or that exercises public functions, other than a State owned corporation,
- (d) a State owned corporation prescribed by the regulations.

## 106E Object of Part

The object of this Part is to deter schemes to avoid tax liability.

## 106F What is a tax avoidance scheme?

- (1) For the purposes of this Part, a **tax avoidance scheme** is a scheme that a person, whether alone or with others, enters into, makes or carries out for the sole or dominant purpose of enabling a tax liability to be avoided.
- (2) It does not matter if the scheme is entered into, made or carried out wholly or partly outside New South Wales.
- (3) In determining the sole or dominant purpose for which a scheme is entered into, made or carried out, any purpose related to avoiding a liability for foreign tax must be disregarded.
- (3A) For Division 3, a scheme that results in, or may reasonably result in, the constitution of a group under the Payroll Tax Act 2007, section 74A is taken to be a tax avoidance scheme.

**Note —**

Under the Payroll Tax Act 2007, section 74(4), the Chief Commissioner may determine that an entity and a former entity that are influenced by a third party do not constitute a group if the Chief Commissioner is satisfied the influence of the third party on the entity and a former entity is not, or was not, intended to avoid tax.

(4) In this section —

**foreign tax** means a duty, tax or other impost imposed under a law of another State, a Territory, the Commonwealth or a jurisdiction outside Australia.

## 106G Matters relevant to whether scheme is tax avoidance scheme

The following matters must be taken into account in determining whether a scheme is a tax avoidance scheme —

- (a) the way in which the scheme was entered into, made or carried out,
- (b) the form and substance of the scheme, including —
  - (i) the legal rights and obligations involved in the scheme, and
  - (ii) the economic and commercial substance of the scheme,

- (c) when the scheme was entered into or made and the length of the period during which the scheme was carried out,
- (d) the purpose of a taxation law, or of a provision of a taxation law, whether or not the purpose is expressly stated,
- (e) the effect that a taxation law would have in relation to the scheme apart from this Part,
- (f) any change in a person's financial position, or other circumstances, that has resulted, will result, or may reasonably be expected to result, from the scheme,
- (g) the nature of any connection, whether of a business, family or other nature, between the person whose tax liability is avoided as a result of the scheme and another person whose financial position or other circumstances have changed, will change, or may reasonably be expected to change, as a result of the scheme,
- (h) the circumstances surrounding the scheme.

## 106H Meaning of “scheme”

(1) In this Part, a **scheme** means —

- (a) a trust, contract, agreement, arrangement, understanding, promise or undertaking, including all steps and transactions by which it is carried into effect —
  - (i) whether entered into or made orally or in writing, and
  - (ii) whether express or implied, and
  - (iii) whether or not it is, or is intended to be, enforceable by legal proceedings, or
- (b) a scheme, plan or proposal, whether implemented or not, or
- (c) an action, a course of action or a course of conduct.

(2) A scheme may be a unilateral scheme.

(3) This Part applies in relation to a part of a scheme in the same way as it applies to a scheme and a reference in this Part to a scheme includes a reference to a part of a scheme.

## 106I Meaning of “avoid”

In this Part —

- (a) a reference to avoiding tax, or payment of tax, includes a reference to postponing payment of tax, and
- (b) a reference to avoiding tax liability includes a reference to reducing or postponing tax liability.

## 106J Payment of tax avoided as a result of tax avoidance scheme

(1) A person is liable to pay the amount of tax avoided by the person as a result of a tax avoidance scheme.

(2) For the purposes of this Part, the amount of tax avoided by a person as a result of a tax avoidance scheme is the amount of tax that, if the tax avoidance scheme had not been entered into, made or carried out —

- (a) would have been payable by the person, or
- (b) it is reasonable to expect would have been payable by the person, assuming that a reasonable alternative to entering into or making the scheme had been adopted, being an

alternative that would have achieved the same economic or commercial result as the scheme, other than the result of avoiding tax.

(3) The Chief Commissioner may make an assessment, or reassessment, of tax liability on the basis of the person's liability under this Part to pay an amount of tax avoided by the person.

### **106K When does a liability to pay avoided tax arise?**

(1) A liability to pay an amount of tax avoided by a person as a result of a tax avoidance scheme is taken to arise on the date the amount of tax avoided would have been payable if the tax avoidance scheme had not been entered into or made.

(2) Accordingly, a tax default is taken to have occurred on the date the amount of tax avoided would have been payable if the tax avoidance scheme had not been entered into or made.

