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THE LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

STAMP DUTIES AND TAXES (AMENDMENT) BILL 1994

EXPLANATORY MEMORANDUM

Circulated by the authority of the Chief Minister and Treasurer

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STAMP DUTIES AND TAXES (AMENDMENT) BILL 1994

The Stamp Duties and Taxes Act 1987 (the Act) provides for the imposition of stamp duties on, among other things, sales and transfers of marketable securities.

This Bill proposes amendments to accommodate the Clearing House Electronic Subregister System (CHESS), which has been developed by the Australian Stock Exchange (ASX). CHESS will electronically process transactions in securities quoted on the ASX, and will replace the traditional transfer document. CHESS participation will be available to ASX member brokers, and other parties that satisfy CHESS criteria. The Securities Clearing House (SCH) has been established pursuant to the Corporations Law, and will be responsible for the operation of CHESS.

This Bill proposes provisions to recognise electronic transfers, and to remove the requirement for stamping of documents for CHESS transactions. It also seeks to allow the payment of duty on CHESS transactions via a return system similar to the current broker provisions contained in the Act.

Currently the Act provides that duty is payable in the ACT for off market transactions (those not handled by a broker) if the shares were on a register in the Territory immediately prior to the transfer. This nexus is not appropriate for CHESS, as all securities transacted on CHESS are deemed to be on the CHESS subregister which is located in NSW. This Bill therefore proposes changed nexus provisions which provide an equitable distribution of duty between the states and territories. Each jurisdiction is introducing the same provisions to ensure that each transaction is dutiable in one location only. Secondary nexus provisions are to be included for foreign companies and unit trusts, as an antiavoidance measure to ensure that registers are not moved offshore.

This Bill also includes a general provision to enable the payment of duty on share transfers by return for prescribed corporations. This will accommodate returns for corporations that process significant volumes of share transactions, such as the Talisman system, which trades Australian securities through the market in the United Kingdom.

The Bill proposes that a liability for duty arises on the change of beneficial ownership of marketable securities. This seeks to remove a deficiency in the current Act which allows the acquisition of an equitable interest in marketable securities without the payment of duty when a corresponding change in legal title does not occur eg where the transfer occurs between beneficiaries of a trust and legal title is held by a trustee. These provisions therefore seek to close off a potential avenue for tax avoidance.

Schedule 4 of the Act identifies transfers that are subject to prescribed duty (currently $20-00), rather than ad valorem duty. The prescribed duty will not apply to transfers where the tax is payable by return, to be consistent with treatment of other return type taxes. Therefore, transfers identified in Schedule 4 will be exempt from duty if included in a return of a CHESS participant, or of a prescribed corporation.

It is proposed that transfers to accounts operated by brokers and CHESS participants to facilitate settlement, transfers made in error, or to correct an error will be exempt.

This Bill also contains consequential amendments to the Taxation (Administration) Act 1987, to update the definition of Australian Stock Exchange and to enable books and accounts to be kept electronically.

Details of the bill are attached.

DETAILS OF THE STAMP DUTIES AND TAXES (AMENDMENT) BILL 1994

Short title

Clause 1 - Provides for the short title of this Act to be the Stamp Duties and Taxes (Amendment) Act 1994 (the Act).

Commencement

Clause 2 - provides that this Act is to commence from the date specified by notice in the Gazette, with the exception of Sections 1 and 2, which commence on the day of gazettal. If a commencement date has not been fixed within 12 months from the date of notification in the Gazette, the Act will commence on the day after the 12 month period.

Principal Act

Clause 3 - Provides that the 'Principal Act' is the Stamp Duties and Taxes Act 1987.

Interpretation

Clause 4 - Updates the definition of "Australian Stock Exchange" to reflect the correct title. It also deletes the definition of "taxable registration", as the term is no longer used in Division 3.

Interpretation

Clause 5 - Introduces definitions that are relevant to Part V which deals with transactions in marketable securities.

