EXPLANATORY MEMORANDUM

PAY-ROLL TAX ASSESSMENT AMENDMENT BILL 2008

The Pay-roll Tax Assessment Amendment Bill 2008 seeks to implement a package of measures aimed at achieving a greater level of consistency in eight specific areas of the pay-roll tax regime between Western Australia and the other States and Territories.

The differences in pay-roll tax arrangements that currently exist between States and Territories have been raised regularly by business as increasing compliance costs, particularly for businesses that operate in more than one jurisdiction.

In March 2006, State and Territory Treasurers endorsed Western Australia leading a major project with other States and Territories to examine the feasibility of achieving greater levels of consistency in eight areas of pay-roll tax administration.

These eight areas are:

- the timing of the lodgement of returns;
- the motor vehicle allowances exemption;
- the accommodation allowances exemption;
- the treatment of fringe benefits;
- the treatment of employee share acquisition schemes;
- the treatment of services performed outside a jurisdiction;
- the treatment of superannuation contributions; and
- grouping.

The final recommendations to adopt consistent provisions and definitions in eight key areas were endorsed by State and Territory Treasurers in March 2007 and were included in the new business regulation reform agenda of the Council of Australian Governments.

In addition, the State Tax Review's final report included a recommendation for the continued involvement of Western Australia in the process to implement increased interstate consistency in the area of pay-roll tax.

These changes are focussed on reducing compliance costs and red tape for Western Australian businesses operating in more than one State.

It should be noted that the consistency initiative specifically excludes tax rates and thresholds. All jurisdictions have recognised a need for policy autonomy in these areas to allow a jurisdiction to maintain flexibility to respond to its State specific budgetary needs.

Nonetheless, in Western Australia, the adoption of the recommendations had to be considered in the context of the 2008-09 Budget, as alignment with the position with other jurisdictions was not a cost neutral exercise.

The estimated cost to revenue of the measures included in this Bill is $164 million over four years to 2011-12, $156 million of which is attributable to changes being adopted in the grouping provisions. The cost of the remaining measures is around $2 million per annum.

The Bill seeks to make a number of changes to the grouping provisions.

The grouping provisions ensure that employers do not avoid pay-roll tax by splitting pay-roll tax liability over several entities, each of which might otherwise claim the benefit of the $750,000 threshold.

Employers are grouped under a number of tests that are based on the relationship, control and connection between the businesses.

The changes include:

- the extension of the Commissioner's discretion to exclude all commonly controlled businesses from a group, except for related bodies corporate under the Corporations Act;
- the removal of grouping of employers where a parent or head business exercises managerial control over a branch, agency or subsidiary business;
- adopting tracing rules which take account of direct and indirect interests to address complex business structures which avoid grouping; and
- amendments to the matters that the Commissioner is to consider when determining that businesses should be excluded from grouping.

It is estimated that approximately 2,900 of the businesses that are currently grouped under the existing common control provisions may benefit from consistency of these arrangements with other States.

The current grouping provisions, including those that operate to group parent or head businesses with branch businesses, will continue to apply to affected Western Australian businesses until 30 June 2009. Any businesses currently grouped under the existing provisions will continue to be liable for pay-roll tax on the basis of the grouping until the amendments become effective on 1 July 2009.

This delayed introduction of the amended grouping provisions will assist in ensuring that the processes are in place to achieve maximum administrative consistency with other States.

It should be noted that a number of other States and Territories have adopted template legislation. This was not the preferred implementation approach in Western Australia, primarily because a number of jurisdictionally specific aspects of the Western Australian pay-roll tax regime have been maintained.

These include the retention of:

- quarterly and annual return provisions, which provide consistent lodgment requirements with the Commonwealth and which have only recently been completed and provide a unique benefit in Western Australia;
- provisions facilitating electronic lodgement processes that support the Revenue Online system operated by the Office of State Revenue;
- specific superannuation provisions which outline the treatment of defined benefit schemes, which have been praised by practitioners and business in the past for their clarity and ease of operation; and
- the exemption of payments made for remote area housing benefits, which recognise Western Australia's extensive and unique regional industries.

All States and Territories impose pay-roll tax on wages paid by employers to their employees. Modelled on the original Commonwealth legislation in 1971, each jurisdiction has amended their legislation since that time, resulting in differences in tax base and administration. These differences are raised regularly by businesses as increasing compliance costs, particularly for those businesses that employ in more than one jurisdiction.

In many cases the provisions of the *Pay-roll Tax Assessment Act 2002* are already consistent with those in other jurisdictions and no amendments are necessary to achieve consistency. However, some inconsistencies will continue to exist due to jurisdiction specific circumstances, such as the opportunity to lodge quarterly and annual pay-roll tax returns in Western Australia and the unique superannuation provisions. In addition, while it was not possible to adopt template legislation from other jurisdictions, Western Australia's legislation is alternative but has consistent outcomes.

Many of the provisions were previously contained in clauses of the Glossary to the Act or the *Pay-roll Tax Assessment Regulations 2003.* The reorganisation to achieve consistency has provided an opportunity to include changes as a result of Commonwealth's superannuation simplification provisions that commenced from 1 July 2007 and to reflect new methods of payment of wages.

As the amendments to the *Pay-roll Tax Assessment Act 2002* made by this Bill introduce provisions that are consistent with those of other jurisdictions across Australia, it is considered that the Bill may be referred to the Uniform Legislation and Statute Review Committee of the Legislative Council under Standing Order 230A.

With the exception of the amendments relating to the grouping provisions that commence from 1 July 2009, the amendments commence with effect from 1 July 2008.

Given the possible referral of the Bill to the Uniform Legislation and Statute Review Committee, it is unlikely that the passage of this Bill will have occurred by 1 July 2008.

As a consequence, pay-roll tax will continue to be collected under the existing provisions, with any adjustments being made after the Bill receives Assent using

the reassessment processes set out in the *Taxation Administration Act 2003* or the annual reconciliation processes at the end of the 2008-09 financial year.

AMENDMENTS COMMENCING FROM 1 JULY 2008

The following amendments are scheduled to commence from 1 July 2008.

Timing of lodgments

The due date for the June return is to be extended from 7 July to 21 July. The due date for the annual reconciliation return will also be brought forward to 21 July from 31 August. The due date for lodgment of all other monthly returns will remain as 7 days after the end of the month. These amendments make Western Australia consistent with the majority of the other States.

Accommodation allowances exemption

An accommodation allowance exemption (as a specified exempt allowance) is currently prescribed by regulation 39 of the *Pay-roll Tax Regulations 2003*, at the rate of $110 per night for accommodation in Western Australia, $145 per night for accommodation elsewhere in Australia and $200 per night for accommodation in another country. In addition, if an allowance is paid under an industrial award, the allowance specified in that award is the exempted allowance.

The accommodation allowance exemption is to be amended to refer to the "lowest salary band/lowest capital city" rate prescribed by the Australian Taxation Office for income tax deduction purposes, updated annually. Currently, the rate is $201.25 per night and is the total of allowances for accommodation, meals and incidentals. Any rates paid under an award will no longer qualify as an exempt rate.

Motor vehicle allowances exemption

The exempt rate allowed for motor vehicle allowances is prescribed by regulation 31 of the *Pay-roll Tax Regulations 2003*. The rate is either a rate specified under an industrial award or the "large car" rate prescribed by the Australian Taxation Office, which is currently 70 cents per kilometre.

Amendments to the Western Australian regulations are made annually to prescribe the Australian Taxation Office "large car" rate as the applicable rate for pay-roll tax purposes. The amendments in this Bill insert a mechanism to automatically adopt the Australian Taxation Office's "large car" rate. Rates paid under an award will no longer qualify as an exempt rate.

Fringe benefits tax – gross up factor, living-away from home allowances and otherwise deductible rule

Gross-up rate

Western Australia requires taxpayers to apply the same gross-up rate for pay-roll tax purposes as they use for calculating their fringe benefits tax liability. Under the Fringe Benefits Tax Assessment Act, the taxable amount of fringe benefits provided to employees is the taxable value after application of either of the grossed-up formulae. Applying the gross-up rate has the effect of calculating the

fringe benefits taxable value including the tax value of the fringe benefit (type-2 factor). From 1 July 2000, following the introduction of the Goods and Services Tax, a second gross-up formula was introduced for determining the taxable value of fringe benefits to include the Goods and Services Tax (type-1 factor).

The type-2 factor is applied where the employer does not have an entitlement to claim input tax credits on the acquisition of the benefit. The type-1 factor is applied in circumstances where the employer can claim input tax credits on the purchase. The type-1 factor grosses up the value of the fringe benefit at a higher rate than the type-2 factor, which excludes the benefit of the input tax credit received by the employer when acquiring the benefit for provision to the employee. This recognises that if the employee had purchased the good or service for private use, they would not have been entitled to claim input tax credits on the acquisition.

