

Duties and Other Legislation Amendment Bill 2016

Explanatory Notes

Short title

The short title of the Bill is the Duties and Other Legislation Amendment Bill 2016 (the Bill).

Policy objectives and the reasons for them

The Bill amends the *Duties Act 2001* (Duties Act) and the *First Home Owner Grant Act 2000* (FHOG Act) to implement 2016–17 State Budget measures.

The Duties Act is amended to extend the existing transfer duty concession for interfamilial transfers of family primary production businesses (family primary production business concession) by removing the requirement that the transfer be by way of gift, from 1 July 2016.

The Duties Act is also amended to impose a 3% duty surcharge that will apply to direct and indirect acquisitions of specified residential property in Queensland by foreign acquirers (additional foreign acquirer duty, or AFAD). This measure will apply from 1 October 2016.

The FHOG Act is amended to increase the amount of the Queensland First Home Owner's Grant (the grant) from \$15,000 to \$20,000 for eligible transactions entered into between 1 July 2016 and 30 June 2017, both dates inclusive.

Achievement of policy objectives

Duties Act 2001

Family primary production business concession

A transfer duty concession is currently provided under the Duties Act for the transfer of land used for a family primary production business (including any adjacent residential land) or personal property used to conduct the business on the land, subject to specified conditions being satisfied. Specifically, the transfer must occur between specified family members. In addition, the concession currently only applies to the extent the transfer is by way of gift, meaning that transfer duty will be imposed on the amount of any consideration paid. The concession is also available for certain indirect acquisitions involving family partnerships, family trusts and family unit trusts, which again must be by way of gift.

The concession will be amended to remove the requirement that the transaction be by way of gift, thus extending application of the concession to where consideration is paid. The amendments commence on 1 July 2016.

Additional foreign acquirer duty

The Duties Act will be amended to impose an additional amount of transfer duty, landholder duty or corporate trustee duty on transactions in which a foreign person acquires certain residential land in Queensland, either directly or indirectly. The additional amount of duty is referred to as 'additional foreign acquirer duty' or 'AFAD'. The AFAD is imposed at a rate of 3% of the dutiable value of a relevant transaction, to the extent of the foreign person's interest acquired through the transaction, and to the extent that interest relates to residential land, as defined.

In order to facilitate imposition of AFAD, the Bill inserts the concept of a 'foreign person' into the Duties Act, which is a foreign individual, foreign corporation or the trustee of a foreign trust. The Bill inserts specific definitions for these terms; however, they will be explained generally here. A 'foreign individual' is an individual other than an Australian citizen or permanent resident. A 'foreign corporation' is a corporation that is incorporated outside Australia, or a corporation that is controlled by a foreign person or persons. Control tests for foreign corporations are specified. A 'foreign trust' is a trust in which at least 50% of the interests in the trust are held by a foreign person or persons.

In relation to residential land on which AFAD will be imposed, the Bill inserts a concept of 'AFAD residential land' into the Duties Act. Generally, AFAD residential land is land in Queensland that is used, or will be used, solely or primarily for residential purposes. The definition covers a number of scenarios including established homes and apartments, vacant land upon which a home or apartment will be built, land for development for residential use and refurbishment of a building for residential use.

As imposition of the AFAD aligns with the existing transfer duty, landholder duty and corporate trustee duty frameworks in the Duties Act, subject to the specific provisions made for AFAD, the same treatments will apply for AFAD as for the duty to which it relates. This includes, for example, the time liability arises, the liable parties, exemptions, and notification, lodgement and stamping requirements. To put the matter beyond doubt, certain concessions which might otherwise be expected to have some relevance for AFAD are specifically noted not to apply for the AFAD calculation. The concessions will continue to apply for the non-AFAD related transfer duty imposed, as intended. Other concessions will simply have no practical scope of operation for AFAD.

In order to protect the interests of non-foreign parties to a transaction in which AFAD is imposed and to protect the State's revenue, the Bill inserts a statutory right of recovery as between the non-foreign and foreign liable parties, and statutory charge provisions.

The AFAD amendments apply if liability for transfer duty, landholder duty or corporate trustee duty arises on or after 1 October 2016.

First Home Owner Grant Act 2000

The FHOG Act currently provides a grant of \$15,000 for first home buyers who have entered into an eligible transaction which has been completed and who satisfy certain eligibility criteria. An eligible transaction is a contract to purchase or build a new home, or the building of a new home by an owner-builder.

