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NSW STAMP DUTIES

Presented by:

Denis Barlin FTIA
Director
SBN Lawyers

Andrew Rider FTIA
Barrister
Selborne Chambers

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INTRODUCTION

Recent economic uncertainty and resultant asset depreciations, as well as legislative pressures and client requirements (such as the demand for asset protection and succession planning) have created an opportune environment for restructuring of client affairs.

The depreciation of asset values has meant that direct taxation (such as capital gains tax) implications have not provided a significant impediment to restructuring but transactions taxes such as stamp duties always pose problems. Transactions taxes can often be overlooked in the context of 'friendly' family and related group entity restructures.

Recent amendments to the *Duties Act 1997* (NSW) (**'the Duties Act'**) made by the *State Revenue Legislation Further Amendment Act 2009* (NSW) (**'the Amendment Act'**) have changed the scope of New South Wales stamp duties. These important changes must be considered when advising on restructuring of client affairs and also their impact on transactions with third parties – e.g. business sales.

Recent changes to New South Wales stamp duties which will be considered in this paper include:

- replacing 'land rich' duty with 'landholder' duty;
- the introduction of a general anti-avoidance regime;
- changes in the apportionment of business assets; and
- amendments to the mortgage duty provisions.

CHANGES TO THE *DUTIES ACT 1997* (NSW)

1 GENERAL OVERVIEW

- 1.1 The Explanatory Memorandum which accompanied the Amendment Act provided the 'objects' of the Amendment Act, which included (and amongst other things):
- *'... make the duty chargeable in respect of an acquisition of an interest in a landholder chargeable regardless of whether the landholder is 'land rich' and to make other changes to the scheme for landholder duty ...'*
 - *'... to revise and simplify arrangements for the assessment of duty on mortgages ...'*;
 - *'... to deter artificial, blatant or contrived schemes to reduce, avoid or postpone liability for duty by introducing special provisions relating to the assessment of tax avoidance schemes ...'*;
 - *'... to make further provision for the charging of duty in respect of the transfer of business assets ...'*; and
 - *'... to provide a further concession in respect of transactions charged with nominal duty ...'*.

2 GENERAL PRINCIPLES RELEVANT TO THE INTRODUCTION TO 'LANDHOLDER DUTY'

- 2.1 The provisions in the Amendment Act which related to the imposition of 'landholder duty' were subject to the following policy changes:

- The removal of the sixty percent (60%) 'land rich' test;
- Imposition of duty on the acquisition of ninety per cent (90%) or more of the interests of a widely held trust or a stock exchange listed entity at a concessional rate of ten percent (10%) of the duty otherwise payable on an acquisition of all the landholdings and goods of a landholder. This change applied from 1 October 2009.
- Align the threshold for liability for landholder duty for unlisted companies and trusts that are not listed or widely held at an acquisition of fifty percent (50%) or more;
- Imposes landholder duty on the acquisition of land and goods
- Provides a tracing through holdings of fifty percent (50%) or more;
- Quarantining of interests acquired when the entity did not own land in New South Wales for twelve (12) months;
- Removes the quarantining of interests before the initial announcement of 'land rich' duty;
- Removes the concession for imminent public unit trusts;
- Amends the meaning of unit trust scheme;
- Strengthens the provisions relating to aggregation of interests;
- Amends the associated person definition;
- Allows for a partial application of the just and reasonable discretion;
- Includes an exemption for corporate reconstruction.

3 OVERVIEW OF CHAPTER 4 OF THE *DUTIES ACT 1997* (NSW)

- 3.1 The 'land rich' provisions which were contained in Chapter 4A of the Duties Act were repealed by the Amendment Act. The Amendment Act introduced a new Chapter 4 into the Duties Act, entitled *Acquisition of interests in landholders*.
- 3.2 Chapter 4 of the Duties Act contains five parts, being:
- Part 1 – which provides an overview of the regime and provides the definitions of terms such as 'landholder' and what the 'land holdings' of a landholder include;
 - Part 2 – which deals with the charging of duty on the acquisition of interests in landholders;
 - Part 3 – which provides for the general principles to be applied under Chapter 4 of the Duties Act;
 - Part 4 – which deals with exemptions and concessions; and
 - Part 5 – which provides for the meaning of specific expressions used in Chapter 4 of the Duties Act.

4 'LANDHOLDER' PROVISIONS - REMOVAL OF THE SIXTY PERCENT 'LAND RICH' TEST

- 4.1 The former Chapter 4A of the Duties Act charged ad valorem duty of 'land rich' transactions. However, the new Chapter 4 of the Duties Act charges ad valorem duty on 'landholder' transactions.
- 4.2 Specifically, the former Chapter 4A of the Duties Act charged land rich duty on a 'relevant acquisition' (former section 163E of the Duties Act), which occurred when (amongst other things) there was an acquisition of a 'significant interest' in a 'land rich' 'landholder'. The former subsection 163B(1) of the Duties Act provided that:

...a landholder is "land rich" if

- (a) it has land holdings in New South Wales with an unencumbered value of \$2,000,000 or more, and*
- (b) its land holdings in all places, whether within or outside Australia, comprise 60% or more of the unencumbered value of all its property.*

- 4.3 However, section 146 of the Duties Act provides a definition of 'landholder'. Subsection 146(1) of the Duties Act provides that:

For the purposes of this Chapter, a landholder is a unit trust scheme, a private company or a listed company that has land holdings in New South Wales with an unencumbered value of \$2,000,000 or more.

- 4.4 That is, there is no longer a requirement that the relevant landholder into which is subject to the transaction needs to have land holdings of 60% or more of its unencumbered value of all of its property before ad valorem duty is charged if there is a transaction with respect to its membership interests. Item (a) of the Explanatory Note accompanying the Amendment Act provided that:

Liability for duty will be assessed on the acquisition of an interest in a landholder whether or not that landholder is "land rich". That is, an acquisition of a significant interest in a unit trust scheme or company will be dutiable under the provisions if the scheme or company has land holdings with an unencumbered value of \$2,000,000 or more. It will no longer be necessary to establish that its land holdings comprise 60% or more of the unencumbered value of all its property. This change will not apply to acquisitions in primary producers. Duty will only be chargeable on an acquisition of a significant interest in a primary producer if the unencumbered value of its land holdings comprise 80% or more of the unencumbered value of all its property.

- 4.5 That is, under the new regime, to the extent that a 'unit trust scheme', a 'private company' or a 'listed company' has land which has an unencumbered value of \$2 million or more, then that entity will be considered a 'landholder'. The proportionate holdings on non-land holdings is irrelevant.
- 4.6 It should also be noted that the threshold \$2 million unencumbered value test contained in subsection 146(1) of the Duties Act relates to 'land holdings in New South Wales.' It does not include value of 'goods', notwithstanding that if the landholder provisions do apply to an 'acquisition', then ad valorem duty is charged on the unencumbered value of both land holdings in New South Wales, as well as goods in New South Wales (see paragraph 4.4).
- 4.7 It should be noted that the \$2 million threshold has not changed since 2003.
- 4.8 The term 'land holdings' is defined in section 147 of the Duties Act. Subsection 147(1) of the Duties Act provides that '*For the purposes of this Chapter, a **land holding** is an interest in land other than the estate or interest of a mortgagee, chargee or other secured creditor, subject to this section.*' The definition is similar to the former section 163C of the Duties Act, except that there is no carve-out from 'land holdings' in the subsection 147(1) of the Duties Act for interests in land being a profit a prendre.

