

EXPLANATORY MEMORANDUM

DUTIES AMENDMENT BILL 2011

This Bill amends the *Duties Act 2008* to address concerns arising from a stamp duty decision in the High Court in the matter of *TEC Desert Pty Ltd & Anor v Commissioner of State Revenue* [2010] HCA 49 on 15 December 2010.

The case concerned the assessment of stamp duty under the *Stamp Act 1921* that involved, among other things, items affixed to land that was subject to a mining tenement.

While the Stamp Act has been replaced by the Duties Act, it is nonetheless desirable that certain consequences of the decision be addressed to ensure the State's duty base is not adversely affected.

The High Court judgement resulted in a departure from the previous understanding of mining tenements, in relation to their status as an interest in land and the nature of items attached to them.

The High Court held that mining tenements were not interests in land, but rather were personal property, involving a grant of rights for mining purposes.

As a consequence, the High Court also determined that items affixed to land that is the subject of a mining tenement were not fixtures in the technical legal sense and therefore could not be assessed under the Stamp Act as an interest in land.

Unlike the general conveyancing provisions of the Stamp Act, the Duties Act imposes duties on transactions involving land by reference to a definition of land that includes any estate or interest in land, a mining tenement and anything that is part of land as a fixture.

While the Duties Act already makes it clear that a mining tenement is land for Duties Act purposes, amendments are considered necessary to clarify the definition of land in relation to any estate or interest in a mining tenement (including, for example, a sub-lease or sub-licence of a mining tenement or an equitable interest), and to specify what constitutes a fixture in relation to petroleum licences, mining tenements and any estate or interest in mining tenements.

This Bill seeks to ensure that items attached to a mining tenement, or any estate or interest in a mining tenement, are regarded as fixtures in the same circumstances that would apply if the mining tenement were a freehold estate in land.

This will result in the same tests, such as the degree of annexation and intention of the parties who place an item on a mining tenement, being applied to determine whether the item is a fixture for duty purposes.

Fixtures attached to land the subject of petroleum licences are also included by including the reference to a pipeline under the *Petroleum Pipelines Act 1969* in the definition of land.

The amendments are proposed to commence from 24 December 2010, the day after an announcement was made by the Minister for Finance that the Government would be legislating to address the issues raised by the High Court decision. The amendments are consistent with the Government's announcement on this matter.

Part 1 – Preliminary

Clause 1: Short title

This clause provides that the short title of this Act is the *Duties Amendment Act 2011*.

Clause 2: Commencement

This clause provides the commencement dates for the Act.

Paragraph (a) provides that Part 1 comes into operation on the day that this Act receives the Royal Assent.

Paragraph (b) provides that Part 2 is deemed to have come into operation on 24 December 2010. This is consistent with the media statement released by the Minister for Finance on 23 December 2010. Part 2 contains the amendments necessary to address the impact of the High Court decision.

Paragraph (c) provides that Part 3 comes into operation on the day after this Act receives the Royal Assent. Part 3 sets out the transitional provisions that are applicable under the *Duties Amendment Act 2011*.

Clause 3: Act amended

This clause provides that this Act amends the *Duties Act 2008*.

Part 2 – Retrospective amendments to the *Duties Act 2008*

Clause 4: Section 3 amended

Section 3 of the Duties Act provides the meanings of terms used in that Act.

This clause amends the meaning of the term “land”.

Paragraph (a) of this clause inserts a new paragraph (ca) into the Duties Act definition of land to provide that an “estate or interest in a mining tenement” is included in the definition of land. The definition of land in section 3 of the Duties Act already refers to a “mining tenement”.

It is considered that this amendment clarifies the interpretation of the Duties Act definition of land by making it clear that an estate or interest in a mining tenement is considered to be land for Duties Act purposes.

Examples of such estates or interests in a mining tenement would include a sub-lease or sub-licence of a mining tenement as well as equitable estates or interests.

At present, the Duties Act definition in section 3 is interpreted by the Commissioner in a manner that achieves this indirectly via the reference to “any estate or interest in land”.

