

**2008**

**The Legislative Assembly for  
Australian Capital Territory**

**Duties (Landholders) Amendment Bill 2008**

**Explanatory Statement**

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Treasurer  
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# Duties (Landholders) Amendment Bill 2008

## Summary

This Bill amends the *Duties Act 1999* (the Duties Act).

## Overview

The purpose of the Bill is to tighten anti-avoidance provisions in the Duties Act to ensure that certain transfers of entities that hold land in the ACT are subject to duty as if they were a transfer of the underlying land.

The transfers addressed in the Bill are those that transfer land indirectly through the transfer of shares or units in an entity that holds land in the ACT. This occurs when specified interests in private companies or private unit trusts are transferred. In such cases, the indirect transfer is subject to landholder duty as if it were a direct transfer of the land.

To protect the Territory's revenue base, the specified interest in private companies and private unit trusts that can be acquired before the acquisition is subject to landholder duty is decreased from the current majority interest. This will align the ACT more closely with other jurisdictions (particularly NSW and Victoria). Landholder duty will apply where an acquisition of an entity that holds land in the ACT results in an interest of:

- 50 percent or more in a 'private company' or a 'wholesale unit trust scheme'; or
- 20 per cent or more in a 'private unit trust scheme'.

The Bill will also strengthen the aggregation provisions to ensure that seemingly independent acquisitions of land (eg those involving substantially one arrangement or 'acting in concert' arrangements) are dutiable. An acquisition arising from the exercise of an option will be aggregated with other acquisitions over a period of 3 years prior to the acquisition of the option up to the exercise of the option. It will also ensure that interests held by 'linked entities' are included in the interest of the primary entity.

The Bill also changes the definition of 'stock exchange' to 'recognised stock exchange'. Marketable securities duty will not apply to entities listed on a 'recognised stock exchange': the Australian Stock Exchange (ASX), a member of the World Federation of Exchanges (formerly called the *Fédération Internationale des Bourses de Valeurs*), or any exchange declared by the Minister – this retains the current treatment of marketable securities duty. However, an entity will be excluded from the scope of landholder duty only where the entity is listed on the ASX or on an exchange that is a member of the World Federation of Exchanges. Landholders will no longer be excluded from landholder duty if they are listed on an exchange declared by the Minister, which brings the ACT more closely into alignment with NSW and Victoria.

Currently, a unit trust scheme may be treated as a 'public unit trust scheme' if the commissioner is satisfied it will be a 'public unit trust scheme' within 12 months after notification. The Bill requires such an 'imminent public unit trust scheme' to be registered under the Duties Act. The Bill includes, as a 'public unit trust scheme', a

‘widely held trust’, being a managed investment scheme in which units have been offered to the public, with at least 300 registered unit holders, and where no unit holder (together with any associated person) holds more than 20 per cent of units. This type of trust is currently only required to have 50 or more registered unit holders with no percentage of ownership threshold to be a public unit trust scheme. The requirement for a minimum of 300 registered unit holders is also used in NSW and Victoria.

The Bill also recognises a ‘wholesale unit trust scheme’ to exclude a ‘qualifying investor’ from the definition of ‘associated person’ so as to prevent aggregation of transactions. However, where an investor acquires 50 per cent or more of the units, then landholder duty will apply. This type of unit trust scheme, as well as an ‘imminent wholesale unit trust scheme’, is also required to be registered.

#### Transitional Provisions:

The Bill contains transitional provisions to provide a period of up to 12 months for a unit trust scheme, which is affected by the changes in definitions, to comply with the new definitions if they wish to do so. Some ‘public unit trust schemes’ that are currently exempt from landholder duty will become a ‘private unit trust scheme’ if they do not comply with the new definitions. It also introduces transitional regulation-making powers to address any issue not dealt with adequately or appropriately. These powers would be used to address any unintended consequence or avoidance issue that may arise as a result of the new provisions. All transitional provisions expire after two years.

#### Financial Implications

These amendments are expected to have a negligible budget impact.



