REVENUE LAWS AMENDMENT BILL 1999

EXPLANATORY NOTES

GENERAL OUTLINE

Policy Objectives

To amend the:

- *Land Tax Act 1915* to provide an exemption and make a minor amendment;
- *Pay-roll Tax Act 1971* to reduce the pay-roll tax rate and include employer superannuation contributions in the pay-roll tax base; and
- *Stamp Act 1894* to address an avoidance arrangement, align the corporate reconstruction provisions with existing administrative arrangements in two respects, provide a marketable security duty exemption and ensure that refunds of duty do not give rise to windfall gains.

Reasons for the Bill

Port authorities that own and operate commercial airports are currently at a competitive disadvantage, in terms of land tax liability, compared to private corporations that lease airport land from the Commonwealth. The *Land Tax Act 1915* is therefore to be amended to remove this disadvantage by providing an exemption for that part of airport land owned by port authorities and used for government or airport purposes.

To reflect the recent increase in the general land tax rebate from 5% to 15%, the land value threshold below which returns are not required to be lodged for the purposes of the *Land Tax Act 1915* is to be increased.

In the 1999-2000 State Budget, it was announced that the rate of pay-roll tax is to be reduced from 5% to 4.9% on and from 1 July 2000, with a further reduction to 4.8% on and from 1 July 2001. All employer superannuation contributions are also to be included in the pay-roll tax base on and from 1 January 2000, including superannuation contributions paid on or after 14 September 1999 in respect of services performed or rendered on or after 1 January 2000. The *Pay-roll Tax Act 1971* is to be amended to give effect to these Budget initiatives.

The 1999-2000 State Budget also announced that an exemption from the payment of marketable security stamp duty would be provided for transfers of shares or rights in respect of shares in Queensland incorporated companies traded on approved stock exchanges where the shares or rights in respect of shares are transferred to a foreign resident and registered on an overseas register. The *Stamp Act 1894* is to be amended to give effect to this announcement.

The *Stamp Act 1894* provides a conveyance stamp duty exemption for property transfers to implement corporate reconstructions, subject to the satisfaction of certain conditions. One of these conditions is that, where a stamp duty exemption is obtained for a transfer of assets between associated companies, those companies must remain associated for five years from the date of the asset transfers. A scheme has been identified which seeks to avoid this continuing association condition. The *Stamp Act 1894* is therefore to be amended to ensure that the conditions of the corporate reconstruction concession are given effect.

Some minor amendments are also being made to section 49C of the *Stamp Act 1894* to give effect to practices that are currently in place which facilitate the operation of the section. These practices address legislative anomalies by ensuring that the conveyance duty concession is available in appropriate cases.

Refunds may be made under the *Stamp Act 1894* in certain circumstances. Sometimes the person seeking the refund has recovered an amount in relation to the duty from another person. Where such an amount has been recovered by a taxpayer, there will be a windfall gain where the refund is not passed on to the other person. The *Stamp Act 1894* is to be amended to include a windfall gains provision requiring the passing on of refunds in certain circumstances.

Achievement of Objectives

Land Tax Act 1915

Exemption for Port Authorities

Section 13(1) is to be amended to provide an exemption in respect of land owned and operated by port authorities as a commercial airport, to the extent that the land is used for specified government or airport purposes. That part of airport land owned by a port authority which is used for a qualifying purpose will be eligible for the exemption, with land tax continuing to be payable on any other part of the airport land which is not used for such a purpose. The exemption will first apply for the 1999-2000 financial year.

Amendment of liability threshold for a natural person

Section 16(1) of the *Land Tax Act 1915* requires owners of land to furnish a return every financial year, unless otherwise notified by the Commissioner, where the land owned has an unimproved value greater than a specified threshold amount. Returns are not required to be lodged where the unimproved value is less than that amount. For individuals, this threshold amount is the unimproved value below which the land tax payable would be less than $100, after allowing for the general rebate. As the land tax general rebate was increased from 5% to 15% for the 1999-2000 financial year onwards, a consequential increase in the threshold amount is also to be made with effect from the same time.

