

South Australia

Pay-roll Tax (Harmonisation Project) Amendment Act 2008

An Act to amend the *Pay-roll Tax Act 1971*.

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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 *Pay-roll Tax (Harmonisation Project) Amendment Act 2008*.

2—Commencement

This Act will come into operation on 1 July 2008.

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 *Pay-roll Tax Act 1971*

4—Amendment of section 3—Interpretation

- (1) Section 3(1), definition of *council*—delete the definition and substitute:

council means a council or council subsidiary under the *Local Government Act 1999*;

- (2) Section 3(1), definition of *eligible termination payment*—delete the definition

- (3) Section 3(1)—after the definition of *employer* insert:

employment termination payment means—

- (a) an employment termination payment within the meaning of section 82-130 of the ITAA; or
- (b) a payment that would be an employment termination payment within the meaning of section 82-130 of the ITAA but for the fact that it was received later than 12 months after the termination of a person's employment; or

- (c) a transitional termination payment within the meaning of section 82-10 of the *Income Tax (Transitional Provisions) Act 1997* of the Commonwealth;

FBTA Act means the *Fringe Benefits Tax Assessment Act 1986* of the Commonwealth;

- (4) Section 3(1), definition of **fringe benefit**—delete "*Fringe Benefits Tax Assessment Act 1986* of the Commonwealth" and substitute:

FBTA Act

- (5) Section 3(1), definition of **group**—delete the definition and substitute:

group has the meaning given by section 18A;

- (6) Section 3(1)—after the definition of **interstate wages** insert:

ITAA means the *Income Tax Assessment Act 1997* of the Commonwealth;

option means an option or right, whether actual, prospective or contingent, of a person to acquire a share or to have a share transferred or allotted to the person;

- (7) Section 3(1)—after the definition of **return period** insert:

share means a share in a company and includes a stapled security within the meaning of section 139GCD of the *Income Tax Assessment Act 1936* of the Commonwealth;

- (8) Section 3(1)—after the definition of **taxable wages** insert:

termination payment means—

- (a) a payment made in consequence of the retirement from, or termination of, any office or employment of an employee, being—
- (i) an unused annual leave payment; or
 - (ii) an unused long service leave payment; or
 - (iii) so much of an employment termination payment paid or payable by an employer, whether or not paid to the employee or to any other person or body, that would be included in the assessable income of an employee under Part 2-40 of the ITAA if the whole of the employment termination payment had been paid to the employee; or
- (b) an amount paid or payable by a company as a consequence of the termination of the services or office of a director of the company, whether or not paid to the director or to any other person or body, that would be an employment termination payment if that amount had been paid or payable as a consequence of termination of employment; or

- (c) an amount paid or payable by a person who is an employer under a service contract within the meaning of section 4 as a consequence of the termination of the supply of the services of an employee under the contract, whether or not paid to the employee or to any other person, if the amount would be an employment termination payment if that amount had been paid or payable as a consequence of termination of employment;

- (9) Section 3(1)—after the definition of *unfunded scheme of superannuation* insert:

unused annual leave payment has the same meaning as in section 83-10 of the ITAA;

unused long service leave payment has the same meaning as in section 83-75 of the ITAA;

- (10) Section 3(1a)—delete subsection (1a) and substitute:

- (1a) Schedule 1 has effect with respect to motor vehicle allowances and accommodation allowances.

- (11) Section 3(1ab)—delete subsection (1ab) and substitute:

- (1ab) Wages include a termination payment.

- (12) Section 3(1c)—delete subsection (1c) and substitute:

- (1c) For the purposes of this Act, the value of taxable wages comprising a fringe benefit is to be determined in accordance with the following formula:

$$VTW = TV \times \frac{1}{1 - \text{FBT rate}}$$

Where

VTW is the value of the taxable wages

TV is the value that would be the taxable value of the benefit as a fringe benefit for the purposes of the FBTA Act

FBT rate is the rate of fringe benefits tax imposed by the FBTA Act that applies when the liability to payroll tax under this Act arises.

- (13) Section 3—after subsection (3b) insert:

- (3c) For the purposes of—

- (a) the operation of the definition of *superannuation benefit*;
and

- (b) the operation of subsections (2a) to (3b) (inclusive),

a reference to an employee will be taken to include a reference to a director or member of the governing body of a company to whom, by virtue of a paragraph of the definition of *wages*, an amount paid or payable in the circumstances referred to in that paragraph constitutes wages (and the company will be taken to be the employer).

- (3d) Wages include the grant of a share or option to an employee by an employer in respect of services performed by the employee.

(3e) Schedule 2 has effect for the purposes of subsection (3d).

