

1998

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

TAXATION ADMINISTRATION BILL 1998

EXPLANATORY MEMORANDUM

Circulated by the authority of the Chief Minister and Treasurer

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Taxation Administration Bill 1998

Summary

This is a Bill for an Act to replace the existing *Taxation (Administration) Act 1987* (the ACT's existing Act) It makes general provisions with respect to the administration and enforcement of the following tax laws

the *Ambulance Service Levy Act 1990*,
the *Business Franchise (Liquor) Act 1993*,
the *Debits Tax Act 1997*,
the *Duties Act 1998*,
the *Financial Institutions Duty Act 1987*,
the *Gaming Machine Act 1987*,
the *Gas Levy Act 1991*,
the *Insurance Levy Act 1998*,
the *Interactive Gambling Act 1998*,
the *Payroll Tax Act 1987*,
the *Stamp Duties and Taxes Act 1987*,
the *Tobacco Licensing Act 1984*,
any Act declared by the Regulations to be a tax law, and
regulations under these Acts

These laws include provisions with respect to

- the imposition and collection of tax,
- exceptions to and exemptions from liability to the particular tax; and
- entitlements to refunds

The Bill, which should be read as one with each of the other tax laws, includes general provisions with respect to the following matters

- assessment and reassessment of tax liability,
- entitlements to and obtaining refunds of tax,
- imposition of interest and penalty tax,
- variation of lodgement of returns and approval of special tax return arrangements,
- collection and time for payment of tax,
- record keeping obligations of taxpayers,
- offences and prosecutions,
- tax officers and their investigative powers and secrecy obligations,
- cooperating with and conducting investigations on behalf of other jurisdictions,
- objections and appeals,
- anti avoidance grouping provisions,
- evidence for legal proceedings, and
- the Minister's determination powers

The *Taxation Administration (Consequential Amendments) Bill 1998* is cognate with this Bill

While, to a large extent, this Bill contains similar provisions to those in the *Taxation (Administration) Act 1987*, there are a small number of important differences which are highlighted below

- the acceptance of a return is not regarded as an assessment,
- the period in which a reassessment can take place has been reduced from six years to five years,
- the refund period has been reduced from six years to five years,
- there are new interest and penalty regimes, and
- special tax returns have been introduced

The time in which an application for a refund of overpaid tax can be made, implicitly limited by the assessment provisions to five years, has been brought into line with the Income Tax Assessment Act of the Commonwealth, providing standardisation for the business community. Additionally the Bill enables the Commissioner for ACT Revenue, with the taxpayer's consent, to use a refund amount to off-set a future tax liability. This would allow an overpayment of payroll tax, for example, to be off-set against the following month's liability, an administrative saving for both the taxpayer and the Revenue Office.

An interest charge will apply in all cases of late payment of tax, and will comprise two components - a market rate and a premium. The market rate will either equate to the rate set out in section 214A (8) of the Commonwealth's *Income Tax Assessment Act 1936*, or if considered appropriate, be a rate determined by the Minister, as in the current legislation. This component is designed to reflect the "opportunity cost" to the Government of not being able to use the revenue for the period that it remains unpaid. The premium component will be 8% per annum and is intended to act as a disincentive to a taxpayer using the Government as a defacto lending institution.

In instances where the non payment of tax is detected, penalty tax may be applied. The Bill stipulates this rate to be 25% of the unpaid tax, or 75% in instances of deliberate non payment. No penalty tax will be payable where the Commissioner is satisfied that the non payment was not deliberate and did not result from a failure of the taxpayer to take reasonable care to comply. There will be no liability for interest or penalty tax of less than \$20.

The rates for both interest and penalty adopt a realistic approach to ensuring timely compliance with tax laws. The new penalties substantially reduce the current more severe imposts while reflecting a balance between cost recoupment and encouraging taxpayers to meet their obligations.

The Bill also provides for the Commissioner for ACT Revenue to approve of special tax return arrangements. This will provide the Government and business with greater flexibility in complying with tax legislation and take into account future developments in electronic communications. It envisages that in the future many taxpayers and/or their agents will satisfy tax requirements by transferring information and cash from a

computer in their own office, together with an electronic fund transfer, direct to the Revenue Office and Reserve Bank respectively. This legislation will ensure that the ACT will continue to be well placed to take advantage of current and emerging technology.

The Bill results from four years of consultation with the State Revenue Offices of New South Wales, Victoria, South Australia and Tasmania to produce taxation administration legislation which is contemporary in language and presentation, simple to administer and, wherever practicable, consistent across the participating jurisdictions.

Revenue/Cost Implications

The Bill has no direct revenue or cost implications.

Details of the Bill are attached.



Details of the Taxation Administration Bill 1998

PART I - PRELIMINARY

Formal Clauses

Clauses 1 and 2 are formal requirements. They refer to the short title of the Act and the commencement dates of the Act. Sections 1 and 2 of the Act commence on the day on which the Act is notified in the Gazette. The remaining provisions commence on 1 March 1999.

Clause 3 - Definitions contains definitions of important terms used in the Act.

Clause 4 - Meaning of "tax laws" specifies the tax laws for the purposes of the Act as being

the *Ambulance Service Levy Act 1990*,
the *Business Franchise (Liquor) Act 1993*,
the *Debits Tax Act 1997*,
the *Duties Act 1998*,
the *Financial Institutions Duty Act 1987*,
the *Gaming Machine Act 1987*,
the *Gas Levy Act 1991*,
the *Payroll Tax Act 1987*,
the *Tobacco Licensing Act 1984*,
the *Stamp Duties and Taxes Act 1987*,
an Act declared by the Regulations to be a tax law, and
a regulation under any of those Acts.

