



New South Wales

Payroll Tax Bill 2007

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.
This Bill is cognate with the *Appropriation Bill 2007*.

Overview of Bill

The object of this Bill is to repeal and re-enact the *Pay-roll Tax Act 1971 (the 1971 Act)* with various changes to harmonise the Act with the equivalent payroll tax legislation of Victoria.

Significant changes made to the 1971 Act include the following:

- (a) a payroll tax exemption is introduced for wages paid for adoption or maternity leave paid in addition to an employee's normal leave,
 - (b) the method used to calculate the taxable value of fringe benefits is changed to restore payroll tax neutrality as between cash wages and fringe benefits,
 - (c) payroll tax exemptions for motor vehicle and accommodation allowances will be determined on the basis of rates applicable for income tax purposes rather than rates at which the allowances are payable under industrial awards,
 - (d) the payroll tax exemption for newly created non-profit organisations will only apply if the organisation has *wholly* charitable, benevolent, philanthropic or patriotic purposes and the person to whom the wages are payable is engaged *exclusively* in that kind of work,
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- (e) provisions for the treatment of contractor payments as wages are modified by:
 - (i) removing the current general exemption for contracts at a rate of \$800,000 or more per annum, and
 - (ii) removing the exemption for amounts paid to financial planners by financial services licensees, and
 - (iii) limiting the payroll tax exemption for contracts for the supply of services by a person who provides the services to the public generally by expressly requiring that the person provides the services to the public generally *in that financial year*,
- (f) provision for the payroll taxing of employer contributions to industry portable long service leave and redundancy schemes is removed with effect from 1 July 2006,
- (g) the payroll tax exemption for employment agents that on-hire staff to a client with wages below the \$600,000 payroll tax-free threshold is removed,
- (h) the Chief Commissioner's discretion to exclude an employer from a payroll tax employer group will be expanded to allow the exclusion of any member of the group except related corporations,
- (i) payroll tax grouped employers will be required to nominate a designated group employer in order to obtain the benefit for the group of the \$600,000 payroll tax-free threshold (instead of the nomination of a designated group employer being optional as at present),
- (j) the payroll tax exemption for apprentices, trainees and group apprenticeship/traineeship schemes is removed and replaced with a rebate scheme (with effect from 1 July 2008) but retained for group apprenticeship/traineeship schemes where the employer is a non-profit organisation,
- (k) payroll tax will no longer be payable on trust distributions to beneficiaries who provide services but receive wages below the applicable award rate.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides that the proposed Act will come into operation on 1 July 2007.

Clause 3 contains the following definitions:

agent which is defined to include a person in NSW who holds or has the management or control of the business of another person outside of NSW. The definition also includes a power by which the Chief Commissioner can declare a person to be an agent for any other person for the purposes of the Bill.

Australia which is defined to mean the States of the Commonwealth and the Territories.

coastal waters of the State which is defined to have the same meaning as in Part 10 of the *Interpretation Act 1987*.

company which is defined to include all bodies and associations, whether incorporated or not, and partnerships.

corporation which is defined to have the same meaning as in section 9 of the *Corporations Act 2001* of the Commonwealth.

corresponding law which is defined to mean a law of another State or Territory which relates to the imposition of payroll tax, and the assessment and collection thereof.

designated group employer which is defined to mean a member designated for a group under clause 80 of the Bill.

director which, in relation to a company, is defined to include a member of the governing body of the company.

employer which is defined to mean a person who pays or is liable to pay wages. The definition includes the Crown, persons taken to be employers under the Bill, and certain public, local and municipal bodies.

employment agency contract which is defined to have the meaning given in clause 37 of the Bill.

employment agent which is defined to have the meaning given in clause 37 of the Bill.

exempt wages which is defined to mean wages that are declared by or under the Bill to be exempt wages, and which are therefore exempt from the payment of payroll tax.

exercise a function, which is defined to include perform a duty.

FBTA Act which is defined to mean the *Fringe Benefits Tax Assessment Act 1986* of the Commonwealth.

financial year which is defined to mean each year commencing on 1 July.

fringe benefit which is defined to have the same meaning as in the *Fringe Benefits Tax Assessment Act 1986* of the Commonwealth, but excluding a tax-exempt body entertainment fringe benefit as defined in that Act, as well as anything which is prescribed by regulations under this Bill not to be a fringe benefit.

function which is defined to include a power, authority or duty.

group which is defined to have the meaning given in clause 67 of the Bill.

GST which is defined to have the same meaning as in the *A New Tax System (Goods and Services Tax) Act 1999* of the Commonwealth, except that it includes notional GST of a kind for which payments may be made under section 5 of the *Intergovernmental Agreement Implementation (GST) Act 2000* by a person that is a State entity within the meaning of that Act.

interstate wages which is defined to mean wages that are taxable wages within the meaning of a corresponding law, as previously defined.

ITAA which is defined to mean the *Income Tax Assessment Act 1997* of the Commonwealth.

liquidator which is defined to mean a person who is required by law to carry out the winding-up of a company, as previously defined, whether or not the person is appointed as a liquidator as such.

month which is defined to mean the month of January, February, March, April, May, June, July, August, September, October, November and December.

option which is defined to mean an option or right (including prospective or contingent options or rights) of a person to acquire a share or to have a share transferred or allotted to him or her.

paid which, when used in relation to wages, is defined to include wages that have been provided, conferred or assigned. The words “pay” and “payable” are defined to have corresponding meanings.

payroll tax which is defined to mean tax imposed under clause 6 of the Bill.

perform which, when used in relation to services, is defined to include rendering of services.

return period which is defined to mean a period for which an employer is required to lodge a return under the Bill.

share which is defined to mean a share in a company, and includes stapled securities.

superannuation contribution which is defined to have the meaning given in clause 17 (2) of the Bill.

taxable wages which is defined to have the meaning given in clause 10 of the Bill.

termination payment which is defined to have the meaning given in clause 27 of the Bill.

