STAMP AMENDMENT BILL (NO. 3) 2000

Second Reading

Resumed from 7 November.

HON N.D. GRIFFITHS (East Metropolitan) [9.40 pm]: The Australian Labor Party supports the passage of this Bill. This is an interesting piece of legislation which involves amending part IIIBA of the Stamp Act. That is an interesting part of the Stamp Act, and before I make some comments about that part I will put that in the context of this Bill.

Hon Kim Chance: It really is interesting.

Hon N.D. GRIFFITHS: Hon Kim Chance finds this area of legislation very exciting; that is why he remains glued to his seat.

Hon Derrick Tomlinson: He is excited and you are interested.

Hon N.D. GRIFFITHS: I thank Hon Derrick Tomlinson for that timely interjection.

Hon Peter Foss: He likes to collect stamps.

Hon N.D. GRIFFITHS: He often puts his stamp on legislation.

This Bill seeks to target tax avoidance involving the purchase of property through company structures, thus circumventing the anti-avoidance provisions of part IIIBA of the Stamp Act. This Bill is designed to stop a revenue loss estimated to be between $30m and $40m per annum. Therefore, it is potentially a significant measure. Part IIIBA was inserted in the Stamp Act in 1987 to tackle the avoidance practice of placing property into a company structure and then selling the property by transferring the shares in the company rather than transferring the property. The 1987 provisions, which operate on non-listed companies when shares in such companies are acquired with regard to land and chattels, are subject to duty at conveyance rates if three tests are met. Those three tests are the value of the land; the property component; and the percentage of the company the subject of the transaction; that is, a majority test.

Avoidance techniques have progressively undermined the operations of part IIIBA of the Stamp Act. A review of these practices has been undertaken, advice has been given and the matter has been the subject of two ministerial statements, the first on 10 August 2000 and the second on 8 October 2000. The legislation attacks relevant arrangements entered into on or after 10 August 2000 and arrangements entered into prior to 10 August 2000, if those arrangements are not put into effect by a date set out in the Bill. The latter is the case because the tax trigger is the acquisition of an interest. Section 76AG of the Stamp Act refers to the acquisition of an interest, rather than an agreement to acquire an interest. The section 76 definition of "acquire" does not include an agreement. Normal conveyancing is dealt with under section 74.

The revenue estimated to be forgone this financial year as a result of the targeted avoidance is in the region $25m to $30m. The Government has had the benefit of legal and State Revenue financial advice to the effect that avoidance practices will be effectively fixed up by the passage of the Bill. It is appropriate, given the complexity of this fascinating area of the Stamp Act concerning land companies, that we rely on the expertise in the advice provided to the Government.

HON HELEN HODGSON (North Metropolitan) [9.46 pm]: As Hon Nick Griffiths indicated, the part of the Act being amended deals with land rich trusts and an anti-avoidance provision inserted in 1987. Given the changes in corporate law and the commercial environment since that time, it is surprising that it has remained relatively unchanged since 1987. The notes on the copy of the Act indicate that this is the first significant amendment to the section. It is appropriate that the amendments cover a range of areas, such as developments in state law and necessary updates resulting from changes in Corporations Law, and tax avoidance practices to be dealt with through broadened definitions.

When I state that land rich unit trusts are an anti-avoidance measure, I refer to the differences in duty levels in the transfer of shares in a company and the transfer of land. The rates set in the schedule are different. People have a propensity to hold land in corporate vehicles, and this is often for legitimate reasons: For example, a professional person may choose to have a corporation protect his or her assets for professional indemnity reasons, which is quite common. On the other hand, trusts can be used for avoidance means.

The three main criteria under the former regime with land unit trusts will remain essentially unchanged. However, the definitions and calculations are refined in the amendments before the Chair. The transfer relates to a majority holding in a unit trust or company. Formerly, a one-year period applied. One could count back to see whether transfers had occurred in that period to ensure that people who progressively transferred shares were caught up in the arrangement. A key change is to take this period back to three years. It will be possible to go back a maximum of three years to determine whether transfer in the ownership of land has occurred by way of selling shares during that time.

The transitional provisions at first glance look fiddly. However, they provide that any transfer of land from now on will be related back only one year. The provisions will be progressively phased in so that in 2002, transfers will be related back for a full three years. That matter has therefore been handled in an equitable way.

The second condition is that the unencumbered value of the land must be more than 80 per cent of the unencumbered value of the assets of the unit trust or company; in other words, it must be a company that has land as its primary asset. This should deal with the situation of somebody carrying on a business with other legitimate trading-type assets in the company.

Thirdly, the value of the land must be more than $1m, although there is a shading-in provision so that the full effect of the provisions do not come into play until the value reaches $1.5m. Taking those factors into account, this provision is clearly designed to deal with certain situations and will not catch the unwary who have set up a company or unit trust and are unaware of its ramifications. The people dealing with these types of companies know that they have large-value property that is worth a lot of the value to the company.

