

Duties Amendment Bill 2009

NOTES ON CLAUSES

- Clause 1 Short title.
- Clause 2 Provides for the Act to commence on 1 July 2009.
- Clause 3 Defines the *Duties Act 2001* as being the Principal Act.
- Clause 4 Amends section 6(1)(b) of the Principal Act to abolish duty on agreements for sale by deleting subparagraph (i) and inserting a new subparagraph (v) that will impose duty on any other transaction that results in a change of beneficial ownership of dutiable property. The new provision is for anti-avoidance purposes to enable the capture for duty of transactions such as partnership agreements that may effect a change in beneficial ownership of dutiable property.
- Clause 5 Amends section 7(2) of the Principal Act by removing agreements for sale or transfer from the table of dutiable transactions and inserting a new item for any other transaction that results in a change of beneficial ownership of dutiable property. This provision will deem any other transaction that results in a change of beneficial ownership as a transfer of dutiable property.
- Clause 6 Amends section 10 of the Principal Act to substitute a new provision for when the liability to duty arises. The new wording is to be uniform with that of the Victorian *Duties Act 2000* equivalent provision which provides that duty liability arises at the time of the transaction.
- Clause 7 Amends section 16 of the Principal Act to remove the conformity concessions that are no longer required as agreements for sale are no longer dutiable. The new wording is to be uniform with the Victorian *Duties Act 2000* equivalent provision and provides for electronic transactions.
- Clause 8 Amends section 19 of the Principal Act by repealing sub-sections 19(2) and 19(3). Sub-section 19(2) is no longer required as it relates to uncompleted agreements for sale. Sub-section 19(3) is no longer required as it relates to goodwill of a business and goodwill of a business is no longer dutiable property since 2008.

- Clause 9 Amends section 20 of the Principal Act by replacing the definition of unencumbered value to conform with the Victorian equivalent. The new definition also enables the value to be calculated by reference to the date of the agreement for sale rather than the resulting transfer. This means a taxpayers liability is calculated on the date they enter into the agreement for sale. This means that if the value of the property changes significantly between the date of entering into the agreement and the date of settlement and transfer, the taxpayer is not disadvantaged.
- Clause 10 Amends section 22 of the Principal Act by amending the aggregation of dutiable transaction provisions that are designed to ensure that taxpayers do not avoid higher duty rates by splitting larger transactions into a series of smaller transactions. The amended provisions ensure that taxpayers do not enter into a series of agreements for sale to avoid duty.
- Clause 11 Amends section 27 of the Principal Act by amending the wording to ensure that transfers rather than agreements are the liable instruments. This provision provides a concession to taxpayers that enter into an agreement for sale that is subsequently amended so that the taxpayer only pays duty on the property transferred by the amended agreement not what was originally agreed to be transferred.
- Clause 12 Amends the Principal Act by repealing sections 32 and 33. Section 32 was a concession for “off the plan” agreements for sale whereby the purchaser was granted an extension of time of up to 12 months or completion of the agreement. Section 33 provided for the refund of duty paid on cancelled agreements. As this Act abolishes duty on agreements for sale these sections are no longer required.
- Clause 13 Amends the Principal Act by repealing the existing section 34 and inserting the substituted wording. The substituted section 34 removes references to the previously abolished mortgage duty provisions.
- Clause 14 Amends the Principal Act by inserting a new Part 4A to chapter 2. This new part is to contain anti-avoidance provisions for persons acquiring interests in dutiable property by means of a sub-sale of the agreement rather than by transfer of the dutiable property. They are required to prevent leakage of the duty base as a result of the abolition of duty on agreements for sale. These provisions are modelled on the Victorian equivalent part 4A of their *Duties Act 2000*.
- Heading Amends Principal Act by inserting new heading for a new Part 4A. This heading and the new Part 4A of the Principal Act are uniform with the Victorian equivalent.

Clause 36A Amends the Principal Act by inserting a new section 36A of the Principal Act that defines the terms used in part 4A . These definitions are required to define the forms of transactions and types of persons that are subject to the anti-avoidance provisions. These definitions are listed under this Part for the convenience of taxpayers and because these defined terms only apply to this new Part 4A.