Territories which is defined to mean the Australian Capital Territory, including the Jervis Bay Territory, and the Northern Territory.

this jurisdiction which is defined to mean NSW.

voting share which is defined to have the same meaning as in section 9 of the *Corporations Act 2001* of the Commonwealth.

wages which is defined to have the meaning given in Part 3 of the Bill.

Clause 4 provides that the Bill is to be read together with the *Taxation Administration Act 1996*, which deals with matters of administration and enforcement of the Bill and other taxation laws.

Clause 5 provides that the Bill binds the Crown.

Part 2 Imposition of payroll tax

Division 1 Imposition of tax

Clause 6 sets out the basis for liability under the Bill, by providing that payroll tax is imposed on all taxable wages, being wages that are not exempt from tax, and that

have the requisite connection to NSW. The definition of *taxable wages* is contained in clause 10 of the Bill.

Clause 7 imposes payroll tax on employers. An employer is liable for payroll tax in respect of all NSW taxable wages paid or payable by that employer.

Clause 8 provides that the method for determining an employer's payroll tax liability is contained in Schedules 1 and 2 to the Bill.

Clause 9 sets out when payroll tax must be paid. For wages paid or payable from July until May, payroll tax for each month must be paid by the 7th day of the following month. At the end of the financial year, registered employers must lodge an annual adjustment return, due by 21 July, which accounts for any underpayment or overpayment of tax throughout the year, and includes tax for wages paid or payable in the month of June. The Chief Commissioner has the power to fix a different date for payment of payroll tax where the Chief Commissioner believes that a person may leave Australia before their payroll tax liability arises.

Division 2 Taxable wages

Clause 10 Subclause (1) defines *taxable wages* to mean wages, other than exempt wages, that are paid or payable by an employer for services performed, and that are:

- paid or payable in NSW (except if the relevant services are performed wholly in one other State or Territory), or
- paid or payable outside NSW for services performed wholly in NSW, or
- paid or payable outside Australia for services performed mainly in NSW.

Taxable wages do not include wages paid or payable in respect of services which are performed wholly in another country for a continuous period of more than 6 months. Such wages are exempt from tax from the commencement of the period of overseas service. This differs from the *Pay-roll Tax Act 1971*, under which the exemption for overseas wages only applies to wages paid or payable from the time that the initial 6 month period overseas has been served.

Subclause (2) provides a method for determining the jurisdiction in which wages are payable, in circumstances where the wages have not been paid at the time that the payroll tax liability arises.

Subclause (3) provides a method for determining the time and place of the payment of wages where the payment is made by way of an instrument (such as a cheque) or transfer of funds.

Subclause (4) provides that, in determining where services are performed in Australia, regard must be had only to the services performed in the month in respect of which the question arises.

Subclause (5) defines *instrument* for the purposes of subclause (3).

Clause 11 provides that wages which are not referable to services performed in a particular month are taken to be paid or payable for services performed during the month in which they were in fact paid or became payable.

Division 3 Other

Clause 12 provides for the continuation of an arrangement between the Commonwealth and NSW which ensures that State taxes, including payroll tax, apply in Commonwealth places in NSW.

Part 3 Wages

Division 1 General concept of wages

Clause 13 provides the general concept of wages for the purposes of the Bill. Wages means wages, remuneration, salary, commission, bonuses or allowances paid or payable to an employee, whether paid or payable at piece work rates or otherwise, and whether paid or payable in cash or in kind. The clause also provides that wages include:

- an amount paid or payable as remuneration to a person holding an office under the Crown,
- an amount paid or payable under any prescribed classes of contracts to the extent to which that payment is attributable to labour,
- an amount paid or payable by a company as remuneration to a director,
- an amount paid or payable as commission to an insurance or time-payment canvasser or collector,
- any amount that is included as or taken to be wages under the Bill.

Division 2 Fringe benefits

Clause 14 provides that a fringe benefit constitutes wages for payroll tax purposes, with the exception of certain benefits which are exempt benefits under the *Fringe Benefits Tax Assessment Act 1986* of the Commonwealth.

Clause 15 Subclause (1) provides a formula for determining the value of a fringe benefit for payroll tax purposes. This value is the taxable value of the fringe benefit grossed up using the formula for "Type 2 benefits" specified in the *Fringe Benefits Tax Assessment Act 1986* of the Commonwealth. Under the *Pay-roll Tax Act 1971*, fringe benefits were grossed up using the "Type 1 benefits" formula or the "Type 2 benefits" formula accordingly.

Subclauses (2) and (3) specify the bases on which fringe benefits are to be included in monthly returns for payroll tax purposes. An employer must include the actual monthly value of the fringe benefits determined under subclause (1) unless the employer has made an election under clause 16, and that election is still in force.

Clause 16 permits employers to elect to declare $\frac{1}{12}$ of the NSW aggregate fringe benefits amount (grossed up using the formula for "Type 2 benefits") included in a preceding annual FBT return. The clause provides a method for reconciling these monthly amounts at the end of the financial year with the current year's FBT return. An election, once made, may only be terminated with the approval of the Chief

Commissioner. The clause also specifies the basis on which a final adjustment of payroll tax is to be effected by an employer who ceases to be liable to payroll tax.

