STAMP AMENDMENT BILL (NO. 3) 2000

Second Reading

Resumed from 11 October.

MR KOBELKE (Nollamara) [10.08 am]: I am not the lead speaker for the Opposition on this Bill, but I will make some comments and leave it to the Deputy Leader of the Opposition to formally put the response of the Opposition. The purpose of this Bill is to tighten up stamp duty due to the clear evidence of avoidance practices; and I will deal with that matter later. In my opening remarks, I will make some comments about the importance of protecting the revenue base of the State. I do not want to canvass all of the issues with regard to the goods and services tax, but I do need to touch on the new tax scheme, because I have put the position previously that the new tax arrangements between the Commonwealth and the States further undermine the revenue base of the States.

This is particularly true of Western Australia, because with the goods and services tax and the commensurate forgoing of state taxes, we are giving a greater share of the total tax take to the Commonwealth, so that the State has a slightly lower percentage of its total revenue within its own control. Therefore, areas such as stamp duty on property transfers form an even larger percentage of the revenue base of the State. Consequently, when avoidance schemes which reduce the revenue flow to the State are put in place, it is a matter of critical importance. It is therefore important that we ensure that such avoidance schemes are shut down.

Stamp duty is a major taxation base for the State. Stamp duty on property is $4.85 per $100; that is, a rate of 4.85 per cent. However, if land is transferred by acquiring an interest in a company by buying shares, depending on the form of those shares, the rate is between 15¢ and 60¢ per $100; that is, a percentage rate of 0.15 to 0.6 per cent. One can see that there is clearly a difference in the rate of taxation, and that provides an incentive for companies to transfer property by selling a company or shares in a company, rather than by direct transfer of the property.

The minister indicated that in the past financial year, avoidance of stamp duty on property transfers has cost the State an amount in the order of $35m. The minister also said that in seven cases that are currently under investigation by the State Revenue Department, there is the potential for a loss of revenue to the State of some $37m as a result of properties being transferred by way of company shares rather than by transferring the properties directly. That has a major impact on the revenue base of the State.

I will make that absolutely clear by giving a simple example. If a family buys a home, the transfer of that residence, at an arbitrary value of $200 000, would attract stamp duty of $9 700. However, if it was a commercial property worth $200 000, instead of paying the stamp duty of $9 700 by direct transfer, if that property was bundled up in a company and the shares were sold, the stamp duty on the share transfer would be in the order of $1 000, depending on the classification placed on the shares. Therefore, there is the potential to reduce a stamp duty bill of approximately $10 000 to $1 000, with a consequent loss to the State of $9 000. I gave that example because it relates to a normal residence in Western Australia that would generally fetch around $200 000. The legislation only operates when a property is worth more than $1m, but I gave that simple, practical example because, of course, a $200 000 property could be bundled up with other properties under a shareholding.

This area of avoidance was addressed by Labor in 1987. When Labor was in government, it was certainly aware of the potential for avoidance in this area. In this legislation, there is a tightening up of the provisions, because further avoidance schemes have been developed to try to get around the controls that were put in place previously.

This amending Bill seeks to tighten up the provisions concerning the transfer of land and chattels by non-listed companies through the acquisition of shares. Three tests are required to be met in order to be caught by these provisions which seek to make sure that the stamp duty is applied when the transfer is by way of shares. The first test is that the company must own land in Western Australia valued at $1m or more, to which I have already alluded. The second one is that 80 per cent of the property of a company must comprise land. Thirdly, the transaction must involve the acquisition of a majority interest or further interest in a company, which is generally more than 50 per cent.

As has been explained to us, the types of schemes that have been put in place have sought to get around those tests. I will comment briefly on some of those schemes. The first test is that 80 per cent of the property of a company must comprise land. To get around that, people have changed the value of a company artificially so that it falls under the 80 per cent rule. This can be done by redefining part of the value of the property into chattels. There is always the definitional issue regarding what is a chattel and what is part of the property. Generally, fixed buildings or heavy equipment are considered part of the property and cannot be considered

chattels in order to reduce the value of the property or the percentage of the total which is attributed to the value of the property. The provisions should be tightened up to get around the situation in which an artificial device is used to claim that something is a chattel, and that because the chattel forms 21 per cent of the value of the whole property, the value of the property is reduced below the 80 per cent threshold. I understand some people have tried to avoid the required stamp duty by using that device.

Another method of avoidance is to put into the company transferable assets, which then water down the value of the property as a percentage of the total holding. For example, a person could do a paper transfer to put into the company some intellectual property. It does not involve shifting something physically; it can be done simply by paper means. One then finds that whereas property was 90 or 95 per cent of the value of a company, because one has loaded in some other assets that are easily transferable, the value of the property falls below the 80 per cent threshold and is therefore not caught by these provisions. This amending Bill tightens up the provisions to deal with that type of measure.

The next avoidance matter on which I will comment relates to the third test; that is, that the transaction must involve the acquisition of a majority interest. As part of the tightening-up exercise, we must look at the time over which the acquisition takes place. A person could acquire only a 45 per cent interest in the company that owns the property, and have a legal arrangement to acquire the remaining interest over a period. The person has, in effect, purchased the property through the acquisition of shares, but because it has been drawn out through a managed arrangement, the purchase has not been completed at a particular time; therefore, that person can seek to avoid the payment of the stamp duty which would be caught on the transfer of the shares, because the shares give a controlling interest in the property. Again, there is a need to tighten up in that area with regard to when one gets a majority holding on a transfer. Therefore, there will be a system under which notice must be given to the State Revenue Department regarding purchases which may be caught, although it is not clear at the initial stage that they are caught by the provisions which require duty at the rate applicable for the transfer of a property to be paid.

