

STAMP AMENDMENT BILL (NO. 3) 2000

EXPLANATORY MEMORANDUM

On 10 August 2000, the Minister assisting the Treasurer made a Ministerial Statement to the Legislative Assembly announcing the Government's intention to legislate to address stamp duty avoidance practices that have emerged in this State.

This Bill proposes amendments to the Stamp Act 1921 to address the weaknesses in the legislation that were the subject of that announcement and that are resulting in significant ongoing revenue loss to the State in the order of \$30m to \$40m a year.

The avoidance at which these amendments is aimed involves the purchase of property through company structures in a way that largely circumvents the operation of the conveyance duty provisions of the Act.

Such practices are clearly inequitable when one considers that as a rule, Western Australian families and businesses face up to their obligations to the community and pay conveyance duty when purchasing their homes or business operations.

One would therefore have to question why certain large companies that have significantly more resources available to them should not likewise meet their tax obligations to the community when purchasing property in this State.

To leave these practices unchallenged will further encourage the placement of property into companies purely to increase the future saleability of the property due to the stamp duty avoidance opportunities available to the purchaser.

This discriminates against those vendors who do not have their property packaged in a company structure, as direct sales of those properties will result in conveyance duty being required to be paid by the purchaser.

Part IIIA was originally inserted into the Stamp Act in 1987 to address an avoidance practice which had then only recently emerged.

It involved placing high value property into a company structure, and selling the property by transferring the shares in the company rather than transferring the property itself.

This resulted in the transaction attracting substantially less stamp duty than if the land were transferred directly, as the lower marketable security rate of duty applied, with the duty calculated on the net value of the shares rather than on the gross value of the land.

The provisions of Part IIIA operate such that where shares in a non-listed company are acquired, the land and chattels of the company are subject to duty at conveyance rates, rather than the lower marketable securities rate, if three tests are met.

Those three tests are:

1. the company must own land in Western Australia valued at \$1 million or more;
2. 80% of the property of the company must comprise land; and
3. the transaction must involve the acquisition of a “majority interest” or “further interest” of the company, which is generally more than 50%.

The avoidance practices in question target the three tests and threaten the integrity of the land rich provisions.

This Bill proposes a number of measures to address these avoidance practices and to increase the Commissioner of State Revenue’s ability to detect transactions which may fall within the ambit of the land rich provisions.

In particular, it is proposed that:

- The period over which acquisitions may be taken into account for the purpose of meeting the “majority interest” test will progressively be increased from 12 months to 3 years;
- The “land-rich” provisions will apply where a majority or further interest entitling a shareholder to participate in the distribution of property on the winding-up of a company is obtained, regardless of whether that entitlement arises upon the acquisition of a shareholding or at some other time;
- Certain additional types of property are to be disregarded in determining whether a company meets the 80% “land-rich” test;
- When determining whether a statement is required to be lodged with the Commissioner, the value of chattels is now to be initially disregarded when determining if a company has non-land property greater than 20% of total property value;
- The value of mining tenements or similar rights located outside of Western Australia will be considered land for the purposes of the 80% “land-rich” test, consistent with the treatment of tenements located within Western Australia;
- In the case of corporations incorporated outside of Western Australia, only the property of the corporation in which the majority or further interest is acquired and its subsidiaries will be relevant in determining if the company is “land-rich”, consistent with the treatment of Western Australian incorporated companies;
- Clarification is to be legislatively provided as to the treatment of uncompleted contracts to which the company in which the interest is being purchased is a party;

- Where the “land-rich” test is defeated through acquisitions in holding and subsidiary companies that arise from substantially one transaction or arrangement designed to defeat the provisions, the underlying interest in land acquired through all acquisitions will be aggregated and brought to duty; and
- References to Corporations Law terms and sections will be updated.

Reflecting the anti-avoidance nature of these amendments, they are proposed to operate from 10 August 2000, the date of the Government’s announcement.

To ensure that the transition to the new arrangements is equitable, the Bill provides that any acquisition which preceded the Ministerial Statement of 10 August 2000 will not be brought to duty by these changes.

Furthermore, any acquisition on or after 10 August 2000 will be subject to the new rules, with the exception of an acquisition that is pursuant to a legally enforceable agreement executed in writing by both the purchaser and the vendor prior to 10 August 2000, providing the subsequent acquisition is completed by 31 December 2000.

The 31 December 2000 sunset date for transitional relief is considered necessary to prevent abuse of this concession in the future.

Clause 1: Short title

This clause contains the short title and citation.

Clause 2: Commencement

This clause provides that the Act is deemed to have commenced on 10 August 2000.

Clause 3: The Act amended

This clause specifies that the proposed amendments are to the Stamp Act 1921.

Clause 4: Section 76 amended

Subclause (1) amends section 76(1) by amending various definitions.

Subclause (1)(a) deletes the definition of “acquire” and inserts a new definition of “**acquire**” in its place.

The changes to the definition are to:

- reflect the fact that the acquisition of an interest in a WA company or corporation may be acquired by any means; and

- clarify that an acquisition does not include an acquisition through a compromise or arrangement under the Corporations Law that has been made with creditors or a class of creditors of a corporation.

Subclause (1)(b) amends the definition of **“entitled”**.

Subclause (1)(c) amends the definition of **“mining tenement”**.

The definition of mining tenement has been amended so that it now encompasses similar property under the laws of another jurisdiction.

Subclause (2) amends section 76(1) by inserting definitions of:

“distributable property”;

“minerals”;

“primary products”; and

“rules”.

Subclause (3) amends section 76(1) by deleting the definition of **“interest”**.

Subclause (4) inserts a new subsection (1a), which provides that references in Division 1 of Part IIIA to the acquisition of an interest includes a reference to the acquisition of a majority interest or a further interest as those terms are described in sections 76AK or 76AR.

Subclause (5) amends section 76(4) by deleting paragraph (c) and inserting a new paragraph (c) in its place, which updates a Corporations Law reference that is applicable to substantial holdings of shares. The amendment does not alter the operation of the provision in any other manner.

Subclause (6) inserts a new subsection (4a), which provides that a reference throughout the Part to an entitlement to property of a corporation or a trust, or to participate in a distribution of that property, is an entitlement to the property except in the capacity of a creditor or any other person to whom the corporation or trust is liable.

The new subsection (4a) also provides that a reference throughout the Part to distributable property means property that is distributable to persons other than in their capacity as a creditor or any other person to whom the corporation or trust is liable.

The effect of this provision is to clarify that the entitlement of persons to the property of a corporation or a trust, upon its distribution or otherwise, is limited to members of the corporation or beneficiaries of the trust.

Subclause (7) repeals section 76(5) and inserts new subsections (5) and (5a) in its place.

Subsection (5) contains updated Corporations Law references and clarifies the point in time that an entitlement of a person to participate in the distribution of the property of a corporation on a winding up is quantified. For the purposes of the Part, the entitlement is measured as if the rules of the corporation and the laws that exist at the time were applied in the winding up, or the person had exercised all of their rights and discretions immediately prior to the winding up so as to maximise their entitlement to the property of the corporation. A person's entitlement is taken to be the greatest amount arrived at, unless the Commissioner determines otherwise after considering the relevant circumstances, as provided in that subsection.

Subsection (5a) provides that if the extent of a person's entitlement to participate in the distribution of the property of a corporation is unascertainable or uncertain, that entitlement will be regarded as being the greatest possible entitlement that the person could derive.

This provides the Commissioner with a way in which to quantify the extent of a person's entitlement to the property of a corporation, where the extent of that entitlement is not certain or cannot be ascertained. This is particularly relevant where the extent of a person's entitlement is contingent upon the occurrence of a future event or happening, or the entitlement is not specified at the time that an interest in a corporation is acquired.

