BUSINESS TAX REVIEW (ASSESSMENT) BILL (NO.2) 2003

EXPLANATORY MEMORANDUM

This Bill, together with the Business Tax Review (Taxing) Bill (No. 2) 2003, seeks to give effect to the stamp duty and debits tax recommendations of the Review of State Business Taxes, as well as dealing with several other minor matters.

A breakdown of the financial impact of each of the measures in this Bill and the Business Tax Review (Taxing) Bill (No. 2) 2003 is contained in the attachment to this document.

Abolition of taxes

This Bill contains amendments to abolish a number of taxes.

Stamp duty on cheques

This measure seeks to abolish stamp duty on cheques with effect from the date of proclamation.

With the exception of South Australia, all other jurisdictions have abolished stamp duty on cheques.

The proposed amendments apply to abolish duty on all blank cheques supplied by a financial institution after the proclamation date. This means that the duty remains payable if a blank cheque has been issued by a financial institution prior to that date, despite the fact that the cheque may not be drawn until after the proclaimed date.

Stamp duty on leases

The proposed amendments abolish stamp duty on leases with effect from the date of proclamation.

Stamp duty on leases is a narrowly based tax that raises only a relatively small amount of duty in relation to its high administration costs.

While the rental component of any lease will no longer be subject to stamp duty, a premium on a lease will still be dutiable at conveyance rates.

Marketable securities

The proposed amendments abolish stamp duty on unlisted marketable securities with effect from the date of proclamation.

Stamp duty on listed marketable securities was abolished from 1 July 2001, as part of the terms of the *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations.* However, transfers of unlisted shares or units of widely held companies and unit trusts are still dutiable.

With the abolition of stamp duty on unlisted marketable securities in Victoria and Tasmania from 1 July 2002, Western Australia faced a potential threat to collections because of the mobility of the marketable securities base.

Stamp duty on unlisted marketable securities was one of the stamp duties scheduled to be reviewed by 2005 by the Ministerial Council. Abolishing the duty early will reduce the high compliance and administration costs associated with this head of duty, that are disproportionate to the revenue raised.

Life Insurance

The proposed amendments abolish stamp duty on policies of life insurance with effect from the date of proclamation.

However, riders to life insurance policies will continue to be dutiable as general policies of insurance in certain circumstances.

Stamp duty on workers' compensation insurance from 1 July 2004

The proposed amendments abolish stamp duty on workers' compensation insurance where the policy of insurance covers the 2004-2005 financial year and beyond. As it is commonplace within the industry to renew such policies on 30 June of each year, the amendments have effect from 30 June 2004.

The rate of stamp duty applicable to workers' compensation insurance was reduced from 5% to 3% from 1 July 2001 for "small" employers.

In view of the fact that Queensland is the only other jurisdiction to impose stamp duty on workers' compensation insurance, abolition of this duty is expected to improve the State's tax competitiveness.

Debits tax from 1 July 2005

This measure seeks to abolish debits tax with effect from 1 July 2005.

Under the terms of the *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations*, debits tax is scheduled to be abolished by 1 July 2005, subject to review by the Ministerial Council of Commonwealth, State, and Territory Treasurers.

Revenue from debits tax has been in decline in recent years due to the prevalence of payment means other than by cheque.

New taxation regimes

This Bill includes substantial amendments to the rental business duty provisions and the mortgage duty provisions, which are to operate from the date of proclamation.

Rental Business Duty

The rental business duty provisions are to be replaced with a hire of goods regime. Under the hire of goods arrangements, duty is imposed on the hiring charges received by a commercial hire business in respect of a hire of goods, where the goods are used solely or predominantly in Western Australia. Specific arrangements have been included to apply to the hire of motor vehicles.

Duty is imposed at a rate of 0.75% if the hire of goods is an "equipment financing arrangement" (ie. hire purchase agreements and agreements of a term not less than nine months), or 1.5% if the hire of goods is an "ordinary hiring arrangement" (ie. agreements with a term of less than nine months).

If the annual hiring charges received from <u>equipment financing arrangements</u> exceed $50,000, duty is imposed on the total hiring charges received. If the annual hiring charges received from <u>ordinary hiring arrangements</u> exceed $50,000, duty is imposed only on the component of the hiring charges that exceed the $50,000 threshold.

An annual reconciliation is undertaken at the end of the financial year to refund any duty paid where the hiring charges received by the commercial hire business do not exceed $50,000, and to ensure that the full $50,000 duty free threshold is applied to hiring charges received from ordinary hiring arrangements.

Separate arrangements apply in the case of a hire of goods from a person other than a commercial hire business. Where person "A" hires out goods from another person "B" who is not a commercial hire business and the total hiring charges are $1,000 or more, "A" is required to prepare a statement of the transaction and pay the appropriate amount of duty on the statement. However, if the goods hired are used solely for private or domestic purposes, an exemption applies.

Mortgage duty

The mortgage duty amendments narrow the mortgage duty base, simplify the duty sharing arrangements where a mortgage secures property in more than one jurisdiction and introduce a single rate of mortgage duty.

These arrangements introduce a new mortgage duty regime to Western Australia that is largely consistent with the regimes operating in Queensland, New South Wales, Tasmania, South Australia and Victoria (until 1 July 2004 when mortgage duty is abolished in that State). These regimes impose mortgage duty on written instruments that fall within the definition of a mortgage, with duty being calculated on the basis of the amount secured by the mortgage.

In harmonising the mortgage duty base, there are significant compliance cost savings that will flow through to taxpayers, particularly those who have mortgages that are secured by property in more than one State.

Unlike the provisions that these arrangements replace which contain crediting arrangements that only cede duty where it is actually paid in another jurisdiction, the duty under this regime will be calculated on a pro-rata basis. The amount is calculated as a proportion of the amount advanced that is secured by Western Australian property compared to the amount secured by all property under the mortgage. This calculation excludes property located overseas and in jurisdictions that do not impose mortgage duty.

The duty sharing arrangements are supported by the concept of a mortgage package and the legislative acceptance of a standard “referable point” to support property values across jurisdictions.

Conveyance duty

The Bill contains amendments to give effect to a number of conveyance duty measures, which are all proposed to commence from a proclamation date.

Wholesale unit trusts

Section 73D of the *Stamp Act* subjects dispositions of units (ie. transfers, issues and redemptions) in “private unit trusts” to stamp duty at conveyance rates to the extent that any Western Australian land owned by the unit trust changes ownership through dealings in the units. For this purpose, “private unit trusts” are classified as trusts in which:

- units are not issued to the public; and
- there are fewer than 50 members who are beneficially entitled to units in the trust, or 20 members or less who hold 75% or more of the total number of units issued.

Trusts that do not meet these criteria are subject to stamp duty at the much lower marketable securities rate, if at all.

Amendments to the *Stamp Act* in 2001 provided relief from the private unit trust provisions for certain types of trusts (“pooled investment trusts” and “equity trusts”) in very limited circumstances.

The amendments in this Bill seek to widen the relief for genuine “wholesale trusts” that are captured by the current private unit trust provisions merely because they fail the spread of ownership test. This is despite the fact that they operate in the funds management industry as a vehicle for allowing other funds (typically with thousands of individual members) to diversify into a real property-backed managed fund.

The amendments involve extending the definition of a “pooled investment trust” by reference to a number of criteria that are indicative of a “wholesale” unit trust. A trust must meet these criteria as a first step to being excluded from the private unit trust provisions. In order to address avoidance concerns, a second step has been included so that the trust will not be excluded from the private unit trust provisions if it exhibits the characteristics of a “sub-trust”.

If the Commissioner is satisfied that the trust meets the definition of a “pooled investment trust” and does not meet the definition of a “sub-trust”, then the trust may be registered as a “pooled investment trust” for a period of three years. Reapplication is required upon expiry of that period. An interim registration process has been included to enable a unit trust that is being established, a period of 12 months to meet the criteria necessary for registration.

Relief is being targeted at genuine wholesale trusts that provide investment services in the funds management industry. Significant effort has been made to ensure that relief is not extended to trusts that are holding property interests in certain trust structures to facilitate trading in those interests.

Simultaneous put and call options

Granting a call option is an offer by the seller to sell. A put option is an offer by the purchaser to buy. Simultaneous put and call options over the same property for the same price effectively creates an offer to sell and an offer to buy, binding the parties as if a contract for sale had been made. However, under the current provisions of the *Stamp Act*, no dutiable contract arises from the granting of these rights that may be used to create a contract in the future.

The proposed amendments impose duty on simultaneous put and call options as if they were a contract to purchase the property.

Mining tenement farm-ins

A "farm-in" arrangement involves someone agreeing to contribute towards the future exploration and development costs of a mining tenement, in order to earn an "interest" in the tenement, with the "interest" being transferred after the amount has been expended. A long standing practice of the Office of State Revenue has resulted in many of these arrangements being assessed with nominal duty. The proposed amendments give legislative support to this practice.

Unit trusts intending to float

The proposed amendments provide relief to private unit trusts that are intending to become public unit trusts. Currently, the *Stamp Act* imposes duty through section 73D on dispositions of units in a private unit trust until the trust has a sufficient number of unit holders to be considered to be a public unit trust.

These amendments will allow a private unit trust to be treated as a public unit trust for a period of 12 months from the date the first units in the trust are issued, or from the date that an information memorandum or prospectus is lodged with the Australian Securities and Investments Commission, where the Commissioner is satisfied that it is intended that the trust will be a public unit trust by the end of the 12 month start up period.

If at the end of the start up period the provisional public trust is still a private unit trust, the unit trustee is required to notify the Commissioner and the status of the provisional public trust will be cancelled with effect from the beginning of the start up period. A statement will be required with the details of all the dispositions that occurred during the period the trust was treated as a provisional public trust and duty will be chargeable on the statement in accordance with section 73D.

Property value thresholds for rebate for first home owners

The proposed amendments increase the property value thresholds for the $500 conveyance duty rebate for first home buyers, from $135,000 to $185,000 for established homes, from $202,500 to $277,500 for established homes north of the 26th parallel, and from $52,000 to $72,000 for vacant land.

Corporate reconstruction provisions

The corporate reconstruction provisions provide relief from conveyance duty for body corporates that, for efficiency, cost or financial reasons, wish to either amalgamate numerous corporate structures into a single business operation, or transfer assets to a new corporate structure from the main body corporate.

The amendments propose to broaden the scope of the corporate reconstruction provisions to include transfers of motor vehicle licences and allow direct property transfers between certain sister subsidiaries of holding companies.

Land-rich threshold

The land-rich provisions of the *Stamp Act* apply stamp duty at conveyance rates, rather than the much lower marketable securities rate, to acquisitions of majority interests and further interests in private companies whose land assets constitute at least 80% of their total assets.

The Bill proposes to broaden the application of the land-rich provisions by reducing the threshold at which a company is considered to be land-rich, from 80% to 60%.

Chattels

Under the current provisions of the *Stamp Act*, chattels (ie. goods, wares and merchandise) are subject to conveyance duty only when transferred in conjunction with land. If transferred in conjunction with other types of property, such as goodwill, chattels are not subject to duty.

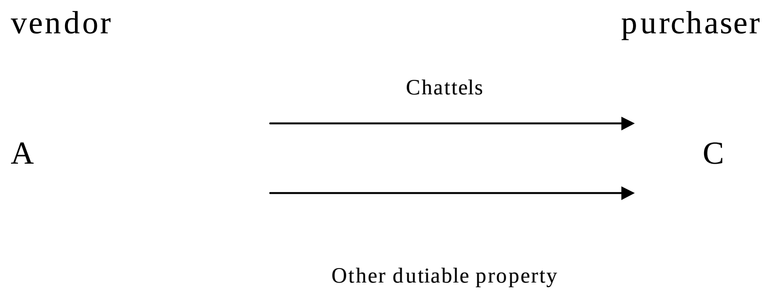
Under these proposed amendments, conveyance duty is applied to chattels transferred in conjunction with any “other property” that is subject to duty under specified provisions, rather than just land. For the purposes of these provisions, “other property” is defined as “property other than goods, wares, or merchandise, and includes an estate or interest in such property”.

Chattels will not be charged with duty in some cases when they are transferred with a business conducted from leased premises, providing the business assets sold do not comprise any other dutiable property.

Where chattels and other dutiable property are transferred together (or are deemed to be transferred together), the chattels will be liable to duty. In other words, where chattels and other dutiable property form “one transaction or one series of transactions” the chattels will be liable to duty.

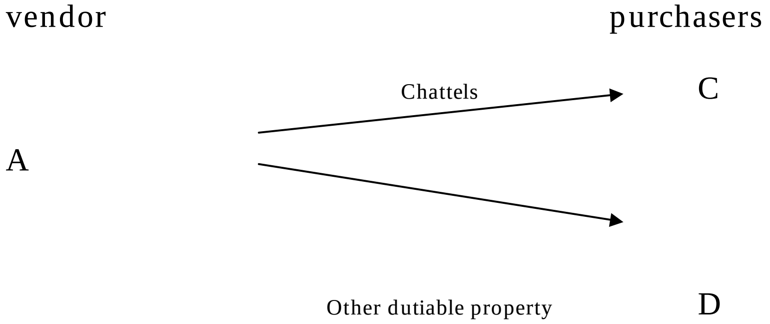
The examples below illustrate the kinds of arrangements that are considered to be one transaction or one series of transactions.

Example 1



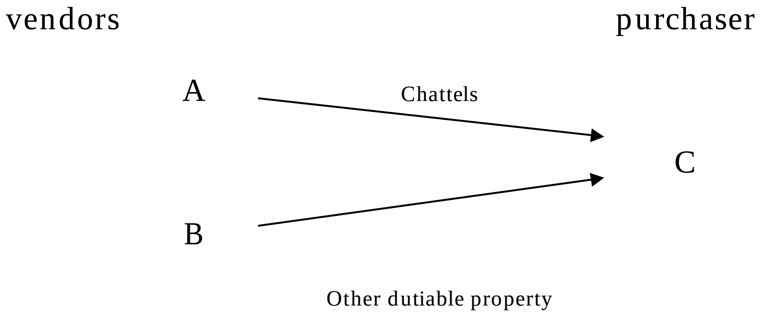
The other dutiable property is transferred in a separate instrument to the chattels, from vendor A to purchaser C. In this case, the chattels transferred are subject to duty as if they were transferred in one instrument with the other dutiable property.

Example 2



The other dutiable property is transferred in a separate instrument from vendor A to purchaser D and the chattels are transferred from vendor A to purchaser C. The chattels transferred are subject to duty as if they were transferred in one instrument with the other dutiable property.

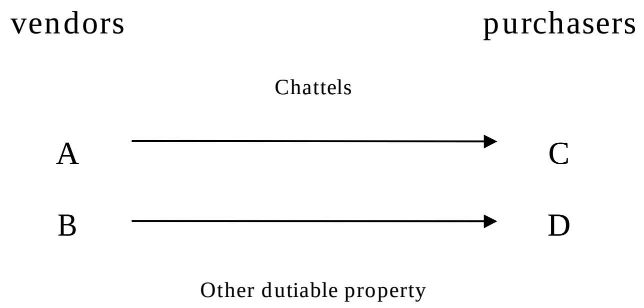
Example 3



The other dutiable property is transferred in a separate instrument from vendor B to purchaser C and the chattels are transferred from vendor A to the same purchaser. The chattels transferred are subject to duty as if they were transferred in one instrument with the other dutiable property. This provision is necessary to prevent a situation occurring where the chattels and other dutiable property are owned by vendor B, who transfers the chattels to vendor A prior to both vendors A & B transferring the other dutiable property and chattels to purchaser C.

This provision could also have effect where vendor B sells other dutiable property and a lease of chattels is assigned. While the chattels are not charged with *ad valorem* duty when the lease is assigned, the exercise of any option to purchase in the lease agreement may trigger the anti-avoidance provision if the exercise of the option to purchase was considered to be part of one series of transactions in relation to the purchase of the other dutiable property by purchaser C. This is necessary to prevent the avoidance by transferring chattels from vendor B to vendor A, vendor A leasing the chattels to purchaser C, and purchaser C exercising the option to buy, thereby acquiring the chattels without the payment of duty.

Example 4



> The other dutiable property is transferred in a separate instrument from vendor B to purchaser D and the chattels are transferred from vendor A to purchaser C. The chattels transferred are subject to duty as if they were transferred in one instrument with the other property.

As noted already, chattels will not generally be liable for duty upon the transfer of a leasehold business.

However, if in any transaction, a value is attributed to a lease and *ad valorem* duty is assessable on the assignment of the lease, the leasehold interest is treated as other dutiable property and duty will be charged on the transfer of the chattels. Duty would also be imposed on the chattels where consideration is paid for the lease.

There are several classes of chattels that will continue to be exempt from duty, regardless of whether they are transferred in conjunction with other dutiable property.

The exempt classes of chattels are:

- stock-in-trade, including raw materials and goods under manufacture;
- vehicles where stamp duty is chargeable on the transfer of a licence or which are specifically exempt from stamp duty under the Third Schedule to the *Stamp Act*;
- chattels used solely or principally with the business of primary production (as defined in section 75D); and
- other chattels as prescribed.

Intellectual property

Under current arrangements, business assets such as patents, trademarks, trade names, copyrights and other types of intellectual property are not subject to duty when transferred as part of a business sale. Amendments are proposed to include intellectual property transferred in conjunction with another business asset in the conveyance duty base and to provide an apportionment method for calculating the value of such assets that will be dutiable in Western Australia where the business operates in Western Australia and elsewhere.

Goodwill

Under current arrangements, undocumented transfers of goodwill are dutiable only to the extent of the consideration paid. Amendments are proposed to include undocumented transfers of goodwill in the conveyance duty base.

Changes in beneficial ownership

Section 31B of the *Stamp Act* imposes duty on changes of ownership of certain property effected without an instrument. However, it only operates where <u>all</u> of the following factors are present:

- a person must become a party to a "transaction";
- that transaction has to cause a change in the beneficial ownership of an estate or interest in the property; and
- the person must have been liable to pay *ad valorem* duty had an instrument effecting or evidencing the transaction been executed.

Section 31B fails to apply to changes in beneficial ownership arising through court orders, schemes of arrangement, mergers and statutory vestings because not all of these criteria are met.

Amendments are proposed to section 31B so that it applies to all changes in beneficial ownership, regardless of how the transaction is structured. Section 31B is amended so that it applies to an acquisition of the beneficial ownership of certain property. Specific provisions have been included in relation to mergers under international laws to ensure that section 31B applies to these forms of acquisitions.

Conversion of public unit trusts to private

As noted earlier, section 73D of the *Stamp Act* subjects dispositions of units (ie. transfers, issues and redemptions) in "private unit trusts" to stamp duty at conveyance rates.

Trusts that do not meet the private unit trust criteria are subject to stamp duty at the much lower marketable securities rate.

The proposed amendments are intended to operate where a disposition of a unit in a public unit trust results in a unit trust becoming a private unit trust. This disposition is referred to as the "transitional disposition". These amendments will treat the trust as being a private unit trust for the purposes of that disposition and conveyance duty will be charged under section 73D on the transitional disposition.

The amendments also aggregate the transitional disposition with those that occurred while the trust was a public unit trust, and those that occurred after the conversion to a private unit trust, where the dispositions are taken to form substantially one disposition. These dispositions are referred to as the “aggregated dispositions”.

A dutiable statement is required to be lodged within two months after the transitional disposition, and the statement is to contain details of all the aggregated dispositions up to the transitional disposition.

If any of the aggregated dispositions occur after the transitional disposition, a statement in respect of all the aggregated dispositions is required at the time the last of the aggregated dispositions occur and a credit is given for any duty paid on the statement lodged at the time of the transitional disposition.

However, a unit trustee may elect by notifying the Commissioner, to lodge a statement solely at the time the last of the aggregated dispositions occurs.

Substituted purchasers

Amendments are proposed to extend the relief available when a purchaser is substituted in the period between entering into an agreement or contract (eg. an offer and acceptance) and the final conveyance or transfer.

Section 74 of the *Stamp Act* provides that a contract or agreement for the sale of property is to be stamped with the same duty payable on the actual conveyance or transfer. Where the subsequent transfer is in accordance with the agreement or contract, no duty is payable on the conveyance or transfer.

In circumstances where the transfer shows the original purchaser has been substituted with another person, *ad valorem* duty is payable on the transfer, except where:

- the purchaser was acting as an agent (section 74(3));
- the purchaser intended the property be transferred to a company that was being formed at the time of the contract (section 74(3a)).

These amendments seek to extend the circumstances in which relief is provided to include where the:

- substituted purchaser is a shelf company yet to be purchased;
- purchaser substitutes the members, or a custodian or trustee for the members, of a single managed investment scheme;
- substituted purchaser is related to the original purchaser.

This relief is to only apply if the substitution is effected on or before completion (settlement) of the original purchase contract and there is no profit made from the substitution.

Contingency principle

Under current arrangements, if a contract for a conveyance includes contingency provisions (ie. allowance for payment of a different amount depending on a contingent event), stamp duty is payable on the highest possible consideration, whether or not that is the ultimate consideration.

The proposed amendments provide the ability to reassess conveyance duty where a lower contingent amount is ultimately realised within five years of the execution of an instrument.

Other amendments

This Bill also includes some minor measures that are not part of the Business Tax Review. These relate to:

- clarifying that the nexus in the case of a disposition of units in a private unit trust is the location of the underlying property;
- requiring a person who becomes a party to a transaction that causes a disposition of units, that is not effected or evidenced by an instrument, to prepare and lodge a statement with the Commissioner;
- providing a mechanism for taxpayers to obtain the Commissioner's opinion on whether the land-rich provisions apply to particular acquisitions;
- providing the Commissioner with the ability to withdraw an assessment in certain circumstances; and
- the calculation of stamp duty on the issue of certain new motor vehicle licenses on the "list price" or "recommended retail price".

Further, during the drafting of the Business Tax Review Bills, a number of minor technical problems were identified in the consequential amendments made to the *Stamp Act* and the *Land Tax Assessment Act*, as a result of the recently enacted *Taxation Administration Act*. The necessary amendments to correct these problems have been incorporated into this Bill.

Part 1 – Preliminary

Clause 1: **Short title**

This clause provides that this Act may be cited as the *Business Tax Review (Assessment) Act (No. 2) 2003.*

Clause 2: **Commencement**

This clause sets out the relevant commencement provisions.

Subclause (1) specifies that the Act, other than Parts 3, 4 and 5, comes into operation on a day fixed by proclamation.

Subclause (2) specifies that different dates may be fixed under subsection (1) for different provisions.

Subclause (3) specifies that Part 3, dealing with the abolition of stamp duty on workers' compensation insurance, will commence on 1 July 2004.

Subclause (4) specifies that Part 4, dealing with the abolition of debits tax, will commence on Royal Assent. Debits tax is to be abolished from 1 July 2005, however, rather than a repeal of the Act, the amendments have been drafted in a manner that removes the tax liability for debits made to an account on or after 1 July 2005. This will allow the Act to operate after 1 July 2005, and administrative provisions such as assessments, objections and investigations to operate for debits made to accounts prior to that date.

Subclause (5) deems Part 5 to come into operation immediately after the *Taxation Administration Act 2003* comes into operation. Part 5 contains minor amendments to the *Stamp Act 1921*, *Taxation Administration Act 2003* and *Land Tax Assessment Act 2002*. These are minor amendments that were identified during the drafting process and require retrospective application to the commencement of the *Taxation Administration Act 2003* to ensure a seamless transition.

Part 2 – Stamp duty changes

Division 1 – *Stamp Act 1921* amended

Clause 3: **The Act amended**

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

<u>Clause 4</u>: **Section 4 amended**

Subclause (1) provides that the amendments in this section are to section 4(1).

Subclause (2) deletes the definition of "dutiable statement" and inserts a new definition in its place. The definition provides that a dutiable statement is a statement required to be lodged under the sections specified.

Subclause (3) amends paragraph (c) of the definition of "marketable security" to remove a redundant reference to a "subunit". This clause also inserts a reference to a unit trust scheme granted registration as a provisional public trust under section 63ADA(2). A unit in a provisional public trust is therefore treated as a marketable security for stamp duty purposes.

Subclause (4) amends the definitions of "section 76AG statement" and "section 76AN statement" to clarify that they relate to statements lodged under those sections.

Subclause (5) amends the definition of "WA company" to clarify that it relates to a company that is taken to be registered in Western Australia for the purposes of the *Corporations Act 2001* of the Commonwealth.

Subclause (6) inserts definitions of "GST" and "supply" which have been moved from repealed section 4A(4).

<u>Clause 5</u>: **Section 4A amended**

This clause amends section 4A by repealing subsections (3) and (4). Subsection (3) related to the treatment of GST and leases and subsection (4) contained definitions of "lease" and "leasing". These subsections are no longer required as a consequence of the abolition of duty on leases. The definitions of "GST" and "supply" that were contained in subsection (4) have been moved to section 4(1).

<u>Clause 6</u>: **Section 17 amended**

This clause amends section 17(1) to remove the reference to an instrument "on which duty is payable", and to replace the existing paragraph (c) with a new paragraph (c) which clarifies that the person liable to pay the duty on a dutiable statement is the person required to lodge the statement.

Clause 7: **Section 17B amended**

This clause repeals section 17B(1) and inserts a new subsection (1) to clarify that an instrument is required to be lodged within two months after the date it was executed.

Clause 8: **Section 17C amended**

This clause amends section 17C by inserting a new subsection (3a), which provides that an instrument is taken to be endorsed under subsection (1) if the Commissioner endorses the instrument under the specified subsections. This ensures the endorsed instruments are considered to be stamped.

Clause 9: **Section 27 amended**

Subclause (1) amends section 27(2) to ensure that a document containing evidence of an acquisition, transaction, disposition or transfer referred to in that subsection cannot be given or pleaded in evidence (except in criminal proceedings), unless a statement of that acquisition, transaction, disposition or transfer has been lodged with the Commissioner and the duty in respect of the statement has been paid.

Paragraph (a) amends section 27(2)(a) so that it applies to an acquisition under section 31B, a transfer under section 31C, a disposition under section 73DAA(1), or a transaction under section 77A.

Paragraph (b) amends section 27(2)(b)(i) so that it relates to an acquisition, transaction, disposition or transfer for which a dutiable statement is required to be lodged under section 31B, 31C, 73DAA(1) or 77A.

Paragraph (c) amends section 27(2) so that it relates to a dutiable statement lodged under section 31B, 31C, 73DAA(1) or 77A.

Paragraph (d) amends section 27(2) so that it relates to an acquisition, transaction, disposition or transfer.

Subclause (2) amends section 27(3) so that it applies to an instrument or document relating to an acquisition, transaction, disposition or transfer referred to in that subsection. This ensures that a person who is not liable to pay the duty on a dutiable statement is permitted to plead or tender the statement as evidence in a Court in accordance with paragraphs (a) and (b).

Paragraph (a) amends section 27(3) so that it relates to an instrument or document relating to an acquisition, transaction, disposition or transfer.

Paragraph (b) clarifies that sections 28, 29 and 30 do not apply to an instrument or a document relating to an acquisition, transaction or transfer for which a dutiable statement is required to be lodged under section 31B, 31C or 77A, and that section 28 does not apply to an instrument or a document relating to a disposition for which a dutiable statement is required to be lodged under section 73DAA(1), in the circumstances provided.

Clause 10: **Section 28 amended**

This clause amends section 28(1)(b) to prevent a person from registering or recording a document that contains evidence of an acquisition, transaction, disposition or transfer referred to in that subsection, unless a statement has been lodged with the Commissioner and the duty in respect of the statement has been paid.

Paragraph (a) amends section 28(1)(b) so that it relates to a statement lodged under section 31B, 31C, 73DAA(1) or 77A.

Paragraph (b) amends section 28(1)(b) so that it relates to an acquisition, transaction, disposition or transfer.

Clause 11: **Section 29 amended**

Subclause (1) amends section 29(1) to require the Court to take notice of a failure to lodge or pay duty on a statement required to be lodged under section 31B(1), 31C(1) or 77A, or a document containing evidence of an acquisition, transaction or transfer to which section 31B(1), 31C(1) or 77A applies.

Paragraph (a) amends section 29(1) to clarify that the reference to a document referred to in section 27(2) does not include a document relating to a disposition to which section 73DAA(1) applies.

Paragraph (b) amends section 29(1) so that it relates to a failure to comply with section 31B(1), 31C(1) or 77A(1).

Paragraph (c) amends section 29(1) so that it relates to a statement required to be lodged under section 31B, 31C or 77A.

Paragraph (d) amends section 29(1) so that it relates to an acquisition, transaction or transfer.

Subclause (2) amends section 29(2a) to allow a Court to receive in evidence a document to which section 31B, 31C or 77A relates, upon lodgement of the statement required by the relevant section and payment of the duty and any fine to the Court.

Paragraph (a) amends section 29(2a) so that it relates to an acquisition, transaction or transfer.

Paragraph (b) amends section 29(2a) so that it relates to a statement lodged under section 31B, 31C or 77A.

Paragraph (c) amends section 29(2a) so that it applies where a statement has not been lodged.

Clause 12: **Section 30 amended**

This clause amends section 30(1)(b) to allow a Court to recognise a document containing evidence of an acquisition, transaction or transfer to which section 31B, 31C or 77A relates as secondary evidence, if the statement required under the relevant section is lodged and the duty and any fine is received.

Paragraph (a) amends section 30(1)(b) to clarify that the reference to a document referred to in section 27(2) does not include a document relating to a disposition to which section 73DAA(1) applies.

Paragraph (b) amends section 30(1)(b) so that it relates to a statement lodged under section 31B, 31C or 77A.

Clause 13: **Section 31B replaced**

This clause repeals the existing section 31B and inserts a new section 31B in its place.