There are a range of complex issues here, which I will not go into now. However, I hope that in the consideration in detail stage we will get specific answers from the minister. I hoped that the minister would be here - he was here earlier; I am not sure whether he has been caught up with other business - because I am interested to get details of the total revenue captured by stamp duty in these categories so that we have specific information on the importance of this area of taxation to the State's revenue. Another issue is the complexity of the processes, because we want to ensure that avoidance does not occur through company structures. One can have a complex arrangement of company structures, and we do not wish to restrict rigidly the way in which companies can operate. At the same time, we do not want companies to use artificial devices to avoid the tax they should pay. Companies will develop new ways of doing business, as they rightly should in some cases. People who advise on tax matters will come up with new schemes to get around this measure. Parliament will not put in place a general anti-avoidance provision to allow tightening up by regulatory means or by the State Revenue Department when new avoidance schemes are developed; however, elements of the legislation give a necessary degree of flexibility with enforcement. As provisions are put in place to tighten up the revenue base to ensure that artificial schemes are not created to avoid paying tax, this area will need to be addressed continuously. One should not assume that these measures will solve the problem for all time. The ingenuity of people in looking after their interests means that they may seek, by artificial means, to avoid the required level of stamp duty in the transfer of properties.

I reiterate the importance of maintaining the revenue base for the State. I will not go into detail now. One can be critical of the Court Government for yielding some of the State's revenue to the Commonwealth in its support of the goods and services tax. This issue will haunt us in years to come. The State is becoming increasingly subservient to the Commonwealth in its revenue base. When the Commonwealth needs money in tight economic times or for new projects, it will screw down on state revenue. The new tax system opens up new areas for disputation between the State and Commonwealth regarding revenue base. It is important that our narrow revenue base be protected. The control and transfer of land is a state responsibility; therefore, we have the power to collect some revenues through stamp duty. This Bill seeks to preserve that taxation base.

It is also a matter of fairness. It is not appropriate that an ordinary family who seeks to sell their home for $200 000 be required to pay stamp duty approaching $10 000, yet people who set up a company structure - I qualify that, because we refer to transactions over $1m, but the same principle applies - avoid paying their share of tax by means of share transfers. This Bill is needed.

The Deputy Leader of the Opposition, the opposition spokesperson for Treasury and finance matters, will give a full response and outline the Opposition's support for this legislation.

Declaration as Urgent

MR BARNETT (Cottesloe - Leader of the House) [10.24 am]: I move -

That this Bill be declared an urgent Bill.

Briefly, this Bill and the First Home Owner Grant Amendment Bill 2000 need to be dealt with by the Government. We amended Standing Order No 168 procedure so that Bills must be on the Table for three weeks before debate is brought on. This Bill has not been on the Table for three weeks, but I understand that members are willing to deal with it.

Mr Kobelke: We are always willing to help.

Mr BARNETT: I appreciate that assistance.

MR RIPPER (Belmont - Deputy Leader of the Opposition) [10.25 am]: The Opposition does not oppose the motion moved by the Leader of the House. However, this is complex taxation legislation presented to the House only last week. As the Opposition supports strong action against tax avoidance, it will not seek to frustrate the Government or to delay the legislation. However, parliamentary scrutiny of this legislation is hampered by the short time available for consideration and the complex subject matter to be examined. I have made comment before in this House that most members of Parliament are without the detailed taxation, legal and accounting expertise needed to challenge the judgments of the State Revenue Department on complex stamp duty matters. That position is made even more tenuous if the Government gives members a short period to examine the legislation. The Labor Party does not oppose the motion moved by the Leader of the House; however, the way the Government is handling the legislation makes an already difficult subject much more difficult for Parliament to consider.

Question put and passed.

Second Reading Resumed

MR RIPPER (Belmont - Deputy Leader of the Opposition) [10.27 am]: Labor supports this legislation and the State Revenue Department's activity in combating tax avoidance. Stamp duty on share transfers is levied at between 15¢ and 60¢ per $100 of transfer, yet duty on land transfer can be as high as $4.85 per $100. This creates an incentive for tax avoiders to transfer effective ownership of land by transferring instead shares in companies owning the land. Anti-avoidance measures applying to the acquisition of majority interest in so-called land-rich companies - that is, companies with 80 per cent or more of their assets in land - were inserted into the stamp duty legislation in 1987 during Labor's period in government. Unfortunately, tax advisers have devised ways to defeat these avoidance measures for land-rich companies. This legislation will expand the circumstances in which transfers of shares in land-rich companies will be taxed at land transfer duty rates rather than at share transfer duty rates. The Government has claimed that the Bill will combat tax avoidance amounting to $35m a year.

The legislation targets the acquisition of unlisted companies owning Western Australian land worth more than $1m. There are four major categories of change. Firstly, previously the avoidance measures were triggered if a majority interest was acquired in a land-rich company over a 12-month period. This Bill will extend the period in which acquisitions are considered for the purposes of an anti-avoidance measure to three years. Secondly, the legislation is based on an assumption that ownership of shares in a company gives a right to a share of the assets of the company if it were to be wound up. Some tax schemes have divorced the acquisition of shares from a right to a share of the company if it were to be wound up, thereby defeating anti-avoidance measures. That defect is corrected by this legislation.

Thirdly, anti-avoidance measures can also be defeated by artificially inserting other property into a target company, thereby diluting its land ownership below the applicable 80 per cent threshold. This Bill broadens the range of assets that will not be taken into account in determining whether a company is 80 per cent land rich. Fourthly, correspondingly, the legislation will take into the net assets that have previously not been taken to be owned for the purpose of the 80 per cent land-rich test. For example, the value of mining tenements or similar rights located outside Western Australia will be considered land for the purpose of the 80 per cent land-rich test, consistent with the treatment of tenements located in Western Australia. Another example is when the land-rich test is defeated through acquisitions in holding or subsidiary companies that arise from substantially one transaction or arrangement designed to defeat the provisions, the underlying interest in land acquired through all acquisitions will be aggregated and brought to duty.

The legislation was announced by the minister on two occasions. He first announced the legislation on 10 August and was rewarded with a front-page story in *The West Australian*. He later re-announced the anti-avoidance legislation on a Sunday and was again rewarded with television coverage. What was not made clear in that television coverage was the minister's re-announcement of the package of measures contained a concession to people who had engaged in these tax avoidance schemes. I am somewhat chagrined that the

minister got two announcements out of one measure and that the second announcement was a backward step in combating tax avoidance rather than a forward step.