#### **Note—**

This means that interest and penalty tax may be charged in addition to the amount of tax avoided.

(3) This section applies only if the Chief Commissioner issues a notice of assessment, or reassessment, of tax liability on the basis that a scheme is a tax avoidance scheme.

### **106L Reasons for decision to be given**

A notice of assessment, or reassessment, of tax liability that is issued by the Chief Commissioner on the basis that a scheme is a tax avoidance scheme must be accompanied by a statement of the Chief Commissioner's reasons for making the assessment or reassessment.

### **106M Innocent participants**

(1) A person is liable under this Part to pay an amount of tax avoided by the person as a result of a tax avoidance scheme whether or not the person entered into, made or carried out the tax avoidance scheme.

(2) However, a person is not liable to pay an amount of tax avoided by the person as a result of a tax avoidance scheme if the Chief Commissioner is satisfied that the person did not know, and could not reasonably be expected to have known, that the scheme was a tax avoidance scheme.

### **106N Promotion of tax avoidance schemes prohibited**

(1) A person must not engage in conduct that results in a person being a promoter of a tax avoidance scheme.

(2) A person is a **promoter** of a tax avoidance scheme if the person markets the scheme or otherwise encourages the growth of the scheme or interest in it.

(3) However, a person is not a **promoter** of a tax avoidance scheme merely because the person —

- (a) provides advice about the scheme, or
- (b) distributes information or material about the scheme prepared by another person.

### **106O Civil penalty for promotion of tax avoidance scheme**

(1) The Supreme Court may, on application by the Chief Commissioner, make an order requiring a person who contravenes section 106N to pay the State a civil penalty not exceeding —

- (a) 10,090 penalty units for an individual, or

- (b) 50,450 penalty units for a corporation.
- (2) In deciding what penalty is appropriate for a contravention of section 106N by a person (referred to in subsection (4) as a **promoter**), the Supreme Court may have regard to all matters it considers relevant, including the following —
- (a) the amount of the consideration received or receivable, directly or indirectly, by the person or associated persons, or both, in relation to the scheme,
  - (b) the deterrent effect the penalty may have,
  - (c) the amount of loss or damage incurred by a person who enters into, makes or carries out the tax avoidance scheme,
  - (d) the nature and extent of the contravention,
  - (e) the circumstances in which the contravention took place, including the deliberateness of the person's conduct and whether there was an honest and reasonable mistake of law,
  - (f) the period over which the conduct extended,
  - (g) whether the person took steps to avoid the contravention,
  - (h) whether the person has previously been found by the Court to have engaged in the same or similar conduct,
  - (i) the degree of the person's cooperation with the Chief Commissioner.
- (3) The debt arising from an order to pay a civil penalty is taken to be a judgment debt.
- (4) For the purposes of this section, a person is an **associated person** of a promoter of a tax avoidance scheme if the person is an associated person of the promoter for the purposes of the Duties Act 1997.

**Note —**

See the Duties Act 1997, Dictionary, clause 2.

## **106P When civil penalty not available**

- (1) The Supreme Court must not order a person (the **relevant person**) to pay a civil penalty if the person satisfies the Court —
- (a) that the conduct in relation to which the proceedings were instituted was due to a reasonable mistake of fact, or
  - (b) that —
    - (i) the conduct in relation to which the proceedings were instituted was due to the act or default of another person, to an accident or to some other cause beyond the relevant person's control, and
    - (ii) the relevant person took reasonable precautions and exercised due diligence to avoid the conduct.
- (2) The other person referred to in paragraph (1)(b) does not include someone who was an employee or agent of the relevant person when the alleged conduct occurred.
- (3) The Chief Commissioner must not make an application under section 106O for conduct referred to in section 106N in relation to a person's involvement in a tax avoidance scheme if —
- (a) the scheme is based on treating a taxation law as applying in a particular way, and
  - (b) that way agrees with —
    - (i) advice given to the person or the person's agent by or on behalf of the Chief Commissioner, or

(ii) a statement in a publication approved in writing by the Chief Commissioner.

(4) The Chief Commissioner must not make an application under section 106O in relation to a person's involvement in a tax avoidance scheme more than 6 years after the person last engaged in conduct that resulted in the person or another person being a promoter of the scheme.