5—Amendment of section 8—Wages liable to pay-roll tax

Section 8(1a)(a)(ii)—delete subparagraph (ii) and substitute:

- (ii) the wages relate, in their entirety, to services performed by a person wholly in another country for a continuous period of more than 6 months beginning on the day on which wages were first paid or payable to that person for services so performed; or

6—Amendment of section 12—Exemptions

(1) Section 12(1)—after paragraph (cb) insert:

- (cc) by a non-profit organisation having wholly charitable objects during a period in respect of which the organisation satisfies the Commissioner that the person is engaged exclusively in work of a kind ordinarily performed in connection with the charitable objects of the organisation, but not so as to include under this paragraph an organisation that is a school, a college, an educational institution, an educational company or an instrumentality of the State; or

(2) Section 12(1)(db)—delete paragraph (db) and substitute:

- (db) to an Aboriginal person who is employed under an employment project under the Community Development Employment Project funded by the Department of Employment and Workplace Relations of the Commonwealth or the Torres Strait Regional Authority; or

(3) Section 12(1)—after paragraph (l) insert:

or

- (m) to an employee in respect of any period when he or she was engaged as a volunteer member of an emergency services organisation under the *Fire and Emergency Services Act 2005* in responding to any situation that involved or may have involved an emergency under that Act, but not so as to include under this paragraph wages paid or payable as recreation leave, annual leave, long service leave or sick leave; or

(n) to an employee in respect of—

- (i) maternity leave, being leave given to a female employee in connection with her pregnancy or the birth of the child; or
- (ii) adoption leave, being leave given to an employee in connection with the adoption of a child by him or her,

but not so as to include under this paragraph—

- (iii) leave taken as sick leave, recreation leave, annual leave or similar leave; or
- (iv) wages paid or payable in respect of maternity or adoption leave that comprise fringe benefits; or

- (v) wages paid or payable after 14 weeks maternity leave in respect of any 1 pregnancy or after 14 weeks adoption leave in respect of any 1 adoption.
- (4) Section 12—after subsection (1) insert:
- (2) For the purposes of subsection (1)(cc), an ***educational company*** is a company—
 - (a) in which an educational institution has a controlling interest; and
 - (b) that provides, promotes or supports the educational services of that institution.
 - (3) For the purposes of subsection (2), an educational institution has a ***controlling interest*** in an educational company if—
 - (a) members of the board of management of the company who are entitled to exercise a majority in voting power at meetings of the board of management are accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the educational institution; or
 - (b) the educational institution may (whether directly or indirectly) exercise, control the exercise of, or substantially influence the exercise of, more than 50% of the voting power attached to voting shares, or any class of voting shares, issued by the company; or
 - (c) the educational institution has power to appoint more than 50% of the members of the board of management of the company.
 - (4) For the avoidance of doubt, a reference in subsection (1)(n)(v) to a period of 14 weeks leave is a reference to—
 - (a) a period that is the equivalent of 14 weeks leave on full pay, in the case of full-time employees who take leave on less than full pay; or
 - (b) a period of 14 weeks leave at part-time rates of pay, in the case of a part-time employees.
 - (5) An employer—
 - (a) wishing to claim an exemption under subsection (1)(n) in respect of maternity leave must obtain and keep a medical certificate in respect of, or statutory declaration by, the employee—
 - (i) stating that the employee is or was pregnant; or
 - (ii) stating that the employee has given birth and the date of birth; or

- (b) wishing to claim an exemption under subsection (1)(n) in respect of adoption leave must obtain and keep a statutory declaration by the employee—
 - (i) that a child has been placed in the custody of the employee pending the making of an adoption order; or
 - (ii) that an adoption order has been made or recognised in favour of the employee.
- (5) Section 12(6)—before the definition of *health service* insert:

educational institution means an entity that provides education above secondary level;

7—Substitution of sections 18A to 18D

Sections 18A to 18D (inclusive)—delete the sections and substitute:

Division 1—Interpretation

18A—Interpretation

In this Part—

business includes—

- (a) a profession or trade; and
- (b) any other activity carried on for fee, gain or reward; and
- (c) the activity of employing 1 or more persons who perform duties for or in connection with another business; and
- (d) the carrying on of a trust (including a dormant trust); and
- (e) the activity of holding any money or property used for or in connection with another business,

whether carried on by 1 person or 2 or more persons together;

group means a group constituted under this Part, but does not include any member of the group in respect of whom a determination under section 18I is in force.

Division 2—Business groups

18B—Constitution of groups

A *group* is constituted by all the persons or bodies forming a group that is not a part of any larger group.

18C—Groups of corporations

- (1) Corporations constitute a group if they are related bodies corporate by reason of section 50 of the *Corporations Act 2001* of the Commonwealth.

- (2) For the purpose of assessing whether corporations are related bodies corporate under that Act, they are taken to carry on a business and not to be trustee companies.

Note—

Section 18I allows the Commissioner, for pay-roll tax purposes, to exclude persons from a group constituted under this section in certain circumstances but not in the case of corporations that are related bodies corporate.

