

TAXATION LEGISLATION AMENDMENT BILL (NO. 2) 2014

EXPLANATORY MEMORANDUM

This Bill seeks to amend the *Land Tax Assessment Act 2002* and the *Duties Act 2008*.

Included in the amendments to the Land Tax Assessment Act is a long overdue modernisation and simplification of the exemption for non-rural land used for primary production

The proposed amendments in the Bill are based on recommendations from an informal review of the operation of the exemption by the Department of Treasury and the Department of Finance's Office of State Revenue. It is the most comprehensive review of this exemption in over 35 years.

The review was initiated in 2012 following a determination that primary producers, who sold produce in a processed or converted state, rather than natural state, were ineligible for the exemption. To illustrate this problem, if a primary producer used the land to grow grapes and then produced and sold wine, rather than grapes, the exemption would be denied.

The review also examined options to modernise and simplify the exemption's overall operation. Specifically, this involved reviewing the eligibility requirements for owners of non-rural land that are currently required to.

- earn at least one-third of their net income from primary production activity in Western Australia; and
- use the land themselves for their primary production business.

In addition, the review considered the need for disparate appeal options that are inconsistent with the avenue generally available to appeal decisions of the Commissioner of State Revenue.

The review also recommended a number of other incidental amendments, including to the definition of a 'rural business'.

KEY AMENDMENTS

Secondary processing of primary produce

The amendments propose that the land tax primary production exemption will apply, even when the primary produce is sold in a processed or converted state. For competitive neutrality reasons, the exemption would apply to land used to grow the produce but would not apply to the portion of land used to process the produce.

Where land is being used for both primary production and secondary processing as part of an integrated business, a partial exemption will apply.

For example, land used to grow oranges may be eligible for the primary production exemption, but not the land used to process the oranges into juice. This is generally how the Commissioner currently applies the exemption when the land is used for multiple purposes, and that distinction will continue after the amendments are made.

One-third income test for non-rural land

The current one-third income test can only be satisfied if any supplemented off-farm income does not exceed two-thirds of the farmer's total net income. For example, continued losses (other than seasonal aberrations), or high financing costs¹ may result in a genuine farmer not satisfying the one-third income test.

The current test may also require a complex apportionment of common expenses or income between rural and non-rural business activities.

Escalating concerns with this test led to the introduction of a 50 per cent concession in 1996 for people who failed the income test.

The amendments seek to abolish the rigid one-third income test (and 50 per cent concession for those failing the one-third income test) and replace it with a more flexible business test.

The proposed business test is based on common law and considers a range of factors in determining whether a genuine primary production business is being conducted on the land. These generally reflect the business test indicators applied by the Queensland Office of State Revenue and the Australian Taxation Office to determine a genuine primary production business.

Owner-user rule (for non-rural land)

The current owner-user rule requires non-rural land to be used for primary production purposes by the owner of the land.

Section 20 and Commissioner's Practice LT 9.1 together provide for exemption where the user of the land is closely related by blood or marriage to the owner of the land, the exemption does not apply where, for example, the land is owned by a natural person but used by a related company or trust.

The amendments seek to replace the Commissioner's discretion to exempt land with defined exemption criteria that effectively expands the owner-user rule to include certain related entities. This would allow, the owner to qualify for the exemption when, for example, a related entity of the owner or family member, uses the land for a primary production business.

The proposed expansion is largely based on the definition of a 'family member' in the *Duties Act 2008*.

Multiple appeal options

There are currently two dispute resolution mechanisms available in relation to the application of the primary production exemption.

The first relates to the general application of the exemption, such as whether the owner is conducting a primary production business on the land and is deriving one-third of their net income from that activity. In these circumstances, an objection is required to be lodged with the Commissioner and, if dissatisfied with the objection decision, the taxpayer may make an application to the State Administrative Tribunal (SAT) for a review of that decision.

¹ Net income is defined as profit after expenses and costs (including financing costs)

The second relates to the exercise of the Commissioner's discretion to allow an exemption where the income test and/or the owner-user rule have not been satisfied. In these circumstances, the taxpayer may only lodge an appeal to the Minister for Finance.

In many cases, the dispute involves both the application of the exemption and the exercise of the discretion, resulting in concurrent proceedings. This causes confusion for taxpayers and inefficiencies for the Commissioner, the SAT and the Minister for Finance.

As a result of the additional clarity added to the exemption by removing the Commissioner's discretions, the right of appeal to the Minister is not required. Instead, taxpayers will have a single right of appeal to the SAT.

Definition of 'rural business'

The current primary production exemption applies to businesses that meet the definition of a 'rural business', regardless of whether the land is rural or non-rural land.

To reduce confusion, it is proposed to replace the definition of 'rural business' with the term 'primary production business'.

It is also proposed to broadly align the definition of a primary production business to the corresponding definition in the *Duties Act 2008*, which includes the breeding, rearing and maintenance of living creatures for the purpose of selling them (or their progeny) for food, the production or collection of their skins and shells or bodily produce; and selling parts of them or their skins, shells or bodily produce.

While the proposed exemption is broader in the case of living creatures, it refocusses the exemption towards the more traditional meaning of agriculture, which is for the production of food or bodily produce. As with the current exemption, a specific exemption for the breeding or rearing of horses for the purpose of selling them or their progeny will continue.

The definition will also continue to include the growing or rearing of plants (including trees, fungi or any crop) for the purpose of selling them, parts of them or their produce.

The change to the definition of 'rural business' is expected to have no or minimal impact on the number of exemption recipients.

The amendments to the primary production exemption are to commence operation from 1 July 2014.

Other amendments to the Land Tax Assessment Act included in the Bill relate to the granting of partial exemptions.

The then Minister for Finance foreshadowed these amendments in the Parliament in November 2013, following a SAT decision that overturned the long-standing practice of only allowing a partial exemption when land is not being fully used for an exempt purpose.

