

South Australia

# Statutes Amendment (Land Holding Entities and Tax Avoidance Schemes) Act 2011

An Act to amend the *Stamp Duties Act 1923* and 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 *Statutes Amendment (Land Holding Entities and Tax Avoidance Schemes) Act 2011*.

#### 2—Commencement

This Act will come into operation, or will be taken to have come into operation, as the case may require, on 1 July 2011.

#### 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 *Stamp Duties Act 1923*

#### 4—Amendment of section 2—Interpretation

Section 2(1)—after the definition of *property* insert:

*quoted*, in relation to any shares, units in a unit trust scheme or interests in such shares or units, includes—

- (a) shares, units or interests that have stopped being quoted on a recognised financial market merely because they belong to a class of shares, units or interests the quotation of which has been suspended, unless the body that issued the shares, units or interests has ceased to be included in the official list of the financial market; and
- (b) shares, units or interests that comprise a stapled security that is quoted on a recognised financial market;

## 5—Amendment of section 71—Instruments chargeable as conveyances

- (1) Section 71—after subsection (7) insert:
- (7a) An instrument effecting or acknowledging, evidencing or recording a transfer of property by a trustee to a self managed superannuation fund in the following circumstances will be taken not to be a conveyance operating as a voluntary disposition *inter vivos*:
- (a) the property was acquired for the trust or became subject to the trust—
- (i) by virtue of an instrument duly stamped with *ad valorem* duty; or
- (ii) as a result of a transaction to which section 71E applies in relation to which a statement under that section has been lodged and *ad valorem* duty paid; and
- (b) the self managed superannuation fund financed the acquisition of the whole of the property by the trustee (either by providing money, obtaining a loan or other financial accommodation, or providing the consideration for the purchase in some other form); and
- (c) the whole of the property being transferred has been held on trust for the benefit of the self managed superannuation fund.
- (2) Section 71(15)—after the definition of *responsible entity* insert:
- self managed superannuation fund* has the meaning as in the *Superannuation Industry (Supervision) Act 1993* of the Commonwealth;

## 6—Amendment of section 85—Exempt transactions

- (1) Section 85—delete "under this Act"
- (2) Section 85—after its present contents as amended by this section (now to be designated as subsection (1)) insert:
- (2) Subsection (1) does not apply in relation to duty under Part 4.

## 7—Substitution of Part 4

Part 4—delete the Part and substitute:

### **Part 4—Land holding entities**

#### **Division 1—Preliminary**

##### **91—Interpretation**

- (1) In this Part—
- asset* includes any form of property;

**associate**—see subsection (8);

**close personal relationship** means the relationship between 2 adult persons (whether or not related by family and irrespective of their gender) who live together as a couple on a genuine domestic basis, but does not include—

- (a) the relationship between a legally married couple; or
- (b) a relationship where 1 of the persons provides the other with domestic support or personal care (or both) for fee or reward, or on behalf of some other person or an organisation of whatever kind;

**Note**—

Two persons may live together as a couple on a genuine domestic basis whether or not a sexual relationship exists, or has ever existed, between them.

**constituent documents** of a relevant entity means—

- (a) for a company—its constitution; or
- (b) for a unit trust scheme—the instruments constituting or governing the administration of the scheme;

**corresponding law** means a law of another State, or a Territory, of the Commonwealth that imposes duties corresponding to those imposed by this Act;

**direct interest**—see section 93(1);

**executive officer** of a company means a person who is concerned in, or takes part in, the management of the company (regardless of the person's designation and whether or not the person is a director of the company);

**goods** does not include—

- (a) goods that are stock-in-trade; or
- (b) materials held for use in manufacture; or
- (c) goods under manufacture; or
- (d) goods held or used in connection with the business of primary production; or
- (e) livestock; or
- (f) a registered motor vehicle or a registered trailer; or
- (g) a ship or vessel;

**group** means a group of associates;

**hold**—a person "holds" a share or unit in a relevant entity if the person—

- (a) is registered as the holder; or
- (b) is beneficially entitled to the share or unit; or

(c) controls the exercise of rights attached to the share or unit;

**indirect interest**—see section 95;

**interest in land** includes any of the following, or an interest in any of the following:

- (a) a lease or licence granted under—
  - (i) the *Mining Act 1971*; or
  - (ii) the *Offshore Minerals Act 2000*; or
  - (iii) the *Petroleum and Geothermal Energy Act 2000*;
- (b) a lease granted under the *Aquaculture Act 2001*, including a sublease of such a lease;
- (c) an interest conferred by a forestry property (vegetation) agreement (within the meaning of the *Forest Property Act 2000*);

**land asset** and **local land asset**—see section 92;

**land holding entity**—see section 98;

**listed company** means a company that is limited by shares and some or all of those shares are quoted on a recognised financial market;

**listed trust** means a unit trust scheme some or all of the units in which are quoted on a recognised financial market;

**motor vehicle** and **trailer** have the same meanings as these expressions respectively have in the *Motor Vehicles Act 1959*;

