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Our ref :

HON KIM CHANCE, MLC
MINISTER FOR AGRICULTURE;
FORESTRY AND FISHERIES;
THE MIDWEST WHEATBELT AND
GREAT SOUTHERN

Dear Kim

GOVERNMENT RESPONSE TO THE STANDING COMMITTEE ON LEGISLATION REPORT ON THE TAXATION ADMINISTRATION BILL 2001

The Chairman of the Standing Committee on Legislation tabled a report on the Taxation Administration Bill 2001, Taxation Administration (Consequential Provisions) Bill 2001 and Taxation Administration (Consequential Provisions) (Taxing) Bill 2001 on 16 October 2002.

Under Standing Order 337, the responsible Minister (if a Member of the Legislative Council) or the Leader of the Government is required to report the Government's response to the report within 4 months.

Please find attached a copy of the Government's response, which agrees to a number of recommended amendments and also suggests some alternative amendments.

It would be appreciated if you could table the response as soon as possible, to allow the maximum amount of time possible to ensure progress of these Bills through the Legislative Council by the end of the year.

Yours sincerely

Eric Ripper

ERIC RIPPER MLA
DEPUTY PREMIER; TREASURER;
MINISTER FOR ENERGY
24/10/02

Att

GOVERNMENT RESPONSE TO STANDING COMMITTEE ON LEGISLATION REPORT ON THE TAXATION ADMINISTRATION BILL 2001

Recommendation 1

The Government believes that the policy intent supporting this provision is warranted and justifiable, particularly in light of recent corporate events that have highlighted the unwillingness of some directors to comply with their corporate responsibilities.

From that perspective, these provisions put the onus on directors to take quicker action in dealing with possible insolvent positions. Insolvency practitioners have informally commented that the inability to meet taxation liabilities is often an early indicator of insolvency, as the money to pay taxation is often used as a substitute for working capital.

These provisions will have benefits for all the community, as they require directors of companies with State taxation debts to deal with possible insolvency problems at a far earlier stage than has previously been the case.

The Government does not agree with the majority of recommended amendments to this clause, because it believes they will defeat the purpose of the provision by introducing a mechanism for the director to challenge the issue of a notice on any grounds. The suggested amendments allow the effectiveness of the provision to be compromised by unnecessary bureaucratic processes.

However, the Government does acknowledge the following points raised in the report:

- the potential of the clause to apply to small incorporated associations;
- the potential of the clause to operate harshly where there is a genuine dispute over an assessed amount; and
- the inadequacy in the defence that may prevent directors who have made a partial payment of the tax debt from recovering it during liquidation proceedings.

The alternative amendment proposed below includes the Committee's suggestion to prevent the clause from applying to directors of a body corporate under the *Associations Incorporation Act 1987*. Rather than the specific provision drafted by the Committee, the whole provision has been redrafted on the basis that it only applies to a company under the Corporations Act.

It also proposes an alternative approach regarding disputed assessments, such that a notice cannot be issued to a director where the assessed amount is the subject of an objection or appeal. The amendment also addresses the indemnity issue raised by the Insolvency Practitioners' Association of Australia by extinguishing the body corporate's debt to the extent of any payment made by a director.

The Government notes the Committee's comment that clause 67 can be used to impose liability on directors who were not involved in "wrong-doing" or who were not directors of the body corporate at the time that the tax debt was incurred.

It is considered that this point fails to recognise that the purpose of clause 67 is to cause directors to act prospectively, rather than to impose joint liability because the company failed to pay a debt while a particular person was a director.

The notice issued to directors places a future obligation on them to examine the body corporate's capacity to pay its debts at that time. If the body corporate cannot do so, it is incumbent on the director to act to address the situation. The issue of whether the director was involved in any wrong-doing or was a director at the time the debt was incurred is irrelevant, because the director is served with a notice and given a future period of time in which to act.

However, this situation does highlight a possible inequity, in cases where a director does everything within his power to cause the company to act, but is frustrated by other directors. The defence in subclause (7) was inserted to address this situation, but this only operates in recovery proceedings after the director has been made jointly and severally liable.

The amendment below involves an additional remedial mechanism for a company director to avoid the imposition of joint liability. This recognises steps taken by any director (acting in the minority if relevant) to have a body corporate placed into provisional liquidation. This has resulted in a number of amendments to the clause to take account of the fact that a director must seek the leave of the court in order to apply to the court.

A further issue, which was highlighted in the evidence given by the Law Society of Western Australia[1], indicated that a director who paid the amount of the liability only had a right of indemnity from the company.

The alternative amendment allows a director who rectifies the tax default to recover a contribution from any other liable director.

Page 37, line 27 to page 39, line 16 — To delete the lines and insert instead —

"67. Liability of company directors

(1) The Commissioner may serve a director's liability notice on the directors of a company if —

(a) the Commissioner has issued an assessment notice to the company;

(b) the outstanding amount is not paid by the due date or within any further time allowed under section 47;

(c) an objection to the assessment was not lodged within 60 days after the date of the assessment notice;

(d) an appeal against a decision on an objection to the assessment is not commenced within 60 days after notice of the decision was served on the company; and

(e) the company's default is not remedied as provided in subsection (6).

(2) The Commissioner may serve a director's liability notice on the directors of a company if the company's default revives under

[1] *Transcript of Evidence*, Law Society of Western Australia, May 15 2002, p2

subsection (10), whether or not a director's liability notice in respect of the same default was previously served.

