EXPLANATORY MEMORANDUM
REVENUE LAWS AMENDMENT BILL 2018

The Revenue Laws Amendment Bill 2018 contains amendments to the Duties Act 2008, Land Tax Assessment Act 2002 and Pay-roll Tax Assessment Act 2002. These amendments address significant duty leakage, ensure certain taxpayer exemptions and concessions apply correctly, and improve the efficiency of the State’s taxation legislation. The Bill is complemented by the Taxation Administration Amendment Bill 2018, which contains amendments to improve the administrative and enforcement arrangements for the State taxes, together with consequential amendments from this Bill.

The measures in this Bill to address duty leakage are the most comprehensive amendments to the Duties Act 2008 (Duties Act) since it replaced the Stamp Act 1921 (Stamp Act) on 1 July 2008. This includes new linked entity and grouping provisions for landholder duty, introducing a fixed to land model, and restoring duty on contractual mining rights.

The Bill also modernises the duties family farm exemption, prescribes the conditions for nominal duty to apply to a transfer to and from a bare trustee and transfers to facilitate a subdivision, and ensures land tax residential exemptions apply to land that is subdivided during an assessment year.

**Landholder duty**

Landholder duty applies to a relevant acquisition in a landholder. A landholder is a company or unit trust entitled to land in Western Australia of $2 million or more. Duty is assessed on the value of land and chattels held by the landholder and any linked entities in proportion to the interest being acquired.

Clauses 56 – 116 of the Bill contain the following amendments to the landholder duty provisions in the Duties Act.

**Linked entities**

The linked entity provisions allow asset ownership to be traced through multiple entities to ensure land that is held indirectly by a company or unit trust scheme is taken into account. Under the current provisions, an entity is linked to another entity if it has:

- where the other entity is listed – an interest in the other entity of at least 90 per cent; and
- where the other entity is unlisted – an interest in the other entity of at least 50 per cent.

The Bill broadens these provisions to link an entity to an unlisted entity where the first entity has a total direct or indirect interest of at least 50 per cent in the other entity. This includes where the interest is held through a combination of direct or indirect interests or through multiple ownership chains. This means land held by an unlisted entity is included for landholder purposes where the main entity has a total direct or indirect interest in that entity of at least 50 per cent.

To ensure consistent treatment, provisions have been included to clarify when interests are held in or by partnerships and discretionary trustees and the percentages of those interests.
**Acquisitions resulting from one arrangement**

New grouping provisions limit the ability for acquisitions to be structured into separate transactions to defeat the landholder duty threshold or to reduce duty on an acquisition. These amendments apply duty to the following acquisitions or transactions that result from substantially one arrangement:

- An acquisition in a landholder and another entity that only holds chattels. The other entity will be treated as a landholder and duty will be assessed on the total value of land and chattels of both entities.

- Acquisitions in two or more entities that are not landholders but together are entitled to land valued at $2 million or more. The entities will be treated as landholders and duty will be assessed on the combined land value.

- A transfer of chattels where it is part of the same arrangement as a landholder acquisition.

- Acquisitions in two or more entities that together have a direct or indirect interest of 50 per cent or more in a landholding entity.

Unless the Commissioner is satisfied otherwise, the following transactions are deemed to be part of one arrangement if they occur within 12 months:

- acquisitions in two or more entities by the same person; or

- a transfer of chattels and a landholder acquisition by the same person.

A transaction or an acquisition that becomes dutiable as a result of another acquisition occurring is retrospectively liable and will be assessed or reassessed for duty as required.

**Relevant acquisitions and related persons**

A defect in the current provisions means that acquisitions between related persons are not always subject to duty. This is an unintended outcome of the transition from the land-rich model under the Stamp Act to the landholder model in the Duties Act. These amendments restore the policy intent by applying duty to relevant acquisitions between related persons.

The legislation defines when persons are related for landholder duty purposes. The Commissioner has discretion to treat related persons as unrelated in certain circumstances. Amendments in this Bill:

- provide that persons will not be related where their acquisitions arise from a public float or in other prescribed circumstances; and

- prevent the discretion from applying to persons who are related because they were acting in concert or acquired their interests as part of one arrangement.

Other minor amendments clarify how the provisions apply to acquisitions by related persons.
Other amendments

The following amendments improve how the provisions operate:

- Where there is an agreement for an acquisition in an entity, the acquisition is taken to occur when the agreement is made. Changes have been made to clarify that in these circumstances the interests of persons in the entity are to be determined as if the agreement had been completed.
- Landholder duty will apply where one or more merging corporations holds land indirectly through a subsidiary.
- The Commissioner can disregard an uncompleted agreement for the sale or purchase of land (or an interest in an entity) that is cancelled or completed before landholder duty is assessed.
- Duty will apply to a terminated agreement for an acquisition where the Commissioner is satisfied the agreement was cancelled, rescinded or terminated to achieve the acquisition another way.
- An excluded interest is clarified to mean an interest held at the time of the relevant acquisition that does not form part of the acquired interest.
- A partial exemption will apply if a direct transfer of the land would have been partly exempt from transfer duty or received a partial transfer duty concession.
- There will be no obligation to lodge an acquisition statement if an agreement for a landholder acquisition is lodged.
- An acquisition statement will not need to include prescribed information.
- The definition of discretionary trust will exclude a unit trust scheme.

Connected entities exemption

The connected entities exemption provides duty relief on certain transactions between tightly controlled corporations and unit trust schemes that qualify as a family. A family consists of a parent entity and its subsidiary entities. To be a subsidiary entity, the parent entity must hold 90 per cent of the securities of that entity and control 90 per cent of the votes at a general meeting of that entity.

Clauses 118 – 128 of the Bill contain the following amendments to the connected entities exemption provisions in the Duties Act.

Automatic revocation of exemption

The purpose of the exemption is to promote more efficient group structures. However, the exemption is currently being exploited to package business assets into an entity so that a third party can acquire them without paying duty. A direct acquisition of these assets is dutiable, but duty does not apply if the assets are acquired indirectly through the purchase of shares in a company or units in a unit trust.

The corporate reconstruction exemption in the Stamp Act was subject to a five-year post-association requirement for the property to remain in the group after an exemption. This was removed when the Duties Act was introduced because duty on business assets was due to be abolished. This would have meant that duty did not apply to either a direct or an indirect acquisition of business assets.

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1 The landholder base was broadened under the Duties Act, which was intended to prevent the connected entities exemption being used to transfer land into different subsidiaries to defeat the landholder threshold on the sale of those subsidiaries.
With business assets remaining in the base, it is appropriate to reinstate a post-association requirement to preserve the policy intent of the exemption and prevent it being used to facilitate the sale of assets without duty.

To achieve this, the Bill introduces an automatic revocation of exemption if the transferee entity:

- is removed from the family within three years after an exempt transaction; and
- still holds any of the dutiable property for which the exemption was received.

The exception will be where this is the result of a public float, which is consistent with the Commissioner’s current practice to not revoke an exemption in these circumstances. The responsible person must notify the Commissioner within two months after the date of the event.

After the Commissioner is notified about an event that triggers an automatic revocation of exemption, the Commissioner will issue a transfer duty assessment for the dutiable property still held by the entity. The duty will be reduced by any landholder duty on the acquisition of the transferee entity to the extent it relates to land and chattels that were previously exempt.

**Other amendments**

The following amendments address minor technical issues and improve the general administration of the exemption:

- The Commissioner will not be able to grant an exemption if satisfied the exemption would be revoked.

- The meaning of ‘security’ is extended to include interests in an entity that are akin to issued shares, which will allow certain hybrid entities to access the exemption.

- The Commissioner will be unable to grant an exemption where part or all of the consideration for a relevant transaction is or will be provided by a non-family member. This does not include:
  - consideration provided by a non-family member as a loan; or
  - for consideration required to effect a corporate consolidation, consideration that is the acquisition of shares in the affected entity and an associated acquisition of shares in another entity.

- All methods of causing a landholder acquisition (such as the cancellation or redemption of shares or units) will qualify for an exemption.

- Correcting a drafting defect will allow an exemption for the surrender of a mining tenement if the surrender is part of an agreement that the tenement be granted to another family member.

**Transitional provisions**

The amended provisions apply in relation to an exemption regardless of the date of the application is made or the date the transaction occurred. However, the new automatic revocation provisions do not apply to a relevant transaction that occurred before commencement day.
The Commissioner is not bound by a pre-transaction decision made before commencement day if a different decision would have been made had the new revocation provisions been in effect. In addition, a person is not prevented from making a pre-transaction decision request for a proposed transaction if a similar request was made before commencement day. This allows a person to seek a decision regarding the impact of the new revocation provisions before entering into a transaction.

**Fixed to land**

*Background*

Things on land that are common law fixtures, such as buildings and infrastructure, are part of the underlying land, and duty applies to the value of the fixtures when the land is acquired. If things on land are not fixtures, duty only applies if they are acquired with the land.

Major infrastructure assets can be acquired without duty because of a statutory abrogation that specifies the item is not a common law fixture. These clauses are commonly included in the enabling legislation for the construction or sale of major infrastructure, and allow the assets to be dealt with separately from the land.

The result of the statutory abrogation is that the item is a chattel rather than part of the land as a fixture, and transfer duty does not apply if the assets are acquired without the underlying interest in freehold land. For landholder duty, the value of the infrastructure cannot be included when determining if the landholder threshold is met.

To address this issue, the Bill introduces a fixed to land model into the Duties Act. This applies duty to direct and indirect acquisitions of things fixed to land, regardless of whether they are common law fixtures or if they are being acquired independently from the underlying land.

Rights that allow people to control, access or operate fixed infrastructure are also included as dutiable assets, together with statutory licences authorising the ownership, operation or control of infrastructure. This ensures duty applies where a person effectively acquires ownership of fixed infrastructure through a licence or contractual arrangement rather than through an outright purchase. This also prevents the value of fixed infrastructure being allocated to these rights or licences in an attempt to reduce duty.

At a high level, duty will apply as follows:

<table>
<thead>
<tr>
<th>Asset acquired</th>
<th>Property for duty purposes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Land only</td>
<td>Land plus common law fixtures</td>
</tr>
<tr>
<td>Land plus a thing fixed to land</td>
<td>Land plus the thing fixed to land plus any common law fixtures (other than the thing fixed to land)</td>
</tr>
<tr>
<td>A thing fixed to land (separate from the underlying land)</td>
<td>The thing fixed to land</td>
</tr>
<tr>
<td>Control rights, access rights, or a statutory licence relating to fixed infrastructure</td>
<td>• Control rights&lt;br&gt;• Access rights or statutory licence if the related fixed infrastructure or fixed infrastructure control rights also acquired</td>
</tr>
</tbody>
</table>
**Fixed to land model**

Clauses 5, 7, 10 – 13, 34, 56 and 100 contain the key amendments, with a number of consequential changes also contained in the Bill.

The meaning of *land* is extended to include anything fixed to land, whether or not that thing:
- constitutes a fixture at law; or
- is owned separately from the land; or
- is notionally severed or considered to be legally separate from the land as a result of how a State or Commonwealth law operates.

A thing is taken to be fixed to land if it has a physical connection to the land or is buried or partly buried under the surface of the land. The term ‘fixed to land’ otherwise takes its ordinary meaning.

A thing is not fixed to land if it is temporarily fixed to land for construction purposes, it is not a fixture at law and is used in a primary production business, or it is a relocatable home fixed to a site in a residential park.

A thing is also not fixed to land if it is acquired without the underlying land and there is an arrangement for the purchaser to permanently remove the thing within 90 days after it is transferred (or a longer period approved by the Commissioner). If the purchaser does not remove the thing within this timeframe, the thing is fixed to land and the Commissioner will issue a duty assessment (or reassessment) on the value of the thing. The purchaser must notify the Commissioner if the thing is not removed within the required timeframe.

A transaction involving a thing fixed to land (either with or without the land to which it is fixed) will attract transfer duty regardless of whether there is consideration for the transaction.

Fixed infrastructure control and access rights, and fixed infrastructure statutory licences are included as dutiable property, new dutiable property, and special dutiable property. Duty will apply to:
- the transfer or grant of a fixed infrastructure control right;
- the transfer or grant of a fixed infrastructure access right or fixed infrastructure statutory licence if the related fixed infrastructure or fixed infrastructure control rights are also acquired. This may be as part one transaction or a separate transaction or acquisition that forms part of one arrangement with the transaction for the access rights or statutory licence; and
- the surrender of these rights if there is consideration for the surrender.

Things fixed to land and fixed infrastructure control rights are included as land assets for landholder duty purposes. The value of these assets will be included when determining a landholder’s entitlement to land and in the value of the landholder when calculating duty.
For the purposes of determining if the landholder threshold is reached, an entitlement to a fixed infrastructure access right will be taken into account when an entitlement to the related fixed infrastructure or a related fixed infrastructure control right is held by:

- a higher entity than the entity in which the interest is being acquired (the main entity); or
- another entity if there is an acquisition in that entity that forms part of the same arrangement as the acquisition in the main entity; or
- a linked entity of any of the above entities.

A fixed infrastructure statutory licence will be included in the value of land assets and chattels for the purposes of calculating landholder duty in the same circumstances.

Fixed to land assets and rights will be dutiable property in the partnership provisions.

Other amendments ensure the value of common law fixtures is included when valuing land that is directly or indirectly acquired, regardless of whether the fixtures are purported to be acquired or not. Matching provisions apply for things fixed to a mining tenement that would be fixtures if the mining tenement was freehold land. Similar provisions in the landholder duty chapter make sure the value of these fixtures is taken into account when determining an entity’s entitlement to land.

**Derivative mining rights**

Under the *Mining Act 1978*, the holder of a mining tenement may authorise another person to explore for and mine specific minerals on the holder’s tenement. Until a Court of Appeal decision in 2014, these rights were considered dutiable as interests in a mining tenement. They were also included as land for landholder duty purposes.

The Bill brings contractual mining rights back into the duty base. Clauses 4, 10 – 13, 34, 56 and 100 contain the key amendments, with a number of consequential changes also contained in the Bill.

A *derivative mining right* is a new category of right that is defined to mean an authorisation of a kind described in section 118A of the *Mining Act 1978* (whether or not the authorisation purports to be made under that section). Duty will apply to:

- the transfer or grant of a derivative mining right, regardless of whether there is consideration for the transaction; and
- the surrender of a derivative mining right if there is consideration for the surrender.

A derivative mining right is included as a land asset for landholder duty purposes. The value of the rights will be included when determining a landholder’s entitlement to land and in the value of the landholder when calculating duty.

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2 *Commissioner of State Revenue v Abbotts Exploration Pty Ltd* [2014] WASCA 211.
A person may acquire a mining tenement where a third party holds derivative mining rights. As the direct transfer of a mining tenement terminates any existing derivative rights, the rights must be re-granted to the person that held them before the transfer. Duty will not apply to the re-grant of these rights if the person paid duty when the rights were originally acquired. Duty will also not apply to the grant of derivative mining rights to a seller under an agreement for the sale of a tenement where that person is essentially retaining the rights.

The Commissioner can take into account the effect of the value of derivative mining rights on the unencumbered value of a mining tenement when:

- it is a condition of the sale of a tenement that existing rights will be re-granted to the holder or that rights will be granted to the seller; or
- the tenement is transferred or agreed to be transferred to the holder of the right; or
- a landholder is entitled to mining tenements where derivative rights have been granted.

Where it is a condition of sale, the rights must be granted within 90 days after the agreement for the sale of a tenement (or a longer period approved by the Commissioner). If this does not occur, the purchaser must notify the Commissioner within two months after the day the required time period ends.

If rights are surrendered for no consideration within 12 months after the transaction, the following people must notify the Commissioner within two months after the day of surrender:

- for transfer duty – the person that surrenders the rights; or
- for landholder duty – the acquirer and the landholder.

When the Commissioner is notified about one of these events, duty will be reassessed to include the value of the rights.

Derivative mining rights will also be dutiable property in the partnership provisions.

**Pastoral leases**

Clauses 4, 5, 7, 11, 12 of the Bill clarify that pastoral leases are land under the Duties Act. A transitional provision validates assessments made from 1 July 2008 on dutiable transactions involving these leases.

**Duties family farm exemption**

The duties family farm exemption applies to certain transfers of farming property between family members. Clauses 36 – 41 of the Bill contain amendments to ensure the exemption better accommodates modern farming business structures and succession planning arrangements.

The exemption will apply where:

- a farmer transfers farming property to a related discretionary trust under which the farmer is a beneficiary;
- a farmer transfers farming property to a family member and retains an interest in the entity conducting the farming business on the land;
- a farmer is not conducting a farming business immediately prior to a transfer of farming property to a family member, if the Commissioner is satisfied the farmer had previously conducted the business and a family member (or a related entity) is conducting the business immediately prior to the transfer;
- the partnership that conducts a farming business includes non-family members;
- a farmer and their spouse (transferors) and the farmer’s sibling and their spouse (transferees) are parties to a transaction or have an interest in the entity conducting the farming business; and
- if a transferee is a bare trustee, the beneficiaries hold an interest in the related entity that conducts the farming business.

Other minor amendments:
- remove the need for a transferor or transferee conducting a farming business through a related discretionary trust to have a vested interest in the trust property;
- extend the landholder duty exemption to unit trust schemes; and
- allow an exemption for all methods of causing a landholder acquisition (such as the cancellation or redemption of shares or units).

**Partnership acquisitions**

Clauses 25 – 29 of the Bill contain amendments to achieve the correct duty outcome on partnership acquisitions.

The main amendments ensure the correct duty outcome where partnership property is transferred to or retained by a partner on their retirement from, or dissolution of, a partnership.

Where dutiable property is transferred to a retiring partner, duty will apply if the value of the transferred property and any retained property exceeds the value of the person’s partnership interest in the property. Where dutiable property is retained by a person who held it for the partnership, there is deemed to be a transfer of that item to that person. Duty applies on the deemed transfer if the value of the property exceeds the value of the person’s partnership interest in the property.

Minor amendments correct the duty calculation for partnership acquisitions on the formation of a new partnership by ensuring that any jointly held dutiable property contributed to the partnership is disregarded.

**Certain nominal duty transactions**

Subject to certain conditions, a duties concession is usually available for the following transactions:
- a transfer of property to a person to hold as bare trustee for the transferor;
- a transfer of property to a person under the *Guardianship and Administration Act 1990*; and
- transfers of property to facilitate a subdivision.

Clauses 45 – 48 of the Bill introduce specific provisions for these concessions to reflect that the transactions are fundamentally different legal and commercial concepts. The new provisions are broadly consistent with the Commissioner’s longstanding practice for providing a concession for these transactions. However, the provisions have been drafted prescriptively to provide certainty about how the concessions apply and to address concerns about duty avoidance.
Transfer to and from a bare trustee

These amendments tighten up the duties concession to ensure it only applies to genuine arrangements involving a bare trustee.

Duty will apply to a transfer of property to a person to hold as bare trustee (original transfer). Nominal duty will apply to a transfer back to the beneficiary (subsequent transfer) if the Commissioner is satisfied that no other person held a beneficial interest in the property between the transfers (other than the trustee’s right of indemnity). At that point, the original transfer will be reassessed for nominal duty.

Where applicable, the subsequent transfer must be registered with the relevant registrar of titles within 60 days after it is endorsed for nominal duty. If this does not occur, nominal duty does not apply to the original or the subsequent transfer and the Commissioner will assess or reassess duty as necessary.

A bare trustee is defined to mean a trustee of a trust, other than a discretionary or unit trust, if the trustee has no active powers or duties other than to transfer the property at the beneficiary’s direction.

Transactions under Guardianship and Administration Act 1990

These amendments introduce a specific concession for transactions under the Guardianship and Administration Act. This will not change how the concession operates.

Nominal duty applies to a transfer of dutiable property to, or a vesting of dutiable property in, an administrator under the Guardianship and Administration Act. Administrator means an administrator as defined in that Act, a person acting under the authority of a court order under that Act, or the Public Trustee acting under the authority of that Act. If nominal duty applies to a transaction, nominal duty also applies to a subsequent transfer to or vesting in the person represented by the administrator.

Transfers to facilitate a subdivision

Nominal duty will apply if the Commissioner is satisfied a transfer is for the sole purpose of facilitating a subdivision and that each person will get back the same ‘dirt’ they contributed to the subdivision. Nominal duty will apply to a transfer of the newly subdivided lots to the extent the person receives the same land they contributed.

Duty will apply to the value of any land that exceeds the transferor’s original contribution. This is consistent with the Commissioner’s longstanding administration of the concession.

The relevant subdivided lots must be transferred back to the owner of the original land within five years after the transfers that facilitate the subdivision (or a longer period approved by the Commissioner). A provision has also been included to deem a transfer to have occurred after subdivision where a person retains land they did not originally contribute. This ensures duty applies where a person acquires land they did not previously own.

Multi-level strata subdivisions have been excluded from the concession. This is because the Commissioner cannot determine in these cases if each person receives the same ‘dirt’ after subdivision. The impact on taxpayers is expected to be minimal because these types of subdivisions usually involve the sale of the newly subdivided lots (rather than transfers back to the original owners).
Incorporated associations

As part of the 2015-16 Budget, the former Government announced it would introduce a duties exemption for certain transfers of property under the Associations Incorporation Act 2015. This Government agrees with the need for the amendment.

Clause 43 of the Bill introduces this exemption, which will apply to transfers of property by not-for-profit associations as a result of winding up, transfer of incorporation, or amalgamation.

Foreign transfer and landholder duty

Clauses 101 – 116 of the Bill contain amendments to the foreign transfer and landholder duty provisions, which will come into effect before the Bill is passed.

The definition of ‘foreign acquirer’ and the modification provision at section 205ZE(2) have been amended so that it produces the correct outcomes when the term is imported into the foreign landholder duty provisions. The amendments ensure non-foreign persons are not liable to pay foreign landholder duty where their interest is taken into account to determine if there has been a foreign landholder acquisition and that they are not required to lodge a foreign landholder declaration.

The other changes ensure the provisions operate correctly with the amendments in the Bill.

Other duties amendments

The Bill contains the following amendments to correct minor technical issues and improve the general administration of the Duties Act:

- Minor amendments will allow the residential concession and first home owner rate of duty to apply correctly where property is transferred under an agreement to an eligible related person of the purchaser.
- The daughter-in-law, son-in-law and step-parents of a purchaser of property are included as eligible related persons who can be substituted transferees that receive a concession on the transfer of property.
- Where a purchaser in their own right under an agreement to purchase property takes the transfer as trustee, duty will not apply to the transfer only if all unit holders or beneficiaries of the trust are related to the purchaser.
- The disposition of a share in a corporate discretionary trustee is subject to duty where there is a scheme or arrangement that results in a change to the beneficial ownership of dutiable property held for the trust. Minor amendments replace the reference to ‘beneficial ownership’ with ‘beneficial interest’ and apply duty to a transaction that will or may result in a change in any beneficial interest.
- The reference to duty in the exemption for cancelled transactions is replaced by a reference to tax.
- The section setting how to determine the unencumbered value of land has been reworded to correct grammatical errors.
- A partnership acquisition may qualify for the deceased estates concession.
- The vehicle licence duty exemption for transfers between spouses is retrospectively reinstated from 1 July 2014.
- For clarity, the administrative functions that the Commissioner delegates to financial institutions under the First Home Owner Grant Act 2000 are extended to administrative functions for the first home owner duties concession.
• The references to ‘child’ in the Duties Act have been broadened to include ‘step-child’. This corrects a drafting defect in amendments to the Stamp Act that was carried over to the Duties Act.

• There is deemed to be an agreement for the transfer of a business licence where the licence is relinquished or not renewed so that it can be issued or granted to another person. A technical defect has been corrected to identify who the liable party is.

• The Duties Act prevents the transfer of a business licence being registered unless the transfer document is duty endorsed or lodged for assessment. However, under section 109 of the Constitution, a Commonwealth law that allows a licence transfer to be registered takes precedence over this restriction. A transfer of a Commonwealth business licence or a fixed infrastructure Commonwealth statutory licence is excluded from this restriction to reflect the interaction between Commonwealth and State laws in this situation.

Land tax amendments
Part 3 of the Bill contains the following amendments to the Land Tax Assessment Act 2002.

Subdivision amendments
A land tax exemption applies in certain circumstances where a person constructs or refurbishes a private residence, moves between two private residences, or constructs or refurbishes a second private residence (transitional residential exemptions). Following two State Administrative Tribunal decisions, these exemptions do not apply correctly where land is subdivided or amalgamated during an assessment year.

The definition of lot is amended to provide that a parent lot that is subdivided into new lots ceases to be a lot for land tax purposes when the new lots come into existence. This will apply for all land tax purposes, not just for the residential exemptions.

Clause 140 of the Bill contains amendments to allow the transitional residential exemptions to apply to land that is subdivided or amalgamated during an assessment year, including where land is jointly owned by people who will each take a new lot after subdivision. Where there is a delay between the subdivision of jointly owned land and the issue of certificates of title for the new lots, the Commissioner may deem the owners of new lots to be some of the joint owners.

In basic terms, provided the conditions for the relevant exemption are met, the exemption will apply to the portion of the parent lot that will be the new lot after subdivision and on which the person constructs or refurbishes their private residence. If a person moves between private residences and the old residence is subdivided during the exemption period, the person must sell all subdivided lots to qualify for the exemption.

The subdivision amendments apply from 1 July 2019. However, under the transitional provisions, the amendments do not apply if construction or refurbishment of the private residence commenced before 1 July 2019. This ensures a consistent set of exemption rules for taxpayers that start construction before the amendments come into effect.

Other amendments

The following amendments deal with minor technical issues:

- A minor amendment to the primary production exemption requires all beneficiaries of a trust (other than a unit trust scheme) to be family members of the nominated beneficiary to qualify for the exemption. Taxpayers will have until 30 June 2020 to amend their trust deeds to comply with this requirement and be entitled to the exemption for 2019-20.

- New apportionment provisions set out how the Commissioner will determine the taxable value of land that is partly used for an exempt purpose. Special rules have been included for apportioning the taxable value of land that includes a multi-storey building that is partly used for an exempt purpose. This gives the Commissioner the flexibility to look at the lettable area of a building as well as the underlying area of the land. Both methods are consistent with the Commissioner’s long-standing practice for apportioning taxable value in these circumstances.

- A residential exemption will apply where a person with a disability lives in a home owned by their child.

- A regulation-making power will allow retrospective regulations to be made where they benefit taxpayers. To give effect to the Government’s announcement on 14 June 2018, this power will be used to retrospectively extend the land tax primary production exemption to certain contract farming business activities.

Payroll tax amendments

Part 4 of the Bill contains a minor amendment to the Pay-roll Tax Assessment Act 2002 for the purposes of calculating the exempt component of a motor vehicle allowance. The reference to the rate prescribed in the income tax regulations is replaced with a reference to the rate prescribed in the payroll tax regulations.
Part 1 – Preliminary

Clause 1: Short title

This clause provides that the short title of this Act is the Revenue Laws Amendment Act 2018.

Clause 2: Commencement

This clause provides the commencement dates for this Bill.

Paragraph (a) provides that Part 1 comes into operation on the day on which Royal Assent is received (assent day).

Paragraph (b) provides that Part 2 comes into operation on the day after assent day if section 3 of the Duties Amendment (Additional Duty for Foreign Persons) Act 2018 comes into operation on or before assent day. If section 3 of that Act does not come into operation on or before the assent day, Part 2 comes into operation when that section comes into operation.

Paragraph (c) provides that Part 3 Division 3 comes into operation on 1 July 2019.

Paragraph (ca) provides that Part 3 Division 4 commences on 1 July 2019 if section 219(3) of the Community Titles Act 2018 comes into operation by that date. Otherwise, Division 4 comes into operation when section 219(3) comes into operation.

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

Part 2 – Duties Act 2008 amended

Clause 3: Act amended

This clause provides that this Part amends the Duties Act 2008 (Duties Act).

Clause 4: Section 3 amended

Section 3 defines terms for the purposes of the Duties Act. This clause amends the definition of land, chattel and discretionary trust and inserts new definitions related to derivative mining rights, fixed infrastructure assets, pastoral leases, relocatable homes and residential park sites.

Derivative mining rights

Under the Mining Act 1978 (Mining Act), the holder of a mining tenement may authorise another person to explore for and mine specific minerals on the holder’s tenement.

Authorisations under section 118A of the Mining Act have the following characteristics.

- Agreements relating to authorisations are not required to be registered under the Mining Act.
• The agreement or consent of the tenement holder is required for all dealings and activities in connection with the mining tenement. A person granted a right to mine under section 118A is not able to deal with that authorisation without consent.

• The agreement between a tenement holder and a person granted an authorisation will dictate whether a right to mine can be assigned with consent, or whether the right must be surrendered to the tenement holder with a new authorisation granted to a third party. The authorisation is generally not transferrable.

• The agreement will also determine whether authorisations granted for a prospecting licence or an exploration licence roll over when a mining tenement becomes a mining lease or if they would need to be re-granted.

• When a mining tenement is transferred to a new owner, any existing authorisations under section 118A are extinguished by the transfer.

Until the Abbotts decision[^4] in 2014, these rights were considered dutiable as an estate or interest in a mining tenement. They were also included as land for landholder duty purposes.

Following the decision, it is clear that certain types of contractual rights do not confer a legal or equitable interest in a mining tenement. As such, the rights do not fall within the definition of land. This means the grant of these rights is not subject to duty and that the value of the rights cannot be included for landholder purposes.

The holders of contractual mining rights have essentially the same entitlements as the legal holder of the tenements. However, unlike the tenement holder, the rights holder is not required to pay duty on their acquisition. In some cases, there is significant value attached to these rights.

The Bill brings contractual mining rights back into the duty base by inserting a **derivative mining right** as a specific item of dutiable property that is a right. These rights will be included as **land assets** for the purposes of landholder duty.

Some contractual mining rights may create an equitable interest in a mining tenement, which would be captured as land. For consistency, a derivative mining right is excluded from the definition of land. This approach better reflects the contractual nature of the rights, and avoids the need to determine whether a particular set of rights creates an equitable interest in the tenement or if they are merely contractual.

In defining a derivative mining right, a direct link is not made to section 118A of the Mining Act. A broader description is used to provide that it is an authorisation of a kind described in section 118A, whether or not the authorisation purports to be made under that section.

[^4]: Commissioner of State Revenue v Abbots Exploration Pty Ltd [2014] WASCA 211.
Unit trusts schemes

Under section 152, landholder duty applies to acquisitions of interests in entities that are corporations or unit trust schemes. Landholder duty does not apply to the acquisition of an interest in the trustee of a discretionary trust.

The Duties Act does not define the term ‘unit trust scheme’.

*Butterworths Concise Australian Legal Dictionary* defines a ‘unit trust’ as a trust in which the beneficial interest in the trust property is divided in the trust instrument into fractions (units), which are typically offered to the public. It is an express fixed trust because all the beneficiaries are ascertainable at any given time. Each beneficiary has a set interest in the trust property and substantial rights to enforce the proper administration of the trust because they have an equitable proprietary interest in the trust.

Under a hybrid trust, the trustee has the power to distribute trust income and, less frequently, capital among a nominated class of beneficiaries in a similar manner to a discretionary trust. The income and capital may be distributed partly in a proportional method relative to the number of units held by each beneficiary and partly or wholly in a discretionary manner.

The purpose of the landholder provisions is to charge duty on the acquisition of indirect interests in land through shares in a corporation or units in a unit trust scheme. As beneficiaries of a discretionary trust do not have any proprietary interest in land held by the discretionary trustee, landholder duty is not intended to apply to discretionary trusts.

However, the definition of ‘discretionary trust’ in the Duties Act is sufficiently broad to include not only hybrid trusts, but also unit trusts with discretionary income units. The definition of discretionary trust is amended to ensure unit trust schemes and hybrid trusts are not unintentionally included in the definition of a discretionary trust. This will ensure they are subject to the landholder duty provisions as intended.

The Commissioner will publish guidance on the meaning of unit trust scheme to complement these amendments.

Subclause (1) deletes the definition of *land*.

Subclause (2) inserts the following terms:

**Derivative mining right** means an authorisation of a kind described in the Mining Act 1978 section 118A (whether or not the authorisation purports to be made under that section);

**Fixed infrastructure, fixed infrastructure access right, fixed infrastructure control right, and fixed infrastructure statutory licence** all have the meanings given in section 91A;

*land* has a meaning affected by section 3A;

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pastoral lease has the meaning given in the Land Administration Act 1997 section 3(1);
pastoral lessee has the meaning given in the Land Administration Act 1997 section 3(1);
public float has the meaning given in section 257;
relocatable home has the meaning given in the Residential Parks (Long-stay Tenants) Act 2006;
residential park site means a site (as defined in the Residential Parks (Long-stay Tenants) Act) in a residential park (as defined in that Act).

The terms relocatable home and residential park site are relevant to new section 3A(4)(ba), which excludes from a thing fixed to land a relocatable home fixed to a residential park site (and any related structures) if those things do not constitute a fixture at law.

Subclause (3) amends the definition of chattel by inserting paragraph (ca), being a thing that is land to which section 3A(1)(f) applies. This ensures that common law chattels that are now a thing fixed to land cannot be treated as chattels.

Subclause (4) amends the definition of discretionary trust by inserting paragraph (ga) to exclude a unit trust scheme from the definition of discretionary trust. The Commissioner will publish guidance about how the term unit trust scheme is interpreted for the purposes of the Duties Act.

Clause 5: Section 3A inserted
This clause inserts section 3A after section 3 and contains an expanded definition of the term land. This definition includes things fixed to land and pastoral leases as new items that are land for the purposes of the Duties Act.

Things fixed to land
The Bill introduces a fixed to land model into the Duties Act by extending the meaning of land to include anything fixed to land, whether or not that thing:

- constitutes a fixture at law; or
- is owned separately from the land; or
- is notionally severed or considered to be legally separate from the land as a result of how a State or Commonwealth law operates.

This ensures duty applies to direct and indirect acquisitions of things fixed to land, regardless of whether they are common law fixtures or if they are being acquired independently from the underlying land.

The key purpose of these amendments is to apply duty to the acquisition of major items of infrastructure that are not fixtures because of a statutory severance that provides the item is a chattel. These amendments will also prevent complex legal arguments about whether other items of large, fixed infrastructure are fixtures or chattels.
**Pastoral leases**

Pastoral leases are leases of Crown land granted or continued under the *Land Administration Act 1997* (Land Administration Act).

Pastoral leases were always intended to be included in the definition of *land* as '“(a) any estate or interest in land ...”

There have been no disputes about whether pastoral leases are land for the purposes of the Duties Act. However, potential arguments may arise that a pastoral lease does not confer an interest in land and is merely a licence.

For example, the status of a pastoral lease as land was considered by the High Court in a native title rights matter. In this case, the Court held that the grant of a pastoral lease did not give a right to exclusive possession.

As the policy intent is that transactions relating to pastoral leases should generally be subject to duty, the status of these leases as ‘land’ is being put beyond doubt. This will have retrospective effect, and transitional validation provisions will support assessments made on these leases from the commencement of the Duties Act on 1 July 2008.

**3A. Term used: land**

Subsections (1)(a) – (c) and (2)(a) replicate paragraphs (a), (b) and (ca) from the current definition.

The current definition of land includes anything that is part of land as a fixture. As a fixture is land at common law, the reference to ‘any estate or interest in land’ at paragraph (a) means fixtures are already included as land. For this reason, a specific reference to fixtures has not been included in new section 3A.

(New section 36A ensures the value of fixtures is taken into account when determining the unencumbered value of land, regardless of whether the fixtures are purposed to be acquired or not (see clause 16). This includes items on a mining tenement that would be fixtures if the tenement was freehold land. New section 149A has the same effect for determining an entity’s entitlement to land assets for landholder duty (see clause 58).)

Subsections (1)(d) – (f) provide that *land* includes the following:

(d) a pastoral lease;

(e) an interest of a pastoral lessee under a pastoral lease;

(f) anything fixed to land (including land the subject of a mining tenement or pastoral lease), whether or not the thing —

(i) constitutes a fixture at law; or

(ii) is owned separately from the land; or

(iii) is notionally severed or considered to be legally separate from the land as a result of how a written law of Western Australia or the Commonwealth operates.

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6 Western Australia v Ward [2002] HCA 28; 213 CLR 1; 191 ALR 1; 76 ALJR 1098 (8 August 2002).
Subsection (3) provides that, without limiting (1)(f), a thing is taken to be fixed to land if it has a physical connection to the land or is buried or partly buried under the surface of the land. The term ‘fixed to land’ otherwise takes its ordinary meaning. The Commissioner will publish guidance about how the term ‘fixed to land’ will be interpreted.

Example 1

Company A owns and operates a gas pipeline on land owned by the State. The enabling legislation for the pipeline provides that it is severed from the land and is not a fixture.

Company A agrees to sell the pipeline to unrelated Company Y, but Company Y does not acquire an interest in the freehold land to which the pipeline is fixed.

The pipeline is not a fixture because of the statutory severance in its enabling legislation. However, the pipeline is ‘fixed to land’ because it is physically connected to the land and is partly buried under the surface of the land.

The pipeline is therefore land for the purposes of the Duties Act. Company Y will pay duty on the acquisition of the pipeline and any other dutiable property it acquires as part of the transaction.

Example 2

Company A owns mining tenements on which there is a mine in care and maintenance.

Company B acquires all the shares in Company A and submits the entity is not entitled to land valued at $2 million or more because:

- the mining infrastructure valued at $50 million is chattels as the items are not fixtures; and

- the value of the mining tenements is $1.8 million.

All of the mining infrastructure is fixed to the land because it has a physical connection to the land or is buried or partly buried in the land. The infrastructure is therefore land for the purposes of the Duties Act. The value of land to which Company A is entitled is $51.8 million, which means it is a landholder and duty applies to the acquisition of the shares by Company B.

Subsection (4) provides that subsection (1)(f) does not apply to:

(a) a thing that is fixed to land on a temporary basis and only for the purpose of being used in construction works;

(b) a thing that does not constitute a fixture at law and that is held or used in connection with the business of primary production;

(ba) a relocatable home fixed to a residential park site, or an addition or structure fixed or attached to the home or site for the use or enjoyment of the occupier of the home, that does not constitute a fixture at law.

(c) a thing of a kind prescribed for the purposes of this paragraph.
Paragraph (a) ensures items that are temporarily on land for construction purposes are not captured as land.

**Example 3**

A purchaser acquires mining tenements on which fixed cranes are being used to construct mining infrastructure. The cranes are owned by an independent contractor and will be removed once the infrastructure is complete.

Although the purchaser is acquiring the underlying land on which the cranes are fixed, the purchaser will not pay duty on the cranes because the cranes are not permanently fixed to the land to be used with the land.

Paragraph (b) maintains the exemption for chattels held or used in connection with the business of primary production. Without this exclusion, fixed items that are chattels (and not fixtures) would be dutiable as land.

Paragraph (ba) excludes from the fixed to land provisions a relocatable home fixed to a residential park site, and related structures such as a pergola or carport fixed or attached to the home or site, if those things do not constitute a fixture at law.

Tenants who buy a relocatable home also lease a site in the residential park. The Residential Parks (Long-stay Tenants) Act prohibits a park operator from charging a tenant anything other than rent and a security bond for entering into or renewing a long-stay agreement.

This means the grant of this type of lease is not a dutiable transaction because there is no consideration. As a result, the purchase of a relocatable home is not currently subject to duty because the home is not acquired with another dutiable transaction.

The fixed to land provisions are aimed at applying duty to the purchase of significant fixed infrastructure assets. Maintaining the current duty treatment of relocatable homes by excluding them from being fixed to land is consistent with this policy.

The regulation making power in paragraph (c) will allow other items to be excluded from being fixed to land where it is appropriate to do so to ensure the correct duty outcome. A retrospective regulation can be made where it does not adversely affect taxpayers.

Subsection (5) provides that a paragraph of subsection (1) is not to be taken into account when determining the meaning of land when used in another paragraph of subsection (1). This means that “land” in paragraphs (a) – (f) takes its ordinary meaning and not the extended Duties Act definition.

**Clause 6:** **Section 6 amended**

Family relationships are taken into account for a number of purposes in the Duties Act.
The Explanatory Memorandum for the Duties Bill 2007 indicates that the intent of section 6 was to include a step-child when determining whether a person is a child of another person. However, as currently drafted, it is unclear if this outcome is achieved.

These amendments put beyond doubt that a step-child is to be treated as a child of a person for the purposes of determining family relationships.

Subclause (1) defines step-child for the purposes of the section to mean a child of a spouse or de facto partner of the person.

Subclause (3) inserts subsection (3) to include ‘stepchild’ in the following provisions:

- section 43 – this sets out the qualifying relationships for the ‘substituted transferee’ provisions. The effect is that a purchaser under an agreement can ‘substitute’ their stepchild without incurring additional duty.
- section 87 – this is relevant to determining whether an agreement is a conditional agreement and whether a general conditional agreement has been terminated on relevant grounds. The effect is that a step-child will be a related party who cannot have control over the happening of an event described in section 87(2).
- section 100 – this defines family member for the family farm exemption. The effect is that a transfer of farming land to a person’s stepchild can qualify for the exemption.

This clause also inserts subsection (4) to provide that, for the purposes of the definition of ‘related persons’ in the landholder duty chapter, a step-child is to be treated as a child when determining whether the relationship between individuals is that of parent and child.

Clause 7: Section 11 amended

Subsection (1) lists what a **dutiable transaction** is for the purposes of Chapter 2. Subsection (2) sets out the transactions that are not dutiable transactions.

**Fixed infrastructure rights and derivative mining rights**

Section 11(2)(a) provides that a transaction involving a right is not a dutiable transaction if no consideration is paid or agreed to be paid for the transaction.

A dutiable transaction relating to a fixed infrastructure right or a derivative mining right will be chargeable with transfer duty even if there is no consideration for the transaction.

Subsection (3) is inserted into section 11 to ensure that subsection (2)(a) does not apply to these rights. This provides that subsection (2)(a) does not apply to a right referred to in section 16(1)(h), (i) or (j), that is, a fixed infrastructure control right, fixed infrastructure access right, and a fixed infrastructure statutory licence.
Subsection (3) also provides that subsection (2)(a) does not apply to a right referred to in section 16(3)(aa), that is, a derivative mining right.

**Pastoral leases**

Section 11(2)(b) provides that a transfer of, or an agreement for the transfer of, a lease is not a dutiable transaction if no consideration is paid, or agreed to be paid, for the transfer or agreement.

However, duty is intended to apply to a transfer of, or an agreement for the transfer of, a pastoral lease even if there is no consideration for the transaction. This because the long-term nature of a pastoral lease is considered to be closer to a freehold interest in land than an ordinary commercial lease.

Section 11 is amended to ensure that subsection (2)(b) does not apply to pastoral leases.

**Clause 8: Section 13 amended**

Section 13 describes a *farm-in agreement*. These agreements relate to the acquisition of a right to acquire an interest in a mining tenement or a *right to exploit a mining tenement* (after spending a specified amount on exploration or development of the tenement).

A *right to exploit dutiable property* represents a right granted by the owner of the dutiable property to allow a third party to use or benefit in some way from the dutiable property. This term is considered to be a reference to the rights provided under an authorisation under section 118A of the Mining Act.

These rights are defined as *derivative mining rights* under other amendments in this Bill. As such, a consequential amendment is required to section 13 to replace the references to a right to exploit a mining tenement with a derivative mining right.

This clause amends section 13 to replace the references to ‘right to exploit’ or ‘right to exploit the mining tenement’ (as appropriate) with ‘derivative mining right’ or ‘derivative mining right in relation to’ (as appropriate).

**Clause 9: Section 14 amended**

Under section 14(1), a direct acquisition of chattels is not a dutiable transaction where the chattels are the only dutiable property. However, section 14(2) provides that the transaction will be a dutiable transaction if it is aggregated under section 37 with another dutiable transaction, and the transactions arise from substantially one arrangement.
Section 37 only operates to aggregate dutiable transactions under the transfer duty chapter. The acquisition of an interest in a landholder cannot be aggregated with the direct acquisition of chattels where the acquisitions are part of one arrangement. This allows a transaction to be structured to reduce or avoid the duty payable on chattels, which can have significant value particularly when they relate to mining operations.

Section 14 is extended so that a direct purchase of chattels will be a dutiable transaction where it arises from the same arrangement as a landholder acquisition.

Subclause (1) amends subsection (1) by including a reference to it being subject to new subsection (3), in addition to subsection (2) as at present.

Subclause (2) inserts new subsections (3), (4) and (5).

Subsection (3) is based on section 37(1). It provides that a transaction for which the only dutiable property is chattels (as referred to in subsection (1)) is a dutiable transaction if there is a landholder acquisition and the transaction and acquisition arise from substantially one arrangement.

Subsection (4) is based on section 37(2). It provides that unless the Commissioner is satisfied to the contrary, a transaction and acquisition will be taken to arise from substantially one arrangement where they occur within 12 months and the person liable to pay duty is the same person.

Subsection (5) provides that a reference in subsection (4) to a person liable to pay duty includes a person who would be liable to pay duty if the transaction were a dutiable transaction. This is needed as the purchase of the chattels is not a dutiable transaction until it is aggregated.

Example

Company A holds land and Company B holds chattels that are used on Company A’s land.

Company Z acquires a significant interest in Company A. As part of the same arrangement, Company Z acquires the chattels directly from Company B, rather than acquiring an interest in the entity.

