

EXPLANATORY MEMORANDUM

DUTIES AMENDMENT (FARM-IN AGREEMENTS) BILL 2022

The Duties Amendment (Farm-in Agreements) Bill 2022 amends the *Duties Act 2008* to address issues with the transfer duty concession for farm-in agreements involving mining tenements, to maintain the long-standing concessions.

A farm-in agreement is an agreement between a holder of a mining tenement or a derivative mining right (the farmor) and another person (the farmee), which entitles the farmee to acquire an interest in the tenement or right after spending an amount on exploration of the tenement. A duty concession has applied to eligible farm-in agreements for over 25 years.

Nominal duty of \$20 applies to an eligible farm-in agreement if there is no consideration for the transaction other than the exploration amount. Duty does not apply to the transfer of an interest in a tenement or derivative mining right under a farm-in agreement if the specified exploration amount has been spent.

Issues identified with the interpretation of the current legislation results in duty outcomes inconsistent with the Commissioner of State Revenue's longstanding assessment practices. If not addressed, the concession will not be available for agreements that have always been eligible. Duty relief will also apply in circumstances never intended, for example, to agreements where the exploration amount is capital expenditure on mining operations or mining infrastructure.

On 28 November 2018, the Government announced amendments would be developed with industry to ensure the concession operates as it has always been administered and to preserve the integrity of the concession. The amendments in this Bill deliver those amendments.

The amendments also update the concession to accommodate, where possible, the different ways in which farm-in arrangements may be structured.

The amendments in the Bill commence from the day after Royal Assent. The transitional validation provisions in the Bill support concessions applied from 1 July 2008 in accordance with the Commissioner's assessing practices and to allow the concession for agreements entered into before the Bill is enacted. They also ensure certain amendments apply to farm-in agreements entered into from the date of the Minister's announcement.

Restoring concession for eligible agreements

The following amendments in the Bill support the operation of the concession consistent with its historical administration. The amendments will apply to farm-in agreements entered into from 1 July 2008 (the commencement date of the Duties Act) to support previously applied concessions.

- The concession applies to multi-stage farm-in arrangements.
- The concession applies to farm-in agreements where the exploration amount includes small amounts of administration costs.

- The concession applies to farm-in agreements where the exploration amount involves funding expenditure to achieve an outcome rather than specifying an exploration amount or refers only to a minimum amount required to be expended.
- The concession applies to farm-in agreements involving applications for mining tenements.
- The concession applies when a farmee earns an interest in a derivative mining right from the holder of the right or earns a derivative mining right from the tenement holder.
- The concession applies when a farmee earns the right, but is not obligated, to take the transfer of an interest in the mining tenement or derivative mining right.
- The concession applies when the farmor is the beneficial owner of a mining tenement but their interest in the tenement is not yet registered.
- Duty does not apply to a transfer of an interest in a replacement mining tenement that has been granted in lieu of, and is over some or all of the same land as, the mining tenement in a farm-in transaction. This also applies to replacement derivative mining rights.
- Liability for all stages in a multi-stage farm-in agreement arises when the agreement is made.

Agreements involving capital expenditure

Historically, the concession has not applied to farm-in agreements where the exploration amount involves capital expenditure in connection with mining operations or mining infrastructure because they do not fall within the intent of the provision. However, ambiguity in the current legislation mean that the concession could apply to these circumstances.

Amendments in the Bill clarify that the concession does not apply where the exploration amount involves capital expenditure on mining operations or mining infrastructure. This supports the appropriate administration of the concession and protects the integrity of the revenue base by ensuring that an agreement to purchase an interest in an operating mine cannot be structured to access the concession.

These amendments will apply to farm-in agreements entered into from the date the amendments were announced on 28 November 2018.

Other amendments

The Bill contains the following amendments that were also announced as applying from 28 November 2018:

- Duty at the general rate applies to all consideration provided under a farm-in transaction (other than the exploration amount), including any further consideration provided to take the transfer of an interest in the mining tenement under the farm-in transaction.
- A reassessment and refund of duty is available when contingent consideration is not paid.

The following amendments in the Bill will apply from the day after Royal Assent:

- A cancelled transaction exemption does not apply to a farm-in transaction if the exploration requirement has been fulfilled, that is, if the farmee has earned the right to acquire an interest in the mining tenement or derivative mining right.
- Duty applies to any signing fee provided for entering into the farm-in agreement to prevent the shifting of consideration for a farm-in transaction to a non-dutiable event.
- Clarification of how the concession applies to variations to farm-in agreements, for example, to add another stage to the agreement, add another mining tenement or increase an interest in the tenement.
- Farm-in transactions involving only prospecting licences or derivative mining rights in relation to prospecting licences are not dutiable transactions.

Clause 1: Short title

This clause provides the short title of the Act is the *Duties Amendment (Farm-in Agreements) Act 2022*.

Clause 2: Commencement

This clause provides the commencement dates for the Act.

Sections 1 and 2 come into operation on the day the Act receives the Royal Assent. The rest of the Act commences on the day after the Royal Assent.

Clause 3: Act amended

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

Clause 4: Section 9 amended

This clause amends section 9 to delete the definitions of ***exploration amount*** and ***farm-in agreement***. It inserts definitions for ***concessional farm-in transaction, exploration requirement,*** and ***farmee*** which have the meaning given in section 91K(1).

Clause 5: Section 11 amended

Section 11 lists the dutiable transactions that are subject to transfer duty. This clause replaces the dutiable transaction “a farm-in agreement” with “a concessional farm-in transaction”.

A ***concessional farm-in transaction*** is defined in section 91K(1).

Clause 6: Section 13 deleted

This clause deletes section 13, which currently defines a farm-in agreement. All provisions relating to the farm-in concession are contained in new Division 9 at the end of Chapter 2 Part 5.

Clause 7: Section 42 amended

This clause deletes section 42(15). The ‘no double duty’ provisions for the transfer, or an agreement for the transfer of, an interest in a mining tenement or derivative mining right under a farm-in transaction are now contained in new section 91R.

Clause 8: Chapter 2 Part 5 Division 9 inserted

This clause inserts new Division 9 at the end of Chapter 2 Part 5 of the Act. Due to the length and complexity of the new farm-in provisions compared to current section 13, they have been included in a standalone division.

Division 9 – Farm-in agreements and farm-in transactions

Subdivision 1 – Preliminary

Section 91J. Introduction to Division

Section 91J provides an overview of the new Division.

Section 91K. Terms used

This section defines the terms used in the new Division.

Subsection (1) defines the following terms:

concessional farm-in transaction means a farm-in transaction contained in a farm-in agreement, subject to:

- section 91L(4), which provides that the concession does not apply to a farm-in transaction in a farm-in agreement if, when the agreement is made, the farmee has an interest in a mining tenement or derivative mining right to which the agreement relates.
- Subdivision 4, which sets out when an added or varied farm-in transaction is or is not a concessional farm-in transaction.
- section 91U, which provides that a farm-in transaction involving only prospecting licences, or derivative mining rights in respect of prospecting licences, is not a concessional farm-in transaction or a dutiable transaction.

exploration is defined to include development that is carried out solely for the purpose of facilitating exploration or incidentally to exploration.

To qualify for the concession, the farmee must expend an amount on exploration, or carry out exploration, specified in, or determined in accordance with, the agreement.

The word *exploration* has an ordinary meaning of “the act of exploring...”.¹ The verb *explore* means “to traverse or range over (a region etc.) for the purpose of discovery; to look into closely; scrutinise; examine...”.²

Section 13(2) of the Duties Act currently provides that a reference to an exploration amount in relation to a farm-in agreement means an amount to be expended, after the agreement is made, on exploration or development of the mining tenement carried out after the agreement is made.

¹ Macquarie Dictionary.

² Ibid.

The words “or development” in section 13(2) technically allows capital expenditure for the development of a mine or in connection with mining operations to qualify as an eligible exploration amount.

However, the concession is not intended to apply to transactions involving expenditure on mining operations or capital expenditure to develop a mine to allow mining operations to be carried out. The words “or development” have been removed from the definition of *exploration requirement* in section 91N to clarify that the concession does not apply to transactions involving only capital expenditure.

If a farm-in transaction involves spending an amount on exploration and capital expenditure, the concession applies to the agreement to the extent of the exploration amount. The general rate of duty applies to the amount of capital expenditure if it is consideration for the farm-in transaction.

Development of a mining tenement to bring out the capabilities of the tenement during the early stages is an integral part of the life cycle of a mine or mining project. The life cycle of a mine generally comprises an eight stage process:

Stage	Description
1. Exploration: Generative stage	Identification of area to be explored and evaluation of publicly available data
2. Exploration: Primary exploration stage	Targeted area subject to exploratory drilling or trenching to delineate likely zones of mineralisation and sampling and geochemical analysis
3. Exploration: Evaluation stage	Scoping studies, pre-feasibility studies and feasibility studies to determine whether mineral deposit is economically viable to develop. Environmental Impact Study must be lodged with relevant Government agencies at this stage.
4. Development stage: Mine construction	Mining lease must be obtained to construct a mine and begin production. Miner must provide a specified report in an application for a mining lease, for example, a mining proposal containing an environmental impact statement or a statement about the proposed

	mining operations and a resource report. ³
5. Production phase	
6. Mine closure and rehabilitation	
7. Monitoring and evaluation	
8. Lease relinquishment	

It is appropriate the concession applies to farm-in transactions involving expenditure in connection with the first three stages of the life of mine cycle, that is, expenditure for the development of the mining tenement until the point that construction of a mine commences.

This includes expenditure to prepare and produce scoping studies, pre-feasibility studies, feasibility studies, mineralisation reports, resource reports, environmental impact studies, and mining proposals.

For this reason, exploration has been defined to include development that is carried out solely for the purposes of facilitating exploration or otherwise incidentally to exploration. This will also allow building or improving access routes to facilitate mineral exploration to qualify as expenditure on exploration.

These activities fall within the ordinary meaning of exploration or development activities carried out for the sole purpose of facilitating exploration or are incidental to exploration.

Any expenditure on the development of a mine or in connection with mining operations will not qualify as exploration. Rehabilitation or other remediation of the mining tenement at the end of the life cycle of a mine is also not exploration.

Further guidance about what constitutes exploration and exploration expenditure will be provided in a revenue ruling after the amendments are passed.

³ Mining Act s 74.

Example 1

A Pty Ltd (A) owns a number of mining tenements based in the Pilbara. The mining tenements contain a large established mine and associated infrastructure where mining operations are carried out.

A & B Pty Ltd (B) enter into a farm-in agreement where A agrees to transfer a 40 per cent interest in the mining tenements to B once B has incurred \$5,000,000 in expenditure rehabilitating the land covered by the mining tenements. As the mine is operational, a large rehabilitation liability is attached to the tenements. B expends \$5,000,000 on progressive rehabilitation activities such as post-mining land use planning, placement of topsoil and revegetation to partially offset this liability.

For nominal duty to apply, the \$5,000,000 must be spent on exploration or development activities conducted for the purpose of facilitating exploration or incidental to exploration. The project situated on the tenements is at its mining stage and the rehabilitation activities were carried out to remediate the existing mined land rather than explore for new ore bodies.

The rehabilitation activities are not exploration or development activities conducted for the purpose of facilitating exploration or incidental to exploration. The expenditure required by the agreement is not an exploration requirement, and it would not qualify as a concessional farm-in transaction.

exploration amount has the meaning given in section 91N(5), subject to section 91N(6).

exploration licence means an exploration licence granted under section 57 of the *Mining Act 1978*.

The definitions for **exploration requirement**, **farmee**, **farm-in agreement**, **farm-in transaction**, and **farmor** set out the sections in which those terms are defined.

minerals and **mining** have the meanings given in section 8(1) of the Mining Act.

primary farmor means

- a) a person who is the holder of a mining tenement. Changing the reference from 'owner' in current section 13 to 'holder' aligns the farm-in provisions with the terminology in the Mining Act.
- b) a person (the **transferee**) who is not the holder of a tenement because the transfer of an interest in the mining tenement has not been registered with the Department of Mines, Industry Regulation and Safety (DMIRS), but is entitled to be the holder because of subsection (2).

Subsection (2) applies if the farmee has earned an interest in a tenement under an earlier farm-in transaction, or they have purchased the tenement. Paragraph (b) of the definition of **primary farmor** and subsection (2) ensure the concession applies when the farmor is entitled to be the registered holder of a mining tenement and allows another person to farm-in to their interest. This aligns the legislation with the Commissioner's practice to allow a concession in these circumstances.

- c) a person who is an applicant or one of the applicants for a mining tenement where the application has not been determined. This paragraph provides legislative support for the Commissioner's practice to allow the concession to apply to farm-in transactions involving applications for mining tenements.

prospecting licence means a prospecting licence granted under section 40 of the Mining Act.

purchase agreement has the meaning given in section 91M(9).

relevant derivative mining right and **relevant mining tenement** have the meaning given in section 91M(1)(a)(ii) and section 91M(1)(a)(i) respectively, subject to section 91K(3). Section 91K(3) lists the provisions where the references to relevant derivative mining right and relevant mining tenement include a reference to a replacement mining tenement or replacement derivative mining right.

The definitions for **replacement derivative mining right** and **replacement mining tenement** set out the sections in which those terms are defined.

vary, in relation to an agreement, includes to modify the agreement's effect. This definition is relevant for section 91T, which deals with variations to farm-in transactions, and section 91U, which deals with farm-in transactions relating to prospecting licences.

Subsection (2) applies for the purposes of paragraph (b) of the definition of **primary farmor**. Paragraph (b) and subsection (2) have the effect that a person can be a primary farmor if there is a transfer of an interest in a mining tenement to that person, the transfer has not been registered with DMIRS and the transfer is made to the person:

- a) under a farm-in transaction after the exploration requirement has been fulfilled; or
- b) as a purchaser under an agreement to acquire the tenement.

Subsection (3) lists the sections in the new Division in which the references to a relevant mining tenement or relevant derivative mining right include a reference to a replacement mining tenement or a replacement derivative mining right.

Replacement mining tenement and replacement derivative mining right are defined in sections 91M(6) and 91M(7) respectively. They are generally mining tenements or derivative mining rights that are granted to replace the tenement or right held by the farmor when the agreement was made.

Subsection (4) clarifies that references in the new Division to a mining tenement or derivative mining right being granted to replace another tenement or right include cases where the mining tenement or derivative mining right is granted in substitution, conversion or renewal of the other tenement or right.

For example, a mining lease that is applied for in conversion of either an exploration licence or prospecting licence is not a like-for-like replacement as the mining lease grants additional rights. This subsection clarifies that a reference to replace includes circumstances where a mining lease is applied for in conversion of the exploration licence or prospecting licence.

Subsection (5) provides that references in the new Division to exploration of a mining tenement or derivative mining right are to exploration of land the subject of the tenement or right.

Subdivision 2 – Explanation of farm-in agreements, farm-in transactions and related concepts

Section 91L. Farm-in agreements and concessional farm-in transactions

A concessional farm-in transaction is a dutiable transaction. A concessional farm-in transaction is a farm-in transaction contained in a farm-in agreement, subject to section 91L(4), Subdivision 4 and section 91U. Proposed section 91L defines a farm-in agreement and explains various concepts about concessional farm-in transactions.

Currently, the concession technically only applies to the first stage of a multi-stage farm-in agreement because the person farming in under the subsequent stages is already a holder of the mining tenement. This interpretation is inconsistent with the Commissioner's assessing practice, which has been to allow a concession for all stages provided the interest earned in the final stage does not result in the farmee holding all of the farmor's interest in the tenement.

The concept of a farm-in transaction being contained in a farm-in agreement allows the concession to apply to a multi-stage farm-in arrangement.

Subsection (1) defines a ***farm-in agreement*** as an agreement, whether conditional or not, that is made between the following persons and contains one or more farm-in transactions:

- a) a person (farmor) who is a primary farmor for one or more mining tenements or a holder (or one of the holders) of one or more derivative mining rights, or both; and
- b) another person who is the farmee.

Subsection (2) clarifies that a farm-in agreement may contain a mixture of farm-in transactions and other transactions such as an agreement to transfer dutiable property or an acquisition of new dutiable property. Duty applies to the other dutiable transactions in the usual manner.

Example 2

An agreement provides for a person to:

- acquire an immediate 25 per cent interest in a tenement for \$500,000; and
- earn a further 25 per cent interest after spending \$1 million on exploration of the tenement.

Although the agreement contains an agreement to transfer dutiable property and a farm-in transaction, it can still be a farm-in agreement.

Subsection (3) provides that a farm-in transaction contained in a farm-in agreement is a concessional farm-in transaction. This is subject to subsection (4) below. A farm-in transaction is defined in section 91M.

Subsection (4) provides that a farm-in transaction in a farm-in agreement is not a concessional farm-in transaction if, when the agreement is made:

- a) the farmee:
 - (i) is a primary farmor for a mining tenement;
 - (ii) the farmee holds an interest in a derivative mining right that authorises exploitation of land the subject of relevant mining tenement; or
 - (iii) otherwise has any other interest in a tenement or right referred to in the above paragraphs;

or

- b) the farmee is:
- (i) a holder of a relevant derivative mining right;
 - (ii) a primary farmor for a mining tenement to which the relevant derivative mining right relates;
 - (iii) a holder of a derivative mining right that authorises exploitation of land the subject of a mining tenement to which the relevant derivative mining right relates; or
 - (iv) otherwise has any other interest in the rights or tenements referred to in the above paragraphs.

This subsection clarifies that the farm-in concession cannot apply if the farmee already holds an interest in the mining tenement or a derivative mining right that authorises exploitation of land the subject of the mining tenement when the farm-in agreement is entered into.

The concession also does not apply if the farmee already holds an interest in a derivative mining right that they are earning an interest in, holds an interest in the mining tenement to which that derivative mining right relates or otherwise has any interest in the derivative mining right or mining tenement.

This is largely consistent with the current eligibility conditions for the concession, which provide that a farm-in agreement is an agreement between an owner of the mining tenement, or a person who holds a derivative mining right in relation to a mining tenement, and another person. The reference to “another person” means that the farmee cannot already have an interest in the mining tenement or derivative mining right.

Under the amendments, any interest in a mining tenement or derivative mining right acquired by the farmee under an earlier stage will not disqualify a later stage from being a farm-in transaction. This is because the interests under the earlier stages were acquired by the farmee after the farm-in agreement was made and were not held by the farmee when the agreement was made.