18D—Groups arising from the use of common employees

- (1) If 1 or more employees of an employer perform duties for or in connection with 1 or more businesses carried on by the employer and 1 or more other persons, the employer and each of those other persons constitute a group.
- (2) If 1 or more employees of an employer are employed solely or mainly to perform duties for or in connection with 1 or more businesses carried on by 1 or more other persons, the employer and each of those other persons constitute a group.
- (3) If 1 or more employees of an employer perform duties for or in connection with 1 or more businesses carried on by 1 or more other persons, being duties performed in connection with, or in fulfilment of the employer's obligation under, an agreement, arrangement or undertaking for the provision of services to any 1 or more of those other persons in connection with that business or those businesses, the employer and each of those other persons constitute a group.
- (4) Subsection (3) applies to an agreement, arrangement or undertaking—
 - (a) whether the agreement, arrangement or undertaking is formal or informal, express or implied; and
 - (b) whether or not the agreement, arrangement or undertaking provides for duties to be performed by the employees or specifies the duties to be performed by them.

Note—

Section 18I allows the Commissioner, for pay-roll tax purposes, to exclude persons from a group constituted under this section in certain circumstances.

18DA—Groups of commonly controlled businesses

- (1) If a person or set of persons has a controlling interest in each of 2 businesses, the persons who carry on those businesses constitute a group.

Note—

Section 18I allows the Commissioner, for pay-roll tax purposes, to exclude persons from a group constituted under this section in certain circumstances.

- (2) For the purposes of this section, a person or set of persons has a controlling interest in a business if—
- (a) in the case of 1 person—the person is the sole owner (whether or not as trustee) of the business; or
 - (b) in the case of a set of persons—the persons are together the owners (whether or not as trustees) of the business; or
 - (c) in the case of a business carried on by a corporation—
 - (i) the person or each of the set of persons is a director of the corporation and the person or set of persons is entitled to exercise more than 50% of the voting power at meetings of the directors of the corporation; or
 - (ii) a director or set of directors of the corporation that is entitled to exercise more than 50% of the voting power at meetings of the directors of the corporation is under an obligation, whether formal or informal, to act in accordance with the direction, instructions or wishes of that person or set of persons; or
 - (d) in the case of a business carried on by a body corporate or unincorporated—that person or set of persons constitute more than 50% of the board of management (by whatever name called) of the body or control the composition of that board; or
 - (e) in the case of a business carried on by a corporation that has a share capital—that person or set of persons can, directly or indirectly, exercise, control the exercise of, or substantially influence the exercise of, more than 50% of the voting power attached to the voting shares, or any class of voting shares, issued by the corporation; or
 - (f) in the case of a business carried on by a partnership—that person or set of persons—
 - (i) own (whether beneficially or not) more than 50% of the capital of the partnership; or
 - (ii) is entitled (whether beneficially or not) to more than 50% of the profits of the partnership; or
 - (g) in the case of a business carried on under a trust—the person or set of persons (whether or not as a trustee of, or beneficiary under, another trust) is the beneficiary in respect of more than 50% of the value of the interests in the first-mentioned trust.

- (3) If—
- (a) 2 corporations are related bodies corporate within the meaning of the *Corporations Act 2001* of the Commonwealth; and
 - (b) 1 of the corporations has a controlling interest in a business, the other corporation has a controlling interest in the business.
- (4) If—
- (a) a person or set of persons has a controlling interest in a business; and
 - (b) a person or set of persons who carry on the business has a controlling interest in another business,
- the person or set of persons referred to in paragraph (a) has a controlling interest in that other business.
- (5) If—
- (a) a person or set of persons is the beneficiary of a trust in respect of more than 50% of the value of the interests in the trust; and
 - (b) the trustee of the trust (whether alone or together with another trustee or trustees) has a controlling interest in the business of another trust,
- the person or set of persons has a controlling interest in the business.
- (6) A person who may benefit from a discretionary trust as a result of the trustee or another person, or the trustee and another person, exercising or failing to exercise a power or discretion, is taken, for the purposes of this Part, to be a beneficiary in respect of more than 50% of the value of the interests in the trust.
- (7) If—
- (a) a person or set of persons has a controlling interest in the business of a trust; and
 - (b) the trustee of the trust (whether alone or together with another trustee or trustees) has a controlling interest in the business of a corporation,
- the person or set of persons is taken to have a controlling interest in the business of the corporation.
- (8) If—
- (a) a person or set of persons has a controlling interest in the business of a trust; and
 - (b) the trustee of the trust (whether alone or together with another trustee or trustees) has a controlling interest in the business of a partnership,

the person or set of persons is taken to have a controlling interest in the business of the partnership.

18DB—Groups arising from tracing of interests in corporations

- (1) An entity and a corporation form part of a group if the entity has a controlling interest in the corporation.