Under the current provisions, duty will apply to the landholder acquisition but not to the direct transfer of the chattels. However, the effect of amended section 14 is that the acquisition of chattels is a dutiable transaction. This is because the transfer of chattels forms part of one arrangement with the landholder acquisition in Company A. The section heading is also amended.
Clause 10: Section 16 amended

A right is dutiable property under section 15(b). Section 16(1)(a) to (g) lists those rights (subject to the provisions of subsections (2) and (3)).

This clause amends section 16 to ensure transactions involving fixed infrastructure rights and derivative mining rights are always dutiable.

**Fixed infrastructure rights**

Subsection (2) provides that a right exists in relation to dutiable property only if the transfer of the property would be a dutiable transaction.

Subclause (1) amends subsection (1) by inserting new paragraphs (h), (i) and (j) in relation to fixed infrastructure control rights, fixed infrastructure rights and fixed infrastructure statutory licences, respectively.

Subclause (2) amends subsection (2) by restricting its application to only the current rights listed in subsection (1)(a) to (g). This ensures transactions involving fixed infrastructure rights are always dutiable.

Subclause (3)(b) amends subsection (3) to provide that a right includes a part of, or an interest in, a right.

Subclause (4) inserts new subsection (4), which clarifies that subsections (1)(a) to (g) do not apply to a right to the extent that it is a fixed infrastructure control right, fixed infrastructure right or fixed infrastructure statutory licence.

**Derivative mining rights**

Section 16(1) sets out the categories of rights that are dutiable property under the Duties Act. Section 16(3) then provides that, without limiting subsection (1), a right includes certain specific rights, as listed in paragraphs (a) to (c).

The list of rights in subsection (1) includes, at paragraph (e), ‘a right to exploit dutiable property’, and at paragraph (f), ‘a right to income from dutiable property’. To avoid doubt, derivative mining rights are specifically mentioned in subsection (3) to ensure they are categorised as rights under section 16.

Subclause (3)(a) amends subsection (3) by inserting new paragraph (aa) in relation to derivative mining rights.

Clause 11: Section 17 amended

Section 17 describes dutiable property that is new dutiable property. An acquisition of new dutiable property on its creation, grant or issue is a dutiable transaction.

**Fixed infrastructure rights**

Subsection (1)(b) lists certain rights that are new dutiable property.

This provision is amended to include references to a fixed infrastructure control right and a fixed infrastructure access right because the grant of
these rights will be subject to transfer duty.

A fixed infrastructure statutory licence is not included because the grant or issue of this type of licence is not intended to attract duty. These grants are not currently subject to duty and the grant of a licence under the *Petroleum Pipelines Act 1969* is specifically excluded from being a dutiable transaction (see below).

Subclause (1) inserts new subparagraphs (iia) and (iib), which respectively refer to a fixed infrastructure control right and a fixed infrastructure access right.

**Derivative mining rights**

The grant of a derivative mining right will also be subject to transfer duty. Subclause (1) also inserts new subparagraph (iic), which is a reference to a derivative mining right.

**Pastoral leases**

A pastoral lease is new dutiable property under section 17(1)(a), being 'land in Western Australia'.

Subsection (2) lists exceptions to the meaning of new dutiable property under subsection (1). Specifically, subsection (2)(c) refers to a lease if no consideration is paid, or agreed to be paid, for the grant of the lease. Where consideration is paid, or agreed to be paid, section 28(4) provides that the dutiable value of the transaction is the total of that consideration and any rental premium.

When the relevant Minister grants a pastoral lease under section 101 of the *Land Administration Act*, the grant may be subject to a sale price if the land under the proposed lease includes any improvements.

The grant of a pastoral lease is intended to be assessed on the same basis as the grant of a common law lease. However, it is appropriate to use language consistent with the *Land Administration Act* rather than relying on the current provisions relating to leases.

Subclause (2)(a) amends subsection (2)(c) to the effect that it does not apply to a pastoral lease.

Subclause (2)(b) amends subsection (2) by inserting new paragraph (ca) in relation to pastoral leases where the grant of the lease is not subject to payment of a sale price.

**Petroleum Pipelines Act 1969**

A licence under the *Petroleum Pipelines Act* is ‘land’ under paragraph (c) of the current definition of that term in section 3. Without these licences being excluded by subsection (2)(e), the grant of a licence would be new dutiable property.

As part of other amendments being made in this Bill, this type of licence will be categorised as a fixed infrastructure statutory licence, which is
not land. As a result, there is no need to specifically exclude these licences from being new dutiable property.

Subclause (2)(c) deletes subsection (2)(e).

**Clause 12:**  **Section 18 amended**

Section 18 describes dutiable property that is *special dutiable property*. A surrender of special dutiable property is a dutiable transaction.

**Pastoral leases**

Section 18(c) provides that a lease is special dutiable property if consideration is paid, or agreed to be paid, by the lessor for the surrender of the lease. The party liable for duty is the person to whom the lease is surrendered (the lessor).

The Land Administration Act provides for lessees to be paid compensation for improvements in certain circumstances where pastoral leases are cancelled. However, there are no duty consequences because the liable party will be the Crown and the transaction will be exempt under section 93.

On that basis, section 18(c) will not apply to pastoral leases. This means a dutiable transaction is not created in the first place.

This clause amends paragraph (c) to the effect that it does not apply to a pastoral lease.

**Fixed infrastructure rights**

The surrender of a fixed infrastructure control right and a fixed infrastructure access right will be subject to transfer duty if consideration is paid, or agreed to be paid, for the surrender of the right.

This clause amends section 18 by inserting paragraphs (ga) and (gb), being a fixed infrastructure control right and a fixed infrastructure access right if consideration is paid for the surrender of the right.

A fixed infrastructure statutory licence is not included because the surrender of this type of licence is not intended to be dutiable. A surrender of these types of licences (such as a licence under the Petroleum Pipelines Act) is not currently subject to duty.

**Derivative mining rights**

Duty will also apply to the surrender of a derivative mining right where consideration is paid, or agreed to be paid, for the surrender of the right.

This clause amends section 18 by inserting paragraph (gc), being a derivative mining right if consideration is paid for the surrender of the right.

**Clause 13:**  **Section 18A inserted**

Land now includes a thing fixed to land or an estate or interest in such a thing. An acquisition of a thing fixed to land will be subject to transfer duty as land, even where the thing is being acquired without the
underlying land to which it is fixed.

However, a thing fixed to land will be treated as a chattel for duty purposes where the underlying land is not being acquired and there is an agreement or understanding that the thing will be permanently removed from the land upon sale.

The purchaser must remove the thing within 90 days after the transaction or a longer period approved by the Commissioner. If the purchaser fails to remove the thing within the required timeframe, they must notify the Commissioner. At that time, the thing will no longer be a chattel for duty purposes and the Commissioner will assess or reassess duty as required.

This clause inserts section 18A at the end of Chapter 2 Part 3 Division 2.

18A. Things fixed to land that are to be permanently removed

Subsection (1) provides that a thing fixed to land, or an estate or interest in such a thing, is taken not to be land in relation to a transaction if:

(a) the transaction is a transfer or agreement for transfer of the thing (or estate or interest in it); and

(b) none of the following are transferred as part of the transaction, or another transaction aggregated under section 37 –

(i) the land (or estate or interest in it) to which the thing is fixed;

(ii) if the land to which the thing is fixed is subject to a mining tenement, the mining tenement (or estate or interest in it); and

(c) there is an agreement, arrangement or understanding that the thing is to be permanently removed from the land.

Subsection (2) provides that subsection (1) applies whether or not the thing is a fixture at law. It is not intended that this concession should apply only to things that are fixed to land but are not fixtures.

Subsection (3) provides that where subsection (1) applies, the thing is taken to be a chattel for the purposes of the Duties Act. This is to avoid taxpayer arguments that the effect of this section is that the thing is not dutiable property under the Duties Act.

Subsection (4) provides that subsection (1) ceases to apply to a thing (or estate or interest in it) if the thing is not permanently removed from the land within 90 days after the transfer of the thing (or estate or interest in it) occurs, or such longer period as the Commissioner allows. An application for an extension of time must be made within the 90-day period.

Subsection (5) provides that if a failure to remove the thing occurs, the transferee must lodge a notice of the failure in the approved form within two months after expiry of the allowed time period.

A penalty of $20,000 applies for failure to comply with this subsection.
Subsection (6) provides that the Commissioner must make any reassessment necessary as a result of the operation of subsection (4). This is subject to the time limits set out in section 17 of the Taxation Administration Act 2003 (TAA).

Example 1

Person A owns residential land to which he has fixed a large backyard shed. A wants to sell the shed and enters into an agreement for Person B to purchase the shed and remove it from the land within 30 days after the sale is finalised. B pays the consideration for the shed and starts removing it from the land the next day. The shed is fully removed within a week.

In this case, subsection (1) is satisfied and the shed is a chattel under subsection (3). As B is not acquiring any other dutiable property with the shed, there is no duty payable on the purchase of the shed.

Example 2

Company A owns an operating mine on which there is fixed infrastructure, including equipment to carry out mining operations and staff accommodation.

Company A and Company B enter into an agreement for Company B to purchase all the fixed equipment. The agreement provides that, after the transaction is completed, Company A will own the mining tenements and Company B will own the mining equipment and carry out mining operations on the tenement.

In this case, there is no agreement, arrangement or understanding for Company B to remove the items permanently from the land. As a result, the mining equipment is land because it is a thing fixed to land and duty will apply to the purchase of the fixed infrastructure.

Clause 14: Section 28 amended

Section 27 sets out the general rules that apply for determining the dutiable value of a dutiable transaction, and section 28 sets out the dutiable value of certain dutiable transactions.

Under subsection 28(4), the dutiable value of a dutiable transaction that is the grant of a lease is the total of the consideration, and any excessive rent that represents an amount payable for the grant.

When the relevant Minister grants a pastoral lease under section 101 of the Land Administration Act, the grant may be subject to a sale price if the land under the proposed lease includes any improvements.

Pastoral leases are intended to be assessed on the same basis as common law leases. However, it is appropriate to use language consistent with the Land Administration Act rather than relying on the current provision relating to leases.
Subclause (1) amends subsection (4) so that the reference to a lease does not include a pastoral lease.

Subclause (2) inserts new subsection (4A). This provides that the dutiable value of the grant of a pastoral lease is the sale price upon which the lease is granted under section 101 of the Land Administration Act.

Clause 15: Section 36 amended

Section 36 sets out the factors that apply when determining the unencumbered value of property. The section applies for both transfer duty and landholder duty (via section 150).

This clause makes minor amendments to section 36.

Subclause (1) deletes subsection (4)(c) as that is now contained in subsection (5).

Subclause (2) inserts new subsection (5). This essentially replicates deleted subsection (4)(c), apart from several changes to correct grammatical errors.

The one significant addition in subsection (5) is that it will not apply where new section 36A applies (see paragraph (e)). Section 36A contains specific provisions relating to determining the unencumbered value of land where there are fixtures to the land.

The section heading is also amended.

Clause 16: Section 36A inserted

This clause inserts new section 36A at the end of Chapter 2 Part 4 Division 5 Subdivision 3.

36A. Determining unencumbered value: fixtures and mining tenement fixtures

This section sets out how the unencumbered value of land is to be determined where there are fixtures to the land. It provides that any fixtures are to be taken into account when valuing land, even if the transaction does not include the fixture. It also ensures fixtures are only taken into account once per transaction. This is necessary because a thing may be land as a fixture and may also be fixed to land.

This section is the transfer duty equivalent to new section 149A in Chapter 3 for landholder duty.

Subsection (1) defines a mining tenement fixture to mean anything fixed to land the subject of a mining tenement that would be a fixture if the mining tenement was an interest in freehold land. This replicates paragraph (cb) of the deleted definition of land in section 3.

Under the new definition of land in section 3A, land includes anything fixed to land, including land the subject of a mining tenement, whether or not the thing constitutes a fixture at law. However, a reference to a ‘mining tenement fixture’ in section 36A is limited to things that would be common law fixtures if the mining tenement were freehold land.
Subsection (2) provides that in, determining the unencumbered value of land, any fixtures are to be taken into account, even if the transaction does not, or purports not to, apply to the fixture as well as the land.

Subsection (3) is a ‘no double duty’ provision. It provides that subsection (2) does not apply if the value of the fixture would otherwise be taken into account separately in determining the dutiable value of the transaction or another transaction aggregated under section 37.

Subsection (4) is the equivalent to subsection (2) and provides that a mining tenement fixture is to be taken into account, when determining the unencumbered value of a mining tenement (or estate or interest in it).

Subsection (5) is the equivalent of subsection (3) and operates in relation to mining tenement fixtures.

Subsection (6) provides that when applying this section, ‘land’ does not include a mining tenement or anything fixed to land. This is because section 36A is directed at fixtures on physical land only.

**Example**

Company A owns mining tenements on which there are fixed infrastructure items for the mining operation. Company A enters into an agreement to sell the mining operation to Company B.

Some of the mining equipment would be fixtures if the mining tenement was freehold land, which means they are mining tenement fixtures under subsection (4). Some items are fixed to the land the subject of the tenement and some items are chattels.

The mining tenement fixtures are taken into account when valuing the mining tenement. The things that are fixed to the land and the things that are chattels are valued separately, but duty will apply to the tenement including the mining tenement fixtures, the things fixed to land, and the chattels.

**Clause 17: Section 39 amended**

Section 39 sets out how to calculate the dutiable value of a transfer or agreement to transfer that constitutes a partition of jointly held dutiable property. This clause amends section 39 to ensure the partition provisions cannot apply to:

- transfers of land to a partner on retirement or dissolution of a partnership under sections 78 and 78A; and
- subsequent transfers of land to the original owner after a subdivision to which section 120A applies.

Section 78 of the Duties Act deals specifically with the transfer of partnership property to a partner on their retirement from the partnership or upon the partnership’s dissolution. Section 78A is a new provision inserted by clause 29 which sets out how to calculate the dutiable value of a deemed transfer of property retained by a partner on
retirement or dissolution of the partnership.

In *O’Meagher and Commissioner of State Revenue*, the State Administrative Tribunal confirmed the Commissioner’s decision that section 78 applied to determine the dutiable value of the distribution of partnership property following the partnership’s dissolution, and that the partition provisions in section 39 did not apply.

Although the Tribunal’s decision was favourable to the Commissioner, the result was determined by how the documents were drafted.

A different outcome under section 39 could otherwise have occurred, where the dutiable value of the transfers would have been reduced to nil or to an amount significantly lower than the amount determined under section 78.

This clause inserts subsection (4) to ensure section 39 cannot be used where sections 78 and 78A apply to the transaction.

Subsection (4) also provides that section 39 does not apply to a subsequent transfer referred to in section 120A.

New section 120A, as inserted by clause 46, provides that nominal duty will apply to a transfer of land if the Commissioner is satisfied the transfer is for the sole purpose of facilitating a subdivision and that each person will get back the land they contributed to the subdivision. Nominal duty also applies to the subsequent transfer of the newly subdivided lots to the original owner to the extent the person receives the same land they contributed.

Subsection (4) ensures that a person cannot apply for nominal duty under section 120A on the original transfer of land to another person to facilitate the subdivision (so the land is held jointly by the transferor and transferee) and then use section 39 to calculate the dutiable value of the subsequent transfer of the land after subdivision.

**Clause 18: Section 42 amended**

A transfer and an agreement for the transfer of dutiable property are dutiable transactions under section 11 of the Duties Act. If an agreement is duty endorsed, the transfer is exempt from duty if one of the ‘no double duty’ provisions of section 42 applies.

Under section 42(1), a transfer of dutiable property to a transferee is not chargeable with duty if it is ‘in conformity with’ the duty endorsed agreement for the transfer of that property. This applies to most transactions where the property is transferred to the purchaser named in the agreement.

Where a purchaser enters into an agreement to take the property in their own right but then takes the transfer as trustee of a trust, section 42(1) is not intended to apply to exempt duty on the transfer as the transfer is not ‘in conformity with’ the agreement. The exception is where section 42(4B) applies.

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Section 42(4B) provides that duty is not chargeable on a transfer of the property under the agreement to the purchaser in the purchaser’s capacity as:

- the trustee of a unit trust scheme if the purchaser is the sole unit holder or is related to each of the other unit holders; or
- another trustee, except a discretionary or unit trustee, if the beneficiaries and the purchaser are related.

However, a trust is only a fiduciary relationship and not a separate legal entity. This means that a person does not become a different legal entity when acting in the capacity as a trustee. If the purchaser acting in their own right under an agreement takes the transfer in the capacity of trustee, the transfer is in conformity with the agreement because the transfer is to the purchaser and not to a third party.

In this circumstance, section 42(1) will apply regardless of whether the requirements of section 42(4B) are satisfied, which means section 42(4B) has no effect and an exemption from duty will apply in broader circumstances than intended.

The amendments in this clause restore the intention for duty to apply to a transfer where a purchaser in their own right takes a transfer in a trustee capacity, unless the unit holders or beneficiaries of the trust are related to the purchaser as described in section 42(4B).

This clause replaces subsection (4B) and amends (4C).

Subsection (4B) provides that section 42(1) does not exempt a transfer if the agreement is for the transfer of dutiable property to the purchaser in their own right but the property is transferred to the purchaser acting in a trustee capacity, unless the purchaser is:

(a) an individual acting as trustee of a unit trust and the purchaser is the sole unit holder;
(b) the trustee of a unit trust scheme and the purchaser is a unitholder who is related to each of the other unitholders; and
(c) the trustee of a trust, except a discretionary trust or unit trust, and each beneficiary is related to the purchaser.

Subclause (2) amends section 42(4C) to clarify the intent of the provision. The purpose of section 42(4C) is to provide that the unitholder or beneficiary referred to in subsection (4B) must be acting in their own capacity and not as trustee for another person. This is not clear from the current drafting of the section.

Clause 19: Section 43 amended

Section 42(2) provides that duty is not chargeable on a transfer of dutiable property where the transferee under the transfer is related to the purchaser under the agreement and the agreement is duty endorsed. Section 43 sets out when a purchaser and a transferee are
related for the purpose of satisfying the 'substituted transferee’ provision.

The amendments in this clause extend the qualifying relationships for the substituted transferee provisions to include the purchaser’s son- or daughter-in-law, de facto partner of a child, step-parent, and de facto partner of a parent. Minor consequential amendments are also required to this section as a result of other amendments in this Bill.

Subclause (1) deletes section 43(1)(c) and inserts new paragraphs (c), (ca) and (cb). New paragraph (c) refers only to a child or remoter lineal descendant of the purchaser. The reference to a child or remoter lineal descendant of the purchaser’s spouse or de facto partner is no longer required as a result of the amendments to section 6.

Paragraphs (ca) and (cb) extend the qualifying relationships. Paragraph (ca) will allow a purchaser under an agreement to substitute to a spouse or de facto partner of a child, or remoter lineal descendant, of the purchaser (for example, a son or daughter-in-law of a purchaser).

Paragraph (cb) will allow a purchaser to substitute to a spouse or de facto partner of a parent, or remoter lineal ancestor, of the purchaser (for example, a step-parent).

Section 43(4)(c)(i) limits the substituted transferee provisions to exclude a transferee that will hold the property as a trustee of a trust (other than a unit trust scheme or discretionary trust) unless the purchaser, transferee and beneficiary are all individuals and the purchaser is related to the transferee and the beneficiary.

Subclause (2) makes consequential amendments to section 43(4)(c)(i) to include the new qualifying relationships in section 43(1).

Clause 20: **Section 57 amended**

Section 57 sets out the rules for determining when a discretionary trust holds an indirect interest in dutiable property.

Minor consequential amendments are required to this section as a result of other amendments in this Bill regarding determining when entities are taken to be linked.

Subclause (1) amends subsection (2) by including an additional reference to section 156A. This is a new section under which entities can be taken to be linked for the purposes of section 156.

Subclause (2) amends subsection (3) to also include a reference to section 156A. The reference to section 152(2) is extended to include section 152(3). This is an additional subsection setting out what is meant by an ‘entity’.

Clause 21: **Section 61 amended**

This section describes how to value the interest of a taker in default in a discretionary trust for the purposes of section 59. The value is the total of the amounts described in paragraphs (a) and (b) of section 61.
Paragraph (a) relates to dutiable property held directly by the discretionary trust.

Paragraph (b) relates to where an entity linked to a discretionary trustee is entitled to dutiable property. The value is determined by applying the taker in default’s interest in the discretionary trust to an amount obtained by applying section 157 as if a reference in that section:

(i) to land were a reference to dutiable property; and
(ii) to the main entity were a reference to the discretionary trustee.

Section 157 sets out how to determine the value of land assets to which a linked entity is entitled. Amendments in this Bill mean that section 157 now refers to the main entity’s total direct or indirect interest in the linked entity determined under section 154A. A consequential amendment is required to section 61.

This clause replaces subparagraphs (i) and (ii) of paragraph (b).

Subparagraph (i) now refers to ‘land assets’ rather than ‘land’. This reflects the broadening of the landholder duty base to include fixed infrastructure rights and derivative mining rights.

Subparagraph (ii) has the same practical effect as the deleted provision. The amendment ensures the appropriate terminology is used when applying section 154A for the purposes of section 157.

Clause 22: Section 66 amended

Section 66 sets out the rules for determining when a corporate trustee holds an indirect interest in dutiable property.

Section 156 sets out when an entity is linked to another entity. This Bill inserts new section 156A, which describes additional ways in which an entity can be linked to another entity for the purposes of section 156. Minor consequential amendments are required to section 66 as a result of these amendments.

Subclause (1) amends subsection (2) by including an additional reference to section 156A.

Subclause (2) amends subsection (3) to also include a reference to section 156A. The reference to section 152(2) is extended to include section 152(3). This is an additional subsection setting out what is meant by an ‘entity’.

Clause 23: Section 67 amended

Section 67 is an anti-avoidance provision aimed at preventing a change of shareholding in a corporate trustee for the purpose of changing the beneficial interests of the trust property without duty applying. It does this by treating a disposition of a share in a corporate trustee of a discretionary trust as an agreement for the transfer of dutiable property if it is a transaction or part of a transaction that is, or is part of, a scheme or arrangement that results in a change in the beneficial ownership of dutiable property held by the trustee.
Section 67 is based on section 73E of the Stamp Act, which had the same purpose.

This clause addresses several drafting issues that limit the effectiveness of the section.

Section 67 refers to ‘beneficial ownership’. However, the discretionary trustee is the absolute owner of the trust’s assets and there is no person who has beneficial ownership. The beneficiaries may have lesser beneficial (that is, equitable) interests in the assets, but this is not beneficial ownership. This means that section 67 currently has little to no application.

This clause replaces the reference to ‘beneficial ownership’ with the words ‘beneficial interest, whether vested or contingent’. This is consistent with the wording in section 73E of the Stamp Act.

Another deficiency with current section 67 is that its application is limited to a scheme or arrangement ‘that results in a change’. This means it only captures schemes that have an immediate effect. In contrast, section 73E of the Stamp Act referred to a scheme whereby a beneficial interest ‘has passed or will or may pass’.

The amendment replaces the reference to ‘results in a change in the beneficial ownership of’ with ‘results, or will or may result, in a change’ so that the section will also apply to schemes under which a change may or is to occur in future.

Clause 24: Section 68 amended

This section describes how to determine the dutiable value of a transaction referred to in section 67, being a disposition of a share in a corporate trustee that has been taken to be an agreement for the transfer of dutiable property.

Section 68(2) applies where the dutiable property is held indirectly by a corporate trustee. The dutiable value is determined by applying section 157 as if a reference in that section:

(a) to land were a reference to dutiable property; and
(b) to the main entity were a reference to the corporate trustee.

Section 157 sets out how to determine the value of land assets to which a linked entity is entitled. Amendments in this Bill mean that section 157 now refers to the main entity’s total direct or indirect interest in the linked entity determined under section 154A. A consequential amendment is required to section 68.

This clause replaces paragraphs (a) and (b) of subsection (2).

Paragraph (a) now refers to ‘land assets’ rather than ‘land’. This reflects the broadening of the landholder duty base.

Paragraph (b) has the same practical effect as the deleted provision. This amendment ensures the appropriate terminology is used when applying section 154A for the purposes of section 157.
Clause 25: Section 70 amended

Where there is a partnership acquisition as set out in section 72, duty only applies to the dutiable property specified in section 70. This section currently provides that, for the purposes of the partnership provisions (other than section 78), dutiable property means land and chattels.

Fixed infrastructure rights

Under this Bill, a fixed infrastructure control right and a fixed infrastructure access right are included under section 72 as property which may result in a partnership acquisition. These rights are also included in section 70 as dutiable property to which duty will apply upon a partnership acquisition.

A fixed infrastructure statutory licence is also included as dutiable property. These licences will be treated similarly to chattels in that the assets do not determine whether there is a partnership acquisition but are included when determining the dutiable value of a partnership acquisition when there is one.

Derivative mining rights

These rights are also included under section 72 as property which may result in a partnership acquisition. These rights must be included in section 70 as dutiable property on which duty will apply upon a partnership acquisition.

This clause amends section 70 by inserting new paragraphs (c) to (f). These respectively relate to a fixed infrastructure control right, a fixed infrastructure access right, a fixed infrastructure statutory licence, and a derivative mining right.

Clause 26: Section 72 amended

A partnership acquisition is a dutiable transaction. Section 72 provides that a partnership acquisition means a person acquiring an interest in a partnership that holds land or holds an indirect interest in land.

A reference to an indirect interest in land is to land held by an entity linked to the partnership (refer section 73).

Fixed infrastructure rights

The partnership provisions operate on a similar basis to the landholder duty provisions in that there will only be a partnership acquisition if the partnership holds land. If the partnership holds land, duty will apply to the land together with any chattels held by the partnership.

Fixed infrastructure control rights and fixed infrastructure access rights are included as ‘land assets’ in Chapter 3, which means they are treated as land for landholder duty. For consistency, these rights should be also included in section 72 as property which may result in a partnership acquisition.
A fixed infrastructure access right will only be taken into account where the partnership also holds the relevant fixed infrastructure or fixed infrastructure control right, or there is another transaction arising from substantially one arrangement that relates to the infrastructure or right (see section 91C).

**Derivative mining rights**

These rights are included for the same reason that fixed infrastructure rights are included.

This clause amends section 72 by deleting paragraph (b) (an indirect interest in land) and inserting new paragraphs (b), (c), (d) and (e).

Paragraphs (b), (c) and (d) respectively relate to a fixed infrastructure control right, a fixed infrastructure access right, and a derivative mining right. Paragraph (e) relates to an indirect interest in any of the property referred to in paragraphs (a) to (d).

**Clause 27: Section 73 amended**

Minor consequential amendments are required to section 73 as a result of other amendments in this Bill.

Subclause (1) deletes subsection (1) and inserts a new subsection which now refers to property of a kind referred to in section 72(a) to (d) rather than specifically to land.

Subclause (2) amends subsection (2) by including an additional reference to section 156A. This is a new section under which entities can be linked for the purposes of section 156.

Subclause (3) amends subsection (3) to also include a reference to section 156A. The reference to section 152(2) is extended to include section 152(3), which is an additional subsection setting out what is meant by an ‘entity’.

The section heading is also amended.

**Clause 28: Section 77 amended**

Section 76 provides that the dutiable value of a partnership acquisition is:

- the consideration for the acquisition to the extent it relates to dutiable property; or
- the value of the partnership interest the subject of the acquisition if there is no consideration for the acquisition, the consideration cannot be ascertained, or the value of the interest is greater than the consideration.

This section describes how to value a partnership interest the subject of a partnership acquisition for the purpose of section 76(b).

The value is the total of the amounts described in subsection (1)(a) and (b) of section 77.
Subsection (1)(a) relates to dutiable property held directly by the partnership.

Subsection (1)(b) applies where an entity linked to the partnership is entitled to dutiable property. The value is determined by applying the partner’s partnership interest to an amount obtained by applying section 157 as if a reference in that section:

(i) to land were a reference to dutiable property; and

(ii) to the main entity were a reference to the partnership.

Section 157 sets out how to determine the value of land assets to which a linked entity is entitled. Amendments in this Bill mean that section 157 now refers to the main entity’s total direct or indirect interest in the linked entity determined under section 154A, and a consequential amendment is required to section 77.

Subclause (1) replaces paragraphs (i) and (ii) of subsection (1)(b).

Subparagraph (i) now refers to ‘land assets’ rather than ‘land’. This reflects the broadening of the landholder duty base.

Subparagraph (ii) has the same practical effect as the deleted provision. The amendment ensures that the appropriate terminology is used when applying section 154A for the purposes of section 157.

**Dutiable property contributed on formation**

Subsection (2) provides that in determining the value of a partnership interest in a new partnership, any dutiable property contributed by the partner on formation is to be ignored.

Where joint property is contributed by the partners on formation, duty should not be chargeable if the interest in the property contributed by the partners is equal to their partnership interest. If there is a variation in the interests, duty is chargeable to the extent of the variation.

As currently drafted, section 77 does not give the correct result. The following example illustrates the issue.

**Example 1**

Land is owned jointly by A and B in equal shares before being contributed as partnership property. An equal partnership is formed between A and B. The land is valued at $1 million.

Under section 77(1), the value of the partnership interest acquired by A is determined by applying A’s partnership interest (50 per cent) to the unencumbered value of the dutiable property of the partnership ($1 million).

However, section 77(2) provides that in determining the value, the dutiable property contributed by A is to be disregarded. The value to be disregarded is $500,000.

For the remaining dutiable property, the value of A’s 50 per cent partnership interest is $250,000, calculated as 50 per cent of $500,000.
This is also the value of B’s 50 per cent partnership interest. A and B will each have to pay duty on the value of $250,000. However, duty should not be charged at all upon formation of the partnership as the relative interests of A and B in the land have not changed.

Subclause (2) amends subsection (2) to exclude any property that the partner holds jointly with another partner from the calculation in subsection (1). The value of jointly held property contributed by the partner on formation is dealt with under new subsection (2A).

Subclause (3) inserts new subsections (2A) and (2B). Subsection (2A) sets out how to calculate the value of a partnership interest where jointly held property is contributed by the partner on the partnership’s formation.

Subsection (2B) defines ‘joint property’ for the purposes of subsections (2) and (2A) to be property held by the new partner jointly with one or more other partners. The effect of these new subsections is that, in determining the value of a new partner’s partnership interest on formation, the value determined under subsection (1) and (2) is to be reduced by:

(a) the unencumbered value, when liability for duty on the transaction arises, of the interest in the jointly held property contributed by the partner; or

(b) if the amount determined under paragraph (a) is more than the amount determined by applying the partner’s partnership interest to the total unencumbered value of the jointly held property (referred to as the cap amount) – the cap amount.

If a partner contributes more than one interest in jointly held property on formation, a reduction under subsection (2A) has to be made for each interest in joint property contributed by the new partner.

**Example 2**

Using the facts of example 1, the amendments to section 77 will produce the following result for A:

- The value of the amount determined under section 77(1) is $500,000.
- The value of any dutiable property contributed by A to be disregarded under section 77(2) is nil.
- Under section 77(2A), the value of $500,000 is to be reduced by $500,000, which is the unencumbered value of the interest in the joint property contributed by A, as this amount is not greater than the cap amount.
- The dutiable value of A’s partnership interest acquired on formation is nil and no duty is payable.

The duty outcome for B is the same.

**Example 3**

This example illustrates how the value of a partnership interest is calculated where:

- the interest in the jointly held property contributed on formation
differs to the partners’ interest in the partnership; and

• the partners each contribute dutiable property that is not jointly held.

Lot 1 is owned jointly by A and B in equal shares before being contributed as partnership property. A and B also respectively contribute Lots 2 and 3 to the partnership. Each lot is valued at $1 million. Upon formation, A acquires a 70 per cent interest in the partnership and B acquires a 30 per cent interest.

The value of A’s partnership interest is calculated as follows:

• The value of the amount determined under section 77(1) is $2.1 million (70 per cent of $3 million).

• However, section 77(2) provides that, in determining the value of the partnership interest, the value of Lot 2 contributed by A is to be disregarded. The amount determined under subsection (1) and (2) is therefore $1.4 million (70 per cent of $2 million).

• As A has contributed jointly held property, the amount is to be reduced under section 77(2A) by:
  – the unencumbered value of A’s interest in Lot 1, being $500,000; or
  – if the amount determined above is greater than an amount determined by applying A’s partnership interest in the total unencumbered value of Lot 1 (the cap amount) – the cap amount. In this case, the cap amount is $700,000 (70 per cent of $1 million).

• Therefore, the amount of $1.4 million calculated under section 77(1) and (2) is to be reduced by $500,000.

• The dutiable value of the A’s partnership interest is $900,000.

This is the correct outcome because it reflects that A has acquired a notional interest of 20 per cent in Lot 1 (valued at $200,000) and a notional interest of 70 per cent in Lot 3 from B (valued at $700,000).

The value of B’s partnership interest is calculated as follows:

• The value of the amount determined under section 77(1) is $900,000 (30 per cent of $3 million).

• However, section 77(2) provides that the value of Lot 3 must be disregarded in determining the value of B’s partnership interest. The amount determined under subsection (1) and (2) is $600,000 (30 per cent of $2 million).

• As B has contributed jointly held property, section 77(2A) requires the amount to be reduced by:
  – the unencumbered value of B’s interest in Lot 1, being $500,000; or
  – if the amount determined above is greater than an amount (the cap amount) determined by applying B’s partnership interest in the total unencumbered value of Lot 1 – the cap amount. In this case, the cap amount is $300,000 (30 per cent of $1 million).

• As the unencumbered value of B’s interest in Lot 1 is greater than the cap amount, the amount of $600,000 determined under
section 77(1) and (2) is reduced by the cap amount of $300,000.

- The dutiable value of B’s partnership interest is $300,000.

This is the correct outcome because it reflects that B has acquired a notional interest of 30 per cent in Lot 2 (valued at $300,000) from A.

Subclause (4) makes a consequential amendment to section 77(3). The effect of the amendment is that the subsection now sets out when a person is a new partner for the purposes of subsection (2) and new subsection (2A).

Clause 29: Section 78 replaced

Section 78 sets out how to calculate the dutiable value of a transfer of dutiable property to a partner on retirement or dissolution of the partnership.

The purpose of section 78 is to ensure the dutiable value of any property transferred to a retiring partner is reduced by an amount representing the partner’s partnership interest in that property. This is on the basis that the partner paid duty when they acquired the partnership interest.

However, in certain circumstances the total duty assessed on the transfer of dutiable property to a retiring partner does not properly reflect the changes in ownership interests that have occurred. Amendments are necessary to ensure an equitable duty outcome in all cases.

The following examples illustrate the issues with section 78 where land is transferred to a retiring partner on their retirement or dissolution of the partnership.

Example 1

Land is contributed by A, and an equal partnership is formed between A and B. A and B are each taken to have acquired a 50 per cent partnership interest. B pays duty on 50 per cent of the value of the land. Under section 77(2) A pays no duty because A contributed the land, which is the correct duty outcome.

Upon dissolution of the partnership, A transfers a 50 per cent interest in the land to B and A retains 50 per cent. Under section 78, the value of the land transferred (a 50 per cent interest) is reduced by B’s 50 per cent partnership interest, so duty is charged on 25 per cent of the value of the land.

This means that B has been charged duty on 75 per cent of the land value (50 per cent on formation plus 25 per cent upon dissolution). However, B only has a 50 per cent interest in the land after dissolution.

The transfer of the 50 per cent legal interest to B upon dissolution represents no more than the 50 per cent partnership interest B acquired upon formation and there should be no duty as a result. Likewise, A is
retaining a 50 per cent legal interest in accordance with their partnership interest and no duty should apply.

**Example 2**

Land is owned jointly by A and B before being contributed as partnership property. Under section 77(2A) as inserted by clause 28, duty will not be charged upon formation of the partnership as the relative interests of the partners in the land have not changed.

Upon dissolution, A’s 50 per cent interest in the land is transferred to B. Under section 78, duty will be charged on 25 per cent of the land value. However, as no duty was assessed on formation of the partnership, B should pay duty in relation to 50 per cent of the land value, not 25 per cent. This is because B’s legal interest in the land has increased from 50 per cent to 100 per cent.

New section 78 is inserted to overcome the issues described in these examples.

The following example illustrates how section 78 does not produce the correct duty outcome when land is retained by a retiring partner on retirement or dissolution.

**Example 3**

Land is contributed by A, and an equal partnership is formed between A and B. A and B are each taken to have acquired a 50 per cent partnership interest. B pays duty on 50 per cent of the value of the land. Under section 77(2), A pays no duty because A contributed the land.

Upon dissolution, A retains the land, while other non-land assets are transferred to B. There is no transfer of land for the purposes of section 78. However, A is effectively reacquiring B’s notional 50 per cent interest in the land and should pay duty as a result. New section 78A corrects this issue by deeming there to be a transfer of the retained property to the retiring partner.

This clause inserts new section 78 and 78A to address the issues described above.

**78. Dutiable value of transfer of dutiable property to retiring partner**

The new section 78 ensures that duty is charged on the transfer of dutiable property to a retiring partner to the extent that the legal interest transferred and retained exceeds the retiring partner’s partnership interest immediately before dissolution of the partnership or the person’s retirement from the partnership.

Subsection (1) provides that the section applies if:

(a) a person (the retiring partner) ceases to be a partner in a partnership because of their retirement from the partnership or its dissolution;

(b) dutiable property of the partnership is transferred or agreed to be transferred to the retiring partner (the transfer property); and
(c) the transfer property is, or is an interest in, a particular item of
dutiable property held by the partnership immediately before the
retirement or dissolution (referred to as the relevant partnership
property).

Section 27 applies to determine the dutiable value of the transfer, or
agreement for the transfer, of the transfer property to the retiring
partner.

Subsection (2) provides that in determining the dutiable value, the
unencumbered value of the transfer property is calculated as follows:
(a) the first step is to add the value of the transfer property to the value
of any relevant retained property. Relevant retained property is
defined in subsection (3).
(b) the second step is to subtract from the value determined under
paragraph (a) an amount calculated by applying the retiring
partner’s partnership interest in the partnership to the
unencumbered value of the relevant partnership property.

The relevant partnership property is the same item of dutiable property
to which the transfer property relates. Paragraph (b) essentially
reduces the value of the transfer property and retained property that the
partner is receiving by an amount representing the partnership interest
the retiring partner had in that same item of dutiable property held by
the partnership immediately before retirement or dissolution.

For example, a partnership holds a 100 per cent interest in Lot 1 and a
100 per cent interest in Lot 2. A partner retires from the partnership and
50 per cent of Lot 1 is transferred to the retiring partner. The transfer
property is 50 per cent of Lot 1. The relevant partnership property is the
whole of the interest in Lot 1.

Lot 2 is not ‘relevant partnership property’ and is not taken into account
in reducing the value of the transfer property under subsection (2)(b) as
no part of that property is being transferred to the retiring partner.

Subsection (3) provides that property is relevant retained property in
relation to the transfer property if:
(a) the property is also an interest in the relevant partnership property;
(b) immediately before retirement or dissolution, the retiring partner
was the legal owner of the property and held it for the partnership;
and
(c) immediately after the retirement or dissolution, the retiring partner
remains the legal owner of the property but no longer holds it for
the partnership.

Subsection (4) clarifies that section 78 does not apply to a deemed
transfer to which section 78A applies.

Example 4
Using the facts in example 1, assume the value of the land is $1 million
and no consideration is provided for the transfer of the land to B.
The transfer property is the 50 per cent interest in the land transferred to B. The relevant partnership property is 100 per cent interest in the same land held by the partnership.

In determining the dutiable value of the transfer, the unencumbered value of the 50 per cent interest in the land transferred to B is determined by new section 78(2) as follows:

- The aggregate unencumbered value of the transfer property and the relevant retained property is $500,000. The value of the transfer property is calculated as 50 per cent of the land value and there is no relevant retained property.
- The amount of $500,000 is to be reduced by an amount calculated by applying B’s retiring partnership interest to the unencumbered value of the relevant partnership property. This is calculated as 50 per cent of $1 million.
- The value of the transfer property calculated under subsection (2) is nil and no duty is payable by B.

This is the correct duty outcome as B paid duty on that 50 per cent interest upon formation of the partnership.

**Example 5**

Using the facts in example 2 where land is contributed jointly by A and B, assume the value of the land is $1 million and consideration is not provided for the transfer of A’s 50 per cent interest in the land to B.

The transfer property is the 50 per cent interest in the land transferred to B.

The unencumbered value of the 50 per cent interest in the land transferred to B is determined by new section 78(2) as follows:

- The aggregate unencumbered value of the transfer property and the relevant retained property is $1 million. The relevant retained property is the 50 per cent interest in the land retained by B. The value of the transfer property and the relevant retained property is calculated as 50 per cent of the land value.
- The amount of $1 million is to be reduced by an amount calculated by applying B’s retiring partnership interest to the unencumbered value of the relevant partnership property. The relevant partnership property is the 100 per cent interest in the same land held by the partnership immediately before dissolution. This is calculated as 50 per cent of $1 million.
- The value of the transfer property calculated under subsection (2) is $500,000.

B will have to pay duty on the value of $500,000. This is the correct duty outcome as B’s interest in the land has increased from 50 per cent to 100 per cent.

A transfer of dutiable property to a retiring partner under section 78 and a deemed transfer of retained property to that partner under section 78A are transactions arising from substantially one arrangement. As a
result, section 37 will apply to aggregate the transfer and deemed transfer so that duty is assessed on the total dutiable value of the transactions.

Note: Under section 70 of the Duties Act, the definition of *dutiable property* that applies for the purposes of section 78 is the general definition at section 15. This means section 78 applies to all types of dutiable property (including business assets) transferred to a retiring partner and not just to transfers of land, rights or chattels referred to in section 70.

### 78A. Certain retained property taken to be transferred to retiring partner

Where property is retained by a retiring partner, section 78A deems there to be a transfer of that property to that partner, and sets out how to calculate the dutiable value of the deemed transfer. This ensures duty is chargeable on any notional interest in the retained property acquired by the retiring partner from the other partners.

Subsection (1) provides the section applies if:

(a) a person (the retiring partner) ceases to be a partner in a partnership because of their retirement from the partnership or its dissolution;

(b) immediately before the retirement or dissolution, the retiring partner was the legal owner of dutiable property and that property was held for the partnership (referred to as the retained property);

(c) immediately after the retirement or dissolution, the retiring partner remains the legal owner of the retained property but they no longer hold it for the partnership;

(d) the retained property is, or is an interest in, a particular item of dutiable property held by the partnership immediately before the retirement or dissolution (referred to as the relevant partnership property); and

(e) the retained property is or includes property referred to in section 72(a) to (d).

Note: Section 78A only applies if the retained property includes property to which section 72 applies (land, fixed infrastructure control rights, fixed infrastructure access rights, or derivative mining rights). If it does, duty is payable on retained property that is dutiable property within the meaning of section 70.

Subsection (2) deems a transfer of the retained property to the retiring property to occur when the retirement or dissolution occurs.

Subsection (3) provides that in determining the dutiable value of the deemed transfer, the unencumbered value of the retained property is to be determined by reducing the unencumbered value of the retained property by an amount calculated by applying the retiring partner’s partnership interest to the unencumbered value of the relevant partnership property.
The relevant partnership property is the same item of dutiable property to which the retained property relates. For example, a partnership holds a 100 per cent interest in Lot 1 and Lot 2. On the partnership’s dissolution, a retiring partner retains a 50 per cent interest in Lot 1. No property is transferred to the retiring partner. The retained property is the 50 per cent interest in Lot 1 and the relevant partnership property is the whole interest in Lot 1.

Lot 2 is not ‘relevant partnership property’ and is not taken into account in reducing the value of the retained property under subsection (3)(b) as no part of that property is being retained by the retiring partner.

Subsection (4) clarifies that section 78A does not apply to retained property taken into account when determining the dutiable value of a transaction under section 78.

Example 6
Using the facts from example 3, section 78A will apply to deem that there has been a transfer to A of the land A retained.

Assume the value of the land is $1 million and no consideration is provided for the land retained by A. In determining the dutiable value of the deemed transfer, the unencumbered value of the retained property is determined by new section 78A(2) as follows:

- the unencumbered value of the retained property when liability for duty on the deemed transaction arises is $1 million;
- the amount determined above is then reduced by an amount determined by applying A’s partnership interest (50 per cent) to the unencumbered value of the relevant partnership property ($1 million). This is calculated as $500,000.

A will pay duty on the value of $500,000. This is the correct outcome as A is paying duty on the 50 per cent notional interest in the land acquired from B.

Clause 30: Section 79 amended

Section 79 defines terms relating to Western Australian business assets.

This clause replaces the current definition of business licence with an amended definition.

The only substantive change is the addition of new paragraph (b) to the definition, which provides that a business licence does not include a fixed infrastructure access right, fixed infrastructure control right or a fixed infrastructure statutory licence. This is to ensure that a fixed infrastructure licence is not treated as a business licence under the Duties Act.

Clause 31: Section 80 amended

This section provides that where a person agrees to relinquish a business licence so that it can be issued to another person, the agreement is taken to be an agreement to transfer a Western Australian business asset and is liable to duty accordingly.
The purpose of this provision is to treat a transaction that has the same effect as a transfer as if it was a transfer. Without this provision, duty would not apply to the grant or surrender of a business licence because a business licence is not new dutiable property or special dutiable property.