A derivative mining right is defined in section 3 as an authorisation of a kind described in section 118A of the Mining Act (whether or not the authorisation purports to be made under that section). As this definition is broad and could capture a right to access the tenement or a right to explore (including the farm-in agreement itself), section 91L(4) only excludes the concession from applying if the derivative mining right held by the farmee authorises the exploitation of the mining tenement when the farm-in agreement is entered into.

A derivative mining right that authorises the exploitation of the mining tenement is a right that allows the person to exercise rights conferred by the particular type of mining tenement under the Mining Act. An example of a derivative mining right that authorises the exploitation of the mining tenement is an authorisation by the holder of a tenement with gold and copper present. If the holder of the tenement is a gold miner, the holder might choose to authorise another person to exploit the copper.

Section 91L(4) does not exclude the concession from applying if the farmee is granted, and holds, a derivative mining right to conduct due diligence checks for the farm-in arrangement as that is only a right to explore and not a right to exploit the mining tenement.

Example 3

ABC Pty Ltd holds a right to explore and mine gold in respect of a mining tenement if valuable mineral resources are identified on the land the subject of the tenement.

ABC Pty Ltd enters into an agreement with the tenement holder to acquire 50 per cent of the interest in the tenement after spending \$1 million on exploration.

The agreement is not a farm-in agreement as ABC Pty Ltd held a derivative mining right to exploit the land the subject of the mining tenement (that is, the right to mine gold) when the agreement was entered into.

91M. Farm-in transactions and other concepts

Section 91M defines a farm-in transaction. Broadly, a farm-in transaction is an agreement which provides that the farmee is to fulfil, or has the option of fulfilling, an exploration requirement and after fulfilling the exploration requirement, the farmor is to, or the farmee has the option of requiring the farmor to:

- transfer an interest in the farmor's mining tenement to the farmee;
- grant the farmee a derivative mining right that relates to the farmor's mining tenement; or
- arrange for the farmee to acquire an interest in the farmor's derivative mining right.

However, an agreement is not a farm-in transaction if:

- it allows the person to acquire an interest in the mining tenement or derivative mining right upfront before the exploration requirement has been fulfilled; or
- it will result in the farmee having an aggregate 100 per cent interest in the mining tenement or derivative mining right.

A farm-in transaction may involve more than one mining tenement or derivative mining right, or both mining tenements and derivative mining rights. For example, an agreement provides that after a farmee spends \$1 million on exploration on three of the farmor's exploration licences, the farmor is to transfer a 20 per cent interest in all three tenements to the farmee. In this example, there is one farm-in transaction involving three relevant mining tenements.

Subsection (1) defines a ***farm-in transaction*** as an agreement, whether conditional or not, to the effect that:

- a) the agreement relates to either or both of:
 - (i) a mining tenement (or one or more mining tenements) of a primary farmor under a farm-in agreement (referred to as a ***relevant mining tenement***); or
 - (ii) a derivative mining right (or one or more derivative mining rights) held by a farmor under a farm-in agreement (referred to as a ***relevant derivative mining right***);and
- b) the farmee is to fulfil, or has the option of fulfilling, an exploration requirement; and
- c) if the transaction involves a relevant mining tenement - the farmor is to do, or the farmee has the option of requiring the farmor to do, one or both of the following after the farmee fulfils the exploration requirement:
 - (i) transfer an interest in each relevant mining tenement or replacement mining tenement to the farmee;
 - (ii) grant the farmee a derivative mining right in relation to each relevant mining tenement or replacement mining tenement;and
- d) if the transaction involves a relevant derivative mining right - the farmor is to arrange, or the farmee has the option of requiring the farmor to arrange, for the farmee to acquire an interest in the derivative mining right, or replacement derivative mining right, after the farmee fulfils the exploration requirement.

Under paragraphs (c) and (d), an agreement still qualifies as a farm-in transaction if the farmee earns the right, but is not obligated, to take a transfer of an interest in the tenement or derivative mining right. This is because there may be legitimate commercial reasons why a farmee does not want to or cannot take a transfer of an interest earned after fulfilling the exploration requirement (for example, when no economic resource is identified or the tenement is surrendered).

Subsection (2) ensures that otherwise than under a purchase agreement (defined in section 91M(9)), if a farmee becomes beneficially entitled to an interest when the farm-in transaction is entered into and without fulfilling the exploration requirement, the transaction will not be a farm-in transaction. This is consistent with the current eligibility requirements for the concession.

In this situation, the transaction may be another type of dutiable transaction. For example, depending on the way the agreement is structured, the transaction may be assessed as an agreement for the transfer of dutiable property or a declaration of trust.

Example 4

An agreement provides the following.

- The farmor agrees to assign, and the farmee agrees to accept, a 55 per cent legal interest in certain mining tenements in consideration for the farmee agreeing to spend \$3 million on exploration on the tenements in three years.
- Upon execution of the agreement, the farmor holds the 55 per cent interest in the mining tenements upon trust for the benefit of the farmee.
- If the farmee fails to spend the whole or part of the \$3 million in prescribed expenditure, the farmee's beneficial interest in the mining tenements will be reacquired by the farmor for no consideration.

The agreement for the farmor to assign the 55 per cent legal interest to the farmee after they spend \$3 million is not a farm-in transaction that qualifies for the concession. This is because the farmee acquires a beneficial interest before fulfilling the exploration requirement.

This subsection does not prevent a transaction from being a farm-in transaction when an agreement gives the farmee an option to either expend an amount on exploration to earn an interest in the tenement or elect to acquire the interest in the tenement by paying cash.

Example 5

A farmor and farmee enter into a farm-in agreement which provides that the farmee can either:

- spend \$2 million on exploration to earn a 50 per cent interest in the farmor's mining tenement; or
- at any time during the farm-in period, elect to acquire the 50 per cent interest in the mining tenement by paying \$500,000, or by paying any remaining exploration amount that has not been expended yet in cash, to the farmor.

The option to spend \$2 million on exploration to earn a 50 per cent interest in the farmor's mining tenement is a farm-in transaction.

The option to acquire the interest by paying cash does not prevent the concession from applying because the farmee does not have an option to acquire a beneficial interest without fulfilling the exploration requirement (with the legal interest to be transferred after that requirement is fulfilled). Instead, the farmee has an option to acquire both the beneficial and legal interest by paying cash without fulfilling any of the exploration requirement.

Nominal duty applies to the farm-in transaction because consideration is not provided for the transaction. The option to acquire a 50 per cent interest for \$500,000 is not dutiable as there is no consideration for the grant of the option.

If the farmee chooses to acquire the interest for \$500,000 without fulfilling any of the exploration requirement, the farm-in transaction will be a cancelled transaction under amended section 107.

On the exercise of the option there will be an agreement for the transfer of the interest in the tenement. As the agreement for transfer will only be made when the option is exercised, liability to duty arises on the transaction at that point.

Duty will be assessed on the greater of the \$500,000 consideration and the unencumbered value of the 50 per cent interest in the tenement. Provided the agreement for transfer is duty endorsed, duty will not apply to the transfer under section 42(1).

Subsection (2) does not apply to a purchase agreement as defined in section 91M(9). This ensures that a transaction can still be a concessional farm-in transaction if a farmee has partly fulfilled the exploration requirement and the balance of the unspent amount is paid in cash (or some other form of consideration) to acquire the interest in the tenement or derivative mining right.

Example 6

A farmor and farmee enter into an agreement which provides that the farmee must spend \$500,000 on exploration to earn a 50 per cent interest in a mining tenement. After spending \$400,000, the parties agree that the farmee can acquire the 50 per cent interest by paying the remaining \$100,000 in cash to the farmor.

The agreement is a purchase agreement under section 91M(9) and is not prevented from being a farm-in transaction under section 91M(2).

See also Example 9.

Subsection (3) has the effect that where the farmee is earning into an interest in a mining tenement or replacement mining tenement, an agreement is only a farm-in transaction if:

- a) the agreement sets out
 - (i) the interest to be transferred; or
 - (ii) the way in which that interest is to be determined; and
- b) if the transfer is made, the interest would be held by both the farmor and the farmee.

Paragraph (a)(ii) caters for agreements where the interest to be earned is determined by a formula.

The requirement in paragraph (b) for the transferred interest to be held by both the farmor and farmee ensures that a transaction cannot be a farm-in transaction if it results in the farmee acquiring all of the farmor's interest in the mining tenement.

A multi-stage agreement may result in a farmee acquiring an aggregate 100 per cent interest after completing the final stage. In this case, the final stage will not be a farm-in transaction that qualifies for the concession as the tenement will not be held by the farmor and farmee. This is consistent with the existing eligibility conditions.

If consideration is given for the final stage, there will be taken to be an acquisition of new dutiable property (an option to acquire dutiable property) and duty will apply to the consideration for the option.

Completion of the exploration expenditure for the final stage will be taken to effect an agreement for transfer in respect of that stage, which will become chargeable with duty at that point.

Example 7

An agreement provides the following.

- The farmee must spend \$2 million on exploration to earn a 50 per cent interest in a tenement (Stage 1).
- The farmee agrees to pay \$250,000 cash to the tenement holder after completing Stage 1 for the right to earn the remaining 50 per cent interest in the mining tenement by spending another \$2 million on exploration (Stage 2).

Stage 1 is a farm-in transaction. Nominal duty will apply as there is no consideration for the transaction. The no double duty provisions will apply to the transfer of this interest in the tenement.

Stage 2 is not a farm-in transaction because the farmor will not hold the mining tenement with the farmee if the remaining 50 per cent interest is transferred. Stage 2 will be assessed as an acquisition of new dutiable property (an option to acquire dutiable property). The \$250,000 cash payment is taken to be the option fee, and duty at the general rate will be assessed on that amount.

Completion of the \$2 million exploration expenditure for Stage 2 will constitute an agreement for the transfer of the 50 per cent interest in the tenement. Duty will be assessed on the greater of the consideration or the unencumbered value or the unencumbered value of that interest.

Subsection (4) provides that where a farmee is earning into a derivative mining right in relation to the farmor's mining tenement, an agreement is only a farm-in transaction if:

- a) The agreement sets out:
 - (i) the mining authorised by the derivative mining right; or
 - (ii) the way in which the mining is to be determined; and
- b) The grant of the right will not result in the farmee having substantially the same mining rights that the farmor has under the mining tenement. This is an anti-avoidance provision to prevent the farmee from receiving a concession when they acquire all of the valuable mineral rights relating to the mining tenement without acquiring the legal interest in the tenement.

Paragraph (a)(ii) allows the agreement to specify the mining that is authorised by the derivative mining right in a general way, for example, by reference to the rights allowed by the mining tenement.

A concession does not apply if a farmee farms into 100 per cent of a mining tenement and paragraph (b) is the equivalent of that for a derivative mining right. It aligns the treatment of derivative mining rights with tenement farm-ins.

If the farmee is being granted a right over an exploration or prospecting licence, they cannot have the same rights as the farmor to explore or prospect for all of the minerals in respect of the whole of the tenement. If the farmee will be granted a right over a mining tenement that allows them to take minerals, they cannot have the same right to take minerals that the farmor has.

For example, a split commodity agreement that allows the farmee to farm-in to all of the gold rights while the farmor retains all of the iron ore rights will be allowed under paragraph (b). A farmee can also farm-in to all the minerals over a part of the tenement.

However, a farmee cannot have rights to all of the minerals over the whole of the tenement. The farmee will have “substantially the same authority to carry out mining that the farmor has” if the farmee obtains the rights to all of the minerals over the whole of the tenement.

Subsection (5) provides that where a farmee is earning into an interest in a derivative mining right held by the farmor, an agreement is only a farm-in transaction if:

- a) the agreement specifies the interest to be acquired or the way in which that interest is to be determined; and
- b) if the farmee chooses to acquire the interest, the farmor and farmee would both hold the relevant derivative mining right. As with a mining tenement, the concession is not available if the farmee earns all of the farmor’s interest in the derivative mining right.

The references to a relevant mining tenement and relevant derivative mining right in sections 91M(1)(c) and (d) and sections 91M(3) to 91M(5) include a replacement mining tenement and replacement derivative mining right respectively (section 91K(3)).

The effect is that a farm-in transaction includes an agreement that contemplates that the farmee may acquire an interest in a replacement mining tenement or replacement derivative mining right that is granted instead of the tenement or right held by the farmor when the agreement was made. For example, where a mining lease is applied for in conversion of an exploration licence or prospecting licence.

Section 91K(4) clarifies a reference to a mining tenement or derivative mining right being granted to replace another tenement or right include cases where it is granted in substitution, conversion or renewal of the other tenement or right.

A replacement mining tenement and replacement derivative mining right are defined in subsections (6) and (7) respectively. Under section 91R(3), duty will not apply to the transfer of the interest in the replacement mining tenement or replacement derivative mining right to the farmee as the transaction is under a concessional farm-in transaction.

Subsection (6) defines a **replacement mining tenement** as a mining tenement:

- a) that is granted after the farm-in transaction is entered into to replace (wholly or partly):
 - (i) the relevant mining tenement;
 - (ii) an earlier replacement mining tenement for the relevant mining tenement; or
 - (iii) a mining tenement referred to in the above paragraphs together with another relevant mining tenement under the farm-in transaction or a replacement mining tenement for such a tenement;

and

- b) that relates only to the land, or a part of the land, the subject of the mining tenement or tenements that are replaced; and
- c) of which the farmor is the holder or one of the holders.

The reference to “wholly or partly” in paragraph (a) clarifies that a replacement mining tenement includes a mining tenement that is granted to replace part of a relevant mining tenement. Paragraph (a)(iii) covers situations where a mining tenement is granted to replace more than one relevant mining tenement under the farm-in transaction.

For example, a mining lease may be granted to replace part of two or more exploration licences. The other parts of the exploration licences may continue to exist despite part of them being replaced but it does not prevent the mining lease from being a replacement mining tenement.

Subsection (7) defines **replacement derivative mining right** as a derivative mining right:

- a) that is granted after the farm-in transaction is entered into to replace (wholly or partly)
 - (i) the relevant derivative mining right;
 - (ii) earlier replacement derivative mining right; or
 - (iii) a derivative mining right referred to in the above paragraphs, together with another relevant derivative mining right under the farm-in transaction or a replacement derivative mining right for such a right;

and

- b) that relates only to the land, or to a part of the land, the subject of the derivative mining right or rights that are replaced; and
- c) subject to subsection (8), that does not authorise any mining beyond that authorised by the replaced rights; and
- d) of which the farmor is the holder or one of the holders.

A replacement derivative mining right may be granted when the underlying mining tenement is transferred to another holder. When this occurs, the existing derivative mining right is terminated and another right that is substantially the same as the previous right is granted by the new tenement holder to the farmor. The new right is a replacement derivative mining right.

A replacement derivative mining right may also be granted when the underlying mining tenement is converted into another tenement type, for example, an exploration licence is converted into a mining lease. When this occurs, a new derivative mining right may be granted in relation to the new mining tenement to the farmor. In this situation, the requirement in paragraph (c) for the new right not to authorise any mining beyond that allowed by the previous right does not need to be satisfied provided that the new right only authorises mining for the same minerals as the replaced right.

Subsection (8) provides that the requirement in subsection (7)(c) does not need to be satisfied when:

- a) the derivative mining right is granted in relation to a new mining tenement that was granted to replace (wholly or partly) a previous mining tenement;
- b) the new tenement authorises mining beyond that authorised by the previous tenement; and
- c) the derivative mining right only authorises mining for the same minerals as the derivative mining right or rights that are replaced.

Example 8

A farmor holds a derivative mining right in relation to an exploration licence at the time they enter into a farm-in transaction for the farmee to earn an interest in the right. The derivative mining right authorises the farmor to explore for gold.

The exploration licence is converted to a mining lease and the derivative mining right is terminated. A new derivative mining right related to the mining lease is granted to the farmor.

Provided that the mining authorised under the new right is only for gold and not other minerals, subsection (7)(c) does not need to be satisfied because the new right authorises mining activities rather than exploration.

Subsection (9) defines a ***purchase agreement*** for the purposes of subsection (2). A purchase agreement is an agreement made between the farmor and farmee, which provides that:

- a) the farmee is to provide, or has the option of providing consideration, to the farmor;
- b) the consideration is provided instead of the farmee fulfilling a part of the exploration requirement; and
- c) if the consideration is provided, the farm-in transaction would be varied so that the exploration requirement is reduced by the consideration amount and the reduced requirement becomes the exploration requirement for the transaction.

Paragraph (c) means that the exploration requirement is fulfilled for the purposes of sections 91R(2)(a)(ii) and 91R(3)(a)(iii) if the farmee chooses to provide consideration instead of fulfilling the rest of the exploration requirement.

Duty applies under section 91Q to the consideration provided in lieu of fulfilling the exploration requirement. This is because the consideration for the concessional farm-in transaction is increased before the transaction is completed.

The farmee must lodge the instrument effecting the increase in consideration or a transfer duty statement within two months after the day on which the consideration is increased. The Commissioner must then reassess the duty chargeable on the concessional farm-in transaction.

The acquisition of the interest in the mining tenement or derivative mining right is not subject to duty provided the other requirements of section 91R are satisfied.

As the exploration requirement is fulfilled, the farm-in transaction cannot be a cancelled transaction under section 107.

An agreement that allows the farmee to provide consideration instead of fulfilling the whole of the exploration requirement is not a purchase agreement. If the farmee chooses to purchase the mining tenement or derivative mining right instead of fulfilling the exploration requirement, the agreement is treated as an agreement to transfer an interest in the tenement or right.

Example 9

A farmor and farmee enter into an agreement which provides that the farmee must spend \$500,000 on exploration to earn a 50 per cent interest in a mining tenement. Nominal duty applies to the concessional farm-in transaction.

After spending \$400,000, the parties agree that the farmee can acquire the 50 per cent interest by paying the remaining \$100,000 in cash to the farmor.

The farmee must lodge the instrument effecting the increase in consideration or a transfer duty statement within two months after the day on which the consideration is increased.

The Commissioner will reassess the duty chargeable on the concessional farm-in transaction on the consideration of \$100,000.

The reduced exploration requirement is \$400,000, which has been fulfilled. The transfer of the 50 per cent interest in the mining tenement to the farmee will be exempt from duty under section 91R(2) provided the concessional farm-in transaction is duty endorsed.

91N. Exploration requirement and exploration amount

Under a farm-in transaction, the farmee must fulfil the exploration requirement before they can acquire an interest in the mining tenement or derivative mining right. This has been an eligibility condition since the farm-in concession was introduced.