Clause 5 - Act binds the Crown - This clause binds the Territory Crown and overrides section 7 (6) of the *Interpretation Act 1969*. This means that while the question of whether tax is directly payable by the Crown will be unaffected and will be determined under the provisions of the Acts imposing the various taxes, if a Crown body is liable to a tax, various provisions of this legislation specifying the enforcement or collection of tax will apply.

PART II - PURPOSE OF ACT AND RELATIONSHIP WITH OTHER TAX LAWS

Clause 6 - Purpose of Act and relationship with other tax laws - gives the purpose of the Act as being to make general provisions with respect to the administration and enforcement of the other tax laws. While the other tax laws impose the various taxes, set out exceptions to and exemptions from liability to the tax, and in some instances include payment provisions, this Act contains general provisions with respect to the following matters:

- assessment and reassessment of tax liability,
- entitlements to and obtaining refunds of tax,
- imposition of interest and penalty tax,

- variation of lodgement of returns and approval of special tax return arrangements,
- collection and time for payment of tax,
- record keeping obligations of taxpayers, offences and prosecutions,
- tax officers and their investigative powers and secrecy obligations,
- cooperating with and conducting investigations in other jurisdictions,
- evidence for legal proceedings,
- anti avoidance grouping provisions,
- objections and appeals, and
- the Minister's determination powers

PART III - ASSESSMENT OF TAX LIABILITY

Under this Part, the Commissioner is given the power to make an assessment or a reassessment of tax liability under a tax law

Clause 7 - General power to make assessment - gives the Commissioner the authority to make an assessment of the tax liability, if any, of a taxpayer including a trustee of a deceased estate

Clause 8 - Tax avoidance schemes made ineffective - seeks to ensure that tax avoidance schemes are made ineffective by allowing the Commissioner to assess and impose the appropriate levels of tax avoided or sought to be avoided through the use of a scheme

Clause 9 - Reassessment - gives the Commissioner the authority to reassess a taxpayer's liability Any reassessment must be made as though the legal interpretations and assessment practices that applied at the time of the original liability are unchanged, unless it would be illegal to do so As a result, reassessment will generally be confined to the correction of mathematical or factual errors affecting liability

Reassessment must be made within 5 years of the original assessment However, in cases where a true and full disclosure of facts was not made at the time of the assessment, there is no time limit A reassessment can also be made outside the 5 year time limit in the case of an objection or appeal

Clause 10 - Requirement for full and true disclosure of relevant facts and circumstances - is an offence provision which puts the onus on the taxpayer to fully and truly disclose to the Commissioner all the relevant facts and circumstances affecting the taxpayer's tax liability either prior to or at the time of the assessment of liability

However, the reasonable reliance on another person to ensure satisfaction of these requirements is a defence against the offence

Clause 11 - Information on which assessment is made - gives the Commissioner the power to make an assessment based on information available from any source at the time the assessment is made and to make an estimated assessment where the full details are not available

Clause 12 - Compromise assessment - provides the Commissioner with power to make a compromise assessment by agreement with taxpayers where it is difficult or impracticable to determine the exact liability. If a compromise assessment has been made, a reassessment can only be made with the taxpayer's agreement, or if the assessment was procured by fraud or there was a deliberate failure to disclose information.

Clause 13 - Withdrawal of assessment - provides the Commissioner with the power to withdraw an assessment within 5 years of the date of issue of the original assessment notice.

Clause 14 - Notice of assessment, reassessment or withdrawal of assessment - The issue of a notice of assessment by the Commissioner is discretionary unless the taxpayer asks for one within 5 years from the date of the liability. A notice must be issued in the case of a reassessment or a withdrawal of an assessment.

Clause 15 - Inclusion of interest and penalty tax in notice of assessment - Any interest and penalty tax payable under Part V as a result of a tax default must be specified in a notice of assessment.

Clause 16 - Validity of assessment - provides that a taxpayer cannot argue that an assessment was not valid simply because he or she did not comply with the requirements of the tax law under which liability was determined.

Clause 17 - Acceptance of money not necessarily an assessment - provides that the Commissioner's acceptance of payment connected with the lodgement of any document, including a return, does not necessarily constitute an assessment of the taxpayer's liability. This protects the Commissioner from claims by self-assessing taxpayers that the Commissioner must have assessed the taxpayer's liability because he or she accepted the taxpayer's payment.

Clause 18 - Remissions of tax - allows for the remission of tax in circumstances where a liability for tax has been assessed but not paid and the transaction does not proceed.

PART IV - REFUNDS OF TAX

The purpose of clauses 19 through 25 are to protect Territory revenue, legitimately collected as taxes, from having to be refunded following an adverse decision by the High Court or another court on the validity of a tax law, or where an amount refunded is not returned to the person who bore the incidence of tax.

Clause 19 - Entitlement to refund - is the provision which entitles taxpayers to a refund of overpaid tax.

Clause 20 - Offset of refund against other tax liability - allows the Commissioner to offset a refund amount against any outstanding amounts of tax, general rates or land tax. If the taxpayer agrees, the refund amount may be credited to a future liability.