This section is replicated in new section 91B for fixed infrastructure statutory licences. The following drafting deficiencies with the section have been rectified in section 91B:

- Although there is deemed to be an agreement for transfer, there is no person liable for duty because there is no person identifiable as the purchaser or transferee.
- It is not clear whether the licence being relinquished or the new licence being acquired is the one deemed to be agreed to be transferred.

For consistency with section 91B, this clause amends section 80 to correct these issues.

The section heading is also amended.

Clause 32: Section 81 amended

Section 81 describes certain transactions involving Western Australian business assets that are not dutiable transactions.

Subsection (2) provides that a transaction is not a dutiable transaction if the only dutiable property is intellectual property of a business.

However, subsection (3) provides that a transaction referred to in subsection (2) is a dutiable transaction if it is aggregated under section 37 with another dutiable transaction for a Western Australian business asset.

Subsection (3) is extended so that it also applies where the other dutiable transaction relates to a fixed infrastructure control right, fixed infrastructure access right, or a fixed infrastructure statutory licence.

This clause amends subsection (3) by including a reference to these fixed infrastructure rights, in addition to a business asset.

Clause 33: Section 87 amended

Section 87 defines a conditional agreement as an agreement for the transfer of dutiable property, the completion of which is conditional upon the happening of an event described in section 87(2).

The parties to the agreement or related persons cannot have control over the happening of the event. Section 87(5) defines related persons to include the family members described in section 87(6).

This clause makes consequential amendments to section 87(6) because of the amendments to section 6 to include a step-child as a child.

Paragraph (a) makes a minor technical amendment to section 87(6)(c) to clarify that a family member of a person includes a child or remoter
lineal descendant of a sibling of a person.

Section 87(6)(f) provides that a family member includes a family member referred to in paragraph (a), (b), (c) or (d) of a spouse, former spouse, de facto partner or former de facto partner of the person. Paragraph (a) of section 87(6) refers to a child or remoter lineal descendant of a person.

Paragraph (b) deletes the reference to paragraph (a) referred to in section 87(6)(f). This removes the reference to a child or remoter lineal descendant of a spouse or de facto partner of a person, which is no longer required because of the amendment to section 6 which provides that a reference to a child in this section includes a step-child.

Paragraph (c) inserts section 87(6)(h) to provide for a child or remoter lineal descendant of a former spouse or former de facto partner of a person, which is removed because the reference to section 87(6)(a) in paragraph (f) is deleted.

Clause 34: Chapter 2 Part 5 Divisions 7 and 8 inserted

This clause inserts new Division 7, which relates to fixed infrastructure rights. The terms fixed infrastructure, fixed infrastructure access right, fixed infrastructure control right and fixed infrastructure statutory licence are defined. In general, these are rights that allow people to control or access fixed infrastructure, together with statutory licences authorising the ownership, operation or control of infrastructure.

The division specifies when transactions involving fixed infrastructure access rights and fixed infrastructure statutory licences will be dutiable. Specific provisions are included to determine the dutiable value of a Commonwealth fixed infrastructure statutory licence.

This clause also inserts new Division 8, which deals with transactions involving mining tenements that are conditional on the grant of derivative mining rights. These provisions set out how the dutiable value of a transaction involving a mining tenement is to be determined when derivative mining rights must be granted as part of the transaction. They also describe when no double duty will apply to the grant of derivative mining rights in these cases.

This clause inserts the following provisions at the end of Chapter 2 Part 5.

Division 7 – Rights relating to fixed infrastructure

91A. Terms used

Subsection (1) defines the following terms:

**fixed infrastructure** is dutiable property that is land because it is a thing fixed to land;

**fixed infrastructure access right** means a licence or other right that authorises access to or use of any land for certain purposes related to
or associated with fixed infrastructure or things used in conjunction with fixed infrastructure. This includes a purpose related to the control, operation, use, construction, maintenance, or repair of fixed infrastructure;

**fixed infrastructure control right** means a lease, licence or other right that gives the holder day-to-day control, and the operation or use, of fixed infrastructure. It does not include a security interest or a fixed infrastructure statutory licence;

**fixed infrastructure statutory licence** means a licence, permit or authority under a State or Commonwealth law that licences, permits or authorises the ownership, control, operation or use of fixed infrastructure (relevant activity) and the law prohibits a person from engaging in that relevant activity without a licence, permit or authority.

This subsection also provides that the terms **landholder** and **linked entity** have the meaning given in the landholder duty chapter (section 148).

Subsection (2) provides that, in the definition of fixed infrastructure access right, ‘land’ does not include anything fixed to land or an estate or interest in anything fixed to land. An access right allows access to land for the purpose of using fixed infrastructure situated on the land, so the reference to land in the definition needs to exclude the fixed infrastructure itself.

Subsection (3) provides that anything that is land is not a fixed infrastructure right or licence. This is necessary to ensure that where the nature of the rights or licence in a particular case constitutes an interest in land, it is to be treated as land and not as a right.

Subsection (4) provides a regulation making power to exclude classes of rights from the definition of fixed infrastructure access right, fixed infrastructure control right or fixed infrastructure statutory licence. A retrospective regulation can be made where it does not adversely affect taxpayers.

### 91B. Some transactions involving fixed infrastructure statutory licences to be taken to be agreements for transfer

This section replicates section 80, which applies to business licences. It provides that where a person agrees to relinquish a fixed infrastructure statutory licence so that it can be issued to another person, the agreement is taken to be an agreement for the transfer of the licence to the other person.

The purpose of this provision is to treat a transaction that has the same effect as a transfer as if it was a transfer. Without this provision, duty would not apply to the grant or surrender of a fixed infrastructure statutory licence because a fixed infrastructure statutory licence is not new dutiable property or special dutiable property.

### 91C. Which transactions as to fixed infrastructure access rights and fixed infrastructure statutory licences are dutiable
This section limits when transactions relating to fixed infrastructure access rights and fixed infrastructure statutory licences will be dutiable.

Essentially, transactions involving these assets are not intended to attract duty unless the related fixed infrastructure, or a fixed infrastructure control right in relation to that fixed infrastructure, is also acquired. This may be as part of the same transaction or under a separate transaction arising from the same arrangement. This includes where the access rights or statutory licence is acquired directly and there is a landholder acquisition relating to the fixed infrastructure or fixed infrastructure control rights.

Subsection (1) provides that a transaction relating to a fixed infrastructure access right or fixed infrastructure statutory licence (fixed infrastructure transaction) is not a dutiable transaction unless subsection (2), (3) or (4) applies.

Subsection (2) provides that this subsection applies if the fixed infrastructure transaction also relates to:

(a) the fixed infrastructure to which the fixed infrastructure access right or fixed infrastructure statutory licence relates; or
(b) an estate or interest in that fixed infrastructure; or
(c) a fixed infrastructure control right that relates to that fixed infrastructure.

Subsection (3) provides that this subsection applies if:

(a) there is another dutiable transaction that relates to property referred to in subsection (2)(a), (b) or (c); and
(b) the fixed infrastructure transaction and the other transaction arise from substantially one arrangement.

Subsection (4) provides that this subsection applies if:

(a) there is a landholder acquisition, or an agreement for the making of an acquisition; and
(b) the entity being acquired, or a linked entity, is entitled to property referred to in subsection (2)(a), (b) or (c); and
(c) the fixed infrastructure transaction and the acquisition or agreement arise from substantially one arrangement.

Subsection (5) provides that section 37(2) applies to subsection (3)(b) transactions as if the fixed infrastructure transaction were a dutiable transaction. Section 37(2) deems that separate dutiable transactions arise from substantially one arrangement when they occur within 12 months and have the same liable party.

Until there is substantially one arrangement, the fixed infrastructure transaction is not a dutiable transaction. Subsection (5) ensures that the deeming provision in section 37(2) can be applied.

Subsection (6) provides that sections 14(4) and (5) apply to a transaction and acquisition referred to in subsection (4)(c) as if they were a transaction and acquisition referred to in section 14(3).
Section 14(3) relates to where a transaction in relation to chattels and a landholder acquisition arise from substantially one arrangement. Section 14(4) replicates section 37(2) and deems that a transaction and an acquisition arise from substantially one arrangement when they occur within 12 months and have the same liable party.

Subsection (6) enables the deeming provision to apply by treating the fixed infrastructure transaction and acquisition as if they were the ones referred to in section 14(3).

**Example**

- There is a transaction (fixed infrastructure transaction) that relates to a fixed infrastructure access right or a fixed infrastructure statutory licence.
- There is also a relevant acquisition of an interest in a Landholder that holds a 100 per cent interest in a Linked Entity (section 91C(4)(a)).
- Under section 91C(4)(b), the Linked Entity is entitled to:
  - the relevant fixed infrastructure to which the access right or statutory licence relates; or
  - an estate or interest in the fixed infrastructure; or
  - a fixed infrastructure control right that relates to the fixed infrastructure.
- The fixed infrastructure transaction and the relevant acquisition arise from substantially one arrangement (section 91C(4)(c)).
- As a result, the fixed infrastructure transaction is a dutiable transaction (section 91C(1)).

Subsection (7) allows this section to be applied to a transaction that is a partnership acquisition. This subsection deems the acquisition to relate
to the land, fixed infrastructure control right, fixed infrastructure access right or derivative mining right held by the partnership, or in which the partnership has an indirect interest.

91D. Dutiable value of fixed infrastructure statutory licences

This section sets out how to determine the dutiable value of a dutiable transaction for a fixed infrastructure statutory licence. It overrides the general provisions of section 27 that would otherwise apply to determine the dutiable value.

Subsection (1) applies to licences issued under a law of the Commonwealth and is based on section 83, which relates to business licences. The dutiable value of a dutiable transaction for a Commonwealth statutory licence is the greater of:

- the value of the licence in so far as it authorises the ownership, control, operation or use of fixed infrastructure in Western Australia; or
- the portion of the consideration for the transaction that relates to carrying out the activity in Western Australia under the authority of the licence.

Subsection (2) applies to licences issued under a law of Western Australia and is based on section 84, which relates to business licences. The dutiable value of a dutiable transaction for a fixed infrastructure statutory licence under a law of Western Australia is:

- the consideration for the transaction; or
- the unencumbered value of the licence if there is no consideration for the transaction, the consideration is unascertainable, or the value is greater than the consideration.

Division 8 – Derivative mining rights

Where a tenement is transferred subject to the grant of a derivative mining right to another person, the purchaser will usually only pay for the balance of the rights they are acquiring. However, as the purchaser technically acquires all the rights under the transaction the consideration will not represent the full value of the tenements. This means the Commissioner must assess duty on the unencumbered value of the tenements including the value of the rights.

To overcome this, the division includes specific provisions to ensure the effect of derivative mining rights are taken into account when determining the unencumbered value of the tenements being transferred.

Because of amendments in this Bill, the grant of a derivative mining right will be a dutiable transaction. However, it is not appropriate for duty to apply to the grant of rights where a person essentially retains their rights or there is a re-grant of the same rights after a tenement is transferred. This division includes specific no double duty provisions for certain grants of derivative mining rights.
91E. Agreement for transfer of mining tenement conditional on grant of derivative mining right to transferor

A mining tenement may be transferred subject to the grant of a derivative mining right (‘prospective right’) by the transferee to the transferor.

In this situation, the transferor is effectively ‘retaining’ the rights and the transferee is obtaining only the balance of the rights under the tenement. However, the prospective right cannot be taken into account when determining the unencumbered value of the mining tenement for the purposes of the transfer. In addition, the grant of the derivative mining right is a dutiable transaction chargeable with duty.

In these circumstances, the tenement should be valued for the purposes of the transfer taking into account the rights that will revert to the transferor after the transfer. Similarly, the grant of the rights should not be subject to duty.

This section achieves this outcome as follows.

Subsection (1) provides that this section applies where there is an agreement for the transfer of a mining tenement and it is a condition of the agreement that, after the transfer, the transferee is to grant a prospective right to the transferor.

There must be an agreement for transfer, rather than solely a transfer, to ensure that the condition regarding the grant of the prospective right is genuinely agreed and documented.

Subsection (2) provides that, in determining the dutiable value of the agreement for transfer, the unencumbered value of the tenement is to be determined having regard to the effect of the prospective right on the value, as if the prospective right were in force when liability for duty on the agreement arose. This is despite section 36(1), which would otherwise not provide for this outcome.

Note: The effect of the right will not always result in a reduction in the unencumbered value of the tenement as the effect may be negligible. In addition, the right holder may need to pay a royalty to the tenement holder, and the value of the royalty may enhance the value of the tenement more than the effect of the right reduces the value.

Subsection (3) provides that if the agreement for transfer is duty endorsed, duty is not chargeable on the acquisition of the prospective right on its grant by the transferee.

Example

Person A holds a mining tenement and agrees to sell the tenement to Person B subject to person B retaining the rights to explore for and mine gold in the tenement. A pays consideration for the tenement excluding the value of the gold rights.

Section 91E(2) allows the Commissioner to have the tenement valued
taking into account the effect of the gold rights. In this case, the consideration paid by A reflects the value of the tenements having regard to the rights. Duty will be assessed on the consideration.

Once the agreement for transfer are duty endorsed, duty will not apply to the grant of gold rights by A to B.

Note: Section 91I provides for a reassessment to be made if the prospective right is not granted as required.

91F. Agreement for transfer of mining tenement conditional on grant of derivative mining right to current right holder

The holder of a mining tenement may have granted a derivative mining right (‘previous right’) to another person. The tenement may then be transferred with the holder of the rights continuing to hold those rights after the transfer.

The following issues arise in this situation:

- When determining the unencumbered value of the mining tenement for the purposes of the transfer, the previous right cannot be taken into account.
- The transfer has the effect of extinguishing the previous right, which must then be re-granted by the transferee to the transferor. However the grant of the replacement right (‘prospective right’) will be chargeable with duty even though duty was assessed on the grant of the previous right.

The tenement should be valued for the purposes of the transfer taking into account the effect of the previous right on the value. The grant of the prospective right, which merely replaces the previous right, should not be subject to duty.

This section achieves this outcome as follows.

Subsection (1) provides that this section applies where there is an agreement for the transfer of a mining tenement and it is a condition of the agreement that, after the transfer, the transferee is to grant a prospective right to another person who, when the agreement was made, held the previous right and continued to do so until immediately before the transfer.

There must be an agreement for transfer, rather than solely a transfer, to ensure the condition regarding the grant of the prospective right is genuinely agreed and documented.

Subsection (2) provides that in determining the dutiable value of the agreement for transfer, the unencumbered value of the tenement is to be determined having regard to the effect of the previous right on the value when liability for duty on the agreement arose. This is despite section 36(1), which would otherwise not provide for this outcome.

Subsection (3) provides that duty is not chargeable on the acquisition of the prospective right on its grant by the transferee if both the agreement
for transfer and the acquisition on the grant of the previous right are duty endorsed.

**Example**

Person A holds a mining tenement and has granted Person B the right to explore for and mine iron ore in the tenement. A agrees to sell the tenement to Person C. The agreement provides that C must re-grant the iron ore rights to B after the transaction is completed. C pays consideration for the tenement excluding the value of the iron ore rights.

Section 91F(2) allows the Commissioner to have the tenement valued taking into account the effect of the iron ore rights. In this case, the consideration paid by C reflects the value of the tenements having regard to the rights. Duty will be assessed on the consideration.

B paid duty when the iron ore rights were first granted. As both this instrument and the agreement for transfer are duty endorsed, duty will not apply to the grant of ore rights by C to B.

Note: Section 91I provides for a reassessment to be made if the prospective right is not granted as required.

### 91G. Transfer or agreement for transfer of mining tenement to holder of derivative mining right

The holder of a mining tenement may have granted a derivative mining right ('previous right') to another person before later transferring the tenement to the holder of the right.

In this situation, the previous right cannot be taken into account when determining the unencumbered value of the mining tenement for the purposes of the transfer, even though duty was charged when the previous right was granted.

This section overcomes this issue as follows.

**Subsection (1)** provides that this section applies where a person holds a derivative mining right ('previous right'), the acquisition of which is duty endorsed, and there is a transfer, or agreement for the transfer, of the mining tenement to the holder of the previous right. The holder of the previous right must continue to hold the right until immediately before the transfer.

**Subsection (2)** applies where there is a transfer. It provides that in determining the dutiable value of the transfer, the unencumbered value of the tenement is to be determined having regard to the effect of the previous right on the value, as if the previous right were in force when liability for duty arose. This is despite section 36(1), which would otherwise not provide for this outcome.

The previous right is taken to be in force when liability arose on the
transaction to ensure there are no timing issues resulting from the fact the transfer has the effect of extinguishing the previous right. 

Subsection (3) applies where there is an agreement for transfer. It provides that in determining the dutiable value of the agreement, the unencumbered value of the tenement is to be determined having regard to the effect of the previous right on the value when liability for duty on the agreement arose. This is despite section 36(1), which would otherwise not provide for this outcome.

Example

Person A holds a mining tenement and has granted Person B the right to explore for and mine iron ore in the tenement. A agrees to sell the tenement to Person B. B pays consideration for the tenement excluding the value of the iron ore rights.

Section 91G(3) allows the Commissioner to have the tenement valued taking into account the effect of the iron ore rights. In this case, the consideration paid by B reflects the value of the tenements having regard to the rights. Duty will be assessed on the consideration.

91H. Acquisition of derivative mining right substantially the same as was held in relation to previous mining tenement

The holder of a prospecting or exploration licence may have granted a derivative mining right to another person before the holder applies for and is granted a mining lease (which replaces the prospecting or exploration licence).

In this situation, relinquishing the prospecting or exploration licence upon the grant of the mining tenement has the effect of extinguishing the derivative mining right and the right must be re-granted to the holder. However, duty will apply even though duty was also charged on the original grant of the right to that person. This section overcomes this issue as follows.

Subsection (1) provides that duty is not chargeable on an acquisition of a derivative mining right by a person if:

- the right relates to a mining lease; and
- before the grant of the mining lease the holder of the lease held a prospecting licence or exploration licence in relation to the land the subject of the mining lease; and
- the person held a derivative mining right in relation to the prospecting or exploration licence, the acquisition of which was duty endorsed.

Subsection (2) provides that a reference in this section to certain tenements is a reference to tenements granted or continued under the Mining Act. This ensures that the section can apply to tenements previously granted under the Mining Act 1904.

Note: A valuation provision is not required as the grant of the mining lease is not subject to duty.
91I. Failure to grant, or surrender of, derivative mining right after transfer of mining tenement

New section 91E provides for a prospective derivative mining right to be taken into account when determining the unencumbered value of a mining tenement that is transferred subject to that right being granted after the transfer of the tenement.

New section 91F provides for an existing derivative mining right to be taken into account when determining the unencumbered value of a mining tenement that is transferred subject to an equivalent right being granted after the transfer of the tenement.

These provisions mean the value of a tenement may be discounted for the purposes of assessing duty on the transfer of the tenement on the basis that the right will be granted.

To ensure that duty cannot be reduced on a transaction through the artificial grant of rights, a reassessment will be made to include the value of the rights where:

- the rights are not granted within 90 days after the agreement for the sale of the tenement (or a longer period approved by the Commissioner); or
- the rights are surrendered for no consideration within 12 months after the transaction.

This section achieves this outcome as follows.

Subsection (1) defines the terms mining tenement valuation provision to mean section 91E(2) or 91F(2) and prospective right to mean the right referred to in section 91E(1)(b) or 91F(1)(b) as relevant.

Subsection (2) provides that the mining tenement valuation provision (under which the value of the tenement is discounted) ceases to apply if either the prospective right is not granted within the period specified in subsection (3), or it is surrendered for no consideration within 12 months after the transfer of the tenement.

Subsection (3) provides that the period within which the right must be granted is 90 days after the transfer of the tenement, or such longer period as the Commissioner allows. An application for an extension of time must be made before expiry of the 90 days.

Subsection (4) provides that if the right is not granted within the required timeframe, the transferee of the tenement (who is obliged to grant the right) must lodge a notice of the failure in the approved form, within two months after expiry of the allowed time period.

A penalty of $20,000 applies for failure to comply with this subsection.

Subsection (5) provides that if the right (having been granted) is surrendered as referred to in subsection (2), the person who surrenders the right must lodge a notice of the surrender in the approved form, within two months after the surrender occurs.

A penalty of $20,000 applies for failure to comply with this subsection.
Subsection (6) provides that the Commissioner must make any reassessment necessary as a result of the operation of subsection (2), that is, where the mining tenement valuation provision ceases to apply. This is subject to the time limits set out in section 17 of the TAA.

Clause 35: Section 96B amended

This section provides for an application to be made to the Minister for a beneficial body determination where an application for a charitable exemption has been refused because the taxpayer is a relevant body. This includes where the Commissioner has decided a landholder acquisition is not exempt under section 168(1) because the acquirer is a relevant body.

This clause contains a consequential amendment to subsection (1)(a)(ii) to amend the section reference from ‘168(1)’ to ‘168(3)’. This is a consequential change resulting from amendments to section 168. The amended reference carries out the same function as the superseded one and there is no change to the operation of section 96B.

Clause 36: Section 99 amended

Sections 99 – 106 of the Duties Act contain an exemption for transfers of farming property between family members.

This section defines terms used for the purposes of the family farm exemption.

Subsection (3) provides that a partnership acquisition is a dutiable transaction for the purposes of this subdivision if the land referred to in section 72 is farming land. This includes an indirect interest in land, which is described in section 73.

Section 72 currently refers only to dutiable property being land. This Bill amends the reference to dutiable property to include fixed infrastructure rights and derivative mining rights.

This clause makes the following consequential amendments to section 99(3).

- The reference to ‘land referred to in section 72’ is amended to ‘property of a kind referred to in section 72(a) to (d)’.
- The interpretation of the section is clarified by inserting a reference to the property being ‘held by the partnership’.
- A reference ‘to the extent that’ is inserted. This recognises that not all of the land may be farming land and also that section 72 no longer applies solely in respect of land.
- A reference to an indirect interest under section 73 is included. This is necessary as paragraphs (a) to (d) of section 72 list only the categories of dutiable property. Paragraph (e) refers to an indirect interest in property referred to in those paragraphs.
Clause 37:  Section 100 amended

The family farm exemption provisions provide that a transfer of farming property is exempt if the property is transferred between family members, and family members or related entities of the transferor and transferee are carrying on the farming business. Section 100 defines family member for the family farm exemption provisions.

Currently, a transfer of farming property from a farmer and their spouse or de facto partner to the farmer’s brother or sister and their spouse does not qualify for the exemption. This is because the farmer’s spouse or de facto partner is not a family member of the farmer’s brother or sister and their spouse or de facto partner.

This is a result of historical drafting at a time when farming properties were traditionally only owned by the male party. However, as it is increasingly common for both spouses to own the land and carry on the farming business, it is inequitable to maintain the historical approach.

The amendments in this clause extend the definition of family member to include a brother-in-law or sister-in-law of a person and a spouse or de facto partner of that brother-in-law or sister-in-law.

Where farming property is transferred to a family member, the family member must be acting in their own capacity and not as trustee or agent. The administration of the exemption in this manner is supported by reading the current provisions as a whole.

This clause amends section 100(2) to clarify that interests in a related entity can only be held by a family member acting in their own capacity and not as trustee or agent.

Subclause (1)(b) makes a minor technical amendment to insert ‘a child or’ into section 100(c) to clarify that a family member of a person includes a child or remoter lineal descendant of a brother or sister of the person.

Subclause (1)(d) inserts the new qualifying family members at paragraphs (g) and (h). Paragraph (g) describes a brother or sister of a person’s spouse or of the person’s de facto partner of two years, and paragraph (h) describes a spouse or de facto partner of two years of the brother or sister referred to in paragraph (g). The effect is a transfer of farming property to these people can qualify for the exemption.

Subclause (2) inserts a new subsection (2) which provides that a reference to ‘family member’ in the family farm exemption provisions is to a family member acting in their own capacity and not as agent, trustee or on behalf of any other person. The effect is that, in determining whether a transferor or transferee is related to an entity, the interest in a related entity must be held by the family members in their own right.
Clause 38: Section 101 amended

Section 101 describes the persons that can be transferees for an exempt family farm transaction. A transferee can generally be:

- a family member of the transferor if the family member is acting in their own capacity;
- a trustee of a trust, other than a unit trust scheme or a discretionary trust, if the beneficial owner of the trust property is a family member of the transferor; and
- a trustee of a discretionary trust if the beneficiaries of the trust are family members of the transferor and the transferor does not control the discretionary trust.

Section 101(c) currently requires that all beneficiaries of a transferee discretionary trust must be family members of the transferor. As the definition of ‘family member’ in section 100 does not include the person themselves, a transferor cannot be a family member of themselves.

Farmers and farming industry advisers have expressed concern that this does not facilitate succession planning arrangements where the transferee is a trustee of a family discretionary trust and the transferor is a beneficiary of the trust.

Under the Stamp Act, the exemption was administered on the basis that the transferor could be a beneficiary of the transferee trust and receive income from the trust property if they were not in a position to control the trust. The exemption was not intended to apply more narrowly in these circumstances under the Duties Act.

This clause makes amendments to section 101 to overcome this issue and address minor technical matters.

Paragraph (a) is replaced with a new paragraph that refers to a family member of the transferor only. The requirement for the family member not to hold the farming property as agent, trustee or otherwise on behalf of any other person still applies, but it is now achieved by new section 100(2) (as inserted by clause 37). Accordingly, the words after ‘transferor’ in current section 100(a) are no longer required.

An amendment is made to simplify paragraph (b) by replacing the reference to ‘beneficial owner of the trust property under the trust’ to ‘each beneficiary of the trust’.

Paragraph (c)(i) is replaced by subparagraphs (i) and (iia). The effect is that the transferee can be a trustee of a discretionary trust if each beneficiary of the trust is the transferor or a family member of the transferor, provided the transferor is not the only beneficiary of the trust and does not control the trust. This will allow the exemption to apply where the transferor is a beneficiary of a transferee trust.

The reference to ‘all the persons who have a share or interest in the trust property, whether vested or contingent, or who may benefit from the discretionary trust’ in former subparagraph (i) is replaced with ‘each beneficiary of the trust’ in new subparagraph (i). The condition in subparagraph (i) is satisfied if the person may benefit from the trust as a beneficiary. This amendment simplifies the subparagraph.
Clause 39: Section 102 amended

Section 102 sets out the requirements for a dutiable transaction involving farming property to be an exempt family farm transaction.

Section 102(2) requires each transferor to have been using the farming property in the business of primary production immediately before the transaction and for each transferee to intend to continue using the farming property in the business of primary production.

An exception is provided in section 102(3) to allow the transferor or transferee (as the case may be) to indirectly use the farming property in the business of primary production through a related entity or a combination of related entities.

Section 102(3)(b) provides that the transferor or transferee can use the farming property through a partnership to which the respective transferor or transferee is related. The transferor or transferee is related to a partnership only if the transferor or transferee is a partner in the partnership and every other partner is related to the transferor.

Under the Stamp Act, the exemption could apply where the transferor or transferee carried on the farming business either personally or with others in a partnership, regardless of whether the others were family members. The transition from the Stamp Act to the Duties Act has unintentionally narrowed the exemption in these circumstances. The amendments in this clause restore the policy intent and allow a farming business to be operated through a partnership comprising the transferor or transferee and non-family members.

This clause also relaxes the requirement for the transferor to be carrying on the farming business immediately before the transfer of the farming property in certain circumstances.

There have been several cases where an exemption has been denied because, for various reasons, the transferor was not carrying on the farming business immediately before the transfer.

Examples include:

- A farmer who owns the land and runs the primary production business personally ceases involvement in the business prior to entering a nursing home and transferring the land, and the business continues to be conducted by a family member.

- An eligible family member takes possession of the farming property prior to the transfer and the transferor is not involved in the farming business once early possession has occurred.

- A farmer owns farming land and the primary production business is run by a related family partnership which includes the farmer, his son and his daughter-in-law. The farmer retires from the partnership prior to transferring the land to his son, and the partnership continues conducting the primary production business. After the transfer, the partnership leases the land from the son and continues to carry on
the business.

It is consistent with the policy intent for an exemption to apply in these sorts of circumstances, even though the transferor was not carrying on the farming business immediately before the transfer.

This clause amends section 102 as follows.

Subclause (1) replaces sections 102(3)(a) to (c) and inserts new paragraphs (a) to (c).

In paragraph (a), the words ‘or with others’ has been inserted so that a transferor or transferee can use the farming property in the business of primary production personally or with others, regardless of whether they are related or not.

It is considered that the reference to ‘or with others’ can only mean that the transferor or transferee is using the farming property in the business of primary production in a partnership (whether formally constituted or not). Accordingly, paragraph (b) no longer needs to refer to a ‘partnership’.

Paragraphs (b) and (c) now includes a reference to section 102A, which is inserted by clause 40. Section 102A sets out the tests for when a transferor or transferee is related to an entity. These were formerly in contained section 102(4) and (5).

Subclause (2) deletes section 102(4) and (5) and inserts a new section 102(4). The matters set out in former section 102(4) and (5) have been relocated to section 102A as inserted by clause 40.

Section 102(4) as inserted by subclause (2) provides the Commissioner the discretion to regard the requirement for the transferor to be using the farming property in the business of primary production immediately before the transfer as satisfied, provided that:

- the transferor had previously used the farming property in the business of primary production; and
- a family member of the transferor, or an entity to which they are related, was using the farming property in the business of primary production immediately before the transaction took place. The requirement that the transferor had previously used the farming property is satisfied if a related entity of the transferor carried on the farming business due to the operation of subsection (3).

This amendment will provide greater flexibility to allow the gradual transition of farming property between family members. Section 102(4) will be supported by a Commissioner’s practice that provides guidance on the circumstances in which the Commissioner may exercise the discretion.

Section 102(6) provides that, for the purposes of subsection (2), farming property is used in the business of primary production even if some, but not all, of the farming land is leased for the sole or dominant purpose of silviculture or reafforestation except where all the farming land being transferred is leased. Subclause (3) replaces the reference to ‘subsection (2)’ in section 102(6) with ‘this section’ so that it applies for
the purposes of the whole section.

Clause 40: **Section 102A inserted**

This clause inserts new section 102A after section 102.

New section 102A sets out when a transferor or transferee under an exempt family farm transaction is related to an entity for the purposes of section 102. The relationship tests were formerly contained in sections 102(4) and (5).

**102A. Related entities for s.102**

Subsection (1) sets out when a transferor is related to an entity for section 102(3).

Paragraph (a) provides that a transferor is related to an entity that is a trust (other than a unit trust scheme) if the transferor is a beneficiary of the trust and every other beneficiary is a family member of the transferor.

This paragraph applies to discretionary trusts and trusts (other than a unit trust scheme or a discretionary trust). The test for determining whether a transferor is related to a trust (other than a unit trust scheme or a discretionary trust) is the same for a discretionary trust. To simplify the provisions, the tests in sections 102(4)(a) and (b) have been combined in section 102A(1)(a).

Under the current wording of section 102(4)(b), a transferor is related to a discretionary trust if they have a vested or contingent interest in the trust's property. This would exclude a transferor who is a general beneficiary with a mere expectancy that is realised on the exercise of the trustee's discretion. It was not intended that the requirement would be this limited, and the provision has been administered on the basis it is sufficient for the transferor to be a general beneficiary.

Paragraph (a) overcomes this issue by requiring that the transferor need only be a beneficiary of the discretionary trust and that every other beneficiary is a family member of the transferor.

Paragraph (b) provides that a transferor is related to a unit trust scheme if the transferor holds units in the unit trust scheme and all the other unit holders are family members of the transferor. Apart from a minor amendment to correct grammatical errors, there is no change from section 102(4)(c).

Paragraph (c) provides that a transferor is related to a corporation if the transferor is a shareholder in the corporation and every other shareholder is a family member of the transferor. Apart from a minor amendment to correct grammatical errors, there is no change from section 102(4)(d).
Subsection (2) sets out when a transferee is related to an entity for the purposes of section 102(3).

When the farming exemption transitioned from the Stamp Act to the Duties Act, the exemption was expanded to allow related family entities to use the land in the business of primary production. For an entity to be a related entity, the transferee must have an interest in the entity and all other persons that have an interest must be a family member of the transferor.

However, section 102(5) denies the exemption where the transferor continues to carry on the farming business with the transferee following the transfer. This is because the definition of ‘family member’ of a person in section 100 of the Duties Act does not include the person themselves and the transferor cannot be a family member of themselves.

Section 102A(3) overcomes this issue by providing that the transferor may hold an interest in the relevant entity set out in paragraphs (a) to (d). This will permit the progressive transition of a farm to a family member by allowing the transferor to continue in the business following the transfer.

Paragraph (a) provides that a transferee is related to a trust, other than a unit trust scheme or a discretionary trust, if the transferee is a beneficiary and every other beneficiary is the transferor or a family member of the transferor.

Paragraph (b) provides that a transferee is related to an entity that is a discretionary trust if the transferee is a beneficiary of the trust, every other beneficiary is the transferor or a family member of the transferor, and the transferor does not control the discretionary trust.

The reference in section 102(4)(b) to the transferee having ‘a share or interest in trust property, whether vested or contingent’ has not been replicated in paragraph (b). It was not intended to limit the transferee to a beneficiary that has a vested or contingent interest (for example, a taker in default) and the provision has been administered on the basis the transferee only needs to be a general beneficiary. Paragraph (b) now provides legislative support for this practice.

Paragraph (c) provides that a transferee is related to a unit trust scheme if the transferee holds a unit in the unit trust scheme and every other unitholder is the transferor or a family member of the transferor.

Paragraph (d) provides that a transferee is related to a corporation if the transferee is a shareholder and every other shareholder is the transferor or a family member of the transaction.

The tests in section 102A(1) and (2) no longer refer to a partnership as a related entity because section 102 (as amended by clause 39) now permits the farming business to be conducted through a partnership comprising the transferee and non-family members.

Under the current provisions, a bare trustee must hold an interest in an
entity to qualify as being related to that entity. A bare trustee essentially has no powers to deal with a trust asset and for that reason would generally not be appointed to hold an interest in a farming entity on behalf of a beneficiary. On that basis, it is unlikely a bare trustee will ever qualify as being related to an entity.

To reflect this, subsection (3) provides that if a transferee is the trustee of a trust (other than a unit trust scheme or a discretionary trust), in determining whether the transferee is related to an entity that farms the land, subsection (2) applies as if the references to the transferee in subsection (2)(a), (b), (c) and (d) were to each beneficiary of the trust.

The effect of subsection (3) is that the trustee will be related to the entity provided each of the beneficiaries of the trust holds an interest in that entity and every other person who holds an interest in the entity is a family member of the transferor.

For example, farming land is transferred to a transferee that is the trustee of a bare trust. The trustee of the bare trust continues to farm the land through a related corporation. The trustee of the bare trust will be related to the corporation under subsection (2) if each beneficiary of the bare trust is a shareholder in the corporation and every other shareholder is the transferor or a family member of the transferor.

Subsection (4) provides that for the purposes of section 102(4)(b), subsection (2) applies to determine whether a family member of the transferor is related to an entity that farms the land before the transfer, as if the family member were a transferee referred to in that section.

**Example**

A farmer who owns farming land and runs a primary production business ceases his involvement in the business prior to entering a nursing home and transferring the land to his son. After the transfer, the son’s discretionary trust conducts the farming business.

Under section 102(4), the Commissioner may treat the requirement that the farmer farmed the land immediately prior to the transfer as satisfied if the farmer previously used the farming property in the business of primary production and a family member, or a related entity of the family member, used the farming property in the business of primary production immediately before the transaction.

The discretionary trust will be related to the son for the purposes of section 102(4)(b) if the son is a beneficiary of the trust, every other beneficiary is the farmer or a family member of the farmer and the farmer does not control the trust.

**Clause 41:**  Section 105 amended

Section 105 deems a transfer of farming property to have occurred where:

- a transferee under an exempt family farm transaction is the trustee of a discretionary trust; and
- after the transaction a person who is not a family member of the
transferor becomes a beneficiary of the trust or the transferor gains control of the trust.

This clause amends section 105 by inserting the words ‘the transferor or’ after ‘person that is not’. The effect is that a duty liability could be triggered if a person who is not the transferor or a family member of the transferor becomes a beneficiary after the transaction. This reflects the amendment to section 101(c) which allows the transferor to be a beneficiary of a transferee discretionary trust.

Clause 42: Section 107 amended

Subject to certain criteria, section 107 provides an exemption for a dutiable transaction that is cancelled. Relevantly, a cancelled transaction is not exempt under this section if the transaction is cancelled so that a replacement transaction can be entered into.

Replacement transaction is defined in section 107(1) to be another dutiable transaction that is between all of the same parties as the cancelled transaction, is substantially similar in effect to the cancelled transaction, and is considered by the Commissioner to be a scheme or arrangement for which the sole or dominant purpose is to avoid, reduce or defer the payment of duty.

The term duty is defined in section 3 to mean duty under the Duties Act. Duty does not include penalty tax, which is defined in the TAA to mean penalty tax payable under that Act or the Duties Act. This means that a transaction can be cancelled, and a replacement transaction entered into, so that penalty tax applicable to the first transaction (such as a late lodgment penalty) can be reduced or avoided.

To address this issue, this clause replaces the reference to duty in the definition of replacement transaction with tax. Tax is defined in the TAA to include both duty and penalty tax payable under a taxation Act.

The effect is that duty will remain chargeable on a transaction that is cancelled and replaced for the purpose of avoiding penalty tax.

Clause 43: Section 113A inserted

To complement the introduction of the Associations Incorporation Act 2015 (Associations Incorporation Act), the 2015-16 Budget announced an exemption for certain transfers for incorporated associations.

The Associations Incorporation Act was introduced to streamline the regulation of associations to promote efficiency and greater accountability. These reforms were partly in response to a 2010 Productivity Commission report, which included a recommendation to permit the not-for-profit sector to migrate from one legal form to another without onerous transaction costs.
This clause inserts an exemption for certain transfers of property under the Associations Incorporation Act that result from the restructure of not-for-profit associations through amalgamation, winding-up, or transfer of incorporation.

New section 113A is inserted at the end of Chapter 2 Part 6 Division 1 Subdivision 4.

113A. Certain incorporated association transactions

Subsection (1) provides that the terms Commissioner, prescribed body corporate, surplus property and surplus receiving body have the meanings given in the Associations Incorporation Act.

Subsection (2) provides that duty is not chargeable on the following transactions under the Associations Incorporation Act:

(a) a vesting of dutiable property in an incorporated association (that is the amalgamation of two or more former associations) on its incorporation;

(b) a transfer, or agreement for the transfer, of dutiable property from an incorporated association to a prescribed body corporate on the transfer of incorporation by the association;

(c) a transfer of, or agreement to transfer, surplus property to a surplus receiving body from an incorporated association on winding up, from an incorporated association under an approved distribution plan, or from the Commissioner where property is vested in the State.

Clause 44: Section 116 amended

Section 116 applies nominal duty to certain transfers, and agreements for the transfer, of dutiable property by a trustee of a trust (other than discretionary trust or a unit trust scheme) to a beneficiary.

New section 118 inserted by clause 45 applies nominal duty to the transfer of dutiable property to and from a bare trustee if certain conditions are met.

The transfer of dutiable property to a person to hold as bare trustee for the transferor is assessed for full duty and reassessed for nominal duty once the transfer back to the transferor has occurred (subsequent transfer). The subsequent transfer is charged with nominal duty if the conditions in section 118(1) are satisfied.

However, if the subsequent transfer is not lodged for registration with the relevant titles registrar within the required timeframe, the Commissioner must reassess both transfers for full duty in accordance with new section 118A(2).

This clause inserts new section 116(3). Its purpose is to clarify that section 116 does not apply to charge nominal duty on a subsequent transfer to which the new section 118(1) applies. This ensures that if the subsequent transfer is subject to full duty under section 118A(2), nominal duty under section 116 cannot apply to the transfer.
Clause 45: **Section 118 replaced**

Section 118 of the Duties Act currently provides that nominal duty is chargeable on a transfer of dutiable property:

- to a trustee to be held solely as trustee for the transferor, without any change in the beneficial ownership of the dutiable property; or
- by way of re-transfer to the transferor, if no other person has had a beneficial interest in the property.

This concession is usually applied to the following transactions:

- a transfer of property to a person to hold as bare trustee for the transferor;
- a transfer of property to a person under the *Guardianship and Administration Act 1990*; and
- a transfer of land to facilitate a subdivision.

This Bill separates these transactions into individual provisions to reflect that the transactions are fundamentally different legal and commercial concepts. The requirements for each concession have been prescribed in the legislation to provide certainty about how the concessions apply and to address concerns about duty avoidance.

This clause deletes section 118 and replaces it with new sections 118 and 118A. Clause 46 inserts new sections 120A – 120E for transfers to facilitate a subdivision, and clause 48 inserts new section 139A for certain transactions under the *Guardianship and Administration Act 1990*.

Current section 118 applies nominal duty in the first instance to a transfer to a bare trustee even though there is no certainty the property will ever be transferred back to the original owner. There is also usually little conclusive evidence, other than the taxpayer’s representations, that the transferee is truly holding the property as trustee for the transferor. The fact the land is ultimately retransferred is not necessarily evidence it was being held on trust.

In addition, because there is no requirement to retransfer the property, the bare trust arrangement could be collapsed. This means the person who was acting as trustee has acquired the beneficial ownership in the property without paying full duty.

In contrast, section 120 of the Duties Act provides that where dutiable property has been transferred by way of security, full duty is charged. However, a reassessment for nominal duty can be made on that transfer once the property is retransferred to the original owner.

Most of the other jurisdictions have duty concessions for transfers to a bare trustee. However, the relevant legislation in these jurisdictions usually applies duty upfront and requires the property to be transferred back to the transferor before the original transfer can be reassessed for nominal duty.
The unrestricted application of section 118 as currently drafted potentially allows duty relief for transactions involving a change in the beneficial ownership of property, which is generally inconsistent with the duties scheme. This clause brings the concession in line with section 120 of the Duties Act and the models in other jurisdictions.

Duty will apply to a transfer of property to a person to hold as bare trustee (original transfer). Nominal duty will apply to a transfer back to the beneficiary (subsequent transfer) if the Commissioner is satisfied that no other person held a beneficial interest in the property between the transfers (other than the trustee’s right of indemnity). At that point, the original transfer will be reassessed for nominal duty.

As an anti-avoidance measure, the subsequent transfer must be registered with the relevant registrar of titles (for example, Landgate) within 60 days after it is endorsed for nominal duty or a longer period approved by the Commissioner. If this does not occur, the Commissioner must reassess the original and subsequent transfers for full duty.

118. Transfers to and from bare trustee

Subsection (1) charges nominal duty on a transfer that is a subsequent transfer if the following conditions are satisfied:

(a) There has been a transfer of dutiable property from a person (the transferor) to another person who is to hold the property solely as a bare trustee for the transferor.

The reference to a ‘bare trustee’ is inserted to ensure the provision only applies to genuine bare trust arrangements.

(b) The original transfer, an agreement for the original transfer, or a declaration of trust is duty endorsed. This means that the subsequent transfer will only be chargeable with nominal duty if duty has been paid on the original transfer, an agreement for the original transfer, or a declaration of trust (endorsed transaction). The endorsed transaction can be reassessed for nominal duty after the subsequent transfer.

Under the current section, nominal duty only applies to transfers of dutiable property. However, parties often enter into an agreement for transfer or execute a declaration of trust which sets out the arrangement between the parties. The transactions that nominal duty can apply to in relation to the original transaction have been extended to include an agreement and declaration of trust.

(c) The subsequent transfer of the dutiable property is to the transferor or to a person to whom the transferor’s beneficial interest in the property has been transmitted by death or bankruptcy. This is consistent with section 120.

(d) The Commissioner is satisfied that, between the original and subsequent transfers, only the transferor has held a beneficial interest in the dutiable property. For the purposes of this provision, the trustee’s right of indemnity does not constitute another person obtaining a beneficial interest in the property.
Subsection (2) defines a **bare trustee** for the purposes of subsection (1) to mean a trustee of a trust, other than a unit trust scheme or a discretionary trust, if the trustee has no active duties or powers other than transferring the dutiable property to the transferor or as directed by the transferor. It includes a trustee appointed in substitution for, or in addition to, a trustee or trustees.

Subsection (3) provides that if nominal duty is chargeable on the subsequent transfer, then nominal duty is also chargeable on the endorsed transaction on which full duty was payable.

Subsection (4) provides that the Commissioner must, on the application of the taxpayer, reassess the liability to duty of the endorsed transaction in accordance with subsection (3). Subsection (5) provides that the reassessment time limits in section 17 of the TAA do not apply to a reassessment under subsection (4).

**118A. Transfers to and from bare trustee: failure to lodge subsequent transfer**

Subsection (1) provides that the section applies if:

(a) nominal duty is chargeable under section 118 on a subsequent transfer and the endorsed transaction;

(b) the subsequent transfer is required to be lodged for registration under the *Transfer of Land Act 1893*, *Registration of Deeds Act 1856*, or *Mining Act 1978*;

(c) the subsequent transfer is assessed in accordance with section 118(1) on the basis that nominal duty is chargeable;

(d) the endorsed transaction is reassessed in accordance with section 118(3) on the basis that nominal duty is chargeable; and

(e) the subsequent transfer is not lodged for registration within 60 days after it is duty endorsed.

Subsection (2) provides that nominal duty is not chargeable on the subsequent transfer or the endorsed transaction despite section 118(1) and (3).