Mr Kierath: No, I pulled it back. Apparently, if I had not put an end date on it, the transitional provisions would have been left open forever. I did not believe that was fair. I wanted to close off the transitional provisions so that if they are not completed by Christmas they will miss out altogether.

Mr RIPPER: That is an interesting spin on events. The minister presented his rebuttal before I presented my argument.

My understanding of the announcement of 10 August is at that date anybody entering into an acquisition of shares in a land-rich company would be caught by the new measures and would have avoidance proposals defeated by these new measures. The minister, in his Sunday television announcement, said people who had entered into but not executed a binding agreement before 10 August would have until 31 December to operate under the old rules and to execute the agreement. The minister may have been aware of a transitional provision in the legislation, as the legislation was being developed in his agency, and in his own mind pulled back on a transitional provision. However, from the public's point of view, he announced the measure would stop as at 10 August and, when he re-announced it, said that some things would continue until 31 December. Perhaps in his response the minister can outline the sequence of events as it appears from inside the agency. However, the sequence of events from outside the agency is that he announced something on 10 August and about six weeks later re-announced something a little bit weaker on Sunday television.

This legislation is not about taxation arrangements entered into by average Western Australian citizens. The legislation targets unlisted companies with acquisitions of more than $1m worth of land in Western Australia. The people involved in these transactions can afford expensive accounting and legal advice and they get it from specialists in the area who make their living by providing advice on esoteric commercial arrangements to minimise the payment of stamp duties and other taxes. There is a legislative chase here. Bright people with technical expertise dream up creative transactions to defeat the purposes of the stamp duty legislation. Revenue offices become aware of weaknesses in the legislation and for a while people get away with it. Legislation then comes to the Parliament and a loophole is closed. Meanwhile, the creative specialists in that area have moved on to yet another esoteric scheme aimed at defeating the revenue collection activities of the Government.

The Government and the Parliament are at a disadvantage in this type of legislative chase. The Government continues to find itself having to respond reactively to an initiative taken by a corporate tax adviser. We must tackle this issue in a different way. Schemes that have no realistic commercial purpose other than the avoidance of tax should be subject to strong anti-avoidance measures in the legislation. There should be general anti-avoidance measures in the stamp duty legislation constructed in such a way that the Commissioner of State Taxation can act to crack down on this type of tax avoidance without having to come to Parliament for yet new legislation.

The commissioner should be able to use a power equivalent to a regulation-making power to act against contrived schemes that do not have a realistic commercial purpose. The use of that power could be subject to disallowance by the Parliament to ensure accountability. However, if such a mechanism were available to the commissioner, he could crack down on those schemes more quickly than he can now and in a way which would further deter tax avoidance activity. Currently, the Parliament comes along behind the play, reactively fixing up loopholes at the same time as the creators of those tax avoidance schemes are busy designing new ones.

A lot of money is involved in some of these transactions and a lot of duty could be paid or could not be paid. There is a powerful motive for people to work on creative schemes designed to defeat the revenue. One way in which we can get the revenue collectors ahead of the tax avoiders is through some tough general anti-avoidance provisions in the legislation which would allow the commissioner to crack down on a contrived scheme without having, first, to come to Parliament for new legislation. I understand that some people might see this as creating uncertainty for business. I understand that some people might see this as creating a dangerous power which could be exercised in an arbitrary and unfair manner. However, in response to these two objections I say, firstly, the general anti-avoidance provisions should be directed at contrived schemes which do not have a genuine commercial purpose. The people involved in those contrived schemes know what they are doing and, if they are involved in those schemes and they are worried about uncertainty for business, they are contributing to that uncertainty by engaging in a risky scheme which might be knocked off by the commissioner. Secondly, on the question of the power perhaps being arbitrarily used, if there were a disallowance provision, the Parliament would be the accountability mechanism in the event that the commissioner went too far. In the absence of that sort of mechanism, Parliament will year after year be dealing with efforts to plug loopholes which have been exposed by tax avoiders in the stamp duty legislation. Parliament will always be behind the game and there will always be a profit for the tax avoiders because they get the "first mover" advantage - they get the advantage of

the operation of their scheme for the period it takes the State Revenue Department and the Parliament to correct the defect in the legislation.

I think the State Revenue Department is acting correctly by embarking on a program to review stamp duty legislation and to progressively implement tighter provisions to prevent tax avoidance. I praise the State Revenue Department for the work it is doing in that area. The Government, while it is to be supported for bringing this legislation to the Parliament, has not always acted consistently to tighten the legislation and to prevent tax avoidance. I give two examples. The Government extended the principal place of residence land tax exemption to residences owned in family trust structures.

Mr Kierath: That is an old debate; we are talking about stamp duty.

Mr RIPPER: Ordinary people do not own their houses in family trust structures. Family trust structures are set up principally by the wealthy in our community for their commercial and taxation advantages. It is wrong that they should be entitled to those commercial and taxation advantages without at the same time suffering some of the minor disadvantages of using family trust structures. This Government took away one of those minor disadvantages of using a family trust structure by extending that principal place of residence land tax exemption to houses owned by people in family trust arrangements.

Mr Kierath: That has nothing to do with this Bill.

Mr RIPPER: I agree that it is a side issue. I am using it, however, as an example of the Government's overall approach to avoidance measures. In that matter the Government actually assisted people who preferred to use for their commercial and taxation advantages esoteric ownership arrangements.

There is another example, which is closer to the stamp duty legislation, and that is the stamp duty exemption for corporate reconstructions. We debated this with the minister earlier in the year when the minister was forced to bring in legislation to tighten the way in which the corporate reconstruction stamp duty exemption works. There is no doubt that the revenue forgone as a result of the Government's introduction of its corporate reconstructions stamp duty exemption has blown out. The revenue forgone is way beyond the Government's initial estimates of, firstly, $5m a year and, secondly, $7.5m a year with some subsequent amending legislation. We are losing a lot more than $7.5m a year as a result of the corporate reconstructions taxation exemption. For a recent financial year an amount of $46m a year was forgone as a result of that stamp duty exemption. Of course, that published figure operates as a result of the arbitrary assumption that only one-third of the corporate reconstructions revenue forgone should be counted as revenue genuinely forgone. The gross figure for revenue forgone as a result of the corporate reconstructions stamp duty exemption is three times the figure that was published in the Government's budget papers.