Division 3 Superannuation contributions

Clause 17 provides that a superannuation contribution constitutes wages for payroll tax purposes. A superannuation contribution includes an employer contribution:

- to a superannuation fund within the meaning of the *Superannuation Industry (Supervision) Act 1993* of the Commonwealth,
- as a superannuation guarantee charge within the meaning of the *Superannuation Guarantee (Administration) Act 1992* of the Commonwealth,
- as a form of superannuation, provident or retirement fund or scheme, including to the Superannuation Holding Accounts Special Account within the meaning of the *Small Superannuation Accounts Act 1995* of the Commonwealth, to a retirement savings account within the meaning of the *Retirement Savings Accounts Act 1997* of the Commonwealth, and contributions, including “top up payments”, made to unfunded or partly funded superannuation schemes.

A superannuation contribution also includes a non-monetary contribution, the value of which is to be worked out in accordance with clause 43 of the Bill.

A superannuation contribution also constitutes wages if paid or payable in respect of a company director, or in respect of a person taken to be an employee under the contractor provisions in Division 7.

Division 4 Shares and options

Clause 18 provides that the grant of a share or option to an employee constitutes wages for payroll tax purposes.

The clause also ensures that the grant of a share or option by or to a third party may be subject to payroll tax under the third party payment provisions in clause 46 of the Bill.

Clause 19 permits employers to elect to treat the wages constituted by the grant of a share or option as having been paid or payable on the date the share or option is granted to the employee, or the date on which the share or option vests in the employee. The vesting date of a share is the date on which any conditions applying to the grant of the share have been met and the employee’s legal or beneficial interest in the share cannot be rescinded. The vesting date for an option is the earlier of two dates, being the date on which the share to which the option relates is granted to the employee, or the date on which the employee exercises a right to have the share transferred or allotted to (or vest in) him or her. The clause adopts provisions of the *Income Tax Assessment Act 1936* of the Commonwealth for determining when a share or option is granted.

Clause 20 provides that, where an employer does not include the value of a grant of a share or option in its taxable wages for the financial year in which the grant occurred, the wages constituted by the grant are taken to have been paid or payable

on the vesting date of the share or option. Where the value of a grant of a share or option is nil, or the wages constituted by such a grant would not be liable to payroll tax on the date of the grant, such wages will be treated as paid or payable on the date that the share or option was granted.

Clause 21 ensures that payroll tax will continue to be payable in respect of a grant of a share or option that is later withdrawn, cancelled or exchanged, if it is withdrawn, cancelled or exchanged for valuable consideration. The clause also allows an employer to reduce its taxable wages by the value of a grant of a share or option, where it previously paid payroll tax on the grant, and the grant is subsequently rescinded because the conditions attaching to it were not met.

Clause 22 ensures that, where an employer has paid any applicable payroll tax in respect of the grant of an option, the subsequent grant of a share pursuant to the exercise of that option is not subject to payroll tax. Additionally, payroll tax is not payable where an employer grants a share pursuant to the exercise of an option, if the option was granted before 1 July 2003.

Clause 23 provides for the valuation of grants of shares or options in accordance with Commonwealth income tax provisions. Any consideration paid by an employee in respect of the share or option is to be deducted from the value of the share or option for payroll tax purposes.

Clause 24 ensures that the grant of a share or option to a director as remuneration for the appointment or services of the director constitutes wages for payroll tax purposes.

Clause 25 provides that, where a grant of a share or option constitutes wages under the Bill, the services to which those wages relate will be taken to have been performed during the month in which the grant or vesting (whichever date applies, as determined under clauses 19 and 20) of the share or option occurs.

Clause 26 provides that wages constituted by the grant of a share or option will be taken to be paid or payable in NSW if the share is a share in a company registered in NSW or any other body corporate incorporated under a NSW Act. If the wages are taken to be paid or payable outside NSW, the grant of a share or option may still be liable to payroll tax in NSW (under clause 10 (1) (b) or (c) of this Bill) if the grant is made for services performed wholly or mainly in NSW.

Division 5 Termination payments

Clause 27 defines *termination payment* as a payment made in consequence of the retirement from, or termination of, any office or employment of an employee. This includes:

- unused annual leave and long service leave payments, and
- employment termination payments (within the meaning of section 82-130 of the *Income Tax Assessment Act 1997* of the Commonwealth) that would be included in the assessable income of an employee under Part 2-40 of that Act, including transitional termination payments within the meaning of section 82-10 of the *Income Tax (Transitional Provisions) Act 1997* of the

Commonwealth, and any payment that would be an employment termination payment but for the fact it was received more than 12 months after termination.

The definition of *termination payment* also includes amounts paid or payable:

- by a company as a consequence of terminating the services or office of a director, or
- by a person who is taken to be an employer under the contractor provisions contained in Division 7, as a consequence of terminating the supply of services by a person taken to be an employee under those provisions.

Clause 28 provides that a *termination payment*, as defined in clause 27, constitutes wages for payroll tax purposes.

Division 6 Allowances

Clause 29 provides that wages do not include the exempt component of a motor vehicle allowance, calculated in accordance with this clause. An employer need only pay payroll tax on the amount of the motor vehicle allowance that exceeds the exempt component. The exempt component is a function of the number of business kilometres travelled during the financial year and the exempt rate (being a rate prescribed by regulations under the *Income Tax Assessment Act 1997* of the Commonwealth, or otherwise as prescribed by regulations under the Bill). The method for determining the number of business kilometres travelled is determined in accordance with Part 5 of Schedule 1.

Clause 30 provides that wages only include an accommodation allowance paid or payable to an employee for a night's absence from his or her usual place of residence to the extent that it exceeds the exempt rate. The exempt rate is ascertained by reference to Australian Taxation Office determinations in respect of reasonable daily travel allowance expenses, or is otherwise as prescribed by regulations under the Bill.

