

STAMP DUTIES (AMENDMENT) BILL 1987

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The object of this Bill is to amend the Stamp Duties Act 1920—

- (a) to overcome a practice which avoids the payment of stamp duty by effecting, without the creation of a dutiable instrument, a change in the beneficial ownership of an estate or interest in certain property (Schedule 1);
- (b) to require ad valorem duty at the rate applicable to a conveyance of land to be paid on transfers of certain interests in private companies and private unit trust schemes which would otherwise be liable to duty at a lower rate than conveyances (Schedule 2);
- (c) to provide that guarantees and indemnities are not dutiable as loan securities and to clarify a number of other provisions relating to loan securities (Schedule 3);
- (d) to exempt from stamp duty certain transfers of the underlying shares of an option traded on the Australian Options Market by a registered trader (Schedule 4); and
- (e) to make other miscellaneous amendments (Schedule 5).

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides for the commencement of the provisions of the proposed Act on a number of different dates, some of them retrospective. The dates of commencement and the reasons for those dates, where they are retrospective, are given elsewhere in this Explanatory Note.

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Clause 3 provides that the Stamp Duties Act 1920 is referred to in the proposed Act as the Principal Act.

Clause 4 is a formal provision which gives effect to the Schedules of amendments.

Clause 5 is a formal provision which gives effect to the Schedule of savings and transitional provisions.

**SCHEDULE 1—AMENDMENTS TO THE PRINCIPAL ACT RELATING TO
TRANSACTIONS OTHERWISE THAN BY DUTIABLE INSTRUMENTS**

The amendments in this Schedule are intended to ensure that ad valorem duty as for a transfer of property will be paid at the appropriate rate whenever a transfer of certain property is effected otherwise than by means of an instrument which is chargeable with ad valorem duty. For this purpose, a new Division 3A—Transactions otherwise than by dutiable instruments—is to be inserted into Part III of the Principal Act and consequential amendments, for the purpose of assisting the enforcement of the new provisions, are to be made to a number of other sections. The amendment inserting proposed Division 3A is to commence from 21 November 1986, the date on which the Minister for Finance announced that the provisions in the proposed Division would be made.

The main amendment is effected by Schedule 1 (6) and the consequential amendments are effected by Schedule 1 (1)–(5).

Schedule 1 (6) inserts proposed Division 3A into Part III of the Principal Act. The proposed Division contains the following provisions.

Proposed section 44 lists the transactions to which the proposed Division applies, being transactions which, on or after 21 November 1986, caused or cause a change in the beneficial ownership of an estate or interest in those types of property specified in the proposed section. The types of property can be extended by regulation or transactions may be excluded by regulation. Changes in beneficial ownership occurring as the consequence of certain events (such as the appointment of a receiver or trustee in bankruptcy or a liquidator) are specifically excluded.

Proposed section 44A requires a party to a relevant transaction which is not effected by a dutiable instrument to lodge a statement with the Chief Commissioner within 2 months after the change in beneficial ownership occurs as a result of the transaction. The statement is deemed to be an instrument effecting the relevant transaction and is chargeable with ad valorem duty on the consideration or the unencumbered value of the property the subject of the transaction.

Proposed section 44B is intended to prevent people from seeking to pay ad valorem duty at a lower rate by splitting one transaction into a number of transactions.

Proposed section 44C provides that an instrument executed in respect of a relevant transaction for which a statement under proposed section 44A has been prepared and duly stamped is not chargeable with duty to the extent to which duty has been paid on the statement. Similarly, the obligation to prepare a statement under proposed section 44A in respect of a relevant transaction lapses if a dutiable instrument is executed to purport to effect the transaction.

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Proposed section 44D makes it an offence to aid or abet another person or to be concerned with another person in a relevant transaction knowing that the other person does not intend to lodge a statement or pay duty in accordance with the proposed Division.

Proposed section 44E makes it an offence to fail to lodge a statement within 6 months after a change in beneficial ownership occurs as a result of a relevant transaction or to lodge a statement which is false or misleading.

Schedule 1 (1) inserts a definition of "Land" into section 3 (Interpretation) to make it clear that land includes a stratum. The new definition commences on the same day as proposed Division 3A of Part III as it is used in the proposed Division.

