REVENUE LAWS AMENDMENT (ASSESSMENT) BILL (NO. 2) 2001

EXPLANATORY MEMORANDUM

PART 1 – PRELIMINARY

This Part contains the title of the Act and the relevant commencement provisions.

Clause 1: **Short title**

This clause contains the short title and citation.

Clause 2: **Commencement**

Subclause (1) provides that the Act commences on the day that it receives the Royal Assent, subject to subsection (2).

Subclause (2) provides that Part 3 containing amendments to the Pay-roll Tax Assessment Act, commences on 1 January 2002.

PART 2 – LAND TAX ASSESSMENT ACT 1976 – PRINCIPAL PLACE OF RESIDENCE EXEMPTIONS

This Part seeks to amend the Land Tax Assessment Act to remove the sole or principal place of residence land tax exemption for land owned by companies and trusts, from the 2002/03 year of assessment.

Currently, properties that are occupied as the principal place of residence of the shareholders of a company that owns the land, or by the trustee of a trust on whose behalf the land is owned, are able to receive a residential land tax exemption.

Under the changes proposed in this Bill, from 1 July 2002, property held by companies or trusts will generally no longer qualify for a principal place of residence exemption.

In the future, trustees of trusts will be able to access the exemption only in very limited circumstances, as detailed more fully below.

This measure will result in a broader land tax base, and recognises that such structures are often in existence for tax minimisation purposes, or to ensure that the property is protected from claims by creditors against individual family members.

While it is considered that a person should be free to place their family home in such a structure and gain the associated benefits, the Government believes that they should not also expect to enjoy the same land tax treatment provided to natural persons who directly own and occupy their home, and as a result, forego those other benefits.

Put simply, the Government does not believe that State taxation laws should be structured to allow shareholders of private companies and trustees of trusts to enjoy the best of both worlds.

The removal of this exemption is expected to raise an additional $10.7 million in 2002/03, rising to $12.3 million by 2004/05.

It is estimated that around 1,400 companies and trusts that currently receive a principal place of residence land tax exemption will be affected.

However, this measure will have no impact on direct owner-occupiers, who will continue to be exempt from land tax on their principal place of residence.

Clause 3: **The Act amended**

This clause identifies that the amendments contained in this Part are to the Land Tax Assessment Act 1976.

Clause 4: **Application of amendments**

This clause provides that the amendments are to apply for the land tax assessment year commencing on 1 July 2002 and for every subsequent year of assessment.

Clause 5: **Section 22 amended**

This clause amends section 22(1) of the Act to add a reference to the new Part 1 Clause 9(b)(iiia) of the Schedule to the Act. A reference to this clause is necessary to ensure that the Commissioner is not able to exercise discretion to provide an exemption where a person does not qualify for a principal place of residence exemption due to a failure to occupy the property as their sole or principal place of residence.

Clause 6: **Schedule amended**

This clause amends Clause 9 of Part 1 of the Schedule to the Act to effect the removal of the principal place of residence land tax exemption currently available for companies and trusts.

Paragraph (a) deletes subparagraph (aa)(i) and (ii), as these definitions will no longer be relevant given that the principal place of residence land tax exemption will not generally be available for land owned by a company.

A new subparagraph (aa)(i) is inserted to provide new definitions.

"corporation" is defined to give it the same meaning as contained in the Corporations Act.

"disabled beneficiary" is defined in the context of certain land held by a trustee on behalf of such a beneficiary.

Such beneficiaries must:

- have a disability as defined in section 3 of the *Disability Services Act 1993* and have been independently assessed by an appropriate assessor as requiring full time care; or

- be mentally incapacitated; or

- be an orphan who is a minor.

Section 3 of the *Disability Services Act 1993* defines a disability as a disability:

"(a) which is attributable to an intellectual, psychiatric, cognitive, neurological, sensory, or physical impairment or a combination of those impairments;

(b) which is permanent or likely to be permanent;

(c) which may or may not be of a chronic or episodic nature; and

(d) which results in --

(i) a substantially reduced capacity of the person for communication, social interaction, learning or mobility; and

(ii) a need for continuing support services."

"trustee" is also defined in the context of land and a disabled beneficiary.

Paragraph (b) deletes subparagraphs (a)(vi), (vii), (viii) and (ix). These subparagraphs are removed because the principal place of residence land tax exemption would not generally be available for land owned by a company.

New subparagraphs (vi) to (ixa) are inserted in their place.

Subparagraph (vi) provides for ownership by a natural person or natural persons and a corporation that does not act as trustee for a disabled beneficiary.

Subparagraph (vii) provides for ownership by a trustee on behalf of a disabled beneficiary where that beneficiary uses the land solely or principally as their sole or principal place of residence. Notably, not all beneficiaries need to be a "disabled beneficiary" for the exemption to apply. One beneficiary of this type will be sufficient for the land to qualify for exemption.

Subparagraph (viii) provides for ownership by a trustee on behalf of a disabled beneficiary and a corporation that does not act as trustee for a disabled beneficiary.

Subparagraph (ix) provides for ownership by a trustee on behalf of a disabled beneficiary and by a natural person or natural persons.

Subparagraph (ixa) provides for ownership by a trustee on behalf of a disabled beneficiary, by a natural person or natural persons, and by a corporation that does not act as trustee for a disabled beneficiary.

It should be noted that while ownership by a corporation that does not act as trustee for a disabled beneficiary is provided for, the qualifications contained in Part 1 Clause 9(b) prevent the exemption from applying to the extent of such ownership.

Paragraph (c) inserts in Part 1 Clause 9(b) new subparagraphs (ia) and (ib).

Subparagraph (ia) clarifies that an exemption is only available for trustee ownership where the trustee holds the land on behalf of a disabled beneficiary and where that beneficiary uses the land solely or principally as their sole or principal place of residence.

Subparagraph (ib) clarifies that ownership by a corporation will only qualify for exemption where:

- the land is held because of a requirement of a financial institution as provided for in Part 1 Clause 9(a)(iv);

- the land is held in the capacity of trustee on behalf of a disabled beneficiary and where that beneficiary uses the land solely or principally as their sole or principal place of residence; or

- the land is held in the capacity of executor as provided for in Part 1 Clause 9(a)(x), (xi), (xii) or (xiii).

Paragraph (d) deletes subparagraphs (b)(iii) and (iv) and inserts new subparagraphs (iii), (iiia) and (iv).

Subparagraph (iii) limits the exemption for natural person ownership provided for by Part 1 Clause 9(a)(vi) to the proportion of the interest in the land owned by natural persons that do not act as trustees. Such trustees where the land is held in the capacity of trustee on behalf of a disabled beneficiary and where that beneficiary uses the land solely or principally as their sole or principal place of residence is elsewhere provided for.