If left unaddressed, the Tribunal decision would have set a precedent, putting at risk millions of dollars of land tax revenue because a landowner could enjoy an exemption for an entire piece of land by using just a small portion of it for an exempt purpose

The relevant amendments restore the longstanding policy position that exemptions are only applied to the part of the land that is actually used for an exempt purpose

As was flagged last November, these amendments will have effect from 1 July 2003, the date that the Land Tax Assessment Act commenced operation. They will not impact retrospectively on the matter decided by the SAT or other matters that were in dispute at the time of the announcement.

The Bill also contains two amendments to improve the efficacy of the Duties Act

The landholder duty provisions seek to impose duty on certain indirect acquisitions of land made through the purchase of interests in corporations and unit trust schemes

There is an anomaly in these provisions in that an agreement to acquire or dispose of a landholder's subsidiary is treated in a different manner to an agreement to acquire or dispose of a direct interest in land.

The amendments seek to resolve this inequity and, where the amendments work in favour of the taxpayer, the amendments apply retrospectively from 1 July 2008, the date the Duties Act commenced operation

Finally, taxpayers continue to attempt to shift value away from dutiable property, such as land and chattels, to other assets that do not attract duty.

These situations most commonly occur in relation to transfers of interests in mining companies, where attempts to minimise the value of dutiable mining tenements are made by arguing that significant portions of a transaction's value should be attributed to items such as mining information.

While the Duties Act already contains provisions that address how information should be treated, it continues to be necessary to counter arguments from taxpayers and their representatives that significant values should be attributed to information.

The Bill seeks to improve the operation of the valuation provisions of the Duties Act by clarifying that, when valuing dutiable property, information relating to the property is to be regarded as an attribute of the property and not a separate item to which an independent value can be ascribed.

These amendments do not change the current policy surrounding the treatment of information and commence from the day after the Bill receives the Royal Assent.

Clause 1: Short title

This clause provides that the short title of this Bill is the *Taxation Legislation Amendment Act (No 2) 2014*.

Clause 2: Commencement

This clause provides the commencement dates for this Bill

Paragraph (a) provides that Part 1 and Part 3 Divisions 1 and 3 commence on the day on which the Royal Assent is received (*assent day*).

Paragraph (b) provides that Part 2 Division 1 is deemed to have come into operation on 1 July 2014

Paragraph (c) provides that Part 3 Division 2 is deemed to have come into operation immediately after the *Land Tax Assessment Act 2002* came into operation, this date being 1 July 2003.

Paragraph (d) provides that the rest of the Act comes into operation on the day after assent day

Part 2 – Amendments about primary production

Division 1 – *Land Tax Assessment Act 2002* amended

Clause 3: Act amended

This clause provides that the amendments in this Division are to the *Land Tax Assessment Act 2002*

Clause 4: Section 15 amended

Section 15 provides for the reassessment of previously exempted land on which a business of primary production was carried out or land which has received a concession where that primary production land is subsequently subdivided.

Minor amendments are made to the title and section to update references. The reference in the title to the term 'rural business land' has been replaced with the term 'primary production business land'. The references to sections 29 and 30 in subsection (1) are removed and replaced with a reference to Part 3 Division 3.

Clause 7 of the Bill deals with transitional matters relating to these amendments.

Clause 5: Section 20 amended

Under current section 20(1), the Commissioner has a discretion to apply an exemption, concession or further concession to land in certain circumstances

Paragraphs (c), (d) and (e), which relate to primary, production, are removed from this section as a consequence of other amendments.

Paragraph (c) relates to land used as holding paddocks for stock that is not used in the course of carrying out a rural business (primary production business). Paragraph (d) relates to non-rural land that is not exempt because the one-third income test or owner-user rule is not satisfied and land used for silviculture or reforestation that does not satisfy the minimum size and stocking criteria. Paragraph (e) deals with the 50 per cent concession in current section 30 which applies when a taxpayer fails the one-third income test.

As a consequence of other amendments, a Commissioner's discretion is no longer required in these circumstances

There are now new expanded rules for the owner-user test for non-rural land

The one-third income test has been removed and replaced with a more flexible business test. Similarly, the minimum size and stocking requirement for silviculture and reforestation businesses and whether land used for holding paddocks for stock qualify for the exemption will be determined using the business test outlined in proposed section 30B.

The 50 per cent concession in section 30 is no longer required due to the removal of the one-third income test which results in paragraph (e) also becoming unnecessary. Owners that satisfy the business test and the new expanded owner-user test will now be eligible for a full exemption.

Clause 7 of the Bill deals with transitional matters relating to these amendments.

Clause 6:

Part 3 Division 3 replaced

Part 3 Division 3 of the Land Tax Assessment Act provides the exemptions from land tax for land used for primary production. The existing provisions are replaced with provisions that reflect the updated policy for the primary production exemption

Division 3 – Land used for primary production business

Subdivision 1 – Terms used

Section 29. Terms used

This section sets out the meaning of terms used in Division 3 which provides for an exemption from land tax for land used for a primary production business

The terms defined are self-explanatory.

Section 30A. What is primary production

Subsection (1) describes the activities that are primary production for the purpose of the exemption.

There has been a change from the term 'rural business' used in current section 29 to the term 'primary production business' in Division 3

In addition to the growing or rearing of plants for the purpose of selling them, parts of them or their produce, primary production includes the breeding, rearing and maintenance of living creatures for the purpose of selling them (or their progeny) for food, the production or collection of their skins and shells or bodily produce, and selling parts of them or their skins, shells or bodily produce (for example, eggs and milk).

While the proposed exemption is broader in the case of living creatures, it refocusses the exemption towards the more traditional meaning of agriculture, which is for the production of food or bodily produce. A specific exemption for the breeding or rearing of horses for the purpose of selling them or their progeny is retained.

The new term encompasses all of the types of rural businesses described in the current section 29, which includes an agricultural business, a silvicultural business, a reforestation business, a grazing business, horse-breeding business, horticultural business, viticultural business, apicultural business, pig-raising business and poultry farming business.

Paragraph (e) provides a prescription power to accommodate any new form of primary production.

