

EXPOSURE DRAFT

(Prepared by Parliamentary Counsel's Office)

Duties (Commercial Mortgages) Amendment Bill 2003

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Duties (Commercial Mortgages) Amendment Bill 2003

A Bill for

An Act to amend the *Duties Act 1999*

The Legislative Assembly for the Australian Capital Territory enacts as follows:

1 Name of Act

This Act is the *Duties Act 1999*.

2 Commencement

This Act commences on a day fixed by the Minister by written notice.

Note 1 The naming and commencement provisions automatically commence on the notification day (see Legislation Act, s 75 (1)).

Note 2 A single day or time may be fixed, or different days or times may be fixed, for the commencement of different provisions (see Legislation Act, s 77 (1)).

3 Act amended

This Act amends the *Duties Act 1999*.

4 Chapter 7

substitute

Chapter 7 Commercial mortgages

Part 7.1 Application

174 Mortgages and advances to which ch 7 applies

- (1) This chapter applies if a mortgage over property secures an advance, and—
 - (a) the advance is for purposes that include a commercial purpose; and
 - (b) either—

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- (i) the amount of the advance is at least \$1 000 000; or
 - (ii) the sum of the amount of the advance and the total amount of all outstanding advances for purposes that include a commercial purpose, and that are secured by mortgage over the property (or part of the property), is at least \$1 000 000.
- (2) This chapter also applies if 2 or more mortgages, taken together, secure advances of separate amounts of money to 1 or more people, and—
- (a) the advances are for purposes that include a common commercial purpose; and
 - (b) either—
 - (i) the total amount of the advances is at least \$1 000 000; or
 - (ii) the sum of the total amount of the advances and the total amount of all outstanding advances for purposes that include the common commercial purpose, and that are secured by mortgage, is at least \$1 000 000.

Example

A, B, C and D incorporate a company to build 2 town houses on a suburban block. They all do so with the intention of earning income from the company out of the project (a *commercial purpose* as defined in s 174E). A, B, C and D each individually own property in the ACT. To finance the company, they each take out a loan of \$900 000 secured by mortgages of their individual ACT properties from different credit providers.

The loans (*advances*) have a *common commercial purpose* as defined in s 174F (that is, a particular commercial purpose in common), namely financing the building of the town houses to produce income.

Because the total amount of the advances (\$3 600 000) is at least \$1 000 000, section 174 (2) applies to the mortgages.

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

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- (3) For subsection (2) (b) (ii)—
- (a) the parties to the outstanding advances mentioned may or may not be parties to the advances secured by the mortgages to which subsection (2) applies; and
 - (b) the outstanding advances mentioned may be secured by mortgage over properties that are different from the properties that are security for the mortgages to which subsection (2) applies.

Example for par (a)

The outstanding advances may be between Lender 1 and Borrower 1, and Lender 2 and Borrower 2. The mortgages to which subsection (2) applies may be between Lender 3 and Borrower 3 and Lender 4 and Borrower 4.

Example for par (b)

The outstanding advances may be secured by mortgages over properties P1 and P2. The mortgages to which subsection (2) applies may be given over properties P3, P4 and P5.

- (4) However, this chapter does not apply if an advance (the *further advance*) is secured by a mortgage and—
- (a) an advance (a *dutiable previous advance*) had previously been made, secured by the same mortgage, in relation to which a liability to duty arose under this chapter or a corresponding law; and
 - (b) the amount secured by the mortgage immediately after the further advance is made does not exceed the amount secured by the mortgage immediately after the most recent dutiable previous advance was made.
- (5) Also, this chapter does not apply to a mortgage or an advance if—
- (a) mortgage duty is not payable in relation to the mortgage or advance because of part 7.5 (Mortgage duty concessions), part 7.6 (Mortgage duty exemptions) or part 7.7 (Mortgage-backed securities); or

(b) the mortgage or advance is exempt from mortgage duty under a corresponding law.

(6) In this section:

mortgage includes 2 or more mortgages.

property includes 2 or more properties.

Note 1 Definitions of key terms used in this section are located as follows:

- *advance*—s 174D
- *commercial purpose*—s 174F
- *common commercial purpose*—s 174G
- *liability day*—s 174J.
- *mortgage*—s 174C
- *mortgage duty*—s 174B
- *outstanding advance*—s 174E.

174A Liability for duty under ch 7 in addition to other liability under Act

This chapter does not prevent duty being payable on an instrument under another chapter of this Act.

Part 7.2 Interpretation for ch 7

174B Meaning of *mortgage duty*

In this chapter:

mortgage duty means duty payable under this chapter.

174C What is a *mortgage*?