Division 7 Contractor provisions

Clause 31 contains the following definitions applicable to the contractor provisions: *contract* which is defined to include an agreement, arrangement or undertaking, whether formal or informal and whether express or implied.

relevant contract which is defined to have the meaning given in clause 32 of the Bill.

re-supply which, in relation to goods acquired from a person, is defined to include a supply to the person of goods in an altered form or condition, and a supply to the person of goods in which the first-mentioned goods have been incorporated.

services which is defined to include results, whether goods or services, of work performed.

supply which is defined to include supply by way of sale, exchange, lease, hire or hire-purchase, and in relation to services includes the provision, grant or conferral of services.

Clause 32 Subclause (1) defines a *relevant contract* as one under which a person, in the course of a business carried on by that person, supplies services to another person, or is supplied with persons to perform work, or gives out goods to natural persons for work to be performed by those persons and for the re-supply of those goods to the first-mentioned person.

Subclause (2) provides that various contracts are not *relevant contracts* for payroll tax purposes. These include contracts under which a person, in the course of a business carried on by that person, is supplied with services meeting any of the following criteria:

- the services are incidental to the supply or use of goods by the person who is supplying the services,
- the services are of a kind not ordinarily required in the course of the person's business and which are provided by persons who are genuinely supplying services to the public generally,
- the services are of a kind ordinarily required in the course of the person's business but are required for less than 180 days in a financial year,
- the services are provided by a person for less than 90 days in a financial year,
- none of the above criteria are met, but the Chief Commissioner is satisfied that the services are supplied by a person who ordinarily supplied services of that kind to the public generally in the financial year in respect of which liability is being assessed.

The clause further provides that, in some cases, a contract is not a relevant contract where a contractor supplies services to a person, in the course of a business carried on by that person, and uses one or more additional persons to perform the work to which the services relate. Nevertheless, such a contract will be taken to be a relevant contract if the Chief Commissioner determines that the contract or arrangement under which the services were supplied was entered into for the purposes of evading or avoiding tax.

The clause also provides that a contract is not a relevant contract if it relates to services supplied by an owner driver, insurance agent or direct selling agent, unless the Chief Commissioner determines that the contract or arrangement under which the services were supplied was entered into for the purposes of evading or avoiding tax.

Lastly, the clause provides that the relevant contract provisions do not apply to employment agency contracts, which are covered by Division 8 of Part 3.

Clause 33 provides rules for determining which of the parties to a relevant contract is taken to be the employer for payroll tax purposes.

Clause 34 provides rules for determining which of the parties to a relevant contract is taken to be the employee for payroll tax purposes.

Clause 35 provides that amounts paid or payable by an employer under a relevant contract are taken to be wages for payroll tax purposes. However, where only part of the amount paid or payable relates to the performance of work or re-supply of goods under the contract, the Chief Commissioner has the power to determine how much

of the overall amount paid or payable will be taken to be wages for payroll tax purposes.

The clause also provides that the following are taken to be wages:

- any payment which would amount to a superannuation contribution if the parties to the relevant contract were actually in a relationship of employer and employee,
- the value of any grant of a share or option, provided or liable to be provided by the person taken to be the employer, that would be wages under Division 4 if the parties to the relevant contract were actually in a relationship of employer and employee.

Clause 36 is designed to prevent double taxation. Where a person taken to be an employer has paid payroll tax in respect of a payment taken to be wages under the contractor provisions, no other person is liable to pay payroll tax in respect of that payment, or any other payment for the same work, unless any such payment is made for the purpose of avoiding tax.

Division 8 Employment agents

Clause 37 defines an *employment agency contract*, which includes an agreement, arrangement or undertaking under which an employment agent procures the services of another person (*service provider*) for a client of the agent. Due to the wide concept of *person*, a service provider may include a company, a partnership or a natural person. An employment agency contract does not include arrangements under which a contract of employment results between the service provider and the client.

Clause 38 provides that an employment agent under an employment agency contract is taken to be an employer for payroll tax purposes.

Clause 39 provides that the natural person who performs the work for the client of the employment agent is taken to be an employee of the employment agent. This clause applies to situations where the service provider is a company, partnership or trustee. It provides that the natural person who in fact performs the work is taken to be an employee of the employment agent.

Clause 40 provides that any amount paid or payable (or the value of any benefit which would be a fringe benefit or a payment which would be a superannuation contribution) to or in relation to the service provider in respect of the provision of services under the employment agency contract is taken to be wages paid or payable by the employment agent. However, such a payment or benefit is not taken to be wages if it would be exempt from payroll tax under Part 4 of the Bill (other than under Division 4 or 5 or clause 50 of that Part, or clause 5 of Schedule 2) had the service provider been paid by the client as an employee. It is a requirement that the employment agent receives a declaration to that effect from the client.

Clause 41 is designed to prevent double taxation. Where an employment agent has paid payroll tax in respect of an amount or benefit taken to be wages under an employment agency contract, no other person is liable to pay payroll tax in respect

of wages paid or payable in respect of the provision of those services by the service provider for the client.

Clause 42 provides that if an employment agency contract has the effect of reducing or avoiding the liability of any party to the contract to assessment, imposition or payment of payroll tax, the Chief Commissioner may disregard the contract and determine any party to it to be an employer and any payment in respect of the contract to be wages. A notice of the determination must be served on the person taken to be an employer.

Division 9 Other

Clause 43 sets out the method for determining the value of wages (except fringe benefits, shares and options) that are paid or payable in kind.

Clause 44 provides for GST to be excluded from wages in circumstances where payment for a supply of services is taken to be wages under the Bill and the payment includes an amount of GST.

Clause 45 provides that a reference in the Bill to wages paid or payable by a member of a group includes wages that would be taken to be paid or payable by a member of a group if the member were the employer of the employee to whom the wages were paid.

