

DUTIES AMENDMENT BILL 2004

EXPLANATORY NOTES

GENERAL OUTLINE

Policy Objectives

To amend the *Duties Act 2001* to

- implement transfer duty and mortgage duty concessions for first home buyers announced by the Government during the 2004 election;
- include a general anti-avoidance provision to support the concessions; and
- introduce an 18 year age requirement which taxpayers must satisfy to claim the concessions subject to a discretion for the Commissioner of State Revenue to allow a minor to claim the concessions in certain circumstances.

Reasons for the Bill

During the 2004 election, the Government proposed the following additional transfer duty and mortgage duty relief for first home buyers.

- Raising the maximum purchase price for a full rebate of transfer duty on first home purchases from \$80,000 to \$250,000.
- Transfer duty on first home purchases above \$250,000 will be reduced by a rebate which is capped at \$2,500 and reduces by \$100 for every \$10,000 over \$250,000. The rebate cuts out completely for first homes costing \$500,000 or more.
- Raising the exempt amount for mortgage duty on a loan for the purchase or construction of a first home from \$100,000 to \$250,000.

The *Duties Act 2001* is to be amended to give effect to these proposals, with the amendments taking effect on and from 1 May 2004.

Due to the delay between announcement and commencement of the concessions, there is scope for taxpayers to structure transactions to gain the benefit of the amendments by schemes to defer transactions to a date after 30 April 2004. An anti-avoidance provision is required to address these schemes.

Amendments are also required to the *Duties Act 2001* to provide that a taxpayer must be at least 18 years of age if they claim either concession, subject to a discretion which the Commissioner of State Revenue may exercise to allow either concession in genuine cases.

Achievement of the Objectives

Transfer duty and mortgage duty

Currently, a concessional transfer duty rate of 1% applies for the first \$250,000 of the consideration for, or value of a home, that is, a person's principal place of residence. The general rates of duty apply to the excess price or value over \$250,000. Also, for buyers purchasing their first home for \$80,000 or less, a first home transfer duty rebate applies so that no transfer duty is payable. A reducing rebate, in addition to the 1% home concessional rate of duty, applies for first home purchases above \$80,000. This rebate cuts out at \$160,000.

Currently, first home buyers receive a mortgage duty exemption on the first \$100,000 of the amount secured by a mortgage to buy or build a first home. Mortgage duty applies for any amount secured above the exemption limit.

During the 2004 election, the Government announced that the transfer duty exemption limit for first home buyers would be raised from \$80,000 to \$250,000. For first home purchases of more than \$250,000, a maximum \$2,500 rebate would apply, reducing by \$100 per \$10,000 over \$250,000 and ending once the value of the first home reaches \$500,000. Also, that the first home mortgage duty exemption limit would be raised from \$100,000 to \$250,000.

18 year age requirement

There is currently no age restriction on taxpayers obtaining the benefit of the first home duty concessions. Consequently, minors may claim the first home transfer duty concession and the first home mortgage duty exemption. The announced changes will provide first home buyers with substantial transfer duty and mortgage duty savings. First home buyers may obtain a maximum reduction of \$2500 in transfer duty or total

exemption and a maximum reduction of \$1000 in mortgage duty or total exemption.

The increased concessions provide greater incentive for abuse by using minors in first home transactions to obtain the benefit of the concessions where the real purchaser, such as their parents, would be ineligible for the first home concessions, as they have previously owned a home. To prevent potential abuse of these concessions, the *Duties Act 2001* is to be amended to require that taxpayers claiming the benefit of either the first home transfer duty concession or the first home mortgage duty exemption be at least 18 years of age.

To cater for genuine circumstances where a minor may purchase a first home or obtain a first mortgage, a discretion will be conferred on the Commissioner of State Revenue to allow either concession in those circumstances. The discretion will be considered on a case by case basis. Factors for consideration would include the age of the minor, the way in which the first home purchase is structured, the reason for the purchase, the living arrangements of the minor and their family, the family arrangements generally and whether the funds to purchase the first home were independently sourced.

Examples of where the discretion may be exercised on the basis of the factors to be taken into account are:

- where a paraplegic child who has obtained funds from a compensation payment builds a home modified for their medical needs;
- a 17 year old child who has used funds from an inheritance to purchase a home in which they will live with their partner.

An example of where the discretion may not be exercised is where parents acquire a home unit for a young child, either in the child's name or as trustee for the child, using their own funds to acquire and maintain the home unit.

Anti-avoidance provision

The Government announced the first home transfer duty initiative on 28 January 2004. As the amendments will commence on 1 May 2004, taxpayers may seek to structure their transactions to gain the benefit of these amendments by schemes to defer first home transactions to a date after 30 April 2004. The *Duties Act 2001* is to be amended to include an anti-avoidance provision to address these schemes.

The anti-avoidance provision will operate so that the *Duties Act 2001* first home transfer duty concessions which have effect on and from 1 May 2004 will not apply to certain dutiable transactions made on or after 1 May 2004, where a prior transaction or arrangement is made before that date. A prior transaction or arrangement includes a pre-existing transfer or agreement which is replaced by another transfer or agreement for the same land after 1 May 2004 or an option to purchase land or an option to require a transferee to purchase land granted before 1 May 2004 and exercised on or after 1 May 2004.

Arrangements made before 1 May 2004 to defer a dutiable transaction until 1 May 2004 or later to gain the benefit of the new first home transfer duty concessions will also mean that the new first home transfer duty concessions will not apply.

If any of these situations arise, the parties will be able to claim only the first home transfer duty concessions as they currently stand.