Section 31B(1) requires a person who acquires an interest as a result of an acquisition to which this section applies (as specified in subsection (3)), to lodge a statement with the Commissioner in respect of that acquisition. The statement is required to be lodged within two months after the acquisition. An offence penalty of $20,000 is applicable for contravention of this subsection.

Section 31B(2) requires that the dutiable statement referred to in subsection (1) be prepared in an approved form.

Section 31B(3) specifies the acquisitions to which this section applies. However, this section is subject to subsection (8), which provides that there are certain acquisitions and transactions to which this section does not apply.

Paragraph (a) provides that this section applies to an acquisition of the beneficial ownership of an estate or interest in freehold land, a Crown lease or a mining tenement. It also extends to any buildings on, fixtures annexed to, or fixtures annexed to buildings on, any such land, lease or mining tenement situated in Western Australia.

Paragraph (b) provides that this section applies to an acquisition of the beneficial ownership of chattels and other property. Section 70 defines "chattels" as goods, wares or merchandise (other than exempt chattels) and "other property" as property other than goods, wares or merchandise.

Paragraph (c) provides that this section applies to an acquisition of the beneficial ownership of chattels, if those chattels are acquired as part of a series of acquisitions or transactions relating to chattels and other property. However, at least one of the acquisitions or transactions in the series must change, or include an agreement to change, the beneficial ownership of the other property.

Paragraph (d) provides that this section applies to the acquisition of a business asset to which section 74C applies. Section 74C sets out the assets of a business that constitute business assets (including goodwill and intellectual property) and the circumstances in which that section applies.

<u>Section 31B(4)</u> applies where there is a merger of a corporation ("company A") with and into another corporation ("company B"). In these circumstances, this subsection provides that the merger effects an acquisition by company B of the beneficial ownership of company A's property, and this section is taken to apply to that acquisition. However, this subsection does not apply where subsections (5) or (6), which relate to alternative forms of mergers, apply.

<u>Section 31B(5)</u> applies where there is a merger of corporations (referred to as "the merging corporations") which results in a new corporation ("company C") emerging. In these circumstances, this subsection provides that the merger effects an acquisition by company C of the beneficial ownership of all of the property of the merging corporations, and this section is taken to apply to that acquisition.

Section 31B(6) applies where there is a merger of corporations (referred to as "the merging corporations") with and into each other. The merging corporations continue to exist following the merger, however, they exist in a merged structure. For example, where the merging corporations are company A and company B, the company that results is a merged entity that consists of both company A and company B. In these circumstances, this subsection provides that the merger effects an acquisition of the beneficial ownership of 50% of the value of the property of the merging corporations, for which the merging corporations are jointly liable. This section is taken to apply to that acquisition.

Section 31B(7) applies where the transaction is one relating to a business licence to which section 73F applies and the business licence is prescribed in the Stamp Regulations for the purposes of this paragraph. Section 73F sets out the definition of a business licence and the types of transactions to which it applies. Such a transaction is taken to be an acquisition to which this section applies and a statement is required to be lodged in respect of the transaction in accordance with section 31B(1).

Section 31B(8) specifies the acquisitions and transactions to which this section does not apply. These are set out in paragraphs (a) to (f). It was necessary in these paragraphs to distinguish between "effecting" an acquisition and "evidencing" an acquisition. An acquisition is considered to be "effected" by an instrument if it actually causes the acquisition to occur, whereas an acquisition is considered to be "evidenced" by an instrument if the acquisition had occurred previously and the instrument is merely evidence of it having occurred.

Paragraph (a) provides that this section does not apply to an acquisition that is effected by an instrument that is chargeable with duty under item 4 or item 6 of the Second Schedule, or is exempt from duty.

The effect of this paragraph is that this section does not apply where an instrument has been created to effect a transfer of property (such as an offer and acceptance for a parcel of land) that would be chargeable with conveyance duty under item 4. Further, this section would not apply where an instrument has been created to effect a transfer of property that would be chargeable with nominal duty under item 6 (such as a transfer pursuant to a trust deed) or would be exempt under the Third Schedule (such as the transfer of a boat).

Paragraph (b) provides that this section does not apply to an acquisition that is evidenced by an instrument that is chargeable with duty under item 4 of the Second Schedule. The effect of this paragraph is that this section would not apply where an instrument evidences a transfer of property (such as a transfer of land document) that would be chargeable with conveyance duty under item 4.

Paragraph (c) provides that this section does not apply to an acquisition that is evidenced by an instrument that, if that instrument effected the acquisition, would be exempt from duty or chargeable with nominal duty under item 6 of the Second Schedule. It is irrelevant whether it is practicable or possible to effect such an acquisition by that instrument.

This paragraph is required to ensure that section 31B will apply in respect of transactions whereby ownership of land is transferred by a method, such as through the operation of law, which provides for a change in ownership without a transfer, instrument or conveyance being created. The subsequent transfer lodged to evidence the change in ownership is subject to nominal duty as there is no change in beneficial ownership at the time the transfer is executed, as the beneficial ownership has already changed at the earlier undocumented stage

The effect of this paragraph is that section 31B would apply to such acquisitions as the transfer document would not be exempt or chargeable with nominal duty if it effected the transfer – it would be chargeable with conveyance duty under item 4. The reference to it being irrelevant whether it is “practicable or possible” to effect the acquisition by such an instrument is necessary as some acquisitions may be incapable of being effected by an instrument, such as an acquisition by virtue of the operation of law. In these circumstances, even though it may not be possible to make a notional instrument of conveyance, this paragraph would still apply.

Paragraph (d) provides that this section does not apply to an acquisition that is not effected by an instrument, but if it were, that instrument would be exempt from duty or chargeable with nominal duty under item 6 of the Second Schedule. It is irrelevant whether it is practicable or possible to effect such an acquisition by an instrument. The effect of this paragraph is that this section does not apply to an undocumented transfer of property, which if there were a document effecting the transfer, it would be exempt or chargeable with nominal duty.

Paragraph (e) provides that this section does not apply to an acquisition that relates to chattels and other property under subsection (3)(b) unless this section would have applied to the acquisition if it had only related to the other property. The effect of this subsection is that where an acquisition involves chattels and other property, this section will only apply if that other property would be subject to these provisions had the other property been acquired on its own and not in conjunction with the chattels.

Paragraph (f) provides that this section does not apply to an acquisition that is part of a series of acquisitions or transactions that relate to chattels and other property under subsection (3)(c), unless one of the transactions involves other property and would be dutiable under one of the heads of duty referred to in section 70, or would be a transaction to which this section would apply.

Section 31B(9) provides that a statement lodged in respect of an acquisition to which this section applies is taken to be an instrument of conveyance of property and is chargeable with duty accordingly. It is necessary to deem the statement to be an instrument to ensure stamp duty can be properly imposed.

Section 31B(10) requires the person from whom an acquisition has been made (eg. the vendor) to notify the Commissioner of the acquisition within two months after the acquisition has been made. The notification must be in an approved form. An offence penalty of $20,000 applies for contravention of this subsection.

Section 31B(11) applies where there are two or more parties that are required to notify the Commissioner of an acquisition under subsection (10). This subsection allows the parties to jointly notify the Commissioner.

Section 31B(12) provides that the requirement to lodge a dutiable statement or notify the Commissioner of an acquisition ceases if an instrument that is chargeable with *ad valorem* duty is executed after the acquisition was made. However, if an offence is committed prior to the execution of the instrument because a person has failed to lodge a statement under subsection (1) or give notification to the Commissioner under subsection (10), the person is still liable for the offence.

Section 31B(13) applies where an instrument that is chargeable with *ad valorem* duty is executed after the acquisition was made, as referred to in subsection (12). That instrument is to be treated as having been first executed on the day on which the acquisition was made for the purposes of section 17A. The effect of this subsection is that the liability to pay duty on the instrument arises on the day the acquisition was made, and any late lodgement penalty would remain payable.

Section 31B(14) applies where an instrument that is chargeable with *ad valorem* duty as referred to in subsection (12), is executed after a dutiable statement has been lodged in respect of the acquisition. The dutiable statement will cease to be treated as an instrument of conveyance of property for the purposes of subsection (9) and therefore will no longer be chargeable with duty, if duty has not already been paid in relation to the statement. This prevents duty being payable on both the statement and the subsequent instrument.

Section 31B(15) applies where duty has already been paid in relation to the statement as referred to in subsection (14). In these circumstances, the subsequent instrument will not be chargeable with *ad valorem* duty. However, the Commissioner is required to endorse on the instrument that duty has been paid if he is requested to do so. This prevents duty being payable on both the statement and the subsequent instrument.

Clause 14: **Section 31C amended**

This clause amends section 31C which relates to transfers of assets under the *Financial Sector (Transfers of Business) Act 1999* of the Commonwealth.

Subclause (1) amends section 31C(1) to clarify that a dutiable statement in respect of a transfer of assets under the *Financial Sector (Transfers of Business) Act 1999* is required to be lodged within two months after the transfer takes place.

Subclause (2) amends section 31C(2) to clarify that a dutiable statement must be prepared in an approved form.

Subclause (3) amends subsection 31C(2a) to clarify that a dutiable statement lodged under subsection 31C(1) is taken to be an instrument which transfers the assets that is chargeable with duty accordingly.

Clause 15: **Sections 39 and 40 inserted**

This clause inserts new sections 39 and 40, which have been relocated from sections 102 and 106 of the *Stamp Act*.

Section 39 (Determining whether securities are situated in Western Australia) sets out the nexus arrangements applying to marketable securities or rights in respect of shares. Despite the abolition of stamp duty on marketable securities or rights in respect of shares, these provisions are still necessary for ancillary purposes, such as determining the nexus of marketable securities for the purposes of a mortgage where marketable securities are used to secure the mortgage.

Section 39(1) provides that for the purposes of a stamp Act (as defined in section 4), a marketable security or right in respect of shares of a WA company (as defined in section 4 of the Act) is situated in Western Australia. This provision applies for the purposes of the Act, regardless of:

- where the register on which the security is kept is situated;
- section 1070A(4) of the Corporations Act; or
- any other law.

Section 39(2) provides that for the purposes of a stamp Act, a security of a foreign company (as defined in section 4 by reference to section 9 of the Corporations Act) is situated in Western Australia if it is registered on a register kept by the company in Western Australia.

Section 9 of the Corporations Act defines "foreign company" as:

"(a) a body corporate that is incorporated in an external Territory, or outside Australia and the external Territories, and is not:

(i) a corporation sole; or

(ii) an exempt public authority; or

(b) an unincorporated body that:

(i) is formed in an external Territory or outside Australia and the external Territories; and

(ii) under the law of its place of formation, may sue or be sued, or may hold property in the name of its secretary or of an officer of the body duly appointed for that purpose; and

(iii) does not have its head office or principal place of business in Australia."

Section 39(3) provides that for the purposes of a stamp Act, a unit in a unit trust scheme is situated in Western Australia if:

- the scheme's principal register is kept in Western Australia; or
- where that is not the case, the scheme's manager, or if the scheme does not have a manager, the trustee, is:
    - an individual resident in Western Australia;
    - a WA company;
    - a foreign company with a registered office under the Corporations Act in Western Australia.

Section 39(4) provides that where a security of a company is taken to be incorporated in a State or Territory other than Western Australia, it is not situated in Western Australia even if it is registered here. This provision ensures that double duty does not arise for those securities that have a common law nexus (ie. place of register) to Western Australia.

Section 39(5) provides that section 39(1) is a displacement provision for the purposes of section 5G of the Corporations Act in relation to section 1070A(4) of that Act.

Section 5G of the Corporations Act provides the ability for the State to specifically authorise the non-application of the Corporations Act in particular circumstances.

Item 3 in the table in subsection 5G(3) of the Corporations Act provides that the State provision must meet the following requirement:

> "the State provision is declared by a law of the State or Territory to be a Corporations legislation displacement provision for the purposes of this section (either generally or specifically in relation to the Commonwealth provision)".

Section 40 (Valuing a marketable security or right in respect of shares) provides power relevant to determining the value of a marketable security or right in respect of shares. It replaces repealed section 106. Like new section 39, this power is also needed for ancillary purposes under the *Stamp Act*.

Section 40(1) provides that the value of an unlisted WA security is to be determined –

(a) as if the constitution or governing rules of the issuer satisfied any requirements of the Australian Stock Exchange Limited that are required in order for the security to be quoted on the Australian Stock Exchange Limited. This requirement will generally ensure that all securities in particular classes have similar rights attached to them; and

(b) by disregarding provisions in the constitution or governing rules of the issuer that determine how that security it to be valued.

Section 40(2) provides the Commissioner with a valuation power that allows the value of the security to be determined as the amount the Commissioner considers the holder of the security would have received if the issuer were voluntarily wound up on the date of the transfer.

Clause 16: **Part IIIA (s. 49-50D) repealed and transitional**

Subclause (1) repeals Part IIIA of the *Stamp Act* to abolish stamp duty on cheques.

Subclause (2) provides that, despite the abolition of duty payable on cheques, duty is still payable on blank cheques provided by a financial institution to the holder of a cheque account before this section came into operation, regardless of when the cheque is drawn. This provision ensures that duty remains payable on all cheques where duty is paid at the time of issue of a cheque book to a customer by a financial institution.

Clause 17: **Section 63 amended**

This clause amends section 63, which contains the interpretation provisions applicable to Part IIIB – Conveyances and transfers.

Subclause (1) amends the definitions contained in section 63(1).

Paragraph (a) inserts definitions of “custodian trustee”, “disposition”, “provisional public trust”, “start up period”, “transfer” and “unit”.

The definition of “custodian trustee” is based on section 15 of the *Trustees Act 1962*, which outlines the meaning of a custodian trustee for the purposes of that Act. A custodian trustee effectively holds the trust property on behalf of the unit holders, but does not have any rights in relation to the trust property and is not able to deal in the trust property.

The definition of “disposition” has been removed from section 73D and inserted into section 63(1) so that it applies more broadly to the entire Part.

A “provisional public trust” is a private unit trust that has been granted registration under section 63ADA as it is intended that the trust will not be a private unit trust scheme by the end of the start up period.

The meaning of “start up period” differs according to the type of trust for which the period is being determined.

Paragraph (a) provides that in relation to a unit trust other than a provisional public trust referred to in paragraph (b), the start up period is a period of one year beginning on the day on which the first units under the trust were issued. This period would apply, for example, in relation to a trust that is required to apply for interim registration as a pooled investment trust before the end of the start up period. It would also apply to a provisional public trust for which a prospectus or information memorandum has not, and will not be, lodged with the Australian Securities and Investments Commission (ASIC).

Paragraph (b) provides that in relation to a provisional public trust for which a prospectus or an information memorandum has been, or will be, lodged with ASIC, the start up period is either the period referred to in subparagraph (i) or the period referred to in subparagraph (ii).

Subparagraph (i) provides that the start up period is a period of one year beginning on the day on which the first units under the trust are issued. This subparagraph is intended to apply to a newly created trust and gives the trust a period of one year in which to issue units to unit holders so that it is not a private unit trust scheme.

Subparagraph (ii) provides that the start up period is a period of one year beginning on the day on which the trust's prospectus or information memorandum is lodged with ASIC. This subparagraph is intended to apply to an existing trust that, for example, is seeking to raise additional capital through public subscriptions. This subparagraph links the start up period to the day on which it can be identified that there is an intention to become a public unit trust.

Where both the periods referred to in subparagraphs (i) and (ii) apply in relation to a provisional public trust, the start up period is taken to be the period which is the later to expire. This may arise, for example, in relation to a newly created trust. The first units in the trust may be issued to particular unit holders on 1 January 2004. However, to enable subscriptions to be offered to the public, a prospectus is required to be lodged with ASIC. This is lodged on 1 March 2004. In this case, the start up period would be the period of one year beginning on 1 March 2004.

The definition of "transfer" has been removed from section 73D and inserted into section 63(1) so that it applies more broadly to the entire Part.

The definition of "unit" has been removed from section 73D and inserted into section 63(1) so that it applies more broadly to the entire Part. The definition has also been amended to remove the redundant reference to a "subunit".

Paragraph (b) amends the definition of "trustee" to clarify that the definition applies "unless the contrary intention appears". This is necessary as "trustee" has been defined to have a particular meaning for the purposes of the related party provisions of section 63(5).

Paragraph (c) amends the definition of "unit trust scheme" to clarify that the definition applies "unless the contrary intention appears". This is necessary as certain unit trust schemes, such as pooled investment trusts, are not considered to be private unit trusts for the purposes of this Part.

Subclause (2) inserts a new section 63(1aa) which outlines the circumstances under which the Commissioner would treat two or more parcels of land as a single parcel of land for the purposes of section 63AA(2a)(a) and 63AB(2)(g). Sections 63AA(2a)(a) and 63AB(2)(g) set out criteria which relate to the number of parcels of land a trust must hold to be considered a sub-trust or a pooled investment trust. For the purposes of determining whether these criteria have been met, the Commissioner may treat two or more parcels of land as a single parcel if he is satisfied it is appropriate to do so. The factors the Commissioner would have regard to in making such a determination would include:

(a) the ownership of the parcels of land;

(b) the proximity of the parcels of land;

(c) the use of the parcels of land (including the use of any improvements on the land); and

(d) any other matter the Commissioner considers relevant.

For example, in the case of a shopping centre complex that is built over three parcels of land that are adjacent and have the same owner, the Commissioner would treat the parcels as a single parcel of land. Similarly, if a shopping centre complex is built over three parcels of land that are not adjacent as they are separated by a local council carpark, the Commissioner would also treat the parcels as a single parcel of land.

Subclause (3) repeals section 63(1a) and (1b) as these provisions contained references to the definitions of “disposition” and “unit” in section 73D. However, these definitions have been relocated to section 63(1) to apply more broadly to the entire Part.

Subclause (4) amends section 63(2) to remove the redundant reference to a “subunit”.

Subclause (5) repeals section 63(4) and inserts new subsections (4), (5), (6) and (7).

<u>Section 63(4)</u> clarifies the treatment of partnerships for the purposes of determining whether an insufficient number of persons is beneficially entitled to the units in a unit trust scheme, such that it is a private unit trust under sections 63(2)(a) and 63(2)(b)(ii).

Paragraph (a) applies where a partnership holds units in a unit trust scheme. Each partner in the partnership will be treated as being beneficially entitled to the same proportion of the units in the unit trust scheme as the proportion of the partnership assets they would be entitled to upon dissolution of the partnership.

For example, A, B, C and D each have a 25% interest in a partnership, which in turn holds 100 units in a unit trust scheme. This paragraph operates such that A, B, C and D will each be taken to be beneficially entitled to 25 units in the unit trust scheme.

Paragraph (b) provides that a person will be treated as beneficially entitled to all the units held by that person, as well as all the units held by a related person, as defined in subsection (5).

Section 63(5) specifies the nature of persons that are considered to be related for the purposes of subsection (4). It includes relationships between individuals, corporations and trustees, as well as relationships between individuals and corporations, individuals and trustees and corporations and trustees. These provisions have been based broadly on those that were located in section 63AB(4), (5), (6) and (7). However, those subsections have been repealed and the related party provisions relocated to section 63 so that they apply more broadly to the entire Part.

Section 63(6) provides further clarification as to the nature of persons who fall within subsection (5). It also provides definitions of a "majority shareholder" and a "trustee" for the purposes of the related party provisions in subsection (5).

Section 63(7) provides that for the purposes of the related party provisions in subsection (5), a person's share or interest on a distribution of a trust shall be the greatest proportion able to be derived by the operation of all powers, conditions or contingencies, with the Commissioner having the right to quantify such entitlement if he so determines.

Clause 18: **Section 63AA amended**

This clause amends section 63AA, which relates to registration of a unit trust scheme as a pooled investment trust or an equity trust.

Subclause (1) repeals the existing section 63(1) and inserts new subsections (1), (1a), (1b) and (1c).

Section 63(1) inserts definitions of "land" and "scheme land" for the purposes of this section.

The definition of "land" is based on the definition in section 76 and includes "any estate or interest in land".

The definition of "scheme land" means land held by a unit trustee in its capacity as trustee of a unit trust scheme. As the definition of "land" includes any interest in land, "scheme land" includes any land in which the unit trustee has a beneficial interest. It would, for example, include land that is held through a chain of unit trusts.

Section 63(1a) allows a unit trustee to apply to the Commissioner in an approved form for registration of a unit trust scheme as a pooled investment trust or an equity trust. Both "unit trustee" and "unit trust scheme" are defined terms in section 63(1).

Section 63(1b) clarifies that an application can still be made regardless of whether the unit trust scheme has previously been registered as a pooled investment trust or an equity trust.

Section 63(1c) requires that an application for registration as a pooled investment trust be accompanied by a statement in respect of the unencumbered value of the trustee's interest in land, as referred to in section 63AB(2)(f) and section 63AB(2)(g)(i), if it applies.

Subclause (2) amends section 63AA(2), which outlines the requirements that must be met for the Commissioner to register a unit trust scheme as either a pooled investment trust or an equity trust.

Paragraph (a) removes the reference to "the Commissioner is satisfied that" as it is not relevant to all of the matters referred to in the subparagraphs of subsection (2).

Paragraph (b) inserts the words "the Commissioner is satisfied that" at the beginning of paragraph (a) so that the Commissioner must be satisfied as to the matter referred to in that paragraph.

Paragraph (c) inserts a new subsection (ab) that applies to an application for registration of a unit trust scheme as a pooled investment trust. It requires that the unit trust scheme is not to be treated as a sub-trust, as defined in subsection (2a).

Paragraph (d) inserts the words "the Commissioner is satisfied that" at the beginning of paragraph (b) so that the Commissioner must be satisfied as to the matter referred to in that paragraph.

Subclause (3) inserts a new section 63AA(2a), which defines a "sub-trust" for the purposes of section 63AA(2)(ab), which relates to the requirements that must be met for the Commissioner to register a unit trust scheme as a pooled investment trust.

Section 63AA(2a) describes the factors that the Commissioner may consider for the purposes of determining whether a trust is a sub-trust. A sub-trust is a unit trust scheme that is being utilised by managed funds as a single purpose vehicle to hold and control interests in property. It is used as an alternative to holding the property interests directly. The Commissioner shall treat a trust as a sub-trust if any of the following factors are present, unless he is satisfied that it is not reasonable to do so based on the circumstances of the case.

(a) A trust will be treated as a sub-trust if the unit trustee holds only one parcel of land. This is necessary as research suggests that sub-trusts generally hold only one property and have a small number of unit holders, which facilitates future sales of the property via a disposition of units, rather than a direct sale.

(b) A trust will be treated as a sub-trust if a unit holder in the sub-trust was involved either directly or indirectly in the acquisition of the scheme land. This is intended to cover, for example, circumstances where a unit holder is involved in the negotiations to purchase or sell the trust property. This is not intended to include participation as the vendor in a transaction, nor would it include the provision of subscriptions to the funds manager to fund the acquisition of the property.

(c) A trust will be treated as a sub-trust if a unit holder in the sub-trust states in financial reports or other documents that are provided to its members, that the unit holder has an interest in the scheme land. This is necessary as research suggests that typically unit holders state that they hold an interest in the scheme land directly, rather than holding an interest in a unit trust that holds scheme land.

(d) A trust will be treated as a sub-trust if a unit holder in the sub-trust owns an interest in another parcel of land otherwise than as a unit holder in a unit trust scheme. This is necessary as research suggests that sub-trusts are used as an alternative to holding interests in land directly because of the stamp duty benefits in doing so. If a person has an interest in a parcel of land which is held directly, and an interest in another parcel of land held by a unit trust in which the person holds units, this may indicate that the unit trust is a sub-trust that is being used as a vehicle to hold the interest in land, rather than the interest in land being held directly.

(e) A trust will be treated as a sub-trust if a unit holder in the scheme makes an offer to the public for subscriptions in the unit trust and the principal basis of that offer is that an interest in the scheme land will be obtained, rather than units in a unit trust that holds land.

Subclause (4) inserts a new section 63AA(3a), which provides that the registration of a unit trust scheme as either a pooled investment trust or an equity trust is effective for a period of three years. This means that registration will cease at the expiration of the three year period and the unit trustee will be required to re-apply.

Subclause (5) inserts a new subsection (4a), which allows the Commissioner to make any reassessment necessary, within the time period set out in section 17 of the *Taxation Administration Act*, to give effect to the registration of a pooled investment trust or an equity trust. This may be necessary where duty has already been paid in relation to a disposition of units in a unit trust prior to it being granted registration.

Clause 19: Section 63AB amended

This clause amends section 63AB, which sets out the criteria for registration as a pooled investment trust or an equity trust.

Subclause (1) amends section 63AB by repealing subsection (2) and inserting new subsections (1a), (2), (2a) and (2b).

Section 63AB(1a) provides that section 63(5) applies to determine whether persons are related for the purposes of this section.

Section 63AB(2) sets out the criteria that a unit trust scheme must meet to be eligible for registration as a pooled investment trust. The unit trust scheme is required to meet all of the criteria specified in paragraphs (a) to (h).

Paragraph (a) requires that the scheme is established and managed by a funds manager. A “funds manager” is defined in subsection (2a). The scheme must also be established and managed solely or principally for the investment and management of subscriptions by unit holders that are of the particular kind referred to in paragraph (c). Further, the scheme cannot be established or managed for a particular person.

Paragraph (b) requires that the unit trust scheme must have at least two unit holders who are not related to each other.

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

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

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

Subparagraph (iii) provides that the unit holder may hold the unit in its capacity as a trustee or manager of a fund that is part of a public sector superannuation scheme.

Subparagraph (iv) provides that the unit holder may be a life company that holds the unit solely for the purpose of investing its statutory funds.

Subparagraph (v) provides that the unit holder may hold the unit in its capacity as a trustee of a unit trust that is not a unit trust scheme (ie. it is not a private unit trust).

Subparagraph (vi) provides that the unit holder may hold the unit in its capacity as a trustee of a master trust, which is described as a trust by means of which the public may invest in managed funds.

Subparagraph (vii) provides that the unit holder may hold the unit in its capacity as a trustee of a registered pooled investment trust.

Subparagraph (viii) provides that the unit holder may hold the unit in its capacity as a trustee of a unit trust scheme, if that unit trust scheme only has unit holders that are of the type referred to in the other subparagraphs of this paragraph.

Subparagraph (ix) provides that the unit holder may hold the unit in its capacity as a trustee or manager of a trust or fund referred to in subparagraphs (i), (ii), (iii), (v) or (vi) under the law of an external Territory or a country other than Australia. An ”external Territory” is defined in the *Acts Interpretation Act 1901* of the Commonwealth to be a Territory other than an internal Territory (ie. other than the Australian Capital Territory, the Jervis Bay Territory or the Northern Territory) for the government of which as a Territory, provision is made by any Act.

Subparagraph (x) provides that a unit holder may be a body corporate that the Commissioner is satisfied corresponds to a life company (as referred to in subparagraph (iv)) under an external Territory or country other than Australia. The Commissioner must also be satisfied that the body corporate is holding the unit for the purpose of investing its statutory funds (as referred to in subparagraph (iv)).

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

Subparagraph (xii) provides that the unit holder may be a person, or a class of persons, the Commissioner is satisfied is prescribed as unit holders for the purposes of this paragraph. There are currently no prescriptions for the purposes of this paragraph.

Paragraph (d) provides that where the unit trust scheme has more than one unit holder that is of a type referred to in paragraph (c)(xi) (ie. is a unit holder not within the other subparagraphs of paragraph (c) that does not hold more than 5% of the units), unit holders of that type cannot hold more than 10% of the total issued units under the scheme.

Paragraph (e) requires that the subscription of at least two unit holders in the unit trust scheme is $3 million or more. Further, the two unit holders must not be related.

Paragraph (f) relates to the value of the land held by the trustee in its capacity as trustee of the unit trust scheme. It includes land held directly or indirectly (such as through another unit trust scheme), and also includes land situated in Western Australia or outside Western Australia. The paragraph requires that the total value of the interests in land held by the unit trustee is at least $50 million.

Paragraph (g) requires that either subparagraph (i) or subparagraph (ii) is met.

Subparagraph (i) requires that the interests in land consist of at least three parcels (the term “parcels” is explained in section 63(1aa)) and at least two of those parcels have a value of not less than $10 million.

Subparagraph (ii) requires that if subparagraph (i) does not apply, that the unit trust scheme has at least six unit holders who are not related to each other that each have a subscription under the scheme of not less than $3 million.

Paragraph (h) requires that the initial offers for subscriptions under the scheme were made to investors to whom an offer of securities does not need disclosure under section 708(8) or (11) of the *Corporations Act 2001*. This section relates to “sophisticated” or “professional” investors.

<u>Section 63AB(2a)</u> inserts a definition of “funds manager” for the purposes of subsection (2)(a), which is the criterion which relates to the establishment and management of the trust, and sections 63AC(2a) and 63AD(1)(d), which relate to the start up period for a body corporate to become a funds manager.

Paragraph (a) provides that a “funds manager” is a body corporate that provides funds management and investment services as its principal business. These services must be provided to investors of the kind referred to in subsection (2)(c). Further, subparagraph (i) provides that these services cannot be provided only to particular investors and subparagraph (ii) provides that the body corporate must manage funds in excess of $500 million.

Paragraph (b) provides that a “funds manager” is a body corporate that is a member of a corporate group that provides funds management and investment services as its principal business. These services must be provided to investors of the kind referred to in subsection (2)(c). Further, subparagraph (i) provides that these services cannot be provided only to particular investors and subparagraph (ii) provides that the body corporate or the group must manage funds in excess of $500 million.