Clause 46 ensures that payments of money or provision of other valuable consideration, which is referable to an employee's services to his or her employer, is taken to be wages paid or payable by the employer to the employee (and therefore subject to payroll tax), even if the amount is paid, or the benefit is provided, by:

- a third party to the employee, or
- the employer to a third party, or
- a third party to a third party.

The same principles apply to payments of money or provision of other valuable consideration by way of remuneration for the appointment or services of a company director.

Clause 47 is an anti-avoidance provision which relates to agreements etc under which a natural person performs services for or on behalf of another person, and a payment in respect of those services is made to a person related or connected to the natural person. If such an agreement has the effect of reducing or avoiding the liability of any party to the agreement to assessment, imposition or payment of payroll tax, the Chief Commissioner may disregard the agreement and determine any party to it to be an employer and any payment in respect of the agreement to be wages. A notice of the determination must be served on the person taken to be an employer.

Part 4 Exemptions

Division 1 Non-profit organisations

Clause 48 provides an exemption for non-profit organisations. Wages are exempt from payroll tax if they are paid or payable by a religious institution or a public benevolent institution. In order to qualify for exemption, the wages must be paid or payable for work of a kind ordinarily performed in connection with the religious or public benevolent purposes of the institution, and to a person engaged exclusively in that kind of work.

The clause also provides an exemption for wages paid or payable by a non-profit organisation that has wholly charitable, benevolent, philanthropic or patriotic purposes. The wages must be paid or payable for work of a kind ordinarily performed in connection with those purposes, and to a person engaged exclusively in that kind of work.

Wages are not exempt under this clause if they are paid or payable by a school, an educational institution, a company in which an educational institution has a controlling interest, or an instrumentality of the State. However, schools and persons providing educational services may be exempt from payroll tax under Division 2 of this Part.

Division 2 Education and training

Clause 49 provides a payroll tax exemption for wages paid or payable by schools and certain other educational bodies. The exemption is specific to NSW. The content of the exemption is set out in Division 1 of Part 3 of Schedule 2 to the Bill.

Clause 50 provides that wages are exempt from payroll tax if they are paid or payable to an Aboriginal person who is employed under an employment project of the Community Development Employment Project.

Division 3 Health care service providers

Clause 51 provides an exemption for wages paid or payable by a health care service provider for work of a kind ordinarily performed in connection with the conduct of such an organisation. The wages must be paid or payable to a person engaged exclusively in that kind of work. A health care service provider is defined in Division 2 of Part 3 of Schedule 2 to mean a public or non-profit hospital. That Division also provides an exemption for wages paid to employees of an area health service, the Home Care Service and the Ambulance Service.

Clause 52 ensures that the provisions relating to the exemption for health care service providers do not limit the application of any other payroll tax exemption. In other words, the exemption for health care service providers may co-exist with other exemptions. An example is given of a health care service provider which is also an exempt non-profit organisation under clause 48 of the Bill.

Division 4 Maternity and adoption leave

Clause 53 provides an exemption from payroll tax in respect of paid maternity leave and paid adoption leave. Employers providing paid maternity or adoption leave are entitled to an exemption from tax for any wages paid or payable to an employee, up to a maximum of 14 weeks maternity leave or adoption leave. The maternity leave exemption is available in respect of leave provided to female employees. The adoption leave exemption is available in respect of leave provided to employees of either gender.

Clause 54 provides that an employer wishing to claim an exemption for paid maternity or adoption leave must obtain certain records and keep them for a period of at least 5 years, as required by section 53 of the *Taxation Administration Act 1996*.

Division 5 Volunteer firefighters and emergency service volunteers

Clause 55 provides an exemption from payroll tax for wages paid or payable to employees who are absent from work on volunteer firefighter duty.

Clause 56 provides an exemption from payroll tax for wages paid or payable to employees who are absent from work on volunteer emergency service duty.

Clause 57 provides that the exemptions for volunteer firefighter and emergency service duty do not apply to wages paid or payable as part of approved leave.

Division 6 Local government

Clause 58 provides an exemption for wages paid or payable by a local or county council.

Clause 59 provides an exemption for wages paid or payable by a wholly-owned subsidiary of a local council, where there is a written arrangement for the subsidiary to make tax-equivalent payments to the council.

Clause 60 provides that local councils and their subsidiaries are not entitled to an exemption for wages paid or payable in respect of certain activities, including the supply of electricity and gas, water supply, sewerage, and the conduct of certain business activities. Nor is an exemption available for wages paid or payable in respect of construction of buildings or works, or installation of plant, machinery or equipment, for use in any such activities. The list of non-exempt activities can be extended by regulation and other non-exempt activities are specified in Division 3 of Part 3 of Schedule 2.

Division 7 Other government and defence

Clause 61 provides that wages paid or payable by the Governor of a State are exempt wages.

Clause 62 provides an exemption for wages paid or payable to an employee who is on leave from employment by reason of being a member of the Defence Force of the Commonwealth, or the armed forces of any part of the Commonwealth of Nations.

Clause 63 provides an exemption for wages paid or payable by the Commonwealth War Graves Commission.

Division 8 Foreign government representatives and international agencies

Clause 64 provides an exemption for wages paid or payable by a consular or other representative in Australia to members of his or her official staff. This exemption does not apply to a diplomatic representative.

Clause 65 provides an exemption for wages paid or payable by a Trade Commissioner representing any other part of the Commonwealth of Nations in Australia, to members of his or her official staff.

Clause 66 provides an exemption for wages paid or payable by the Australian-American Fulbright Commission.

Part 5 Grouping of employers

Division 1 Interpretation

Clause 67 provides definitions of *business* and *group* for the purposes of this Part.

Clause 68 provides that the fact that a person is not a member of a group constituted under one of the grouping provisions does not prevent them from being a member of a group constituted under any of the other grouping provisions.