Employers are currently required to use the same gross-up factor for pay-roll tax purposes that they use for Commonwealth taxation purposes. This method was originally chosen on the basis that it minimised employer compliance costs through consistency with Commonwealth requirements.

However, there is an argument that for pay-roll tax purposes, fringe benefits should not include the amount of input tax credits the employer could claim, as this has no relevance to the benefit the employee receives.

The Bill will amend the provisions to require only the type-2 factor to be used when calculating the taxable value of fringe benefits provided for pay-roll tax purposes.

Living away from home allowance

Currently, Western Australia requires a living away from home allowance to be valued at the actual value of the allowance and not as a fringe benefit. This rule requires employers to remove the taxable value of these allowances from the fringe benefits tax return and calculate pay-roll tax liability on the actual cost of the allowance. The amendments contained in the Bill provide that only the part of a living away from home allowance that is a fringe benefit is to be included for pay-roll tax purposes. The amendment therefore reduces the amount of pay-roll tax payable in these circumstances.

In addition, the Western Australian provisions currently disregard the "otherwise deductible rule" of the Commonwealth when valuing fringe benefits provided to employees. The amendments will provide for employers to apply the "otherwise deductible rule" to reduce the taxable value of a fringe benefit by the amount of the income tax deduction that would have been claimable by an employee. The amendment therefore reduces the amount of pay-roll tax payable in these circumstances.

Employee share acquisition schemes

Unlike the majority of other jurisdictions, since 1997 Western Australia has included the value of a grant of shares or options to an employee as wages for pay-roll tax purposes. These provisions are to be amended to be consistent with the provisions of the New South Wales/Victoria Acts.

For Western Australia, these changes mean that employers will be able to elect the day of liability for pay-roll tax between the grant day and the vesting day. Provisions are included to allow for a refund of pay-roll tax paid on a grant of shares or options that do not vest in an employee, except when the employee has chosen not to take up the shares.

In addition, the methods for calculating the value of a grant of shares or options included in Commonwealth legislation are to be inserted and will replace the current valuation method. Also, the wages will be deemed to have been paid in the State in which the company providing the shares or options is incorporated. This will have the effect of determining the nexus and liability for pay-roll tax in circumstances where the wages (that are the grant of a share or option) are paid for services that are not performed wholly or mainly in one State.

Work performed wholly or partly outside a jurisdiction – services performed in another country

Western Australia currently exempts from pay-roll tax, wages paid for services carried out wholly in another country for a continuous period of more than six months after the period of six months from the date the wages first became payable.

The amendments extend this exemption from pay-roll tax for services performed in another country to include wages paid in the first six months. This will provide consistency with other jurisdictions and ensure wages paid to off-shore employees are not inappropriately excluded from pay-roll tax.

Superannuation contributions

Superannuation contributions are a form of remuneration paid by employers to their employees and are included in employers' taxable wages. Under the interjurisdictional consistency project, all Treasurers have agreed that superannuation contributions for non-executive directors and non-monetary contributions will be included for pay-roll tax. The amendments in the Bill specifically clarify that Western Australia imposes pay-roll tax on superannuation contributions made on behalf of non-executive directors. Non-monetary contributions have always been included as wages for employers in Western Australia and no amendments are required in relation to this.

Other technical amendments have been made to reflect changes to the relevant Commonwealth legislation.

Termination payments

Western Australia currently taxes eligible termination payments, within the meaning given in section 27A of the *Income Tax Assessment Act 1936* of the

Commonwealth, paid to employees. The Commonwealth has amended its superannuation provisions, and as a result, the definition of "eligible termination payment" has been updated. This Bill inserts a definition of an employment termination payment that replaces the definition of an "eligible termination payment" and also includes termination payments paid to directors.

Western Australia taxes remuneration to directors or members of the governing body of a company, however, this does not extend to termination payments to non-employee directors. As a consequence of the consistency project and the adoption of the pay-roll tax provisions of other jurisdictions, provisions have been included to impose pay-roll tax on amounts paid by a company as a consequence of the termination of the services or office of a director, which includes members of the governing body of the company. The amount is taxable whether or not it is paid to the director or to a third party. The amount is deemed to be an employment termination payment within the meaning of Commonwealth legislation.

This change will bring the pay-roll tax treatment of payments to non-employee directors into line with those relating to employees. In addition, death benefit termination payments will also become taxable for employees as well as non-employee directors.

AMENDMENTS COMMENCING FROM 1 JULY 2009

The amendments in this Bill that will commence from 1 July 2009 are to the grouping provisions as described below. The delayed introduction of these amendments will help to ensure that processes will be in place to achieve the maximum administrative consistency with the other jurisdictions. The extension of the Commissioner's discretion to exclude commonly controlled businesses from grouping, except related corporations, accounts for the majority of the cost to revenue from the proposed amendments made by this Bill.

Grouping

For the purposes of the application of pay-roll tax, employers related or connected to each other are treated as a group. The tax liability of a group depends on the level of combined Australia wide wages of all group members. The group can claim only one tax-free threshold, which is done by the designated group employer as set out in the Act. Grouping prevents employers from avoiding pay-roll tax by splitting the business into smaller businesses and, as a consequence, creating several entities which would all otherwise claim the $750,000 tax-free threshold.

Currently under the *Pay-roll Tax Assessment Act 2002*, employers may be grouped where:

- they are related bodies corporate under the *Corporations Act 2001* (Commonwealth);
- the same employees carry out duties for more than one business;

- a person or persons together have a controlling interest in each of two or more businesses (the common control test);
- a head or parent business exercises managerial control over a branch, agency or subsidiary business; or
- an employer is a member of two or more groups (in which case all the groups are combined into one group).

As the provisions are drafted broadly, the Commissioner currently has discretion in specific circumstances to exclude members from a group where he is satisfied regarding certain matters. The discretion to exclude can apply where discretionary trusts are involved, but does not extend to all other types of commonly controlled businesses, such as private companies, unit trusts and partnerships.

The new tests relate to circumstances where the business conducted by a member is independent of, and not connected with, the business conducted by any other member of the group.

In considering the application of this discretion, the Commissioner will have regard to the nature and degree of ownership and control of the businesses, the nature of the businesses, and any other relevant matters. The new discretion is available to all commonly controlled businesses except corporations that are related bodies corporate under section 50 of the Corporations Act.

Under the New South Wales/Victorian legislation, all commonly controlled businesses, except those related under the Corporations Act, may apply to the Commissioner for exclusion from grouping.

This legislation is the model that is being adopted by the remaining jurisdictions, either through the introduction of template legislation or amendments to existing Acts to achieve consistency in the eight identified areas.

The Bill seeks to amend the Western Australian grouping provisions to replace the matters the Commissioner is to consider when exercising a discretion to exclude a business from a group. These matters will align with those of the New South Wales/Victorian legislation, and will also extend the grouping exclusion discretion to all commonly controlled businesses that operate independently of each other and are not connected with each other, except those related under the Corporations Act. The discretion to exclude businesses from a group will also be extended to larger groups created by subsuming smaller groups.

The current Western Australian provisions that allow the Commissioner to group a head or parent business that exercises managerial control over a branch, agency or subsidiary business with the branch, agency or subsidiary business, are not included in the New South Wales/Victorian legislation. This Bill seeks to repeal those provisions to ensure consistency between Western Australia's provisions and those of other jurisdictions.

Tracing provisions

As a result of the adoption of the grouping provisions in the New South Wales/Victorian legislation, the Bill also includes provisions to consider an entity's interest in a corporation for the purposes of determining whether the entity has a controlling interest. The controlling interest may be direct or indirect.

Indirect interests may be traced through interposed entities, and may be aggregated with direct interests for the purpose of determining whether an entity has a controlling interest. An entity is defined and this may be a person, or 2 or more associated persons.

The Bill provides that the grouping exclusion discretion may also apply to groups formed under the tracing provisions.

Pay-roll Tax Assessment Regulations 2003

Many of the provisions currently contained in regulations have been transferred to the Act to align the legislation with that of other jurisdictions. This has necessitated a number of amendments to the regulations. As a result, the consequential amendments to the regulations have been included with the amendments to the Act to ensure that all amendments will commence concurrently on 1 July 2008.

Part 1 – Preliminary

Clause 1: **Short title**

This clause provides that this Act may be cited as the *Pay-roll Tax Assessment Amendment Act 2008.*

Clause 2: **Commencement**

This clause sets out the relevant commencement provisions.

Paragraph (a) specifies that Part 1 comes into operation on the day on which the Act receives the Royal Assent. Part 1 provides the short title and commencement provisions for the Act.

Paragraph (b) specifies that Part 2 Divisions 1 and 2 and Part 3:

(i) come into operation on 1 July 2008 if the date this Act received the Royal Assent is not later than that day; or

(ii) come into operation on the date this Act received the Royal Assent if that day is later than 1 July 2008. The interaction

of this clause with clause 11 should be noted. Clause 11 inserts Schedule 1 into the Bill to provide transitional provisions such that a person's liability to pay-roll tax under the amendments included in this Bill for the assessment year commencing from 1 July 2008 is to be determined as if the provisions had come into operation on 1 July 2008.