Note—

Section 18I allows the Commissioner, for pay-roll tax purposes, to exclude persons from a group constituted under this section in certain circumstances.

- (2) For the purposes of this section, an entity has a controlling interest in a corporation if the corporation has share capital and—
- (a) the entity has a direct interest in the corporation and the value of that direct interest exceeds 50%; or
 - (b) the entity has an indirect interest in the corporation and the value of that indirect interest exceeds 50%; or
 - (c) the entity has an aggregate interest in the corporation and the value of the aggregate interest exceeds 50%.

- (3) Division 3 applies for the purposes of the interpretation of this section.

Note—

Division 3 sets out the manner for determining whether an entity has a direct interest, indirect interest or aggregate interest in a corporation, and the value of such an interest.

- (4) In this section—

associated person means a person who is associated with another person in accordance with any of the following provisions—

- (a) persons are associated persons if they are related persons;
- (b) natural persons are associated persons if they are partners in a partnership;
- (c) private companies are associated persons if common shareholders have a majority interest in each private company;
- (d) trustees are associated persons if any person is a beneficiary common to the trusts (not including a public unit trust scheme) of which they are trustees;
- (e) a private company and a trustee are associated persons if a related body corporate of the company (within the meaning of the *Corporations Act 2001* of the Commonwealth) is a beneficiary of the trust (not including a public unit trust scheme) of which the trustee is a trustee;

domestic partner means a person who is a domestic partner within the meaning of the *Family Relationships Act 1975*, whether declared as such under that Act or not;

entity means—

- (a) a person; or
- (b) 2 or more persons who are associated persons (as defined in this section);

private company means a company that is not limited by shares, or whose shares are not quoted on the Australian Stock Exchange or any exchange of the World Federation of Exchanges;

related person means a person who is related to another person in accordance with any of the following provisions:

- (a) natural persons are related persons if—
 - (i) 1 is the spouse or domestic partner of the other; or
 - (ii) the relationship between them is that of parent and child, brothers, sisters, or brother and sister;
- (b) private companies are related persons if they are related bodies corporate within the meaning of the *Corporations Act 2001* of the Commonwealth;
- (c) a natural person and a private company are related persons if the natural person is a majority shareholder or director of the company or of another private company that is a related body corporate of the company within the meaning of the *Corporations Act 2001* of the Commonwealth;
- (d) a natural person and a trustee are related persons if the natural person is a beneficiary of the trust (not being a public unit trust scheme) of which the trustee is a trustee;
- (e) a private company and a trustee are related persons if the company, or a majority shareholder or director of the company, is a beneficiary of the trust (not being a public unit trust scheme) of which the trustee is a trustee.

Division 3—Business groups—tracing of interests in corporations

18DC—Application

This Division applies for the purposes of section 18DB.

18DD—Direct interest

- (1) An entity has a direct interest in a corporation if—
 - (a) in the case of an entity that is a person—the person can, directly or indirectly, exercise, control the exercise of, or substantially influence the exercise of, the voting power attached to any voting shares issued by the corporation; or

- (b) in the case of an entity that is 2 or more persons who are associated persons—each of the associated persons can, directly or indirectly, exercise, control the exercise of, or substantially influence the exercise of, the voting power attached to any voting shares issued by the corporation.
- (2) The value of the direct interest of the entity in the corporation is the proportion (expressed as a percentage) of the voting power of all voting shares issued by the corporation that—
- (a) in the case of an entity that is a person—the person can directly or indirectly exercise, control the exercise of, or substantially influence the exercise of, as referred to in subsection (1); or
 - (b) in the case of an entity that is 2 or more persons who are associated persons—the associated persons can, if acting together, directly or indirectly exercise, control the exercise of, or substantially influence the exercise of, as referred to in subsection (1).

18DE—Indirect interest

- (1) An entity has an indirect interest in a corporation if the corporation is linked to another corporation (the directly controlled corporation) in which the entity has a direct interest.
- (2) A corporation is linked to a directly controlled corporation if the corporation is part of a chain of corporations—
 - (a) that starts with the directly controlled corporation; and
 - (b) in which a link in the chain is formed if a corporation has a direct interest in the next corporation in the chain.

Examples—

The following are examples of how subsections (1) and (2) work (the examples are cumulative):

- 1 Corporation A (a directly controlled corporation) has a direct interest in corporation B. Corporations A and B form part of a chain of corporations, and corporation B is linked to corporation A. Accordingly, an entity that has a direct interest in corporation A also has an indirect interest in corporation B.
- 2 Corporation B also has a direct interest in corporation C. In this case, corporations A, B and C form part of a chain of corporations. Both corporations B and C are linked to corporation A. The entity that has a direct interest in corporation A has an indirect interest in both corporations B and C.