Clause 21 - Limitation of refunds of revenue amounts - provides that the Commissioner is not to refund tax to a taxpayer claiming a refund unless the claimant satisfies the Commissioner that he or she has not passed the impost on to any third party, or, if the claimant has, the third party has been reimbursed

The claimant must also give a written undertaking that the tax impost will not be passed on, either wholly or in part, to a third party. Should the claimant not comply with the undertaking, he or she must pay the Commissioner double the amount charged to or recovered from the third party.

These provisions will ensure that the refund sought will not represent a windfall gain to the taxpayer, but will be returned to the person who bore the incidence of the tax, namely the taxpayer's customer.

Clause 22 - Judgements for the recovery of revenue amounts - places the same restrictions on a court as are imposed on the Commissioner (under clause 21) in respect of the refund of tax.

Clause 23 - No recovery of revenue amounts following non-legislative change in law - prevents recovery of taxes that were paid in the belief that a revenue law was valid even though the law was subsequently found by a court to be invalid. Subclause 23 (2) allows a person to apply, in the normal way, to the Commissioner for a refund of any tax that, had the tax been valid, the person has overpaid.

Clause 24 - Characterisation - provides for Part IV (the refund provisions) to form part of the substantive law of the ACT (as opposed to procedural law). This will result in these provisions being applied by the courts in other States and Territories in the event of action being taken to obtain a refund of moneys from the ACT in those courts.

PART V - INTEREST AND PENALTY TAX

Division 1 - Interest

Clause 25 - Interest in respect of tax defaults - provides for the imposition of simple daily interest on any outstanding amount of tax resulting from a tax default, including penalty tax but excluding interest, while the amount remains unpaid.

A tax default is defined in **Clause 4** as a failure by a taxpayer to pay the whole or part of a tax liability.

Clause 26 - Interest rate - The interest rate is the sum of two components, a market rate component and a premium component which is fixed at 8%. The market rate component is either a rate determined by the Minister or the interest rate applied to a range of overdue taxes by the Commonwealth under the *Income Tax Assessment Act 1936*.

Clause 27 - No interest is imposed if the amount would be small - that is, less than \$20.00.

Clause 28 - Interest rate to prevail over interest otherwise payable on a judgement debt, means that the interest rate as imposed under clause 26 will remain in force until the debt is paid, and a court cannot set another rate of interest on the outstanding debt

Clause 29 - Remission of interest - allows for the remission of either or both the premium and market rate components if the Commissioner has determined that no penalty tax is payable, or penalty tax has been reduced or remitted wholly or partly. However, market rate component remissions are limited to exceptional circumstances which justify remission

Division 2 - Penalty tax

Clause 30 - Penalty tax in respect of certain tax defaults - provides for the imposition of penalty tax in addition to the amount of tax unpaid where there is a tax default, except default on the payment of interest or previously imposed penalty tax

Clause 31 - Amount of penalty tax - imposes penalty tax for a tax default at the basic rate of 25% of the unpaid amount, or 75% where there has been intentional disregard of the tax law. However, no penalty tax is payable if the Commissioner is satisfied that the taxpayer took reasonable care to comply with the tax law, or that the tax default occurred solely because of circumstances beyond the taxpayer's control

Clause 32 - Reduction in penalty tax for voluntary disclosure - provides that penalty tax is reduced by 80% where the taxpayer voluntarily discloses sufficient information to allow assessment of his or her full liability, provided the taxpayer makes the disclosure before the Commissioner notifies the taxpayer that there is to be an investigation into the taxpayer's affairs

Clause 33 - Reduction in penalty tax for disclosure before investigation - provides that penalty tax is reduced by 20% where the taxpayer, after being advised of an investigation into his or her affairs but prior to that investigation commencing, voluntarily discloses sufficient information to allow assessment of his or her full liability

Clause 34 - Increase in penalty tax for concealment - sets penalty tax at 90% where the taxpayer takes action to conceal his or her full liability during an investigation into the taxpayer's affairs

The table provides a summary of the penalties and the circumstances under which they are imposed

Clause 35 - Minimum amount of penalty tax - No penalty tax less than \$20 00 is imposed

Clause 36 - Time for payment of penalty tax - this provision imposes the requirement that, where penalty tax is payable, taxpayers must be issued with a notice of assessment of the tax liability and penalty and given a minimum of 14 days within which they must pay the liability

Clause 37 - Remission of penalty tax - gives the Commissioner limited discretion in specific circumstances to remit penalty tax wholly or in part where it would be fair and reasonable to do so. The circumstances specified are

- the taxpayer has taken steps to prevent a recurrence of the default, or
- exceptional circumstances led to the liability for penalty tax

PART VI - RETURNS

Division 1 - General

Clause 38 - Form of returns - This provision allows the Commissioner to specify formal requirements for taxpayers' returns

Clause 39 - Time of lodgement - provides that a return is not lodged until it has been served on the Commissioner. Clause 127 contains further information about the service of documents on the Commissioner

Clause 40 - Variation of time for lodgement of return or of period covered by return - this clause allows the taxpayer to apply to the Commissioner in writing for approval to vary the date and frequency for lodging returns for the assessment of tax, where complying with the lodgement provisions of a tax law would be unduly onerous

If any variation is approved, the Commissioner must give written notice of the variation which, while in force, must be complied with by the taxpayer. The Commissioner may revoke the notice where the circumstances are alleviated. The provision does not apply to payroll tax because the *Payroll Tax Act 1987* contains an equivalent provision