Subparagraph (iiia) limits the exemption for joint ownership by a trustee where the land is held in the capacity of trustee on behalf of a disabled beneficiary and where that beneficiary uses the land solely or principally as

their sole or principal place of residence, and a corporation to the proportion of the interest in the land owned by the trustee.

Subparagraph (iv) provides that in cases of joint ownership involving a corporation, as provided for by Part 1 Clause 9(a)(ix) and (ixa), the proportionate interest in the land of the corporation is excluded from the exemption.

Paragraph (e) deletes the existing subparagraph (b)(iva)(III) and replaces it with a new one to account for joint ownership which includes an executor and a trustee on behalf of a disabled beneficiary where that beneficiary uses the land solely or principally as their sole or principal place of residence.

Paragraph (f) amends subparagraph (b)(v) relating to land held in transitional circumstances due to construction to ensure that the qualifications provided for by subparagraph (iiia) relating to trusts involving disabled beneficiaries apply.

Paragraph (g) amends subparagraph (b)(vi) relating to land held in transitional circumstances in relation to refurbishment to ensure that the qualifications provided for by subparagraph (iiia) relating to trusts involving disabled beneficiaries apply.

PART 3 – PAY-ROLL TAX ASSESSMENT ACT 1971 – GROSS-UP OF FRINGE BENEFIT VALUE

This Part of the Bill seeks to amend the Pay-roll Tax Assessment Act to provide that the value of fringe benefits will be "grossed-up" for pay-roll tax purposes, in the same way they are grossed-up for Fringe Benefits Tax purposes, with effect from 1 January 2002.

The pay-roll tax base was extended in 1997 to include most non-cash fringe benefits. However, it only includes the after-tax equivalent of the benefit. These amendments propose to expand the pay-roll tax base to include the before-tax (gross) equivalent of the benefit.

This will ensure that fringe benefits are treated the same as cash wages for pay-roll tax purposes, thereby removing the pay-roll tax distortion in favour of fringe benefits.

Clause 7: **The Act amended**

This clause provides that the amendments are to the Pay-roll Tax Assessment Act 1971.

Clause 8: **Section 3C amended**

The amendments in this clause are to section 3C, which provides the valuation provisions for fringe benefits.

Subclause (1) proposes to repeal the existing subsection (1) and replace it with new subsections (1) and (1a).

Subsection (1) provides for the valuation of a fringe benefit that is provided on or after 1 January 2002. The existing valuation provisions, which are based on the after-tax equivalent value of a fringe benefit, will continue to apply to benefits provided before 1 January 2002.

Paragraph (a) provides that the value of a fringe benefit will be the grossed-up value of a fringe benefit calculated in accordance with the new subsection (1a), unless paragraph (b) applies.

Paragraph (b) provides that the value of a fringe benefit for which the regulations prescribe a method for determining the value of a benefit of that particular kind, should be the value as determined in accordance with the regulations.

The new subsection (1a) provides the formula by which the grossed-up value of a fringe benefit is calculated. It provides that the grossed-up value of a fringe benefit is determined by multiplying the taxable value of the fringe benefit by the appropriate gross-up factor. The subsection then goes on to define "appropriate gross-up factor" and "taxable value of the fringe benefit".

The meaning of "appropriate gross-up factor" is set out in paragraphs (a) and (b). Paragraph (a) applies to a fringe benefit that is a GST-creditable benefit, which under the Fringe Benefits Tax Assessment Act (FBTA Act) is a fringe benefit for which the benefit provider is entitled to claim an input tax credit in respect of GST paid on goods or services acquired in order to provide the fringe benefit.

The FBTA Act makes a distinction between GST-creditable benefits and non GST-creditable benefits to avoid allowing employers the benefit of GST input tax credits for goods and services purchased for the private use of employees. As a result, the gross-up rate applicable to GST-creditable benefits effectively recovers the input tax credit that can be obtained by an employer in providing a fringe benefit.

Paragraph (a) provides that for the purposes of a GST-creditable benefit, the "appropriate gross-up factor" is the factor by which the "Type 1 aggregate fringe benefits amount" is multiplied under section 5B(1B) of the FBTA Act.

Section 5B(1B) of the FBTA Act sets out the formula by which the gross-up rate applicable to GST-creditable benefits is calculated. The formula is as follows:

$$\text{Type 1 aggregate} \quad \underline{\text{FBT rate + GST rate}} \quad \text{fringe benefits} \quad \times \quad (1 - \text{FBT rate}) \times (1 + \text{GST rate}) \times \text{FBT rate} \quad \text{amount}$$

The "Type 1 aggregate fringe benefits amount" represents the total taxable values of fringe benefits that are GST-creditable benefits.
The gross-up formula results in a gross-up rate of 2.1292 where the FBT rate is 48.5% and the GST rate is 10%.

Therefore, the "appropriate gross-up factor" of a GST-creditable benefit for the purposes of paragraph (a) is 2.1292 (based on current FBT and GST rates).

Paragraph (b) applies to a fringe benefit that is a not a GST-creditable benefit, which under the FBTA Act is a fringe benefit for which there is no entitlement to claim an input tax credit.

Paragraph (b) provides that for the purposes of a non GST-creditable benefit, the "appropriate gross-up factor" is the factor by which the "Type 2 aggregate fringe benefits amount" is multiplied under section 5B(1C) of the FBTA Act.

Section 5B(1C) of the FBTA Act sets out the formula by which the gross-up rate applicable to non GST-creditable benefits is calculated. The formula is as follows:

$$\text{Type 2 aggregate fringe benefits amount} \times \frac{1}{(1 - \text{FBT rate})}$$

The "Type 2 aggregate fringe benefits amount" represents the total taxable values of all other fringe benefits that are not type 1 benefits.

The gross-up formula results in a gross-up rate of 1.9417 where the FBT rate is 48.5%.

Therefore, the "appropriate gross-up factor" of a non GST-creditable benefit for the purposes of paragraph (b) is 1.9417 (based on the current FBT rate).

The meaning of "taxable value of the fringe benefit" is set out in paragraphs (a) and (b). Paragraph (a) applies to a benefit that is a work-related benefit. The existing section 3C(3) defines what is meant by a work-related benefit for the purposes of this paragraph. Paragraph (a) provides that the value of a work-related fringe benefit is the employee's share of the taxable value of the fringe benefit for the purposes of the FBTA Act. The reference to an "employee's share" is necessary as a fringe benefit may be provided in respect of the employment of more than one employee (for example, a pooled car which may be used by a number of employees). The FBTA Act requires that the taxable value be reasonably allocated between the recipient employees.

Paragraph (b) applies to a benefit that is not a work-related benefit and provides that the value of such a benefit is the employee's share of the taxable value of the fringe benefit for the purposes of the FBTA Act without regard to the "otherwise deductible" rule. The existing section 3C(4) defines what is meant by the "otherwise deductible" rule for the purposes of this paragraph.