These Parts contain the provisions that are to apply from 1 July 2008.

Paragraph (c) provides that Part 2 Division 3 comes into operation on 1 July 2009. Part 2 Division 3 amends the grouping provisions and inserts the new tracing provisions.

Part 2 – Amendment of the *Pay-roll Tax Assessment Act 2002*

Division 1 – Act amended

Clause 3: **The Act amended**

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

Division 2 – Amendments to commence on 1 July 2008

Clause 4: **Section 5 amended**

Section 5 provides for the circumstances when pay-roll tax is payable in Western Australia.

Subclause (1) deletes the words "taxable in Western Australia under subsection (2) except wages that are exempt under section 40" and inserts instead "WA taxable wages".

These amendments are necessary, as the provisions of section 40(3) have been transferred to the definition of taxable wages in section 6AA(1). In addition, the provisions of subsection (2) have been repealed and rewritten by section 6AA(1).

Subclause (2) repeals section 5(2) so that new terms and definitions may be inserted.

Clause 5: **Sections 6A and 6B inserted**

This clause inserts new sections 6A and 6B after section 5.

6A. The term "WA taxable wages"

Subsection (1) defines "WA taxable wages" to mean wages, other than exempt wages, that are paid or payable by an employer for services performed, and that are paid or payable -

(a) in Western Australia, except if the relevant services are performed wholly in one other State or Territory; or the services are performed by a person wholly in another country for a continuous period of more than 6 months;

(b) outside Western Australia for services performed wholly in Western Australia; or

(c) outside Australia for services performed mainly in Western Australia.

WA taxable wages do not include wages paid or payable in respect of services that are performed wholly in another country for a continuous period of more than 6 months. Such wages are exempt from tax from the commencement of the period of overseas service. This differs from current section 40(3) of the Act, which provides an exemption for wages paid for services performed in another country only from the time that the initial 6-month period overseas has been served.

Subsection (2) provides a method for determining the jurisdiction in which wages are payable, in circumstances where the wages have not been paid at the time that the pay-roll tax liability arises. These provisions were previously located in clause 4 of the Glossary to the Act.

(a) If the services are performed wholly in Western Australia the wages that are paid or payable but have not been paid, are to be taken to be payable to that person in Western Australia.

(b) If the wages are not payable for services carried out wholly in Western Australia or wholly in one other State, the wages are taken to be payable to the person in Western Australia if the wages last paid or payable to the person were required to be included in a return in Western Australia.

(c) Where the wages are not taken to be payable in Western

Australia or in another State under a corresponding law of another State, the wages are taken to be payable at the place where the person last carried out any services for the employer before the wages became payable.

Subsection (3) fixes the time and place of payment for the purposes of the Act where wages are paid other than in cash. It provides that an instrument is sent, or given or an amount is transferred to a person or his agent, or an instruction is given for the crediting of an amount to the employee's account, those wages shall be deemed to have been paid at the time the instrument was sent or given, the amount was transferred or the account was credited.

These provisions were also previously located in clause 4 of the Glossary to the Act.

Subsection (4) provides that, in determining where services are performed in Australia, regard must be had only to the services performed in the month in question.

This provision was previously implied by legislation, and it requires taxpayers to determine the place where the wages were paid and the services were performed, on a monthly basis. This does not affect taxpayers who lodge annual or quarterly returns except that they must consider these requirements for each month that is included in the return.

Subsection (5) defines an instrument for the purposes of subsection (3).

6B. Wages not referable to services performed in a particular month

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

In addition, for circumstances when wages have been paid or are payable and no services have been performed in that month, the liability for pay-roll tax is to be decided according to the State in which the wages were paid or became payable.

Clause 6: Part 2 Division 2A inserted

This clause inserts new Division 2A after Part 2 Division 1.

Division 2A – Wages

Subdivision 1 – General concept of wages

9AA. The term "wages"

Section 9AA provides the meaning of wages for the purposes of the Act. This section was previously located in clause 2(1) of the Glossary.

In practical terms, the outcome of these amendments is that the same elements are taxable however in the interests of consistency, the structure of the changes is aligned with the New South Wales/ Victorian provisions. Also, in order to maintain an element of consistency, the provisions have been transferred to this Division from other areas of the Act and retain a fair degree of consistency with the current provisions.

Subsection (1) provides that "wages" means:

Paragraph (a): wages, remuneration, salary, commission, bonuses or allowances paid or payable to an employee or in relation to an employee. Amounts paid or payable in relation to an employee are included to ensure that such payments will be wages for the purposes of the Act, even though they may be made to a person other than the employee, if the payment can be seen to be in relation to an employee.

Paragraph (b): an amount paid or payable by way of remuneration to a person holding office under, or in the service of, the Crown in right of the State of Western Australia. This provision makes the wages taxable in the first instance, with specific exemptions then being available for wages paid by certain Crown entities under section 40 of the Act.

Paragraph (c): an amount paid or payable under a contract that is in a class of contract prescribed under section 45(2)(g), to the extent to which that payment is attributable to labour. Regulations 5 and 6 of the *Pay-roll Tax Assessment Regulations 2003* relate to this section.

Paragraph (d): an amount paid or payable by a company by way of remuneration to or in relation to a director or member of the governing body of the company. The definition of "director" includes members of the governing body of a company.

Paragraph (e): an amount paid or payable by way of commission to an insurance or time-payment canvasser or collector.

Paragraph (f): an amount that is taken to be wages paid or payable by an employer to a person by another provision of this Division. This would include amounts such as superannuation contributions, fringe benefits, shares and options and termination payments. While these amounts are currently taxable under the Act, the provisions have been restructured to align the wages definition with the New South Wales and Victorian provisions.

Paragraph (g): a motor vehicle allowance paid or payable to an employee for a financial year, to the extent that it exceeds the exempt component determined under section 9FA.

Paragraph (h): an accommodation allowance paid or payable to an employee in a financial year in respect of a night's absence from the person's usual place of residence, to the extent that it exceeds the exempt rate determined under section 9FB.

Subsection 2 provides that the wages, remuneration, salary, commission, bonuses or allowances are wages:

(a) whether paid or payable at piece work rates or otherwise; and

(b) whether paid or payable in cash or in kind.

This provision was previously located in clause 2(1)(a) and (b) of the Glossary to the Act.

Subdivision 2 – Fringe benefits and specified taxable benefits

9BA. Wages include fringe benefits and specified taxable benefits

This section was previously located in clause 2(1)(i) of the Glossary to the Act.

Subsection (1) provides that the value of a fringe benefit or specified taxable benefit that is provided by an employer to an employee, or in relation to an employee, is wages paid or

payable by the employer to the employee.

This section also provides that a grant of a share or option, the value of which is taken to be wages under section 9DA(1), is not included as a fringe benefit for the purposes of this Act.

Subsection (2) provides that subsection (1) does not apply to exempt benefits under the Fringe Benefits Tax Assessment Act, other than payments to the Superannuation Holding Accounts Special Account within the meaning of the *Small Superannuation Accounts Act 1995* on behalf of employees.

9BB. Actual value of a fringe benefit

This section was previously located in clause 7 of the Glossary to the Act. It has been updated to apply the type-2 formula only.

Subsection (1) provides the formula for determining the value of a fringe benefit for pay-roll tax purposes. This value is the taxable value of the fringe benefit grossed up using the formula for "type 2 benefits" specified in the *Fringe Benefits Tax Assessment Act 1986* of the Commonwealth.

Under current clause 7, fringe benefits are grossed up using the "type 1 benefits" formula or the "type 2 benefits" formula, depending on which gross up factor is used for Commonwealth taxation purposes.

Subsection (2) provides that the value calculated according to the formula in subsection (1) is the actual value of the fringe benefits provided by the employer.

9BC. Basis for including the value of fringe benefits in returns

The methods for calculating the value of fringe benefits, for the purposes of lodgment of a pay-roll tax return, have been transferred to the Act from regulation 20 of the Pay-roll Tax Assessment Regulations.

Subsection (1) provides that an eligible employer may use the estimated method of valuing fringe benefits provided by the employer instead of the actual value. Eligibility requirements to use the estimated value method are outlined in section 9BD.

Subsection (2) requires the employer to use the same method

for all returns during an assessment year unless the Commissioner allows the employer to change the method used during that year under section 9BH(4).

9BD. Eligibility to use estimated value method

The requirements for eligibility to use the estimated value method to calculate the value of fringe benefits have been transferred to the Act from regulation 22 of the Pay-roll Tax Assessment Regulations.