Schedule 1 (2) amends section 24 (Penalty for registering instrument not duly stamped) to make it an offence for a person to enrol or register a non-dutiable document in respect of a relevant transaction unless an instrument effecting the transaction has been sufficiently stamped or any statement required under proposed section 44A has been lodged and stamped. A defence is provided if the defendant can show that he or she had a justifiable lack of knowledge as to the nature of the document.

Schedule 1 (3) amends section 28 (Secondary evidence of unstamped and other documents) to enable secondary evidence to be given in court proceedings of a non-dutiable document relating to a relevant transaction if an instrument effecting the transaction has been sufficiently stamped or any statement required under proposed section 44A has been lodged and stamped.

Schedule 1 (4) amends section 29 (Inadmissibility of unstamped and other instruments) to prevent a non-dutiable document in respect of a relevant transaction to be admitted in proceedings (other than criminal proceedings) unless an instrument effecting the transaction has been sufficiently stamped or any statement required under proposed section 44A has been lodged and stamped.

Schedule 1 (5) amends section 38 (Stamp duty a debt to the Crown) to make a person who is required to lodge a statement under proposed section 44A but who fails or refuses to do so or who lodges an unsatisfactory statement personally liable for duty assessed by way of default assessment under section 127B.

**SCHEDULE 2—AMENDMENT TO THE PRINCIPAL ACT RELATING TO
ACQUISITIONS OF COMPANY AND UNIT TRUST INTERESTS DUTIABLE AS
CONVEYANCES OF LAND**

The amendment in this Schedule is intended to require ad valorem duty as on a conveyance of land to be paid on transfers of shares and units in unit trust schemes of certain private bodies which are holders of land in New South Wales which are effected by types of dutiable instruments which are subject to a lower rate of duty than conveyances. The amendment addresses 2 situations. One is where a person acquires an exclusive, or substantially exclusive, right to the possession of land in New South Wales. The other is where a person acquires a majority interest in a significant holder of land in New South Wales.

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Schedule 2 inserts proposed Division 30—Acquisitions of company and unit trust interests dutiable as conveyances of land—into Part III of the Principal Act. The proposed Division contains the following provisions.

Proposed section 99A defines a number of expressions used in the proposed Division. Included among these expressions are the following. A “landholder” is a private company or private unit trust scheme. A “designated landholder” is a landholder, 80 per cent of the gross assets of which comprise land and the unencumbered value of the New South Wales landholding of which is not less than \$1,000,000. A “land use entitlement” is an entitlement to the exclusive, or substantially exclusive, possession of land in New South Wales (not being an entitlement to a dwelling in a building containing a number of dwellings which is conferred by the ownership of shares or units in a unit trust scheme). An “interest” in a landholder is an interest which entitles the holder to make a claim, otherwise than as a creditor, on a winding up of the landholder. A “majority interest” in a landholder is an interest which entitles the holder to make a claim, otherwise than as a creditor, on a winding up of the landholder to more than 50 per cent of the gross assets of the landholder. Proposed section 99A (2) specifies the circumstances in which land is owned by a landholder. The circumstances in which landholders are entitled to land are set out in proposed section 99A (3). The means of ascertaining the unencumbered value of land are set out in proposed section 99A (4). The provisions which govern the winding up of a landholder are set out in proposed section 99A (5). Entitlement to land in circumstances where there are discretionary trusts is set out in proposed section 99A (6) and (7). The circumstances in which persons are related persons for the purposes of the proposed Division are set out in proposed section 99A (8).

Proposed section 99B excludes the acquisition of certain interests from the operation of the proposed Division.

Proposed sections 99C and 99D deal with the acquisition by a person of an exclusive right to the use of land in New South Wales.

Proposed section 99C requires a person to lodge a statement with the Chief Commissioner if the person acquires a land use entitlement in relation to a landholder. The statement is required to be lodged within 2 months after the entitlement is acquired and accompanied by information which will enable the Chief Commissioner to determine the value of the entitlement. Entitlements acquired within 3 years before the entitlement which necessitated the lodging of the statement (but not before 21 November 1986 in the case of a landholder being a private company or the date of assent to the proposed Act in the case of a landholder being a private unit trust scheme) also have to be disclosed.