- (1) For this chapter, each of the following instruments is a *mortgage*:
- (a) a security by way of a charge over ACT property;

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- (b) a security by way of transfer or conveyance of ACT property, if the property is held in trust to be sold or otherwise converted into money, and the security is redeemable (expressly or otherwise) before the sale or conversion;
- (c) an instrument that, on the deposit of documents of title to ACT property, or of instruments that create a charge on ACT property, becomes a mortgage or evidences the terms of a mortgage.
- (2) However, a security mentioned in subsection (1) (b) is not a *mortgage* if the transfer or conveyance is made for the benefit of creditors who accept the transfer or conveyance in full satisfaction of debts owed to them.
- (3) In this section:
- ACT property*, in relation to a security or other instrument, means property that is located completely or partly in the ACT on the liability day, or the day that would be the liability day if (apart from this section) mortgage duty were payable on the security or instrument.

174D What is an *advance*?

- (1) In this chapter:
- advance* means financial accommodation in 1 of the following forms:
- (a) a loan; or
- (b) a bill facility; or
- (c) a contingent liability to which section 174N applies.
- (2) If, after a bill facility has been given in relation to a certain amount of funds, further funds are made available under the facility, the

provision for each amount of further funds is, for this chapter, a separate advance.

(3) In this section:

bill facility means 1 or more agreements, understandings or arrangements as a consequence of which a bill of exchange or promissory note—

- (a) is drawn, accepted, endorsed or made; and
- (b) is held, negotiated or discounted to obtain funds (no matter whom the funds are obtained from).

loan means—

- (a) an advance of money; or
- (b) the payment of money for or on account of, or on behalf of, or at the request of, a person; or
- (c) the refraining from requiring the payment of money owing on an account; or
- (d) a transaction in any form that in substance effects a loan of money.

174E Meaning of *outstanding advance*

- (1) For this chapter, ***outstanding advance***, in relation to a later advance to which this chapter applies, means the amount of an advance made before the liability day in relation to the later advance that had not been repaid at the liability day.
- (2) However, an advance is not an ***outstanding advance*** if mortgage duty is not payable in relation to the advance because of part 7.6 (Mortgage duty exemptions) or part 7.7 (Mortgage-backed securities).

Example

An advance is made before the commencement of section 174ZA (Exemption of advances before commencement). Mortgage duty is not payable in relation to the advance because of pt 7.6 (which includes s 174ZA), and the advance is therefore not an *outstanding advance*.

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (3) If section 174P (Property not completely in the ACT—dutable proportion) applies in relation to an outstanding advance, the outstanding advance is taken to be reduced by the difference between the original amount of the advance and the dutiable proportion of the advance under that section.

174F When is an advance for a *commercial purpose*?

- (1) For this chapter, an advance is for a purpose that includes a *commercial purpose* if the advance has as a purpose—
- (a) gaining or producing income; or
 - (b) carrying on a business to gain or produce income.
- (2) Without limiting subsection (1), an advance is taken to be for a purpose that includes a *commercial purpose* if interest on all or any part of the advance is deductible as a business expense under the *Income Tax Assessment Act 1997* (Cwlth), section 8-1 (General deductions).

Examples

- 1 an advance to acquire income-producing assets
- 2 an advance to finance business operations
- 3 an advance to meet business expenses

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

174G When are advances for a *common commercial purpose*?

- (1) For this chapter, 2 or more advances are for purposes that include a *common commercial purpose* if they have a particular commercial purpose in common.
- (2) In deciding whether 2 or more advances have a particular commercial purpose in common, considerations including the following may be taken into account:
 - (a) the nature of any business enterprise for which the advances are made;
 - (b) the nature of any other business enterprise in which any of the parties to the advances, or anyone for whose benefit the advances are made, have been, are or propose to be involved;
 - (c) whether any of the parties to any of the advances, or anyone for whose benefit the advances are made, are associated persons in relation to each other.

Example

See example for section 174 (2) (Mortgages and advances to which ch 7 applies).

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

174H Location of company, unit trust and government security property

For this chapter, property is taken to be *located* as follows:

- (a) for property that is shares in, or securities of, a corporation—
 - (i) if the corporation is a company within the meaning of the Corporations Act—in the place where the company is taken to be registered for that Act; or
 - (ii) in any other case—in the place of incorporation of the corporation;

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- (b) for units in a unit trust scheme—
 - (i) in the place where the register on which the units are registered is kept; or
 - (ii) in the place of residence of the manager of the unit trust scheme, if the register on which the units is registered is not kept in Australia;
 - (c) for debt securities of the Territory or a government of a State or another Territory—in the Territory or State.

Part 7.3 Payment of duty

174I Who is liable to pay mortgage duty?

- (1) The person liable to pay mortgage duty is the mortgagor or the person bound.
- (2) If, because of the application of section 174 (1) or (2) (Mortgages and advances to which ch 7 applies) mortgage duty is payable in relation to 2 or more mortgages or advances, taken together, and there are 2 or more mortgagors or persons bound, the mortgagors or persons bound are liable separately and together to pay mortgage duty.