Subclause 2 amends section 3C(3) and (4) to remove the reference to subsection (1) which is no longer applicable and replace it with a reference to the new subsection (1a).

Clause 9: **Fringe benefits provided before 1 January 2002**

This clause ensures that these amendments do not apply to fringe benefits provided prior to 1 January 2002 and the provisions in force prior to 1 January 2002 will continue to apply to such fringe benefits. This means that the existing valuation provisions, which are based on the after-tax equivalent value of a fringe benefit, will continue to apply to benefits provided before 1 January 2002.

PART 4 – PAY-ROLL TAX ASSESSMENT ACT 1971 – GROUPING PROVISIONS

This Part seeks to amend the Pay-roll Tax Assessment Act to rectify an anomaly in the grouping provisions. Pay-roll tax is imposed on a business that pays, or a group of businesses that pay, wages in excess of $675,000 in a financial year. The grouping of businesses is necessary to prevent an otherwise liable employer from splitting its business operations into separate entities to ensure that the wages paid by each entity fall below the pay-roll tax threshold.

Grouping provisions were introduced into the Pay-roll Tax Assessment Act with effect from 1 January 1976. The grouping provisions operate to ensure that the Australia wide wages of all businesses in a group are aggregated to determine:

- if a liability to register for pay-roll tax exists;
- the amount of the allowable deduction (ie. the tapering of the tax-free threshold); and
- the rate of tax payable.

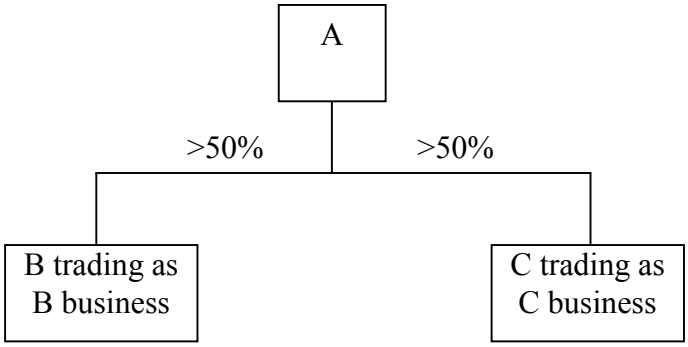
However, tax is paid by each individual group member only on the Western Australian wages paid in its own right.

The grouping provisions operate to deem employers to constitute a group where:

- one company is a subsidiary of another company under the Corporations Act;
- an employee or employees of one business, by arrangement, perform duties for another business;
- the same person or persons together have a controlling interest (greater than 50%) in each of two businesses; or
- one business is a branch or a subsidiary of a head or parent business, and the head or parent business exercises managerial control over the other business.

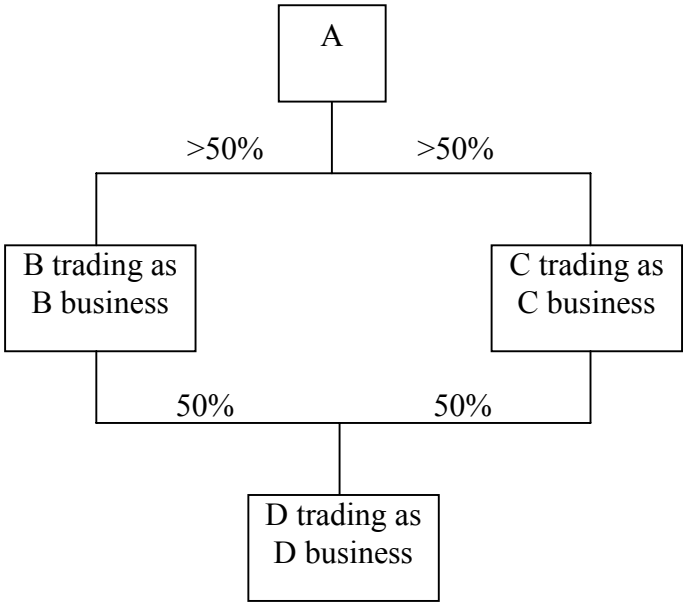
An anomaly exists with the operation of the provision that applies to commonly controlled businesses. This provision operates such that where the same person holds, or persons together hold, a greater than 50% interest in each of two businesses, the persons who carry on those businesses constitute a group for pay-roll tax purposes.

Consider the following example involving the entities A, B and C.



A has a greater than 50% interest in both B and C. Therefore, B and C would constitute a group for pay-roll tax purposes.

However, an anomaly arises where a person or persons together hold their controlling interest indirectly. Such an arrangement is represented in the example below, showing a person that holds a greater than 50% interest in each of 2 businesses, and each of those 2 businesses hold a 50% interest in a further business.



In this example, A has a controlling interest in each of B and C as it has a greater than 50% interest in each. Therefore, B and C would constitute a group. However, A doesn't directly have a controlling interest (greater than 50%) in the business being carried on by D. The controlling interest is held by B and C together. The grouping provisions do not recognise that A has indirect control (through its interests in B and C) over the business being carried on by D. Therefore, the grouping provisions would not operate to include D in the group with B and C.

Even though the same person effectively controls 100% of the business, the grouping provisions in relation to trusts and partnerships do not recognise that a controlling interest may be held indirectly. The provisions do not allow the controlling interest to be traced back to the beneficial owner (A in the above example).

If one of the entities in the structure was a corporation, the grouping provisions would apply because the provision relating to the grouping of corporations includes a controlling interest in a business that is held directly or indirectly. However, where the entities are trusts or partnerships, the grouping provisions do not recognise indirect interests and an employer is able to use this omission to minimise its pay-roll tax liability.

The proposed amendments ensure that the grouping provisions operate in a situation where a person indirectly has control over a business being carried on by a trust or a partnership. This will ensure that they are grouped on the same basis as a business being carried on by a corporation.

The legislative solution in Western Australia is based on the amendments implemented in New South Wales. The proposed amendments operate where 2 businesses have been deemed to constitute a group under the grouping provisions and those businesses have a controlling interest in a further business. The amendments would operate to deem the 2 businesses constituting the group and the person carrying on the further business in which they have a controlling interest, to constitute a larger group.

Using the above example, B and C constitute a group and together have a controlling interest in the business carried on by D. Therefore, the amendments would deem B, C and D to constitute a group.

Clause 10: **The Act amended**

This clause provides that the amendments are to the Pay-roll Tax Assessment Act 1971.

Clause 11: **Section 16E amended**

Subclause (1) inserts a new subsection (1a), which provides that where the members of a smaller group have a controlling interest in another business, the members of that smaller group and the person or persons carrying on the other business, constitute one group.

Subclause (2) amends subsection (2) to include a reference to the new subsection (1a).

Subclause (3) inserts a new subsection (3), which provides that for the purposes of this section, "controlling interest" has the same meaning as it has in section 16D.