Subsection (2) paragraph (a) clarifies that land is used for primary production whether or not the primary produce is sold in a natural, processed or converted state.

For example, a farmer with a business of grape growing may sell the grapes in a natural state to a wine maker. Growing grapes for the purpose of selling them in a natural state is primary production.

Alternatively, a farmer may have a business of grape growing but rather than sell the grapes in a natural state, the farmer processes the grapes into wine and sells the wine. Growing grapes for the purpose of processing them and selling them in a converted state as wine is also, for the purposes of the Land Tax Assessment Act, primary production.

Paragraph (b) clarifies that land that is used for the processing or converting of anything is not land used for primary production. For example, the grape grower that processes grapes grown into wine before sale is not using the land used for processing the grapes into wine for primary production. In this example, only the land used for growing the grapes is being used for primary production.

The reason that the exemption does not apply to the portion of land used to process produce is to maintain competitive neutrality with secondary processors that have no primary production and therefore cannot claim the land tax exemption.

Section 30B. When land is used for primary production business

This section describes what criteria need to be satisfied to ascertain whether land being used for primary production is being used for a primary production business

The indicators that have been embedded into the legislation are well established indicators derived from common law

The common law indicators are relevant to determining whether primary production activities constitute the carrying on of a business and are no different, in principle, from the indicators as to whether any activity constitutes the carrying on of a business

No single indicator is decisive and whether a business is being carried on depends on consideration of all the indicators

In determining whether an activity is a business of primary production, consideration will be given to the following indicators:

- (a) the size, scale and permanency of the activity,
- (b) whether the activity has a significant commercial purpose or character,
- (c) whether the taxpayer has more than just an intention to engage in business;
- (d) whether the taxpayer has a purpose of profit as well as a prospect of profit from the activity;
- (e) whether there is repetition and regularity of the activity;
- (f) whether the activity is of the same kind and carried on in a similar manner to that of the ordinary trade in that line of business;
- (g) whether the activity is planned, organised and carried on in a businesslike manner such that it is directed at making a profit, and

- (h) whether the activity is better described as a hobby, recreation or sporting activity

A prescription power is also contained within the section should any further indicators be identified. For example, this may occur as a result of new case law.

Subdivision 2 – Primary production business exemption

Section 30C. Exemption for rural land

To qualify for the exemption, rural land must be used solely for a primary production business at midnight on 30 June in the previous financial year

Rural land is defined in section 29 to mean all land in the State other than non-rural land, which is also a defined term

The exemption for rural land is based on its use by any person. There are no requirements for use by the owner or a related party to qualify for the exemption

Where a portion of land is being used solely for a primary production business, a partial exemption will be allowed on that portion of the land pursuant to section 18.

For example, if two-thirds of a parcel or lot of land is being used solely for a primary production business and one-third of the land is being used for a trucking business, two-thirds of the land will be exempt from land tax.

Section 30D. Exemption for non-rural land

This section sets out the requirements that must be satisfied for a primary production exemption for land that is non-rural land

Non-rural land is defined in section 29 Non-rural land includes land in the Perth metropolitan region, regardless of how it is zoned, and land outside the metropolitan region that is not zoned for rural purposes The metropolitan region has the same meaning as in the *Planning and Development Act 2005*.

Subsection (1) provides that in addition to being used solely for a primary production business, non-rural land must be used for that purpose only by an owner of the land, a person related to an owner of the land (if the owner of the land is a family owner), or a combination of both

Example 1 – John is the owner of the land The land is used in a business of primary production by John. The land is exempt.

Example 2 – John is the owner of the land. The land is leased to unrelated neighbour David, who uses the land for a business of primary production. The land is not exempt.

Example 3 – John is the owner of the land. The land is used in a business of primary production by John and unrelated neighbour David. The land is not exempt, including on a proportionate basis.

Example 4 – John is the owner of the land. The land is used in a business of primary production by John's brother Mark. A brother is a related person as set out in the meaning of family member. The land is exempt.

Example 5 – John is the owner of the land. The land is used in a business of primary production by John and John's brother Mark. The land is exempt.

Subsection (2) describes the circumstances where non-rural land used in a business of primary production that is jointly owned is not exempt.

Land will only qualify for the exemption where a related person is conducting the business of primary production if the joint owners of the land all qualify as family owners and each owner is related to each other.

Further, when land is jointly owned by unrelated persons, an exemption will only apply if all of the owners are using the land in a business of primary production.

It should be noted that where land is owned jointly by unrelated persons and not all of the owners are using the land in a business of primary production, there is no partial exemption under section 18 of the Land Tax Assessment Act because one or some of the owners are not using the land for primary production.

Example 1 – unrelated persons John, David and Joan own the land and only Joan uses the land for a primary production business. This land is not exempt because it is not being used by all the owners John, David and Joan for a business of primary production.

Example 2 – unrelated persons John, David, Joan and Sue own the land and John, David, Joan and Sue use the land for a primary production business. The land is exempt.

Example 3 – John, John Pty Ltd and John as trustee for the John Family Unit Trust jointly own the land. All owners qualify as a family owner of land under proposed section 30H. All owners of the land are related to each other under Subdivision 3. Paul, the son of John, is using the land for a business of primary production. The land is exempt.

Example 4 – John, John's wife Jane and unrelated David jointly own land. Allan, the son of David, is using the land for a business of primary production. The land is not exempt as even though the person using the land for a primary production business is related to one owner, all the owners are not related to each other.

Section 30E. Exemption under section 30D after death of family owner or person related to family owner

Section 30E provides that for one assessment year after the death of a family owner or a person related to a family owner, the relationship tests required to be satisfied to gain an exemption can be satisfied by disregarding the person's death.

Where following the death of a person the executor or administrator of the deceased's estate becomes the owner or conducts the business of primary production, the relationships are tested against the deceased person for the purpose of the exemption.

Section 30F. Notice to Commissioner about changes to exempt land

Subsection (1) paragraph (a) places a notification requirement on the taxpayer where land has been exempt, but is no longer used solely for a primary production business.

