

1989

THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

PAYROLL TAX (AMENDMENT) BILL 1989

EXPLANATORY MEMORANDUM

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Payroll Tax (Amendment) Bill 1989

The Payroll Tax Act 1987 provides for payroll tax to be levied in respect of the Australian Capital Territory.

Payroll Tax is payable in respect of wages of employees of individual employers and groups of related employers paying wages in the Australian Capital Territory.

The Government has decided to introduce a number of anti-avoidance provisions to prevent an erosion of the tax base through a movement away from traditional forms of salary and wage payments and also through the growth of tax minimisation and avoidance schemes which operate either to cloud employer/employee relationships or deliberately set out to put payments to employees outside the current narrow definition of "wages". The amendments will come into effect from 1 November 1989.

The changes will broaden the definition of "wages" and "employer" to allow the taxing of benefits, along the lines of the Commonwealth Fringe Benefits Tax legislation, provided to employees and will clarify the payroll tax liability of employment agents by deeming such agents to be the employer in certain circumstances.

New provisions will also be inserted in the Act to recognise as taxable, payments made by or to third parties in relation to employees' services as well as payments made by employers through artificial contractual arrangements.

As the amendments are designed to be anti-avoidance measures any estimate of revenues is difficult to calculate. However, based on revenue gains experienced in the States, the imposition of the anti-avoidance package is estimated to provide an extra \$1.8 million in revenue in a full financial year.

The measures are expected to be absorbed within current administration costs.

Details of each clause of the proposed Bill are outlined in the Attachment.

ATTACHMENT

PAYROLL TAX (AMENDMENT) BILL 1989

CLAUSE 1 will cite the Bill, when enacted, as the Payroll Tax (Amendment) Act 1989

CLAUSE 2 will provide that the Bill will commence on 1 November 1989.

CLAUSE 3 will cite the Principal Act as meaning, the Payroll Tax Act 1987.

CLAUSE 4 will make various insertions and amendments to the interpretation provisions in section 3 of the Principal Act.

Paragraph 4(a) will expand the definition of "employer" to include employment agents. This has the effect of making the employment agent directly liable for the payment of payroll tax in certain circumstances.

Paragraphs 4(b) to (h) will extend the definition of "wages" in the Principal Act to include:

- . payments made to former employees as a consequence of their employment;
- . the payment of benefits;

payments made by third parties in relation to services provided by an employee and payments made to third parties in relation to that employment;

payments made under a service contract; and

payments made to a person employed by an employment agent.

This will overcome avoidance schemes associated with the current narrow definition of wages under which benefits, termination payments, contract payments and payments made by and through related parties are not considered to be wages.

Definitions for the terms 'employment agent' and 'pay' have also been inserted.

Subclause 4(3) will provide that a reference to a benefit in the Act includes a reference to a fringe benefit within the meaning of the Fringe Benefits Tax Assessment Act 1986 of the Commonwealth. This will assist in quantifying the types of benefits covered by the Payroll Tax Act.

CLAUSE 5 will insert sections 3A and 3B into the Act.

New section 3A will provide that where a benefit is a fringe benefit under the Fringe Benefit Tax Assessment Act 1986, the taxable value for payroll tax purposes will be the same as that

determined under the Fringe Benefit Tax Assessment Act 1986. By adopting the same valuation, employers will not be required to keep separate records.

New section 3B will provide that the Act will apply to certain contracts. It is intended to overcome tax avoidance schemes which are designed to sever the employer/employee relationship by the creation of certain contracts.

Paragraphs (1)(a),(b) and (c) set out the types of contracting arrangements which will be included as a service contract. These include supplies of services, by a designated person, for or in relation to the performance of work, services supplied to that designated person for or in relation to the performance of work and the giving of goods to persons for work to be performed in respect of those goods for the re-supply of those goods to the designated person.

Paragraphs (1)(d) and (e) set out the types of contracts considered not to be service contracts and hence would be exempt for payroll tax purposes. The exemption provided by paragraph (1)(d) is directed at arrangements where the supply of materials or equipment is the fundamental object of the contract.

The exemption provided by subparagraph (1)(e)(i) recognises that many business transactions are contracts for services which are not part of the mainstream of a persons business. It applies where work of this type is performed by persons who are bona fide in rendering services to other business and the public generally.