174J When does liability to duty arise?

- (1) In this chapter:
 - liability day* means the day when liability for mortgage duty arises because of this section.
- (2) A mortgage to which this chapter applies becomes liable to duty on the day it is first executed.
- (3) A mortgage to which this chapter applies becomes liable to additional duty on the making of an advance or further advance by

which the amount secured by the mortgage exceeds the amount secured by it at the time a liability to duty last arose in relation to it under this chapter or a corresponding law.

- (4) If, because of section 174 (1) or (2) (Mortgages and advances to which ch 7 applies), this chapter applies in relation to 2 or more mortgages (taken together), or to 2 or more advances (taken together), any liability for duty under this chapter arises on the day the latest mortgage was executed, or the latest advance was made.
- (5) If an instrument of security does not affect property that is located in the ACT on the day of its execution, but affects land in the ACT at any time within 12 months after that day, any liability for duty under this chapter arises on the day the instrument first affects the land, unless it is stamped under a corresponding law.
- (6) If, on the deposit of documents of title to property that is located completely or partly in the ACT or of instruments creating a charge on property that is located completely or partly in the ACT, an instrument becomes or evidences a mortgage, any liability for mortgage duty arises on the day of deposit of the documents or instruments.

174K When must duty be paid?

There is no tax default for the Taxation Administration Act if duty is paid within 90 days after the liability day.

174L How is mortgage duty charged?

- (1) The duty payable on a mortgage in relation to an advance (a *dutiable advance*) to which this chapter applies is determined by the amount of the advance, in accordance with whichever of subsection (2) or (3) applies.
- (2) If there are no outstanding advances, or if the total amount of outstanding advances is less than \$1 000 000, the duty payable on

the dutiable advance must be worked out in accordance with the following formula:

duty payable = fixed duty + duty at determined rate calculated on excess over \$1 000 000

Example

This chapter applies in relation to an advance of \$900 000. There are outstanding advances totalling \$200 000. The fixed duty is determined to be \$2 000. The determined rate of duty is \$0.20 per \$100 or part of \$100. Duty payable on the dutiable advance (\$900 000) is \$2 200, worked out as follows:

duty payable = \$2 000 (fixed duty) + \$200 (duty at determined rate calculated on \$100 000)

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (3) If the total amount of outstanding advances is \$1 000 000 or more, the duty payable on the dutiable advance must be worked out in accordance with the following formula:

duty payable = duty at determined rate calculated on dutiable advance

Example

This chapter applies in relation to an advance of \$100 000. There are outstanding advances totalling \$1 500 000. The determined rate of duty is \$0.20 per \$100 or part of \$100. Duty payable on the dutiable advance is \$200.

- (4) However, this chapter does not require the payment of duty more than once in relation to the amount of any particular advance .
- (5) In this section:

determined rate means the rate determined by the Minister under the Taxation Administration Act for this section.

excess over \$1 000 000, in relation to a dutiable advance, means the amount by which the sum of the amount of the dutiable advance and the total amount of any outstanding advances exceeds \$1 000 000.

fixed duty means the amount determined by the Minister under the Taxation Administration Act for this section.

Note 1 Section 174M (2) may reduce the amount of the dutiable advance on which mortgage duty is payable if mortgage duty has been stamped for this chapter or under a corresponding law for a previous advance secured by the same mortgage.

Note 2 Sections 174P (Property not completely in the ACT—dutiable proportion) and 174R (Multi-jurisdictional mortgage packages) deal with the assessment of mortgage duty if part of the property secured by mortgage (or a mortgage package) is located outside the ACT.

Note 3 If the dutiable advance is made under a refinanced mortgage, section 174Y (Refinancing mortgages—concessional duty) or 174Z (Additional advances—concessional duty) may provide that no mortgage duty is payable on the (otherwise) dutiable advance, or may reduce the amount of the dutiable advance on which duty is payable.

Note 4 Section 174W (Additional advances of not more than \$10 000 in 12 months), pt 7.6 (Mortgage duty—exemptions) and pt 7.7 (Mortgage-backed securities) exempt certain advances and mortgages from mortgage duty.

174M Dutiable amount of advance

- (1) Any duty payable on a mortgage under this chapter is only payable on the amount of the advance that is actually secured by the mortgage and (apart from this chapter) recoverable under it.
- (2) Also, if—
 - (a) a mortgage has been stamped for this chapter, or is stamped or exempt from duty under a corresponding law, for an amount of advances secured by the mortgage; and
 - (b) a further advance secured by the mortgage is made; and
 - (c) the total amount secured by the mortgage exceeds the amount for which the mortgage has been stamped for this chapter, or is stamped or exempt from duty under a corresponding law;

the amount on which duty is payable is, for section 174L (How is mortgage duty charged?), the excess amount mentioned in paragraph (c).