4.9 As noted at paragraph 4.4, landholder duty is relevant for 'acquisitions' in 'landholders', which includes:

- unit trust schemes;
- private companies; and
- listed companies.

(a). Unit Trust Schemes

4.10 Section 163L of the Duties Act defines the term 'unit trust scheme' for the purposes of Chapter 4 of the Duties Act. That section defines the term 'unit trust scheme' by reference to the definition contained in the Dictionary of the Duties Act, and includes '*... a managed investment scheme ... [and] ... any sub-trust of a unit trust scheme (as defined in the Dictionary) or a managed investment scheme*'.

4.11 Managed Investment Schemes

4.11.1 That is, the landholder duty provisions now impose ad valorem duty on an acquisition in a 'managed investment scheme' which meets the definition of 'landholder' as a result of the extended definition of 'unit trust scheme' contained in section 163L of the Duties Act. Regard should be given to the definition of the term 'managed investment scheme' contained in section 9 of the *Corporations Act 2001* (Cth). That is, a 'unit trust scheme' now includes time-sharing schemes and primary production type schemes.

4.12 Inclusion of 'sub-trusts' in the definition of 'unit trust scheme'

4.12.1 The meaning of 'unit trust scheme' contained in section 163L of the Duties Act now includes 'sub-trusts':

Without limiting the meaning of unit trust scheme in the Dictionary, the following are taken to be unit trust schemes for the purposes of this Chapter ... any sub-trust of a unit trust scheme ... or a managed investment scheme...

4.12.2 The term 'sub-trust' is not defined for the purposes of paragraph 163L(b) of the Duties Act. It is assumed that the term refers to property held in a 'subsidiary' trust arrangement with respect to the unit trust scheme' or the 'managed investment scheme' from which the sub-trust is defined.

4.12.3 Consideration will need to be given to the landholder implications of (for example) re-segregating assets within a 'unit trust scheme' or a 'managed investment scheme', notwithstanding that there is no change in 'beneficial' holdings of the sub-trust.

4.13 Definition of unit trust scheme

4.13.1 The definition of the term 'unit trust scheme' is defined in clause 1 of the Dictionary of the Duties Act as:

unit trust scheme means any arrangements made for the purpose, or having the effect, of providing, for persons having funds available for investment, facilities for the participation by them, as beneficiaries under a trust, in any profits, income or distribution of assets arising from the acquisition, holding, management or disposal of any property whatever pursuant to the trust.

4.13.2 Further, there are two types of 'unit trust schemes' for the purposes of the Duties Act, being 'public unit trust schemes' and 'private unit trust schemes'. 'Private unit trust schemes' are defined in clause 1 of the Dictionary of the Duties Act as '*... a unit trust scheme that is not*

a public unit trust scheme ..., whereas the term 'public unit trust scheme' is defined as '*... a listed trust or a widely held trust...*'.

4.13.3 The terms 'listed trust' and 'widely held trust' are also defined in the Dictionary of the Duties Act. The term 'listed trust' is defined in clause 1 of the Dictionary of the Duties Act as '*... a unit trust scheme any of the units of which are quoted on the Australian Stock Exchange or any Exchange of the World Federation of Exchanges...*'. The term 'widely held trust' is defined in clause 1 of the Dictionary of the Duties Act by referring to clause 3 of the Dictionary, which in turn provides:

- (1) *For the purposes of this Act, a **widely held trust** means a unit trust scheme which has not less than 300 unit holders none of whom, individually or together with any associated person, is entitled to more than 20% of the units in the trust.*
- (2) *If a registered unit holder in a unit trust scheme holds units as a trustee for 2 or more trusts the unit holder is to be treated as a separate registered unit holder in relation to each of those trusts and the units held under each trust are to be treated as a separate unit holding.*
- (3) *However, a trustee is not to be treated as a separate registered unit holder in relation to 2 or more trusts if, as separate registered unit holders in relation to those trusts, they would be associated persons.*

(b) Private companies

4.14 The term 'private company' is defined in clause 1 of the Dictionary of the Duties Act as: '*... a company that is not limited by shares, or whose shares are not quoted on the Australian Stock Exchange or any exchange of the World Federation of Exchanges.*'

4.15 The place of incorporation of the private company is irrelevant for landholder duty purposes.

(c) Listed company

4.16 The term 'listed company' is defined in clause 1 of the Duties Act as: '*... a company any of the shares of which are quoted on the Australian Stock Exchange or any exchange of the World Federation of Exchanges ...*'.

(d) Case study – Landholders

4.17 The following practical examples illustrate the types of entities that are landholders under the new provisions.

4.17.1 New Technologies Corporation ('**NTC**') establishes a software start-up business structured as an unlisted unit trust ('**The Start-Up Unit Trust**'). NTC leases part of its building to The Start-Up Unit Trust for \$1.00 per annum. The commercial market rental payable for this space would normally be in excess of \$2 million per annum. The unit trust is a landholder.

4.17.2 Lifestyle Furnishings Pty Limited has owned and operated a large furniture store in Sydney's inner west for over 50 years. The company holds stock worth \$5 million and land and buildings worth \$3 million. The company is a landholder.

4.17.3 Aurion Gold NL is a small gold producer listed on the ASX. It holds \$2 million worth of plant and equipment and mining tenements in NSW worth \$6 million. The company is a landholder.

(e) Continuation of the 'land rich' requirements for acquisition of interests in 'primary producers'

4.18 Unlike other 'landholders', the acquisition of interests in 'primary producers' will be subject to ad valorem duty if the primary producer is 'land rich'. That is, duty is chargeable on an acquisition of a significant interest in a primary producer if the unencumbered value of its land holdings comprise 80% or more of the unencumbered value of all its property, and if it has land holdings in New South Wales has an unencumbered value of \$2 million or more.

4.19 Subsection 163D(2) of the Duties Act defines the term 'primary producer', by providing that:

*For the purposes of this section, a **primary producer** is a landholder whose land holdings in all places, whether within or outside Australia, wholly or predominantly comprise land used for primary production or land that would be considered to be land used for primary production if it were land in New South Wales.*

4.20 Subsection 163D(1) of the Duties Act provides that duty is charged on an acquisition in a primary producer only if the primary producer is 'land rich'. The term 'land rich' for the purposes of subsection 163D(1) of the Duties Act in subsection 163D(3) of the Duties Act as:

(3) A primary producer is **land rich** if:

- (a) it has land holdings in New South Wales with an unencumbered value of \$2,000,000 or more, and
- (b) its land holdings in all places, whether within or outside Australia, comprise 80% or more of the unencumbered value of all its property.

4.21 Subsection 163D(5) of the Duties Act contains an anti-avoidance provision similar to the former subsection 163B(3) of the Duties Act, being that property which has been obtained to '*... reduce ... the ratio of its land holdings ...*'. That is, property which is obtained for the purposes of defeating the 80% test contained in paragraph 163D(3)(b) of the Duties Act.

4.22 Subsection 163D(4) of the Duties Act contains a claw-back with respect to acquisitions of interests in land rich primary producers if the entity '*... ceases for any length of time to be a primary producers ...*'.