Pay-roll Tax Act 1971

Inclusion of employer superannuation contributions

Over a number of years, changing trends in labour market salary and wage arrangements have increasingly seen employer superannuation contributions make up a significant component of remuneration packages, often replacing wage rises. This trend has primarily been driven by the Commonwealth's requirement under the Superannuation Guarantee (Administration) Act 1992 (Cwlth) that employers pay a certain level of superannuation contributions on behalf of their employees. This rate is currently 7%, increasing to 9% in 2002.

Currently, in Queensland, pay-roll tax only applies to a superannuation contribution where the employee elects to have the employer make a payment to a superannuation scheme as part of salary-sacrifice arrangements. This limited pay-roll tax treatment of superannuation contributions has provided opportunities for employers to structure wage and salary arrangements to minimise pay-roll tax.

Accordingly, the 1999-2000 State Budget announced that all employer superannuation contributions will be liable for pay-roll tax on and from 1 January 2000. To prevent avoidance by the bringing forward of payments, contributions made on and from the date of the Budget announcement of 14 September 1999 to 1 January 2000, in respect of services to be performed or rendered on or after 1 January 2000, are also to be liable. These amounts will be taken to have been paid on 1 January 2000.

Pay-roll tax will be payable on contributions paid or payable by an employer in respect of an employee to a superannuation fund within the meaning of the *Superannuation Industry (Supervision) Act 1993* (Cwlth), as a superannuation guarantee charge within the meaning of the *Superannuation Guarantee (Administration) Act 1992* (Cwlth), or to any other form of superannuation, provident or retirement fund or scheme.

To reduce possible tax avoidance, the superannuation contributions liable for pay-roll tax will include non-monetary contributions. In addition to the valuation provisions in the *Pay-roll Tax Regulation 1999*, arrangements for the ascertainment of the value of any non-monetary taxable wages, including superannuation contributions, are to be included in the *Pay-roll Tax Act 1971*. These provisions will include the power for the Commissioner to require evidence of value and to appoint a person to undertake a valuation where dissatisfied with the evidence provided. The costs of such a valuation may be recovered from the employer where the value obtained by the Commissioner is greater than the value stated by the employer.

These amendments will also ensure that double imposition of pay-roll tax does not arise where an employer is liable for pay-roll tax on both an obligation to contribute to a superannuation fund and a superannuation guarantee charge in respect of the same obligation. This provision will reduce the taxable component of the superannuation guarantee charge to the extent that the contribution to the superannuation fund would have reduced the charge percentage under section 23 of the *Superannuation Guarantee (Administration) Act 1992* (Cwlth) if the contribution was made.

Certain other measures are to be included to ensure the proper operation of the arrangements.

- Payment made by an employer on or after 1 January 2000 in relation to a superannuation contribution will be taken to be in relation to services performed or rendered by an employee on or after 1 January 2000 except to the extent that the Commissioner is satisfied that the payment relates to services performed or rendered by an employee before 1 January 2000. If part of a contribution made after 1 January 2000 is attributable to services performed or rendered before 1 January 2000, only that part of the contribution is excluded from taxable wages.
- To ensure that employers cannot avoid liability where they claim to be unable to determine the amount of a superannuation contribution attributable to particular employees, the Commissioner may decide the employee or employees to whom the contribution relates.

Reduction of the pay-roll tax rate

The 1999-2000 State Budget also announced that the rate of pay-roll tax would be reduced from 5% to 4.9% on and from 1 July 2000, with a further reduction to 4.8% on and from 1 July 2001. The *Pay-roll Tax Act 1971* is to be amended to give effect to this change.