This section allows an employer to use the estimated value method of calculating the value of fringe benefits provided by the employer, when the employer:

(a) has lodged returns for at least fifteen months ending immediately before the beginning of the assessment year; and

(b) lodges monthly returns for the assessment year.

9BE. Returns (other than annual returns) using the estimated value method

Subsection (1) provides a formula for calculating the value of the fringe benefits to be included in each return for the year except the last return, when the employer uses the estimated value method.

Unlike the provisions of the other States and Territories, Western Australia's formula takes into account that returns may be lodged for quarterly or annual periods in addition to monthly periods.

Subsection (2) provides that the value of the fringe benefits provided by the employer to be included in the last return for the year is the amount equal to the difference between:

(a) the actual value of the WA fringe benefits provided by the employer during the fringe benefits tax year which ended on 31 March in the assessment year; and

(b) the sum of the amounts included in each of the previous returns for the assessment year as calculated using the formula in subsection (1).

When provisions refer to fringe benefits that are to be included as wages, the fringe benefits are not necessarily WA taxable wages until they are recorded in a return. WA fringe benefits are fringe benefits that have been included in a return and are therefore WA taxable wages.

9BF. Annual returns using the estimated value method

The requirements for lodging annual returns when the employer uses the estimated value method during the assessment year have been transferred to the Act from regulation 24 of the Pay-roll Tax Assessment Regulations.

This section provides for employers who lodge an annual pay-roll tax return and who use the estimated value method of calculating the value of fringe benefits during the assessment year, and advises that the value to be included in the annual return is the actual value of the fringe benefits provided by the employer.

9BG. Final returns using the estimated value method

The requirements for lodgment of the final return, when the employer has used the estimated value method for calculating the value of the fringe benefits, have been transferred to the Act from regulation 25 of the Pay-roll Tax Assessment Regulations.

When an employer who has used the estimated value method to calculate the value of the fringe benefits provided to employees, ceases to carry on a business, changes the method of reporting or no longer has a requirement to lodge pay-roll tax returns, lodges the final return for that business, the value of the fringe benefits to be included in the final return is the amount equal to the difference between:

(a) the sum of the WA fringe benefits provided by the employer during the fringe benefits tax year that ended on 31 March in the assessment year and the WA fringe benefits provided by the employer for the months of April, May and June in the assessment year (if any have been provided); and

(b) the sum of one quarter of the WA fringe benefits provided by the employer for the fringe benefits tax year that ended in the first financial year for which the employer chose to

use the estimated value method and the total of the amount of WA fringe benefits included in the monthly returns for the assessment year.

An adjustment calculation must be undertaken to identify the amount to be included in the final return. This accounts for the difference between pay-roll tax paid under the estimated method, and the pay-roll tax that should have been paid on the actual value of the fringe benefits provided, where an employer has been declaring fringe benefits under the estimated method, and the liability to pay-roll tax is to cease, or a change to the actual method is to occur.

9BH. Changing method of valuing fringe benefits

These requirements have been transferred to the Act from regulation 26 of the Pay-roll Tax Assessment Regulations.

Subsection (1) provides that an employer may commence using the estimated value method for an assessment year if the employer is eligible to use the estimated value method (see section 9BD) and the employer is also to give the Commissioner notice of the intended change before the day on which the first or only return for the assessment year is to be lodged.

Subsection (2) provides that an employer who has been using the estimated value method may cease using that method if notice has been provided to the Commissioner before the day on which the first or only return of an assessment year is to be lodged.

Subsection (3) provides for the notice required in subsections (1) and (2) to be in the approved form.

Subsection (4) provides that on written application of the employer, the Commissioner may allow the employer to change the method for calculating the value of fringe benefits if the Commissioner is satisfied that:

(a) there is a compelling reason for the change; and

(b) where it is relevant, if the change were not allowed, the amount of pay-roll tax payable by the employer would be substantially greater than if pay-roll tax is paid on the actual value of the fringe benefits. This paragraph authorises a

change from estimated value method to the actual value method and vice versa.

Subsection (5) provides for circumstances where an employer ceases to use the estimated value method during an assessment year, the value of the fringe benefits to be included in the last return for that year is the amount equal to the difference between:

(a) the sum of:
    (i) the actual value of the WA fringe benefits provided by the employer during the fringe benefits tax year that ended on 31 March in the assessment year; and

    (ii) the actual value of the WA fringe benefits provided by the employer for the months of April, May and June in the assessment year (if any have been provided); and

(b) the sum of:
    (i) one quarter of the actual value of the WA fringe benefits provided by the employer for the fringe benefits tax year that ended in the first financial year for which the employer chose to use the estimated value method; and

    (ii) the total amount of WA fringe benefits included in the monthly returns for the assessment year.

Subsection (6) provides for the circumstances where an employer commences using the estimated value method during an assessment year. Where that is the case, the value of the fringe benefits to be included in the last return for the assessment year is the amount equal to the difference between:

(a) the actual value of the WA fringe benefits provided by the employer during the fringe benefits tax year that ended on 31 March in the assessment year; and

(b) the total amount of WA fringe benefits included in the returns for the assessment year.

9BI. Value of a specified taxable benefit

This section provides that the value of a specified benefit is the

prescribed value or the value calculated in the prescribed manner, whichever method applies.

Currently, the value of contributions to redundancy benefits schemes and portable long service leave payments are prescribed, and are specified taxable benefits in regulations 11 to 15 of the Pay-roll Tax Assessment Regulations.

Subdivision 3 – Superannuation contributions

9CA. Terms used in this Subdivision

This section provides the definitions for the purposes of Subdivision 3.

The definition of an "employee" for this Subdivision includes any person to whom wages are paid under paragraphs (a) to (e) of section 9AA(1), and a director as referred to in section 9DG(1). This means that a superannuation contribution constitutes wages if paid or payable in respect of a non-executive director.

The definition of a "notional contribution" is as in section 9CD, and the definition of a "superannuation contribution" has the meaning given in section 9CC.

9CB. Wages include superannuation contributions and other similar amounts

Subsection (1) provides that the amount of each of the following superannuation contributions are taken to be wages paid by the employer to the employee in the return period:

(a) a contribution made in the return period;

(b) a notional contribution taken to have been made by the employer in the return period;

(c) if an employer has an individual superannuation guarantee shortfall for the return period, the amount of the shortfall.

Subsection (2) provides that if an employer is taken to have made a notional superannuation contribution in relation to an employee, no actual contribution made by the employer for that employee is to be included in the pay-roll tax return as wages. An example would be an employer whose employee is a

member of a defined benefit fund and a notional contribution amount has been actuarially calculated to be payable. Should the employer pay that amount then, under these provisions, both the paid contribution and the payable contribution would be liable for pay-roll tax. This provision exempts the contribution that has been paid from pay-roll tax.

Subsection (3) provides that if a contribution was payable but not paid and an individual superannuation guarantee shortfall results from the employer's failure to pay the contribution, then the amount of the shortfall is reduced by the amount of the contribution. If an employer has a superannuation guarantee shortfall, this is paid to the Australian Taxation Office with a penalty and includes the amount that should have been paid as a contribution. However, under these provisions, the employer would be liable for pay-roll tax on the contribution that is payable although not paid. Without this provision, the employer would be liable for pay-roll tax on both contributions.

Subsection (4) provides that the liability provisions, contained in section 6A(2) that apply to wages payable but not paid, apply to a superannuation contribution that is payable but not paid, or is required to be credited as a contribution, or is a notional contribution or an individual superannuation guarantee shortfall amount, as if the provisions of section 6A(2) referred to contributions and not wages, and the amounts were contributions payable.

Subsection (5) provides for the purposes of subsection (1)(c) of this section,

(a) a superannuation shortfall penalty imposed on the employer, because of non-compliance with the choice of funds requirements, is not included for pay-roll tax (this is because a superannuation contribution would have been paid but would have been paid to the incorrect fund); and

(b) if an employer has an individual guarantee shortfall for an employee, that shortfall is taken to be for the last month of the quarter.

Section 6 of the Superannuation Guarantee Act provides that a superannuation guarantee shortfall is calculated each quarter.

9CC. Superannuation contributions

Subsection (1) provides that a contribution is:

(a) a contribution paid or payable by an employer to or as a superannuation fund in respect of an employee: or

(b) an amount that applies in the circumstance that an employer has an obligation to credit an account in a superannuation fund but does not. Where such an obligation exists, the employer is deemed to have made the credit.

As an example, if an employment contract or award outlined an amount to be credited to an in-house unregulated accumulation fund, and the transaction is not performed, this subsection deems the crediting to have occurred on the basis of the obligation.

Subsection (2) provides that subsection (1)(b) applies only in respect of Australian superannuation funds that do not provide a defined benefit.

Subsection (3) deems the setting aside of money or anything worth money as, or as part of, a superannuation fund, to be paying a contribution to a superannuation fund.

Subsection (4) deals with contributions in kind and makes section 9HA apply for valuing any contribution in kind.