Section 63AB(2b) clarifies that for the purposes of determining whether a unit holder falls within one of the categories referred to in subsection (2)(c), a custodian trustee (as defined in section 63(1)) will be disregarded and the person for whom the custodian is holding the unit will be considered to be the unit holder. This is necessary to ensure that where, for example, a custodian is holding units in a unit trust scheme on behalf of a complying superannuation fund, the unit trust scheme will still qualify for registration. This is in recognition of the fact that a custodian merely holds the trust property on behalf of the unit holders, but does not have any rights in relation to the trust property and is not able to deal in the trust property.

Subclause (2) amends section 63AB(4) by removing the reference to subsections (2)(b) and (c) which have been repealed, and removing the explanation of persons that are considered to be beneficially entitled to units, as this has been moved to section 63(1) as part of the related party provisions.

Subclause (3) repeals subsections (5), (6) and (7) which have been moved to section 63, and subsection (8) which has been moved to section 63AA.

Clause 20: **Section 63AC amended**

This clause amends section 63AC, which relates to the interim registration of a pooled investment trust or an equity trust. This allows newly created trusts that do not satisfy the criteria for registration as a pooled investment trust or an equity trust at the time of their creation, a period of 12 months (the "start up period") within which to satisfy the criteria.

Subclause (1) amends section 63AC(1), which sets out the time period in which the unit trustee must apply for interim registration. The subsection has been amended to make reference to the "start up period", which has been defined in section 63(1). The time period has not changed, it has merely been clarified by referring to the defined term.

Subclause (2) amends section 63AC(2), which allows the Commissioner to register the unit trust scheme for the start up period if certain conditions are met.

Paragraph (a) amends the subsection to make reference to the "start up period", which has been defined in section 63(1). The time period for registration has not changed, it has merely been clarified by referring to the defined term.

Paragraph (b) amends the subsection to delete paragraph (a) and insert new paragraphs (a) and (ab), which are criteria that must be satisfied at the commencement of the start up period for the Commissioner to grant a unit trust scheme interim registration as a pooled investment trust or equity trust.

The new paragraph (a) requires a unit trust scheme applying for interim registration as a pooled investment trust to satisfy the criteria in relation to:

(a) the establishment and management of the unit trust scheme as referred to in section 63AB(2)(a);

(b) the types of unit holders in the unit trust scheme as referred to in section 63AB(2)(c) (other than subparagraph (xi) which restricts other unit holdings by other persons to not more than 5%); and

(c) the offer of initial subscriptions to certain types of investors as referred to in section 63AB(2)(h).

This paragraph is subject to subsection (2a), which relates to the start up period of a funds manager.

A unit trust scheme applying for interim registration as an equity trust must satisfy the criterion in relation to the assets held by the trust as referred to in section 63AB(3)(a).

The new paragraph (ab) requires that a unit trust scheme applying for interim registration as a pooled investment trust is not a trust that is treated as a sub-trust under the definition in section 63AA(2a).

Paragraph (c) amends paragraph (b), which sets out the criteria which the unit trustee must undertake to satisfy at the end of the start up period for the Commissioner to grant a unit trust scheme interim registration as a pooled investment trust or an equity trust. This amendment requires a unit trust scheme applying for interim registration as a pooled investment trust to satisfy the criteria in relation to:

(a) the number of unit holders in the unit trust scheme as referred to in section 63AB(2)(b);

(b) the types of unit holders in the unit trust scheme as referred to in section 63AB(2)(c) (including subparagraph (xi) which restricts unit holdings by other persons to not more than 5%);

(c) the restriction on unit holders of the type described in section 63AB(2)(c)(xi) to not more than 10% as referred to in section 63AB(2)(d);

(d) the value of the subscriptions of the unit holders as referred to in section 63AB(2)(e);

(e) the property interests held by the unit trustee as referred to in section 63AB(2)(f); and

(f) either the property interests or the number of unit holders referred to in section 63AB(2)(g).

Subclause (3) inserts a new section 63AC(2a), which relates to the start up period of a funds manager. It allows a unit trust scheme to be granted interim registration as a pooled investment trust even if the trust does not meet the criterion referred to in section 63AB(2)(a), related to the establishment and management of the trust by a body corporate, because the body corporate does not fall within the definition of a "funds manager" in section 63AB(2a) at the commencement of the start up period. In this regard, the Commissioner must be satisfied that the trust otherwise meets the criterion referred to in section 63AB(2)(a) and that the body corporate will meet the definition of a "funds manager" by the end of the start up period.

Subclause (4) inserts a new subsection (3a), which allows the Commissioner to make any reassessment necessary, within the time period set out in section 17 of the *Taxation Administration Act*, to give effect to the interim registration of a pooled investment trust or an equity trust. This may be necessary where duty has already been paid in relation to a disposition of units in a unit trust prior to it being granted interim registration.

Clause 21: **Section 63AD amended**

This clause amends section 63AD, which relates to the cancellation of the registration or interim registration of a pooled investment trust or an equity trust.

Subclause (1) repeals section 63AD(1) and inserts a new subsection (1), which outlines when the occurrence of an event constitutes a disqualifying event that results in the cancellation of the trust's registration or interim registration.

Section 63AD(1) provides that a disqualifying event occurs in the circumstances outlined in paragraphs (a) to (d).

Paragraph (a) provides that a disqualifying event occurs if a unit trust scheme that has been granted registration as a pooled investment trust or equity trust ceases to comply with any of the criteria applicable to it referred to in section 63AB(2) or (3).

Paragraph (b) provides that a disqualifying event occurs if a unit trust scheme that has been granted interim registration as a pooled investment trust ceases to comply with the following criteria during the start up period:

(a) the establishment and management of the unit trust scheme as referred to in section 63AB(2)(a);

(b) the types of unit holders in the unit trust scheme as referred to in section 63AB(2)(c) (other than subparagraph (xi) which restricts unit holdings by other persons to not more than 5%); and

(c) the offer of initial subscriptions to certain types of investors as referred to in section 63AB(2)(h).

Further, a disqualifying event occurs if a unit trust scheme that has been granted interim registration as an equity trust ceases to comply with the criterion in relation to the assets held by the trust as referred to in section 63AB(3)(a).

Paragraph (c) provides that a disqualifying event occurs if a unit trust scheme that has been granted interim registration as a pooled investment trust does not comply with the following criteria applicable to it at the end of the start up period:

(a) the number of unit holders in the unit trust scheme as referred to in section 63AB(2)(b);

(b) the types of unit holders in the unit trust scheme as referred to in section 63AB(2)(c) (including subparagraph (xi) which restricts other unit holdings by other persons to not more than 5%);

(c) the restriction on unit holders of the type described in section 63AB(2)(c)(xi) to not more than 10% as referred to in section 63AC(2)(d);

(d) the value of the subscriptions of the unit holders as referred to in section 63AC(2)(e);

(e) the property interests held by the unit trustee as referred to in section 63AC(2)(f); or

(f) either the property interests or the number of unit holders referred to in section 63AB(2)(g).

Further, a disqualifying event occurs if a unit trust scheme that has been granted interim registration as an equity trust does not comply with the following criteria applicable to it at the end of the start up period:

(a) the number of unit holders in the unit trust scheme as referred to in section 63AB(3)(b); or

(b) the percentage entitlement of the unit holders in the unit trust scheme as referred to in section 63AB(3)(c).

Paragraph (d) provides that a disqualifying event occurs if the body corporate that established and managed the unit trust scheme that has been granted interim registration as a pooled investment trust as a result of section 63AC(2a) (which allows the body corporate 12 months to become a funds manager) is not a funds manager at the end of the start up period.

Subclause (2) amends section 63AD(2) to clarify that the trustee is not required to notify the Commissioner of a disqualifying event if subsection (4) or (6) applies. These subsections relate to a determination by the Commissioner that a disqualifying event has occurred without notification from the unit trustee.

Subclause (3) amends section 63AD(3)(b), which sets out the time from which cancellation of the interim registration of a pooled investment trust or equity trust is taken to have had effect. It replaces the words “first units under the scheme were issued” with a reference to the “start up period”. A definition of the “start up period” has been inserted in section 63(1). This amendment does not change the operation of the provision, rather it clarifies the point in time to which the paragraph refers.

Subclause (4) amends section 63AD(4), which relates to the occurrence of a disqualifying event in circumstances where the Commissioner has not been notified, but is satisfied that one has occurred.

Paragraph (a) clarifies that where the Commissioner has not been notified of a disqualifying event but is satisfied that one has occurred, a disqualifying event is taken to have occurred. This is necessary to ensure that the requirement to lodge a statement about the disqualifying event under section 63AE is applicable.

Paragraph (b) deletes paragraph (c) and inserts a new paragraph (c), which requires the Commissioner to notify the unit trustee of the cancellation of a unit trust's registration where the Commissioner has not been notified of the occurrence of a disqualifying event, but is satisfied that one has occurred. The Commissioner is required to notify the unit trustee "from when" the cancellation takes effect, the reasons for the cancellation, and when the Commissioner is satisfied that the disqualifying event occurred.

The reference to "from when" replaces a reference to "the date on which" the cancellation takes effect under the previous paragraph (c). This amendment was considered necessary as "the date on which" may imply that the Commissioner is required to provide a specific date as to when the cancellation takes effect. Section 63AD(5)(b) provides that in certain circumstances, cancellation under section 63AD(4)(c) is to take effect from immediately before the first units under the scheme were issued. The Commissioner may not know the actual date of the first issue of units under the scheme that is required for the purposes of cancellation under section 63AD(4)(c). This amendment therefore allows the Commissioner to refer more broadly to cancellation taking effect from the date the first units under the scheme were issued.

The notification of the date the disqualifying event occurred is necessary to ensure that the unit trustee is aware of the time period in which a statement about the disqualifying event is required to be lodged.

Subclause (5) amends section 63AD(5)(b), which sets out the time from which cancellation of the interim registration of a pooled investment trust or equity trust under subsection (4) is taken to have had effect. It replaces the words "first units under the scheme were issued" with a reference to the "start up period". A definition of the "start up period" has been inserted in section 63(1). This amendment does not change the operation of the provision, rather it clarifies the point in time to which the paragraph refers.

Subclause (6) amends section 63AD(6), which relates to the use of registration or interim registration as part of a scheme or arrangement to avoid or reduce the duty payable, and allows the Commissioner to cancel the registration or interim registration in such circumstances.

Paragraph (a) clarifies that the use of registration or interim registration as part of a scheme or arrangement to avoid or reduce duty constitutes a disqualifying event for which a statement is required to be lodged under section 63AE.

Paragraph (b) requires the Commissioner to provide the unit trustee with notification of the cancellation in accordance with subsection (4)(c). This subsection requires the Commissioner to notify the unit trustee of the cancellation, from when the cancellation takes effect, the reasons for the cancellation and when the Commissioner is satisfied that the disqualifying event occurred.

Subclause (7) inserts a new section 63AD(8), which provides that a disqualifying event is taken to have occurred where a unit trust scheme granted registration or interim registration is to be treated as a sub-trust as defined in section 63AA(2a). In these circumstances, the Commissioner shall cancel the registration or interim registration and notify the unit trustee of the cancellation, from when the cancellation takes effect, the reasons for the cancellation and when the Commissioner is satisfied that the disqualifying event occurred.

Clause 22: **Sections 63ADA and 63ADB inserted**

This clause inserts two new sections related to provisional public trusts.

Section 63ADA (Registration of private unit trust scheme as provisional public trust) sets out the requirements for the registration of a private unit trust scheme as a provisional public trust.

Section 63ADA(1) requires a trustee of a private unit trust scheme to apply to the Commissioner in an approved form for registration as a provisional public trust. The application is required to be made before the end of the start up period, which is defined in section 63(1) to be a period of one year beginning on either the day on which the first units under the trust were issued, or the day on which the trust's prospectus or information memorandum is lodged with ASIC.

Section 63ADA(2) provides that the Commissioner may grant a private unit trust scheme registration as a provisional public trust if he is satisfied that the conditions outlined in paragraphs (a) and (b) are met.

Paragraph (a) requires that it is intended that the unit trust will no longer fall within the definition of a private unit trust, as set out in section 63(2), at the end of the start up period. There must therefore be an intention that the unit trust will become a public unit trust by the end of the start up period before the Commissioner may grant registration.

Paragraph (b) requires that registration is not being used as part of a scheme or arrangement with one of its purposes being to avoid the duty payable on the conveyance or transfer of trust property. This prevents registration as a provisional public trust being used merely as a means of transferring the property of the trust by way of dispositions of units in the trust.

If the Commissioner is satisfied as to the matters referred to in paragraphs (a) and (b), the Commissioner may register the unit trust as a provisional public trust for the start up period.

Section 63ADA(3) allows the Commissioner to take into account any matter he considers to be relevant for the purposes of being satisfied that registration is not being used as part of a scheme or arrangement to avoid the duty payable on the conveyance or transfer of trust property, as referred to in subsection (2)(b).

Section 63ADA(4) requires the Commissioner to notify the unit trustee whether or not registration as a provisional public trust has been granted. If the Commissioner decides not to register the unit trust scheme, he must give the unit trustee reasons for his decision.

Section 63ADA(5) allows the Commissioner to make any reassessment necessary, within the time period set out in section 17 of the *Taxation Administration Act*, to give effect to the registration of a unit trust as a provisional public trust. This may be necessary where duty has already been paid in relation to a disposition of units in a unit trust prior to it being granted registration.

Section 63ADA(6) ensures a right of objection exists where the Commissioner decides not to register a unit trust scheme as a provisional public trust. This power is necessary as the objection provisions in the *Taxation Administration Act* require that an objection may be made by a taxpayer where a decision affects their liability to pay duty. At the time of the decision, it is possible that a liability to duty is not affected.

Section 63ADB (Cancellation of registration of provisional public trust) sets out the process for the cancellation of the registration of a unit trust scheme as a provisional public trust.

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

Paragraph (a) provides that a disqualifying event occurs if a provisional public trust remains a private unit trust, within the meaning set out in section 63(2), on the last day of the start up period applicable to it.

Paragraph (b) provides that a disqualifying event occurs in the circumstances outlined in subparagraphs (i) and (ii). Subparagraph (i) refers to a provisional public trust for which the start up period is a period beginning on the day on which the trust's prospectus or information memorandum is lodged with ASIC. Subparagraph (ii) refers to a disposition of a unit in the trust that was held in the scheme on the first day of that start up period.

The effect of this paragraph is that a disqualifying event occurs in relation to a trust for which the start up period is a period beginning on the day on which the trust's prospectus or information memorandum is lodged with ASIC, if there is a disposition of a unit in the trust that was held by a unit holder at the time of the commencement of the start up period. However, certain dispositions may be disregarded in accordance with subsection (2).

Paragraph (b) has effect without limiting the application of paragraph (a). This means that paragraph (a) could also apply to a trust for which the start up period begins on the day on which the prospectus or information memorandum is lodged with ASIC.

Section 63ADB(2) provides that a disposition of a unit in the trust that was held by a unit holder at the time of the commencement of the start up period, as referred to in subsection (1)(b)(ii), will be disregarded if the Commissioner is satisfied that it is appropriate to do so based on the circumstances in a particular case. This would enable the Commissioner to disregard a disposition that occurs involuntarily, such as on the death of a unit holder or the break down of a marriage.

Section 63ADB(3) outlines the events that follow the occurrence of a disqualifying event.

Paragraph (a) provides that the registration of the trust as a provisional public trust is cancelled.

Paragraph (b) provides that the cancellation has effect on and from immediately before the commencement of the start up period applicable to the trust.

Paragraph (c) provides that the unit trustee must give the Commissioner notice about the disqualifying event within 14 days of the occurrence of the disqualifying event, unless subsection (4) or (5) applies. These subsections relate to situations where the Commissioner has not received notification of the occurrence of a disqualifying event, but is satisfied that one has occurred.

Section 63ADB(4) applies where the Commissioner has not been notified of the occurrence of a disqualifying event, but he is satisfied that one has occurred.

Paragraph (a) provides that in such circumstances, a disqualifying event is taken to have occurred and subsections (3)(a) and (3)(b) apply. Therefore, registration of the unit trust scheme as a provisional public trust would be cancelled with effect on and from immediately before the commencement of the start up period.

Paragraph (b) requires the Commissioner to notify the unit trustee of the cancellation under subsection (3)(a), the reasons for the cancellation and when he is satisfied that the disqualifying event occurred. The notification of when the disqualifying event occurred is necessary to ensure that the unit trustee is aware of the time period in which a statement about the disqualifying event is required to be lodged.

Section 63ADB(5) applies where the Commissioner is satisfied that a provisional public trust is being used as part of a scheme or arrangement with one of its purposes being to avoid the duty payable on the conveyance or transfer of trust property.

Paragraph (a) provides that in such circumstances, a disqualifying event is taken to have occurred and subsections (3)(a) and (3)(b) apply. Therefore, registration of the unit trust scheme as a provisional public trust would be cancelled with effect on and from immediately before the commencement of the start up period.

Paragraph (b) requires the Commissioner to notify the unit trustee of the cancellation under subsection (3)(a), the reasons for the cancellation and when he is satisfied that the disqualifying event occurred. The notification of when the disqualifying event occurred is necessary to ensure that the unit trustee is aware of the time period in which a statement about the disqualifying event is required to be lodged.

However, subsection (6) clarifies that certain conveyances and transfers of trust property may be disregarded for the purposes of this subsection.

Section 63ADB(6) allows certain conveyances or transfers of trust property to be disregarded for the purposes of determining whether a provisional public trust is being used as part of a scheme or arrangement with one of its purposes being to avoid the duty payable on the conveyance or transfer of trust property under subsection (5). This subsection applies where a conveyance or transfer of trust property is taken to have been made for the purposes of charging duty on a disposition of a unit in a private unit trust under section 73D(4), and that conveyance or transfer has resulted solely from the allotment or issue of units in the trust during the start up period. In these circumstances, the conveyance or transfer will be disregarded to the extent that the disposition relates to a unit that was held by a unit holder at the commencement of the start up period.

This subsection is necessary as the addition of new unit holders will result in a transfer of the trust property to the extent that the new unit holders will acquire an interest in the trust property and the interests of the original unit holders at the time of the commencement of the start up period are diluted. In such circumstances, there will not be a conveyance or transfer of trust property to the extent that units are issued or allotted to new unit holders, and the interests of the original unit holders are diluted.

Section 63ADB(7) allows the Commissioner to take into account any matter that he considers to be relevant for the purposes of determining whether a provisional public trust is being used as part of a scheme or arrangement with one of its purposes being to avoid the duty payable on the conveyance or transfer of trust property.

Clause 23: Section 63AE amended

This clause amends section 63AE, which relates to the lodgement of a statement about a disqualifying event and any subsequent transfers or dispositions.

Subclause (1) amends section 63AE(1) to clarify that a dutiable statement in relation to a disqualifying event is required to be lodged within two months after the day on which the event occurred.

Subclause (2) amends section 63AE(2), which relates to the form of the dutiable statement and the details it is required to contain.

Paragraph (a) clarifies that a dutiable statement is required to be prepared in an approved form.

Paragraph (b) inserts a reference in section 63AE(2)(c), which relates to the details of the dispositions that are required to be contained in the statement, to section 63AA(2). This means that section 63AE(2)(c) only applies to a trust registered as a pooled investment trust or an equity trust.

Paragraph (c) removes the reference to “and” at the end of section 63AE(2)(c) to allow for the insertion of a new paragraph (e).

Paragraph (d) amends section 63AE(2)(d), which sets out the period to which the dispositions detailed in the statement must relate. It replaces the words “first units under the scheme were issued” with a reference to the “start up period”. A definition of “start up period” has been inserted in section 63(1). This amendment does not change the operation of the provision, rather it clarifies the point in time to which the paragraph refers.

Paragraph (e) amends section 63AE(2)(d) to allow for the insertion of a new paragraph.

Paragraph (f) inserts a new section 63AE(2)(e), which relates to the cancellation of the registration of a unit trust scheme as a provisional public trust. It requires a statement to be prepared containing details of all the dispositions that occurred from immediately before the start up period and ending on the day the Commissioner is given notice of the disqualifying event, or if the Commissioner is not given notice, the day on which the Commissioner is satisfied a disqualifying event occurred. However, details are only required in respect of transfers and dispositions that occurred during this period that would have been chargeable under the private unit trust provisions (section 73D) if the trust had not been registered as a provisional public trust.

Clause 24: **Section 63AF amended and transitional**

This clause amends section 63AF, which charges duty on statements lodged under section 63AE in relation to disqualifying events and subsequent transfers or dispositions in a unit trust scheme.

Subclause (1) amends section 63AF(1) to deem a statement lodged under section 63AE(2)(e) in respect of a disqualifying event and subsequent transfers or dispositions in a provisional public trust, to be a transfer of a unit or an instrument effecting or evidencing a disposition of a unit, which is chargeable with duty.

Subclause (2) repeals section 63AF(2), as a reduction for any marketable security duty paid in relation to a conveyance or transfer included in a dutiable statement is no longer necessary as a consequence of the abolition of marketable security duty.

Subclause (3) is a transitional provision which provides that a reduction for any marketable security duty paid in relation to a conveyance or transfer included in a dutiable statement will still apply in relation to the conveyance or transfer if it was executed prior to the commencement of this section. In these circumstances, item 4A of the Second Schedule is taken to have the meaning that it had prior to the commencement of this Act.

Clause 25: **Sections 63AG to 63AJ inserted and transitional provision**

Subclause (1) inserts new sections 63AG, 63AH, 63AI and 63AJ.

Section 63AG (When unit trust scheme becomes private unit trust scheme) outlines the circumstances in which a unit trust scheme becomes a private unit trust scheme.

Section 63AG(1) provides definitions of “aggregated dispositions” and ”private unit trust scheme” for the purposes of sections 63AH, 63AI and 63AJ, which relate to the imposition of duty where a unit trust scheme becomes a private unit trust scheme.

The term “aggregated dispositions” is defined to include the transitional disposition and any other dispositions that are considered to form one disposition because of the operation of this section. The transitional disposition is the disposition that results in the unit trust converting to a private unit trust scheme. The “aggregated dispositions” could therefore include dispositions that occur both before and after the occurrence of the transitional disposition.

The term “private unit trust scheme” has the same meaning as it has in section 63(2).

Section 63AG(2) provides that where a disposition results in a unit trust scheme becoming a private unit trust scheme, the unit trust scheme will be taken to have become a private unit trust scheme immediately before the occurrence of that disposition. Therefore, that disposition will be chargeable with duty under the private unit trust provisions of section 73D. However, this subsection is subject to subsection (3), which aggregates certain dispositions.

Section 63AG(3) applies where a disposition results in a unit trust scheme becoming a private unit trust scheme and that disposition is one of two or more dispositions that together form substantially one disposition. These dispositions together form the “aggregated dispositions”. In these circumstances, the unit trust scheme will be taken to be a private unit trust scheme from immediately before the first of the aggregated dispositions.

Section 63AG(4) provides further clarification as to when two or more dispositions will be taken to be one disposition for the purposes of subsection (3).

Paragraph (a) provides that where dispositions are made in response to a single offer made or arrangement entered into, those dispositions will be taken to be one disposition for the purposes of subsection (3).

For example, A wishes to acquire all of the units in unit trust scheme B. A makes an offer to all the unit holders and receives acceptances over a period of time from 100% of them. As the accepting unit holders transfer their unit entitlements to A, the point is reached where the trust converts to a private unit trust. In this case, all the transfers arising from the acceptances would be aggregated and these provisions would charge duty as if the trust were a private unit trust from immediately before the first transfer in respect of the acceptances.

Paragraph (b) provides that where dispositions are made in response to offers made or arrangements entered into within 12 months of each other, then those dispositions will be taken to be one disposition for the purposes of subsection (3). This includes offers made or arrangements entered into by a person or a person and a related person. Subsection (5) clarifies when a person is considered to be related to another person. However, subsection (6) allows the Commissioner to determine that certain dispositions will not form part of the aggregated dispositions.

For example, X wishes to acquire all of the units in unit trust scheme Y. X makes an offer to all the unit holders and receives acceptances over a period of time from 70% of them (the first round of acceptances). The accepting unit holders transfer their unit entitlements to X. Six months later, X proceeds to acquire the units of the non-accepting unit holders either by a further offer, using takeover law, or making private purchases from each unit holder individually. As the unit holders in the second round of acceptances transfer their unit entitlements to X, the point is reached where the trust converts to a private unit trust. In this case, all the transfers arising from both rounds of acceptances would be aggregated and these provisions would charge duty as if the trust were a private unit trust from immediately before the first transfer in respect of the first round of acceptances.

Section 63AG(5) clarifies that a person will be considered to be related to another person for the purposes of subsection (4)(b) if they are related persons as provided in section 63(5).

Section 63AG(6) allows the Commissioner to determine that certain dispositions will not form part of the aggregated dispositions. The Commissioner may treat a disposition as not forming part of the aggregated dispositions where the aggregated dispositions are made in response to two or more offers made or arrangements entered into, and where he is satisfied that the disposition was not made for a common purpose.

In the example above relating to the offers made by X to acquire the units of unit trust scheme Y, there was a common purpose to both rounds of offers made by X, being for X to takeover unit trust scheme Y. Both rounds of offers were made for this purpose. Therefore, the Commissioner would not exercise his discretion to disregard any of the dispositions in these circumstances as he could not be satisfied that the dispositions were not made for a common purpose.

The Commissioner cannot exercise any discretion to treat a disposition as not forming part of the aggregated dispositions where the aggregated dispositions are made in response to a single offer or arrangement, as the subsection only applies where there are two or more offers made or arrangements entered into. Therefore, in the example above relating to the offer made by A to acquire the units of unit trust scheme B, all the dispositions made in response to that offer would be taken to form substantially one disposition.

Section 63AG(7) charges duty on the transitional disposition (the disposition that results in the unit trust scheme becoming a private unit trust scheme) and any of the aggregated dispositions made before the transitional disposition is made. Duty is charged under section 73D as if the aggregated dispositions formed one disposition occurring at the time the transitional disposition is made. The effect of this subsection is that duty is charged on all of the dispositions that form part of the aggregated dispositions that are made before the unit trust scheme converts to a private unit trust scheme, as if they were made at the time of the conversion. However, this subsection is subject to subsection (10).

Section 63AG(8) applies where one or more of the aggregated dispositions occurs after the transitional disposition. This provision charges duty under section 73D on all of the dispositions forming part of the aggregated dispositions (including those occurring before the transitional disposition) as if the aggregated dispositions formed one disposition occurring at the time the last of the aggregated dispositions was made. The effect of this subsection is that duty is charged on all of the dispositions that form part of the aggregated dispositions that are made before and after the unit trust scheme converts to a private unit trust scheme, as if they were made at the time the last of the dispositions was made.

Section 63AG(9) provides for the duty payable under subsection (8) to be reduced by any duty paid under subsection (7). This is necessary as both subsections (7) and (8) charge duty on the transitional disposition and those dispositions made prior to the transitional disposition. If duty had already been paid under subsection (7), double duty may be payable in relation to these dispositions. This subsection allows a credit for the duty already paid under subsection (7).

Section 63AG(10) allows the unit trustee to elect to pay duty only under subsection (8). This may be necessary where there is a large number of dispositions involved and it is preferable to prepare only one statement in respect of those dispositions. The unit trustee is required to notify the Commissioner of the intention to pay duty on the aggregated dispositions at the time the last aggregated disposition is made, in an approved form and within two months of the transitional disposition.

Section 63AG(11) operates where the unit holder ceases to be the beneficial owner of a unit, but the actual disposition of the unit is not made within three months of the cessation of beneficial ownership. This subsection provides that the disposition of the unit will be taken to have occurred at the end of the three month period if it has not already done so, and the Commissioner is able to create a memorandum under section 20 of the *Taxation Administration Act* (which applies where an instrument is misleading or unavailable) in relation to the disposition.

Section 63AH (Liability for duty on aggregated dispositions) specifies the party liable to pay the duty in respect of the aggregated dispositions.

Section 63AH(1) provides that the unit trustee is required to pay any duty that is chargeable under section 73D as a result of section 63AG. This is despite section 73D(7) which provides for a different liable party.

Section 63AH(2) allows a refund where duty has already been paid in respect of a disposition by a person other than the unit trustee. This may arise, for example, where duty is paid in respect of a unit transfer in accordance with section 73D by a unit holder. When the transfer is presented to the unit trustee for registration, the trustee may take the view that it forms part of the aggregated dispositions under section 63AG. This provision would allow any duty already paid by the unit holder to be refunded to the unit holder upon payment of duty by the unit trustee in respect of the aggregated dispositions.

Section 63AH(3) allows the Commissioner to make any reassessment necessary, within the time period set out in section 17 of the *Taxation Administration Act*, to give effect to the refund allowed in subsection (2).

Section 63AI (Interstate security duty) allows a refund where marketable security duty has been paid in respect of a disposition in another State or Territory.

Section 63AI(1) applies where “interstate security duty” has been paid in respect of a disposition that forms part of the aggregated dispositions. This subsection allows the “aggregated duty” attributable to that disposition to be reduced by the interstate security duty. Duty is reduced by the same proportion of the interstate security duty paid as the Western Australian trust property bears to the aggregate value of all of the trust property.

Section 63AI(2) sets out the meaning of the terms “aggregated duty” and “interstate security duty” that are used in this section.

Section 63AJ (Dutiable statement to be lodged) sets out the requirements for the lodgement of a dutiable statement with the Commissioner in respect of the aggregated dispositions.

Section 63AJ(1) requires a dutiable statement to be lodged with the Commissioner in accordance with paragraphs (a) and (b) if duty is chargeable under section 73D as a result of section 63AG.

Paragraph (a) applies where there has been no election made under section 63AG(10), so that duty is payable under both sections 63AG(7) and 63AG(8). A statement is required to be lodged under this paragraph in respect of the transitional disposition and those dispositions forming part of the aggregated dispositions that were made before the transitional disposition was made. The statement is required to be lodged within two months of the transitional disposition. If an election has been made under section 63AG(10), this paragraph would not apply and the statement would be required to be lodged in accordance with paragraph (b).

