

2009

**The Legislative Assembly for
Australian Capital Territory**

Duties Amendment Bill 2009

Explanatory Statement

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Treasurer
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Duties Amendment Bill 2009

Summary

The *Duties Amendment Bill 2009* (the Bill) amends the *Duties Act 1999* (the Duties Act) in three respects. It moves the duty exemption for residential leases to another area of the Act; it closes a potential loophole in the landholder duty provisions; and it introduces a new exemption from duty for certain types of property trust restructures.

More specifically, the Bill:

1. Moves the duty exemption for residential leases from Chapter 5 of the Duties Act to Chapter 2 (given that Chapter 5 is scheduled to expire on 30 June 2009).
2. Clarifies that a declaration of trust cannot be used as a vehicle to circumvent liability to landholder duty.
3. Introduces a duty exemption for 'top-hatting' arrangements that give effect to a rollover scheme under subdivision 124-Q of the *Income Tax Assessment Act 1997* (Cwlth).

Overview

The Bill makes three principal amendments to the Act. An overview of each follows.

1. Residential Long-Term Lease Exemption Amendments

Under the *Intergovernmental Agreement on the Reform of Commonwealth State Financial Relations*, the ACT Government agreed to a timetable on the abolition of certain taxes. One of the taxes scheduled to be abolished on 1 July 2009 was duty on short-term commercial leases. These measures were implemented by the *Duties Amendment Act 2006 (No 2)* [A2006-45](#) (the 2006 Act). However, duty on long-term leases was retained as an anti-avoidance measure.

The grant of a long-term lease is a transaction on which duty is chargeable under Chapter 2 of the Duties Act. A long-term lease is a lease of land that lasts for longer than 30 years. Long-term leases remain dutiable in order to prevent the avoidance of conveyance duty by the granting of a lease over land instead of making an outright conveyance of it.

The 2006 Act transferred the provisions that duty long-term leases from Chapter 5 to Chapter 2 of the Duties Act. However, it did not transfer the residential lease exemption that accompanied those provisions. Given that the 2006 Act amended the Duties Act so that Chapter 5 would expire on 30 June 2009, the lease exemptions in that chapter are scheduled to expire too. Hence, in order to ensure that the residential lease exemption applies to long-term leases, the Bill will include the residential lease exemption in Chapter 2 of the Duties Act. The amendment is dated so that the exemption applies from the date the 2006 Act commenced (i.e. 29 November 2006), in order to ensure that long-term leases for residential purposes are exempted from

duty in accordance with the policy that has existed since (and prior to) the 2006 amendments were made.

2. Declaration of Trust (Landholder Duty) Amendments

The ‘declaration of trust’ amendments made by the Bill are anti-avoidance measures aimed at preventing the avoidance of landholder duty by means of a declaration of trust. The landholder duty provisions in the Act are designed to promote taxation equity between indirect acquisitions of interests in land, and direct purchases of interests in land. Essentially, the Bill closes a potential loophole in the landholder duty provisions that a declaration of trust could be used to exploit.

The purpose of these amendments is to ensure that taxation equity is maintained between landholder interests that are transferred by means of a declaration of trust, and landholder interests that are transferred by other means. Accordingly, the Bill achieves this purpose by clarifying that landholder duty cannot be avoided by declaring a trust instead of transferring shares in the company or units in the trust. It provides that a change in the capacity in which a person holds an interest in a landholder is to be regarded as an acquisition of an interest in the landholder. By way of example, the amendments target the scenario where a person who holds a unit or a share in the landholder subsequently declares a trust over that unit or share.

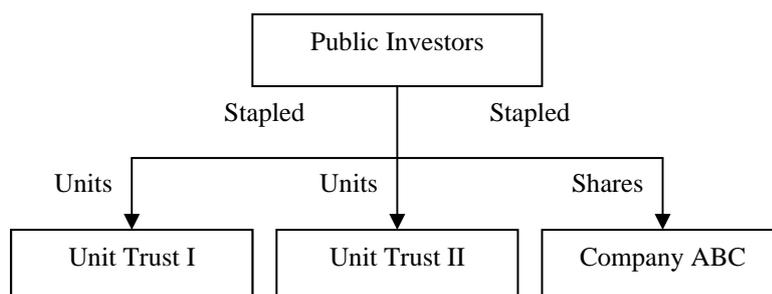
These amendments will take effect on 1 July 2009.