9CD. Notional contributions

This section provides the process for determining contributions for Australian superannuation funds that are either not regulated or are unfunded public sector schemes (whether or not they are regulated) where the fund provides a defined benefit. This clause also applies to funds that provide both a defined benefit and any other benefit that is not a defined benefit (hybrid funds).

Subsection (1) provides that notional contributions are deemed to have been made in respect of an employee if the employee is a member of an Australian defined benefit superannuation fund.

Subsection (2) deems a notional contribution to be payable for each return period.

Subsection (3) requires the notional contribution to be determined by an actuary and provides the principle on which it is calculated.

This principle requires that the amount is sufficient, together with earnings, to provide for the cost to the employer of the entitlement accruing in respect of services performed or rendered in the return period. This principle assumes that a fund to which this clause relates is fully funded. As such, it is irrelevant whether a fund is in surplus or deficit.

Subsection (4) provides that the regulations can include guidance on how an actuary is to determine the amount under subsection (3).

Subdivision 4 – Shares and options

Western Australia has included the value of a grant of a share or an option to an employee as wages for pay-roll tax purposes from 1997 using a simple method of valuation. These provisions are to be amended to be consistent with the provisions of the New South Wales/Victoria Acts.

9DA. Wages include shares and options granted to employees

Subsection (1) provides that the grant of a share or option to an employee, in respect of the appointment of the employee or for services performed by the employee, constitutes wages for pay-roll tax purposes.

In addition, subsection (1) does not apply to the grant of a share or an option if the grant is wages under another paragraph of section 9AA(1) other than paragraph (f).

Subsection (2) adopts provisions of the *Income Tax Assessment Act 1936* of the Commonwealth for determining when a share or option is granted or in circumstances prescribed by regulations.

Note: Section 139G of the *Income Tax Assessment Act 1936* provides that: -
A person *acquires* a share or right if:

(a) another person transfers the share or right to that person (other than, in the case of a share, by issuing the share to that person); or

(b) in the case of a share - another person allots the share to that person; or
(c) in the case of a right - another person creates the right in that person; or
(d) the person otherwise acquires a legal interest in the share or right from another person; or
(e) the person acquires a beneficial interest in the share or right from another person.

Subsection (3) provides that the value of the grant of a share or an option is taken to be wages paid or payable on the relevant day (as specified in subsection (4)).

Subsection (4) provides that the relevant day is the day the employer elects to treat as the day on which the wages are paid or payable (see section 9DB below).

Subsection (5) provides that the grant of a share or an option to an employee, for the appointment of the employee, is deemed to be for services performed by the employee, in the place or places, where it is reasonably expected that the services would be performed.

Subsection (6) provides that the grant of a share or option by or to a third party is valuable consideration under the third party payment provisions in section 9HC.

9DB. Relevant day – choice of

Subsection (1) permits employers to elect to treat the wages constituted by the grant of a share or option as having been paid or payable on the date the share or option is granted to the employee, or the date on which the share or option vests in the employee.

Subsection (2) provides that the vesting date of a share is the date on which any conditions applying to the grant of the share have been met and the employee's legal or beneficial interest in the share cannot be rescinded.

Subsection (3) advises that the vesting date for an option is the earlier of two dates, being:

(a) the date on which the share to which the option relates is granted to the employee; or

(b) the date on which the employee exercises a right to have the share transferred to, allotted to or vest in him or her.

9DC. Relevant day – special cases

Subsection (1) provides that, where an employer does not include the value of a grant of a share or option in its taxable wages for the financial year in which the grant occurred, the wages constituted by the grant are taken to have been paid or payable on the vesting date of the share or option.

Subsection (2) provides that where the value of a grant of a share or an option is nil, or the wages constituted by such a grant would not be liable to pay-roll tax on the date of the grant (for example, the employee has paid the full purchase price for the share or option), such wages will be treated as paid or payable on the date that the share or option was granted.

9DD. Value of shares and options

Subsection (1) provides that the value of a share or an option is the market value of the share or option on the relevant day.

Any consideration paid by an employee in respect of the share or option is to be deducted from the value of the share or option for pay-roll tax purposes.

Subsection (2) provides for the valuation of grants of shares or options in accordance with Commonwealth income tax provisions.

Subsection (3) provides required modifications to the relevant Commonwealth income tax provisions so that they will apply in accordance with subsection (2).

Subsection (4) defines the "Commonwealth income tax provisions" to mean the provisions of Subdivision F of Division 13A of the *Income Tax Assessment Act 1936* of the Commonwealth.

9DE. Effect of rescission, cancellation etc. of share or option

Subsection (1) ensures that pay-roll tax will continue to be payable in respect of a grant of a share or option that is withdrawn, cancelled or exchanged for valuable consideration.

The day that the share or option is withdrawn, cancelled or exchanged is deemed to be the relevant day and the market value of the share or option on that day, is the valuable consideration.

Subsection (2) provides that in circumstances where an employer:

(a) has granted shares or options to an employee that are taken to be wages; and

(b) has included the value of those shares or options in a pay-roll tax return; and

(c) the grant has been rescinded because the conditions attaching to the grant have not been met,

then the employer may reduce the amount of wages returned in the period in which the grant was rescinded by the value of the shares or options as specified in the previous return.

Subsection (3) prevents subsection (2) from applying in the circumstances where an employee fails to exercise an option or to exercise their rights in respect of a grant of a share or an option.

9DF. Grant of share under exercise of options

This section ensures that, where an employer has paid any applicable pay-roll tax in respect of the grant of an option, the subsequent grant of a share pursuant to the exercise of that option is not subject to pay-roll tax.

9DG. Wages include certain shares and options granted to directors

Subsection (1) ensures that the grant of a share or an option to a director, as remuneration for the appointment or services of the director, constitutes wages for pay-roll tax purposes, as if the director were an employee and the company were the employer.

Subsection (2) provides that for the purposes of subsection (1), the other provisions of this Subdivision apply to a grant of shares or options to a director as if references to the employer

were references to the company and references to the director were references to an employee.

Subsection (3) provides that references to a director include references to persons to be appointed as directors and former directors of a company.

Subsection (4) provides that the grant of a share or an option to a director, for the appointment of the director, is to be taken to be for services performed by the director for the company, in the place or places where it is reasonably expected that those services would be performed.

9DH. When services considered to have been performed

This section provides that, where a grant of a share or an option constitutes wages under this Subdivision, the services to which those wages relate will be taken to have been performed during the month in which the grant or vesting (whichever date applies as the relevant day, as determined) of the share or option occurs.

9DI. Place where wages (as shares or options) are payable

This section provides that wages constituted by the grant of a share or option will be taken to be paid or payable in Western Australia if the share is a share in a company registered in Western Australia or any other body corporate incorporated under a Western Australian Act.

If the wages are taken to be paid or payable outside Western Australia, the grant of a share or an option may still be liable to pay-roll tax in Western Australia (under section 6A(1)(b) or (c)) if the grant is made for services performed wholly or mainly in Western Australia.

Subdivision 5 – Termination payments

9EA. Wages include termination payments

Subsection (1) provides that a termination payment, as defined in subsection (2), constitutes wages for pay-roll tax purposes.

Subsection (2) defines an "employment termination payment" as:

(a) an employment termination payment (within the meaning of section 82-130 of the *Income Tax Assessment Act 1997* of the Commonwealth) that would be included in the assessable income of an employee under Part 2-40 of that Act; or

(b) any payment that would be an employment termination payment but for the fact it was received more than 12 months after termination; or

(c) a transitional termination payment within the meaning of section 82-10 of the *Income Tax (Transitional Provisions) Act 1997* of the Commonwealth.

A "termination payment" is defined as: —

(a) payments made in consequence of the retirement from, or termination of, any office or employment of an employee. These include an unused annual leave payment; an unused long service leave payment; or so much of an employment termination payment that would have been included in the assessable income of the employee if the whole employment termination payment had been assessable.

(b) a payment made as a consequence of terminating the services or office of the director, to a director whether or not paid directly to the director.

The inclusion of amounts paid or payable to non-executive directors is new to Western Australia and is not currently contained in the Act.

Definitions of "unused annual leave" and "unused long service leave" have been adopted from the relevant provisions of the *Income Tax Assessment Act 1997* (Commonwealth).

A payment that is received in consequence of the termination of employment, is an unused annual leave payment if:
(a) it is for annual leave not used; or
(b) it is a bonus or other additional payment for annual leave used; or
(c) it is for annual leave, or is a bonus or other additional payment for annual leave, to which the employee was not entitled just before the employment termination, but that

would have been made available to the employee at a later time if it were not for the employment termination.

A payment received in consequence of the termination of employment is an unused long service leave payment if:

(a) it is for long service leave not used; or

(b) it is for long service leave to which the employee was not entitled just before the employment termination, but that would have been made available to the employee at a later time if it were not for the employment termination.