When the minister made his announcement about tax avoidance, I was naturally very interested in the industries and the people who might have been involved in the tax avoidance. I was particularly interested because the minister referred to one transaction that would have seen the avoidance of $90m of stamp duty. I am advised that the minister cannot inform Parliament of the corporations and advisers involved in this tax avoidance because of confidentiality provisions in the taxation legislation. I am actually advised - and the minister might confirm this - that not even the minister is advised of the taxpayers involved.

People are sensitive about the public revelation of their financial circumstances. People do have a right to privacy. I do not think people would accept ministers having access to their financial and taxation details. Nevertheless, there is a role for public opinion in deterring those people who ruthlessly avoid their taxation obligations. I would like to see some consideration given to the naming of companies that have been involved in contrived tax avoidance schemes. I would like to see some consideration given to the naming of those professional accounting and legal advisers who have been involved in the construction of these schemes. We are not talking here about people going about their normal business and paying their normal taxation; we are talking about people who have deliberately and creatively and ruthlessly sought to manipulate commercial transactions in order to avoid their taxation obligations to the people of this State. Those people are engaged in a deliberate campaign to take revenue from the public of Western Australia. If they engage in such ruthless contrivances, they should be subject to the possibility of their activities being made public. If the minister could name people who have been caught by the Commissioner of Taxation in these contrived schemes, particularly if the minister could name the professional advisers involved in developing the schemes, we would have some deterrent to the future activity.

We need to move beyond the current process of combating tax avoidance by undertaking a review of the legislation when we notice unusual transactions, and bringing a Bill to the Parliament after the event. Future operations of that sort are prevented, but the ones that have gone through to the keeper stay with the keeper and the revenue is lost. We need a tough general anti-avoidance procedure, which the commissioner can implement without having to come to the Parliament when he finds a contrivance scheme. We need provisions where

people who have been involved in these ruthless artificial contrivances are subject to the possibility of public naming and shaming.

The 80 per cent land-rich test is arbitrary. If shares in companies that are 80 per cent or more land rich are transferred, land duty rates apply. If shares in companies with 75 per cent of their assets in land are transferred, there is no problem. There is still an advantage to be gained for people acquiring interests in those companies to use the share transfer mechanism rather than the land transfer mechanism. I understand that in some other jurisdictions the threshold is set at 60 per cent. I would like to hear the minister's view as to why he thinks the threshold should be set at 80 per cent in Western Australia when it is set at 60 per cent in some other jurisdictions. I would also like to hear some indication of what sort of revenue we would gain for the State if we were to reduce the 80 per cent land rich threshold in these anti-avoidance measures to a 60 per cent land rich threshold. I can put that another way: How much revenue are we giving to the tax avoiders because we have an 80 per cent land-rich test rather than a 60 per cent land-rich test as applies in other jurisdictions?

I am convinced that our State Revenue Department is serious about combating tax avoidance. I am not as convinced that our Government is serious about combating tax avoidance. The Government has brought this legislation to the Parliament, but in the past it has brought legislation which has extended concessions to people involved in esoteric corporate manoeuvres. The Government has not shown sufficient interest in moving beyond the present reactive process to combat tax avoidance in a more efficient and timely fashion.

The Opposition supports the legislation. We do not believe that people involved in ruthless contrivances to avoid taxation should get away with it. If they are allowed to get away with it, they rob the people of Western Australia of schools, hospitals and police stations, and the health, education and community safety services that they deserve. We have lost much of the control of our revenue to the Commonwealth. The tax reform package and the goods and services tax measures mean that more and more of the State's revenue is now effectively out of our control. The State has little discretion left in revenue matters as a result of the tax reform package. We need to protect what is left of the State's revenue base lest we lose our role in the Federation as we lose more and more control and discretion over our revenue raising possibilities. For all of those reasons we support this legislation.

MR BROWN (Bassendean) [10.57 am]: The Bill seeks to make a number of changes to the Stamp Act based on research on people avoiding paying stamp duty. I hope the research for this Bill is better than that done previously on matters of this nature. The Government increased stamp duty on workers compensation insurance from 3 per cent to 5 per cent 18 months ago. The explanation that the Government gave to the Parliament at that stage was that it was to bring it into line with other States of Australia. Since then the Chamber of Commerce and Industry has issued a publication, having checked with its counterparts in other States to ascertain the level of stamp duty on workers compensation insurance in those States.

Mr Kierath: What has this to do with the Bill before the House?

Mr BROWN: This Bill relates to the minister's research base. I hope the research for this Bill is a bit better than that done previously. According to the WA Chamber of Commerce and Industry - the minister can dispute this if he likes - the information provided to the Parliament was wrong. The majority of other States do not impose a 5 per cent levy on workers compensation insurance. That wrong information resulted from research that the Government relied on when it came into this Parliament and made the change, in the same way as it is doing now. That is not an insignificant issue given the amount of the income of the State. More importantly, it is not an insignificant issue when considering the equity of stamp duty, particularly for the competitiveness of Western Australian industry. Stamp duty on large vehicles was increased. I asked some questions about that, because I was told that people who acquire large vehicles such as trucks, particularly interstate vehicles, can purchase those vehicles anywhere in Australia.

