

House of Assembly—No 2

As laid on the table and read a first time, 11 May 2010

South Australia

Payroll Tax (Nexus) Amendment Bill 2010

A BILL FOR

An Act to amend the *Payroll Tax Act 2009* and to make a related amendment to the *Taxation Administration Act 1996*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Payroll Tax (Nexus) Amendment Act 2010*.

2—Commencement

- 5 This Act will be taken to have come into operation on 1 July 2009.

3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Payroll Tax Act 2009*

4—Amendment of section 3—Interpretation

- (1) Section 3—before the definition of *agent* insert:

5 *ABN* means the ABN (Australian Business Number) for an entity within the meaning of the *A New Tax System (Australian Business Number) Act 1999* of the Commonwealth;

- (2) Section 3—after the definition of *Australia* insert:

Australian jurisdiction means a State or a Territory;

- (3) Section 3—after the definition of *GST* insert:

10 *instrument* includes a cheque, bill of exchange, promissory note, money order or a postal order issued by a post office;

- (4) Section 3—after the definition of *perform* insert:

15 *registered business address* means an address for service of notices under the *A New Tax System (Australian Business Number) Act 1999* of the Commonwealth on an entity that has an ABN, as shown in the Australian Business Register kept under that Act;

5—Substitution of sections 10 and 11

Sections 10 and 11—delete the sections and substitute:

10—What are taxable wages

- 20 (1) For the purposes of this Act, *taxable wages* are wages that are taxable in this jurisdiction.
- (2) However, exempt wages are not taxable wages.

11—Wages that are taxable in this jurisdiction

- 25 (1) For the purposes of this Act, wages are taxable in this jurisdiction if—
- (a) the wages are paid or payable by an employer for or in relation to services performed by an employee wholly in this jurisdiction; or
- 30 (b) the wages are paid or payable by an employer for or in relation to services performed by an employee in 2 or more Australian jurisdictions, or partly in 1 or more Australian jurisdictions and partly outside all Australian jurisdictions, and—
- (i) the employee is based in this jurisdiction; or
- 35 (ii) the employer is based in this jurisdiction (in a case where the employee is not based in an Australian jurisdiction); or

(iii) the wages are paid or payable in this jurisdiction (in a case where both the employee and the employer are not based in an Australian jurisdiction); or

(iv) the wages are paid or payable for services performed mainly in this jurisdiction (in a case where both the employee and the employer are not based in an Australian jurisdiction and the wages are not paid or payable in an Australian jurisdiction); or

(c) the wages are paid or payable by an employer for or in relation to services performed by an employee wholly outside all Australian jurisdictions and are paid or payable in this jurisdiction.

Note—

Section 66A provides an exemption for wages paid or payable for services performed wholly in 1 or more other countries for a continuous period of more than 6 months.

(2) The question of whether wages are taxable in this jurisdiction is to be determined by reference only to the services performed by the employee in respect of the employer during the month in which the wages are paid or payable, subject to this section.

(3) Any wages paid or payable by an employer in respect of an employee in a particular month are taken to be paid or payable for or in relation to the services performed by the employee in respect of the employer during that month.

Note—

For example, if wages paid in a month are paid to an employee for services performed over several months, the question of whether the wages are taxable in this jurisdiction is to be determined by reference only to services performed by the employee in the month in which the wages are paid. The services performed in previous months are disregarded. (The services performed in previous months will be relevant to the question of whether wages paid in those previous months are taxable in this jurisdiction.)

(4) If no services are performed by an employee in respect of an employer during the month in which wages are paid or payable to or in relation to the employee—

(a) the question of whether the wages are taxable in this jurisdiction is to be determined by reference only to the services performed by the employee in respect of the employer during the most recent prior month in which the employee performed services in respect of the employer; and

(b) the wages are taken to be paid or payable for or in relation to the services performed by the employee in respect of the employer during that most recent prior month.