Paragraph (b) requires a statement to be lodged in respect of all of the aggregated dispositions if any of the dispositions forming part of the aggregated dispositions were made after the transitional disposition. The statement is required to be lodged within two months after the last of the aggregated dispositions is made. A statement under this paragraph is required to be lodged regardless of whether an election has been made under section 63AG(10). If no election has been made, a statement would be required to be lodged in accordance with both this paragraph and paragraph (a). However, the credit arrangements set out in subsection (4) would apply.

An offence penalty of $20,000 is applicable for contravention of this subsection.

Section 63AJ(2) requires the dutiable statement to be prepared in an approved form.

Section 63AJ(3) provides that the statement lodged in accordance with subsection (1) is taken to be an instrument evidencing the dispositions in respect of which it is lodged. However, it is only chargeable with duty to the extent that the duty chargeable under section 73D as a result of section 63AG has not been paid. This prevents double duty being imposed on the dispositions under section 73D and on the statement under this section.

Section 63AJ(4) clarifies that the duty payable in respect of a dutiable statement lodged under subsection (1)(b) is to be reduced by the amount of duty, if any, paid on the statement under subsection (1)(a). This prevents double duty being imposed on the transitional disposition and those dispositions forming part of the aggregated dispositions that were made before the transitional disposition was made.

Subclause (2) inserts the transitional provisions applicable to section 63AG. It provides that section 63AG does not apply to a disposition made before the commencement of that section, or to a disposition made in response to an offer made or arrangement entered into before the commencement of that section.

<u>Clause 26:</u> **Section 63A amended**

This clause amends section 63A(2) to require the Commissioner to denote the duty on a decree or order if he is requested to do so.

<u>Clause 27:</u> **Section 69 amended and transitional**

This clause amends section 69, which relates to the conveyance duty chargeable in certain cases where there is a conveyance of property made at the request or by the direction of an intermediary.

Subclause (1) amends section 69(2), which provides that a conveyance or transfer to an intermediary is not subject to duty to the extent that conveyance duty or marketable security duty is paid in relation to the conveyance or transfer. This subsection is amended to remove the reference to item 4A(1) of the Second Schedule. This reference is no longer required as a consequence of the abolition of marketable securities duty.

Subclause (2) is a transitional provision, which provides that section 69(2) will still apply in relation to a conveyance or transfer if it was executed prior to the commencement of this section. In these circumstances, item 4A of the Second Schedule is taken to have the meaning that it had prior to the repeal by this Act.

<u>Clause 28:</u> **Section 70 amended**

This clause amends section 70 to allow duty to be charged on the chattels conveyed or transferred in conjunction with other dutiable property.

Subclause (1) specifies that the amendments is subclauses (2) to (5) are to section 70(1) of the *Stamp Act*.

Subclause (2) replaces the defined term “chargeable with duty” with the term “dutiable” and reinstates that definition in its appropriate alphabetical position.

Subclause (3) amends the definition of “exempt chattels” in section 70(1).

Paragraph (a) replaces the term “chattels” in paragraph (a) of the definition of exempt chattels with the expression ”goods, wares or merchandise” to clarify the definition.

Paragraph (b) inserts a new paragraph (aa), after paragraph (a), into the definition of “exempt chattels” which extends the definition to include goods, wares, or merchandise used solely or principally in connection with the business of primary production (as defined in section 75D). This retains an existing concession in an amended repealed form that was previously available through the definition of “farming land”.

Subclause (4) deletes the definitions of “estate or interest in land”, “farming land” and “land” as chattels transferred in conjunction with any type of dutiable property (not just land) are to be subject to conveyance duty.

Subclause (5) inserts a self-explanatory definition of “other property” in its appropriate alphabetical position.

Subclause (6) inserts a subsection (1a) after section 70(1) to specify that, for the purposes of this section, a mining tenement (as defined in section 76) is an estate or interest in property. This was previously achieved through the repealed definition of “estate or interest in land”.

Subclause (7) amends both section 70(2) and 70(3) by replacing the term “land” in each instance with the expression “other property” as chattels transferred in conjunction with any type of dutiable property (“other property”) (not just land) are to be subject to conveyance duty.

Subclause (8) replaces the expression “chargeable with duty” with the term “dutiable” in section 70(2)(b) and section 70(3)(b). This avoids confusion with the charging clause of the section.

Clause 29: **Section 72 amended**

This clause amends section 72(4), which relates to the duty chargeable on an instrument which transfers or assigns a mortgage for value. This clause provides that where an instrument is not chargeable with duty because duty on a principal instrument has already been paid, the Commissioner shall endorse on that instrument the duty paid, if requested to do so.

Clause 30: **Section 73AB inserted**

This clause inserts a new section 73AB (Duty on conveyance to correct error) which provides a concession where a conveyance or transfer is made to correct a previous error.

The concession in this section is intended to be used where a property is incorrectly conveyed through an error, such as where the wrong property in a subdivision is conveyed to the purchaser because the incorrect lot number has been included on the documentation.

This provision is not intended for use where a purchaser incorrectly nominates a purchaser on a contract and subsequently maintains that he has made an "error". Transfers in these circumstances may be covered by the amendments being made to section 74, to allow an incorrectly nominated purchaser to be substituted by a more desirable purchaser prior to completion of a contract.

Nominal duty under item 6 of the Second Schedule to the *Stamp Act* will be available where the Commissioner is satisfied that:

(a) the conveyance or transfer is solely for the purpose of correcting the effect of an error made in a contract or agreement for the sale of property or a previous conveyance or transfer;

(b) no additional consideration passes between any person in order to make the correcting transfer; and

(c) the correcting transfer only passes an interest in the property to the extent that is necessary to correct the error.

Clause 31: **Section 73D amended**

This clause amends section 73D, which contains the provisions applying to dispositions of units in private unit trusts.

Subclause (1) amends section 73D(1) by deleting the definitions of "disposition", "transfer" and "unit" which have been transferred to section 63(1) so that they apply more broadly to the entire Part.

Subclause (2) inserts a new subsection (1a) to specify the nexus arrangement that operates under section 73D. This section has been included to clarify the existing interpretation of the Commissioner in relation to the section 73D nexus. Such action has been necessary due to an increasing propensity for alternative nexus arrangements to be argued in this area.

Subsection (1a) specifies that section 73D applies in relation to a disposition in a private unit trust, if the trust property of the trust comprises or includes property situated, or taken to be situated, in Western Australia. It also applies where the property of the trust includes any interest, including any beneficial interest, in property situated, or taken to be situated, in Western Australia.

This means, for example, that where the trust property of a unit trust, (unit trust A) comprises units in another unit trust (unit trust B) that holds an interest in land situated in Western Australia, a disposition of units in unit trust A would be chargeable with duty under subsection (4) as if it were a conveyance or transfer of the land held by unit trust B, as unit trust A is taken to have a beneficial interest in the land owned by B.

Subclause (3) amends section 73D(2), which outlines the circumstances in which a disposition in relation to a unit may be registered in the books or records of a private unit trust.

Paragraph (a) removes the references to “make” and “accept” as they are not considered necessary and are covered by other references in subsection (2).

Paragraph (b) removes and replaces section 73D(2)(a) and (b), which provide the circumstances in which a disposition in relation to a unit may be registered in the books or records of a private unit trust.

Paragraph (a) provides that a disposition may be registered where a transfer, or an instrument effecting or evidencing the disposition, is executed and delivered to the person, and the duty chargeable has been paid.

Paragraph (b) provides that a disposition may be registered where the person is satisfied that a dutiable statement has been lodged under section 63AJ or 73DAA, and the duty chargeable on the statement has been paid.

Subclause (4) clarifies that section 73D(7), which specifies the party liable to pay duty in respect of a disposition in a private unit trust scheme, is subject to section 63AH. This is necessary as the liable party under section 63AH is different to that under section 73D(7).

Subclause (5) amends section 73D(10) to remove the references to “made” and “accepted” to be consistent with the changes to subsection (2).

Subclause (6) amends section 73D(11), which provides that duty under section 73D does not apply to dispositions of units in a private unit trust in certain circumstances.

Paragraph (a) amends section 73D(11) to insert a reference to new section 73DC. This is necessary so that duty is payable under section 73D where there is an acquisition of a majority interest or a further interest in a registered pooled investment trust, despite subsection (11) which provides that section 73D does not apply to registered pooled investment trusts.

Paragraph (b) removes the reference to "or" at the end of section 73D(11)(a) to allow for the insertion of a new paragraph.

Paragraph (c) removes the full stop at the end of section 73D(11)(b) and inserts a semi colon and the word "or" to allow for the insertion of a new paragraph.

Paragraph (d) inserts a new section 73D(11)(c), which refers to a unit trust scheme that is granted registration as a provisional public trust under section 63ADA(2). This ensures that the provisions of section 73D do not apply to a unit trust scheme during any period it is registered as a provisional public trust. However, this is subject to section 73D(12).

Subclause (7) amends section 73D(12) so that it also applies to a unit trust scheme registered as a provisional public trust. The effect of this subsection is that where the registration or interim registration of a unit trust scheme as a pooled investment trust or an equity trust, or the registration of a unit trust scheme as a provisional public trust, is cancelled, section 73D is to apply to the unit trust scheme from the time of the cancellation. However, section 73D is not taken to apply if duty is chargeable on a statement containing details of a disqualifying event and subsequent dispositions. This ensures that double duty does not arise as a result of duty being charged on a disposition under both provisions.

Clause 32: **Section 73DAA inserted**

This clause inserts a new section 73DAA (Dutiable statement required if transfer or instrument not lodged) into the Act. This section creates an obligation for the preparation of a dutiable statement if a unit transfer, or an instrument effecting or evidencing the disposition of units in a unit trust, is not created.

Under section 73D(2), it is an offence to record a disposition of a unit in a unit trust scheme into the books or records of the scheme unless a transfer or instrument effecting or evidencing a disposition is executed and stamped. Rather than rely on this offence provision to require a person responsible for a unit trust scheme to create a transfer or other instrument under the threat of prosecution, this provision has been inserted to require a statement to be brought into existence and stamped. Where that statement is not lodged as required by the Act, the Commissioner is able to utilise the powers in the *Taxation Administration Act* to create a memorandum of the dutiable statement and assess the duty and any applicable penalty on the memorandum.

Section 73DAA(1) requires a statement to be lodged with the Commissioner in respect of a disposition if, within two months of the disposition occurring, a transfer or instrument effecting or evidencing the disposition has not been lodged with the Commissioner. An offence penalty of $20,000 applies for contravention of this requirement.

Section 73DAA(2) inserts a definition of liable person for the purposes of section 73DAA(1).

Section 73DAA(3) overrides the requirement under section 73DAA(1) where a disposition is already included in a dutiable statement required to be lodged under section 63AJ in respect of aggregated dispositions.

Section 73DAA(4) requires that a dutiable statement be prepared in an approved form.

Section 73DAA(5) deems the dutiable statement lodged under subsection (1) to be an instrument that evidences the disposition of units in the unit trust scheme and charges duty on it accordingly.

Section 73DAA(6) specifies that the requirement to lodge a dutiable statement ceases if a transfer or instrument effecting or evidencing a disposition is lodged with the Commissioner at any time after the disposition was made. Where that transfer or instrument is created after the time period specified in section 73DAA(1) to lodge a dutiable statement, the offence against section 73DAA(1) is not effected, such that it would continue to apply.

Section 73DAA(7) specifies that where section 73DAA(6) applies, any transfer or instrument referred to in that subsection is to be regarded as having been first executed on the date the disposition was made, rather than the date the transfer or instrument was actually executed. This ensures that late lodgement penalties cannot be avoided by the operation of section 73DAA(6).

Section 73DAA(8) clarifies that section 31B does not apply to the disposition of units in a unit trust that is referred to in subsection 73DAA(1).

Clause 33: **Sections 73DB to 73DE inserted**

This clause inserts new sections 73DB, 73DC, 73DD and 73DE.

Section 73DB (Interpretation for sections 73DC, 73DD and 73DE) contains the interpretation provisions for sections 73DC, 73DD and 73DE.

Section 73DB(1) inserts definitions of "acquire" and "registered unit trust scheme". It should be noted that a registered unit trust scheme is one that has been granted registration as a pooled investment trust. It does not include a unit trust scheme that has been granted interim registration.

Section 73DB(2) clarifies that where an interest is acquired or held by a custodian trustee (as defined in section 63(1)) on behalf of another person, that interest will be taken to have been acquired or held by that person. This is in recognition of the fact that a custodian merely holds the trust property on behalf of the unit holders, but does not have any rights in relation to the trust property and is not able to deal in the trust property. This provision is necessary to ensure that where a custodian acquires units on behalf of unrelated persons, those acquisitions are not aggregated for the purposes of determining whether a majority interest has been acquired.

For example, custodian X holds a 40% interest in a pooled investment trust on behalf of superannuation fund A, and acquires another 30% interest on behalf of life company B. This provision means that the 40% and 30% interests are taken to be held by A and B respectively. Therefore, if A and B are unrelated, the acquisition on behalf of life company B would not be aggregated with superannuation fund A's interest in determining whether a majority interest had been acquired.

Section 73DB(3) clarifies the circumstances under which a person and another person will be considered to be related.

Paragraph (a) provides that persons are related if they are related for the purposes of the related party test in section 63(5).

Paragraph (b) provides that persons are related if they acquire interests in a unit trust scheme that form or arise from one transaction or series of transactions.

Section 73DC (Acquisition of majority interest or further interest in pooled investment trust) relates to the acquisition of a majority interest or a further interest in a pooled investment trust.

Section 73DC(1) provides that despite section 73D(11) providing that section 73D does not apply to dispositions in a registered pooled investment trust, section 73D will apply to a disposition in a registered unit trust scheme if it results in the acquisition of a majority interest or a further interest. These terms are explained in section 73DD.

Section 73DC(2) applies where a majority interest is acquired because a disposition results in the acquisition of an interest and that interest, when aggregated with previous interests already held by the person, constitutes a majority interest. The dispositions of units that resulted in the acquisition of the majority interest are referred to as the "aggregated dispositions". For the purpose of imposing duty under section 73D, the aggregated dispositions are taken to form one disposition made at the time the majority interest was acquired.

Section 73DC(3) applies where the aggregated dispositions include a disposition made when the unit trust scheme was not granted registration or interim registration. The dispositions that occurred while the unit trust scheme was not granted registration or interim registration are referred to as "relevant aggregated dispositions". This subsection allows a reduction in the duty chargeable under section 73D by the amount of duty that would have been chargeable under section 73D if the relevant aggregated dispositions formed one disposition made immediately before the majority interest was acquired.

For example, a person acquires a 60% interest in a unit trust scheme by way of two acquisitions of 30% each, within a three year period. The first 30% acquisition occurred while the trust was not registered as a pooled investment trust. The subsequent 30% acquisition occurred while the trust was registered as a pooled investment trust.

This subsection reduces the duty chargeable on the aggregated 60% acquisition by the duty that would have been chargeable on the 30% acquisition that occurred when the trust was not registered. However, duty is calculated on that disposition as if it were made immediately before the acquisition of the majority interest. Therefore, the effect of this subsection is that duty is only chargeable on the acquisition of the 30% interest while the trust was registered.

Section 73DC(4) sets out the method of charging duty under section 73D on a disposition that results in the acquisition of a further interest in a registered unit trust scheme. Duty is charged on both the disposition that results in the acquisition of the further interest, and each of the dispositions that resulted in the interest already held immediately before the further interest was acquired. These dispositions will be treated as if they together formed one disposition that was made at the time the disposition resulting in the acquisition of the further interest was made.

Section 73DC(5) sets out a reduction in the duty payable in relation to the dispositions referred to in subsection (4). The duty payable is reduced by the amount of duty that would have been payable in relation to the dispositions referred to in subsection (4)(b) (ie. the dispositions that resulted in the interest already held immediately before the further interest was acquired). These dispositions are taken to form one disposition that was made immediately before the disposition resulting in the acquisition of the further interest was made. The result is that duty is only payable in relation to the acquisition of the further interest.

Section 73DC(6) operates despite section 73D(7), which specifies that each of the unit holders is liable for the duty in relation to a disposition of a unit. This subsection provides that if the liability to duty under section 73D arises because of this section, the person liable to pay duty under section 73D is the person that acquires the majority interest or the further interest.

Section 73DC(7) provides that where a majority interest or a further interest is acquired by a person and a related person, they are both jointly and severally liable for the duty.

Section 73DC(8) applies where interstate security duty (as defined in subsection (9)) has been paid in respect of a disposition to which a liability to duty under section 73D also arises because of this section. The duty under section 73D is to be reduced by the same proportion of the interstate security duty as the value of the property situated in Western Australia bears to the total value of all of the trust property.

For example, a unit trust scheme owns a property in Western Australia valued at $10 million and a property in New South Wales valued at $30 million. It has paid $10,000 in marketable security duty in New South Wales in relation to a disposition. That same disposition is liable to duty in Western Australia under section 73D. This subsection allows the duty under section 73D to be reduced by $2,500 (calculated as $10 million divided by $40 million, then multiplied by $10,000).

Section 73DC(9) inserts a definition of "interstate security duty" for the purposes of subsection (8).

Section 73DD (Meaning of majority interest and further interest) sets out the meaning of majority interest and further interest, as used in section 73DC.

Section 73DD(1) provides that a majority interest is acquired where a person, or a person and a related person, acquires an interest in a unit trust scheme such that the person would be entitled to 50% or more of the distributable property of the unit trust scheme if the property of the scheme were to be distributed. The interest that results in the acquisition of the majority interest is referred to as the "relevant interest". A majority interest may be acquired in two ways, as described in paragraphs (a) and (b).

Paragraph (a) provides that a majority interest may be acquired through the acquisition of the relevant interest itself. For example, where a person that is not a unit holder of a unit trust scheme acquires 60% of the issued units. The acquisition of the 60% interest would constitute the acquisition of a majority interest.

Paragraph (b) provides that the majority interest may be acquired through the aggregation of the acquisition of the relevant interest with the interests held by the person or a related person immediately before the acquisition of the relevant interest, and that were acquired within three years of the acquisition of the relevant interest. For example, a person acquires a 10% interest in a unit trust scheme on 1 January 2004, another 15% interest on 1 February 2005, another 20% interest on 1 March 2006 and another 25% interest on 1 April 2007. The relevant interest is the 25% interest acquired on 1 April 2007. This is aggregated with the 15% and 20% interests to constitute the acquisition of a majority interest. The acquisition of the 10% interest on 1 January 2004 is not aggregated as it was not acquired within three years of the acquisition of the relevant interest on 1 April 2007.

Section 73DD(2) provides that only acquisitions of interests that are made while the property of the trust included land situated in Western Australia will be taken into account for the purposes of determining whether a majority interest has been acquired under section 73DD(1). This is necessary so that conveyance duty is not chargeable on an acquisition of an interest that did not relate to an acquisition of land.

Section 73DD(3) applies where a unit trust scheme is granted registration following a period of interim registration. It provides that where a majority interest is held in a unit trust scheme on the day that it was granted registration, any interest that was acquired during the interim registration period as a result of a disposition during that period, will be taken to have been acquired as a result of a disposition made on the day of registration.

This is necessary as the definition of a registered unit trust scheme in section 73DB(1) does not include a unit trust scheme that has been granted interim registration. This is to prevent a majority interest being acquired in unit trust scheme during the interim registration period as a result of the issuing of units to unit holders. However, if on the day that the unit trust scheme is granted registration a person has a majority interest in the unit trust scheme, the dispositions occurred during the period of interim registration that resulted in that majority interest will be taken to have occurred on the day that the trust was granted registration. This ensures that dispositions during the interim registration period will still be taken into account for the purposes of determining whether a majority interest is held on the day the trust is granted registration, but only to the extent of the interest held when the interim period ceased. Those dispositions occurring prior to the interim registration period should also be taken into account to determine whether a majority interest is held on the day the trust is granted registration. However, a credit under section 73DC(3) would apply to those dispositions.

For example, a person acquires a 30% interest in a unit trust scheme prior to it being granted interim registration, and then acquires another 30% interest during the interim registration period. Subsequently, the trust is granted registration as a pooled investment trust. This subsection applies as a majority interest (in this case, a 60% interest) is held in the trust on the day that the trust is granted registration. The acquisition of the 30% interest that occurred during the interim registration period will be taken to have been acquired as a result of a disposition that occurred on the day the trust was granted registration. This 30% interest will be aggregated with the 30% interest acquired prior to interim registration under section

73DD(1) to constitute the acquisition of a majority interest. However, the duty chargeable on the aggregated dispositions will be reduced by the duty chargeable on the acquisition that occurred while the trust was not granted interim registration in accordance with section 73DC(3).

Section 73DD(4) provides that a further interest is acquired in circumstances where a person has, or a person and a related person have, a majority interest in a unit trust scheme and the acquisition of that majority interest was liable to duty under section 73D as an acquisition of a majority interest in a registered unit trust scheme under section 73DC. A further interest is acquired if there is a disposition of a unit in the unit trust scheme that results in the acquisition of an interest such that the person, or the person and a related person, would be entitled to participate further in a distribution of the property of the scheme if it were to be distributed.

Section 73DD(5) is an anti-avoidance provision that prevents the cancellation of registration being used to avoid duty on the acquisition of a majority interest or a further interest in a unit trust scheme. It applies where the registration of a unit trust scheme is cancelled under section 63AD and a disposition (referred to as the "relevant disposition") in the scheme is made within 12 months of the cancellation. This subsection provides that the relevant disposition will be treated as having been made when the unit trust scheme was still a registered unit trust scheme. However, the Commissioner may exercise his discretion under section 73DD(6).

For example, A holds a 45% interest in a registered pooled investment trust and intends to acquire another 10% interest. This should result in a majority interest being acquired, with duty chargeable on the acquisition of a 55% interest. Instead, A arranges for the unit trustee to cancel the unit trust's registration as a pooled investment trust and then acquires the 10% interest. Duty would only be charged on the 10% interest under section 73D. Some time later, the unit trustee re-registers the unit trust as a pooled investment trust. The outcome is that A has acquired a 55% interest but has only paid duty on the 10% interest.

The effect of this subsection is that the acquisition of the 10% interest will be taken to be a disposition in the registered pooled investment trust, which would allow it to be aggregated with previous interests, unless the Commissioner is satisfied that the disposition was made independently of any previous acquisitions.

Section 73DD(6) provides that section 73DD(5) does not apply if the Commissioner is satisfied that the relevant disposition was not made for the collateral purpose of avoiding or reducing the duty that would be payable if the unit trust scheme's registration had not been cancelled.

Section 73DD(7) allows the Commissioner to take into consideration any matter he considers to be relevant for the purposes of making a determination under section 73DD(6).

Section 73DD(8) clarifies that the reference to the entitlement of a person to participate in a distribution of the property of a unit trust scheme does not include the person's entitlement as a creditor. Further, the reference to distributable property does not include property distributable to creditors or other persons to whom the scheme is liable.

Section 73DD(9) clarifies that for the purposes of this section, a person's entitlement on a distribution of a trust shall be the greatest proportion able to be derived by the operation of all powers, conditions or contingencies, with the Commissioner having the right to quantify such entitlement if he so determines.

Section 73DE (Dutiable statement to be lodged) relates to the lodgement of a dutiable statement in respect of the dispositions that result in the acquisition of a majority interest or a further interest.

Section 73DE(1) requires a person who acquires a majority interest or a further interest in a registered unit trust scheme to lodge a statement in respect of the dispositions that resulted in the acquisition of that interest and that are dutiable under section 73D because of section 73DC. The statement must be lodged within two months after the acquisition. An offence penalty of $20,000 is applicable for contravention of this subsection. This subsection is subject to subsection (3).

Section 73DE(2) requires the dutiable statement to be prepared in an approved form.

Section 73DE(3) provides that where a majority interest or a further interest is acquired by a person and one or more related persons, section 73DE(1) will be taken to have been satisfied if one of the persons lodges a statement on behalf of all of the persons. This is necessary as the person required to lodge a statement under section 73DE(1) is the person that acquires the majority interest or further interest. Where the interest is acquired by related persons, only one of the persons is required to lodge the statement on behalf of all those persons.

Section 73DE(4) provides that the statement lodged in accordance with section 73DE(1) is taken to be an instrument evidencing the dispositions in respect of which it is lodged. However, it is only chargeable with duty to the extent that the duty chargeable under section 73D because of section 73DC, has not been paid. This prevents double duty being imposed on the dispositions under section 73D and on the statement under this section.

Clause 34: **Section 73G inserted**

This clause inserts a new section 73G (Farm-in agreements relating to mining tenements) which provides for concessional treatment for certain farm-in agreements.

Section 73G(1) provides a number of definitions for the purposes of the section.

A "farm-in agreement" means an agreement between the owner of a mining tenement and another person where the other person earns a right to acquire an interest in a mining tenement following the expenditure of an amount on future exploration and development of the mining tenement, that is specified in the agreement.

A further requirement is that the tenement will be held with the owner of the mining tenement, so that the person does not acquire a 100% interest in the tenement through this process.

An "exploration amount" is defined for the purposes of a farm-in agreement as an amount to be expended after the agreement is made on exploration and development of the mining tenement carried out after the agreement is made. This ensures no concessional treatment is available for amounts paid to the owner as reimbursement for past expenses because these amounts are not included as exploration amounts.

Definitions of "mining tenement" and "payment" have also been included for the purposes of this section.

Section 73G(2) determines how a farm-in agreement is to be charged with duty.

Section 73G(2)(a) provides that where an instrument is a farm-in agreement as defined and no payment (other than the exploration expenditure as defined in section 73G(1)), has been paid or is payable for either the right to acquire the interest in a mining tenement or the acquisition of an interest in a mining tenement, then the agreement is charged with nominal duty of $20.00 under item 8 of the Second Schedule to the Act.

Section 73G(2)(b) applies to the extent that an agreement is not a farm-in agreement as defined. Where the instrument provides for the acquisition of an interest in a mining tenement, other than pursuant to a farm-in agreement, or some other payment has been made or is payable for the right to acquire the interest or the acquisition of the interest, the agreement is charged with duty under either item 4 or item 19 of the Second Schedule.

This provision would also apply where, for example, the registered owner of the mining tenement declares that an interest in the mining tenement was held in trust for another person under the agreement.

Section 73G(3) details how a conveyance or transfer of the tenement is to be charged with duty.

Paragraphs (a), (b) and (c) set out the factors that the Commissioner must be satisfied of when determining the duty payable on the conveyance or transfer.

Paragraph (a) requires the Commissioner to be satisfied that the conveyance or transfer evidences or effects the acquisition of an interest in a mining tenement pursuant to a farm-in agreement.

Paragraph (b) requires the Commissioner to be satisfied that the amount specified in the farm-in agreement has been expended on exploration or development of the tenement.

Paragraph (c) requires the Commissioner to be satisfied that any duty payable under section 73G(2) has been paid.

Paragraph (d) applies to charge nominal duty of $20.00 under item 6 of the Second Schedule on the conveyance or transfer of the interest where there are no other payments made for the acquisition of the interest or alternatively, if a separate payment is made for the acquisition of the interest, duty has been paid previously on the instrument evidencing the separate payment.

Paragraph (e) provides that where a further payment has been made or is payable for the acquisition of the interest at the time of the transfer then that amount is chargeable with duty under item 4 or item 19 of the Second Schedule.

<u>Clause 35:</u> **Section 74 amended**

This clause amends section 74 to provide duty relief where a purchaser is substituted between the time of signing a contract or agreement and the ultimate conveyance or transfer to give effect to it.

Subclause (1) inserts a new section 74(1aa), which contains a number of defined terms relevant to section 74.

Subclause (2) amends section 74(2). This amendment takes into account of the extended circumstances being included in the section. Section 74(2) will then operate subject to all of the requirements of the section, not just those in section 74(3).

Subclause (3) makes the operation of section 74(3) subject to the Commissioner being satisfied of certain matters. This ensures that the taxpayer must provide the necessary information to satisfy the Commissioner that he or she is entitled to the relief provided by the section.

Subclause (4) repeals section 74(3a) and inserts new sections 74(3a) to (3h).

<u>Section 74(3a)</u> provides that where a purchaser enters into a contract with the intention of transferring the property to a corporation which was in the process of being incorporated, or a dormant corporation which was in the process of being purchased (ie. a shelf company), nominal duty will apply to the subsequent conveyance or transfer.

For this subsection to apply, action must be underway to incorporate the corporation or purchase the dormant company at the time of entering into the contract or agreement. Duty must have also been paid on the initial agreement or contract.

<u>Section 74(3b)</u> applies nominal duty on conveyances to members of a public managed investment scheme where the purchaser's intention at the time the agreement to purchase was entered into was that the property would be scheme property.

Paragraph (a) provides that nominal duty treatment is subject to the Commissioner being satisfied that the managed investment scheme is established by way of a public subscription offer.

Paragraph (b) requires that the Commissioner must also be satisfied that the person who entered into the contract or the scheme promoted had an intention <u>before</u> the establishment of the managed investment scheme for the property to become scheme property.

Paragraph (c) specifies that the contract or agreement must also provide for the termination of the contract if the scheme is not established. Where this is not provided for in the contract, stamp duty relief will not be available.

Paragraph (d) requires the Commissioner to make an endorsement on the conveyance or transfer where he is satisfied in relation to matters specified in section 74(3b)(a) and (b).

Paragraph (e) requires duty to be paid on the initial agreement or contract before nominal duty is applied to the subsequent conveyance or transfer.