Paragraph (b) provides for additional notification requirements for non-rural land.

- (i) where the land is no longer used in a business of primary production by a qualifying person as described in section 30D(1)(c); or
- (ii) in the case of unrelated owners of jointly owned land, not all owners are using the land in the business of primary production or, in the case of jointly owned land used by a related person, the ownership changes such that an owner no longer qualifies as a family owner or the family owners are no longer all related to each other. For example, this could occur where a corporation that was a family owner issues a share to a person that is not a family member.

Subsection (2) provides the timeframes in which a taxpayer must notify the Commissioner of such changes. There is a penalty for an offence under this subsection of a fine of \$5,000

Subdivision 3 – Family owners of land and persons related to family owners of land

The proposed sections in this Subdivision are relevant to non-rural land only

Proposed section 29 of the Land Tax Assessment Act provides that a family member has the meaning given in the *Duties Act 2008* section 100

Section 100 of the Duties Act provides that a family member is as follows:

References to family member

A reference in this Subdivision to a family member of a person is to —

- (a) a child or remoter lineal descendant of the person; or*
- (b) a parent or remoter lineal ancestor of the person; or*
- (c) a brother or sister of the person or remoter lineal descendant of a brother or sister of the person; or*
- (d) an aunt or uncle of the person; or*
- (e) the spouse, former spouse, de facto partner of 2 years or former de facto partner of 2 years of the person; or*
- (f) the spouse or de facto partner of 2 years of a person mentioned in paragraph (a), (b), (c) or (d), or more than one of them.*

This definition is expanded by section 6 of the Duties Act which provides:

Family relationships, determining

In determining whether a person is a family member of, or related to, another person —

- (a) an illegitimate person is to be treated as the legitimate child of that person's parents; and*
- (b) it is irrelevant whether a relationship is of the whole or half-blood, or whether it is a natural relationship or a relationship established by a written law*

Section 30G. References to individuals, family members and nominated individuals

To obtain an exemption where the user of the land differs from the owner of the land, the user must be related to the owner who must be a family owner

A family owner is defined in proposed section 30H.

Subdivision 3 provides the rules which must be satisfied for the relationship test

Paragraph (a) provides that in this Subdivision a reference to an individual is to a person acting in their own right, not in any other capacity such as an agent or trustee on behalf of another person.

Paragraph (b) provides that to determine family relationships, an individual that is a shareholder, beneficiary or unit holder is required to be nominated in writing by the family corporation, trustee of the family trust or unit trust scheme as the case may be. Such a nomination determines which family the relationships are to be tested for. This prevents 'different' families from being related by using, for example, the extended family of a brother or sister-in-law. Such an extension would go beyond the policy setting to contain the owner-user rule to related persons within one family.

If an owner fails to make a nomination within a reasonable period of time, the Commissioner has the power to make a nomination.

Section 30H. Family owner of land

Section 30H clarifies, for the purposes of the primary production exemption, who is a family owner of land

Where the owner and user of non-rural land are not the same, there must be a family relationship between the owner and the user for the land to qualify for the exemption

Section 30H(b) defines a 'family corporation' as one in which every shareholder is either the nominated shareholder or a family member of the nominated shareholder.

For example, if the only shareholders of land owning corporation J&J Pty Ltd are husband and wife John and Jane and their children Paul and Mary, and John was the nominated shareholder, J&J Pty Ltd would be a family corporation. This is because all of the shareholders are either the nominated shareholder or family members of the nominated shareholder

Following on from this example, if John's brother Mark was a shareholder, it would remain a family corporation as that relationship fits within the definition of a family member of nominated shareholder John. However, if Jane's sister Susan was also a shareholder, it would cease to be a family corporation, as Susan is not a family member, as defined, of the nominated shareholder John.

Section 30H(c) defines a 'family trust' and the same rules apply as for family corporations described above, except that the terms nominated shareholder and shareholder become nominated beneficiary and beneficiary.

Section 30H(d) defines a 'family unit trust scheme' and the same rules apply as for family corporations described above, except that the terms nominated shareholder and shareholder become nominated unit holder and unit holder.

30I. Persons related to family owner who is an individual

Section 30D(1)(c)(ii) provides that non-rural land that is used solely for a business of primary production is exempt, if the use is by a person related to a family owner.

Section 30I describes who is related to a family owner of land who is an individual.

Subsection (1) describes the different types of qualifying relationships to an individual family owner.

An individual is related to an individual family owner if that person is a family member as described in section 100 of the Duties Act.

For example, if John owns land and it is being used in a business of primary production by himself and his wife Jane, the land will be exempt. However, if the land is being used in a business of primary production by John, Jane and David, who is unrelated, the land will not be exempt.

Similarly, if John owns the land and the land is being used in a business of primary production by J&J Pty Ltd, of which all the shareholders are family members of John, (the nominated shareholder), the land is exempt. However, if one of the shareholders of J&J Pty Ltd is not a family member of John, the land is not exempt.

Similar relationship requirements are applied where land is owned by an individual and the land is being used in a business of primary production by either a partnership, or trustee of a unit trust scheme, discretionary trust or other trust.

Subsection (2) provides that where land is jointly owned by two or more individuals there is a requirement for one individual to be nominated for the purposes of determining whether the relationship tests are met. If an owner fails to make a nomination within a reasonable period of time, the Commissioner has the power to make a nomination.

30J. Persons related to family corporation

Section 30D(1)(c)(ii) provides that non-rural land that is used solely for a business of primary production is exempt if the use is by a person related to a family owner

Section 30J provides who is related to an owner of land that is a family corporation.

An individual is related to a family owner that is a family corporation if they are a family member of the nominated shareholder of the corporation. For example, if John is the nominated shareholder of land owning corporation J&J Pty Ltd, John's children would be related to J&J Pty Ltd.

Similarly, if John was the nominated shareholder and the land is being used in a business of primary production by the trustee of the John Unit Trust, of which the only unit holder was John's wife Jane, the unit trust scheme would be related to the family corporation. However, if there was a unit holder in the unit trust scheme that was not a family member of the nominated shareholder John, there would not be a relationship and no exemption could be applied.