Subclause (8) amends section 76(7) by inserting a reference to section 76AP(4). This amendment clarifies that a trust referred to in section 76AP(4) also includes any other trust in which the first-mentioned trust has any interest.

Clause 5: Section 76A amended

This clause amends section 76A(1) by removing superfluous words.

Clause 6: Section 76AB amended

This clause amends section 76AB(2)(a) to provide that an entitlement to participate in the distribution of the property of a corporation can be acquired without also acquiring any shares of the corporation. The application of the provision has not been altered in any other way.

Clause 7: Section 76AG amended

Subclause (1) repeals section 76AG(1) and inserts a new subsection (1) in its place.

Subsection (1) now provides that a person is required to lodge a statement for the acquisition of a majority interest or further interest that the person makes in a WA company, if:

- the shares of the WA company are not listed on a recognized stock exchange, or are listed on a prescribed stock exchange, and it is a land holder as described in section 76AI(2); or
- the shares of the WA company are not listed on a recognized stock exchange, or are listed on a prescribed stock exchange, and it would be a land holder as described in section 76AI(2), if the goods, wares and merchandise that the company is entitled to are regarded as being land when applying the 80% test in subsection 76AI(2)(b).

Section 76AG(1) is now only a provision to require persons to lodge statements in the circumstances outlined therein. This has been done to ensure that the Commissioner is provided with information in relation to a corporation that may be considered to be land-rich to enable him to evaluate the transaction. At present there is no requirement to lodge a statement if it is believed, even mistakenly, that a company is not land-rich. This could result in persons inadvertently not paying duty that they are obliged to pay under the Act, simply because they may have the mistaken belief that a corporation is not land-rich.

A statement's liability to duty is established separately to the requirement to lodge a statement. A statement will only be chargeable with duty where a relevant acquisition occurs in a WA company that meets with the requirements of section 76AI(1)(a), or the Commissioner believes that goods, wares and merchandise have been used in such a way as to defeat the operation of Part IIIIBA.

Subclause (2) inserts a new subsection (4)(f) and makes minor amendments to section 76AG(4) to accommodate the insertion of the new subsection.

The new subsection (4)(f) provides that where a statement is lodged because of subsection (1)(b), that fact should be noted on the statement. In addition, information pertaining to the goods, wares and merchandise must be provided to the Commissioner in an approved form.

Subclause (3) repeals section 76AG(5) and inserts in its place new subsections (5) to (5e).

Subsection (5) provides that a statement that is lodged because of section 76AG(1)(a) is to be regarded as an instrument that is executed on the day of the relevant acquisition. A statement lodged because of section 76AG(1)(b) will also be considered to be an instrument that is executed on the day of the relevant acquisition, but only if the

Commissioner has not given written notice of a determination under subsection (5c).

Those statements that are regarded as instruments under this subsection will be charged with duty in accordance with section 76AH. However, as outlined previously, only those statements lodged in relation to a WA company that meets with the requirements of section 76AI(1)(a), or if the Commissioner believes that it would meet with the requirements of that section if the goods, wares or merchandise that the corporation is entitled to were not part of a scheme or arrangement to defeat the purpose of Part IIIA, will be dutiable under this Part.

Subsection (5a) provides the Commissioner with a means with which to determine that a statement lodged under subsection (1)(b) is not an instrument under subsection (5) that is chargeable with duty, but only where the Commissioner is satisfied that the goods, wares or merchandise included in the statement are not being used as part of a scheme or arrangement to defeat the application of Division 2 of Part IIIA.

The Commissioner's discretion in relation to goods, wares and merchandise is considered necessary, as this form of property has been widely used in the past to circumvent the application of Part IIIA. It is recognised, however, that goods, wares and merchandise do legitimately comprise a component of a corporation's business activities. Therefore, where it can be shown to the Commissioner's satisfaction that the valuation, acquisition and entitlement to goods, wares and merchandise, is not part of a scheme or arrangement to circumvent the application of Part IIIA, the Commissioner may exercise a discretion so that a statement lodged under subsection (1)(b) will not be chargeable with duty.

It is important to note that where, for example, fixtures or other property have been mistakenly classified as goods, wares or merchandise, or an incorrect valuation has been ascribed to goods, wares or merchandise, and where section 76AI(2) would otherwise apply, any statement that has been lodged with the Commissioner would be considered to be lodged under section 76AG(1)(a), rather than section 76AG(1)(b).

Subsection (5b) provides that the Commissioner may have regard to the matters listed in paragraphs (a) to (d) of that subsection in making a determination under subsection (5a). This provides guidance as to the things that will be considered when making a determination under subsection (5a).

Subsection (5c) provides that a determination under subsection (5a) has effect according to its terms and that the Commissioner must give the person who lodges a statement pursuant to section 76AG(1)(b) written notice of that determination.

Subsection (5d) provides that where the Commissioner has not made a determination under subsection (5a), he must give written reasons for not doing so to the person who lodged a statement pursuant to section 76AG(1)(b), but only where that person makes such a request to the Commissioner in writing.

Subsection (5e) provides that where a person is required to lodge a statement under subsection (1)(b) and they fail to do so within 3 months of the date of the relevant acquisition, that person commits an offence against the Act.

This means that a person who is required to lodge a statement under subsection (1)(b) may be prosecuted under the Act if they fail to lodge the statement, or they lodge the statement after 3 months from the date of the relevant acquisition, even if the statement is not ultimately charged with duty under Part IIIBA. Such a measure is necessary to encourage persons to lodge statements required under subsection (1)(b) within the requisite time period.

Clause 8: Section 76AH amended

Subclause (1) amends section 76AH(1) so as to clarify that only statements that section 76AG(5) has application to are to be charged with duty.

Subclause (2) inserts a new subsection (2a), which provides that the concessional duty treatment conferred upon certain statements under subsection (2), shall not be available for acquisitions that are obtained other than through the acquisition of a shareholding that confers a commensurate entitlement to participate in the distribution of the property of the corporation in which the acquisition is made.

If this provision were not inserted, persons who acquired an interest in a corporation other than through acquiring a shareholding would obtain a duty benefit more favourable than that provided under subsection (2) for persons who obtain an interest through acquiring a shareholding.

Subclause (3) amends section 76AH(4) so that it only applies to statements that section 76AG(5) has application to. The amendment does not affect the operation of the provision in any other way.

Clause 9: Section 76AI amended

Subclause (1) amends section 76AI(2) to insert an anti-avoidance measure that will operate in addition to the tests outlined in paragraphs (a) and (b) of that subsection. The anti-avoidance provision will operate in such a manner that the Commissioner may determine that the WA company is a land holder at the time of the relevant acquisition if he is of the opinion that the criteria outlined in paragraphs (a) and (b) would have applied but for the relevant acquisition being comprised of

a transaction or series of transactions, structured in such a way so as to defeat the object of the Division.

Subclause (2) inserts new subsections (2a), (2b) and (2c).

Subsection (2a) requires the Commissioner to provide written notification of a determination that has been made under subsection (2) to the person who made the relevant acquisition.

Subsection (2b) requires the Commissioner to include in the written notification the reasons for the determination made under subsection (2).

Subsection (2c) provides that for the purposes of lodging a statement within 3 months of the occurrence of the relevant acquisition, the date of the relevant acquisition is taken to be the date when the notice is given.

Subclause (3) amends section 76AI(3) by inserting paragraphs (ba), (ea), (eb), (ec) and (ed) and amending paragraph (f) to specify additional items of property which are not to be included for the purposes of determining whether the 80% test has been met under subsection (2)(b).

Subclause (3)(a) inserts paragraph (ba) which excludes property that consists of rights or interests arising from sales contracts, including forward sales contracts, which relate to minerals or primary products, which are defined terms in section 76(1), or any other commodities. The property referred to is the contract rights or interests themselves, not the property that is the subject of the contract.