Stamp Act 1894

Corporate reconstructions – avoidance arrangement

To facilitate the rationalisation of corporate structures and asset holdings, section 49C of the *Stamp Act 1894* provides a conveyance stamp duty exemption for property transfers to implement corporate reconstructions, subject to the satisfaction of certain conditions. One of these conditions is that there is no arrangement that the transferor and transferee will cease to be associated. Where a stamp duty exemption is obtained for a transfer of assets between associated companies, those companies must remain associated for five years from the date of the asset transfers (the "continuing association condition"). This condition ensures that companies are not able to take advantage of the stamp duty concession simply to package assets for sale outside the group.

Section 49C presently provides that the companies may cease to be associated by the liquidation of one of them. A scheme has been identified which seeks to exploit this liquidation exception to avoid the continuing association condition. The scheme involves a series of transactions which purport to satisfy the requirements of section 49C but where steps have been included for the sole purpose of defeating the continuing association condition. That is, rather than transferring assets from A to C, which is the intended transferee, assets are transferred from A to newly incorporated B and then from B to C. B is then liquidated so that, it is contended, there is no requirement for any continuing association between A and C under section 49C as presently drafted.

In this case, a transfer of assets directly from A to C would qualify for exemption from stamp duty under section 49C. However, that section would then require that those companies remain associated for five years from that time. The only reason for interposing B in the series of transactions is to seek to break the association between A and C by an artificial and contrived arrangement which could then allow assets to be transferred between group companies free of stamp duty. Interests in those companies could then be sold outside the group without there being any obligation for payment of the duty which would have otherwise been payable on the intra-group asset transfers had the arrangement not been adopted.

The circumstances in which the concession under section 49C(2) will be available will therefore be clarified. That is, an exemption from stamp duty will only be available where the instrument mentioned in section 49C(2)(a) is made in connection with a scheme for the reconstruction of a company or the amalgamation of companies. The purpose of the instrument will therefore be a relevant factor in the application of the exemption.

To address the artificial use of arrangements involving company liquidations in an attempt to avoid the continuing association condition, section 49C will now specify that cessation of association may only be allowed where there is an eligible liquidation. Where a significant purpose of an arrangement involving a liquidation is to avoid the requirement that the companies remain associated for five years, the liquidation will not be an eligible liquidation. In addition to applying for section 49C(4)(b), this eligible liquidation test will apply for the purposes of section 49C(2)(d)(iii).

Section 49C(2)(c)(ii) currently facilitates a stamp duty exemption where a company is first incorporated with at least 90% of its issued share capital owned by another company. However, there is no clear requirement that the first company continues to own at least 90% of the second company's issued share capital at the time that the instrument mentioned in section 49C(2)(a) is executed. The *Stamp Act 1894* is therefore to be amended to require such continuous share ownership.

Corporate reconstructions – other amendments

Section 49C is also being amended to ensure that companies constituted by statute are eligible for exemption and that instruments executed in connection with a conveyance, transfer or assignment of a beneficial interest in property may qualify for exemption under section 49C(2)(a). For instance, where a Form Z required under the land-rich provisions (sections 56FA-FO) or a Form S(a) required under section 54A are executed in connection with a conveyance of a beneficial interest in property, those instruments will be eligible for exemption where the other requirements of section 49C are satisfied. This will be so including where the Form S(a), for instance, is the only instrument executed in connection with a transaction.

Marketable security duty exemption for foreign trades of Queensland incorporated companies

Stamp duty is payable in Queensland on the off-market transfer of marketable securities in a Queensland incorporated company. If a transfer occurs outside Australia, whether on or off-market, duty will still be payable in Queensland by the parties to the transfer instrument. The company is also required to pay duty on all transactions for which duty has not been paid by the transferor or transferee.

Queensland incorporated companies may list on foreign exchanges where the obligation for Queensland duty is not commonly known. In these cases, there are no mechanisms in place which allow collection of duty from a foreign transferee. Consequently, the company would be liable to pay duty on foreign trades in most cases.

In the 1999-2000 State Budget, it was announced that a stamp duty exemption would be provided for trades in Queensland company shares or share rights on approved foreign exchanges to foreign residents.