When the stamp duty in this State was 3 per cent and the stamp duty in Queensland was 2 per cent, Western Australian operators would, by and large, purchase vehicles in this State. There was a slight difference, but it was not significant. However, when the stamp duty increased to 5 per cent, there was a very significant difference between the stamp duty in Western Australia and that in Queensland. I was told by people in the motor vehicle industry that that caused interstate drivers, who have the option of legitimately purchasing trucks anywhere in Australia, to purchase their large trucks interstate. I asked some questions of the appropriate minister about the revenue from stamp duty on large vehicles. The rate of stamp duty increased by 66.66 per cent - that is, it went from 3 per cent to 5 per cent - but the revenue decreased. Why did the revenue decrease? Because people who can legitimately operate interstate transport trucks and large vehicles in all areas of Australia elected to purchase their vehicles interstate. Those are two changes that have had a detrimental impact on the industry.

The third change that has had a detrimental impact on the industry and on consumers is the notion that stamp duty is now imposed on top of the goods and services tax inclusive price. The Government's record in this area is not great; in fact, the Government's record is abysmal. I know the minister is trying to avoid these issues - I understand there is some embarrassment - by saying that they are not measures in the Bill and, therefore, will not be discussed in this debate. They are covered by the legislation to the extent that any Bill is based on research or alleged research. The research brought to Parliament by the Government to justify the previous changes was deficient. As a result, ill-considered changes were made which have had an impact on the community and business in Western Australia.

I have not done the level of research on this Bill which would enable me to comment on whether the 60 or 80 per cent cut-off figure is appropriate. I hope the appropriate research has been done and that we will not find some six or 12 months later, after these changes have come into effect, that, once again, those changes are deficient. That has been the Government's record. If the minister is game enough - he may want to avoid it - he may put some comments on the record about the certainty of these sorts of changes, what revenue will be caught by the State and what measures are still available for those who avoid meeting their stamp duty obligations. I am keen to hear from him on that matter. Should he be game enough to comment on the other matters I have raised, I will appreciate that as well. If he is not, I can understand his embarrassment in dealing with them and why he seeks to avoid them.

MR KIERATH (Riverton - Minister assisting the Treasurer) [11.03 am]: I will go through the issues raised, and I will start with the comments made by the member for Bassendean. I am not avoiding the issue, but nothing in this Bill relates to stamp duty on workers compensation premiums, large vehicles or the goods and services tax. I understand what the member is trying to do - it was quite cute - but it has nothing to do with the Bill before the House. They may be matters of interest to the member for Bassendean and he may want to raise them in other forums; however, this is not the proper forum. This Bill relates to stamp duty on transfers of property.

I cannot give the member a guarantee that these provisions will do all that they are intended to do. I made that comment when talking to officers of the department. This area of tax law is very complex and, as such, most of us are highly reliant on the advice we are given. I have asked the department to seek additional legal advice externally, not just Crown Law advice, to ensure that these provisions do what is intended, contain no loopholes or other shortcomings, and are watertight. I am glad the member is thinking along those lines, because my thoughts are along the same lines.

The member for Belmont raised a number of issues. First, he said that closure of the transitional provisions on 31 December will give an added advantage to people who are trying to avoid stamp duty. It is exactly the opposite: Legal advice suggests that if I do not close it on 31 December, any transaction that was commenced before 10 August but is not concluded by 31 December will be alive forever or until that transaction is completed. That could be two to five years down the track. That would be unfair.

Mr Kobelke: You could shut it off at proclamation.

Mr KIERATH: I could. I was advised of the sorts of issues that might be raised; for example, the contract had been signed but the capital was being raised, and other matters that flow from that. Therefore, I tried to make it as short as possible. People will get not quite three months. The member for Belmont has now entered the Chamber, so I will repeat some of my comments on issues he raised.

Mr Ripper: I expected the member for Bassendean to conform to his usual form.

Mr KIERATH: Unfortunately, the issues he raised, which were very interesting, had nothing to do with the Bill before the House.

I was just explaining the transitional provisions. The member thinks that by not providing a cut-off date, I shall give those people who may have avoided tax extra time to deal with it.

Mr Ripper: I interpreted your original announcement as meaning that anybody who executes a share transfer after this date will pay land transfer duty rates. In your second announcement you said that if they happen to enter an agreement before 10 August, they will have a bit longer - to 31 December.

Mr KIERATH: Without the transition date, a transaction involving a legally binding agreement signed before 10 August, but not completed - it may be dependent on finance or capital to be raised some time in the future - would be alive forever. It could still be alive in five years if the transaction has not been completed by then. The transition date was introduced because the Government does not want an open-ended arrangement. If people have not completed the transaction by then, they will miss out, even if the agreement was signed prior to 10 August. That provision will reduce the options for those who might be caught in the transitional procedures and whose agreement was signed before 10 August but has not been completed. It does not give people an added

advantage; it reduces the number of options available to them. If it is a long, complicated transaction that they cannot complete by 31 December, even though they signed the agreement before 10 August, they will still dip out.

Mr Ripper: It all depends on the interpretation of your announcement on 10 August. I interpreted that announcement as closing the door.

Mr KIERATH: No. The Government's legal advice is that if people had a legally binding agreement before 10 August but the transaction for stamp duty is not completed, it will remain alive. If they have taken two to five years to deal with it, it will still be alive and qualify as an agreement signed before 10 August. However, if the transaction cannot be completed by 31 December, they will miss out. It does not increase the options for people trying to avoid tax; it closes further doors.

The member raised the issue of using regulations when there is a need to act immediately. The Government could not have acted any more quickly. The device it used is one the Commonwealth commonly employs when amending tax laws. When it becomes aware of a tax-avoidance scheme, it makes an announcement before the legislation is drafted, which is backdated to the date of the public announcement. That is faster than regulations can be enacted, as they must also be drafted. As a result of the process we used, we did not suffer through any loss of time. We have appropriate drafting priorities, and the legislation is now before the House. Nothing was lost in making that announcement, but I agree with the member that in many cases it is more expedient to enact regulations than to amend the Act. That is worthy of consideration. The Government is drafting some tax revenue administration Bills to update the tax law, and I am more than happy to consider the member's suggestions. However, I doubt they will be ready for this session. They will probably be introduced into Parliament next year. In this case, the Government did not lose any time, and I do not believe it could have moved any faster.