Clause 36B Amends the Principal Act by inserting a new section 36B. This clause describes the types of transactions captured by the anti-avoidance provisions in Part 4A. The new section 36B applies duty to a “transfer right” which is a right a third party (defined as a subsequent purchaser) who, for additional consideration (eg payment) obtains from a purchaser in an uncompleted agreement for sale the right to take title to the property on completion. This is more commonly known as a sub-sale of property and because the original purchaser does not necessarily have the title transferred without these provisions the original purchaser who sold their interest in the property through the agreement would avoid duty.

The new section 36B will impose duty on all subsequent transactions that occur on a property that is subject to an uncompleted agreement. The provision defines additional consideration as any consideration paid to either the original purchaser or their associates.

Clause 36C Amends the Principal Act by inserting a new section 36C. The new section 36C charges the final transfer of a property that has been subject to a subsequent transaction (sub-sale) with separate and distinct duty for every subsequent transaction that has occurred. This section charges duty on the original agreement for sale of the property and then the subsequent transactions that may have occurred. The rate of duty charged on the agreement and subsequent transactions is the same rate as applied to a standard transfer of the property as set out in part 3 of chapter 2 of the Principal Act.

This section does not apply duty to transactions whereby a person completes an agreement and takes title without further consideration (payment) as this is not seen as a sub-sale merely the completion of the original transaction from which the original agreement was derived. For example if a person enters into a contract in their own name and completes it in the name of their company, family trust or a relative, no further duty is payable unless that person paid for the right to complete (eg a sub-sale).

- Clause 36D Amends the Principal Act by inserting a new section 36D of the Principal Act. The new section 36D describes how the dutiable value of the original sale agreement and subsequent transactions are calculated. The new section provides that duty is calculated on the original agreement and each subsequent transaction on the greater of the consideration paid or the market value. These provisions mirror the method of calculating the dutiable value contained in section 20 as applied to a normal transfer. The new provisions rely on the market value being the value the property would achieve on the open market. In default of this the Commissioner may refer to the Government Valuation as calculated by section 248 or obtain a valuation under section 247.
- Clause 36E Amends the Principal Act by inserting a new section 36E. The new section 36E provides that duty becomes payable on agreements for sale and subsequent transactions under this Part are payable at the time of transfer of the property. This conforms with the provisions applicable to normal transfers under Chapter 2 of the Principal Act that provide duty is payable at time to transfer. This means that payment only becomes liable at completion of the transaction(s).
- Clause 36F Amends the Principal Act by inserting a new section 36F. This section imposes the liability to pay duty on the purchaser and subsequent purchaser. As the final transfer is the instrument to be stamped with the duty, this section allows a power of recovery, for the final transferee to collect the duty from the other purchasers paid by them for the chain of transactions effected by the transfer and the prior agreements and sub-sales.
- Clause 36G Amends the Principal Act by inserting a new section 36B. This clause enables the application of the exemptions and concessions provided for in the other Parts of Chapter 2 of the Principal Act to the sub-sale transactions captured under this Part. This will prevent inconsistent treatment between the anti-avoidance transactions with a normal transfer that may be subject to a concession or exemption.
- Clause 36H Amends the Principal Act by inserting a new section 36H. The new section 36H defines what is the consideration for a transaction under this part and mirrors the equivalent provision applied to the rest of Chapter 2 of the Principal Act.

- Clause 36l Amends the Principal Act by inserting a new section 36l. The new section 36l empowers the Commissioner to require the transferee of the final transfer that was subject to a sub-sale and these provisions to provide a statutory declaration providing the information needed to calculate the duty payable. This provision is aimed at ensuring that taxpayers comply with these provisions by ensuring they are compelled to declare when a sub-sale occurs. It also provides a statutory compunction for transferees who are aware that a transaction that is not otherwise recorded on the land registry to provide information on the transactions.
- Clause 15 Amends the Principal Act by repealing section 54. Section 54 provided a concession for agreements for sale under the *Homes Act 1935* that duty was not payable on these agreements until transfer. This concession is no longer required as duty will only be payable on transfer.
- Clause 16 Amends section 91 of the Principal Act by substituting the wording provided. Section 91 relates to the anti-avoidance provisions for put and call option agreements. The new amendments in this clause will deem a put and call option agreement to be a transfer rather than an agreement for sale.
- Clause 17 Amends the Principal Act by inserting a new section 259B to the Principal Act. The new section 259B provides for the transitional arrangements for the new amendments in this Bill. This section will retain the obligation to pay duty under the former provisions for matters entered into before commencement. Transactions entered into after the commencement will be subject to the new provisions.