Division 2 Business groups

Clause 69 ensures that when two or more groups form part of a larger group, the two or more smaller groups are not considered as groups in their own right.

Clause 70 provides that corporations constitute a group if they are related bodies corporate within the meaning of the *Corporations Act 2001* of the Commonwealth. The Chief Commissioner has no discretion to exclude such corporations from a group constituted under this clause.

Clause 71 provides for groups arising from the inter-use of employees. Where:

- one or more employees of an employer perform duties for one or more businesses carried on by the employer and one or more other persons, or
- one or more employees of an employer are employed solely or mainly to perform duties for one or more businesses carried on by one or more other persons, or
- one or more employees of an employer perform duties for one or more businesses carried on by one or more other persons, being duties performed in connection with or in fulfilment of the employer's obligation under an agreement, arrangement or undertaking for the provision of services to any of those persons,

the employer and each of those other persons constitutes a group.

Clause 72 provides for groups arising through common control of 2 businesses. Under this clause, a group exists where a person, or a set of persons, has a controlling interest in each of 2 businesses. The entities carrying on the businesses are grouped. The rules for determining whether a person (or set of persons) has a controlling interest in a business vary depending upon the type of entity conducting the business (eg a corporation, partnership or trust), and generally relate to the level of ownership or control of the business, or of the entity conducting the business.

In some circumstances, a person or set of persons will be taken to have a controlling interest in a business on the basis that a related person or entity has a controlling interest in that business. More specifically:

- if a corporation has a controlling interest in a business, any related body corporate of the corporation (within the meaning of the *Corporations Act 2001* of the Commonwealth) will also be taken to have a controlling interest in the business,
- if a person or set of persons has a controlling interest in a business, and the person or set of persons who carry on that business has a controlling interest in another business, the first-mentioned person or set of persons is taken to have a controlling interest in the second-mentioned business,
- if a person or set of persons has a controlling interest in the business of a trust, and the trustee(s) of the trust has a controlling interest in the business of another entity (being a trust, corporation or partnership), the person or set of persons is taken to have a controlling interest in the business of that other entity.

Clause 73 provides for groups arising from the tracing of interests in a corporation. Under this clause, an entity (being a person or 2 or more associated persons) and a corporation form part of a group if the entity has a controlling interest in the corporation. Such a controlling interest exists if the entity has a direct interest, an indirect interest, or an aggregate interest in the corporation, and the value of that interest exceeds 50%. Division 3 applies in making this determination. This clause also contains a definition of *associated person*, and defines a number of other relevant terms.

Clause 74 provides that, where any person is a member of 2 or more groups, those groups will form a single group. Under clause 69, the smaller groups which have been subsumed cease to exist as groups for the purposes of the legislation.

Division 3 Business groups—tracing of interests in corporations

Clause 75 applies this Division for the purposes of grouping an entity with a corporation under clause 73.

Clause 76 provides that an entity has a direct interest in a corporation if the entity can directly or indirectly exercise, control the exercise, or substantially influence the

exercise of voting power attached to voting shares in the corporation. The clause also provides that the percentage interest of voting power which an entity controls is the percentage of total voting power which the entity can exercise, control the exercise of, or substantially influence the exercise of.

Clause 77 provides that an entity has an indirect interest in a corporation (called the indirectly controlled corporation) if the entity is linked to that corporation by a direct interest in another corporation (called the directly controlled corporation) that has a direct and/or an indirect interest in the indirectly controlled corporation. The clause also provides that the value of an indirect interest in an indirectly controlled corporation is determined by multiplying the value of the entity's direct interest in the directly controlled corporation by the value of the directly controlled corporation's interest in the indirectly controlled corporation.

Clause 78 provides that an entity has an aggregate interest in a corporation when it has either a direct interest and one or more indirect interests, or 2 or more indirect interests. The clause also provides that the value of an entity's aggregate interest is the sum of the entity's direct and indirect interests in that corporation.

Division 4 Miscellaneous

Clause 79 provides the Chief Commissioner with a discretion to exclude a member from a group if satisfied that the business conducted by that member is independent of, and not connected with, the business conducted by any other member of the group. In considering the application of this discretion, the Chief Commissioner will have regard to the nature and degree of ownership and control of the businesses, the nature of the businesses, and any other relevant matters. The discretion is not available for corporations that are related bodies corporate under section 50 of the *Corporations Act 2001* of the Commonwealth.

Clause 80 provides that the members of a group or the Chief Commissioner may designate one member of the group to be the designated group employer for the group. The designated group employer is the member entitled to claim the benefit of the threshold on behalf of the group when calculating its payroll tax liability.

Clause 81 provides for the joint and several liability of every member of a group where any one of them fails to pay an amount required under the Bill. The Chief Commissioner is entitled to recover the whole amount payable from any member of the group.

Part 6 Adjustments of tax

Clause 82 provides that this Part applies to both group and non-group employers, and defines various terms which are used in the Part. Where an employer is a group employer for parts of a financial year, and a non-group employer for other parts of the same financial year, separate adjustments are to be made in respect of any period as a group employer, and any period as a non-group employer.

Clause 83 provides for an annual adjustment of payroll tax at the end of each financial year in accordance with the calculations in Schedule 1. Where an employer

has paid too much tax throughout a financial year, the employer may apply for a refund from the Chief Commissioner. Conversely, where an employer has not paid enough tax throughout a financial year, the employer must make up the difference in their annual return.

Clause 84 requires an employer to make an adjustment of payroll tax if they change their circumstances at any time during a financial year, meaning that they cease to pay or be liable to pay wages, become a member of a group, or cease to be a member of a group. The adjustment is made at the time that the employer's circumstances change, and relates to the period commencing from the start of the financial year (or the last change of circumstances, whichever is more recent) and ending with the change of circumstances. The adjustment requires an employer to compare their monthly returns with their actual liability for the period (using the annual payroll tax calculations in Schedule 1, pro-rated for the number of days in the period). The employer is then required to make up any tax shortfall to the Chief Commissioner. Any payments made under this clause are taken into account in the employer's annual adjustment calculation at the end of the financial year.

