

18 March 2011

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Dear Mr Jackson

Thank you for the opportunity to comment on the Statutes Amendment (Land Holding Entities and Tax Avoidance Schemes) Bill 2001.

The South Australian Farmers Federation (SAFF) submits the following.

Part 4 of the *Stamp Duties Act 1923 as amended* (the Act) (Land Rich Entities) provides that a land rich entity is an entity in which the unencumbered value of the underlying local land assets of the entity and associate entities is \$1 million or more and the value of the entity's underlying land assets comprises:

- in the case of a primary production entity – 80% or more; and
- in any other case – 60% or more;

of the unencumbered value of the entity's total underlying assets.

By adopting a landholder model, the 80% and 60% tests are removed. This will have the effect of broadening the tax base in relation to primary production entities so that if control of an entity changes and the entity holds South Australian land assets, being farming land above a value of \$1 million, conveyance rates of duty will apply to the land assets being transferred. SAFF objects to the broadening of the tax base in this way.

There will many farming operations in which more than 20% of the value of the entity's assets consist of assets other than land. Often a change in the underlying ownership of farming land held by a private company or trust entity will take place between generations. By removing the 80% threshold in relation to farming entities, many more transactions in which there is a change in the underlying ownership between generations will be subject to duty.

Section 100 of the Bill provides a general liability for duty. A transaction will be liable for duty if it acquires a prescribed interest or increases its prescribed interest in a land holding entity. In this case, the person or group notionally acquires an interest in the underlying local land assets and is liable for duty in respect of the notional acquisition.

Under Section 100(2), the following transactions are dutiable:

- A transaction as a result of which a person or group acquires or has a prescribed interest in a land holding entity; or
- A transaction as a result of which a person or group has a prescribed interest in a land holding entity and increases its prescribed interest in the entity.

Section 100(3) provides that a transaction will be dutiable even though the person or group that has a prescribed interest or increases its prescribed interest is not a party to the transaction.

A group means a group of associates. Under Section 91(8) various people will be associated with each other if certain conditions are met, for example one is the trustee of a trust and the other is a beneficiary of a trust. There are other situations in which people will be associated with each other.

The circumstances in which a person might be associated with another person and therefore be part of a group is very wide. For example, typically in the context of a family trust, the potential beneficiaries of the trust will be a large group of individuals. For the purpose of the definition of "associated", a person may be part of a group by merely being the beneficiary of a trust and, even though that person is not a party to a dutiable transaction, they may be liable for duty simply because they are part of a group of associates. Subsection (8) should be reformed to provide more clarity as to how associations are formed.

Section 102 of the Bill provides where a group has, as a result of a dutiable transaction, a prescribed interest being in relation to a private company a proportionate interest in the entity of 50% or more in a landholding entity the value of the interest acquired in the entity's underlying local land assets, the total unencumbered value of the entity's underlying local land assets multiplied by the fraction representing the proportionate interest of the person or the group in the entity.

This means that if a person or group acquires an interest of, say, 60% in an entity, the person or group will pay duty as if it acquired a 60% interest in the entity's underlying local land assets.

However, if a person or group already has a minority interest in the entity (say 49%) with stamp duty having been paid when the entity acquired that interest and the group increases its 40%

interest to say a 100% interest, then the group or person will be assessed as if it had acquired a 100% interest, no credit being given for the stamp duty paid when the initial 49% interest was acquired. The Bill should be amended so the stamp duty paid in relation to the earlier acquisition is counted in determining duty in respect of a transaction in which a majority interest is acquired.

Section 102A provides that duty payable by a person or group which acquires a prescribed interest in a land holding entity in which the entity's underlying land asset is \$1 million or more is, in the case of an entity that is a private company, duty payable on a conveyance of land with an unencumbered value equivalent to the value of the acquirer's notional interest in the entity's underlying local land assets plus the value of the entity's South Australian goods. I note that Section 91(12) provides that a reference to "goods" does not include the following:

- Goods that are stock-in-trade;
- Materials held for use in manufacture;
- Goods under manufacture;
- Goods held or used in connection with primary production;
- Livestock.

Given that the new provisions seek to assess for duty a transaction in which a person or group acquires a majority interest in a land holding entity on the same basis that would have been the case had the person or group acquired the land directly, there is no basis for including the value of the entity's South Australian goods. By including the value of the entity's South Australian goods, the amount of duty payable on what is essentially a land acquisition may be greater than had the person or group acquired the land directly and not acquired a majority interest in the underlying entity.

In any event the value of "goods" to be taken into account should be limited to a proportion of goods which corresponds to the proportion of land, the subject of the transaction.

Section 92(3) provides that a relevant entity's interest in land will be taken to include an interest in anything fixed to the land, including anything:

- separately owned from the land; or
- physically fixed to the land but notionally severed or considered to be legally separate to the land by operation of another Act or law.

With a significant roll out of wind farms taking place on farming land, a circumstance may arise in which wind turbines are fixed to the land, but are not owned by the farmer. This will usually be the case. Generally speaking, a wind farm operator will take a long-term lease of farming land.

The value of the wind farm infrastructure may be several million dollars, depending on the size of the wind farm. In theory, the relevant entity's interest in the land would be taken to include an interest in the wind farm infrastructure, even though it is not owned by the farmer.

In addition, there may be a plantation of trees on the land or growing crops yet to be felled or harvested. The trees or growing crops may have been sold under a forward sale contract so that, although they are physically fixed to the land (i.e. still growing on the land), they may be considered legally separate from the land by operation of law. Where there is a change in the underlying interest in the private entity which owns the land upon which the trees or crops are growing, the transaction will exclude the value of the trees and crops on the basis that the entity has already disposed of them by way of the forward sale contract. However, for the purpose of determining what is to be included in assessing the relevant entity's interest in the land, the trees and growing crops may be included.

Taxation Administration Act

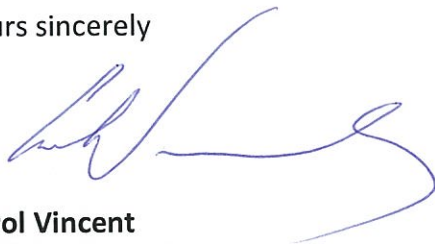
Section 13A(1) provides that if the Commissioner is satisfied that a person has used a tax avoidance scheme (as defined) the Commissioner may determine the tax which the person (and other people) would have been liable apart from the use of the scheme and take action that the Commissioner considers necessary to allow assessments of tax so determined.

The drafting of Section 13A (1) is very vague. It is not clear how the Commissioner will determine what "other people" would have been liable for duty apart from the use of the scheme.

Section 13A(2) goes on to say that if the Commissioner makes a determination under subsection (1), then each person who has "gained a benefit" from the scheme is liable for duty. Again, it may be difficult to say who is going to benefit from a scheme and the drafting of this provision is very vague.

Section 13A(3) provides that the section applies in relation to a scheme "*whenever and wherever entered into*". This effectively means that the Commissioner can assess people who he thinks should have been liable for duty had the scheme not occurred, where the scheme took place some time ago. This means that the section has retrospective effect. SAFF objects to any anti-avoidance provisions with retrospective effect.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Carol Vincent', with a long, sweeping underline.

Carol Vincent
CHIEF EXECUTIVE