Subsection (3) provides that the Commissioner must make any reassessment necessary as a result of the operation of subsection (2). This means the Commissioner must reassess the subsequent transfer and the endorsed transaction for full duty to give effect to subsection (2).

It also includes any reassessment for foreign transfer duty if the subsequent transfer or the endorsed transaction is a foreign dutiable transaction.

In relation to section 118, foreign transfer duty will apply if a foreign person transfers, or agrees to transfer, residential property to a trustee to hold on their behalf, or a trustee declares they hold the residential property on behalf of the foreign person, because the property is acquired by a trustee of a foreign trust.
On the subsequent transfer of the residential property to the foreign transferor, nominal duty under section 118(1) applies to the transfer. This means the subsequent transaction will be exempt from foreign transfer duty under section 205Y(2)(c).

If the Commissioner reassesses the endorsed transaction for nominal duty in accordance with section 118(3), a reassessment is also made under section 205ZC because the endorsed transaction has become chargeable with nominal duty and is therefore exempt from foreign transfer duty under section 205Y(2)(c).

If a further reassessment occurs under section 118A(2) to charge full duty on the endorsed transaction and the subsequent transfer, a reassessment under this subsection is also required to impose foreign transfer duty because the endorsed transaction and subsequent transfer will cease to be exempt under section 205Y(2)(c). Subsection (4) provides that the time limits in section 17 of the TAA do not apply for a reassessment under subsection (3).

Clause 46: Chapter 2 Part 6 Division 2 Subdivision 1A inserted

This clause inserts new Subdivision 1A in Chapter 2 Part 6 Division 2, which deals with transfers to facilitate the subdivision of land.

To effect an amalgamation and subdivision of adjoining lots of land owned by different people, the owner of each lot often transfers an interest to the other person(s) so that all original lots are commonly owned for the purposes of the subdivision. These transfers are dutiable transactions to which duty applies.

After subdivision, each owner may take a new lot (or lots) representing the original land they contributed. These transfers are also dutiable transactions to which duty applies.

The Commissioner’s longstanding practice is to allow a duty concession for transfers to facilitate a subdivision. Current section 118 is applied so that nominal duty applies to a transfer of land to a person to effect common ownership for the purposes of facilitating a subdivision, provided the transferor will receive the same piece of land after subdivision that they previously owned.

Nominal duty also applies to the transfer of new lots from common ownership to the original transferor to the extent the person receives the same land they contributed. If they receive land they did not contribute, duty applies to that portion.

As explained in the notes for clause 45, section 118 is being amended so that it only applies to genuine bare trust arrangements where the trustee has no active powers or duties other than to transfer the property to the transferor.

Transfers of land to facilitate a subdivision are legally and commercially different from most bare trust arrangements. For this reason, subdivision 1A is inserted to specifically provide for nominal duty on transfers of land to facilitate a subdivision, provided the transferor receives the whole or part of the same land they previously owned. The
provisions also charge duty on any of the transferor’s land that is retained by the person after the subdivision.

The new provisions are broadly consistent with the Commissioner’s longstanding assessment practice, which compares the ‘dirt’ that a person has before and after the transfers. However, the provisions have been drafted prescriptively to ensure that nominal duty only applies to genuine subdivisions and the section cannot be used to reduce duty on other transfers of land.

Victoria is the only other jurisdiction that allows a duty concession for transfers to facilitate a subdivision.

**Subdivision 1A – Transfers to facilitate subdivision of land**

120A. Transfers to facilitate subdivision of land

**Subsection (1)** charges nominal duty on a dutiable transaction (the original transfer):

(a) if the transaction is a transfer, or agreement for the transfer, of land from a person (referred to as the original transferor) to another person; and

(b) the Commissioner is satisfied that –

(i) the transfer is for the sole purpose of facilitating a subdivision of the land; and

(ii) after the subdivision there is to be a transfer back to the original transferor of the land or part of the land.

Nominal duty will apply to the original transfer if there is a transfer or agreement to transfer land made for the sole purpose of facilitating a subdivision and, after the subdivision, the land or part of the land will be transferred back to the original transferor.

The reference to ‘part of the land’ recognises that a transferor will not always receive the same land after subdivision. It is not uncommon for some land to be given up for infrastructure and services necessary for the subdivision. In these circumstances, it is not possible for the original transferor to receive the same land after the subdivision.

**Subsection (2)** provides that if nominal duty is chargeable on the original transfer, nominal duty is also chargeable on the subsequent transfer of the land or part of the land back to the original transferor after the subdivision.

**Subsection (3)** provides that nominal duty is chargeable on the subsequent transfer only to the extent it relates to land that is also the subject of the original transfer.

Subdivisions of land may result in parts of land being exchanged between the parties to a subdivision. If the original transferor receives any land that they did not contribute as part of the subsequent transfer,
full duty is chargeable on the value of that land.

120B. Land retained by transferee following transfer to facilitate subdivision

This section deems a transfer to have occurred after subdivision where a person retains land they did not originally contribute. This ensures duty applies where a person acquires land they did not previously own.

Subsection (1) provides that the section applies if:

(a) nominal duty is chargeable under section 120A(1) on a transfer of land from the original transferor to the original transferee for the purposes of a subdivision;

(b) after the subdivision, there is a transfer of the land, or part of the land, back to the original transferor (the subsequent transfer); and

(c) either or both of the following apply:

(i) the land the subject of the subsequent transfer is only a part of the land that was transferred to the original transferee and the rest of that land is retained by the original transferee after the subsequent transaction;

(ii) after the subsequent transfer, the land the subject of the subsequent transfer, or part of that land, is held jointly by the original transferor with the original transferee.

Example 1 – Only part of land retransferred to original owner

A owns Lot 1 and B owns Lot 2.

\[
\begin{array}{c|c}
A & B \\
\hline
\text{(Lot 1)} & \text{(Lot 2)} \\
\end{array}
\]

A transfers Lot 1 to B to facilitate a subdivision of Lots 1 and 2 into four separate lots. Following subdivision, A receives less of their original land (former Lot 1) back, with B retaining a portion of A’s land (shaded area). The dotted line shows the original boundary of Lots 1 and 2.

\[
\begin{array}{c|c|c|c}
A & A & B & B \\
\end{array}
\]

Example 2 – Subdivided land held jointly

A owns Lot 1 and B owns Lot 2.

\[
\begin{array}{c|c}
A & B \\
\hline
\text{(Lot 1)} & \text{(Lot 2)} \\
\end{array}
\]

A transfers Lot 1 to B to facilitate a subdivision. The lots are subdivided to create three separate lots. Following subdivision, B transfers Lot 3, which formed part of former Lot 1, to A. B also transfers a half interest
in the whole of Lot 4 to A. B has retained an interest in the portion of Lot 4 that formed part of former Lot 1 (shaded area).

The dotted line shows the original boundary of Lots 1 and 2.

Subsection (2) provides that when the subsequent transfer is made, there is taken to be a dutiable transaction consisting of the transfer to the original transferee of:

(a) any land the subject of the original transfer that is not also the subject of the subsequent transfer. In example 1, there is a deemed transfer to B of the portion of the land that formed part of former Lot 1.

(b) the original transferee’s interest in any land held jointly with the original transferor. In example 2, there is a deemed transfer to B of a half interest in the portion of Lot 4 that formed part of former Lot 1.

Subsection (3) provides that in determining the dutiable value of the deemed transfer, the unencumbered value of the land or interest in land is the unencumbered value of the land when the original transfer occurred.

Subsection (4) ensures that duty is not charged on any land retained by the original transferee if that land will be transferred to another party to the subdivision.

For example, A and B transfer their land to C to facilitate a subdivision. Following the subdivision, C retransfers part of A’s land back to A. A portion of A’s land is retained by C to be transferred to B. There is no deemed transfer to C of the portion of A’s land that will be transferred to B.

Under section 120A(3), nominal duty is chargeable on the subsequent transfer of land to B only to the extent that it relates to land that is also the subject of the original transfer. Accordingly, full duty will be chargeable on the portion of A’s land received by B.

120C. Transfers to facilitate subdivision: failure to lodge subsequent transfer within five years

This section imposes a requirement for subdivided lots to be transferred back to the original owner of the land within five years of the original transfer. This is to ensure the original transfer of land is part of a genuine subdivision that will occur soon.

Subsection (1) provides that if the subsequent transfer of the subdivided land back to the original owner is not lodged for registration under the Transfer of Land Act 1893 within five years after the original transfer
was registered, nominal duty is not chargeable on the original transfer or the subsequent transfer.

Subsection (2) allows the Commissioner to extend the five-year period in which to lodge the subsequent transfer.

Subsection (3) provides that the Commissioner must make any reassessment necessary as a result of the operation of subsection (1).

Subsection (4) provides that the time limits in section 17 of the TAA do not apply for the reassessment.

120D. Subdivisions of land excluded from s.120A and 120B

This section excludes multi-level strata subdivisions from the nominal duty provisions. The underlying policy is that nominal duty only applies if the person receives the same ‘dirt’ back after the subdivision. In the case of multi-level strata subdivisions, the Commissioner cannot determine if each person receives the same ‘dirt’ after subdivision, especially if the lot is not directly above the land they contributed.

The section provides that sections 120A and 120B do not apply in relation to:

(a) a subdivision under –

(i) before the coming into operation of section 7 of the Strata Titles Amendment Act 2018 – a strata plan registered under the Strata Titles Act 1985 (Strata Titles Act), except for a strata plan for a single tier strata scheme as defined in section 3(1) of the Strata Titles Act; or

(ii) after the coming into operation of section 7 of the Strata Titles Amendment Act 2018 – a strata scheme as defined in section 3(1) of the Strata Titles Act, except for a single tier strata scheme as defined in clause 3 of Schedule 2A to the Strata Titles Act; or

(b) a subdivision of land in circumstances prescribed in the regulations.

Once the Strata Titles Amendment Bill 2018 comes into operation, the definition of ‘single tier strata scheme’ will be deleted from section 3(1) of the current Strata Titles Act and reinserted at clause 3 of Schedule 2A of the amended Act. Paragraph (i) refers to the Strata Titles Act in its current form and has effect until the Strata Titles Amendment Bill comes into operation. Paragraph (ii) has effect after the Strata Titles Amendment Bill comes into operation.

The regulation-making power is to cater for any new form of subdivisions introduced by the Community Titles Bill 2018 or the Strata Titles Amendment Bill 2018 (once they are passed and come into operation) that are required to be excluded from the concession.

For example, a subdivision of land by a community titles (building) scheme, which is like a strata subdivision, is likely to be excluded from the operation of these sections.

120E. References to transfer of land back to person

This section ensures that land is considered transferred back to the
original transferor after a subdivision even though there has been a change in a legal description of the land and even if the land is held jointly with the original transferee after the subsequent transfer.

**Clause 47:** **Section 139 amended**

Section 139 provides that nominal duty applies to certain transactions that distribute property to the beneficiaries of a deceased estate in accordance with their entitlement under a will or the *Administration Act 1903* (Administration Act).

The concessional treatment is currently limited to the following dutiable transactions:

- a transfer, or agreement for the transfer, of dutiable property to the extent that the transfer gives effect to a distribution in the estate of a deceased person and there is no consideration for the agreement or transfer;
- a declaration of trust over dutiable property to the extent that it gives effect to a distribution in the estate of a deceased person; and
- a vesting of dutiable property by, or as a consequence of, a court order made under the *Family Provision Act 1972* or under section 65 of the *Trustees Act 1962* on an application under the Family Provision Act.

A deceased person’s partnership interest may be distributed to a beneficiary under the person’s will. Where this results in a dutiable partnership acquisition, nominal duty cannot apply under current section 139.

This clause inserts a new section 139(2)(d) to provide that nominal duty is chargeable on a partnership acquisition to the extent the partnership acquisition gives effect to a distribution in the estate of a deceased person and there is no consideration for the partnership acquisition.

This is consistent with the underlying policy intent of section 139 to provide duty relief for transactions that effect a distribution of property in accordance with the deceased person’s last wishes or the laws of intestacy.

**Clause 48:** **Section 139A inserted**

This clause inserts new section 139A, which charges nominal duty on transfers of dutiable property under an administration order made under the *Guardianship and Administration Act 1990* (Guardianship and Administration Act).

Transfers of dutiable property to a legal administrator to hold as trustee for a person under a disability are currently assessed with nominal duty under section 118. However, as explained above, section 118 is being amended so that it only applies to transfers involving a bare trust where the trustee has no active powers or duties other than to transfer the property to the transferor.

To preserve duty relief for these transfers, new section 139A is inserted into the Duties Act to specifically provide for nominal duty on the
transfer of dutiable property to an administrator.

139A. Some transfers and vestings under orders made under Guardianship and Administration Act 1990

Subsection (1) defines:

administration order to mean certain orders made under the Guardianship and Administration Act; and

administrator, to mean an administrator under the Guardianship and Administration Act, a person acting under the authority of an order under the Guardianship and Administration Act, or the Public Trustee acting under the authority of the Guardianship and Administration Act.

Subsection (2) provides that nominal duty applies to:

(a) a transfer to an administrator of dutiable property of the person to whom the administration order relates (the represented person) made under the authority of the administration order; or

(b) a vesting in an administrator of dutiable property of a represented person by, or as a consequence of, an order of the State Administrative Tribunal under the Guardianship and Administration Act.

Subsection (3) provides that if nominal duty is chargeable on a transfer or vesting of dutiable property to or in an administrator, nominal duty is also chargeable on:

(a) the transfer of the dutiable property back to the represented person; or

(b) any subsequent vesting in the represented person of the dutiable property by, or as a consequence of, an order of the State Administrative Tribunal.

Clause 49: Section 141 amended

Sections 141 to 146 of the Duties Act provide a concessional rate of duty for first home buyers where:

- the value of the property is below the required threshold; and
- each person is paid the first home owner grant or would have otherwise qualified for the grant if consideration was paid or if the grant was still payable for the purchase of an established home.

The concessional first home owner rate of duty is chargeable on first home owner concessional transactions as defined in section 143.

The Revenue Laws Amendment Act 2012 made amendments to section 142 to include as first home owner concessional transactions, agreements where the subsequent transfer is not chargeable with duty under section 42(2) or (4).

The effect of the amendment was to allow the first home owner rate of duty to apply where a purchaser under an agreement ‘substitutes’ their
interest to a related person who is a first home owner or where the purchaser was acting as agent for the transferee who is a first home owner.

However, the amendments may not be operating as intended. When sections 142A(1), 142(1), 143(1) are considered together with the definition of ‘transferee’ in section 141, the first home owner concessional transaction will be the agreement for transfer where the person to whom the property is agreed to be transferred is paid a first home owner grant.

Although the 2012 amendments were intended to overcome this issue, it seems that the purchaser under the agreement must still be a person who is paid, or would otherwise have qualified for, the first home owner grant. A similar issue applies to further concessional transactions referred to in section 142(2).

The provisions have been administered by the Commissioner in accordance with the intended policy outcome, which is to allow the concession on the agreement for transfer. The amendments in this clause and in clause 51 (which amends section 142) achieve the intended outcome.

This clause amends section 141 by inserting subsection (3), which provides that a person is a ‘substituted transferee’ in relation to an eligible transaction if:

- the dutiable transaction is an agreement for the transfer of dutiable property; and
- duty is not chargeable on the transfer of the dutiable property under the agreement because of section 42(2) or (4).

Clause 50: Section 142A amended

This clause makes a minor amendment to section 142A(3)(b) to replace the reference to section 14AA(2)(a)(ii) of the First Home Owner Grant Act 2000 (FHOG Act) with section 14AA(2)(a). Section 14AA(2)(a)(ii) was deleted and replaced with section 14AA(2)(a) by the First Home Owner Grant Amendment Act 2017.

Clause 51: Section 142 amended

This section sets out the conditions that must be satisfied for a transaction to be a first home owner concessional transaction.

Section 142(1) provides that a first home owner concessional transaction is a transfer, or an agreement for the transfer, of dutiable property that meets the criteria specified in paragraphs (a) and (b).

Paragraph (a) requires all the transferees to be concessional first home owners. This means they must all be paid the first home owner grant or would have otherwise qualified for the grant if consideration was paid or if the grant was still payable for the purchase of an established home.

Paragraph (b) provides that the value of the property must be below the relevant threshold.
This clause amends paragraph (a) to require either:
  • each transferee to be a concessional first home owner; or
  • if the transaction is an agreement for transfer in relation to which there are one or more substituted transferees, each **substituted transferee** to be a concessional first home owner.

**Substituted transferee** is defined in section 141(3) to provide that a person is a substituted transferee if the substituted transferee provisions in subsection 42(2) or (4) apply so that duty would not be chargeable on a transfer to the person under an agreement for transfer.

The words that begin with ‘and includes a transaction where...’ at the end of the subsection have been deleted. No changes have been made to the value thresholds in paragraph (b).

The effect of the amendments is that an agreement for transfer in relation to which there are one or more substituted transferees that receive the grant (or would otherwise be eligible for the grant) will be a first home owner concessional transaction.

Section 142(2) defines a further concessional transaction to be a transfer or an agreement for the transfer of a further interest in the dutiable property the subject of a first home owner concessional transaction if:
  • the interest is acquired from a person that is excluded from the operation of section 16(1) of the **FHOG** Act;
  • it is made within ten years of the first transaction; and
  • all of the transferees were transferees when the first transfer was made.

The provision is to accommodate shared equity arrangements with an entity such as the Housing Authority, where the transferee is purchasing some or all of the entity’s equity in the property.

Subclause (2) amends subsection (2) by deleting the words that begin with ‘and includes a transaction...’ at the end of the subsection.

Subsection (2) as amended will also apply to any further interests in the property acquired by the substituted transferee from the person excluded under section 16(1) of the FHOG Act.

This is because ‘first home owner concessional transaction’ is now defined in subsection (1) to include an agreement for transfer in relation to which there are one or more substituted transferees that are concessional first home owners.

**Clause 52:** **Section 146 amended**

Section 146 sets out the relationship between the first home owner rate of duty provisions in the Duties Act and the FHOG Act.

Specifically, section 146(b) provides that the FHOG Act applies to applications under the Duties Act as if a reference to ‘application’ or
'applicant' in the FHOG Act were a reference to those same terms in the Duties Act.

Section 37 of the FHOG Act provides that the Commissioner may enter into administration agreements with financial institutions under which the Commissioner delegates functions relating to the administration of the first home owner grant scheme to those financial institutions.

Section 146 should provide sufficient authority for the administrative functions delegated to financial institutions under the FHOG Act to extend to administrative functions relating to the duties concession under the Duties Act.

This is particularly relevant where an application is not made under the FHOG Act because the purchaser is not eligible for the grant, but an application is made under the Duties Act for the first home owner rate of duty (for example, where consideration was not provided for the transaction or the purchaser bought an established home).

In these circumstances, functions delegated by the Commissioner to financial institutions should extend to functions of the Commissioner related to an application for the first home owner rate of duty.

This clause amends section 146(b) to include a new subparagraph which provides that the FHOG Act applies to an application under the Duties Act as if the reference in section 37(1)(a) of the FHOG Act to functions of the Commissioner were a reference to functions of the Commissioner related to an application for the first home owner rate of duty concession.

**Clause 53: Section 147A amended**

The concessional residential rate of duty applies where the *taxpayer* has begun, or entered into a contract for, construction of a residence on residential land. Section 147A defines *taxpayer* as the person liable to pay duty in relation to the transaction.

The concessional rate of duty under sections 147A to 147G of the Duties Act is currently limited by its interaction with the ‘substituted transferee’ provisions in section 42.

The issue typically occurs in the following scenario:

- A purchaser enters into an agreement to purchase vacant land and duty on the transaction is assessed at the general rate of duty.
- The purchaser ‘substitutes’ all of their interest in the agreement to a transferee who is related (within the meaning of section 43) to the purchaser.
- On the basis that duty has been paid on the agreement to purchase, the transfer to the related transferee is not chargeable with duty under section 42(2).
- The transferee enters into a contract to construct a residence on the vacant land within five years.
The transferee applies for a reassessment of duty at the residential rate within the specified timeframe on the agreement to purchase the vacant land.

In this scenario, the transferee does not qualify for a reassessment of duty at the residential rate because they are not the person liable to pay duty in relation to the transaction. In these cases, although the person liable to pay duty on the agreement is the original purchaser named in the agreement, the transferee is likely to have paid the duty on the agreement.

This issue would occur where the transferee constructs a residence on the land or enters into a contract to purchase a moveable building that will be affixed to the land. It may also happen where a transfer is not chargeable with duty under subsection 42(4) or 42(5) because the purchaser is acting as agent for the transferee or the purchaser intends for the dutiable property to be transferred to a corporation yet to be incorporated.

The amendments in this clause and clauses 54 and 55, which amend sections 147D and 147F respectively, allow the concessional residential rate of duty to apply where there is a substituted transferee.

This clause amends section 147A by inserting subsection (3), which provides that a person is a substituted transferee in relation to an eligible transaction if:

- the eligible transaction is an agreement for the transfer of dutiable property; and
- duty is not chargeable on the transfer to the person of the dutiable property under the agreement because of section 42(2), (4) or (5).

**Clause 54: Section 147D amended**

The residential rate of duty applies to an eligible transaction the subject of which is residential land. Section 147D defines the land to be residential land if there is a residence on the land, the taxpayer has begun construction or entered into a contract for the construction of a residence on the land, or the taxpayer has entered into a contract to purchase a moveable building that will be affixed to the land.

This amendment clarifies that land the subject of an eligible transaction is residential land if any of paragraphs (a) to (d) apply.

The references to taxpayer in paragraphs (b) to (d) are amended to include a substituted transferee in relation to the eligible transaction. Substituted transferee is now defined in section 147A(3).

The effect is that land is residential land if the taxpayer or the substituted transferee constructs the residence on the land, enters into a contract to construct a residence on the land, or purchases a building that will be affixed to the land and be used as a residence.

**Clause 55: Section 147F amended**

Section 147F provides for the reassessment of duty at the residential
rate on eligible transactions that were assessed at the general rate.

Section 147F(2) provides that the Commissioner is to reassess the transaction at the residential rate if, within five years from the date of liability, the taxpayer commences construction of a residence, enters into a contract for the construction of a residence, or enters into a contract to purchase a moveable building that will be affixed to the land.

Subclause (1) amends subsection (2) to include a reference to a substituted transferee in relation to the eligible transaction.

The effect is that the Commissioner must reassess an eligible transaction that is the agreement for transfer at the residential rate if a substituted transferee has commenced construction of a residence on the land, entered into a contract for the construction of a residence or entered into a contract to purchase a moveable building that will be affixed to the land, within the five year period.

*Substituted transferee* is now defined in section 147A(3).

Sections 147F(3) and (4) provide for the reassessment of duty at the residential rate where transactions have been aggregated under section 37 and treated as a single transaction. The residential rate of duty may be applied if at least one of the transactions is an eligible transaction for dutiable property that is land and the criteria in subsection (4) is satisfied.

Subclause (2) amends subsection (4) to include a reference to a substituted transferee in relation to the eligible transaction for the land. This will allow a reassessment of the aggregated transaction at the residential rate of duty if a substituted transferee has commenced construction of a residence on the land, entered into a contract for the construction of a residence or entered into a contract to purchase a moveable building that will be affixed to the land, within the five-year period.

**Clause 56: Section 148 amended**

Chapter 3 of the Duties Act contains the landholder duty provisions, which impose duty on the indirect acquisition of land through the purchase of shares in a corporation or units in a unit trust scheme.

Section 148 defines terms used in Chapter 3. This clause amends some of those definitions and inserts additional defined terms.

Subclause (1) converts the existing section to subsection (1). This is necessary due to the insertion of new subsection (2).

Subclause (2) inserts definitions for the terms *further interest* and *land asset*.

The term further interest has been included in section 148 because section 164, which dealt with an acquisition of a further interest, is deleted. These acquisitions are now set out in section 163 as amended
by clause 74.

The definition of **land asset** brings fixed infrastructure control rights, derivative mining rights and, subject to certain conditions, fixed infrastructure access rights into the landholder base.

Subclause (3) makes a consequential amendment to the section references in the definition of **relevant acquisition**.

Subclause (4) makes a consequential amendment to the section references in the definition of **unencumbered value**.

Subclause (5) inserts new subsection (2). This provides that land assets that are a fixed infrastructure control right, a derivative mining right and a fixed infrastructure access right are taken to be land assets in Western Australia. This avoids any doubt about these rights having nexus to Western Australia.

**Clause 57: Section 149 amended**

Section 149 allows certain uncompleted agreements to be taken into account when determining a landholder’s entitlement to land.

Section 149(1) provides that, when determining the entitlement of a landholder to land:

- if the landholder has entered into an agreement to acquire an interest in land, the agreement is regarded as being completed even if it has not been completed; and
- if the landholder has entered into an agreement to dispose of an interest in land, but the agreement has not been completed, the agreement is to be disregarded.

In each case, the value of the land the subject of the agreement is included when determining if an entity meets the landholder threshold. The value of land and chattels under the agreement are also included for the purpose of calculating landholder duty. If an agreement to acquire is terminated without being completed, or when an agreement to dispose is completed, the Commissioner will generally make a reassessment to disregard the land the subject of the agreement.

Where an agreement relates to land and chattels, it is unclear whether section 149(1) operates to deem the entire agreement completed or disregarded or only the part relating to land. If it is interpreted on the basis than an agreement is regarded as complete (or is disregarded) only for the land, the landholder would be entitled to the land the subject of the agreement but not the chattels. This is inconsistent with chattels being in the landholder base, including where they are held by linked entities that are not also entitled to land.

To clarify this issue, subclause (1) amends section 149(1) so that it refers to agreements to acquire or dispose of interests in land, chattels, or land and chattels.

References to **land** are also amended to **land assets** to reflect the broadening of the landholder duty base to include fixed infrastructure rights and derivative mining rights.
Consequential amendments make the same amendment to section 195, which relates to reassessments where section 149(1) applies.

A final minor change is the relocation of current section 155(4) to become section 149(2) so that all provisions about determining an entity’s entitlements to land assets and chattels are in the same section. This clause amends section 149 as follows.

Subclause (1) amends subsection (1) so that references to ‘land’ are replaced with references to ‘land assets, chattels, or land assets and chattels’.

Subclause (2) deletes subsections (2A) to (4). Subsections (2A)(a), (2) and (4) are deleted as the matters the subject of those provisions are now contained in new section 149A. Subsections (2A)(b) and (3) are deleted as they are no longer being required following the fixed to land amendments.

Subclause (2) also inserts new subsection (2), which essentially replaces current section 155(4) (to be deleted). It clarifies that, when determining an entity’s entitlement to land assets or chattels, an entity that is a partnership, unit trust scheme or trustee of a discretionary trust is taken to be entitled to land assets or chattels if the partnership or trust property includes those land assets or chattels.

The section heading is also amended.

Clause 58: Section 149A inserted
This clause inserts new section 149A after section 149.

This section sets out how the entitlement of an entity to land or a mining tenement is to be determined when there are fixtures to the land. It provides that any fixtures are to be taken into account, even if the fixture is the subject of an entitlement separate from the ownership of the rest of the land.

This section is the landholder duty equivalent to new section 36A in Chapter 2 for transfer duty.

149A. Determining entitlement to land assets: fixtures and mining tenement fixtures
Subsection (1) defines the term mining tenement fixture. This is consistent with the term as defined in section 36A and restates paragraph (cb) of the deleted definition of ‘land’ in section 3.

Under the new definition of ‘land’ in section 3A, land includes anything fixed to land, including land the subject of a mining tenement, whether or not the thing constitutes a fixture at law. However, a reference to a ‘mining tenement fixture’ in section 149A is limited to things that would be common law fixtures if the mining tenement were freehold land.

Subsection (2) provides that when determining an entity’s entitlement to land, any fixtures are to be taken into account, even if the fixture is the subject of an entitlement separate from the ownership of the rest of the
land.

Subsection (3) provides that when determining an entity’s entitlement to a mining tenement (or estate or interest in it), anything that is a mining tenement fixture is to be taken into account, even if the mining tenement fixture is the subject of an entitlement separate from the ownership of the rest of the mining tenement.

Subsection (4) is a ‘no double duty’ provision. It provides that subsections (2) and (3) do not apply if the fixture would otherwise be taken into account separately in determining the land assets to which the entity is entitled.

Example

Entity A is entitled to mining tenements. Its wholly owned subsidiary B is entitled to the mining infrastructure on the tenements. The infrastructure would be fixtures if the tenement was freehold land, so the infrastructure is ‘mining tenement fixtures’ as defined in subsection (1). A third party acquires all the shares in A. Before section 149A is considered, A is entitled to land assets being the mining tenements, and linked entity B is entitled to land assets being the things fixed to the land the subject of the mining tenements.

For the purposes of calculating duty on the acquisition, the value of A will be the unencumbered value of the mining tenements plus 100 per cent of the unencumbered value of the infrastructure.

However, under subsection (3), when determining the entitlement of A to the mining tenements, the infrastructure is also to be taken into account even though it is owned by B. This means the infrastructure will be taken into account separately when determining the entitlement to land assets of both A and B.

Subsection (4) therefore applies so that the value of the infrastructure is not included twice when determining A’s entitlement to land.

Subsection (5) provides that when applying this section, ‘land’ does not include a mining tenement or anything fixed to land. This is because section 149A is directed at fixtures to physical land only.

Clause 59: Section 150 amended

Section 150 allows the valuation provisions in section 36 (in Chapter 2) to apply to the valuation of land or chattels for landholder duty purposes.

This clause makes the following minor consequential amendments to section 150.

Paragraph (a) inserts a reference to section 36A in addition to section 36. This is necessary as determining the unencumbered value of land where there are fixtures to the land is now under new
section 36A rather than section 36.

Paragraph (b) amends the reference to ‘land’ to ‘land assets’. This reflects the broadening of the landholder duty base.

The section heading is also amended.

**Clause 60: Section 152 amended**

This section sets out what an entity is for the purposes of the landholder duty chapter.

Section 152(1) provides that a reference in Chapter 3 to an ‘entity’ means a corporation or a unit trust scheme.

Under section 152(2), the trustee of a discretionary trust and a partnership can also be an entity, but only as a linked entity under section 156.

This Bill introduces new provisions for determining when entities are linked or have interests in other entities. Consequently, it is necessary to include references to the new subsections in section 152, so that the trustee of a discretionary trust and a partnership can be an entity for the purposes of those sections.

This clause amends section 152 as follows.

Subclause (1) amends subsection (2) by removing the reference to the trustee of a discretionary trust, or a partnership, being a linked entity under section 156. This is replaced by a reference to ‘the extent set out in subsection (3)’.

Subclause (2) inserts new subsection (3). This provides that the trustee of a discretionary trust or a partnership may be:

(a) an entity in an ownership chain under section 154A (other than the ‘main entity’ which is being acquired); or

(b) an entity referred to in section 154B (which relates to determining interests for the purposes of sections 154A, 156 and 156A); or

(c) a linked entity under section 156 (this replicates current subsection (2)); or

(d) a ‘relevant entity’ referred to in section 156A(1)(b)(i) (this does not include the ‘main entities’ that are being acquired).

**Clause 61: Section 153 amended**

This section sets out what is meant by an ‘interest’ in a landholder or other entity. It provides that a reference in Chapter 3 to a percentage interest means an entitlement to receive that percentage of the surplus property of the landholder or entity if it were wound up.

The reference in section 153 to an interest means a direct interest only. Other amendments in this Bill introduce the concept of an indirect interest, and section 153 is amended to clarify that it does not refer to
an indirect interest.

Section 153(3) provides that the section operates subject to section 159, which sets out the method of determining the percentage interest in a partnership.

Other amendments in this Bill delete section 159 and include, in new section 153B, expanded provisions for determining interests in partnerships. New section 153A is a similar provision for determining interests in the trustee of a discretionary trust.

This clause amends section 153 as follows.

Subclause (1) amends subsection (1) to clarify that a reference in Chapter 3 to an interest does not include a reference to an indirect interest.

Subclause (2) amends subsection (3) to replace the reference to section 159 with a reference to sections 153A and 153B.

Clause 62: Sections 153A and 153B inserted

Clause 64 introduces new section 154A, which sets out how to determine the total direct and indirect interest one entity (the higher entity) has in another entity (the lower entity).

Under this section, the concept of an ownership chain is introduced to capture an indirect interest that a higher entity holds in a lower entity through a series of entities that each successively have a direct interest in the next entity.

To enable partnerships and discretionary trustees to be treated the same as other entities for these purposes, provisions are included to clarify when interests are held in or by those entities and the percentages of those interests.

This clause inserts new sections 153A and 153B after section 153.

153A. References to interest in, or held by, trustee of discretionary trust

This section amalgamates and replaces the provisions currently contained in sections 157(4) and 158 for determining interests in trustees of discretionary trusts.

Section 153A operates for the purposes of section 154A, under which the total direct or indirect interest that one entity has in another entity through an ownership chain may be determined. A trustee of a discretionary trust may be a ‘higher entity’ or a ‘lower entity’ referred to in that section, but not the ‘main entity’ that is being acquired (refer to section 152 amendments in clause 60).

Section 153A applies where a trustee of a discretionary trust is an entity in an ownership chain referred to in section 154A and provides the
following:

(a) This paragraph restates section 157(4) and applies where the discretionary trustee is the lower entity referred to in section 154A. It provides that an entity has an interest in a trustee of a discretionary trust if it is a potential beneficiary under the trust. This is subject to paragraph (c).

(b) This paragraph is new and applies where the discretionary trustee is the higher entity referred to in section 154A. It clarifies for that a trustee of a discretionary trust has an interest in an entity if the trust property includes the interest.

(c) This paragraph essentially restates section 158 and provides that the percentage interest an entity has in a discretionary trustee is a 100 per cent interest, or if the Commissioner decides that this would be inequitable, some other interest or no interest.

The following example illustrates how section 153A applies.

- A Pty Ltd is a beneficiary under the X Discretionary Trust and therefore has an interest in the trustee X Pty Ltd (paragraph (a)).
- The interest of A Pty Ltd in X Pty Ltd is 100 per cent unless the Commissioner determines otherwise (paragraph (c)).
- X Pty Ltd has an interest in B Pty Ltd because the property of X Discretionary Trust includes that interest (paragraph (b)).

153B. References to interest in, or held by, partnership

This section amalgamates and replaces the provisions currently contained in sections 156(6) and 159 for determining interests in partnerships.

As with section 153A, section 153B operates for the purposes of section 154A, under which the total direct or indirect interest that one entity has in another entity through an ownership chain may be determined. A partnership may be a ‘higher entity’ or a ‘lower entity’ referred to in that section, but not the ‘main entity’ that is being acquired (refer to section 152 amendments in clause 60).

Section 153B applies where a partnership is an entity in an ownership chain referred to in section 154A and provides the following:
(a) This paragraph essentially restates the start of section 156(6) and applies where the partnership is the lower entity referred to in section 154A.

It provides that an entity has an interest in a partnership if it is a partner in the partnership. Where the entity is a unit trust scheme, it will have an interest in a partnership if the trustee of the scheme is a partner in the partnership (see also paragraph (c)).

(b) This paragraph is new and applies where the partnership is the higher entity referred to in section 154A. It clarifies that a partnership has an interest in an entity if the partnership property includes the interest.

(c) This paragraph essentially restates section 159 and describes how to calculate the percentage interest that an entity has in a partnership. This is the greater of the capital the entity is required to contribute or loss it is required to bear.

The following example illustrates how section 154A applies.

- **A Pty Ltd has an interest in the Partnership because it is a partner in the Partnership (paragraph (a)).**

- **The percentage interest of A Pty Ltd in the Partnership is taken to be the greater of the capital it is required to contribute or the losses it is required to bear (paragraph (c)).**

- **The Partnership has an interest in C Pty Ltd because the partnership property includes that interest (paragraph (b)).**

**Clause 63: Section 154 amended**

Section 154 sets out the rules for calculating an interest in a landholder or entity. This clause makes the following consequential amendments to section 154.

Subclause (1) amends subsection (3) to replace the reference to ‘section 158 or 159’ with a reference to ‘section 153A(c) and 153B(c)’. The former sections have been deleted and their contents are now the subject of new sections 153A and 153B.

Subclause (2) amends subsection (6)(d) to remove the reference to deleted section 164.
The section heading is also amended.

Clause 64: Sections 154A and 154B inserted

This clause inserts new sections 154A and 154B at the end of Chapter 3 Part 3.

Section 154A sets out how to determine the total direct and indirect interest one entity (the higher entity) has in another entity (the lower entity). The concept of an ownership chain is introduced to capture an indirect interest that a higher entity holds in a lower entity through a series of entities that each successively have a direct interest in the next entity.

The effect of this section is that an entity will be linked to an unlisted entity (under section 156) where the first entity has a total direct or indirect interest of at least 50 per cent (or at least 90 per cent) in the other entity. This includes where the interest is held through a combination of direct or indirect interests or through multiple ownership chains.

When determining if an entity is linked to another entity, current section 156(8) deems an uncompleted agreement to acquire or dispose of an interest in another entity to be completed or disregarded (as relevant). However, this concept needs to apply more broadly than just for the linked entity provisions. The subsection has been replaced with new section 154B, which sets out how an uncompleted agreement is taken into consideration when determining the interest that an entity has in another entity.

154A. Calculating total direct or indirect interest in entity

An entity is a landholder if it, or a linked entity, is entitled to land assets in Western Australia valued at $2 million or more.

Currently, an entity is linked to another entity if:

- for a listed corporation or unit trust scheme – it has an interest of at least 90 per cent in the other entity; or
- for any other case – it has an interest of at least 50 per cent in the other entity.

Where entities are linked, a proportionate share of any land assets held by the linked entity are taken into account when determining if the landholder threshold is met. Any land assets and chattels held by the linked entity will be taken into account in the calculation of landholder duty. This captures the value of land assets that are not held directly by the entity in which the acquisition occurs but are held indirectly through a subsidiary.

For example, an entity in which an acquisition occurs (the main entity) does not hold land assets but has a 50 per cent interest in another
entity which holds land assets of $10 million. Because of the linked entity provisions, the first entity is entitled to land assets valued at $5 million and is therefore a landholder.

An entity may be indirectly linked via multiple ownership ‘chains’ to another entity that holds land assets. For the linking to be maintained, each entity must have a direct interest of at least 50 per cent in the next entity in the chain (or 90 per cent in the case of listed entities).

If any entity in the chain has an interest in the next entity of less than 50 per cent, the ownership chain fails and the interest in the lowest entity’s land assets cannot be taken into account. This is the case even where the main entity has an aggregate indirect interest in the land asset holding entity of at least 50 per cent.

To overcome this problem, this clause inserts new section 154A, which describes how to calculate the ‘total direct or indirect interest’ that one entity has in another. When an entity has a total direct or indirect interest in an unlisted entity of at least 50 per cent, the entities will be linked under section 156.

Section 154A provides as follows:

**Subsection (1)** provides that the section applies where there is an acquisition of an interest in a ‘main entity’ and it is necessary in relation to that acquisition to determine the total direct or indirect interest that a ‘higher entity’ has in a ‘lower entity’.

**Subsection (2)** states that a higher entity has a direct or indirect interest in a lower entity if there are one or more ownership chains between the entities.

**Subsection (3)** provides that an ownership chain exists if:
- the higher entity has a ‘direct interest’ in the lower entity, as defined in whichever of section 153 (corporation or unit trust scheme), 153A (discretionary trustee) or 153B (partnership) is applicable; or
- there is a series of at least three entities, including the higher entity and lower entity, each of which successively has a direct interest in the next.

**Subsection (4)** provides that the percentage interest that a higher entity has in a lower entity is:
- for a direct interest – the percentage calculated under section 153A(c), 153B(c) or 154 as applicable; or
- for a series of at least three entities – the percentage calculated by multiplying the higher entity’s direct interest in the next entity, and so on until the lower entity. This provision has been transferred from current section 157(3).

**Subsection (5)** provides that the total direct or indirect interest that a higher entity has in a lower entity is the aggregate of the percentage amounts calculated under subsection (4) for each ownership chain.

*Example 1*
• Under the current provisions, A Pty Ltd is not linked to D Unit Trust because neither B Unit Trust nor C Pty Ltd is linked to D Unit Trust. This causes both chains to fail.

• Under new section 154A, A Pty Ltd has a total direct or indirect interest in D Unit Trust of 50 per cent.

• Under amended subsection 156(4)(b), A Pty Ltd is now linked to D Unit Trust.

**Example 2**

• Under the current provisions, A Pty Ltd is not linked to E Pty Ltd.

• A Pty Ltd is a beneficiary of C Discretionary Trust and is taken to have an interest in C Pty Ltd under section 153A(a).

• Under section 153A(c)(i), the interest of A Pty Ltd in C Pty Ltd is taken to be 100 per cent.

• Under new section 154A, A Pty Ltd (higher entity) has a total direct or indirect interest of 100 per cent in E Pty Ltd (lower entity).

• Under amended section 156(4)(b), A Pty Ltd is now linked to E Pty Ltd.

• If the Commissioner determines under section 153A(c)(ii) that
A Pty Ltd has (for example) no interest in C Pty Ltd, the total direct or indirect interest of A Pty Ltd in E Pty Ltd will be reduced to 60 per cent. They will still be linked.

154B. Determining interest in entity: uncompleted agreements

This section sets out the rules for determining the interest that an entity has in another entity where there is an uncompleted agreement to acquire, or dispose of, an interest in the other entity.

The section has been transferred from current section 156(8). This ensures that all provisions for determining an interest in an entity (sections 153, 153A, 153B, 154, 154A and 154B) are together in Part 3 of Chapter 3.

Section 154B refers to an interest that an entity has in another entity, rather than an entity being linked to another entity. This is because an entity’s interest in another entity must be established to determine whether the entities are linked.

Paragraph (a) provides that where there is an agreement for the entity to acquire an interest in the other entity, the agreement is to be regarded as having been completed.

Paragraph (b) provides that where there is an uncompleted agreement for the entity to dispose of an interest in the other entity, the agreement is to be disregarded.

Where an agreement referred to in paragraph (a) is terminated without completion, or an agreement referred to in paragraph (b) is completed, the assessment and reassessment provisions of sections 195 and 195B apply. These provisions allow the Commissioner to make an assessment or reassessment taking into account an agreement that is terminated or completed.

Clause 65: Section 155 amended

The transfer duty chapter allows different transactions relating to separate items of dutiable property to be aggregated and assessed as a single transaction when the transactions are the result of substantially one arrangement. This is an anti-avoidance provision to prevent taxpayers from entering into separate contracts to reduce duty.

This clause introduces equivalent provisions into the landholder duty chapter to apply duty to the following acquisitions that form or arise from substantially one arrangement:

- An acquisition in a landholder and another entity that only holds chattels. The other entity will be treated as a landholder and duty will be assessed on the total value of the land and chattels of both entities.

- Acquisitions in two or more entities that are not landholders but together have a land value of $2 million or more. The entities will be treated as landholders and duty will be assessed on the combined land value.

- An acquisition in a landholder and another entity that is entitled to
land of less than $2 million. The other entity will be treated as a landholder and duty will be assessed on the total value of the land and chattels of both entities.

Where these acquisitions occur within 12 months and have the same acquirer, the acquisitions are deemed to arise from substantially one arrangement unless the Commissioner is satisfied to the contrary.

This clause amends section 155 as follows.

Subclause (1) makes a consequential amendment to subsection (1) to remove the redundant reference to section 164, which is being deleted.

Subclause (2) amends subsection (2) to replace the references to a 'corporation' with an 'entity', which means both a corporation and a unit trust scheme. The reference to 'land' is also amended to 'land assets'.

Subclause (3) deletes subsections (3) and (4). Subsection (3) is redundant as unit trust schemes are now dealt with under subsection (2). Subsection (4), which details when a partnership or unit trust scheme that is a linked entity is entitled to land, is being removed because it is now contained in section 149(2).

Subclause (3) also inserts new subsections (3), (4) and (4A).

Subsection (3) provides that an entity which is not a landholder as described in subsection (2) is a landholder if:

- the entity, or a linked entity, is entitled to land assets or chattels; and
- the acquisition is part of a 'relevant arrangement' under subsection (4).

Subsection (4) provides that an acquisition of an interest in a 'relevant entity' is part of a relevant arrangement for the purposes of subsection (3) if:

- there are one or more acquisitions in one or more 'other entities' (whether before or after the acquisition in the relevant entity); and
- the acquisitions in the relevant entity and other entities arise from substantially one arrangement; and
- either or both of the following applies:
  - at least one of the other entities is a landholder under subsection (2);
  - the total value of entitlements to land assets referred to in subsection (4A) is $2 million or more.

Subsection (4A) provides that the total value of the following entitlements is to be determined:

- the entitlements to land assets (immediately before the acquisition of the interest in the relevant entity) of the relevant entity and each entity linked to the relevant entity;
- the entitlements to land assets (immediately before the acquisition of
the interest in each of the other entities) of that other entity and each entity linked to that other entity.

Subclause (4) amends subsection (5) to replace the reference to ‘land’ with ‘land assets’ and to replace the reference to ‘a corporation or the trustee of a unit trust scheme’ with ‘an entity’.

Subclause (5) inserts new subsection (6) after subsection (5). This provides that an entity that is a landholder in relation to an acquisition under subsection (3) is taken to be a landholder, even if the acquisition does not become part of a relevant arrangement until after the acquisition occurs.