The FHOG Act will be amended to increase the amount of the grant to \$20,000 for eligible transactions entered into between 1 July 2016 and 30 June 2017, both dates inclusive. When an eligible transaction is entered into is determined by reference to the ‘commencement date’ for the eligible transaction, as defined in the FHOG Act. The commencement date for a contract to purchase or build a new home is the date when the contract is made, while the commencement date for the building of a new home by an owner-builder is generally the date when laying the foundations for the home starts.

Alternative ways of achieving policy objectives

The policy objectives of the Bill can only be achieved by legislative amendment.

Estimated cost for government implementation

The implementation costs are expected to be met from existing budget allocations.

Consistency with fundamental legislative principles

The Bill is generally consistent with fundamental legislative principles. Potential inconsistencies are discussed below

***Legislation should have sufficient regard to the rights and liberties of individuals—
Legislative Standards Act 1992, section 4(2)(a)***

Amendments to the Duties Act – AFAD

General

While the AFAD amendments apply only to foreign acquirers, this measure is necessary as foreign acquirers are not necessarily subject to some of the other major sources of State Government revenue. It is therefore important to ensure that foreign acquirers, who benefit from Government services and infrastructure, make an appropriate contribution to their delivery.

Despite foreign acquirers being liable for additional duty, such persons will be afforded the same objection and appeal rights available to all taxpayers under the Duties Act and the *Taxation Administration Act 2001* (Taxation Administration Act).

New lodgement obligation and offence

Clause 9 inserts a new lodgement requirement for an acquirer where AFAD applies to a relevant transaction (new section 246H). In addition clause 9 requires certain persons to give

notice to the Commissioner in particular circumstances where a reassessment power applies (new section 246A).

The two abovementioned new provisions will be subject to the offence provisions under the Taxation Administration Act. Under the Taxation Administration Act, it is an offence for a person to fail, without reasonable excuse, to give a notice or comply with a lodgement requirement under a tax law. It is also an offence for a person to give to the Commissioner a document containing information that the person knows, or should reasonably know, is false or misleading in a material particular.

The relevant provisions are necessary to allow the effective administration of AFAD so that the Commissioner is made aware of matters when a liability may apply for assessment or reassessment. For these lodgement and notification requirements to be meaningful, it is necessary that offences apply where they are breached, in the same way as existing notice and lodgement obligations.

Clause 9 introduces part 6 into new chapter 4 establishing a statutory charge in favour of the Commissioner where all or part of a transfer duty liability which includes AFAD is not paid by the date the amount is required to be paid. This charge is similar to the Commissioner's existing powers under the Duties Act to register a charge over property in the context of Electronic Lodgement Network (ELN) transfers (for electronic conveyancing). Other existing charges are also provided for revenue protection, to secure payment of landholder duty under the Duties Act, debts under the FHOG Act, and land tax debts under the *Land Tax Act 2010*.

As with these other charges, the amendments provide that a charge securing transfer duty where additional duty is unpaid will rank as a first charge over the chargee's interest in land. This will mean that these tax debts will be paid prior to payment of debts owed to other secured creditors in relation to the transferee's interest in the land. Some mortgagees may have concerns that providing priority to the Commissioner's charge in this way will negatively impact on their securities. However, the charge is necessary to protect revenue, where recovery may be made more complex where a foreign purchaser is liable.

The charging provisions seek to strike a balance between protection of revenue and rights and interests of person affected by the provisions through:

- limitation of the statutory charge to the chargee's interest in the land;
- requiring the charge to be registered before it runs with the land; and
- allowing the charge to be registered only while the chargee for the relevant duty transaction is still the registered owner of the land.

In particular, these measures are intended to protect bona fide purchasers in good faith. Until registered, the statutory charge simply gives the Commissioner a right to priority of payment from any sale of the land. If, after the relevant transaction is complete, the chargee gives security over the land to a mortgagee, the Commissioner's statutory charge would have priority to that mortgage. However, the prospects of this are considered low, as:

- the charge only arises if duty is not paid; and

- Mortgagees, particularly those taking a second or subsequent mortgage, take into account a range of risks of non-payment in their lending decisions. The potential for an unregistered first charge in favour of the Commissioner already exists for unpaid transfer duty for ELN transfers under chapter 2, part 15, division 4, and for unpaid landholder duty under chapter 3, part 1, division 7 of the Duties Act. The potential existence of a charge under the amendments will simply be another commercial factor to be taken into account in their lending decision.