Subclause (3)(b) inserts paragraphs (ea), (eb), (ec) and (ed).

Paragraph (ea) excludes licences, patents and other intellectual property that relates to certain mining or primary production activities. This extends to any form of knowledge that has a commercial value and includes “know-how” and other information.

Paragraph (eb) excludes physical holdings of minerals or primary products that have been produced by the WA company or a related person that may be processed or unprocessed.

The paragraph would not apply to raw materials acquired by a corporation from an arms length party that would be used in the corporation’s production process. For example, iron-ore that was acquired by a steel mill from an unrelated party for the purpose of refining into steel.

The provision would also not extend to livestock.

Paragraph (ec) excludes any future tax benefits such as tax losses, capital losses, foreign losses or foreign tax credits under laws of the Commonwealth or another jurisdiction.

Paragraph (ed) enables other items to be excluded from the value of property for the purposes of the 80% test, by way of regulation.

The property that has been included in the foregoing paragraphs is property that has been used in the past for the purpose of defeating the application of the Part. It is considered that this property is similar in nature to property that is already excluded from the 80% test, being financial or intangible property, or is property that may be used to transform value from the land owned by the company into property that is used to defeat the 80% test.

An ability to prescribe forms of property that may be excluded from the 80% test has been included in an attempt to provide a way of reacting quickly to any future attempts to circumvent the operation of the Part by the use of particular forms of property that have not been so used to date.

Subclause (3)(c) amends paragraph (f) of subsection (3) so that the Commissioner may disregard the property of a WA company for the purposes of the 80% test where he is not satisfied that its ownership has not been structured for the purposes of defeating Part IIIA. The amendment also enables the Commissioner to disregard the property of a subsidiary of the WA company where he is not satisfied in this regard.

Subclause (4) inserts a new subsection (3a) to provide guidance as to some of the factors that the Commissioner may consider when forming an opinion under subsection (3)(f). The factors are specified in paragraphs (a), (b), (c) and (d).

Subclause (5) amends section 76AI(4)(a) and (4)(c).

Subclause 5(a) amends section 76AI(4)(a) to extend the meaning of a subsidiary for the purposes of determining the entitlement of a WA company to land or property. A subsidiary will include a corporation in which the WA company has an entitlement to participate in the distribution of that corporation's property on its winding up to an extent greater than 50%. Where a WA company has such an entitlement, the corporation will be considered to be a subsidiary of the WA company even if the WA company does not own any shares in the corporation.

Subclause 5(b) amends section 76AI(4)(c) to remove references that have been made redundant because of the insertion of a reference to "distributable property", which is a defined term.

Subclause (6) inserts new subsections (5) and (6) which relate to uncompleted contracts.

Subsection (5) is inserted to specify how an uncompleted contract for the acquisition or disposal of land will be treated in determining an entity's entitlement to that land for the purposes of the land holder tests and the calculation of the dutiable value, where a relevant acquisition occurs prior to the completion of the contract.

Paragraph (a) deems a contract or agreement entered into by an entity for the acquisition of land to be completed at the time of the relevant acquisition. Therefore, an entity is considered to be entitled to any land that it is acquiring pursuant to a contract or agreement that is yet to be completed. Provision has been made to allow duty to be reassessed if the contract or agreement is not completed, as duty would have been charged on land that the entity is not ultimately entitled to.

Paragraph (b) deems a contract or agreement entered into by an entity for the disposal of land to be disregarded at the time of the relevant acquisition. Therefore, an entity is still considered to be entitled to land that is being sold pursuant to a contract or agreement that is yet to be completed. Provision has been made to allow duty to be reassessed if the contract or agreement is completed, as duty would have been charged on land that the entity is not ultimately entitled to.

Subsection (6) is inserted to specify how an uncompleted contract for the acquisition or disposal of property other than land will be treated in determining the entity's entitlement to that non-land property for the purposes of the land holder tests.

Paragraph (a) considers a contract or agreement to dispose of property other than land to be completed at the time of the relevant acquisition. Therefore, an entity is considered not to be entitled to non-land property at the time of the relevant acquisition. Provision has been made to allow duty to be reassessed if the contract or agreement is not completed, as duty may have been charged on property that the entity is not ultimately entitled to, or the entity may not be land-rich for the purposes of the Part.

Paragraph (b) provides for a contract or agreement to acquire property other than land to be disregarded at the time of the relevant acquisition. Therefore, an entity is considered not to be entitled to non-land property at the time of the relevant acquisition. Provision has been made to allow duty to be reassessed if the contract or agreement is completed, to determine if the entity is land-rich for the purposes of the Part, provided the Commissioner does not believe the acquisition of that property was intended to defeat the object of Part IIIBA.

Clause 10: Sections 76AJ and 76AK replaced

Sections 76AJ and 76AK have been repealed and the following sections are inserted.

76AJ. Meaning of “relevant acquisition”

Section 76AJ(1) provides that an acquisition is a “relevant acquisition” if paragraph (a) or paragraph (b) applies.

Paragraph (a) applies where the acquisition results in the person acquiring a majority interest, which is defined in section 76AK(2).

Subparagraph (i) provides that the majority interest may be acquired through one acquisition that represents a majority interest in itself.

Subparagraph (ii) provides that the majority interest may be acquired through multiple acquisitions that occur within a relevant period and that are aggregated to form the acquisition of a majority interest.

Subparagraph (ii) allows for a majority interest to be comprised of acquisitions of interests that occur within a three year period. The extension of the period from 12 months to three years is to be phased-in progressively over the next 2 years. This is to be achieved by using the concept of a “relevant day”, which is explained in subsection (4). Any earlier acquisitions that fall on or after the day that is determined to be the relevant day of an acquisition of an interest, will be aggregated with the later acquisition to determine whether a majority interest has been acquired.

For example, the provisions would operate in respect of 3 transactions occurring on the dates below as follows:

	10 August 2000	1 August 2001	10 August 2006
<u>Relevant day</u>	10 August 1999	10 August 1999	10 August 2003

Assuming that none of the individual acquisitions in the WA company constituted a majority interest, subsection (1) would not apply. When considering the acquisition on 1 August 2001, the earlier acquisition falls on or after the relevant day for that acquisition. Therefore both these acquisitions would be taken into account to determine whether a majority interest has been acquired.

However, the acquisitions occurring on 10 August 2000 and 1 August 2001 are before the relevant day for the acquisition of 10 August 2006. Therefore the earlier acquisitions would not be taken into consideration

when determining whether a majority interest has been acquired, in respect of the acquisition of 10 August 2006.

Paragraph (b) provides that an acquisition is a relevant acquisition if it results in the acquisition of a further interest. A “further interest” is defined in section 76AK(3).

Section 76AJ(2) clarifies that if an acquisition is taken to be a relevant acquisition for the purposes of subsection (1)(b) (ie. it is considered to be the acquisition of a further interest) then subsection (1)(a)(ii) is not applicable. For instance, where more than 2 acquisitions, each being a 50% or lesser interest in a corporation, occur on or after the relevant day for the final acquisition, and the first two acquisitions result in a majority interest being acquired pursuant to subsection (1)(a)(ii), each acquisition subsequent to the first 2 will be the acquisition of a further interest pursuant to subsection (1)(b), even though, in the absence of subsection (2), they may otherwise be aggregated with previous acquisitions pursuant to subsection (1)(a)(ii).

Section 76AJ(3) relates to circumstances where a person has an interest in a WA company from an earlier acquisition and, pursuant to an arrangement entered into during the relevant period of the earlier acquisition, obtains another interest outside of that relevant period. The period that constitutes a relevant period for an acquisition is determined in accordance with subsection (5).