- 5
- (5) If no services were performed by an employee in respect of an employer during the month in which wages are paid or payable to or in relation to the employee or in any prior month—
- (a) the wages are taken to be paid or payable for or in relation to services performed by the employee in the month in which the wages are paid or payable; and
- (b) the services are taken to have been performed at a place or places where it may be reasonably expected that the services of the employee in respect of the employer will be performed.
- 10
- (6) All amounts of wages paid or payable in the same month by the same employer in respect of the same employee are to be aggregated for the purposes of determining whether they are taxable in this jurisdiction (as if they were paid or payable for all services performed by the employee in the month in which the wages are paid or payable, or the most recent prior month, as the case requires).
- 15

Note—

20 For example, if 1 amount of wages is paid by an employer in a particular month for services performed in this jurisdiction, and another amount of wages is paid by the same employer in the same month for services performed by the same employee in another Australian jurisdiction, the wages paid are to be aggregated (as if they were paid for all services performed by the employee in that month). Accordingly, subsection (1)(b) would be applied for the purpose of determining whether the wages are taxable in this jurisdiction.

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- (7) If wages are paid in a different month from the month in which they are payable, the question of whether the wages are taxable in this jurisdiction is to be determined by reference to the earlier of the relevant months.

30 **11A—Jurisdiction in which employee is based**

- (1) For the purposes of this Act, the jurisdiction in which an employee is based is the jurisdiction in which the employee's principal place of residence is located.
- 35 (2) The jurisdiction in which an employee is based is to be determined by reference to the state of affairs existing during the month in which the relevant wages are paid or payable.
- (3) If more than 1 jurisdiction would qualify as the jurisdiction in which an employee is based during a month, the jurisdiction in which the employee is based is to be determined by reference to the state of affairs existing on the last day of that month.
- 40 (4) An employee who does not have a principal place of residence is taken, for the purposes of this Act, to be an employee who is not based in an Australian jurisdiction.

- (5) In the case of wages paid or payable to a corporate employee, the jurisdiction in which the employee is based is to be determined in accordance with section 11B instead of this section (as if a reference in section 11B to an employer were a reference to an employee).
- 5 (6) In this section, a *corporate employee* is a company that is taken to be an employee under section 34 or 39 or a company to whom a payment is made that is taken to be wages payable to an employee under section 42 or 47.

11B—Jurisdiction in which employer is based

- 10 (1) For the purposes of this Act, the jurisdiction in which an employer is based is—
- (a) the jurisdiction in which the employer’s registered business address is located (if the employer has an ABN); or
 - (b) the jurisdiction in which the employer’s principal place of
15 business is located (in any other case).
- (2) If wages are paid or payable in connection with a business carried on by an employer under a trust, the employer’s registered business address is the registered business address of the trust or, if the trust does not have an ABN, the registered business address of the trustee
20 of the trust.
- (3) If an employer has registered business addresses located in different jurisdictions at the same point in time, the jurisdiction in which the employer is based at that point in time is the jurisdiction in which the employer’s principal place of business is located.
- 25 (4) The jurisdiction in which an employer is based is to be determined by reference to the state of affairs existing during the month in which the relevant wages are paid or payable.
- (5) If more than 1 jurisdiction would qualify as the jurisdiction in which an employer is based during a month, the jurisdiction in which the employer is based is to be determined by reference to the state of
30 affairs existing on the last day of that month.
- (6) An employer who has neither a registered business address nor a principal place of business is taken, for the purposes of this Act, to be an employer who is not based in an Australian jurisdiction.

11C—Place and date of payment of wages

- 35 (1) For the purposes of this Act, wages are taken to have been paid at a place if, for the purpose of the payment of those wages—
- (a) an instrument is sent or given or an amount is transferred by an employer to a person or a person’s agent at that place; or
 - (b) an instruction is given by an employer for the crediting of an
40 amount to the account of a person or a person’s agent at that place.

(2) The wages are taken to have been paid on the date that the instrument was sent or given, the amount was transferred or the account credited in accordance with the instruction (as the case requires).

5 (3) Wages are taken to be payable at the place at which they are paid, subject to this section.