- 3 Corporation B also has a direct interest in corporation D. There are now 2 chains of corporations, one consisting of A, B and C, and one consisting of A, B and D. Corporations B, C and D are all linked to corporation A and an entity that has a direct interest in corporation A would have an indirect interest in corporations B, C and D. An entity that has a direct interest in corporation B would have an indirect interest in corporations C and D. However, an entity that has a direct interest in corporation C only would not have an indirect interest in corporation D, as corporation D is not linked to corporation C.
- (3) The value of the indirect interest of an entity in a corporation (an indirectly controlled corporation) that is linked to a directly controlled corporation is calculated by multiplying together the following:
- (a) the value of the direct interest of the entity in the directly controlled corporation;
 - (b) the value of each direct interest that forms a link in the chain of corporations by which the indirectly controlled corporation is linked to the directly controlled corporation.

Examples—

The following are examples of how subsection (3) works (the examples are cumulative):

- 1 An entity has a direct interest (with a value of 80%) in corporation A. Corporation A has a direct interest (with a value of 70%) in corporation B. The value of the indirect interest of the entity in corporation B is 80% x 70% (that is, 56%). Accordingly, in this example the entity has a controlling interest (within the meaning of section 18DA) in corporation B.
 - 2 Corporation B also has a direct interest (with a value of 40%) in corporation C. The value of the indirect interest of the entity in corporation C is 80% x 70% x 40% (that is, 22.4%). Accordingly, in this example the entity does not have a controlling interest in corporation C.
- (4) It is possible for an entity to have more than 1 indirect interest in a corporation, which may occur if the corporation is linked to more than 1 corporation in which the entity has a direct interest, or if the corporation is linked to only 1 corporation in which the entity has a direct interest but is linked through more than 1 chain of corporations.
- (5) In a case where subsection (4) applies, the entity has an aggregate interest in the corporation—see section 18DF.

18DF—Aggregation of interests

- (1) An entity has an *aggregate interest* in a corporation if—
- (a) the entity has a direct interest and 1 or more indirect interests in the corporation; or

- (b) the entity has more than 1 indirect interest in the corporation.
- (2) The value of the aggregate interest of an entity in a corporation is the sum of the following:
- (a) the value of the direct interest (if any) of the entity in the corporation;
 - (b) the value of each indirect interest of the entity in the corporation.

Example—

- (a) an entity has a direct interest (with a value of 40%) in corporation B;
- (b) the entity also has a direct interest (with a value of 25%) in corporation A, which in turn has a direct interest (with a value of 60%) in corporation B (accordingly, the entity also has an indirect interest in corporation B with a value of 15% (that is, $25\% \times 60\%$));
- (c) the value of the entity's aggregate interest in corporation B is the sum of the direct interest (40%) and the indirect interest (15%), which is 55%;
- (d) accordingly, in this example, the entity has a controlling interest in corporation B (within the meaning of section 18DB).

8—Insertion of heading

Before section 18E insert:

Division 4—Other matters

9—Repeal of section 18H

Section 18H—delete the section

10—Substitution of section 18I

Section 18I—delete the section and substitute:

18I—Exclusion of persons from groups

- (1) The Commissioner may, by order in writing, determine that a person who would, but for the determination, be a member of a group is not a member of the group.
- (2) The Commissioner may only make such a determination if satisfied, having regard to the nature and degree of ownership and control of the businesses, the nature of the businesses and any other matters the Commissioner considers relevant, that a business carried on by the person, is carried on independently of, and is not connected with the carrying on of, a business carried on by any other member of that group.

- (3) The Commissioner cannot exclude a person from a group if the person is a body corporate that, by reason of section 50 of the *Corporations Act 2001* of the Commonwealth, is related to another body corporate that is a member of that group.
- (4) This section extends to a group constituted by reason of section 18F.
- (5) A determination can be expressed to take effect on a date that is earlier than the date of the determination.
- (6) The Commissioner may by order in writing revoke a determination that applies in respect of a person if satisfied that the circumstances in which a determination may be made do not apply to the person.
- (7) The revocation of a determination can be expressed to take effect on a date that is earlier than the date of the determination.

11—Insertion of Schedules 1 and 2

After section 35 insert:

Schedule 1—Motor vehicle and accommodation allowances

Division 1—Motor vehicle allowances

1—Motor vehicle allowances—general

- (1) For the purposes of this Act, *wages*, in respect of a financial year, do not include the exempt component of a motor vehicle allowance paid or payable in respect of that year.
- (2) Accordingly, if the total motor vehicle allowance paid or payable to an employee in respect of a financial year does not exceed the exempt component, the motor vehicle allowance is not *wages* for the purposes of this Act.
- (3) If the total motor vehicle allowance paid or payable to an employee in respect of a financial year exceeds the exempt component (if any), only that amount that exceeds the exempt component of the motor vehicle allowance is included as *wages* for the purposes of this Act.
- (4) The *exempt component* of a motor vehicle allowance paid or payable in respect of a financial year is calculated in accordance with the following formula:

$$E = K \times R$$

Where

E is the exempt component

K is the number of business kilometres travelled during the financial year

R is the exempt rate.