**notional interest**—see section 96;

**prescribed interest** means—

- (a) in relation to a private company or a private unit trust scheme—a proportionate interest in the entity of 50% or more; and
- (b) in relation to a listed company or a public unit trust scheme—a proportionate interest of 90% or more;

**private company** means—

- (a) a company that is limited by shares but whose shares are not quoted on a recognised financial market; or
- (b) a company that is not limited by shares,

but does not include a company excluded from the ambit of this definition by the regulations;

**private unit trust scheme** means a unit trust scheme other than a listed trust or a widely held trust;

**proportionate interest** in a relevant entity means—

- (a) for a person or group that has a direct or indirect interest in the entity—the percentage representing the extent of that interest; or
- (b) for a person or group that has both a direct and an indirect interest in the entity—an aggregate percentage representing the extent of both those interests;

**public unit trust scheme** means a listed trust or a widely held trust;

**related**—see section 94;

**relevant entity** means—

- (a) a private company; or
- (b) a listed company; or
- (c) a private unit trust scheme; or
- (d) a public unit trust scheme;

**significant interest** in a relevant entity means a proportionate interest in the entity of 50% or more;

**South Australian goods** means goods that are used solely or predominantly in South Australia;

**underlying**—the underlying assets of a relevant entity include both the assets held beneficially by the entity and its notional interests in the assets of related entities;

**unit** in a unit trust scheme means—

- (a) a right to participate in profits, income or distribution of assets under the scheme; or
- (b) a right to any such right of participation;

**unit trust scheme** means an arrangement under which investors may acquire rights to participate, as beneficiaries under a trust, in profits, income or distribution of assets arising from the acquisition, holding, management, use or disposal of property;

**widely held trust**—see section 97;

**winding up**—a unit trust scheme is wound up if the assets subject to the scheme are distributed in their entirety.

- (2) Property is taken to be held beneficially by a unit trust scheme if it is held by the trustees of the scheme in trust for the unitholders.
- (3) A relevant entity or other person that is an object of a discretionary trust is to be regarded, for the purposes of this Part, as beneficially entitled to the trust property unless—
  - (a) the relevant entity or other person satisfies the Commissioner that this subsection operates unreasonably in the circumstances of the particular case; and

- (b) the Commissioner determines that the relevant entity or other person is not, in the circumstance of the particular case, to be regarded as beneficially entitled to the trust property.
- (4) A relevant entity or other person that is a partner in a partnership is to be regarded, for the purposes of this Part, as beneficially entitled to a proportionate share in each and every asset of the partnership.
- (5) For the purposes of subsection (4) but subject to subsection (6), a proportionate share of a partner will be represented by the greater of the following:
  - (a) the relative entitlement of the partner to participate in the surplus property of the partnership after the realisation of assets and the payment, satisfaction or discharge of debts and liabilities;
  - (b) the relative capital contribution of the partner (being equity and any loan capital).
- (6) The Commissioner may—
  - (a) if satisfied that it would be reasonable and appropriate to do so in the circumstances of the particular case—
    - (i) determine that the paragraph under subsection (5) that provides the lesser proportionate share (rather than the greater) will be the paragraph that applies; or
    - (ii) determine that the proportionate share of a partner will be represented in some other manner; and
  - (b) if paragraph (b) of subsection (5) applies, determine not to take loan capital into account if the Commissioner is satisfied that the loan was entered into as part of a genuine business arrangement and not as an arrangement to avoid or reduce duty under this Part.
- (7) Subsections (4) and (5) do not limit the operation of any other section of this Act (but not so as to impose double duty with respect to the same transaction).
- (8) A person is an *associate* of, or *associated* with, another if—
  - (a) they are married or in a close personal relationship; or
  - (b) one is the parent, child, brother or sister of the other; or
  - (c) they are in partnership; or
  - (d) they are companies which are related bodies corporate for the purposes of the *Corporations Act 2001* of the Commonwealth; or
  - (e) one is a company and the other is a director or executive officer of, or shareholder in, the company; or

- (f) they are both trustees of a trust or one is a trustee of a trust and the other is a beneficiary of the trust; or
  - (g) a chain of relationships can be traced between them under one or more of the above paragraphs,
- (but a person is not to be regarded as an associate of another if the Commissioner is satisfied that the association has not arisen as a result of a common commercial interest or purpose and they will act entirely independently of each other).
- (9) An obligation or liability imposed under this Part on a unit trust scheme attaches to the trustees for the time being of the scheme jointly and severally.
  - (10) An obligation or liability imposed under this Part on a group attaches to the members of the group jointly and severally.
  - (11) To avoid doubt, a reference in this Part to underlying South Australian goods are goods that, if considered as being assets, constitute underlying assets.
  - (12) For the purposes of determining whether goods are used solely or predominately in South Australia, the determination will be made according to—
    - (a) unless paragraph (b) applies—the circumstances that exist at the time of the acquisition or increase (as the case may be) of the relevant interest;
    - (b) if the Commissioner is satisfied that the location of the goods has been changed in order to obtain a reduction in duty under this Part—the circumstances that existed immediately before the change in location.