Paragraph (a) of this clause also inserts a new paragraph (cb) into the Duties Act definition of land. The new paragraph provides that where land is the subject of a mining tenement, and something is affixed to the land under the authority of the mining tenement, were that land to have been a freehold estate and the item characterised as a fixture, then for the purposes of the Duties Act, that item is deemed to be land.

The current definition of land includes a fixture. Prior to the High Court decision in *TEC Desert*, the law was applied on the basis that an item affixed to a mining tenement, such as a power generation plant, was a fixture and as such liable to be assessed for duty as land on its transfer.

The inclusion of paragraph (cb) in the Duties Act definition restores this position.

Proposed paragraph (cb) uses the words “*anything that under the authority (whether direct or indirect) of a mining tenement is fixed to the land...*”. The use of the word “indirect” in relation to the authority under which something is attached to a mining tenement covers lesser or derivative interests in mining tenements, such as a sub-lease or sub-licence of a tenement by the holder of a tenement to another person.

For example, a building attached to a mining tenement by the owner of that tenement would be fixed to the land on the basis of the direct authority of the mining tenement.

However, if the owner of a mining tenement licensed the tenement to another person (the licensee) and under the authority of the licence arrangement, the licensee attached a building to the mining tenement, that building would be fixed to land that is the subject of that mining tenement under the indirect authority of the mining tenement.

Proposed subparagraph (cb)(ii) ensures that when determinations are made as to whether an item affixed to a mining tenement is a fixture, the same common law tests are used that would otherwise be applied if the mining tenement were a freehold estate in land. These tests include among other matters, the intention of the parties who affixed the item to the mining tenement and the item's degree of annexation.

Subclause (b) inserts a new paragraph (da) into the Duties Act definition of land. The new paragraph provides that a pipeline, as defined in the *Petroleum Pipelines Act 1969*, constructed on land under the authority of the Petroleum Pipelines Act is, for the purposes of the Duties Act, land.

The current definition of land in the Duties Act includes a licence under the Petroleum Pipelines Act section 4(1). The definition of a pipeline in section 4(1) of the Petroleum Pipelines Act includes in part, "*pipeline means a pipe or system of pipes used or intended to be used for the conveyance of petroleum; and includes all structures for protecting or supporting a pipeline and all loading terminals, works and buildings and all fittings, pumps, tanks, storage tanks, appurtenances and appliances*". It is considered that this Petroleum Pipelines Act definition removes any need to further clarify that fixtures attached to land that is the subject of a petroleum pipeline licence are land for the purposes of the Duties Act.

Clause 5:

Section 149 amended

Section 149 is in Chapter 3 of the Duties Act. This Chapter deals with the imposition of landholder duty.

Section 149 of the Duties Act deals, among other matters, with a landholder's entitlement to land where the ownership of the land and fixtures on the land are, or purport to be, in separate ownership.

Subclause (1) inserts a new subsection (2A) in section 149 of the Duties Act to provide that certain things are fixtures and as such, are considered to be part of land for the purposes of sections 149(2) and (3) and landholder duty generally. These amendments correspond to the amendments proposed in clause 4 to the definition of land, ensuring that the provisions operate in a similar manner in circumstances where the land and items attached to it are, or purport to be, separately owned.

Subclause (2) inserts a new subsection (4) in section 149 of the Duties Act. This subsection clarifies that the term “land” is to be read more narrowly than the general definition of land in section 3, only when used in section 149(2) and (3) and proposed section (2A). It ensures that the general definition of land in section 3 will apply to all other provisions in the landholder Chapter of the Duties Act.

Part 3 – Transitional provisions inserted in *Duties Act 2008*

Clause 6:

Schedule 3 Division 5 inserted

This clause inserts a new Division 5 into Schedule 3 of the Duties Act. Schedule 3 contains the transitional provisions of the Duties Act.

These provisions deal with transfer duty and landholder duty matters that would not have been liable to duty but for the operation of the *Duties Amendment Act 2011*.