(3) A director's liability notice must —

(a) inform the directors that they will become jointly and severally liable to pay the outstanding amount unless the company remedies its default within the period of 28 days after the date of service of the notice; and

(b) be served personally on each director.

(4) However if, after exercising due diligence, it appears to the Commissioner that it is not practicable to serve a notice on a director personally, the notice may be sent, by prepaid post requiring proof of delivery, to the director at his or her last known personal or business address.

(5) If a second or later director's liability notice is served in respect of a default, then a reference in the remainder of this subsection to the period of 28 days is to be read as a reference to the period of 28 days after the date of the last notice to be served in respect of the default, whether or not any period of 28 days relating to an earlier notice has ended.

(6) For the purposes of this section, the company's default is remedied if —

(a) the company's tax liability is discharged;

(b) the company enters into a tax payment arrangement under section 47;

(c) an application is made under section 459P for leave to apply for an insolvency order but the application has not been heard and determined or otherwise disposed of;

(d) if leave to apply for an insolvency order is granted —

(i) the application is made within a reasonable time;

(ii) any conditions imposed under section 459P of the Corporations Act are complied with; and

(iii) the application has not been heard and determined or otherwise disposed of;

(e) the company is under the management of an official liquidator appointed provisionally under section 472(2) of the Corporations Act;

(f) an insolvency order is made;

(g) an application is made under section 462 of the Corporations Act for an order to wind up the company on a ground provided for by section 461 of that Act, and the application has not been heard and determined or otherwise disposed of;

(h) the company is being wound up in accordance with an order under section 461 of the Corporations Act; or

(i) the company enters into voluntary administration under Part 5.3A of the Corporations Act.

(7) The 28 day period stops running if the company's default is remedied, but starts running again if the default revives under subsection (10).

(8) If the company's default is not remedied within the 28 day period, the directors are jointly and severally liable, with the company, to pay the outstanding amount.

(9) However, a director is not liable if —

(a) before the end of the 28 day period the director made or supported an application under section 459P of the Corporations Act for leave to apply for an insolvency order; and

(b) if leave is granted — the director makes or supports an application for an insolvency order.

(10) Unless the company's liability has been discharged, the company's default revives if —

(a) the company does not comply with a condition of a tax payment arrangement or otherwise defaults on a tax payment arrangement;

(b) an objection to the assessment is disallowed in whole or in part;

(c) an appeal against a decision on an objection to the assessment has been finally determined or otherwise disposed of, and the outstanding amount is not paid within the time allowed by the Court or the Commissioner;

(d) the court refuses to give leave to apply for an insolvency order;

(e) the court refuses to make an insolvency order;

(f) the court refuses to order the winding up of the company under section 461 of the Corporations Act; or

(g) the company ceases to be under the control of an official liquidator, but has not been wound up.

(11) A director of a company who pays an amount in discharge of the company's liability or his or her liability under this section, or pays an amount to another director by way of contribution, is entitled —

(a) to be indemnified by the company for an amount equal to the amount paid by him or her less any amount paid to him or her by the company by way of reimbursement or by another director by way of contribution; and

(b) to recover a contribution from any other director of the company who is subject to the same liability as if the directors who are subject to the liability had jointly guaranteed payment of the assessed amount.

(12) If a director pays an amount in discharge of the company's tax liability or in discharge of the director's liability under this section, the company is taken to have discharged its tax liability to the extent of that amount.

(13) In proceedings for recovery of tax from a director under this section, it is a defence for the director to establish that —

(a) the director took all reasonable steps to get the company's default remedied; or

(b) the director was unable because of his or her illness or some other proper reason to take steps to get the company's default remedied."

The Glossary

Page 71, after line19 — To insert the following definitions —

" "company" means a company within the meaning of the Corporations Act;

"Corporations Act" means the *Corporations Act 2001* of the Commonwealth; "

Page 71, after line 24 — To insert the following definition —

" "director's liability notice" means a notice under section 67;"

Page 72, after line 4 — To insert the following definition —

" "insolvency order", in relation to a company, means an order under section 459A of the Corporations Act for the company to be wound up in insolvency;"

Recommendation 2

Serving of documents or processes on a person can generally proceed by:

- personal service, where the document is given to the recipient personally; or
- substituted service, where the document is given to some other person, sent by post or advertised.

Clause 108 of the Taxation Administration Bill provides a number of methods of service that can be used by the Commissioner to serve a notice or other document. These methods were specifically narrowed for notices served on directors under clause 67 so that personal service must be used. A backup was retained, so that if after exercising due diligence it was not practicable to personally serve the notice, the Commissioner could send a copy of the notice by prepaid post to the last known personal or business address of the director. The use of "prepaid post" and "last known addresses" was considered an acceptable alternative, on the basis that it is used in section 56A of the *Justices Act 1902* and section 75 of the *Interpretation Act 1984.*

The Committee's recommended amendment to clause 108 provides that the Commissioner can apply to the Supreme Court for substituted service where any other method of service fails or is impracticable.