## 92—Land assets

- (1) A *land asset* is an interest in land other than—
  - (a) a mortgage, lien or charge; or
  - (b) an interest under a warrant or writ.
- (2) A *local land asset* is a land asset consisting of an interest in land in South Australia.
- (3) A relevant entity's interest in land will be taken to include an interest in anything fixed to the land, including anything—
  - (a) separately owned from the land other than where the separation of ownership occurs by virtue of or as a result of the operation of another Act or law; or
  - (b) fixed to the land but notionally severed or considered to be legally separate to the land by virtue of or as a result of the operation of another Act or law (so that a separation by another Act for the purposes of that Act will not affect the operation of this paragraph for the purposes of the imposition and calculation of duty under this Part).

- (4) In connection with the operation of subsection (3)—
  - (a) the subsection applies to all items fixed to the land whether or not they constitute fixtures at law; and
  - (b) all fixtures at law will be taken to be within the application of the subsection.
- (5) In addition—
  - (a) in connection with the operation of subsection (3)(a), if the Commissioner is satisfied that, at a relevant time, it was not part of an arrangement to avoid duty under this Part that an item was separately owned from the land, the Commissioner may determine that an entity's interest in land will not be taken to include an interest in the item; and
  - (b) in connection with the operation of subsection (3)(b), an entity's interest in land will not be taken to include an interest in an item which is owned by another entity unless—
    - (i) the relevant entity and the other entity are related entities and—
      - (A) the relevant entity holds a significant interest in the other entity or vice versa; or
      - (B) a chain of significant interest can be traced between the relevant entity and the other entity; or
    - (ii) a person or group holds a significant interest in both the relevant entity and the other entity.

### 93—Direct interests

- (1) A person has a *direct interest* in a relevant entity if the person holds a share or unit in the entity.
- (2) A direct interest that a person or group has in a relevant entity is to be expressed as a proportionate interest.
- (3) The *proportionate interest* is the highest of the following:
  - (a) a percentage representing the proportion of votes that the person or members of the group would be entitled to exercise (or control) at a general meeting of shareholders or unitholders assuming that all shareholders or unitholders exercised their voting rights;
  - (b) a percentage representing the extent the person or members of the group are entitled to participate in dividends or distributions of income;
  - (c) a percentage representing the extent to which the person or members of the group would be entitled to participate in the distribution of assets on a winding up of the relevant entity.

- (4) The proportionate interest of a person or group in a relevant entity is to be determined as if any power that the person has, or the members of the group or any of them have, to increase the extent of an interest (by varying the constituent documents of the relevant entity or in any other way) had been exercised so as to maximise the relevant interest in the relevant entity.

#### 94—Related entities

- (1) Two relevant entities are *related entities* if—
- one has a direct interest in the other; or
  - a series of such relationships can be traced between them through another or other related entities (*intermediate entities*).
- (2) If a relevant entity is related to another relevant entity by a relationship traced through an intermediate entity or intermediate entities, the relevant entity's proportionate interest in the other is calculated by multiplying the relevant fractions together and expressing the result as a percentage.

##### Example—

Entity A (a listed company) holds a 75% proportionate interest in entity B (a private unit trust scheme) which in turn holds a 50% proportionate interest in entity C (a private company). In this case the proportionate interest of entity A in entity C (insofar as it is traced through entity B) is 37.5%.

#### 95—Indirect interests

- (1) If a person or group has a direct interest in a private company or a private unit trust scheme (entity A) which is related to another private company or a private unit trust scheme (entity B), the person or group has an *indirect interest* in entity B.
- (2) An indirect interest that a person or group has in an entity is to be expressed as a proportionate interest.
- (3) The proportionate interest is calculated by multiplying together—
- a fraction representing the proportionate interest of the person or group in entity A; and
  - a fraction representing entity A's proportionate interest in entity B,

and expressing the result as a percentage.

##### Example—

X holds a proportionate interest of 33 $\frac{1}{3}$ % in entity A which in turn holds a 75% proportionate interest in entity B which in turn holds a 50% proportionate interest in entity C. In this case the X's indirect interest in entity C is to be expressed as a proportionate interest of 12.5%.

## 96—Notional interest in assets of related entity

- (1) A relevant entity has a notional interest in an asset held beneficially by a private company or a private unit trust scheme if—
  - (a) the relevant entity holds a significant interest in the private company or private unit trust scheme; or
  - (b) a chain of significant interests can be traced between the relevant entity and the private company or private unit trust scheme.

### Example—

Entity A holds a 75% proportionate interest in entity B which in turn holds a 60% proportionate interest in entity C which in turn holds a 40% proportionate interest in entity D. In this case entity A has a notional interest in the assets held beneficially by entity B and entity C but not in the assets held by entity D.