Section 16D provides that two business constitute a group where the same person or persons together have a controlling interest in each business. A controlling interest may occur in circumstances which include where:

- a person or persons together (directly or indirectly) exercise or control more than 50% of the voting power of a corporation;
- a person or persons together are entitled to more than 50% of the capital or profit of a partnership;
- a person as a beneficiary of a trust is entitled to more than 50% of the interests in that trust; or
- a person is the sole owner of a business.

PART 5 – STAMP ACT 1921 – VOLUNTARY TRANSFERS UNDER THE FINANCIAL SECTOR (TRANSFERS OF BUSINESS) ACT 1999

This Part seeks to amend the Stamp Act to require a statement evidencing a voluntary transfer under the *Financial Sector (Transfers of Business) Act 1999* of the Commonwealth to be prepared and lodged with the Commissioner and to charge stamp duty on the statement.

Prior to the introduction of the *Financial Sector (Transfers of Business) Act*, each of the States and Territories introduced specific enabling legislation as the need arose to facilitate bank mergers by reducing the associated administrative workload.

The merger of two banks involves the transfer of many assets and liabilities, including thousands of customer accounts. Without facilitation, there would be a need for separate documentation in respect of each transfer. Instead, the legislation provided for the banks to pay an amount in lieu of the State taxes and charges that would have applied if normal commercial transfers of the assets and liabilities had been required.

Mergers between credit unions and between building societies were previously not subject to duty as no instrument was created at the time of the merger to evidence the transfer of assets and liabilities, and no obligation to create one arose under the Stamp Act.

The *Financial Sector (Transfers of Business) Act* allows all the assets and liabilities of one body (the transferring body) to become the assets and liabilities of another body (the receiving body) without any transfer, conveyance or assignment of property. The need for State legislation was therefore redundant. Furthermore, there is no dutiable instrument created to evidence the transfer, nor is there an obligation to create one under the Stamp Act.

The effect is that the stamp duty position that previously only applied to mergers of building societies and credit unions is extended to all mergers between life insurance companies and authorised deposit-taking institutions, which includes building societies, credit unions and banks. As a result, the State no longer receives payments in lieu of the taxes and charges that would have been payable in respect of bank mergers.

These proposed amendments compel the parties to a voluntary transfer under the *Financial Sector (Transfers of Business) Act* to create a statement in respect of the transfer and lodge it with the Commissioner. Stamp duty is then chargeable on the property conveyed, transferred or assigned.

Clause 12: **The Act amended**

This clause provides that the amendments in this Part are to the Stamp Act 1921.

Clause 13: **Section 20 amended**

Subclause (1) amends subsection (1) which deals with timing requirements for lodging instruments and statements without the imposition of fines for late lodgement.

A new paragraph (aa) is inserted which allows a statement prepared in respect of a transfer under the *Financial Sector (Transfers of Business) Act* (section 31C(1)) to be lodged without fine if it is lodged within 3 months after the day of the transfer.

Amendments are also made to subsection (1) to remove the reference to a statement prepared under section 112HB, as that section has been repealed as a result of the consequential amendments arising from the *Corporations Act 2001*.

Subclause (2) amends subsection (5a) to insert a reference to a statement prepared in respect of a transfer under the *Financial Sector (Transfers of Business) Act* (section 31C) to exclude it from the definition of a "return". This is necessary to ensure that such a statement is excluded from the fining provisions applicable to the lodgement of returns outside the requisite times. Statements prepared under section 31C may be subject to the fining provisions in section 20(2) of the Act.

Amendments are also made to subsection (5a) to remove the reference to a statement prepared under section 112HB(2), as that subsection has been repealed as a result of the consequential amendments arising from the *Corporations Act 2001*.

Clause 14: **Section 27 amended**

Subclause (1) amends subsection (2) to include a reference in paragraphs (a) and (b) to a statement prepared in respect of a transfer under the *Financial Sector (Transfers of Business) Act* (section 31C). This ensures that a document containing evidence of a transfer to which section 31C applies cannot be given or pleaded in evidence (except in criminal proceedings), unless a statement of that transfer has been prepared and lodged with the Commissioner and the duty in respect of the statement has been paid.

Subclause (2) amends subsection (3) to include a reference to a statement prepared in respect of a transfer under the *Financial Sector (Transfers of Business) Act* (section 31C) to permit a person who is not liable to pay the duty to plead or tender the statement as evidence in a Court, subject to the Court being satisfied that the person:

- has, or will inform the Commissioner of the name of the person liable to pay the duty on the instrument or statement; and

- has, or will lodge the instrument or document with the Commissioner,

in accordance with arrangements approved by the Court.

Clause 15: **Section 28 amended**

Subclause (1) amends subsection (1)(b) to include a reference to a statement prepared in respect of a transfer under the *Financial Sector (Transfers of Business) Act* (section 31C(1)). This is necessary to prevent a person from registering or recording a document which contains evidence of a transfer to which section 31C applies, unless a statement of that transfer has been prepared and lodged with the Commissioner and the duty in respect of the statement has been paid.

Subclause (2) amends subsection (4) to include a reference to a statement prepared in respect of a transfer under the *Financial Sector (Transfers of Business) Act* (section 31C(1)). This is necessary to prevent a caveat from being registered unless a statement of the transfer has been prepared and lodged with the Commissioner.

Clause 16: **Section 29 amended**

Subclause (1) amends subsection (1) to include references to a statement prepared in respect of a transfer under the *Financial Sector (Transfers of Business) Act* (section 31C(1)). This requires the Court to take notice of a failure to lodge or pay duty on a statement prepared under section 31C(1), or a document containing evidence of a transfer to which section 31C(1) applies.

Subclause (2) amends subsection (2a) to include a reference to a statement prepared in respect of a transfer under the *Financial Sector (Transfers of Business) Act* (section 31C(1)). This is necessary to allow a Court to receive in evidence a document to which section 31C(1) relates, upon lodgement of the statement required by that subsection and payment of the duty and any fine to the Court.

Clause 17: **Section 30 amended**

This clause amends paragraph (b) to include a reference to a statement prepared in respect of a transfer under the *Financial Sector (Transfers of Business) Act* (section 31C(1)). This allows a Court to recognise a document containing evidence of a transfer to which section 31C(1) relates, as secondary evidence if the statement required by that subsection is lodged and the duty and any fine is received.

Clause 18: **Section 31C inserted**

This clause inserts a new section 31C.

Subsection (1) applies to a transfer of assets from a transferring body to a receiving body under Part 3 of the *Financial Sector (Transfers of Business) Act*, which provides for a voluntary transfer of assets. Where assets are transferred under this Part, the receiving body must prepare and lodge a statement with the Commissioner in respect of the transfer.

Subsection (2) provides that the statement must be in a form approved by the Commissioner and be lodged within 3 months of the day of the transfer of the assets.