Transfer duty and landholder matters that have been assessed within the relevant period, as set out in proposed clause 33, will be liable to be reassessed if affected by the amendments contained in Part 2 of the *Duties Amendment Act 2011*.

The power of the Commissioner of State Revenue to make a reassessment is contained in the *Taxation Administration Act 2003*.

Division 5 – Provisions for *Duties Amendment Act 2011*

Clause 33: Terms used: relevant period

This clause defines the term “**relevant period**” for the purposes of Division 5 of Schedule 3 of the Duties Act.

The term “relevant period” is the period beginning on 24 December 2010 and ending on the day before the day on which the *Duties Amendment Act 2011* Part 3 comes into operation.

The relevance of 24 December 2010 is that it is the day immediately following the day the Minister for Finance announced that the Government would amend the Duties Act to address the *TEC Desert* decision.

Clause 34: When transfer duty deemed to arise in certain cases

Subclause (1) provides that a term used in the Transfer Duty Chapter of the Duties Act has the same meaning when used in clause 34 as it has in the Transfer Duty Chapter.

Subclause (2) provides that clause 34 applies to a transaction entered into between 24 December 2010 and the day before the day on which the *Duties Amendment Act 2011* Part 3 comes into operation, where that transaction would not have been a dutiable transaction but for the operation of clause 4 of the *Duties Amendment Act 2011*.

For example, if a transaction were entered into on 7 January 2011, the amendments to section 3 of the Duties Act would apply to the transaction. This is because the transaction falls within the relevant period as defined in proposed clause 33.

However, if a transaction were entered into prior to 24 December 2010, the amended definition of land will not apply to that transaction as it did not arise within the relevant period.

Subclause (3) provides how the date that liability for transfer duty is calculated for a transaction that is a dutiable transaction as a result of the operation of proposed subclauses (1) and (2) of this clause.

For example, if a transaction is entered into on 7 July 2011 and becomes a dutiable transaction because of the operation of proposed clause 34, the date that liability for duty arises for that transaction is taken to be the later of 7 July 2011 and the day after the *Duties Amendment Act 2011* is assented to.

This will result in duty being assessed on that transaction taking into account the amendments in Part 2 of the *Duties Amendment Act 2011* and penalties for late lodgment only being imposed if the transaction is lodged more than two months after 7 July 2011 or the date the Royal Assent is given, whichever is the later.

Clause 35: When landholder duty deemed to arise in certain cases

Subclause (1) provides that a term used in the Landholder Duty Chapter of the Duties Act has the same meaning when used in clause 35 as it has in the Landholder Duty Chapter.

Subclause (2) provides that clause 35 applies to a relevant acquisition, made between 24 December 2010 and the day before the day on which the *Duties Amendment Act 2011* Part 3 comes into operation, that would not have been a relevant acquisition but for the operation of Part 2 of the *Duties Amendment Act 2011*.

A relevant acquisition is an acquisition of an interest in a company or unit trust that is chargeable with landholder duty under Chapter 3 of the Duties Act.

For example, if a relevant acquisition was made on 7 January 2011, the amendments to the Duties Act in the *Duties Amendment Act 2011* would apply to the transaction. This is because the transaction falls within the relevant period as defined in proposed clause 33.

However, if an acquisition is made prior to 24 December 2010, the amended definition of land will not apply to that transaction as it does not arise within the relevant period.

Subclause (3) provides how the date that liability for landholder duty is calculated for an acquisition in an entity that is a relevant acquisition as a result of the operation of proposed subclauses (1) and (2) of this clause.

For example, if an acquisition in an entity is made on 7 July 2011 and it becomes a relevant acquisition because of the operation of proposed clause 35, the date that the relevant acquisition is taken to have been made for the purposes of the *Duties Act 2008*, is the later of 7 July 2011 and the day after the *Duties Amendment Act 2011* is assented to.

This will result in landholder duty being assessed on that transaction taking into account the amendments in Part 2 of the *Duties Amendment Act 2011* and penalties for late lodgment only being imposed if a statement in respect of the acquisition is lodged more than two months after 7 July 2011 or the date the Royal Assent is given, whichever is the later.