It is understood that the following steps would be required to effect substituted service:

- The Commissioner would apply to the Master in Chambers for an order for substituted service;

- The application would be drawn up on behalf of the Commissioner by the Crown Solicitor's Office. When the application is lodged at the Supreme Court, it must be accompanied by a supporting affidavit outlining matters such as the steps already taken to serve the notice, any evasive action of the intended recipient and an indication of where the intended recipient may be residing currently;
- The Supreme Court lists the application, generally for seven days from the date of filing. The Master may request further information from the applicant and may approve or reject the application for substituted service, or may adjourn the decision awaiting the provision of further information; and
- Once the Master in Chambers gives approval for substituted service, the applicant executes the service of documents in the manner approved. The applicant files evidence of the effected service with the Supreme Court and the document is then deemed to have been served on the intended recipient.

This is clearly a far more onerous and bureaucratic method of serving a notice, and is likely to result in substantial delays when serving notices under the director provisions. The Government considers the amendment already made to clause 67 in the Legislative Assembly to require personal service in the first instance adequately deals with the problem identified.

Recommendation 3

The Government does not support the Committee's recommended amendment, as it does not adequately address the situation of a director who has knowledge of a contravention, but did not take active steps to deal with it. Under the Committee's amendment, a director would have a defence unless he personally was in some way knowingly concerned in or party to the contravention of the law by the company.

There is scope under the recommended amendment for a director to argue that he personally was not knowingly concerned in or party to the contravention of the law by the company, even though he was aware of the company's contravention, was in a position to prevent it and failed to take steps to do so.

In each case, the question would be whether the director was "by omission" knowingly concerned in or party to the contravention of the law. An "omission" suggests that there must be a duty to act, the person must be aware that performance is required and the person fails to carry out the act required.

For example, a director who deliberately turns a blind eye to a contravention of the law or a lazy/negligent director could well establish that there was no "omission" on their part, either because they expected other officers or employees to take the necessary steps to prevent the contravention or it occurred in an area of management that they would not normally be involved with.

It is considered that a defence should only be available where a director with knowledge that the company was contravening the law, does all he or she can to prevent the contravention.

Accordingly, the Government proposes the following alternative amendment, which takes into account this position and provides a wider defence than that currently contained in clause 100(2) of the Taxation Administration Bill. The amendment is also consistent with provisions already in place in the Taxation Administration Act provisions of New South Wales, ACT, Victoria and Tasmania.

Page 61, lines 21, 22, 23 and 24 — To delete the lines and insert instead —

"(2) It is a defence in proceedings under subsection (1) for a director to prove that —

(a) the company contravened the provision without the director's knowledge;

(b) the director was not in a position to influence the conduct of the company in relation to its contravention of the provision; or

(c) the director, if in that position, used all due diligence to prevent the contravention by the company."

Recommendation 4

The Government agrees that any future amendment under this provision should be subject to the appropriate level of scrutiny by the Parliament. In the interests of transparency, the Government supports this recommendation.

Recommendation 5

During debate on this Bill in the Legislative Assembly on 9 April 2002, the Treasurer stated:[2]

> "I am prepared to consider inserting the procedures into regulation. In this way, they would be specified in subsidiary legislation, and people would understand the law as it relates to claims of legal professional privilege and the taxation administration legislation."

The Government considers that this approach is more workable than the amendment proposed by the Committee. The proposed section only partially deals with all procedures that would be necessary. Furthermore, it is attempting to insert procedures that would enhance a taxpayer's ability to make a claim of legal professional privilege, compared to existing rights under the common law.

Proposed subsection 94A(3) would require the Commissioner to have regard to information in relation to the document and its origins, which is unlikely to be in the Commissioner's possession and be difficult to obtain. It would impose a significant burden on the Commissioner in carrying out investigations.

Proposed subsection 94A(4) is attempting to allow a retrospective claim of legal professional privilege for material that is already in the possession of the Commissioner or an investigator. This is essentially trying to put the legal professional privilege "genie" back in the bottle. Under current common law, if a claim for legal professional privilege is not made, the right to privilege is waived and the Commissioner can access the documents. The suggested provision is therefore seeking to give taxpayers rights that currently do not exist under the common law. This would restrict the Commissioner's ability to access documents in circumstances where legal professional privilege has been waived by conduct.

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[2] Parliamentary Debates (WA) (Hansard), Thirty Sixth Parliament First Session 2002, April 9 2002, p9260

Given that the Committee's view is that section 94 "in its current form fails to clarify adequately how the provision will operation in practice"[3], the Government is now committing to an alternative mechanism to introduce the clarity required.

The amendment suggested below inserts a specific regulation making power to allow regulations to be made that set out more workable procedures for dealing with legal professional privilege claims.

These regulations will be made after consultation with the Law Society of Western Australia and the Taxation Institute of Australia. It is important that the regulations address the concerns raised by these groups, while not jeopardising the ability of the Commissioner to efficiently and effectively collect the revenue of the State that funds important community initiatives.

Page 58, after line 31 — To insert —

> **"(5) If a person indicates during an investigation that the person is making or considering whether to make a claim of legal professional privilege in respect of any information or material, the prescribed procedures for dealing with the claim or possible claim must be followed."**

Recommendation 6

The Government's commitment to removing the disincentives involved in pursuing administrative rights is well progressed. On 24 September 2002, the Attorney General announced[4] that Cabinet endorsed the recommendations of the Taskforce Report on 22 July 2002, subject to some qualifications. The Attorney noted that he expected the State Administrative Tribunal (SAT) to be fully operational by January 2004.