Section 74(3c) provides nominal duty treatment where the initial purchaser on a contract or agreement is substituted for a related purchaser on the subsequent conveyance or transfer.

The substitution may be to the extent of the whole or any part of the interest that the purchaser would have acquired in the property had the contract or agreement proceeded as originally contemplated.

The substituted purchaser must be related to the original purchaser at the time the contract or agreement was entered into. The qualifying relationships are set out in section 74(3d).

To ensure a clear understanding exists of how the provision will operate, the following examples are provided. Section 10(c) of the *Interpretation Act 1984* states, “words in the singular number include the plural and words in the plural number include the singular”.

Specifically, this interpretation would apply in the case of proposed section 74(3c) so that the references to “purchaser” and “person” could also be taken to be references to “purchasers” and “persons”.

Example 1 – Purchase as tenants in common

In the case of property purchased as tenants in common, each person is a purchaser of an undivided share in the property. Therefore, any substituted purchaser must be related to the purchaser who is transferring his or her undivided share in the property.

For example, Barry Smith and Kerry Jones (who are unrelated) enter into an offer and acceptance as tenants in common in equal shares. Subsequent to signing the contract, Kerry’s accountant advises him that he should have purchased the property in the name of his family company, Jones Company Pty Ltd, in which he and his wife are the only shareholders.

Kerry is able to substitute Jones Company Pty Ltd on the transfer to the extent of his 50% interest in the property. However, Barry could not transfer his 50% interest to Jones Company Pty Ltd, as the company would not meet the relationship test specified in section 74(3d).

Example 2 – Purchase as joint tenants

In the case of property purchased as joint tenants, the tenants are joint purchasers of the property. If the property were being transferred in its entirety to a substituted purchaser, the substituted purchaser would be required to be related to all of the joint tenants.

For example, Robyn and Kyle Brown (who are husband and wife) enter into a contract to purchase property as joint tenants and decide that they should have put the contract in the name of their unit trust, in which Robyn and Kyle and their two children are the sole unit holders. Robyn and Kyle are able to substitute the trustee of the unit trust on the subsequent transfer, as all the unitholders of the unit trust are the same as, or related to, both the purchasers on the original contract.

Similarly, the 100% interest of Robyn and Kyle Brown (ie. the purchasers) could be substituted on the transfer with any person who is related, within the meaning of section 74(3d), to both of them.

Example 3 – Purchase as joint tenants

Should two joint tenants enter into a contract, and then seek to deal separately with an undivided interest, the joint tenancy would be dissolved in accordance with property law principles, and the purchasers' interests would revert to tenants in common in equal shares. As such, they would be entitled to an undivided share in the property. The substituted purchaser is required to be related to the purchaser who is transferring his or her undivided share in the property to them.

For example, Brett Green and Cheryl Black (who are unrelated) enter into an offer and acceptance to purchase property as joint tenants. Brett subsequently seeks advice from his accountant and decides that he should have purchased his interest in the property in his family company's name, in which he, his children and his grandchildren are the sole shareholders. As Cheryl is not related to Brett's family company, Brett and Cheryl would need to dissolve the joint tenancy, becoming tenants in common with equal shares. Brett could then transfer the property to the extent of his 50% interest in the Green's family company on the subsequent transfer.

Example 4 – Purchase as individual

It is common for an individual to enter into a contract and subsequently receive professional advice that the contract should have included their spouse. This provision allows the substitution of a partial interest to a related person in these circumstances.

For example, Colin Richards enters into an offer and acceptance to purchase an investment property as the sole purchaser. After signing the contract, his accountant indicates that it would have been more appropriate to have purchased the property jointly with his spouse. Under the operation of section 74(3c)(c), Colin is able to substitute his wife as a purchaser on the conveyance or transfer to the extent of any part interest. In this case, he wishes to become a joint owner, and substitute a 50% interest in the property.

Section 74(3d) specifies qualifying relationships for the purposes of section 74(3c) where the initial purchaser is an individual.

Section 74(3e) specifies the qualifying relationships for the purposes of section 74(3c) where the initial purchaser is a corporation.

Section 74(3f) specifies the qualifying relationships for the purposes of section 74(3c) where the initial purchaser is the trustee of a unit trust.

Section 74(3g) specifically limits the application of section 74(3d), (3e) and (3f) to exclude circumstances where the substituted purchaser will not be the legal and beneficial owner of the property.

Paragraph (a) ensures that a person is not related under subsections (3d), (3e) and (3f) if the substituted purchaser is holding the property on behalf of a trustee of a discretionary trust. This provision is intended to preclude transfers under these subsections from involving discretionary trusts, due to potential avoidance concerns.

Paragraph (b) imposes the same limitation in respect of unit trusts, except for the specific situation accommodated under section 74(3d)(f).

Paragraph (c) applies to any trustee relationship other than those in section 74(3g)(a) and (b), limiting the availability of the relief where the property is held on trust. Notwithstanding this limitation, where the substituted purchaser is holding the property on behalf of a beneficiary who is also related to the purchaser, the relief will be allowed.

Examples under section 74(3g)(c) would include where a parent wishes to substitute a child as a purchaser on a conveyance or transfer, but cannot do so because the child has a legal disability. In these cases, this section would operate to allow the parent to substitute a whole or part interest to a trustee, who is holding that property on trust for the child.

Section 74(3h) specifies the status of illegitimate children for the purposes of sections 74(3d), (3e) and (3f), and also includes relationship provisions which are consistent with the recent equality of status legislation passed by the Parliament.

Subclause (5) clarifies the endorsement provision in section 74 to ensure that conveyances or transfers are appropriately endorsed under section 74 and as a consequence, considered properly stamped for the purposes of section 17C of the *Stamp Act*.

Clause 36: **Section 74A amended**

This clause amends section 74A, which charges duty on certain conveyances or transfers of corporation property, to remove the reference to duty under item 4A(1) as a consequence of the abolition of marketable securities duty.

Clause 37: **Section 74B and 74C inserted**

This clause inserts new sections 74B and 74C.

Section 74B charges duty on documented and undocumented put and call options by deeming the put and call arrangement to be a contract for the sale of the option property. The provision includes details of how reassessments are to be made if the options expire without being exercised or otherwise not carried into effect.

Section 74B(1) inserts a number of defined terms for the purposes of section 74B.

Section 74B(2) sets out the circumstances where section 74B is to apply. Importantly, it is only relevant that the call option described in section 74B(2)(a) and the put option described in section 74B(2)(b) be in existence at the same time to allow the provision to operate. The application of this subsection is subject to the exclusions set out in section 74B(4).

Section 74B(3) clarifies that the exercise periods of the call option and put option are irrelevant for the purposes of determining whether the section applies.

Section 74B(4) provides that subsection (2) does not apply in the following circumstances:

Paragraph (a) - where the Commissioner determines that the call and put option arrangement is only in existence for the sole purpose of obtaining finance or making other financial arrangements.

Generally, such a situation will arise because a financier refuses to finance a significant, but potentially risky, development project without some form of assurance that the project will be sold upon completion for a guaranteed amount.

Paragraph (b) – where the Commissioner is satisfied that the call and the put option arrangement is between the proprietors of a business for the sole purpose of providing continuity of that business on the death, total and permanent disablement, retirement or bankruptcy of a proprietor.

Throughout the consultation process, these are the only circumstances that were identified as a "genuine" use for a put and call arrangement.

Section 74B(5) inserts a definition of "proprietor" for the purposes of section 74B(4)(b), which is self-explanatory.

Section 74B(6) provides the mechanism for assessing the amount of duty payable on the put and call arrangement by deeming the call option to be a contract of sale of the option property for the purposes of section 74(1) or an acquisition of the beneficial ownership of the property for the purposes of section 31B. This deeming arrangement results in duty being chargeable as if the option were an agreement or acquisition under those sections.

Section 74B(7) provides a mechanism to determine the amount upon which a deemed contract or acquisition is to be assessed. Duty is assessed on the sum of the amount paid for the granting of the call option and the amount payable in the event of the call option being exercised. However, where the unencumbered value of the option property is ascertainable, and that amount is higher than the sum of the call option fee and exercise price, duty is to be assessed on the unencumbered value of the option property.

Section 74B(8) operates where the call option or put option is exercised, resulting in an actual contract or acquisition coming into existence. This section authorises duty to be assessed on the consideration or value of the contract, but allows the amount payable to be reduced to take account of the duty paid under subsections (6) and (7) on the deemed contract or acquisition.

Section 74B(9) applies where there is a simultaneous put and call arrangement in existence which has been charged with duty as a contract for sale or an acquisition of the option property, and the parties arrange for another person to acquire the same or similar option rights to the property. This usually involves the holder of the call option assigning the option to the other person, who grants a new put option to the property owner. The section reflects the nature of put and call option arrangements, such that it is the call option that is capable of being assigned, while the put option is usually renegotiated.

Section 74B(10) prevents the imposition of double duty where a put and call option is effectively assigned. Duty is to be charged under the assignment arrangements. Without this subsection, it is possible that the assignment arrangement could also be subject to duty as a new put and call arrangement.

Section 74B(11) provides the mechanism for assessing the amount of duty payable on the effective assignment of a put and call arrangement, by deeming the call option to be a contract of sale of the option property for the purposes of section 74(1) or an acquisition of the beneficial ownership of the property for the purposes of section 31B. This deeming arrangement results in duty being chargeable as if there had been an assignment of the contract or a sub-sale of the property that is the subject of the option arrangement.

Section 74B(12) provides a mechanism to determine the amount upon which a deemed contract or acquisition under subsection (11) is to be assessed. Duty is assessed on the sum of the amount paid for the assignment of the call option and the amount payable in the event of the call option being exercised. However, where the unencumbered value of the option property is ascertainable, and that amount is higher than the sum of the call option fee and exercise price, duty is to be assessed on the unencumbered value of the option property.

Section 74B(13) operates where the assigned call option or renegotiated put option is exercised, resulting in an actual contract or acquisition coming into existence. This section authorises duty to be assessed on the consideration or value of the contract, but allows the amount payable to be reduced to take account of the duty paid under subsections (11) and (12) on the deemed contract or acquisition.

Section 74B(14) provides for a reduction of duty where the call option has never been assigned and either the put or the call option expire without being exercised, or after either has been cancelled or rescinded the other expires without being exercised. The duty is reduced to the amount that would have been payable on the amount paid by way of consideration for the granting of the call option.

Section 74B(15) provides for a reduction of duty on the assignment of the call option where either the rights expire without being exercised, or after either of the rights is rescinded or cancelled the other expires without being exercised. The duty is reduced to an amount that would have been payable on the amount paid by way of consideration for the assignment of the right.

Section 74B(16) requires the Commissioner to make any reassessment necessary to give effect to subsections (14) or (15).

Section 74B(17) specifies that for the purposes of subsection (16), the time limit for reassessment applies as if the original assessment had been made:

- in the case of subsection (14), as soon as the call option and the put option had both expired; and
- in the case of subsection (15), as soon as the rights referred to in subsection (9)(a) and (b) had both expired.

Section 74B(18) sets out how the refund provision of section 20 will apply in relation to duty paid because of subsections (6) and (7).

Paragraph (a) specifies that the matter is not carried into effect for the purposes of section 20 if the call option and the put option are rescinded or cancelled by agreement or, after either option expires without being exercised, the other is rescinded or cancelled.

Paragraph (b) specifies that in these circumstances the amount of duty is not to be reduced to an amount less than the amount that would have been payable on the consideration for the granting of the call option.

Section 74B(19) sets out how the refund provision of section 20 will apply in relation to duty paid because of subsections (11) and (12).

Paragraph (a) specifies that the matter is not carried into effect for the purposes of section 20 if the rights referred to in subsection (9) are rescinded or cancelled by agreement or, after either of the rights expires without being exercised, the other is rescinded or cancelled.

Paragraph (b) specifies that in these circumstances the amount of duty is not to be reduced to an amount less than the amount that would have been payable on the consideration for the assignment of the right.

Section 74C (Acquisition of certain business assets), applies to assets usually involved when a business is acquired. However, it also applies to some assets which may be sold separately from a business, such as rent rolls and client lists.

The section defines a "business asset" and applies if a business asset of a business is acquired by a person and, at any time in the previous year, the business has been carried on in or from Western Australia, or supplied commodities or provided services to customers in Western Australia.

An apportionment method is provided so that where a business also operates outside of Western Australia, the dutiable amount in this State for assets involved can be determined.

This section will not affect the liability of some business assets that are currently dutiable when conveyed or transferred separately from a business.

Section 74C(1) provides definitions for the purposes of this section.

"business asset" includes:

- goodwill of a business;
- a restraint of trade arrangement (which is also defined);
- a business identity (which is also defined);
- a business licence, which is given the same meaning as in paragraph (b) of the definition of business licence in section 73F(1). This relates to a licence, permit or authority issued, granted or given under a law of the Commonwealth;
- a right of a business under an uncompleted contract to supply commodities or provide services(eg. a product sales agreement);
- intellectual property of a business (which is also defined); and
- things that a business has accumulated over a period of operation which have a value to the business and may be sold, with or without the business, and be used by the purchaser in a business context. These are in the nature of rent rolls and client lists. Rent rolls are rights to manage property usually held by a real estate firm. Client lists include, for example, an accountancy firm selling "fees" by way of receiving value for introducing clients to a purchaser and then refraining from further servicing those clients. They are in the nature of confidential information and may be

described or contained in a written, tangible, electronic or oral form, of past or current customers or lists of properties managed by the business on behalf of owners. Things of this nature are capable of sale as “property” and dutiable, regardless of the name they are called by. However, in the case of client lists, it is not intended that the acquisition of a simple list of names be dutiable, as in a list of names provided for the purpose of mailing out advertising material, but rather that for consideration, the owner of the client list is giving up the right to provide goods or services to those clients with an expectation on the part of the acquirer that he will be engaged by the clients to provide those goods or services.

A “business entity” is defined as a business name, trading name or Internet domain name or a right to use theses entities.

A definition of “circuit layout right” is included for the purposes of the definition of “intellectual property”. The definition is self explanatory.

“commodities” is defined as it is used in paragraph (e) of the definition of business asset. The definition is self explanatory.

The meaning of a “franchise arrangement” has been included for the purposes of subsection (3) of this section.

“intellectual property” means a patent, trademark, industrial design, copyright, registered design, plant breeder right or circuit layout right. However, in order to encompass new types of intellectual property as it emerges, the definition is not restricted to these things, but also extends to include anything else that is in the nature of intellectual property which might be sold or consideration paid for it when included in a sale of a business. It is intended that it would include an invention within the meaning of the *Patents Act 1990* and other types of intellectual property that may be created in the future (eg. animal breeding rights). A right to use or exploit intellectual property is also considered to be intellectual property.

If information or know-how is included in a business acquisition, it would come within the definition of intellectual property for the purposes of this section. In this regard, it should be noted that section 33 of the *Stamp Act* separately deals with mining information when ascertaining the value of a mining tenement.

“plant breeder right” is defined as it is used in the definition of intellectual property. The definition is self explanatory.

“restraint of trade arrangement” means an arrangement which, in the opinion of the Commissioner, enhances or is likely to enhance the value of the business. This provision will apply regardless of when the restraint of trade is entered into.

The creation of a restraint of trade raises a liability to duty under these provisions when money is paid to the seller of a business for an agreement not to compete with the business after its sale. It reflects a payment to protect the value of the business and as such is a payment for the business, which should be liable to duty in a similar manner to consideration paid for goodwill.

<u>Section 74C(2)</u> sets out when this section will apply. Section 74 will apply if a business asset (as defined) of a business is acquired by a person and at any time in the year before the acquisition, the business has either been carried on, in or from Western Australia, or supplied commodities in Western Australia. This makes it clear that the acquisition of the business asset is dutiable in Western Australia if the business supplies commodities or services in Western Australia, regardless of the location of the business.

The following example illustrates how this would work.

Michele has a business creating and selling ornaments, posters and other advertising material to tourist operators in all Australian States and Territories (including Western Australia). Her customers order their supplies by telephone and through her Internet web site, directly to Michele in Sydney. Michele then arranges for the supplies to be delivered to her customers where they are located.

If Michele decides to sell her business, the acquisition of the business assets by the other party would be dutiable in Western Australia due to the supply of commodities to customers in Western Australia in the previous year. The dutiable amount would be determined using the formula in subsection (9)), which apportions part of the business assets sold to the extent that the business is carried on in Western Australia.

<u>Section 74C(3)</u> provides that this section does not apply to the acquisition of a business asset by a franchisee from a franchisor in accordance with a franchise arrangement, when the franchise is first created. This does not affect the current liability to duty of the conveyance or transfer of an existing franchise arrangement from the franchisee to another person, including where an arrangement has the same effect as a sale. This occurs when, instead of directly selling the franchise business, the franchise holder relinquishes, or agrees not to extend, the franchise so that the franchisee can acquire the business assets comprised in a new franchise.

Section 74C(4) provides that section 74C does not apply to the acquisition of intellectual property unless the acquisition includes another business asset other than the intellectual property. This ensures that the acquisition of intellectual property by itself does not give rise to a stamp duty liability.

Section 74C(5) provides for circumstances where a business is carried on and a person who carries on that business, for the purpose of the sale, creates in favour of the buyer intellectual property, a restraint of trade arrangement or a business identity related to that business, for the carrying on of that business or another business, by another person. This subsection deems the creation of that property to be an acquisition of a business asset by the other person. This provision is necessary due to the intangible nature of intellectual property and the ability to grant rights or other entitlements over existing property as a substitute for selling it directly. It is anti-avoidance in nature, and requires special provisions as the *Stamp Act* otherwise generally charges duty on the conveyance of existing property.

Section 74C(6) ensures that where this section applies, a “business asset” as defined is property. This removes any doubt that all forms of intellectual property are property for the purposes of the section. The subsection also provides that the acquisition of the business asset is a transaction that transfers property and is chargeable with duty. This subsection operates despite item 2(7) of the Third Schedule, which provides an exemption for a conveyance or transfer of any estate or interest in any real or personal property locally situated out of Western Australia. This operates to provide a nexus to Western Australia in circumstances where neither the principal place of business nor the head office of the business is in Western Australia, but the business has supplied commodities or provided services to customers in Western Australia.

Section 74C(7) provides that duty on the acquisition of the business asset is to be assessed in accordance with either subsection (8) or (9), unless the Commissioner has determined that another method would be more appropriate under subsection (10).

Section 74C(8) provides the formula for calculating the dutiable value in Western Australia when the principal place of business or head office of the business is situated in Western Australia. The effect of the formula is that it includes for Western Australian duty, the value of overseas sales made by the business when calculating the dutiable amount.

In circumstances where the principal place of business or head office of the business are situated in Western Australia and all of the commodities are supplied or services are provided by the business to customers in Western Australia, the dutiable amount will be the consideration for the acquisition of the business asset, or the unencumbered value of the business asset, whichever is the greater.

Section 74C(9) provides the formula for calculating the dutiable value in Western Australia when neither the principal place of business nor the head office of the business is in Western Australia. This formula only takes account of commodities delivered and services provided by the business to customers in Western Australia as a proportion of all commodities delivered and services provided by the business.

Section 74C(10) allows the Commissioner to determine some other dutiable amount if he is satisfied the other amount is more appropriate in the circumstances.

Section 74C(11) provides that if this section applies to the acquisition of a business asset that is a business licence referred to in paragraph (d) of the definition of "business asset", section 73F which deals specifically with a business licence will not apply to the acquisition. However, section 73F will continue to apply to licences issued, granted or given under a law of the Commonwealth in circumstances where this new section 74C does not apply.

Section 74C(12) operates to remove any possibility that a contract or agreement for the acquisition of a business asset does not fall within the operation of existing section 74.

Clause 38: **Section 75 amended**

This clause amends section 75(2), which relates to the duty chargeable on a conveyance where the unencumbered value of the property conveyed exceeds the consideration payable in respect of that property. This clause removes the reference to the duty chargeable under item 4A(1) of the Second Schedule as a consequence of the abolition of marketable securities duty.

Clause 39: **Section 75AD amended**

This clause amends section 75AD(1), which relates to the duty chargeable where there is a partition of property. This clause removes the reference to the duty chargeable under item 4A(1) of the Second Schedule as a consequence of the abolition of marketable securities duty.

<u>Clause 40</u>: **Section 75AG amended and transitional**

This clause amends section 75AG, which provides for a reduction in the duty payable on the conveyance or transfer of residential property or vacant land to a first home owner if certain criteria are met.

Subclause (1) amends section 75AG(1)(c), which requires that the value of the residential property does not exceed $277,500 if the property is situated north of the 26th parallel of south latitude, or $185,000 in all other cases.

Subclause (2) amends section 75AG(3)(d), which requires that the value of the vacant land does not exceed $72,000.

Subclause (3) sets out the relevant transitional arrangements. It provides that these amendments do not apply in relation to an agreement for the conveyance or transfer of property that is executed prior to the commencement of these amendments, regardless of when the subsequent transfer is executed. Therefore, if a transfer is executed after the commencement of these amendments, but is pursuant to an agreement executed prior to the commencement of these amendments, then these amendments do not apply to that agreement.

<u>Clause 41</u>: **Section 75CA inserted**

This clause inserts a new section 75CA (Refund where contingent consideration is not paid). This section provides for a reassessment to be made where duty has been paid in respect of a contingent consideration forming part of an agreement or contract for the sale of any estate or interest in any property and that contingency is not ultimately realised.

<u>Section 75CA(1)</u> defines for the purposes of this section a “contract” as a contract or agreement for the sale of any estate or interest in any property, and a “contingent consideration” as a payment made in respect of a contract which is dependent on the happening of a future event. This subsection provides that in relation to a contract where a contingent consideration is charged with *ad valorem* duty and that consideration is dependent on the occurrence of a future event which, upon application under subsection (2), the Commissioner is satisfied was not realised, then the Commissioner must reassess the duty payable on the contract taking into account the contingent consideration which is deemed not to be part of the consideration in respect of which the contract is chargeable.

Paragraph (a) specifies that this provision applies only to contracts executed on or after the day on which this section comes into operation.

Paragraph (b) specifies that this provision applies only where the contingent consideration has not been paid.

Paragraph (c) specifies that this provision applies only where the future event did not happen, or did not happen within the time frame specified in the contract for its occurrence.

Paragraph (d) specifies that this provision applies only where either the event cannot occur in the future or the time specified in the contract for its occurrence is lapsed.

Section 75CA(2) provides that for the purposes of this section an application for reassessment is to be made:

(a) by the person liable to pay the duty and in a form approved by the Commissioner; and

(b) within five years of the execution of the contract.

Section 75CA(3) provides that a reference in this section to the happening of an event includes a reference to an event not happening.

Clause 42: **Section 75D amended**

This clause amends section 75D, which contains the interpretation provisions for Part IIIBAA. This clause amends the definition of “instrument of conveyance” in subsection (1) to remove the reference to duty under item 4A(1) of the Second Schedule as a consequence of the abolition of marketable securities duty.

Clause 43: **Section 75E amended**

This clause amends section 75E as a consequence of the abolition of duty on the transfer of marketable securities. An exemption was previously available for the conveyance between family members of shares in a farming company. This exemption is no longer necessary with the abolition of marketable securities duty, except to the extent that the share transfer gives rise to a requirement to lodge a statement under the land-rich provisions.

Subclause (1) amends subsection 75E(1) by removing references to a share in a farming company in paragraphs (c), (d)(iii) and (e)(iii), as well as making necessary grammatical amendments. The exemption under Part IIIBAA will now only be available for a direct conveyance or transfer of farming property, or the conveyance or transfer of an interest in a farming partnership.

The amendments in subclauses (2) to (5) amend section 75E to remove various redundant references to “company”, “share” and “farming company”.

Clause 44: **Section 75G amended**

This clause amends section 75G to ensure that redundant references to shares and other related matters are removed from the exemption provision.

Clause 45: **Section 75H amended**

This clause amends section 75H to ensure that the redundant reference to “share” is removed from the application provision.

Clause 46: **Section 75HA amended**

This clause amends section 75HA as a consequence of the abolition of marketable securities duty. Section 75HA is a claw-back provision that applies where a conveyance or transfer of farming property has been made to the discretionary trust of a family member and a “taxable event” occurs during the lifetime of the transferor. The amendments to this section remove the operation of the clawback in respect of marketable securities duty, but will continue to operate for any exempted land-rich duty where the exempted share transfer also gave rise to an exempted liability under the land-rich provisions.

It was not considered feasible to continue the clawback in relation to marketable securities duty, as the time limit for its continuation under these provisions is linked to the “lifetime” of the transferor.

Subclause (1) makes minor amendments to section 75HA(3) to ensure a statement is lodged with the Commissioner where a taxable event occurs.

Subclause (2) inserts the word “prepared” into section 75HA(3a) to ensure a dutiable statement is prepared in an approved form.

Subclause (3) amends the obligation under section 75HA(4) to align it with the lodgement of a dutiable statement, rather than the preparation of the statement.

Subclause (4) inserts a new section 75HA(4a) to remove the obligation to lodge a dutiable statement, except in circumstances where section 75HA(6) applies.

Subclause (5) amends section 75HA(5) to refer to the lodgement of a dutiable statement, rather than the preparation of the statement.

Subclause (6) amends section 75HA(6) to update various references to the lodgement of a dutiable statement, rather than the preparation of the statement.

Paragraph (b) also removes the reference to repealed section 75E(1)(e)(iii) and replaces it with a general reference to a conveyance of a share in a farming company. This more general reference is required, as the exemption from land rich duty available under section 75I is limited to circumstances where a share in a farming company is conveyed.

Paragraph (c) amends the claw back provision in subsection 75HA(6) so that it only operates where, at the date of the taxable event, the relevant farming company is still beneficially entitled to the farming land that was the subject of the exemption.

Subclause (7) repeals section 75HA(7), which previously clawed back marketable securities duty. The removal of this clawback provision means that if a taxable event occurs after the commencement of these provisions, the marketable securities duty that was exempted will not have to be repaid.

Subclause (8) amends section 75HA(8) to update a reference to lodge and replace it with a reference to prepare. A reference to a repealed section has been removed and replaced with a more general reference. The general reference is still required for the operation of the land rich exemption.

Clause 47: **Section 75I amended**

This clause amends section 75I to retain the exemption from land rich duty where an instrument of conveyance of shares in a farming company gives rise to a liability to lodge a land rich statement.

Subclause (1) replaces section 75I(1)(a) to grant an exemption from land rich duty if an exemption would have been available under the operation of Part IIIBAA prior to the amendments to abolish marketable securities duty. This clause is intended to preserve the operation of the land rich exemption as it currently operates, where a conveyance of shares would give rise to a requirement to pay duty under Division 2 of Part IIIBA.

Subclause (2) amends section 75I(1)(b) to refer to the lodgement of a dutiable statement, rather than the preparation of the statement.

<u>Clause 48:</u> **Section 75J amended**

This clause amends section 75J as a consequence of the abolition of marketable securities duty and the changes to the calculation of market value for stamp duty on the issue or transfer of a vehicle licence.

Subclause (1) specifies that the amendments in this section are to section 75J(1).

Subclause (2) deletes the definition of "foreign person" as the definition was only required for section 75JA(1a) which is being repealed.

Subclause (3) amends the definition of "section 31B or 31C statement" as those sections now require a dutiable statement to be lodged within the relevant time period, rather than prepared.

Subclause (4) makes punctuation changes.

Subclause (5) inserts definitions of "licence" and "vehicle" to give them the same meaning as those terms have in section 76B.

<u>Clause 49:</u> **Section 75JA amended**

This clause amends section 75JA as a consequence of the abolition of duty on marketable securities.

Subclause (1) repeals sections 75JA(1a), (2) and (2a) and inserts a new section 75JA(2).

<u>Section 75JA(2)</u> preserves the exemption under section 75JA where the requirements of section 75HA(1) are met and the acquisition is one to which the land rich provisions apply.

Subclause (2) amends section 75JA(3) to update the reference in that section to refer to the new section 75JA(2).

Subclause (3) repeals section 75JA(4) and inserts a new section 75JA(4).

<u>Section 75JA(4)</u> preserves the claw back that applied where an instrument was exempted under subsection 75JA(2a) and the company did not list on a recognised stock exchange within 6 months as required.

<u>Clause 50:</u> **Section 75JB amended and transitional**

This clause amends section 75JB to broaden the scope of the provisions to include transfers of motor vehicle licences and allow direct property transfers between certain subsidiaries of holding companies.

Subclause (1) amends section 75JB(1)(d).

Paragraph (a) deletes section 75JB(1)(d)(i) as the circumstances allowing A and B to become associated no longer arise under section 75JA(1)(a) to (e), or (1a)(a) to (h). Section 75JA now only provides an exemption from duty under the land rich provisions as a consequence of changes in share ownership.

Paragraph (b) deletes "or" after section 75JB(1)(d)(ii) to allow for the insertion of a new subparagraph (iv).

Paragraph (c) amends section 75JB(1)(d)(iii) to refer to the requirement to lodge a Part IIIBA statement.

Paragraph (d) inserts a new section 75JB(1)(d)(iv).

<u>Section 75JB(1)(d)(iv)</u> specifies that two body corporates (**A** and **B**) are associated for the purpose of Part IIIBAAA if a third body corporate (**C**) beneficially owns at least 90% of the issued share capital of each and has voting power over each. In addition, the third body corporate **C** must have owned the issued share capital of **B** since it was incorporated in Australia. **B** must have been dormant from when it was incorporated until it resolved to acquire the property from **A**, and **A** has been associated with **C** for at least the qualifying period.

Subclause (2) is a transitional provision that ensures any pre-determination provided prior to commencement is preserved if the exemption application is made after the commencement day.

Subclause (3) inserts a new subsection 75JB(2a).