Proposed section 99D provides that a statement under proposed section 99C is chargeable with duty at the rate applicable to a conveyance of land on the value of the land at the date of acquisition of the land use entitlement relating to that land aggregated with the value of land to which any prior land use entitlement required to be disclosed in the statement relates at the date of acquisition of the prior land use entitlement. Certain off-sets of duty are provided for in the proposed section.

Proposed sections 99E and 99F deal with the acquisition by a person of majority interests and other interests in designated landholders.

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Proposed section 99E requires a person to lodge a statement with the Chief Commissioner if the person (or the person and any related person) becomes (or become) entitled to a majority interest in a designated landholder or, being the holder of a majority interest, increases the interest. The statement is required to be lodged within 2 months after the interest is acquired and accompanied by information which will enable the Chief Commissioner to determine the extent of the interest and value of the interest. Interests acquired within 3 years before the interest which necessitated the lodging of the statement (but not before 21 November 1986 in the case of a designated landholder being a private company or the date of assent to the proposed Act in the case of a designated landholder being a private unit trust scheme) also have to be disclosed. The statement is deemed to be an instrument and is chargeable with ad valorem duty in accordance with proposed section 99F.

Proposed section 99F provides that a statement under proposed section 99E is chargeable with duty at the rate applicable to a conveyance of land on the land-related value of the interest at the date of acquisition of the interest (calculated as provided in the proposed section) aggregated with the land-related value (so calculated) of any prior interests required to be disclosed in the statement at the date of their acquisition. Certain off-sets of duty are provided for in the proposed section.

Proposed section 99G enables the Chief Commissioner to value property for the purposes of the proposed Division.

Proposed section 99H specifies the dates on which statements under proposed sections 99C and 99E are deemed to have been first executed.

Proposed section 99I makes it an offence to fail to lodge a statement under proposed section 99C or 99E within a specified period or to lodge a statement which is false or misleading.

The amendment made by Schedule 1 (5) to section 38 (Stamp duty a debt to the Crown), in addition to its application to statements required to be lodged under proposed section 44A, makes a person who is required to lodge a statement under proposed section 99C or 99E but who fails or refuses to do so personally liable for duty assessed by way of default assessment under section 127B.

**SCHEDULE 3—AMENDMENTS TO THE PRINCIPAL ACT RELATING TO
LOAN SECURITIES**

This Schedule effects miscellaneous amendments to the provisions of the Principal Act relating to loan securities. All the amendments (except the amendment in Schedule 3 (1) (a)) are deemed to have commenced on 1 January 1987 and apply to instruments executed on or after that date. The amendment in Schedule 3 (1) (a) will commence on the date of assent to the proposed Act. The amendments in this Schedule are supplementary to the amendments made to the Principal Act relating to loan securities by the Stamp Duties (Further Amendment) Act 1986 and which commenced on 1 January 1987. Most of the amendments give effect to practice notes issued by the Department of Finance in December 1986 and January 1987.

Schedule 3 (1) (a) inserts a definition of "Corporation" into section 83 (1).

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Schedule 3 (1) (b) amends the definition of "Debenture" in section 83 (1) to clarify the extent of its application.

Schedule 3 (1) (c) amends the definition of "Financial accommodation" in section 83 (1) to exclude from the definition obligations under chattel leases.

Schedule 3 (1) (d) amends the definition of "Loan security" in section 83 (1)—

- (a) to exclude guarantees and indemnities from the definition; and
- (b) to provide that a mortgage which did not affect property in New South Wales at the date of its execution will be a loan security only if the property in New South Wales that it affects within 12 months after its execution is land.

Schedule 3 (2) (a) amends section 84 (Limited and unlimited loan securities) to make it clear that an unlimited loan security is liable to duty of \$5 on the first \$15,000 advanced and 40 cents per \$100 on additional advances with a minimum duty payable of \$5.

Schedule 3 (2) (b) makes a minor amendment by way of statute law revision to section 84 (6).