Mr Ripper: What do you think about general anti-avoidance provisions in the legislation so that the Commissioner of Taxation has a general power to crack down on what he thinks might be an artificial contrivance?

Mr KIERATH: Parliaments are usually loath to give people those powers through subsidiary legislation. The delegated legislation committee believes it is not appropriate to give such powers through regulations and that they should be prescribed in the Act. Those things must be considered.

I have made the point that the legislation is to be backdated to the time of the media announcement. From that point of view, the Government is acting quickly.

I do not know where the example of the company that would have avoided $90m in stamp duty came from. I have not mentioned it publicly. The first time I became aware that the figure of $90m was in the public arena was when it was published in *The West Australian*. The journalist did not get it from me, and I do not believe any of my officers supplied it. I am mystified as to where it surfaced, but it certainly did not come from my office or from anyone associated with me.

The member asked why 80 per cent would be the benchmark for the amount of property that must comprise land. I should be asking him that as it was his Government that introduced it in 1987. Will he tell me why it is 80 per cent?

Mr Ripper: Since I was not in Parliament until 1988, it is a bit hard to answer. Nevertheless, it is an interesting question. It could be 85, 75 or 60 per cent.

Mr KIERATH: It is like many of these things. All the States agree, however. The 80 per cent test applies to every State and Territory except for the Northern Territory, in which the test is 60 per cent. All States introduced the figure of 80 per cent in 1987. That was when the bar was set, and we have followed suit.

Mr Ripper: Do you have any idea of the revenue implication of 60 per cent versus 80 per cent?

Mr KIERATH: We would have no way of determining that. It would be a massive exercise to try to come up with some guesswork figures.

The member raised the issue of naming firms. Under the fair trading legislation, the minister is able to use parliamentary privilege to name firms that he is reasonably certain are engaging in shonky practices when there is not enough evidence to take them to court. I think it has some merit. I will seriously consider whether a similar provision could be included in the tax revenue administration Bills. It could be a good vehicle for the State Revenue Department when it becomes aware of firms trying to sell the latest tax-avoidance scheme. It might have some merit; however, the other side of the coin is that it might alert people with tax problems to the firm they should talk to. I am reasonably receptive to the idea that someone engaged in practices that do not

breach any laws but would be considered improper from a tax revenue point of view should be named in Parliament. I am prepared to give serious consideration to whether such a provision should be included in any other Bills before the House.

I appreciate the comments and support of opposition members. I was told that when Governments of all political persuasion have been alerted to lost revenue through various loopholes and arrangements, all have been prompt in amending the legislation to prevent such practices. I do not think this Government could have acted any more quickly. An announcement was made ahead of the drafting of the legislation with the proviso that it would be backdated to the time of the announcement. Although it took some time to draft the legislation, the mechanism of backdating it to the announcement has ensured that nobody else has escaped paying their proper and appropriate taxes. I thank the members opposite for their support.

Question put and passed.

Bill read a second time.

Consideration in Detail

Clauses 1 to 3 put and passed.

Clause 4: Section 76 amended -

Mr RIPPER: Clause 4 deals with a number of definition matters. I am interested in the link between acquiring a majority interest in a land-rich company and the entitlement to a share of the assets of that company should it be wound up, which seems to be one of the underlying features of the legislation. Why is that link needed? It seems to be problematic and could create further opportunity for avoidance. I understand some tax avoidance schemes have separated the acquisition of shares from the right to have a share of the company if it is wound up. Those schemes have been able to defeat the legislation. It is something that we are rectifying with this clause. Why do we have to have the link? Would it not be possible to charge duty on the basis of people's share entitlements rather than having it linked to the potential winding up of a company?

Mr KIERATH: I am advised that the link is necessary to tie the entitlement being acquired to the property that is normally subject to duty.

Mr Ripper: The point I am trying to make is that it is not necessary to have the concept of a company being wound up. One could simply say that if people held, for example, 50 per cent of shares, then they owned 50 per cent of the assets.

Mr KIERATH: I am advised that there are different classes of shares. Some shares have entitlements to income, some have entitlements to capital and some have the entitlements to property. That is a reason that it is necessary to have the link.

Clause put and passed.

Clauses 5 to 8 put and passed.

Clause 9: Section 76AI amended -

Mr RIPPER: This clause inserts an interesting paragraph into the legislation. It could be interpreted as a general anti-avoidance provision. It states -

> or if the Commissioner determines that paragraphs (a) and (b) would have applied to the WA company at the time of the relevant acquisition but for a transaction, or series of transactions, which in the Commissioner's opinion had as its purpose, or one of its purposes, the defeat of the object of this Division.

That seems to allow the commissioner to make a decision about whether there has been a deliberate anti-avoidance contrivance and to act as though the contrivance had not been entered into. This is the sort of provision that should be more widely used throughout the legislation. I wonder why it is limited to this section and why there cannot be a more general provision of this nature that would allow the commissioner to make this type of judgment?

Mr KIERATH: The member's interpretation is correct. It is a general anti-avoidance mechanism. I am advised that it is limited because two fundamental tests are used to determine whether a company is land rich. The mechanism applies to the two tests.

Mr RIPPER: Is the commissioner's opinion subject to legal action? Could the company involved challenge the manner in which the commissioner reached his opinion or the validity of the opinion? How effective is the commissioner's opinion with regard to these matters?

Mr KIERATH: I am advised that under section 32 of the Act, a company can raise an objection against the commissioner's opinion. Under section 33, there is a right of appeal for the company. These are the existing mechanisms under the current Act.

Mr Ripper: Can an objection be made on the substantive merits of the case? Can it be argued that the commissioner's opinion is wrong or can an objection only be made against the process by which the commissioner reached his decision?

Mr KIERATH: An argument would have to be made that one of the purposes of the arrangement was not to defeat the purpose of this division.

Clause put and passed.

Clauses 10 to 14 put and passed.