<u>Section 75JB(2a)</u> provides that the corporate reconstruction provisions apply to an instrument that evidences an agreement to transfer or assign an interest in a vehicle, executed after the commencement of the provision. While it is not usually necessary to evidence motor vehicle licence transfers in an instrument, the exemption under these provisions requires it to be done in order for the exemption to be determined by the Commissioner.

Paragraph (a) sets out the information that the instrument must include in respect of the vehicle.

Paragraph (b) specifies that the conditions set out in section 75JB(1)(b) to (f) must be met. Rather than amend these sections to deal with any minor amendments, the required modifications are authorised by this section.

Subclause (4) amends section 75JB(3).

Paragraph (a) amends section 75JB(3) so that it does not apply in respect of an instrument that transfers or assigns an interest in a motor vehicle. A separate provision is inserted as section 75JB(3a) to deal with an instrument of this type.

Paragraph (b) deletes a reference to item 4A of the Second Schedule. Item 4A has been deleted due to the abolition of marketable securities duty.

Paragraph (c) amends section 75JB(3)(b) to refer to a Part IIIBA statement lodged in respect of a relevant acquisition.

Subclause (5) inserts a new section 75JB(3a) to deal with an instrument that transfers or assigns an interest in a motor vehicle. Where the Commissioner is satisfied that the corporate reconstruction exemption should apply, he is to issue an exemption certificate to the applicant.

Subclause (6) amends section 75JB(4).

Paragraph (a) ensures that the requirement to report a change in circumstances within 5 years of the execution of the instrument, or the date of the relevant acquisition, also applies to an instrument that transfers or assigns an interest in a motor vehicle.

Paragraph (b) deletes a reference to section 75JA(1a)(a) to (h) as that section has been removed due to the abolition of marketable securities duty.

Paragraph (c) deletes a reference to section 75JA(1a)(f) as that provision has been removed due to the abolition of marketable securities duty.

Subclause (7) amends section 75JB(5) to ensure that the claw-back also applies to an instrument that transfers or assigns an interest in a motor vehicle.

Subclause (8) amends section 75JB(5f).

Paragraph (a) ensures that the claw-back also applies to an instrument that transfers or assigns an interest in a motor vehicle.

Paragraph (b) clarifies that a reference to control by the parent body means voting control.

Subclause (9) amends section 75JB(6) to ensure that the claw-back also applies to an instrument that transfers or assigns an interest in a motor vehicle.

Subclause (10) amends section 75JB(7).

Paragraph (a) ensures that the claw-back also applies to an instrument that transfers or assigns an interest in a motor vehicle.

Paragraph (b) deletes a reference to section 75JA(1a)(a) to (h) as that section has been removed due to the abolition of marketable securities duty.

Paragraph (c) deletes a reference to section 75JA(1a)(f) as that section has been removed due to the abolition of marketable securities duty.

Subclause (11) is a transitional provision to ensure that the references to section 75JA(1a) still apply in respect of instruments executed before the commencement of this clause.

Subclause (12) provides a self-explanatory definition of “commencement day”.

Clause 51: **Section 75JBA amended**

This clause amends section 75JBA(2), which relates to a pre-determination of the application of the claw-back provisions, to clarify issues relating to voting control.

Clause 52: **Section 75JC amended**

This clause amends section 75JC, which relates to a pre-determination of the availability of corporate reconstruction relief.

Subclause (1) amends section 75JC(1) so that it relates to an acquisition, transaction, or transfer that would give rise to an instrument, or an obligation to lodge a section 31B, 31C or Part IIIBA statement, that might be exempt.

Subclause (2) amends section 75JC(5)(a) to correct a minor grammatical error.

<u>Clause 53:</u> **Section 75JD amended**

Subclause (1) amends section 75JD(2), which requires a request for a reassessment of duty on instruments or statements that should have been granted an exemption but were not, to be made within 12 months after the date of execution or the occurrence of the relevant acquisition. It removes the reference to a specific section and instead refers to an instrument or Part IIIBA statement.

Subclause (2) inserts a new section 75JD(2a) to ensure that application for a reassessment of duty payable on the transfer of a licence on the basis that an exemption certificate should have been, but was not, issued in relation to an instrument can only be made within 12 months after the date of application for the transfer.

Subclause (3) inserts a new section 75JD(5), which specifies that an "exempted instrument" in subsection (4) includes an instrument in relation to which an exemption certificate has been issued under section 75JB(3a) for a vehicle licence.

<u>Clause 54:</u> **Section 75JDA amended**

This clause amends section 75JDA(3), which allows the Commissioner to refuse to grant an exemption in respect of an instrument or Part IIIBA statement where he considers that it relates to a duty avoidance arrangement. This amendment ensures that this provision also applies to the issue of an exemption certificate in respect of a vehicle licence.

<u>Clause 55:</u> **Section 75JE amended**

Subclause (1) amends section 75JE.

Paragraph (a) inserts the designation (1) at the beginning of the section to enable new subsections (2) and (3) to be inserted.

Paragraph (b) restricts the operation of section 75JE(1) to an instrument that has been exempted from duty under section 75JB(3) so that it does not operate in respect of an instrument that evidences an agreement to transfer or assign a beneficial interest in a vehicle. A specific provision is inserted to deal with these circumstances.

Paragraph (c) inserts a reference to an acquisition into section 75JE(1)(d) to take account of amendments to section 31B which now applies to an acquisition of beneficial ownership.

Subclause (2) inserts new subsections (2) and (3) into section 75JE.

Section 75JE(2) sets out the procedure when a claw-back applies to an instrument that evidences an agreement to transfer or assign a beneficial interest in a vehicle. It specifies that the exemption certificate issued under section 75JB(3a) is revoked and the consequences, if the licence has been transferred without duty being payable.

Paragraph (a) instructs the Commissioner to assess the amount of duty that should have been paid on the transfer.

Paragraph (b) authorises the Commissioner to impose penalty tax equal to 20% per annum of the duty chargeable on the transfer.

Paragraph (c) requires the duty and penalty tax to be paid within one month after an assessment notice is issued.

Paragraph (d) specifies that if a body corporate that is liable to pay the duty and penalty tax has been wound up voluntarily, its directors at the time of the resolution to wind-up are jointly and severally liable to pay the duty and penalty tax. This does not apply where the Commissioner is satisfied that the winding-up was a creditor's voluntary winding-up and no creditor was an associate of the body corporate.

Paragraph (e) provides that on payment of the duty and penalty tax, the transfer is deemed to be duly stamped and to have always been stamped.

Section 75JE(3) provides that for the purposes of subsection (2)(a), the amount to be assessed is the amount of duty that would have been payable at the time when the licence was transferred. It also provides that in these circumstances, the provisions of section 76E(2) and (3) which apply to the assessment of duty by the Director-General, apply to the Commissioner as if he were the Director-General.

Clause 56: **Section 75JF amended**

This clause amends section 75JF(d)(ii), which relates to the claw-back under the corporation reconstruction provisions, to refer to the requirement to lodge a section 76AN statement.

Clause 57: **Section 76 amended**

This clause amends section 76, which contains the interpretation provisions for Part IIIBA (the land rich provisions).

Subclause (1) provides that the amendments in this section are to section 76(1), which sets out the definitions of certain terms used in the Part.

Subclause (2) amends the definition of "acquire" to delete item (b)(iii)(III). This item is no longer required as it relates to section 112HA, which has been repealed as a consequence of the abolition of marketable securities duty.

Subclause (3) amends the definition of "chattels" to clarify that it includes goods, wares or merchandise that are used solely or principally in connection with the business of primary production. The term "primary production" is defined in section 75D(1).

Clause 58: **Section 76A amended**

This clause amends section 76A, which relates to the treatment of a relevant acquisition by a person, in that person's capacity as a trustee. Section 76A(2)(b) is amended to clarify that a relevant statement lodged by the trustee is taken to have been lodged by the beneficiary.

Clause 59: **Section 76AA amended**

This clause amends section 76AA, which relates to the Commissioner's ability to make an assessment in the absence of a dutiable statement. This clause clarifies that the Commissioner may exercise his powers under sections 19 and 20 of the *Taxation Administration Act* to make an assessment where a dutiable statement required by section 76AN has not been lodged.

Clause 60: **Section 76AB inserted**

This clause inserts new section 76AB (Request that the Commissioner determine whether dutiable statement is required to be lodged) to allow taxpayers to obtain certainty about their obligation to lodge a statement under this Part.

Section 76AB(1) provides that a person who is party to an acquisition to which Part IIIBA may apply may, within 2 months of making the acquisition, request that the Commissioner determine whether a dutiable statement is required to be lodged by that person in respect of that acquisition, under section 76AG or section 76AN of the *Stamp Act*. It should be noted that the availability of this section is limited to the person who is required to lodge the statement.

Section 76AB(2) provides that a request made under section 76AB(1) is subject to certain conditions, namely:

(a) that it must be made in a form approved by the Commissioner; and

(b) that it must include the information that would be required under section 76AG(4)(a) to (f) or section 76AN(3)(a) to (f) if the request were a dutiable statement and any other information prescribed in the Regulations.

Section 76AB(3) provides that if, in accordance with section 76AB(1), the Commissioner is requested by a person to make a determination as to whether that person is required to lodge a dutiable statement and that request meets the requirements of section 76AB(2), then:

(a) the Commissioner must make the requested determination; and

(b) the person having made the request is no longer required to lodge a dutiable statement under section 76AG or section 76AN in respect of the acquisition which forms the basis of the request.

Section 76AB(4) defines the expression “specified period” to be that time specified by the Commissioner in a requirement to the person making the request for a determination to provide further information. This subsection provides that, despite the requirement in section 76AB(3)(a) for the Commissioner to make the requested determination, the Commissioner may defer the determination and require the person making the request to provide any further information needed to make the determination.

Section 76AB(5) provides that where the period specified by the Commissioner for the person to provide further information has lapsed, and the Commissioner still does not have sufficient information and evidence to make the requested determination, then:

(a) the Commissioner is no longer required to make the requested determination; and

(b) the requirement for a person to lodge a dutiable statement under section 76AG or section 76AN is revived, despite the person having made a request under section 76AB.

Section 76AB(6) provides that where the Commissioner makes a determination that the person making the request under section 76AB(1) is not required to lodge a dutiable statement under section 76AG or section 76AN, then the Commissioner must notify the person to that effect.

Section 76AB(7) provides that where the Commissioner makes a determination that the person making the request under section 76AB(1) is required to lodge a dutiable statement under section 76AG or section 76AN, then the request and any further information or evidence provided under section 76AB(4) are deemed to constitute the dutiable statement required to be lodged by the person.

Clause 61: **Section 76AG amended**

This clause amends section 76AG, which relates to the lodgement of a statement in respect of a relevant acquisition under the land-rich provisions in a company that is taken to be registered in Western Australia.

Subclause (1) amends section 76AG(1) to clarify that a statement in respect of a relevant acquisition is required to be lodged with the Commissioner within two months after the acquisition.

Subclause (2) amends section 76AG(2) to clarify that where a relevant acquisition is made by a person and a related person, one of those persons is required to lodge a dutiable statement in respect of the acquisition.

Subclause (3) amends section 76AG(3) to clarify that a dutiable statement must be prepared in an approved form.

Subclause (4) amends section 76AG(4)(f), (5), (5a), (5c) and (5d) to refer to a dutiable statement that is lodged in accordance with section 76AG(1).

Clause 62: **Section 76AH amended**

This clause amends section 76AH, which relates to the method of charging duty on a dutiable statement.

Subclause (1) amends section 76AH(2), which provides for the phasing-in of conveyance duty and the phasing-out of marketable securities duty where the value of land and chattels is between $1 million and $1.5 million.

Paragraph (a) deletes the formula for the calculation of duty under subsection (2) and inserts a new formula as a consequence of the abolition of marketable securities duty. The new formula allows for the phasing-in of conveyance duty where the value of land and chattels is between $1 million and $1.5 million. The new formula is:

$$\frac{A - \$1\,000\,000}{\$500\,000} \times B$$

where A is the value of the land and chattels and B is the conveyance duty chargeable under item 4(1) of the Second Schedule.

Paragraphs (b) and (c) make minor punctuation and grammatical changes.

Paragraph (d) deletes the definition of “C”.

Subclause (2) repeals section 76AH(2a), which is no longer required as a consequence of the abolition of marketable securities duty.

Subclause (3) amends section 76AH(3) to clarify that it applies to a dutiable statement required to be lodged under section 76AG.

Clause 63: **Section 76AI amended**

This clause amends section 76AI, which sets out the circumstances in which a WA company is a land-holder for the purposes of the Division. It amends section 76AI(2)(b) to provide that the value of the land to which the company is entitled is to be 60% or more of the value of all the property to which it is entitled.

Clause 64: **Section 76AJ amended**

This clause amends section 76AJ, by inserting a new section 76AJ(2a) that sets out the meaning of a “relevant acquisition”.

Section 76AJ(2a) is inserted to clarify that a previous acquisition will not be taken into account for the purposes of determining whether a relevant acquisition has been made if, at the time of the acquisition, the company was not a land-holder for the purposes of this Division under the provisions operating at the time of the acquisition. This is intended to clarify that an acquisition when the company was not land-rich (such as where the land represented only 70% of its property), would not be aggregated with an acquisition following the commencement of these provisions when the company is land-rich because the percentage has been lowered.

Clause 65: **Section 76AM amended**

This clause amends section 76AM to clarify that it applies to a statement lodged under section 76AG.

Clause 66: **Section 76AN amended**

This clause amends section 76AN, which relates to the lodgement of a statement in respect of a relevant acquisition under the land-rich provisions in a corporation that is incorporated, or taken to be registered, outside of Western Australia.

Subclause (1) amends section 76AN(1) to clarify that a statement in respect of a relevant acquisition is required to be lodged with the Commissioner within two months after the acquisition.

Subclause (2) amends section 76AN(2) to clarify that a dutiable statement must be prepared in an approved form.

Subclause (3) amends section 76AN(3)(f), (4) and (4a) to refer to a dutiable statement that is lodged in accordance with section 76AN(1).

Clause 67: **Section 76AO amended**

This clause amends section 76AO, which relates to the method of charging duty on a dutiable statement.

Subclause (1) amends section 76AO(2), which provides for the phasing-in of conveyance duty and the phasing-out of marketable securities duty where the value of land and chattels is between \$1 million and \$1.5 million.

Paragraph (a) deletes the formula for the calculation of duty under section 76AN(2) and inserts a new formula as a consequence of the abolition of marketable securities duty. The new formula allows for the phasing-in of conveyance duty where the value of land and chattels is between \$1 million and \$1.5 million. The new formula is:

$$\frac{A - \$1\,000\,000}{\$500\,000} \times B$$

where A is the value of the land and chattels and B is the conveyance duty chargeable under item 4(1) of the Second Schedule.

Paragraphs (b) and (c) make minor punctuation and grammatical changes.

Paragraph (d) deletes the definition of “C”.

Subclause (2) repeals section 76AO(2a), which is no longer required as a result of the abolition of marketable securities duty.

Subclause (3) amends section 76AO(3) to clarify that it applies to a dutiable statement required to be lodged under section 76AN.

<u>Clause 68:</u> **Section 76AP amended**

This clause amends section 76AP, which sets out the circumstances in which a corporation is a land-holder for the purposes of the Division. It amends section 76AP(2)(b) to provide that the value of the land to which the corporation is entitled is to be 60% or more of the value of all the property to which it is entitled.

<u>Clause 69:</u> **Section 76AQ amended**

This clause amends section 76AQ by inserting a new section 76AQ(2a).

<u>Section 76AQ(2a)</u> clarifies that a previous acquisition will not be taken into account for the purposes of determining whether a relevant acquisition has been made if, at the time of the acquisition, the corporation was not a land-holder for the purposes of this Division under the provisions operating at the time of the acquisition. This is intended to clarify that an acquisition when the corporation was not land-rich (such as where the land represented only 70% of its property), would not be aggregated with an acquisition following the commencement of these provisions when the corporation is land rich because the percentage has been lowered.

<u>Clause 70:</u> **Section 76B amended**

This clause amends section 76B to implement changes to the calculation of stamp duty on the issue of certain new vehicle licences on the "list" or "recommended retail" price.

Subclause (1) inserts definitions into section 76B(1).

The definition of "market value" provides different methods of valuation for particular types of new vehicles and for any other vehicle.

The types of new vehicles are those that are prescribed and for which a price has been set by the manufacturer, or principal distributor as the retail selling price in Western Australia of a vehicle of that make and model. The value is the price that has been set for the vehicle plus that which has been set for any optional feature. The vehicles to be prescribed are motor cars, motor wagons and motor cycles as set out in the First Schedule to the *Road Traffic Act 1974*. As unproclaimed road traffic legislation may affect the operation of the First Schedule, the descriptions of the vehicles may be subject to change once that legislation becomes operative.

For other types of vehicles, the market value is defined as the amount for which the vehicle might reasonably be sold, free of encumbrances, in the open market.

The term "new vehicle" is defined to mean a vehicle that has never been used and also a vehicle that has only been used for the purpose of selling it in the ordinary course of a dealer's business or demonstrating it to prospective purchasers, or both. However, where a vehicle has been used for the purpose of demonstrating it to prospective purchasers for a period of more than 3 months, it is no longer considered to be a "new vehicle" for the purposes of determining the market value.

The definition of "optional feature" means any particular type of transmission and anything that is prescribed, that is a standard feature of a vehicle of that make and model. It is not intended to prescribe any other feature initially.

Subclause (2) repeals section 76B(2) and inserts a new subsection (2).

Section 76B(2) provides that in sections 76D(4)(a) and 76D(5)(a), where it is stated that the dealer has acquired a vehicle solely for particular purposes, it also includes a reference to that purpose or purposes and for minor incidental purposes. The repealed subsection (2) made reference to section 76D(4) and (5), whereas the new subsection refers to specific paragraphs within those subsections.

Clause 71: **Section 76D amended**

Subclause (1) amends section 76D(3) to insert a new section 76D(3)(c). The new paragraph implements the extension of the corporate reconstruction exemption to include transfers of vehicle licences in certain circumstances. This change to section 76D(3) provides that duty is not payable on the transfer of a licence if an exemption certificate has been issued under section 75JB(3a) in relation to an instrument relating to the vehicle and that certificate is given to the Director General.

Subclause (2) amends section 76D(5)(a)(i) to make it clear that no duty is payable on the grant of a licence to a dealer where the dealer acquired the vehicle to which the licence relates solely for the purposes of selling it to another person in the ordinary course of the dealer's business. This provides consistency with section 76D(4)(b).

<u>Clause 72:</u> **Section 76G amended**

This clause amends section 76G, which requires a person applying for the grant or transfer of a vehicle licence under the *Road Traffic Act 1974* to provide information regarding the market value and purchase price of the vehicle. In circumstances where duty is not payable on the transfer because the Commissioner has issued an exemption certificate under section 75JB(3a), this amendment removes the obligation to provide the information. To ensure any duty is correctly calculated if a claw-back of the duty eventuates, this information would have been provided to the Commissioner when the application for exemption was made.

<u>Clause 73:</u> **Section 76H amended**

This clause amends section 76H, which requires a person who ceases to be the owner of a vehicle to notify the Director General of the new owner and to provide information regarding the market value and purchase price of the vehicle. In circumstances where duty is not payable on the transfer because the Commissioner has issued an exemption certificate under section 75JB(3a), this amendment removes the obligation to provide the information. However, this information would have been provided to the Commissioner when the application for exemption was made.

<u>Clause 74:</u> **Section 76I amended**

This clause amends section 76I, which imposes an obligation on a dealer who has obtained a transfer or grant of a vehicle licence with no duty payable to only use a vehicle, or allow any other person to use the vehicle, for the purposes for which the vehicle was acquired. This clause amends the reference to section 76D(4) or (5) to more specific references of section 76D(4)(a) and 76D(5)(a).

<u>Clause 75:</u> **Section 77 amended**

This clause amends section 77(2), which provides that a lease that is made subsequent to an agreement to lease is not chargeable with duty. The amendment requires the Commissioner to endorse on the lease the duty paid on the agreement to lease if requested to do so.

<u>Clause 76:</u> **Section 77A inserted**

This clause inserts new section 77A (Offer to lease) pertaining to undocumented lease agreements.

Section 77A replaces the provisions relevant to undocumented lease arrangements set out in section 31B of the S*tamp Act* prior to amendments made by this Bill.

Section 77A(1) provides that, subject to section 77A(2), a lessee must lodge with the Commissioner a statement in respect of a leasing transaction within 2 months after entering into the transaction. The offence penalty for failing to comply with this requirement is $20,000.

Paragraph (a) specifies that the leasing transaction is in respect of land located in Western Australia, buildings on land located in Western Australia, or fixtures annexed to land situated in Western Australia, or fixtures annexed to buildings on land situated in Western Australia.

Paragraph (b) specifies that this provision applies where a written offer to lease or a written acceptance of an offer to lease exists in respect of the land, buildings or fixtures.

Paragraph (c) specifies that this provision applies where the leasing transaction is not effected or evidenced by an instrument chargeable with *ad valorem* duty under item 12 of the Second Schedule.

Section 77A(2) specifies that the provisions of section 77A(1) only have application where the lessee would have been liable to pay *ad valorem* duty under item 12 of the Second Schedule, if an instrument effecting or evidencing the transaction had been executed.

Section 77A(3) provides that the dutiable statement must be prepared in a form approved by the Commissioner.

Section 77A(4) deems a dutiable statement lodged under section 77A(1) to be a lease and chargeable with duty as such.

Section 77A(5) makes it a requirement of each party to a transaction described in section 77A(1), except the person required to lodge the dutiable statement, to notify the Commissioner in an approved form within two months after entering into the transaction. The offence penalty for failing to make this notification is $20,000.

Section 77A(6) specifies that the provisions of section 77A(5) only have application where the lessee would have been liable to pay *ad valorem* duty under item 12 of the Second Schedule, if an instrument effecting or evidencing the transaction had been executed.

Section 77A(7) provides that any two parties to a transaction who are required to make a notification under section 77A(5) may do so jointly.

Section 77A(8) provides that if an instrument that evidences a transaction and is chargeable with *ad valorem* duty under item 12 of the Second Schedule is executed at any time after the transaction is entered into, the requirement to lodge a dutiable statement under section 77A(1) or to give notification under section 77A(5) ceases to apply. A person's liability for an offence against section 77A(1) or section 77A(5) committed before the instrument was executed is not affected by anything in this subsection.

Section 77A(9) specifies that where section 77A(8) has effect, for the purposes of section 17A of the *Stamp Act*, the date of first execution of the instrument referred to in that section is the day on which the transaction occurred.

Section 77A(10) provides that where an instrument is executed as referred to in section 77A(8) after a dutiable statement has been lodged under section 77A(1), then section 77A(4) no longer applies, unless duty has already been paid in respect of the dutiable statement.

Section 77A(11) provides that where duty has already been paid as mentioned in section 77A(10), then the instrument is not chargeable with *ad valorem* duty, but is to be endorsed by the Commissioner with the duty paid upon request.

Section 77A(12) allows for an exemption from the operation of sections 77A(1) and section 77A(5) to be prescribed to a class of transaction by the *Stamp Regulations 1979*.

Clause 77: **Section 79 amended**

This clause repeals sections 79(3), (4), (6), and (7) of the *Stamp Act* due to the abolition of duty on leases.

Clause 78: **Section 80 repealed**

This clause repeals section 80 of the *Stamp Act* relating to the duty on periodic re-appraisement of rent due to the abolition of duty on leases.

Clause 79: **Part IIIE (s. 81 – 90A replaced)**

This clause repeals Part IIIE and replaces it with a new Part that implements the mortgage duty recommendations of the Business Tax Review.

Section 81 (Definitions) inserts a number of self-explanatory defined terms for the purposes of Part IIIE.

Section 82 (Mortgages) sets out the meaning of “mortgage” and other relevant provisions.

Section 82(1) provides an exclusive definition of “mortgage”. Stamp duty will only apply to an instrument that falls within this definition. Notably, the definition does not cover an agreement to grant a mortgage, a loan application, loan agreements, instruments securing the payment or repayment of money at stated periods (including annuities), bonds, covenants and unsecured debentures.

The nexus is also specified in each paragraph of the definition, requiring property charged by the mortgage to be situated in Western Australia before duty will apply.

Section 82(2) provides an interpretive provision that operates for the purposes of section 91B (Collateral mortgages). This provision ensures that a reference to a mortgage or earlier mortgage includes mortgages which may have been first executed before the commencement of the section.

Section 83 (Advances) sets out the provisions relevant to an “advance”.

Section 83(1) provides an exclusive definition of “advance”, which is the provision or obtaining of funds by way of financial accommodation by a loan or bill facility. It is the act of making an advance or further advance that triggers a liability for duty on a mortgage which secures that advance.

The term “financial accommodation” has been used to ensure consistency with other mortgage duty regimes, and bears its ordinary meaning to the extent that it is given by way of a loan or bill facility as specified.

The definition of advance further narrows the existing mortgage duty base. For example, a mortgage that secures obligations under contracts, leases, chattel leases and accounts current will not attract mortgage duty unless they secure a loan or bill facility. This is because such arrangements do not generally result in the provision of, or obtaining of funds by way of, an "advance", as defined.

Section 83(2) clarifies the operation of subsection (1)(b), making it clear that an "advance" covers any bill facility regardless of from whom the funds are obtained.

Section 83(3) specifically notes that an advance includes a contingent liability under section 90. Without this provision, the contingent liabilities set out in that clause would not normally be considered to be an "advance" and duty could not be applied to such arrangements.

Section 84 (Loans) specifies four matters that are to be included in the meaning of loan. The use of the term loan in section 83 takes its ordinary meaning, which would generally cover a payment or agreement to pay by one person, in consideration of the borrower incurring an obligation to repay (*Ferguson v O'Neil* [1943] VLR 30 at 32). This section specifies that the matters mentioned in paragraphs (a) to (d) are a loan to remove any doubt that may otherwise exist.

Section 85 (Home mortgages) sets out the meaning of a "home mortgage". This term is relevant to the charging provisions in item 13 of the Second Schedule, as a lesser rate of duty is payable on a home mortgage or a mortgage where part of an amount secured is for the purposes of a home mortgage. This section replicates the requirements of the mortgage duty concession provided in repealed section 83(1a) of the *Stamp Act*.

Section 85(1) requires that the mortgagor be an individual, the secured amount be used for the specified purposes relating to a dwellinghouse, and the dwellinghouse be used by the mortgagor as his or her sole or principal place of residence.

Section 85(2) specifies the required uses in relation to a dwellinghouse that will allow a mortgage to be considered a home mortgage. Notably, these requirements do not include the purchase of vacant land.

Section 86 (Assessing mortgage duty) has been inserted to clearly set out the relationship between section 16, Part IIIE and the Second and Third Schedules to the *Stamp Act*.

Section 87 (Liability dates) sets out when a liability to mortgage duty arises.

Section 87(1) specifies that a mortgage is liable to mortgage duty when it is first executed. The term “first execution” is used throughout the *Stamp Act* and is generally taken to mean the time when the instrument becomes a complete document (ie. when it first becomes effective as an instrument).

For example, while a mortgage usually only requires execution by the mortgagor, if there are two or more such persons, it will become liable to duty when “first” signed by any one of them, such that it is enforceable against that person even if the other person(s) fail to sign.

When a mortgage is executed, and an amount secured has been specified but no advance has been made, the mortgage will be subject to nominal duty of $20.00 under item 13(1) of the Second Schedule.

Section 87(2) also applies mortgage duty when an advance or further advance is made under the mortgage and the total amount secured exceeds the secured amount for which the mortgage has been stamped. To take account of practical concerns raised during consultation on this model in other jurisdictions, section 88 also allows a mortgage to be stamped before an advance has been made under it.

Sections 87(3) and (4) provide special liability rules for an instrument of security that does not affect property in Western Australia when it is first executed, but which subsequently affects certain Western Australian property. If the security has been stamped in another jurisdiction or is exempt from duty in another jurisdiction, these provisions do not apply, as duty would have already been paid on the full amount of the advance(s) or an exemption would have been applied.

These anti-avoidance provisions apply to impose duty on the instrument of security where any property, including land, is specifically identified and under an arrangement is intended to be brought under the security. An additional rule applies where land is brought under the security within one year of first execution.

Section 87(5) provides the timing for the imposition of mortgage duty for the purposes of a mortgage falling within the meaning of section 82(1)(d).

Section 88 (Stamping before advance) was introduced to address practical concerns with the mortgage duty model operating across participating jurisdictions. Despite mortgage duty being calculated on the advances actually secured by a mortgage, it may be stamped to an amount to secure future advances, such as a limit that a bank has allowed a borrower to draw upon. In reality, stamping is effected before the liability to duty arises and the duty paid eventually satisfies the liability on advances once they are made. This section eliminates the need for financial institutions to upstamp the mortgage on a continuing basis where there may be, for example, progressive drawdowns under the loan facility. For multi-jurisdictional mortgages, the need for a financial institution to consider the property mix at the time of each actual drawdown made until the loan limit is reached may also be eliminated.

Section 88(1) authorises a mortgage to be stamped prior to an advance being made.

Section 88(2) provides that if this option is chosen and the mortgage is a multi-jurisdictional mortgage or part of a mortgage package, mortgage duty is calculated on the basis of the property mix at the date of stamping.

Section 89 (The secured amount) contains the explanation of a "secured amount" for the purposes of Part IIIE and item 13 of the Second Schedule.

Section 89(1) provides that the amount secured by a mortgage is the amount equal to the sum of advances actually secured by it (which would include any contingent liabilities) and which is recoverable under the terms of the mortgage.

There are two features of this section that bear further explanation.