174N Contingent liabilities

- (1) This section applies to a mortgage that is used or can be used (whether directly or through a chain of relationships) to recover all or any part of an amount contingently payable under a guarantee, indemnity or other instrument in connection with an advance.
- (2) Duty is payable under this chapter as if the guarantee, indemnity or other instrument were a separate advance secured by the mortgage.
- (3) If there are 2 or more instruments under which the contingent liability arises, subsection (2) applies to the instrument under which the greatest amount of contingent liability arises.
- (4) If the mortgage is part of a chain of relationships, the amount of the contingent liability to which this section applies is limited to the amount of any advance by any party in the chain, and does not include the amount of any other kind of contingent liability.
- (5) This section does not apply if the commissioner is satisfied that there is no connection between the mortgage and any advance by any party to the arrangements.

Note Section 174L (4) provides that this chapter does not require the payment of duty more than once in relation to the amount of any particular advance.

174O Nonpayment of duty

- (1) A mortgage on which mortgage duty is required to be paid is, while any of the duty remains unpaid, enforceable only to the extent of the amount secured by the mortgage on which mortgage duty has been paid.

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- (2) A mortgage mentioned in sections 174P (Property not completely in the ACT—dutiabale proportion) or 174R (Multi-jurisdictional mortgage packages) on which mortgage duty is required to be paid is, while any of the duty remains unpaid, enforceable only to the extent of the dutiable proportion on which mortgage duty has been paid.
- (3) In this section:
duty includes interest or a penalty payable under Taxation Administration Act in association with the duty.

Part 7.4 Multi-jurisdictional property

174P Property not completely in the ACT—dutiabale proportion

- (1) Mortgage duty (if any) must be assessed for a mortgage over property that is partly in and partly outside the ACT as if the advance (or further advance) secured by the mortgage were only the dutiable proportion.
- (2) For this section, the *dutiabale proportion* must be worked out in accordance with the following formula:

$$\textit{dutiabale proportion} = A \times \frac{V}{T}$$

- (3) In subsection (2):

A means the amount of the advance on which duty would, apart from this section, be payable at the liability day.

T means the value of all property affected by the mortgage, excluding property located in another Territory or outside Australia.

V means the value of property located in the ACT affected by the mortgage.

174Q Property not completely in the ACT—valuation

- (1) For section 174P, the value of property secured by a mortgage must be worked out by reference to a referable point prepared within 12 months before the liability day for the mortgage.
- (2) For subsection (1), *referable point*, in relation to property secured by a mortgage, means any of the following:
 - (a) an independent valuation of the property;
 - (b) a statement by the mortgagee of the value of the property based on information obtained by the mortgagee in deciding to make the advance to the mortgagor;
 - (c) a property valuation used by the mortgagor in preparing an annual return to be lodged under the Corporations Act;
 - (d) a statement of the value of the property included in a financial report of the mortgagor, if the report is certified by an independent auditor as presenting a true and fair view of a corporation's financial position;
 - (e) an agreed property valuation that forms the basis of the mortgagor's insurance policies;
 - (f) any other document the commissioner consider to be appropriate for working out the value of the property.
- (3) However, if there is more than 1 referable point for a property, the *referable point* is the later, or the latest, of the referable points, subject to subsection (4).
- (4) If a referable point is used, or is to be used, in working out liability to duty corresponding to the liability to duty under this chapter that arises under a corresponding law, the *referable point* for this section is the same as the referable point used under the corresponding law.

174R Multi-jurisdictional mortgage packages

- (1) For this chapter, a *mortgage package* is 2 or more instruments of security if—
 - (a) at a liability day, the instruments secure or partly secure the same money; and
 - (b) at least 1 of the instruments is a security affecting property located completely or partly outside the ACT; and
 - (c) at least 1 of the instruments is a mortgage.
- (2) In the case of an initial advance, 2 or more instruments of security are taken to be part of a *mortgage package* only if the commissioner is satisfied that the mortgages were intended to be part of the same package.
- (3) For subsection (2), the instruments are taken, for the purpose of assessing duty, to be first executed on the day the last of the instruments was executed.
- (4) In the case of a further advance, a *mortgage package* includes—
 - (a) a mortgage first executed after the initial liability day for another mortgage, if the commissioner is satisfied the mortgages were intended to be part of the same package; and
 - (b) a mortgage previously collateral to an earlier advance under 1 or more of the other mortgages in the package.
- (5) Duty on a mortgage package must be assessed under this chapter as if the instruments comprising the package were a single mortgage.
- (6) One of the security instruments in the mortgage package must be stamped with the duty paid under this chapter for the mortgage package, and each other security instrument must be stamped as a collateral mortgage.