Subsection (3) provides that section 31B does not apply in relation to a statement lodged in respect of a transfer under the *Financial Sector (Transfers of Business) Act*. This is necessary to prevent the preparation of two statements that would each be chargeable with duty.

Subsection (4) is an offence provision such that if a person that is required to lodge a statement fails to do so, or lodges a statement that is false in a material particular, that person is taken to commit an offence and the general offence provision of section 116 applies. This involves a maximum penalty of $10,000.

Clause 19: **Section 75J amended**

Subclause (1) amends subsection (1) to replace the definition of a "section 31B statement" with a definition of a "section 31B or 31C statement". This includes a statement lodged under the provisions of section 31C relating to a voluntary transfer of business.

Subclause (2) amends subsection (4) to include a reference to a statement in respect of a voluntary transfer under the *Financial Sector (Transfers of Business) Act* lodged under section 31C and deemed to be an instrument under section 31D. This subsection deems the statement to have been executed on the date the relevant transfer to which it relates occurred.

Proposed section 31D contained in the complementary Revenue Laws Amendment (Taxation) Bill (No. 2) 2001 deems a statement lodged in respect of a transfer of assets under the *Financial Sector (Transfers of Business) Act* to be an instrument of transfer for the assets to which the statement relates. As such, the statement may qualify for an exemption under section 75JB. The deemed execution date is necessary to apply the criteria for the exemption under that section.

Clause 20: **Section 75JC amended**

Subclause (1) amends subsection (1) to include a reference to a statement in respect of a voluntary transfer under the *Financial Sector (Transfers of Business) Act* (section 31C). This allows a company to make application to the Commissioner for pre-determination as to whether an exemption on a proposed section 31C statement would apply.

Subclause (2) amends subsection (5) to include a reference in paragraphs (a) and (b) to a statement in respect of a voluntary transfer under the *Financial Sector (Transfers of Business) Act*. This provides that if the Commissioner approves the application for pre-determination, the statement when lodged shall, upon application under section 75JD, be exempt unless:

- there is a material variance between the draft statement and the lodged statement;
- there has been a material change in the circumstances surrounding the transfer; or
- there has been less than full and true disclosure of information relating to the transfer.

Clause 21: **Section 75JE amended**

This clause amends subsection (1) to include a reference in paragraph (d) to a statement in respect of a voluntary transfer under the *Financial Sector (Transfers of Business) Act* (section 31C). This specifies the parties to the transfer as the persons liable for the payment of the duty and fine in the case where the claw-back applies.

Clause 22: **Section 76AH and 76AO amended**

This clause amends sections 76AH(4)(a) and 76AO(4)(a) to include a reference to a statement in respect of a voluntary transfer under the *Financial Sector (Transfers of Business) Act*. These sections charge duty on chattels transferred outside the company structure in certain circumstances. However, the transfer will be exempt where the chattels have been charged with duty under section 31D.

PART 6 – STAMP ACT 1921 – PRIVATE UNIT TRUSTS

This Part seeks to amend the Stamp Act 1921 to exclude certain pooled investment trusts and equity trusts from the operation of the private unit trust provisions.

A unit trust is a vehicle for pooling investors' funds. Unless otherwise precluded by the trust deed, unit holders have a beneficial entitlement to all the property held by the unit trust in proportion to their unit holdings.

Prior to 1982, stamp duty on the transfer of units in all unit trusts was calculated on the basis that these units were marketable securities. Since the rate of stamp duty on the conveyance of real property is significantly higher than the rate applicable to the transfer of marketable securities, trusts holding real property were being established for the primary purpose of avoiding stamp duty.

By purchasing units in property-owning trusts that had a small membership, new unit holders were able to effectively acquire significant interests in real property without having to pay conveyance duty.

To counteract such avoidance, section 73D was inserted into the Stamp Act in 1982 to charge dispositions of units in "private unit trusts" with stamp duty at conveyance rates.

For this purpose, a "private unit trust" is a trust in which:

- units are not issued to the public; or

- there are fewer than 50 members who are beneficially entitled to units in the trust, or 20 members or less hold 75% or more of the total number of units issued.

Duty is charged at conveyance rates on changes to the underlying interest in the gross value of any Western Australian land and chattels owned by the unit trust, plus any amount of the remaining assets that exceed liabilities.

Trusts that are not brought within the operation of section 73D continue to be subject to stamp duty at the much lower marketable security rates, or where no transfer occurs, no duty applies.

The funds management industry in Australia has grown significantly since section 73D was enacted, and has for some time expressed concern at the detrimental impact the section's operation is having on investment in Western Australian property.

That industry is particularly affected as unit trusts are the preferred investment structure.

The Commissioner of State Revenue has advised that in many cases, the impact of section 73D leads to unintended consequences for that industry that are not consistent with Parliament's original intention.

These amendments propose to remove from the operation of section 73D unit trusts that meet the definition of:

- a Pooled Investment Trust; or

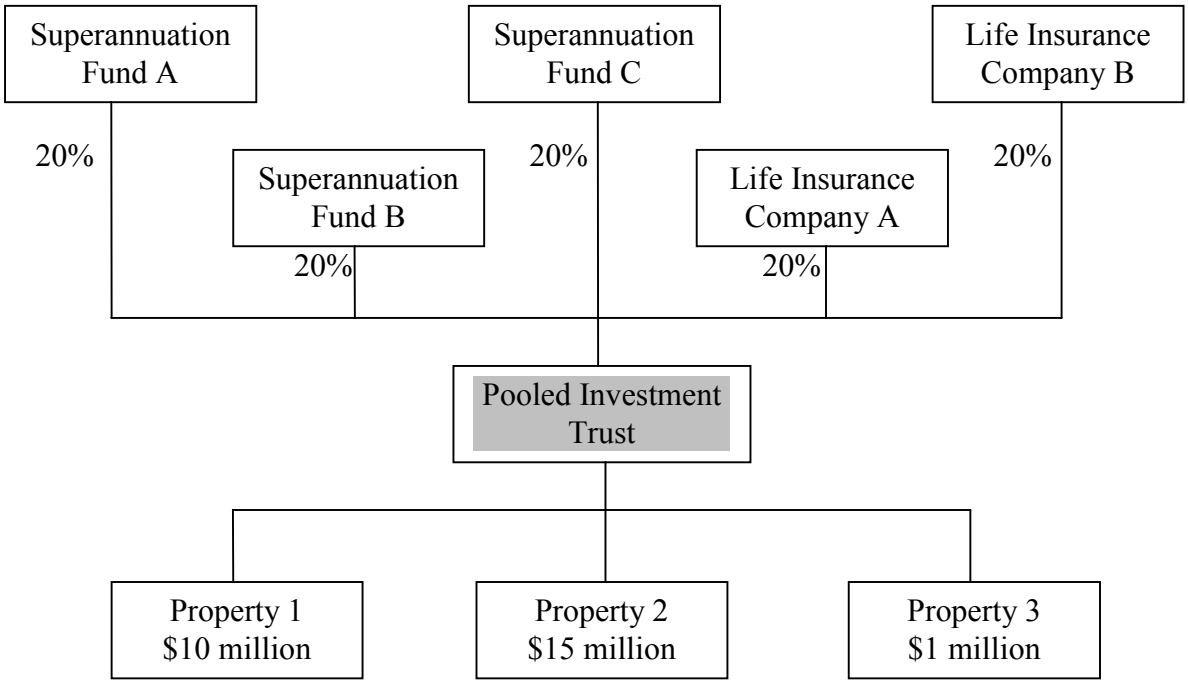
- an Equity Trust.