## Details of the Duties (Landholders) Amendment Bill 2008

### Clause 1 — Name of Act

This Act is the *Duties (Landholders) Amendment Act 2008*.

### Clause 2 — Commencement

This Act commences on issue of a commencement notice.

### Clause 3 — Legislation amended

This Act amends the *Duties Act 1999* (the Duties Act).

### Clause 4 — Divisions 3.2.1 and 3.2.2

**Division 3.2.1 Landholding private corporations** and **Division 3.2.2 Acquisitions of interests in private corporations** are substituted by **Division 3.2.1 Preliminary** and **Division 3.2.2 Landholding entities**.

#### Division 3.2.1 Preliminary

**Section 78 Definitions—pt 3.2** introduces the definition of ‘entity’ in substitution for ‘private corporation’ and lists some key definitions along with their section location in conformity with current drafting practice. The term ‘relevant period’ is introduced to provide, in addition to the current aggregation provisions, for aggregation arising from

the exercise of an option. In such a case, the aggregation period will be 3 years prior to the acquisition of the option up to the exercise of the option.

### **Division 3.2.2 Landholding entities**

**Section 78A Meaning of *entity***—**pt 3.2** is a new section. It provides that in addition to a ‘private company’ and a ‘private unit trust scheme’ (previously ‘private corporation’ under the Duties Act), a ‘wholesale unit trust scheme’ is an ‘entity’.

**Section 79 Meaning of *landholder***—**pt 3.2** replaces ‘private corporation’ with ‘entity’.

**Section 80 Meaning of *landholding***—**pt 3.2** replaces ‘private corporation’ with ‘entity’ and rewords the section in line with current drafting practice.

**Section 81 Constructive ownership of landholdings and other property—linked entities** replaces the subsidiary model, currently used in the ACT to aggregate landholdings, with the linked entities model as used in NSW. This means that landholdings will be aggregated where one person is entitled to 20 per cent or more of the unencumbered value of the property of another person upon winding up of this other person.

**Section 82 Constructive ownership of landholdings and other property—discretionary trusts** replaces ‘private corporation’ with ‘entity’ and rewords the section in line with current drafting practice.

**Section 83 *Interest and significant interest in landholders***—**pt 3.2** replaces ‘majority interest’ with ‘significant interest’ to align the ACT more closely with NSW and Victoria. Landholder duty will apply to acquisitions of 50% or more in either a ‘private company’ or ‘wholesale unit trust scheme’ and 20% or more in a ‘private unit trust scheme’.

**Section 83A Meaning of *associated person***—**pt 3.2** is a new section which brings an element of the Dictionary definition of ‘associated person’ into part 3.2. It also adopts the NSW definition of ‘associated person’ with respect to managed investment schemes. The responsible entities of two schemes will be associated if they have a common member who is entitled to 20 per cent or more of the property of each scheme.

**Section 84 How person *acquires an interest in a landholder***—**pt 3.2** amends section 84 in line with NSW to clarify that an interest may be obtained or increased by any means, including that an acquisition of marketable securities is not necessary to acquire an interest in a landholder. The current examples are retained; additionally, an interest may be obtained or increased by means of an issue of shares or units.

### **Clause 5 — Section 86**

**Section 86 What is a *relevant acquisition*?**—**pt 3.2** aggregates acquisitions that arise from an ‘associated person’ or from an ‘associated transaction’ where people act in concert or under substantially one arrangement. This section also replaces ‘majority interest’ with ‘significant interest’ with respect to aggregation of interests.

### **Clause 6 — Acquisition statements Section 87 (3) (e)**

This clause substitutes this section to replace both ‘private corporation’ and ‘corporation’ with ‘landholder’ and to replace the 3-year aggregation period with the new ‘relevant period’ for aggregating relevant acquisitions.

### **Clause 7 — How duty is charged on relevant acquisitions Section 90 (1) to (3)**

This clause substitutes this section to replace ‘land holdings’ with ‘landholding’ and to replace both ‘private corporation’ and ‘corporation’ with ‘landholder’. It also replaces the 3-year aggregation period with the new ‘relevant period’ for aggregating relevant acquisitions, as under current provisions, and additionally, to aggregate when an option is exercised.