174S Stamping before advance

- (1) A mortgage may be stamped before an advance whether or not an earlier advance has been made.
- (2) If a mortgage mentioned in section 174P (Property not completely in the ACT—dutiabale proportion) or section 174R (Multi-jurisdictional mortgage packages) is stamped before an advance has been made, the liability day for the mortgage is, for determining a referable point for the mortgage, taken to be the date of stamping.

174T Withdrawal of mortgage from mortgage package

- (1) A stamped mortgage or a collateral mortgage that was, but is no longer, part of the same mortgage package, and no longer secures the same money secured by the package, is not security for any other advance unless mortgage duty in relation to the other advance has been paid.
- (2) The withdrawal of a mortgage from a mortgage package does not, for this chapter, affect the amount for which the remaining mortgage or mortgages are security.

174U Collateral mortgages

- (1) In this chapter:

collateral mortgage means a mortgage that secures all or part of the same money as another mortgage, instrument of security, or mortgage package.
- (2) Duty is not payable on the amount or part of the amount of advances secured by a collateral mortgage that is the same money as is secured by—
 - (a) a mortgage or instrument of security that is stamped for this chapter or stamped under a corresponding law; or

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- (b) a mortgage package that has been stamped for section 174R (Multi-jurisdictional mortgage packages) or stamped as a mortgage package under a corresponding law.
- (3) If the same money is secured, or partly secured, by 2 or more mortgages, at least 1 of which is a mortgage that is exempt from duty under a corresponding law because it is a refinancing mortgage and at least 1 of which is a collateral mortgage on mortgage duty is payable—
- (a) the duty payable on the collateral mortgage (or, if there is more than 1 collateral mortgage, on 1 of them) is reduced by the amount of duty from which the refinancing mortgage is exempt under the corresponding law (subject to subsection (4)); and
 - (b) the minimum duty for collateral mortgages is payable on each collateral mortgage other than the collateral mortgage mentioned in paragraph (a).
- (4) Minimum duty of \$20 is payable for a collateral mortgage.
- (5) A collateral mortgage that no longer secures an amount secured by a mortgage, instrument or mortgage package mentioned in subsection (2), or by an exempt mortgage, is not security for another advance unless mortgage duty for the amount of the other advance is paid.

174V Multi-jurisdictional statement

- (1) If, because of this part, mortgage duty is payable in relation to a mortgage, the mortgagor and mortgagee must, within 3 months after the liability day—
- (a) make a written statement about the location and value of the secured property; and
 - (b) give the statement to the commissioner.

Note If a form is approved under the Taxation Administration Act, s 139C (Approved forms) for a statement, the form must be used.

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- (2) If 1 of the parties mentioned in subsection (1) makes and gives a statement as required under that subsection, no-one else is required to comply with the subsection.
 - (3) For this chapter, the statement may be taken to be the mortgage, or the mortgages comprising the mortgage package.

Part 7.5 Mortgage duty concessions

174W Additional advances of not more than \$10 000 in 12 months

Mortgage duty is not payable on additional advances secured by a mortgage if the total of the additional advances does not exceed \$10 000 in any 12-month period, except the period of 12 months following the making of the initial advance.

174X Meaning of *refinancing mortgage*

- (1) For this part, a *refinancing mortgage* is a mortgage that—
 - (a) secures the amount of the balance outstanding under another mortgage (the *earlier mortgage*) that is discharged or to be discharged as part of the arrangements for the new mortgage; and
 - (b) is created to secure an advance to the same borrower as under the earlier mortgage; and
 - (c) is over the same or substantially the same property or part of the property as the earlier mortgage.
- (2) For subsection (1), mortgages are created to secure an advance to the same borrower if, either directly by the mortgages themselves or indirectly through 1 or more collateral arrangements, the same person obtains the advances secured by them.

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- (3) If an advance is refinanced by 2 or more lenders, so that mortgages given to the lenders together secure the balance outstanding under an earlier mortgage, subsection (1) is to be read as though—
- (a) the reference to a mortgage securing the balance outstanding were a reference to the aggregate of the mortgages, and
 - (b) the reference to property were a reference to the property securing the aggregate of refinancing advances made by the lenders under their combined mortgages, to the intent that, if the requirements of subsection (1), as so read, are satisfied, each lender is taken, for this part, to be the holder of a refinancing mortgage.
- (4) A reference in this section to the *same borrower*, or the *same person*, in relation to an earlier mortgage, includes a reference to the following:
- (a) if any borrower under the earlier mortgage is a corporation—a related body corporate;
 - (b) if a borrower under the earlier mortgage dies—the remaining borrower or borrowers;
 - (c) if borrowers under the earlier mortgage were domestic partners, and their domestic partnership has ended, or they intend to end their domestic partnership, or they have separated and there is no reasonable likelihood of them living together again as partners—either domestic partner.
- (5) In deciding whether section (4) (c) applies to a domestic partnership, consideration must be given to any statutory declaration made by either domestic partner to the effect that—
- (a) the domestic partnership has ended; or
 - (b) the partners intend to end the domestic partnership; or