- (5) The *number of business kilometres travelled during the financial year* ("K") is to be determined in accordance with the continuous recording method, or the averaging method, whichever method is selected and used by the employer in accordance with the succeeding clauses of this Division.
- (6) The Commissioner, by notice in writing, may approve the use, by an employer or class of employer, of another method of determining the number of business kilometres travelled during the financial year (including the use of an estimate).
- (7) If the Commissioner acts under subclause (6), the number of business kilometres travelled during the financial year is to be determined in accordance with the method approved by the Commissioner.
- (8) For the purposes of this clause, the *exempt rate* for the financial year concerned is—
 - (a) the rate prescribed by the regulations under section 28-25 of the ITAA for calculating a deduction for car expenses for a large car using the "cents per kilometre method" in the financial year immediately preceding the financial year in which the allowance is paid or payable; or
 - (b) if no rate referred to in paragraph (a) is prescribed, the rate prescribed by the regulations under this Act.

2—Continuous recording method

If an employer selects the continuous recording method for the purposes of determining the number of business kilometres travelled during the financial year, the following details are required to be recorded by the employer:

- (a) the odometer readings at the beginning and end of each business journey undertaken by the person during a financial year by means of a motor vehicle provided or maintained by the person;
- (b) the specific purpose for which each such business journey was taken;
- (c) the distance travelled by the person during the financial year in the course of all such business journeys (which is taken to be the *number of business kilometres travelled during the financial year*), calculated on the basis of the odometer readings referred to in paragraph (a).

3—Averaging method

- (1) If an employer selects the averaging method for the purposes of determining the number of business kilometres travelled during the financial year, the following details are required to be recorded by the employer:
- (a) the odometer readings at the beginning and end of each business journey undertaken by the person during the relevant 12-week period by means of a motor vehicle provided or maintained by the person;
- Note—**
- Clause 4 defines the relevant 12-week period.
- (b) the specific purpose for which each such business journey was taken;
 - (c) the distance travelled by the person during the relevant 12-week period in the course of all such business journeys, calculated on the basis of the odometer readings referred to in paragraph (a);
 - (d) the odometer readings at the beginning and end of the relevant 12-week period for each motor vehicle provided or maintained by the person for the purpose of undertaking business journeys;
 - (e) the distance travelled by each such vehicle during the relevant 12-week period, calculated on the basis of the odometer readings referred to in paragraph (d);
 - (f) the distance travelled by the person in the course of business journeys undertaken by means of each such vehicle during the relevant 12-week period, calculated as a percentage of the distance travelled by that vehicle during that period (the ***relevant percentage***);
 - (g) the odometer readings at the beginning and end of the financial year for each vehicle provided or maintained by the person for the purpose of undertaking business journeys;
 - (h) the distance travelled by each such vehicle during the financial year, calculated on the basis of the odometer readings referred to in paragraph (g);
 - (i) the distance travelled by the person in the course of business journeys undertaken by means of each such vehicle during the financial year (which is taken to be the ***number of business kilometres travelled during the financial year***), calculated on the basis that the percentage of that distance that was travelled by the person in the course of business journeys undertaken by means of each such vehicle during the financial year is the same as the relevant percentage.

- (2) For the next succeeding 4 financial years after the first financial year in which odometer details are recorded in accordance with subclause (1), an employer is not required to calculate the relevant percentage, or record the details referred to in subclause (1)(a) to (f), for the person but is required to record the other details referred to in that subclause.
- (3) Accordingly, for the next succeeding 4 financial years after the first financial year in which odometer details are recorded in accordance with subclause (1), the number of business kilometres travelled during the financial year is to be calculated (as referred to in subclause (1)(i)) on the basis of the relevant percentage calculated for the first financial year.
- (4) Despite subclauses (2) and (3), an employer is required to calculate the relevant percentage for a financial year, and record the details referred to in subclause (1)(a) to (f), if—
 - (a) the Commissioner serves a notice on the employer before the commencement of a financial year during that period directing the employer to keep the details referred to in subclause (1)(a) to (f) for that financial year; or
 - (b) the employer wishes to use the recording method referred to in this clause for 1 or more additional motor vehicles used by the person in any financial year or for any other reason.
- (5) In a situation referred to in subclause (4), the new record for the financial year replaces the relevant percentage details previously recorded and subclauses (2) and (3) apply in relation to the new record for the financial year as if it were the first financial year in which odometer details were recorded.
- (6) An employer who has adopted and employed the method of recording referred to in subclauses (2) and (3) for a person for 4 successive financial years must, in the next succeeding financial year, make a fresh recording of all the details specified in subclause (1) if the employer intends to continue to use the same method of recording for the person and subclauses (2) and (3) then apply in relation to the new record for the financial year as if it were the first financial year in which odometer details were recorded.
- (7) If the odometer of a motor vehicle is replaced or recalibrated during any period for which its readings are relevant for the purposes of this clause, the odometer readings immediately before and after the replacement or recalibration are to be recorded.