The *Stamp Act 1894* is therefore being amended to provide an exemption for transfers of shares and rights in respect of shares in Queensland companies to foreign residents where the transfers are conducted on an approved stock exchange. The exemption will only apply to transfers to foreign residents which are conducted on an approved stock exchange, that is, on-market transfers. The shares or rights in respect of shares will also need to be recorded on an overseas register.

Exchanges to be approved will be those in jurisdictions where stamp duty does not usually apply and with similar listing requirements to the Australian Stock Exchange and on which shares or rights in respect of shares in Queensland incorporated companies are listed. The NASDAQ Stock Market, Inc is named in the Bill as an approved exchange. Further exchanges may be prescribed by regulation.

Consequential amendments to the *Stamp Act 1894* are also required as a result of this Budget initiative. Amendments will be made providing that, where specified conditions are satisfied, the existing prohibition on a transfer of shares being recorded on a company's books unless the transfer is properly documented and duly stamped will not apply.

The requirement in section 31H that a company lodge a return and account for duty on a foreign transfer is also to be modified to ensure that a company will not be obliged to comply with this requirement in relation to a transfer of shares conducted on an approved stock exchange. A company will not need to enquire whether or not the transfer was to a non-resident. However, if the company knows that the transferee was an Australian resident, this exception does not apply and the company will need to comply with its obliga tions under section 31H.

Windfall gains provisions

The nature of stamp duty is that there is generally more than one person who is liable in relation to a particular instrument. For instance, in the case of stamp duty on a transfer of registration of a motor vehicle, the transferor and transferee are liable. In these cases, the commercial practice is that the parties agree which of them will pay the duty.

Refunds may be made under the *Stamp Act 1894* in a range of circumstances, including where a reassessment is made to decrease liability or an instrument was void from inception. In some cases, a person seeking a refund has recovered an amount in relation to the duty from another person. For instance, it is normal commercial practice for a motor vehicle dealer to recover the stamp duty payable on a transfer of registration of a motor vehicle from the purchaser of the vehicle. It is also usual for an insurer to recover the amount of duty payable in relation to a policy of insurance from the insured. Mortgages and leases provide other examples.

Where an amount in relation to duty has been received by a taxpayer from another person, the payment of a refund to the taxpayer inappropriately results in a windfall gain where the taxpayer does not reimburse the other person. This is so regardless of the reasons for which the refund is sought.

To ensure that the benefit of any refund of stamp duty is passed on to the person who bore the incidence of the tax, including where refunds are sought under a provision of the *Stamp Act 1894* which is subsequently found to be invalid, the *Stamp Act 1894* is to be amended to include a windfall gains provision. This provision will apply regardless of the basis for the payment of the refund i.e. whether paid under the *Stamp Act 1894* or otherwise, and will ensure that refunds of stamp duty may be made only where the person to whom the refund is to be made either has not received an amount from another person or will reimburse that person for the amount received within a specified period. Where a refund is made and reimbursement is not made as required, there will be an obligation to repay the relevant amount, together with interest.

Alternatives to the Bill

The policy objectives require statutory amendment to give them ongoing effect.

Estimated Cost for Government Implementation

Any additional administrative costs are not expected to be significant.

Consistency with Fundamental Legislative Principles

Retrospective Operation of Amendments

The amendments to the *Land Tax Act 1915* will have retrospective operation, first applying for the 1999-2000 financial year. Both amendments provide benefits and do not adversely affect rights retrospectively. In the case of the exemption for port authorities owning airport land, the port authorities involved are aware of the matter. In the case of the increase in the land tax threshold amount for the lodgement of returns, there will be no practical effect as land tax returns are no longer generally required, with assessments being automatically issued by the Office of State Revenue based on valuation data from the Department of Natural Resources.