Historically, the concession only applied when a farm-in agreement specified the amount the farmee was required to spend on exploration. As mining practices evolved, the concession was applied more broadly to farm-in agreements that required the farmee to achieve a specified outcome such as carrying out certain exploration works rather than spending an amount of money. The definition of **exploration requirement** provides legislative support for this practice.

Subsection (1) defines an **exploration requirement** as a requirement to do either or both of the following after the farm-in transaction is made.

- a) Expend, on exploration carried out by the farmee after the farm-in transaction is made, an amount set out in, or determined in accordance with, the farm-in transaction. This includes situations where the agreement may only refer to a minimum amount required to be expended on exploration.

- b) Carry out exploration as set out in, or determined in accordance with, the farm-in transaction. This may be a requirement to achieve an identified outcome or milestone rather than spending an amount of money. For example, the farmee may be required to drill to a certain depth or produce a bank feasibility study.

Exploration carried out by the farmee includes anything done on behalf of the farmee such as by a manager or contractor.

Subsection (2) sets out what is meant by **exploration** in subsection (1)(a) and (b). The references to exploration are to:

- a) Subject to paragraph (b) and subsection (4), exploration that only consists of:
 - (i) exploration of each mining tenement if the farmee is earning an interest in a mining tenement or derivative mining right that will be granted over a tenement;
 - (ii) exploration of each relevant derivative mining right if the farmee is earning an interest in a derivative mining right; or
 - (iii) exploration of each relevant mining tenement and relevant derivative mining right if the farmee is earning an interest in a mining tenement or a derivative mining right that will be granted over a tenement and an interest in derivative mining right, or all three;

and

- b) if the farmee is earning an interest in a derivative mining right, the exploration of the derivative mining right only consists of mining authorised by the relevant derivative mining right and / or activities incidental to the authorised mining.

A reference to exploration of a mining tenement or a derivative mining right is to exploration of land the subject of the mining tenement or derivative mining right (section 91K(5)).

Exploration includes development only if it is carried out for the purposes of facilitating exploration or that is incidental to exploration. It does not include any development of the land as a mine or activities that are, or are connected with, mining operations.

A requirement to spend an amount on, or to carry out, activities connected to mine development or mining operations will not be an exploration requirement. An agreement with these types of requirements will not be a farm-in transaction that qualifies for the concession. This reflects the Commissioner's longstanding assessing practice, which has never allowed a concession for transactions that involve capital expenditure on mine development or mining operations.

Guidance about exploration activities will be provided in a revenue ruling after the amendments are passed.

The requirement for exploration to consist of exploration of land the subject each mining tenement and / or each derivative mining right is subject to subsection (4).

Subsection (3) provides that subsection (4):

- a) applies to a relevant mining tenement that has not been granted when the farm-in transaction is made. For example, the farmor may be a primary farmor who is an applicant under the Mining Act for a mining tenement where the application is still to be determined (paragraph (c) of the definition of primary farmor in section 91K(1)); but
- b) cannot be relied on in a way that would mean that there is no exploration amount required to be expended, or exploration required to be carried out, for the concessional farm-in transaction.

Paragraph (b) ensures that there must be an exploration requirement required to be fulfilled for the farm-in transaction, for example, on other mining tenements or derivative mining rights the subject of the transaction or on the tenement the subject of the application after it is granted. This ensures that the concession cannot apply in a case where the farm-in transaction consists only of an application or applications for mining tenements that are not granted yet when the agreement is made and there is no exploration requirement to be fulfilled by the farmee on the tenement or tenements after they are granted.

Example 10

A farm-in agreement provides that the farmee is to acquire a 25 percent interest in an existing exploration licence and a proposed prospecting licence that is the subject of an application by the farmor, after spending \$500,000 on exploration (stage 1).

The agreement provides the farmee can acquire another 30 per cent interest in the tenements under stage 2 if they spend a further \$500,000.

The farmee spends \$500,000 on exploration of the exploration licence under stage 1. Shortly after fulfilling the exploration requirement, the prospecting licence is granted to the farmor. The farmor transfers a 25 per cent interest in the exploration licence and the prospecting licence to the farmee.

Although the farmee did not expend an exploration amount on the prospecting licence that had not been granted yet, the farm-in transaction is still a concessional farm-in transaction because the farmee has fulfilled the exploration requirement. The transfer of the 25 per cent interest in the exploration licence and prospecting licence to the farmee is exempt from duty under section 91R.

Subsection (4) provides that despite the requirement for exploration to consist of exploration of each mining tenement, the exploration on which an amount is required to be expended or carried out does not need to include any exploration of a tenement that has not been granted when the farm-in transaction is made.

The purpose of subsection (4) is to ensure that the requirement to explore on land the subject of a mining tenement does not need to be satisfied where a tenement has not been granted.

Example 11

An agreement provides that the farmee must spend \$1 million to acquire a 25 per cent interest in an exploration licence and a proposed prospecting licence that is the subject of a mining application by the farmor when the farm-in transaction is made (stage 1).

After completing the first stage, the farmee may elect to earn a further 10 per cent interest in the exploration licence and the proposed prospecting licence the subject of the application by spending another \$500,000 (stage 2).

The farmee spends \$1 million on exploration on land the subject of the exploration licence. Shortly after completing the first stage, the prospecting licence the subject of the application is granted to the farmor.

Although the farmee did not carry out exploration on the prospecting licence, the farm-in transaction is still a concessional farm-in transaction because the exploration does not need to include any exploration on the prospecting licence that was not granted when the farm-in transaction was made.

The farmor transfers a 25 per cent interest in the exploration licence and the newly granted prospecting licence to the farmee because they have fulfilled the exploration requirement of spending \$1 million on exploration under the first stage.

The transfers of the 25 per cent interest in the exploration licence and the prospecting licence to the farmee are exempt from duty under section 91R(2).

Subsection (5) defines the **exploration amount** in relation to a concessional farm-in transaction to be the amounts spent on fulfilling the exploration requirements in subsection (1). This definition is relevant for section 91O(1) because the exploration amount is not consideration for a concessional farm-in transaction.

Subsection (6) provides the Commissioner with discretion to treat certain expenditure on administration costs as exploration expenditure subject to any limits or conditions.

The exploration amount specified in a farm-in transaction may include small amounts of administrative costs, provided the majority of an exploration amount relates directly to exploration or development that is incidental to, or that facilitates, exploration.

The actual expenditure can only be verified at the time a transfer under a farm-in transaction is assessed for duty. When determining if the transfer of an interest in a tenement is exempt from duty, the Commissioner's practice has been to generally accept administration costs that do not strictly meet the definition of exploration amount. For example, if less than 20 per cent of the exploration amount is attributed to administrative costs and all other expenditure is on exploration, the transfer of the interest in the tenement would be exempt.

The Commissioner will generally accept costs as exploration costs if they can be included for the purposes of determining whether the expenditure commitment under the Mining Act is met. This excludes administration costs which are not expenditure on exploration and will be subject to the discretion in section (5).

Although rehabilitation costs are prescribed as a cost under the Mining Regulations that may be included for the purposes of determining whether the expenditure commitment is met,⁴ these costs are unlikely to be expended on tenements at the prospecting or exploration stage.

See **Example 1** for an example of rehabilitation activities that are not exploration or development activities conducted for the purpose of facilitating exploration or incidental to exploration.

Guidance will be provided about the costs that will be regarded as exploration expenditure and any limits or conditions to the discretion to treat administrative costs as exploration expenditure.

⁴ *Mining Regulations 1981* r. 96C(2).

Subdivision 3 – Treatment of farm-in agreements and farm-in transactions for duty purposes

910. Consideration

This section sets out the rules for consideration provided under farm-in agreements and farm-in transactions.

Subsection (1) provides that for the purposes of the Duties Act the exploration amount for a concessional farm-in transaction is not consideration for that transaction.

Subsection (2) provides that section 11(2) does not prevent a concessional farm-in transaction from being a dutiable transaction. Section 11(2) sets out transactions that are not dutiable transactions and are therefore not subject to transfer duty. This includes section 11(2)(a), which provides that a transaction for a right is not a dutiable transaction if there is no consideration for the transaction.

Subsection (2) is required to clarify that a concessional farm-in transaction for which there is no consideration can still be a dutiable transaction despite section 11(2).

Subsection (3) provides that subsections (4) to (6) apply if consideration is, or will be, provided for entering into a farm-in agreement.

In some farm-in agreements a signing fee is payable for entering into the agreement. Duty cannot be assessed on this amount because it is not consideration for the farm-in agreement or another type of dutiable transaction. The purpose of subsections (3) to (6) is to prevent consideration for a farm-in transaction or other dutiable transaction in a farm-in agreement being shifted to a non-dutiable event.

If consideration is provided for entering into a farm-in agreement, duty will apply by deeming an acquisition of a derivative mining right to have occurred. If a farm-in transaction is cancelled and the farmee does not earn any interest in the mining tenement or derivative mining right, any duty paid on the consideration for entering into the farm-in agreement will not be refunded.

Subsection (4) provides that the farm-in agreement is taken to contain an acquisition of a derivative mining right by the farmee if there is consideration provided for entering into the agreement.

Subsection (5) provides that the acquisition of the derivative mining right is taken to have occurred on the making of the farm-in agreement.

Subsection (6) deems the dutiable value of the acquisition of the derivative mining right to be the consideration for entering into the agreement.

91P. General rules relating to charging of duty

This section sets out how duty applies to concessional farm-in transactions in a farm-in agreement. The general rules are as follows.

- Nominal duty applies to a concessional farm-in transaction if there is no consideration for the transaction.
- The exploration amount is not consideration for a concessional farm-in transaction.
- For a multi-stage farm-in agreement with no consideration for any of the concessional farm-in transactions, nominal duty applies once to all of the transactions.
- For a multi-stage farm-in agreement with consideration for only one of the concessional farm-in transactions, the general rate of duty applies to the transaction with consideration and the other transactions are exempt.
- If there is consideration for more than one concessional farm-in transaction in a farm-in agreement, the consideration for each transaction is aggregated and the general rate of duty applies to the total amount.

Subsection (1) charges nominal duty on a concessional farm-in transaction if there is no consideration for the transaction. Under section 91O(1), the exploration amount is not consideration for the concessional farm-in transaction.

Subsection (2) provides that subsection (3) applies to a multi-stage farm-in agreement when there is no consideration for each of the concessional farm-in transactions that would be chargeable with nominal duty but for subsection (3).

Subsection (3) ensures that nominal duty only applies once for all of the concessional farm-in transactions for which there is no consideration, as if they were a single dutiable transaction.

Example 12

An agreement provides the following.

- A farmee must spend \$2 million on exploration to earn a 50 per cent interest in a tenement (Stage 1).
- After completing the first stage, the person may earn a further 30 per cent interest by spending another \$1 million on exploration (Stage 2).

Each of the two stages is a concessional farm-in transaction. As there is no consideration for either stage, nominal duty (\$20) applies as if both stages were a single farm-in transaction.

Subsection (4) provides that the dutiable value for a concessional farm-in transaction is the consideration for the transaction. This overrides section 27 which would otherwise apply to establish the dutiable value of a dutiable transaction.

Subsection (5) ensures that nominal duty does not also apply to the concessional farm-in transactions for which there is no consideration if the farm-in agreement contains other farm-in transaction(s) to which the general rate of duty applies.

Example 13

An agreement provides the following.

- A farmee can earn a 20 per cent interest in a tenement by spending \$300,000 on exploration (Stage 1).
- The farmee will reimburse the holder \$250,000 for expenditure the farmor incurred prior to the agreement being made.
- After completing Stage 1, the farmee may earn a further 30 per cent interest by spending another \$500,000 on exploration (Stage 2).
- After completing Stage 2, the farmee may elect to earn a further 20 per cent interest by spending another \$300,000 on exploration (Stage 3).

Each of the three stages is a concessional farm-in transaction. Duty for the first farm-in transaction will be assessed at the general rate on the reimbursement of \$250,000 as it is consideration for the transaction.

Duty does not apply to the second and third concessional farm-in transactions.

Subsection (6) provides that if a multi-stage farm-in agreement contains more than one concessional farm-in transaction to which the general rate of duty applies, the dutiable value of each transaction is to be aggregated as if they were a single dutiable transaction. The Commissioner will decide how to apportion the duty between the transactions.

Example 14

An agreement provides the following.

- A farmee can earn a 50 per cent interest in a tenement by spending \$1 million on exploration (Stage 1).
- The farmee will reimburse the holder \$300,000 for expenditure the holder incurred prior to the agreement being made.
- After completing Stage 1, the farmee may earn a further 30 per cent interest by spending another \$1 million on exploration (Stage 2).
- The farmee must pay \$200,000 to the farmor to proceed to Stage 2.

Each stage is a farm-in transaction. The reimbursement of \$300,000 at Stage 1 and the payment of \$200,000 at Stage 2 is consideration for each transaction. The general rate of duty will apply to the aggregated amount of \$500,000.

The total duty payable is \$19,665. The Commissioner apportions \$11,799 (60 per cent) to the first farm-in transaction and \$7,866 (40 per cent) to the second farm-in transaction based on each stage's proportion of the aggregated consideration.

Subsection (7) provides that if a concessional farm-in transaction is reassessed, any duty on other concessional farm-in transactions that will be affected by the reassessment will also be reassessed.

Subsection (8) provides that the time limits in section 17 of the *Taxation Administration Act 2003* do not apply to a reassessment under subsection (7).

91Q. Changes to consideration

Section 91Q sets out how changes to consideration for a concessional farm-in transaction will be treated.

When the consideration for an agreement for transfer of dutiable property is changed before the property is transferred, section 31 of the Duties Act requires the Commissioner to reassess the transaction based on the increased or reduced consideration.

As section 31 only applies to agreements for transfer, duty cannot be reassessed on a farm-in transaction if the consideration changes after the agreement is entered into but before the interest is transferred. New sections 91Q(1) to (7) essentially replicate section 31 to address this issue for farm-in transactions.

Subsection (1) provides that subsection (3) applies to a concessional farm-in transaction if the consideration for the transaction is increased or reduced before the transaction is completed.

The example for this subsection clarifies that any consideration that is provided in lieu of the farmee fulfilling the exploration requirement under a purchase agreement in section 91M(9) is an increase to the consideration for the concessional farm-in transaction. This means that the Commissioner must assess duty on the increased consideration under subsection (3).

Subsection (2) provides that a concessional farm-in transaction is completed for the purposes of subsection (1) when the farmee has fulfilled the exploration requirement and:

- a) the farmee acquires an interest in a relevant mining tenement or relevant derivative mining right or is granted a derivative mining right in relation to a relevant mining tenement; or
- b) all of the farmee's option to require the farmor to do these things in paragraph (a) terminates without being exercised.

If a concessional farm-in transaction involves more than one relevant mining tenement or relevant derivative mining right, the concessional farm-in transaction will be completed under paragraph (a) as soon as the farmee acquires an interest in one of the relevant mining tenements or relevant derivative mining rights after fulfilling the exploration requirement.

If paragraph (a) does not apply, the concessional farm-in transaction is only completed after all of the farmee's options to require the farmor to transfer an interest in a relevant mining tenement or relevant derivative mining right, or to grant a derivative mining right, to the farmee expire without being exercised.

Subsection (3) provides that the Commissioner must assess or reassess the duty on a concessional farm-in transaction if the consideration is increased or reduced before the transaction is completed.

Subsection (4) provides that the Commissioner does not need to reassess duty if the consideration is reduced unless the taxpayer applies for the reassessment.

Subsection (5) provides that if the consideration is increased after the concessional farm-in transaction is duty endorsed, the farmee must lodge the instrument that effects the increased consideration, or a transfer duty statement if there is no instrument, within two months after the day the consideration was increased.

Subsection (6) provides that duty applies to the reassessment for increased or reduced consideration at the same rate and using the same thresholds that applied when liability for the concessional farm-in transaction initially arose.

Subsection (7) provides that subsection (3) does not apply if the taxpayer can apply for a reassessment because of subsection (8), which allows a reassessment if contingent consideration is not paid.

A farm-in transaction may provide for further consideration to be given to the farmor upon the happening of an event, either before or after the exploration amount has been expended. For example, the farmee may be required to make a milestone payment to the farmor upon achieving drilling of a specified depth.

Depending on how the agreement is structured, duty applies to the contingent consideration. However, a refund is not currently available to the farmee if the contingent amount is not given.

Section 32 of the Duties Act requires the Commissioner to reassess an agreement for transfer of dutiable property when contingent consideration for an agreement for transfer duty is not paid.

Subsection (8) applies sections 32(1) and (3) to allow the Commissioner to reassess duty if contingent consideration for a concessional farm-in transaction is not or will not be given.

Subsection (9) modifies the time limit in section 32 for a taxpayer to apply for a reassessment if contingent consideration is not given. The five-year reassessment time limit is extended to allow a further 12 months from the passing or expiry of the event to facilitate the longer timeframes generally involved with farm-in transactions.

For a concessional farm-in transaction, a taxpayer must apply for a reassessment within five years after the day on which the farm-in agreement is made or 12 months after the passing or expiry of the time specified for the happening of the event, whichever is the later.

91R. No double duty

Under section 91R, duty does not apply to a transfer or acquisition of an interest in a mining tenement or derivative mining right if it is under a concessional farm-in transaction that is duty endorsed and the exploration requirement has been fulfilled. It also ensures that duty applies if further consideration is given for the transfer of an interest in the tenement or derivative mining right.

Subsection (1) provides that under this section consideration, in relation to a dutiable transaction, does not include the exploration amount for the concessional farm-in transaction.

Subsection (2) provides that duty does not apply to a dutiable transaction if:

- a) the dutiable transaction is under a concessional farm-in transaction and occurs after the farmee has fulfilled the exploration requirement; and
- b) the concessional farm-in transaction is duty endorsed.

This subsection ensures that a transfer or acquisition of an interest in a mining tenement or derivative mining right is exempt from duty if it is in accordance with a concessional farm-in transaction that is duty endorsed. This includes a transfer or acquisition of an interest in a replacement mining tenement or replacement derivative mining right that is contemplated under a concessional farm-in transaction.

The duty treatment is consistent with the other 'no double duty' provisions for transactions that are made in conformity with a duty endorsed agreement or other dutiable transaction.

Subsection (3) ensures that duty does not apply if the farmee acquires an interest in a replacement mining tenement or replacement derivative mining that was not contemplated by the concessional farm-in transaction.