Clause 41 - Authenticity of returns - this deeming provision, that a return will be taken to have been made and signed with the authority of the person in whose name it is signed unless the contrary is established, is desirable from an evidentiary point of view and is included so that a taxpayer is not able to avoid his or her responsibilities

Division 2 - Special arrangements for making returns and paying tax

Division 2 contains Clauses 42 to 47. These provisions relate to mutually convenient administrative arrangements made between taxpayers and the Commissioner for lodging special tax returns and payments of tax. Such arrangements do not affect liability for payment of the primary liability occurring under a tax law

The provisions could be utilised by a firm of solicitors who lodge a monthly return of all the duty on conveyances the firm has handled during the past month. The taxpayers would be exempt from lodging the conveyances with the Commissioner because the firm acting on their behalf would be entitled, under the agreement with the Commissioner, to collect the duty, endorse the conveyances as duly stamped and pay the duty when they lodged the monthly return. It may also be used by motor vehicle dealers who, although not responsible for collecting duty on transfers at the time of sale, prefer to do so for the convenience of their customers

Clause 42 - Special arrangements for classes of persons - gives the Commissioner the power to approve special tax return arrangements with specified classes of taxpayers or agents acting on behalf of a specified class of taxpayers for the lodging of returns and the manner of payment of tax. It also sets some indicative guidelines relating to the types of arrangements the Commissioner may approve, including allowing non-return type payments to be made by return.

Clause 43 - Special arrangements for individual applicants - gives the Commissioner the same power to enter into special tax return arrangements as in clause 42, but in relation to individual taxpayers or individual agents for taxpayers of a specified class. However, if a group of people, or a group of companies, wish to get together and ask for special treatment using a single agent, this would have to be done by application from each of them. The approval would then be an approval for the taxpayers, not the agent. To prevent its use as a second avenue by which a taxpayer, who has unsuccessfully applied for a concession under another provision, may reapply for that concession, such things as payment by instalments, extensions of time to pay tax, or variations of the time for lodgement of a normal return are excluded from this clause.

Clause 44 - Conditions of approval - gives the Commissioner power to impose conditions on an approval and provides some guidelines as to the types of conditions the Commissioner may set.

Clause 45 - Variation and cancellation of approvals - gives the Commissioner the power to vary or cancel an approval.

Clause 46 - Taxpayers and agents must comply with conditions - provides that it is an offence if any of the imposed conditions are not met while the taxpayer continues to rely on the approval. However, this does not preclude the taxpayer from complying instead with the provisions of the tax law from which he or she has been exempted by the approval.

Clause 47 - Stamping of instruments - provides that even though an unstamped instrument, which is endorsed in accordance with its approval conditions, is deemed to have been stamped as though duty had been paid, the mere endorsement of the instrument does not affect the liability for duty. It is an offence to falsely endorse an instrument so that it appears to be duly stamped.

PART VII - COLLECTION OF TAX

Clause 48 - Tax payable to the Commissioner - This provision authorises the Commissioner to collect tax which is due to the Territory and allows the Commissioner to recover debts from taxpayers in his or her official name. It also allows the Commissioner to recover taxes from the trustee of a deceased person in the same way as he or she could from the person, if the person were alive.

Clause 49 - Costs of recovery are payable to the Commissioner - ensures that the legal costs of recovering a debt are secure.

Clause 50 - Joint and several liability - is a revenue protection measure which allows the Commissioner to recover the full amount of tax from any or all persons who have joint and several liability for the payment of a tax liability

Clause 51 - Time for payment of tax - provides uniformity across all tax types in relation to the due date for payment, where specific tax laws are silent on this issue

Clause 52 - Arrangements for payment of tax - allows the Commissioner to extend the time for payment of tax or to allow payment by instalments. If an instalment is not paid by the due date, the whole outstanding amount immediately becomes due and payable

Clauses 53 through 55 are revenue protection measures which give the Commissioner the power to recover tax debts from various third parties

Clause 53 - Duties of agents, trustees, etc. - ensures that a person (the agent) having possession, control or management of a taxpayer's business or property as the taxpayer's agent or trustee is responsible for discharging any related undischarged tax liabilities of that taxpayer in a timely manner, whenever those liabilities may arise. It specifies how these obligations should be met, protects the agent from personal liability for the taxpayer's debt, and provides penalties for agents for failure to fulfil their obligations

Clause 54 - Collection of tax from third parties - gives the Commissioner the power to be able to demand, by written notice, part or all of a taxpayer's tax debts from the taxpayer's debtor or potential debtor, including from other persons who hold money which is owed to the taxpayer. For non compliance, it also allows a court to impose a penalty on the debtor and to order the debtor to pay the debt, and the Commissioner to recover official legal costs if there is legal action taken against a taxpayer

Clause 55 - Money held for non-residents of Australia - allows the Commissioner to service written notice on a non-resident's agent requiring the discharge by the agent of the taxpayer's tax liability. It further sets out the agent's obligations and liability on receiving a notice under this section

Clause 56 - Enforcement of payment orders provides that where the Supreme Court or Magistrates Court orders payment to the Commissioner, the taxpayer must pay his or her debt immediately the court decision is handed down, and may not wait until any appeal period has expired