5 EXTENSION OF LANDHOLDER DUTY ON ACQUISITION OF INTERESTS IN PUBLIC UNIT TRUST SCHEMES AND LISTED COMPANIES

5.1 As discussed at paragraph 4.9, a landholder includes listed companies and unit trust schemes. As a result, landholder duty is charged on (amongst other things) acquisitions of interests in public unit trust schemes (see paragraph 4.13) and 'listed companies' that meet the criteria of being a 'landholder'. The former Chapter 4A of the Duties Act provided that 'landholders' could only be 'a private unit trust schemes', 'wholesale unit trust schemes' and 'private companies'.

5.2 That is, liability for landholder duty is extended under Chapter 4 of the Duties Act as compared to the former Chapter 4A of the Duties Act to include acquisitions of interests in 'public unit trust schemes' and 'listed companies'.

5.3 Whilst subsection 146(1) of the Duties Act defines a 'landholder' as a '*... unit trust scheme, a private company or a listed company that has land holdings in New South Wales with an unencumbered value of \$2,000,000 or more ...*', subsections 146(2) and (3) of the Duties Act characterizes a 'landholder' as either a 'private landholder' or 'public landholder'.

5.4 Specifically, subsection 146(2) of the Duties Act provides that a '*... landholder is a private landholder if the landholder is a private unit trust scheme or a private company...*', whereas subsection 146(3) of the Duties Act provides that a '*... landholder is a public landholder if the landholder is a public unit trust scheme or a listed company*'.

- 5.5 The differentiation as between 'private landholders' and 'public landholders' is relevant for the purposes of determining both the rate of duty charged on an acquisition that attracts landholder duty, and when duty will be charged. Indeed, Item (b) of the Explanatory Note which accompanied the Amendment Act provided that:

Liability for duty will be extended to acquisitions of interests in public unit trust schemes and listed companies that are landholders. At present, only acquisitions in private unit trust schemes and private companies that are landholders are dutiable. However, for public unit trust schemes and listed companies that are landholders (public landholders), a different threshold for the charging of duty will apply. A significant interest is acquired in a public landholder only if a 90% interest in the landholder is acquired. For private landholders a 50% interest suffices. Duty on the acquisition of a significant interest in a public landholder will be charged at a concessional rate, being 10% of the rate that would be charged on a transfer of all the land holdings and goods of the public landholder.

(a) Charging of landholder duty

- 5.6 Part 2 of the Duties Act is entitled *Charging of Duty on Acquisitions of Interests in landholders*. Specifically, section 148 of the Duties Act is the central charging provision for the landholder duty provisions, and provides that 'A liability for duty charged by this Part arises when a relevant acquisition is made'.

- 5.7 Section 148 of the Duties Act replicates the former section 163E of the Duties Act.

- 5.8 Section 149 of the Duties Act provides for when a 'relevant acquisition' may be made.

(1) For the purposes of this Chapter, a person makes a **relevant acquisition** if the person:

(a) acquires an interest in a landholder:

(i) that is of itself a significant interest in the landholder, or

(ii) that, when aggregated with other interests in the landholder held by the person or an associated person, results in an aggregation that amounts to a significant interest in the landholder, or

(iii) that, when aggregated with other interests in the landholder acquired by the person or other persons under transactions that form, evidence, give effect to or arise from what is substantially one arrangement between the acquirers, results in an aggregation that amounts to a significant interest in the landholder, or

(b) having a significant interest, or an interest described in paragraph (a)(ii), in a landholder, acquires a further interest in the landholder.

(2) However, an acquisition of an interest in a private landholder under an arrangement that results in the private landholder ceasing to be a landholder is not a relevant acquisition because of subsection (1)(a)(iii).

- 5.9 Section 149 of the Duties Act closely resembles the former section 163F of the Duties Act.

- 5.10 That is, in order for there to be a 'relevant acquisition' pursuant to section 149 of the Duties Act (and therefore for landholder duty to be charged under section 148 of the Duties Act), there needs to be (amongst other things) an acquisition of an 'interest' which is a 'significant interest' in a landholder.

- 5.11 As with the former subsection 163D(1) of the Duties Act, the term 'interest' is defined in subsection 150(1) of the Duties Act as:

... a person has an **interest** in a landholder if the person has an entitlement (otherwise than as a creditor or other person to whom the landholder is liable) to a distribution of property from the landholder on a winding up of the landholder or otherwise.

- 5.12 That is, in order for there to be an 'interest' (and therefore a 'significant interest' and in turn a 'relevant acquisition'), the thing being acquired needs to entitle the holder to a distribution of property from the relevant entity. If the thing acquired (for example) only entitles the holder to an interest in income and no other property, then the thing acquired may not be an 'interest'.
- 5.13 In *Affinity Health Limited v Chief Commissioner of State Revenue* [2005] NSWSC 663, the court held that in order to have an entitlement to a distribution of property on a winding up, a person had to be a member and could not be a member unless they were so registered as such.
- 5.14 Following *Affinity Health*, the Act was amended (and the landholder provisions embody this amendment), such that if an agreement is made to purchase or issue a share or unit in a landholder, then on and from the completion of the agreement, the purchaser or person to whom the unit of share is to be issued is taken to have acquired an interest in the landholder. An agreement is taken to be completed when the necessary transfer or title documents are delivered to the person acquiring the interest, or the consideration for the purchase or issue is paid, whichever first occurs. These provisions do not apply in respect of shares or units in a landholder which is a listed company or trust.
- 5.15 Subsection 150(2) of the Duties Act defines the term 'significant interest', by providing that:
- (2) A person who has an interest in a landholder has a **significant interest** in the landholder if the person, in the event of a distribution of all the property of the landholder immediately after the interest was acquired, would be entitled to:
- (a) in the case of a private landholder—50% or more of the property distributed, or
- (b) in the case of a public landholder—90% or more of the property distributed.
- 5.16 That is, the threshold for the purposes of determining whether there is a 'significant interest' depends on whether the 'landholder' is a 'private landholder' or a 'public landholder'. If the 'landholder' is a:
- 5.16.1 **private landholder** – then there will be a significant interest if the person who has acquired interests in the landholder which entitles the person to **50% or more** of the property which may be distributed from the landholder; and
- 5.16.2 **public landholder** - then there will be a significant interest if the person who has acquired interests in the landholder which entitles the person to **90% or more** of the property which may be distributed from the landholder.
- 5.17 That is, a difference between the former 'land rich' regime in the former Chapter 4A of the Duties Act is that Chapter 4 of the Duties Act imposes duty on an acquisition which is a 'significant acquisition' in a 'public landholder'.
- 5.18 Another difference as between the former Chapter 4A of the Duties Act and the new landholder regime is that a 'significant interest' is not acquired in a 'private landholder' until a person has acquired an interest in the landholder which entitles the person to 50% or more of the property of the landholder. Specifically, paragraph 150(2)(a) of the Duties Act provides that a:
- ... person who has an interest in a landholder has a **significant interest** in the landholder if the person, in the event of a distribution of all the property of the landholder immediately after the interest was acquired, would be entitled to ... **in the case of a private landholder—50% or more of the property distributed** ... [emphasis added]

- 5.19 Under the former Chapter 4A of the Duties Act a 'significant interest' occurred if a person acquired an interest in a landholder which entitled the person to 20% or more of the property of the landholder. Item (c) of the Explanatory Note accompanying the Amendment Act provided that:

The threshold at which duty is charged on an acquisition in a private unit trust scheme is increased so that it is the same as the threshold for the charging of duty on an acquisition in a private company. In both cases, a significant acquisition will now be an acquisition of an interest of 50% or more. At present, an acquisition of an interest in a private unit trust scheme is dutiable if an interest of 20% or more is acquired.

