

# TAXATION AND RELATED LEGISLATION (MISCELLANEOUS AMENDMENTS) BILL (NO.2) 2011

## NOTES ON CLAUSES

### Part 1 – Preliminary

Part 1 of the Act contains the short title and commencement provisions.

Clause 1 Short title.

Clause 2 Part 5 commences on 1 July 2012, and Part 7 is taken to have commenced on 25 October 2008. The remaining Parts commence on the day on which the Act receives Royal Assent.

### Part 2 – *Duties Act 2001* Amended

Clause 3 In this Part, the *Duties Act 2001* is referred to as the Principal Act.

Clause 4 Amends section 3 of the Duties Act by inserting definitions of a “mineral tenement” and a “special disability trust”.

Clause 5 Amends paragraph 9(1)(b) to remove a reference to the *Mineral Resources Development Act 1995*, which is no longer necessary after the inclusion of a definition of a mineral tenement in section 3.

Clause 6 Inserts a new section 24 which provides that the Commissioner of State Revenue may disregard the value of goods in determining the dutiable value of property in a transaction that consists of a grant, surrender or transfer of lease of a commercial property and also involves goods, if it would not be just and reasonable in the circumstances to charge duty on the dutiable value of all the dutiable property in the transaction.

The Commissioner may only exercise this discretion if satisfied that the transaction was not structured for the purpose of reducing or avoiding the payment of duty.

Clause 7 Provides that duty is not chargeable on a declaration of trust over property or transfer to the trustee of a special disability trust for the purposes of the trust, if the Commissioner is satisfied that the property is being, or is to be, used as the principal place of residence of the beneficiary of the special disability trust.

Clause 8 Amends subsection 61(1) to clarify that for the purposes of the land-rich private corporations provisions, an interest in a mineral tenement or an interest in a pipeline within the *Gas Pipelines Act 2000* is taken to be an interest in land.

Inserts new subsection (5) clarifying that if a private corporation has an entitlement to or interest in land, anything that is part of the land as a fixture is to be taken into account in determining the extent of the interest, even if the fixture is, or purports to be, the subject of an entitlement or interest separate from the ownership of the rest of the land.

However, a fixture is not to be taken into account under subsection (5) if the Commissioner is satisfied that it would not be just and reasonable to do so in the circumstances.

Inserts new subsection (7) that provides that if a private corporation has an entitlement to or interest in something that is part of land as a fixture, and that entitlement or interest is, or purports to be, separate from the ownership of the rest of the land, the private corporation is to be regarded as having an interest in land for the purposes of the land-rich provisions to the extent of its entitlement to or interest in the fixture.

For the purposes of new subsections (5) and (7), anything that, under the authority (whether direct or indirect) of a mineral tenement, is fixed to land that is the subject of that mineral tenement, and would be part of that land as a fixture if the mineral tenement were a freehold estate in the land, is to be taken to be part of land as a fixture.

Clause 9 Provides a new class of transaction that allows the intergenerational rural transfer exemption to be applied to a transfer of farming land from a company (other than as a trustee) to another company (other than as trustee) of which all the shareholders are relatives of all the shareholders of the first mentioned company.

Amends subparagraph 223(1)(c)(v) so that the transfer may be from a trustee of a trust to a trustee of another trust of which all the beneficiaries are individually named and relatives at the time of the transfer of all those **named** beneficiaries of the first-mentioned trust who are natural persons and of which the named beneficiaries may not be varied other than by the addition of a relative individually **named** in a deed of variation.

Omits subsection (2) (which provides an exemption on the transfer of shares in a farming company from a natural person to a relative of the person or to a trustee of a trust) and substituting a new subsection such that:

- (2) Duty is not chargeable under Chapter 3 on a relevant acquisition, within the meaning of section 67, of an interest in a farming company to the extent of the unencumbered value of the company's farming property, if the interest is transferred from a person specified in a subparagraph of subsection (1)(c) to a person specified in the same sub-paragraph.

Provides that for the purposes of the intergenerational rural transfer exemptions, a reference to a relative of a person is taken to include a reference to the person himself or herself.

Clause 10 Incorporates savings and transitional provisions formerly contained in the *Revenue Legislation (Miscellaneous Amendments) Act 2002* and the *Revenue Measures Act 2005* that are still necessary into the Duties Act. The Revenue Legislation (Miscellaneous Amendments) Act and the Revenue Measures Act are repealed by clause 31 of this Act.