PART VIII - RECORD KEEPING AND GENERAL OFFENCES

Divisions 1 and 2 (Clauses 57 through 68) impose requirements for record-keeping, accessibility to records, the form in which records are to be kept and the period for which records are to be retained, and provides penalties for non-compliance. They create offences for a range of actions taxpayers may take to avoid revealing their tax liability including knowingly avoiding tax, giving false or misleading information to a tax officer, deliberately omitting facts from information given to a tax officer with the effect that the information is rendered false or misleading, failing to lodge documents

required to be lodged by a tax law and falsifying or concealing a person's identity or address

Division 1 - Record Keeping

Clause 57 - Requirement to keep proper records - requires persons liable to pay tax to keep whatever records are necessary to enable a correct assessment of their liability

Clause 58 - Additional records - allows the Commissioner to issue written notice to a taxpayer requiring the taxpayer to keep specified additional records

Clause 59 - Failure to keep proper records - makes it an offence not to keep accurate and adequate tax accounts and records and sets penalties for failure to comply, but provides for a defence based on reasonable ignorance

Clause 60 - Reckless or deliberate failure to keep proper records - makes it a more serious offence to recklessly or knowingly keep deliberately inadequate, incorrect or misleading tax accounts and records and sets penalties

Clause 61 - Keeping accounts or records intended to deceive - makes it an offence to deliberately manipulate tax accounts and records in such a way that they are intentionally deceptive, misleading or obstructive to a tax officer or prevent the execution of a tax law

Clause 62 - Accessibility - requires a person to keep required records in a readily accessible form

Clause 63 - Records must be accessible in English - requires a person to keep tax records in English

Clause 64 - Period of retention - requires a person to keep required records for at least 5 years unless exempted by the Commissioner in writing

Division 2 - General Offences

Clause 65 - Avoidance of tax - is an offence provision which imposes high penalties for a conviction for knowingly avoiding tax

Clause 66 - Giving false or misleading information - creates an offence for giving false or misleading information in any form to a tax officer. The provision also applies to any statements, made in connection with the operation of a tax law, in any documents or information given to a person other than a tax officer

Clause 67 - Failure to lodge documents - makes it an offence for a person to fail to lodge or submit for stamping any document required to be lodged by a tax law

Clause 68 - Falsifying or concealing identity - makes it an offence for a person to falsify or conceal any address or identity, whether the person's own or another person's

Division 3 - Supplementary Offence Provisions

Division 3 - contains supplementary offence provisions, and a general defence provision

Clause 69 - General defence to a charge under a tax law - this provides a general defence for a person who proves that the offence was not committed deliberately and that reasonable care was taken to avoid committing the offence. This defence does not apply for offence provisions with a mental element, such as knowingly avoiding tax or intentionally deceiving the Commissioner or another tax officer

Clause 70 - Penalties for second and subsequent offences - allows a court to impose more serious penalties where persons are convicted of second and subsequent related offences relating to

- failing to provide information, lodge documents, or appear to answer questions, or
- failing to keep proper records, making false statements, or concealing identity

It provides that original offences include offences against the Act and other Territory legislation as well as Commonwealth legislation which deal with similar offences and such offences as aiding and abetting and conspiracy in relation to tax offences, and that a related offence is an offence against the law of the Territory or the Commonwealth relating to taxation

It allows a judge, in determining a penalty, to take into account such a previous offence where a case against a person was proven but a conviction was not recorded

Clause 71 - Orders to comply with requirements - provides that where a person is convicted, or a finding of guilt is made without a conviction being entered, for an offence against a provision of a tax law that requires the person to provide the Commissioner with information, lodge a document, attend before a tax officer or cause an instrument to be duly stamped, the court may not only impose a penalty on the person but order the person to comply with the original requirement

Clause 72 - Orders to pay additional amounts - allows a court to order the payment to the Commissioner of an additional penalty by a person convicted of certain offences such as

- giving false or misleading information,
- failing to keep proper records,
- keeping deliberately deceptive records, or
- falsifying or concealing identity,

where, had the offence not been detected, tax would have been avoided

PART IX -TAX OFFICERS, INVESTIGATION AND SECRECY PROVISIONS

Division 1 - Tax Officers

Clause 73 - The Commissioner - this gives the Minister the power to appoint (and consequently to remove from office) a Commissioner for Australian Capital Territory Revenue

Clause 74 - General administration of the tax laws - this gives the Commissioner the power to administer this Act and the other tax laws

Clause 75 - Commissioner may perform functions under Commonwealth Act - allows the Commissioner to exercise the functions conferred on a State taxation officer by Part IIIA of the Commonwealth *Taxation Administration Act 1953* in relation to cooperation between Commonwealth and State taxation authorities

Clause 76 - Other staff - enables the appointment of staff to administer the tax laws

Clause 77 - Use of consultants and contractors - gives the Commissioner the power to engage consultants and contractors

Clause 78 - Delegation by Commissioner - allows the Commissioner to delegate any of his or her functions under a tax law

Clause 79 - Authorised officers - confers the powers of an authorised officer under the tax laws on the Commissioner and gives the Commissioner the power to appoint other authorised officers and confer temporary authorising officer status on officers from reciprocating jurisdictions to allow them to carry out specified functions approved by the Commissioner in the ACT. It also confers the powers of an authorised officer on tax officers having delegation to carry out any investigations under *Division 2*

Clause 80 - Identity cards for authorised officers - requires that authorised officers must be issued with identity cards containing their name, photograph and stating that the officer is authorised for the purposes of the tax laws

Clause 81 - Personal liability - relieves the Commissioner and tax officers from personal liability for things done in good faith for the purposes of administering the tax laws, including things done in relation to reciprocating jurisdictions

Division 2 - Powers of Investigation

Clause 82 - Power to require information, instruments or records or attendance for examination - confers power on the Commissioner to require a person to provide specified information, documents or records, a statutory declaration, or to attend for interview by an authorised officer and, if so required, give information on oath or affirmation. The clause makes it an offence if a person, without reasonable excuse, refuses or fails to comply with these requirements. It also provides that a person required to give evidence is to be paid determined expenses

Clause 83 - Powers of entry and inspection - confers on authorised officers powers of entry, inspection and seizure for the administration or enforcement of taxation laws. It precludes an authorised officer from remaining on any premises if, when requested, he or she is not able to produce an identity card, or from entering or inspecting residential premises without the consent of the owner or occupier.