Subsection (3) provides that an earlier acquisition is regarded as having occurred on or after the relevant day of the later acquisition, if that later acquisition was as a result of an arrangement entered into during the relevant period of the earlier acquisition.

For example, consider the following transactions, and the relevant day and relevant period for each determined in accordance with subsections (4) and (5).

	10 August 2000 Earlier acquisition	1 August 2001 Arrangement to acquire further interest	10 August 2006 Later acquisition pursuant to arrangement
<u>Relevant day</u>	10 August 1999	10 August 1999	10 August 2003
<u>Relevant period</u>			
Beginning	10 August 1999	10 August 1999	10 August 2003
Ending	10 August 2003	1 August 2004	10 August 2009

The earlier acquisition of 10 August 2000 does not fall within the relevant period for the later acquisition of 10 August 2006. However, the arrangement resulting in the later acquisition was entered into on 1 August 2001, which is during the relevant period of the earlier acquisition. Therefore, the provisions regard the earlier acquisition as being entered into on or after the relevant day of the later acquisition, even though it was made 6 years prior to the later acquisition. Both acquisitions can therefore be taken into account for the purposes of determining whether a majority interest has been acquired in respect of the later acquisition.

The provisions also apply where there is more than one earlier acquisition. For example, consider the following transactions, and the relevant day and relevant period for each determined in accordance with subsections (4) and (5).

	10 August 2000 Earlier acquisition	1 August 2001 Arrangement to acquire further interest	1 August 2001 Earlier acquisition	10 August 2006 Later acquisition pursuant to arrangement
<u>Relevant day</u>	10 August 1999	10 August 1999	10 August 1999	10 August 2003
<u>Relevant period</u>				
Beginning	10 August 1999	10 August 1999	10 August 1999	10 August 2003
Ending	10 August 2003	1 August 2004	1 August 2004	10 August 2009

The earlier acquisition of 10 August 2000 falls within the relevant period of the acquisition of 1 August 2001. Neither of the earlier acquisitions fall within the relevant period of the later acquisition of 10 August 2006. However, the arrangement resulting in the later acquisition was entered into on 1 August 2001, which is during the relevant period of both the earlier acquisitions. Therefore, the provisions regard both the earlier acquisitions as being entered into on or after the relevant day of the later acquisition pursuant to the arrangement. All three acquisitions can therefore be taken into account for the purposes of determining whether a majority interest has been acquired in respect of the later acquisition.

Section 76AJ(4) defines the “**relevant day**” for an acquisition. The concept of a “relevant day” is required to set a point in time from which all acquisitions may be aggregated. The “relevant day” represents the first day of the “relevant period”.

It should be noted that for the acquisition of an interest that occurs before 10 August 2000, the concept of a relevant day does not apply. The “old” provisions should be used to determine whether acquisitions will be aggregated in such instances.

Section 76AJ(5) defines the “**relevant period**” in relation to an acquisition. The relevant period represents the period in which acquisitions may be taken together to determine whether a majority interest has been acquired, where one of the acquisitions is pursuant to an arrangement to acquire an interest. The provision is structured such that it will not affect such acquisitions that occurred more than 12 months prior to the Minister’s announcement.

The relevant period in respect of each of the acquisitions below would be the period beginning on the relevant day, and ending on the day determined in accordance with subsection (5). This is illustrated in the example below.

	10 August 2000	1 August 2001	10 August 2003
<u>Relevant period</u>			
Beginning	10 August 1999	10 August 1999	10 August 2000
Ending	10 August 2003	1 August 2004	10 August 2006

The above examples demonstrate that the provisions have been structured such that the three year period before or after the acquisition is imposed progressively on acquisitions following the Minister’s announcement such that only acquisitions made after 10 August 2002 will be subject to the full three year period.

Subsection (6) provides that the amended subsection (3) does not apply retrospectively to arrangements that were entered into prior to 10 August 2000, other than those that were captured under the previous subsection (3).

76AK. Meaning of acquiring an interest, majority interest or further interest

Section 76AK(1) defines acquiring an interest in a WA company as acquiring an entitlement to participate in a distribution of property if the company were to be wound up. Such an entitlement may be acquired by any means, and is not restricted to an entitlement obtained upon the acquisition of shares. The acquisition of an interest in a WA company includes acquisitions made by a person, or a person and any related person.

Section 76AK(2) defines acquiring a majority interest as acquiring an interest, such that having acquired that interest, the person, or the person and any related person, would be entitled to participate in a

distribution of property, which represents more than 50% of the value of all property so distributable, if the company were to be wound up. Such an entitlement may be acquired by any means, and is not restricted to an entitlement obtained upon the acquisition of shares. A “majority interest” has a corresponding meaning for the purposes of determining whether there has been a relevant acquisition and for subsection (3).

Section 76AK(3) defines the criteria which must be satisfied (as specified in paragraphs (a), (b) and (c)) for the acquisition of an interest to constitute the acquisition of a further interest.

Paragraph (a) provides that the person, or the person and any related person, must already have a majority interest. As majority interest has the same meaning as in section 76AK(2), persons will be regarded as having a majority interest in a corporation where they, or they and any related person, or any related person, have an entitlement to participate in the distribution of the property of the corporation to an extent greater than 50%.

Paragraph (b) requires that at the time the majority interest was acquired, duty must have been payable on the acquisition of that majority interest under the provisions of Part IIIA of the Act operative at that time.

Paragraph (c) provides that by the acquisition of the interest, a further entitlement to participate in a distribution of property if the company were to be wound up must be obtained.

Clause 11: Section 76AL amended

Subclause (1) makes a minor amendment to section 76AL(3)(a) to insert a comma and to provide for changes to the concept of acquiring a further interest, as outlined in section 76AK(3).

Subclause (2) amends section 76AL(5) to remove superfluous words.

Clause 12: Section 76AM amended

Subclause (1) amends section 76AM(1) to clarify that a person who is required to lodge a statement under section 76AG is liable to pay the duty on the statement, if the statement is dutiable because section 76AG(5) applies to it.

Subclause (2) makes a minor amendment to section 76AM(2) to provide for changes that have been made to the concept of acquiring an interest, as outlined in section 76AK(1).

Clause 13: Section 76AN amended

Subclause (1) repeals section 76AN(1) and inserts a new subsection (1) in its place.

Subsection (1) now provides that a corporation is required to lodge a statement in relation to the acquisition of a majority interest or further interest in the corporation:

- that section 76AP(1) has application to; or
- that section 76AP(1) has application to, if the goods, wares and merchandise that the corporation is entitled to are regarded as being land when applying the 80% test in subsection 76AP(2)(b).

Section 76AN(1) is now only a provision to require corporations to lodge statements in the circumstances outlined therein. This has been done to ensure that the Commissioner is provided with information in relation to a corporation that may be considered to be land-rich to enable him to evaluate the transaction. At present there is no requirement to lodge a statement if it is believed, even mistakenly, that a corporation is not land-rich. This could result in corporations inadvertently not paying duty that they are obliged to pay under the Act, simply because they may have the mistaken belief that a corporation is not land-rich.

A statement's liability to duty is established separately to the requirement to lodge a statement. A statement will only be chargeable with duty where a relevant acquisition occurs in a corporation that meets with the requirements of section 76AP(1)(a), or the Commissioner believes that goods, wares and merchandise have been used in such a way as to defeat the operation of Part III BA.

Subclause (2) amends section 76AN(3).

Subclause 2(a) amends subsection (3)(d) to allow a corporation to estimate the unencumbered value of land and chattels that it is entitled to for the purposes of lodging a Part III BA statement.

Subclause 2(b) repeals paragraphs (db) and (e) of subsection (3), and inserts new paragraphs (db) to (f).