In relation to other interests which may be created by the chargee, impacts of an unregistered Commissioner's charge will be dependent on the nature of the interest granted, but in most cases are expected to be limited. For example, a person's ability to be granted a lease by the chargee will not be affected. If, on the other hand, the chargee transfers the land to a purchaser, provided that transfer to the purchaser is registered, the Commissioner's charge over the land lapses and therefore will not impact the purchaser. However, if the parties choose not to register, then they assume the risks of that decision, including operating outside the protections of indefeasibility provided by the *Land Title Act 1994*.

New section 246I provides a right of recovery for a non-foreign acquirer against the foreign-acquirer for AFAD relating to transfer duty paid on a transaction. This provides additional recourse to any non-foreign acquirer should they, for example, pay duty including AFAD to avoid, or clear the imposition of a charge over land.

Consultation

Community consultation was not undertaken as the amendments implement Budget measures.

Consistency with legislation of other jurisdictions

Victoria also imposes additional duty for foreign acquirers of residential land. However, this Bill is not uniform with or complementary to the Victorian legislation in this regard. The Bill is not otherwise uniform with or complementary to legislation of the Commonwealth or another state or territory.

Notes on provisions

Part 1 Preliminary

Clause 1 provides that the Bill, when enacted, may be cited as the *Duties and Other Legislation Amendment Act 2016*.

Clause 2 provides for the commencement of the amendments made by the Bill.

Part 2 Amendment of the Duties Act 2001

Clause 3 provides that part 2 amends the *Duties Act 2001*.

Clause 4 amends section 8 to add an additional note to reference the application of additional foreign acquirer duty under new chapter 4.

Clause 5 replaces section 96 with a new section 96 to reflect the fact that the gift requirement for the family primary production business concession has been removed.

Clause 6 omits section 105, which currently provides the concession for both primary production businesses and prescribed businesses. A new section 105 is inserted to provide the concession for primary production businesses.

Duty is imposed on the dutiable value of dutiable transactions. Dutiable value is generally the consideration for the dutiable transaction or unencumbered value of the dutiable property the subject of the dutiable transaction, whichever is the greater. As the current concession is limited to dutiable transactions by way of gift, the dutiable value should not exceed the unencumbered value. Consequently, the current operation of the concession for primary production businesses was that the unencumbered value of the business property and adjacent residential land used to carry on the business was taken to be nil. Dutiable transactions in other dutiable property continue to be liable in the normal way.

New section 105 operates similarly to current section 105. However, its application for primary production businesses is no longer limited to the extent a dutiable transaction is by way of gift. In addition, as consideration may now be paid for the business property and adjacent residential land used to carry on the business, the concession now specifies the dutiable value (rather than the unencumbered value) of these to be nil. As before, dutiable transactions in other dutiable property will continue to be liable in the normal way.

The new section 105A ensures the existing operation of a concession for prescribed businesses continues to apply.

Clause 7 amends section 157 to insert an additional note referencing the application of the additional foreign acquirer duty under new chapter 4.

Clause 8 amends section 205 to insert an additional note referencing the application of the additional foreign acquirer duty under new chapter 4.

Clause 9 inserts a new chapter 4, which contains provisions for Additional Foreign Acquirer Duty (or AFAD). Part 1 of new chapter 4 contains preliminary provisions about AFAD.

New section 230 specifies that the chapter is concerned with imposing AFAD on certain relevant transactions, which are dutiable transactions and relevant acquisitions. Those terms are defined in Schedule 6. Transfer duty is imposed on dutiable transactions under chapter 2. Landholder duty and corporate trustee duty are each imposed on relevant acquisitions, as the context requires, under chapter 3.

New section 231 explains that AFAD is an additional amount of transfer duty, landholder duty or corporate trustee duty for relevant transactions, and names the additional duty ‘additional foreign acquirer duty’ or as abbreviated, ‘AFAD’. It sets out the structure of the chapter. It specifies that AFAD imposed on a relevant transaction is added to the duty imposed on the transaction under chapter 2 or 3. It also makes clear that subject to express provision in chapter 4, references in the Act outside chapter 4, to transfer duty, landholder duty and corporate trustee duty, include any AFAD relating to that duty. As a consequence, the general operation of the Act is intended to continue for each of those duties, whether or not AFAD is also included in the duty through the operation of chapter 4. Subject to the operation of chapter 4 itself for the AFAD, once AFAD applies and becomes part of the transfer duty, landholder duty or corporate trustee duty for the relevant transaction on which it is imposed, the normal operation of the Duties Act for that duty, and duty generally, applies to the liability. So, for example, the same parties who are liable to pay transfer duty on a transaction if AFAD is not imposed on it, will also be liable for all of the transfer duty including AFAD, if AFAD is imposed on that transaction. To put this beyond doubt, new section 231 states that references to transfer duty, landholder duty or corporate trustee duty (and therefore to duty generally), include AFAD where it applies. This treatment is necessary to maintain the revenue protections and operation provided by the existing duty framework.