Clause 85 ensures that an employer who only pays or is liable to pay wages for part of a financial year receives the benefit of the payroll tax threshold for the whole year if the Chief Commissioner determines that, by reason of the nature of the employer's trade or business, the wages paid or payable by the employer fluctuate with different periods of the year. If the employer only conducts that trade or business in Australia for part of the financial year, they can still seek a determination under this clause, and if successful, will receive the benefit of the payroll tax threshold for that part of the financial year.

Part 7 Registration and returns

Clause 86 provides that an employer who pays wages in NSW must register for payroll tax if their total Australian wages exceeds the weekly exemption level during any one month. If the employer is a member of a group, the total Australian wages paid or payable by all members of the group determines whether the employer should register for payroll tax. If a registered employer's wages fall below the weekly exemption level during any one month, the Chief Commissioner may cancel that employer's registration.

Clause 87 provides that every employer who is registered, or required to be registered, under the Bill must lodge a monthly return within 7 days after the end of each month except June, and an annual adjustment return (including the monthly return for June) by 21 July of each year.

This clause also provides that designated group employers may, with the Chief Commissioner's approval, lodge joint returns on behalf of specified members of the group.

Part 8 Collection and recovery of tax

Division 1 Agents and trustees generally

Clause 88 provides that this Division applies to an agent or trustee for an employer, and states that nothing in the Division limits the application of the Part 5 grouping provisions to agents and trustees.

Clause 89 provides that an agent or trustee for an employer may be treated as the employer and is subject to all of the employer's obligations arising from the payment of taxable wages under the Bill.

Clause 90 provides that an agent or trustee must make returns, in its representative capacity only, and where a person is an agent or trustee for more than one employer, returns for each employer must be made separately.

Clause 91 provides that an agent or trustee must retain enough money to pay payroll tax out of any money which comes to the agent or trustee in their representative capacity, and provides for the personal liability of the agent or trustee in some circumstances where they fail to do so.

Clause 92 provides an agent or trustee who pays tax in its representative capacity with an indemnity and right of recovery against the employer.

Division 2 Special cases

Clause 93 provides for the lodgment of returns and payment of tax by the trustee of a deceased estate where the deceased person did not make complete and accurate returns during his or her lifetime, and therefore escaped full payment of tax. The amount of tax payable is a charge on the estate with priority over all other encumbrances.

Clause 94 provides for the assessment and recovery of tax from executors or administrators of an employer's estate where an employer dies without paying all of the tax payable up to the date of death.

Clause 95 provides for the assessment of a deceased person where probate has not been granted within 6 months of their death. The clause requires the Chief Commissioner to advertise the notice of assessment, and permits any person claiming an interest in the estate of the deceased to lodge an objection. Once an assessment has been advertised and confirmed under this clause, the Chief Commissioner may rely on the general rights to recover unpaid tax contained in the *Taxation Administration Act 1996*.

Clause 96 provides that the Chief Commissioner may recover tax from any person (the *controller*) who has the receipt, control or disposal of money belonging to a person (the *principal*) who is liable for tax, and who is resident out of Australia. The clause requires the controller to retain sufficient money to pay the tax, and provides for the personal liability of the controller in some circumstances where it fails to do so. It also provides the controller with an indemnity and right of recovery against the principal.

Clause 97 provides for the recovery of tax from an agent of an absentee principal who has been required to wind-up the principal's business. The agent is required to notify the Chief Commissioner of the intention to wind-up the business before taking any steps to do so, and must pay any payroll tax liability from the assets of the business. The agent is penalised for failure to comply with these obligations, and made personally liable for the tax.

Clause 98 provides a general right of recovery for any person who pays tax for another person under the provisions of the Bill.

Clause 99 provides for the recovery of tax from a liquidator of an employer which is registered or required to be registered under the Bill. A liquidator is obliged to set aside assets to the value of the amount of tax notified by the Chief Commissioner as being payable by the employer, and is liable as trustee to pay the tax to the extent of the value of those assets. The liquidator is penalised for failure to comply with these obligations, and made personally liable for the tax.

Part 9 General

Clause 100 provides for the operation of Schedule 2, which contains provisions which are specific to NSW.

Clause 101 provides a general power for making regulations in respect of procedural matters and things required or permitted to be prescribed under the Bill.

Clause 102 provides the procedure for dealing with offences under the Bill.

Clause 103 provides for the operation of Schedule 3, which contains savings and transitional provisions.

Clause 104 repeals the *Pay-roll Tax Act 1971*.

Clause 105 provides for the operation of Schedule 4, which contains consequential amendments to other Acts.

Clause 106 provides for a review of the Bill after 5 years.

Schedule 1 Calculation of payroll tax liability for financial year commencing 1 July 2007 and subsequent financial years

Part 1 Interpretation

Clause 1 provides a number of definitions which apply throughout the rest of the Schedule.

Part 2 Employers who are not members of a group

Clause 2 provides that this Part only applies to an employer who is not a member of a group. This Part sets out the annual adjustment calculation of payroll tax for

non-group employers. The annual adjustment gives employers the opportunity to review their tax paid for the financial year and make any necessary adjustments to correct overpayments or underpayments made during that year.

Clause 3 defines the variables which are used in the annual adjustment calculations in clauses 4 and 5 of this Part.