The proposed paragraph (db) provides that the corporation should include an estimate of the unencumbered value of chattels referred to in paragraph (da).

The proposed paragraph (e) provides that the corporation should include an estimate of the unencumbered value of its assets.

The proposed paragraph (f) provides that where a statement is lodged because of subsection (1)(b), that fact should be noted on the statement. In addition, information pertaining to the goods, wares and merchandise must be provided to the Commissioner in an approved form.

Subclause (3) repeals section 76AN(4) and inserts in its place new subsections (4) to (4e).

Subsection (4) provides that a statement that is lodged because of section 76AN(1)(a) is to be regarded as an instrument that is executed on the day of the relevant acquisition. A statement lodged because of section 76AN(1)(b) will also be considered to be an instrument that is executed on the day of the relevant acquisition, but only if the Commissioner has not given written notice of a determination under subsection (4c).

Those statements that are regarded as instruments under this subsection will be charged with duty in accordance with section 76AO. However, as outlined previously, only those statements lodged in relation to a corporation that meets with the requirements of section 76AN(1)(a), or if the Commissioner believes that it would meet with the requirements of that section if the goods, wares or merchandise that the corporation is entitled to were not part of a scheme or arrangement to defeat the purpose of Part IIIA, will be dutiable under this Part.

Subsection (4a) provides the Commissioner with a means with which to determine that a statement lodged under subsection (1)(b) is not an instrument under subsection (4) that is chargeable with duty, but only where the Commissioner is satisfied that the goods, wares or merchandise that are included in the statement are not being used as part of a scheme or arrangement to defeat the application of Division 3 of Part IIIA.

The Commissioner's discretion in relation to goods, wares and merchandise is considered necessary, as this form of property has been widely used in the past to circumvent the application of Part IIIA. It is recognised, however, that goods, wares and merchandise do legitimately comprise a component of a corporation's business activities. Therefore, where it can be shown to the Commissioner's satisfaction that the valuation, acquisition and entitlement to goods, wares or merchandise, is not part of a scheme or arrangement to circumvent the application of Part IIIA, the Commissioner may exercise a discretion so that a statement lodged under subsection (1)(b) is not chargeable with duty.

It is important to note that where, for example, fixtures or other property have been mistakenly classified as goods, wares or merchandise, or an incorrect valuation has been ascribed to goods, wares or merchandise, and where section 76AP(2) would otherwise

apply, any statement that has been lodged with the Commissioner would be considered to be lodged under section 76AN(1)(a), rather than section 76AN(1)(b).

Subsection (4b) provides that the Commissioner may have regard to the matters listed in paragraphs (a) to (d) of that subsection in making a determination under subsection (4a). This provides some guidance as to the things that will be considered when making a determination under subsection (4a).

Subsection (4c) provides that a determination under subsection (4a) has effect according to its terms and that the Commissioner must give the corporation that lodges a statement pursuant to section 76AN(1)(b) written notice of that determination.

Subsection (4d) provides that where the Commissioner has not made a determination under subsection (4a), he must give written reasons for not doing so to the corporation, but only where the corporation makes such a request to the Commissioner in writing.

Subsection (4e) provides that where a corporation is required to lodge a statement under subsection (1)(b) and it fails to do so within 3 months of the date of the relevant acquisition, the corporation commits an offence against the Act.

This means that a corporation that is required to lodge a statement under subsection (1)(b) may be prosecuted under the Act if they fail to lodge the statement, or they lodge the statement after 3 months from the date of the relevant acquisition, even if the statement is not ultimately charged with duty under Part IIIA. Such a measure is necessary to encourage corporations to lodge statements required under subsection (1)(b), within the requisite time period.

Subclause (4) amends section 76AN(5) to specify that it is the corporation in which a relevant acquisition is made that commits an offence if a false statement is lodged with the Commissioner.

Clause 14: Section 76AO amended

Subclause (1) amends section 76AO(1) so as to clarify that only statements that section 76AN(4) has application to are to be charged with duty.

Subclause (2) inserts a new subsection (2a), which provides that the concessional duty treatment conferred upon certain statements under subsection (2), shall not be available for acquisitions that are obtained other than through the acquisition of a shareholding that confers a commensurate entitlement to participate in the distribution of the property of the corporation in which the acquisition is made.

If this provision were not inserted, a duty benefit more favourable than that provided under subsection (2) for interests acquired through a shareholding, would be available in respect of interests in a corporation that are acquired other than through a shareholding.

Subclause (3) amends section 76AO(4) so that it only applies to statements that section 76AN(4) has application to. The amendment does not affect the operation of the provision in any other way.

Clause 15: Section 76AP amended

Subclause (1) amends section 76AP(2) to insert an anti-avoidance measure that will operate in addition to the tests outlined in paragraphs (a), (b) and (c) of that subsection. The anti-avoidance provision will operate in such a manner that the Commissioner may determine that the corporation is a land holder at the time of the relevant acquisition if he is of the opinion that the criteria outlined in paragraphs (a), (b) and (c) would have applied but for the relevant acquisition being comprised of a transaction or series of transactions, structured in such a way so as to defeat the object of the Division.

Subclause (2) inserts new subsections (2a), (2b) and (2c).

Subsection (2a) requires the Commissioner to provide written notification of a determination that has been made under subsection (2) to the corporation.

Subsection (2b) requires the Commissioner to include in the written notification the reasons for the determination made under subsection (2).

Subsection (2c) provides that for the purposes of lodging a statement within 3 months of the occurrence of the relevant acquisition, the date of the relevant acquisition is taken to be the date when the notice is given.

Subclause (3) amends section 76AP(3) by inserting paragraphs (ba), (da), (db), (dc) and (dd) and amending paragraph (e) to specify additional items of property which are not to be included for the purposes of determining whether the 80% test has been met.

Subclause (3)(a) amends subsection (3) to remove the reference to a related corporation and replace it with another corporation. Such a change is necessary as a result of amendments to the meaning of “entitled” when considered in relation to the deemed entitlement of a corporation.

Subclause (3)(b) inserts paragraph (ba) which excludes property that consists of rights or interests arising from sales contracts, including forward sales contracts, which relate to minerals or primary products,

which are defined terms in section 76(1), or any other commodities. The property referred to is the contract rights or interests themselves, not the property that is the subject of the contract.

Subclause (3)(c) amends paragraph (d) to remove the reference to a related corporation and replace it with another corporation. Such a change is necessary as a result of amendments to the meaning of “entitled” when considered in relation to the deemed entitlement of a corporation.

Subclause (3)(d) inserts paragraphs (da), (db), (dc) and (dd).

Paragraph (da) excludes licences, patents and other intellectual property that relates to certain mining or primary production activities. This extends to any form of knowledge that has a commercial value and includes “know-how” and other information.

Paragraph (db) excludes physical holdings of minerals or primary products that have been produced by the corporation or a related person that may be processed or unprocessed.

The paragraph would not apply to raw materials acquired by a corporation from an arms length party that would be used in the corporation’s production process. For example, iron-ore that was acquired by a steel mill from an unrelated party for the purpose of refining into steel.

The provision would also not extend to livestock.

Paragraph (dc) excludes any future tax benefits such as tax losses, capital losses, foreign losses or foreign tax credits under laws of the Commonwealth or another jurisdiction.

Paragraph (dd) enables other items to be excluded from the value of property for the purposes of the 80% test, by way of regulation.

The property that has been included in the foregoing paragraphs is property that has been used in the past for the purpose of defeating the application of the Part. It is considered that this property is similar in nature to property that is already excluded from the 80% test, being financial or intangible property, or is property that may be used to transform value from the land owned by the company into property that is used to defeat the 80% test.