- (2) The value of the notional interest is calculated as follows:

$$V = V_1 \times P$$

Where—

$V_1$  is the unencumbered value of the asset

$P$  is a fraction representing the proportionate interest of the relevant entity in the private company or private unit trust scheme.

## 97—Widely held trusts

- (1) For the purposes of this Part, a **widely held trust** is a unit trust scheme which has not less than 300 unitholders none of whom, individually or together with any associated person, is entitled to more than 20% of the units in the trust.
- (2) If a registered unitholder in a unit trust scheme holds units as a trustee for 2 or more trusts, the unitholder is to be treated as a separate registered unitholder in relation to each of those trusts and the units held under each trust are to be treated as a separate unit holding.
- (3) However, a trustee is not to be treated as a separate registered unitholder in relation to 2 or more trusts if, as separate unitholders in relation to those trusts, they would be associated with each other.

## 98—Land holding entity

A relevant entity is a **land holding entity** if the unencumbered value of the underlying local land assets of the relevant entity is \$1 000 000 or more.

## 99—Determination of value

- (1) In this section—

**relevant asset** means any underlying land assets or any South Australian goods.

- (2) The value of any relevant asset under this Part is to be determined according to the market value of the relevant asset at the time that the question of value falls to be determined.
- (3) Where no evidence of the value of a relevant asset or interest acquired or held is furnished to the Commissioner for the purposes of this Part, or the evidence so furnished is, in the Commissioner's opinion, unsatisfactory, the Commissioner may cause a valuation of the asset or interest to be made by some person appointed by the Commissioner and may apply any such valuation for the purposes of this Part.
- (4) The Commissioner may, having regard to the merits of the case, charge the whole or a part of the expenses of, or incidental to, the making of a valuation pursuant to subsection (3) to any person liable to pay duty under this Part in relation to an acquisition of the relevant asset or any interest.
- (5) A reference in this section to the acquisition of an asset or interest extends to a notional acquisition under this Part.
- (6) Any determination of market value under this Part must be based on the unencumbered value.
- (7) In addition, when determining the value of an asset or interest—
  - (a) it is to be assumed that a hypothetical purchaser would, when negotiating the price for any asset or interest, have knowledge of all existing information relating to the asset or interest; and
  - (b) no account is to be taken of any amount that a hypothetical purchaser would have to expend to reproduce, or otherwise acquire a permanent right of access to and use of, existing information relating to the asset or interest.

## **Division 2—Dutiable transactions**

### **100—General principle of liability to duty**

- (1) A person or group that acquires a prescribed interest, or increases a prescribed interest, in a land holding entity notionally acquires an interest in the underlying local land assets of the entity and is liable to duty in respect of the notional acquisition.
- (2) The following transactions are therefore dutiable:
  - (a) a transaction as a result of which a person or group acquires or has a prescribed interest in a land holding entity; or
  - (b) a transaction as a result of which a person or group that has a prescribed interest in a land holding entity increases its prescribed interest in the entity.

- (3) A transaction is dutiable under this Part even though the person or group that has a prescribed interest, or increases a prescribed interest, in the land holding entity as a result of the transaction—
  - (a) is not a party to the transaction; or
  - (b) has a passive role in the transaction.
- (4) For example, any of the following is capable of being a dutiable transaction:
  - (a) an allotment of shares in a company or units in a unit trust scheme; or
  - (b) the variation or abrogation of rights attaching to shares in a company or units in a unit trust scheme; or
  - (c) the redemption, surrender or cancellation of shares in a company or units in a unit trust scheme; or
  - (d) the addition or retirement of a partner in a partnership with assets comprising shares in a company or units in a unit trust scheme.
- (5) However, if a relevant entity acquires a local land asset and, as a result of the acquisition, becomes a land holding entity, and conveyance duty is paid in respect of the transaction, the transaction is not dutiable under this Part.
- (6) If a person who acquires or holds an interest in a land holding entity is a trustee for 2 or more trusts, any interest in the entity acquired or held by the person for different trusts are to be treated as if they were acquired or held by separate persons.

### **101—Aggregation of interests**

- (1) If a person or group acquires an interest in a land holding entity that, when aggregated with an interest in the entity acquired by another person as a result of an associated transaction on the same day or within the preceding 3 years, amounts to a prescribed interest in the entity, then for the purposes of this Part—
  - (a) the person or group acquires that prescribed interest in the entity; and
  - (b) the person or group and any other person acquiring an interest in the entity as a result of the associated transaction are jointly and severally liable for the payment of duty in respect of the acquisition.
- (2) In this section—

***associated transaction***, in relation to the acquisition of an interest in a land holding entity by a person or associated person, means an acquisition of an interest in the entity by another person in circumstances in which—

  - (a) those persons are acting in concert; or

- (b) the acquisitions form, evidence, give effect to or arise from substantially 1 arrangement, 1 transaction or 1 series of transactions.