It provides that duty does not apply to a dutiable transaction (***replacement dutiable transaction***) if:

- a) the replacement dutiable transaction –
 - (i) is occurring instead of a dutiable transaction that would have been under a concessional farm-in transaction;
 - (ii) the only reason it is not a dutiable transaction under the concessional farm-in transaction is because the replacement mining tenement or replacement derivative mining right was not anticipated in the farm-in transaction; and
 - (iii) occurs after the exploration requirement is fulfilled; and
- b) the concessional farm-in transaction is duty endorsed.

Example 15

A farm-in transaction provides that the farmee can acquire an interest in an exploration licence after the exploration requirement is fulfilled. The agreement does not contemplate that the exploration licence may be replaced or converted into another tenement type.

The exploration licence is converted to a mining lease before the farmee has fulfilled the exploration requirement.

The transfer of an interest in the mining lease to the farmee after the exploration requirement is fulfilled will not be exempt under section 91R(2) because the transfer is not under the concessional farm-in transaction.

However, the transfer of the interest in the replacement mining tenement will be exempt under section 91R(3) provided the farm-in transaction is duty endorsed.

After spending the exploration amount, a farmee may be required to give further consideration to the farmor to acquire the interest in the mining tenement or derivative mining right. If this is not contemplated by the farm-in agreement, duty on the extra consideration cannot currently be assessed on the transfer because the 'no double duty' rule in section 42(15) is satisfied if the farm-in agreement is duty endorsed and the exploration amount has been expended.

Under the *Stamp Act 1921*, the transfer of an interest in a mining tenement under a farm-in agreement was only chargeable with nominal duty to the extent that no consideration was given (other than the exploration amount).

Conveyance duty applied to the transfer to the extent that consideration was given but for which duty had not been paid on the farm-in agreement. The transition from the Stamp Act to the Duties Act was not intended to change the operation of the farm-in concession. Subsections (4) and (5) ensure duty applies to any consideration provided for the transfer.

Subsection (4) provides that duty applies to the acquisition of an interest in a mining tenement or derivative mining right which would have been exempt under subsections (2) and (3) if there is, or will be, consideration for the transaction.

Subsection (5) provides that the consideration is the dutiable value for the purposes of subsection (4) to the extent the consideration was not taken into account when the concessional farm-in transaction was duty endorsed.

Example 16

An agreement provides for a person to acquire a 40 per cent interest in a mining tenement by paying \$600,000 cash and spending \$1 million on exploration of the tenement. The agreement is a concessional farm-in transaction and is assessed on the consideration of \$600,000 paid by the farmee.

After spending the exploration amount, the farmor and farmee renegotiate and agree that the farmee must pay a further \$200,000 cash to take the transfer of the 40 per cent interest. Under subsections (4) and (5), duty is assessed on the transfer on a dutiable value of \$200,000.

Subsection (6) provides that the reference to a dutiable transaction in subsection (3)(a)(i) includes a transaction that would be a dutiable transaction but for section 91DA. This is to cover a case where the transaction that is replaced is not a dutiable transaction because of section 91DA, for example, where the farm-in transaction originally provided for the transfer of an interest in a prospecting licence.

Subdivision 4 – Variations and other events affecting farm-in agreements and farm-in transactions

Subdivision 4 deals with variations to farm-in agreements and farm-in transactions.

91S. Farm-in transaction added to farm-in agreement

Section 91S provides for the treatment of a variation to a farm-in agreement to add a farm-in transaction after the farm-in agreement is made.

Generally, a concession applies to a farm-in transaction that is added to a farm-in agreement if:

- the farmee does not hold an interest in the relevant mining tenement or relevant derivative mining right when the agreement is varied; and
- the additional farm-in transaction is in respect of the same relevant mining tenement or relevant derivative mining contained in the farm-in agreement when the agreement was made.

A farmee may fulfil the exploration requirement under a farm-in agreement and realise it is worth continuing the farm-in arrangement beyond the stages provided in the agreement. The parties may agree to vary the agreement to add another stage that is a farm-in transaction. The concession applies to the added farm-in transaction if the variation is made before an interest in the tenement is transferred to the farmee under an earlier stage of the farm-in agreement.

The concession does not apply to an added farm-in transaction if:

- the farmee has earned an interest in the mining tenement or derivative mining right and the interest earned has been transferred to the farmee; or
- the farmee has not yet earned an interest in the mining tenement or derivative mining right under a farm-in transaction but purchased an upfront interest when the farm-in agreement was made and that interest has been transferred to the farmee.

This generally aligns with the policy that the farmee must not have a prior interest in the mining tenement or derivative mining right when the farm-in agreement is entered into.

If an added farm-in transaction is not a concessional farm-in transaction under this section but it is another type of dutiable transaction, duty will apply to the transaction in the usual way.

Subsection (1) provides that the section applies if a farm-in transaction is added to a farm-in agreement after the agreement is made (referred to as the ***additional farm-in transaction***).

Subsection (2) provides that the additional farm-in transaction is only a concessional farm-in transaction:

- a) if the additional farm-in transaction:
 - (i) satisfies the requirements in subsection (3) or (4) if the farm-in agreement involves a relevant mining tenement or a relevant derivative mining right; and
 - (ii) if the farm-in agreement involves both a relevant mining tenement and a relevant derivative mining right, the additional transaction satisfies both subsections (3) and (4).

or

- b) in any circumstances prescribed for the purposes of this paragraph.

The regulation making power provides flexibility to prescribe other circumstances in which an additional farm-in transaction may be treated as a concessional farm-in transaction if it is appropriate and within the policy of the concession to do so. A regulation can be backdated to the start of these amendments, if necessary, as retrospective regulations can be made where taxpayers are not adversely affected.⁵

Subsection (3) provides that the additional farm-in transaction is a concessional farm-in transaction if:

- a) the farm-in transaction involves the farmee earning a right to an interest in a relevant mining tenement after fulfilling the exploration requirement (under section 91M(1)(a)(i) and (c)(i)); and
- b) each relevant mining tenement for the additional farm-in transaction is a relevant mining tenement contained in the farm-in agreement when the farm-in agreement was made or a replacement mining tenement for such a tenement;
and
- c) when the additional farm-in transaction is added to the farm-in agreement, the farmee is not the holder or one of the holders of the relevant mining tenement(s) for the additional farm-in transaction.

The additional farm-in transaction is only a concessional farm-in transaction if the transfer of the interest in the tenement under the additional transaction does not result in the farmee holding 100 per cent interest in the mining tenement.

⁵ Duties Act s 285(4).

This is because the additional farm-in transaction is only a concessional farm-in transaction if sections 91M(1)(a)(i) and (c)(i) apply. Section 91M(3)(b) provides that the requirement of subsection (1)(c)(i) is met only if the farmor and farmee would both be the holders of the mining tenement after the interest in the tenement is transfer, or would still both be the holders if it were to be transferred.

Subsection (4) sets out the requirements for an additional farm-in transaction to be a concessional farm-in transaction for relevant derivative mining rights. It provides that the additional farm-in transaction is a concessional farm-in transaction if:

- a) the farmee earns the right to an interest in a relevant derivative mining right or rights after fulfilling the exploration requirement;
- b) each relevant derivative mining right for the additional farm-in transaction is a relevant derivative mining right contained in the farm-in agreement when the farm-in agreement was made or a replacement derivative mining right for such a right; and
- c) the Commissioner is satisfied that the farmee is not the holder or one of the holders of the relevant derivative mining right when the additional farm-in transaction is added to the farm-in agreement.

A Commissioner's satisfaction test is included in paragraph (c) because, unlike a mining tenement, an interest in a derivative mining right does not need to be registered with DMIRS so the point at which the farmee becomes the holder of the right is less clear. A Commissioner's Practice will provide guidance on when the Commissioner will consider the farmee to be the holder of a relevant derivative mining right, which will generally be if the farmee has given notice to the farmor that the exploration requirement is fulfilled.

Sections 91S(3) and (4) do not address the situation where a farmee is to be granted a derivative mining right over a relevant mining tenement after they fulfil the exploration requirement. This is because it is unlikely that another stage would be added in this scenario. The grant of the derivative mining right already results in the farmee having a 100 per cent interest in the right.

Example 17

A farm-in agreement provides the following.

- The farmee must spend \$2 million on exploration to earn a 50 per cent interest in a mining tenement (Stage 1).
- After completing the first stage, the farmee may earn a further 30 per cent interest by spending another \$1 million on exploration (Stage 2).

After spending \$1 million under Stage 1, but before the 50 per cent interest is transferred to the farmee, the parties agree to vary the agreement to add a third farm-in transaction that allows the farmee to earn a further 10 per cent interest by spending \$500,000 after completing Stage 2.

The additional farm-in transaction is a concessional farm-in transaction because:

- an interest in the tenement has not been transferred to the farmee when the agreement is varied;
- the tenement the subject of the additional farm-in transaction is contained in the farm agreement when the agreement was made; and
- the additional farm-in transaction does not result in the farmee holding a 100 per cent interest in the relevant mining tenement.

Example 18

A farm-in agreement provides that a farmee must spend \$2 million on exploration to earn a 50 per cent interest in a mining tenement. After completing this stage, a 50 per cent interest in the mining tenement is transferred to the farmee.

The parties then agree to add a second stage that allows the farmee to earn a further 20 per cent interest by paying cash of \$100,000 and spending \$800,000 on exploration.

The farm-in concession does not apply to the second stage (that is, the additional farm-in transaction) because the farmee already holds a 50 per cent interest in the mining tenement.

The second stage is an acquisition of new dutiable property. The cash component of \$100,000 is taken to be the option fee, and duty is assessed on this amount. Completion of the \$800,000 exploration expenditure will constitute an agreement for the transfer of the 20 per cent interest in the tenement. Duty will be assessed on the greater of the consideration or the unencumbered value of that interest.

The transfer of the 50 per cent interest in the mining tenement is exempt from duty under section 91R(2) provided that the concessional farm-in transaction is duty endorsed.

The transfer of the 20 per cent interest is exempt from duty under section 42(1) if the agreement for transfer is duty endorsed.

Example 19

A farm agreement provides that a farmee can:

- acquire an immediate 25 per cent interest in a tenement for \$500,000; and
- earn a further 25 per cent interest after spending \$1 million on exploration of the tenement (Stage 1).

After providing \$500,000, the 25 per cent interest is transferred to the farmee. The agreement is then varied to allow the farmee to earn a further 10 per cent interest after completing Stage 1 by spending \$500,000 on exploration.

The additional transaction to earn a further 10 per cent interest after completing Stage 1 is not a concessional farm-in transaction because the farmee already has a 25 per cent interest in the mining tenement.

Subsection (5) allows the Commissioner to reassess duty on other concessional farm-in transactions in the agreement for the purposes of applying section 91P(3), (5) or (6) if an additional farm-in transaction is treated as a concessional farm-in transaction.

Subsection (6) deems that the concessional farm-in transactions occur when the last concessional farm-in transaction was added to the farm-in agreement for the purposes of a reassessment under subsection (5). This has the effect of duty being charged at the rate that applies when the additional farm-in transaction was added to the farm-in agreement.

Subsection (7) extends the time in which a taxpayer may apply for a reassessment, or in which the Commissioner may reassess, under subsection (5) to the later of five years after the original assessment was made or 12 months after the day on which the additional farm-in transaction was added to the farm-in agreement. The extended time limit is to cater for the longer timeframes generally involved with farm-in transactions.

Example 20

A farm-in agreement provides the following:

- The farmee can earn a 50 per cent interest in a tenement by paying \$200,000 cash and spending \$1 million on exploration (Stage 1).
- After completing Stage 1, the farmee can acquire a further 25 per cent interest in the tenement by paying \$100,000 cash and spending \$500,000 on exploration (Stage 2).

Duty at the general rate is assessed on the aggregated consideration of \$300,000.

Prior to the farmee fulfilling the exploration requirement under Stage 1, the parties agree to vary the agreement to add a third farm-in transaction.

The variation provides that after completing the second stage, the farmee may acquire a further 10 per cent interest in the tenement by paying \$100,000 cash and spending another \$500,000 on exploration.

The additional farm-in transaction that is Stage 3 is a concessional farm-in transaction because the farmee does not hold an interest in the mining tenement at the time of the variation.

Under subsection (5), the Commissioner can reassess the earlier concessional farm-in transactions so that the consideration for the transactions is aggregated with the consideration for the additional farm-in transaction. Duty is assessed on the aggregated consideration of \$400,000 and apportioned between the concessional farm-in transactions.

Section 91P(7) does not apply because reassessment of the original farm-in transactions was not triggered by a reassessment of one of those transactions (that is, the reassessment is triggered by a variation to add a farm-in transaction).

91T. Variation to farm-in transactions

Section 91T provides for the treatment of variations to farm-in transactions contained in a farm-in agreement.

A transaction ceases to be a concessional farm-in transaction if it is varied so that it no longer meets the eligibility conditions. If the varied transaction evidences another dutiable transaction, duty applies to the transaction as if the liability for duty arose when the variation occurred.

The farmee can apply for a reassessment of the concessional farm-in transaction under section 107 on the basis the transaction is cancelled. The exemption will apply if the requirements for a cancelled transaction are met. If the exploration requirement has been fulfilled, the concessional farm-in transaction is completed and cannot be cancelled.

Any subsequent transfer or acquisition of an interest in the mining tenement or derivative mining right is not exempt under section 91R. This is because the transaction is not under a concessional farm-in transaction and the farmee has not fulfilled the exploration requirement.

However, if the varied farm-in transaction evidences an agreement to transfer an interest in the tenement or derivative mining right, the transfer of that interest may be exempt under section 42(1) (no double duty) if the agreement is duly endorsed.

If a concessional farm-in transaction is varied but still meets the eligibility conditions, it continues to be a concessional farm-in transaction unless the variation is to:

- add a relevant mining tenement or relevant derivative mining right to the concessional farm-in transaction, other than a new prospecting or exploration licence that was granted after the farm-in agreement was made; or
- increase the interest that the farmee is to acquire in a relevant mining tenement or relevant derivative mining right under a concessional farm-in transaction if the farmee already holds an interest in the relevant mining tenement or relevant derivative mining right at the time of the variation.

Subsection (1) provides that if a concessional farm-in transaction ceases to meet the requirements for a farm-in transaction set out in section 91M(1) to (5), the transaction ceases to be a concessional farm-in transaction.

Example 21

A farm-in agreement provides the following.

- The farmee must spend \$2 million on exploration to earn a 50 per cent interest in a mining tenement (Stage 1).
- After completing the first stage, the farmee may earn a further 40 per cent interest by spending another \$1 million on exploration (Stage 2).

Shortly after fulfilling the exploration requirement for Stage 1, the farmor and farmee vary the agreement so that the farmee agrees to purchase the remaining 50 per cent interest in the tenement by providing \$500,000.

Stage 2 ceases to be a concessional farm-in transaction. It no longer meets the requirements of a farm-in transaction in section 91M(1) to (5) because the farmee does not have to fulfil an exploration requirement to acquire the interest in the tenement and the farmee would hold all of the interest in the tenement.

The Stage 2 farm-in transaction is a cancelled transaction under amended section 107 as the exploration requirement has not been fulfilled, and the farmee can apply for a reassessment under that section.

If a concessional farm-in transaction is varied or has its effect modified but still meets the requirements for a farm-in transaction, then it will continue to be a concessional farm-in transaction unless subsection (4) applies.

Subsections (2) and (3) set out the circumstances in which a farm-in transaction ceases to be a concessional farm-in transaction under subsection (4).

Subsection (2) provides that a farm-in transaction ceases to be a concessional farm-in transaction (including to a certain extent) under subsection (4) if an agreement is varied to add a relevant mining tenement or relevant derivative mining right, except:

- a) if subsection (1) applies instead, that is, the farm-in transaction is varied so that it no longer meets the requirements for a farm-in transaction in section 91M(1) to (5);
- b) if all of the following apply:
 - (i) the relevant mining tenement being added is a prospecting licence or exploration licence or the relevant derivative mining right being added relates to a prospecting licence or exploration licence;
 - (ii) the relevant mining tenement or relevant derivative mining right was granted after the concessional farm-in transaction was made; and

(iii) the concessional farm-in transaction was varied to add the new relevant mining tenement or relevant derivative mining right within three months of the grant of the tenement or right or a longer period allowed by the Commissioner.

c) any circumstances prescribed for the purposes of this paragraph.

Paragraph (b) reflects the more common circumstances that RevenueWA has come across in which a mining tenement may be added to a farm-in transaction. The farm-in transaction will continue to be a concessional farm-in transaction in these circumstances.

The farm-in transaction will not be a concessional farm-in transaction to the extent of a new tenement or derivative mining right that is added outside of the circumstances in paragraph (b), for example, if the tenement or right is a mining lease or a derivative mining right in relation to a mining lease. In these cases, the parties can choose to enter into a separate farm-in agreement over the added tenements if they wish and a concession may apply to the agreement if it meets the eligibility requirements.

Limiting paragraph (b) to these circumstances ensures that a concession does not apply where another mining tenement, for example, a mining lease, is added to a farm-in transaction after the exploration requirement is fulfilled, or close to being fulfilled, so that the farmee can get an interest in the tenement and receive the concession rather than directly acquiring the tenement.

A regulation making power is included to allow the concession to apply to variations to add a mining tenement or derivative mining right in prescribed circumstances if it is appropriate to do so. A regulation can be backdated to the start of these amendments, if necessary, as retrospective regulations can be made where taxpayers are not adversely affected.⁶

Subsection (3) provides that a farm-in transaction also ceases to be a concessional farm-in transaction (including to a certain extent) under subsection (4) if an agreement is varied to increase the interest in a relevant mining tenement or relevant derivative mining right, except in the following circumstances:

- a) subsection (1) applies instead, that is, the farm-in transaction is varied so that it no longer meets the requirements for a farm-in transaction in section 91M(1) to (5);
- b) the farmee is not the holder, or one of the holders, of the relevant mining tenement when the variation occurs or the Commissioner is satisfied that the farmee is not the holder, or one of the holders, of the relevant derivative mining right when the variation occurs (whichever is relevant); or

⁶ Duties Act s 285(4).

c) any of circumstances prescribed for the purposes of this paragraph.

Paragraph (b) means that a farm-in transaction continues to be a concessional farm-in transaction if it is varied to increase the interest in the mining tenement or derivative mining right under the farm-in agreement as long as the farmee is not a holder of that tenement or right, for example, an interest in the tenement or right earned under an earlier stage has not been transferred to them yet.