### **Clause 8 — New part 3.2A**

#### **Part 3.2A Registration of unit trust schemes Sections 95A-95J**

Part 3.2A adopts the NSW model for registration of unit trust schemes. It provides for the registration of an ‘imminent public unit trust scheme’, which is included in the new definition of a ‘public unit trust scheme’. This is an extension of the current discretion, which recognises a unit trust scheme as a ‘public unit trust scheme’ if the commissioner is satisfied that it will be a ‘public unit trust scheme’ within 12 months after notification of that opinion.

This new part also provides for the registration of ‘wholesale unit trust schemes’ and ‘imminent wholesale unit trust schemes’, with a ‘significant interest’ being 50 per cent or more. The major requirement for registration of a ‘wholesale unit trust scheme’ is that it must have ‘qualified investors’ where at least 80 per cent of the units are held by such investors and no qualifying investor holds 50 per cent or more of the units. Registration as an ‘imminent wholesale unit trust scheme’ will also be available where the commissioner is satisfied that the unit trust scheme will meet the criteria for registration as a ‘wholesale unit trust scheme’ within 12 months (or within a longer period as the commissioner may determine). ‘Qualifying investors’ are excluded from the definition of ‘associated persons’ in relation to a registered ‘wholesale unit trust scheme’, which prevents aggregation of transactions for landholder duty. This means, for example, that acquisitions by trustees of certain trusts (excluding ‘public unit trust schemes’) are not necessarily aggregated if they share common beneficiaries.

These new provisions require ‘imminent public unit trust schemes’ and ‘imminent wholesale unit trust schemes’, together with ‘wholesale unit trust schemes’, to be registered. In the absence of registration, a unit trust scheme will be treated as a ‘private unit trust scheme’ and, accordingly, an acquisition of an interest in such a scheme may be dutiable as an acquisition in a ‘private unit trust scheme’.

The commissioner will be required to keep a register of registered ‘wholesale unit trust schemes’. A copy of this register will be available to the public on the revenue website.

### **Clause 9 — Interpretation for pt 3.3 Section 96 (1), definition of *company*, paragraph (b)**

This replaces ‘stock exchange’ with ‘recognised stock exchange’ to retain the current definition of ‘company’ for the purposes of part 3.3.

### **Clause 10 — When does liability for duty arise? Section 103 (2)**

This replaces ‘stock exchange’ with the Australian Stock Exchange (ASX) or any other exchange that is a member of the World Federation of Exchanges (formerly called the Fédération Internationale des Bourses de Valeurs). This means that the conveyance rate of duty for the purposes of part 3.4 will apply unless the entity is listed on the ASX or any other exchange that is a member of the World Federation of Exchanges.

### **Clause 11 Application of pt 3.5 Section 109**

This replaces the term ‘stock exchange’ with ‘recognised stock exchange’. This will retain the current marketable securities rate of duty to exclude a land use entitlement by allotment of shares where the company is listed on the ASX, on any other exchange that is a member of the World Federation of Exchanges or on a financial market declared by the Minister.

### **Clause 12 Objections and review of decisions New section 252 (1) (ma) to (mh)**

Section 252 is amended to extend objection and appeal rights with respect to all decisions made by the commissioner under new part 3.2A.

### **Clause 13 New chapter 16**

This chapter provides transitional arrangements which allow a period of up to 12 months for a unit trust scheme that is affected by the change in definitions to comply with the new definitions. After 12 months, a unit trust scheme will be a ‘private unit trust scheme’ if it does not comply with the new definition of ‘public unit trust scheme’.

This provision allows the executive to make transitional regulations where they consider any matter is not dealt with adequately or appropriately. This power would usually be used to address any unintended consequence or avoidance issue that may arise after the amendment is in place. The whole chapter expires two years after commencement.