**Example 1 – Acquisitions in a landholder and other entities that are not landholders**

<table>
<thead>
<tr>
<th>Entity</th>
<th>Value of Land</th>
<th>Chattels</th>
</tr>
</thead>
<tbody>
<tr>
<td>B Pty Ltd</td>
<td>$&lt;2M</td>
<td>100%</td>
</tr>
<tr>
<td>C Pty Ltd</td>
<td>50%</td>
<td>50%</td>
</tr>
<tr>
<td>D Pty Ltd</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

- A Pty Ltd acquires interests in each of B Pty Ltd, C Pty Ltd and D Pty Ltd under one arrangement.
- B Pty Ltd is a landholder under section 155(2), however C Pty Ltd and D Pty Ltd are not.
- Subsection (4) applies to each ‘relevant entity’, being C Pty Ltd and D Pty Ltd, to determine whether they are landholders under section 155(3).
- For relevant entity C Pty Ltd, one of the other entities (B Pty Ltd) is a landholder under subsection (2). In this case subsections 4(c)(i) and 4(c)(ii) are both satisfied. The outcome will be the same result for relevant entity D Pty Ltd.
- The acquisitions in each of C Pty Ltd and D Pty Ltd are therefore part of a relevant arrangement, and they are landholders under subsection (3).
- Duty will be assessed on the total value of land and chattels held by B Pty Ltd, C Pty Ltd and D Pty Ltd.

**Example 2 – Acquisitions in two or more entities that are not**
landholders

- This example is similar to example 1, except that none of the acquired entities is a landholder under subsection (2).

- The total value of all land entitlements of the acquired entities is more than $2 million, which means subsection (4)(c)(ii) is satisfied for each entity. As result, there is a relevant arrangement in each case and B Pty Ltd, C Pty Ltd and D Pty Ltd all landholders under subsection (3).

- Duty will be assessed on the total value of land and chattels held by B Pty Ltd, C Pty Ltd and D Pty Ltd.

Clause 66: Section 156 amended

This section sets out when entities are 'linked' to each other for the purposes of determining if an entity is a landholder under section 155.

As noted above, under the current linked entity provisions, an entity is linked to another entity if it has:

- for listed entities – an interest of at least 90 per cent in the other entity; and

- for unlisted entities – an interest of at least 50 per cent in the other entity.

This clause broadens the linked entity provisions to ensure that an entity is linked to an unlisted entity where it has a total direct or indirect interest in the other entity of 50 per cent or more.

The key changes to this section relate to the following:

- Removal of references about when unlisted entities such as partnerships and discretionary trustees are linked. All direct and indirect interests in unlisted entities are now calculated under section 154A (which in turn refers to sections 153, 153A and 153B), and the entities are linked if the interest is at least 50 per cent.

- As a higher entity can have an interest in a lower entity via multiple ownership chains, they will be linked provided the higher entity has
an aggregate direct and indirect interest of at least 50 per cent in the lower entity. This will be the case even where any entity in the chain has a direct interest in the next entity of less than 50 per cent. Under the current provisions, this would cause the relevant chain to fail.

This clause amends section 156 as follows.

Subclause (1) amends subsection (1) by replacing the reference to ‘section 155(2)(a) or (3)(a)’ with ‘section 155’. The deleted subsection and paragraph references are no longer valid due to the amendments in section 155.

Subclause (2) amends subsection (2) by replacing the reference to an ‘ownership chain’ with a ‘linkage chain’. The term ‘ownership chain’ now has a different meaning in section 154A. ‘Ownership’ means simply having an interest in an entity, whereas ‘linkage’ means an interest that allows an entity to be linked to another entity for landholder purposes.

Subclause (3) amends subsection (3) by replacing the reference to an ‘ownership chain’ with a ‘linkage chain’.

Subclause (4) deletes subsections (4) to (6). Subsections (5) and (6) are being removed as the matter of whether an entity is linked to the trustee of a discretionary trust, or to a partnership, is now covered by subsection (4)(b). The calculation of the interest is made under section 154A, which in turn refers to section 153A for discretionary trusts and section 153B for partnerships.

Subclause (4) also inserts new subsection (4). It has the same role as the deleted subsection (4), subject to the following variations.

- It refers to an interest of ‘at least’ 90 (or 50) per cent, rather than ‘a 90 (or 50) percent interest, or a greater interest’.
- Paragraph (b) now refers to the total direct or indirect interest calculated under section 154A. The reference to ‘in any other case’ in this paragraph means where the other entity is an unlisted corporation, unlisted unit trust scheme, partnership or trustee of a discretionary trust.

Subclause (5) amends subsection (7) by removing the references to subsections (5) and (6), which are being deleted under subclause (4).

Subclause (6) deletes subsection (8). This subsection sets out the rules for determining whether an entity is linked to another entity where there are uncompleted agreements to acquire or dispose of interests. The subsection has been relocated and now forms new section 154B. This is to ensure that all provisions for determining an interest in an entity (sections 153, 153A, 153B, 154, 154A and 154B) are together in Part 3 of Chapter 3.

Clause 67: Section 156A inserted

A person may acquire interests in multiple entities, each of which has an interest in a landholder. If an acquired entity’s interest in the
landholder is less than 50 per cent, the entities will not be linked. This means that a person can acquire a total indirect interest of 50 per cent or more in a landholder without duty applying.

To overcome this, this clause inserts new section 156A after section 156. New section 156A provides that the acquired entities will be linked to the other entity where:

- there are acquisitions in two or more entities arising from substantially one arrangement; and
- each of those entities has a direct or indirect interest in another entity; and
- the aggregate interest in the other entity is at least 50 per cent.

**156A. Linked entities: acquisitions forming one arrangement**

The following points about this section should be noted.

- It only applies where the interest of at least one of the main entities in the relevant entity is less than 50 per cent. Otherwise, all entities are linked and this section would not be required.
- It does not apply to relevant entities that are listed.
- Under section 204F, where the related acquisitions occur within 12 months and have the same acquirer, the acquisitions are deemed to arise from substantially one arrangement unless the Commissioner is satisfied to the contrary.
- Section 204H allows the Commissioner to reassess duty where an entity is taken to be linked under section 156A because a subsequent acquisition occurred.

**Subsection (1)** provides that subsection (3) applies if:

(a) there are acquisitions of interests in two or more main entities that together arise from substantially one arrangement (related acquisitions); and

(b) either –

(i) (example 1 below) – each of the main entities has a direct or indirect interest in a relevant entity (which is not a listed corporation or unit trust scheme); or

(ii) (example 2 below) – one of the main entities is the relevant entity (which is not a listed corporation or unit trust scheme), and each of the other main entities has a direct or indirect interest in the relevant entity; and

(c) at least one main entity has a total direct or indirect interest in the relevant entity that is less than 50 per cent; and

(d) the aggregated direct or indirect interest in the relevant entity determined under subsection (2) is at least 50 per cent.

**Subsection (2)** provides that the aggregated direct or indirect interest in the relevant entity is:

(a) (in relation to example 1) – the aggregate of the total direct or indirect interests of the main entities in the relevant entity; or

(b) (in relation to example 2) – the aggregate of –
(i) the interests acquired in the relevant entity; and
(ii) the total direct or indirect interests of the main entities (other than the relevant entity) in the relevant entity.

Subsection (3) provides that the relevant entity is taken to be linked, under section 156(2), to each main entity that has a total direct or indirect interest in the relevant entity of less than 50 per cent. Where the interest is at least 50 per cent, they are linked anyway.

Subsection (4) provides that a relevant entity that is taken to be linked to a main entity under subsection (3) is taken to be linked when the acquisition occurs, even if subsection (3) does not become applicable to the acquisition until a later time. This is necessary because the related acquisitions may occur at different times, and the section cannot apply until there are at least two acquisitions.

Subsection (5) provides that, for the purposes of this section, the interest that a main entity has in the relevant entity is to be determined immediately after the acquisition of an interest in the main entity.

Example 1 – Each main entity has an interest in the relevant entity

- X Pty Ltd acquires a 100 per cent interest in main entities A Pty Ltd, B Pty Ltd, C Pty Ltd and D Pty Ltd.
- Each of the main entities has a direct or indirect interest in relevant entity Y Pty Ltd (subsection (1)(b)(i)).
- Under the current linked entity provisions, only D Pty Ltd is linked to the relevant entity. This means only D Pty Ltd is a landholder.
- The interest of each of A Pty Ltd, B Pty Ltd and C Pty Ltd in the relevant entity is less than 50 per cent (subsection (1)(c)). However, the aggregate interest the main entities have in the relevant entity is 100 per cent (subsections (1)(d) and (2)(a)).
- The relevant entity is taken to be linked to each of A Pty Ltd, B Pty Ltd and C Pty Ltd under subsection (3). It is already linked to D Pty Ltd under section 156.
• Section 156A alone does not make any of the main entities landholders. D Pty Ltd is a landholder under section 155(2). A Pty Ltd, B Pty Ltd and C Pty Ltd will be landholders under section 155(3) and (4) as there is a relevant arrangement for the purposes of those provisions.

Example 2 – One main entity is the relevant entity and other main entities have a direct or indirect interest in the relevant entity

Before

After

- D Pty Ltd acquires the 60 per cent interest of A Pty Ltd in X Pty Ltd and the 100 per cent interest of B Pty Ltd in C Pty Ltd.
- X Pty Ltd and C Pty Ltd are both main entities (subsection (1)(a)) while X Pty Ltd is also the relevant entity (subsection (1)(b)(ii)).
- The interest of C Pty Ltd in X Pty Ltd is less than 50 per cent (subsection (1)(c)), and the aggregated direct or indirect interest of the main entities in the relevant entity is 100 per cent (subsections (1)(d) and (2)(b)).
- X Pty Ltd is taken to be linked to C Pty Ltd under subsection (3).

- X Pty Ltd is a landholder under section 155(2). C Pty Ltd will be a landholder under section 155(3) and (4) as there is a relevant arrangement for the purposes of those provisions.
Clause 68: **Section 157 amended**

This section describes what the value of a linked entity's entitlement to land is for the purposes of section 155. Amendments are needed because interests in entities are now determined under section 154A, and some provisions have been relocated to other sections.

This clause amends section 157 as follows.

Subclause (1) amends subsection (1) to replace the reference to 'land' with 'land assets' to reflect the broadening of the landholder duty base to include fixed infrastructure rights and derivative mining rights.

Subclause (2) amends subsection (2) to replace the reference to 'land' with 'land assets'. It also amends subsection (2) so that it refers to the main entity's 'total direct or indirect' interest in the linked entity rather than simply 'interest', and to state that this interest is calculated under section 154A.

Subclause (3) deletes subsections (3) and (4). Subsection (3) can be removed as this provision is now contained in section 154A(4)(b). Subsection (4) can be removed as this provision is now contained in section 153A(a).

The section heading is also amended.

Clause 69: **Sections 158 and 159 deleted**

Section 158 contains provisions for determining the extent of an interest in a discretionary trust. Section 159 contains provisions for determining the extent of an interest in a partnership.

This clause deletes sections 158 and 159. Section 158 is now incorporated in new section 153A, and section 159 is now incorporated in new section 153B.

Clause 70: **Section 160 amended**

Section 160 sets out the ways in which a person may acquire an interest in an entity.

This clause amends section 160 by inserting new subsection (4) after subsection (3). Subsection (4) provides that the section operates subject to section 160A, which is a new section dealing with acquisitions of interests by merger of corporations.

The section heading is also amended.

Clause 71: **Section 160A inserted**

Section 12 of the Duties Act provides that a merger of corporations is taken to be a vesting by statute law of the property in Western Australia.
of the relevant corporation or corporations. This is a dutiable transaction under section 11(1)(d)(i) of the Duties Act and transfer duty is chargeable on any dutiable property taken to be vested.

However, shares in a corporation and units in a unit trust scheme are not dutiable property. This means land assets and chattels will not be subject to duty where it is held by a subsidiary of a merging corporation rather than directly by the corporation itself.

In the first example below, the land held by Merging Corporations A and B will be taken to have been vested in Company C. Transfer duty will apply to the value of the land.

However, as shown in the second example, duty does not apply to the merger where the land is held by a subsidiary of a merging corporation.

This clause inserts new section 160A at the end of Chapter 3 Part 5 Division 1 to apply duty where merging corporations hold land indirectly through subsidiaries.

160A. Acquisition of interest by merger of corporations

Subsections (1) to (3) refer to three different ways that corporations may
be merged. They mirror current subsections 12(3) to (5) respectively but refer to the merging corporations having an interest in an entity rather than property in Western Australia.

Landholder duty will apply to the following mergers:

- Company A merges with and into Company B;
- two or more corporations merge and form Company C;
- two or more corporations merge with and into each other and each merging corporation continues in existence.

Note: Under section 176(3A), an acquisition resulting from a merger of corporations is taken to occur when the merger is completed.

Clause 72: Section 161 amended

Section 161 defines the term significant interest.

This clause deletes the definition and inserts a new one. The new definition:

- refers to an interest of 'at least' 90 (or 50) per cent, rather than 'a 90 (or 50) percent interest, or a greater interest'; and
- substitutes the references to 'corporation' and 'unit trust scheme' with the word 'landholder'.

Clause 73: Section 162 amended

Chapter 3 imposes duty on a relevant acquisition of an interest in an entity that is a landholder. An entity is a landholder if it, or a linked entity, is entitled to land assets in Western Australia valued at $2 million or more.

An acquisition by a person is a relevant acquisition if:

- it results in the person having a significant interest of at least 50 per cent in an unlisted entity or at least 90 percent in a listed entity; or
- the person already holds a significant interest and acquires a further interest.

The interests of related persons are taken into account to determine whether a significant interest is acquired. This overcomes situations where a person divides an acquisition of a significant interest between related persons so that each acquisition is less than a significant interest and landholder duty is avoided.

Section 162(1) sets out the persons that are related for the purposes of determining if there has been a relevant acquisition. This includes family relationships, related corporations, and persons who acquired their interests as part of one arrangement.

Under subsection (2), if satisfied that subsection (3) applies, the Commissioner has discretion to determine for a particular acquisition
that persons are not related persons. Section 162(3) applies to persons if they are not acting in concert with each other, and their interests in the entity were acquired independently and not for a common purpose.

The purpose of the Commissioner’s discretion is to address unfair outcomes that could arise due to the broad scope of the relationships set out in subsection (1).

If the Commissioner is satisfied subsection (3) applies, the Commissioner will usually decide under subsection (2) that the acquirers are not related persons, unless there are exceptional and unusual circumstances not to exercise the discretion to treat them as unrelated.

Paragraphs (a) to (g) of subsection (1) are factually based. In other words, the persons are related if these relationships exist. Subsections (2) and (3) then provide a mechanism for unrelating those persons to cater for circumstances where treating them as related would create an inequitable result.

In contrast, paragraphs (h) and (i) of subsection (1) require the Commissioner to determine whether acquisitions arise from:

• substantially one transaction or series of transactions (paragraph (h)); or

• persons acting in concert with each other (paragraph (i)).

In these cases, the Commissioner’s decision that the acquirers are related should not be undone by the discretion to treat them as not related. Acquirers in these situations are specifically related because of their joint conduct in acquiring their interests in the landholder, rather than being related by existing circumstances such as family relationships. On that basis, it is not an unfair outcome to aggregate the acquirers’ interests.

The discretion does not apply to acquirers that are related corporations. This qualification is extended so that subsections (2) and (3) also do not apply where it is determined that persons are related under subsection (1)(h) or (i).

Section 162(3) applies if persons are not acting in concert with each other and their interests were acquired independently and not for a common purpose.

Determining if persons were acting in concert with each other requires the Commissioner to also determine whether those persons had a common purpose for their acquisitions. This usually means establishing if there was an arrangement or understanding between those persons.

This subsection is difficult to administer as an arrangement or understanding between the acquirers may not be in writing. Even if the
agreement is in writing, the relevant documents may not be provided to
the Commissioner to make an informed decision. It is also difficult to
interpret where acquisitions are made at separate times.

To overcome these problems, the test in subsection 162(3) is amended
to delete the requirement for the parties not to be acting in concert.
This will allow the Commissioner to consider only objective factors
about whether the interests in the entities:

- were acquired independently and will be used independently; and
- were not acquired for a common purpose and will not be used for a
  common purpose.

Commissioner’s Practice DA 2 ‘Landholder Duty – Related Persons and
Commissioner’s Discretion’ sets out the factors the Commissioner will
consider when determining if persons should be related for the
purposes of section 162.

Persons or entities that acquire their interests under a public float or
public offering are related under section 162(1)(h) because their
acquisitions arise from one arrangement. Under the practice, the
Commissioner will determine the acquirers are not related in these
circumstances. As this has been the Commissioner’s practice since the
Duties Act commenced, amended section 162 will provide that
subsections (1)(h) and (i) do not apply where the acquisitions result
from a public float or in prescribed circumstances.

The term public float is now defined in section 3 by reference to the
meaning in section 257.

The regulation-making power will allow other circumstances to be
prescribed where it is considered inequitable to relate persons. A
retrospective regulation can be made where it does not adversely affect
taxpayers.

This clause amends section 162 as follows:

Subclause (1) amends subsection (1) by:
- removing the reference to section 164, which is being deleted; and
- amending paragraph (h) to refer to acquisitions arising from an
  arrangement, rather than a transaction or series of transactions. This
  aligns the paragraph with the other aggregation provisions in the
  Duties Act.

Subclause (2) inserts new subsection (1A) after subsection (1). This
provides that subsections (1)(h) (one arrangement) and (1)(i) (acting in
concert) do not apply where the acquisitions arise from a public float, or
in prescribed circumstances.

Subclause (3) amends subsection (2) by:
- removing the reference to related corporations, as these are now
dealt with under new subsection (2A); and
- removing the reference to section 164, which is being deleted.
Subclause (4) inserts new subsection (2A) after subsection (2). This provides that the Commissioner cannot apply subsection (2) (to unrelate persons) where those persons are related under subsection (1)(c) (related corporations), (h) (one arrangement) or (i) (acting in concert).

Subclause (4) also replaces subsection (3) with a new subsection (3). The subsection as replaced does not contain paragraph (a), which refers to persons not acting in concert with each other. Paragraphs (b)(i) and (ii) from the deleted subsection are restated as paragraphs (a) and (b).

The section heading is also amended.

**Clause 74: Sections 163 and 164 replaced**

Section 151 imposes duty on a relevant acquisition of an interest in an entity that is a landholder. Current sections 163 and 164 define when an acquisition by a person of an interest in an entity is a relevant acquisition.

Section 163 provides that an acquisition is a relevant acquisition if:

- immediately before the acquisition – any interest of the person and any related person did not amount to a significant interest; and
- after the acquisition – the interest of the person, whether alone or aggregated with any interest of a related person, amounts to a significant interest.

Section 164 provides that an acquisition is also a relevant acquisition if:

- immediately before the acquisition – the interest of the person, or any related person, or the person and any related person, is a significant interest; and
- by the acquisition – the person or related person, or the person and a related person, acquires a further interest.

A significant interest is defined to mean:

- for a listed corporation or unit trust scheme – an interest of at least 90 per cent; and
- otherwise – an interest of at least 50 per cent.

Under the land rich provisions of the Stamp Act it was irrelevant whether a person acquired a significant interest from a related or an unrelated person. An acquisition of a significant interest from a related person was chargeable with duty. This is also the outcome under the respective landholder/land rich regimes of all other jurisdictions.

Section 163 requires that the acquirer or any related persons must not have a significant interest before the acquisition. This means an acquisition of a significant interest by a person from a related person who already holds a significant interest cannot be a relevant acquisition under section 163. This type of acquisition was intended to be captured under section 164 as the acquisition of a further interest; however, as drafted, this outcome is not achieved.

The wording of section 164 has the result that an acquisition involving related persons will only be a relevant acquisition where the aggregated
interest of the acquirer and any related persons increases. This interpretation means that landholder duty does not apply to the following acquisitions because there has been no change in the aggregated interests of the persons:

- a person has a 50 per cent interest in a landholder and acquires the remaining 50 per cent interest from a related person; or
- two related persons have an aggregate 50 per cent interest in a landholder and one of the persons acquires the other person’s 25 per cent interest; or
- a person acquires a 100 per cent interest in a landholder from a related person.

The explanatory materials for the Duties Bill 2007 support that the transition from the land rich provisions to the landholder provisions was not intended to represent a fundamental policy change to allow landholder acquisitions between related persons to occur without duty applying. The introduction of the Duties Act that has resulted in the inequitable treatment of landholder acquisitions and significant ongoing revenue leakage.

These amendments restore the policy intent by applying duty to relevant acquisitions between related persons.

This clause deletes sections 163 and 164 and inserts new section 163.

163. Relevant acquisitions

Subsection (1) provides that an acquisition by a person (‘acquirer’) of an interest in an entity that is a landholder is a relevant acquisition in any of the circumstances described in paragraphs (a) to (d). The reference to ‘any’ indicates that one or more of these paragraphs may apply to an acquisition.

(a) The acquirer did not have a significant interest before the acquisition but has a significant interest after the acquisition.

Example 1

<table>
<thead>
<tr>
<th>Before acquisition</th>
<th>After acquisition</th>
</tr>
</thead>
<tbody>
<tr>
<td>A Pty Ltd</td>
<td>A Pty Ltd</td>
</tr>
<tr>
<td></td>
<td>Acquirer</td>
</tr>
<tr>
<td>40%</td>
<td>60%</td>
</tr>
<tr>
<td>B Pty Ltd</td>
<td>B Pty Ltd</td>
</tr>
<tr>
<td>Landholder</td>
<td>Landholder</td>
</tr>
</tbody>
</table>

A Pty Ltd has acquired a 20 per cent interest in addition to its existing 40 per cent interest and now has a significant interest of 60

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*See, for example, Explanatory Notes to the Exposure Draft cl 159; Explanatory Memorandum, Duties Bill 2007 cl 164.*
per cent.

**Example 2**

B Pty Ltd has acquired a significant interest of 60 per cent from a related person. It is irrelevant that the aggregated group interest (group interest) is 100 per cent before and after the acquisition.

(b) The group interest is not a significant interest before the acquisition but is a significant interest after the acquisition.

**Example 3**

A Pty Ltd and B Pty Ltd are related to the acquirer D Pty Ltd. The group interest has increased from 40 per cent to 60 per cent.

**Example 4**

A Pty Ltd increases its interest from 30 per cent to 60 per cent, which increases the group interest from 40 per cent to 70 per cent.
In this scenario there is also an acquisition of a significant interest under paragraph (a), however only paragraph (b) will be applied. The duty outcome is the same in each case due to the meaning of “the interest of the acquirer in a landholder after a relevant acquisition” in section 185.

(c) The acquirer has a significant interest before the acquisition and that interest increases because of the acquisition.

**Example 5**

Before acquisition

- A Pty Ltd
  - 60%
- B Pty Ltd
  - Landholder

After acquisition

- A Pty Ltd
  - Acquirer
  - 70%
- B Pty Ltd
  - Landholder

A Pty Ltd already had a significant interest and has increased its interest from 60 per cent to 70 per cent.

(d) The group interest is a significant interest before the acquisition and that interest increases because of the acquisition.

**Example 6**

Before acquisition

- A Pty Ltd
  - Related person
  - 40%
- B Pty Ltd
  - Related person
  - 10%
- C Pty Ltd
  - Landholder

After acquisition

- A Pty Ltd
  - Related person
  - 40%
- B Pty Ltd
  - Related person
  - 10%
- D Pty Ltd
  - Acquirer
  - 20%
- C Pty Ltd
  - Landholder

Acquirer D Pty Ltd is related to A Pty Ltd and B Pty Ltd. The group
interest was already a significant interest and has now increased from 50 per cent to 70 per cent.

Subsection (2) defines *aggregated group interest* to mean the aggregate of the interest (if any) that the acquirer has in the landholder and all of the interests that related persons have in the landholder.

Clause 75: **Sections 167 and 168 replaced**

This clause deletes sections 167 and 168 and inserts new sections.

167. **Exemption or reduction of duty if nominal duty would be chargeable on transfer**

Current section 167 provides that an acquisition of an interest in a landholder is exempt if nominal transfer duty ($20) would have applied if the landholder’s land had been transferred directly to the acquirer.

In certain circumstances, the transfer duty provisions apply so that nominal duty is charged only ‘to the extent that’ certain requirements are met. Full transfer duty is then charged to the extent the relevant requirements are not met.

For example, subject to certain conditions, a transfer of property under the terms of a will qualifies for nominal duty. If one of the conditions is not met, such as when a beneficiary receives a greater interest in property than they are entitled to under the will, nominal duty applies to the portion transferred in accordance with the will. Full transfer duty applies to the portion that exceeds the entitlement.

As currently drafted, section 167 does not apply where nominal duty would be chargeable on a direct transfer only ‘to the extent’ the nominal duty conditions apply. This means full landholder duty applies to an acquisition that does not meet all the nominal duty requirements.

This clause ensures a partial landholder duty exemption is available in the same circumstances that a partial transfer duty exemption would apply.

Subsection (1) defines the following terms:

- **acquiring person** means the person making the acquisition;
- **notional transfer** means a transfer of the relevant land assets by the relinquishing person to the acquiring person as if the relinquishing person owned the land assets;
- **relevant land assets** means the land assets to which the landholder and each linked entity are entitled;
- **relinquishing person** means the person from whom the interest in the landholder was acquired.

Subsection (2) provides that the section applies to a landholder acquisition if nominal duty would be chargeable to any extent on the notional transfer in relation to the acquisition. This subsection is based on repealed subsection (1), however, it now operates both where the notional transfer would be solely chargeable
with nominal duty and where the notional transfer would be only partly chargeable with nominal duty.

**Subsection (3)** provides that if only nominal duty would be chargeable on the notional transfer, the acquisition is exempt. This is the same outcome as that provided for under deleted subsection (1).

**Subsection (4)** provides that if the notional transfer would be chargeable with nominal duty only to an extent, the duty payable on the acquisition is reduced by the same proportion as the proportion of the notional transfer that would be chargeable with nominal duty.

For example, a notional transfer would qualify for nominal duty to the extent of 25 per cent with transfer duty applying to the other 75 per cent. In this case, landholder duty on the total interest acquired will be reduced by landholder duty on the 25 per cent interest that would have qualified for nominal duty.

**Subsection (5)** restates deleted subsection (2), however it now refers to the ‘relinquishing person’ in the definition of ‘notional transfer’ in subsection (1). These changes do not affect how the subsection operates.

168. **Exemption or reduction of duty if transfer duty would not be chargeable**

Current section 168 is similar to section 167. It provides an exemption from landholder duty where no duty would have been charged if the landholder’s land had been transferred directly to the acquirer. Amendments are required to this section to allow a partial exemption where a direct transfer would have been exempt only to a certain extent.

Section 194 provides a landholder duty concession on certain acquisitions on the winding up of a corporation or unit trust scheme. It is the equivalent of section 29, which provides a concession on the transfer of dutiable property to a shareholder or unit holder on winding up of an entity. These provisions only allow a duty concession if:

- the value of the property transferred to the shareholder or unitholder does not exceed their interest in the entitlement; and
- the winding up is not part of a scheme to reduce duty that would otherwise apply.

Where the person receives property or an interest that exceeds their entitlement, duty applies to this extent. The portion that represents their entitlement is exempt from duty. As a result, a landholder acquisition on winding up of an entity could be assessed for duty under new section 168 and under section 194. Further amendments in section 168 will prevent it from applying to an acquisition to which section 194 applies.

**Subsection (1)** defines the terms *acquiring person, notional transfer, relevant land assets* and *relinquishing person*. These have the
Subsection (2) provides that the section applies to a landholder acquisition if no transfer duty would be chargeable, or duty would be chargeable only to an extent, on the notional transfer in relation to the acquisition. This subsection is based on deleted subsection (1), however, it now operates both where the notional transfer would be fully exempt from duty and where the notional transfer would be partly exempt from duty.

Subsection (3) provides that the acquisition is exempt if no transfer duty would be chargeable on the notional transfer. This is the same outcome as that provided for under deleted subsection (1).

Subsection (4) provides that if the notional transfer would be chargeable with transfer duty only to an extent, the duty payable in respect of the acquisition is reduced by the same proportion as the proportion of the notional transfer on which no transfer duty would be chargeable. This operates in the same way as subsection 167(4) explained above.

Subsection (5) restates deleted subsection (2), however, it now refers to the ‘relinquishing person’ in the definition of ‘notional transfer’ in subsection (1). These changes do not affect how the subsection operates.

Subsection (6) provides that this section does not apply if:
- transfer duty would not be chargeable, or only chargeable to an extent, because of an exemption or reduction under Chapter 6. This is a clarification of the words ‘other than under Chapter 6’ in deleted subsection (1). This provision is needed because the concession provided by section 168 is not intended to apply in circumstances where the notional transfer might be a relevant transaction between connected entities; and
- section 171 or 194 applies to the acquisition. The reference to section 171 (which provides an exemption for an acquisition in a landholder engaged in primary production) restates deleted subsection (3), while the issue about section 194 is discussed above.

Clause 76: Section 171 amended

Section 171 contains the landholder duty family farm exemption for certain acquisitions in corporations that carry on a business of primary production. The conditions for the exemption are generally aligned with the conditions of the family farm exemption in the transfer duty chapter.

Although the landholder duty chapter applies to both corporations and unit trust schemes, the exemption provision does not currently apply to acquisitions of an interest in a unit trust scheme. This means an acquisition in a corporation that uses land in a farming business is treated differently from an acquisition in a unit trust that uses land in a farming business.

In addition, section 171 does not currently apply where the person’s interest in the landholder increases other than by an acquisition of
shares in the corporation, for example, due to a cancellation of another person’s shares.

Subclause (1) deletes the definition of corporation in subsection (1) because the exemption provision is being amended to extend to unit trust schemes.

Subclauses (2)(a) to (c) and subclause (e) amend subsection (2) to replace the references to ‘corporation’ with ‘landholder’, which means both a corporation and a unit trust scheme. The references to ‘land’ are replaced with ‘land assets’ to reflect the broadening of the landholder duty base to include fixed infrastructure rights and derivative mining rights.

Subclause (2)(d) deletes the reference to subsections 102(3), (5) and (6) from section 171(2)(a)(ii) because subsections (3) and (6) do not need to be considered if section 102(2) is not in place, and subsection (5) is being deleted by clause 39. These are minor technical amendments that do not change the practical effect of the subparagraph.

Subclause (3) inserts new subsection (2A). The subsection provides that if the acquirer did not acquire the interest in the landholder from another person, a reference to the person from whom the interest was acquired is to be read as a reference to the person whose interest is decreased because of the acquisition, or whose decrease in interest resulted in the acquisition.

This extends the exemption to acquisitions that occur other than by a direct transfer of an interest in a landholder from one person to another. The amendment also aligns section 171 with the general exemption provision in section 168.

Subsection (3) deals with leased land that is used in the business of primary production. Subclause (4) amends subsection (3) to limit its application to a land asset that is land.

The section heading is also amended.

Clause 77: Section 172 amended

Section 172 provides a partial exemption for an acquisition in an entity that holds land used in a farming business and other land that would be subject to duty if transferred directly.

Subclause (1) makes consequential amendments to subsection (1) by replacing the references to ‘corporation’ with ‘landholder’ and the references to ‘land’ with ‘land assets’. The amendments are required because of the exemption being extended to unit trust schemes and the broadening of the landholder duty base.

Subclause (2) amends subsection (2) to replace the reference to ‘land’ with ‘land assets’ and the reference to ‘corporation’ with ‘landholder’.

The section heading is also amended.
Clause 78:  Section 173 amended

Section 173 reverses an exemption granted under section 171 if the acquirer is the trustee of a discretionary trust and there is a material change to the operation of the discretionary trust after the exemption is granted.

Subclause (1) makes consequential amendments to subsection (1) by replacing the references to ‘corporation’ with ‘entity’ and the reference to ‘land’ with ‘land assets’. ‘Entity’ includes both a corporation and a unit trust scheme.

Subclause (2) amends subsection (2)(a) by inserting ‘the transferor or’ after ‘that is not’. The effect is that a duty liability could be triggered if a person who is not the transferor or a family member of the transferor becomes a beneficiary after the transaction. This reflects the amendment in the transfer duty exemption provision, which now allows the transferor to be a beneficiary of a transferee discretionary trust.

Subclause (3) makes a consequential amendment to section 173(4)(a) to replace the reference to ‘corporation’ with ‘entity’.

Clause 79:  Section 174 amended

Section 174 provides that an acquisition in a landholder that uses land in a farming business is not exempt if the interest was the subject of an exempt acquisition that occurred within the last five years.

This clause makes consequential amendments to section 174 by replacing the references to ‘corporation’ with ‘landholder’ and the reference to ‘land’ with ‘land assets’.

Clause 80:  Section 176 amended

Section 176 sets out when a landholder acquisition occurs. It provides that “if there is an agreement for the making of the acquisition”, the acquisition occurs when the agreement is made.

If an agreement is terminated without being completed, section 196 allows the Commissioner to reassess duty disregarding the agreement. However, section 197 provides that the Commissioner is not to reassess an agreement unless satisfied the agreement was not terminated as part of a scheme or arrangement to achieve the object of the agreement in another way.

There is a significant avoidance opportunity where an agreement is terminated without being completed before an assessment is made. In this case, there no longer ‘is’ an agreement for the acquisition; there only ‘was’ an agreement.

This means liability to duty on the agreement is extinguished and the Commissioner is unable to consider whether duty should continue to apply to the agreement because it was terminated as part of a scheme or arrangement to achieve the object of the agreement in another way.

The transfer duty chapter contains an exemption for cancelled transactions. However, duty remains chargeable on a cancelled
transaction if an agreement was terminated to allow a different purchaser to acquire the property or the Commissioner considered that the parties terminated the agreement to enter into a new contract to avoid or reduce the duty on the transaction. A cancelled agreement for a landholder acquisition should be treated consistently.

This clause amends section 176 as follows.

Subclause (1) deletes subsections (1) and (2) and inserts new subsections.

Subsection (1) essentially restates deleted subsection (1) with the following variations.

- It operates subject to section 204G as well as remaining subject to section 173(4)(c). Section 204G modifies the operation of section 176 in circumstances where there are multiple acquisitions occurring under one arrangement.
- It refers to an acquisition of an interest in an entity, rather than in a landholder. This reflects that an entity might only be taken to be a landholder after an agreement is made, for example, where section 204G applies.

Subsection (2) fulfils the same function as deleted subsection (2), but with several variations.

- It now commences “If an agreement is made for the making of the acquisition...”. The effect of this is that the acquisition will continue to be taken to have occurred when the agreement was made, even if the agreement has been terminated. This is because termination does not alter the fact the agreement was made.
- In addition to providing that an acquisition is taken to occur when an agreement is made, it also provides that the interests of persons in the entity are to be determined as if the agreement had been completed. This removes any doubt that the current provision only operates to determine a time at which a liability to duty arises, by making it clear that an interest is also taken to have been acquired in the entity when an agreement is made.

Subclause (2) inserts new subsection (3A) after subsection (3). This provides that an acquisition resulting from a merger of corporations under section 160A occurs when the merger is completed.

Subclause (3) makes a consequential amendment to subsection (4) to include a reference to new subsection (3A).

**Clause 81:** Section 177 amended

Section 176 sets out when an acquisition of an interest in an entity occurs. Section 177 provides that, for the purposes of section 176, when a simultaneous put and call option in relation to an interest in a landholder comes into existence, the call option is taken to be an agreement for the making of an acquisition by the holder of the call option.

This clause amends subsection (2) to provide that the section also operates for the purposes of section 154B when determining the
interest that one entity has in another entity. This is because the agreement resulting from the simultaneous put and call option coming into existence is, while the option remains on foot, an uncompleted agreement that should be regarded as having been completed.

For example, if Entity A is the holder of a call option under a simultaneous put and call option in relation to an acquisition of an interest in a landholder, the deemed agreement resulting from the simultaneous put and call option will be regarded as having been completed. This will be relevant where there is an acquisition of an interest in Entity A.

This clause also amends the Note at the end of the section to include references to all the new sections that relate to the assessment or reassessment of duty where a deemed agreement is not completed.

**Clause 82: Section 179 amended**

Section 179 sets out who is liable to pay duty on a relevant acquisition.

This includes at subsection (2)(d) any person “taken into account” under section 163 or 164 as related to the acquirer for the purposes of the acquisition. There can be uncertainty about which related persons were taken into account in determining whether there was a relevant acquisition.

Under the current drafting, a person can still be liable to pay landholder duty even if they do not have an interest in the landholder after the acquisition occurs.

This clause amends subsection (2)(d) so that the liable person is anyone who is a related person of the acquirer and has an interest in the landholder immediately after the acquisition.

Related persons are defined in section 162.

**Clause 83: Section 180 amended**

Section 180 provides that certain persons may, within two months after an acquisition, apply to the Commissioner for a determination of whether there is any liability for landholder duty on the acquisition.

The persons that may apply include, at subsection (2)(b), any person that “may be taken into account” under section 163 or 164 as being related to the acquirer for the purposes of the acquisition.

This section requires amending in a similar manner to section 179.

This clause amends subsection (2)(b) so that the person that may apply is anyone who is a related person of the acquirer and has an interest in the entity immediately after the acquisition.

**Clause 84: Section 185 amended**

Section 188 sets out how to calculate the duty payable for a relevant
acquisition. An amount is first calculated by applying the appropriate rate of duty to the value of “the interest of the acquirer in the landholder immediately after the relevant acquisition”. (The amount is then reduced by the value of any excluded interest).

Section 185 provides that a reference to the interest of the acquirer in a landholder after a relevant acquisition is to the aggregated interests of the acquirer and any related person taken into account in relation to the acquisition for the purposes of section 163 or 164.

This section requires amending in a similar manner to sections 179 and 180.

This clause amends section 185 as follows:

- a reference to the aggregated interests is inserted in the chapeau to mean those interests immediately after the acquisition; and
- paragraph (b) is amended to refer to each person that is a related person of the acquirer and has an interest in the landholder.

Clause 85: Section 186 amended

This section describes what the value of a landholder is for the purposes of calculating duty on a relevant acquisition. This is the total of the value of property to which the landholder is entitled and a percentage of the value of property to which a linked entity is entitled.

Subclause (1) replaces subsection (1)(a) and (b) with new subsections that have the following changes:

- The references to ‘land’ are amended to ‘land assets’. This reflects the broadening of the landholder duty base to include fixed infrastructure rights and derivative mining rights.
- The reference in paragraph (b) to the interest in a linked entity taken into account under section 157 is amended to refer to the total direct or indirect interest in the linked entity calculated under section 154A. This amendment is to ensure consistency with the amendments to section 157(2), which now refer to the main entity’s total direct or indirect interest in the linked entity calculated under section 154A.

Subclause (2) deletes subsection (2A). This subsection provided a way to use section 157 to determine the interest in a linked entity that was not entitled to land. This was necessary because section 157 only applies where a linked entity is entitled to land. As the interest is now calculated under section 154A rather than section 157, subsection (2A) is not required.

Clause 86: Section 187 amended

Section 187 sets out how to determine the interest of an acquirer where there has been an acquisition of a further interest in a listed landholder. This clause amends subsection (1)(a) to clarify that the interest of an acquirer in a landholder is one held after the relevant acquisition.

Clause 87: Section 189 amended

Section 188 provides that to calculate the duty payable for a relevant
acquisition:
• an amount is first calculated by applying the appropriate rate of duty to the value of the interest of the acquirer in the landholder immediately after the relevant acquisition; and
• if applicable, the amount is reduced by the duty that applies to the value of any ‘excluded interest’.

Excluded interests are defined in subsection (2) and are essentially interests:
(a) held more than three years before the acquisition;
(b) acquired within the period of three years before the acquisition and upon which duty was chargeable; or
(c) acquired where the landholder was not entitled to land.

The Commissioner considers the proper interpretation of section 189 is that an excluded interest must be an interest that is presently held at the time of the relevant acquisition; but does not form part of the interest acquired by the relevant acquisition.
This clause amends section 189 to put this interpretation beyond doubt.

Subclause (1) amends subsection (2) as follows:
• The start of subsection (2) is amended to clarify that an excluded interest is an interest held after the relevant acquisition, other than the interest acquired by that acquisition.
• Subsection (2)(b) relates to interests that are excluded because they are acquired within three years before the relevant acquisition. This subsection is amended to delete the reference to the interest being excluded only to the extent that it is held immediately before the relevant acquisition. This provision is now redundant because of the amendment to subsection (2).
• A consequential amendment is made to subsection (2)(c) to refer to ‘land assets’ rather than ‘land’. This reflects the broadening of the landholder duty base to include fixed infrastructure rights and derivative mining rights.

Subclause (2) amends subsection (4)(a) to refer more specifically to ‘section 163(1)(a) or (b)’ as a result of the amendments made to that section.

Clause 88: Section 193 amended
Section 193 applies to the calculation of duty where periodical statements relating to acquisitions of further interests are lodged under section 201.

This clause makes a consequential amendment to subsection (1) to refer to ‘section 163(1)(c) or (d)’ rather than ‘section 164’. Section 164 has been deleted and its provisions are now incorporated in section 163.

Clause 89: Section 195A amended
Subclause (1) makes consequential amendments to subsections (1)
and (2) to include a reference to ‘agreement’ after the references to ‘acquisition statement’. This is because section 200 has been amended to allow an agreement for the making of an acquisition to be lodged in place of an acquisition statement.

Subclause (2) amends subsection (5) to change the references to ‘land’ to ‘land assets’. This reflects the broadening of the landholder duty base to include fixed infrastructure rights and derivative mining rights.

Clause 90: Chapter 3 Part 6 Division 6 heading replaced

This clause deletes the heading to Chapter 3 Part 6 Division 6 and inserts:

Division 6 – Assessment or reassessment of liability for landholder duty if uncompleted agreements terminated or completed

Clause 91: Sections 195B and 195C inserted

This clause inserts sections 195B and 195C at the beginning of Chapter 3 Part 6 Division 6.

195B. Assessment of duty where s.149(1) or 154B applied at acquisition time

When there is an acquisition of an interest in a landholder, the following agreements entered into by the landholder at the acquisition date are taken into consideration to determine the landholder’s entitlement to land assets and chattels:

- an agreement to acquire an interest in land assets or chattels (section 149(1)(a)) or an interest in another entity (section 154B(a)); and
- an agreement to dispose of an interest in land assets or chattels (section 149(1)(b)) or an interest in another entity (refer section 154B(b)).

For the purposes of the landholder acquisition, an agreement to acquire is treated as completed and an agreement to dispose is disregarded. This means the value of the relevant land assets, chattels or interest the subject of the agreement is included for calculating duty.

Under section 195, if an agreement to acquire is terminated without being completed, or when an agreement to dispose is completed, the Commissioner is to make a reassessment disregarding the terminated agreement to acquire or having regard to the completed agreement to dispose.

Where an agreement to acquire is terminated without being completed, a reassessment is subject to the conditions set out in section 197. This section provides that the Commissioner is not to make a reassessment unless satisfied that the agreement was not terminated as part of a scheme or arrangement under which the object of the agreement has been or may be achieved in another way.

Section 195 is drafted on the basis that an assessment was made before the agreement was terminated or completed.
Where an assessment was not made before termination or completion of the relevant agreement, the Commissioner cannot make an assessment that reflects that an uncompleted agreement was completed or terminated after liability for landholder duty arose and before an assessment was made. This creates an inequitable outcome for taxpayers in similar situations that depends only on the timing of an assessment.

New section 195B is the equivalent to section 195 but applies where the main acquisition has not yet been assessed. The section refers to ‘land assets’, ‘chattels’, or ‘land assets and chattels’ because of:

- the amendments to section 149, which now also applies to chattels; and
- the broadening of the landholder duty base to include fixed infrastructure rights and derivative mining rights.

**Subsection (1)** provides that subsection (2) applies if:

(a) at the time a ‘main acquisition’ of an interest in a ‘main entity’ occurs, there is an agreement to which section 149(1)(a) or 154B(a) applies; and

(b) after the main acquisition occurs but before an assessment in relation to the main acquisition is made, the agreement is terminated without being completed.

**Subsection (2)** provides that section 149(1)(a) or 154B(a) applies to the agreement for the purpose of making an assessment in relation to the acquisition, unless the Commissioner is satisfied that the termination of the agreement was not part of a scheme or arrangement under which the object of the agreement has been or may be achieved in another way.

**Subsection (3)** provides that subsection (4) applies if:

(a) at the time a main acquisition of an interest in a main entity occurs, there is an agreement to which section 149(1)(b) or 154B(b) applies; and

(b) after the main acquisition occurs but before an assessment in relation to the main acquisition is made, the agreement is completed.

**Subsection (4)** provides that despite section 149(1)(b) or 154B(b), the agreement is not to be disregarded for the purpose of making an assessment in relation to the acquisition.

**195C. Assessment of duty where s. 176(2) applied at acquisition time**

Under subsection 176(2), if there is an agreement for making a landholder acquisition, the acquisition is taken to occur when the agreement is made. The interests of the persons in the entity are to be determined as if the agreement was completed.

Section 196 provides for a reassessment where section 176(2) applied to an agreement for the making of an acquisition and the relevant
agreement, or a simultaneous put and call option (which is treated as an agreement), is terminated or expires without being completed.