4—Meaning of relevant 12-week period

- (1) In clause 3, *relevant 12-week period* means a continuous period of at least 12 weeks, selected by the employer, throughout which a motor vehicle is provided or maintained by a person and if the motor vehicle is provided or maintained for less than 12 weeks, the period must be the entire period for which the motor vehicle is provided or maintained.

- (2) The period may overlap the start or end of the financial year, so long as it includes part of the year.
- (3) If the averaging method is used for 2 or more motor vehicles for the same financial year, the odometer readings for those motor vehicles must cover periods that are concurrent.

5—Replacing 1 motor vehicle with another motor vehicle

- (1) For the purposes of using the averaging method, an employer may nominate 1 motor vehicle as having replaced another motor vehicle with effect from a day specified in the nomination.
- (2) After the nomination takes effect, the replacement motor vehicle is treated as the original motor vehicle, and the original motor vehicle is treated as a different motor vehicle.
- (3) An employer need not repeat for the replacement vehicle the steps already taken for the original motor vehicle.
- (4) An employer must record the nomination in writing in the financial year in which the nomination takes effect.
- (5) However, the Commissioner may allow an employer to record the nomination at a later time.

6—Changing method of recording

- (1) An employer may change from using the averaging method to using the continuous recording method with effect from the beginning of a financial year if the employer complies with clause 2 in respect of the financial year.
- (2) An employer may change from using the continuous recording method to using the averaging method with effect from the beginning of a financial year if the employer complies with clause 3 in respect of the financial year.

7—Definition

In this Division—

business journey means—

- (a) a journey undertaken in a motor vehicle by a person otherwise than in the application of the vehicle to a private use, being an application that, if the person is paid a motor vehicle allowance for that use, results in the provision of a fringe benefit (within the meaning of the FBTA Act) by the employer; or
- (b) a journey undertaken in a motor vehicle by a person in the course of producing assessable income of the person (within the meaning of the *Income Tax Assessment Act 1936* of the Commonwealth).

Division 2—Accommodation allowances

8—Accommodation allowances

- (1) For the purposes of this Act, *wages* do not include an accommodation allowance paid or payable to an employee in respect of a night's absence from the person's usual place of residence that does not exceed the exempt rate.
- (2) If the accommodation allowance paid or payable to an employee in respect of a night's absence from the person's usual place of residence exceeds the exempt rate, *wages* include that allowance only to the extent that it exceeds the exempt rate.
- (3) For the purposes of this clause, the *exempt rate* for the financial year concerned is—
 - (a) the total reasonable amount for daily travel allowance expenses using the lowest capital city for the lowest salary band for the financial year determined by the Commissioner of Taxation of the Commonwealth; or
 - (b) if no determination referred to in paragraph (a) is in force, the rate prescribed by the regulations.

Schedule 2—Shares and options

1—Preliminary

- (1) Any wages constituted by a share or option under section 3(3d) are taken, for the purposes of the imposition of pay-roll tax, to be paid or payable on the relevant day.
- (2) For the purposes of this Schedule, the *relevant day* is the day that the employer elects in accordance with this Schedule to treat as the day on which the wages are paid or payable.

2—Choice of relevant day

- (1) The employer can elect to treat as the *relevant day* either the date on which the share or option is granted to the employee or the vesting date.
- (2) A share or option is granted to a person in the following circumstances—
 - (a) in the case of a share—if the person acquires the share (within the meaning of section 139G of the *Income Tax Assessment Act 1936* of the Commonwealth) or in the circumstances prescribed by the regulations under this Act;
 - (b) in the case of an option—if the person acquires a right (within the meaning of section 139G of the *Income Tax Assessment Act 1936* of the Commonwealth) to the share to which the option relates or in the circumstances prescribed by the regulations under this Act.

- (3) The *vesting date* in respect of a share is the date on which the share vests in the employee (that is, when any conditions applying to the grant of the share have been met and the employee's legal or beneficial interest in the share cannot be rescinded).
- (4) The *vesting date* in respect of an option is 1 of the following dates (whichever happens first):
 - (a) the date on which the share to which the option relates is granted to the employee;
 - (b) the date on which the employee exercises a right under the option to have the share the subject of the option transferred to, allotted to or vest in him or her.