(b) Case study - Interest

- 5.20 Samuel is registered as a unit holder of The Start-Up Unit Trust. Samuel acquires an interest in the unit trust.
- 5.21 Anna agrees to subscribe for shares in Lifestyle Furnishings Pty Limited and pays her subscription monies. Anna acquires an interest in the company.

(c) Case study – Relevant acquisition

- 5.22 Michael buys 49% of the shares in Lifestyle Furniture Pty Limited. Three (3) years later, Michael buys an additional 2% of the shares in the company. Michael makes a relevant acquisition in the company.
- 5.23 Jenny buys 35% of the shares in Heavy Engineering Pty Limited. Two (2) years later, Jenny's husband, Patrick, buys 45% of the shares in the company. Patrick makes a relevant acquisition in the company.
- 5.24 Brothers Paul, Tom and Alex together buy 60% of the units in The Start-Up Unit Trust. The brothers make a relevant acquisition in the unit trust.

(d) Case study – Significant interest

- 5.25 Liam and Brett hold 40% and 60% of the units in The Start-Up Unit Trust respectively. Brett redeems all of his units. Liam acquires a significant interest in the unit trust.
- 5.26 Aurion Gold NL grants Mark an entitlement to a distribution of its 95% property. Mark acquires a significant interest in the company.

6 IMPOSITION OF LANDHOLDER DUTY ON THE UNENCUMBERED VALUE OF BOTH GOODS AND LAND HOLDINGS IN NEW SOUTH WALES AT THE TIME THE INTEREST IS ACQUIRED

- 6.1 Subsection 155(1) of the Duties Act outlines how landholder duty is charged on a relevant acquisition of a 'private landholder' if the relevant 'acquisition statement' does not disclose any other acquisitions during the 'statement period'. Subsection 155(1) of the Duties Act provides that:

*If an acquisition statement that discloses a relevant acquisition in a private landholder does not disclose any other acquisitions during the statement period, duty is chargeable, at the general rate, on the amount calculated by multiplying the **unencumbered value of all land holdings and goods of the landholder in New South Wales** (calculated at the date of acquisition of the interest acquired) by the proportion of that value represented by the interest acquired in the relevant acquisition. [emphasis added]*

- 6.2 Subsection 156(1) of the Duties Act outlines how landholder duty is charged on a relevant acquisition with respect to a 'public landholder'. Subsection 155(1) of the Duties Act provides that:

*If an acquisition statement discloses a relevant acquisition in a public landholder, the duty chargeable on the relevant acquisition is 10% of the duty that would be chargeable, at the general rate, **on a transfer of all the***

land holdings and goods of the landholder in New South Wales (calculated as if the transfer had occurred at the date of relevant acquisition). [emphasis added]

- 6.3 It seems that the inclusion of goods in the landholder provisions is intended to be aligned with the interposition of duty on the transfer of goods as provided for in Chapter 2 of the Duties Act. However, whereas duty under Chapter 2 of the Duties Act referable to goods is only subject to duty if the goods are transferred ‘... *subject of an arrangement that includes a dutiable transaction over any dutiable property (other than intellectual property) ...*’ (see paragraph 11(1)(j) of the Duties Act), there is no such ‘association’ test in Chapter 4 of the Duties Act. That is, duty is charged on a relevant acquisition of an interest in a landholder on the unencumbered value of the goods held by that entity, notwithstanding that some or all of the goods held by the entity is not connected with the land held by the landholder.
- 6.4 Subsection 156(1) of the Duties Act provides that for the purposes of subsection 156(1) of the Duties Act ‘...*the dutiable value of the **land holdings and goods** is the unencumbered value of land holdings and goods at the date of the relevant acquisition.*’ Further, subsection 156(3) of the Duties Act provides that ‘*If an acquisition disclosed in an acquisition statement is an exempt acquisition, the duty chargeable under this section is to be calculated after deducting from the **dutiable value of the land holdings and goods** the proportion of that value represented by the value of the interest acquired in the exempt acquisition.*’ [emphasis added]
- 6.5 The term ‘general rate of duty’ as provided for in both sections 155 and 156 of the Duties Act is provided for in section 157 of the Duties Act as ‘... *the rate of duty specified in section 32 for a transfer of dutiable property*’. That is, the general rate of duty is the ad valorem rate of duty.
- 6.6 The term ‘goods’ for the purposes of Chapter 4 of the Duties Act is defined in section 163K of the Duties Act as:
- (1) *In this Chapter:*
- goods** does not include the following:
- (a) *goods that are stock-in-trade,*
 - (b) *materials held for use in manufacture,*
 - (c) *goods under manufacture,*
 - (d) *goods held or used in connection with land used for primary production,*
 - (e) *livestock,*
 - (f) *a registered motor vehicle,*
 - (g) *a ship or vessel.*
- (2) *For the purposes of this Chapter, goods are considered to be goods of a landholder if the landholder has any interest in the goods, other than an interest as mortgagee, chargee or other secured creditor.*
- 6.7 The definition of ‘goods’ contained in section 163K of the Duties Act replicates the definition of that term contained in paragraph 11(1)(j) of the Duties Act.
- 6.8 It should also be noted that duty is imposed on the ‘... *unencumbered value of all land holdings and **goods of the landholder in New South Wales** (calculated at the date of the interest acquired) ...*’ [emphasis added] (see both subsections 155(1) and 156(1) of the Duties Act).

(a) Differing rates of duty – ‘private landholders’ and ‘public landholders’

- 6.9 As noted at paragraph 5.16 above, the threshold levels before a ‘significant interest’ arises differs between ‘private landholders’ and ‘public landholders’. As well as this, the landholder provisions impose different rates of duty with respect to the acquisition of interests which are ‘relevant acquisition’ depending on whether the landholder is a ‘private landholder’ or a ‘public landholder’.
- 6.10 As outlined at paragraph 6.1 above, subsection 155(1) of the Duties Act an acquisition of an interest in a ‘private landholder’ that is a ‘relevant acquisition’ ‘... **is chargeable, at the general rate, on the amount calculated by multiplying the unencumbered value of all land holdings and goods of the landholder in New South Wales (calculated at the date of acquisition of the interest acquired) by the proportion of the value represented by the interest acquired in the relevant acquisition**’ [emphasis added]. The ‘general rate’ is defined in section 157 of the Duties Act as the ad valorem rates of duty provided in section 32 of the Duties Act.
- 6.11 That is, a ‘relevant acquisition’ causes ad valorem duty to be charged on the proportionate interest acquired by the person in the landholder.
- 6.12 However, a relevant acquisition in a ‘public landholder’ supposedly attracts a concessional rate of duty. Subsections 156(1) and (2) of the Duties Act provides that:
- (1) *If an acquisition statement discloses a relevant acquisition in a public landholder, the duty chargeable on the relevant acquisition is 10% of the duty that would be chargeable, at the general rate, on a transfer of all the land holdings and goods of the landholder in New South Wales (calculated as if the transfer had occurred at the date of relevant acquisition).*
 - (2) *For that purpose, the dutiable value of the land holdings and goods is the unencumbered value of land holdings and goods at the date of the relevant acquisition.*
- 6.13 That is, duty on an acquisition in a public landholder which causes a ‘relevant acquisition’ to occur is charged at 10% of the ‘general rate’ (i.e. ad valorem duty), which is charged on the unencumbered value of **all of** the land holdings and goods of the landholder at the date of the acquisition.
- 6.14 For example, if a person acquires 91% of the units in a unit trust scheme which is a ‘public landholder’, then the person is required to pay 10% of the ad valorem rates of duty on 100% of the unencumbered value of the land holdings and goods of the landholder which are situated in New South Wales as at the date of the acquisition.