### **102—Value of notional interest acquired as a result of dutiable transaction**

- (1) If a person or group has, as a result of a dutiable transaction, a prescribed interest in a land holding entity, the value of the notional interest acquired in the entity's underlying local land assets is determined as follows:

$$NV = TV \times P$$

Where—

*NV* is the value to be of the notional interest acquired

*TV* is the total unencumbered value of all the entity's underlying local land assets

*P* is the fraction representing the proportionate interest of the person or group in the entity.

- (2) If a person or group that has a prescribed interest in a land holding entity increases its prescribed interest as a result of a dutiable transaction, the value of the notional interest acquired in the entity's underlying local land assets is determined as follows:

$$NV = TV \times (P_2 - P_1)$$

Where—

*NV* is the value to be ascertained

*TV* is the total unencumbered value of all the entity's underlying local land assets

*P<sub>1</sub>* is the fraction representing the proportionate interest in the entity before the increase

*P<sub>2</sub>* is the fraction representing the proportionate interest in the entity after the increase.

### **102A—Calculation of duty**

- (1) The duty in respect of a transaction under which a person or group acquires a prescribed interest in a land holding entity is to be equivalent to—
- (a) in the case of an entity that is a private company or a private unit trust—the duty payable on a conveyance of land with an unencumbered value equivalent to—
- (i) the value of the acquirer's notional interest in the entity's underlying local land assets; plus

- (ii) the value of the acquirer's notional interest in the entity's underlying South Australian goods (on the assumption that this interest corresponds to the interest in the entity's underlying local land assets);
  - (b) in the case of an entity that is a listed company or a public unit trust scheme—10% of the duty payable on a conveyance of land with an unencumbered value equivalent to—
    - (i) the value of the acquirer's notional interest in the entity's underlying local land assets; plus
    - (ii) the value of the acquirer's notional interest in the entity's underlying South Australian goods (on the assumption that this interest corresponds to the interest in the entity's underlying local land assets).
- (2) Duty on a dutiable transaction under which a person or group increases its prescribed interest in a land holding entity is to be calculated as follows:

$$D = d_1 - d_2$$

Where—

***D*** is the amount of the duty

***d*<sub>1</sub>** is the amount that would have been payable if the person or group had acquired the whole of its interest in a single transaction at the time of the increase

***d*<sub>2</sub>** is the amount that would have been payable if the person or group had acquired its pre-existing interest in a single transaction at the time of the increase.

- (3) To avoid doubt, duty under subsection (2) is to include duty that relates to land plus duty that relates to goods.
- (4) If—
- (a) a person or group holds an interest in a relevant entity; and
  - (b) the relevant entity then acquires land so as to become a land holding entity; and
  - (c) the acquisition under paragraph (b) was subject to *ad valorem* duty that has been duly paid; and
  - (d) the person or group acquires a prescribed interest in the entity as a land holding entity,

the duty calculated under subsection (1) is to be reduced in accordance with the following formula:

$$D = d_1 - d_2$$

Where—

***D*** is the amount of the duty to be paid on account of this subsection

$d_1$  is the amount that would have been payable if the person or group had acquired the whole of its interest in a single transaction at the time of the acquisition

$d_2$  is the amount that would be payable on a conveyance of an interest in the relevant land corresponding to the interest held by the person or group at the time of the acquisition under paragraph (b)

**relevant land** is the total amount of land in South Australia that is held by the land holding entity at the time that the person or group acquires the prescribed interest under paragraph (d).

- (5) If any part of a prescribed interest in a land holding entity was acquired by the relevant person or group more than 3 years before the date of a dutiable transaction (the **earlier acquisition**), the duty calculated under subsection (1) is to be rebated by a percentage representing the extent of the earlier acquisition as a proportion of the prescribed interest as a whole.
- (6) Insofar as subsections (4) and (5) may both apply to the acquisition of a prescribed interest in a particular land holding entity by a person or group, the provision that provides the higher benefit to the person or group will apply.
- (7) If a person or group acquires or increases a prescribed interest in a land holding entity through the acquisition of financial products or units in a private unit trust scheme and duty has been paid under this Act or a corresponding law in respect of the transaction for the acquisition of the financial products or units (the "relevant transaction"), the duty calculated under this section is to be reduced by the sum of the amounts severally calculated in accordance with the following formula:

$$R = \frac{A}{B} \times C$$

Where—

**R** is the amount of the reduction

**A** is the total unencumbered value of all of the entity's underlying local land assets and underlying South Australian goods

**B** is the total unencumbered value of all of the entity's assets held in South Australia, a corresponding jurisdiction or any other place

**C** is the sum of the duty paid under this Act or a corresponding law in respect of the relevant transaction.

- (8) In subsection (7)—  
**corresponding jurisdiction** means any jurisdiction where a corresponding law applies.
- (9) The Commissioner may, if the Commissioner considers it to be fair and reasonable to do so, in the circumstances of a particular case, exclude specified goods, or specified classes of goods, from the calculation of duty under this section.