The provisions allow the Commissioner to recover unpaid mortgage duty and transfer duty on certain property with regard to transactions entered into before 1 July 2007 and 1 July 2008 respectively.

The provisions also govern the duty treatment of leases entered into before 1 July 2002, providing that a lessor is not required to produce a lease for periodic reassessment and payment of duty after that date, and that a refund of duty is not payable on an application for a reassessment of duty paid on a lease instrument that was lodged on or after 23 May 2002 (when the abolition of duty on leases was announced).

### **Part 3 – First Home Owner Grant Act 2000 Amended**

Clause 11 In this Part, the *First Home Owner Grant Act 2000* is referred to as the Principal Act.

Clause 12 Inserts a new section 28 into the First Home Owner Grant Act to provide that a court or administrative review body, including the Magistrates Court (Administrative Appeals Division), does not have jurisdiction or power to consider any question concerning a decision of the Commissioner except as provided in Division 6 of Part 2 of the First Home Owner Grant Act, which deals with objections and appeals.

#### **Part 4 – *Land Tax Act 2000* Amended**

- Clause 13 In this Part, the *Land Tax Act 2000* is referred to as the Principal Act.
- Clause 14 Amends section 3 of the Land Tax Act by inserting a definition of a “special disability trust”.
- Clause 15 Amends paragraph 6(3)(a) to include the trustee of a special disability trust as one of the types of trustees that may hold land that the Commissioner is to determine, upon application by the trustee, is principal residence land for a financial year if:
- the land is held by the trustee of a special disability trust; and
  - the principal residence of a beneficiary of the trust is situated on the land as at 1 July in that financial year; and
  - the Commissioner is satisfied that the beneficiary does not own any other principal residence land.

#### **Part 5 – *Payroll Tax Act 2008* Amended**

- Clause 16 In this Part, the *Payroll Tax Act 2008* is referred to as the Principal Act.
- Clause 17 Amends subsection 3(1) of the Payroll Tax Act by omitting “within the meaning of section 139GCD of the *Income Tax Assessment Act 1936* of the Commonwealth” from the definition of “share”. Section 139GCD of the Income Tax Assessment Act has been repealed.
- Clause 18 Amends section 18 by omitting subsection (1) and substituting
- (1) For the purposes of this Act, “wages” include the grant of a share or option to an employee by an employer in respect of services performed by the employee if the share or option is an ESS interest (within the meaning of section 83A-10 of the *Income Tax Assessment Act 1997* of the Commonwealth) and is granted to the employee under an employee share scheme (within the meaning of that section).

A note is also included to clarify that a grant of a share or an option to an employee by an employer that is not an ESS interest will be taxable as a fringe benefit under Division 2 of this Part.

- Clause 19 Omits subsections 19 (2), (3) and (4) and replaces them with the following:
- Subsection (2) sets out the circumstances in which a share or option is taken to be granted to a person for the purpose of determining when payroll tax is payable. The provision replaces a reference to a repealed provision of the *Income Tax Assessment Act 1936* of the Commonwealth which set out those circumstances.
- Subsection (2A) clarifies that if an employee acquires the right to be granted a share or an option, or some other material benefit, at the election of the employer, the share or option is not granted until the employer elects to grant the share or option.
- Subsections (3) and (4) provide that the vesting date of a share or option is taken to be the date at the end of 7 years after the grant of the share or option, if it has not occurred before that date.
- Clause 20 Amends section 23, which establishes the value of shares or options.
- Clause 20(a) omits the word “market” from subsection 23(1) so that if the grant of a share or option constitutes wages, the amount paid or payable is taken to be the ~~market~~-value of the share or option on the relevant day, less the consideration paid or given by the employee.
- Clause 20(b) then omits subsections 23(2) to (5) and substitutes new subsections to provide that the value of shares or options is either the market value or the amount determined in accordance with new provisions in the *Income Tax Assessment Act 1997* of the Commonwealth. The employer may elect the method by which the value of the share or option is determined in any return lodged by the employer. However, the Commissioner may determine the method by which the value is determined if the grant of the share or option is not included as wages in a return lodged by an employer.
- Clause 21 Amends Section 24 to make it clear that the grant of a share or option by a company to one of its directors (who is not an employee of the company) is considered “wages” for the purposes of the Payroll Tax Act. However, if the wages referred to in section 24 are fringe benefits, the value of the wages is to be determined in according with Division 2 of this Part (and not this Division). Division 2 governs the treatment of fringe benefits.