3. ‘Top-Hatting’ Exemption (Landholder Duty) Amendments

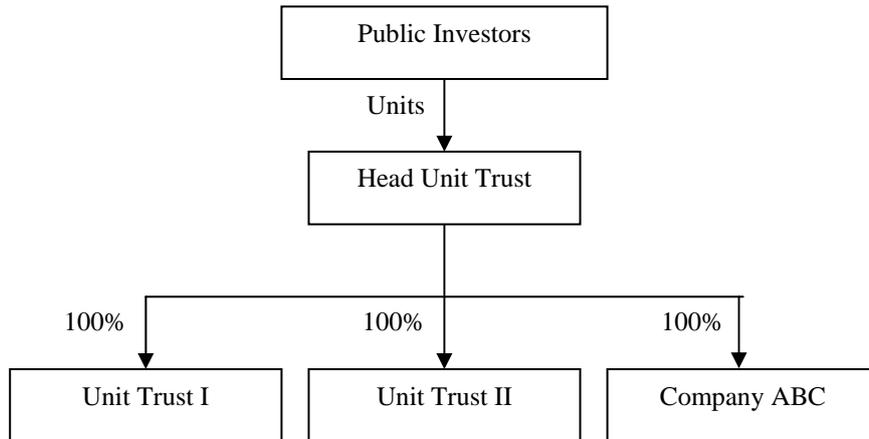
A ‘top-hatting’ arrangement occurs where an existing group of landholder unit trusts and companies decide to reorganise their structure in order to come under a single ‘head’ trust. In this manner, the head trust is ‘interposed’ over the other trusts and companies. This ‘head’ trust could be an entirely new trust, or one of the existing trusts in the group. The ‘head’ trust must acquire all of the interests in the other trusts and companies in the group, and the reorganisation must result in no effective change in ownership of the interests in the property trust. For the purposes of the amendments, the reorganisation must qualify as a roll-over scheme under subdivision 124-Q of the *Income Tax Assessment Act 1997* (Cwlth).

The following 3 examples are illustrative of how a top-hatting restructure occurs:

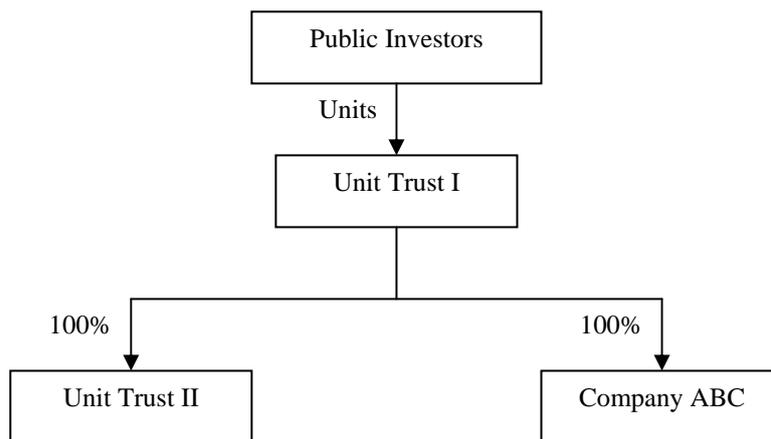
Example 1: A group’s structure before top-hatting occurs



Example 2: After top-hatting — where a new head trust is interposed



Example 3: After top-hatting — where an original unit trust of the group is interposed



As with the ‘declaration of trust’ amendments, the primary purpose of the ‘top-hatting’ amendments is to achieve taxation equity between landholder transactions. Currently, taxation inequity exists because of the potential for effective double duty to occur as a result of a ‘top-hatting’ arrangement. ‘Top-hatting’ arrangements, as exempted by the amendments, result in no change to the real ownership of interests in the property trust. Therefore, the charging of landholder duty on such arrangements is inequitable in that duty is charged when, in substance, the ownership interests of public investors in the property trust have not changed. The amendments simply seek to rectify this inequity.