An Australian incorporated company has been defined, as there is a specific nexus that applies to those companies. Further definitions have been introduced that are specific to the CHESS system. Definitions for the Securities Clearing House (SCH), and associated terms are found in Chapter 1, Section 9 of the Corporations Law.

Exemption

Clause 6 - Introduces an amendment to Section 39 to provide an exemption for a transaction made in error, and the transaction to reverse the error.

Keeping of records

Clause 7 - Amends section 40 to reduce the amount of time that a broker has to retain records from 6 years to 5. The five year period was agreed to by all jurisdictions, to standardise differing record keeping requirements.

Recognition of the electronic transfer

Clause 8 - Section 41 of the Act requires a broker who has made a taxable or exempt sale or purchase of a marketable security, to make a statement that stamp duty (if any) has been paid. This amendment provides that for SCH regulated transactions, inclusion on the transfer of the broker's participant identifier shall have the same effect as the broker's statement.

It also provides a penalty for a person endorsing a transfer with a participant identifier, without the authority of the participant.

Liability to duty

Clause 9 - Section 44 identifies the transfers to which duty is payable to the Commissioner for ACT Revenue. The existing provisions have been repealed, and a new scheme developed. Section 44(a) ensures that a transaction is not dutiable under both Divisions 1 and 2. Transfers of marketable securities in a company are liable for duty under the Act if the company:

- is an Australian incorporated company that is incorporated in the ACT [44(b)];
- is a non Australian incorporated company [44(c)];
  - . the transfer is effected on the CHESS system, and the registered office of the company is located in the Territory [sub paragraph (i)]; or
  - . the transfer is non SCH, and
    the shares were on a register in the ACT immediately prior to the transfer [subparagraph (ii)(a)] or
    there is no Australian register, if the registered office is in the Territory [subparagraph (ii)(b)].

Section 44(d) proposes that transfers of units in unit trusts will be dutiable if the principal register is located in the Territory. If there is no register in Australia, then transfers will be dutiable if the registered office of the management company, or if the manager is a person the principal place of residence is in the Territory.

Liability to duty

Section 45 of the Act specifies which party to a transfer is liable to pay the duty. Currently duty on transfers is always payable by the transferee. However, where share transactions involve holdings that are not on the SCH register, this may not be convenient for all parties involved. The amendment proposes that where one party to a transaction is an SCH participant, the participant will be liable for payment of stamp duty. If the transfer is between two holdings on the SCH subregister, the liable party will be the participant transferring shares on behalf of the transferee. The transferor SCH participant will be liable if transferring shares to a holding not on the SCH subregister.

Section 45A will allow a participant or prescribed corporation liable for tax under section 45 to recover tax from the transferee.

Section 45B will require a liable SCH participant to keep a record of the transfer containing the same detail as is currently required for broker transactions, and provides a penalty for failure to do so. The participant will be required to endorse the transfer document with the participant's identifier, which ensures that stamp duty has or will be paid. There is a penalty for use of the identifier without the authorisation of the participant.

Exemption from prescribed duty

Clause 10 - Amends section 46 to provide that SCH regulated transfers and transfers included in returns made by prescribed corporations will not be subject to prescribed duty if they are identified in Schedule 4. That Schedule specifies transfers to which ad valorem duty does not apply, such as transfers made to charitable organisations.

Exemption from stamping of transfer

Clause 11 - Provides that SCH regulated transfers and transfers by prescribed corporations are not required to be lodged with the Commissioner for assessment, as the duty is payable by return.

SCH provisions

Clause 12 - Inserts provisions into the Act specifically to accommodate returns lodged in relation to SCH regulated transfers. Section 49A will requires SCH participants to lodge returns, and pay the amount of duty required by the 7th day of the following month. Each participant that has made any dutiable transactions will lodge one return to the SCH, who will then forward one return to each jurisdiction containing all details provided by participants.