New section 195C is the equivalent to section 196 but applies where the agreement is terminated before an assessment is made. This effect is similar to section 107, which only provides a transfer duty exemption for a cancelled transaction if the transaction was not cancelled to allow a replacement or a subsale transaction to be entered into.

Subsection (1) provides that the section applies where, under section 176(2), an acquisition has been taken to occur when an agreement was made and the agreement is terminated without being completed before an assessment is made.

Subsection (2) provides that section 176(2) continues to apply to the terminated agreement, despite the termination, unless the Commissioner is satisfied that the termination was not part of a scheme or arrangement to achieve the object of the agreement in another way. Subsection (3) provides that section 176(2) ceases to apply if the Commissioner is satisfied as described in subsection (2). This means the acquisition is no longer taken to have occurred when the agreement was made and is not liable for duty as a result.

The following example demonstrates how new section 195C would operate based on the current linked entity provisions. (The amendments in this Bill for linked entities and acquisitions resulting from one arrangement would operate so the acquisitions referred to in steps 2 – 4 would be landholder acquisitions.)

Example
On 1 June 2018, Company Z enters into an agreement to acquire all the shares in Landholder from Company A.

Shortly after, the agreement is terminated without being completed and the transaction is restructured.

Step 1

On 1 July 2018, Company A transfers a 49 per cent interest in Landholder to its wholly owned subsidiary, Company A1. This is not a landholder acquisition because Company A1 does not acquire a significant interest of 50 per cent or more.

Step 2
On 5 July 2018, Company Z acquires a 51 per cent interest in Landholder from Company A. This is a landholder acquisition.

**Step 3**

Immediately after step 2 (also on 5 July 2018) a wholly owned subsidiary of Company Z, Company Z1, acquires a 100 per cent interest in Company A1 from Company A. This is not a landholder acquisition because Company A1 is not linked to Landholder.

**Step 4**

On 10 July 2018, Company Z1 acquires the other 49 per cent interest in
Landholder from Company A1. This is not a landholder acquisition because it is not a significant interest of 50 per cent or more.

At the end of these transactions, Company Z has a total direct and indirect interest of 100 per cent in Landholder. However, only stage 2 triggers a landholder acquisition and duty only applies to 51 per cent of the value of Landholder’s land and chattels.

In this case, the Commissioner would consider the agreement of 1 June 2018 was terminated as part of a scheme to allow Company Z to acquire 100 per cent of Landholder in a different way.

As the Commissioner is not satisfied under section 195C(2), the landholder liability continues on the agreement despite it being terminated. The agreement would be assessed for duty on 100 per cent of the value of Landholder’s land and chattels (as well as to the 51 per cent interest acquired under stage 2).

Clause 92: Section 195 amended

Section 195 provides for a reassessment to be made where:

- an assessment has been made because an agreement to acquire land (section 149(1)(a)) or an interest in an entity (section 154B(a)) has been regarded as being completed, and the agreement is terminated without being completed; or
- an assessment has been made because an agreement to dispose of land [section 149(1)(b)], or an interest in an entity [section 154B(b)], has been disregarded, and the agreement is completed.

This clause makes consequential amendments to the section.

Subclause (1) amends subsection (1)(a) by:

- changing the reference to ‘land’ to refer to ‘land assets’ and ‘chattels’. This reflects both the amendments to section 149 to include chattels and the broadening of the landholder duty base to include fixed infrastructure rights and derivative mining rights.
- changing the reference to section 156(8)(a) to a reference to section 154B(a), which reflects that these provisions have been transferred to section 154B.

Subclause (2) makes similar amendments to subsection (2).

The section heading is also amended.

Clause 93: Section 196 replaced

Under subsection 176(2), if there is an agreement for making a landholder acquisition, the acquisition is taken to occur when the agreement is made. The interests of the persons in the entity are to be determined as if the agreement was completed.

Section 196 provides for a reassessment where section 176(2) applied
to an agreement for the making of an acquisition, and the relevant agreement, or a simultaneous put and call option (which is treated as an agreement), is terminated or expires without being completed.

Section 197 provides that the Commissioner is not to make a reassessment under section 196 unless satisfied that the agreement was not terminated as part of a scheme or arrangement to achieve the object of the agreement in another way.

This clause deletes section 196 and inserts a new section.

196. **Reassessment of duty where s.176(2) applied**

Subsection (1) provides that a reassessment is required where:

- under subsection 176(2), an acquisition was taken to have occurred when an agreement was made, under section 176(2);
- an assessment of duty was made; and
- since that assessment, the agreement has been terminated without being completed.

The new subsection is essentially unchanged from deleted subsection (1) apart from removing the reference to deleted subsection (2).

Subsection (2) provides that if subsection (1) applies, the Commissioner is to make a reassessment disregarding the terminated agreement.

Subsection (3) provides that, once an agreement is terminated without being completed, section 176(2) no longer applies. This allows a reassessment to be made.

Note: Subsections (2) and (4) from the repealed section, which relate to simultaneous put and call options, are not included in new section 196 as they are now the subject of section 197A.

**Clause 94:** **Section 197 amended**

This section provides that the Commissioner cannot reassess a terminated agreement under section 195(3)(a) or 196(3) unless satisfied that the termination was not part of a scheme or arrangement to achieve the object of the agreement in another way.

This clause makes a consequential amendment to the section by amending the reference from section ‘196(3)’ to ‘196(2)’. This is required due to section 196 being replaced. Subsection (2) in new section 196 carries out the same function as subsection (3) in the deleted section.

**Clause 95:** **Section 197A inserted**

A put and call option has been included as an uncompleted agreement for the purposes of determining the interest an entity has in another entity. Specific provisions will describe when an expired put and call option is taken to be terminated.

This clause inserts new section 197A after section 197.
197A. Expired put and call options taken to be terminated

Section 197A essentially restates the provisions of current section 196(2) and (4), which are being repealed.

Subsection (1) defines a call option and put option by reference to section 177. That section provides that where a simultaneous put and call option in relation to an interest in a landholder comes into existence, the call option is taken to be an agreement for an acquisition of the interest.

Subsection (2) provides that where, under section 177, an agreement for the making of an acquisition was taken to exist, the agreement is taken to be terminated without being completed if the call option and put option:

- both expire without being exercised; or
- are both rescinded; or
- one expires and the other is rescinded.

This provision also operates for the purposes of section 200, which imposes an obligation to lodge an acquisition statement. Section 200(6) provides that the obligation continues if an agreement has been terminated without being completed.

Subsection (3) provides that subsection (2) does not apply if the call option has been assigned.

Subsection (4) provides that section 17 of the TAA applies as if the original assessment had been made when the agreement was taken to be terminated where a reassessment is required under section 195 (where the agreement is one to which section 154B applies) or section 196 (where the agreement is one to which section 176 applies). This starts the five-year reassessment time limit.

Where the agreement is taken to be terminated without being completed but has not yet been assessed, section 195B (where the agreement is one to which section 154B applies) or section 195C (where the agreement is one to which section 176 applies) will apply. Under both sections, liability to duty continues to apply unless the Commissioner is satisfied that termination is not part of a scheme to achieve the object of the agreement another way.

Clause 96: Section 200 amended

Section 200 provides that a landholder acquisition statement must be lodged within two months of a relevant acquisition occurring.

A relevant acquisition in a landholder is taken to occur when an agreement for the making of an acquisition is made, or when the interest is acquired if there is no agreement. An acquisition statement is required to provide the Commissioner with information relevant to assessing duty.

Currently, an acquisition statement must be lodged even if there is an
agreement for making a relevant acquisition. This is considered unnecessary red tape, as the information required for assessment purposes is either contained in the agreement or will be provided in other documents such as a valuation report.

These amendments remove the requirement to lodge an acquisition statement where an agreement is lodged before the period to lodge the statement expires. This is similar to the transfer duty arrangements where a statement is only required to be lodged if there is no instrument evidencing or effecting the dutiable transaction.

The obligation to lodge a statement or agreement will continue where an agreement is terminated before it is lodged. As noted above, an acquisition can be taken to occur when an agreement is made. Under sections 195B and 195C, the Commissioner must be satisfied that where an agreement is terminated without being completed, the termination was not part of a scheme to achieve the object of the agreement in another way.

This clause amends section 200 as follows:

Subclause (1) amends subsection (2) to provide that a statement is not required to be lodged where the agreement has been lodged in accordance with subsection (2A).

Subclause (2) inserts subsection (2A) after subsection (2). This provides that if there is an agreement, the agreement may be lodged instead of a statement.

Subclause (3) amends subsection (3) to provide that an agreement under subsection (2A) must be lodged within two months after the relevant acquisition occurs.

Subclause (4) amends subsection (4) to provide that the Commissioner can extend the time allowed to lodge an agreement or statement.

Subclause (5) amends subsection (5) to provide that an application for an extension of time applies in respect of an agreement or statement.

Subclause (6) inserts new subsection (6) after subsection (5). This provides that the obligation to lodge a statement or agreement continues to apply even if the agreement has been terminated without being completed, and regardless of whether the termination occurs before or after the time allowed for lodgment expires.

The amendments to this section do not impose a requirement to lodge an agreement. If there is an agreement, it may be lodged instead of a statement, in which case the obligation to lodge a statement no longer applies. An agreement must be lodged within the same time limit that applies to lodging a statement.

The section heading is also amended.

Clause 97: Section 201 amended

Section 201 provides for the lodgment of periodical statements for
acquisitions of further interests.

This clause makes a consequential amendment to subsection (1)(a) to refer to 'section 163(1)(c) or (d)', rather than 'section 164'. Section 164 has been deleted and its provisions are now incorporated in section 163.

**Clause 98: Section 203 amended**

Section 203 sets out the requirements for the form and content of acquisition statements. Section 203(1) currently provides that an acquisition statement must:

- be in the approved form; and
- contain the prescribed information and particulars.

The prescribed information requirement was carried over from the Stamp Act. However, this limits the Commissioner’s flexibility to amend the acquisition statement and the information required for landholder assessment purposes. It also creates additional red tape for taxpayers where the prescribed information will be provided another way, for example, in an agreement or a valuation report, or in a previous acquisition statement.

On that basis, the requirement for prescribed information to be included in an acquisition statement is removed.

This clause replaces current subsection (1) with a new subsection (1). This simply provides that an acquisition statement must be in the approved form.

The section heading is also amended.

**Clause 99: Section 204 amended**

Section 204 creates an offence where an acquisition statement is not lodged as required under section 200, 201 or 202.

Section 200 has been amended to allow lodgment of an agreement instead of a statement. This requires the specific reference in section 204 to lodgment of an acquisition statement to be removed.

A further issue relates to the persons who may commit an offence under this section. This includes at paragraph (d) any person “taken into account” under section 163 or 164 as related to the acquirer for the purposes of the acquisition. This paragraph requires amending in a similar manner to section 179.

This clause amends section 204 as follows:

- The start is amended to the effect that, rather than providing that an offence is committed if an acquisition statement is not lodged, an offence is committed where there is a “contravention of” the relevant sections.
- Paragraph (d) is amended so that the person that commits an offence is any person that is a ‘related person’ of the acquirer and
has an interest in the landholder immediately after the acquisition.

Clause 100: Chapter 3 Part 7 inserted
This clause inserts the following at the end of Chapter 3.

Part 7 – Application of this Chapter to certain acquisitions
Division 1 – Rights relating to fixed infrastructure

204A. When fixed infrastructure access rights are taken into account in determining entitlement to land assets
This section explains when an entitlement to a fixed infrastructure access right will be taken into account for the purpose of determining an entity’s entitlement to land assets.

An entitlement to a fixed infrastructure access right will only be taken into account when an entitlement to the related fixed infrastructure or a related fixed infrastructure control right is held by:

- a higher entity than the entity in which the interest is being acquired (the main entity);
- another entity if there is an acquisition in that entity that forms part of the same arrangement as the acquisition in the main entity; or
- a linked entity of any of the above entities.

Subsection (1) provides that when determining an entitlement to land assets for an acquisition of an interest in a main entity, the value of any fixed infrastructure access right to which the main entity, or a linked entity, is entitled is not to be taken into account as a land asset unless subsection (2) applies.

Subsection (2) applies to a fixed infrastructure access right if the main entity, or an associated entity under section 204D, is entitled to:

(a) the fixed infrastructure to which the fixed infrastructure access right relates; or
(b) an estate or interest in that fixed infrastructure; or
(c) a fixed infrastructure control right that relates to that fixed infrastructure.

Subsection (3) sets out when the entitlement to the fixed infrastructure and fixed infrastructure control right referred to in subsection (2) is to be determined.

(a) For the main entity, or an associated entity that is a linked entity (whether ‘upstream’ or ‘downstream’) at the time of the acquisition in the main entity, the entitlement will be determined when that acquisition occurs.

(b) Where the main entity and an associated entity are associated because there are acquisitions in each of them arising from substantially one arrangement, the entitlement will be determined when the acquisition in the associated entity occurs.

In paragraph (a) there is only one acquisition, and the relationship between the main entity and the associated entity exists at the time of
that acquisition. However, in paragraph (b), the association results from a separate acquisition in the other entity so the entitlement should be determined when that acquisition occurs, regardless of whether this is before or after the acquisition in the main entity.

Subsection (4) applies where there is a separate acquisition in an entity that is taken to be an associated entity and that acquisition occurs after the acquisition in the main entity. The value of the fixed infrastructure access right will be taken into account for the acquisition in the main entity, even though the acquisition in the associated entity had not occurred at that point in time.

The Chapter 2 equivalent to this section is contained in section 91C.

**Example**

The main entity is entitled to fixed infrastructure access rights valued at $2 million or more, but is not entitled to any other land assets.

Company A acquires a 50 per cent interest in the main entity. The main entity is linked to a higher entity to which another entity is linked (linked entity).

The linked entity is entitled to the fixed infrastructure to which the access rights relate. In this case, the linked entity is an associated entity as defined in section 204D.

As a result, section 204A(2) is satisfied and the fixed infrastructure access rights are land assets for the purposes of the acquisition in the main entity. This means the main entity is a landholder and the acquisition in the main entity is a relevant acquisition.

204B. When fixed infrastructure statutory licences are treated as land assets in calculating duty
Unlike a fixed infrastructure access right, a fixed infrastructure statutory licence is not a land asset and is not taken into account when determining if an entity is a landholder. However, once there is an acquisition in a landholder, a fixed infrastructure statutory licence may be treated as a land asset for the purposes of calculating duty.

**Subsection (1)** provides that when calculating duty under section 186 for a relevant acquisition, a fixed infrastructure statutory licence will treated as a land asset if:

(a) the landholder, or a linked entity, is entitled to the fixed infrastructure statutory licence; and

(b) the landholder, or an associated entity under section 204D, is entitled to –

(i) the fixed infrastructure to which the fixed infrastructure statutory licence relates; or

(ii) an estate or interest in that fixed infrastructure; or

(iii) a fixed infrastructure control right that relates to that fixed infrastructure.

**Subsection (2)** provides that for the purposes of subsection (1)(a) a landholder or linked entity will be taken to be entitled to the fixed infrastructure statutory licence in circumstances where:

(a) the landholder or linked entity held the licence immediately before the acquisition; and

(b) the licence is cancelled by operation of law because of the acquisition; and

(c) there is an agreement or arrangement that after the acquisition, the licence or another licence of that kind, will be issued to the landholder or an entity associated under section 204D.

**Subsection (3)** sets out when the entitlement to the fixed infrastructure and fixed infrastructure control right referred to in subsection (1)(b) is to be determined.

(a) For the landholder, or an associated entity that is a linked entity (whether ‘upstream’ or ‘downstream’) at the time of the acquisition in the landholder, the entitlement will be determined when that acquisition occurs.

(b) where the landholder and an associated entity are associated due to there being acquisitions in each of them arising from substantially one arrangement, the entitlement will be determined when the acquisition in the associated entity occurs.

**Subsection (4)** applies where there is a separate acquisition in an entity that is taken to be an associated entity, and that acquisition occurs after the acquisition in the landholder. The value of the fixed infrastructure statutory licence will be taken into account when applying section 186 in relation to the acquisition in the landholder, even though the acquisition in the associated entity had not occurred at that point in time.

**Subsection (5)** provides that once a fixed infrastructure statutory licence is treated as a land asset under subsection (1), it will also be treated as one for the purposes of certain other landholder provisions.
The Chapter 2 equivalent to this section is also contained in section 91C.

**Example 1**

- **There is a relevant acquisition in a Landholder.** The value of Landholder is the unencumbered value of the land assets or chattels to which Landholder or a linked entity is entitled (section 186).

- **Landholder holds a 100 per cent interest in Linked Entity, which is entitled to a fixed infrastructure statutory licence (section 204B(1)(a)).**

- **Under section 204B(1)(b)), Landholder is entitled to land assets being:**
  - relevant fixed infrastructure to which the relevant fixed infrastructure relates; or
  - an estate or interest in the fixed infrastructure; or
  - a fixed infrastructure control right that relates to the fixed infrastructure.

- **The statutory licence is therefore a land asset for the purposes of calculating the duty on the relevant acquisition in Landholder.**

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## Example 2
There is a relevant acquisition in a Landholder. The value of Landholder is the unencumbered value of the land assets or chattels to which Landholder or a linked entity is entitled (section 186).

Landholder is entitled to a fixed infrastructure statutory licence (section 204B(1)(a)).

There is also an acquisition of an interest in Associated Entity.

Under sections 204B(1)(b) and 204D(2)(d), Associated Entity is entitled to land assets being:
- relevant fixed infrastructure to which the statutory licence relates; or
- an estate or interest in the fixed infrastructure; or
- a fixed infrastructure control right that relates to the fixed infrastructure.

The acquisitions in Landholder and in Associated Entity together arise from substantially one arrangement.

The statutory licence is therefore a land asset for the purposes of calculating the duty on the relevant acquisition in Landholder.

**204C. Unencumbered value of fixed infrastructure statutory licences treated as land assets**

This section allows the Duties Act valuation provisions to apply to fixed infrastructure statutory licences which are treated as land assets.

Subsection (1) provides that section 36 is to apply, with any necessary modifications, in determining the unencumbered value of a fixed infrastructure statutory licence which is treated as land assets.

Subsection (2) provides that where the fixed infrastructure statutory licence is issued under Commonwealth law, the unencumbered value is limited to that which relates to the ownership or use of fixed infrastructure situated in Western Australia.

**204D. Associated entities for s. 204A and 204B**
This section sets out what associated entities are for the purposes of section 204A and 204B.

Subsection (1) provides that this section applies where it is necessary to determine which entities are associated with a main entity referred to in section 204A(2) or a landholder referred to in section 204B(1) or (2).

Subsection (2) lists the categories of associated entities as entities which are:

(a) linked to the main entity / landholder; or
(b) higher entities to which the main entity / landholder is linked; or
(c) linked to a higher entity referred to in (b); or
(d) entities in which an interest is also being acquired, and both acquisitions arise from substantially one arrangement; or
(e) entities that are linked to an entity referred to in (d).

For the purposes of subsection (2)(d), where the related acquisitions occur within 12 months and have the same acquirer, the acquisitions are deemed to arise from substantially one arrangement unless the Commissioner is satisfied to the contrary (see section 204F).

Subsection (3) allows subsections (2)(b) or (c) to be applied by treating the higher entity as a main entity for the purposes of section 156(1).

**Division 2 – Derivative mining rights**

204E. Unencumbered value of mining tenement subject to derivative mining right

As explained previously, the holder of a mining tenement may authorise another person to explore for and mine particular minerals on the tenement. Where the holder of a mining tenement is a corporation or unit trust scheme in which a landholder acquisition occurs, the acquisition will not extinguish the mining rights the way a direct transfer of the tenement would.

However, the Commissioner still needs the ability to determine the unencumbered value of the mining tenement taking into account the effect of the mining rights on the value. Similarly, the Commissioner must be notified if mining rights are surrendered for no consideration within 12 months so that landholder duty can be reassessed having regard to the value of mineral rights.

This section allows the unencumbered value of the mining tenement to be determined having regard to any derivative mining right that has been granted in relation to the tenement. It also creates an obligation to notify the Commissioner if rights are surrendered for no consideration with 12 months after an acquisition where the value of rights was taken into consideration. This provides the same outcomes for landholder duty as sections 91E to 91I do for transfer duty.
acquisition of an interest in an entity, and it is necessary to determine
the unencumbered value of a land asset that is a mining tenement for
which a derivative mining right is in force.

Subsection (2) provides that if the acquisition of the derivative mining
right is duty endorsed, the unencumbered value of the tenement is to be
determined having regard to the effect of the right on the value of the
tenement. This is despite section 36(1) as applied by section 150,
which would otherwise not provide this outcome.

Subsection (3) provides that subsection (2) ceases to apply if the right is
surrendered for no consideration within 12 months after the acquisition
of the interest in the entity.

Subsection (4) provides that, if the right is surrendered as referred to in
subsection (3), both the entity and the acquirer of the interest in the
entity must lodge a notice of the surrender in the approved form, within
two months after the surrender occurs.

A penalty of $20,000 applies for failure to comply with this subsection.

Subsection (5) provides that the Commissioner must make any
reassessment necessary because of the operation of subsection (3).
This is subject to the time limits set out in section 17 of the TAA.

Example

Company A owns mining tenements on which it operates a gold mine.  
Company A has granted Company B the rights to explore for and mine
iron ore on the tenements.

Company C enters into an agreement to purchase 100 per cent of the
shares in Company A. The amount of consideration for the acquisition
that is allocated to the mining tenements excludes the value of the iron
ore rights.

This section allows the Commissioner to have Company A’s mining
tenements valued taking into account the effect of the iron ore rights. In
this case, the consideration allocated to the tenements reflects the
value without the iron ore rights. The Commissioner adopts this amount
as the unencumbered value for the tenements.

Six months after the transaction, Company C wants to expand its
mining operations into iron ore. It offers Company B $10 million to
surrender the iron ore rights, which Company B accepts.

Company C pays duty on the surrender of the iron ore rights. This
means the landholder assessment for its acquisition of Company A
does not need to be reassessed.

If Company B surrendered the iron ore rights to Company C for no
consideration, Company C and Company A would need to notify the
Commissioner. The Commissioner would then reassess the duty on the
acquisition of Company A based on an unencumbered value of the
mining tenements including the iron ore rights.
Division 3 – Acquisitions forming one arrangement

204F. Acquisitions in 2 or more entities forming one arrangement

This is a general deeming provision applicable to sections 155(4)(b), 156A(1)(a) and 204D(2)(d) in Chapter 3, which relate to acquisitions that arise from substantially one arrangement.

Section 204F has a similar effect to sections 14(4) and 37(2) in Chapter 2.

Subsection (1) provides that where acquisitions of interests in two or more entities occur within 12 months and have the same acquirer, the acquisitions arise from substantially one arrangement, unless the Commissioner is satisfied to the contrary.

Subsection (2) provides that subsection (1) does not limit the sections to which it applies. This means the Commissioner can determine that acquisitions form part of one arrangement outside of the circumstances described in subsection (1). However, in these cases the acquisitions are not deemed upfront to form part of one arrangement.

204G. Modified application of s. 176 if entity becomes landholder because of acquisitions forming one arrangement

Section 176 sets out when an acquisition of an interest in an entity is taken to occur. Under section 176(2), where there is an agreement for the making of the acquisition, an acquisition will generally be taken to occur when the agreement is made. However, under section 176(3), the interest is taken to be acquired at completion where an entity is not a landholder when the agreement is made but is at completion.

Section 204G modifies the application of section 176 to cater for situations where an entity is not a landholder when an agreement for the acquisition is made, but subsequently becomes a landholder as a result of one or more other acquisitions that arise from substantially one arrangement.

Subsection (1) provides that this section modifies the application of section 176 in relation to a 'main acquisition' of an interest in a 'main entity' if:

(a) when the agreement for the main acquisition is made, the main entity is not a landholder; and

(b) after the agreement is made (and either before or after it is completed), one or more other acquisitions occur; and

(c) as a result of those other acquisitions, the main entity becomes a landholder in relation to the main acquisition because of one of the following:

(i) Section 155(3) becomes applicable.

This is where the main entity is entitled to land assets or chattels but is not a landholder under section 155(2). However, the main entity becomes a landholder under section 155(3) because the main acquisition is part of a relevant arrangement under section 155(4).
This occurs where there are acquisitions in one or more other entities arising from substantially one arrangement, at least one of the other entities is a landholder, and/or the total value of entitlements to land assets of all entities is $2 million or more.

(ii) Section 156A(3) applies.

This is where there are acquisitions in two or more main entities arising from substantially one arrangement and the main entities have interests in a relevant entity. If the aggregate interest in the relevant entity is at least 50 per cent, the relevant entity is linked to each main entity that has an interest in it of less than 50 per cent. If the relevant entity is entitled to land assets this may result in a main entity becoming a landholder.

(iii) Section 204A(2) becomes applicable.

This is where the main entity is entitled to a fixed infrastructure access right, but neither it nor a linked entity is entitled to the relevant fixed infrastructure or fixed infrastructure control right. Consequently, the value of the fixed infrastructure access right cannot be taken into account.

However, section 204A(2) applies if there is an acquisition in another entity which is entitled to the fixed infrastructure or fixed infrastructure control right and the acquisitions arise from substantially one arrangement. This means the value of the fixed infrastructure access right that the main entity is entitled to can be taken into account under section 204A(1). This may result in the main entity becoming a landholder.

Subsection (2) provides that from the time one of these sections becomes applicable, section 176(2) applies in relation to the main acquisition, rather than section 176(3). This means the acquisition is taken to have occurred when the agreement was made, even though it may not have been a landholder at that time.

Subsection (3) overrides subsection (2) for the purposes of certain liability and lodgment provisions of Chapter 3.

It provides that, for the purposes of the sections listed at paragraphs (a) to (d), the main acquisition is taken to have occurred when the entity becomes a landholder under one of the relevant sections, rather than when the agreement was made. This is necessary to prevent situations where, for example, an acquisition statement would need to be lodged before the entity became a landholder.

204H. Reassessment of landholder duty if amount of duty chargeable changes because of acquisitions forming one arrangement

This section provides for a reassessment where, after duty is assessed for an acquisition of an interest in a landholder, the duty liability changes because acquisitions occur in two or more other entities that arise from substantially one arrangement.
Subsection (1) provides that this section applies if:

(a) there has been a ‘main acquisition’ of an interest in a landholder, for which duty has been assessed; and

(b) after that assessment is made, one or more acquisitions in other entities occurs; and

(c) as a result of the acquisitions in the other entities, the duty payable for the main acquisition changes because of one of the following:

(i) Section 156A(3) applies – this is the scenario described above under section 204G.

(ii) Section 204A(2) applies – this is also described above under section 204G.

(iii) Section 204B(1) becomes applicable.

This is where there has been a relevant acquisition and the value of the landholder’s entitlement to land assets and chattels is being determined under section 186. The landholder is entitled to a fixed infrastructure statutory licence (which is not a land asset), but neither it nor a linked entity is entitled to the relevant fixed infrastructure or fixed infrastructure control right. Consequently, the value of the fixed infrastructure statutory licence cannot be taken into account.

However, section 204B(1) applies if there is an acquisition in another entity that is entitled to the fixed infrastructure or fixed infrastructure control right and the acquisitions arise from substantially one arrangement. This means the fixed infrastructure statutory licence the landholder is entitled to can be treated as a land asset for the purposes of section 186.

Subsection (2) provides that the Commissioner must make any reassessment necessary to give effect to a change in the amount of duty chargeable, subject to the time limits set out in section 17 of the TAA.

Clause 101: Section 205A amended

This clause makes a consequential amendment to update the reference to section 148 in section 205A to section 148(1) as a result of the amendments in clause 56.

Clause 102: Section 205E amended

This clause makes consequential amendments to the definition of residential property in section 205E as a result of the amendments to the definition of land in this Bill. Land is amended to include a thing fixed to land, whether or not the thing is a common law fixture or owned separately from the land or an estate or interest in such a thing (section 3A(1)(f) as inserted by clause 5 of this Bill).

Subclause (1) replaces the reference to ‘anything that is part of the land as a fixture’ with ‘anything to which section 3A(1)(f) applies or an estate or interest in such a thing’.
Subclause (2) inserts new categories of land that are not residential property for the purposes of the foreign buyers surcharge.

A thing fixed to land, or an estate or interest in the thing, is not residential property if it is not land under section 18A(1) because it will be permanently removed from the land after it is transferred. To avoid doubt, a mining tenement or an estate or interest in a mining tenement, a pastoral lease or an interest of a pastoral lessee in a pastoral lease and a derivative mining right are also excluded from being residential property.

Clause 103: **Section 205P amended**

Section 205P provides that the rules for determining dutiable value in the transfer duty chapter apply to determine the dutiable value of foreign dutiable transactions, with the appropriate modifications.

This clause inserts new sections 28(4A), 36A(1), (4) and (5) as provisions that are not applied by section 205P(1) for foreign transfer duty.

Section 28(4A) provides for the dutiable value of the grant of a pastoral lease and sections 36A(1), (4) and (5) deal with the unencumbered value of land upon which there are mining tenement fixtures. As pastoral leases and mining tenements are not residential property these sections are not relevant to foreign transfer duty.

Clause 104: **Section 205RA inserted**

This clause inserts section 205RA at the end of Chapter 3A Part 2 Division 4. Section 205RA provides that foreign transfer duty is chargeable on a deemed transfer under new section 120B(2) if the transaction is a foreign dutiable transaction.

Section 120B(2), inserted by clause 46, deems a transfer to have occurred after a subdivision where a person retains land they did not originally contribute. Section 205RA ensures foreign transfer duty applies to the deemed transfer if the person who retained the land is a foreign person and the land is residential property.

Clause 105: **Section 205S amended**

Section 205S applies the transfer duty rules for simultaneous put and call options, trust acquisitions and surrenders, share dispositions in a corporate trustee and partnerships, to foreign dutiable transactions of the same kind.

This clause makes consequential amendments to section 205S as a result of other amendments in this Bill.

Subclause (1) amends section 205S(1) by inserting new Divisions 7 and 8 as provisions that are not applied by section 205S. These divisions deal with fixed infrastructure rights and derivative mining rights and are not relevant to foreign dutiable transactions.
Subclause (2) amends the modification provisions in section 205S(2) as follows.

Paragraph (a) makes a consequential amendment to section 205S(2)(h) as a result of the amendments in section 73 to replace the reference to ‘land in Western Australia’ with ‘property of a kind referred to in section 72(a), (b), (c) or (d)’. The effect is that section 73 is modified so a reference to ‘property of a kind referred to in section 72(a), (b), (c) or (d)’ is a reference to residential property.

Paragraph (b) inserts new section 205S(2)(ia) to modify sections 78(1)(a) and 78A(1)(a) so that the reference to a person ceasing to be a partner in a partnership is to a foreign person ceasing to be a partner. This ensures that sections 78 and 78A only apply where the retiring partner is a foreign person.

The existing modifications in section 205S mean that sections 78 and 78A as applied by that section will apply where the retiring partner is a foreign person and the transfer property or retained property is residential property. In these cases, there will be a foreign dutiable transaction consisting of the transfer of the transfer property or the retained property (whichever is applicable) to the retiring partner.

Clause 106: Section 205W amended

Section 205W charges foreign transfer duty on a disposition of a share in a corporate trustee where the transaction is a scheme or arrangement to change the beneficial interest of the residential property held by the discretionary trust for the benefit of a foreign person. The section mirrors section 67, which is the equivalent provision for transfer duty.

This clause amends section 205W(1) to reflect the amendments that are being made to section 67 by clause 23 of this Bill.

Clause 107: Section 205ZB amended

Section 205ZB provides an exemption for a transaction relating to a vacant parcel of land if the foreign person or their associate intends to subdivide, or complete subdividing, the land for the purpose of constructing 10 or more dwellings on the land.

This clause makes a minor amendment by deleting the second occurrence of ‘parcel of’ in section 205ZB(2)(b) to improve the readability of the section.

Clause 108: Section 205ZD amended

Section 205ZD(1) defines the terms foreign acquirer, foreign landholder acquisition and residential landholder for the purposes of the foreign landholder duty provisions.

Foreign acquirer currently means:
(a) a foreign person that acquires an interest in a residential landholder;
(b) a foreign person that is a related person to a person that acquires an interest in a residential landholder; or
(c) if there is more than one person referred to above, each of them.

Paragraph (b) is intended to refer to a foreign person that is related to a non-foreign acquirer of an interest in a residential landholder, if the foreign person also has an interest in the residential landholder immediately after the acquisition.

However, as currently drafted, paragraph (b) has a much broader application as it could refer to any foreign person related to an acquirer of an interest in a residential landholder even if that foreign person does not hold an interest in the residential landholder. It also captures foreign persons who are related to a foreign acquirer described in paragraph (a).

This produces incorrect outcomes in sections 179, 185, 189 (as applied by section 205ZE) and 205ZT.

Subclause (1) amends the definition of foreign acquirer to mean:
(a) a foreign person that acquires an interest in a residential landholder by an acquisition described in section 205ZH(1)(a)(i); or
(b) a foreign person that is related to a person who acquires an interest in a residential landholder by an acquisition described in section 205ZH(1)(a)(ii) and has an interest in the landholder immediately after the acquisition.

Subclause (2) makes a consequential amendment to the definition of foreign landholder acquisition by deleting the reference to section 205ZI. Section 205ZI is deleted by clause 111 and its provisions are now incorporated in section 205ZH.

Subclause (3) makes a minor amendment to section 205ZD(3) to provide that, unless the contrary intention appears, a reference to a landholder duty provision is to those provisions as so applied by section 205ZE(1).

Clause 109: Section 205ZE amended

Section 205ZE applies the landholder duty rules to foreign landholder duty, except for the provisions set out in the Table in subsection (1). Subsection (2) sets out the modifications to be made to the landholder duty chapter for those provisions to apply to foreign landholder duty.

Subclause (1) inserts a new Table to update the provisions that are not relevant to foreign landholder duty as a result of the amendments in this Bill. The updated provisions are:

- Section 148(2) – which provides that particular categories of land assets (which are not residential property) are taken to be land assets in Western Australia.
- Sections 149A(1) and (3) – which provides for how the entitlement of an entity to a mining tenement is to be determined.
• Section 157 – which describes what the value of a linked entity’s entitlement to land is for the purposes of determining whether an entity is a landholder. This section is not required because section 186 as amended by this Bill no longer refers to section 157.

• Part 7 Divisions 1 and 2 – which deal with certain fixed infrastructure rights and derivative mining rights. These rights are not residential property and are not relevant to foreign landholder duty.

• Section 204G – which modifies the application of section 176 where an entity becomes a landholder because of acquisitions forming one arrangement. The equivalent section for foreign landholder duty is new section 205ZKA as inserted by clause 112.

Subclause (2) amends the modification provisions in subsection (2) as follows:

(a) This paragraph amends section 205ZE(2)(b) to provide that the landholder duty provisions apply as if a reference to an acquirer were a reference to a foreign acquirer, other than in section 179. This is because the reference to acquirer in section 179 is being modified by new subparagraph (j).

(b) This paragraph amends section 205ZE(2)(e) to replace the references to ‘land’ in that paragraph with ‘land assets’. This reflects the changes the broadening of the landholder duty base to include fixed infrastructure rights and derivative mining rights.

(c) This paragraph deletes section 205ZE(2)(g). The modification of section 157 is not necessary because section 186, as amended by this Bill, will no longer refer to section 157. A new paragraph (g) is inserted to modify section 148 and delete the definition of land asset, as it is not relevant to foreign landholder duty.

(d) This paragraph deletes section 205ZE(2)(j) and inserts new paragraphs (j), (ja) and (jb).

Paragraph (j) now provides that a reference in section 179(2)(a) to the acquirer is a reference to a foreign acquirer, other than a person whose interest in the residential landholder is an excluded interest. This amendment ensures that a person defined as a foreign acquirer at section 205ZD(1)(b) is not liable to pay foreign landholder duty if their interest is an excluded interest for the purpose of calculating duty.

The modification in new paragraph (ja) limits the reference to ‘related person in respect of an acquisition’ referred to in sections 179(2)(d) and 185(b) to only a foreign person that is a related person of a foreign acquirer as defined at section 205ZD(1)(a).

This amendment ensures that any non-foreign persons that are related to the foreign acquirer and have an interest in the landholder are not jointly liable to pay foreign landholder duty. It also corrects an issue with section 185(b) (as applied by section 205ZE(1)) which, as currently drafted, also captures related foreign persons that fall under section 185(a).
New paragraph (jb) modifies section 189(2)(a) and (6) to clarify that the person referred to in those sections is the foreign acquirer.

It also limits the reference to ‘a related person’ in those sections to only a foreign person that is a related person of a foreign acquirer as defined at section 205ZD(1)(a). This ensures it does not also capture related foreign persons that fall within the definition of foreign acquirer at section 205ZD(1)(b).

Paragraph (e) modifies the Table in section 205ZE(2)(m) to delete the reference to section 164, which is deleted by clause 74 of this Bill.

Paragraph (f) inserts an additional row to the Table in section 205ZE(2)(m) to provide that the landholder duty provisions apply as if a reference to section 204G were a reference to section 205ZKA.

Clause 110: Section 205ZG amended

Section 205ZG sets out when an entity is a residential landholder. This clause makes consequential amendments to this section as a result of amendments in this Bill to the landholder duty chapter.

Subclause (1) makes a consequential amendment to subsection (1) to delete the redundant reference to section 205ZI, which is being deleted.

Subclause (2) deletes subsections (3) and (4), and replaces subsection (2).

The new subsection (2) refers to when an ‘entity’ is a residential landholder, which includes a corporation and a unit trust scheme. This amendment is consistent with the amendments being made to section 155 (see clause 65).

Subsection (2)(b) is amended to refer to an entity being a landholder in relation to the acquisition. This is required because of the amendments to section 155 and the insertion of section 156A, which mean an entity can be a landholder in relation to an acquisition even though it is not a landholder immediately before the acquisition.

Subsection (3) is deleted because unit trust schemes are now dealt with under subsection (2). Subsection (4) is deleted because this provision is unnecessary now that new section 149(2) is included and applied by section 205ZE. This is consistent with section 155(4) being deleted.

Clause 111: Section 205ZH and 205ZI replaced

Sections 205ZH and 205ZI define when an acquisition by a person of an interest in an entity is a foreign landholder acquisition. The sections are modelled on sections 163 and 164, which set out when a relevant acquisition occurs for landholder duty.

Section 164 is deleted and its provisions incorporated into section 163 to address the issues described in the notes to clause 74 above. For consistency with these amendments, this clause deletes section 205ZI and incorporates those provisions within section 205ZH. Section 205ZH is modelled on the new section 163.
Section 205ZH. Foreign landholder acquisitions

Subsection (1) provides that an acquisition by a person (‘acquirer’) of an interest in a residential landholder in relation to the acquisition is a foreign landholder acquisition if:

(a) either –

   (i) the acquirer is a foreign person; or

   (ii) the acquirer is not a foreign person but there is at least one related person in respect of the acquirer that is a foreign person and that related person has an interest in the residential landholder immediately after the acquisition; and

(b) subsection (2) applies to the acquisition.

As with repealed sections 205ZH(2) and 205ZI(2), an acquisition of an interest in a residential landholder can also be a foreign landholder acquisition if the acquirer is not a foreign person, provided that at least one foreign related person has an interest in the residential landholder immediately after the acquisition.

This means that an acquisition of an interest in a residential landholder by a non-foreign person from a foreign related person will not be a foreign landholder acquisition if it does not result in a foreign related persons holding an interest in the entity after the acquisition.

Although a non-foreign person’s interest in a residential landholder is taken into account in determining whether there is a foreign landholder acquisition, the effect of Chapter 3 Part 6 Division 5 as applied by section 205ZE is that foreign landholder duty is only calculated on the value of the foreign person’s interest in the residential landholder.

Subsection (2) provides that the subsection applies to any acquisition in any of the circumstances set out in paragraphs (a) to (d). The reference to ‘any’ indicates that more than one of these paragraphs may apply to the acquisition.

Paragraph (a) provides for the situation where the acquirer did not have a significant interest before the acquisition, but has a significant interest after the acquisition.

Paragraph (b) provides for an acquisition where the aggregated group interest, as defined in subsection (3), is not a significant interest before the acquisition, but is a significant interest after the acquisition.

Paragraph (c) provides for an acquisition where the acquirer has a significant interest before the acquisition, and that interest increases as a result of the acquisition.

Paragraph (d) provides the situation where the aggregated group interest is a significant interest before the acquisition, and that interest increases as a result of the acquisition.

Subsection (3) defines aggregated group interest to mean the aggregate of the interest (if any) that the acquirer has in the entity and the interests of all related persons who have an interest in the entity.
The notes for clause 74 contain examples of how these paragraphs work.

Clause 112: Sections 205ZKA inserted

Where there is an agreement for making an acquisition of an interest in a foreign landholder, section 176 (as applied by section 205ZE) sets out when the acquisition is taken to occur.

Under section 176(2) (as applied by section 205ZE), an acquisition is generally taken to occur when the agreement is made. However, under section 176(3) (as applied by section 205ZE), the interest is taken to be acquired at completion if an entity is a residential landholder when the agreement is completed but not when it is made.

This clause inserts section 205ZKA, which is the equivalent of section 204G that applies for landholder duty. (The notes for clause 100 explain how section 204G operates.)

Section 205ZKA modifies the application of section 176 (as applied by section 205ZE) where an entity is not a residential landholder when an agreement for the acquisition is made, but becomes a residential landholder as a result of one or more other acquisitions that arise from substantially one arrangement.

Subsection (1) provides that this section modifies the application of section 176 (as applied by section 205ZE) in relation to a ‘main acquisition’ of an interest in a ‘main entity’ if:

(a) when the agreement for the main acquisition is made, the main entity is not a residential landholder in relation to the main acquisition; and

(b) after the agreement is made (and either before or after it is completed) one or more other acquisitions occur; and

(c) as a result of those other acquisitions, the main entity becomes a residential landholder in relation to the main acquisition because –

(i) the main entity becomes a landholder in relation to the main acquisition because of the application of section 155(3) or 156A(3); and

(ii) the main entity becomes a residential landholder in relation to the main acquisition because the entity is a landholder in relation to the acquisition under section 205ZG(2)(b).

The notes to clause 100 explain how sections 155(3) and 156A(3) apply in these circumstances.

An entity is a residential landholder if the entity, or a linked entity, is entitled to residential property and it becomes a landholder in relation to the acquisition. The scenario contemplated by section 205ZKA(1)(c) is where the main entity is entitled to residential property but is not a landholder under section 155(2).

However, the main entity can become a landholder because of section 155(3) or 156A(3) where there are acquisitions in other entities arising from substantially one arrangement.
When the main entity becomes a landholder because of those acquisitions, they also become a residential landholder under section 205ZG.

Subsection (2) provides that, from the time at which the main entity becomes a landholder in relation to the acquisition, the acquisition is taken to have occurred when the agreement was made even though it may not have been a residential landholder at that time.

Subsection (3) overrides subsection (2) for the purposes of section 180(1) and 183 (as applied by section 205ZE). This is necessary to prevent a liability to pay foreign landholder duty from arising under section 183 (as applied by section 205ZE) when the main entity has not yet become a residential landholder. It also allows the taxpayer two months from the date the main entity becomes a residential landholder to apply to the Commissioner to determine if a liability has arisen under section 180(1) (as applied by section 205ZE).

There is no need to override subsection (2) for the purposes of section 205ZS, which sets out when a foreign landholder duty declaration must be lodged. Section 205ZS requires a foreign landholder duty declaration to be lodged at the same time that an acquisition statement or agreement is required to be lodged under section 200 for that acquisition.

If the main entity becomes a landholder because of section 155(3) or 156A(3), the effect of section 204G(3) is that the acquisition statement or agreement is required to be lodged within two months of the entity becoming a landholder, rather than when the agreement is made. Under section 205ZS, the foreign landholder duty declaration is required to be lodged by the same time.

Clause 113: Section 205ZM amended

Section 205ZM provides an exemption from foreign landholder duty if foreign transfer duty would not be chargeable if the acquirer had acquired the residential property directly. This section is the equivalent of section 168 for landholder duty.

Section 168 is being amended by clause 75 to allow a partial exemption where a direct transfer would have been exempt from transfer duty only to a certain extent. For consistency with these amendments, this clause amends section 205ZM to allow a partial exemption where the transaction would have been partially exempt from foreign transfer duty.

Subclause (1) inserts new definitions of notional transfer and relevant residential property in subsection (1).

A notional transfer describes a hypothetical transfer of relevant residential property by the relinquishing person to the acquiring person at the time of the acquisition.

Relevant residential property means residential property in Western Australia to which the landholder or a linked entity is entitled.

Subclause (2) makes a minor amendment to the definition of relinquishing person to clarify that the landholder referred to in the definition is a residential landholder.
Subclause (2) replaces section 205ZM(2) and inserts new subsections (2A) and (2B).

New subsection (2) provides that the section applies to an acquisition of an interest in a residential landholder if no foreign transfer duty would be chargeable, or would be chargeable only to a certain extent, on the notional transfer. This subsection is based on deleted subsection (2), however it now operates where the notional transfer would be either fully or partly exempt from foreign transfer duty.

Subsection (2A) provides that the acquisition is exempt if no foreign transfer duty would be chargeable on the notional transfer.

Subsection (2B) provides that, if the notional transfer would be chargeable with foreign transfer duty only to a particular extent, the duty payable on the acquisition is reduced by the same proportion as the proportion of the notional transfer on which no foreign transfer duty would be chargeable.