### **Clause 14 Dictionary, new definitions of *entity* and *listed trust***

This clause inserts into the Dictionary the new definitions of ‘entity’ and ‘listed trust’.

### **Clause 15 Dictionary, definitions of *private company*, *private unit trust scheme* and *public unit trust scheme***

This substitutes a new definition of ‘private company’ in accordance with current drafting style. A ‘private company’ includes a company whose shares are not quoted on the ASX or any other exchange that is a member of the World Federation of Exchanges. A company whose shares are quoted on an exchange declared by the Minister will fall within the scope of landholder duty.

The definition of ‘private unit trust scheme’ is substituted to exclude a ‘wholesale unit trust scheme’ that, along with a ‘private company’ and a ‘private unit trust scheme’, is an ‘entity’ under new section 78A.

The definition of ‘public unit trust scheme’ is substituted so as to include a ‘listed trust’, a ‘widely held trust’ and registered schemes under part 3.2A. The new term,

‘widely held trust’, will bring the ACT more closely into alignment with NSW and Victoria with regard to the definition of a ‘public unit trust scheme’. It will potentially increase the number of entities that may be considered landholders for ACT duty purposes and reduce the opportunities for avoidance by increasing the minimum number of registered unit holders from 50 to 300.

### **Clause 16 Dictionary, new definitions**

New definitions are included in the Dictionary by this clause.

## **Schedule 1 Minor and consequential amendments**

### **Clause 1.1 Section 4A (1), new note**

This advises that ‘territory company’ is a term defined in the Dictionary.

### **Clause 1.2 Section 7 (3), definition of *transfer*, note**

This replaces ‘landholding private corporation’ with ‘landholder’ and provides consequential changes to the wording in the note.

### **Clause 1.3 Section 10 (1) (h) (i), new note**

This advises that ‘territory company’ is a term defined in the Dictionary.

### **Clause 1.4 Section 87 (3) (d) and (f)**

This replaces ‘private corporation’ with ‘landholder’.

### **Clause 1.5 Section 90 (4)**

This replaces ‘private corporation’ with ‘landholder’.

### **Clause 1.6 Section 91A (6), definition of *relevant acquisition***

This removes a redundant reference to the term ‘relevant acquisition’.

### **Clause 1.7 Section 92 (1)**

This replaces ‘private corporation’ with ‘landholder’.

### **Clause 1.8 Section 92 (2) and (3)**

This replaces ‘private corporation’ with ‘landholder’.

### **Clause 1.9 Section 92 (4)**

This amends section 92 (4) to conform to current drafting practice.

### **Clause 1.10 Section 93**

This replaces ‘land holdings’ with ‘landholdings’.

### **Clause 1.11 Section 94**

Section 94 is amended by substituting newly defined terms.

### **Clause 1.12 Section 95 (1)**

This replaces ‘landholding private corporation’ with ‘landholder’.

**Clause 1.13 Section 100 (3)**

This replaces ‘landholding private corporations’ with ‘landholders’ and provides consequential changes to the naming of section 86.

**Clause 1.14 Section 103 (2) and 109, new note**

This clause advises that ‘territory company’ is a term defined in the Dictionary.

**Clause 1.15 Section 115B (2)**

This amendment brings the section into line with current drafting practice.

**Clauses 1.16 — 1.21, Sections 252 (1) (f) - (m)**

These clauses provide consequential amendments to *Section 252 Objections and review of decisions* by relocating sections and amending references to changed sections.

**Clause 1.22 Section 252A (1)**

This substitutes the term ‘financial market’ for ‘stock exchange’.

**Clauses 1.23 — 1.38 Dictionary**

Consequential amendments (substitutions, insertions and omissions) to definitions in the Dictionary.

**Clause 1.39 Further amendments, mentions of *stock exchange***

This replaces ‘stock exchange’ with ‘recognised stock exchange’.

**Clause 1.40 Further amendments, mentions of *shall be taken***

This replaces ‘shall be taken’ with ‘is taken’ throughout the Duties Act to conform to current drafting practice.