Clause 84 - Search warrant - this provision allows a magistrate to issue a search warrant authorising an authorised officer to

- enter and search specified premises, and
- seize and remove documents or gaming machines as specified in the clause

Clause 85 - Use and inspection of documents and records produced or seized - provides that documents produced to the Commissioner or seized and removed by an authorised officer may be retained by the Commissioner pending a determination of their taxability and the outcome of any consequent action, legal or otherwise, to recover any tax or prosecute the owner.

Clause 86 - Use of goods produced or seized - this provision allows the Commissioner to hold (produced or seized) goods, such as gaming machines, petroleum products or liquor stocks, produced or seized pending a determination of their taxability or legality and the outcome of any consequent action, legal or otherwise, to recover any tax or prosecute the owner. If the goods are illegal and the owner is convicted or leaves town prior to legal action being taken, this provision allows the goods to be forfeited to the Territory for disposal.

Clause 87 - Self-incrimination - provides that a person may not use self-incrimination as an excuse for not answering a question, providing information or producing a document when required to do so. However, if the person objects to responding, the answer, information or document is not admissible evidence in criminal proceedings except in certain specified circumstances.

Clause 88 - Hindering or obstructing authorised officers etc - makes it an offence to hinder, obstruct or fail to comply with a requirement of an authorised officer unless the authorised officer failed to identify himself or herself and issue a caution that failure to comply is an offence.

Clause 89 - Impersonating authorised officer - makes it an offence to impersonate an authorised officer.

Clause 90 - Access to public records without fee - allows the Commissioner to inspect and copy public records in the ACT free of charge.

Division 3 - Co-operation with other jurisdictions

Clause 91 - Co-operative agreements - allows the Commissioner to make agreements with reciprocating jurisdictions which set the guidelines for interjurisdictional cooperation in relation to the administration of Commonwealth, State and Territory tax laws.

Clause 92 - Investigation at request of reciprocating jurisdiction - allows the Commissioner to cooperate with a request from a reciprocating jurisdiction for an investigation of a matter that relates to the administration or enforcement of a tax law of that jurisdiction and authorise a tax officer of the Territory or of the reciprocating jurisdiction to investigate the matter. All provisions of this Act apply to any such investigation.

Clause 93 - Disclosure of information to a reciprocating jurisdiction - allows the Commissioner to pass on confidential tax information to a tax officer of a reciprocating jurisdiction for the purposes of the administration or enforcement of a tax law of that jurisdiction. It further allows reciprocating jurisdictions to act on the information obtained by their officers.

Division 4 - Secrecy

Clause 94 - Interpretation - broadens the meaning of "tax officer", as used in Division 3, to protect confidentiality of information acquired by officers in the course of administering the tax laws.

Clause 95 - Tax officers shall respect confidentiality - makes it an offence for a tax officer to record confidential information about another person, otherwise than in the performance of the tax officer's duties, or to disclose confidential information except as permitted by the Division.

Clause 96 - Permitted disclosures of a general nature - allows the Commissioner to disclose tax information of a general nature so long as it does not lead to the identification of a particular taxpayer or disclose matters concerning the personal affairs of a particular taxpayer. This means that the Commissioner can publish, or provide to the Minister, information such as taxation revenue receipts and statistics. However, the Commissioner may release statistical information which will indirectly identify a particular taxpayer, but only where there is only one taxpayer in a certain category and the Commissioner is satisfied that the release of such information is in the public interest.

Clause 97 - Permitted disclosures to particular persons - allows for the disclosure of confidential taxation information under specified circumstances or to specified persons or persons prescribed by regulations. This provision allows for the exchange of confidential, mutually beneficial information, obtained under or in relation to a tax law, between the Commissioner and certain specified office holders of other government bodies, both Commonwealth and Territory.

Clause 98 - Prohibition on secondary disclosures of information - restricts the passing on of information by the recipient of confidential taxation information disclosed under section 97 to a third party.

Clause 99 - Further restrictions on disclosure - protects a tax officer from being required to produce or disclose confidential information by a court, including a tribunal, authority or person having power to require such production or disclosure, unless the court believes that the information is necessary to give effect to a tax law.