### **Division 3—Payment and recovery of duty**

#### **102B—Acquisition statement**

- (1) If a dutiable transaction occurs, the person or group that acquires or increases its prescribed interest in the land holding entity must, within 2 months after the date of the dutiable transaction—
  - (a) lodge a return with the Commissioner in a manner and form determined by the Commissioner; and
  - (b) pay the relevant amount of duty.

Maximum penalty: \$10 000.

- (2) The return must contain the following information:
  - (a) the name and address of the person, or the name and address of each member of the group, that has the prescribed interest or has increased its prescribed interest as a result of the transaction; and
  - (b) the date of transaction; and
  - (c) particulars of—
    - (i) the interest acquired as a result of the transaction; and
    - (ii) any other interest held and the dates and circumstances of their acquisition; and
    - (iii) the underlying land assets and the underlying local land assets of the land holding entity as at the date of the transaction; and
    - (iv) the underlying assets of the land holding entity as at the date of the transaction; and
    - (v) the underlying South Australian goods of the land holding entity; and
    - (vi) amounts of duty paid under this Act or a corresponding law in relation to the acquisition of the prescribed interest in the land holding entity; and
  - (d) other information required by the Commissioner.

#### **102C—Recovery from entity**

- (1) If a person or group fails to pay duty as required under this Part, the Commissioner may recover the duty, as a debt, from the relevant entity.
- (2) Instead of, or as well as, proceeding against the relevant entity for recovery of duty as a debt, the Commissioner may register a charge on any of its land for the amount of the unpaid duty.

- (3) The Commissioner must give written notice of the registration of a charge under this section to—
  - (a) the registered proprietor of the land; and
  - (b) the person in default, or each member of the group in default.
- (4) A charge under this section will rank as a first charge on the relevant land.
- (5) If the duty remains unpaid 6 months after the registration of the charge, the Commissioner may apply to the District Court for an order for the sale of the land.
- (6) On an application under subsection (5), the Court may make an order for sale of the land by public auction and, in that event, the proceeds of sale are to be applied as follows:
  - (a) firstly—in payment of the costs of the sale and other costs of proceeding under this section; and
  - (b) secondly—in discharging the liability to duty; and
  - (c) thirdly—in discharging other liabilities secured by registered instrument; and
  - (d) fourthly—in discharging other liabilities as directed by the Court; and
  - (e) fifthly—in payment to the registered proprietor of the land immediately before the completion of the sale.
- (7) If the Commissioner recovers duty under this section, the relevant entity may recover the amount paid to, or recovered from, the entity from the person or persons principally liable for the payment of the duty.

#### **Division 4—Miscellaneous**

##### **102D—Valuation of interest under contract or option to purchase land**

If an interest in land consists of an interest arising under a contract or option to purchase the land, the interest is to be valued, for the purposes of this Part, by subtracting from the market value of the land the amount that the purchaser under the contract or the holder of the option would be required to pay in order to complete the purchase.

##### **102E—Separation of statutory funds held by life companies**

- (1) If a person who acquires an interest in a land holding entity is a life company, any interests in the land holding entity acquired or held by the life company for different statutory funds are to be treated as if they were acquired or held independently by separate persons.

- (2) If a life company acquires or holds an interest in a land holding entity otherwise than for a statutory fund, that interest is to be treated as if it were acquired or held independently of, and by a separate person to, any interest acquired or held by the life company for a statutory fund.
- (3) For the purposes of this Part, a life company, its statutory funds, and any trustee, are not to be treated as associates except in a case where the Commissioner determines that particular dealings between them (in any combination) form substantially one arrangement.
- (4) In this section—

*life company* has the same meaning as in the *Life Insurance Act 1995* of the Commonwealth;

*statutory fund* has the same meaning as in the *Life Insurance Act 1995* of the Commonwealth.

### **102F—Exempt transactions and related matters**

- (1) A transaction under which a person or a group acquires an interest in a land holding entity is exempt from duty under this Part if it takes place in circumstances in which a conveyance of an interest in the underlying local land assets would not attract *ad valorem* duty.

**Example—**

Suppose that A is entitled under the will of B to 60% of the shares in X Pty Ltd, a land holding entity, owning land in the State valued at \$2m. A's acquisition of the shares on distribution of the estate is exempt from duty because a conveyance of the land itself would, if it occurred in these circumstances (ie on distribution of the estate), be exempt from *ad valorem* duty.

- (2) The following transactions are exempt from duty under this Part:
  - (a) an acquisition of an interest in a land holding entity that takes place solely as a result of the making of a compromise or arrangement with the creditors of the land holding entity under Part 5.1 of the *Corporations Act 2001* of the Commonwealth;
  - (b) a transaction exempted by regulation from duty under this Part.
- (3) If—
  - (a) a transaction provides for—
    - (i) the acquisition of all shares or units in a relevant entity from a person who holds, or from members of a group who together hold, those shares or units; or
    - (ii) the acquisition of shares or units in a relevant entity where the parties to the transaction are the members of the same group; and

- (b) the underlying land assets are used wholly or mainly for the business of primary production; and
- (c) the Commissioner is satisfied—
  - (i) in a case where paragraph (a)(i) applies—that the transaction forms part of a sale as a going concern of the undertaking carried out on the land; and
  - (ii) in a case where paragraph (a)(ii) applies—that the undertaking carried out on the land is to continue without any change, or any significant change,

then the value of any underlying South Australian goods held or used in connection with the undertaking carried out on the land that would be dutiable under this Part on account of the transaction but for this subsection will not be taken into account for the purposes of the calculation and imposition of duty under this Part.