(4) Wages that are not paid by the end of the month in which they are payable are taken to be payable at—

10 (a) the place where wages were last paid by the employer to the employee; or

(b) if wages have not previously been paid by the employer to the employee—the place where the employee last performed services in respect of the employer before the wages became payable.

15 (5) If wages paid or payable in the same month by the same employer in respect of the same employee are paid or payable in more than 1 Australian jurisdiction, the wages paid or payable in that month are taken to be paid or payable in the Australian jurisdiction in which the highest proportion of the wages are paid or payable.

20 **Note—**

Section 11 requires all wages paid or payable in the same month by the same employer in respect of the same employee to be aggregated for the purpose of determining whether the wages are taxable in this jurisdiction. The above provision ensures only 1 Australian jurisdiction can be considered to be the jurisdiction in which the wages are paid or payable.

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6—Amendment of section 13—What are wages?

Section 13—after subsection (2) insert:

30 (2a) This Act applies in respect of wages referred to in subsection (1)(a) to (e) that are paid or payable to or in relation to a person who is not an employee in the same way as it applies to wages paid or payable to an employee (as if a reference in this Act to an employee included a reference to any such person).

7—Amendment of section 24—Inclusion of shares and options granted to directors as wages

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(1) Section 24(3)—at the foot of subsection (3) insert:

Note—

40 Section 13 provides that a reference to an employee in this Act includes a reference to any person to whom any amount that is treated as wages under this Act is paid or payable. See also section 11, which deems the wages to be paid or payable for services performed.

(2) Section 24(4)—delete subsection (4)

8—Repeal of section 25

Section 25—delete the section

9—Amendment of section 26—Place where wages are payable

Section 26(2)—delete the note at the foot of subsection (2) and substitute:

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Note—

The place where wages are paid or payable is sometimes relevant to determining whether the wages are liable to payroll tax under this Act. See section 11.

10—Amendment of section 40—Amounts taken to be wages

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Section 40(2)—after "(other than under Division 4 or Division 5 of that Part or section 50)" insert:

or under Part 3 of Schedule 2 (other than clause 17)

11—Insertion of Part 4 Division 9

After section 66 insert:

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Division 9—Services outside Australia

66A—Wages paid or payable for or in relation to services performed in other countries

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Wages are exempt wages if they are paid or payable for or in relation to services performed by an employee wholly in 1 or more other countries for a continuous period of more than 6 months beginning on the day on which wages were first paid or payable to that employee for the services so performed.

12—Amendment of Schedule 3—Repeal and transitional provisions

(1) Schedule 3, clause 3(1)—after "this Act" insert:

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or any Act amending this Act

(2) Schedule 3, clause 3(4)—after "this Act" insert:

or any Act amending this Act

Schedule 1—Related amendment and transitional provisions

Part 1—Amendment of *Taxation Administration Act 1996*

30

1—Amendment of section 4—Meaning of taxation laws

Section 4(e)—delete "*Pay-roll Tax Act 1971*" and substitute:

Payroll Tax Act 2009

Part 2—Transitional provisions

2—Transitional provisions—taxable wages

(1) In this clause—

principal Act means the *Payroll Tax Act 2009*.

- 5 (2) For the purposes of this clause, an "expired month" is a month occurring after June 2009 that ended before the date of assent of this Act.
- (3) The amendments made to the principal Act by this Act apply in respect of taxable wages that are paid or payable on or after 1 July 2009.
- 10 (4) The amendments made to the principal Act by this Act are to be applied for the purpose of determining the correct amount of payroll tax (within the meaning of section 82) payable by an employer in respect of the financial year commencing on 1 July 2009 (including in respect of expired months).
- (5) However, section 9 of the principal Act continues to apply in respect of an expired month as if the amendments made to the principal Act by this Act had not been made.

3—Transitional provisions—taxation administration

15 The *Pay-roll Tax Act 1971* will continue to be a taxation law for the purposes of the *Taxation Administration Act 1996* despite its repeal and despite the enactment of clause 1 of this Schedule.