



THE TAX INSTITUTE

THE MARK OF EXPERTISE

26 August 2015

The Hon. Tom Koutsantonis
Treasurer
South Australian Government
GPO Box 2264
ADELAIDE SA 5001

By email: minister.koutsantonis@sa.gov.au

Dear Treasurer,

Statutes Amendment and Repeal (Budget 2015) Bill 2015

The Tax Institute would like to make a submission in relation to the *Statutes Amendment and Repeal (Budget 2015) Bill 2015* (**Bill**) that is currently before the South Australian Parliament.

Our comments relate to particular items of the Bill as set out below.

1. Item 24 (Corporate Reconstruction)

Proposed section 102M(1) restricts applications for relief to one year after the transaction. This is inconsistent with the time period in other states which can allow up to 5 years¹, and also with the 5 year period for re-assessment under section 10 of the *Taxation Administration Act 1996* (SA). It is submitted that the period should be extended to 5 years.

2. Item 25 (Interpretation – Section 2)

The new definition of "Mining Act" includes the *Petroleum and Geothermal Energy Act 2000* (SA), and the new definition of "mining tenement" includes the "Mining Act", as defined. The exploration for, and extraction of, hydrocarbons (petroleum) is not ordinarily referred to as "mining".

We note there are other references in the Act to "mining tenement" which specifically relate to tenements under the *Mining Act 1971* (SA) only.

¹ See section 273F of the *Duties Act 1997* (NSW)

For clarity and to reduce the potential for confusion, it would be useful if the defined terms "Mining Act" and "mining tenement" if those defined terms were changed to "Resources Act" and "Resources Tenement", respectively.

3. Item 38 (Abolition of duty on non-real property transfers)

It appears that the provisions effecting the abolition of duty on non-real property transfers (proposed Division 3 of Part 4A) purport to retain an ability to tax 'prescribed goods'. In our view, this seems to be inconsistent with the policy intent behind the abolition, which is to abolish stamp duty on non-real property transfers, and therefore the reference to 'prescribed goods' should be removed.

In the event 'prescribed goods' are unable to be excluded, there is a clear need to change the wording of proposed section 104B(4). The intention here appears to be to exclude any goods that do not have a significant connection with the relevant land, but the existing wording fails to achieve that by trying to include goods which do have a significant connection to the land in the main part of the definition and then providing a list of exclusions. This may lead to confusion regarding which goods are intended to be 'prescribed goods' and which are not. It may be simpler to include a catch-all sub-provision in the list of exclusions expressly stating that goods that do not have a significant connection with the land are excluded.

As such, we suggest the words 'and the term includes goods that have a significant connection with the land' be removed from the opening paragraph of section 104B(4), and a new paragraph (h) in similar terms as are used in proposed section 91(1)(h) (per Item 36(3) of the Bill) be inserted.

4. Items 42 and 49 (Section 60A)

The retrospective operation of the amendments to section 60A is inappropriate and unnecessary. In our view, the enactment of retrospective taxation legislation should be avoided wherever possible, particularly where it may adversely and unfairly impact on taxpayers who have genuinely relied on the existing legislation. The use of retrospective legislation creates uncertainty in the law, and can have a significant impact on consumer and business confidence.

It may be necessary for legislation to have retrospective effect in limited circumstances. However, ordinarily taxpayers should be able to rely on the legislation to determine their potential liability to duty that was in place at the time that the relevant transaction took place. In this regard, retrospective application of this provision is not appropriate and will give rise to uncertainty arising unnecessarily.

5. Item 44(1) (Charitable exemptions)

Proposed section 71(5)(j) should be amended to refer to a "registered charity", with that term defined by reference to registration under the *Australian Charities and Not-for-Profits Commission Act 2012* (Cth). This will avoid the current position we have where

a body can be accepted under Federal law by the Australian Charities and Not-for-Profits Commission (**ACNC**) (and Australian Taxation Office) as a charity for Federal revenue law purposes, but then be denied that status for State revenue purposes. This would seem inconsistent with the expressed policy of the South Australian Government to reduce red tape by referring matters to the ACNC.

We would also submit that any restriction of the exemption based on the proposed use of the property should be removed. Once the transferee is found to be a qualifying body under proposed section 71(5)(j), the exemption should apply. Restricting the exemption by reference to subsequent use of the property will lead to difficult questions of interpretation - for example is passive holding of land for the purposes of charging rent a 'commercial or business purpose'? The proposed restriction is also clearly inconsistent with the approach of the High Court in *Commissioner of Taxation v Word Investments Limited* [2008] HCA 55 where the alleged distinction between commercial and charitable expenses was strenuously rejected).

6. Item 50 (Reduction of duty)

We suggest the Government consider bringing forward the date of the abolition of conveyance duty on non-residential, non-primary production property from 1 July 2018. Under the current proposed staged reduction process, taxpayers are likely to consider deferring transactions until such time as conveyance duty is abolished, adversely impacting on revenue collections over the next three years.

Also, we understand that proposed section 71DC will also apply to the assessment of section 102B returns under the landholder provisions. This should be expressly stated in the Bill, and confirmed by Revenue Ruling in due course.

7. Rulings needed

We recommend the Commissioner consider issuing a ruling (or series of rulings) to explain the application of the *Stamp Duties Act 1923* (SA) (**Act**) (as amended by the Bill) to:

- partnerships;
- discretionary trusts; and
- unit trusts.

In the case of partnerships, the application of the Act is already uncertain following the decision of the High Court in *Commissioner of State Taxation v Cyril Henshke Pty Ltd* [2010] HCA 43 and this Bill will only further complicate the matter. Presumably the benefits of the various abolitions and reductions of duty in the Bill will 'flow through' to partnership transactions – such as admission and exit of partners and assignments of partnership interests - but this should be clarified.

A similar issue arises in relation to conveyances arising in the trust context, with a particular need to ensure that there is nothing in section 71 of the Act which prevents the benefits of the abolitions and reductions of duty in the Bill applying in the trust

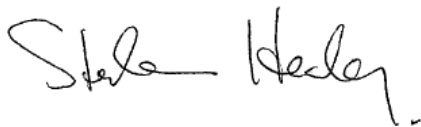
context. For example, in the case of a discretionary trust, we assume that a 'resettlement' over dutiable assets ordinarily subject to the duty rates contained in Schedule 2 of the Act will now result in duty applying only to assets that are not excluded by proposed section 104C, and that the reduced rates of duty applicable to 'non-residential, non-primary production' real property from 1 July 2016 will also apply in these circumstances². As such, until this (and other) duties are abolished, we anticipate that different rates of duty for the same transaction will apply depending on the nature of the asset the subject of the conveyance, giving rise to an additional administrative burden to taxpayers.

Similar issues will arise in relation to unit trusts, where units are issued, redeemed or transferred. The treatment of trust liabilities will also need to be clarified.

We would appreciate it if the Commissioner was able to confirm the above.

If you would like to discuss any of the above, please contact Paul Ingram (Minter Ellison), The Tax Institute's representative on RevenueSA's Liaison Group on 08 8233 5601.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Steve Healey', with a stylized flourish at the end.

Stephen Healey
President

² Though please note the suggestion above to bring forward the abolition of conveyance duty on non-residential non-primary production' real property to an earlier date.