A "Pooled Investment Trust" has been defined largely by the nature of its members, with 90% or more of the units on issue required to be held by the trustees of complying superannuation funds, approved deposit funds, public sector superannuation schemes, public unit trusts, or by life companies.

Conditions also apply regarding the number of unit holders, the ownership spread, the value of the trust's property investments, and a range of other factors.

These unit trusts are wholesale in nature and generally hold a number of high value properties and have a small number of high value direct investors. As they do not meet the ownership requirements to be treated as a public unit trust, dispositions of units currently attract duty at conveyance rates, rather than the lower marketable security duty rate.

An example of a unit trust structure that these amendments are designed to exclude from the private unit trust provisions is illustrated below. This example is based on the assumption that the funds and companies are unrelated.



An "Equity Trust" has been defined primarily by the nature of its allowable investments, which are confined largely to marketable securities and other liquid assets. Notably, indirect investments in property are largely excluded from what is considered allowable, thereby ensuring that the State's real property duty base remains protected.

The rationale for the exclusion of such equity trusts is that if the marketable securities were traded directly, they may attract duty at the lower marketable security rate or no duty at all.

The exclusion will only apply upon registration by the Commissioner as a Pooled Investment Trust or Equity Trust. Merely meeting the criteria is not sufficient to remove a trust from the scope of section 73D.

The proposed amendments also provide for interim registration for newly created trusts, where upon creation, the criteria for a Pooled Investment Trust or Equity Trust cannot be met, but it is expected that the criteria will be satisfied within 12 months from the date the first units in the trust are issued.

The proposed amendments should be viewed as the first stage in redesigning the private unit trust provisions in a manner that meets the revenue raising requirements of the State, while also being cognisant of their impact upon property investment in Western Australia.

Broader issues associated with the operation of section 73D will be examined as part of the Government's Business Tax Review announced during the recent Budget to allow industry consultation and input.

Until such solutions are devised and put in place, compliance is expected with the law as it stands.

However, it should be noted that it is not intended that any redesign of section 73D will extend to removing from its operation sub-trusts created for the purpose of holding single properties, as has been proposed by some members of the property industry.

To do so would place significant stamp duty revenue at risk, thereby placing pressure on other tax bases and taxpayers to make up the resultant revenue shortfall.

Clause 23: **The Act amended**

This clause provides that the amendments in this Part are to the Stamp Act 1921.

Clause 24: **Section 4 amended**

This clause amends the definition of a "marketable security" in section 4(1) to include a unit in a unit trust scheme that is registered or granted interim registration as a pooled investment trust or an equity trust.

Clause 25: **Section 20 amended**

Subclause (1) amends subsection (1) which deals with timing requirements for lodging instruments and statements without the imposition of fines for late lodgement.

A new paragraph (ab) is inserted which allows a statement prepared in respect of a disqualifying event and subsequent transfers or dispositions (section 63AE) to be lodged without fine if it is lodged within the time allowed by section 63AE(1). This subsection requires the statement to be lodged within 14 days after the day on which the disqualifying event occurred.

Subclause (2) amends subsection (5a) to insert a reference to a statement prepared in respect of a disqualifying event and subsequent transfers or dispositions (section 63AE) to exclude it from the definition of a "return".

This is necessary to ensure that such a statement is excluded from the fining provisions applicable to the lodgement of returns outside the requisite times. Statements prepared under section 63AE may be subject to the fining provisions in section 20(2) of the Act.

Clause 26: **Section 63 amended**

This clause inserts new subsections (1a) and (1b).

Subsection (1a) provides that for the purposes of sections 63AE and 63AF, which are the provisions relating to lodging and charging duty on a statement prepared in respect of a disqualifying event and subsequent transfers or dispositions, "disposition" has the same meaning as it has in the provisions relating to dispositions of units in unit trust schemes.

Subsection (1b) provides that for the purposes of sections 63AB to 63AF, which are the provisions relating to registered unit trust schemes, "unit" has the same meaning as it has in the provisions relating to dispositions of units in unit trust schemes.

Clause 27: **Section 63AA to 63AE inserted**

This clause inserts new sections 63AA to 63AE.

Section 63AA sets out the process for registration of unit trust schemes.

Subsection (1) allows a unit trustee to apply to the Commissioner in an approved form for registration of a unit trust scheme. "Unit trustee" and "unit trust scheme" are both defined terms in section 63(1).

Subsection (2) provides that the Commissioner may register the unit trust scheme as either a pooled investment trust or an equity trust, if the Commissioner is satisfied as to the matters in paragraphs (a) and (b).

Paragraph (a) provides that the Commissioner may register the unit trust scheme if he is satisfied that it meets the criteria necessary for registration as either a pooled investment trust or an equity trust. These criteria are specified in section 63AB(2) and (3) respectively.

Paragraph (b) provides that the Commissioner must also be satisfied that the registration of the unit trust scheme is not being used, and is not likely to be used in the future, as part of a duty avoidance scheme or arrangement that has as a collateral purpose, avoiding or minimising the duty that would otherwise be payable if it was not for the registration of the unit trust scheme.

If the Commissioner is satisfied as to the matters in paragraphs (a) and (b), he may register the unit trust scheme with effect from the date of the application.

Subsection (3) allows the Commissioner to take into account any matter that he considers to be relevant for the purposes of determining whether registration is being used, or may be used, as part of a duty avoidance scheme or arrangement.

Subsection (4) requires the Commissioner to notify the unit trustee in writing as to whether he has registered the unit trust scheme as a pooled investment trust or an equity trust.

Subsection (5) requires the Commissioner to give written reasons to the unit trustee in the case where he has decided not to register the unit trust scheme as a pooled investment trust or an equity trust.

Section 63AB sets out the criteria for registration of a unit trust scheme.

Subsection (1) provides that for the purposes of this section, "land" has the same meaning as it has in section 76.

Subsection (2) sets out the criteria that a unit trust scheme must meet to be eligible for registration as a pooled investment trust. The unit trust scheme is required to meet all of the criteria specified in paragraphs (a) to (j).