A regulation making power is included to allow the concession to apply to variations to increase an interest in a mining tenement or derivative mining right in prescribed circumstances if it is appropriate to do so. A regulation can be backdated to the start of these amendments, if necessary, as retrospective regulations can be made where taxpayers are not adversely affected.⁷

Subsection (4) provides that the agreement is taken not to be a concessional farm-in transaction to the extent that the agreement relates to the added relevant mining tenement or relevant derivative mining right or the increase in the interest in the relevant mining tenement or relevant derivative mining right. This subsection only applies if the circumstances set out in subsections (2) or (3) apply.

Example 22

A farm-in agreement provides the following.

- The farmee must spend \$2 million on exploration to earn a 50 per cent interest in a mining tenement (Stage 1).
- After completing the first stage, the farmee may earn a further 30 per cent interest by spending another \$1 million on exploration (Stage 2).

Stage 1 is a concessional farm-in transaction. After fulfilling the exploration requirement under Stage 1, the 50 per cent interest earned under that stage is transferred to the farmee.

Shortly after fulfilling the exploration requirement under stage 2, the farmor and farmee agree to vary that stage to provide that the farmee may earn a 40 per cent interest (instead of 30 per cent) in the tenement by providing consideration of \$50,000 and spending \$1.3 million on exploration (instead of \$1 million).

The farmee pays the cash consideration of \$50,000 and spends a further \$300,000 on exploration to earn the right to acquire the further 10 per cent interest.

Sections 91T(3) and (4) apply as the concessional farm-in transaction has been varied to increase an interest in a relevant mining tenement that the farmee is a holder of when the variation

⁷ Duties Act s 285(4).

occurs and the transaction still meets the requirements of a farm-in transaction under section 91M(1) to (5).

Under section 91T(4), Stage 2 will continue to be a concessional farm-in transaction to the extent of the initial 30 per cent interest that has been earned, but not the further 10 per cent. This is because the farmee already has an interest in the tenement when the farm-in transaction is varied.

The duty outcome is the same as if the parties had varied the farm-in agreement to add another farm-in transaction to earn a further 10 per cent interest. In that scenario, the additional farm-in transaction would not be a concessional farm-in transaction under section 91S because the farmee already holds an interest in the mining tenement.

Example 23

An agreement provides that the farmee will acquire a 60 per cent interest in several exploration licences over three stages. Under each stage, the farmee is required to spend on exploration \$1 million to obtain a 20 per cent interest in the licences.

Shortly after entering into the agreement, another exploration licence is granted to the farmor. Within a month of the grant of the new licence, the agreement is varied to add the new exploration licence so that the farmee will also acquire a 60 per cent interest in the new tenement after the exploration requirements for the three stages are fulfilled.

Section 91(4) does not apply because the added mining tenement falls within the circumstances described in section 91T(2)(b). The farm-in transaction continues to be a concessional farm-in transaction in respect of all the exploration licences including the newly granted licence.

Example 24

An agreement provides that the farmee must spend \$1 million on exploration to earn a 50 per cent interest in two exploration licences.

Shortly before the exploration requirement is fulfilled, the agreement is varied to add a mining lease to the farm-in transaction so that the farmee will also acquire a 50 per cent interest in the mining lease.

Sections 91T(2) and (4) apply as the concessional farm-in transaction is varied to add a mining tenement. The transaction still meets the requirements of a farm-in transaction under section 91M(1) to (5) but the added tenement does not meet the circumstances described in section 91T(2)(b) because it is not a newly granted exploration licence or prospecting licence.

Under section 91T(4), the transaction will continue to be a concessional farm-in transaction to the extent of the exploration licences under the original agreement but not the added mining lease. This means any transfer of the mining lease to the farmee will

not be under a concessional farm-in transaction and will not be exempt from duty under section 91R.

Subsection (5) provides that regulations can be made to prescribe other circumstances in which a varied concessional farm-in transaction ceases to be a concessional farm-in transaction including to a certain extent.

A farm-in transaction only ceases to be concessional if the variations described in sections 91T(1) to (3) occur. A farm-in transaction does not cease to be concessional if the variation does not materially alter the agreement, for example, if the parties vary the time for the farmee to complete the exploration requirement, the agreement is varied to remove a mining tenement or the exploration requirement is varied to increase the exploration amount.

The regulation making power will allow other circumstances in which a transaction should cease to be a concessional farm-in transaction after it is varied to be prescribed, if it is appropriate to do so.

Subsection (6) provides that subsections (7) to (10) apply, if at any time (the **relevant time**), an agreement ceases to be a concessional farm-in transaction to any extent under this section or under regulations made under subsection (5).

Subsection (7) provides that if an agreement that is a concessional farm-in transaction gives effect to, or evidences, another type of dutiable transaction when it is varied, duty applies to the dutiable transaction in the usual manner. The dutiable transaction is taken to have occurred when the agreement is varied and ceases to be a concessional farm-in transaction.

Example 25

Using the facts in example 21, Stage 2 ceases to be a concessional farm-in transaction after it is varied. The varied agreement evidences an agreement to transfer a 50 per cent interest in the mining tenement to the farmee. The liability to duty arises when the agreement is varied and ceases to be a concessional farm-in transaction.

Duty applies to the greater of the consideration of \$500,000 or the unencumbered value of the 50 per cent interest in the mining tenement.

The transfer of the 50 per cent interest is exempt from duty under section 42(1) (no double duty) if the agreement is duty endorsed.

Subsection (8) provides that if an agreement ceases to be a concessional farm-in transaction to a certain extent, the reference to the agreement in subsection (7) is to the agreement to the extent that is it not a concessional farm-in transaction.

Example 26

Using the facts in example 22, Stage 2 is a concessional farm-in transaction to the extent of the initial 30 per cent interest that has been earned.

The varied agreement, to the extent that it is not a concessional farm-in transaction, evidences an acquisition of new dutiable property by the farmee (that is, the grant of an option to acquire a 10 per cent interest in the mining tenement). The cash payment of \$50,000 is taken to be the option fee, and duty at the general rate will be assessed on this amount.

Completion of the \$300,000 exploration expenditure will constitute an agreement for the transfer of the 10 per cent interest in the tenement. Duty will be assessed on the greater of the consideration or the unencumbered value of that interest.

The transfer of the 10 per cent interest will be exempt from duty under section 42(1) if the agreement for transfer is duty endorsed.

Subsection (9) provides that an agreement ceasing to be a concessional farm-in transaction does not affect any duty that applied before the agreement was varied.

Subsection (10) clarifies that section 107 can apply to the agreement if it becomes a cancelled transaction as a result of it being varied. If a concessional farm-in transaction is reassessed under section 107, any duty chargeable on other concessional farm-in transactions contained in the same farm-in agreement can be reassessed under section 91P(7).

Example 27

A farm-in agreement provides the following.

- The farmee can earn a 50 per cent interest in a tenement by spending \$1 million on exploration and reimbursing the holder \$300,000 for expenditure the holder incurred prior to the agreement being made (Stage 1).
- After completing Stage 1, the farmee may pay \$200,000 to proceed to the next stage and spend \$1 million on exploration to earn a further 25 per cent interest (Stage 2).

Duty at the general rate of duty applies to the aggregated consideration of \$500,000.

After completing Stage 1, the farmor and farmee agree to vary Stage 2 so that the farmee acquires the remaining 50 per cent in the tenement for cash consideration of \$500,000.

Stage 2 ceases to be a concessional farm-in transaction under section 91T(1) when the agreement is varied.

The agreement for the transfer of the 50 per cent interest in the tenement is a dutiable transaction. Under section 91T(7), the liability to duty arises when the agreement ceases to be a concessional farm-in transaction. Duty applies to the greater of the consideration of \$500,000 or the unencumbered value of the interest in the tenement.

The farm-in transaction under Stage 2 is a cancelled transaction because the exploration requirement has not been fulfilled. The farmee may apply for a reassessment of the duty paid on Stage 2 under section 107.

The concessional farm-in transaction under Stage 1 is reassessed under section 91P(8) so that duty applies to \$300,000.

Subdivision 5 – Other provisions

91U. Farm-in transactions relating to prospecting licences

Section 91U provides that a farm-in transaction involving only prospecting licences or derivative mining rights in relation to prospecting licences (or both) (a **prospecting farm-in transaction**) are not dutiable transactions.

This aligns the farm-in provisions with the amendments in the *Duties Amendment Act 2022* to abolish duty on prospecting licences, unless transferred with other dutiable property, from 1 July 2022.⁸

⁸ See Duties Act s 91DA.

A transfer of an interest in a prospecting licence or a derivative mining right in relation to a prospecting licence, or the grant of such a right, to the farmee under a farm-in transaction is exempt from duty under section 91DA.

This section also provides that a prospecting farm-in transaction can become a concessional farm-in transaction if certain events occur, for example, if the prospecting licence is converted to another tenement type such as a mining lease before the transfer. If the prospecting farm-in transaction becomes a concessional farm-in transaction, any transfer of the replacement mining tenement (that is, the mining lease) is exempt from duty under section 91R.

A transaction can only become a concessional farm-in transaction if the transaction would have met the requirements of section 91L(4) when the agreement was made. In other words, the farmee must not have had an interest in the prospecting licence, or derivative mining right in relation to the prospecting licence, when the farm-in agreement was made.

The prospecting farm-in transaction must be lodged for duty assessment within two months of the events occurring.

Subsection (1) defines the terms used in the section.

non-prospecting interest means:

- a) an interest in a non-prospecting mining tenement that is a replacement mining tenement for a relevant mining tenement. A non-prospecting mining tenement is a tenement that is not a prospecting licence. For example, if a prospecting licence is converted into a mining lease before an interest is transferred to the farmee, the interest in the mining lease is a non-prospecting interest;
- b) a derivative mining right that relates to a non-prospecting mining tenement where the tenement is a replacement mining tenement. For example, an agreement provides that a farmee will acquire a derivative mining right in relation to the farmor's prospecting licence after fulfilling the exploration requirement but that licence is converted to a mining lease. The derivative mining right granted in relation to the mining lease is a non-prospecting interest; or
- c) an interest in a derivative mining right where the right is a replacement derivative mining right that relates to a non-prospecting mining tenement. For example, an agreement provides that the farmee will acquire an interest in the farmor's derivative mining right in relation to a prospecting licence but the licence is converted to a mining lease. A derivative mining right in relation to the mining lease is granted to the farmor. The interest in the derivative mining right in relation to the mining lease acquired by the farmee after the exploration requirement is fulfilled is a non-prospecting interest.

non-prospecting mining tenement means a mining tenement that is not a prospecting licence.

prospecting farm-in transaction generally means a farm-in transaction contained in a farm-in agreement involving only one or more prospecting licences, or one or more derivative mining rights in relation to a prospecting licence (or a combination of the two), and section 91L(4) would not prevent the farm-in transaction from being a concessional farm-in transaction.

Section 91L(4) prevents the farm-in transaction from being a concessional farm-in transaction if the farmee has an interest in the relevant mining tenement or relevant derivative mining right as set out in that subsection when the farm-in agreement is made.

If the farmee had an interest in the relevant mining tenement or relevant derivative mining right when the farm-in agreement was made, the transaction is not a prospecting farm-in transaction and cannot become a concessional farm-in transaction under this section. A transaction can only become a concessional farm-in transaction under this section if it would have met the requirements of a concessional farm-in transaction.

Subsection (2) clarifies that section 91DA does not prevent a concessional farm-in transaction from being a dutiable transaction. This means that section 91U (and not section 91DA) applies in relation to prospecting farm-in transactions.

Subsection (3) provides that a prospecting farm-in transaction is not a concessional farm-in transaction and is not a dutiable transaction. This is subject to subsections (6) and (8).

Example 28

An agreement provides for the farmee to acquire a 50 per cent interest in a prospecting licence after spending \$200,000 on exploration of the tenement. The agreement is a prospecting farm-in transaction that is neither a concessional farm-in transaction nor a dutiable transaction. The agreement does not need to be lodged for duty assessment.

After spending the exploration amount, the farmor transfers a 50 per cent interest in the prospecting licence to the farmee. The transfer is not a dutiable transaction under section 91DA and can be registered with DMIRS without being lodged for duty assessment.

Subsection (4) applies to a situation where:

- a prospecting farm-in transaction anticipates that the prospecting licence, or derivative mining right in relation to a prospecting licence, may be replaced by a non-prospecting mining tenement or derivative mining right in relation to a non-prospecting mining tenement; and

- after the farmee fulfils the exploration requirement, the farmee acquires a non-prospecting interest (referred to as the ***non-prospecting dutiable transaction***) under the prospecting farm-in transaction.

If this occurs, the prospecting farm-in transaction becomes a concessional farm-in transaction, and is taken always to have been a concessional farm-in transaction, under subsection (6).

Subsection (5) applies to a situation where:

- there is a prospecting farm-in transaction that does not contemplate that the prospecting licence, or derivative mining right in relation to a prospecting licence, may be replaced by a non-prospecting mining tenement or derivative mining right in relation to a non-prospecting mining tenement;
- the prospecting licence, or derivative mining right in relation to the prospecting licence, is replaced by a non-prospecting mining tenement or derivative mining right in relation to a non-prospecting mining tenement; and
- the farmee acquires a non-prospecting interest (referred to as the ***non-prospecting dutiable transaction***) after they fulfil the exploration requirement.

If this occurs, the prospecting farm-in transaction also becomes a concessional farm-in transaction, and is taken always to have been a concessional farm-in transaction, under subsection (6).

Subsection (6) provides that when a non-prospecting dutiable transaction in subsections (4) or (5) occurs:

- a) the farm-in transaction stops being a prospecting farm-in transaction;
- b) the farm-in transaction becomes, and is always taken to have been, a concessional farm-in transaction and a dutiable transaction. This means that duty applies to any consideration provided for the farm-in transaction (other than the exploration amount); and
- c) liability for duty on the farm-in transaction arises when the non-prospecting dutiable transaction occurs (that is, when the farmee acquires a non-prospecting interest). This means that the farm-in transaction must be lodged for duty assessment within two months of the non-prospecting dutiable transaction occurring.

Once the prospecting farm-in transaction becomes a concessional farm-in transaction, section 91R can apply accordingly in relation to transactions related to the farm-in transaction. For example, the transfer of a non-prospecting mining tenement to the farmee can be exempt from duty under section 91R(2) or (3) and duty can apply to any consideration provided for the dutiable transaction under section 91R(4).

Example 29

A prospecting farm-in transaction provides for the farmee to acquire a 50 per cent interest in a prospecting licence after paying \$50,000 cash and spending \$200,000 on exploration of the tenement. The agreement provides that the prospecting licence may be converted by the farmor to a mining lease and that the farm-in transaction will continue to apply to any mining lease granted in lieu of the prospecting licence.

Under section 91U(3), the prospecting farm-in transaction is not a dutiable transaction when the agreement is made.

Shortly before the farmee fulfills the exploration requirement, the farmor applies for, and is granted, a mining lease in conversion of the prospecting licence.

The farmor transfers a 50 per cent interest in the mining lease to the farmee after they fulfil the exploration requirement. The transfer is a non-prospecting dutiable transaction under section 91U(4) because the farmee acquires a non-prospecting interest under the farm-in transaction.

Under section 91U(6), the farm-in transaction ceases to be a prospecting farm-in transaction when the transfer occurs and is taken to always have been a concessional farm-in transaction. The farmee must lodge the farm-in transaction and the transfer of the interest in the mining for duty assessment within two months of the non-prospecting dutiable transaction occurring.

Duty applies to the consideration of \$50,000 for the concessional farm-in transaction. The transfer of the 50 per cent interest in the mining lease to the farmee is exempt from duty under section 91R.

Example 30

A prospecting farm-in transaction provides for the farmee to be granted a derivative mining right in relation to the farmor's prospecting licence after spending \$100,000 on exploration. The agreement does not anticipate that the prospecting licence may be converted to a mining lease. Under section 91U(3), the prospecting farm-in transaction is not a dutiable transaction when the transaction is made.

Before the farmee fulfils the exploration requirement, the farmor applies for, and is granted, a mining lease in conversion of the prospecting licence.

After the farmee fulfils the exploration requirement, the farmor and farmee renegotiate and the farmor agrees to grant the farmee a derivative mining right in relation to the mining lease if the farmee provides \$50,000 cash for the grant of the right.

Section 91U(5) applies because the farmee is granted a derivative mining right in relation to a replacement mining tenement that was

not anticipated in the farm-in transaction. The grant of the derivative mining right is a non-prospecting dutiable transaction.

Under section 91U(6), the farm-in transaction ceases to be a prospecting farm-in transaction when the derivative mining right is granted to the farmee and is taken to always have been a concessional farm-in transaction. The farmee must lodge the farm-in transaction and the grant of the derivative mining right for assessment within two months of the non-prospecting dutiable transaction occurring.

Nominal duty applies to the concessional farm-in transaction. Under sections 91R(4), duty applies to the consideration of \$50,000 for the grant of the derivative mining right in relation to the mining lease.

Subsection (7) applies to a situation where a prospecting farm-in transaction is varied to add a non-prospecting mining tenement or a relevant derivative mining right that relates to a non-prospecting mining tenement. If this occurs, subsection (8) applies.

Subsection (8) provides that the following apply:

- a) the farm-in transaction stops being a prospecting farm-in transaction when the transaction is varied to add the non-prospecting mining tenement or relevant derivative mining right that relates to a non-prospecting mining tenement;
- b) the farm-in transaction becomes, and is always taken to have been, a concessional farm-in transaction and a dutiable transaction. This means that duty applies to any consideration provided for the farm-in transaction (other than the exploration amount); and
- c) liability for duty on the farm-in transaction arises when the transaction is varied. This means that the farm-in transaction must be lodged for duty assessment within two months of the variation occurring.

Once the prospecting farm-in transaction becomes a concessional farm-in transaction, section 91R can apply accordingly in relation to transactions related to the farm-in transaction.

Example 31

An agreement provides for the farmee to acquire a 50 per cent interest in a prospecting licence after paying \$100,000 cash and spending \$200,000 on exploration of the tenement.

The agreement is a prospecting farm-in transaction that is neither a concessional farm-in transaction nor a dutiable transaction when it is made.

After entering into the agreement, the parties vary the agreement to add an exploration licence to the agreement so that the farmee can also acquire a 50 per cent interest in the exploration licence after the exploration requirement is fulfilled.

Section 91U(7) applies because the prospecting farm-in transaction is varied to add a non-prospecting mining tenement, that is, the exploration licence.

Under section 91U(8), the farm-in transaction ceases to be a prospecting farm-in transaction and is taken to always have been a concessional farm-in transaction. The farmee must lodge the farm-in transaction for assessment within two months of the variation occurring. Duty applies to the consideration of \$100,000 for the concessional farm-in transaction.