Schedule 3 (2) (c) ensures that the provisions of section 25 (Terms on which instruments may be stamped after execution) apply to mortgages referred to in paragraph (d) of the definition of "Loan security" in section 83 (1) from the date the mortgage affects land and not the date of first execution of the mortgage.

Schedule 3 (2) (d) makes a minor amendment by way of statute law revision to section 84 (7).

Schedule 3 (2) (e) inserts section 84 (8) to overcome any suggestion of perpetual unenforceability which might arise in respect of the loan security under which the borrower has defaulted if a payment of outstanding duty under the loan security by the lender to ensure the enforceability of the loan security were to be regarded as an additional advance which was, in turn, liable to duty.

Schedule 3 (3) amends section 84^{CA} (Unregistered mortgage protected by caveat) to provide that the mortgagor is the person primarily liable for the duty chargeable under that section and to exempt from duty caveats lodged to protect a consumer mortgage.

Schedule 3 (4) makes an amendment consequential on the amendment made by Schedule 3 (1) (d) in respect of guarantees and indemnities.

SCHEDULE 4—AMENDMENTS TO THE PRINCIPAL ACT RELATING TO THE AUSTRALIAN OPTIONS MARKET

The amendments made by this Schedule are intended to assist the further development of the Australian Options Market by providing an exemption from stamp duty on the transfer of the underlying shares of an option traded on the Australian Options Market by a registered trader if the shares are sold within 3 months of their acquisition.

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Schedule 4 (1) inserts into section 97A (Definitions and application of ss. 97AA–97AD) definitions for the purposes of the amendments. The “Australian Options Market” is the market regulated by the Stock Option Trading Regulations of the Australian Stock Exchange (Sydney) Limited. A “Registered trader” is a person who is a registered trader under those Regulations.

Schedule 4 (2) inserts proposed sections 97ADA, 97ADB and 97ADC into Division 27 (Shares or stock—transfer) of Part III of the Principal Act.

Proposed section 97ADA exempts a New South Wales dealer (a broker or broker’s agent) from including in a return, or from paying duty on, a sale or purchase of shares if the sale or purchase was on behalf of a registered trader acting in that capacity and was of shares of a type for which options are traded on the Australian Options Market.

Proposed section 97ADB requires a registered trader to keep full and accurate records of sales and purchases of shares made on behalf of the registered trader in that capacity by a dealer and which are not liable to stamp duty by virtue of proposed section 97ADA.

Proposed section 97ADC requires a registered trader to lodge a monthly return with the Chief Commissioner of details of sales and purchases recorded under proposed section 97ADB of shares which have been held for more than 3 months and to pay stamp duty in respect of those sales and purchases.

SCHEDULE 5—MISCELLANEOUS AMENDMENTS TO THE PRINCIPAL ACT

Schedule 5 contains a number of amendments to the Principal Act on miscellaneous matters.

Schedule 5 (1) amends section 35 (Chief Commissioner to assess duty) to extend the powers of the Chief Commissioner under that section to the assessment of duty payable on a return or statement.

Schedule 5 (2) amends section 37 (Deficient duty may be recovered) to enable the Chief Commissioner to reassess a default assessment under section 127B.

Schedule 5 (3), (4) and (5) amend section 43 (Agreements for goods, wares or merchandise generally), section 43A (Goods, wares or merchandise included in or connected with an agreement for the sale or conveyance of other property) and section 43B (Certain goods, wares or merchandise exempt from section 43A) so as to apply the exemption from ad valorem duty under those sections to conveyances as well as agreements.

Schedule 5 (6) amends section 66E (Conveyance between married couple) to provide that the exemption from stamp duty on a conveyance of property between a married couple will only apply if, as a result of the conveyance, the property is held by the married couple as joint tenants, tenants in common in equal shares or tenants in common in shares, other than equal shares, where the shares are proportionate to their respective contributions towards the purchase and improvement of the property.

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Schedule 5 (7) amends section 74E (Instrument to be made out) by way of statute law revision. The effect of the amendment is to make it clear that, in assessing the amount of duty payable in respect of a hiring arrangement, a credit should be allowed for duty paid in respect of the arrangement in another State or a Territory.