As has been repeatedly emphasised by the Commissioner in the context of submissions to the SAT Taskforce, the outcome of a revenue appeal can have serious implications for the revenue of the State, even where the amount of tax involved in the particular case may not be significant. This is because the judgment may have widespread implications for similar matters or transactions. This point has been specifically addressed by the Taskforce, which noted in its report[5] that:

> "The Taskforce considers the SAT revenue jurisdiction should be exercised by a Presidential member in all cases (whether sitting alone or with others), save where the President directs otherwise. This allows for the development of this jurisdiction and the possibility that, as the jurisdiction develops or in special cases, the President or the Deputy President may not need to determine all revenue appeals."

Because of the potential implications for the revenue of the State, it is considered essential that revenue matters are dealt with by persons with appropriate revenue experience.

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[3] Point 5.25 of the Committee's Report
[4] Keynote address to the Institute of Public Administration of Australia CEO Forum
[5] *Western Australian Civil and Administrative Review Tribunal*, Taskforce Report on the Establishment of the State Administrative Tribunal, May 2002, p96

Paragraph 6.9 of the Committee's report notes that the Taxation Institute commented that making an appeal to the Supreme Court is expensive and many appeals are not progressed on that basis. However, the following comment by the Taxation Institute should also be noted regarding the expertise of those making judgements on revenue matters:

> "Firstly, it would be very helpful to have a tribunal of some kind, but it needs a person with some revenue expertise as the arbitrator, otherwise it would not be effective. The Stamp Act is very complex with quite archaic wording, so it would need someone with a degree of revenue experience, ..."[6]

It is important to recognise that most matters currently before the Small Claims Tribunal essentially involve dispute resolution over monetary payments, rather than legal interpretation of statutory provisions imposing tax. This is illustrated by the definition of a "small claim" from section 4 of the *Small Claims Tribunal Act 1974*, which states that:

> **"small claim"** means —
> (a) a claim for payment of money in an amount less than the fixed amount;
> (b) a claim for performance of work of a value less than the fixed amount;
> (c) a claim for relief from payment of money in an amount less than the fixed amount; or
> (d) a claim for the return or replacement of goods to the value of less than the fixed amount,
> that in any case arises out of a contract for the supply of goods or the provision of services made between persons who, in relation to those goods or services, are a consumer on the one hand and a trader on the other;

The referral of taxation appeals is outside the intended scope of that Tribunal's operations. This has obviously been taken into account by the proposed amendment, as it gives the Tribunal jurisdiction to hear the appeal and requires the Tribunal to be constituted by a Magistrate. Such an amendment would override section 5 of the *Small Claims Tribunal Act 1974*, which states that the Tribunal is to be constituted by a referee sitting alone.

At face value, it is difficult to see how a magistrate (who is unlikely to have significant revenue experience as revenue appeals currently go to the Supreme Court), would have the level of experience referred to by the Taxation Institute.

The approach suggested by the Committee is only a partial solution to a wider problem, as it provides a low cost option for only a very limited number of taxpayers. For example, pay-roll tax appeals are rarely likely to be under $10,000, because of the monthly obligations that arise and the exemption threshold. These appeals would still need to go to the Supreme Court.

The amendment also fails to address the fact that land tax appeals already go to the Land Valuation Tribunal. This provides a low cost appeal option for payers of land tax. Providing an appeal right to the Small Claims Tribunal for land tax matters would have the potential effect of removing these appeals from their current specialist and low cost jurisdiction.

This is likely to result in only debits tax (where appeals are rare) and stamp duty matters being brought before the Small Claims Tribunal.

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[6] *Transcript of Evidence*, Taxation Institute of Australia, May 15 2002, p5

The nature of stamp duty is such that any appeal is likely to involve complex legal issues (even where the amount payable is small), and as a result, the Commissioner would almost invariably attempt to use section 17A of the *Small Claims Tribunal Act 1974* to have the matters referred to the Supreme Court.

It should also be noted that section 18 of the *Small Claims Tribunal Act 1974* provides that the decision of the Small Claims Tribunal is final, and specifically restricts any right of further appeal. While this may be appropriate for matters that fall within the definition of a "small claim", the Government considers it entirely inappropriate for a magistrate to provide a final decision on a matter that has the potential to create a precedent with significant revenue impact.

The Government is committed to the introduction of an SAT and is a long way progressed in delivering an appeal mechanism that addresses all of the issues raised by taxation practitioners who gave evidence on this Bill.

The Government does not support this amendment on the basis that it is a very narrow and ineffective solution to a far greater problem. The Government's proposed SAT will see that problem addressed in its entirety, with a comprehensive solution that takes account of the requirements of both the taxpayer and the Commissioner in revenue appeals.

Recommendation 7

The Government does not support this recommendation for many of the same reasons outlined in recommendation 6. Very careful consideration has been given to making these decisions non-reviewable and the Government considers these reasons can be fully justified.

However, it is noted that point 6.15 of the Report has expressed a view that the Commissioner should conduct a review of the various taxation Acts to determine which of the non-reviewable decisions should remain non-reviewable and which should be brought within the appeals process set up under the Taxation Administration Bill.

This has been done and the Government proposes to make an amendment to remove the non-reviewable decision in subclause 16(5). As a consequence, the power currently contained in clause 18(3) has been relocated into clause 16.