After spending the exploration amount, the farmor transfers a 50 per cent interest in the prospecting licence and exploration licence to the farmee. The transfers are exempt from duty under section 91R.

Subsection (9) provides that the Commissioner may reassess the duty that applies on any dutiable transaction for the purpose of applying subsection (6) or (8) on the Commissioner's own initiative or on application by the taxpayer.

Subsection (10) provides that the time limits in the Taxation Administration Act do not apply in relation to a reassessment under subsection (9).

91V. Treatment of certain options under farm-in agreements

Liability for all dutiable stages of a multi-stage farm-in agreement arises when the farm-in agreement is made. This is the case when each stage is a farm-in transaction and when any stage is taken to be a dutiable transaction that is not a farm-in transaction.

A stage of a farm-in agreement may be a dutiable transaction that is not a farm-in transaction when:

- the farmee is granted an option for consideration to purchase the interest instead of earning the interest by fulfilling an exploration requirement; or
- the final stage will result in the farmee acquiring an aggregate 100 per cent interest in the mining tenement.

In the first case, the grant of the option is not a concessional farm-in transaction because the farmee is not required to fulfil an exploration requirement to earn the interest. The transaction is an acquisition of new dutiable property and duty applies to the consideration for the option.

If the farmee exercises the option to purchase the interest in the tenement, there will be an agreement for the transfer of dutiable property. Duty is assessed on the greater of the consideration or the unencumbered value of that interest. Duty does not apply to the transfer of the interest if it is in conformity with the duty endorsed agreement.

The final stage that results in the farmee acquiring a 100 per cent interest in a mining tenement is not a concessional farm-in transaction because the interest in the tenement will not be held with the farmor. The transaction is the grant of an option to acquire an interest in the mining tenement.

If consideration is provided for the final stage, there will be an acquisition of new dutiable property (an option to acquire dutiable property). Duty is assessed on the amount of consideration given for the option.

An option is not granted on the making of the farm-in agreement if the farmee must fulfil certain conditions before being granted the option to acquire the final interest in the tenement. For example, the farmee may be required to complete an earlier stage of the farm-in. In this case, the liability to duty arises when the option is actually granted and not when the farm-in agreement is made.

Section 91V treats an option to acquire an interest in a mining tenement or derivative mining right as being granted on the making of the farm-in agreement. This brings forward the liability date so that it arises at the same time as other dutiable transactions under the agreement.

This simplifies administration so that taxpayers will not have to re-lodge a farm-in agreement each time a transaction occurs under the agreement.

Section 91V only applies if consideration is provided for the option. If the option is not subsequently granted, the section also provides for a refund of duty paid on the grant.

Completion of the exploration expenditure for the final stage is taken to effect an agreement for transfer of that interest. This stage becomes chargeable with duty at that point and not at the time the farm-in agreement is made.

Subsection (1) provides that subsection (2) applies if:

- a) separate from any concessional farm-in transactions, a farm-in agreement provides for the grant of an option to acquire an interest in a mining tenement (or replacement mining tenement) or derivative mining right (or replacement derivative mining right) after the agreement is made; and
- b) the grant of the option would be a dutiable transaction as an acquisition of new dutiable property on its creation, grant or issue. This ensures the section only applies if consideration is provided for the grant of the option.

Subsection (2) provides that the Duties Act applies as if the option were granted, and acquired by the farmee, when the agreement is made. This means the acquisition of the option by the farmee becomes liable for duty when the agreement is made.

Subsection (3) provides that duty does not apply to an acquisition of an option that is taken to have been granted if the option is not granted because the time for granting the option has expired or the parties agree that the option is not to be granted.

Subsection (4) provides that the Commissioner must reassess the duty paid on the acquisition of the option if the option is not granted. The taxpayer must apply for the reassessment.

Subsection (5) modifies the time limit in the Taxation Administration Act for a taxpayer to apply for a reassessment if the option is not granted. Under this subsection, a taxpayer cannot apply for a reassessment more than five years after the day on which the original assessment was made or 12 months after the expiry of the option or the day the parties agree not to grant the option, whichever is later.

Example 32

An agreement provides the following.

- The farmee must spend \$2 million on exploration to earn a 50 per cent interest in a tenement (Stage 1).
- After completing Stage 1, the farmee can elect to pay \$200,000 cash to the farmor and earn the remaining 50 per cent by spending another \$2 million on exploration (Stage 2).

Stage 1 is a concessional farm-in transaction and nominal duty applies because there is no consideration for the transaction.

Stage 2 is not a farm-in transaction because the transaction will result in the farmee holding 100 per cent of the tenement. It is an acquisition of new dutiable property (an option to acquire dutiable property). The consideration of \$200,000 is taken to be an option fee and duty will be assessed on that amount.

Section 91V treats the acquisition of the option by the farmee as occurring when the farm-in agreement is made. The liability to duty on the farm-in transaction and the grant of the option arises when the farm-in agreement is made.

Under section 91R(2), duty does not apply to the transfer of the 50 per cent interest earned under Stage 1.

The option to purchase the remaining 50 per cent interest is considered to be exercised when the farmee has fulfilled the exploration requirement for Stage 2, and there will be an agreement for the transfer of that interest. As the agreement is only made when the option is exercised, liability to duty on the transaction arises at this point.

Duty will be assessed on the greater of the consideration or the unencumbered value of the 50 per cent interest. Provided the agreement for transfer is duty endorsed, duty will not apply to the transfer of that interest if it is in conformity with the agreement.

If the farmee chooses not to proceed with Stage 2 after completing Stage 1, they can apply for a reassessment of the duty paid on the deemed acquisition of the option.

91W. Derivative mining right granted for purposes of exploration requirement for farm-in transaction

A farm-in agreement usually authorises another person to carry out mining (which includes exploring for minerals) on the land the subject of the mining tenement subject to certain conditions. This means the person is technically acquiring a derivative mining right that allows them to fulfil their exploration requirement under the agreement.

From 13 June 2019,⁹ a derivative mining right is new dutiable property.¹⁰ An acquisition of a derivative mining right on its grant is a dutiable transaction, regardless of whether there is consideration or not.¹¹

This section exempts the acquisition of a derivative mining right under a farm-in transaction that authorises mining for the purposes of fulfilling the exploration requirement. To remove the opportunity to shift consideration for a farm-in transaction to the acquisition of the right, the exemption only applies if there is no consideration for the grant of the derivative mining right.

Section 91W provides duty does not apply to the acquisition of a derivative mining right if:

- a) the person who acquires the derivative mining right is the farmee;
- b) the derivative mining right authorises mining only for the purpose of fulfilling the exploration requirement under a concessional farm-in transaction; and
- c) there is no consideration for the transaction.

Clause 9: Section 107 amended

Clause 9 amends section 107, which provides a duty exemption for cancelled transactions.

A cancelled transaction is a dutiable transaction that has not been, and will not be, carried into effect.¹² The exemption does not apply if the transaction was cancelled to allow a replacement or subsale transaction to be entered into.¹³

A farm-in transaction can be a cancelled transaction if the transaction is cancelled before the farmee has earned the right to acquire an interest, or an entitlement to an interest, in the mining tenement or derivative mining right. This is on the basis that the right to acquire is only created after the farmee has fulfilled the exploration requirement.

⁹ Date of commencement of Part 2 of the *Revenue Laws Amendment Act 2019*.

¹⁰ Duties Act s 17(1)(iic).

¹¹ Duties Act s 11(3).

¹² Certain transactions (not relevant to farm-in arrangements) are excluded from being cancelled transactions.

¹³ Broadly, a replacement transaction is another dutiable transaction that is similar to the cancelled transaction (including all the same parties to the transaction) that the Commissioner considers is part of a scheme or arrangement with a sole or dominant purpose of avoiding, reducing or deferring tax. A subsale transaction means another dutiable transaction which results in the beneficial interest in the dutiable property under the cancelled transaction being held by a person who is not a party to the cancelled transaction, a result which is contemplated under, or substantially similar in effect to, the cancelled transaction, or another person as a result of an arrangement between a person liable to pay duty on the cancelled transaction and another party to the transaction.

In these circumstances, a reassessment is made under section 107 and any duty charged on consideration for the farm-in transaction is refunded. Consideration includes any reimbursement of past expenditure.

The cancellation provisions in the Stamp Act considered whether the taxpayer had received a benefit under a cancelled transaction and reduced the amount of stamp duty refunded to the amount of the benefit.¹⁴ A deliberate policy change was made to remove this concept when the Duties Act was drafted.

For example, a full refund of duty applies when a contract to purchase real estate is cancelled before completion, even if the purchaser's deposit is forfeited under the contract. It is inconsistent to not provide a full duty refund on a farm-in transaction cancelled before the farmee earns the right to acquire simply because the farmee gave consideration to enter into the transaction.

Once the farmee has fulfilled the exploration requirement and has the right to acquire the interest, the transaction is not cancelled if the parties decide not to proceed further.

Subclause (1) amends section 107(2) to insert paragraph (d) to provide that a concessional farm-in transaction is not a cancelled transaction if the farmee has fulfilled the exploration requirement.

Section 17 of the Taxation Administration Act provides that a taxpayer is not entitled to apply for a reassessment more than five years after the original assessment was made.

Section 107(7) of the Duties Act modifies this requirement for agreements for transfer and provides that a person is not entitled to apply for a reassessment more than five years after the original assessment was made, or more than 12 months after the agreement became a cancelled transaction, whichever is later.

Subclause (2) amends section 107(7) so that the extended timeframe for reassessment also applies to a cancelled farm-in transaction. This takes into account the longer period of time that is usually associated with mineral exploration.

Clause 10: Section 135 deleted

This clause deletes section 135 as the rules for charging of duty on farm-in transactions are now contained in new section 91P.

¹⁴ Stamp Act s 20.

Clause 11: Section 205Q amended

Section 205Q applies the 'no double duty' provisions to foreign transfer duty with the exception of section 42(15). As section 42(15) is being deleted by clause 7, this clause makes a consequential amendment to delete the reference to section 42(15) in section 205Q.

The 'no double duty' provisions for the transfer, or an agreement for the transfer of, an interest in the mining tenement or derivative mining right under a farm-in transaction are contained in new section 91R.

Clause 12: Section 205S amended

Section 205S applies Chapter 2 Part 5 of the Duties Act to foreign transfer duty, except for section 70 and Divisions 5 to 8.

This clause makes a consequential amendment to section 205S to ensure that new Division 9 relating to farm-in transactions does not apply to foreign transfer duty.

Clause 13: Schedule 1 amended

Schedule 1 of the Duties Act sets out when liability for duty arises on a dutiable transaction and who is liable to pay it.

This clause amends the item for section 11(1)(j) to provide that for a concessional farm-in transaction:

- liability to duty arises when the concessional farm-in transaction is made; and
- the farmee is liable to pay the duty.

The liability to duty for all dutiable transactions in a farm-in agreement arises when a farm-in agreement is made including:

- all concessional farm-in transactions;
- an agreement for a transfer of dutiable property, for example, an agreement to acquire an upfront interest in the tenement;
- an option for consideration to purchase an interest in the mining tenement or derivative mining right granted to a farmee when the farm-in agreement is made; and
- an option to acquire an interest in a mining tenement or derivative mining right that is deemed under section 91V to have been granted when the farm-in agreement is made.

Example 33

A farm-in agreement provides the following.

- The farmee agrees to pay \$100,000 to acquire a 10 per cent interest in a mining tenement (Stage 1).
- The farmee can earn another 40 per cent interest in the tenement by spending \$400,000 on exploration (Stage 2).
- The farmee agrees to pay \$200,000 cash to the tenement holder after completing Stage 2 and can earn the remaining 50 per cent interest in the mining tenement by spending another \$500,000 on exploration (Stage 3).

Liability arises when the farm-in agreement is made for:

- the agreement to purchase an upfront interest in the tenement under Stage 1;
- the concessional farm-in transaction under Stage 2; and
- the grant of the option for \$200,000 to acquire the remaining 50 per cent interest in the tenement under Stage 3.

Completion of the \$500,000 exploration expenditure under Stage 3 will be taken to be an agreement for transfer of the 50 per cent interest in the tenement. As the agreement for transfer will only be made when the option is exercised, liability to duty arises on the transaction at that point and not when the farm-in agreement is made.

Clause 14: Schedule 3 Division 11 inserted

A number of the amendments provide retrospective legislative support for the Commissioner's longstanding assessment practices to ensure the concession is available for agreements that have always been considered eligible. The transitional provisions will validate concessions previously applied from 1 July 2008 under these practices and will allow the concession for transactions on hand.

Other amendments apply to agreements entered into from either the date of the Minister for Finance's announcement on 28 November 2018 or the day after Royal Assent.

Clause 14 inserts Schedule 3 Division 11, which sets out the transitional and validation provisions for the farm-in amendments. The table in Attachment A summarises when the different amendments apply from.

Division 11 – Provisions for *Duties Amendment (Farm-in Agreements) Act 2022*

Subdivision 1 – Preliminary

60. Terms used

Clause 60 defines the terms used in Division 11.

Subclause (1) defines the following terms:

actual section 13 farm-in agreement means a farm-in agreement made between 1 July 2008 and the amendment day (the day the farm-in amendments commence) that satisfies all the requirements of current section 13, but does not include a deemed section 13 farm-in agreement under clause 64(2).

amending Act means the *Duties Amendment (Farm-in Agreements) Act 2022*.

amendment day means the day on which section 14 of the amending Act (which contains the transitional provisions) commences.

deemed section 13 farm-in agreement means an agreement:

- a) that is deemed to be a section 13 farm-in agreement under clause 64(2); or
- b) that is a deemed section 13 farm-in agreement under clause 65(2)(b)

These are agreements that do not technically satisfy the requirements of section 13 but received the concession based on the Commissioner's assessment practices, including any agreement that is added to a farm-in agreement on or after amendment day if it would be a concessional farm-in transaction under section 91S.

This is subject to:

- clause 65(7), which provides that an agreement is not a deemed section 13 farm-in agreement if on or after amendment day it is varied so that it ceases to meet the requirements for a farm-in transaction in section 91M(1) to (5); and
- clause 65(8), which applies section 91T(2) to (4), and any regulations made for the purposes of section 91T(2)(c), (3)(c) or (5), for the purposes of determining whether a transaction that is varied on or after amendment day ceases to be a deemed section 13 farm-in agreement including to a certain extent (where clause 65(7)) does not apply.

first pre-amendment period means the period between 1 July 2008 and amendment day.

second pre-amendment period means the period between 28 November 2018 (the day of the Government's announcement) and amendment day.

section 13 means section 13 as in force before amendment day and as modified under subdivision 5.

section 13 exploration amount means:

- a) the exploration amount defined in section 13(2) for an actual section 13 farm-in agreement; and
- b) the exploration amount defined in section 91N(5), subject to section 91N(6), for a deemed section 13 farm-in agreement.

section 13 exploration requirement means:

- a) the requirement to expend the section 13 exploration amount for an actual section 13 farm-in agreement; and
- b) the exploration requirement defined in sections 91N(1) to (4), subject to section 91N(6), for a deemed section 13 farm-in agreement.

section 13 farm-in agreement means an actual section 13 farm-in agreement or a deemed section 13 farm-in agreement.

section 42(15) means section 42(15) as in force from time to time before amendment day.

Subclause (2) provides that any terms defined in section 91K that are used in this Division have the meanings given in that section (unless otherwise indicated).

Subclause (3) provides that if a transitional provision listed in subclause (4) below refers to a provision in new Chapter 2 Part 5 Division 9, that provision of Division 9 applies for the purposes of the transitional provisions in relation to a deemed section 13 farm-in agreement as it applies in relation to a farm-in transaction with any necessary modifications.

For example, paragraph (b) of the definition of **section 13 exploration requirement** in clause 60(1) is listed in subclause (4), which refers to section 91N(5), a provision in new Chapter 2 Part 5 Division 9. Section 91N(5) would apply to deemed section 13 farm-in agreements with the necessary modifications such as replacing the references to “concessional farm-in transaction” with “a farm-in agreement”.

Subclause (4) lists the relevant transitional provisions that refer to provisions in Chapter 2 Part 5 Division 9 for the purposes of subclause (3) being:

- a) paragraph (b) of the definition of **section 13 exploration amount** in clause 60(1);
- b) paragraph (b) of the definition of **section 13 exploration requirement** in clause 60(1);
- c) clause 62(a);
- d) clause 69;
- e) clause 71(4)(b);

- f) paragraph (b) of the definition of **replacement mining tenement** in clause 73(1); and
- g) paragraph (b) of the definition of **replacement derivative mining right** in clause 74(1).

61. Assessments

This clause validates:

- assessments made in accordance with the Commissioner's practices since 1 July 2008 that will be supported by these amendments; and
- any assessments made in line with the amendments that apply from the date of the Minister's announcement.

It also extends the time in which a person can apply for, or the Commissioner can make, a reassessment if an assessment was not made in line with the provisions that support the Commissioner's practices or the Minister's announcement.

Subclause (1) provides that in this clause, **made** in relation to an assessment includes purportedly made.

It also defines **relevant provision** to mean the deeming provisions that have the effect of applying certain amendments to farm-in agreements entered into from 1 July 2008 and 28 November 2018. These provisions are:

- Clause 64(2), which deems an agreement to have always been a section 13 farm-in agreement if it does not technically meet the requirements of section 13 but would be a concessional farm-in transaction under new Division 9 (subject to some modifications).
- Clause 67(1), which has the effect of applying the amendments to exclude capital expenditure from the exploration amount to farm-in agreements entered into between 28 November 2018 and amendment day.
- Clause 68(1), which has the effect of applying the amendments to give the Commissioner discretion to treat administrative costs as exploration expenditure for farm-in agreements entered into between 1 July 2008 and amendment day.
- Clause 69, which has the effect of applying the amendments to Schedule 1 to provide for the person liable to pay duty under a farm-in agreement, to deemed section 13 farm-in agreements entered into from 1 July 2008.
- Clause 70(2), which has the effect of applying the amendments in section 91P regarding the general rules for charging duty on farm-in transactions to section 13 farm-in agreements entered into between 1 July 2008 and amendment day.