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- (c) the partners have separated, and there is no reasonable likelihood of them living together again as partners.
- (6) Subsection (5) does not limit the functions given to the commissioner under the Taxation Administration Act, section 82 (Power to require information, instruments or records or attendance for examination).
- (7) In this section:

domestic partner means a person who is a party to a domestic relationship or a legal marriage, and includes a person who was a party to a domestic relationship or legal marriage that has ceased, whether the cessation took effect in Australia or elsewhere.

domestic partnership means a domestic relationship or legal marriage.

domestic relationship—see the *Domestic Relationships Act 1994*, section 3 (1) (Interpretation for Act).

Note 1 The definition of *domestic partner* in the dictionary (which extends only to a person who is a party to a domestic relationship, and so does not include legal marriage) does not apply in this section, because the definition in s (7) implicitly provides for the dictionary definition to have a more limited application (see Legislation Act, s 156 (1)).

Note 2 The definition of *domestic relationship* in the *Domestic Relationships Act 1994*, s 3 (1) includes a ‘domestic partnership’ as defined in Legislation Act, s 169 (2), but does not include a legal marriage.

174Y Refinancing mortgages—concessional duty

- (1) In working out the duty (if any) payable under this chapter on a refinancing mortgage, the amount of the advance or advances secured by the mortgage is taken to be reduced by the closing balance under the earlier mortgage if—
- (a) mortgage duty has been paid, or is payable, under this chapter or a corresponding law on the earlier mortgage (even if the

-
- earlier mortgage was created before the commencement day);
or
- (b) all advances secured by the earlier mortgage were made before the commencement day.
- (2) In working out the duty (if any) payable under this chapter on a refinancing mortgage, if the earlier mortgage was created before the commencement day the amount of the advance or advances secured by the refinancing mortgage is taken to be reduced by the commencement day balance under the earlier mortgage, if—
- (a) there is at least 1 advance secured by the earlier mortgage that was made on or after the commencement day, and was for purposes that include a commercial purpose; and
- (b) no mortgage duty has been paid, and no mortgage duty is payable, under this chapter or a corresponding law, on the earlier mortgage.
- (3) This section does not apply if—
- (a) the earlier mortgage was created on or after the commencement day; and
- (b) there is at least 1 advance secured by the earlier mortgage that was for purposes that include a commercial purpose; and
- (c) no mortgage duty has been paid, and no mortgage duty is payable, on the earlier mortgage; and
- (d) no mortgage duty has been paid, and no mortgage duty is payable, under a corresponding law on the earlier mortgage.
- (4) In this section:
- closing balance***, of an earlier mortgage, means the total amount of the balance outstanding on the earlier mortgage at the time it is discharged (or is to be discharged).

commencement day means the day this section commences.

Note This section commences on a day fixed by the Minister under the *Duties (Commercial Mortgages) Amendment Act 2003*, s 2.

commencement day balance—the **commencement day balance** of an earlier mortgage is so much of the amount secured by the earlier mortgage as had not been repaid immediately before the commencement day.

174Z Additional advances—concessional duty

In working out the duty (if any) payable under this chapter on an additional advance secured by a refinancing mortgage, the total amount of any outstanding advances is taken to be reduced by the same amount (if any) as the amount of the initial advance or advances secured by the refinancing mortgage is taken to be reduced under section 174Y.

Part 7.6 Mortgage duty exemptions

174ZA Exemption of advances before commencement

Mortgage duty is not payable on an advance made before the day this section commences.

Note This section commences on a day fixed by the Minister under the *Duties (Commercial Mortgages) Amendment Act 2003*, s 2.

174ZB General exemptions

The following mortgages are exempt from payment of mortgage duty:

- (a) a mortgage taken by a charitable organisation;
- (b) a mortgage of any ship or vessel, or of any part, interest, share or property of or in any ship or vessel;

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- (c) a mortgage given or taken by an offshore banking unit within the meaning of the *Income Tax Assessment Act 1936* (Cwlth), section 128AE.