This amendment will mean that the rights of the Commissioner and the rights of the taxpayer are exactly the same with respect to the limitation on reassessing an assessment that was made on the basis of the interpretation of the applicable law or Commissioner's practice that applied at the time of the original assessment.

This would ensure that the reassessment power could not be used to retrospectively assess further tax or make a refund if the original assessment was based on law that was generally applied at the time including, for example, a court case which subsequently changes the law.

Page 8, line 21 — to delete "The" and insert instead —

" Subject to subsection (5), the ".

Page 8, lines 29 and 30 — To delete the lines and insert instead —

" (5) If an assessment is based on a particular interpretation of the applicable law or a particular practice of the Commissioner that was generally applied to instruments of that kind when the assessment was made, then the Commissioner cannot make a reassessment based on the ground that the interpretation or practice is or was erroneous. ".

[Clerks:
Renumbering of subsequent subclauses will be required.]

Page 9, line 29 to page 10, line5 — to delete the lines.

[Clerks:
Renumbering of subsequent subclauses will be required.]

Recommendation 8

The issue of a formal rulings system was also raised by a joint Law Society and Taxation Institute submission to the Western Australian Review of State Business Taxes. The Government will be considering the issue of formal ruling systems as part of its response to the Review. It is considered that this is the most appropriate mechanism to deal with the issue, as it will allow the increases in cost per dollar of revenue collected to be measured against the benefits of providing greater certainty to taxpayers and practitioners.

Recommendation 9

See response to recommendation 8.

Recommendation 10

The Government understands that the payment requirements and administrative systems set up under the various taxation Acts make it impractical for a single assessment to be made for several different types of tax (eg. a combined stamp duty and pay-roll tax assessment).

However, the amendment would arguably create a conflict with the current land tax and metropolitan region improvement tax collection procedures and could prevent the use of the current collection assessment process for these two tax types.

Accordingly, the Government cannot support the amendment. However, to set at rest the minds of the Parliamentarians and taxpayers, the Government does note that there is no identifiable administrative benefit that would drive a decision to make concurrent assessments for any other tax types. In addition, such a move is likely to have prohibitive costs associated with it that would prevent it from occurring.

Recommendation 11

The Government understands that this issue has recently been raised with the Commissioner in the context of a similar section of the Stamp Act[7] by a practitioner who sits on the State Revenue Liaison Committee (an ongoing consultation group convened by the Office of State Revenue).

In response, the Commissioner has committed to undertaking a comprehensive review of existing practices and procedures, with a view to making public the "Commissioner's practices" which are relevant to assessments. An important part of this review will involve distinguishing between legal interpretations and administrative practices.

The Government is advised that the issue of defining and identifying a "Commissioner's practice" was not raised during the extensive consultation phase of this Bill, nor when the similar section was introduced into the Stamp Act in 2000. The Commissioner has responded to the request for clarification put to him in the context of the State Revenue Liaison Committee in an appropriate and timely manner.

The Government considers that there is no need to legislate a requirement for the Commissioner to publish his administrative practices in the manner proposed. While the Government can understand the need for taxpayers to have clarification, it is considered that a requirement for the Commissioner to publish a practice before he can direct his staff to observe it introduces a bureaucratic overhead on the administration of the State's revenue that, to our knowledge, is not faced by any other State or Territory in Australia.

This is particularly the case given that the Committee has not recommended the inclusion of a definition of a "Commissioner's practice".

Recommendation 12

The Government does not support this amendment, as the volume of material that could potentially be required to be published could substantially increase advertising costs. This recommendation is also contrary to the Government's recent cost cutting measures in the area of advertising.

The Government also considers that more appropriate methods of publishing exist for taxation related information, bearing in mind that a number of taxpayers would not ordinarily purchase the Government Gazette or have ready access to it. It is therefore considered that more suitable means of granting access to documents should be used, such as the internet.

The amendment drafted below is an alternative provision, which will enable taxpayers and practitioners easier access to any material required to be published by the Commissioner.

Page 73, after line23 — To insert the following definition —

" "publish" means make available, at no cost, on an appropriate internet site or from the Office of State Revenue; ".

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[7] Section 31AA

Recommendation 13

The Government gives in-principle support to this amendment, but has proposed an alternative that maintains consistency with current provisions of this nature in the Stamp Act and Pay-roll Tax Assessment Act.

Page 10, line 21 — To delete "suspects" and insert instead —

" has reason to suspect ".

Recommendation 14

The Government notes that the current power of the Commissioner to create a memorandum under section 31A of the Stamp Act does not require reasonable efforts be made to obtain sufficient information upon which to base an accurate assessment. The Committee's report does not indicate that the Taxation Institute's comment is supported by any evidence of specific circumstances where the Commissioner has made assessments in the past without having made reasonable attempts to gather information upon which to base the assessment. It is certainly the Commissioner's current practice to do this, although the willingness and timeliness with which taxpayers provide the information varies markedly.

Nevertheless, the Government considers it is realistic to require that the assessment of tax be based on reasonable efforts by the Commissioner to obtain the necessary information. For that reason, the Government supports the recommended amendments.

Recommendation 15

The Government believes that the Committee may have misunderstood the scope of proposed section 23(2)(a) of the Bill. The power only operates for notification of a reassessment.

In practice, this means its use is limited to those instances where an assessment is reassessed to nil (ie. the original assessment is cancelled and no amount of duty is payable), and there is no amount to be refunded (ie. no payment had been received on the original assessment that requires refunding).