As a footnote, I note that all States have a version of these land rich trust provisions. I recall several years ago writing on this issue with reference to the Western Australian situation. My publisher came back to me and said I should find out what happens in the other States. Therefore, I had to conduct some extensive research - going back five years now - and found that the regimes, with some technical changes, are similar across Australia. Essentially, all States have recognised this problem and have enacted provisions to deal with it.

I shall deal with some of the other issues addressed by the amendment before us. The definition of acquisition has been broadened, as mentioned by Hon Nick Griffiths. The period of acquisition has been extended to three years, as I said; and entitlements have been redefined in a broader way, partly due to changes in the Corporations Law and concepts and partly due to closing anti-avoidance loopholes. Some changes are mechanical and these are where the real anti-avoidance effect will be felt. People will be required to lodge a statement in more situations, even if no duty is payable. This will allow the commissioner to see whether a transaction is occurring that needs to attract the interest of the State Revenue Department. Goods, wares and merchandise now come into the calculations, although they are excluded from taxing. They become part of the value when determining whether to lodge a statement and whether they fall within the relevant provisions.

Certain other chattels come into play; for example, minerals. This is an interesting issue in relation to companies that could potentially be caught by this provision, because companies with large land-holdings could also have mineral rights and stockpiles in question. However, although this provision brings in the value, it later excludes it under the 80 per cent rule. Therefore, the value of those minerals will not be taxed but, rather, it will be taken into account in determining whether to lodge necessary statements and comply with the provision. Considerably more discretion is given to the commissioner to determine whether anti-provisions have been used.

This is consistent with the way in which tax legislation has been developing, but it is problematic, because whenever extended discretions are granted discretions must be applied consistently and appropriately. There is sometimes a question mark over whether an arrangement is for a commercial reason. People often enter into transactions into which they would prefer not to enter. Sometimes people are driven by family or commercial reasons. They may not be able to find any way out of the problem that does not bring them technically within the provisions of an anti-avoidance section. Such an instance was drawn to my attention recently in respect of the most recent amendments that were made to the Stamp Act, whereby corporation anti-avoidance provisions were brought into play because, due to family arrangements, a company had to be broken up and have its assets distributed. Things will be all right as long as the commissioner has the discretion and exercises it fairly and appropriately, and properly considers these other issues.

My concern is that as we go down this path we are leaving more of these issues to the judgment of individuals who sometimes get it wrong. It is good to see that we have appropriate court and objection procedures in the Stamp Act. I hope that we do not discover that we are opening up the floodgates to problems in that area. The wording of the discretion states that the commissioner must apply a number of criteria as well as take into account any other relevant matter. I hope that provision turns out to be applied appropriately.

In respect of the comments made by Hon Nick Griffiths that the Government has received legal advice on the provision, I have been fortunate enough to receive copies of correspondence from the Minister assisting the Treasurer to the member for Nollamara, John Kobelke. It indicates that the Government has received legal advice. I received it with wry amusement. When I first looked at the document I could see that paragraphs had been removed. About two pages of information had been deleted. When I read what was left I could see why the information had been deleted. The paragraph following the deleted sections states -

> I have set out above possible areas of vulnerability I have been able to identify in the legislative package presented to me.

That proves my point when dealing with tax, commercial and anti-avoidance legislation: As soon as one tries to close a loophole a clever lawyer, tax professional or accountant will find ways around it. That is why, when it comes to matters such as the commissioner's discretion - although I have some philosophical issues with it - I accept that it is necessary to leave it in the hands of people who administer the law, as they see what is happening on a daily basis. My amusement stems from the fact that it goes to show that we will never get a piece of legislation that will deal with the issue without leaving further loopholes. Now that these have been drawn to the minister's attention there is a suggestion that they may be addressed at a subsequent date in another Bill. That is the appropriate way to go. The Australian Democrats support the Bill, as it tightens anti-avoidance provisions that already exist to ensure that they are current and keep up with modern practices. The Australian Democrats cannot see any problem with that.

HON J.A. SCOTT (South Metropolitan) [9.59 pm]: The Greens (WA) will join other members of the House in stamping out tax avoidance and closing loopholes. This Bill clearly seeks to cover a loophole that allows an unfair advantage to certain parties through the use of corporate structures. Such a loophole should be removed as quickly as possible. I share the concerns of Hon Helen Hodgson about the speed with which the rabbits find a new way through the maze and open up yet another loophole. Perhaps we should look at a way of taking away their money first and then requiring them to get it back again. That might be the only way to make it too difficult for them. However, even that might not do the trick. For the time being, this Bill will certainly make a difference.

Question put and passed.

Bill read a second time, proceeded through remaining stages without debate and passed.