For example, a notional transfer would qualify for an exemption to the extent of 60 per cent, with foreign transfer duty chargeable on the other 40 per cent. In this case, the foreign landholder duty chargeable on the acquisition is reduced by 60 per cent.

Subclause (4) makes minor amendments to section 205ZM(3) to replace the reference to ‘subsection (2)’ with ‘this section’ and to replace the reference to ‘section 205ZH(2) or 205ZI(2)’ with ‘section 205ZH(1)(a)(ii)’ as a result of the amendments to amalgamate sections 205ZH and 205ZI.

Subclause (5) amends section 205ZM(4) so that the section now refers to the ‘relinquishing person’ in the definition of ‘notional transfer’ in subsection (1). These changes do not affect how the subsection operates.

Subclause (6) inserts new section 205ZM(5) which provides that the section does not apply if:

- foreign transfer duty would not be chargeable, or only chargeable to a certain extent, because of a connected entities exemption or reduction under Chapter 6.

  This was previously achieved by the words ‘other than under Chapter 6’ in deleted subsection (2). This provision is needed because section 205ZM is not intended to apply in circumstances where the notional transfer might be a relevant transaction between connected entities; or

- section 194 (as applied by section 205ZE) applies to the transaction.

  Section 194(3) (as applied by section 205ZE) applies to determine the foreign landholder duty payable on the excess value where a shareholder or unit holder is receiving property that exceeds their entitlement on the winding up of a company or unit trust scheme, and the winding up is not a scheme or arrangement to reduce foreign landholder duty.
New section 205ZM(2B) and its interaction with section 29 could also apply in this situation. However, section 194 (as applied by section 205ZE) takes precedence because that provision applies specifically to winding up of corporations and unit trust schemes and contains qualifications relating to whether there is a duty reduction scheme, which are absent from section 205ZM.

The section heading is also amended.

Clause 114: Section 205ZP amended

Section 205ZP exempts an acquisition where residential property of the residential landholder is subdivided for the purpose of constructing 10 or more dwellings on the land.

This clause makes a minor amendment by deleting the second occurrence of ‘parcel of’ in section 205ZP(1)(b) to improve the readability of the section.

Clause 115: Section 205ZS amended

Section 205ZS requires a foreign landholder duty declaration to be lodged by the same day an acquisition statement is required to be lodged.

Section 200 is being amended to remove the requirement to lodge an acquisition statement where an agreement for making the relevant acquisition is lodged within the required timeframe.

This clause makes a consequential amendment to section 205ZS(2) to allow a foreign landholder duty declaration to be lodged by the same day an acquisition statement or agreement is required to be lodged.

Clause 116: Section 205ZT amended

Section 205ZT provides that it is an offence if a foreign landholder duty declaration is not lodged in accordance with section 205ZS(2). It also sets out that the persons who commit the offence are the same persons liable to pay foreign landholder duty (under section 179 as applied by section 205ZE).

The modifications to section 179 are amended by clause 109 to clarify the persons who are liable to pay foreign landholder duty. This clause makes equivalent amendments to section 205ZT to align the persons who would commit an offence if a foreign landholder duty declaration is not lodged with the persons liable to pay foreign landholder duty.

Paragraph (a) amends section 205ZT(a) to ensure that, if their interest is an excluded interest for the purpose of calculating foreign landholder duty, a person defined as a foreign acquirer at section 205ZD(1)(b) does not commit an offence if a declaration is not lodged.

Paragraph (b) makes a minor amendment to section 205ZT(b) and (c) to clarify that a landholder referred to in those paragraphs is to a residential landholder.
Paragraph (c) amends section 205ZT(d) to limit the related person who would commit an offence. This section now provides that the related person is a foreign person that is a related person of a foreign acquirer as defined at section 205ZD(1)(a) if that person has an interest in the residential landholder. This does not include a related person whose interest is an excluded interest for calculating foreign landholder duty.

Clause 117: Section 244A amended

Section 244A of the Duties Act provides an exemption from vehicle licence duty for the transfer of certain vehicle licences between spouses.

To ensure the exemption applied only for certain vehicles used for private or non-commercial purposes, the vehicle was required to qualify for the family vehicle licence concession under the Road Traffic Act 1974.

The family vehicle licence concession was abolished on 1 July 2014. The amendments to the road traffic legislation did not include consequential amendments to the Duties Act to preserve the operation of the exemption.

These amendments restore the operation of the exemption retrospectively from 1 July 2014. This is achieved by inserting the eligibility conditions for the former family vehicle licence concession into the Duties Act.

Subclause (1) replaces the definitions in subsection (1) with definitions of the terms car or bus, de facto partners of 2 years, goods vehicle, motor cycle and motorised wheelchair.

Subclause (2) replaces subsection (5). Subsection (5) incorporates the eligibility conditions for the exemption. These mirror the conditions for the former family vehicle licence concession that was provided under the Road Traffic Act 1974.

The exemption is only available for a car, bus or goods vehicle used essentially for private or non-commercial purposes with an unloaded mass not exceeding 3000 kg that is not a heavy vehicle. The term heavy vehicle is defined in section 228.

Clause 118: Section 257 amended

The connected entities exemption in Chapter 6 of the Duties Act provides relief from duty on certain transactions between tightly controlled corporations and unit trust schemes that qualify as a family.

A family consists of a parent entity and its subsidiary entities. To be a subsidiary, the parent must hold 90 per cent of the securities of that entity and control 90 per cent of the votes at a general meeting of that entity.

Section 257(1) defines security to mean an issued share in a corporation and an issued unit in a unit trust scheme.
**Corporation** is defined in section 3 of the Duties Act by reference to section 57A of the *Corporations Act 2001* (Cth) (Corporations Act), which allows a wide range of entities to be captured as corporations.

Hybrid entities, such as limited liability companies and Dutch cooperatives, are corporations within the meaning of the Corporations Act. However, these entities do not issue shares in the same way that most companies do. Limited liability companies have members to whom the entity’s profits and losses are passed through, and Dutch cooperatives are set up with members that are entitled to the entity’s profits.

It is the Commissioner’s practice to treat a foreign company as a corporation for the purposes of the connected entities exemption where its interests are sufficiently similar to issued shares. On that basis, the meaning of security is extended to include an interest in a hybrid company if the Commissioner considers the interest is analogous to an issued share of the corporation.

To determine if the interests in a hybrid company are analogous to issued shares, the Commissioner must consider whether:

- the foreign hybrid company has ‘shares’ as that term is understood under general Australian law; and
- whether those shares have been ‘issued’ rather than simply created

The factors the Commissioner will have regard to for this purpose will be published in a Commissioner’s practice to complement these amendments.

New section 264A (as inserted by clause 125) provides for the automatic revocation of an exemption after a notifiable event. This is not to occur where the event is the result of a public float.

A definition of the term *public float* is included in section 257. The term also appears in the list of definitions in section 3, which provides that it has the meaning given in section 257.

The term *notifiable event* is currently defined in section 264(1) and applies to section 264 only. As this term is now to be used more widely throughout Chapter 6 it is included in section 257 with the other defined terms.

This clause amends section 257 as follows:

Subclause (1) amends subsection (1) by deleting the definition of the term *security*.

Subclause (2) amends subsection (1) by inserting definitions of the following terms:

- *notifiable event* has the meaning in section 264(2) and (3);
- *public float* means the securities of an entity being offered for sale or issue to the public for the purpose of listing the entity on a prescribed financial market or being listed on a prescribed financial market within 12 months after being offered to the public;
security means an issued share of a corporation, an interest in a hybrid company that the Commissioner considers similar to an issue share in a corporation, or a unit issued under a unit trust scheme.

Subclause (3) inserts new subsection (3) after subsection (2). This provides that a reference in section 260 or 264A to residential property includes a chattel that is transferred with the residential property, and the use of which is directly linked to, or is incidental to, the use of residential property for residential purposes.

This clarifies that a reference to ‘residential property’ in the list of foreign dutiable transactions that are relevant reconstruction transactions under section 260(1)(aa) includes any linked chattels transferred with the residential property.

It also ensures that if there is an automatic revocation of the exemption under section 264A, foreign transfer duty will also be chargeable under section 266A(2) on both the residential property and linked chattels held by, or on trust for, the relevant entity at the time of the notifiable event.

Clause 119: Section 259 amended

Section 259(1) defines a corporate consolidation as the formation of a family by the interposition of a head entity between an affected entity and the holders of the affected entity’s securities. This is commonly referred to as ‘top-hatting’.

Section 259(2) describes a relevant consolidation transaction as an acquisition, made solely for the purposes of a corporate consolidation, on which landholder duty or foreign landholder duty is chargeable. A relevant consolidation transaction is:

(a) an acquisition of the affected entity’s securities, for which the only consideration given by the head entity is the issue or transfer of its securities to the holder of the affected entity’s securities; or

(b) an acquisition of the head entity’s securities by a holder of the affected entity’s securities.

Under the Stamp Act and in several other jurisdictions, an exemption cannot be granted if part or all of the consideration for the relevant transaction has been, or is to be, provided by a person that is not a family member.

Consideration provided by a non-family member usually indicates that a third party was involved in the matter from the beginning. This is a key sign that the transactions between the family members are part of a duty avoidance scheme or arrangement involving the third party.

This clause reinstates this condition in the Duties Act. The effect is that if consideration is provided by a non-family member for either of the transactions referred to in subsection (2)(a) and (b), neither of the transactions is a relevant consolidation transaction for which an exemption may be granted.
This condition does not apply to consideration provided by the security holder referred to in subsection (2)(b). This is because the family that has been formed by the corporate consolidation consists of the head entity and its subsidiary, the affected entity.

The persons who originally held the securities in the affected entity, but now hold the securities in the head entity, are not members of that family. To effect the consolidation, those persons provided consideration in the form of the transfer of the securities in the affected entity to the head entity.

Consideration provided by a third party will be accepted as being provided by a family member when it is provided as a loan to that family member.

This clause amends section 259 by inserting new subsections after subsection (5), (6) and (7).

Subsection (5) provides that an acquisition is not a relevant consolidation transaction if any part of the consideration for the acquisition, or an associated acquisition, is provided by a person that is not a member of the family formed by the corporate consolidation.

This subsection is subject to new clause 260A. This applies where a third party provides the consideration because it has loaned the money to a family member (see clause 121).

Subsection (6) provides that, for the purposes of subsection (5):

(a) for an acquisition referred to in subsection (2)(a), an associated acquisition is an acquisition of a kind referred to in subsection (2)(b) that is made for the purposes of the same corporate consolidation; and

(b) for an acquisition referred to in subsection (2)(b), an associated acquisition is an acquisition of a kind referred to in subsection (2)(a) that is made for the purposes of the same corporate consolidation.

Subsection (7) provides that subsection (5) does not apply in relation to consideration provided for an acquisition or associated acquisition of a kind referred to in subsection (2)(b), where the consideration is the transfer of the affected entity’s securities by the security holder to the head entity.

Clause 120: Section 260 amended

Section 260(1) lists the relevant reconstruction transactions for which a connected entities exemption is available. These are certain dutiable transactions and foreign dutiable transactions, vehicle licence transfers, and an acquisition of an interest in an entity.

Under subsection (1)(d) a relevant reconstruction transaction includes an acquisition by one member of a family from another member of the family of an interest in an entity, if landholder duty or foreign landholder duty is chargeable. However, the requirement that the acquisition is ‘from’ another family member means the exemption is not available for all landholder acquisitions that may occur between family members.
Under the landholder duty provisions, a person can acquire an interest in an entity by other means than the transfer of shares or units. For example, an interest may be acquired as a result of the cancellation of another person’s entitlements.

Where a person acquires an interest other than by the transfer of shares or units, sections 167, 168 and 171 (as amended) deem the person who the interest was acquired ‘from’. This is either:

- the person whose interest is decreased because of the acquisition;
- or
- the person whose interest decreased resulting in the acquisition.

This clause amends section 260(1)(d) along these lines to allow the connected entities exemption to apply for all landholder acquisitions between family members.

Under subsection (1)(a)(v), a relevant reconstruction transaction includes a surrender of special dutiable property (within the meaning of section 18) where the property is surrendered by one family member to another member of the family.

Special dutiable property includes a mining tenement where the surrender is part of an agreement that the tenement be granted to another person (section 18(f)). The surrender of a mining tenement from one member of a family to another is therefore included as a transaction for which a connected entities exemption is available.

However, the exemption cannot apply in practice because a mining tenement cannot be surrendered ‘to’ another family member. The drafting of section 18(f) reflects that a tenement is not surrendered by the tenement holder ‘to’ the other person. Instead, the tenement is surrendered by the holder and an equivalent tenement is granted by the relevant authority to the other person.

This clause amends section 260(1)(a)(v) to reflect the wording in section 18(f). The reference to a surrender ‘to another member of the family’ will be taken to include an acquisition by, or grant to, the other member as a result of the surrender by the first member.

As explained in the notes for clause 120, an exemption should not be available for a transaction where consideration is provided by a non-family member. Similar amendments are made to section 260.

This clause amends section 260 as follows.

Subclause (1) inserts new subsections (1A) and (1B).

**Subsection (1A)** provides that, for the purposes of subsection (1)(a)(v), a surrender of a mining tenement by a member of a family is taken to be a surrender to another family member if the surrender is part of an agreement that the tenement be granted to, or acquired by, the other family member.
**Subsection (1B)** provides that, for the purposes of subsection (1)(d), an acquisition of an interest in an entity by a member of a family is taken to be an acquisition from another family member, if the other family member’s interest is decreased because of the acquisition or the other family member’s interest decreased resulting in the acquisition.

Subclause (2) inserts new subsection (5).

**Subsection (5)** provides that a transaction, transfer or acquisition referred to in subsection (1) is not a relevant reconstruction transaction if any part of the consideration for the transaction, transfer or acquisition is provided by a person that is not a member of the family referred to in that subsection.

This subsection is subject to new clause 260A. This applies where a third party provides the consideration because it has loaned the money to a family member (see clause 121).

**Clause 121:** Section 260A inserted

This clause inserts new section 260A after section 260.

**260A. Consideration provided as loan**

Under sections 259(5) and 260(5), an acquisition, transaction or transfer is not a relevant transaction if any part of the consideration is provided by a person that is not a member of the family.

Section 260A provides that, for the purposes of sections 259(5) and 260(5), consideration provided by a non-family member will be taken to be provided by a member of the family if the Commissioner is satisfied it was provided as a loan and is to be repaid by the family member.

For example, a purchaser or acquirer borrows the amount to be used as the consideration for the transaction or acquisition and the monies are provided directly to the other party by the lending institution. The purchaser or acquirer must repay the amount to that institution. In this case, the family member is taken to provide the consideration for the transaction.

This section is modelled on the apparent purchaser provisions in section 117 in the transfer duty chapter.

**Clause 122:** Section 261 amended

Under section 261, subject to certain conditions, a person proposing to enter into a relevant transaction may make a ‘pre-transaction decision request’ and ask the Commissioner to decide whether:

- a proposed relevant transaction would be exempted if it is entered into (subsection (2));
- an exemption would be revoked under section 265 if a proposed relevant transaction is entered into and exempted (subsection (3)); or
- the exemption granted for a relevant transaction would be revoked if a proposed transaction is entered into (subsection (4)).
Section 261(7) provides that the Commissioner may refuse a request where:

(a) the transaction has already been entered into; or

(b) the request does not differ materially from a request made previously; or

(c) a request for information about the proposed transaction is not satisfied.

The word 'may' in subsection (7) provides a discretion to allow a pre-transaction decision request to be made even if one of the conditions to refuse a request is met.

Where the transaction to which a request relates has been entered into, the request must always be refused. This is on the basis there can be no grounds for allowing a 'pre-transaction' decision request where the transaction has already occurred. This clause amends section 261(7) to clarify that where paragraph (a) applies, a request must always be refused.

Under section 261(3), a person proposing to enter into a relevant transaction may ask the Commissioner to decide whether, if the transaction were entered into and exempted, the exemption would be revoked under section 265.

Clause 123 inserts new section 263(4)(a). This provides that where an application for exemption is made under section 262, the exemption cannot be granted if the Commissioner is satisfied that the transaction is part of a scheme or arrangement entered into by a person for a purpose of avoiding or reducing duty. This test is the same as that in section 265.

To apply section 261(3), the Commissioner must assume the proposed transaction has been entered into and exempted before section 265 can be considered.

However, the amendments in clause 123 mean that an exemption cannot be granted without having regard to section 263(4)(a), which uses the same terms as section 265. If the Commissioner is aware when the application is made that there is a scheme for the purposes of section 265, the Commissioner must also be aware that there is a scheme for the purposes of section 263(4)(a).

As a result of the amendment to section 263(4)(a), section 261(3) is redundant and is therefore deleted. Section 261(2) will still allow a person proposing to enter into a transaction to ask the Commissioner to decide whether the transaction would be exempted if it were entered into.

This clause amends section 261 as follows.

Subclause (1) amends the definition of the term **pre-transaction decision request** by removing the reference to subsection (3), as that subsection is being deleted.
Subclause (2) deletes subsection (3).

Subclause (3) deletes subsection (7)(a).

Subclause (4) inserts new subsection (7A) after subsection (7). This provides that the Commissioner must refuse a pre-transaction decision request if the transaction has been entered into.

**Clause 123: Section 263 amended**

If an exemption application is made under section 262, and the Commissioner is satisfied there has been a relevant transaction, the Commissioner must exempt the relevant transaction unless section 263(4) applies. Section 263(4) provides that an exemption cannot be granted if any member of the family has an outstanding tax liability.

Under section 265, the Commissioner may revoke an exemption if the Commissioner determines an exempt relevant transaction is part of a scheme or arrangement entered into by a person for a purpose of avoiding or reducing duty or tax.

Where it is evident at the time of application that an exemption should be revoked under section 265 after it is granted, the Commissioner cannot refuse to grant the exemption. The Commissioner must exempt the relevant transaction under section 263 and then revoke the exemption under section 265. It is inefficient to grant an exemption from duty where it will be immediately revoked.

This clause amends section 263 so that an exemption cannot be granted for a relevant transaction if the Commissioner is satisfied the transaction is part of a scheme or arrangement entered into by a person for a purpose of avoiding or reducing duty or tax.

New section 264A (as inserted by clause 125) provides for an automatic revocation of an exemption where a specific notifiable event occurs within three years after a relevant transaction.

However, an application for exemption under section 262 can be made up to 12 months after the date of the transaction. This means it is possible for a notifiable event to have already occurred when an exemption is applied for, and an exemption should not be granted for the relevant transaction.

Amended section 263(4) will also provide that an exemption cannot be granted where the exemption would be revoked under section 264A.

This clause amends section 263 by replacing subsection (4).

**Subsection (4) provides that an exemption cannot be granted if:**

(a) the Commissioner is satisfied the transaction is part of a scheme or arrangement entered into, or carried out, by a person for a purpose of avoiding or reducing duty or tax; or

(b) the Commissioner is satisfied the exemption would be revoked under section 264A due to the occurrence of a notifiable event; or
(c) any member of the family has an outstanding tax liability (this replicates the current provision).

Clause 124: Section 264 amended

The purpose of the exemption is to facilitate transfers of property between family members to achieve more efficient group structures. On that basis, the Commissioner must be notified of events that result in property leaving the family after a connected entities exemption has been granted.

Under section 264, the Commissioner must be notified when the following events occur within three years after the date of an exempt relevant transaction:

- the controlling entity is wound up and no one holds 90 per cent of its securities;
- the controlling entity ceases to directly or indirectly hold at least 50 per cent of the securities of a member of the transaction group;
- where entities are family members because their securities are stapled – those securities stop being stapled.

The transaction group means the members of the family that were parties to the transaction. The controlling entity means the member of the transaction group that is a parent entity of the group.

An exemption can be revoked under section 265 where the Commissioner is satisfied an exempt transaction was part of a scheme or arrangement to avoid or reduce duty. Clause 125 inserts new section 264A, which provides an automatic revocation of exemption where, within three years after an exempt transaction, the parent entity ceases to directly or indirectly hold at least 50 per cent of the securities of a member of the transaction group.

Under section 264(3)(c), a notifiable event does not occur if the parent entity loses control of the subsidiary because of an acquisition chargeable with landholder duty. If the subsidiary holds land assets of $2 million or more as well as business assets, duty applies to the land assets under the landholder acquisition.

In this case there is no notifiable event because there was a landholder acquisition chargeable with duty. As a result, the connected entities exemption cannot be revoked and duty will not be charged on the business assets.

To correct this problem, this clause deletes section 264(3)(c). This means the acquisition is a notifiable event and the new automatic revocation of exemption will apply to both the land assets and the business assets.

Duty assessed on land assets and chattels as a result of an exemption being automatically revoked will be reduced by any landholder duty assessed on the relevant acquisition (the notifiable event) to the extent it relates to land assets and chattels still held by the transferee entity (see new sections 266A to 266C as inserted by clause 128).
Under section 264(3)(b), a notifiable event does not occur if it results from a relevant transaction that is the subject of an application for an exemption under section 262.

For example, a landholder entity is removed from the transaction group because it is acquired by a member of the wider family. This acquisition is a relevant reconstruction transaction for which an exemption is available. Subsection (3)(b) ensures that the original exemption is not revoked in these circumstances.

However, if the entity is not a landholder, subsection (3)(b) cannot apply because there is no relevant reconstruction transaction. As a result, there is no application for exemption. This means the original exemption will be automatically revoked even though the entity remains in the family.

This clause amends subsection (3) so that a notifiable event does not occur if it results from an acquisition by one family member from another family member of an interest in an entity where landholder duty is not chargeable.

The definition of the term *notifiable event* is currently contained in section 264(1) and applies to section 264 only. This term has been moved to section 257 as it will now be used more widely throughout Chapter 6.

This clause amends section 264 as follows:

Subclause (1) amends subsection (1) by removing the definition of the term *notifiable event*, which is now contained in section 257.

Subclause (2) deletes subsection (3)(c) and inserts a new subsection (3)(c).

Subsection (3)(c) provides that, if landholder duty is not chargeable, a notifiable event does not occur if it results from an acquisition by one family member from another family member of an interest in an entity.

**Clause 125: Section 264A inserted**

This clause inserts new section 264A after section 264.

**264A. Automatic revocation of exemption**

Under section 265, the Commissioner may at any time revoke an exemption granted for a relevant transaction if the Commissioner determines the transaction is part of a scheme or arrangement entered into, or carried out by, a person:

- for a purpose of avoiding or reducing duty on a transaction, transfer of licence or acquisition; or
- for the sole or dominant purpose of avoiding or reducing tax other than duty.
Current section 264(2)(b) provides that a notifiable event occurs in relation to a relevant transaction if the controlling entity ceases to hold more than 50 per cent of the securities of a member of the transaction group or ceases to control more than 50 per cent of the votes of a member of the transaction group.

(The transaction group means the members of the family that were parties to the transaction. The controlling entity means the member of the transaction group that is a parent entity of the group.)

Under section 264(4), the Commissioner must be notified if a notifiable event occurs within three years after the date of an exempt relevant transaction. An exemption is not automatically revoked following a notifiable event. When the Commissioner is advised about a notifiable event, the Commissioner must determine whether section 265 applies to revoke the exemption.

To revoke an exemption under section 265, the Commissioner must have reasonable grounds to determine the transaction was part of a scheme or arrangement for a purpose of avoiding or reducing duty on a transaction or acquisition, or for the sole or dominant purpose of avoiding or reducing tax other than duty. Anti-avoidance provisions are onerous to administer because significant evidence is required to prove a purpose of avoidance.

The purpose of the connected entities exemption is to promote more efficient group structures. However, the exemption is currently being used to package business assets into a company structure so that a third party can acquire them without paying duty. A direct acquisition of these assets is dutiable, but duty does not apply if the assets are acquired indirectly through the purchase of shares in a company or units in a unit trust.

For example, an entity wants to sell business assets to an unrelated party. Rather than selling the assets directly, which will be subject to transfer duty, the entity transfers the assets to a newly created subsidiary and receives an exemption for the transaction. The third party then acquires the shares in the subsidiary and does not pay duty because a landholder liability is not triggered.

The corporate reconstruction exemption provisions in the Stamp Act included a post-association requirement for property to remain in the group for five years after an exemption was removed. Where the parent corporation lost control of a subsidiary within that period, the exemption was automatically clawed back. The claw-back did not depend on proving there was a scheme or arrangement with a purpose of avoiding or reducing duty.

This test was designed to prevent asset stripping through the packaging of assets for sale in a company structure that would not be dutiable under the land rich provisions, for example, splitting land into different subsidiaries so they would not meet the 60 per cent land rich test.9

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9 Explanatory Memorandum, Duties Bill 2007, 171
The test was removed when the Duties Act was introduced on the basis that changing the landholder threshold to $2 million would result in landholder duty applying to the acquisition of a majority interest in a corporation or unit trust scheme in most cases where an entity held land.\textsuperscript{10}

In addition, when the Duties Act was being drafted, duty on business assets was due to be abolished on 1 July 2010.\textsuperscript{11} This would have meant that duty would not apply to either a direct or indirect acquisition of business assets. However, duty on business assets has been retained, which has allowed for the packaging of business assets for acquisition by a third party without duty applying.

In some cases, the transfer of assets between family members is a condition of the sale of the transferee entity to the third party. Even in these cases, the Commissioner is usually unable to revoke the exemption for the transfer of assets between the family members because there is insufficient evidence to prove a purpose of avoiding or reducing duty on the sale of the assets to the third party.

With business assets remaining in the base, it is inappropriate to allow the connected entities exemption to be used to facilitate the sale of assets to a third party without duty applying.

On that basis, the Bill introduces an automatic revocation of exemption where the transferee entity leaves the family within three years after the exemption was granted and it still holds some or all of the property that received an exemption. This preserves the policy of the exemption and is consistent with the post-association requirements in most other jurisdictions.

The first exception to this will be where an entity is removed from the family group as the result of a public float. This is consistent with the Commissioner’s longstanding practice to not revoke an exemption in these circumstances and the approach in most other jurisdictions. The term \textit{‘public float’} is inserted in section 257(1) for this purpose (see notes for clause 118).

The other exception will be where the entity no longer holds any of the property when the notifiable event occurs. As the automatic revocation of exemption is targeted at the removal of assets from a family without duty being assessed, there is no basis to revoke an exemption where the entity no longer holds the assets. The Stamp Act had a similar provision and did not apply a claw-back where the entity only held cash or money in an account (refer section 75JB(5a)).

Subsection (1) provides that the exemption for an exempt relevant reconstruction transaction is revoked if:

(a) a notifiable event to which section 264(2)(b) applies occurs within three years after the date of the transaction; and

\textsuperscript{10} Explanatory Memorandum, Duties Bill 2007, 172

\textsuperscript{11} This was later amended to 1 July 2013 and subsequently the removal of business assets from the duty base was unwound by the Duties Legislation Amendment Act 2013
(b) the member of the transaction group referred to in section 264(2)(b)(i) or (ii) (‘relevant entity’), being the entity that is removed from the transaction group, is the entity that would have been liable for the duty on the transaction but for the exemption, that is –

(i) where section 260(1)(a)(iii) applies – the entity for which property is held on trust (this entity, not the declarant, is liable for duty on a declaration of trust); or

(ii) where section 260(1)(d) applies – the acquirer of an interest (under section 179, persons in addition to the acquirer are liable for landholder duty); or

(iii) otherwise – the entity who would have been liable for the duty but for the exemption; and

(c) when the notifiable event occurs, some or all of the property is still held by, or on trust for, the relevant entity.

Subsection (2) sets out what the property is for each relevant reconstruction transaction listed in section 260(1)(a) to (d).

Subsection (3) provides that the section does not apply to a notifiable event resulting from a public float or in prescribed circumstances.

The regulation-making power will allow other notifiable events to be excluded from section 264A where automatically revoking an exemption is inconsistent with the policy. These regulations can apply retrospectively where they benefit taxpayers.

Subsection (4) provides that the section applies whether or not there has been a change in the legal description of the property between the transaction and the notifiable event, for example, there is a new certificate of title following a subdivision of land.

The notes for clause 128 provide examples of how duty will be calculated when an exemption is automatically revoked.

Clause 126: Section 265 amended

The Commissioner may revoke an exemption granted for a relevant transaction if it is determined that the transaction is part of a scheme or arrangement entered into, or carried out, by a person:

(a) for a purpose of avoiding or reducing duty on a transaction, transfer of licence or acquisition; or

(b) for the sole or dominant purpose of avoiding or reducing tax other than duty.

The current drafting of section 265 limits its application where there is only a hypothetical transaction on which duty would have been avoided or reduced as a result of an exempt relevant transaction.

For example, a person wishes to purchase business assets from an entity. The purchaser could acquire the assets directly.
However, the selling entity first transfers the assets to a newly created subsidiary and a connected entities exemption is granted for this transfer. The purchaser then acquires the subsidiary, which does not trigger a landholder duty liability.

To revoke the exemption, the Commissioner must determine that the exempt relevant transaction (the transfer of the business assets from the head entity to the subsidiary) is part of a scheme or arrangement entered into, or carried out, by a person for a purpose of reducing or avoiding duty on a ‘transaction’.

The transfer of the assets directly from the entity to the purchaser is the transaction that might have occurred but for the exempt relevant transaction and on which duty has been avoided. However, this is a hypothetical transaction that did not occur. Section 265 cannot apply in this scenario because there is no actual transaction.

This clause amends section 265 as follows:

(a) The specific reference in paragraph (a) to a purpose of avoiding or reducing duty on a transaction, transfer of licence or acquisition is replaced by a more general reference to a purpose of avoiding or reducing any liability of a person for duty.

(b) For consistency with paragraph (a), paragraph (b) is also amended to insert a reference to “any liability of a person for” tax other than duty.

The section heading is also amended.

**Clause 127:** Section 266 amended

Currently, an exemption can only be revoked under section 265 if the Commissioner determines the transaction is part of a scheme or arrangement entered into by a person for a purpose of avoiding or reducing duty or other tax. Where an exemption is revoked, section 266 requires the Commissioner to make an official assessment for the transaction that includes penalty tax equal to the duty.

As explained in the notes for clause 125, new section 264A automatically revokes an exemption where a notifiable event occurs. However, as this revocation operates without any regard to whether there is a purpose of duty avoidance, the Commissioner should not be obliged to impose penalty tax equal to the duty in these cases.

This clause amends section 266 to provide that where an exemption is revoked under section 264A, the resulting assessment may include penalty tax equal to the duty. The Commissioner will publish the factors that will be taken into account in determining the amount of penalty tax to apply.

Where an exemption is revoked under section 264A, the duty assessed on the previously exempt transaction will be reduced:

- by any landholder duty on the acquisition of the transferee entity to the extent it relates to land and chattels that were previously exempt; or
• where the entity no longer holds all of the property it held at the time of the exempt transaction.

The five-year time limit for reassessments that generally applies is amended to the later of that period, or 12 months after the Commissioner is notified of the notifiable event which resulted in the automatic revocation. This is necessary to allow the Commissioner to reassess an exempt transaction where the responsible person fails to notify the Commissioner, or lodges a late notification, about a notifiable event.

This clause amends section 266 as follows:

Subclause (1) amends subsection (1) to refer more specifically to an exemption being revoked under either section 264A or 265.

Subclause (2) inserts new subsection (1A) after subsection (1). Subsection (1A) applies where an exemption is revoked under section 264A and provides that the official assessment:

(a) must determine the duty payable on the relevant transaction at the transaction date subject to any reduction under section 226A or 266B; and
(b) may (rather than must) include penalty tax equal to that amount of duty.

Note: a reduction may apply under section 266A and section 266B.

Subclause (3) amends subsection (2) so that it is limited to circumstances where an exemption is revoked under section 265.

Subclause (4) inserts new subsection (6).

Subsection (6) provides that despite section 17 of the TAA, where an exemption is revoked under section 264A, the Commissioner can make a reassessment up to the later of:

(a) five years after the assessment or reassessment that was made under section 263 when the exemption was granted; or
(b) 12 months after lodgement of the notice of the notifiable event which resulted in the revocation.

Clause 128: Sections 266A to 266D inserted

This clause inserts new sections 266A to 266D at the end of Chapter 6.

266A. Reduction of duty following automatic revocation or refusal of exemption

The automatic revocation of an exemption under new section 264A is aimed at situations where the exemption is used to allow property to be removed from a family group without duty applying. For this reason, a notifiable event will not always result in an automatic revocation of an exemption. For example, an exemption will not be revoked if an entity no longer holds any of the relevant property at the time the notifiable event occurs.
An exemption will be revoked where the entity still holds some or all of the original property at the time of the notifiable event. However, where only some of the property is held, the reassessment is limited to that property. This achieves the policy of the automatic revocation.

This section only applies to relevant reconstruction transactions as these circumstances will not arise for relevant consolidation transactions.

Subsection (1) provides that the duty to be assessed on a relevant reconstruction transaction is to be reduced in accordance with subsection (2) if:

(a) either –
   (i) an exemption is revoked under section 264A due to a notifiable event; or
   (ii) an application for exemption under section 262 is refused under section 263(4)(b) because the exemption would be revoked under section 264A if granted; and

(b) when the notifiable event occurred, only part of the property to which the relevant reconstruction transaction related was still held by the relevant entity.

The relevant entity is the member of the transaction group the parent entity ceased to control, causing the notifiable event.

Subsection (2) provides that duty is charged on the relevant reconstruction transaction only to the extent of the property held by, or on trust for, the relevant entity at the time of the notifiable event.

Subsection (3) provides that the section applies whether or not there has been a change in the legal description of the property between the transaction and the event, for example, a new certificate of title is registered as a result of a subdivision of land.

Example

Company A owns business assets valued at $10 million and land valued at $10 million. The assets are used by Company A’s wholly owned subsidiary B. To align ownership of the assets with the entity using them, Company A transfers the land and business assets to Company B. The transaction receives a connected entities exemption.

One year after the exempt relevant transaction, Company B sells the land to a purchaser who pays duty on the acquisition.

Two years after the exempt relevant transaction, another third party acquires all the shares in Company B. This is a notifiable event under section 264(1)(b) that results in the connected entities exemption being automatically revoked under section 264A.
The business assets were the only property held by Company B at the
date of the notifiable event. Section 266A(2) applies so that duty is
assessed on the previously exempt transaction only in relation to the
business assets valued at $10 million.

266B. Reduction of duty following automatic revocation or refusal
of exemption resulting from relevant acquisition

A notifiable event occurs where the parent entity loses control of the
member of the transaction group that received an exemption. In a
landholder context, this means there has been an acquisition of a
significant (or further) interest in the entity by a third party.

Where the property held by the entity includes land assets or chattels,
landholder duty may be chargeable on the acquisition of that interest.
Any landholder duty assessed in this situation will be deducted from the
duty assessed on land assets and chattels (as a result of the exemption
being revoked) to the extent it relates to land assets and chattels still
held by the entity. This prevents ‘double duty’ applying as a result of
the originally exempt transaction being reassessed for duty while
landholder duty also applies to those assets.

A reduction may apply under both this section (because duty is paid on
the relevant acquisition) and section 266A (because not all of the
original exempt property is still held).

Subsection (1) defines property to mean land assets (defined in
section 148(1)) or chattels or both and relevant acquisition to have the
meaning given in section 148(1).

Subsection (2) provides that the duty on a relevant reconstruction
transaction is to be reduced in accordance with subsection (3) if:
(a) either –
   (i) an exemption is revoked under section 264A on the occurrence
       of a notifiable event; or
   (ii) an application for exemption under section 262 is refused
       under section 263(4)(b) because the exemption would have
       been revoked under section 264A if granted; and
(b) the notifiable event results from a relevant acquisition (‘triggering
    acquisition’) on which landholder duty is chargeable; and
(c) transfer duty or landholder duty is chargeable on the relevant
    reconstruction transaction in relation to particular property (‘relevant
    reconstruction transaction property’); and
(d) landholder duty is chargeable on the triggering acquisition in
    relation to particular property (‘triggering acquisition property’); and
(e) the triggering acquisition property is or includes the relevant
    reconstruction transaction property, or part of that property.
**Subsection (3)** provides that the duty assessed on the relevant reconstruction transaction is to be reduced by the lesser of:

(a) the transfer duty or landholder duty chargeable on the relevant reconstruction transaction, to the extent it is chargeable in relation to relevant property; or

(b) the landholder duty chargeable on the triggering acquisition, to the extent it is chargeable in relation to relevant property.

**Subsection (4)** provides that, for the purposes of subsection (3), relevant property is that which is both triggering acquisition property and relevant reconstruction transaction property. It does not matter if there has been a change in the legal description of the property between the relevant reconstruction transaction and the triggering acquisition, for example, a new certificate of title is registered as a result of a subdivision of land.

**Subsection (5)** provides that, if the relevant reconstruction transaction property and the triggering acquisition property relate to different interests in the same property, the property is relevant property for the purposes of subsection (3) only to the extent of the lesser of those two interests.

**Example**

Company A holds a 100 per cent interest in Company B, which holds Land X valued at $2 million. Company A holds Land Y valued at $3 million and transfers this land to Company B. This transfer is a relevant reconstruction transaction that receives an exemption.

Within three years after the transfer, Company C acquires 50 per cent of Company B. This triggering acquisition is a notifiable event under section 264(1)(b) that results in the exemption being automatically revoked under section 264A.

Section 266B allows the landholder duty assessed on the acquisition by Company C to be deducted from the transfer duty assessed on the transfer of Land Y due to the exemption being revoked. New section 266C sets out the property in relation to which landholder duty can be deducted.

The reduction is calculated as follows:

- Transfer duty is assessed on the relevant transaction in relation to the relevant transaction property that is 100 per cent of Land Y (section 266B(2)(c)).
- Landholder duty is assessed on the triggering acquisition in relation to triggering acquisition property that is a 50 per cent interest in each of Land X and Land Y (section 266B(2)(d) as calculated under section 266C).
- Duty of $148,415 is assessed on the relevant transaction on a dutiable value of $3 million.
- This amount is reduced by the landholder duty assessed on the triggering acquisition, to the extent the duty relates to relevant property (section 266B(3)).
The relevant property is a 50 per cent interest in Land Y because it is:
- the property that is both triggering acquisition property and relevant transaction property (section 266B(4)); and
- the lesser of the 100 per cent interest in Land Y under the relevant transaction and the 50 per cent interest that is taken into account for the purposes of determining the landholder duty on the triggering acquisition (refer section 266B(5)).

Duty of $71,165 is assessed in relation to the relevant property (based on the value of 50 per cent of Land Y).

The total duty assessed on the relevant transaction is $77,250 ($148,415 less $71,165).

This section only applies to relevant reconstruction transactions.

266C. Property in relation to which landholder duty taken to be chargeable for s.266B

Section 266B provides an amount of landholder duty to be deducted from transfer duty assessed after an exemption is automatically revoked to the extent it relates to the same property.

Landholder duty is assessed on an acquisition of an interest in an entity, rather than a direct interest in property. Section 266C sets out how interests in property are to be determined for the purposes of applying section 266B.

Subsection (1) defines the terms property and relevant acquisition, which have the same meanings as in section 266B.

To determine the duty that is chargeable ‘in relation to’ relevant property for the purposes of section 266B, subsection (2) has the effect of ‘looking through’ to the value of property taken into account when calculating landholder duty. The percentage interest in the property is determined in accordance with the formula set out in subsection (3).

Subsection (2)(a) relates to situations where the property is held by the entity or is held by a linked entity in which the interest is 100 per cent. Landholder duty is taken to be chargeable in relation to that property.

Subsection (2)(b) relates to situations where the property is held by a linked entity in which the interest is less than 100 per cent. Landholder duty is taken to be chargeable in relation to a percentage interest in that property equal to the percentage used to calculate the landholder duty.

Subsection (3) provides the formula \( P \times (I - E) \) for calculating the percentage of the value of the property for the purposes of subsection (2).
Applying the example in section 266B to the formula gives the following result:

- \( P = 100 \) per cent. This is because the land is held directly by Company B. If the land were held by an entity linked to Company B, \( P \) would reflect the interest of Company C in that linked entity, being the percentage referred to in section 186(1)(b).

- \( I = 50 \) per cent. This is the interest that Company C has in Company B after the acquisition.

- \( E = 0 \). In this example there is no excluded interest (as referred to in section 189) for the acquisition.

The percentage interest applicable to section 266C(2)(b) is 50 per cent. This enables section 266B to be applied.

266D. Application of s. 266B and 266C to foreign transfer duty and foreign landholder duty

This section applies where foreign transfer duty or foreign landholder duty is chargeable on a relevant reconstruction transaction. It allows sections 266B and 266C to apply in relation to the relevant reconstruction transaction by deeming references in those sections to certain terms to be references to certain equivalent terms in the provisions of the Duties Act dealing with foreign transfer duty or foreign landholder duty.

Clause 129: Section 277 amended

This section provides that a person cannot give effect to, or register, a dutiable transaction in relation to a business licence, unless the transaction is duty endorsed or lodged for assessment.

This clause amends this section so that it also applies to a fixed infrastructure statutory licence.

Under section 109 of the Constitution, a Commonwealth law that allows a licence transfer to be registered takes precedence over this restriction. Although duty may be charged to the extent that the licence relates to a business or property in Western Australia, there is no power to prevent the transaction being registered until duty has been paid.

To reflect the interaction between Commonwealth and State laws in this situation, a transfer of a Commonwealth business licence or a fixed infrastructure Commonwealth statutory licence will be excluded from section 277.

This clause amends section 277 as follows:

Subclause (1) deletes subsection (1) and inserts a new subsection (1), which defines the term **relevant licence** to mean a business licence or a fixed infrastructure statutory licence under a Western Australian law.

Subclause (2) amends subsection (2) by replacing the references to ‘business licence’ with ‘relevant licence’.
Subclause (3) amends subsection (3) by replacing the reference to ‘business licence’ with ‘relevant licence’.

**Clause 130: Schedule 1 amended**

Schedule 1 to the Duties Act sets out when liability for transfer duty arises for particular dutiable transactions and who is liable to pay it.

Subject to certain exceptions, for a dutiable transaction that is a surrender of special dutiable property, the liable party is generally the person to whom the interest is surrendered. In the case of a surrender of a right under an application for a mining tenement (section 18(g)), the liable party is the person who paid the consideration for the surrender.

This clause amends Schedule 1 so that for a surrender of a fixed infrastructure control right, fixed infrastructure access right and a derivative mining right (section 18(ga), (gb) and (gc) respectively), the liable party is also the person who paid the consideration for the surrender.

**Clause 131: Schedule 3 clause 1 amended**

The term *relevant acquisition* is defined in section 148 and refers to the meaning given in sections 163 and 164. The definition is amended to remove the reference to section 164, which is deleted under clause 56(3) of this Bill.

Schedule 3 Division 1 clause 1 provides that in this Division *relevant acquisition* has the meaning given in sections 163 and 164. This clause is amended to refer to the term having the meaning given in section 148.

This clause deletes the reference to sections 163 and 164 and inserts a reference to section 148.

**Clause 132: Schedule 3 Division 9 inserted**

This clause inserts new Division 9 at the end of schedule 3.

**Division 9 – Provisions for Revenue Laws Amendment Act 2018**

46. **Terms used**

This clause applies to Division 9.

Subclause (1) defines *commencement day* to mean the day on which the Revenue Laws Amendment Act 2018 comes into operation, and *transaction* to mean a transaction, transfer, acquisition or other matter chargeable under the Duties Act.

Subclause (2) provides that a reference to doing anything includes a reference to omitting to do anything.

Subclause (3) clarifies that when the acquisition of an interest in an entity occurs is to be determined under section 176.
47. Application of amendments made by Revenue Laws Amendment Act 2018

Subclause (1) establishes the general rule that the amendments made under this Bill apply to transactions that occur on or after commencement day. The term transaction is defined in clause 46(1) and covers anything dutiable under Chapters 2, 3, 3A and 5 of the Duties Act.

The following are exceptions to this rule:

Sections 155, 156A, 204D and 204F apply where there are multiple landholder acquisitions that together arise from substantially one arrangement. Under these sections, an acquisition may become chargeable with duty after it occurs as a result of a later acquisition.

Subclause (2) provides that these sections do not apply unless each of the acquisitions occurs on or after commencement day.

Under section 91C(3), a transaction relating to a fixed infrastructure access right or a fixed infrastructure statutory licence may become a dutiable transaction where there is another dutiable transaction relating to fixed infrastructure, or a fixed infrastructure control right, and the transactions together arise from substantially one arrangement.

Subclause (3) provides that section 91C(3) does not apply unless each of the transactions occurs on or after commencement day.

Section 14(3) applies where there is a transfer duty transaction in relation to chattels and a relevant acquisition under that together arise from substantially one arrangement.

Section 91C(4) applies in a similar way to section 91C(3) where there is a relevant acquisition in an entity entitled to fixed infrastructure or a fixed infrastructure control right.

Subclause (4) provides that sections 14(3) and 91C(4) do not apply unless both the transaction and the acquisition occur on or after commencement day.

Subclause (5) provides that this clause is subject to the other provisions of Division 9.

48. Definition of land taken always to have included pastoral leases

Subclause (1) defines pre-commencement period to mean the period beginning on 1 July 2008 and ending immediately before commencement day.