Part 2 of new chapter 4 provides basic concepts for AFAD. Section 232 defines ‘AFAD residential land’. It is land in Queensland that is or will be used solely or primarily for residential purposes, where particular conditions are met.

Section 233 specifies who is an ‘acquirer’ in respect of each dutiable transaction and relevant acquisition on which AFAD is imposed. Section 234 defines a ‘foreign person’, while ‘foreign individual’ is defined in section 235, ‘foreign corporation’ is defined in section 236, and ‘foreign trust’ is defined in section 237.

Section 238 defines ‘related persons’, which is relevant for the purposes of the foreign corporation and foreign trust definitions. Section 239 clarifies that a reference in the chapter to a partnership or trust holding property is a reference to the holding of the property by the partners for the partnership or trustees on trust.

Part 3 of new chapter 4 imposes liability for AFAD. Section 240 specifies the conditions for the imposition of AFAD, which concern requirements that the relevant transaction involves a foreign acquirer, and relates to AFAD residential land in the specified ways for that transaction type. Section 241 sets out how AFAD residential land must be part of each relevant transaction for AFAD to apply.

Part 4 of new chapter 4 provides for the calculation of AFAD. Section 242 contains definitions of ‘foreign acquirer’ and ‘foreign acquirer’s interest’, for the purposes of the part.

They contemplate apportionment where there may be more than one acquirer for a particular relevant transaction, given AFAD only applies to the extent of the foreign acquirer's interest. For example, if there are three transferees of a block of land as equal co-owners, all individuals, but only one is a foreign acquirer, then AFAD is only applicable to the extent of the foreign acquirer's one third interest under the transaction.

Section 243 lists certain concession provisions in the Duties Act which do not apply to the calculation or payment of AFAD, for example transfer duty concessions for homes. These concessions continue to apply to calculation of the non-chapter 4 duty for the transaction in the normal way.

Section 244 imposes AFAD for transfer duty at a rate of 3% of the dutiable value of the transaction for each of the dutiable transactions on which AFAD is imposed, to the extent of the foreign acquirer's interest.

Under the Duties Act framework, for dutiable transactions where dutiable property is the direct subject of the transaction – for example, a transfer of dutiable property – there are separate dutiable transactions for the separate dutiable property. So if, for example, one written agreement provides for the transfer of five pieces of freehold land, there will be five separate dutiable transactions of agreement for transfer of land, one for each piece of land. Section 30 of the Duties Act operates to aggregate these transactions, and any other dutiable transactions, arising from the one written agreement. Consequently, in cases such as this, there is no need for a specific apportionment down to the AFAD residential land, as for the relevant transaction, it will be the sole land the subject of the transaction. For dutiable transactions and relevant acquisitions which involve the acquisition of an interest in an entity or structure that may hold a pool of dutiable property, the provisions make it clear that AFAD is only applied to the extent that property relevant for calculation of duty on that transaction is AFAD residential land.

Section 245 imposes AFAD for landholder duty at a rate of 3% of the dutiable value of the relevant acquisition for landholder duty in a private landholder, to the extent the landholdings of the landholder are AFAD residential land. A special calculation is provided for the application of landholder duty in a public landholder. The provision reflects the standard calculation for landholder duty in that circumstance, but ensures that for AFAD, the rate applied is 3%, rather than the normal ad valorem duty rates which usually apply in the calculation of the landholder duty. It also limits the calculation to the landholdings of the public landholder which are AFAD residential land.

Section 246 imposes AFAD for corporate trustee duty at a rate of 3% of the dutiable value of the relevant acquisition for corporate trustee duty, to the extent dutiable property held by the corporate trustee directly or indirectly is AFAD residential land, and to the extent of the foreign acquirer's interest in the relevant acquisition.