Subparagraph (1)(e)(ii) allows the Commissioner to exempt a person who ordinarily provides particular services to the public generally.

Any exemptions described under paragraphs (1)(d) and (e) will not be granted if the Commissioner determines that the contract or arrangement under which the services are so supplied is entered into with an intention of either directly or indirectly avoiding or evading the payment of tax by any person.

Paragraphs 2(a), (b) and (c) will, for the purposes of section 3B, deem who is an employer or an employee and what constitutes wages paid or payable under a service contract.

For the purposes of section 3B a -

Deemed employer will mean a person who receives services under a contract or a person who gives out goods to other persons for re-supply (subparagraphs 2(a)(i) and (ii)).

Deemed employee will mean a person who performs work for or in relation to services which are supplied to another person or a natural person who re-supplies goods to an employer (subparagraphs 2(b)(i) and (ii))..

Deemed wages will mean amounts paid or payable by an employer for or in relation to the performance of work relating to a service contract or the re-supply of goods by an employee under a service contract (paragraph 2(c)).

Paragraph 2(d) will allow the Commissioner to determine the material proportions of amounts paid under a service contract by an employer attributable to the performance of work. This will ensure that the non labour component of any contract is excluded for payroll tax purposes.

New subsection (3) is intended to prevent instances of double taxation. Where payroll tax is paid by a deemed employer in respect of a payment made for or in relation to the performance of work that is deemed to be wages under subsection (2) no other person shall be liable for payroll tax unless the arrangement forms part of an avoidance scheme.

New subsection (4) will provide that references to the terms 'contract', 'supply', 're-supply', and 'services', for the purposes of section 3B, are as defined in subsection (4).

New subsection 5 will provide that a reference in paragraph 4(b) to "regulated credit contract" has the same meaning as in the Credit Act 1985.

CLAUSE 6 will insert new section 5A, in Part I.

Paragraph 5A (1)(a) will provide the Commissioner with the power to disregard any agreements, transactions or arrangements if they have the effect of reducing or avoiding payroll tax. He or she may also determine that any party to the arrangements may be deemed to be an employer, and any payment made in respect of the agreements, transactions or arrangements may be deemed to be wages, for the purposes of the Act. Payroll tax will therefore be assessed on the amounts of those payments.

New subsection 5A(2) will provide that section 5A has effect in relation to agreements, transactions and arrangements made before the commencement of the section.

The Commissioner's power will apply to all such agreements, transactions or arrangements, whether in writing or not, including those made on or before 1 November 1989, although payments made under arrangements before 1 November 1989 will not be liable for payroll tax.

This is a general anti-avoidance provision similar to those included in the NSW, QLD, WA and Northern Territory Acts. It will ensure that employment agents do not escape their responsibilities and will also cover situations where companies or other business entities are artificially imposed between an employer and an employee in an attempt to blur or sever the employer/employee relationship.

CLAUSE 7 will insert new subsection 6(2). Subsection 6(2) is intended to prevent instances of double taxation. Where, in respect of wages paid for or in relation to the performance of work, payroll tax is paid by an employment agent, no other person shall be liable for payroll tax in respect of that payment.

CLAUSE 8 will amend section 19 of the Principal Act by inserting new paragraphs (a), (ab) and (ac) before paragraph (6). Section 19 provides for review of decisions by the Administrative Appeals Tribunal.

The amendments will provide that an application may be made to the Administrative Appeals Tribunal for a review of a decision made by the Commissioner under:

Subsection 3B(1), being a decision to disallow an exemption from a service contract where it has been entered into with an intention either directly or indirectly of avoiding or evading the payment of tax (new paragraph (a)).

Paragraph 3B(2)(d), being a decision to determine what proportion of an amount paid under a service contract would be attributable to the performance of work relating to the service contract or to the re-supply of goods by an employee under the service contract (new paragraph (ab)).

- . Section 5A, being a decision to disregard agreements, transactions or arrangements (new paragraph (ac)).

Because the various anti-avoidance provisions give the Commissioner extended power it is important that taxpayers are:

- . advised of any decisions which affect their payroll tax liability; and
- . given the opportunity to appeal against that decision.

The inclusion of these additional provisions will ensure that this occurs.