174ZC Farm machinery and commercial vehicles

- (1) Mortgage duty is not payable on so much of an advance to an individual for the acquisition of farm machinery or a commercial vehicle as is secured by the mortgage.
- (2) In subsection (1):

commercial vehicle means:

- (a) a motor vehicle constructed or adapted mainly for the carriage of goods, except a utility, station wagon, panel van or caravan; or
- (b) a vehicle without motive power of its own that is constructed or adapted mainly for the carriage of goods and for being drawn by a motor vehicle.

farming undertaking includes the following:

- (a) any agricultural, apicultural, dairy farming, horticultural, orcharding, pastoral, poultry keeping, viticultural or other business involving the cultivation of the soil, the gathering of crops or the rearing of livestock; and
- (b) the cutting of timber for sale, and
- (c) any other business determined by the commissioner to be a farming undertaking for this section.

farm machinery means any of the following if acquired for a farming undertaking:

- (a) a harvester, binder, tractor, plough or other agricultural implement;

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- (b) any other goods commonly used for a farming undertaking that are determined by the commissioner to be farm machinery for this section.
- (3) A determination of the commissioner for the definitions of *farm undertaking*, paragraph (c), or *farm machinery*, paragraph (b), is a notifiable instrument.

Note A notifiable instrument must be notified under the Legislation Act.

174ZD Mortgage-backed debentures issued by financial corporations

- (1) Mortgage duty is not payable on a mortgage solely or partly securing the repayment of advances arising from the issue of a debenture by a financial corporation or a related body corporate.
- (2) This section applies in relation to a debenture issued, or a mortgage executed, by a related body corporate only so far as the debenture is issued, or the mortgage is executed, for raising funds to be used for a financial corporation.
- (3) In this section:

financial corporation means a corporation whose sole or principal business is providing finance to the public, including making loans to the public.

Part 7.7 Mortgage-backed securities

174ZE Exemption from mortgage duty

- (1) Mortgage duty is not payable in relation to a mortgage over the interest of a person in a pool of mortgages relating to debt securities that are mortgage-backed securities issued by the person to secure the repayment of financial accommodation provided to the person.

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- (2) Mortgage duty is not payable in relation to a mortgage of a mortgage or pool of mortgages or part of a pool of mortgages in connection with creating, issuing, marketing or securing a mortgage-backed security.
 - (3) Mortgage duty is not payable in relation to a mortgage of a mortgage or pool of mortgages or part of a pool of mortgages for creating, issuing, marketing or securing a mortgage-backed security—
 - (a) to a person entitled to a mortgage-backed security or a trustee or agent for such a person, or
 - (b) by or to a person who issues, makes or endorses a mortgage-backed security, or
 - (c) to a person who provides security (whether as a guarantor, surety or otherwise) to a person entitled to a mortgage-backed security or a trustee or agent for such a person.

174ZF Exemptions from duty under Act—related instruments

- (1) Duty is not payable under this Act in relation to an instrument that provides for any of the following:
 - (a) the issue or making of a mortgage-backed security;
 - (b) the transfer or assignment of or other dealing with a mortgage-backed security;
 - (c) the discharge, cancellation or termination of a mortgage-backed security.
- (2) Duty is not payable under this Act in relation to an instrument that was executed for the purpose of creating, issuing or marketing mortgage-backed securities.

174ZG Meaning of *mortgage-backed security*

- (1) For this part, *mortgage-backed security* means any of the following:

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- (a) an interest in a trust that entitles the holder of, or beneficial owner under, the interest—
- (i) to all or any part of the rights or entitlements of a mortgagee and any other rights or entitlements in relation to a mortgage or any money payable by the mortgagor under the mortgage (whether or not the money is payable to the holder of, or beneficial owner under, the interest on the same terms and conditions as under the mortgage); or
 - (ii) to all or any part of the rights or entitlements of a mortgagee and any other rights or entitlements in relation to a pool of mortgages or any money payable by mortgagors under the mortgages (whether or not the money is payable to the holder of, or beneficial owner under, the interest on the same terms and conditions as under the mortgages); or
 - (iii) to payments that are derived substantially or, if the regulations prescribe the extent, to the prescribed extent, from the income or receipts of a pool of mortgages;
- and that may, in addition, entitle the holder or beneficial owner to a transfer or assignment of the mortgage or mortgages;
- (b) a debt security (whether or not in writing) the payments under which by the person who issues or makes the debt security are derived substantially (or, if the regulations prescribe the extent, to the prescribed extent) from the income or receipts of a pool of mortgages;
- (c) an interest in a trust creating, giving or consisting of a right or interest (whether described as a unit, bond or otherwise) of or on a beneficiary in a scheme under which any profit or income in which the beneficiaries participate arises from the acquisition, holding, management or disposal of prescribed

property, or any instrument that evidences such a right or interest;

- (d) a security (whether or not in writing) the payments under which by the person who issues or makes the security are derived substantially from the income or receipts of prescribed property;
 - (e) an interest in a trust, a debt security (whether or not in writing), an instrument or property that creates an interest in or charge over an interest in a trust, a debt security (whether or not in writing) or other instrument or property, to which paragraph (a), (b), (c) or (d) applies.
- (2) However, *mortgage-backed security* does not include any of the following:
- (a) a mortgage;
 - (b) the transfer of a mortgage;
 - (c) a declaration of trust;
 - (d) an instrument declared under the regulations not to be a mortgage-backed security for this section.