### **102G—Multiple incidences of duty**

- (1) If it is possible under this Part to assess the incidence of duty in different ways in respect of the same transaction, duty will be assessed so as to maximise the return to the revenue but not so as to extend the incidence of duty beyond a single person or group identified in the assessment.
- (2) If a person or a group acquires a prescribed interest in a land holding entity, and another person or group later acquires a prescribed interest in the land holding entity without diminishing the former prescribed interest, the Commissioner may, if satisfied that it is just and equitable to do so, exempt the later acquisition, wholly or partly, from duty under this Part.

#### **Example—**

Suppose the shares of X Pty Ltd, a land holding entity, are divided into Class A and Class B. The Class A shares confer rights to dividends but no rights to share in the distribution of assets on winding up of the company. The Class B shares confer no rights to dividends but do confer rights to share in the distribution of assets on the winding up of the company. Suppose that A acquires all the Class A shares and pays duty under this Part on the acquisition of a prescribed interest in the company. Suppose that B then acquires all the Class B shares. In this case, the Commissioner could, if satisfied that it would be just and equitable to do so, grant relief under the above subsection.

- (3) If—
  - (a) a person holds a prescribed interest in a land holding entity and a group of which the person is a member acquires all or part of that prescribed interest from that person; or
  - (b) a person who is a member of a group acquires an interest in a land holding entity from another member of the group who holds a prescribed interest in the land holding entity,

the Commissioner may, if satisfied that it is just and equitable to do so, exempt the later acquisition, wholly or partly, from duty under this Part.

- (4) If a group holds a prescribed interest in a land holding entity and a person or group that is a member or subgroup of the group acquires all or part of that prescribed interest from the group, the Commissioner may, if satisfied that it is just and equitable to do so, exempt the later acquisition, wholly or partly, from duty under this Part.

## 8—Transitional provision

- (1) In this section—

*new Part 4* means Part 4 inserted into the principal Act by this Part;

*old Part 4* means Part 4 of the principal Act as in force immediately before the commencement of this Act;

*principal Act* means the *Stamp Duties Act 1923*.

- (2) Unless the contrary intention appears, a term used in this section and also in new Part 4 has the same meaning in this section as it has in that Part.
- (3) The duty chargeable under new Part 4 is chargeable on any acquisition of a prescribed interest, or any increase of a prescribed interest, in a land holding entity occurring on or after 1 July 2011.
- (4) If a person acquires an interest in a land holding entity on or after 1 July 2011, acquisitions made before that date are to be counted for the purpose of determining whether the person has a prescribed interest in the entity under new Part 4.
- (5) The enactment of new Part 4 does not affect a liability to duty arising under the principal Act with respect to the acquisition of a significant interest, or an increase in a significant interest, in a private entity (as those terms are defined for the purposes of old Part 4) occurring before 1 July 2011 (and accordingly old Part 4 will continue to apply with respect to the assessment and imposition of duty in such a case as if this Act had not been enacted).
- (6) An interest acquired in a land holding entity on or after 1 July 2011 as a result of an agreement entered into, or option executed, before 1 July 2011 is to be treated, for the purposes of this section, as if it were acquired before 1 July 2011 (and accordingly old Part 4 will apply to the relevant acquisition but the acquisition may still be counted for the purposes of determining whether a prescribed interest is acquired or held under new Part 4 on or after 1 July 2011).

## Part 3—Amendment of *Taxation Administration Act 1996*

### 9—Insertion of Part 6A

After section 40 insert:

#### **Part 6A—Tax avoidance schemes**

##### **40A—Object of Part**

The object of this Part is to deter artificial, blatant or contrived schemes to reduce or avoid liability for tax.

##### **40B—Payment of tax avoided as a result of tax avoidance scheme**

- (1) A person is liable to pay the amount of tax avoided by the person as a result of a tax avoidance scheme that is of an artificial, blatant or contrived nature.
- (2) For the purposes of this Part, the amount of tax avoided by a person as a result of a tax avoidance scheme is the amount of tax, or the amount of additional tax, that would have been payable by the person, or that is reasonable to expect would have been payable by the person, if the tax avoidance scheme had not been entered into or made.
- (3) The Commissioner may make an assessment, or reassessment, of a liability for tax on the basis of the person's liability under this Part to pay an amount of tax avoided by the person.