Clause 22 Amends Schedule 3 by inserting new clauses 12 and 13 that provide savings and transitional provisions consequent on the enactment of the *Taxation and Related Legislation (Miscellaneous Amendments) Act (No.2) 2011*.

Clause 12 contains savings and transitional provisions that validate any decision made by an employer after June 2009 and before the commencement of the proposed amendments to treat the grant of a share or an option as a fringe benefit for the purposes of payroll tax if that decision would have been validly made had the proposed amendments been in force.

Clause 13 contains savings and transitional provisions that allow for certain shares or options to continue to be treated as shares or options to which Division 4 of Part 3 (as amended by this Act) applies, even if, as a result of the amendments, the shares or options should be treated as fringe benefits under Division 2 of that Part, if the shares or options were granted before 1 July 2012 (the commencement date for the proposed amendments).

#### **Part 6 – *Taxation Administration Act 1997* Amended**

Clause 23 In this Part, the *Taxation Administration Act 1997* is referred to as the Principal Act.

Clause 24 Amends subsection 28(2) of the *Taxation Administration Act* to clarify that a taxpayer may not apply, **and is not entitled to**, a refund if the Commissioner has previously served a notice of assessment of the tax liability of the taxpayer in respect of the matter in respect of which the payment was made to the Commissioner.

Further amends section 28 by providing that subsection 2 does not apply in relation to a refund of tax paid under the *Land Tax Act 2000*.

Clause 25 Repeals section 29 and replaces it with a new refund provision.

The new refund provision differs substantively from the original in that it does not require a person who has over paid an amount to apply for a refund if the overpayment has been identified during an investigation, and by clarifying that a person is not, after 3 years from the date on which the person has overpaid an amount, entitled to a refund of the amount or to have such an amount applied against another liability unless an application is lodged within 3 years of the overpayment.

- Clause 26 Amends section 80(1) to provide that a taxpayer may object to –
- (a) an assessment, other than a compromise assessment **or an assessment that gives effect to the determination of an objection made under section 84**; or
  - (b) a decision of the Commission under a taxation law, unless that law states that the decision is a non-reviewable decision.

This clause prevents a taxpayer from objecting to an assessment that results from the Commissioner's determination of a previous objection.

- Clause 27 Incorporates savings and transitional provisions to do with the repeal of the *Debits Duties Act 2001* that were formerly contained in the *Revenue Measures Act 2005* into the Taxation Administration Act. The Revenue Measures Act is repealed by clause 33 of this Act.

The provisions allow the Commissioner to recover from an account holder, financial institution, credit card holder or credit card provider any duty that relates to a transaction made before 1 July 2005 and that was unpaid at that day.

#### **Part 7 – Taxation Administration Act 1997 Further Amended**

- Clause 28 In this Part, the *Taxation Administration Act 1997* is referred to as the Principal Act.
- Clause 29 Provides that if an assessment is based on a particular interpretation of the applicable law or a particular practice of the Commissioner that was generally applied to assessments of that kind when the assessment was made, the Commissioner cannot make a reassessment based on an interpretation, or practice, that applied after the assessment was made, other than to give effect to a change in interpretation or practice brought about by a legislative change.
- Clause 30 Provides that if a person has paid, or purportedly paid, an amount of tax, the Commissioner cannot refund all or part of the amount based on a particular interpretation of the applicable law or a particular practice of the Commissioner that applied after the time at which it was paid, other than to give effect to a change in interpretation or practice brought about by a legislative change.

**Part 8 – Legislation Repealed**

Clause 31 Provides that the legislation specified in Schedule 1 is repealed.

**Part 9 - Repeal**

Clause 32 Provides that this Act is repealed on the ninetieth day from the day on which all its provisions commence.

**Schedule 1 – Legislation Repealed**

The *Revenue Legislation (Miscellaneous Amendments) Act 2002* and the *Revenue Measures Act 2005* are repealed. Transitional arrangements that are still necessary have been incorporated into the *Duties Act 2001* and the *Taxation Administration Act 1997* by clauses 10 and 27 respectively.