Similar relationship requirements are applied where land is owned by a family corporation and the land is being used in a business of primary production by another corporation, partnership, trustee of a discretionary trust or other trust

30K. Persons related to trustee of family trust

Section 30D(1)(c)(ii) provides that non-rural land that is used solely for a business of primary production is exempt if the use is by a person related to a family owner

Section 30K provides who is related to an owner of land that is a trustee of a family trust

An individual is related to a family owner of land that is a trustee of a family trust if the individual is a family member of the nominated beneficiary of the family trust. For example, if John is the nominated beneficiary of the land owning family trust and the land is being used in a business of primary production by John's children, the children would satisfy the relationship test. If someone who is not a family member of John was also farming the property with John's children, they would not satisfy the relationship test and the land would not be exempt

If land owned by a trustee of a family trust was being used in a business of primary production by another trustee of a family trust, to satisfy the relationship test all the beneficiaries of the family trust farming the land would have to be the nominated beneficiary or family members of the nominated beneficiary of the family trust that owns the land

Similar relationship requirements are applied where land is owned by a trustee of a family trust and the land is being used in a business of primary production by a corporation, a partnership, or a trustee of a unit trust scheme

Section 30. Persons related to trustee of a family unit trust scheme

Section 30D(1)(c)(ii) provides that non-rural land that is used solely for a business of primary production is exempt if the use is by a person related to a family owner

Section 30 provides who is related to an owner of land that is a trustee of a family unit trust scheme

An individual is related to a family owner of land that is a trustee of a family unit trust scheme if the individual is a family member of the nominated unit holder of the family unit trust scheme. For example, if John is the nominated unit holder of a family unit trust scheme that owns land and that land is being used in a business of primary production by John's brother and sister, the relationship test would be satisfied and the land would be exempt.

If land owned by a trustee of a family unit trust scheme was being used in a business of primary production by a corporation, to satisfy the relationship test all the shareholders of the corporation would have to be the nominated unit holder or family members of the nominated unit holder of the family unit trust scheme that owns the land.

Similar relationship requirements are applied where land is owned by a trustee of a family unit trust scheme and the land is being used in a business of primary production by a partnership, a trustee of a different unit trust scheme, discretionary trust or other trust.

Clause 7:

Schedule 1 Division 4 inserted

Schedule 1 to the Land Tax Assessment Act provides the transitional provisions for the Act. This clause inserts a new Division 4 that provides the transitional arrangements for the amendments about the primary production exemption.

Division 4 – Provisions for *Taxation Legislation Amendment Act (No. 2) 2014*

6. Term used: amending Act

This clause provides a self-explanatory definition of the term 'amending Act'.

7. Application of section 15 during transitional period

Section 15 of the Land Tax Assessment Act provides for a clawback of land tax when rural business land (primary production land) is subdivided (other than for a purpose relating to compulsory acquisition of land) if land was exempt from land tax or subject to a concession for any of the five years reckoned retrospectively from and including the year in which the land was subdivided

A transitional provision is required due to the proposed repeal of current section 30, which provides a concession of 50 per cent for land tax in certain circumstances.

Subclause (1) determines that the transitional period in relation to clawbacks of land tax under section 15 is confined to the period that begins on 1 July 2014 and ends on 30 June 2018. Land that is subdivided after 30 June 2018 will not have received a concession under current section 30 in the five years reckoned retrospectively due to the repeal of the section effective on 1 July 2014.

Subclause (2) ensures that a clawback of land tax under section 15 will apply where the land was subject to a concession under section 30 prior to 1 July 2014 for any land that is subdivided in the period 1 July 2014 to 30 June 2018.

8. Application of section 20 to previous assessment years

This clause ensures that a taxpayer may still make application to the Commissioner to exercise a discretion to allow an exemption, concession or further concession in respect of an assessment year before the 2014-15 land tax assessment year where paragraphs (c), (d) or (e) of section 20 apply.

Where assessments for years before the 2014-15 assessment year are made on or after 1 July 2014, section 20 still has application to.

- (i) land used as holding paddocks for stock that is not exempt under current section 29 only because it is not used for that purpose in the course of carrying on a rural business of a kind referred to in that section,
- (ii) land that is not exempt under current section 29 because of the operation of section 29(3) or (4); or

- (iii) land that is subject to a concession under current section 30

9. Application of section 30D to land held in trust for assessment year 2014-15

Section 30H(c) defines a family trust to be a trust where every beneficiary is either the nominated beneficiary or a family member of the nominated beneficiary.

As the amendments to the primary production exemption provisions apply for the 2014-15 assessment year, where land is owned by the trustee of a discretionary trust the owner will not have had the opportunity to have regard to section 30H(c) prior to midnight on 30 June 2014.

It may be that to comply with the definition of a family trust in order to be eligible for an exemption, amendments to the trust deed will be required.

This transitional provision will allow a taxpayer who satisfies the relationship requirement set out in section 30H(c) by midnight 30 June 2015, subject to all other requirements of the exemption being satisfied, to obtain an exemption for the 2014-15 year of assessment

Subclause (1) provides a self-explanatory definition of a compliant trustee.

Subclause (2) provides that if an exemption would be denied for the 2014-15 assessment year solely because the trustee of the discretionary trust or other trust was not a compliant trustee, the land can receive an exemption if the trust deed is varied before midnight 30 June 2015 to enable the trustee to satisfy the relationship test.

Clause 8:

Glossary amended

Subclause (1) deletes from clause 1 of the Glossary the terms that are no longer needed due to the amendments to the primary production exemption. The terms relevant to the amended exemption are contained in proposed section 29.

Subclause (2) deletes clauses 4 and 5 of the Glossary (relating to the definition of non-rural and the calculation of net income) which are no longer necessary due to the amendments to the primary production exemption. The terms relevant to the amended exemption are contained in proposed section 29.