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

The Bill confers on the Commissioner of State Revenue a discretion to allow a person under the age of 18 years to claim a first home transfer duty concession or first home mortgage duty exemption. This discretion can only be exercised where the Commissioner is satisfied there is no scheme to circumvent limitations on, or requirements affecting, eligibility or entitlement for the concession or exemption in relation to the relevant transaction. This will enable the relevant concession or exemption to apply in genuine cases of a minor purchasing a first home or entering into a first mortgage.

Consultation

The transfer duty and mortgage duty amendments were announced by the Government during the 2004 election.

Consultation on the anti-avoidance and 18 year age requirement amendments was not appropriate as the amendments are designed to minimise any potential abuse in claiming the first home transfer duty concession or first home mortgage duty exemption.

NOTES ON PROVISIONS

Clause 1 cites the short title of the Bill.

Clause 2 states the date on which the Bill is taken to have commenced.

Clause 3 states that the Bill amends the *Duties Act 2001*.

Clause 4 amends section 92(1) by adding the requirement that a transferee claiming a first home transfer duty concession be at least 18 years of age on the day the liability for transfer duty arises.

A new subsection (1A) is included to clarify when section 92 applies. That is, if section 92(1)(b)(ii) applies, a beneficiary, who is under a legal disability only because the beneficiary is under 18 years of age, will be eligible for the first home transfer duty concession in section 92 only if the Commissioner is satisfied there is no avoidance scheme in relation to the transaction.

Section 92(2) is also amended to provide that the first home transfer duty concession amounts are contained in a new Schedule 4A of the Act. New section 92(3) provides that the Commissioner may exempt a transferee from the 18 year age requirement if satisfied there is no avoidance scheme in relation to the dutiable transaction.

A transferee or beneficiary of a first home who cannot satisfy the 18 year age requirement and who does not have the Commissioner's discretion exercised in their favour is not precluded from claiming the home concession under section 91, provided the residence is the home of the transferee or beneficiary and all other requirements of section 91 are satisfied.

Clause 5 inserts a new subsection (3A) into section 93 to provide that the section will only apply in respect of a first home where the relevant transferee is at least 18 years of age on the day the liability for transfer duty arises. A new subsection (3B) provides that the Commissioner may exempt a transferee of a first home from the 18 year age requirement if satisfied that there is no avoidance scheme in relation to the dutiable transaction.

A transferee of a first home who cannot satisfy the 18 year age requirement in new subsection (3A) and who does not have the Commissioner's discretion contained in new subsection (3B) exercised in their favour is not precluded from claiming the home concession under section 93, provided the residence is the home of the transferee and all other requirements of section 93 in respect of claiming the home concession are satisfied.

A consequential amendment is made to section 93(6A) to reflect the inclusion of new Schedule 4A in the Act.

Clause 6 inserts a new subsection (3) into section 94 to clarify when section 93(3A) and (3B) will apply in the case of a beneficiary under a legal disability. That is, if because of section 94, section 93 applies to a transaction as if a beneficiary is a transferee of residential land, the 18 year age requirement will apply to the beneficiary under a legal disability if the legal disability of the beneficiary is only that the beneficiary is under 18 years of age.

Clause 7 replaces the definition of a "first home borrower" in section 273(2) to add the requirement that the first home borrower be at least 18 years of age on the day the liability for mortgage duty arises. A new subsection (3) provides that the Commissioner may exempt a borrower from the 18 year age requirement if the Commissioner is satisfied there is no avoidance scheme in relation to the home mortgage.

A first home borrower who cannot satisfy the 18 year age requirement in new subsection (2) and who does not have the Commissioner's discretion contained in new subsection (3) exercised in their favour is not precluded from claiming the home borrower exemption under section 274, provided the borrower is a home borrower and all other requirements of section 274 in respect of claiming the home borrower exemption are satisfied.

Clause 8 amends section 274 to increase the first home borrower mortgage duty exemption limit to \$250,000.

Clause 9 inserts a new subsection (3) into section 275 to clarify when section 273(2)(b) and (3) will apply in the case of a beneficiary under a legal disability. That is, if because of section 275, section 273(2)(b) and (3)

apply to a beneficiary as if the beneficiary is a first home borrower, the 18 year age requirement will apply to the beneficiary under a legal disability if the legal disability of the beneficiary is only that the beneficiary is under 18 years of age.

Clause 10 makes a minor technical change to the heading of Chapter 17, Part 2 of the Act.

Clause 11 inserts Chapter 17, Part 3 in the Act which contains new section 551. New subsection (1) contains transitional provisions for the Bill. This subsection clarifies that the amendments, including the 18 year age requirement, apply to dutiable transactions and mortgages for which a duty liability arises on or after 1 May 2004.

New subsection (2) provides that Chapter 2, Part 9, Division 3 of the Act, as in force immediately before 1 May 2004, will apply to certain transfers or agreements for transfer of residential land made on or after 1 May 2004, in the following circumstances.

- Where the transfer, or agreement for transfer of residential land replaces a transfer, or an agreement for transfer that included the residential land which was made before 1 May 2004.
- Where the transferee had an option to purchase the residential land or the transferor had an option to require the transferee to purchase the residential land granted before 1 May 2004 and the option was exercised on or after 1 May 2004.
- Where another arrangement was made before 1 May 2004 the sole or main purpose of which was to defer the making of the transfer or agreement until 1 May 2004 or later so the new first home transfer duty concessions would apply in relation to the dutiable transaction.

Clause 12 inserts new Schedule 4A in the Act which contains the first home transfer duty concession.

Clause 13 amends Schedule 6 of the Act by inserting a definition of “avoidance scheme”.