In relation to the amendment to the *Pay-roll Tax Act 1971* to include employer superannuation contributions, the relevant details were included in the 1999-2000 State Budget, which was delivered on 14 September 1999. The Budget provided that pay-roll tax would be payable on all superannuation contributions made by employers for employees in relation to services performed or rendered on or after 1 January 2000. That announcement also made it clear that employer superannuation contributions paid on or after the date of announcement in respect of services performed or rendered on or after 1 January 2000 would be liable for pay-roll tax. Such amounts will be deemed to be paid on 1 January 2000. This measure is necessary to prevent the avoidance of tax by employers through the prepayment of superannuation contributions prior to the commencement date.

As the intention to impose pay-roll tax on such contributions has been publicly announced in the context of the State Budget, and because the legislation will be in operation before there is any obligation to pay pay-roll tax on such contributions, these amendments are not considered to adversely affect taxpayers' rights retrospectively.

Other provisions

The remaining amendments included in the *Revenue Laws Amendment Bill 1999* are not considered to raise fundamental legislative principle issues.

Consultation

Consultation on the amendment to address the avoidance arrangement under section 49C of the *Stamp Act 1894* would have been inappropriate as it would have alerted the community to the avoidance technique. In addition, consultation on the windfall gains provision is not necessary as that provision merely ensures that refunds are made to the person who ultimately paid the tax.

Consultation on the remaining amendments is considered to be unnecessary.

NOTES ON PROVISIONS

Clause 1 cites the short title of this Act.

Clause 2 specifies the commencement date for Part 2 of the Act.

Clause 3 provides that Part 2 amends the *Land Tax Act 1915*.

Clause 4 provides an exemption from land tax in relation to land owned and operated by a port authority as a commercial airport to the extent that specified ownership and land use conditions are satisfied. The exemption will apply only in respect of those parts of the land that qualify so that, for example, land tax will remain payable in respect of areas leased to commercial tenants.

The clause also provides definitions of the key terms “exempt Commonwealth authority”, “exempt State authority” and “port authority”.

Clause 5 amends section 16(1)(b) to increase the unimproved value threshold for the lodgement of returns from $219,895 to $221,665. This reflects the increase in the general land tax rebate from 5% to 15%.

Clause 6 provides that Part 3 amends the *Pay-roll Tax Act 1971*.

Clause 7 amends the definition of “wages” contained in section 3(1) of the *Pay-roll Tax Act 1971* to include superannuation contributions that are paid or payable, other than those for employees’ services performed or rendered before 1 January 2000. Contributions for which a liability to contribute has been incurred but for which no payment has been made will be liable for pay-roll tax when the liability to contribute is incurred.

The clause also relocates and renumbers existing section 3(2A) of the *Pay-roll Tax Act 1971* as section 3B(5) and renumbers existing sections 3(3) and (6) of the *Pay-roll Tax Act 1971* as sections 3(2) and (3).

Clause 8 inserts new sections 3A and 3B. Section 3A provides a definition of “superannuation contribution”. Such amounts include monetary and non-monetary contributions made to unfunded or partly funded superannuation funds or schemes.

In addition, payments made by employers in relation to the superannuation guarantee charge under the *Superannuation Guarantee (Administration) Act 1992* (Cwlth) will be liable for pay-roll tax. However, any additional superannuation guarantee charges under that Act will not be included. In addition, the definition of superannuation guarantee charge ensures that there will not be any double liability for pay-roll tax where a superannuation guarantee charge is payable in relation to a contribution for which the employer has paid pay-roll tax when the contribution was payable and for which there would have been a reduction in the charge percentage under the *Superannuation Guarantee (Administration) Act 1992 (*Cwlth) if the contribution had been paid.

Section 3B applies for the definition of "wages" contained in section 3(1) of the *Pay-roll Tax Act 1971*. Subsections (2) and (3) are inserted to deem any superannuation contributions paid or payable on or after 1 January 2000 to relate to services performed or rendered on or after that date, except to the extent that the Commissioner is satisfied that any part of the contribution relates to services performed or rendered before that date.

Subsection (4) provides that:

- where superannuation contributions cannot be readily attributed to a particular employee or employees, the Commissioner may determine the amount that is attributable to a particular employee or employees; and
- superannuation contributions paid on or after 14 September 1999 and before 1 January 2000 in respect of services performed or rendered on or after 1 January 2000 are taken to be paid on 1 January 2000.

