

STATUTES AMENDMENT (LAND HOLDING ENTITIES AND TAX AVOIDANCE SCHEMES) BILL

Adjourned debate on second reading.

(Continued from 4 May 2011.)

Mr PEDERICK (Hammond) (12:32): In rising to speak to the Statutes Amendment (Land Holding Entities and Tax Avoidance Schemes) Bill 2011, I declare that I am involved in the Pederick Family Trust, which is a discretionary trust, not a unit trust. I will seek clarification from the Treasurer as to whether this legislation is all encompassing to cover trusts that are not unit trusts and I hope that can be clarified during the debate.

It is certainly interesting to note that we on this side of the house had very limited time to conduct our consultation. I am more concerned that the forestry industry, the mining industry and the fisheries (especially the aquaculture sector) have not been consulted. This is far-ranging legislation. It is technical legislation. I would challenge this place to see how many people are accountants, because I think you would need to be an accountant to know the full effect of this bill coming through. I think there will be quite a few questions asked during the committee stage.

I am very concerned about the lack of consultation, especially regarding sectors such as the forestry industry. We see the South-East under threat from the forward sale of forests. The dilemma for that region is incredible. It is disgraceful what this government inflicts on the regions in this state: the fact that the burgeoning mining industry has not been consulted, especially in relation to the interface that we are seeing, and will continue to see, between mining and agriculture. I would have thought it would be vital that mining was included in the discussion.

There are far more times now where we see proposals all around the state, on the Eyre Peninsula, the Yorke Peninsula, throughout my electorate in the Mallee and into the Riverland, with different exploration going on, whether it be for metals, zircon sands, or other mining minerals, that mining should have been involved, especially in the interaction with farmers and the potential for whether there are any payments that may come under this bill relating to access to land, whether it is under a lease arrangement or other arrangement, and whether there is any tax to be levied in that situation.

Fisheries, and especially the agriculture sector, that have had their fees roughly doubled in the last few years are already paying a significant cost just operating their businesses, so I think it is disgraceful that they have not been consulted either in as far as what effect this legislation may have on their businesses.

I know that the member for Davenport has given a very good contribution to the house on this matter. I am going to read in the submission that came in from the South Australian Farmers Federation, because I am concerned from my side of the house, representing agriculture, about the impacts that may happen to people who are involved—people, companies, whatever entities are involved in land—and what effect it may have on transactions. I want to make sure that inter-family transactions are protected. We are told they are, but I want the Treasurer to fully outline the

proposals there in the bill, because poor old regional South Australia at the moment does not get too much from this government. In fact, they usually get a belting.

In regard to the letter from the South Australian Farmers Federation, addressed to Graeme Jackson, the Deputy Commissioner of State Taxation:

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 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 per cent or more; and
- in any other case, 60 per cent or more;

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

By adopting a landholder model, the 80 per cent and 60 per cent 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 be many farming operations in which more than 20 per cent 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 per cent 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 landholding entity; or
- A transaction as a result of which a person or group has a prescribed interest in a landholding 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 party 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 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 in 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—

which certainly happens—

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 purposes 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.

We have some comments in relation to SAFF's comments on the Taxation Administration Act, but I was unable to find the exact section numbers. It quotes them as:

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.

It was signed off, 'Yours sincerely, Carol Vincent', from the South Australian Farmers Federation.

I believe there are many, many questions that will be raised at the committee stage. I know the member for Davenport raised many questions in his speech, and I am sure I have colleagues on my side of the house who wish to add their contribution as well. I did note this morning, having a look at members' interests in this place, that quite a few people—

Mr Venning interjecting:

Mr PEDERICK: It is on the public record; it is there to find.

Mr Venning: It is, too.

Mr PEDERICK: Many members in this place operate trusts, and it will be interesting to see how debate on this bill carries forward. I am certainly concerned in relation to any tax burdens that may be put onto farming families in this state who, through a probably once in a decade opportunity, have had the opportunity to have a decent income year this year (noting the issues with classification of grain and harvest).

I also note that sheep prices are extremely good. It is a bit tough if you want to buy them, but South Australian farmers have been able to purchase sheep that were in drought conditions in Western Australia and bring them over here; and so they have been able to make some money and make good use of an asset, instead of having these sheep potentially just put down in Western Australia. I know plenty of these sheep are heading over to the Eastern States as well. Certainly, people in the cattle industry are seeing increased returns as well.

Be that as it may, farmers have gone through many poor years, not all because of drought; some have been income-poor years. I think 2005 was a big year for grain growing—a good, wet year—but grain prices were shocking, somewhere around the \$100 a tonne mark. It is unviable to grow crops for that money for any period of time, really, with the price of inputs and the associated costs of farming.

I am concerned, as I know other members on this side of the house are concerned, as to what effects this bill may have. I note that people have entered into family trust schemes and unit trust schemes because they are perfectly legal entities to operate in, but it will be interesting to see what happens with this bill and what effect it will have. I hope it has a very minimal effect on the farming community in this state. With those few words, I note that we will be going into committee and asking quite a few questions in relation to the bill.

Debate adjourned on motion of Hon. P. Caica.

Resumed on motion.

The Hon. J.J. SNELLING: In terms of the trust itself, no, it is not the purpose of this provision to pick up discretionary trusts, but to the extent that discretionary trusts might have an interest in a land rich entity, then, yes. In terms of the trust itself, no, but only to the extent that a trust might have an

interest in a land rich entity, in which case, yes, the land rich entity is what would be caught up in this provision.

Mr PEDERICK: So what you are saying—and I suppose I am probably speaking for possibly thousands of property owners in the farming community—is that they could be caught up in this if they have got a company established under a discretionary trust. I just want full clarification. You could have AB and BC Bloggs Pty Ltd under Bloggs family trust as trustee for the Bloggs family trust. So that does get caught up. I am just trying to make sure that we know exactly what we are talking about here.

The Hon. J.J. SNELLING: The member for Hammond is correct to this extent: yes, if you have got a company which is set up under a trust, which is a land rich entity, the purpose of this is to ensure that, if there is a change in ownership of that company and it is treated differently from any other, it is a land rich entity. But, for people who are established in this way, it is only going to affect them if there is a change in ownership of the land rich entity, in which case there would be duty payable. Otherwise, this does not affect them. It only affects them if there is a change in ownership of the land rich entity. So, the member for Hammond is correct. If there is a land rich entity or company, which is land rich, sitting underneath a trust and there is a change in ownership of that company, presumably from the trust to some other owner, then, yes, they would be subject to a higher duty as a land rich entity. That is right.

Mr PEDERICK: Obviously, if there was a transfer into family under those arrangements they would be exempt. I am just making sure we get all this.

The Hon. J.J. SNELLING: Yes, that's correct.

Mr PEDERICK: Is there any retrospectivity in regards to land held in both, say, a company as trustee for a family trust or in a unit trust ownership, as regards to this bill, or, with any deals done before the appropriate date in July, is how they act relevant to the legislation when they were formed?

The Hon. J.J. SNELLING: No, there is no retrospectivity. This only applies from 20 July 2011. There are some transitional arrangements so that if a contract is entered into and effectively signed but the acquisition itself does not occur until after 1 July, the current regime still applies. There is no retrospectivity at all.