Paragraph (a) requires that the unit trust scheme must have at least five unit holders.

Paragraph (b) provides that no person may be beneficially entitled to more than 40% of the total issued units under the scheme. For the purposes of determining whether this criterion has been met, a related party test is included in subsections (4) to (7).

Paragraph (c) is a spread of ownership requirement that provides that not less than three persons may be beneficially entitled to 75% or more of the total issued units under the scheme. The related party test also applies for the purposes of determining whether this criterion has been met.

Paragraph (d) requires that the unit trustee, in its capacity as trustee of the unit trust scheme, holds an interest in at least two parcels of land, and at least two of those interests have a value of $10 million or more. The interests in the land may be held either directly or indirectly. Specific provisions relating to the valuation of these interests are contained in subsections (8) and (9).

Paragraph (e) limits the types of entities that may hold units in the unit trust scheme. Each unit holder in the scheme must be of a type specified in one of the subparagraphs (i) to (vi).

Subparagraph (i) provides that the unit holder may hold the unit in its capacity as a trustee of a complying superannuation fund.

Subparagraph (ii) provides that the unit holder may hold the unit in its capacity as a trustee of a complying approved deposit fund.

Subparagraph (iii) provides that the unit holder may hold the unit in its capacity as a trustee or manager of a fund that is a part of a public sector superannuation scheme.
Subparagraph (iv) provides that the unit holder may be a life company that holds the unit solely for the purpose of investing assets of its statutory fund.

Subparagraph (v) provides that the unit holder may hold the unit in its capacity as the trustee of a unit trust scheme, which under section 63(1) means a private unit trust scheme.

Subparagraph (vi) provides that the unit holder may be of a type not referred to in subparagraphs (i) to (v), but only if it does not hold more than 5% of the total issued units under the scheme. This requirement is also conditioned by paragraph (g).

Paragraph (f) provides that where the unit holder holds the unit in its capacity as the trustee of a complying superannuation fund, a complying approved deposit fund or a trustee or manager of a fund that is part of a public sector superannuation scheme, the fund or scheme must have at least 100 members.

Paragraph (g) provides that where the unit trust scheme has more than one unit holder that is of a type referred to in paragraph (e)(vi), unit holders of that type cannot hold more than 10% of the total units issued under the scheme.

Paragraph (h) requires that in the case where the unit trustee is a corporation, no two persons may directly or indirectly have sufficient control to appoint, or have the power to appoint, the majority of the board of directors of the trustee corporation.

Paragraph (i) requires that the trust must be open to further subscription from new members.

Paragraph (j) requires that the initial subscription by each of the unit holders under the trust is at least $1 million.

Subsection (3) sets out the criteria that a unit trust scheme must meet to be eligible for registration as an equity trust. The unit trust scheme is required to meet all of the criteria specified in paragraphs (a) to (c).

Paragraph (a) limits the types of assets that the unit trustee may hold in its capacity as trustee of the unit trust scheme. The trustee may only hold assets of the type specified in subparagraphs (i) to (v).

Subparagraph (i) provides that the unit trustee may hold shares in a company or corporation that is not one to which section 76AI or 76AP applies. These sections are part of the land rich provisions. This subparagraph prevents the unit trustee from holding shares in a company or corporation to which the land rich provisions apply

Subparagraph (ii) allows the unit trustee to hold units in a unit trust that are marketable securities. The definition of a "marketable security" is contained in section 4(1).

Subparagraph (iii) allows the unit trustee to hold certain incidental items of property that the Commissioner is satisfied are necessary for the administration of the trust, but which cannot be used for investment purposes.

Subparagraph (iv) allows the unit trustee to hold cash or money in an account at call.

Subparagraph (v) allows the unit trustee to hold negotiable instruments and money on deposit with any person.

Paragraph (b) requires that the unit trust scheme must have at least five unit holders.

Paragraph (c) provides that no person may be beneficially entitled to more than 40% of the total issued units under the scheme. However, there is an exception to this requirement where a Commonwealth, State or Territory Government is beneficially entitled to the units either directly, or indirectly through the majority shareholding of a company. For the purposes of determining whether this criterion has been met, a related party test is included in subsections (4) to (7).

Subsection (4) provides that for the purposes of determining whether the criteria for registration in relation to the number of unit holders and the spread of their ownership, one person shall be treated as being beneficially entitled to the units it holds and any units held by a person referred to in paragraphs (a) to (d).

Subsection (5) specifies the nature of persons who are considered to be related for the purposes of this section.

Subsection (6) specifies the nature of persons who are considered to be relatives for the purposes of subsection (4)(c).

Subsection (7) expands on the nature of persons who fall within subsections (5) and (6).

Subsection (8) requires that an application for registration as a pooled investment trust must be accompanied by a statement in respect of the unencumbered value of the trustee's interests in land, as referred to in subsection (2)(d).

Subsection (9) provides that the valuation provisions of section 76AA(1) to (2a) apply for the purpose of determining the unencumbered value of the trustee's interests in land, as referred to in subsection (2)(d).

Section 76AA, as applied by this subsection, contains special provisions which allow the Commissioner to request a statement of the unencumbered value of any land or property and assess duty in accordance with that valuation.

Section 76AA(1a) provides that failure to comply with a requirement of the Commissioner to furnish a statement of the value of the land or property is an offence.

Section 76AA(1b) allows the Commissioner to cause any land or property to be valued, notwithstanding that a person may not have furnished the required statement of value, and assess duty in accordance with that valuation.

Section 76AA(2) provides that section 75A(3) and (4) apply for the purposes of subsection (1b). Section 75A(3) and (4) respectively allow any overriding power of revocation or reconveyance to be disregarded and provide the mechanism for assessing an undivided share of property.

Section 76AA(2a) allows the Commissioner to assume that information relating to land or other property is known to a hypothetical purchaser in determining the value of the land or other property.

Section 63AC sets out the requirements for interim registration.

Subsection (1) provides that a unit trustee may apply to the Commissioner in an approved form for interim registration of a unit trust scheme. The unit trustee must apply within one year after the day on which the first units in the unit trust scheme were issued.

Subsection (2) provides that the Commissioner may grant interim registration in respect of a unit trust scheme for one year from the day on which the first units in the unit trust scheme were issued, if the requirements of paragraphs (a) and (b) have been met.

Paragraph (a) provides that the Commissioner may grant a unit trust scheme interim registration as a pooled investment trust if he is satisfied that it meets all the criteria specified in section 63AB(2)(e) to (j), or as an equity trust, if it meets the criterion specified in section 63AB(3)(a).

Paragraph (b) requires that a unit trustee give to the Commissioner an undertaking that units in a pooled investment trust will be issued so that at the end of the start up period (being one year from the day on which the first units in the unit trust scheme were issued) the scheme will also meet the criteria specified in section 63AB(2)(a) to (d). This allows the pooled investment trust a period of one year to meet the criteria relating to the number of unit holders, the spread of ownership requirements, and the interest in at least two properties valued at $10 million or more.