Clause 9 amends section 7 of the *Pay-roll Tax Act 1971* to reduce the rate of pay-roll tax from 5% to 4.9% on and from 1 July 2000 and then to 4.8% on and from 1 July 2001.

Clause 10 inserts new subsections into section 8A of the *Pay-roll Tax Act 1971* to allow for the valuation of non-monetary wages. The employer must provide satisfactory evidence of the stated value of taxable wages, if requested by the Commissioner. Where the Commissioner is not satisfied with the evidence provided by the employer, the Commissioner may appoint a person to value the wages and, in certain circumstances, charge the employer with the cost of obtaining a valuation from the appointed person.

Clause 11 provides that Part 4 amends the *Stamp Act 1894.*

Clause 12 provides that section 31G(1) of the *Stamp Act 1894* will not apply in respect of a transfer where, because of section 31H(3A), section 31H does not apply to the transfer.

Clause 13 provides that section 31H of the *Stamp Act 1894* will not apply to a Queensland incorporated company in respect of a transfer of a share or right in respect of a share in the company if the transfer is of a share or right which is listed and traded on an approved stock exchange and the share or right, and the transfer of the share or right, is to be recorded on the company's overseas branch register.

Where the transfer is to an Australian resident, the parties to the transfer will remain liable for the duty because exemption 20 does not apply. However, the company may not be liable under section 31H to account for duty on the transfer in this case because that section will not apply where the conditions in new subsection 31H(3A) are satisfied. If the company knows that the transfer is to an Australian resident, new subsection (3B) provides that the company will remain liable to comply with section 31H.

The clause also provides a definition of "Australian resident".

Clause 14 effects a number of changes to section 49C.

- The instrument mentioned in section 49C(2)(a) must be made in connection with a scheme for the reconstruction of a company or the amalgamation of companies.
- The circumstances in which cessation of association may be permitted where a section 49C(2) exemption is sought or has been provided are modified. Cessation of association within 5 years will only be allowed where there is an eligible liquidation. That is, where a significant purpose of an arrangement involving a liquidation is to avoid the requirement that the companies remain associated for five years, the liquidation will not be an eligible liquidation. In addition to applying for section 49C(4)(b), this requirement will also apply for the purposes of section 49C(2)(d)(iii).
- For the purposes of section 49C(2)(c)(ii), the issued share capital in the newly incorporated company must be continuously owned by the other company until the instrument mentioned in section 49C(2)(a) is executed.
- Instruments (e.g. the approved form for section 54A) executed in connection with a transfer, conveyance or assignment of a beneficial interest in property may qualify for exemption under section 49C(2).

- Companies constituted by statute will not be excluded from eligibility for exemption under section 49C.

Clause 15 inserts section 80A which ensures that the benefit of any refund of stamp duty is passed on to the person who bore the incidence of the tax, including where refunds are sought under a provision of the *Stamp Act 1894* which is subsequently found to be invalid. This provision will apply regardless of the basis for the payment of the refund.

Clause 16 inserts a further exemption in the “Conveyance or transfer” heading in schedule 1 of the Stamp Act 1894. The exemption applies to exempt from payment of stamp duty a transfer of a share or right in respect of a share in a Queensland company to a foreign resident where the share or right is listed on an approved stock exchange and the transfer is conducted on the approved stock exchange.

In addition, for the exemption to apply, the share or right must be recorded on an overseas branch register and the transfer must be recorded on the overseas branch register. The clause also provides definitions of “approved stock exchange”, “foreign resident” and “Queensland company”.

Clause 17 provides that Part 5 amends the *Pay-roll Tax Regulation 1999.*

Clause 18 amends section 24 of the *Pay-roll Tax Regulation 1999* to change the cross-references to correspond with the renumbered section 3B(5) of the *Pay-roll Tax 1971*.