PART X - OBJECTIONS AND APPEALS

Division 1 - Objections

Clause 100 - Objection - confers a right of objection on a taxpayer who is dissatisfied with an assessment or a decision of a kind listed in Schedule 1 or 2

Clause 101 - Grounds for objection - sets the requirements for objections generally, and limits the grounds for objection against a reassessment to the reassessment itself, not the original assessment. Also provides that on objection or appeal the burden of establishing the taxpayer's case by evidence rests with the taxpayer. This is because the taxpayer has the best knowledge of his or her own affairs

Clause 102 - Time for lodging objection - allows a taxpayer 60 days to lodge an objection from the date of service of the notice advising the decision or the assessment

Clause 103 - Objections lodged out of time - gives the Commissioner the discretion to accept an objection which is lodged after the 60 day limit, with or without imposing conditions on the taxpayer making the application for late lodgement

Clause 104 - Determination of objection - requires the Commissioner or his or her delegate to consider and make a determination on the objection, however the person who considers the objection must be a different person from the person who made the assessment or decision in the first place

Clause 105 - Notice of determination - requires the Commissioner to notify his or her decision to the objector in writing, giving an explanation if the objection is disallowed fully or in part

Clause 106 - Recovery of tax pending objection or appeal - gives the Commissioner the power to take recovery action for tax which is the subject of an objection or appeal prior to the outcome being known

Division 2 - Appeals to the Tribunal

Clause 107 - Right of appeal to the Tribunal - provides for a right of review by the Administrative Appeals Tribunal of a determination by the Commissioner of an objection to an assessment or any decision identified in Schedule 1

Clause 108 - Grounds of appeal - provides that at an appeal both the appellant and the respondent, in support of their cases, may introduce new grounds from those covered during the objection process unless the appeal is in relation to a reassessment, in which case the grounds must be limited to the extent of the reassessment

Clause 109 - Giving effect to decision on appeal - gives the Commissioner 60 days to take any necessary action to conclude matters resulting from the Tribunal's decision. However, the Commissioner is not required to give effect to any decision by the Tribunal until the appeal process has been exhausted or the time for lodging a further appeal has expired

Division 3 - Interest

Clause 110 - Interest payable on amounts to be paid by taxpayer - provides that if the determination of an objection by a taxpayer results in the taxpayer having to pay tax, the interest provisions of PART V of the Act apply to the unpaid tax

Clause 111 - Interest payable on refunds - provides that following a successful objection or appeal the Commissioner must pay interest on any overpaid amounts at the market rate component under section 26. However, interest may be offset against another tax liability

PART 11 - MISCELLANEOUS PROVISIONS

Division 1 - Business Groups

This Division provides for the grouping of certain related businesses, primarily for the purpose of determining a “grouped” employer’s liability for payroll tax under the *Payroll Tax Act 1987*

The objective of the grouping provisions, as they relate to payroll tax, is to ensure that where a number of businesses employing labour are owned and or controlled by the same persons, the tax free threshold is claimed only once by the group

Clause 112 - Membership of groups - sets the parameters for a group for the purposes of a tax law and gives the Commissioner the discretion to determine that a person is not a member of a group provided that the person satisfies certain specified criteria. It allows the Commissioner to retrospectively group a business entity or exclude a business entity from a group of businesses and thereby reduce the payroll tax liability of both the excluded firm and that of the firm remaining in the group

The Commissioner can only exclude a group member if that member has been grouped through the operation of Clause 114

Clauses 113 to 115 set out the 3 basic situations where persons will constitute a primary group, namely

- corporations are related (Clause 113),
- there is common use of employees (Clause 114), and
- the businesses are controlled by the same persons (Clause 115)

Clause 113 - Primary groups of corporations - provides that corporations form a primary group if they are related corporations within the meaning of the *Corporations Law*. Under *Corporations Law* two corporations are related to each other if one corporation is the holding company of the other corporation, one corporation is a subsidiary corporation of the other corporation, or both corporations are subsidiaries of the same holding company

Clause 114 - Primary groups arising from the use of common employees - provides that where, by arrangement with the employer, an employee works solely or mainly in another business, or performs work in relation to another business, that

business and the business of the employer constitute a primary group. It is not necessary that the arrangement be formalised by written agreement.

Clause 115 - Primary groups of commonly controlled businesses - provides that a primary group is formed if a person has, or persons have together, a controlling interest in two or more businesses, and specifies the criteria by which it is decided if a person has a controlling interest. These criteria are

- where a business is a sole trader - a person is sole owner (including a trustee carrying on business under a trust),
- where a business is carried on by a corporation - a person can, directly or indirectly exercise a majority voting power at directors meetings, or can directly or indirectly exercise control more than half the voting power attached to the voting shares,
- where a business is carried on by a partnership - a person is entitled to more than either half the partnership capital or the profits,
- where a business is carried on under a trust - a person owns the business as trustee, or is entitled to more than half the value of the beneficial interests in the trust. Note: all beneficiaries of discretionary trusts are deemed to be entitled to more than half the value of the beneficial interests in the trust.

The grouping provisions extend beyond direct control to include indirect control through interposing entities (Sub-clauses (3) to (5)).

It is unnecessary for the controlling interest test to apply where two separate businesses are owned by the same person because in these circumstances there is only a single person controlling both businesses - a person would be regarded as the single employer of all employees working in both businesses under the *Payroll Tax Act 1987* (Sub-clause (7)).

Clause 116 - Smaller primary groups are subsumed under larger groups - provides that if a person is a member of 2 or more primary groups, all the members of those groups constitute a single primary group.

Division 2- Treatment of corporations

Clause 117 - Public officer of corporation - provides the Commissioner with the power to require a corporation to appoint an appropriate adult to be the public officer of the corporation to provide the link between the corporation and the Commissioner for the purposes of the tax laws.

Clause 118 - Liability of directors or other officers - allows the Commissioner to take proceedings against a company's statutory office holders instead of the company's public officer and those proceedings shall be effective as if the proceedings had been taken against the public officer.