Subclause (2) provides that the Duties Act is taken, at all times from its commencement on 1 July 2008 up to immediately before commencement day, to have applied as if the definition of ‘land’ (in section 3) specifically provided that it included a reference to a pastoral lease, and an interest of a pastoral lessee under a pastoral lease.
Subclause (3) validates any assessment made, or purported to be made, from 1 July 2008 up to immediately before commencement day, on the basis that subclause (2) applied.

Subclause (4) provides that subclause (2) has effect in respect of a transaction that occurred from 1 July 2008 up to immediately before commencement day, even where an assessment of duty was not made before commencement day.

49. Validation of administration agreements entered into before commencement day

This clause validates administration agreements entered into by the Commissioner with financial institutions on or after 3 October 2015, where the Commissioner delegated functions relating to administration of applications for a duty concession under the Duties Act.

Subclause (1) defines previous administration agreement to mean an administration agreement entered into under section 37 of the FHOG Act on or after 3 October 2015 and before commencement day.

The Revenue Laws Amendment Act 2015 Part 2, which abolished the first home owner grant for the purchase of an established home, came into operation on 3 October 2015. However, a first home owner can still apply under the Duties Act for the concessional first home owner rate of duty if they would have met the requirements for the grant had they not purchased an established home.

Subclause (2) provides that a previous administration agreement entered into is taken to have always been as valid and effective as it would have been if clause 52 of this Bill had been in force when the agreement was made.

50. Transfers of vehicle licences between spouses between 1 July 2014 and commencement day

This clause sets out the transitional arrangements for the amendments to the vehicle licence duty exemption for transfers of a vehicle licence between spouses under section 244A.

Subclause (1) defines:

(a) amended section 244A to mean section 244A as in force after clause 117 of this Bill comes into operation, and

(b) relevant vehicle licence transfer to mean the transfer of a vehicle licence that occurred during the period from 1 July 2014 to the day before commencement day and the transfer was between spouses or de facto partners of two years.

Subclause (2) provides that if this clause uses a term defined in the vehicle licence duty chapter, the term has the same meaning in this clause as it has in that chapter.

Subclause (3) validates any exemptions provided for a relevant vehicle licence transfer even though amended section 244A was not in force at the time.
Subclause (4) provides that an assessment of any relevant vehicle licence transfer that was not assessed before commencement date must be made as if amended section 244A had been in force when the transfer occurred. This has the effect of exempting any vehicle licence transfers that have occurred but are not yet assessed.

Subclause (5) provides that if a relevant vehicle licence transfer was assessed for vehicle licence duty and the transfer would have been exempt had amended section 244A been in force when the transfer occurred, the Commissioner must, on the application of the taxpayer, reassess the transfer as if amended section 244A had been in force at the time.

Subclause (6) provides that the taxpayer must apply for a reassessment on or before the later of the day that is five years after the day on which the original assessment was made, or the day that is 12 months after the commencement day.

51. Provisions relating to exemptions for connected entities

Under subclause (1), the amendments to Chapter 6 apply to a connected entities exemption if the application for exemption is made on or after commencement day, regardless of whether the transaction occurred before or after commencement day.

Subclause (2) provides that, despite subclause (1), the following sections do not apply to a relevant transaction that occurred before commencement day:

- section 263(4)(a) and (b) – this means an exemption cannot be denied where there is a scheme or arrangement to avoid or reduce liability for duty, or because the Commissioner would revoke the exemption under section 264A because of a notifiable event;
- section 264A – this means an exemption will not be automatically revoked if a notifiable event occurs on or after commencement day; and
- sections 266A to 266D – these sections will not apply if sections 263(4)(a) and (b) and 264A will not apply to a relevant transaction that occurred before commencement day.

Subclause (3) provides that subclause (4) applies in the following circumstances:

- before commencement day, the Commissioner makes a decision on a pre-transaction decision request made under section 261(2) or (3); and
- the decision is that if the transaction were entered into it would be exempted, or if the transaction were entered into and exempted the exemption would not be revoked under section 265; and
- the transaction is not entered into before commencement day.

Section 261(10) provides that the Commissioner is generally bound by a pre-transaction decision. Subclause (4) provides that, despite this section, the Commissioner is not bound by a decision if the Commissioner would have made a different decision if amended sections 263, 264 and 265 and new section 264A had been in force when the decision is made.
This means that the Commissioner has made a favourable decision before commencement day for a proposed transaction, the Commissioner is not bound by the decision if:

- the transaction is not entered into until after these amendments come into effect; and
- a different decision would have been made under the amended provisions.

Section 261(7)(b) provides that the Commissioner may refuse a pre-transaction decision request if the request is not materially different from a previously made request.

**Subclause (5)** provides that section 261(7)(b) does not apply to a request if the previous request was made before commencement day.

The reason for this is that, under subclauses (3) and (4), the Commissioner may not be bound by a decision where the transaction is not entered into before commencement day. Rather than leaving the taxpayer with a previously favourable decision which is now potentially ineffective, subclause (5) allows a person to make another request after the amendments come into effect but before the transaction is entered into.

**52. Provisions about validated assessments**

Subclause (1) provides that a *previous assessment* in this clause means one to which the following clauses apply:

- clause 48(3) – where an assessment was made between 1 July 2008 and commencement day on the basis that when liability for duty arose, ‘land’ included a pastoral lease and an interest of a pastoral lessee under a pastoral lease; and
- clause 50(3) – where an assessment was made before commencement day that no duty was chargeable on a relevant vehicle licence transfer.

**Subclause (2)** provides that the rights and obligations of all persons are taken to be the same as if a previous assessment had been validly made.

**Subclause (3)** provides that anything done before commencement day is taken to have always been as valid and effective as it would have been if a previous assessment had been validly made.

**53. Application of s.195B and 195 to acquisitions before commencement day**

Section 156(8) is deleted (clause 66(6)) and its provisions replicated as new section 154B (clause 64).

As a result of this amendment:

- new section 195B, inserted under clause 91, contains references to section 154B rather than section 156(8); and
- section 195 is amended under clause 92 to replace the existing references to section 156(8) with references to section 154B.
Clause 53 enables sections 195B and 195 to apply to acquisitions that occurred before commencement day by deeming the references in those sections to section 154B to include references to section 156(8) as in force before commencement day.

**Part 3 – Land Tax Assessment Act 2002 amended**

**Division 1 – Act amended**

**Clause 133:** Act amended

This clause provides that Part 3 amends the *Land Tax Assessment Act 2002* (LTA Act).

**Division 2 – Amendments commencing on day after Royal Assent**

The amendments in Division 2 commence operation on the day after Royal Assent.

**Clause 134:** Section 18A inserted

Section 18A describes how to determine the taxable value of land that is partly exempt.

A partial exemption from land tax may apply in certain circumstances, for example, where only some of the owners use the land as their primary residence or where the land is used for both exempt and non-exempt purposes, such as residential and business purposes.

In these circumstances, the exemption applies to the unimproved value of the land (as determined by the Valuer-General) but only to the extent of the proportion that the land is used for its exempt purpose. For example, if the relevant requirements of an exemption are satisfied for only half the area of a lot valued at $1 million, the taxable value of the lot is $500,000.

This clause inserts section 18A to set out how the Commissioner will determine the taxable value of land that is partly used for an exempt purpose.

Special rules are included for apportioning the taxable value of land that includes a multi-storey building that is partly used for an exempt purpose. This will give the Commissioner the flexibility to look at the lettable area of a building as well as the underlying area of the land. The provision supports the Commissioner’s longstanding practice for apportioning taxable value in these circumstances.

**18A. Taxable value of land subject to partial exemption**

Subsection (1) defines:

*exemption provision* to mean a provision referred to in section 17(1)(b). This provides that land is exempt if it is exempt under Part 3.
relevant requirements as having the meaning given in section 18(1). This essentially means the ownership, use or occupation of land as required by the relevant exemption provision.

Subsection (2) provides that section 18A applies if an exemption applies to a lot or parcel of land only to a particular extent because the relevant requirements of the exemption provision do not apply to any extent to a part of the area of the lot or parcel, and do apply, or apply to some extent, to the remainder of the area of the lot or parcel.

For example, if land must be used by persons for a particular purpose to qualify for an exemption and half of that lot of land is not used for that purpose, the remainder of that lot or parcel must be used to some extent for that purpose. The part that is used for the exempt purpose is the ‘exempt area’.

Subsection (3) provides that, for the purposes of determining the taxable value of the lot or parcel to which this section applies, the unimproved value of the lot or parcel for the assessment year is determined by subtracting the unimproved value of the exempt area from the unimproved value of the whole of the lot or parcel, but only to the extent the relevant requirements of the exemption provision apply to the exempt area.

Subsection (4) sets out how the unimproved value of the exempt area is to be determined. The unimproved value of the exempt area is based on the same proportion of the unimproved value of the whole lot, as determined by the Valuer-General, that the exempt area bears to the whole area of the lot or parcel.

Example 1

Peter and his brother, Michael, own a 10,000m$^2$ lot. Peter uses 6,000m$^2$ as his primary residence (the exempt area) and the other part of the land (4,000m$^2$) for a convenience store. Michael uses a different property as his primary residence. The unimproved value of the lot is $1 million.

The lot qualifies for a partial residential exemption under sections 18 and 21 as the land is used both as Peter’s primary residence and for a non-exempt purpose.

The proportion that the exempt area bears to the whole area of the lot or parcel is 60 per cent, calculated as (6,000m$^2$/10,000m$^2$) x 100. Under subsection (4), the unimproved value of the exempt area is $600,000, being 60 per cent of the unimproved value of the lot.

In determining the taxable value of the lot, the unimproved value of the lot is determined as the unimproved value of the whole lot of $1 million less the unimproved value of the exempt area, but only to the extent the relevant requirements of the residential exemption are satisfied.

As only one of the owners uses the land as their primary residence, a 50 per cent exemption will apply to the exempt area. The unimproved value of the lot is $700,000, calculated as $1 million – ($600,000 x 0.50).
Subsection (5) accommodates situations where a multi-storey building that is not strata titled is partly exempt because only some floors of the building are used for an exempt purpose. It provides that if there is a multi-storey building on the lot or parcel, the Commissioner may determine:

(a) an area that is to be treated as the exempt area; and

(b) an area that is to be treated as the whole area of the lot or parcel for the purposes of subsection (4).

Subsection (6) provides that a determination under subsection (5) has effect according to its terms and may be made on any basis that the Commissioner decides is appropriate, taking into account the areas of the lot or parcel and parts of the building to which the relevant requirements apply or apply to some extent.

**Example 2**

A religious body owns a lot of land on which there is a multi-storey building that is not strata titled. The unencumbered value of the lot as determined by the Valuer-General is $10 million.

Excluding the ground floor, the building contains five floors with each floor comprising an area of 2,000 m² (10,000 m² in total). The total surface area of the land that is capable of being let, including the ground floor of the building, is 3,500 m². The area under the surface of the land is used as a carpark comprising of a Lower Ground level with an area of 3,400 m² and a Basement level with an area of 3,100 m².

The religious body uses the two top floors of the building (a total area of 4,000 m²) and 1,000 m² of the Lower Ground level for religious purposes. The other floors of the building, including the surface area and ground floor, and the remaining area of the Lower Ground and Basement levels are leased to commercial tenants.

The lot qualifies for a partial exemption under sections 18 and 32 as the land is used both for an exempt purpose (as a site used for religious purposes) and a non-exempt purpose.

In this case, the Commissioner considers it appropriate to determine the exempt area and the whole area of the lot using the total lettable area of the land. Under subsection (5), the Commissioner determines the exempt area of the land to be the 5,000 m² used by the religious body for religious purposes. The whole area of the lot is determined to be 20,000 m² comprising:

- the total area of the five floors – 10,000 m²;
- the surface area of the land that is capable of being let, including the ground floor – 3,500 m²;
- the area of the Lower Ground level – 3,400 m²; and
- the area of the Basement level – 3,100 m².
The proportion the exempt area bears to the total area of the lot is 25 per cent, calculated as \( \frac{5,000 \, \text{m}^2}{20,000 \, \text{m}^2} \times 100 \). Under subsection (4), the unimproved value of the exempt area is $2.5 million, being 25 per cent of the unimproved value of the lot.

In determining the taxable value of the lot, the unimproved value of the lot is determined as the unimproved value of the whole lot of $10 million less the unimproved value of the exempt area to the extent that the relevant requirements of the exemption are satisfied.

In this case, the relevant requirements of the exemption under section 32 are fully satisfied for the exempt area. The unimproved value of the lot is $7.5 million, calculated as $10 million – $2.5 million.

Clause 135: Section 26A amended

Section 26A provides an exemption from land tax for land owned by an individual that a disabled family member uses as their primary residence.

The exemption currently applies if the owner is the parent, grandparent, brother or sister of the disabled person. Disabled person is defined in section 26A(1) to include a person who qualifies for a disability support pension under the Social Security Act 1991 (Cth).

As currently provided, an exemption under this section does not apply where accommodation is provided to a disabled person by their child because the child of a disabled person is not a qualifying relationship under section 26A(3). However, it is inconsistent with the policy intent to allow an exemption where a child provides accommodation to a parent with a disability.

This clause amends section 26A(3) to extend the qualifying relationships to include a child of a disabled person. This means the residential exemption will apply where a person with a disability lives in a home owned by their child.

Clause 136: Section 29 amended

Section 29 defines the terms used in Part 3 Division 3 of the Land Tax Assessment Act, which provides an exemption for land used for a primary production business. These provisions were amended by the Taxation Legislation Amendment Act 2015.

Section 30D provides an exemption for non-rural land used for a primary production business by a user who is not the owner of the land, if the owner is a ‘family owner’ and the user is related to the owner.

Section 30H defines family owner to mean an individual, a family corporation, a family trust or a family unit trust scheme. Sections 30I to 30 sets out the relationship tests that must be satisfied for a person to be related to a family owner in each case.

Section 30H(c) defines a family trust (other than a unit trust scheme) to be a trust under which every beneficiary is either a nominated beneficiary or a family member of the nominated beneficiary.
Section 29 defines **beneficiary**, in relation to a discretionary or other trust (other than a unit trust scheme), to mean an individual who is a beneficiary under the trust (whether the beneficiary has a vested share or is contingently entitled or is a potential beneficiary under a discretionary trust).

To satisfy the relationship tests, the intention is that all interests in an entity must be held by family members. This aligns with the family farm exemption provisions in the Duties Act, and the term **family member** takes its meaning from section 100 of that Act.

Currently, the interaction between the term ‘beneficiary’ and section 30H(c) results in a trustee of a trust (other than a unit trust scheme) being a family owner of land if the beneficiaries who are individuals are either the nominated beneficiary or a family member of the nominated beneficiary. This is inconsistent with the policy intent, which is that all beneficiaries of the trust must be individuals who are the nominated beneficiary or a family member of that beneficiary.

As a consequence, a trust with beneficiaries that include entities such as charitable institutions or companies can be a family owner and qualify for the primary production exemption, provided the individual beneficiaries are family members. The same outcome arises when the meaning of the term ‘beneficiary’ is imported into sections 30I to 30.

To correct this issue and restore the policy intent, this clause amends section 29 by replacing the reference to ‘an individual’ with ‘a person’ in the definition of ‘beneficiary’. The effect is that, for a trust to be a family owner of land, every beneficiary under the trust must be an individual who is the nominated beneficiary or a family member of the nominated beneficiary.

The transitional provisions inserted by clause 138 gives taxpayers until 30 June 2020 to amend their trust deeds to comply with the amendment.

**Clause 137: Section 46 amended**

Section 46 provides that the Governor may make regulations prescribing all matters that are required or permitted by the Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the Act.

The Duties Act, *Pay-roll Tax Assessment Act 2002*, and FHOG Act all contain similar provisions. However, these Acts permit a regulation to apply before the day on which it comes into operation, provided the application does not adversely affect any person.

For consistency, a similar retrospective power should apply to the LTA Act.
This clause inserts section 46(3) to provide that regulations may be expressed to apply to or in relation to an assessment year that began before the day on which the regulations came into operation provided that the regulations would not adversely affect a person who is or may become liable to pay land tax for the assessment year.

Clause 138  Schedule 1 Division 6 inserted

This clause inserts Division 6 at the end of Schedule 1 to set out the transitional rules for the amendments to section 29.

Division 6 – Provisions for Revenue Laws Amendment Act 2018

20. Application of section 30D to land held in trust for assessment year 2019-20

To be eligible for an exemption under section 30D, trust deeds may need to be amended to comply with the definition of a family trust.

Subject to all other requirements of the exemption being met, this transitional provision will allow a taxpayer who satisfies the relationship requirement set out in section 30H(c) by midnight 30 June 2020 to receive an exemption for the 2019-20 assessment year.

Subclause (1) defines a compliant trustee to mean a trustee of a discretionary trust, or other trust (other than a discretionary trust), that is a family owner of land under section 30H(c) or a person related to a family owner of the land described in section 30I(1)(d), 30J(d), 30K(d) or 30(d).

Subclause (2) provides that if an exemption would be denied for the 2019-20 assessment year solely because the trustee was not a compliant trustee as at 30 June 2019, the land is eligible for an exemption if the trust deed is amended by midnight on 30 June 2020 to enable the trustee to satisfy the relationship test.

Division 3 – Amendments commencing on 1 July 2019

Clause 139:  Part 3 Division 2 Subdivision 1 heading inserted

These amendments commence on 1 July 2019. This clause inserts the heading for subdivision 1 at the beginning of Part 3 Division 2. Subdivision 1 deals with exemptions and rebates for private residential property.

Clause 140:  Part 3 Division 2 Subdivision 2 inserted

Generally, provided certain requirements are met, a land tax exemption can be granted for up to two consecutive assessment years for the construction or refurbishment of private residential property that is to be occupied by the owner as their primary residence (transitional residential exemptions).
Two recent State Administrative Tribunal decisions (Carter\textsuperscript{12} and Eames\textsuperscript{13}) have highlighted that the transitional residential exemption provisions do not apply correctly when land is subdivided during an exemption period. The amendments in Division 3 address the issues highlighted in these decisions.

Section 24A provides an exemption from land tax for two years for newly constructed private residential property that takes two or more years to be completed. One of the requirements is that the owner must be the first to occupy the property as their primary residence during the second assessment year.

In Carter, four couples purchased a lot of land with the intention of developing four new apartments on the lot. An application was made for an exemption under section 24A.

The Commissioner granted a provisional partial exemption for the 2012-13 and 2013-14 assessment years on the basis that two of the couples would use the lot as their primary residence prior to the end of the 2013-14 assessment year.

On 12 June 2014, the local council issued an Occupancy Permit and approved the Strata Plan. On 20 June 2014, two of the couples commenced occupying their units. Certificate of titles for the four subdivided lots containing the four dwellings were issued on 9 July 2014.

The Commissioner determined that as the new lots came into existence for land tax purposes on 12 June 2014 with the issue of the occupancy permits, the parent lot had ceased to exist as of that date. Consequently, the newly constructed private residences on the parent lot were not completed and occupied by the owners prior to the end of the 2013-14 assessment year.

The parties applied to the State Administrative Tribunal to review the decision. The Tribunal found that the parent lot had not ceased to exist for assessment purposes on 12 June 2014 as the certificate of title for that lot was not cancelled until 9 July 2014. The parent lot was available to allow an exemption under section 24A as of 30 June 2014.

Similarly in Eames, the applicants applied for an exemption from land tax under section 24A for a lot on which they were intending to construct four apartments for the 2014-15 and 2015-16 assessment years. However, unlike in Carter, the parent title in this case was cancelled and new titles issued before the building was ready for occupation and before the applicants moved in at the end of the second assessment year.

\textsuperscript{12} Carter and Commissioner of State Revenue [2016] WASAT 56.
\textsuperscript{13} Eames and Commissioner of State Revenue [2018] WASAT 14.
The Tribunal held that the exemption under section 24A did not apply to the parent lot for both assessment years. This is because the criteria in section 24A is based on the private residence that is constructed and occupied forming part of the same lot of land referred to in the chapeau of that section (that is, the parent lot).

*Private residence* is defined to mean a building occupied or fit to be occupied by the owner as a place of residence. By the time the building was fit to be occupied as a place of residence, the parent lot had ceased to exist as the certificate of title had been cancelled.

These two decisions highlight that whether an exemption is available under section 24A for land that is subdivided or amalgamated depends on the timing of the issue of the new titles. Although *Carter* and *Eames* arose in the context of a section 24A exemption, the issue also potentially causes an unfair outcome for residential exemptions under sections 24, 25, 25A, 27 and 27A.

The amendments inserted by this clause will ensure the exemptions apply consistently, provided the requirements of the relevant provisions are satisfied.

Clause 141 of this Bill amends clause 2(2) of the Glossary to address the issue identified in *Carter* where a parent lot that has been subdivided for land tax purposes can co-exist with the new lots until the title for the parent lot is cancelled.

This is inconsistent with the land tax scheme, which operates on the basis that once the parent lot is subdivided for land tax purposes, the parent lot becomes redundant and it is the new lots that are valued and assessed for land tax. These amendments will deem a parent lot to cease to exist when the new lots come into existence for land tax purposes.

The amendments in new Part 3 Division 2 Subdivision 2 will allow the transitional residential exemption to apply where the land has been subdivided, as long as the requirements for the relevant exemption are met.

**Subdivision 2 – Application of private residential exemptions to subdivided land**

**28A. Terms used**

Section 28A defines the following terms used in Subdivision 2:

(a) *exemption period* means an assessment year in relation to section 24, 25 or 27 and two consecutive assessment years for section 24A, 25A, or 27A.

(b) *exemption provision* means:

- sections 24 and 24A, which respectively provide one and two year exemptions for the construction of a private residence;
- sections 25 and 25A, which respectively provide one and two year exemptions for the refurbishment of a private residence;
• section 27, which provides an exemption for a person moving between two private residences; and
• section 27A, which provides a two year exemption for the construction or refurbishment of a second private residence.

(c) **new lot** means a new lot that comes into existence as a result of the subdivision.

(d) **parent lot** means a lot that ceases to be a lot for the purposes of the LTA Act under clause 2(2) of the Glossary as a result of the subdivision.

28B. Application of certain private residential exemptions to property subdivided during exemption period

Subsection (1) provides the section applies if:

(a) land is subdivided during an exemption period for an exemption provision; and

(b) because of the subdivision, there are one or more requirements of the exemption provision that –

(i) cannot be satisfied in relation to private residential property that is the parent lot; but

(ii) would be satisfied if the private residential property the subject of the exemption provision were one or more of the new lots.

This subdivision also includes an amalgamation of land. New clause 2(2) of the Glossary makes it clear that the definition of parent lot includes lots that are amalgamated into a new lot. Section 28B also applies where land is amalgamated during the exemption period.

Subsection (2) provides that for the purposes of the application of the exemption provision to private residential property that is a parent lot for the exemption period:

(a) the unsatisfied requirements are taken to be satisfied;

(b) if an exemption applies to the parent lot because of paragraph (a), the exemption only applies to the part or parts of the parent lot that, after the subdivision, constitute the new lot or lots that satisfy the requirements of the exemption provision; and

(c) section 18A applies to determine the taxable value of the parent lot if there is a part of that lot to which the exemption does not apply. The portion of the lot that is exempt is the ‘exempt area’ referred to in section 18A(2).

The purpose of paragraph (b) is to provide a partial exemption for only the portion of the parent lot that will be the new lot after subdivision and on which the person constructs or refurbishes their private residence.

The effect of subsection 28B(1) and (2) is that if the exemption requirements would be satisfied in relation to either the parent lot or the new lot then the exemption will apply. However, the requirement that relates to the ownership of private residential property at midnight on 30 June immediately before the exemption period at sections 24(1)(b) and 24A(1)(c) cannot be satisfied in relation to either the parent lot or the new lot.
Section 24(1)(b) and 24A(1)(c) require that at midnight on 30 June in the previous financial year, the individual owned the land on which the private residence is constructed. The land owned at midnight on 30 June before the exemption period is the parent lot, but the land on which the private residence is constructed is the new lot. At midnight on 30 June, the individual could not have owned the new lot on which the private residence is constructed as it is not yet in existence.

Sections 24 and 24A also require the owners of the parent lot as at midnight 30 June to be the first occupants of the private residence. An issue arises where a parent lot is jointly owned but new lots are owned by some of the joint owners (for example, each joint owner takes a separate new lot after the subdivision).

In these cases, a partial exemption only would be available in relation to a new lot if some of the owners of the parent lot at midnight on 30 June later occupy the private residence on the new lot.

**Subsection (3)** addresses these issues. It provides that for the purposes of determining whether a relevant requirement would be satisfied in relation to a new lot under subsection (1)(b)(ii):

(a) a requirement that relates to the ownership of private residential property at midnight on 30 June immediately before the exemption period is taken to be satisfied in relation to a new lot if each new lot owner was also an owner of the parent lot at that time; and

(b) if the new lot owners owned the parent lot jointly with other persons as at midnight on 30 June, the new lot is taken to have been owned at that time by the new lot owner only.

If sections 28B(3)(a) and (b) apply, the requirements are taken to be satisfied in relation to the new lot. The requirements will then be taken to be satisfied in relation to the parent lot under subsection (2).

**Subsection (4)** clarifies that a reference in subsection (3) to an owner of the new lot after subdivision is to the person who is the owner on the certificate of title for the new lot. This is required because there can be a delay between subdivision for land tax purposes and the issue of certificates of title for the new lots. During this time and until the certificates of title are issued for the new lots, the owners of the subdivided lots are arguably all the joint owners of the parent lot.

The following examples illustrate how section 28B will apply to the exemption provisions.

**Example 1 – Subdivision: application for two-year exemption under section 24A**

At midnight on 30 June 2019 A and B own a vacant block of land (Lot 100) with an area of 1,200m². A and B intend to subdivide the lot into three equally sized lots by the registration of a survey-strata plan, and to construct private residences on each lot.
A and B intend to each take a lot to occupy as their primary residence. The third lot will be owned by A and B jointly for investment purposes. A and B do not own any other property and are living in rental accommodation.

On 1 August 2019, a building contract is entered into for construction of the residences. An application for an exemption is made under section 24A for Lot 100 for the 2019-20 and 2020-21 assessment years.

On 2 June 2021, a statement is endorsed on the survey-strata plan by the Western Australian Planning Commission under section 25B of the Strata Titles Act. For land tax purposes, the land is subdivided at this time.

On 10 June 2021, A and B apply to register the survey-strata plan. The certificate of title for Lot 100 is cancelled and new certificates of title are issued for new Lots 200, 201, and 202. On 15 June 2021, the homes are completed and A and B respectively move into Lots 200 and 201.

Under the current provisions, applying the reasoning in Eames, the section 24A exemption will not apply to Lot 100 for both assessment years because the private residences that were constructed did not form part of former Lot 100. This is because, by the time the buildings became a ‘private residence’, Lot 100 ceased to exist.

Under new section 28B, the section 24A exemption will apply to the proportion of Lot 100 that becomes Lot 200 and 201 for both assessment years as follows:

- Under subsection (1), section 28B applies because Lot 100 is subdivided during the two year exemption period and, because of the subdivision, there are one or more requirements of section 24A that cannot be satisfied for Lot 100 but can be satisfied for two of the new lots, being Lot 200 and 201.
  - Under subsection (3)(a), the requirement in section 24A(1)(c) is taken to be satisfied for Lots 200 and 201 as the owner of each new lot, being A and B respectively, were owners of the parent lot at midnight on 30 June before the first assessment year; and
  - Under subsection (3)(b), A is taken to be the owner of Lot 200 and B is taken to be the owner of Lot 201 at midnight on 30 June. This is to satisfy the requirement that the owners of the parent lot at that time must occupy the new lots as their primary residence.
- Under subsection (2), for the purposes of applying section 24A to Lot 100 for the 2019-20 and 2020-21 assessment years:
  - All of the requirements under section 24A are taken to be satisfied.
  - A partial exemption will apply for both assessment years to the part of Lot 100 that will constitute new Lots 200 and 201 after the subdivision. The portion of Lot 100 that becomes Lot 202 is not exempt as it does not satisfy the requirements of section 24A.
- Section 18A applies to determine the taxable value of Lot 100. The exempt area referred to in section 18A will comprise of the area of each new lot (total exempt area of 800 m²).

**Example 2 – Amalgamation: application for one year exemption under section 24**

At midnight on 30 June 2019, A owns adjoining vacant blocks, Lot 10 and Lot 20. A intends to construct a private residence on the amalgamated lots to use as their primary residence.

On 1 September 2019, the Western Australian Planning Commission approves the amalgamation of the lots and new Lot 50 is created for land tax purposes. A enters into a contract on 10 September 2019 to construct the residence on the new lot. A applies for an exemption under section 24 for the 2019-20 assessment year.

The certificates of title for Lot 10 and Lot 20 are cancelled on 30 November 2019 and a new title is registered for Lot 50. On 1 June 2020, construction of the residence is completed and A moves in on the same day.

Under the current provisions, applying the reasoning in Eames, an exemption under section 24 cannot apply to exempt Lot 10 and Lot 20 for the 2019-20 assessment year. This is because the private residence that is constructed did not form part of Lot 10 and Lot 20. However, the private residence forms part of Lot 50.

New section 28B applies to each of Lots 10 and 20 to allow the section 24 exemption for the 2019-20 assessment year as follows:

- Under subsection (1), section 28B applies because Lots 10 and 20 are subdivided during the assessment year, and because of the subdivision, there are one or more requirements of section 24 that cannot be satisfied for both parent lots but can be satisfied for the new lot.

- Under subsection (2), for the purposes of applying section 24 to Lots 10 and 20 for the 2019-20 assessment years –
  - All of the requirements under section 24 are taken to be satisfied.
  - The part of Lots 10 and 20 that constitute the new lot after subdivision is the whole of both parent lots. Therefore, an exemption applies to both parent lots for the assessment year.

**Example 3 – Subdivision: application for two year exemption under section 27A**

On 30 May 2015, B acquired Lot 150 and occupies it as their primary residence.

On 20 June 2019, B acquires a vacant block at Lot 250 with the intention of constructing a new private residence and moving into it as their primary residence. On 15 July 2019, B enters into a building contract. B applies for an exemption under section 27A for the 2019-20 and 2020-21 assessment years in anticipation that the new residence will be constructed and occupied by 30 June 2021.
On 30 May 2021, a subdivision of Lot 250 is approved by the Western Australian Planning Commission. The subdivision creates Lots 300 and 350.

On 5 June 2021, new certificates of title are issued for Lots 300 and 350. The certificate of title for Lot 250 is cancelled on the same day. On 10 June 2021, construction of the new residence is completed and B moves into their new residence on Lot 300. Lot 350 is a vacant block of land which B intends to sell.

B puts Lot 150 on the market while the new residence is being constructed. The sale of Lot 150 settles on 20 June 2021 and the new owners move in on that date.

Under the current provisions, an exemption under section 27A cannot apply to Lot 250 for the two assessment years.

The lot of land on which the building was being constructed (Lot 250) ceased to exist prior to completion of the private residence. The private residence that B occupies forms part of Lot 300.

As there was never a private residence that formed part of the property that was Lot 250, paragraphs (e), (f), (h) and (i) of section 27A(1) cannot be satisfied for that lot.

Under new section 28B, the section 27A exemption will apply to the proportion of Lot 250 that becomes Lot 300 for both assessment years as follows:

- Under subsection (1), section 28B applies because Lot 250 is subdivided during the two year exemption period and, because of the subdivision, some requirements of section 27A cannot be satisfied for Lot 250 but can be satisfied for one of the new lots, being Lot 300.

- Under subsection (2), for the purposes of applying section 27A to Lot 250 for the 2019-20 and 2020-21 assessment years:
  - Paragraphs (e), (f), (h) and (i) of section 27A(1) (the unsatisfied requirements) are taken to be satisfied.
  - A partial exemption will apply for both assessment years to the part of Lot 250 that, after the subdivision, will constitute new Lot 300. The portion of Lot 250 that becomes Lot 350 is not exempt as it does not satisfy the requirements of section 27A.
  - Section 18A applies to determine the taxable value of Lot 250 for the two assessment years. The exempt area referred to in section 18A will comprise the area of Lot 300.

28C. Application of requirements relating to sale or disposal of subdivided property

This section applies where the property acquired first, as referred to in section 27 and 27A, is subdivided during the exemption period.
Section 27 provides an exemption for a person moving between two private residences for one assessment year and section 27A provides a two year exemption for the construction or refurbishment of a second private residence.

Both sections require the owner to sell the property acquired first and deliver possession of that property to the new owner by the end of the exemption period.

If the property acquired first is subdivided during the exemption period, the requirement in section 27(1)(f) or 27A(1)(j) may not be satisfied because the new lots are sold and delivered into the possession of the new owner, rather than the property acquired first (which ceases to exist once it is subdivided).

Subsection (1) provides that the requirement in section 27(1)(f) or 27A(1)(j) is taken to be satisfied if the property acquired first is subdivided during the exemption period and all of the new lots are sold and delivered into the possession of the new owner by the end of the assessment year or second assessment year (whichever is relevant).

Subsection (2) clarifies that subsection (1) applies in relation to section 27(1)(f) whether the property acquired first is Property A or Property B referred to in that section. Under section 27, either Property A or Property B referred to in that section can be the property acquired first.

Section 28B(2)(a) provides the unsatisfied requirements are taken to be satisfied for a parent lot if the requirements would be satisfied for one or more of the new lots. This means that if one of the newly subdivided lots is sold and delivered into the possession of the new owner by the end of the exemption period, the unsatisfied requirement is taken to be satisfied.

Subsection (3) provides that, despite section 28B(2)(a), where the property acquired first has been subdivided, a requirement in section 27(1)(f) or 27A(1)(j) is not taken to be satisfied unless all of the new lots are sold and delivered into the possession of the new owner by the end of the exemption period.

Example 4

At midnight on 30 June 2020, A and B own two properties. One property is a home in City Beach that was purchased on 1 June 2020. A and B are residing in this property as their primary residence at midnight on 30 June 2020. They intend to subdivide their own old home in Scarborough and sell the new lots.

The new City Beach home is exempt under section 21 for the 2020-21 assessment year because A and B used it as their primary residence at midnight on 30 June.

On 20 January 2021, the old Scarborough home is subdivided for land tax purposes. The certificate of title for the old lot is cancelled and new titles are issued for two new lots on 25 January 2021.
The new lots are placed on the market and one of the new lots is sold by 31 March 2021. The other lot remains for sale.

A and B apply for an exemption under section 27 for the old Scarborough home for the 2020-21 assessment year. Under section 27, all of the requirements except section 27(1)(f) are satisfied. Section 27(1)(f) is not satisfied because it is the new lots that are sold by the end of the assessment year and not the property acquired first, as that property ceased to exist when it was subdivided.

Under section 28B(2)(a), the unsatisfied requirement is taken to be satisfied if the requirement is satisfied for one or more of the new lots.

However, section 28C(3) provides that, despite section 28B(2)(a), the requirement in section 27(1)(f) is only taken to be satisfied if each of the new lots are sold by the end of the assessment year. Therefore, for A and B to obtain an exemption for the old Scarborough home for the 2020-21 assessment year, they must also sell the other new lot by 30 June 2021.

28D. Application of two-year private residential exemptions if property subdivided during first year

Where land is subdivided in the first assessment year of a two-year exemption period, the new lots need the exemption for the second assessment year (as they would otherwise be subject to land tax).

Section 28D addresses this situation by providing that if private residential property that is a parent lot is exempt for two assessment years under sections 24A, 25A or 27A and the subdivision occurs in the first assessment year, the exemption applies for the second assessment year to the new lots that meet the relevant requirements and not to the parent lot.

28E. Ownership of land during period when land subdivided but certificates of title not issued

Where there is a delay between the subdivision of jointly owned land and the issue of certificates of title for the new lots, section 28E allows the Commissioner to deem the owners of the new lots to be some of the joint owners for that period of time.

Subsection (1) provides the section applies if:

(a) a parent lot that is owned jointly by two or more persons (the joint owners) is subdivided; and

(b) there is a period of time (the relevant period) between the subdivision occurring and a certificate of title for any new lot being registered under the Transfer of Land Act 1893; and

(c) either –

(i) after the certificate of title is registered, each new lot is owned by some, but not all, of the joint owners (the relevant owners); or

(ii) the Commissioner is satisfied that after the certificate of title is registered, each new lot will be owned by the relevant owners.
Subsection (2) provides that, for the purposes of the private residential property exemptions in Division 2, the Commissioner may treat each new lot as being owned during the relevant period by the relevant owners and not all of the joint owners.

The word ‘may’ provides the Commissioner the discretion to treat each new lot as being owned during the relevant period by the relevant owners.

**Example 5**
Four owners jointly own Lot 100. The owners construct four residences on the lot during the 2019-20 assessment year with the intention the land will be subdivided and each owner will take one lot to use as their primary residence.

The construction of the private residences is completed and Lot 100 is subdivided into four new lots for land tax purposes before 30 June 2020. Each of the owners moves into their private residence and uses it as their primary residence at midnight on 30 June 2020.

The certificate of title for Lot 100 is cancelled on 2 July 2020 with new titles for the four lots issued on the same day. During the period between subdivision occurring for land tax purposes and the issue of titles for the new lots, the owners of each of the new lots are all of the owners of the parent lot.

However, as only one of the four owners is using each lot as their primary residence at 30 June 2020, a partial exemption applies to each lot for the 2020-21 assessment year to the extent of 25 per cent. A full exemption under section 21 will not apply to each of the new lots for the 2020-21 assessment year.

In these circumstances, the Commissioner will deem the owner of each lot as at midnight 30 June 2020 to be the person that will become the owner of the lot when the certificate of title is issued. This means each owner will be entitled to a full exemption under section 21 for the 2020-21 assessment year.

**Clause 141: Schedule 1 amended**
This clause inserts transitional provisions for the new sections set out in Part 3 Division 2 Subdivision 2 and clause 2(2) of the Glossary.

21. **Application of amendments relating to subdivision of land**
Subclause (1) provides that Part 3 Division 2 Subdivision 2 (except for section 28E) applies to exemption periods that begin on or after 1 July 2019. This is subject to subclause (3).

Subclause (2) provides that section 28E and clause 2(2) of the Glossary apply in relation to assessment years that begin on or after 1 July 2019, whether the subdivision referred to in those provisions occurs before or after 1 July 2019. This is subject to subclause (3).
Subclause (3) provides that despite subclauses (1) and (2), Part 3 Division 2 Subdivision 2 and clause 2(2) of the Glossary do not apply for the purposes of determining whether an exemption under section 24, 24A, 25, 25A or 27A applies if the commencement date for the construction or refurbishment referred to in the exemption provision is before 1 July 2019.

The effect of subclause 3 is that the amendments do not apply to determine a transitional residential exemption (except section 27) if the construction or refurbishment of the private residence commenced before 1 July 2019.

This ensures a consistent set of rules for persons who commenced construction or refurbishment before 1 July 2019. It also prevents complicated administrative arrangements that would be needed if the exemption rules changed during a two-year exemption period that starts before the amendments come into effect.

Section 27 is not referred to in subclause (3) because that section does not refer to construction or refurbishment of a private residence. The amendments will apply to determine an exemption under section 27 as long as the assessment year begins on or after 1 July 2019.

Clause 142: Glossary clause 2 amended

The land tax regime has always operated on the basis that a new lot resulting from the subdivision of a parent lot is created when the subdivision is approved by the Western Australian Planning Commission.

When this occurs, the parent lot ceases to exist for land tax purposes, and the new lots become the lots for valuation under the Valuation of Land Act 1978 and are assessed for land tax at the next 30 June.

The *Carter* decision determined that a parent lot that has been subdivided for land tax purposes can co-exist with the new lots until the title for the parent lot is cancelled. This raises an issue about which lot is to be valued for land tax given both the new lot and parent lot are in existence.

To correct this issue, this clause amends clause 2 by inserting new subclauses (2), (2A) and (2B).

Subclause (2) provides that, despite the definition of ‘lot’ in subclause (1), if:

(a) a lot (the *parent lot*) is subdivided resulting in two or more new lots referred to in the definition of lot at subclause (1)(a)(vii) or (c) coming into existence, the parent lot ceases to be a lot for the purposes of the LTA Act when the new lots come into existence; or
(b) land that constitutes two or more lots (the **parent lots**) is subdivided resulting in a new single lot referred to in the definition of lot at subclause (1)(a)(vii) or (c) coming into existence, the parent lots cease to be lots for the purposes of LTA Act when the new lot comes into existence. This paragraph applies to an amalgamation of land.

Subclause (1)(a)(vii) of the definition of lot refers to the whole of the land the subject of a lot depicted on a strata plan or survey-strata plan that has been subdivided in accordance with subclause 3(1)(d) and (e) of the Glossary.

Subclause (1)(c) of the definition of lot refers to a defined portion of land depicted on a diagram or plan of survey of a subdivision approved by the Western Australian Planning Commission. Land subdivided in accordance with clauses 3(1)(a), (b) and (c) is covered in the definition of lot by subclause (1)(c).

Liability for land tax for an assessment year is based on ownership and usage of land at midnight on 30 June before the assessment year. Where land is subdivided during an assessment year, land tax is payable that year on the parent lot and not on the new lot.

For example, if subdivision occurs on 2 July 2020, the parent lot ceases to exist under subclause (2) at that point. However, land tax is still payable on the parent lot for the 2020-21 assessment year because the parent lot existed at midnight on 30 June 2020.

Further, a final decision about the application of the transitional residential exemptions for an assessment year can only be determined retrospectively (once construction or refurbishment is completed). Where land is subdivided during an assessment year, the lot that needs to be exempt is the parent lot that would otherwise be liable for land tax.

At the time the final assessment is made about whether private residential property is exempt from land tax, the parent lot must still be able to be characterised as ‘private residential property’ (which generally means a lot of land) so the exemption can apply to it.

Subclause (2A) ensures that, despite a parent lot ceasing to be a lot for land tax purposes once it is subdivided, subclause (2) does not prevent land tax from being payable on the parent lot, or an exemption, rebate or concession being applied in relation to the parent lot, for the financial year in which the land is subdivided or any earlier financial year.

Subclause (2B) provides that subclause (2) does not apply to a subdivision of land in circumstances prescribed by the regulations. The regulation-making power is to cater for a new form of leasehold subdivision to be introduced by the *Strata Titles Amendment Act 2018* (once it comes into operation). Land subdivided by a leasehold scheme does not cease to exist and will be exempt from land tax for the duration of the scheme.
Division 4 – Amendment commencing when *Community Titles Act 2018* s.219(3) commences

Clause 142A: Glossary clause 2 amended

Clause 2(2) of the Glossary (inserted by clause 142) provides that a parent lot ceases to exist when it is subdivided for land tax purposes and a new lot referred to at clauses 1(a)(vii) and (c) of the Glossary come into existence.

Section 219(3) of the *Community Titles Act 2018*, once it comes into operation, inserts paragraph (a)(via) into the definition of lot at clause 2(1) to include a lot defined in a community titles scheme plan where the land has been subdivided for land tax purposes.

This clause amends clause 2(2) to include a reference to a lot referred to in paragraph (a)(via). The effect of the amendment is that a parent lot that is subdivided by a community titles scheme plan ceases to be a lot for land tax purposes when the community title lots come into existence.

Part 4 – *Pay-roll Tax Assessment Act 2002* amended

Clause 143: Act amended

This clause provides that Part 4 amends the *Pay-roll Tax Assessment Act 2002* (PTA Act).

Clause 144: Section 9FA amended

Allowances paid to employees are taxable wages under PTA Act. This includes a motor vehicle allowance. To recognise the cost of running a vehicle, a component of the motor vehicle allowance is exempt from payroll tax.

Section 9FA of the PTA Act provides that the exempt component is calculated by applying the rate prescribed by the regulations under section 28-25 of the *Income Tax Assessment Act 1997* (Cth) (ITA Act). Section 9FA(3)(b) of the PTA Act provides that if no rate has been prescribed as referred to in the ITA Act, the rate prescribed under the *Pay-roll Tax Assessment Regulations 2003* is used.

The Commonwealth recently amended the ITA Act to simplify and modernise the methods for calculating work-related car expense deductions. The amendments also provided for the rate to be set in a statutory instrument by the Commissioner of Taxation of the Commonwealth, rather than by regulations to the ITA Act.

As a result, the link in the PTA Act to the rate to calculate the exempt component of an allowance for payroll tax purposes was broken. This would have resulted in taxpayers having to pay tax on the full amount of these allowances from the 2016-17 payroll tax assessment year.

To avoid this, regulation 28 to the Pay-roll Tax Assessment Regulations was gazetted on 24 June 2016 to prescribe the exempt rate for the purposes of section 9FA(3)(b) of the PTA Act.
Regulation 28 does not prescribe a particular monetary rate of cents per kilometre, but refers to the rate determined by the Commissioner of Taxation of the Commonwealth for the purposes of the ITA Act.

As this provision is harmonised with other jurisdictions and exists in their respective Acts, the reference to the exempt rate that is currently prescribed in regulation 28 is inserted into the PTA Act.

This clause replaces section 9FA(3)(a) and (b).

New paragraph (a) provides that the exempt rate for the financial year concerned is the rate determined by the Commissioner of Taxation of the Commonwealth under section 28-25(4) of the ITA Act as the rate of cents per kilometre for cars for the income year before the financial year in which the allowance is payable. This rate is currently prescribed in regulation 28 of the Pay-roll Tax Assessment Regulations, which will be repealed.

New paragraph (b) provides that if the exempt rate is the rate prescribed in the regulations if no such determination is in force.