The amendment put forward by the Committee means that the Commissioner would be required to issue assessment notices with nil amounts payable. In the past, the issue of accounts with nil balances by Government Departments has been roundly criticised by the public as products of an inefficient public service.

The Government does not support the amendment on that basis.

Recommendation 16

The Government proposes an alternative amendment that makes the publishing of the "Commissioner's practice" for remitting penalties under clause 29 mandatory. The clause is currently drafted to make such publication discretionary.

However, the Government notes that it is not necessary to publish any guideline relating to the imposition of penalty tax under clause 26.

This is because the Act will require the penalty to always be imposed at 100% (see clause 26(3)). A guideline is not necessary because the Commissioner cannot legally impose an amount less than 100%.

The mandatory publication of the Commissioner's remission policy is all that is needed to inform the taxpayer of the amount that will ultimately be payable, because any lesser penalty payable occurs through remission of the penalty, rather than by imposition at an amount less than 100%.

Page 17, lines 2 and 3 — To delete "may, from time to time, issue guidelines setting out the policy to be followed" and insert instead —

" must publish the policy followed by the Commissioner ".

Recommendation 17

The Government considers that the validity or correctness of taxation assessments should be exclusively reviewed through the objection and appeal process within the time limits set down by this Bill.

Furthermore, in the absence of the proposed provision, it would be open for a taxpayer to pursue action through the courts while the objection process is still on foot. The consequences of this, particularly in matters involving complex valuations, means that significant administrative resources will be necessarily expended, to not only resolve the objection matter, but to also deal with defending any action in the courts.

Such a duplication of resources is not considered warranted and may, in fact lead to delays in being able to progress the determination of an objection in a timely manner. On balance, the Government considers the proposed provision properly balances the rights of the taxpayer in having any issues they have with an assessment properly dealt with, while preventing needless duplication of effort on the part of the tax administrator.

Recommendation 18

The Government notes that this provision was debated at length in the Legislative Assembly and is the subject of an explanation in the Department's submission to the Committee[8]. It is clear from the concerns raised and the discussion in points 6.62 and 6.63 that the operation of the clause has been misunderstood. The Government understands that some of this confusion has since been cleared up with the Law Society, as the matter was the subject of an informal discussion after the Committee hearings between the Committee and other officers with members of the Taxation Committee of the Law Society.

The following points address the concerns raised in point 6.62 of the report:

- objections can be made against a reassessment which has altered the basis of a taxpayer's liability. Clause 34(2)(b) is a restriction that operates against one reassessment only, and that is the reassessment made as a result of determining an objection. Unlike the previous provisions in the taxation Acts, this Bill specifically requires that a reassessment be made to give effect to an objection decision that wholly or partially allows an objection.

[8] See p.99 of the report.

As the objection decision and the reassessment are two separate processes, it is necessary to prevent the taxpayer from objecting to both the objection decision, and the reassessment that is made as a consequence of the decision. Previously, the taxation Acts only needed to state that a person could not object to an objection decision.

When an objection is determined, there are three possible outcomes, namely an allowed objection, a partially allowed objection or a disallowed objection. Clause 34(2)(b) will usually only operate in the case of a partially allowed objection. This is because a reassessment to give effect to a wholly allowed objection decision is unlikely to cause the taxpayer to want to object to the reassessment that refunds the tax paid to the extent submitted by the taxpayer. In the case of a disallowed objection decision, there is no requirement to make a reassessment and the taxpayer would proceed to appeal if they wish to take the matter further.

In the case of a partially allowed objection, the Commissioner would make a reassessment to reduce the amount of tax paid, but as not all of the objection is allowed, there would still be a portion of the objection decision that the taxpayer could take issue with.

The appropriate course of action would be to proceed to appeal on the portion of the objection that the taxpayer still did not agree with. Objecting to the reassessment that reduces the amount of tax paid would merely replicate the same objection process that has just been completed.

- The third dot point of point 6.62 of the report claims that the provision prevents an objection to a reassessment to those circumstances where there has been an increase in the amount of the liability. This is not correct. Subclause 34(3) only prevents an objection being lodged to a reassessment that decreases the amount of tax payable <u>if the time for lodging an objection to the previous assessment has expired.</u> This has been inserted on the basis that a reassessment could allow the person to object outside the time period originally allowed for an objection to the previous assessment. In any event, it is still possible to object to a reassessment outside the 60 day time period, by lodging an application for an extension of time under clause 36(4) of the Bill.

The Government does not support this amendment because the concerns raised are inconsistent with the actual manner in which the Bill will operate.

Recommendation 19

The Government notes that this amendment is sensible and agrees to it, however, it has been redrafted below to account for the punctuation changes necessary.

Page 19, line 25 — To delete "or".

Page 19, after line 25 — to insert —

> **"(b) if, within 30 days after the date of the assessment notice, the taxpayer requested the Commissioner under section 25(2)(a) to provide a statement of grounds for the assessment — the date on which the statement of grounds was served on the taxpayer; or".**

[Clerks:
Renumbering of the subsequent paragraph will be required.]

Recommendation 20

The Government has examined the amendment suggested by the Committee and finds it difficult to understand how it addresses the points raised during the Committee hearings. If a taxpayer or external agency has not provided the information required to determine the objection, the appeal body will be subject to the same problems as the Commissioner in attempting to make any decision. The suggestion serves only to increase the costs of the taxpayer.