Clause 15 Section 76AP amended -

Mr RIPPER: This clause relates to property that is excluded from the assets of a company for the purpose of determining whether a company is land rich. Many of the provisions seem to relate to the mining industry. I am concerned about their impact on normal mining operations. Proposed subsection (3)(ba) states -

> property consisting of rights or interests under a sales contract (including a forward sales contract) relating to minerals, primary products or other commodities;

Such things cannot be included for the purposes of establishing whether a company is 80 per cent land rich. Licences, patents, intellectual property, stores, stockpiles, holdings of minerals and future tax benefits are also excluded. A lot of property that a mining company may have seems to be excluded by the operations of this clause. As I indicated during my second reading debate remarks, I am not in any way a supporter of tax avoidance. I wonder about the impact of these provisions on the mining industry. I seek the minister's explanation for why particular attention has been paid to the mining industry in this clause?

Mr KIERATH: The member is correct; some of the provisions relate to the mining industry. The provisions do not impact upon normal mining operations as the provisions only come into being if the company is sold. The provisions do not have an impact upon a company that is undertaking normal operations. Of the nine measures that are being proposed, only two are specific to the mining sector. The provisions are in direct response to avoidance practices that are specific to the mining industry. The Government has found that certain types of property have been excluded from the land-rich test. Companies have attempted to take such property from the land-rich test. The second provision is the recognition of mining tenements outside Western Australia as land for the purposes of the land-rich test. The provisions are included to cover such avoidance practices.

Mr RIPPER: It seems that the minister is arguing that some companies or individuals have been manipulating forward sales contracts in order to enhance the non-land aspects of a company and that people have been claiming intellectual property, which is, at best, dubious.

Mr Kierath: Yes.

Mr RIPPER: Forward sales contracts are a common feature of the goldmining industry. Most goldmining companies would have forward sales contracts and hedging arrangements. Hedging arrangements have enabled a number of companies to survive during gold price downturns. They are a normal feature of the operation of the industry and not just a contrivance.

Mr KIERATH: The Government is aware of certain activities and is moving to remove some of those things, so that the companies are not as land rich. In many cases, they are artificial contrivances. This legislation is designed to make it clear and to bring some of those practices to an end.

Clause put and passed.

Clause 16: Sections 76AQ and 76AR replaced -

Mr RIPPER: Clause 16 deals with the meaning of "relevant acquisition" and the meaning of "acquiring an interest, majority interest or further interest". My understanding is that this legislation targets unlisted companies, therefore it deals with private companies. Is there a similar problem with listed companies? Is the State losing tax revenue because listed companies are taken over by companies that happen to be land rich? Can the minister explain why listed companies are not covered by this legislation?

Mr KIERATH: I am advised that the reason private companies are targeted is that they are using these vehicles to wrap up assets. A publicly listed company has a wider share base and that is not normally used for packaging up assets. This is consistent with the Australian Stock Exchange legislation and with legislation across Australia. That is another reason it is designed in this way.

Mr Ripper: In principle, could a listed company be 80 per cent land rich?

Mr KIERATH: That is possible. However, that is likely to be a general investment vehicle rather than a vehicle for contriving the removal of an asset. The ones of which the Government is aware broadly use private companies to do that. It would be difficult to use a public company to do that.

Clause put and passed.

Clauses 17 to 20 put and passed.

Clause 21: Transitional -

Mr RIPPER: This clause applies to a number of clauses. What consultation with accounting or legal bodies has occurred on the detail of this legislation? Has consultation involved the Chamber of Minerals and Energy WA, the Association of Mining and Exploration Companies or the Western Australian Chamber of Commerce and Industry? I understand that, for the Government to crack down on tax avoidance, the minister might wish to announce that this legislation will apply from a particular date, rather than go through a period of consultation that might, inadvertently, tip people off. Those people could then finalise their schemes and conclude their deals ahead of anti-avoidance action. Nevertheless, after the announcement, there might be room for consultation with the various business bodies that are affected by the legislation.

As the legislation was introduced last week and is being debated this week, the Opposition has not had the opportunity to engage in its usual practice of sending the legislation to various expert bodies for comment. The Opposition might send out the legislation for comment before it goes to the upper House. Perhaps the Government has engaged in consultation. On the other hand, perhaps it has not. Has the Government received representations? Could the minister indicate what dealings the Government has had with the business community on this legislation?

Mr KIERATH: Absolutely none - zip, zero, zilch. The Government would not normally talk to industry about it. It is a bit like the shepherd saying that he will talk to the wolf about how to prise a few lambs out of the flock.

Mr Ripper: Perhaps after your announcement you could do that.

Mr KIERATH: Yes. The legislation was concluded on the Friday before it was introduced into this House. On the Monday it went to Cabinet for printing and on Tuesday it was introduced. Time is of the essence with tax revenue laws such as this. I mentioned in my reply to the member for Bassendean - I do not know whether the member for Belmont heard me - that a Queen's Counsel has been briefed to make sure that the legislation does exactly what the Government believes that it should. This outside advice has been sought to verify and back up internal advice - to make sure that the legislation does what the Government intends.

Mr Kobelke: Has that advice come back from the QC?

Mr KIERATH: No. I hope that it will be back before the passage of the legislation is completed in the other House. The Government must ensure that the legislation does what it says it will do. The legislation is highly complex and difficult to understand. The Attorney General told me that this area of law is difficult to understand. That is one of the reasons this Government has sought legal advice from a Queen's Counsel - to give it additional confidence. The Government has already sought advice from within government and Crown Law. That is the only way that the Government can have that extra degree of confidence. I am advised that the State Revenue Department was disappointed that the Government sought another view. I want to make sure that what the Government intends with this legislation is carried through. The last thing that I want to do is bring legislation that has shortcomings to the House. The Government has taken advice in an attempt to ensure the integrity of this Bill. The bottom line is that the Government does not want to talk to those firms that engage in those sorts of schemes and activities. The Government does not want to ask them about any suggested changes.

Mr Ripper: I am talking about representatives of legitimate businesses.

Mr KIERATH: Obviously, they will see it. The Government must move quickly on revenue laws. If, in the future, a shortcoming is found in the legislation, the Government will quickly move to change it.