An ability to prescribe forms of property that may be excluded from the 80% test has been included in an attempt to provide a way of reacting quickly to any future attempts to circumvent the operation of the Part by the use of particular forms of property that have not been so used to date.

Subclause (3)(e) amends paragraph (e) of subsection (3) to extend the power of the Commissioner to disregard the property of a corporation for the purposes of the 80% test where he is not satisfied that its ownership has not been structured for the purposes of defeating Part IIIBA. The amendment enables the Commissioner to also disregard the property of a trustee or other related corporation where he is not satisfied in this regard.

Subclause (4) inserts a new subsection (3a) to provide guidance as to some of the factors that the Commissioner may consider when forming an opinion under subsection (3)(e). The factors are specified in paragraphs (a), (b), (c) and (d).

Subclause (5) amends section 76AP(4) by deleting paragraph (b) and inserting new paragraphs (b) and (c) to clarify the entitlement of a corporation to land or property.

Paragraph (b) provides that where the relevant acquisition results in the acquisition of an entitlement in the corporation itself, that corporation is deemed to be entitled to the land or property of its subsidiary corporations. A subsidiary corporation includes any corporation in which it has a greater than 50% shareholding, or a corporation in which it has an entitlement to participate in the distribution of property on its winding up to an extent greater than 50%.

Paragraph (c) provides that where the relevant acquisition results in the acquisition of an entitlement in a corporation through the acquisition of an entitlement in its holding corporation, that corporation is deemed to be entitled to the land or property of the subsidiary corporations of the holding corporation. A subsidiary corporation includes any corporation in which it has a greater than 50% shareholding, or a corporation in which it has an entitlement to participate in the distribution of property on its winding up to an extent greater than 50%.

Subclause (6) inserts new subsections (5) and (6) which relate to uncompleted contracts.

Subsection (5) is inserted to specify how an uncompleted contract for the acquisition or disposal of land will be treated in determining an entity's entitlement to that land for the purposes of the land holder tests and the calculation of the dutiable value, where a relevant acquisition occurs prior to the completion of the contract.

Paragraph (a) deems a contract or agreement entered into by an entity for the acquisition of land to be completed at the time of the relevant acquisition. Therefore, an entity is considered to be entitled to any land that it is acquiring pursuant to a contract or agreement that is yet to be completed. Provision has been made to allow duty to be reassessed if the contract or agreement is not completed, as duty would have been charged on land that the entity is not ultimately entitled to.

Paragraph (b) deems a contract or agreement entered into by an entity for the disposal of land to be disregarded at the time of the relevant acquisition. Therefore, an entity is still considered to be entitled to land that is being sold pursuant to a contract or agreement that is yet to be completed. Provision has been made to allow duty to be reassessed if the contract or agreement is completed, as duty would have been charged on land that the entity is not ultimately entitled to.

Subsection (6) is inserted to specify how an uncompleted contract for the acquisition of property other than land will be treated in determining the entity's entitlement to that non-land property for the purposes of the land holder tests.

Paragraph (a) considers a contract or agreement to dispose of property other than land to be completed at the time of the relevant acquisition. Therefore, an entity is considered not to be entitled to non-land property at the time of the relevant acquisition. Provision has been made to allow duty to be reassessed if the contract or agreement is not completed, as duty may have been charged on property that the entity is not ultimately entitled to, or the entity may not be land-rich for the purposes of the Part.

Paragraph (b) provides for a contract or agreement to acquire property other than land to be disregarded at the time of the relevant acquisition. Therefore, an entity is considered not to be entitled to non-land property at the time of the relevant acquisition. Provision has been made to allow duty to be reassessed if the contract or agreement is completed, to determine if the entity is land-rich for the purposes of the Part, provided the Commissioner does not believe the acquisition of that property was intended to defeat the object of Part IIIBA.

Clause 16: Sections 76AQ and 76AR replaced

Sections 76AQ and 76AR have been repealed and the following sections are inserted.

76AQ. Meaning of “relevant acquisition”

Section 76AQ(1) provides that an acquisition is a “relevant acquisition” if paragraph (a) or paragraph (b) applies.

Paragraph (a) applies where the acquisition results in the person acquiring a majority interest, which is defined in section 76AR(2).

Subparagraph (i) provides that the majority interest may be acquired through one acquisition that represents a majority interest in itself.

Subparagraph (ii) provides that the majority interest may be acquired through multiple acquisitions that occur within a relevant period and that are aggregated to form the acquisition of a majority interest.

Subparagraph (ii) allows for a majority interest to be comprised of acquisitions of interests that occur within a three year period. The extension of the period from 12 months to three years is to be phased-in progressively over the next 2 years. This is to be achieved by using the concept of a “relevant day”, which is explained in subsection (4). Any earlier acquisitions that fall on or after the day that is determined to be the relevant day of an acquisition of an interest, will be aggregated with the later acquisition to determine whether a majority interest has been acquired.

For example, the provisions would operate in respect of 3 transactions occurring on the dates below as follows:

	10 August 2000	1 August 2001	10 August 2006
<u>Relevant day</u>	10 August 1999	10 August 1999	10 August 2003

Assuming that none of the individual acquisitions in the corporation constituted a majority interest, subsection (1) would not apply. When considering the acquisition on 1 August 2001, the earlier acquisition falls on or after the relevant day for that acquisition. Therefore both these acquisitions would be taken into account to determine whether a majority interest has been acquired.

However, the acquisitions occurring on 10 August 2000 and 1 August 2001 are before the relevant day for the acquisition of 10 August 2006. Therefore the earlier acquisitions would not be taken into consideration when determining whether a majority interest has been acquired in respect of the acquisition of 10 August 2006.

Paragraph (b) provides that an acquisition is a relevant acquisition if it results in a further interest being acquired. A “further interest” is defined in section 76AR(3).

Section 76AQ(2) clarifies that if an acquisition is taken to be a relevant acquisition for the purposes of subsection (1)(b) (ie. it is considered to be a further interest) then subsection (1)(a)(ii) is not applicable. For instance, where more than 2 acquisitions, each being a 50% or lesser interest in a corporation, occur on or after the relevant day for the final acquisition, and the first two acquisitions result in a majority interest being acquired pursuant to subsection (1)(a)(ii), each acquisition subsequent to the first 2 will be the acquisition of a further interest pursuant to subsection (1)(b), even though, in the absence of subsection (2), they may otherwise be aggregated with previous acquisitions pursuant to subsection (1)(a)(ii).

Section 76AQ(3) relates to circumstances where a person has an interest in a corporation from an earlier acquisition and, pursuant to an

arrangement entered into during the relevant period of the earlier acquisition, obtains another interest outside of that relevant period. The period that constitutes a relevant period for an acquisition is determined in accordance with subsection (5).

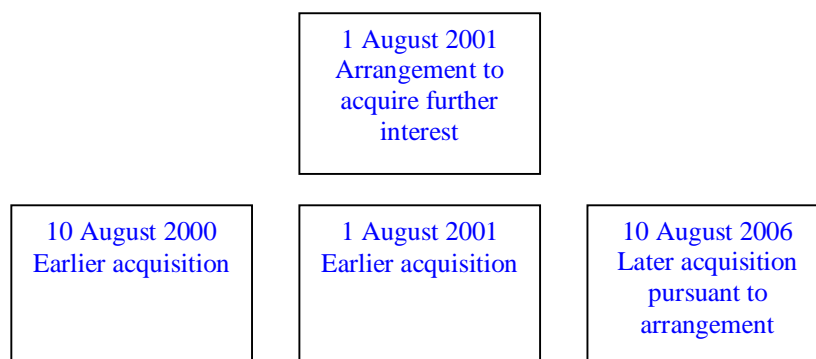
Subsection (3) provides that an earlier acquisition is regarded as having occurred on or after the relevant day of the later acquisition, if that later acquisition was as a result of an arrangement entered into during the relevant period of the earlier acquisition.