Subdivision 6 – Allowances

9FA. Motor vehicle allowances

Subsection (1) for the purposes of section 9AA(1)(g), provides the taxable wages component of a motor vehicle allowance is to be calculated on the amount of the motor vehicle allowance that exceeds the exempt component in accordance with the provided formula.

The exempt component is a function of the number of business kilometres travelled during the financial year and the exempt rate (being a rate prescribed by regulations under the *Income Tax Assessment Act 1997* of the Commonwealth, or otherwise as prescribed by regulations).

Subsection (2) provides that the number of business kilometres is to be determined:

(a) in accordance with the applicable recording method prescribed in the regulations. Currently, regulations 30 and 32 to 38 of the Pay-roll Tax Assessment Regulations provide the different recording methods available; or

(b) if the Commissioner approves, in writing, the use of another method of determining the number of business kilometres travelled during a financial year, the employer must use that method.

Subsection (3) provides the exempt rate for a financial year is:

(a) the rate prescribed by regulations under the *Income Tax Assessment Act 1997* of the Commonwealth for calculating the deduction for car expenses for a large car using the cents per kilometre method; or

(b) as prescribed by regulations. There is no other rate intended to be prescribed presently in the regulations.

The Australian Taxation Office updates these amounts each year, and includes the rates for calculating the deduction for car expenses in regulation 28-25.01 of the *Income Tax Assessment Regulations 1997*.

9FB. Accommodation allowances

This section provides the exempt rate for the financial year for the purposes of section 9AA(1)(h). The exempt rate is:

(a) calculated by reference to the lowest capital city for the lowest salary band of the Australian Taxation Office determinations in respect of reasonable daily travel allowance expenses, or

(b) as prescribed by regulations. There is no intention presently to prescribe another rate in the regulations.

The Australian Taxation Office updates these amounts annually and includes the reasonable amounts for daily travel expenses according to salary level and destination in a Taxation Determination each year. Currently, the reasonable travel expenses for the lowest capital city/lowest salary band is $201.25 per day.

Subdivision 7 – Employment agents

9GA. Wages include amounts paid by employment agents

The employment agent provisions are not one of the agreed eight areas forming part of the recommendations of the consistency project. This section has reproduced current clause 2(1)(h) of the Glossary to the Act. No amendments have been made to the Western Australian provisions (apart from those necessary to relocate the provision) and pay-roll tax continues to apply where an agent procures for a client the services of an individual worker to perform employee-like functions and the worker does not become the employee of either the agent or the client.

This section includes any amount paid or payable by an employment agent, either directly or indirectly, to a person

engaged to perform services for a client of that agent, or to some other person in respect of those services, if the employment agent receives a lump sum or ongoing fee during or in respect of the period the services are provided to the client.

Subdivision 8 – Miscellaneous provisions

9HA. Value of wages paid in kind

This section sets out the method for determining the value of wages (except fringe benefits or specified taxable benefits) that are paid or payable in kind, and determined to be:

(a) the value agreed, attributed to the wages, or ascertainable for the wages from arrangements between the employer and the employee, whichever is the greater of the three amounts; and

(b) if an amount is prescribed, that amount.

Currently, the value of contributions to redundancy benefits schemes and portable long service leave payments are prescribed, as specified taxable benefits in regulations 11 to 15 of the Pay-roll Tax Assessment Regulations.

9HB. GST excluded from wages

Subsection (1) provides for GST to be excluded from wages in circumstances where payment for a supply of services is taken to be wages under the Act, and the payment includes an amount of GST.

Subsection (2) provides that subsection (1) does not apply in respect of wages that comprise a fringe benefit. The taxable value of a fringe benefit will include the GST amount where applicable.

9HC. Wages paid by or to third parties

Currently these provisions are contained in clauses 2(2) and 5 of the Glossary to the Act. The amendments introduce more

specific third party provisions to be consistent with the legislation that applies in other jurisdictions. The provisions cover third party payments relating to directors in addition to third party payments to employees.

Subsection (1) ensures that payments of money or the provision of other valuable consideration, which is referable to an employee's services to his or her employer, is taken to be wages paid or payable by the employer to the employee (and therefore subject to pay-roll tax), even if the amount is paid, or the benefit is provided, by—

(a) a third party to the employee; or

(b) the employer to a third party; or

(c) a third party to a third party.

Subsection (2) provides that the same principles apply to payments of money or the provision of other valuable consideration by way of remuneration for the appointment or services of a company director.

Subsection (3) provides that references to a director include references to persons to be appointed as directors and former directors of a company.

Clause 7: **Section 26 amended**

Section 26 provides the dates for lodgement of monthly pay-roll tax returns.

This clause repeals section 26(2) and inserts new subsections (2) and (3) to require that returns due for a month other than June are to be lodged by the 7th day of the following month and the June return is to be lodged by the 21st day after the end of the month (that is 21 July).

These amendments make the lodgement dates for monthly returns in Western Australia consistent with those applying in all States and Territories except the Northern Territory.

Clause 8: **Section 27 amended**

Section 27(2)(c) currently requires additional (reconciliation) returns to be lodged within 2 months after the end of the

assessment year. This paragraph is amended to require the additional return to be lodged within 21 days after the end of the assessment year.

These amendments make the lodgement dates for the reconciliation return in Western Australia consistent with those applying in all other States and Territories except the Northern Territory.

Clause 9: **Section 40 amended**

Section 40(3) relates to the payment of wages in Western Australia for services carried out wholly in another country for a continuous period of more than 6 months. This clause removes this subsection, and the amendments in clause 5 insert an amended version of the provision in section 6A(1)(a)(ii).

Clause 10: **Section 45 amended**

Section 45(2)(g) is amended to change the reference to clause 2(1)(e) of the Glossary to refer to section 9AA(1)(c). This is required as clause 2 of the Glossary has been repealed and is relocated in the definition of "wages" in section 9AA.

Clause 11: **Section 46 and Schedule 1 inserted**

This clause inserts section 46 that contains Schedule 1 for the transitional provisions.

Schedule 1 – Transitional provisions

Division 1 – Provisions for the *Pay-roll Tax Assessment Amendment Act 2008*

1. Notices under regulations 26(1) or (2) of the *Pay-roll Tax Assessment Regulations 2003*

This clause is a transitional provision that provides for a notice issued under regulation 26(1) or (2) in relation to the assessment year commencing 1 July 2008 has effect as if it had been issued under section 9BH(1) or (2) of this Act.

2. Liability to tax if *Pay-roll Tax Assessment Amendment Act 2008* comes into operation after the start of the assessment year

Subclause (1) provides that this clause applies if the amendments receive the Royal Assent later than 1 July 2008.

Subclause (2) provides that a taxpayer's liability for pay-roll tax under this Act, for the financial year that commences on 1 July 2008, is to be determined as if the Act had come into operation on 1 July 2008.

Clause 12: **Glossary amended**

This clause amends a number of definitions (many of which relate to the superannuation provisions) in clause 1 of the Glossary. Also, amendments have been made to the definition of "value" to refer to the various sections of the Act that have been modified.

A definition of "share" has been inserted that includes a stapled security.

Paragraph (j) deletes a number of definitions that are no longer required, the majority of which relate to superannuation. This is due to the update of the superannuation provisions in the Pay-roll Tax Assessment Act to reflect the new superannuation legislation of the Commonwealth.

Subclause (1) repeals clauses 2 to 12 of the Glossary, as the amendments in this Act have relocated these provisions into the main body of the Pay-roll Tax Assessment Act.

Division 3 – Amendments to commence on 1 July 2009

The amendments contained in Division 3 are to the grouping provisions to ensure consistency with the pay-roll tax legislation of other jurisdictions.

Clause 13: **Section 31 amended**

This clause amends section 31(4) by deleting all of the subsection from and including the words "if the Commissioner".

Section 31(4) currently contains the provisions that allow discretion to exclude businesses from grouping when the Commissioner is satisfied of certain matters. To achieve greater consistency with other jurisdictions, the matters the Commissioner is to consider when excluding a business from a group have been standardised and inserted in section 38.

When excluding a business from a group, the Commissioner will be required to take account of the matters listed in section 38.

Clause 14: Section 32 amended

Section 32 provides for commonly controlled businesses to be grouped and for discretion to exclude those businesses when grouped under the provisions relating to discretionary trusts.

This clause repeals subsections (3) and (4) which list the existing matters the Commissioner is to take account of to exclude a business from a group and inserts a discretion for the Commissioner to exclude a person from a group in accordance with section 38. The new discretion will apply to all commonly controlled businesses, except related bodies corporate.

Clause 15: Section 33 amended

This clause amends section 33 to replace the term "related corporation" with "related body corporate". This is to ensure the term is consistent with the *Corporations Act 2001* of the Commonwealth.