(b) Exemption from landholder duty if the entity has a ‘significant holding in goods’

- 6.15 Section 163G of the Duties Act provides a discretion for the Chief Commissioner to disregard ‘significant holdings in goods’. The section provides an exemption from landholder duty with respect to the unencumbered value of the goods only, if the value of goods for the purposes of determining landholder duty if the landholder’s goods component is greater than 90% of the unencumbered value of the landholder’s total land holdings and goods holdings in New South Wales. The section provides that:

If the Chief Commissioner is satisfied that the unencumbered value of all goods in New South Wales of a landholder comprises not less than 90% of the total unencumbered value of all land holdings and goods in New South Wales of a landholder, the Chief Commissioner may disregard the value of the goods in determining the duty chargeable under this Chapter.

7 LINKED ENTITY PROVISIONS - TRACING

- 7.1 Section 158 of the Duties Act provides for the ‘linked entity’ provisions. Subsection 158(1) of the Duties Act provides that as well as ‘... any interest in land or other property...’ that a unit trust

scheme, a private company or a listed company '*... may hold in its own right ...*', such entities are deemed '*... to hold an interest in land or other property held by a linked entity of the unit trust scheme or company*'.

- 7.2 The term 'linked entity' for the purposes of subsection 158(1) of the Duties Act has a different meaning depending on whether the test applies to a:
- 7.2.1 private unit trust scheme or a private company (see subsection 158(2) of the Duties Act); or
- 7.2.2 public unit trust schemes or listed companies (see subsection 158(3) of the Duties Act).
- 7.3 With respect to private unit trust schemes and private companies, subsection 158(2) of the Duties Act provides that:

- (2) A **linked entity** of a private unit trust scheme or a private company (the **principal entity**) means a person:
- (a) who is part of a chain of persons:
- (i) which includes the principal entity, and
- (ii) which is comprised of one or more links, and
- (iii) in which a link exists if a person would be entitled to receive not less than 50% of the unencumbered value of the property of another person if the other person were to be wound up, and
- (iv) which does not include, in any of the links between the person and the principal entity, a public unit trust scheme or a listed company, and
- (b) who is not a public unit trust scheme or a listed company.

- 7.4 That is, an entity is a 'linked entity' of a private unit trust scheme or a private company if there is a 'chain of persons' which includes the private unit trust scheme or a private company, which includes one or more 'links', where the link exists if a person is entitled to not less than 50% of the assets of the entity in which the link exists. The links cannot include a public unit trust scheme or a listed company.
- 7.5 Similarly, with respect to 'public unit trusts' and 'listed companies', subsection 158(3) of the Duties Act provides the following definition of 'linked entity':

- (3) A **linked entity** of a public unit trust scheme or listed company (the **principal entity**) means a person who is part of a chain of persons:
- (a) which includes the principal entity, and
- (b) which is comprised of one or more links, and
- (c) in which a link exists if a person would be entitled to receive not less than 50% of the unencumbered value of the property of another person if the other person were to be wound up.

- 7.6 Item (e) of the Explanatory Notes accompanying the Amendment Act provides that:

Tracing provisions that allow land holdings to be traced through linked entities are revised so that entities can be linked only where a person has an interest of 50% or more in another entity (rather than 20%).

- 7.7 That is, in order to maintain consistency between the 'significant acquisition' test, the 'linked entity' provisions only applies if the 'link' is entitled to 50% or more of the unencumbered value of the property held by the entity being linked.

(a) Case study – Linked entity

7.8 Heavy Engineering Pty Limited owns 100% of the shares in Lifestyle Furniture Pty Limited, which in turn owns 50% of the units in The Start-Up Unit Trust, which in turn owns 10% of the units in the Listed Unit Trust, which in turn owns 20% of the units in the Unlisted Unit Trust. In this example, the linked entities of Heavy Engineering Pty Limited comprise:

7.8.1 Lifestyle Furniture Pty Limited; and

7.8.2 The Start-Up Unit Trust.

7.9 However, the linked entities of Heavy Engineering Pty Limited do not include the:

7.9.1 Listed Unit Trust (because it is a public unit trust scheme); or

7.9.2 Unlisted Unit Trust (because of the interposed public unit trust scheme).

8 AGGREGATION OF INTEREST TEST – ACQUISITION STATEMENTS

8.1 The 'acquisition statement' requirements have been amended, and are now contained in section 152 of the Duties Act.

8.2 Subsection 152(1) of the Duties Act (as with the former subsection 163H(1) of the Duties Act) provides that a '*... person who has made a relevant acquisition must prepare a statement (an **acquisition statement**) and lodge it with the Chief Commissioner*'.

8.3 As with the former subsection 163H(2) of the Duties Act, subsection 152(2) of the Duties Act provides that an acquisition statement must be prepared in the approved form, and contain certain information:

(2) The acquisition statement is to be prepared in an approved form and must contain the following information:

- (a) the name and address of the person who has acquired the interest,*
- (b) in relation to each interest acquired, the date on which it was acquired,*
- (c) if the relevant acquisition results from the aggregation of the interests of associated persons, particulars of the interests acquired by the person and any associated persons on the date of the relevant acquisition,*
- (d) particulars of the total interest of the person and any associated person in the landholder at that date.*

8.4 Subsection 152(3) of the Duties Act requires 'additional information' to be provided, but only if the 'relevant acquisition' is not an 'exempt acquisition'. That is, the approved form and the information required in subsection 152(2) of the Duties Act is required to be provided to the Chief Commissioner even if the 'relevant acquisition' is an exempt acquisition'. Subsection 152(3) of the Duties Act provides:

(3) The acquisition statement must also contain the following additional information:

- (a) the unencumbered value of all land holdings and goods in New South Wales of the landholder as at the date of the relevant acquisition and, if the landholder is a private landholder, as at the date of acquisition of each interest acquired in the landholder during the statement period,*
- (b) such other information as the Chief Commissioner may require.*

- 8.5 That is, paragraph 152(3)(a) of the Duties Act requires as 'additional information', if the landholder is a 'private landholder' '*... each interest acquired in the landholder during the **statement period***' [emphasis added]. Further, subsection 155(3) of the Duties Act provides that if an acquisition statement discloses one or more other acquisitions during the statement period, then '*... duty is chargeable, at the general rate, on the amounts severally calculated ... in respect of each interest required to be disclosed in the statement*'.
- 8.6 The 'statement period' is provided for in subsections 152(5) to (7) of the Duties Act.
- 8.7 As a starting point, subsection 152(5) of the Duties Act provides that the statement period is '*... the period commencing 3 years before the date of the relevant acquisition and ending on the date of the relevant acquisition*'. That is, the information required to be provided in the acquisition statement prima facie relates to the period of 3 years before the relevant acquisition.
- 8.8 However, subsections 152(6) and (7) of the Duties Act extends the 'statement period' to an 'earlier acquisition' if that earlier acquisition was made at the same time as the acquisition in question, or connected with the later acquisition (i.e. if they are 'related acquisitions'. Specifically, subsection 152(6) of the Duties Act provides that:
- (6) *However, if the relevant acquisition is related to an acquisition of an interest in the landholder that was made before the start of that 3-year period (an **earlier acquisition**), the statement period is the period commencing on the date that earlier acquisition was made (or, if there is more than one, the first of them) and ending on the date of the relevant acquisition.*
- 8.9 The term 'related to an acquisition' is defined for the purposes of subsection 152(6) of the Duties Act, in subsection 152(7) of the Duties Act as:
- (7) *For the purposes of this section, a relevant acquisition is related to an earlier acquisition if it is made as a result of an arrangement entered into at the time of, or in connection with, the earlier acquisition.*