Division 2 – Duties Act 2008 amended

Clause 9: Act amended

This clause provides that the amendments in this Division are to the *Duties Act 2008*.

Clause 10: Section 3 amended

Section 3 of the Duties Act provides the meaning of terms used throughout the Duties Act

This clause deletes the current Duties Act definition of 'primary production' and replaces it with a pointer to the new definition in proposed section 101A.

Clause 11: Section 101A inserted

101A. References to primary production

Subsection (1) inserts a new definition of primary production into the Duties Act. The definition is consistent with the definition proposed to be inserted into the Land Tax Assessment Act and provides consistency across both tax lines.

Subsection (2) provides that in determining whether an activity constitutes primary production it is irrelevant whether the produce is sold in a natural, processed or converted state and clarifies that secondary processing for the purpose of sale is not primary production.

The purpose of the amendment is to ensure that the exemption for the transfer of farming property between family members is not affected by reason that product produced on the farm is sold in a processed or converted state. Providing the land is used solely or dominantly for primary production and not secondary processing, the exemption will apply to the land used for primary production and secondary production purposes.

Part 3 – Other amendments to *Land Tax Assessment Act 2002*

Division 1 – Preliminary

Clause 12: Act amended

This clause provides that the amendments in this Part are to the *Land Tax Assessment Act 2002*.

Division 2 – Amendments about exemptions

Clause 13:

Section 17 amended

The Land Tax Assessment Act provides, at section 5, that all land in Western Australia is subject to land tax unless it is exempt under section 17.

Section 17 of the Land Tax Assessment Act is situated within Part 3 of the Act, relating to exemptions, concessions and rebates. The section provides that land is exempt if.

- (a) the Commissioner grants an exemption under section 20 of the Act; or
- (b) it is exempt under another provision of this Part.

Section 20 of the Land Tax Assessment Act provides the Commissioner with discretion to grant an exemption in particular circumstances where land does not qualify under another provision of Part 3

Subclause (1) recasts existing section 17 as section 17(1) to allow for the insertion of a new subsection (2)

Subsection (2) provides that, unless Part 3 provides otherwise, an exemption under another provision of this Part, except for section 20, applies in accordance with section 18 to either the whole or part of a lot or parcel of land.

This amendment clarifies that the Part 3 exemption provisions can provide either a full or partial exemption. Section 18 then sets out when a full exemption is applicable, and when and to what extent a partial exemption is applicable

References to 'land' in the Part 3 exemption provisions are references to the whole or part of the lot in question, whichever is applicable. The whole of a lot is exempt if the relevant exemption requirements are satisfied in relation to the whole of the lot. Only part of a lot is exempt if the requirements are satisfied only in relation to part of the lot.

Clause 14:

Section 18 replaced

Section 18 of the Land Tax Assessment Act currently provides that if an exemption or concession would apply to land if it were used or occupied solely for an exempt purpose, or owned, used or occupied solely by a person of a particular class, and the land is only partly used or occupied as required; then the exemption or concession applies to the proportion of the land that is so used or occupied

This clause replaces section 18 with a new section which provides as follows:

18. Whole and partial exemptions

Subsection (1) contains definitions of the terms used in this section

The term 'relevant requirements' sets out the circumstances by virtue of which land may be exempt. It is similar to what is described in the current section, however, it has been expanded to ensure that it covers all of the factors that give rise to an exemption under Part 3

More importantly, the references to land owned, used or occupied *solely* have been removed. This reference was seen as potentially restricting the ability of the Commissioner to allow partial exemptions, as the majority of exemption provisions in Part 3 do not contain a sole use or ownership test

Subsection (2) provides that if an exemption provision applies to a lot or parcel of land, then the whole of the lot or parcel is exempt only if all of the relevant requirements apply in respect of the whole of the lot or parcel. Otherwise, only a part of the lot or parcel is exempt

Subsection (3) provides that where an exemption only applies to a part of a lot or parcel, it applies to the lot or parcel to the same extent that the relevant requirements apply in respect of the lot or parcel.

For example, if land is required to be used by persons for a particular purpose to qualify for an exemption, and only half of the relevant lot of land is used for that purpose, then only a 50 per cent partial exemption applies.

Similarly, if an exemption requires the owners of land to use the land for a particular purpose in order to qualify, and only half of the owners use the land for that purpose, then only a 50 per cent partial exemption applies.

Where multiple partial exemption conditions apply in respect of the same matter, then the resulting partial exemption will be a product of the two. For example, if the foregoing examples relating to use and ownership were to coincide, then only a 25 per cent partial exemption would apply.

Certain exemptions may require that land is used *solely* for a particular purpose. The effect of this is that in order to qualify for the exemption, the whole or part of the lot of land that is used for the exempt purpose and in respect of which a whole or part exemption is sought, cannot be used for any other purpose

Similarly, certain exemptions may require that land is used *solely or principally* for a particular purpose. The effect of this is that in order to qualify for the exemption, the whole or part of the lot of land that is used for the exempt purpose and in respect of which a whole or part exemption is sought, may only be used for another purpose that is a minor purpose or is ancillary to the exempt purpose

Clause 15:

Section 20 amended

Section 20 of the Land Tax Assessment Act provides the Commissioner with discretion to grant an exemption, concession or further concession in particular circumstances where land does not otherwise qualify under Part 3.

This clause amends section 20(2) by replacing a reference to 'the land' therein with a reference to 'a lot or parcel of land'.

The amendment is not intended to affect the operation of the section, but to ensure consistency with the terminology used in proposed section 18, inserted by clause 14 above.

Clause 16:

Section 38 amended

Section 38 of the Land Tax Assessment Act provides an exemption or concession for land owned by non-profit associations

This clause amends section 38(3) by replacing a reference to 'land' therein with a reference to 'the whole of a lot or parcel of land' A reference to 'used solely' is also replaced with a reference to 'used as described'

The amendment is not intended to affect the operation of the section, but to ensure consistency with the terminology used in proposed section 18, inserted by clause 14 above

Clause 17:

Section 39 replaced

Section 39 of the Land Tax Assessment Act contains an exemption for land used for a retirement village.