For this reason, it is considered that the amendments will be ineffective, and provide no greater benefit to the taxpayer than the current clause.

However, the Government proposes an alternative amendment that removes clause 38(2)(b). This means that the Commissioner will no longer have an indeterminate time in which to determine an objection. The only circumstances where an extension of the 90 day period will occur are those beyond the Commissioner's control (ie. caused by an external agency or the taxpayer).

Page 21, line 23 — To insert after "objection;" —

" or ".

Page 21, lines 24 and 25 — To delete the lines.

[Clerks:
Renumbering of the subsequent paragraph will be required.]

The Government does not agree with the suggested amendment to require an objection to be referred to the Supreme Court within 14 days of the notice. It is the Commissioner's responsibility to prepare all necessary documentation to submit to the Court or Tribunal. Fourteen days does not give adequate time for the required documentation to be prepared.

The Government agrees with the thrust of the final two amendments to this clause (page 22 line 11 and page 22 line 17). This will allow a land tax appeal to be referred to the Land Valuation Tribunal that has jurisdiction to hear these appeals, rather than the Supreme Court. However, the suggested drafting requires some adjustments to relocate the defined term into the Glossary to maintain consistency with the remainder of the Bill.

Page 22, lines 6 and 7 — To delete "refer the objection to the Supreme Court" and insert instead —

" refer the objection —

(a) if the objection relates to an assessment or decision under the *Land Tax Assessment Act 2001* — to the Land Valuation Tribunal; or

(b) in any other case — to the Supreme Court.".

Page 22, line 9 — To delete "Supreme Court" and insert instead —

" court or tribunal ".

Page 22, line 11 — To delete "Supreme Court" and insert instead —

" court or tribunal ".

Recommendation 21

The Government does not support the removal of the provision that limits the time within which an appeal can be extended to 12 months. This is a revenue protection measure that is more fully described in the Commissioner's written submission to the Committee. The Government considers that it is an acceptable position, particularly given the policy symmetry the provision shares with the version of section 37A inserted into the *Limitation Act 1935* in 1997.

Recommendation 22

The Government notes that this recommendation extends payment limits in the taxation Acts for all assessments by a further 30 days. For example, the Pay-roll Tax Assessment Bill 2001 specifies that all returns must be lodged and paid by the 7th day of the month. This amendment will extend that period by an additional 30 days.

This is an unacceptable outcome, as it will delay tax collection periods (particularly in the case of return based taxes) and require significant computer system changes.

In point 6.79 of the Report, the Committee noted that it was desirable for taxpayers to have a legislative guarantee of the time in which they will be required to pay tax under a reassessment.

The Government notes that clause 24(5) of the Taxation Administration Bill already provides a guaranteed minimum 14 day period for all assessments. Any greater period than 14 days will significantly affect the payment and collection of all return based taxes administered by the Commissioner.

The Government does not support the recommendation on the basis that a guaranteed time limit for reassessments is already provided by the Bill.

Recommendation 23

The Government notes the reasoning behind the recommended amendment. Although the scenario suggested is one that would be unlikely to be supported by the courts, the Government agrees to the amendment in the interests of improving the clarity of the Bill.

Recommendation 24

The Government has considered recommendation 24 and has drafted an appropriate amendment in response.

In progressing this amendment, the Government notes that it would be highly unlikely for the Commissioner to use the garnishee power to access an employee's wages. However, the amendment has been drafted in a manner that ensures the restriction can only be used in cases of genuine entitlements to wages (ie. it cannot be relied on to prevent use of the power in cases of fees paid to a director in a company structure).

Page 37, after line 5 — To insert —

> **"(4) However, a garnishee notice served on the employer of a taxpayer can require the garnishee to pay to the Commissioner the wages payable by the garnishee to the taxpayer in respect of a period only to the extent of the amount by which the amount of the wages exceeds the amount of average earnings for that period calculated on the basis of statistics published in respect of the period by the government statistician.".**

Recommendation 25

The Government considers there is a sound policy basis for inclusion of clause 69(1), in that the person should not be registered as the owner of the land unless the stamp duty is paid.

The Committee has noted in point 6.94 that innocent parties could be affected by this power. The Government finds it difficult to comprehend how a mortgagee or any other person could be adversely affected, given that their calculations of liquidity are likely to include the stamp duty amount payable to acquire the property that is the subject of the mortgage in the first instance.

Recommendation 26

The Government notes that laws are generally interpreted by the courts to avoid any absurd interpretation. Clause 79 provides a specific limit for the period in which records can be kept and it is considered unlikely that clause 82(c) would be interpreted to override this requirement. However, again in the interests of providing clarity, the Government will agree to this amendment.

Recommendation 27

This amendment is inserting a provision to require that the Commissioner give a person reasonable time within which to provide requested information. The Government agrees to the redrafted amendment below, which retains the penalty amount of $20,000 that seems to have been inadvertently omitted by deleting line 13 on page 52.

Page 52, after line 9 — To insert —

"(4) The Commissioner must —

(a) allow the person a reasonable time within which to comply with a requirement; and

(b) if the requirement is made by notice served on the person, specify the time allowed in the notice.".

[Clerks:
Renumbering of the subsequent subclause will be required.]