More specifically, the purpose of these amendments is to exempt duty on transactions where the ultimate beneficial ownership of land remains unchanged as a result of the top-hatting restructure. That is, although the transactions effecting the restructure

take place, the land owned by the landholders in a stapled group remains subject to the ownership and control of the public investors in *pari passu* with the ownership interests they had prior to the restructure. This occurs either directly or indirectly, by virtue of the investors holding interests in the interposed trust, and because the interposed trust ends up having total ownership and control of the land in the stapled group.

The exemption will take effect on 1 July 2009.

Financial Implications

The bill is expected to be revenue neutral. This is because:

1. The **Residential Long-Term Lease Exemption Amendments** will merely continue the current practice of the ACT Revenue Office; as such they will not actually create a new lease duty exemption.
2. The **Declaration of Trust (Landholder Duty) Amendments** will merely clarify the current landholder provisions. They will not create a new liability to landholder duty, or change any existing administrative arrangements.
3. Although the **‘Top-Hatting’ Exemption (Landholder Duty) Amendments** will create a new exemption from landholder duty, the exemption will have an unquantifiable (or negligible) impact on landholder duty revenue. This is due to the likelihood that, rather than incurring ACT Landholder Duty in the absence of a “top-hatting” exemption, property trusts will either fail to undertake the restructure entirely, or they will just exclude landholding entities in the ACT from the restructures themselves. In the latter manner, the restructuring would occur only for landholders in other jurisdictions, rather than including landholders in the ACT.

Commencement Date

The Bill amends the Act so that the amendments are effective on 1 July 2009, with the residential long-term lease exemption being backdated to 29 November 2006 to remedy the omission caused by the 2006 Act.

Transitional provisions

In order to ensure that taxation equity and consistency is maintained when providing a ‘top-hatting’ exemption for property trust restructures, the bill includes a necessary transitional provision. It provides that a transfer of marketable securities is exempt from duty if it is made to give effect to a ‘top-hatting’ arrangement that is part of a roll-over scheme under subdivision 124-Q the *Income Tax Assessment Act 1997* (Cwlth).

These measures are necessary to ensure that restructuring arrangements that are granted a ‘top-hatting’ exemption are not required to bear any extra duty liability for any transfers of marketable securities that are made to give effect to the restructure. The transitional provision will apply to such transfers of marketable securities that occur on and after the date of the commencement of the Bill (on 1 July 2009), until duty on unquoted marketable securities is scheduled to expire (on 30 June 2010).



Details of the Duties Amendment Act 2009

Clause 1 – Name of Act

This clause provides that the Act is named the *Duties Amendment Act 2009*.

Clause 2 – Commencement

This clause provides that the Act commences on 1 July 2009.

Clause 3 – Legislation amended

This clause provides that the Act makes amendments to the *Duties Act 1999*.

Clause 4 – New section 73D

This clause inserts a new section 73D into the *Duties Act 1999*. The new section 73D will ensure that a transfer or a grant of a long-term lease for residential purposes is exempt from duty under chapter 2 of the *Duties Act 1999*. The clause also ensures that the new section 73D is deemed to have commenced on 29 November 2006.

The purpose of section 73D is to ensure that long-term leases for residential purposes receive the same exemption from duty that was applicable to them before the *Duties Amendment Act 2006 (No 2)* came into force on 29 November 2006. Section 73D has been deemed to have commenced retrospectively simply to ensure that taxpayers are not required to bear an unintended taxation burden as a result of the failure of the *Duties Amendment Act 2006 (No 2)* to move the residential exemption from chapter 5 to chapter 2 of the *Duties Act 1999* along with the other long-term lease provisions.

Clause 5 – Marketable securities

New section 75 (4)

This clause inserts a new subsection (4) into section 75 of the *Duties Act 1999*. The new subsection (4) provides that a transfer, or an agreement for the sale or transfer, of marketable securities that is made to give effect to a ‘top-hatting’ arrangement, is exempt from duty under chapter 2 of the *Duties Act 1999*. The new subsection (4) is a transitional provision, in that it will expire along with the rest of section 75 when duty on marketable securities is scheduled to be abolished (on 30 June 2010 – as per section 75A of the *Duties Act 1999*).

The purpose of this section is to ensure that ‘top-hatting’ restructures that involve transfers of marketable securities (as defined by the *Duties Act 1999*) do not incur marketable securities duty when the land that is the subject of the restructure ends up obtaining a ‘top-hatting’ exemption from landholder duty. As such, the section simply aims to ensure that there is taxation equity between both elements of a restructure.