Clause 4 provides that an employer, who is not part of a group, is not liable to pay payroll tax in a financial year if the total NSW and other Australian taxable wages paid or payable by the employer is at or below the employer's threshold amount. This amount is the maximum threshold, adjusted by the ratio of the number of days in the financial year in which the employer was liable to pay NSW or other Australian taxable wages, to the total number of days in that year (which is taken to be 365).

Clause 5 provides the formula for calculating payroll tax of an employer, who is not part of a group, and whose total NSW and other Australian taxable wages paid or payable during a financial year exceeds the employer's threshold amount. The payroll tax payable is the NSW taxable wages of the employer, less the applicable deduction, multiplied by the rate of tax set out in Part 1 of Schedule 1. The applicable deduction is the maximum threshold, adjusted by the ratio of the employer's NSW taxable wages to its total Australian taxable wages, and also by the ratio of the number of days in the financial year in which the employer was liable to pay NSW or other Australian taxable wages, to the total number of days in that year (which is taken to be 365).

Part 3 Groups with a designated group employer

Clause 6 provides that this Part only applies to an employer who is a member of a group for which there is a designated group employer. This Part sets out the annual adjustment calculation of payroll tax for employers who are part of such a group.

Clause 7 defines the variables which are used in the annual adjustment calculations in clauses 8 and 9 of this Part.

Clause 8 provides that none of the members of a group are liable to pay payroll tax in a financial year if the total NSW and other Australian taxable wages paid or payable by the group during that year is at or below the group threshold amount. This amount is the maximum threshold, adjusted by the ratio of the number of days in the financial year in which at least one group member was liable to pay NSW or other Australian taxable wages, to the total number of days in that year (which is taken to be 365).

Clause 9 Subclause (1) provides that subclauses (2) and (3) contain the formulas for calculating payroll tax of a designated group employer and each other member of a group, where the total NSW and other Australian taxable wages paid or payable by the group during a financial year exceeds the group threshold amount.

Subclause (2) provides that the payroll tax payable by the designated group employer is the NSW taxable wages of the group, less the applicable deduction, multiplied by the rate of tax set out in Part 1 of Schedule 1. The applicable deduction is the maximum threshold, adjusted by the ratio of the group's NSW taxable wages to its

total Australian taxable wages, and also by the ratio of the number of days in the financial year in which at least one group member was liable to pay NSW or other Australian taxable wages, to the total number of days in that year (which is taken to be 365).

Subclause (3) provides that the payroll tax payable by a member of a group other than the designated group employer is the NSW taxable wages of the group member multiplied by the rate of tax set out in Part 1 of Schedule 1.

Part 4 Groups with no designated group employer

Clause 10 provides that this Part only applies to an employer who is a member of a group for which there is no designated group employer. This Part sets out the annual adjustment calculation of payroll tax for employers who are part of such a group.

Clause 11 defines the variable which is used in the annual adjustment calculation in clause 12 of this Part.

Clause 12 provides that the payroll tax payable by a member of a group (for which there is no designated group employer) is the NSW taxable wages of the group member multiplied by the rate of tax set out in Part 1 of Schedule 1.

Part 5 Motor vehicle allowances

Clause 13 provides for certain information to be recorded by an employer if the employer elects to use the continuous recording method for determining the number of business kilometres travelled during a financial year.

Clause 14 provides for certain information to be recorded by an employer if the employer elects to use the averaging method for determining the number of business kilometres travelled during a financial year. The averaging method allows employers to record the percentage of business kilometres travelled to total kilometres travelled in the relevant 12-week period, and then use this percentage to determine business kilometres travelled throughout the whole financial year, as well as the next 4 financial years.

Clause 15 stipulates that the relevant 12-week period for the averaging method of recording business kilometres travelled is a continuous period of at least 12 weeks. If the motor vehicle is maintained for less than 12 weeks, then the period is the entire period the motor vehicle was maintained. The 12-week period may overlap into the start or end of a financial year, so long as it includes part of the year.

Clause 16 provides that an employer, which has elected to use the averaging method, may replace one motor vehicle with another motor vehicle. An employer need not repeat for the replacement vehicle the steps already taken for the original motor vehicle.

Clause 17 provides for an employer to change from using the averaging method to the continuous recording method, or vice versa, from the beginning of a financial year.

Clause 18 defines *business journey* for the purposes of this Part.

Schedule 2 NSW specific provisions

Part 1 Introduction

Part 1 provides that Schedule 2 sets out the payroll tax provisions which are specific to NSW.

Part 2 Calculation of payroll tax

Part 2 deals with the method of calculating the amount of payroll tax that is payable for the period to which a return relates.

Part 3 Exemptions

Division 1 Education and training

Division 1 deals with exemptions for schools, colleges, apprentices and trainees.

Division 2 Health care service providers

Division 2 deals with exemptions for public and non-profit hospitals and employees of area health services, the Home Care Service and the Ambulance Service.

Division 3 Local government

Division 3 sets out the activities in respect of which a local council or its subsidiary will not receive exemption under Division 6 of Part 4 of the Bill.

Division 4 Other exemptions

Division 4 provides an exemption for wages paid or payable by a joint government enterprise that has the function of allocating funds for water savings projects. The Division also provides for the continuation of certain exemptions for religious institutions, public benevolent institutions and non-profit and charitable organisations.

Part 4 Government bodies—special provisions

Part 4 contains special provisions for Government bodies and State owned corporations.

Part 5 Recovery of payroll tax from principal contractors

Part 5 contains NSW specific provisions for the recovery from principal contractors of payroll tax payable by their subcontractors.

Part 6 Miscellaneous

Part 6 contains provisions about time limits for refund applications and exemptions from furnishing returns.

Schedule 3 Savings, transitional and other provisions

Schedule 3 contains savings and transitional provisions consequent on the Bill.

Schedule 4 Amendment of Acts

Schedule 4 makes consequential amendments to other Acts.