In respect of an equity trust, the unit trustee must give the Commissioner an undertaking that units in the equity trust will be issued so that at the end of the start up period the scheme will meet the criteria specified in section 63AB(3)(b) and (c). This allows the equity trust a period of one year to meet the criteria relating to the number of unit holders and the spread of ownership requirements.

The Commissioner must be satisfied that the criteria referred to in the undertaking will be met by the end of the start up period.

Subsection (4) requires the Commissioner to advise the unit trustee in writing as to whether interim registration as a pooled investment trust or an equity trust has been granted.

Subsection (5) requires the Commissioner to provide the unit trustee with written reasons if he decides not to grant the unit trust scheme interim registration as a pooled investment trust or an equity trust.

Section 63AD sets out the process for the cancellation of the registration or interim registration of a unit trust scheme.

Subsection (1) provides that for the purposes of this section and section 63AE, which relates to the lodgement of a statement about a disqualifying event and subsequent transfers or dispositions, a disqualifying event occurs in the circumstances outlined in paragraphs (a) to (c).

Paragraph (a) provides that a disqualifying event occurs if a unit trust scheme that has been granted registration as a pooled investment trust or as an equity trust, ceases to meet any of the criteria it was required to satisfy to be eligible for registration.

Paragraph (b) provides that a disqualifying event occurs if, during the start up period, a unit trust scheme that has been granted interim registration as a pooled investment trust or an equity trust, ceases to meet any of the criteria it was required to satisfy to be eligible for interim registration.

Paragraph (c) provides that a disqualifying event occurs if, by the end of the start up period, a unit trust scheme that has been granted interim registration as a pooled investment trust or an equity trust, does not comply with any of the criteria which were referred to in the undertaking given to the Commissioner.

Subsection (2) provides that if such a disqualifying event occurs, the unit trustee is required to give the Commissioner notice about the disqualifying event within 14 days after it occurs.

Subsection (3) applies once the Commissioner has been notified of a disqualifying event in accordance with subsection (2).

Paragraph (a) provides that in the case of unit trust scheme that is registered as a pooled investment trust or an equity trust, that registration is cancelled with effect from immediately before the occurrence of the disqualifying event.

Paragraph (b) provides that in the case of a unit trust scheme that is granted interim registration as a pooled investment trust or an equity trust, that interim registration is cancelled with effect from immediately before the first units under the unit trust scheme were issued.

Subsection (4) applies where the Commissioner has not been notified of a disqualifying event, but is satisfied that one has occurred.

Paragraph (a) provides that in the case of a unit trust scheme that is registered as a pooled investment trust or an equity trust, the Commissioner shall cancel that registration.

Paragraph (b) provides that in the case of a unit trust scheme that is granted interim registration as a pooled investment trust or an equity trust, the Commissioner shall cancel that interim registration.

Paragraph (c) requires the Commissioner to notify the unit trustee in writing of the cancellation and the date from which it is to take effect.

Subsection (5) specifies from when cancellation is taken to have had effect in cases where the Commissioner has not been notified of a disqualifying event, but is satisfied that one has occurred.

Paragraph (a) provides that in the case of unit trust scheme that is registered as a pooled investment trust or an equity trust, that registration is cancelled with effect from immediately before the occurrence of the disqualifying event.

Paragraph (b) provides that in the case of a unit trust scheme that is granted interim registration as a pooled investment trust or an equity trust, that interim registration is cancelled with effect from immediately before the first units under the unit trust scheme were issued.

Subsection (6) applies where the Commissioner is satisfied the registration or interim registration of a unit trust scheme is being used as part of a duty avoidance scheme or arrangement that has a collateral purpose of avoiding

or minimising the duty that would otherwise be payable if it was not for the registration or interim registration of the unit trust scheme.

If the Commissioner is so satisfied, paragraph (a) provides that he shall cancel the unit trust scheme's registration or interim registration and paragraph (b) provides that he shall notify the unit trustee in writing of the cancellation and the date from which that cancellation is to take effect.
Subsection (7) allows the Commissioner to take into account any matter that he considers to be relevant for the purposes of determining whether registration is being used as part of a duty avoidance scheme or arrangement.

Section 63AE relates to statements about disqualifying events and subsequent transfers and dispositions.

Subsection (1) requires a unit trustee to prepare and lodge a statement with the Commissioner if a disqualifying event occurs. The statement must be lodged within 14 days after the day on which the disqualifying event occurred.

Subsection (2) sets out the requirements relating to the statement.

Paragraph (a) requires that the statement be in an approved form.

Paragraph (b) requires that the statement contain details of the disqualifying event.

Paragraph (c) requires that in the case of the cancellation of the registration of a pooled investment trust or an equity trust, the statement shall contain details of certain transfers and dispositions of units in the unit trust scheme. Details are required in respect of transfers and dispositions that occurred during the period commencing immediately before the occurrence of the disqualifying event and ending on the day on which notice of the disqualifying event was given to the Commissioner, or in the case where the Commissioner has not been notified, the day on which the Commissioner is satisfied that the event occurred. However, details are only required in respect of transfers and dispositions that occurred during this period that would have been chargeable under the private unit trust provisions (section 73D) if the scheme had not been registered.

Paragraph (d) requires that in the case of the cancellation of the interim registration of a pooled investment trust or an equity trust, the statement shall contain details of certain transfers and dispositions of units in the unit trust scheme. Details are required in respect of transfers and dispositions that occurred during the period commencing immediately before the first units in the scheme were issued and ending on the day on which notice of the disqualifying event was given to the Commissioner, or in the case where the Commissioner has not been notified, the day on which the Commissioner is satisfied that the event occurred. However, details are only required in respect of transfers and dispositions that occurred during

this period that would have been chargeable under the private unit trust provisions (section 73D) if the scheme had not been granted interim registration.

Subsection (3) provides that where a person fails to lodge a statement within the time specified in subsection (1), the statement is not in accordance with subsection (2), or the statement is false in a material particular, that person is taken to commit an offence against the Act and the general offence provision of section 116 is to apply. This involves a maximum penalty of $10,000.

Clause 28: **Section 73D amended**

This clause inserts new subsections (11) and (12) into section 73D.

Subsection (11) provides that section 73D, which contains the provisions applying to dispositions of units in unit trust schemes, does not apply to a disposition of a unit in a unit trust scheme during any time it is registered or granted interim registration. However, this is subject to subsection (12).

Subsection (12) provides that where registration or interim registration of a unit trust scheme is cancelled, section 73D is to apply to the unit trust scheme from the time of the cancellation, unless duty is chargeable on a statement containing details of a disqualifying event and subsequent transfers or dispositions. This will prevent duty being charged on a disposition twice under both provisions.