The use of "actually secured by it" has been used to indicate that the advance has actually been provided and its repayment is secured by the mortgage. This clarifies the position where, for example, it is required to nominate a "maximum prospective liability" when lodging a mortgage which is a company charge at ASIC. The mortgage will only be liable for stamp duty on the advances it actually secures, rather than a limit that a person may express it to secure.

The second matter deals with the use of "recoverable under the terms of the mortgage", which is used to recognise that the amount recoverable under a mortgage may be capped. If the amount of the cap is less than the advances made under and secured by the mortgage, then duty will only be calculated on the amount of the cap.

By way of example, it is common for a mortgage to include a provision as follows:

"Notwithstanding that this mortgage secures the whole of the secured moneys, the amount recoverable under this mortgage is limited to $500,000."

If advances in excess of $500,000 were made and secured by this mortgage, it would be stamped only to an amount of $500,000 in recognition of the cap.

In this respect, the amount recoverable under the terms of the mortgage should not be confused with the extent to which a mortgage is enforceable under proposed section 91C.

Section 89(2) sets out how an amount secured is to be determined where there are further advances made under a previously stamped mortgage. This is perhaps best illustrated by an example.

A mortgage has been stamped for previous advances of $200,000. An amount of $80,000 remains unpaid on the loan when a further advance of $300,000 is made.

The amount secured in relation to the further advance would be the excess of the total amount secured by the mortgage over the amount for which the mortgage has been stamped.

The total amount secured is $380,000 and the amount for which the mortgage has been stamped is $200,000. The amount secured for the purposes of calculating duty on the further advance is $180,000.

If the further advance had been for $100,000, the total amount secured by the loan would have been $180,000, which is less than the amount for which the mortgage had been previously stamped. Accordingly, there would be no further duty payable on the further advance of $100,000.

Section 89(3) reproduces the exemption that was located in repealed section 83(8).

Section 90 (Contingent liabilities) deals with contingent liabilities. This section is anti-avoidance in nature and is designed to prevent a situation occurring where the parties indirectly mortgage property so that it does not fall within the standard mortgage provisions.

Section 91 (Mortgage over property partly outside WA) sets out the arrangements that are to apply where a mortgage secures property partially in Western Australia and partially in another State.

Section 91(1) provides that where a mortgage secures property that is partly in Western Australia and partly outside Western Australia, mortgage duty is only payable on a proportion of the secured amount.

Section 91(2) sets out how the dutiable proportion is to be ascertained. This is the proportion of the secured amount that the secured property in Western Australia bears to all secured property at the date that the liability to duty arises. Overseas property and property in a Territory is not included when calculating the dutiable proportion. The property mix is tested each time there is an advance that triggers a mortgage duty liability. The valuation of the property is made at the liability date for duty in respect of the advance that requires duty to be paid.

The following example illustrates this calculation:

"A" grants a mortgage to "B" to secure an advance of $600,000.

The mortgaged property has a total value of $750,000, broken down as follows:

Western Australia	$200,000
Queensland	$250,000
Victoria	$300,000

The dutiable proportion for Western Australia would be:

$$\frac{200,000}{750,000} \times \$600,000 = \$160,000$$

Duty on $160,000 is $640.00.

In the case of excluded property, if the same facts are assumed to exist, except the property is secured in Western Australia, the Northern Territory and Victoria, the dutiable proportion for Western Australia would be:

$$\frac{200,000}{500,000} \times \$600,000 = \$240,000$$

Duty on $240,000 is $960.00.

Section 91(3) has been inserted as a method of minimising compliance costs. It requires that property values must be calculated according to a referable point. Referable points have been designed to include more flexible methods of providing acceptable property valuations to all jurisdictions, by referring to information that is generally available or produced in the course of running a business.

Section 91(4) lists the referable points that are acceptable under this section.

Section 91(5) provides that where more than one referable point exists for a mortgage, the later or latest of the referable points is to be used.

Section 91(6) provides that the same referable point must be used for all jurisdictions. This ensures the duty sharing arrangements are applied consistently by all jurisdictions where the mortgaged property is located.

Section 91A (Mortgage packages) introduces the concept of a mortgage package.

Section 91A(1) provides that two or more security instruments are a mortgage package if at least one of the instruments in the package is a mortgage, the instruments in the package secure or partly secure the same moneys at the liability date and at least one of the instruments secures property wholly or partly outside of Western Australia.

Section 91A(2) has two additional requirements that affect the composition of a mortgage package.

Paragraph (a) ensures that all mortgages that are contemplated as security for the same advance are included in the mortgage package and can be taken into account in calculating the mortgage duty payable in a particular jurisdiction in the event that the mortgage is not executed at the same time as the remaining instruments in the package.

Paragraph (b) clarifies that a mortgage executed after a mortgage package was last stamped, and which has been stamped as a collateral mortgage under section 91B, is included as part of the mortgage package at the next liability date. This ensures that the property secured by the collateral mortgage is taken into account when calculating the dutiable proportion for any further advances under the mortgage package.

Section 91A(3) provides how a mortgage package is to be assessed where the instruments in the package are executed on different dates.

Section 91A(4) sets out how the mortgage package is to be stamped, such that one mortgage is stamped with the duty paid in Western Australia, with the remaining mortgages stamped as collateral.

Section 91B (Collateral mortgages) sets out the duty consequences for collateral mortgages. A collateral mortgage is a mortgage, not being part of a mortgage package, which secures the same advance as another mortgage such that the liable party nominates one mortgage (the "primary mortgage") to be chargeable with full duty, thus bringing the second one for consideration under this section and ensuring duty is not paid twice for the same advance. It also arises where a mortgage is executed outside of a mortgage package, but secures the same advance as secured by the mortgage package that is fully stamped.

Section 91B(1) ensures duty is paid only once where there are multiple securities for the same advance, by eliminating duty chargeable on a collateral mortgage to the extent that the amount it secures is covered by the duty paid on the primary mortgage or by a mortgage package which is stamped in Western Australia or another State.

Section 91B(2) sets out the circumstances where further duty must be paid on a collateral mortgage. As there is no formal distinction between primary and collateral securities for duty purposes, this provision has been inserted to ensure that collateral mortgages cannot be used to secure new advances when they no longer secure any part of the advance secured by the mortgage or mortgage package to which the collateral mortgage has been stamped collateral.

By way of example, assume that a financial institution advances $200,000 to Jessica Smith. This loan is secured by a mortgage given by Jessica and a guarantee and all moneys mortgage given by her mother Jan. The mortgage given by Jessica is stamped with mortgage duty and the mortgage given by Jan is stamped collateral (ie. endorsed as no duty payable under section 17C of the *Stamp Act*).

Two years later, Jan approaches the lender and asks that her mortgage no longer be included as security for Jessica's loan. The financial institution agrees to this, as Jessica now has sufficient equity under her own mortgage to support the loan. The financial institution advances $200,000 to Jan. Even though Jan's mortgage is stamped to secure $200,000, as it no longer secures the amount secured by Jessica's mortgage, duty must be paid on the loan to Jan.

Section 91B(3) requires the Commissioner to endorse on the collateral mortgage, the mortgage duty paid on the primary instrument, when requested to do so.

Section 91C (Extent to which mortgage can be enforced) deals with the extent to which a mortgage or mortgage package can be enforced if mortgage duty is not paid.

Section 91C(1) provides that a mortgage or mortgage package that is subject to duty under this Act or which has a similar duty imposed under equivalent laws, can only be enforced to the extent of the amount secured where the relevant amount of duty has been paid or exempted under this Act or the other relevant law.

Section 91C(2) includes specific provisions dealing with the enforceability of mortgages or mortgage packages that affect property partly inside and partly outside Western Australia. The enforceability of these mortgages is preserved if duty has been paid (or exempted) in one or more jurisdictions in respect of the total advances.

The dutiable proportion used to calculate mortgage duty liability in Western Australia must have been based on a referable point and the valuations so used must not be incorrect by more than 5%. This provision ensures that a multi-jurisdictional mortgage is only fully enforceable in any jurisdiction if the correct amount of duty has been paid in all jurisdictions. The 5% error margin ensures that a lender's security is not jeopardised as a result of an administrative mechanism designed to add simplicity to the multi-jurisdictional mortgage arrangements.

Section 91D (Use of stamped and collateral mortgages as security) limits the extent to which a mortgage can be used to secure advances, where the mortgage was previously part of a mortgage package, but is no longer part of that package and does not secure a further advance secured by the other mortgages in the package. This clause deals with any potential avoidance activity that may otherwise allow a mortgage that previously formed part of a package to secure further advances without duty being paid.

Section 91E (Multi-jurisdictional statement) sets out an administrative requirement to facilitate the stamping of multi-jurisdictional mortgages.

Section 91E(1) requires that where duty is imposed in relation to a dutiable proportion of a mortgage, a statement must be prepared by the mortgagor or mortgagee in an approved form about the location and value of the secured property. An offence penalty of $5,000 applies for failure to prepare the statement.

Section 91E(2) relieves the obligation on either the mortgagor or mortgagee where the other party prepares the statement.

Section 91E(3) facilitates easier stamping of the mortgage, by allowing the statement to be taken to be the mortgage where it is expedient to do so. Such an election would usually be made by the taxpayer for expediency as it overcomes the need to send the mortgages around the States for stamping of each State's proportion of the duty.

Section 91F (Exemption for charitable or public purposes) reproduces the exemption previously located in repealed section 90A for mortgages that secure an advance that has been, is being, or will be used for a university or any charitable or similar public purpose.

Clause 80: **Section 92 amended**

This clause amends section 92 to implement the abolition of duty on life insurance policies, including the related issue of the duty treatment of life insurance riders.

Paragraph (a) inserts the subsection designation (1) before the word "In".

Paragraph (b) deletes the word "accident" from the definition of "policy of insurance" and inserts a new paragraph (a) to the effect that policies of insurance include those against accident, but do not include any policy of insurance where the period for which the insurance is effected commences on or after the day on which this section of this Act comes into operation. This gives effect to the abolition of stamp duty on life insurance.

Paragraph (c) inserts two new sections 92(2) and (3).

Section 92(2) defines a life insurance rider to be a general policy of insurance if an identified part of the premium is attributed to it. Duty is payable on that identifiable part.

Section 92(3) specifies when section 91A(2) applies.

Clause 81: **Section 92A amended**

This clause amends section 92A(1) by inserting new paragraphs to outline when a statement is required to be lodged if the insurance policy is issued outside of Western Australia. The requirement to lodge a dutiable statement in respect of a policy of life insurance has been removed.

Clause 82: **Section 92B amended**

This clause amends section 92B by deleting references to a policy of life insurance as a consequence of the abolition of duty on life insurance policies.

Clause 83: **Section 96 amended**

This clause amends section 96 to remove references to a policy of life insurance as a consequence of the abolition of duty on life insurance policies.

Clause 84: **Part IV (s. 100 – 107) and IVAC (s. 112H – 112HA) repealed**

This clause repeals Parts IV and IVAC as a consequence of the abolition of marketable securities duty.

Sections 102 and 106 have been reproduced as sections 39 and 40 of the *Stamp Act*, as these sections are necessary for purposes other than marketable securities duty.

Clause 85: **Part IVB (s. 112I - 112P) replaced**

This clause repeals Part IVB and inserts a new Part IVB in its place. The new Part IVB is structured as six Divisions which are as follows:

- Division 1 – Interpretation in Part IVB;
- Division 2 – Registration of commercial hire businesses;
- Division 3 – Connection to the State;
- Division 4 – Commercial hire businesses;
- Division 5 – Persons other than commercial hire businesses; and
- Division 6 – General provisions.

Division 1 – Interpretation in Part IVB

Section 112I sets out the definition of a "commercial hire business" for the purposes of this Part. This is necessary as duty applies to the hiring charges received by a commercial hire business. Separate arrangements apply to a person who is not a commercial hire business.

Section 112I(1) provides that a person who hires out goods as a business is a "commercial hire business".

Section 112I(2) clarifies that it is irrelevant whether the hiring out of the goods is the principal activity of the business, or is ancillary to the business. Therefore, a manufacturing business that also hires out pieces of its equipment on an irregular basis to its customers would still be considered to be a commercial hire business. It is also irrelevant whether the business is undertaken partly or wholly outside of Western Australia. A business may still be considered to be a commercial hire business even if its business is undertaken outside of Western Australia.

Section 112IA inserts a definition of "goods" which provides that goods includes:

(a) all chattels personal, which are movable things or items of personal property which have no connection with real property;

(b) fixtures which can be separated from the realty; and

(c) fixtures which cannot be separated from the realty but which are treated by an arrangement between the parties as if they were separated from the realty.

This section also provides that "goods" does not include books, money, livestock and things in action.

Section 112IB explains what is meant by the term "hire of goods".

Section 112IB(1) provides that a "hire of goods" is an arrangement under which goods are or may be used by a person, being a person other than the person hiring out the goods. However, it does not include those arrangements that are specifically excluded under section 112IB(3).

Section 112IB(2) provides that there are two kinds of hire of goods, being an "equipment financing arrangement" and an "ordinary hiring arrangement". An "equipment financing arrangement" is defined in section 112ID(1) as a hire purchase agreement or another agreement for a term of at least 9 months under which the final payment is not payable until at least 8 months after the agreement was entered into. An "ordinary hiring arrangement" is defined in section 112IF as a hire of goods that is not an equipment financing arrangement.

Section 112IB(3) provides that certain arrangements are excluded from the definition of "hire of goods". These are as follows:

(a) an arrangement giving a person a right to use goods that is incidental to a lease of or a licence to occupy or use, land if the consideration is not apportioned between the use of the goods and the use of the land;

(b) an arrangement between related corporations (related corporations is defined in section 4 of the Act);

(c) an arrangement for the hire of an aircraft, ship or vessel, or an engine or other component of an aircraft, ship or vessel;

(d) an arrangement for the provision of goods to a trader for the purposes of displaying or demonstrating the goods pending their sale to a third party;

(e) an arrangement commonly referred to as a "wet hire", being an arrangement where an operator is also provided by the person hiring out the goods to operate the goods for the hirer;

(f) an arrangement for the use of goods, where the use of goods is ancillary to the provision of a service and the goods are provided solely to enable the provision of the service;

(g) an arrangement whereby a motor vehicle is subleased by an employee to an employer as part of the employee's remuneration or employment benefits;

(h) an arrangement for the use of an invalid aid or prosthetic device or similar, by a person who is partially or totally incapacitated;

(i) a credit contract within the meaning of the *Consumer Credit (Western Australia) Code*. The Code relates to credit provided to a natural person (or a strata corporation) for personal, domestic or household use only. The Code does not apply to credit in excess of $200,000. Therefore, this exemption does not extend to credit contracts for business purposes, and any credit contracts (whether for business or personal use) that are in excess of $200,000;

(j) an arrangement relating to the use of a caravan on site;

(k) a "State hire of goods" (as defined in section 112IC); and

(l) any other arrangement that is prescribed by the regulations.

Section 112IB(4) clarifies that a hire of goods does not have to be effected or evidenced by an instrument in writing for it to be dutiable under this Part. Duty is still chargeable in relation to a hire of goods that is not effected or evidenced in writing.

Section 112IB(5) clarifies that a hire of goods need not be constituted by a single instrument, but may be constituted by two or more instruments which on their own would not constitute a hire of goods.

Section 112IC explains what is meant by a "State hire of goods".

Section 112IC(1) provides that a “State hire of goods” is a hire of goods to which one of the following is a party:

(a) the State;

(b) a State instrumentality, agent of the State or Government authority that is designated as an exempt person or body; or

(c) a person acting on behalf of the State or an exempt person or body.

Section 112IC(2) allows the Minister to publish an order in the *Government Gazette* to designate an exempt person or body for the purposes of subsection (1).

Section 112IC(3) allows the Minister to vary or revoke an order published in the *Government Gazette* by a further order in the *Government Gazette.*

Section 112ID explains what is meant by an “equipment financing arrangement”.

Section 112ID(1) provides that an “equipment financing arrangement” is a hire purchase agreement (as defined in section 112ID(2)) or another agreement for a term of at least 9 months, under which the final payment is not payable until at least 8 months after the agreement was entered into.

Section 112ID(2) defines a “hire purchase agreement” as a letting of goods with an option to purchase, or an agreement for the purchase of goods by instalments. However, it does not include an agreement by which the title to the goods passes at the time of the agreement or at any time before the goods are delivered. Therefore, it would not include typical store credit arrangements where the customer obtains the goods at the time the agreement is entered into and then makes payments over the period of the agreement.

Section 112IE explains what is meant by “hiring charges”.

Section 112IE(1) defines “hiring charges” as payments made by or on behalf of the hirer to the person who hires out the goods for the hire of the goods, or that arise as an incident of the hire of goods.

Section 112IE(2) extends the definition of “hire of goods” to include charges that are:

(a) payments for damage waiver or for damage excess. These payments are common in the car hire industry. When hiring a vehicle on a short term basis, hirers have the option of paying these fees to avoid the need to pay a substantial excess should the vehicle hired be involved in an accident or be otherwise damaged while it is hired out;

(b) late return fees; and

(c) an amount for giving the hirer information about, or rights relating to, the use of the goods for the purposes of the hire of goods. This includes amounts paid to the person who hires out the goods and, by virtue of section 112NA(b), amounts paid to a person other than the person who hires out the goods.

Section 112IE(3) provides that the following charges are excluded from the definition of "hire of goods":

(a) payments for delivery, repositioning, erection, installation, maintenance or cleaning of the goods;

(b) refundable deposits or bonds, unless they are retained as hiring charges;

(c) a deposit or other consideration under a hire purchase agreement that is paid by a customer to the person who hires out the goods at or before the time the agreement is made. This is designed to cover amounts paid by a customer as part payment of the purchase price, where the balance is financed by way of a hire purchase agreement but the agreement acknowledges payment of the deposit;

(d) insurance premiums payable by the hirer;

(e) an amount equivalent to duty paid or payable under this Act or interstate duty ("interstate duty" is defined in section 4 to include duty of a similar nature to the duty payable under this Act that is payable in another State or Territory;

(f) payments for the sale of goods;

(g) an amount equivalent to any GST payable on the supply to which the hire of goods relates ("GST" is defined in section 4(1) of the Act);

(h) a payment by the hirer under a hire of goods if title to the goods passes to the hirer as a consequence of the payment; and

(i) any payment of a type that is prescribed by the regulations.

Section 112IF provides definitions of the following terms that are used in this Part:

"annual duty-free threshold", "commercial hire business", "duty-free threshold", "equipment financing arrangement", "goods", "hire of goods", "hire purchase agreement", "hirer", "hiring charges", "ordinary hiring arrangement", "registered commercial hire business", "return period" and "State hire of goods".

Division 2 – Registration of commercial hire businesses

Section 112J sets out the requirement for a commercial hire business to apply for registration.

Section 112J(1) requires a commercial hire business that is not already registered, to apply for registration if the hiring charges it receives in a month exceed $4,167. This monthly threshold is based on 1/12th of the annual threshold of $50,000.

Section 112J(2) sets out the period in which the application for registration must be made. This section requires the application to be made in an approved form on or before the 21st day after the month in which the threshold is exceeded. For example, if during the month of January an unregistered commercial hire business receives $5,000 in hiring charges, the business would be required to apply for registration on or before 21 February. An offence penalty of $20,000 applies for failure to apply within the requisite time period.

Section 112JA sets out the Commissioner's obligations in registering a commercial hire business.

Section 112JA(1) provides that the Commissioner must register a commercial hire business that applies for registration.

Section 112JA(2) provides that the Commissioner must register a commercial hire business that has not already applied for registration if he is satisfied that the business meets the requirements to be registered under this Part.

Section 112JA(3) requires the Commissioner to notify a commercial hire business of its registration. This applies to both a commercial hire business that has applied for registration, and a commercial hire business that the Commissioner has registered on his own initiative.

Section 112JB sets out the circumstances in which the Commissioner may cancel the registration of a commercial hire business.

Section 112JB(1) provides that the registration of a commercial hire business may be cancelled by the Commissioner on his own initiative, or at the request of the commercial hire business.

Section 112JB(2) clarifies that the Commissioner is not to cancel the registration of a commercial hire business unless he is satisfied that the business no longer meets the requirement to be registered under this Part.

Section 112JB(3) provides that the cancellation of a commercial hire business's registration has effect from the date specified in the notice of cancellation provided by the Commissioner to the commercial hire business. This day may be a day that is earlier than the day on which the notice is issued. This allows the Commissioner to cancel a commercial hire business's registration retrospectively, such as in the case where a commercial hire business ceased operating on 1 January, but failed to notify the Commissioner until 1 March. This provision enables the Commissioner to cancel the registration of the commercial hire business from 1 January. If the Commissioner were not able to cancel the registration retrospectively, the duty payable by the commercial hire business would be reduced, as the business would receive the benefit of the duty free threshold for the months it was not required to be registered.

Division 3 – Connection to the State

Section 112K contains the nexus provisions which set out the connection to the State which must exist for this Part to apply.

Section 112K(1) provides that duty is payable in relation to a hire of goods by a commercial hire business if the goods are used solely or predominantly in Western Australia during the return period. A return period is defined in section 112LC as a period of one month, unless a special tax return arrangement is in force under section 49 of the *Taxation Administration Act*. The effect of this subsection is that duty may be payable in a different jurisdiction for each return period if the jurisdiction in which the goods are solely or predominantly used changes over the course of the hire. The place of sole or predominant use is clarified in section 112K(3).

Section 112K(2) provides that duty is payable in relation to a hire of goods by a person other than a commercial hire business if the goods are used solely or predominantly in Western Australia during the course of the hire. The place of sole or predominant use is clarified in section 112K(3).

Section 112K(3) sets out the basis for determining the place of sole or predominant use of a good.

Paragraph (a) provides that where a motor vehicle is registered in a particular jurisdiction and is the subject of an equipment financing arrangement (ie. a hire purchase agreement or agreement for a term of not less than 9 months), the motor vehicle will be taken to be used solely in the jurisdiction in which it is registered.

Paragraph (b) provides that where a motor vehicle is registered in a particular jurisdiction and is the subject of an ordinary hiring arrangement (ie. for a term of less than 9 months), the motor vehicle will be taken to be used solely in the jurisdiction in which it was initially delivered under the arrangement.

Paragraph (c) applies to any other hire of goods and provides that the goods will be taken to be used in Western Australia if they are used more in Western Australia than in any other jurisdiction.

Paragraph (d) provides that where goods are not used solely or predominantly in any particular jurisdiction, they will be taken to be used predominantly in the jurisdiction in which they were initially delivered under the hire of goods.

Division 4 – Commercial hire businesses

Section 112L sets out the requirements for a commercial hire business to lodge returns and pay duty on those returns.

Section 112L(1) requires a registered commercial hire business to lodge a return in respect of each return period (return period is defined in section 112LC as a period of one month, unless a special tax return arrangement is in force under section 49 of the *Taxation Administration Act*) and pay any duty payable on that return. The return is required to be lodged and duty paid on or before the 21st day after the end of the return period. For example, if a return period ended on 31 January, the commercial hire business would be required to lodge a return and pay any duty on or before 21 February. An offence penalty of $5,000 is applicable for failure to comply with these requirements.

Section 112L(2) clarifies that a commercial hire business is required to lodge a return even if there is no duty payable on the return.

Section 112L(3) applies where a commercial hire business is not registered, but the total hiring charges it receives during a month exceed $4,167. This section requires the commercial hire business to lodge a return in respect of that month and pay any duty payable on the return. The return is required to be lodged and duty paid on or before the 21st day after the end of the month. For example, if a business received hiring charges of $5,000 in January, the business would be required to lodge a return and pay any duty on or before 21 February.

This provision is considered necessary to ensure that the business is required to lodge a return and pay duty in respect of the first month in which the hiring charges exceed the monthly threshold. In subsequent months, the business would be registered and the provisions relating to registered commercial hire businesses would be applicable.

An offence penalty of $5,000 is applicable for failure to comply with these requirements.

Section 112L(4) clarifies that the "month" referred to in section 112L(3) is considered to be a return period for the purposes of this Part. This is necessary to ensure that, for example, the nexus provisions will apply despite the reference to the use of a good "during a return period" in those provisions. This section ensures that the "month" is taken to be a return period.

Section 112LA sets out the method for calculating the assessable amount in respect of a return period.

Section 112LA(1) provides that the assessable amount for a return period is the sum of all the hiring charges received in that return period, or the amount calculated by using another basis for calculation approved by the Commissioner under section 112LA(2).

Section 112LA(2) allows the Commissioner to approve a basis other than the hiring charges received (referred to in section 112LA(1)(a)) for calculating the assessable amount for a return period if the Commissioner is satisfied that the amount of duty payable on the approved basis will approximate the duty payable on the basis of the hiring charges received.

Section 112LA(3) allows the Commissioner to revoke an approval to calculate the assessable amount on another basis by giving the commercial hire business notice of the revocation.

Section 112LA(4) allows a commercial hire business to change the basis for calculating the assessable amount from return period to return period if the Commissioner gives his approval, however, the business cannot change the basis for calculating the assessable amount within a return period.

Section 112LA(5) allows the Commissioner to make any assessment or reassessment necessary on the change of basis of calculation to ensure that hiring charges are not charged with duty twice, and that duty is paid on hiring charges on which duty has not been paid.

Section 112LB sets out the method for calculating the amount of duty payable on a return.

Section 112LB(1) sets out the rates of duty that are applicable depending upon the kind of hiring arrangement.

(a) A rate of 0.75% applies to that part of the assessable amount (ie. all hire charges received, or another basis approved by the Commissioner) that is attributable to equipment financing arrangements (ie. hire purchase agreements and agreements for a period greater than 9 months).

(b) A rate of 1.5% applies to that part of the assessable amount attributable to ordinary hiring arrangements (ie. agreements for a period less than 9 months) that exceeds the duty-free threshold (calculated in accordance with subsection (2)).

The amount of duty payable on the return is the sum of these amounts.

Section 112LB(2) sets out the method for calculating the duty-free threshold for a return period. The annual duty-free threshold is set at $50,000. However, this section allows the annual duty-free threshold to be apportioned based on the number of whole months in the return period.

For example, where the return period is one month, the duty-free threshold would be calculated as:

$$\$50{,}000 \times \frac{1}{12} = \$4{,}166.67$$

However, if the return period was six months, the duty-free threshold would be calculated as:

$$\$50{,}000 \times \frac{6}{12} = \$25{,}000.00$$

Section 112LC sets out the meaning of a return period for a commercial hire business. A return period is a period of one month, unless a special tax return arrangement is in force under section 49 of the *Taxation Administration Act*. Such an arrangement would allow a commercial hire business to lodge returns other than on a monthly basis.

Section 112LD sets out the annual reconciliation process that provides a rebate or refund of duty in certain circumstances.

Section 112LD(1) provides that where the sum of all the assessable amounts (ie. all hiring charges received, unless another basis is approved by the Commissioner) does not exceed the annual duty free threshold (specified in section 112LB(2) as $50,000), the commercial hire business is entitled to a rebate or refund of any duty paid or payable in respect of those amounts. The effect of this subsection is that where the hiring charges received over 12 months do not exceed $50,000, no duty will be payable in respect of those hiring charges.

Section 112LD(2) operates where the sum of all the assessable amounts exceeds the annual threshold, the assessable amount includes hiring charges from ordinary hiring arrangements (referred to as an "attributable amount") and the sum of all the attributable amounts does not exceed the annual duty free threshold. In these circumstances, the commercial hire business is entitled to a refund or rebate of the duty paid in respect of the attributable amounts.

The effect of this subsection is that duty in respect of hiring charges from ordinary hiring arrangements is only chargeable on the component of the hiring charges that exceeds the duty-free threshold. However, the amount of hiring charges from equipment financing arrangements is subject to duty on the entire amount, even though that amount in itself may not exceed the annual duty free threshold (but does exceed the threshold when taken with the hiring charges from ordinary hiring arrangements).

For example, consider a business that receives $60,000 in hiring charges during the financial year, with $40,000 being in respect of ordinary hiring arrangements and $20,000 being in respect of equipment financing arrangements. The assessable amount would be $60,000 and the attributable amount would be $40,000. Under this subsection, as the attributable amount does not exceed the annual duty-free threshold of $50,000, the commercial hire business would be entitled to a refund or rebate of any duty paid or payable in respect of the attributable amount. Duty would be payable on the $20,000 of hiring charges received from equipment financing arrangements as the assessable amount exceeds the annual duty-free threshold.

Section 112LD(3) operates where the sum of all the assessable amounts exceeds the annual duty-free threshold, the assessable amount includes hiring charges from ordinary hiring arrangements (referred to as an “attributable amount”), the sum of all the attributable amounts exceeds the annual duty-free threshold and the sum of duty paid by the commercial hire business in respect of the attributable amounts exceeds 1.5% (the rate applicable to ordinary hiring arrangements) of the dutiable amount. The “dutiable amount” is defined in subsection (4) as the amount by which the sum of the attributable amounts in a financial year exceeds the duty-free threshold.

In these circumstances, the commercial hire business is entitled to a rebate equal to the difference between the amount of duty paid in respect of the attributable amounts and 1.5% of the dutiable amount.

The effect of this subsection is that the commercial hire business will receive the full benefit of the annual duty-free threshold even though the amount of hiring charges may fluctuate during the financial year.

For example, consider Business A and Business B. Business A receives $5,000 in hiring charges from ordinary hiring arrangements for each month of the financial year. Business A lodges monthly returns and receives the benefit of the monthly threshold of $4,167 each month. The result would be that the business receives hiring charges of $60,000 annually and receives the full annual duty free threshold of $50,000. Duty of $150 would be payable (calculated as 1.5% x $10,000).