##### **40C—Nature of a tax avoidance scheme**

- (1) For the purposes of this Part, a *tax avoidance scheme* is any scheme that a person, whether alone or with others, enters into, makes or carries out for the sole or dominant purpose of enabling liability for tax to be avoided or reduced.
- (2) It does not matter that the scheme is entered into, made or carried out wholly or partly outside South Australia.
- (3) In determining the sole or dominant purpose for which a scheme is entered into, made or carried out, any purpose relating to avoiding, reducing or postponing a liability for foreign tax is to be disregarded.
- (4) In this section—

*foreign tax* means a duty, tax or other impost under a law of another State, a Territory, the Commonwealth or a jurisdiction outside Australia.

#### **40D—Matters relevant to whether scheme is tax avoidance scheme**

The following matters are taken into account in determining whether a scheme is a tax avoidance scheme, and whether it is of an artificial, blatant or contrived nature:

- (a) the way in which the scheme was entered into, made or carried out;
- (b) the form and substance of the scheme, including—
  - (i) the legal rights and obligations involved in the scheme; and
  - (ii) the economic and commercial substance of the scheme;
- (c) when the scheme was entered into or made and the length of the period during which the scheme was carried out;
- (d) the purpose of the relevant taxation law or any provision of the relevant taxation law (whether or not that purpose is expressly stated);
- (e) the effect that the relevant taxation law would have in relation to the scheme apart from this Part;
- (f) any change in any person's financial position, or other circumstances, that has resulted, will result, or may reasonably be expected to result, from the scheme;
- (g) the nature of any connection, whether of a business, family or other nature, between the person whose liability for duty is avoided or reduced as a result of the scheme and any other person whose financial position or other circumstances have changed, will change, or may reasonably be expected to change, as a result of the scheme;
- (h) the circumstances surrounding the scheme.

#### **40E—Liability to pay avoidance tax**

- (1) A liability to pay an amount of tax avoided by a person as a result of a tax avoidance scheme is taken to arise on the date the amount of tax avoided would have been payable if the tax avoidance scheme had not been entered into or made.
- (2) Accordingly, a tax default is taken to have occurred on the date the amount of tax avoided would have been payable if the tax avoidance scheme had not been entered into or made.
- (3) The tax default will be taken to be a deliberate tax default under Part 5.
- (4) This section applies only if the Commissioner issues a notice of assessment, or reassessment, of liability for tax on the basis that a scheme is a tax avoidance scheme of an artificial, blatant or contrived nature.

#### **40F—Reasons for decision to be given**

A notice of assessment, or reassessment, of liability for tax that is issued by the Commissioner on the basis that a scheme is a tax avoidance scheme of an artificial, blatant or contrived nature is to be accompanied by a statement of the Commissioner's reasons for making the assessment or reassessment.

#### **40G—Innocent participants**

- (1) A person is liable under this Part to pay an amount of tax avoided by the person as a result of a tax avoidance scheme whether or not the person entered into, made or carried out the relevant tax avoidance scheme.
- (2) However, a person is not liable to pay an amount of tax avoided by the person as a result of a tax avoidance scheme if the Commissioner is satisfied that it would be unfair to impose a liability for tax in the circumstances of the particular case.

#### **40H—Meaning of "scheme"**

- (1) In this Part—  
*scheme* means—
  - (a) a trust, contract, agreement, arrangement, understanding, promise or undertaking (including all steps and transactions by which it is carried into effect)—
    - (i) whether entered into or made orally or in writing; and
    - (ii) whether express or implied; and
    - (iii) whether or not it is, or is intended to be, enforceable by legal proceedings; or
  - (b) a scheme, plan, proposal, action, course of action or course of conduct.
- (2) A scheme may be a unilateral scheme.
- (3) This Part applies in relation to a part of a scheme in the same way as it applies to a scheme.
- (4) Accordingly, in connection with subsection (3), a reference in this Part to a scheme includes a reference to a part of a scheme.

#### **40I—Related matter**

This Part does not limit a provision under another taxation law that allows the Commissioner to assess or recover tax that a person has sought to avoid.

### **10—Transitional provision**

- (1) In this section—  
*new Part 6A* means Part 6A inserted into the principal Act by this Act;

*principal Act* means the *Taxation Administration Act 1996*;

*relevant time* means—

- (a) in relation to the *Land Tax Act 1936*—midnight on 30 June 2011;
  - (b) in any other case—1 July 2011.
- (2) Unless the contrary intention appears, a term used in this section and also in new Part 6A has the same meaning in this section as it has in that Part.
- (3) Part 6A applies in respect of a scheme if the scheme, or any part of the scheme—
- (a) is entered into or made on or after the relevant time; or
  - (b) is carried out or has effect (in whole or in part) on or after the relevant time (regardless of when it was first entered into or made).
- (4) However—
- (a) new Part 6A does not apply to any amount of tax avoided by a person as a result of a tax avoidance scheme if, apart from the scheme, the date on which the amount of tax avoided would have been payable occurred before the relevant time; and
  - (b) penalty tax cannot be imposed in respect of a tax default on account of the operation of new Part 6A in respect of a scheme, or any part of a scheme, entered into or made, or carried out, before the relevant time.