9 QUARANTINING OF INTERESTS ACQUIRED WHEN THE ENTITY DID NOT OWN LAND IN NSW FOR 12 MONTHS

(a) Abolition of former quarantining of 'interests'

- 9.1 The land rich provisions in the former Chapter 4A of the Duties Act quarantined interests which were acquired before the initial announcement of the interposition of land rich duty for the purposes of determining whether there was an acquisition of a 'significant interest'. Those quarantining provisions do not apply in the new landholder provisions.
- 9.2 Specifically, the former subsection 163D(3) of the Duties Act provided that an 'interest' in a landholder is not counted for (amongst other reasons) determining whether there had been an acquisition of a 'significant interest' if either:
- 9.2.1 the interest is in a unit trust scheme acquired before 10 June 1987;
- 9.2.2 the interest is in a private company acquired before 21 November 1986; or
- 9.2.3 the interest was acquired at a time when the landholder did not hold land in New South Wales.

(b) The new limited quarantining provisions

- 9.3 That is, for the purposes of determining whether there is a 'significant interest' as provided for in section 150 of the Duties Act, interests acquired at the times specified at paragraph 9.2 directly above are taken into account.

- 9.4 However, the landholder duty regime quarantines interests for the purposes of determining whether there has been a 'significant interest' if the interest is acquired when the landholder does not hold land in New South Wales. The quarantining only applies for a period of 12 months after the landholder first holds land in New South Wales. Specifically, subsection 150(3) of the Duties Act provides that:

An interest in a landholder that was acquired at a time when the landholder did not hold land in New South Wales is not counted during the period of 12 months after the landholder first holds land in New South Wales.

- 9.5 That is, for the purpose of determining whether a person has a 'significant interest' in a landholder, an interest that the person acquired before the entity became a landholder is disregarded, but only for a period of 12 months after the landholder first holds land in New South Wales.

- 9.6 Item (f) of the Explanatory Notes accompanying the Amendment Act provided that:

Provisions that quarantine interests in private landholders that were acquired before the landholder duty provisions commenced or before the landholder held land are removed. As a result, those interests may be counted for the purpose of determining whether a person has acquired a significant interest in a landholder. However, duty will not be chargeable on an interest to the extent that it was acquired before the commencement of the landholder duty provisions or before the landholder held land in New South Wales. An interest in a landholder that is acquired at a time when a landholder does not hold land in New South Wales will continue to be quarantined for the period of 12 months after the landholder first holds land in New South Wales.

10 EXEMPTION FROM DUTY – INTEREST ACQUIRED BEFORE THE COMMENCEMENT OF LANDHOLDER DUTY

- 10.1 The general exemption provision of section 163A of the Duties Act exempts acquisitions in landholders which were acquired before the commencement of the landholder duty provisions or before the landholder held land in New South Wales. Specifically, paragraphs 163A(g) to (k) of the Duties Act provides that:

An acquisition by a person of an interest in a landholder is an exempt acquisition:

...

- (g) if the interest concerned was acquired before the landholder held land in New South Wales, or*
- (h) if the interest concerned is an interest in a private unit trust scheme acquired before 10 June 1987, or*
- (i) if the interest concerned is an interest in a private company acquired before 21 November 1986, or*
- (j) if the interest concerned is an interest in a private landholder acquired before 1 July 2009 and, at the time of its acquisition, the private landholder was not a land rich landholder within the meaning of Chapter 4A (as in force before its repeal by the State Revenue Legislation Further Amendment Act 2009), or*
- (k) if the interest concerned is an interest in a public landholder acquired before 1 July 2009.*

11 PARTIAL APPLICATION OF THE 'JUST AND REASONABLE' EXEMPTION

- 11.1 The former subsection 163ZB(2) of the Duties Act provided an exemption from land rich duty '...if the Chief Commissioner, being satisfied that the application of this Chapter to the acquisition in the particular case would not be just and reasonable, so determines.' However, the former subsection 163ZB(2) of the Duties Act did not allow for partial exemptions on 'just and reasonable grounds'. Land rich duty was either fully charged, or the transaction was wholly exempt under subsection 163ZB(2) of the Duties Act.

11.2 Indeed, Item (l) of the Explanatory Note which accompanied the Amendment Act provided that:

Provision is made for a partial exemption from duty under the landholder provisions where the Chief Commissioner considers it just and reasonable to grant a partial exemption. At present, only a full exemption can be granted.

11.3 However, section 163H of the Duties Act allows the Chief Commissioner to grant either a full or partial exemption from landholder duty if the Commissioner considers that imposing the duty would not be 'just and reasonable'. Subsection 163(1) of the Duties Act provides that:

The Chief Commissioner may, if satisfied that the application of this Chapter to an acquisition in a particular case would not be just and reasonable:

- (a) *grant a full exemption in respect of the acquisition, or*
- (b) *grant a partial exemption in respect of the acquisition.*

11.4 Subsection 163H(2) of the Duties Act provides that if '*... the Chief Commissioner grants a full exemption in respect of the acquisition, the acquisition is an exempt acquisition.*' Subsection 163H(3) of the Duties Act provides that if '*... the Chief Commissioner grants a partial exemption in respect of the acquisition, the Chief Commissioner may make any reduction in the duty chargeable in respect of the acquisition that the Chief Commissioner considers just and reasonable in the circumstances.*'

12 EXTENSION OF THE CORPORATE RECONSTRUCTION EXEMPTION FROM LANDHOLDER DUTY

12.1 The Amendment Act amended the corporate reconstruction exemption contained in section 281 of the Duties Act to include (amongst other things) an exemption for landholder duty. Item (m) of the Explanatory Notes accompanying the Amendment Act provided that: '*The general exemption under the Act for corporate reconstructions is extended to landholder duty.*'

12.2 The new section 281 of the Duties Act provides that:

- (1) *Duty under this Act is not chargeable on a corporate reconstruction transaction approved by the Chief Commissioner in accordance with guidelines approved by the Treasurer.*
- (2) *For the purposes of this section, a **corporate reconstruction transaction** means:*
 - (a) *a transfer, or agreement for sale or transfer, of dutiable property between corporations that are members of the same group, or*
 - (b) *a surrender of an interest in land by a corporation to a corporation who is a member of the same group, or*
 - (c) *a vesting of dutiable property if the dutiable property was held, immediately before the vesting, and continues to be held, immediately after the vesting, by corporations who are members of the same group, or*
 - (d) ***an acquisition of an interest in a landholder (within the meaning of Chapter 4) by a corporation if the interest is acquired from another corporation who is a member of the same group, or***
 - (e) *an application to register a motor vehicle as a result of a transfer of the vehicle between corporations who are members of the same group.*