Section 49B will require the SCH to lodge a monthly return of all transfers specified in returns provided by participants. The SCH will also be required to pay to the Commissioner any amounts received from participants in relation to above returns, together with any other amounts such as penalties, or amounts owing from previous months.

Section 49C will provide that where a participant fails to meet stamp duty obligations the Commissioner may serve a notice of noncompliance. The SCH and the participant will be jointly and severally liable for payment of duty for any transfers made more than 7 days after the date of the notice. This sanction is intended to encourage the SCH to suspend the participant from the CHESS system until tax obligations have been met. If the SCH allows the participant to continue to use the system then it will also be responsible for payment of tax in respect of future transactions by the participant. If the participant meets the stamp duty obligations referred to in the above notice, the Commissioner will withdraw the notice, and the joint liability with the ASX will cease.

Returns for prescribed corporations

Section 49D will enable corporations that have been prescribed to lodge and pay tax by means of a return. This will allow corporations that process large volumes of transfers to use a return system in a similar manner to brokers and SCH participants. If a prescribed corporation is also an SCH participant, then SCH transfers will be declared in their SCH return.

New section 49E will provide that the Commissioner shall approve the forms for returns made under the sections 49A, 49B and 49D.

Division 3

Clause 13 - will repeal the existing provisions in Division 3. That Division creates a responsibility for companies incorporated in the ACT to lodge a return detailing all transfers registered by the company. If duty has been paid to another jurisdiction which was less than the amount payable under this Act, the company is required to pay the balance with the return. As duty on all non broker transfers of shares in ACT incorporated companies will become liable in the Territory, these provisions will no longer be necessary.

The following new sections will be included.

Section 51 will impose a liability for duty in respect of a change in beneficial ownership, whether made by a formal instrument of transfer or otherwise. This section will recognise that an equitable interest in marketable securities may be acquired without a corresponding change in legal title. This includes verbal arrangements between parties. This provision will seek to close off a loophole which provides the opportunity to engage in tax avoidance.

In order to avoid the imposition of double duty, section 51 will not apply if duty is payable under another section. The person who acquires beneficial ownership of the securities becomes liable for payment of stamp duty, and shall do so by a statement to be forwarded to the Commissioner together with payment of the stamp duty applicable to the transactions in the statement.

Section 52 will provide that a company's share register can only be updated to reflect a share transfer where the document evidencing the transfer has been correctly endorsed to the effect that stamp duty, if payable, has been or will be paid.

Exemptions - Schedule 3

Clause 13 - will amend Schedule 3, the Schedule which identifies broker transactions that are exempt from stamp duty. Paragraph (a) will be been deleted, as it will be no longer required. It appears that this exemption excludes transactions from broker returns, where the consideration is less than market value. The intent is to require brokers to lodge such transactions with the Commissioner for assessment. However, there is no corresponding provision in the Act requiring the lodgement of such documents. As there will be no reason for brokers to exclude transactions for a consideration of less than market value, this provision will be deleted.

The time specified in paragraph (e) has been extended to 10 days to be consistent with other jurisdictions.

Schedule 4

Clause 14 - will amend Schedule 4, which identifies transfers which are not subject to ad valorem duty. Paragraph (ka) will be inserted, to identify transfers made in error, and the transfer to correct an error. The existing provision at paragraph (m) will be revised, to ensure that it targets securities lending transactions that have a 12 month time limit in which to return the securities. Provisions will also be included, to enable transfers to working accounts to be made by brokers and SCH participants without attracting ad valorem duty.

Schedule 5

Clause 15 - This will delete Schedule 5 which is no longer necessary, as the existing substantive provisions in Division 3 be deleted.

Consequential amendments

Clause 16 - Will amend the Taxation (Administration) Act 1987 to update the definition of "Australian Stock Exchange", and to allow for the keeping of records by means of an electronic device.