This clause replaces section 39 with a new section which provides as follows.

39. Land used for retirement villages: exemption for

Subsection (1) provides that in this section each of the terms 'residence contract', 'residential premises', 'retirement village' and 'retirement village scheme' has the meaning given in section 3 of the *Retirement Villages Act 1992*.

Subsection (2) provides an exemption for land that is used for residential premises that are:

- (a) in a retirement village; and
- (b) occupied, or available for occupation, under a residence contract

Subsection (3) provides that where land used for residential premises is exempt under subsection (2), the exemption also extends to any land in the village that is appurtenant to the residential premises and which is occupied or used in connection with the retirement village scheme

The linkage of subsection (3) with subsection (2) means that appurtenant land, for example, used for social, sporting or administration purposes, will not be exempt unless there are completed residential premises that are exempt.

Furthermore, the exemption does not extend to residential premises that are under construction. Nor does it extend to vacant land set aside for future use or expansion of a retirement village.

The amendments clarify that the land that is to be exempted are in accordance with the policy position established in the equivalent provisions in the *Land Tax Assessment Act 1976*. The section has always been administered in accordance with that policy.

Clause 18:

Section 39B amended

Section 39A of the Land Tax Assessment Act provides that the Commissioner may determine that land is 'dwelling park land'. Section 39B then provides that such land is exempt, for assessment years commencing on or after 1 July 2010. A 50 per cent concession applies for earlier assessment years.

Section 39B(3) provides that section 18 does not apply to a concession or exemption that applies under section 39B. The rationale for this was that section 39A contains its own provisions relating to a determination in respect of a part of a lot.

This clause deletes subsection (3) from section 39B. This reflects the different emphasis of proposed section 18, inserted by clause 14 above, to clarify that it now applies in respect of both whole and partial exemptions and is not inconsistent with the provisions of sections 39A and 39B.

The heading to section 39B is amended to include a reference to exemptions, as the section provides for both exemptions and concessions.

Division 3 – Transitional and validation provisions

Clause 19:

Schedule 1 heading amended

Schedule 1 to the Land Tax Assessment Act contains transitional provisions.

This clause inserts, after 'Transitional' in the heading to Schedule 1, the words 'and validation'. This reflects the broadened role of the Schedule 1 provisions resulting from the amendments the subject of clause 21.

Clause 20:

Schedule 1 Division 4 Subdivision 1 heading inserted

This clause inserts, after the heading to Schedule 1 Division 4, as inserted by clause 7 above, the following subheading:

Subdivision 1 – Preliminary

Clause 21:

Schedule 1 Division 4 Subdivision 2 heading inserted

This clause inserts, after Schedule 1 clause 6, as inserted by clause 7 above, the following further subheading:

Subdivision 2 – Provisions about primary production

Clause 22:

Schedule 1 Division 4 Subdivision 3 inserted

This clause inserts a new Subdivision 3 in Division 4 that provides the transitional arrangements for the amendments about partial exemptions.

Subdivision 3 – Provisions about exemptions

10. Terms used

This clause contains self-explanatory definitions of the terms 'amended Act', 'commencement', 'previous assessment' and 'validation period', which are used in this Subdivision.

11. Validation of previous assessments

This clause validates all previous assessments made during the validation period as if the amended Act had been in force when the assessment was made.

However, clause 11 is made subject to clause 12.

12. Land tax decisions made or pending

This clause sets out certain circumstances where previous assessments will not be validated

Subclause (1) contains a self-explanatory definition of the term 'decision'

Pursuant to subclause (2), where a previous assessment validated by clause 11 conflicts, or is inconsistent with, a decision then the decision prevails

The effect of this is that where the Commissioner had partially exempted land due to the purported application of current section 18, or had exempted land due to the purported application of current section 39, then any court or tribunal decisions in relation to the assessment made before these amendments come into effect remains valid

Similarly, where an objection to a previous assessment was determined by the Commissioner before these proposed amendments come into effect, then the objection decision remains valid

Subclause (3) provides that the validation provisions of clause 11 also do not apply to a previous assessment in respect of which an objection had been lodged, but was not finally determined, before 28 November 2013.

Similarly, clause 11 does not apply to a previous assessment in respect of which review proceedings were commenced, but not finally determined, before 28 November 2013.

13. Reassessment

This clause provides that the Commissioner may make any reassessment necessary to give effect to these proposed amendments, subject only to the reassessment time limits set out in section 17 of the *Taxation Administration Act 2003*.

This clarifies that, due to the retrospective nature of these amendments, in circumstances other than where clause 12 has application the Commissioner may make a reassessment of an assessment made before commencement

Where no assessment has been made before commencement, the Commissioner may make an original assessment in respect of any assessment year before commencement.

Part 4 – Other amendments to *Duties Act 2008*

Division 1 – Preliminary

Clause 23: Act amended

This clause provides that the amendments in this Part are to the *Duties Act 2008*.

Division 2 – Amendments about value of property and landholder duty

Clause 24: Section 36 amended

Section 36 sets out how the unencumbered value of property is to be determined, with subsection (4) specifying certain rules to be applied in determining that value

Section 36(4)(b) of the Duties Act is a similar provision to those inserted into the *Stamp Act 1921* by the *Stamp Amendment Act (No. 2) 1991* following the Full Court of the Supreme Court of Western Australia in *Commissioner of State Taxation (WA) v Nischu Pty Limited* 21 ATR 1557 (Nischu amendments)

The Nischu amendments were required to overcome attempts by taxpayers involved in indirect acquisitions of mining interests to minimise stamp duty by attributing significant portions of transaction values to non-dutiable assets in the form of mining information

Amendments are now required to confirm and clarify the treatment of information because taxpayers and their representatives continue to advance technical legal arguments based on there being some doubt that the Nischu amendments have succeeded in fully resolving the issue of the treatment of information.