- (3) *The approval of the Chief Commissioner may be given to such extent as may be determined by the Chief Commissioner and in accordance with such conditions as may be so determined.*
- (4) *In this section, **corporation** includes a unit trust scheme.* [emphasis added]

13 LANDHOLDER DUTY TRANSITIONAL PROVISIONS

13.1 The following transitional provisions need to be considered:

- 13.1.1 Duty chargeable under Chapter 4 of the Duties Act is charged on 'relevant acquisitions' in private landholders made as a consequence of a person acquiring an interest in a private landholder on or after 1 July 2009.
- 13.1.2 If a person acquires an interest in a private landholder on or after 1 July 2009, acquisitions made before 1 July 2009 are to be counted for the purpose of determining whether the person has made a relevant acquisition in the private landholder under Chapter 4 of the Duties Act.
- 13.1.3 The former Chapter 4A of the Duties Act continues to apply in respect of a 'relevant acquisition' in a 'land rich' 'landholder' (within the meaning of that Chapter) made as a consequence of a person acquiring an interest in the land rich landholder before 1 July 2009.
- 13.1.4 An interest that is acquired in a private company or private unit trust scheme on or after 1 July 2009 as a result of an agreement entered into, or option executed, before 11 November 2008 is to be treated as if it were acquired before 1 July 2009. As a result, the former Chapter 4A of the Duties Act applies to a relevant acquisition made as a result of such an acquisition, but the acquisition may still be counted for the purposes of determining whether a relevant acquisition is made under Chapter 4 of the Duties Act.
- 13.1.5 The duty chargeable under Chapter 4 of the Duties Act is chargeable on any relevant acquisition in a public landholder made as a consequence of a person acquiring an interest in the public landholder on or after 1 October 2009.
- 13.1.6 If a person acquires an interest in a public landholder on or after 1 October 2009, acquisitions made before 1 October 2009 (including any made before 1 July 2009) are to be counted for the purpose of determining whether the person has made a relevant acquisition in the public landholder under new Chapter 4 of the Duties Act.
- 13.1.7 Duty is not chargeable under Chapter 4 of the Duties Act on a relevant acquisition made by a person in a public landholder if the person's intention to make the acquisition was announced to the market before the date on which the Bill for the Amendment Act was introduced into the Legislative Assembly.

14 INTRODUCTION OF A GENERAL ANTI-AVOIDANCE REGIME

14.1 The Explanatory Notes to the Amendment Act explained the rationale for the introduction of a general anti-avoidance regime as follows:

to deter artificial, blatant or contrived schemes to reduce, avoid or postpone liability for duty by introducing special provisions relating to the assessment of tax avoidance schemes

- 14.2 The general anti-avoidance regime is contained in new Chapter 11A of the Duties Act.
- 14.3 Section 284C of the Duties Act states that the object of Chapter 11A (in accordance with the Explanatory Notes) is to deter artificial, blatant or contrived schemes to reduce or avoid liability for duty.

- 14.4 Section 284D(1) of the Duties Act makes a person liable to pay the amount of duty avoided by the person as a result of a tax avoidance scheme that is of an artificial, blatant or contrived nature. The 'amount of duty avoided' is the amount of duty, or additional duty, that would have been payable by the person, or that it is reasonable to expect would have been payable by the person, if the tax avoidance scheme had not been entered into or made - subsection 284D(2) of the Duties Act.
- 14.5 The Chief Commissioner has discretion to make an assessment, or reassessment, of a liability for duty on the basis of the person's liability under Chapter 11A to pay an amount of duty avoided by the person – subsection 284D(3) of the Duties Act.
- 14.6 Subsection 284E(1) of the Duties Act provides that a 'tax avoidance scheme' is any scheme that a person, whether alone or with others, enters into, makes or carries out for the sole or dominant purpose of enabling liability for duty to be avoided or reduced. The place where the scheme is entered into, made or carried out is irrelevant – subsection 284E(2) of the Duties Act. Also, in determining the sole or dominant purpose of the scheme, any purpose related to avoiding, reducing or postponing a liability for duty, tax or other impost imposed under a law of another State, a Territory, the Commonwealth or a jurisdiction outside Australia is to be disregarded – subsections 284E(3) and (4) of the Duties Act.
- 14.7 Section 284F of the Duties Act provides that the following matters are to be taken into account in determining whether a scheme is a tax avoidance scheme, and whether it is of an artificial, blatant or contrived nature:
- (a) *the way in which the scheme was entered into, made or carried out;*
 - (b) *the form and substance of the scheme, including:*
 - (i) *the legal rights and obligations involved in the scheme, and*
 - (ii) *the economic and commercial substance of the scheme;*
 - (c) *when the scheme was entered into or made and the length of the period during which the scheme was carried out;*
 - (d) *the purpose of the Duties Act or any provision of the Duties Act, whether or not that purpose is expressly stated;*
 - (e) *the effect that this Act would have in relation to the scheme apart from Chapter 11A;*
 - (f) *any change in any person's financial position, or other circumstances, that has resulted, will result, or may reasonably be expected to result, from the scheme;*
 - (g) *the nature of any connection, whether of a business, family or other nature, between the person whose liability is avoided or reduced as a result of the scheme and any other person whose financial position or other circumstances have changed, will change or may reasonably be expected to change, as a result of the scheme; and*
 - (h) *the circumstances surrounding the scheme.*
- 14.8 A liability to pay an amount of duty avoided by a person as a result of a tax avoidance scheme is taken to arise on the date the amount of duty avoided would have been payable if the tax avoidance scheme had not been entered into or made – subsection 284G(1) of the Duties Act. Therefore, a 'tax default' is taken to have occurred under the *Taxation Administration Act 1996* (NSW) on the date the amount of duty avoided would have been payable if the tax avoidance scheme had not been entered into or made – subsection 284G(2) of the Duties Act. However, a person is only liable if the Chief Commissioner issues a notice of assessment, or reassessment, of liability for duty on the basis that a tax avoidance scheme is of an artificial, blatant or contrived

nature – subsection 284G(3) of the Duties Act. Also, the Chief Commissioner must give reasons for issuing such a notice of assessment or reassessment – section 284H of the Duties Act.

14.9 A person's liability under Chapter 11A does not depend upon whether the person entered into, made or carried out the relevant tax avoidance scheme – subsection 284I(1) of the Duties Act. However, a person is not liable if the Chief Commissioner is satisfied that the person did not know that the scheme was a tax avoidance scheme - subsection 284I(2) of the Duties Act.

14.10 Subsection 284J(1) provides that in Chapter 11A, a 'scheme' means:

(a) *a trust, contract, agreement, arrangement, understanding, promise or undertaking (including all steps and transactions by which it is carried into effect):*

(i) *whether entered into or made orally or in writing, and*

(ii) *whether express or implied, and*

(iii) *whether or not it is, or is intended to be, enforceable by legal proceedings, or*

(b) *a scheme, plan, proposal, action, course of action or course of conduct.*

Also, a 'scheme' may be a unilateral scheme – subsection 284J(2) of the Duties Act. Further, Chapter 11A applies in relation to part of a scheme in the same way that it applies to a scheme – subsection 284J(3) of the Duties Act.

14.11 The new provisions apply to tax avoidance schemes entered into or made, or carried out (regardless of when they were first entered into or made) on or after 1 July 2009.