Clause 16: Section 35 replaced by sections 35A to 35D

Section 35 provides that two businesses together constitute a group in the circumstances where one of the businesses is the head or parent business and the second business is a branch, agency or subsidiary of the first business and that business exercises managerial control over the branch, subsidiary or agency business.

As Queensland and Western Australia are the only jurisdictions that have these provisions, the relevant sections have been removed to achieve consistency in the grouping arrangements across Australia. However, this policy change is effective from 1 July 2009, and the repeal of this provision should not be interpreted in the interim as a relevant factor to exclude a business from a group under section 35(2).

35A. Groups arising from tracing of interests in corporations

Subsection (1) provides that an entity and a corporation can be grouped through the tracing of interests in the corporation.

Subsection (2) provides an entity (being a person or 2 or more associated persons) and a corporation from part of a group if the entity has a controlling interest in the corporation. Such a controlling interest exists if the entity has a direct interest, an indirect interest, or an aggregate interest in the corporation, and the value of that interest exceeds 50%.

Subsection (3) provides that the Commissioner may exclude an entity from a group in accordance with section 38.

Subsection (4) contains a definition of "associated person", and defines a number of other relevant terms.

35B. Direct interests

Subsection (1) provides that an entity has a direct interest in a corporation if:

(a) the entity can directly or indirectly exercise, control the exercise of, or substantially influence the exercise of voting power attached to any voting shares in the corporation; or

(b) where the entity is 2 or more associated persons, each person can, directly or indirectly exercise, control the exercise, or substantially influence the exercise of voting power attached to voting shares in the corporation.

Subsection (2) provides that the percentage interest of voting power which an entity controls, is the percentage of the total voting power which the entity can exercise, control the exercise of, or substantially influence the exercise of.

35C. Indirect interests

Subsection (1) provides that an entity has an indirect interest in a corporation (called the indirectly controlled corporation) if the entity is linked to that corporation by a direct interest in another corporation (called the directly controlled corporation) that has a direct and/or indirect interest in the indirectly controlled corporation.

Subsection (2) provides that a corporation is linked to a directly controlled corporation if the corporation is part of a chain of corporations:

(a) that starts with the directly controlled corporation; and

(b) in which a link in the chain is formed if the corporation has a direct interest in the next corporation in the chain.

Subsection (3) provides that the value of an entity's indirect interest in an indirectly controlled corporation is determined by multiplying:

(a) the value of the entity's direct interest in the directly controlled corporation; and

(b) the value of the directly controlled corporation's interest in the indirectly controlled corporation.

Subsection (4) provides that if a corporation has more than one indirect interest in a corporation, the value of the interest is calculated under section 35D, as an aggregate interest.

35D. Aggregate interests

Subsection (1) provides that an entity has an aggregate interest in a corporation when:

(a) the entity has a direct interest and one or more indirect interests; or

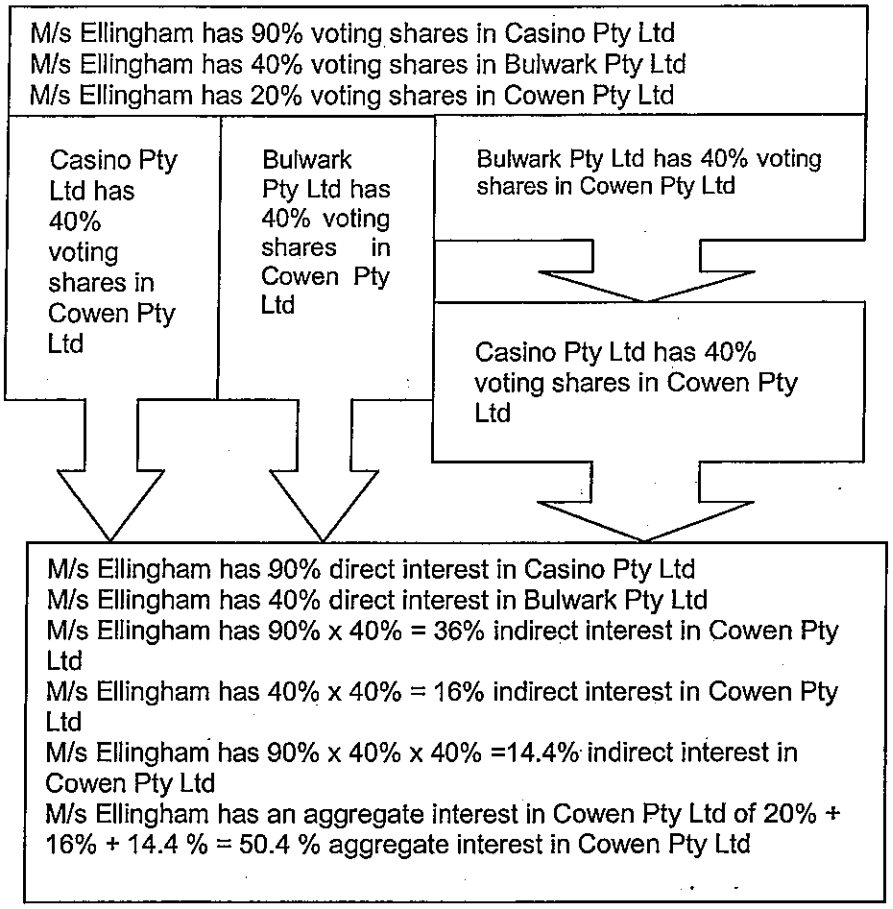
(b) the entity has 2 or more indirect interests.

Subsection (2) provides that the value of an entity's aggregate interest is the sum of:

(a) the value of the entity's direct interest in the corporation; and

(b) the value of each of the entity's indirect interest in that corporation.

The following is an example of the application of the tracing provisions to group businesses.



M/s Ellingham has 1 direct link to Casino Pty Ltd.
M/s Ellingham has an indirect link through 1 corporation to Cowen Pty Ltd.
M/s Ellingham has an indirect link through a chain of 2 corporations to Cowen Pty Ltd.
M/s Ellingham and Casino Pty Ltd are a group.
M/s Ellingham and Cowen Pty Ltd are a group.
Casino Pty Ltd and Cowen Pty Ltd are subsumed to a group.

Clause 17: **Section 36 amended**

Subclause (1) amends section 36(3) by deleting all of the subsection from and including "except for the purpose of".

This amendment aligns section 36 to be consistent with section 69 of the New South Wales and Victoria legislation.

Subclause (2) inserts a reference to the exclusion provisions

contained in section 38, as these provisions will now apply to larger groups created by subsuming smaller groups under section 36.

Clause 18: **Section 38 amended**

This clause repeals and replaces subsection (1) of section 38.

Subsection (1) provides the Commissioner with a discretion to exclude a member from a group if satisfied that the business conducted by that member is independent of, and not connected with, the business conducted by any other member of the group.

In considering the application of this discretion, the Commissioner will have regard to the nature and degree of ownership and control of the businesses, the nature of the businesses, and any other relevant matters. The discretion is not available for corporations that are related bodies corporate under section 50 of the Corporations Act.

Clause 19: **Glossary amended**

This clause replaces the definition of "related corporation" in clause 1 of the Glossary to the Act with a definition of a "related body corporate". This is to update the definition to be consistent with the definition in the Corporations Act and also for the purposes of the tracing provisions.

Part 3 – Amendment of the *Pay-roll Tax Assessment Regulations 2003*

Clause 20: **The regulations amended**

This clause provides that the amendments in this Part are to the *Pay-roll Tax Assessment Regulations 2003*.

Clause 21: **Regulation 5 amended**

Regulation 5 prescribes an amount paid or payable under a contract to the extent to which that payment is attributable to labour.

The regulation currently prescribes contracts made between a ship or boat builder and another party for the procurement of the services of persons for the construction, fit-out or

maintenance of a ship or boat for the purposes of the definition of wages.

This regulation is to be amended to refer to new section 9AA(1)(c) of the Act and not clause 2(1)(e) of the Glossary as clause 2 of the Glossary is to be repealed.

Clause 22: **Regulation 6 amended**

Regulation 6 prescribes contracts that are exempt from a class prescribed by regulation 5 and at subregulation (c) includes workplace agreements in force under the *Workplace Agreements Act 1953*.

As the *Workplace Agreements Act 1953* was repealed on 14 September 2003, this subregulation no longer applies.

Clause 23: **Regulations 12 and 14 amended**

Regulations 12 and 14 prescribe the value of contributions to a fund that are specified benefits, and refer to current clause 6 of the Glossary to the Act.

These regulations are to be amended to refer to section 9BI of the Act instead of clause 6.

Clause 24: **Regulations 16 to 18 repealed**

Regulations 16, 17 and 18 provide that contributions to an employee share acquisition scheme are specified benefits and therefore taken to be wages for the purposes of pay-roll tax. These regulations also provide the valuation method to use for a contribution to an employee of a share or an option under an employee share acquisition scheme.

This clause repeals these provisions as they have been transferred to Part 2 Division 2A Subdivision 4 of the Act.