Page 52, line 11 — To delete "specified in the notice" and insert instead —

" allowed under subsection (4) ".

Recommendation 28

The Government agrees with the intent of this recommendation, however, an alternative provision has been drafted to ensure that a person cannot access instruments or documents that may be provided by third parties (ie. documents provided to the Commissioner with the protection of anonymity from a taxpayer).

Page 53, after line 28 — To insert

"(2) While an instrument or other document is being retained under subsection (1), the Commissioner must permit the inspection of the instrument or document by, or provide a copy of it to —

(a) in the case of an instrument within the meaning of the *Stamp Act 1921* — a party to the transaction to which the instrument relates; or

(b) in any other case — the person who lodged the instrument or document with the Commissioner. ".

[Clerks:

Page 53, line 18 — subclause designation (1) to be inserted.]

Recommendation 29

The Government agrees with the intent of this amendment, but has provided a more straightforward amendment.

Page 54, after line 7 — To insert —

"(3) Upon the request of the person, a copy of the recording must be provided to the person within 30 days after the request is made.".

Recommendation 30

Clause 90(2) currently requires the investigator to obtain the Commissioner's authorisation before entering residential premises without consent or a warrant, where the investigator believes it is urgently necessary to do so to prevent the destruction of or interference with relevant material, but that authorisation does not have to be in writing. The Government notes that the inclusion of the above power in the provision is already a substantial weakening of the powers in existing Acts, but considers that such a position is necessary in terms of access to a person's place of residence.

An almost identical clause to this was presented by the previous Government and passed by the Parliament in 2000, in the form of section 42 of the First Home Owner Grant Act 2000. It is difficult to see why this provision was acceptable to the Parliament of the day in 2000, in respect of investigations concerning a $7,000 first home owner grant, but is not acceptable as part of a standard set of powers which enforce taxation collection in the many millions of dollars.

The Government considers that requiring the Commissioner's written authorisation introduces an unacceptable delay in circumstances where information or evidence can be destroyed during an investigation. The Government is assured that the Commissioner does not make these decisions lightly and would fully document the circumstances involved in granting any verbal authority.

Accordingly, the Government has drafted an alternative amendment which requires the Commissioner to make a record of any verbal authorisation given under clause 90(2). This record would then be a matter of evidence in any proceedings surrounding the use of these powers by the Commissioner.

Page 55, after line 8 — To insert —

"(5) When the Commissioner gives an authorisation under subsection (3), the Commissioner must make and keep a record of the circumstances of the particular case.".

Recommendation 31

The Government does not support the amendments made in this recommendation. It is not considered appropriate that a Justice of the Peace be provided with the ability to limit the powers of the Commissioner with respect to investigations on residential premises conducted under a warrant.

As already noted above, a substantial concession has been made in this Bill in respect of investigations conducted on residential premises. The Committee's reasoning for imposing this type of restriction on investigations conducted on residential premises for taxation laws is difficult to follow, particularly in light of the fact that a similar provision was considered appropriate for first home owner grant investigations that are almost always conducted on residential premises.

In the case of the second suggested amendment, the requirement to have prior written authorisation of the Commissioner before breaking anything open on premises presents the same issues referred to in recommendation 30.

The Government suggests that this be dealt with by the same alternative amendment, which requires the Commissioner to make a record of each circumstance where the authorisation is granted.

Page 57, after line 18 — To insert —

"(7) When the Commissioner gives an authorisation under subsection (1)(a), the Commissioner must make and keep a record of the circumstances of the particular case.".

Recommendation 32

The Government notes that this amendment requires the Commissioner to provide prior written authorisation to an investigator before the investigator can use force in the course of an investigation.

Again, the Government suggests an alternative amendment to require the Commissioner to make a record of each circumstance where the authorisation is granted.

Page 58, after line 8 — To insert —

"(3) When the Commissioner gives an authorisation under subsection (2), the Commissioner must make and keep a record of the circumstances of the particular case.".

Recommendation 33

One of the fundamental simplification measures underlying this Bill is the standardisation of time periods to five years. The Government considers that aligning the periods for refunds, reassessments, record keeping and prosecutions has an inherent logic that will be lost if this amendment is agreed to.

It should also be noted that the Commissioner does not take decisions to prosecute lightly. It is common for prosecutions that do commence to involve serious taxation offences which are supported by strong evidence.

In these cases, the Government considers five years to be an appropriate period for prosecution action to be available as a mechanism for the Commissioner to deal with persons who attempt to defraud the community of its rightful taxation revenue.

The Government does not agree with this recommendation on that basis.

Recommendation 34

The Government notes that this clause was discussed extensively during the Legislative Assembly debate on this Bill.

A fully justifiable argument was presented at that time to describe why such a provision is necessary. The Commissioner's submission to the Committee was similarly detailed[9]. The Government does not support the amendment to delete lines 4 – 6 on page 66 for that reason.

However, the second recommended amendment to delete lines 16 – 20 on page 66 will be supported by the Government, on the basis that the specific provision detailing the liability of unincorporated associations was removed from clause 66 of the Bill during debate in the Legislative Assembly.

Recommendation 35

The Government supports this recommendation.

Recommendation 36

The Government does not support this recommendation. However, this response indicates support for a number of specific amendments and has made suggestions for minor amendments to a number of others.

[9] See page 106 of the Committee's Report on the Taxation Administration Bill 2001