Business B receives $10,000 a month in hiring charges from ordinary hiring arrangements for six months of the financial year, and no hiring charges for the other six months of the year. If Business B lodges monthly returns, it will receive the benefit of the monthly threshold of $4,167 for six months of the year only. The result would be that the business receives hiring charges of $60,000 annually, but receives a duty free threshold of only $25,002 (calculated as $4,167 x 6). Duty of $525 would be payable (calculated as 1.5% x ($60,000 - $25,002)).

This subsection applies in relation to Business B such that the assessable amount would be $60,000 and the attributable amount would be $60,000. The dutiable amount would be $10,000 calculated in accordance with subsection (3)(d), and 1.5% of the dutiable amount would be $150.

As the duty paid by Business B ($525) exceeds 1.5% of the dutiable amount ($150), Business B is entitled to a rebate of the difference ($525 - $150 = $375).

This ensures that a seasonal business (Business B) receives the same duty free threshold and pays the same amount of duty over a financial year as a business that receives equal amounts of hiring charges in each month of a financial year (Business A).

Section 112LD(4) sets out the meaning of "dutiable amount" as used in section 112LD(3)(d). The dutiable amount is the amount by which the sum of the attributable amounts (hiring charges attributable to ordinary hiring arrangements) in a financial year exceeds the duty-free threshold.

Section 112LD(5) allows the annual duty-free threshold to be apportioned for the purposes of the annual reconciliation based on the number of days in a year that the commercial hire business was registered.

For example, if a commercial hire business was registered on 1 June, the annual duty free threshold would be calculated as:

$$\$50{,}000 \times \frac{30}{365} = \$4{,}109.58$$

The effect is that references in sections 112LD(1), (2) and (3) to the duty free threshold would be to a threshold of $4,109.58.

Section 112LD(6) allows the Commissioner to make any reassessment necessary to give effect to this section. This allows the Commissioner to give a refund or rebate of duty in the circumstances provided for in this section.

Division 5 – Persons other than commercial hire businesses

Section 112M sets out the arrangements that apply to persons who hire out goods other than commercial hire businesses.

Section 112M(1) provides that where a person that hires goods (the hirer) from a person that is not a commercial hire business and the hiring charges in respect of that hire are at least $1,000, the hirer must prepare a statement in respect of the hire. Section 112M(1) sets out the particulars that the statement must include.

Section 112M(2) specifies the time period for the preparation of the statement. It requires a statement to be prepared on or before the earlier of the time that the hirer makes the first payment of hiring charges or the time that the hiring charges become payable. An offence penalty of $5,000 is applicable to failure to comply with sections 112M(1) and (2).

Section 112M(3) clarifies that it is not necessary to prepare a separate statement if the hire is evidenced in a document that otherwise complies with this section. For example, an invoice may already contain the particulars specified in section 112M(1). In such cases, the invoice would be taken to be the statement.

Section 112M(4) provides that a statement is not required to be prepared where the goods hired are to be used wholly for private or domestic purposes.

Section 112MA sets out the requirements for lodging the statement and paying duty.

Section 112MA(1) requires the hirer to lodge the statement with the Commissioner and pay the appropriate amount of duty (calculated in accordance with section 112MA(2)), within 3 months after the statement is required to be prepared. The time period for preparation of the statement is set out in section 112M(2). The offence penalty for contravention of this subsection is $5,000.

Section 112MA(2) sets out the rates of duty applicable to the hiring charges depending on the kind of hire.

(a) A rate of 0.75% applies to the hiring charges if the hire of goods is an equipment financing arrangement (ie. hire purchase agreement or agreement for a period greater than 9 months).

(b) A rate of 1.5% applies to the hiring charges if the hire of goods is an ordinary hiring arrangement (ie. agreement for a period less than 9 months).

Section 112MB provides the method of calculating the total hiring charges if they are not readily ascertainable.

Section 112MB(1) enables the Commissioner to allow one or more statements to be prepared, rather than the statement referred to in section 112M, if he is satisfied that it is not reasonably practicable to calculate the total of the hiring charges payable over the term of the hire. The Commissioner is to give notice to the hirer specifying the times at which the statement is, or the statements are, required to be prepared.

Section 112MB(2) provides that the statement or statements referred to in subsection (1) must contain the same information specified in section 112M(1) to the extent possible.

Section 112MB(3) requires the hirer to lodge the statement with the Commissioner and pay the appropriate amount of duty (calculated in accordance with section 112MA(2) to the extent that the hiring charges are known), within 3 months after the statement is required to be prepared. The time period for preparation of the statement is determined by the Commissioner under section 112MB(1). The offence penalty for contravention of this subsection is $5,000.

Section 112MB(4) allows the duty already paid on a statement in respect of a hire of goods to be deducted from the duty payable on any subsequent statement to the extent that it relates to the same hire of goods.

Division 6 – General provisions

Section 112N provides that duty payable under this Part is reduced by the amount of interstate duty paid in respect of the hire. The term "interstate duty" is defined in section 4(1) to mean duty of a similar nature to the duty payable under this Act that is payable in another State or Territory. This subsection therefore effectively gives a credit for any duty paid in respect of a hire of goods in another jurisdiction. However, given that there will be a consistent nexus across most jurisdictions with hire of goods regimes, this crediting provision should only be required in limited circumstances.

Section 112NA is an anti-avoidance provision, which deals with splitting or redirecting hiring charges to avoid duty under these provisions.

Section 112NA(1) allows the Commissioner to include certain amounts as hiring charges in an assessment or reassessment. These amounts are:

(a) Payments, or portions of payments, under a hire of goods that are not considered to be hiring charges, that the Commissioner is satisfied have been made or included in the payments for the purpose of minimising duty. The reference to "portions of payments" covers increasing the amount of payments that are not considered to be hiring charges. For example, where the amount charged for delivery (which is not included as a hiring charge under section 112IE(3)) should have been $100, but the amount of the payment was actually $1,000, the Commissioner may make a reassessment to include the $900 portion of the payment as hiring charges.

(b) Payments that would be a hiring charge except that the payment is made to a person other than the person hiring out the goods. This is necessary as hiring charges are defined in section 112IE(1) as payments made to the person who hires out the goods. This provision prevents duty from being avoided by making the payment to a person other than the person hiring out the goods.

Section 112NA(2) allows the Commissioner to include in the assessment or reassessment, an amount of penalty tax which is equal to the amount included in the assessment or reassessment as a result of section 112NA(1). Therefore, if $900 was included in an assessment as a result of a payment referred to in section 112NA(1)(a), the Commissioner could also include penalty tax of $900 in that assessment. The *Taxation Administration Act* contains the provisions relating to penalty tax.

Section 112NB explains how the place of use of the goods is to be ascertained and the requirement on the hirer to disclose information in relation to the place of use of the goods.

Section 112NB(1) enables a commercial hire business to rely on a statement as to where the goods are to be used in the course of the hire, or where a motor vehicle will be registered during the course of the hire. This is necessary as a commercial hire business's liability to duty depends on where the goods are used or the motor vehicle is registered during the return period. However, the commercial hire business cannot rely on a statement by the hirer if he knows that it is false.

Section 112NB(2) clarifies that the commercial hire business is not required to make any inquiries as to whether the place of use of a good, or the registration of a motor vehicle, has changed since the hirer provided the commercial hire business with a statement under section 112NB(1) of the place of use or registration. However, if the commercial hire business becomes aware that the place of use or registration has changed, the business cannot continue to rely on the statement.

Section 112NB(3) allows the Commissioner to make an assessment or a reassessment in the case where the actual place of sole of predominant use of the goods has changed from the place advised in the statement under section 112NB(1).

Section 112NB(4) allows the Commissioner to make an assessment or a reassessment in the case where the actual place of registration of a motor vehicle has changed from the place advised in the statement under section 112NB(1).

Section 112NB(5) clarifies that a person's failure to pay duty because they have relied on a statement under section 112NB(1) as to the place of use of the goods, or the place of registration of the motor vehicle, does not constitute a contravention of a taxation Act for the purposes of the *Taxation Administration Act*. Section 26 of the *Taxation Administration Act* sets out the circumstances under which penalty tax for the contravention of a taxation Act is applicable. Further, this subsection provides that a person who fails to pay duty because of reliance on a statement under section 112NB(1) will not be liable to penalty tax if the duty is paid within one month of the issue of the notice of assessment of duty.

Subsection 112NB(6) provides that it is an offence for a person to knowingly falsely make a statement as to the place of use of a good, or the place of registration of a motor vehicle, regardless of whether the person hiring out the goods relies on the statement or not. An offence penalty of $20,000 is applicable.

Section 112NC provides that a commercial hire business, and a hirer who prepares a statement in respect of a hire of goods, are required to keep any prescribed records (no records are currently prescribed for the purposes of this subsection) and any records necessary for the Commissioner to be able to determine their liability to duty under these provisions. Section 79 of the *Taxation Administration Act* provides that the records must be kept for a period of five years from the date the record was made or obtained by the person, or if the record relates to a transaction, five years from the date of completion of the transaction. An offence penalty of $20,000 applies for failure to keep the required records.

Clause 86: **Section 119 amended**

This clause amends section 119, which provides an exemption from duty where the State is a party to an instrument.

Subclause (1) amends section 119(4) and (5) to remove the reference to duty under item 4A of the Second Schedule as a consequence of the abolition of marketable securities duty.

Subclause (2) repeals section 119(9) as a result of the restructure of the mortgage duty base.

Clause 87: **Second Schedule amended**

Subclause (1) provides that the amendments in this section are to the Second Schedule.

Subclause (2) deletes item 2, which relates to duty on bills of exchange and promissory notes, as a result of the abolition of that head of duty.

Subclause (3) amends item 4, which relates to duty on conveyances or transfers of property, by deleting the reference to “(except any marketable security or right in respect of shares)”. This reference is no longer necessary as a general exemption from duty on marketable securities has been inserted into the Third Schedule.

Subclause (4) deletes item 4A, which relates to duty on conveyances or transfers of marketable securities, as a result of the abolition of that head of duty.

Subclause (5) amends item 6, which relates to duty on other conveyances or transfers, by deleting paragraph (d) and removing the reference to item 4A as a result of the abolition of marketable securities duty.

Subclause (6) amends item 12, which relates to duty on leases and agreements to lease, as a result of the abolition of lease duty. However, duty in relation to premiums on leases remains.

Subclause (7) amends item 14(2), which relates to duty on the grant of a licence for a heavy vehicle. This item sets the rate of duty where the vehicle has not previously been used nor registered under the *Road Traffic Act 1974* or a corresponding law. This amendment inserts a reference to a vehicle that has not been licensed to ensure that where vehicles are licensed rather than registered, this item will also apply.

Subclause (8) amends item 14A, which relates to duty on an order to which section 112UB(2) applies, to remove the references to item 4A as a result of the abolition of marketable securities duty.

Subclause (9) amends item 16, which relates to policies of insurance, to remove the references to life insurance as a result of the abolition of duty on policies of life insurance.

Subclause (10) amends item 17, which relates to the duty on a release or renunciation of property, to remove the reference to item 4A as a result of the abolition of marketable securities duty.

Subclause (11) amends item 19, which relates to the duty on a deed of gift or settlement, to remove the references to item 4A as a result of the abolition of marketable securities duty.

<u>Clause 88:</u> **Third Schedule amended**

Subclause (1) provides that the amendments in this section are to the Third Schedule.

Subclause (2) deletes item 1, which relates to duty on bills of exchange and promissory notes, as a result of the abolition of that head of duty.

Subclause (3) amends item 2, which relates to duty on conveyances or transfers of property.

Paragraph (a) repeals subitem (1) and inserts a new subitem (1), which applies to a conveyance or transfer of a marketable security or an agreement under which an option is given or taken to purchase or sell a marketable security.

Paragraph (b) amends subitem (7c) to update the references to undocumented transfers of chattels and other property under section 31B as a result of amendments to that section.

Paragraph (c) deletes subitems (8) and (9) as a result of the abolition of marketable securities duty.

Paragraph (d) deletes subitem (11)(f), which relates to undocumented goodwill, as a result of the amendments to charge duty on goodwill as a business asset under section 74C.

Subclause (4) inserts new items 3(6), (7) and (8), which were previously located under item 1 of the Third Schedule. This amendment results from the abolition of stamp duty on cheques and ensures that duty is not unintentionally reimposed on these agreements as deeds.

<u>Subitem (6)</u> provides an exemption from duty on any draft or order drawn by a financial institution in Western Australia on any other financial institution in Western Australia not payable to the bearer or to order, and used solely for the purpose of clearing any account between those financial institutions.

<u>Subitem (7)</u> provides an exemption from duty of any letter written by a financial institution in Western Australia to any other financial institution in Western Australia directing the payment of any sum of money, the same not being payable to the bearer or to order, and that letter not being sent or delivered to the person to whom payment is to be made or to any person on his behalf.

Subitem (8) provides an exemption from duty of any letter of credit granted in Western Australia authorising drafts payable in Western Australia to be drawn outside Western Australia.

Subclause (5) deletes item 6(2) as a result of the abolition of duty on leases.

Subclause (6) amends item 7 by removing redundant exemptions and references as a result of the narrowing of the mortgage duty base.

Subclause (7) amends item 9, which relates to duty on the grant or transfer of vehicle licenses, to insert a reference to a vehicle registered under the *Road Traffic Act 1974* or a corresponding Act to provide for the use of the term registered rather than licensed in some legislation.

Division 2 – Transitional provisions

Clause 89: **Registered pooled investment trusts**

This clause sets out the transitional arrangements applicable to registered pooled investment trusts.

Subclause (1) inserts definitions of the following terms used in the transitional provisions:

“commencement day”, “former provisions”, “new provisions” and “start up period”.

Subclause (2) provides that a disqualifying event is taken to have occurred if a pooled investment trust registered under the former provisions does not comply with the new criteria for registration set out in section 63AB(2) on commencement of the new provisions. Further, a disqualifying event is taken to have occurred if a pooled investment trust granted interim registration under the former provisions does not comply with the new criteria for registration set out in section 63AB(2) at the end of the start up period.

Subclause (3) provides that if a pooled investment trust is registered under the former provisions immediately before the commencement of the new provisions, then that registration will continue to have effect for a period of three years from the commencement day.

Clause 90: **Determinations under section 75JBA or 75JC**

This clause inserts a transitional provision to deal with predetermination applications under the corporate reconstruction exemption (sections 75JBA or 75JC) that are made before the commencement day. The provision ensures that any predetermination under these sections made before the commencement day continues after the abolition of duty on marketable securities takes effect.

Clause 91: **Agreement for lease**

This is a transitional clause that stipulates that the amendments in respect of leases only have effect on or after the day on which this section comes into operation. This clause provides specifically that the amendments in sections 5, 77, 78 and 87(6) which pertain to leases have no application in relation to:

(a) an agreement for a lease which is executed before this section comes into operation, regardless of when any lease entered into in accordance with the agreement is executed; or

(b) any such lease, regardless of when it is executed.

Clause 92: **Mortgages**

This clause inserts transitional provisions relevant to the assessment of mortgage duty.

Subclause (1) limits the application of the new mortgage duty provisions to mortgages under which the amount secured has increased on or after the commencement day, where the mortgage was one that was dutiable under the former provisions.

Subclause (2) specifies that where an advance is made after the commencement day under a mortgage that was liable to duty before the commencement day, that mortgage is liable to duty as if the mortgage had been executed after the commencement day.

Subclause (3) defines a number of terms for the purposes of clause 92.

Clause 93: **Life insurance**

This clause provides that any policy of life insurance entered into before the commencement date will be subject to stamp duty as applied by the *Stamp Act* prior to the commencement of this section.

Clause 94: **Hire of goods**

This clause sets out the transitional arrangements applying to the hire of goods provisions.

Subclause (1) provides that on commencement, a person that was registered under the old Part IVB will be taken to have been registered under the new Part IVB. This effectively means that registration under the old rental business duty provisions will be taken to be registration under the new hire of goods provisions. The meaning of the terms used in this clause is set out in clause 94(7).

Subclause (2) provides that for the purpose of the ongoing operation of certain provisions as specified in clause 94(5), a person registered under the old Part IVB will continue to be taken to be registered under that Part unless the person's registration is cancelled under the new Part IVB. This ensures that the provisions of old Part IVB that have continuing operation under clause 94(5) will still apply to persons registered under the old provisions.

Subclause (3) provides that a State instrumentality, agent of the State or Government authority that was designated by the Minster under the old Part IVB will be taken to have been designated under the new Part IVB. This effectively means that a designation under the old rental business duty provisions will be taken to be a designation under the new hire of goods provisions.

Subclause (4) allows for the phasing in of the new Part IVB. It provides that the new hire of goods regime applies to hire of goods arrangements entered into after the time of commencement of these amendments. This means that only those contracts entered into on or after the day the new Part IVB commences will be dutiable under these new provisions.

Subclause (5) clarifies that despite the repeal of old Part IVB, it will continue to apply in relation to the conduct of a rental business prior to the commencement of the hire of goods provisions, and to the conduct of a rental business after commencement that relates to rights granted prior to the commencement of the hire of goods provisions, to which the rental business duty provisions of old Part IVB would have applied. This means that any contracts entered into prior to the commencement of these provisions will continue to be dutiable under the rental business duty provisions even if the contract continues into the period after the commencement of the hire of goods provisions.

Subclause (6) provides that the record keeping provisions of the old Part IVB have effect in relation to a rental business conducted after the commencement of the hire of goods provisions, subject to the *Taxation Administration Act*. Section 79 of the *Taxation Administration Act* provides that the records must be kept for a period of five years from the date the record was made or obtained by the person, or if the record relates to a transaction, five years from the date of completion of the transaction.

Subclause (7) sets out the meaning of the following words, as they are used in this clause:

"commencement", "new Part IVB", "old Part IVB" and "registered person".

Subclause (8) provides that an expression used in the transitional provisions that is given a meaning by the *Stamp Act*, regardless of whether that meaning is given by the old Part IVB or the new Part IVB, has that meaning unless a contrary intention appears.

Division 3 – Amendments to other Acts

Clause 95: ***Taxation Administration Act 2003* amended**

Subclause (1) specifies that the amendments made in this section are to the *Taxation Administration Act 2003*.

Subclause (2) inserts a new section 18A (Withdrawal of Assessment).

Section 18A(1) provides that the Commissioner may withdraw an assessment within five years of the issue of the notice of the assessment.

Section 18A(2) provides that if any amount of tax has been paid on an assessment, then the assessment cannot be withdrawn.

Section 18A(3) places an obligation on the Commissioner to the effect that where the Commissioner withdraws an assessment, then a written notice of withdrawal must be provided to the taxpayer.

Section 18A(4) deems a withdrawn assessment to be one that has never been made and provides that the Commissioner may make an assessment in respect of an event or transaction at any time after the withdrawal of an assessment in respect of that event or transaction.

Subclause (3) amends section 20(3) to provide that where an instrument required to be lodged under a taxation Act is not lodged, then the Commissioner may, for the purposes of making an assessment, create a memorandum that is deemed to be the instrument lodged by the person required to lodge it.

Paragraph (a) deletes the words "prepared and".

Paragraph (b) deletes the words "prepared or, if prepared, has not been".

Paragraph (c) replaces the words “treat it as if the memorandum were the instrument” with the expression “for the purposes of the taxation Act and this Act the memorandum is taken to be the instrument lodged by the person required to lodge it under the taxation Act”. This deems the memorandum to be the instrument required to have been lodged by the person required to lodge it, and restricts the validity of its existence to being for the purposes of the relevant taxation Act and the *Taxation Administration Act*.

Subclause (4) deletes section 26(1)(a) to remove the imposition of penalty tax where the taxpayer does not prepare a dutiable statement as required by the *Stamp Act*. It should be noted that penalty tax is imposed where a taxpayer does not lodge an instrument in accordance with a taxation Act (section 26(1)(b)).

Subclause (5) makes amendments to the Glossary.

Paragraph (a) amends the definition of “instrument” by deleting the terms “bill of exchange” and “promissory note”. These terms are deleted due to the abolition of stamp duty on cheques.

Paragraph (b) amends the definition of “penalty tax” by including in paragraph (c) a reference to penalty tax imposed under section 112NA(2) of the *Stamp Act*. This subsection relates to the penalty for splitting or redirecting hiring charges to avoid duty under the hire of goods provisions.

Clause 96: ***Totalisator Agency Board Betting Act 1960* amended**

Subclause (1) provides that the amendment in this section is to the *Totalisator Agency Board Betting Act 1960*.

Subclause (2) deletes the words “or cheque drawn” from section 29. The inclusion of a reference to an exemption from stamp duty on cheques is no longer required due to the abolition of stamp duty on cheques provided by this Bill.

Part 3 – Stamp duty on workers compensation insurance policies

Clause 97: **The Act amended**

This clause provides that the amendments in sections 98 and 99 are to the *Stamp Act*.

Clause 98: **Section 92 amended and transitional**

Subclause (1) amends the definition of "policy of insurance" by deleting the amendments made by clause 80 and reinserting them, together with a provision to exclude from duty any policy of insurance against an employer's liability to pay compensation under the *Workers' Compensation and Rehabilitation Act 1981* where the period for which the insurance is effected commences on or after 30 June 2004.

Subclause (2) provides that despite the amendments effected by this section and section 99, duty is payable in respect of any policy of insurance against an employer's liability to pay compensation under the *Workers' Compensation and Rehabilitation Act 1981* where the period for which the insurance was effected commenced before 30 June 2004.

Clause 99: **Second Schedule amended**

This clause deletes items 16(1)(a) and (1a) due to the abolition of stamp duty on worker's compensation insurance.

Clause 100: ***Taxation Administration Act 2003* amended and transitional**

Subclause (1) provides that the amendment in this section is to the *Taxation Administration Act 2003*.

Subclause (2) deletes section 114(3)(f) pertaining to the disclosure of information to an insurance company for the purposes of determining the amount of stamp duty payable. This deletion results from the abolition of stamp duty on worker's compensation insurance.

Subclause (3) provides that the amendment effected in subsection (2) has no application in relation to a policy of insurance issued or to be issued against an employer's liability to pay compensation under the *Worker's Compensation and Rehabilitation Act 1981* if the period for which the insurance is effected commenced before 30 June 2004.

Part 4 – *Debits Tax Assessment Act 2002* amended

Clause 101: **The Act amended**

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

Clause 102: **Section 5 amended**

This clause inserts a new paragraph (aa) into section 5(4) to provide that debits tax is not payable on a debit made on or after 1 July 2005.

Clause 103: **Section 9 amended**

The new subsection (5) provides that financial institutions are not required to lodge monthly returns, as required under subsections (1) and (2), in respect of any month commencing on or after 1 July 2005.

Clause 104: **Section 10 amended**

This clause amends section 10(1) to provide that where, on the application of a customer, the Commissioner is satisfied that all debits made, or to be made, before 1 July 2005, to an account kept in Western Australia are, or are likely to be, exempt debits or excluded debits, the Commissioner is to issue a certificate for the account. Where such debits are to be made on or after 1 July 2005, the Commissioner is not required to issue a certificate.

Clause 105: **Section 12 amended**

Subclause (1) amends section 12(1) to provide that where a debit, that is not an exempt debit or an excluded debit, is made to a certificated account before 1 July 2005, the customer must notify the Commissioner within 7 days after the debit is made, unless prior to the debit being made, the Commissioner was notified in accordance with subsection (2).

Subclause (2) amends section 12(2) to provide that where a customer for a certificated account becomes aware that a debit, that is not an exempt debit or an excluded debit, will be, or is likely to be, made to the account within the next 30 days and before 1 July 2005, the customer must notify the Commissioner within 7 days of becoming aware of it. This amendment limits the customer's obligation to the Commissioner in respect of debits made to certificated accounts to those debits that are not exempt debits or excluded debits and are made before 1 July 2005.

Clause 106: **Section 14 amended**

This clause inserts subsection (3) which provides that a financial institution is not required to lodge an annual statement under section 14(1) after that required for the 2005 calendar year.

Part 5 – Minor amendments

<u>Clause 107:</u> ***Stamp Act 1921* amended**

Subclause (1) provides that the amendments in the section are to the *Stamp Act 1921*.

Subclause (2) inserts a definition of **"unencumbered value"** in section 4(1).

Subclause (3) amends section 35(1) and (2) to correct an amendment made by the *Stamp Amendment Act 2003*. It replaces "Stamp Act" with "stamp Act", which is a defined term for the purposes of the Act.

Subclause (4) amends section 75HA(7)(b)(ii) to correct an amendment made by the *Stamp Amendment Act 2003*. It replaces the reference to a "section 76AN" statement with a reference to a "section 76AG" statement.

Subclause (5) amends section 76(2)(b)(iv) to replace the reference to "person" with a reference to "individual" to be consistent with changes made by the *Stamp Amendment Act 2003*.

Subclause (6) amends section 88A to remove the subsection designation (1), which is not required.

Subclause (7) amends item 4A of the Second Schedule to insert the subitem designation (1) to ensure that cross-references in the Act to the subitem are correct.

<u>Clause 108:</u> ***Taxation Administration Act 2003* amended**

Subclause (1) provides that the amendments in this section are to the *Taxation Administration Act 2003*.

Subclause (2) amends section 23(2), which sets out the circumstances in which a Commissioner is not required to issue an assessment notice. It removes the reference to "if the Commissioner" from subsection (2) and inserts the reference at the beginning of paragraphs (a) and (b) as it is only relevant to these paragraphs. A new paragraph (c) is also inserted which provides that an assessment notice is not required to be issued if no land tax is payable under an exemption in a taxation Act. This ensures that the Commissioner is not required to issue assessment notices to all land owners in the State who currently receive a principal place of residence exemption and own no other property.

Subclause (3) amends the Glossary to insert a definition of "approved" and amend the definition of "instrument" so that it includes a "policy of insurance", as referred to in the Second Schedule of the *Stamp Act*.

Clause 109: ***Land Tax Assessment Act 2002* amended**

Subclause (1) provides that the amendment in this section is to the *Land Tax Assessment Act 2002*.

Subclause (2) amends section 29(4), which deals with land tax exemptions for land used solely or principally for a rural business. The amendment corrects an error identified in subsection (4) and replaces the reference to land in a "rural zone" with a reference to land in a "non-rural zone".

STREAMLINING WESTERN AUSTRALIA'S TAX SYSTEM – FEWER, FAIRER, SIMPLER

Summary of Measures in the Second Tranche Legislation

	2003-04 $m	2004-05 $m	2005-06 $m	2006-07 $m
As soon as practicable after 1 July 2003[1]				
Abolition of State Taxes				
Abolish lease duty	-13.2	-13.9	-14.7	-15.5
Abolish cheque duty	-6.0	-6.0	-6.0	-6.0
Abolish marketable securities duty	-8.0	-8.5	-9.0	-9.5
Abolish stamp duty on life insurance	-3.0	-3.0	-3.0	-3.0
Conveyance Duty				
Reduce "land rich" threshold to 60%	23.0	24.7	26.1	27.6
Apply conveyance duty to chattels transferred with all dutiable property	5.8	6.1	6.3	6.6
Apply conveyance duty to transfers of intellectual property	3.5	3.7	3.8	3.9
Apply conveyance duty to changes in beneficial ownership arising from court orders, etc.	5.8	6.1	6.3	6.6
Apply conveyance duty to unit trusts which become "private" based on status after transaction	5.8	6.1	6.3	6.6
Broaden conveyance duty base to include undocumented transfers of goodwill	2.3	2.4	2.5	2.6
Introduce anti-avoidance provisions for simultaneous put and call options	0.6	0.6	0.6	0.6
Broaden the corporate reconstruction provisions to include motor vehicle licence transfers and direct property transfers between certain (sister) subsidiaries of holding companies	-0.3	-0.3	-0.3	-0.3
Increase the property value thresholds for the $500 first home buyers rebate	-2.0	-2.1	-2.3	-2.5
Provide ability to reassess conveyance duty where a lower contingent amount is ultimately realised	-2.3	-2.4	-2.5	-2.6
Consistent policy for companies and unit trusts intending to float or becoming private	-5.8	-6.1	-6.3	-6.6
Provide relief to genuine wholesale trusts	-	-	-	-
Legislatively exempt mining tenement "farm-ins"	-	-	-	-
Remove the imposition of double duty on certain substituted purchasers	-	-	-	-

1 The measures will commence as soon as practicable after 1 July 2003, subject to legislation being passed by Parliament and allowing sufficient time for education and for taxpayers to make any necessary changes to accommodate new legislation.

	2003-04	2004-05	2005-06	2006-07
	$m	**$m**	**$m**	**$m**
Mortgage Duty				
Narrow mortgage duty base	-3.0	-3.2	-3.4	-3.6
Introduce a single rate of mortgage duty of 0.4% (except for owner-occupied loans)	3.5	3.7	3.9	4.1
Introduce simplified duty sharing arrangements	-	-	-	-
Rental Business Duty				
Rate reduction	10.3	11.0	11.8	12.7
Increase exemption threshold to $50,000 as part of the "hire of goods" regime	-0.1	-0.1	-0.1	-0.1
Hire of goods regime – apply duty to amount above exemption threshold only	-1.0	-1.0	-1.1	-1.1
Include hire purchase agreements in base	-10.3	-11.0	-11.8	-12.7
Measures Commencing in 2004-05				
From 1 July 2004				
Abolition of State Taxes				
Abolish stamp duty on workers' compensation insurance	-	-26.0	-27.0	-28.0
Measures Commencing in 2005-06				
From 1 July 2005				
Abolition of State Taxes				
Abolish debits tax[2]	-	-	-	-
Non-Business Tax Review measures	-	-	-	-
TOTAL	**5.6**	**-19.3**	**-19.9**	**-20.2**

[2] Debits tax currently raises around $97.5 million per year, however the abolition of debits tax from 1 July 2005 has no cost relative to the forward estimates, which already assume that debits tax will be abolished in 2005-06.