Clause 25: **Regulations 19 to 26 repealed**

This clause repeals regulations 19 to 26 as the relevant provisions have been relocated into the Pay-roll Tax Assessment Act.

Regulations 19 to 26 prescribe excluded fringe benefits and the methods of calculating the value of fringe benefits included in a

taxpayer's return.

Regulation 19 prescribes a living away from home allowance as an excluded fringe benefit; this requires taxpayers to calculate the full taxable value of the allowance and not use the fringe benefits tax amount from their fringe benefits tax return. To achieve consistency, these allowances will be assessed for pay-roll tax for the part that is a fringe benefit only.

The methods of calculating and returning the value of fringe benefits provided to employees contained in regulations 20 to 26.

Regulation 27 that requires notification to the Commissioner by an employer when an amended assessment is received under the Fringe Benefits Tax Assessment Act within 30 days of receiving it, will continue to apply and will remain in the regulations.

Clause 26: **Heading to Part 3 amended**

The current heading to Part 3 refers to specified exempt allowances. As the regulations contained in Part 3 will refer to record keeping for motor vehicle allowances only, the heading has been amended to refer to allowances only.

Clause 27: **Regulations 28 and 29 repealed**

Regulations 28 and 29 prescribe exempt motor vehicle allowances and the extent of the exemption including a formula to calculate the exemption.

As these provisions have been transferred to section 9FA of the Pay-roll Tax Assessment Act, these regulations are repealed.

Clause 28: **Regulation 30 amended**

Regulation 30 contains directions for the calculation of the number of business kilometres depending on the record keeping method selected by the employer.

Regulation 30 is amended by inserting a reference to section 9FA(2) of this Bill, which contains the motor vehicle allowances provisions.

Clause 29: **Regulation 31 repealed**

Regulation 31 prescribes the exempt rate allowed for business kilometres. Currently, this rate is when an allowance is paid under an award, the rate specified in the award, or in any other case the rate prescribed by the Commonwealth for a large car using the cents per kilometre method.

The amendments to the Act have included the exempt motor vehicle rate in section 9FA and apply the Commonwealth's large car rate automatically without requiring it to be prescribed specifically in these regulations. As the rate specified in an award will no longer be applicable, this regulation is not required.

Clause 30: **Part 3 Division 2 repealed**

Part 3 Division 2 currently contains regulations 39 and 40 that refer to accommodation allowances. As these provisions are now in Part 2 Division 2A Subdivision 6 of the Act, this Division is no longer required in the regulations.

Clause 31: **Regulation 41 amended**

Regulation 41 prescribes the requirements for actuarial determinations for some superannuation contributions.

Subregulation (1) is amended by deleting "If an amount contributed to a superannuation scheme is taken by clause 8 in the Glossary to the Act to be paid" and inserting instead "If a superannuation contribution to a superannuation fund is taken by section 9CB of the Act to be wages paid".

This amendment is required as the superannuation provisions in the Glossary to the Act have been transferred to Part 2 Division 2A Subdivision 3 of the Act, and have also been amended to reflect the technical changes made by Commonwealth legislation.

Clause 32: **Regulation 42 amended**

Regulation 42 prescribes that an actuarial determination must be made in relation to each participant of a superannuation scheme and if an actuary considers it reasonable to do so, the participants may be divided into categories.

Subregulation (1) is amended by replacing the word "participant" with "members of a fund".

Subregulation (2) is amended by replacing "participants in a scheme" with "members".

Subregulation (3) is amended by replacing "participant" with "member".

Clause 33: **Regulation 43 repealed**

Regulation 43 refers to the rate of earnings referred to in clause 10(3) of the Glossary to the Act. The provisions of clause 10 of the Glossary have been transferred to section 9CD of the Act, therefore this regulation is no longer required.

Clause 34: **Regulation 44 amended**

Regulation 44 refers to the scope of actuarial determinations to be made for each participant or category of participants for each return period.

Subregulations (1), (2), (3) and (4) are amended by replacing "participant" with "member".

Subregulations (1), (2) and (3) are amended by replacing "participant" with "member".

Clause 35: **Glossary amended**

Clause 1 of the Glossary to the Regulations is amended as follows:

In the definition of "redundancy benefits scheme" by deleting "as defined in clause 1 of the Glossary to the Act".

In the definition of "vehicle" by replacing "vehicle" with "vehicle." The amendment to this definition is required as this will be the last definition in the Glossary.

This clause also deletes definitions no longer required by the regulations as the provisions referred to have been transferred to the Act or have been updated.

Clause 36: **Power to amend or repeal regulations unaffected**

The inclusion of the consequential amendments to the regulations with the amendments to the Act, does not prevent the regulations being amended or repealed by the Minister as delegated legislation under the *Pay-roll Tax Assessment Act 2002.*

COMPARISON TABLE – NEW PROVISIONS TO OLD PROVISIONS

NEW SECTION	NEW SECTION NUMBER	OLD SECTION	OLD SECTION NUMBER
WA taxable wages	Section 6A(1)	WA taxable wages	Section 5(1)
Jurisdictional nexus	Section 6A(1)	Jurisdictional nexus	Section 5(2)
Place of payment	Section 6A(2)	Place of payment of wages	Clause 4(1) of the Glossary
Payment by instrument	Section 6A(3)	Payment by instrument	Clause 4(2) of the Glossary
Definition of "wages"	Section 9AA(1) and (2)	Definition of "wages"	Clause 2(1)(a) of the Glossary
Motor vehicle allowances	Section 9AA(1)(g)	Exempt motor vehicle allowances	Regulation 28
Accommodation allowances	Section 9AA(1)(h)	No WA equivalent	
Piece rates and payments in kind	Section 9AA(2)	Piece rates and payments in kind	Clause 2(1)(a) and (b) of the Glossary
Wages include fringe benefits and specified taxable benefits	Section 9BA	Fringe benefits and specified taxable benefits	Clause 2(1)(i) of the Glossary
Actual value of fringe benefits	Section 9BB	Value of fringe benefits	Clause 7 of the Glossary
Basis for including the value of fringe benefits	Section 9BC	Methods for calculating fringe benefits	Regulation 20
Eligibility to use estimated value method	Section 9BD	Eligibility to use estimated value method	Regulation 22
Returns (other than annual returns) using the estimated value method	Section 9BE	Monthly returns using the estimated value method	Regulation 23
Annual returns using the estimated value method	Section 9BF	Annual returns using the estimated value method	Regulation 24
Final returns using the estimated value method	Section 9BG	Final returns using the estimated value method	Regulation 25
Changing method of valuing fringe benefits	Section 9BH	Changing method of valuing fringe benefits	Regulation 26
Value of a specified taxable benefit	Section 9BI	Value of wages paid in kind and other benefits	Clause 6(2) of the Glossary

NEW SECTION	NEW SECTION NUMBER	OLD SECTION	OLD SECTION NUMBER
Wages include superannuation contributions	Section 9CA	Superannuation benefits	Clause 2(1)(d) of the Glossary
Superannuation contributions	Section 9CB	Superannuation benefits	Clause 8 of the Glossary
Superannuation contributions	Section 9CC	Superannuation fund contributions	Clause 9 of the Glossary
Notional contributions	Section 9CD	Contributions to defined benefit funds. Unfunded credit to certain funds	Clause 10 and 11of the Glossary
Wages include shares and options	Section 9DA	Fringe benefits and specified taxable benefits	Clause 2(1)(i) of the Glossary
Relevant day – choice of	Section 9DB	No WA equivalent	
Relevant day – special cases	Section 9DC	No WA equivalent	
Value of shares and options	Section 9DD	Market value of shares and options	Regulation 18
Effect of rescission, cancellation etc, of shares and options	Section 9DE	No WA equivalent	
Grant of share under exercise of option	Section 9DF	No WA equivalent	
Wages include certain shares and options granted to directors	Section 9DG	No WA equivalent	
When services considered to have been performed	Section 9DH	No WA equivalent	
Place where wages (as shares and options) are payable	Section 9DI	No WA equivalent	
Wages include termination payments	Section 9EA	Eligible termination payments	Clause 2(1)(j) of the Glossary
Motor vehicle allowances	Section 9FA	Extent of exemption for motor vehicle allowance	Regulation 29
Accommodation allowances	Section 9FB	Exemptions for accommodation allowances	Regulation 39

NEW SECTION	NEW SECTION NUMBER	OLD SECTION	OLD SECTION NUMBER
Wages include amounts paid by employment agents	Section 9GA	Amounts paid by employment agents	Clause 2(1)(h) of the Glossary
Value of wages paid in kind	Section 9HA	Value of wages paid in kind	Clause 6(1) of the Glossary
GST excluded	Section 9HB	GST excluded	Clause 3 of the Glossary
Third party payments	Section 9HC	Third party payments	Clause 5(1) and (2), and clause 2(2) of the Glossary