Schedule 5 (8) amends section 74F (Payment of duty on hiring arrangements by return) with effect from 1 January 1987. The amendments provide that an approved person under section 74F is not liable to pay duty on amounts received in respect of hiring arrangements unless the amounts exceed \$6,000 per month. In addition, an approved person receiving less than \$5,500 per month is not required to submit a return. In order to prevent taxpayers from seeking to avoid duty by dividing their hiring business between associated persons, grouping provisions have been included, but the grouping provisions will not apply before the date of assent to the proposed Act.

Schedule 5 (9) and (10) make amendments to provisions relating to the duty payable on transfers of shares of a New South Wales incorporated company registered in a register of members kept in a place outside New South Wales. The amendments are deemed to have commenced on 13 October 1986, the date on which the Stamp Duties (Share Transfer) Amendment Act 1986 was deemed to have commenced.

Schedule 5 (9) amends section 96A (Duty on certain transfers of shares) to make it clear that a transfer of shares of a New South Wales incorporated company registered in a register of members kept in a place outside New South Wales is required to be retained, in accordance with the law of that place, for 3 years after the date of registration of the transfer or, if the law of that place does not require the transfer to be retained or to be retained for 3 years, then the transfer shall be retained in accordance with New South Wales law.

Schedule 5 (10) amends section 96B (Share transfers on registers outside New South Wales) in order to overcome certain administrative difficulties arising from the amendments made by the Stamp Duties (Share Transfer) Amendment Act 1986. The amendment to section 96B exempts companies from having to include in their returns of share transfers registered in a register of members kept outside New South Wales details of a transfer which was—

- (a) executed in respect of shares on a register in a prescribed place, which has been duty stamped or stamped not liable to, or exempt from, duty in accordance with the law of that prescribed place (the prescribed places for the time being consisting of Victoria, South Australia, Western Australia, Tasmania, Queensland, the Australian Capital Territory, the United Kingdom and Northern Ireland); or
- (b) effected by a member of a prescribed stock exchange, or a member of a stock exchange in a prescribed place, on the stock market of the stock exchange of which the member effecting the transfer is a member (a prescribed stock exchange for the time being consisting of the New Zealand stock exchange).

This amendment gives effect to a practice note issued by the Acting Chief Commissioner of Stamp Duties dated 13 January 1987.

Schedule 5 (11) substitutes section 127B (Default assessment of stamp duty) so as to apply the provisions of that section to statements and other instruments required to be lodged for stamping under the Principal Act in addition to returns.

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Schedule 5 (12) amends section 129A (Chief Commissioner may obtain information) by way of statute law revision.

Schedule 5 (13) amends section 129B (Offences) to provide that the Chief Commissioner may obtain an injunction to enforce an obligation imposed under the Principal Act on a person charged with an offence under that Act if an order in respect of the offence is made under section 75B (2) of the Justices Act 1902 (that is, if, following the person's failure to attend the hearing of the charge, a penalty is imposed on the person).

Schedule 5 (14) inserts proposed section 144A into the Principal Act which is a formal provision to give effect to a Schedule of savings, transitional and other provisions.

Schedule 5 (15) (a) makes an amendment by way of statute law revision to certain matter relating to hiring arrangements in the Second Schedule.

Schedule 5 (15) (b) amends the Second Schedule to add an exemption to the list of exemptions under the heading "General Exemptions from Stamp Duty under Part III". The exemption, which is to commence from a day to be appointed by the Governor-in-Council, is granted in respect of the cheques, loan securities, guarantees or other instruments executed for the purpose of those functions of an offshore banking unit which caused it to be exempt from liability for Commonwealth withholding tax.

Schedule 5 (16) inserts a proposed Tenth Schedule into the Principal Act which contains savings provisions arising from the enactment of the Stamp Duties (Further Amendment) Act 1986 and the proposed Act, being provisions which will continue to have application for some time.

SCHEDULE 6—SAVINGS AND TRANSITIONAL PROVISIONS

Schedule 6 contains savings and transitional provisions consequent upon the enactment of the proposed Act, the application of which will be of short duration.