Clause 119 - Offences by persons involved in management of corporations - confers joint responsibility on the company and any person involved in its management, and holding a specified position in the company, for contraventions of the provisions of

the tax laws While there are specified circumstances in which a person may not be held jointly liable, the onus of proof that he or she should not be liable falls on the person Under this provision it is necessary for a person, if he or she knew about the committing of the offence, to prove that either they were not in a position to influence the decision or, if they were in such a position, that they had taken positive steps to prevent such an offence occurring

Clause 120 - Prosecution of corporations - provides guidelines for the prosecution of corporations for tax offences A charge against a corporation may be conducted without the various steps and delays of full proceedings Where it is necessary to prove an intention of a corporation to commit an offence, it is enough to show that a servant or agent had the necessary intention Also provides that the acts or omissions of a director, servant, or agent of a corporation, or a person either directed by or acting with the consent of a director, servant or agent of the corporation, are the acts of the corporation

Clause 121 - Notice of appointment of liquidators, receivers, managers or administrators - is a penalty provision requiring that, on appointment, a liquidator, receiver, manager or administrator of a company must notify the Commissioner of his or her appointment within 14 days

Division 3 - Payments

Clause 122 - Means and time of payment - contains the provisions relating to acceptable methods of payment, including payment by electronic means, and allows the Commissioner to approve other methods with stipulation as to when payment will be taken to be effected by those methods

Clause 123 - Adjustments of amounts - allows the Commissioner to round down the tax payable to the nearest five cents, whether a single amount of tax or an aggregate of several amounts

Clause 124 - Valuation of foreign currency - sets the rules for the conversion of foreign currency to Australian currency where amounts involved in the calculation of tax are not in Australian currency

Clause 125 - Appropriation of Public Money - provides for the appropriation of the Consolidated Fund for payments such as interest paid to taxpayers who have overpaid their taxes

Division 4 - Notices and service of documents

Clause 126 - Notification of decisions - provides that whenever the Commissioner makes an assessment or an appealable decision, taxpayers must be made aware of their rights of objection and appeal in relation to that assessment or decision

Clause 127 - Service of documents on Commissioner - provides details of the acceptable methods of delivery of documents required by the Commissioner for the purposes of the tax laws

Clause 128 - Day of service of document or payment of money - sets the rules of receipt for the delivery to the Commissioner of payments or documents after close of business

Clause 129 - Service of documents by Commissioner - provides details of the acceptable methods of service of documents by the Commissioner for the purposes of the tax laws

Division 5 - Proceedings and evidence - contains a number of evidentiary provisions

Clause 130 - Judicial notice of Commissioner's name and signature - provides that all courts must accept the Commissioner's name and signature, without further proof that they are what they claim to be, because they are considered so well established as to render evidence unnecessary

Clause 131 - Presumption of regularity as to issue of documents - provides for the presumption that all documents bearing the Commissioner's signature or the Commissioner's delegate's signature have been signed duly and lawfully

Clause 132 - Legal proceedings in Commissioner's name - specifies the Commissioner's legal title and a presumption that legal proceedings commenced in the Commissioner's name are authorised

Clause 133 - Evidence of claim - is an evidentiary provision concerning proceedings where a person is summonsed for a tax offence which carries a penalty on conviction. In such a proceedings, the Commissioner's statement is deemed to be evidence against the defendant. If the Commissioner's statement includes both matters of fact and questions of law, only the matters of fact will be accepted as evidence. Any statement by the Commissioner concerning the defendant's intention is not admissible as evidence.

Clause 134 - Evidence of assessments and determinations - is an evidentiary provision relating to assessment notices and notices of determination.

Clause 135 - Commissioner may certify copies of documents - is an evidentiary provision relating to the acceptability of copies of documents certified by the Commissioner.

Clause 136 - Certificate evidence - is an evidentiary provision relating to the admissibility of certain specified certificates signed by the Commissioner.

Clause 137 - Evidence of previous convictions - is an evidentiary provision relating to certification by the Commissioner to effect a heavier penalty for a person who has previously committed related offences.

Division 6 - Miscellaneous

Clause 138 - Tax liability unaffected by payment of penalty - protects the potential for recovery of a debt by providing that a person's tax liability is unaffected by the payment of any penalty a court imposes on the person.

Clause 139 - Determination of amounts payable under tax laws - vests with the Minister the power to make determinations of the amount of tax, duty or licence fee payable under a tax law, the rates and methods by which tax is to be calculated, and a number of other specified amounts, values and rates under this Act or other specified tax laws. Such determinations are instruments which must be tabled in the Legislative Assembly for scrutiny by the Assembly and may be disallowed by the Assembly. The only tax Act to which this provision does not apply is the *Ambulance Service Levy Act 1990* because the provisions of that Act require that when NSW publishes its prescribed rate, the Minister must fix an amount that reflects the NSW rate.

Clause 140 - Regulations - allows the Executive to make regulations, but limits any penalty regulations which create an offence to a penalty not exceeding 20 penalty units.

Clause 141 - Savings, transitionals and other provisions - provides that Schedule 3 has effect.

SCHEDULE 1 - is a list of decisions reviewable by the Commissioner and the Tribunal.

SCHEDULE 2 - is a list of decisions reviewable by the Commissioner only.

SCHEDULE 3 - provides for the making of Regulations to overcome any possible unexpected or unintended effect of the Act or the *Taxation Administration (Consequential and Transitional Provisions) Act 1998*.