Clause 6 – How person *acquires* an interest in a landholder—pt 3.2

New section 84 (2) (c)

This clause inserts a new paragraph (c) into subsection 84 (2) of the *Duties Act 1999*. The new paragraph (c) clarifies that a person can acquire an interest in a landholder if the capacity in which they hold the interest changes. An example of where this can occur is where a person holds a unit or a share in a landholder, and then declares a trust over that unit or share.

The purpose of this paragraph is to prevent the avoidance of landholder duty from occurring where a person changes the capacity in which they hold an interest in the landholder. The paragraph is intended to clarify the scope of section 84 (1) of the *Duties Act 1999*, but it is not intended to otherwise limit it.

Clause 7 – New division 3.7.1 heading

This clause inserts a new heading into Part 3.7 of the *Duties Act 1999*. This amendment is consequential on the introduction of the exemption from landholder duty for ‘top-hatting’ arrangements. It ensures that the current exemptions from landholder duty applicable to personal relationships are contained under a separate heading to the new ‘top-hatting’ exemption.

Clause 8 – New division 3.7.2

This clause inserts a new division 3.7.2 into the *Duties Act 1999* that introduces an exemption from landholder duty for certain ‘top-hatting’ arrangements.

The new ‘top-hatting’ exemption is applicable to arrangements that would qualify for a Capital Gains Tax (CGT) roll-over under subdivision 124-Q of the *Income Tax Assessment Act 1997* (Cwlth). Subdivision 124-Q provides a CGT roll-over for members of a stapled group:

- where there has been an interposition of a unit trust between the holders of ownership interests in the entities of the stapled group and the stapled entities (see Example 2 above); or
- where there is a de-stapling of the stapled entities, and a unit trust that was one of the stapled entities is interposed between the holders of ownership interests in the entities in the stapled group and the remaining formerly stapled entities (see Example 3 above).

The ‘top-hatting’ exemption has been modelled on corresponding provisions in the *Duties Act 1997* (NSW) and the *Duties Act 2000* (VIC). The new exemption combines the policy criteria of the NSW provisions with some of the anti-avoidance features of the Victorian provisions. In particular, the new provisions allow the Commissioner for ACT Revenue to impose conditions on the grant of a ‘top-hatting’ exemption, and to revoke it in certain circumstances.

The purpose of the ‘top-hatting’ exemption is to enable eligible stapled groups to restructure without incurring landholder duty on transactions that result in no real change in the ownership of the interests in the group. In this manner, the exemption is

intended simply to promote taxation equity between taxpayers by ensuring that there is no effective double duty on transactions that are made merely to give effect to a restructure, and to ensure that effective ownership in a stapled group remains unchanged.

The following is a section by section explanation of the new ‘top-hatting’ exemption provisions:

Section 115I – introduces the new definitions of *exchanging members* and *interposed trust* for the purposes of the subsequent ‘top-hatting’ exemption provisions. These definitions adopt the definitions in subdivision 124-Q of the *Income Tax Assessment Act 1997* (Cwlth).

Section 115J – introduces the operative provisions that contain the ‘top-hatting’ exemption itself and the criteria applicable to it.

Subsection (1) provides that a person who makes a transaction that would otherwise be liable to landholder duty may apply to the Commissioner for ACT Revenue for an exemption from duty for that transaction.

Subsection (2) provides that the Commissioner for ACT Revenue must grant a ‘top-hatting’ exemption if all of the following criteria are satisfied:

1. The transaction is part of a scheme that qualifies for a capital gains tax roll-over under subdivision 124-Q of the *Income Tax Assessment Act 1997* (Cwlth).

Note: a roll-over involves a scheme for the interposition of a unit trust scheme (whether it is new or already existing). The interests of the unit holders (or shareholders) are stapled together to form stapled securities and the interposed unit trust becomes the owner of all the stapled interests.

2. The trust that ends up being interposed after the scheme is complete is either a listed trust, a widely held trust, or a landholder (as defined by the *Duties Act 1999*).
3. The transaction is not part of a scheme to avoid duty.
4. Any conditions stated by the Commissioner for ACT Revenue will be met.