Some taxpayers continue to argue that significant portions of transaction values for dealings in mining tenements particularly should be attributable to information and that the value of that information is not subject to duty

To minimise the expensive, resource intensive process involved in countering those arguments through the assessment, objection and review process on this issue, the amendments confirm and clarify that value cannot be attributed to information and the value is attributed to the dutiable property to which the information relates

Subclause (1) inserts new paragraph (aa) into section 36(4).

Paragraph (aa) clarifies that the ordinary principles of valuation apply in determining the unencumbered value of property other than if those principles are modified as provided for in other paragraphs of subsection (4)

Subclause (2) replaces paragraph (b) and inserts new paragraph (ca).

Paragraph (b) replicates current section 36(4)(b)(i)

Paragraph (ca) replaces current section 36(4)(b)(ii) to clarify that for the purpose of determining the unencumbered value of property, information relating to property will not be regarded as something to which an independent value can be ascribed and information relating to property including the right to and use of the information will be regarded as an attribute of the property.

Clause 25:

Section 156 amended

Section 156 of the Duties Act applies to determine whether an entity (that is, a corporation or unit trust scheme) in which an interest is being acquired, has another entity that is linked to it.

Subject to certain exceptions, an entity will be linked to another entity that is listed where it has a 90 per cent or greater interest in the other entity. Otherwise, an entity will be linked to another entity where it has a 50 per cent or greater interest in the other entity.

The relevance of these provisions is that an entity is a landholder if it, or a linked entity, is entitled to land in Western Australia of sufficient value.

This clause inserts new subsection (8) into section 156.

Subsection (8)(a) provides that in determining whether an entity is linked to another entity, an agreement by the entity to acquire an interest in the other entity is to be regarded as having been completed, even if it has not yet been completed

Subsection (8)(b) provides that an uncompleted agreement by the entity to dispose of an interest in the other entity is to be disregarded.

These amendments ensure that where an interest is being acquired in an entity, and at the time of the acquisition that entity has entered into an agreement to acquire or dispose of an interest in another entity, any land held by that other entity will, in the first instance, be included for the purposes of the calculation of duty in respect of the acquisition in the first entity.

It is to be noted that subsection (8)(b) is not intended to change the current operation of the law in regard to the treatment of uncompleted agreements for disposals of interests. This is because, until the agreement is completed and the shares transferred, the entity would be entitled to receive the assets of the other entity if it were to be wound up.

The provision has been inserted for reasons of consistency with the drafting relating to acquisitions of interests and also to provide a reference point to which the reassessment provisions inserted under clause 27 of this Bill can be applied

The amendments mirror existing provisions in section 149 of the Duties Act relating to direct interests in land. These provide that an uncompleted agreement by an entity to acquire an interest in land is to be regarded as having been completed. Similarly, an uncompleted agreement to dispose of an interest in land is to be disregarded.

Clause 26: **Section 176 amended**

This clause deletes section 176(4A) of the Duties Act.

Section 176(4A) was inserted by the *Revenue Laws Amendment Act (No. 2) 2012*. Its purpose was to ensure that duty could be charged in certain circumstances relating to uncompleted agreements to acquire interests in entities that are landholders.

It has been made redundant by the amendments the subject of clauses 25 and 27 of this Bill

Clause 27: **Section 195 amended**

Section 195 of the Duties Act provides the Commissioner with a power to reassess landholder duty acquisitions where section 149 was applied in respect of uncompleted agreements to acquire or dispose of interests in land

Where an agreement to acquire an interest in land was regarded as having been completed, and that agreement is terminated without being completed, the relevant landholder acquisition can be reassessed disregarding that agreement

Likewise, where an agreement to dispose of an interest in land was disregarded, and that agreement is completed, the relevant landholder acquisition can be reassessed having regard to that agreement

This clause extends the operation of section 195 to include uncompleted agreements to make acquisitions or disposals of interests in other entities. The amendments are an adjunct to the amendments made under clause 25 of this Bill

Subclause (1) deletes section 195(1)(a) of the Duties Act and replaces it with a new paragraph (a) This contains an additional reference to the scenario where an agreement to acquire an interest in an entity has been regarded as having been completed, pursuant to section 156(8)(a) that has been inserted by clause 25.

The effect of this is that where that agreement is terminated without being completed, the relevant landholder acquisition can be reassessed disregarding the agreement.

Subclause (2) deletes section 195(2)(a) of the Duties Act and replaces it with a new paragraph (a) containing an additional reference to the scenario where an agreement to dispose of an interest in an entity has been disregarded, pursuant to section 156(8)(b) that has also been inserted by clause 25

The effect of this is that where that agreement is completed, the relevant landholder acquisition can be reassessed having regard to the agreement.

Finally, the heading to section 195 is amended to include a reference to section 156.

Division 3 – Transitional provisions

Clause 28:

Schedule 3 Division 7 inserted

This clause inserts transitional provisions into Schedule 3 of the Duties Act

Division 7 – Provisions for *Taxation Legislation Amendment Act (No. 2) 2014*

The amendments effected under clauses 25 and 27 of this Bill in respect of disposals of interests will allow a reassessment to be made when the agreement is completed

As the proposed amendment to allow a reassessment under section 195(2)(a) is in favour of the taxpayer, the transitional provisions provide that sections 156(8)(b) and 195(2)(a) are to apply to relevant acquisitions that occurred on or after 1 July 2008, the date the Duties Act came into effect.

37. Terms used

This clause provides self-explanatory definitions of terms used in Division 7

38. Duty on certain relevant acquisitions

Subclause (1) provides that sections 156(8)(b) and 195(2)(a) are taken to have always applied for the purpose of assessing and reassessing relevant acquisitions that occurred on or after 1 July 2008

Paragraph (b) of subclause (1) also provides that for the purpose of reassessing duty under section 195(3)(b) an application can be made before the later of 5 years after the original assessment was made or 12 months after the commencement of sections 156(8)(b) and 195(2)(a)

Subclause (2) precludes the operation of section 17(4) of the *Taxation Administration Act 2003* which otherwise provides a 5 year time limit on applications for reassessments from the date of the original assessment