For example, consider the following transactions, and the relevant day and relevant period for each determined in accordance with subsections (4) and (5).

	10 August 2000 Earlier acquisition	1 August 2001 Arrangement to acquire further interest	10 August 2006 Later acquisition pursuant to arrangement
<u>Relevant day</u>	10 August 1999	10 August 1999	10 August 2003
<u>Relevant period</u>			
Beginning	10 August 1999	10 August 1999	10 August 2003
Ending	10 August 2003	1 August 2004	10 August 2009

The earlier acquisition of 10 August 2000 does not fall within the relevant period for the later acquisition of 10 August 2006. However, the arrangement resulting in the later acquisition was entered into on 1 August 2001, which is during the relevant period of the earlier acquisition. Therefore, the provisions regard the earlier acquisition as being entered into on or after the relevant day of the later acquisition, even though it was made 6 years prior to the later acquisition. Both acquisitions can therefore be taken into account for the purposes of determining whether a majority interest has been acquired in respect of the later acquisition.

The provisions also apply where there is more than one earlier acquisition. For example, consider the following transactions, and the relevant day and relevant period for each determined in accordance with subsections (4) and (5).



<u>Relevant day</u>	10 August 1999	10 August 1999	10 August 2003
<u>Relevant period</u>			
Beginning	10 August 1999	10 August 1999	10 August 2003
Ending	10 August 2003	1 August 2004	10 August 2009

The earlier acquisition of 10 August 2000 falls within the relevant period of the acquisition of 1 August 2001. Neither of the earlier acquisitions fall within the relevant period of the later acquisition of 10 August 2006. However, the arrangement resulting in the later acquisition was entered into on 1 August 2001, which is during the relevant period of both the earlier acquisitions. Therefore, the provisions regard both the earlier acquisitions as being entered into on or after the relevant day of the later acquisition pursuant to the arrangement. All three acquisitions can therefore be taken into account for the purposes of determining whether a majority interest has been acquired in respect of the later acquisition.

Section 76AQ(4) defines the “**relevant day**” for an acquisition. The concept of a “relevant day” is required to set a point in time from which all acquisitions may be aggregated. The “relevant day” represents the first day of the “relevant period”.

It should be noted that for the acquisition of an interest that occurs before 10 August 2000, the concept of a relevant day does not apply. The “old” provisions should be used to determine whether acquisitions will be aggregated in such instances.

Section 76AQ(5) defines the “**relevant period**” in relation to an acquisition. The relevant period represents the period in which acquisitions may be taken together to determine whether a majority interest has been acquired, where one of the acquisitions is pursuant to an arrangement to acquire an interest. The provision is structured such that it will not affect such acquisitions that occurred more than 12 months prior to the Minister’s announcement.

The relevant period in respect of each of the acquisitions below would be the period beginning on the relevant day, and ending on the day determined in accordance with subsection (5).

	10 August 2000	1 August 2001	10 August 2003
<u>Relevant period</u>			
Beginning	10 August 1999	10 August 1999	10 August 2000
Ending	10 August 2003	1 August 2004	10 August 2006

The above examples demonstrate that the provisions have been structured such that the three year period before or after the acquisition is imposed progressively on acquisitions following the Minister's announcement such that only acquisitions made after 10 August 2002 will be subject to the full three year period.

Subsection (6) provides that the amended subsection (3) does not apply retrospectively to arrangements that were entered into prior to 10 August 2000, other than those that were captured under the previous subsection (3).

76AR. Meaning of acquiring an interest, majority interest or further interest

Section 76AR(1) defines acquiring an interest in a corporation as acquiring an entitlement to participate in a distribution of property if the corporation were to be wound up. Such an entitlement may be acquired by any means, and is not restricted to an entitlement obtained upon the acquisition of shares. The acquisition of an interest in a corporation includes acquisitions made by a person, or a person and any related person.

Section 76AR(2) defines acquiring a majority interest as acquiring an interest, such that having acquired that interest, the person, or the person and any related person would be entitled to participate in a distribution of property, which represents more than 50% of the value of all property so distributable, if the corporation were to be wound up. Such an entitlement may be acquired by any means, and is not restricted to an entitlement obtained upon the acquisition of shares. A "majority interest" has a corresponding meaning for the purposes of determining whether there has been a relevant acquisition and for subsection (3).

Section 76AR(3) defines the criteria which must be satisfied (as specified in paragraphs (a), (b) and (c)) for the acquisition of an interest to constitute the acquisition of a further interest.

Paragraph (a) provides that the person, or the person and any related person, must already have a majority interest. As majority interest has

the same meaning as in section 76AR(2), persons will be regarded as having a majority interest in a corporation where they, or they and any related person, or any related person, have an entitlement to participate in the distribution of the property of the corporation to an extent greater than 50%.

Paragraph (b) requires that at the time the majority interest was acquired, duty must have been payable on the acquisition of that majority interest under the provisions of the Act operative at that time.

Paragraph (c) provides that by the acquisition of the interest, a further entitlement to participate in a distribution of property if the corporation were to be wound up must be obtained.

Section 76AR(4) specifies what is encompassed by the term “holding corporation”.

A holding corporation is defined in paragraph (a) to include the bodies corporate specified in subparagraphs (i) and (ii). Subparagraph (i) refers to an ultimate holding company in accordance with the Corporations Law meaning, which is a holding corporation of another body corporate that is not a subsidiary of any other body corporate. Subparagraph (ii) refers to a holding company as one which has a subsidiary within the Corporations Law meaning of subsidiary. For the purposes of the Corporations Law, a body corporate is a subsidiary if another body corporate has control of the composition of its board, has voting control or holds more than half of its issued share capital.

Paragraph (b) deems a holding corporation to include those specified in subparagraphs (i), (ii) and (iii).

Subparagraph (i) provides for any trust if the trustee of the trust would be entitled to more than 50% of the property of the corporation or the holding corporation upon winding up. Subparagraph (ii) specifies another corporation which is a beneficiary of the trust in (i). Subparagraph (iii) specifies any other corporation or trust that would be a holding corporation of a holding corporation as described in subparagraphs (i) and (ii).

Clause 17: Section 76AS amended

Subclause (1) makes a minor amendment to section 76AS(3)(a) to insert a comma and to provide for changes to the concept of the acquisition of a further interest, as outlined in section 76AR(3).

Subclause (2) amends section 76AS(5) to remove superfluous words.

Clause 18: Section 76AT amended

This clause amends section 76AT to clarify that a corporation that is required to lodge a statement under section 76AN is liable to pay the duty on the statement, if the statement is dutiable because section 76AN(4) applies to it.

Clause 19: Part IIIBA Division 4 inserted

This clause inserts a new Division into the Act. The new Division relates to the reassessment of liability for duty. The new Division is required to enable the Commissioner to downwardly correct an assessment of stamp duty liability once an assessment has been made. This power will be required where the deemed treatment of uncompleted contracts has affected the liability of a WA company or a corporation to duty on initial assessment and subsequently, depending on the circumstances, the contracts are completed or rescinded, annulled or otherwise terminated.

The new Division is in addition to the reassessment provisions contained in sections 31AA, 31AB and 31AC. However, the application of the new Division is limited to Part IIIBA.

Division 4 – Reassessment of liability for duty**76AU. Definitions and operation**

Subsection (1) includes definitions of “assessment”, “duty”, “statement” and “taxpayer”. The definitions are only applicable to the reassessment provisions of Division 4.

Subsection (2) specifies that Division 4 is in addition to the existing reassessment provisions contained in Part III of the Act and that Division 4 does not affect the operation of the existing provisions. For example, the payment provisions contained in section 31AC in relation to a reassessment would apply equally to a reassessment under this Division.