Subsection (3) provides that if duty has already been paid on a transaction, and if that transaction is exempt (due to the grant of ‘top-hatting’ exemption); then the Commissioner for ACT Revenue must refund the duty that was already paid for that transaction.

Section 115K – provides for the inclusion of conditions on the grant of a ‘top-hatting’ exemption.

Subsection (1) permits the Commissioner for ACT Revenue to grant a ‘top-hatting’ exemption subject to conditions.

Subsection (2) provides that any condition applicable to a ‘top-hatting’ exemption is binding on each exchanging member of the ‘top-hatting’ arrangement.

The purpose of section 115K is to ensure that any potential abuse of the ‘top-hatting’ exemption can be addressed by the commissioner in an expeditious and effective manner. It also allows for flexibility in granting the exemption; so that the commissioner can ensure that the policy behind the exemption is effectively implemented in circumstances where substantial complexity may exist.

Section 115L – provides for the revocation of the ‘top-hatting’ exemption in certain circumstances.

Subsection (1) allows the Commissioner for ACT Revenue to revoke a ‘top-hatting’ exemption in any of the following circumstances:

1. If the trust that ends up being the interposed trust is not a listed trust, a widely held trust, or a landholder (as defined by the *Duties Act 1999*) when the scheme to give effect to the ‘top-hatting’ arrangement is actually completed.
2. If the trust that ends up being the interposed trust ceases to be listed trust, a widely held trust, or a landholder (as defined by the *Duties Act 1999*) within 12 months after the scheme to give effect to the ‘top-hatting’ arrangement is actually completed.
3. If the Commissioner for ACT Revenue is no longer satisfied that either:
 - a. The transaction is part of a scheme that qualifies for a capital gains tax roll-over under subdivision 124-Q of the *Income Tax Assessment Act 1997* (Cwlth); or
 - b. The transaction is not part of a scheme to avoid duty.
4. If the exemption was granted on the basis of false or misleading information provided to the Commissioner for ACT Revenue.
5. If a condition of the exemption is not met.

Subsection (2) deals with the consequences of the revocation of a ‘top-hatting’ exemption. If the exemption is revoked the subsection provides that:

1. Duty becomes chargeable as if the exemption was never granted.
2. An acquisition statement must be lodged with the Commissioner for ACT Revenue for the transaction the exemption was granted for, within 28 days.

Note: an acquisition statement is a compulsory statement of information required by the *Duties Act 1999* for transactions that give rise to a liability for landholder duty.

3. The Commissioner for ACT Revenue must make an assessment of the amount of duty chargeable on the transaction.

4. Interest and penalty tax under the *Taxation Administration Act 1999* become payable if the amount of duty assessed by the Commissioner for ACT Revenue is not paid within 90 days of the assessment.

The purpose of section 115L is to ensure that the Commissioner for ACT Revenue has an effective mechanism to deal with any eventual abuse of the ‘top-hatting’ exemption. It provides a robust means of enforcement to help the commissioner ensure that a scheme that is artificially contrived does not obtain the benefit of the exemption.

Clause 9 – Objections

New section 252 (ua) to (uc)

This clause inserts 3 new grounds (section 252 (ua) to (uc)) on which a person can make an objection under division 10.1 of the *Taxation Administration Act 1999* in relation to a ‘top-hatting’ exemption decision made by the Commissioner for ACT Revenue. A decision made on an objection under the *Taxation Administration Act 1999* is subject to review by the ACT Civil and Administrative Tribunal.

The 3 new grounds on which a person can make an objection are as follows:

1. A refusal to grant a ‘top-hatting’ exemption, under the new section 115J (2).
2. The imposition of a condition when a ‘top-hatting’ exemption is granted, under the new section 115K.
3. The revocation of a ‘top-hatting’ exemption that has been granted, under the new section 115L.

The purpose of the new objections provisions is to provide a robust oversight mechanism for certain decisions made by the commissioner in relation to the granting of a ‘top-hatting’ exemption. Their objective is to help provide additional transparency and accountability in an area of law that is technical and complex.

Clause 10 – Dictionary, new definitions

This clause inserts the new definitions of *exchanging members* and *interposed trust* applicable to the new ‘top-hatting’ exemption into the dictionary of the *Duties Act 1999*.