## **106Q Injunctions**

The Supreme Court may, on application by the Chief Commissioner in relation to a person who has engaged, is engaging or is proposing to engage in conduct referred to in section 106N, grant an injunction —

- (a) restraining the person from engaging in the conduct, and
- (b) if, in the Court's opinion, it is desirable to do so — requiring the person to do something.

## **106R Voluntary undertakings**

(1) The Chief Commissioner may accept a written undertaking given by a person for the purposes of this section in connection with furthering the object of this Part.

(2) The person may withdraw or vary the undertaking at any time, but only with the consent of the Chief Commissioner.

(3) If the Chief Commissioner considers that the person who gave the undertaking has breached any of its terms, the Chief Commissioner may apply to the Supreme Court for an order under subsection (4).

(4) If the Court is satisfied that the person has breached a term of the undertaking, the Court may make one or both of the following orders —

- (a) an order directing the person to comply with the term of the undertaking,
- (b) another order that the Court considers appropriate.

(5) The Chief Commissioner may publish a written undertaking given by a person for the purposes of this section in a way the Chief Commissioner thinks fit.

## **116 Service of documents by Chief Commissioner**

(1) A document authorised or required to be served on a person by the Chief Commissioner for the purposes of a taxation law may be served on the person —

- (a) personally, or
- (b) by leaving it at the last address of the person known to the Chief Commissioner (including, in the case of a corporation, the registered address or a business address of the corporation), or
- (c) by post addressed to the person at the last address of the person known to the Chief Commissioner (including, in the case of a corporation, the registered address or a business address of the corporation), or
- (d) by delivering the document, addressed to the person, to the facilities of a document exchange specified by the person for the service of documents of that kind, or
  - (d1) in an approved electronic manner, or
  - (d2) by any other method authorised by the regulations for the service of documents of that kind, or
- (e) by any means provided for the service of the document by another Act or law.

(2) If a person (**the agent**) has actual or apparent authority to accept service of a document on behalf of another, the Chief Commissioner may, for the purposes of a taxation law, serve the document on the agent as if the agent were that other person.

(3) Service of a document on a member of a partnership, or on a member of the committee of management of an unincorporated association or other body of persons, is taken, for the purposes of a taxation law, to constitute service of the document on each member of the partnership, or on each member of the association or other body of persons.

(4) For the purposes of this section, an **approved electronic manner** of serving a document on a person means —

- (a) sending the document to a telephone number or email address provided by the person for the purposes of the service of the document, or
- (b) providing the person access to the document via an online notification system if the person consents to the use of the system, or
- (c) another electronic manner prescribed by the regulations.

(5) A person may, orally or in writing, provide an email address or telephone number, or consent to the use of an online notification system, for the purpose of being served —

- (a) a particular document, or
- (b) a particular kind of document, or
- (c) documents for a particular period, or
- (d) all documents.

(6) This section does not authorise a document to be served on a person orally.

(7) In this section —

**online notification system** means an online system approved by the Chief Commissioner for the purpose of enabling a person to securely access a document by means of a website, mobile telephone or mobile device or by other electronic means.

**serve** includes give or send.

## **128 Review of amendments by State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022**

(1) The Minister must review the amendments made to this Act by the State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022 to determine —

- (a) whether the policy objectives of the amendments remain valid, and
- (b) whether the terms of the amendments remain appropriate for securing the policy objectives.

(2) The review must be undertaken as soon as possible after the period of 2 years from the date of assent to the State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022.

(3) The Minister must table a report on the outcome of the review in each House of Parliament within 12 months after the end of the period of 2 years.

## **Part 16 Provisions arising from enactment of State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022**

### **47 Part 10A — tax avoidance schemes**

(1) Part 10A, as inserted by the State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022, applies to a scheme that is —

- (a) entered into or made on or after the commencement of the Part, or

(b) carried out on or after the commencement of the Part, regardless of when it was first entered into or made.

(2) However, Part 10A does not apply to tax avoided by a person as a result of a tax avoidance scheme if, apart from the scheme, the tax liability would have arisen before the commencement of the Part.

(3) A provision of Part 10A that corresponds, or substantially corresponds, to a provision of the duty avoidance provisions extends to a scheme to which the duty avoidance provisions applied immediately before their repeal.

(4) In this clause —

**duty avoidance provisions** means the Duties Act 1997, Chapter 11A.

**scheme** includes part of a scheme.

**tax** does not include duty under the Duties Act 1997.

**tax liability** does not include liability for duty under the Duties Act 1997.

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