174ZH Meaning of *pool of mortgages*

- (1) For this part, *pool of mortgages* means a pool or collection of assets—
- (a) that consists only of mortgages; or
 - (b) that consists substantially (or, if the regulations prescribe the extent, to the prescribed extent), of mortgages or of money paid under mortgages (whether or not the money has been invested in prescribed property) or of money (whether or not that money has been invested in prescribed property) if the primary investment policy is to invest in mortgages.

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- (2) For subsection (1) (b), a *pool of mortgages* may also contain either or both of the following:
- (a) prescribed property,
 - (b) any other property that forms part of the pool or collection of assets for the purpose of issuing or making a mortgage-backed security in relation to the pool of mortgages.

174ZI Meaning of *prescribed property*

In this part:

prescribed property means any of the following:

- (a) cash;
- (b) bonds, debentures, stock or treasury bills of the Commonwealth, the Territory or a State;
- (c) debentures or stock of any public statutory body constituted under the law of the Commonwealth, the Territory or a State.
- (d) notes or other securities of the Commonwealth, the Territory or a State;
- (e) deposits with, or the acquisition of certificates of deposits or any other security issued by, a bank or building society (whether expressed in Australian currency or otherwise);
- (f) bills of exchange, promissory notes or other negotiable instruments accepted, drawn or endorsed by a bank (whether expressed in Australian currency or otherwise);
- (g) a guaranteed investment contract (expressed in Australian currency) of a type approved by the commissioner;
- (h) mortgage-backed securities within the meaning of this Act or the *Duties Act 1997* (NSW), mortgage-backed certificates within the meaning of the *Trustee Act 1958* (Vic), part 1B or

marketable securities that are secondary mortgage market securities under the *Mortgages (Secondary Market) Act 1984* (Qld), section 29 (1).

Part 7.8 Miscellaneous

174ZJ Unregistered mortgages protected by caveats

- (1) Duty is payable for a caveat under the *Land Titles Act 1925* in which an interest is claimed in a mortgage to which this chapter applies that is not registered under that Act.
- (2) The amount of duty is—
 - (a) if mortgage duty is payable on the mortgage under this chapter or a corresponding law, but the mortgage is not stamped under this Act or that law—the same amount as is payable on the mortgage; or
 - (b) if the mortgage is stamped with mortgage duty for this chapter or a corresponding law—\$20.
- (3) The mortgagor or person bound is liable to pay the duty.

174ZK Stamping counterpart or collateral instrument

- (1) This section applies if the commissioner is satisfied that a mortgage—
 - (a) has been lost or destroyed; or
 - (b) because of being deposited in the Registrar-General's office or for another reasonable cause, cannot be conveniently produced.
- (2) A counterpart of the mortgage, or a collateral security for an amount secured by a mortgage—
 - (a) is taken to be the mortgage; and

(b) may accordingly be stamped or upstamped for mortgage duty purposes.

5 Dictionary, new definition of *advance*

insert

advance, for chapter 7 (Commercial mortgages)—see section 174D.

6 Dictionary, new definition of *collateral mortgage*

insert

collateral mortgage, for chapter 7 (Commercial mortgages)—see section 174U.

7 Dictionary, new definitions of *commercial purpose*

commercial purpose, for chapter 7 (Commercial mortgages)—see section 174F.

8 Dictionary, new definition of *common commercial purpose*

common commercial purpose, for chapter 7 (Commercial mortgages)—see section 174G.

9 Dictionary, new definition of *earlier mortgage*

earlier mortgage, for part 7.5 (Mortgage duty concessions), in relation to a refinancing mortgage—see section 174X (1) (a) (Meaning of *refinancing mortgage*).

10 Dictionary, new definition of *liability day*

liability day, for chapter 7 (Commercial mortgages)—see section 174J.

11 Dictionary, new definition of *located*

located, for chapter 7 (Commercial mortgages)—see section 174H (*Location* of company, unit trust and government security property).

12 Dictionary, definition of *mortgage*

substitute

mortgage means—

- (a) except for chapter 7 (Commercial mortgages)—any charge on land created only for securing a debt; and
- (b) for chapter 7—see section 174C.

mortgage package, for chapter 7 (Commercial mortgages)—see section 174R.

mortgage-backed security, for part 7.7—see section 174ZG.

13 Dictionary, new definitions

insert

pool of mortgages, for part 7.7 (Mortgage-backed securities)—see section 174ZH.

prescribed property, for part 7.7 (Mortgage-backed securities)—see section 174ZI.

14 Dictionary, new definition of *refinancing mortgage*

insert

refinancing mortgage, for part 7.5 (Mortgage duty concessions)—see section 174X.

Endnotes

Republications of amended laws

- 1 For the latest republication of amended laws, see www.legislation.act.gov.au.