- Clause 71(2), which has the effect of applying the rules in section 91Q to changes to consideration to farm-in agreements during the period between 28 November 2018 and amendment day.
- Clause 72(1), which has the effect of applying the exemption under section 42(15) to transfers of an interest in the mining tenement during the period between 1 July 2008 and amendment day if the amount expended includes administrative costs or were costs expended to achieve a specified outcome or milestone rather than expending a specified amount in the farm-in agreement.
- Clause 73(2), which has the effect of applying the amendments to exempt the transfer of an interest in a replacement mining tenement under a section 13 farm-in agreement during the period between 1 July 2008 and amendment day.
- Clause 73(5), which has the effect of applying the rules in sections 91R(4) to (5) to charge duty on any consideration provided for the transfer of an interest in a mining tenement or replacement mining tenement under a section 13 farm-in agreement during the period between 28 November 2018 and amendment day.
- Clause 74(3), which has the effect of applying the amendments to exempt a derivative mining right or a replacement derivative mining right, or an interest in such a right, acquired under a farm-in transaction during the period between 13 June 2019¹⁵ and amendment day. It also ensures duty can apply to any consideration provided for the acquisition of such a right during this period.

Subclause (2) provides that subclause (3) applies to an assessment of duty made before amendment day that is in line with a relevant provision listed above.

Subclause (3) validates assessments made in accordance with a relevant provision listed in subclause (1). This gives legislative support to concessions applied from 1 July 2008 to farm-in agreements that do not technically satisfy the requirements of section 13. It also provides support for any assessments made in line with the amendments announced by the Minister to start from 28 November 2018.

Subclause (4) provides that subsection (5) applies to an assessment of duty that is made before amendment day that is not in line with a relevant provision.

Subclause (5) provides that the Commissioner may reassess any duty chargeable to give effect to the relevant provision.

¹⁵ Date of commencement of Part 2 of the *Revenue Laws Amendment Act 2019*, which introduced amendments to apply duty to the grant or transfer of a derivative mining right.

Subclause (6) modifies the general five-year reassessment time limit in the Taxation Administration Act if the assessment is not in accordance with a relevant provision to allow:

- a) a taxpayer five years from the original assessment or 12 months after the amendments come into effect (whichever is later) to apply for a reassessment; or
- b) the Commissioner to make a reassessment within five years of the original assessment or 12 months after the amendments commence (whichever is later).

Subdivision 2 – Provisions relating to Chapter 2 Part 5 Division 9

62. Application of section 91K(2)

Paragraph (b)(iv) of the definition of *primary farmor* in section 91K(1) and section 91K(2) ensure that a person is a primary farmor if they have earned an interest in a relevant mining tenement under another farm-in transaction but the transfer of that interest has not been registered yet.

This clause clarifies that a person qualifies as a primary farmor if they have earned the interest in the mining tenement or a derivative mining right under an earlier farm-in agreement entered into before amendment day.

63. Application of Chapter 2 Part 5 Division 9

This clause provides that an agreement can only be a farm-in agreement or a farm-in transaction under Chapter 2 Part 5 Division 9 if the agreement is made on or after amendment day.

Section 13 applies to farm-in agreements entered into before amendment day as modified by the transitional provisions.

Subdivision 3 – Deemed section 13 farm-in agreements

64. Certain agreements taken to be farm-in agreements under section 13

This clause deems agreements that do not meet the requirements of section 13 to be farm-in agreements under that provision if the agreement would be a concessional farm-in transaction under the new provisions. For example, an agreement with an exploration requirement to fund drilling to a specified depth rather than specifying an exploration amount to be expended is a deemed section 13 farm-in agreement because it would be a concessional farm-in transaction under new Division 9.

This clause and clause 61 have the effect of validating concessions for transactions entered into from 1 July 2008 that were assessed as eligible farm-in agreements under section 13 in accordance with the Commissioner's assessing practices, although they did not technically satisfy the requirements of that section.

Subclause (1) provides that subclause (2) applies to an agreement made between 1 July 2008 and amendment day if:

- the agreement does not satisfy the requirements of section 13; and
- if the new farm-in provisions in Chapter 2 Part 5 Division 9 had applied, the agreement would be a concessional farm-in transaction.

Subclause (2) provides that for the purposes of the Act, the agreement referred to in subclause (1) is taken to be, and to always have been, a farm-in agreement under section 13. Concessions applied to deemed section 13 farm-in agreements are validated by clause 61.

Subclause (3) provides that for the purposes of applying the transitional provisions to farm-in agreements entered into between 1 July 2008 and amendment day, new Chapter 2 Part 5 Division 9 is taken to be modified in accordance with subclauses (4) to (8). This means new Division 9 is modified by the following subclauses to determine whether a farm-in agreement is a deemed section 13 farm-in agreement.

Subclause (4) provides that in applying the new farm-in provisions, the references to a derivative mining right are to a right to exploit a mining tenement for agreements made before 13 June 2019.¹⁶

Subclause (5) provides that for an agreement made before 28 November 2018 the definition of **exploration** in section 91K(1) is replaced with "exploration includes development".

This is required because the new definition of exploration, which only includes development for the sole purposes of facilitating exploration or activities incidental to exploration, only applies to agreements entered into from the date of the Minister's announcement.

¹⁶ From 13 June 2019, the *Revenue Laws Amendment Act 2019* amended section 13 to replace a "right to exploit a mining tenement" with "a derivative mining right in relation to a mining tenement".

Subclause (6) modifies section 91N in determining whether a farm-in agreement entered into before amendment day would be a concessional farm-in transaction, so that:

- a) in paragraphs (a)(ii) and (iii), the references to exploration of each relevant derivative mining right are to exploration of each mining tenement to which a relevant derivative mining right relates. This modification better reflects section 13(2), which refers to exploration of the mining tenement as opposed to exploration of the derivative mining right.
- b) paragraph (b) is deleted. Section 91N(2)(b) provides that exploration for a farm-in agreement that involves a farmee earning an interest in a derivative mining right consists only of mining that is authorised by the relevant derivative mining right or incidental activities. This requirement does not apply for agreements entered into before amendment day because this change applies prospectively from the day after Royal Assent.

Subclause (7) provides that in determining whether a farm-in agreement made before amendment day is a deemed section 13 farm-in agreement, Chapter 2 Part 5 Division 9 Subdivision 4 is not to be taken into account. This is because Subdivision 4 deals with variations to farm-in agreements and farm-in transactions and these provisions only apply prospectively to variations made on or after amendment day.

Subsection (8) provides that in determining whether a farm-in agreement made before amendment day is a deemed section 13 farm-in agreement, section 91U is not to be taken into account. This is because section 91U, which applies to farm-in transactions involving only prospecting licences or derivative mining rights in relation to prospective licences, applies prospectively to agreements entered into on or after amendment day.

Subclause (9) provides that clause 64 is subject to clause 65, which deals with variations to section 13 farm-in agreements.

65. Variations and other events affecting section 13 farm-in agreements

This clause has the effect of applying the provisions in sections 91S and 91T to variations that occur on or after amendment day to farm-in agreements entered into before amendment day.

Subclauses (1) to (6) apply when a farm-in agreement is varied to add a farm-in transaction.

Subclause (1) provides that subclauses (2) to (6) apply if, on or after amendment day, an agreement (the **additional agreement**) is added to an existing section 13 farm-in agreement entered into before amendment day.

Subclause (2) provides that the additional agreement is not a concessional farm-in transaction under the new provisions. However, it is a deemed section 13 farm-in agreement if it would be a concessional farm-in transaction under section 91S(3) or (4) or any regulations made for the purposes of 91S(2)(b).

The effect is that any stages added after amendment day to a farm-in agreement entered into before amendment day will receive the concession if it meets the requirements in section 91S(3) or (4). Broadly, these requirements are that the additional agreement must be in relation to a mining tenement or derivative mining right (or both) contained in the farm-in agreement when the agreement was made and the farmee does not already hold an interest in the mining tenement or derivative mining right.

Subclause (3) provides that in determining whether the additional agreement is a deemed section 13 farm-in agreement under subclause (2)(b), section 91S(3) and (4) and any regulations made under section 91S(2)(b), apply with any necessary modifications, to the agreement as if:

- a) the existing agreement were a farm-in agreement; and
- b) any section 13 farm-in agreements in that agreement were a concessional farm-in transaction.

Subclause (4) provides that if the additional agreement is a deemed section 13 farm-in agreement, the Commissioner can reassess duty on other farm-in stages in the agreement for the purposes of applying clauses 70(5), (6), or (7) on the Commissioner's own initiative or on the application of the taxpayer.

Subclause (5) deems the section 13 farm-in agreement as occurring when the additional agreement is added to the existing agreement for the purposes of a reassessment under subclause (4).

Subclause (6) extends the time in which a taxpayer may apply for a reassessment, or in which the Commissioner may reassess, under subclause (4) to the later of:

- five years after the original assessment was made; or
- 12 months after the day on which the additional agreement is added to the existing agreement.

Subclauses (7) to (10) effectively apply section 91T to variations to deemed section 13 farm-in agreements.

Subclause (7) provides that if a deemed section 13 farm-in agreement is varied on or after amendment day and ceases to meet the requirements of a farm-in transaction set out in sections 91M(1) to (5), then the agreement ceases to be a deemed section 13 farm-in agreement.

Subclause (8) applies if a deemed section 13 farm-in agreement is varied on or after amendment day but still meets the requirements for a farm-in transaction. It provides that section 91T(2) to (4), and any regulations made under section 91T(2)(c), (3)(c) or (5), apply for the purposes of determining whether the variation causes the agreement to cease being a deemed section 13 farm-in agreement including to a certain extent.

Subclause (9) provides that in determining whether an agreement has ceased to be a deemed section 13 farm-in agreement under subclause (8), section 91T(2) to (4) and any regulations made under section 91T(2)(c), (3)(c) or (5) apply, with any necessary modifications, as if the agreement were a concessional farm-in transaction.

Subclause 10 applies sections 91T(7) to (10) to a varied agreement that ceases to a deemed section 13 farm-in agreement, with any necessary modifications, in the same way as they apply to an agreement that has ceased to be a concessional farm-in transaction including to a certain extent.

Subdivision 4 – Ongoing application of Act in relation to section 13 farm-in agreements

66. Act to apply in relation to section 13 farm-in agreements as if sections 4 to 13 of amending Act not enacted

This clause provides that after the amendments commence, the Duties Act continues to apply to farm-in agreements (and dutiable transactions under these agreements) entered into before amendment day as if the new farm-in provisions had not been enacted (but as modified by the transitional provisions where relevant).

It has the effect of applying the 'old' or pre-amendment day law to farm-in agreements entered into before amendment day, subject to the modifications of the pre-amendment day law set out in other transitional provisions. See clause 71(2) for an explanation of how clause 66 applies the pre-amendment day law subject to the modifications.

Clause 66 also applies in relation to an agreement made on or after amendment day if the agreement is a deemed section 13 farm-in agreement under clause 65(2)(b), that is, an agreement that is added to a deemed section 13 agreement under a variation that occurs after amendment day. In other words, the pre-amendment day law will apply to the agreement, not new Chapter 2 Part 5 Division 9, but subject to the modifications in clause 65.

Subdivision 5 – Modification of section 13

67. Restriction on activities regarded as exploration or development for purposes of section 13(2)

Section 13(2) defines ‘exploration amount’ for farm-in agreements entered into before the amendment day. On 28 November 2018, the Minister announced that the Duties Act would be amended to ensure the concession does not apply to agreements where the exploration amount involves capital expenditure in connection with mining operations or development of mine infrastructure. The amendments will be backdated to the date of the announcement.

This clause modifies how section 13(2) applies to farm-in agreements entered into between 28 November 2018 and the start of the amendments.

Subclause (1) provides that section 13(2) is taken to have applied to farm-in agreements entered into between 28 November 2018 and the start of the amendments, and continues to apply to these agreements on or after amendment day under clause 66, subject to the modification in subclause (2).

Subclause (2) provides that the reference to “exploration or development” in section 13(2) only includes development to the extent it is carried out solely for the purpose of facilitating exploration or otherwise incidentally to exploration. Limiting development to only activities carried out solely for the purpose of facilitating exploration or otherwise incidentally to exploration excludes any capital expenditure in connection with mining operations or development of mining infrastructure.

68. Commissioner may allow expenditure on administrative costs to be regarded as expenditure on exploration or development for purposes of section 13(2)

Section 91N(6) provides the Commissioner discretion to treat administrative costs as exploration expenditure subject to any limits or conditions imposed by the Commissioner.

This clause has the effect of applying the amendments in section 91N(6) to farm-in agreements entered into between 1 July 2008 and amendment day to provide legislative support for the Commissioner’s assessing practice of treating administrative costs as exploration expenditure.

Subclause (1) provides that section 13(2) is taken to have applied from 1 July 2008 to farm-in agreements entered into before amendment day, and continues to apply on or after amendment day under clause 66, as modified by subclause (2).

Subclause (2) mirrors section 91N(6). For farm-in agreements entered into before amendment day, the Commissioner may treat administrative costs as expenditure on exploration or development for the purposes of section 13(2), subject to any limits or conditions imposed by the Commissioner.

Subdivision 6 – Duty chargeable in relation to section 13 farm-in agreements

69. Application of Schedule 1 to deemed section 13 farm-in agreements

Schedule 1 sets out when liability for duty arises for a dutiable transaction and who is liable to pay it.

For a deemed farm-in agreement (an agreement that does not satisfy section 13 but would be a concessional farm-in transaction under the new provisions), Schedule 1 is taken to have applied from 1 July 2008 as if the reference to the person liable to pay duty in column 4 of the item for section 11(1)(j) were to the farmee as defined in section 91L(1)(b).

70. Section 13 farm-in agreements: modified rules relating to charging of duty

For multi-stage farm-in agreements, the Commissioner's practice has been to charge duty as follows.

- When an agreement contains two or more farm-in transactions for no consideration, nominal duty applies once as if the transactions were a single farm-in transaction.
- If the general rate of duty applies to at least one of the farm-in transactions, the other transactions that would be chargeable with nominal duty are exempt.
- If the general rate of duty applies to more than one farm-in transaction, the dutiable value of each transaction is aggregated as if they were a single dutiable transaction and the duty applies to the aggregated amount.

Section 91P sets out how duty is charged on multi-stage farm-in transactions entered into on or after amendment day.

This clause modifies section 135 to provide legislative support for this practice for farm-in agreements entered into before amendment day. Assessments made in accordance with modified section 135 are validated by clause 61.

Subclause (1) provides that the reference to section 135 in this clause means section 135 as in force from time to time before amendment day.

Subclause (2) provides that section 135 is taken to have applied from 1 July 2008 to section 13 farm-in agreements entered into before amendment day, and continues to apply these agreements on or after amendment day under clause 66, as modified by subclauses (3) to (9).

Subclause (3) provides that the reference to “exploration amount” in section 135(3) is:

- for an actual section 13 farm-in agreement – the exploration amount defined in section 13(2); and
- for a deemed section 13 farm-in agreement – the exploration amount defined in section 91N(5), subject to section 91N(6).

Subclause (4) provides that subclause (5) applies if an agreement contains two or more section 13 farm-in agreements that would be chargeable with nominal duty.

Subclause (5) provides that nominal duty applies once to all of the section 13 farm-in agreements as if they were a single dutiable transaction.

Subclause (6) provides ensures that nominal duty does not also apply to a section 13 farm-in agreement for which there is no consideration if the farm-in agreement contains other farm-in transaction(s) to which the general rate of duty applies.

Subclause (7) provides that if a multi-stage farm-in agreement contains two or more section 13 farm-in agreements to which the general rate of duty applies, the dutiable value of each section 13 farm-in agreement is to be aggregated. The general rate of duty applies to the aggregated value. The Commissioner will decide how to apportion the duty between the transactions.

Subclause (8) provides that if the duty for a section 13 farm-in agreement is to be reassessed at any time, the duty that applies to any other section 13 farm-in agreement that will be affected will also be reassessed.

Subclause (9) provides that the time limits in the Taxation Administration Act do not apply to a reassessment under subclause (8).

See **Examples 12 to 14**.

71. Changes to consideration

The amendments to ensure that duty is assessed on all consideration paid for a farm-in transaction other than the exploration amount were announced as applying from the date of Minister’s announcement on 28 November 2018. The amendments to provide a refund for contingent consideration that is not paid were also announced as applying from this date.

For a farm-in transaction entered into on or after amendment day, section 91Q allows duty to be reassessed if consideration (including contingent consideration) for a farm-in transaction is varied. This clause applies the rules in section 91Q to farm-in agreements entered into from the date of the Minister's announcement. Any assessments made in accordance with these rules are validated by clause 61.

Subclause (1) provides that for the purposes of the clause:

- **consideration** does not include the section 13 exploration amount; and
- for a farm-in agreement made before 13 June 2019, **derivative mining right** means a right to exploit a mining tenement.¹⁷

Subclause (2) has the effect of applying the rules in section 91Q to changes to consideration to:

- farm-in agreements made during the period between 28 November 2018 and amendment day; and
- a farm-in agreement (for example, an additional stage) added on or after amendment day to a farm-in agreement made before amendment day.

It provides that for a section 13 farm-in agreement entered into between 28 November 2018 and amendment day, or added farm-in agreements deemed to be section 13 farm-in agreements under clause 65(2)(b), the Duties Act applies during that period, and continues to apply on or after amendment day under clause 66, subject to the modifications in subclauses (3) to (11).

Clause 71(2) has two limbs. In the first limb, clause 71(2) backdates the rules in clause 71(3) to (11) so that they are taken to have applied between 28 November 2018 and amendment day. For example, assume a section 13 farm-in agreement was made on 1 January 2019. Then, on 1 January 2020, the consideration is increased before the agreement is completed (as defined in clause 71(4)). Clause 71(5) to (8) are taken to have applied to the increased consideration.

In the second limb, clause 71(2) ensures that the pre-amendment day law, as it continues to apply under clause 66 on or after amendment day, applies subject to the modifications in clause 71(3) to (11). For example, assume a section 13 farm-in agreement was made on 1 January 2019 and that the amendment day is 1 November 2022. Then, on 1 January 2023, the consideration is increased before the agreement is completed. Clause 71(5) to (8) will apply to the increase in consideration.

¹⁷ From 13 June 2019, the *Revenue Laws Amendment Act 2019* amended section 13 to replace a "right to exploit a mining tenement" with "a derivative mining right in relation to a mining tenement".

In the case of deemed section 13 farm-in agreements under clause 65(2)(b), the first limb of clause 71(2) is not relevant because the agreement will have been made on or after amendment day.

Subclause (3) provides that subclause (5) applies to a section 13 farm-in agreement if consideration for the agreement is increased or reduced before the agreement is completed.