Mr KOBELKE: My response relates to what was said by the Deputy Leader of the Opposition in debate on the motion to make this Bill, and the following one, urgent - that is, that the Opposition has not had time to consult with people on this Bill. As the Deputy Leader of the Opposition said, the Opposition fully supports the quick passage of the Bill because the impact on state revenue could be substantial if those contrivance devices are not closed. In that, the Opposition fully supports the Government. However, the Opposition is nervous that there could be major errors in this Bill, which the Opposition has not detected and of which the Government might not be aware. That is why it is important that the processes of Parliament involve the wider community, particularly in areas such as this. By the wider community, the Opposition means people who have specialised knowledge and a particular interest in the amendments contained in this Bill. Given that the Bill was second read only last

week, the Opposition has not had the opportunity to seek the opinion of a range of interest groups on the effect of these amendments. It puts the Opposition and the Government in a difficult situation. The Opposition has taken the proposals at face value, and on the guarantees that the Government has provided. There may be problems with this legislation. This Government has not been good at bringing forward legislation that does not have problems. Time after time, legislation has been passed in this place only to be brought back to be fixed. One Bill - which I am not going to harp on - went to the High Court and was struck down 7-nil as unconstitutional. This Government takes the cake for bad drafting and bad principles in legislation. The Opposition has put that aside for this legislation and said that it would support the legislation despite the appalling record of this Government. I will say more about the Government's regular use of retrospective clauses on the next Bill. This Government does not have a good track record for bringing forward legislation that stands the test of time and is shown to be good legislation.

With that background in mind, and with some nervousness, the Opposition is giving its support to this legislation rather than seeking to delay it. Without the extra time to consider the legislation, there is real potential that, if there are major errors in the Bill, they will not come to light. Consultation with major industry groups is important, as the question from the Deputy Leader of the Opposition made clear. He was not implying that the Government should do this at the very outset of the process of developing the legislation. At that stage the Government may not wish to show its hand until the legislation has been drafted. Once the drafting has been done, it can only improve the legislation if it is checked over by the widest possible audience of those who can understand the legislation, and possibly assist its passage through the Parliament, or its amendment. Against the track record of this Government, the Opposition is placing its confidence in the minister and hopes that confidence is not misplaced. It is hoped the Bill will achieve its objectives, and that it does not contain any nasty surprises. The minister's answer misdirected the question from the Deputy Leader of the Opposition about the legislation's earlier development. Because it is being rushed through Parliament, this legislation is advancing without being considered by people with experience and expertise in this area. Those people could be either those who seek to benefit from any loopholes in the legislation or those who simply need fair and equal legislation, which applies to all companies and allows them to function effectively, while paying their dues.

Mr KIERATH: If I misdirected the interpretation of the Deputy Leader of the Opposition, I apologise.

Mr Ripper: I understand that the minister may have wanted to develop a package and announce its requirements and the date it will come into force, without consultation first because he does not want to warn potential avoiders. However, perhaps after developing the legislation, the minister could consult business representatives to determine whether there are any unintended consequences of the package.

Mr KIERATH: If this was the beginning of the spring session, that would be much easier to do, but we now have only a very small window of opportunity to pass this legislation. It is with some trepidation that I bring before the House a Bill that I cannot guarantee to be free from loopholes, or not to have a wider force than intended. I had the same discussion with my officers, and in the end I had to take it at face value. I sought to have an expert from outside Government, a Queen's Counsel, examine the Bill to advise whether he considered it too wide, or too narrow, or if it contained loopholes. Under the circumstances of the limited time to close this matter, that is the best I could do. If there were an extra two months of parliamentary sittings available, after the Bill's introduction, I would have sent it to the various industry groups for comment.

Mr KOBELKE: I wish to make a genuine request of the minister. Will he make available the QC's opinion for the debate in the other place? Although the standard Government response is that it does not make legal opinions available, we have seen one exception to that in the recent past. There is precedent for releasing legal opinion. This opinion, as the minister has pointed out, is specifically to act as a second check on the full implications of this amending Bill. We have not had the time to consult people with experience in this area of tax law to ascertain the full effects of these amendments. We are in the last weeks of the parliamentary session, and this Bill cannot be held over without the State forgoing large amounts of revenue, through people rorting the system. We are relying on a special approach to obtaining advice, and the minister has shown good judgment in seeking a QC's advice, in view of the rushed timetable. In these special circumstances, there are good grounds for releasing that advice prior to the debate in the other place. While I accept that it is not standard practice, no precedent will be set because the Government has released legal advice on a small number of occasions. This does not mean that the Opposition will not support the passage of the Bill through the other place. Obviously I cannot speak for members in the other House, and the Opposition does not have the numbers there in its own right.

Mr KIERATH: When I get that private legal advice I will have no problem with sitting down and briefing the member for Nollamara on that advice. The reason that I will not give a 100 per cent commitment to release the advice is that, if it found some flaws in the legislation, the Government would want to fix those flaws, without telegraphing that to other practitioners.

Mr Ripper: The minister is not saying the Opposition might leak such advice is he?

Mr KIERATH: I am not saying that at all, but I am saying that we would not want the advice to get out into other forums until we had had a chance to fix up the legislation. According to longstanding tradition with Crown Law advice to ministers is never released. If asked, Crown Law will prepare a summary of its advice for publication. I have had this done concerning previous legislation when I wished to publish the thrust of the Crown Law advice without breaching that tradition. I am not saying that I will give the member for Nollamara Crown Law advice, but I have sought outside legal advice, and the minimum I will do is sit down and talk through the advice of that QC with him. It may well be that the Government can release the whole advice, but if changes were required in the legislation as a result of that advice, I would want, not to prevent, but to delay its publication, until the Parliament had had a chance to remedy any shortcomings. I hope that puts the Deputy Leader of the Opposition at ease. I am trying to accommodate him and his request as best I can, given the limitations imposed on me.

Clause put and passed.

Title put and passed.

Third Reading

Bill read a third time, on motion by Mr Kierath (Minister assisting the Treasurer), and transmitted to the Council.