15 CHANGES TO THE APPORTIONMENT OF BUSINESS ASSETS

15.1 Chapter 2 of the Duties Act deals with transactions concerning dutiable property. As an example, paragraph 8(1)(a) of the Duties Act '*... charges duty on ... a transfer of dutiable property ...*'.

15.2 Section 11 of the Duties Act seeks to answer the question of what 'dutiable property' is. Paragraph 11(1)(g) of the Duties Act includes as 'dutiable property' business assets, which includes at paragraph 11(1)(g)(i) '*... the goodwill of a business ...*'.

15.3 Prior to the Amendment Act paragraph 11(1)(g)(i) of the Duties Act provided that:

Dutiable property is ... a business asset, being, at any relevant time ... the goodwill of a business is, during the previous 12 months, a sale of goods or services, or goods and services, has been made to a New South Wales customer of the business ...

15.4 However, as a result of the changes contained in the Amendment Act, paragraph 11(1)(g)(i) of the Duties Act now provides that:

Dutiable property is ... a business asset, being, at any relevant time ... the goodwill of a business, if the business has supplied goods in New South Wales, or provided services in New South Wales, to a customer of the business during the previous 12 months ...

15.5 Further, the Amendment Act inserted a new subsection 11(3) of the Duties Act which extended the definition of 'business asset' to provide that '*... a reference to services provided to a customer includes a reference to anything done for a customer pursuant to a contractual obligation*'.

15.6 There are related amendments to the apportionment provisions of section 28 of the Duties Act.

- 15.7 The Explanatory Notes to the Amendment Act explained the change to the definition by providing that:

Items [1] – [7] clarify the provisions of the Duties Act 1997 relating to the changing of duty in respect of a transfer of business assets. The amendments make it clear that duty is chargeable in respect of a transfer of the goodwill of a business when goods have been supplied or services have been provided by the business in New South Wales in the previous 12 months. It will no longer be necessary for there to have been a sale of goods or services by the business (that is, the provisions extend to goods supplied, or services provided, whether or not for consideration). Also, the provision of services that a business is contractually obliged to provide can fall within the ambit of the provisions.

- 15.8 That is, 'goodwill of a business' now includes:

15.8.1 a business which has 'supplied' (and not just 'sold') goods in New South Wales;

15.8.2 a business which has 'provided' (and not just 'sold') services in New South Wales;

- 15.9 Whether or not the business receives consideration for the supply of goods or the provision of services is irrelevant.

16 AMENDMENTS TO THE MORTGAGE DUTY PROVISIONS

- 16.1 The Explanatory Notes to the Amendment Act explained the rationale for the amendments to the mortgage duty provisions of the Duties Act:

to revise and simplify arrangements for the assessment of duty on mortgages

- 16.2 Mortgage duty is imposed under Chapter 7 of the Duties Act on instruments of security by way of mortgage or charge over property wholly or partly in New South Wales. Duty is payable on the amount secured by the mortgage at each liability date, subject to certain exemptions and concessions.

- 16.3 The amendments to the mortgage duty provisions made by the Amendment Act apply to the assessment of duty in respect of the following:

16.3.1 a mortgage first executed on or after 1 July 2009 or that first becomes liable to duty as a mortgage on or after 1 July 2009;

16.3.2 an instrument of security that first affects property in New South Wales on or after 1 July 2009 (whether or not the instrument of security was first executed before that date); and

16.3.3 a mortgage first executed before 1 July 2009 or that first becomes liable to duty as a mortgage before 1 July 2009 if an advance or further advance is made on or after 1 July 2009 that is secured by the mortgage.

- 16.4 This part of the paper outlines how the amendments affect the application of mortgage duty to:

16.4.1 the amount secured by a mortgage;

16.4.2 mortgage packages;

16.4.3 refinancing; and

16.4.4 transitional rules in relation to limited mortgages and mortgage packages.

- 16.5 Under subsection 213(1) of the Duties Act, the amount secured by a mortgage is the amount of advances made under an agreement, understanding or arrangement for which the mortgage is

security or under any variation to the agreement, understanding or arrangement (even if the amount of advances made exceeds the amount of advances recoverable under the mortgage). Duty is calculated by reference to such amount secured. However, the amount of duty chargeable on a mortgage at a liability date is reduced by the amount of duty for which the mortgage has previously been stamped under the Duties Act. By way of example:

NSW mortgage stamped with duty of \$3,941 to secure \$1,000,000

Amount outstanding reduced to \$950,000

Further advance of \$100,000 on or after 1 July 2009

Amount secured = \$1,050,000

Duty payable on \$1,050,000 = \$4,141

Less duty paid of \$3,941

Duty payable = \$200

- 16.6 If a mortgage and any other instrument of security secure or partly secure the same money at a liability date, they must be assessed as a mortgage package, regardless of when the other instruments of security were executed. Duty on a mortgage package is assessed as if the instruments comprising the mortgage package were a single mortgage.
- 16.7 The result of this approach is that when an advance or additional advance is made or a further mortgage over property in New South Wales (**NSW mortgage**) is executed, duty will be calculated on the total amount secured at the liability date, less credit for any duty paid under the Duties Act. By way of example:

NSW mortgage stamped with duty of \$1,941 to secure \$500,000

New NSW mortgage executed 22 October 2009 and further advance of \$500,000

Total advance = \$1,000,000

Duty payable on \$1,000,000 = \$3,941

Less duty paid = \$1,941

Additional duty payable = \$2,000

- 16.8 A refinancing mortgage is taken to have been stamped with ad valorem duty as a mortgage in respect of the 'duty-free refinancing amount', being the lesser of:
- the amount secured by the earlier mortgage on which duty has been paid under the Duties Act or in relation to which an exemption has been obtained; and
 - \$1,000,000.

- 16.9 The following example illustrates the duty payable on a refinancing mortgage:

Package stamped to secure \$1,000,000. NSW proportion 50%. NSW duty paid = \$1,941.

Refinance of \$2,000,000. NSW proportion 50%.

Duty on NSW portion = \$3,941.

Deemed stamped to \$500,000. Duty paid on \$500,000 = \$1,941

Additional duty payable ($\$3,941 - \$1,941$) = \$2,000

16.10 If the amount of advances recoverable under a mortgage or mortgage package first executed before 1 July 2009 is a definite and limited sum, the amount secured by the mortgage is taken, for the purpose of determining whether the mortgage becomes liable to additional duty on the making of an advance or further advance on or after 1 July 2009, and determining the amount of duty chargeable, to be the total of the following:

- the definite and limited sum; and
- the amount of any advance or further advance made on or after 1 July 2009 in excess of the definite and limited sum.

16.11 The amount secured by any such mortgage at the time a liability to duty last arose under the Duties Act is taken to be the total of the following:

- the definite and limited sum;
- the amount of any advance or further advance in excess of that definite and limited sum in respect of which duty has already been paid under the Duties Act.

16.12 The following example illustrates the transitional rules for mortgages for definite and limited sums:

NSW mortgage executed before 1 July 2009 limits the amount recoverable to \$1,000,000

Total advances under the facility for which the mortgage is security = \$2,000,000

Mortgage stamped in NSW with duty on \$1,000,000 = \$3,941

Post 30 June 2009 increase in limit to \$2,000,000

Duty payable on \$2,000,000 = \$7,941

Duty paid = \$3,941

Additional duty payable = \$4,000