3—Deemed choice of relevant day in special cases

- (1) If an employer grants a share or an option to an employee and the value of the grant of the share or option is not included in the taxable wages of the employer for the financial year in which the share or option was granted, the employer is taken to have elected to treat the wages constituted by the grant of that share or option as being paid or payable on the vesting date.
- (2) If an employer grants a share or an option to an employee and the value of the grant of the share or option is nil or, if the employer were to elect to treat the date of grant as the relevant day, the wages constituted by the grant would not be liable to pay-roll tax, the employer is taken to have elected to treat the wages constituted by the grant of that share or option as being paid or payable on the date on which the share or option was granted.

4—Effect of rescission, cancellation of share or option

- (1) If the grant of a share or option is withdrawn, cancelled or exchanged before the vesting date for any valuable consideration (other than the grant of other shares or options), the following provisions apply:
 - (a) the date of withdrawal, cancellation or exchange is taken to be the vesting date of the share or option;
 - (b) the market value of the share or option, on the vesting date, is taken to be the amount of the valuable consideration (and, accordingly, that amount is the amount paid or payable as wages on that date).
- (2) If an employer includes the value of a grant of a share or option in the taxable wages of the employer for a financial year and the grant is rescinded because the conditions attaching to the grant were not met, the taxable wages of the employer, in the financial year in which the grant is rescinded, are to be reduced by the value of the grant as previously included in the taxable wages of the employer.
- (3) Subclause (2) does not apply just because an employee fails to exercise an option or to otherwise exercise his or her rights in respect of a share or option.

5—Grant of share pursuant to exercise of option

The grant of the share by an employer does not constitute wages for the purposes of this Act if the employer is required to grant the share as a consequence of the exercise of an option by a person and—

- (a) the grant of the option to the person constitutes wages for the purposes of this Act; or
- (b) the option was granted to the person before 1 July 2008.

6—Value of shares and options

- (1) If the grant of a share or option constitutes wages under this Act, the amount paid or payable as wages is taken, for the purposes of this Act, to be the market value of the share or option (expressed in Australian currency) on the relevant day, less the consideration (if any) paid or given by the employee in respect of the share or option (other than consideration in the form of services performed).
- (2) The market value of a share or option on the relevant day is to be determined in accordance with the Commonwealth income tax provisions.
- (3) For that purpose, the Commonwealth income tax provisions apply with the following modifications, and any other necessary modifications:
 - (a) the market value of an option is to be determined as if it were a right to acquire a share;
 - (b) a reference to a taxpayer is to be read as a reference to the employee;
 - (c) a reference to the Commissioner of Taxation is to be read as a reference to either that Commissioner or the Commissioner of State Taxation.
- (4) Section 3(1c) does not apply to the grant of a share or option that constitutes wages, even if it constitutes a fringe benefit.
- (5) In this clause—

Commonwealth income tax provisions means the provisions of Subdivision F of Division 13A of Part III of the *Income Tax Assessment Act 1936* of the Commonwealth.

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

- (1) For the purposes of this Act, wages include the grant of a share, or option, by a company to a director of the company by way of remuneration for the appointment or services of the director that would be wages under this Act if the director were an employee of the company.

- (2) For that purpose, the other provisions of this Schedule apply in respect of any such grant as if a reference to the employer were a reference to the company and a reference to the employee were a reference to the director of the company.
- (3) In this clause, a reference to a director of the company includes a reference to the following:
 - (a) a person who, under a contract or other arrangement, is to be appointed as a director of the company;
 - (b) a former director of the company.
- (4) In the case of wages constituted by the grant of a share or option by a company to a director of the company by way of remuneration for the appointment of the director, but not for services performed—
 - (a) the grant of the share or option is taken, for the purposes of this Act, to be paid or payable for services performed during the month in which the relevant day occurs; and
 - (b) a reference in this Act to the place or places where services are performed is a reference to the place or places where it may reasonably be expected that the services of the director in respect of the company will be performed.

8—When services considered to have been performed

For the purposes of this Act, if the grant of a share or an option constitutes wages for the purposes of this Act, the services in respect of which those wages are paid or payable are taken to have been performed during the month in which the relevant day occurs.

9—Place where wages are payable

- (1) The wages constituted by the grant of the share or option are taken to be paid or payable in this State if the share is a share in a local company or, in the case of an option, an option to acquire shares in a local company.
- (2) In any other case, the wages constituted by the grant of the share or option are taken to be paid or payable outside this State.

Note—

If the wages concerned are taken to be payable outside this State, because the shares concerned are shares in a company that is not a local company, the grant of the share or option may still be liable to pay-roll tax under this Act if the grant is made for services performed or rendered wholly or mainly in this State (see section 8).

- (3) In this clause—

local company means—

- (a) a company incorporated or taken to be incorporated under the *Corporations Act 2001* of the Commonwealth that is taken to be registered in this State for the purposes of that Act; or

- (b) any other body corporate that is incorporated under an Act of this State.