Subclause (4) defines **completed** for the purposes of subclause (3) to mean:

- for an actual section 13 farm-in agreement, when the exploration requirement has been fulfilled and the interest has been transferred to the farmee; or
- for a deemed section 13 farm-in agreement, the agreement has been completed in accordance with section 91Q(2).

Subclause (5) provides that the Commissioner must assess or reassess the duty on a farm-in agreement on the basis of the increased or reduced consideration.

Subclause (6) requires the taxpayer to apply for a reassessment if the consideration is reduced.

Subclause (7) applies section 31(5) with any necessary modifications so that if the consideration is increased after a farm-in agreement made between 28 November 2018 and amendment day is duty endorsed, the farmee must lodge the instrument that effects the increase in consideration or the transfer duty statement (whichever is relevant) by the later of:

- within two months of the amendment day; or
- within two months after the day on which consideration under the transaction is increased.

Subclause (8) provides that duty applies to the increased consideration at the same rate and using the same thresholds that applied when liability for duty on the agreement initially arose.

Subclause (9) provides that subclause (5) does not apply when a taxpayer is applying for a reassessment of duty paid on contingent consideration under subclause (10).

Subclause (10) provides that section 32(1) and (3) apply with any necessary modifications if contingent consideration is not given or will not be given for a section 13 farm-in agreement because an event did not happen.

Subclause (11) modifies the time limit in which a taxpayer can apply for a reassessment if contingent consideration is not paid. A taxpayer cannot apply for a reassessment more than:

- five years after the day on which the farm-in agreement is made;
- 12 months after the passing or expiry of the time specified for the happening of the event; or
- 12 months after amendment day (whichever is later).

The application for a reassessment must be made within that time.

72. No double duty: exploration amount

This clause modifies the ‘no double duty’ rules in section 42(15) when applying the Act to farm-in agreements entered into from 1 July 2008 to the day before amendment day.

This clause and clause 61 validate exemptions applied under section 42(15) to transfers of an interest in the mining tenement if the amount expended includes administrative costs or were costs expended to achieve a specified outcome or milestone rather than expending a specified amount in the farm-in agreement.

Subclause (1) provides that the Duties Act is taken to have applied from 1 July 2008 to amendment day, and continues to apply to section 13 farm-in agreements after amendment day under clause 66, as modified by subclause (2).

Subclause (2) provides that the reference in section 42(15) to “exploration amount having been expended” is a reference to the section 13 exploration requirement for the agreement having been fulfilled.

For an actual section 13 farm-in agreement, the section 13 exploration requirement means the requirement to expend the exploration amount for the agreement as defined in section 13(2). For a deemed section 13 farm-in agreement, the section 13 exploration requirement is defined in section 91N(1) to (4) subject to section 91N(6).

73. No double duty: mining tenements

The Commissioner’s assessing practice has been to allow the concession when an interest in a replacement mining tenement is transferred to the farmee instead of an interest in the mining tenement the subject of the farm-in transaction. This usually occurs for tenement conversions such as when an exploration licence the subject of the farm-in agreement is converted to a mining lease before the earned interest is transferred to the farmee.

This clause provides legislative support for concessions applied to transfers of an interest in a replacement mining tenement from 1 July 2008 and to allow a concession for transactions on hand that were entered into before amendment day.

For farm-in agreements entered into from 28 November 2018, this clause also ensures that duty applies to any consideration given for the transfer of the interest in the mining tenement or replacement mining tenement.

Subclause (1) defines **replacement mining tenement** for the purposes of this clause to mean:

- a) for an actual section 13 farm-in agreement – a mining tenement:
 - (i) that is granted after the agreement is made to replace (wholly or partly) the mining tenement under the agreement, or an earlier replacement mining tenement; and
 - (ii) that relates only to the land, or part of the land, the subject of the mining tenement being replaced; and
 - (iii) of which the farmor is the holder, or one of the holders; and
- b) for a deemed section 13 farm-in agreement – the meaning given in section 91M(6).

Subclause (2) provides that the Duties Act applies to farm-in agreements made between 1 July 2008 and the day before amendment day, and continues to apply after amendment day under clause 66, subject to subclauses (3) and (4).

Subclause (3) provides that duty does not apply to the transfer of, or an agreement for the transfer of, an interest in a mining tenement if:

- a) the tenement is a replacement mining tenement; and
- b) the transfer or agreement –
 - (i) is occurring instead of a transfer or an agreement to transfer the mining tenement the subject of the farm-in agreement; and
 - (ii) would be a transfer under the farm-in agreement except only that the mining tenement is a replacement mining tenement or a replacement mining tenement that was not anticipated in the farm-in agreement; and
- c) the farm-in agreement is duty endorsed; and
- d) the exploration requirement has been fulfilled.

Subclause (4) ensures that the transfer of an interest in a replacement mining tenement can still be exempt from duty under section 42(15) or subclause (3) if the section 13 farm-in agreement was not duty endorsed because it is not a dutiable transaction under section 91DA.

Section 91DA provides that transactions relating to prospecting licences, or derivative mining rights in relation to prospecting licences, are not dutiable transactions, unless they include other dutiable property. This section applies to transactions that occur on or after 1 July 2022.

A farm-in agreement entered into on or after 1 July 2022 involving only a prospecting licence is not a dutiable transaction and is not required to be duty endorsed. If the prospecting licence is converted to another tenement type, for example, a mining lease, the transfer of the interest in the replacement mining lease can still be exempt under subclause (3) even though the farm-in agreement is not duty endorsed.

Example 34

A farm-in agreement made on 1 July 2022 provides that the farmee can earn a 20 per cent interest in a prospecting licence after spending \$200,000 on exploration. The agreement is a farm-in agreement under section 13 as in force on 1 July 2022. Under section 91DA, the farm-in agreement is not a dutiable transaction so it is not required to be lodged for duty endorsement.

The farmee expends the exploration amount. The prospecting licence is converted into a mining lease. A 20 per cent interest in the mining lease is transferred to the farmee. Section 91DA does not apply to the transfer, so the transfer is a dutiable transaction.

Subject to clauses 73(5) to (7), the transfer of the 20 per cent interest in the mining lease to the farmee is exempt from duty under clause 73(3) even though the farm-in agreement was not duty endorsed.

Subclauses (5) to (8) ensure that duty applies to any consideration given by the farmee to take a transfer of an interest in the mining tenement or a replacement mining tenement.

Subclause (5) provides that the Duties Act is taken to have applied between 28 November 2018 and the amendment day, and continues to apply after amendment day under clause 66, subject to subclauses (5) to (8).

Subclause (6) applies duty to the transfer of, or an agreement for the transfer of, an interest in a mining tenement or replacement mining tenement if:

- a) there is, or will be, consideration for the transaction; and
- b) the farm-in agreement is made on or after 28 November 2018 but before amendment day or is an added farm-in agreement that is treated as a deemed section 13 farm-in agreement under clause 65(2)(b).

Paragraph (b) ensures that duty also applies to any increase in consideration for any stages added after amendment day to a farm-in agreement entered into before amendment day.

Subclause (7) provides that the dutiable value of the transfer or agreement is:

- a) the consideration for the transfer or agreement if the agreement was not duty endorsed because it was not a dutiable transaction under section 91DA; or
- b) the consideration to the extent it was not taken into account when the farm-in agreement was duty endorsed.

Subclause (8) provides that for the purposes of subclauses (6) and (7), the exploration amount for the section 13 farm-in agreement is not consideration for the transfer or agreement.

74. No double duty: derivative mining rights

Section 42(15) contains the current 'no double duty' rules for transfers under a farm-in agreement. The subsection exempts duty on a transfer, or an agreement for the transfer, of an interest in a mining tenement under a farm-in transaction if the exploration amount has been spent and the farm-in agreement is duty endorsed.

Prior to 13 June 2019, a derivative mining right was a right to exploit a mining tenement. A grant of a right to exploit a mining tenement was not a dutiable transaction, while the transfer of a right to exploit a mining tenement was dutiable.

Although a farm-in concession could apply to an agreement providing for the farmee to earn a right to exploit a mining tenement, section 42(15) would not apply to exempt a transfer of an existing right because the subsection is limited to interests in a mining tenement.¹⁸ A 'no double duty' provision was not required for the grant of a right to exploit a mining tenement under a farm-in agreement because these grants were not dutiable.

The *Revenue Laws Amendment Act 2019* amended the Duties Act to include derivative mining rights as a new category of rights from 13 June 2019. Duty applies to the grant or transfer of a derivative mining right regardless of whether there is consideration for the transaction. Under the amendments, the references to "a right to exploit a mining tenement" in section 13 were replaced with the term "derivative mining right".

As a result of these amendments, a 'no double duty' provision is required for the grant or transfer of an interest in a derivative mining right on or after 13 June 2019 under a farm-in agreement.

This clause:

- ensures duty does not apply to the grant or transfer of an interest in a derivative mining right or a replacement derivative mining right

¹⁸ This is likely to have been on the basis that a right to exploit a mining tenement was considered to be an interest in a mining tenement. This interpretation changed after the case of *Commissioner of State Revenue v Abbotts Exploration Pty Ltd* [2014] WASCA 211 which found that contractual mining rights do not create an interest in a mining tenement.

on or after 13 June 2019 if it is under a farm-in agreement that has been duly endorsed; and

- charges duty if further consideration is provided for the grant or transfer of an interest in a derivative mining right or a replacement derivative mining right under a farm-in agreement.

Subclause (1) defines the following terms:

derivative mining right, in relation to a farm-in agreement made before 13 June 2019, means a right to exploit a mining tenement.

replacement derivative mining right:

- a) in relation to an actual section 13 farm-in agreement means a derivative mining right –
 - (i) that is granted after the agreement is made to replace (wholly or partly) the derivative mining right the subject of the agreement or an earlier replacement derivative mining right; and
 - (ii) that relates only to land, or to a part of that land, the subject of the replaced right; and
 - (iii) subject to subclause (2), that does not authorise mining beyond the mining authorised by the replaced right; and
 - (iv) of which the farmor is a holder of one of the holders; and
- b) in relation to a deemed section 13 farm-in agreement, has the meaning in section 91M(7) and (8).

replacement mining tenement has the meaning given in clause 73(1).

Subclause (2) ensures that paragraph (a)(iii) of the definition of replacement derivative mining right does not apply if:

- a) the right is granted in relation to a new mining tenement that was granted to replace a previous mining tenement;
- b) the new tenement authorises mining beyond that authorised by the previous tenement; and
- c) the derivative mining right only authorises mining for the same minerals as the right that was replaced.

See ***Example 8***.

Subclause (3) provides that the Duties Act is taken to have applied from 13 June 2019 to the day before the amendment day, and continues to apply after the amendment day under clause 66, as modified by subclauses (4) to (8).

Subclause (4) exempts duty on the grant or transfer of an interest in a derivative mining right if it is occurring under a farm-in agreement. It provides that duty does not apply to a dutiable transaction under a farm-in agreement if:

- a) that transaction involves a derivative mining right; and
- b) the section 13 farm-in agreement is duly endorsed; and
- c) the section 13 exploration requirement for the farm-in agreement has been fulfilled.

Subclause (5) exempts duty on a derivative mining right that is granted in relation to a replacement mining tenement. This may occur where there is a deemed section 13 farm-in agreement under which the farmee will be granted a derivative mining right in relation to the farmor's mining tenement after they fulfil the exploration requirement. The farmor's mining tenement is then converted to another tenement type and the farmee is granted a derivative mining right in respect of the replacement mining tenement.

This subclause provides that duty does not apply to a dutiable transaction involving a derivative mining right if:

- a) the derivative mining right relates to a mining tenement that is a replacement mining tenement in relation to the farm-in agreement; and
- b) the dutiable transaction –
 - (i) is in lieu of a dutiable transaction involving a derivative mining right that, had it occurred, would have been under the farm-in agreement; and
 - (ii) would be a dutiable transaction under the farm-in agreement except for the fact that the mining tenement is a replacement mining tenement or a replacement mining tenement that was not anticipated in the farm-in agreement; and
- c) the farm-in agreement is duly endorsed; and
- d) the section 13 exploration requirement has been fulfilled.

Subclause (6) exempts duty on a replacement derivative mining right that is occurring under a farm-in agreement. It provides that duty does not apply to a dutiable transaction involving a derivative mining right if:

- a) the right is a replacement derivative mining right in relation to the farm-in agreement; and
- b) the dutiable transaction –
 - (i) is in lieu of a dutiable transaction involving a derivative mining right that, had it occurred, would have been under the farm-in agreement; and
 - (ii) would be a dutiable transaction under the farm-in agreement except for the fact that the right is a replacement derivative mining right or a replacement derivative mining right that was not anticipated in the farm-in agreement; and
- c) the farm-in agreement is duly endorsed; and
- d) the section 13 exploration requirement has been fulfilled.

Subclause (7) provides that the reference to a dutiable transaction in subclauses (5)(b)(i) and (6)(b)(i) includes a transaction that would be a dutiable transaction but for section 91DA.

This subclause is required for situations where, for example, a derivative mining right in relation to a prospecting licence is replaced by another derivative mining right in relation to another tenement type, for example, a mining lease.

If the acquisition of the replacement derivative mining right in relation to the mining lease occurs on or after 1 July 2022, the dutiable transaction would not be in lieu of another dutiable transaction under subclause (6)(b)(i) because the acquisition of the derivative mining right would not be a dutiable transaction under section 91DA.

Subclause (8) ensures that the acquisition of an interest in a replacement derivative mining right can still be exempt from duty under subclause (4)(b), 5(c) or (6)(c) if the section 13 farm-in agreement was not duty endorsed because it is not a dutiable transaction under section 91DA.

Section 91DA provides that transactions relating to prospecting licences, or derivative mining rights in relation to prospecting licences, are not dutiable transactions, unless they include other dutiable property. This section applies to transactions that occur on or after 1 July 2022.

A farm-in agreement entered into on or after 1 July 2022 involving only a derivative mining right in relation to a prospecting licence is not a dutiable transaction and is not required to be duty endorsed. If the prospecting licence is converted to another tenement type, for example, a mining lease, a replacement derivative mining right in relation to the mining lease is granted to the farmor (in a case where the farmee is earning an interest in the farmor's derivative mining right).

When the farmee acquires the interest in the replacement derivative mining right in relation to the mining lease after fulfilling the exploration requirement, the transaction can still be exempt under subclause (6) even though the farm-in agreement is not duty endorsed.

Similarly, in a case where the farmee is to be granted a derivative mining right in relation to the farmor's prospecting licence and that licence is converted to another tenement type, the grant of the derivative mining right in relation to the new tenement can still be exempt under subclause (5) even though the farm-in agreement is not duty endorsed because of section 91DA. ,

Subclauses (9) to (11) ensure duty applies to any further consideration provided for the grant or transfer of an interest in a

derivative mining right under a farm-in agreement if that agreement was entered into on or after 28 November 2018.

Subclause (9) provides that duty applies to a dutiable transaction that would otherwise be exempt under subclause (4), (5) or (6) if:

- a) if there is, or will be, consideration for the dutiable transaction; and
- b) the farm-in agreement is made on or after 28 November 2018 but before amendment day or is an added farm-in agreement that is treated as a deemed section 13 farm-in agreement under clause 65(2)(b).

Paragraph (b) ensures that duty also applies to any increase in consideration for any stages added after amendment day to a farm-in agreement entered into before amendment day.

Subclause (10) provides that the dutiable value of the dutiable transaction is:

- a) the consideration for the dutiable transaction if the agreement was not duty endorsed because it was not a dutiable transaction under section 91DA; or
- b) the consideration to the extent it was not taken into account when the farm-in agreement was duty endorsed.

Subclause (11) ensures that, for the purposes of subclauses (9) and (10), the section 13 exploration amount is not taken to be consideration for the grant or transfer of the derivative mining right.

Matters to be validated from 1 July 2008	Matters to apply from 28 November 2018	Matters to apply from another day
<ul style="list-style-type: none"> • The concession applies to eligible multi-stage farm-in agreements. • Liability for all dutiable transactions the subject of a multi-stage farm-in agreement arises when the agreement is made. • The concession applies to farm-in agreements where the exploration amount includes small amounts of administration costs. • The concession applies to farm-in agreements where the exploration amount involves funding expenditure to achieve an outcome rather than specifying an exploration amount or refers only to a minimum amount required to be expended. • When a multi-stage agreement relates to two or more farm-in transactions at least one of which is charged with duty, any other farm-in transaction that would be chargeable with nominal duty is exempt. • For multi-stage farm-in agreements, the dutiable value of each farm-in transaction is to be aggregated. • The concession applies to farm-in transactions involving mining tenement applications. 	<ul style="list-style-type: none"> • The exploration amount does not include any amount to be spent in connection with mining operations or mining infrastructure. • Duty is assessed taking into account consideration for a farm-in transaction that is varied after the transaction is entered into but before the right to acquire the interest is earned. • Duty applies to further consideration for the transfer of an interest in a mining tenement or derivative mining right to the extent it was not previously assessed. • A reassessment and refund of duty can apply when contingent consideration for a farm-in transaction is not paid. 	<p>Amendment to apply from 13 June 2019:</p> <ul style="list-style-type: none"> • The grant or transfer of a derivative mining right is exempt when the interest has been earned under a farm-in agreement. <p>Amendments to apply from the day after Royal Assent:</p> <ul style="list-style-type: none"> • A cancelled transaction exemption does not apply to a farm-in transaction if the exploration requirement has been fulfilled. • Duty will apply to any signing fee provided for entering into the farm-in agreement to prevent the shifting of consideration for a farm-in transaction to a non-dutiable event. • Amendments to clarify how the concession applies to variations to farm-in agreements, for example, to add another stage to the agreement, to add another mining tenement or to increase an interest in the tenement. • Exploration and development of a mining tenement under a derivative mining right is limited to exploration and development of the tenement in relation to the rights to be obtained under that right. • Farm-in transactions involving only prospecting licences or derivative mining rights in relation to prospecting licences

<ul style="list-style-type: none"> • The requirement to hold the interest jointly will not apply when the farmee earns a derivative mining right, provided the farmor will be the tenement holder when the farmee holds the right. • A person can acquire an interest in an existing derivative mining right under a farm-in agreement. • The interest being earned may, but does not need to, be transferred (or granted) to the farmee. • The holder of a mining tenement includes a person who is entitled to be the registered holder. • Duty is not chargeable on the transfer of an interest in replacement mining tenement or replacement derivative mining right. 		<p>are not a concessional farm-in transaction nor a dutiable transaction.</p>
--	--	---