76AV. Request for reassessment of liability for duty

Subsection (1) provides that a taxpayer may request the Commissioner to reassess their liability to duty under the circumstances specified in paragraphs (a) and (b).

Paragraph (a) provides for a taxpayer to request a reassessment where duty was chargeable on an entitlement arising from an uncompleted contract or agreement for the acquisition of land being regarded as being completed, or an uncompleted contract or agreement for the disposal of property other than land being regarded as being completed.

Paragraph (b) requires that the contract or agreement referred to in paragraph (a) is terminated before its completion.

Subsection (2) provides that a taxpayer may request the Commissioner to reassess their liability to duty under the circumstances specified in paragraphs (a) and (b).

Paragraph (a) provides for a taxpayer to request a reassessment where duty was chargeable on an entitlement arising from an uncompleted contract or agreement for the disposal of land being disregarded, or an uncompleted contract or agreement for the acquisition of property other than land being disregarded.

Paragraph (b) requires that the contract or agreement referred to in paragraph (a) is completed.

The provisions contained in subsections (1) and (2) also enable the Commissioner to reassess whether a corporation is in fact land-rich, in circumstances where a statement has been charged with duty because of the application of sections 76AI(5), (6), 76AP(5) or (6).

Subsection (3) specifies that a request for a reassessment of duty must be made in writing and within a period of 5 years after the date that the assessment was issued.

Section 76AW. Reassessment

Subsection (1) allows the Commissioner, where he is satisfied that a contract or agreement that is the subject of a request for reassessment under section 76AV(1) has been terminated before its completion, to reconsider the amount of duty that would have been chargeable, if any.

Subsection (2) allows the Commissioner, where he is satisfied that a contract or agreement that is the subject of a request for reassessment under section 76AV(2) has been completed, to reconsider the amount of duty that would have been chargeable, if any.

Subsection (3) gives the Commissioner the power of reassessment where he is satisfied that a reassessment of duty is justified under subsection (1) or (2).

Paragraph (a) gives the Commissioner the power to issue the reassessment, and paragraph (b) gives the Commissioner the power to endorse the instrument to the effect that Part IIIBA is no longer applicable and no duty is payable, or that a reduced amount of duty is payable, whichever is appropriate in the circumstances.

Subsection (4) provides that the Commissioner is not obliged to issue a reassessment in respect of a request under subsection (1) where he is not satisfied that the termination of the contract prior to its completion

was not part of a scheme whereby the outcome of the contract is or may be achieved by other means.

Section 76AX. Effect of reassessment

Subsection (1) provides that a reassessment supersedes the previous assessment issued in relation to the statement.

Subsection (2) provides that for the purposes of recovery proceedings, a reassessment does not invalidate any proceedings in relation to an amount that may have been assessed under an original assessment. It provides that an adjustment is to be made to the amount to be recovered under the original assessment proceedings to take account of the adjustment made by the reassessment. This allows recovery proceedings taken by the Commissioner to remain on-foot, despite a change in the amount recoverable.

Subsection (3) similarly provides that proceedings on an objection to the original assessment remain valid if a reassessment is made prior to the proceedings being determined. However, the proceedings will only remain on-foot where the grounds of the objection relate to matters which are the same or similar in substance.

Section 76AY. Refund of duty

Subsection (1) provides for a refund of duty paid on an assessment and any fine charged where there is no duty payable as a result of the reassessment.

Subsection (2) provides for a refund of any excess of duty which may have been paid on an assessment and the excess of any fine charged where a reduced amount of duty is payable as a result of the reassessment.

Subsection (3) provides that the payment of the reassessed amount of duty should be in accordance with section 31AC(1), (7) and (8) in certain cases where no duty or less than the amount of reassessed duty has been paid on the original assessment.

Clause 20: Consequential amendments

Subclause (1) amends section 32(6) to include a reference to section 76AW, which will enable persons to:

- object against a reassessment of duty made by the Commissioner under Part IIIA;
- appeal against a decision of the Commissioner in regard to an objection to a reassessment of duty under Part IIIA; and

- appeal to the Supreme Court against a decision of the Commissioner to refuse to extend the time in which an objection to an assessment, or an appeal against an objection decision, may be made.

Subclause (2) amends section 73DA(3)(b) so as to redefine when a unit trustee would have a majority interest in a company for the purposes of section 73DA. A majority interest is no longer determined on the basis of a shareholding in the company, but rather the entitlement of a unit trustee to participate in the distribution of the property of the company. This is consistent with amendments made to Part IIIBA regarding the acquisition of a majority interest under that Part.

Subclause (3) amends section 75HA(6)(b) and section 75I(1)(b) to reflect the fact that, as a result of the proposed amendments, not all statements lodged under Division 2 of Part IIIBA will be dutiable. Only those statements to which section 76AG(5) of Division 2 of Part IIIBA applies, will be dutiable.

Subclause (4) amends section 75HA(7)(b) to reflect the fact that, as a result of the proposed amendments, not all statements lodged under Division 2 of Part IIIBA will be dutiable. Only those statements to which section 76AG(5) of Division 2 of Part IIIBA applies, will be dutiable.

Subclause (5) amends section 75HA(7)(b)(ii) to reflect the fact that, as a result of the proposed amendments, not all statements lodged under Division 2 of Part IIIBA will be dutiable. Only those statements to which section 76AG(5) of Division 2 of Part IIIBA applies, will be dutiable.

Subclause (6) amends section 75J(1) to reflect the fact that, as a result of the proposed amendments, not all statements lodged under Part IIIBA will be dutiable. Only those statements to which sections 76AG(5) or 76AN(4) applies will be dutiable.

Clause 21: Transitional

Subclause (1) inserts definitions of “**amended provisions**” and “**existing provisions**”.

Subclause (2) provides that the existing provisions continue to apply to the acquisition of an interest in a corporation that occurred before 10 August 2000, when determining the dutiability of that acquisition under Part IIIBA.

Subclause (3) provides that the amended provisions should be applied to the acquisition of an interest that occurred before 10 August 2000, in order to determine whether an acquisition that occurs on or after 10

August 2000 is a relevant acquisition for the purposes of the amended provisions.

Subclause (4) provides that where an acquisition of an interest in a corporation occurs on or after 10 August 2000 but before 1 January 2001, as a direct result of a legally enforceable agreement in writing that was executed before 10 August 2000 and that confers an entitlement to that interest, the acquisition is to be regarded for the purposes of subsections (2) and (3) as having occurred before 10 August 2000. As such, the existing provisions will continue to apply to that acquisition. Where such an acquisition occurs after 31 December 2000, the amended provisions will apply to that acquisition even though it may have resulted from a legally enforceable agreement that was executed prior to 10 August 2000.

It is important to recognise that this provision will only apply where the specified agreement creates the entitlement. As such, mere heads of agreement, generally, pre-emptive rights or contracts subject to terms not yet satisfied as at 10 August 2000 will not fall within the specified category of agreements, notwithstanding that they may have been executed prior to 10 August 2000.

Subclause (5) provides that a statement may be lodged within 3 months after the Bill receives the Royal Assent, where:

- an acquisition of an interest occurred on or after 10 August 2000 but before this Bill receives the Royal Assent;
- the amended provisions require the lodgement of a statement under sections 76AG or 76AN; and
- the existing provisions would not have required the lodgement of a statement in respect of the acquisition.

This provision recognises that it may not be possible for a statement to be lodged within the time required by sections 76AG or 76AN in circumstances where the new provisions apply to an acquisition. This is particularly pertinent, given that the new provisions apply from 10 August 2000 and persons would not be aware of those provisions until a later date.