Part 5 of new chapter 4 provides for the reassessment of duty to impose AFAD in certain circumstances. In particular, section 246A requires the Commissioner to make a reassessment to impose AFAD on a transaction in which AFAD was not previously imposed because the acquirer was not a foreign corporation or foreign trust, but within 3 years the acquirer becomes a foreign corporation or foreign trust. Section 246A also requires the acquirer to give notice to the Commissioner within 28 days of the acquirer becoming a foreign corporation or foreign trust.

These are revenue protection provisions to prevent structuring for avoidance. A specific reassessment provision is not provided where a transaction is assessed on the basis that land the subject of the transaction is not AFAD residential land, but it subsequently becomes AFAD residential land. However, as the definition of AFAD residential land contemplates both how the land is used and how it will be used, where a transaction is assessed on the basis that relevant land is not AFAD residential land at the time of the transaction, but evidence subsequently indicates that it was, the Commissioner's reassessment powers under the Taxation Administration Act would apply and the transaction would be reassessed to include AFAD. The Commissioner's powers under chapter 11 of the Duties Act in relation to avoidance schemes for duty also apply in the normal way to transactions in relation to AFAD where it applies for a transfer duty, landholder duty or corporate trustee duty liability.

Part 6 of new chapter 4 provides for the creation of a charge for unpaid transfer duty. Section 246B imposes a charge on the interest of specified acquirers in AFAD residential land where AFAD is imposed on the transaction and the transfer duty imposed is not paid by the date the amount is payable. Existing provisions for charges in relation to landholder duty under chapter 3, part 1, division 7 of the Duties Act will apply for the total landholder duty amount including AFAD where it applies, in the normal way.

Section 246C allows the Commissioner to apply to the Supreme Court for an order to sell the land. Section 246D provides for when the court must order the sale of land. Section 246E sets out how the proceeds of the sale are to be applied. Section 246F requires the transfer of the land to be registered if it is sold under a court order. Section 246G allows the former owner of the land to recover proceeds of the sale against the parties who were liable to pay the outstanding transfer duty liability.

Part 7 of new chapter 4 provides miscellaneous provisions. Section 246H requires the acquirer for a relevant transaction to lodge a statement in the approved form within 30 days after the date of the transaction. Section 264I provides a statutory right of recovery for non-foreign liable parties against foreign liable parties to the extent of any AFAD paid by a non-foreign party. This provision is intended to help ensure AFAD does not directly impact non-foreign persons, while allowing the provisions of the Duties Act that govern which parties are liable for transfer duty, landholder duty and corporate trustee duty, to operate in their normal way, whether or not AFAD is part of that duty.

Clause 10 amends section 498 as a consequence of the insertion of chapter 4.

Clause 11 inserts a new part 21 into the chapter 17, to provide transitional provisions. New section 661 provides that new sections 105 and 105A as amended or inserted by this Bill apply to a dutiable transaction only if liability for transfer duty arises on or after the commencement. Further, it provides that section 105 as in force before the commencement continues to apply to a dutiable transaction for dutiable property used to carry on particular family businesses of primary production if the liability for transfer duty arose before the commencement.

New section 662 provides that the AFAD provisions inserted by the Bill apply to a relevant transaction if liability for transfer duty, landholder duty or corporate trustee duty arises on or after 1 October 2016.

Clause 12 amends the dictionary in schedule 6 to insert new and amend existing definitions relating to AFAD imposed under new chapter 4.

Part 3 Amendment of First Home Owner Grant Act 2000

Clause 13 provides that part 3 amends the *First Home Owner Grant Act 2000*.

Clause 14 inserts a new division 6 into part 3, to provide for the temporary increase to the amount of the grant.

New section 25D defines ‘particular eligible transaction’ for determining eligibility for the increased amount of the grant. Subsection (1) provides that a ‘particular eligible transaction’ is an eligible transaction mentioned in section 5(1) the commencement date for which is between 1 July 2016 and 30 June 2017, both dates inclusive. Subsections (2) and (3) are aimed at preventing abuse of the temporary increase, where parties replace a contract made prior to 1 July 2016 with a contract made on or after 1 July 2016 for substantially the same, or similar home.

New section 25E specifies that the amount of the grant for a particular eligible transaction (as defined in new section 25D) is \$20,000. However, if the consideration for the transaction is less than \$20,000, the amount of the grant will be equal to the amount of the consideration.

Clause 15 amends the schedule (Dictionary) to insert a definition of ‘particular eligible transaction’.