May 2006

State Tax Review

Technical Appendices

Department of **Treasury and Finance**
Government of **Western Australia**

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STATE TAX REVIEW

TECHNICAL APPENDICES

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1. Stamp Duty – GST-Exclusive Tax Bases

ISSUE

Submissions have been made as part of the State Tax Review to consider applying stamp duty to GST exclusive prices. These submissions have focused on the fact that applying stamp duty to GST inclusive prices is a "tax on a tax" and the resultant situation places additional and unnecessary financial burden on taxpayers.

The particular issues raised in the submissions were:

- **Institute of Chartered Accountants** (Submission 2)

  Michelle Zimmel (Submission 10)

  Tony Fowler (Submission 57)

  Master Builders Association of Western Australia (Submission 63)

  Western Australian Fishing Industry Council (Submission 73)

  Chamber of Commerce and Industry of Western Australia (Submission 81)

  Neil Durston (Submission 120)

  Institute of Chartered Accountants (Submission 124)

  - Each submission suggests that stamp duty should be imposed on GST exclusive prices.

- **B W Churcher** (Submission 12)

  B Walker (Submission 17)

  - Each submission suggests that stamp duty should be imposed on the GST exclusive component of insurance premiums and motor vehicle licences.

- **Small Business Development Corporation** (Submission 94)

  - The submission suggests that stamp duty should be imposed on the GST exclusive component of motor vehicle licences.

- **K J Ridley** (Submission 22)

  J E Berry (Submission 32)

  Council of the Ageing National Seniors Partnership (Submission 50)

  Graham Lawrence (Submission 52)

  Insurance Council of Australia (Submission 55)

  - Each submission suggests that stamp duty be imposed on the GST exclusive component of insurance premiums.

- **Taxpayers Australia - Western Australian Divisional Council** (Submission 51)

  - This submission recommends that conveyance duty be imposed on the GST exclusive price of property.

  - Taxpayers Australia also recommends that motor vehicle transfer duty be imposed on the GST exclusive amount of a motor vehicle.

- **Alcock Brown-Neave Group of Companies** (Submission 65)

  Dave Barnao & Co (Submission 67)

  Real Estate Institute of Western Australia (Submission 84)

  Housing Industry Association (Submission 86)

  Small Business Development Corporation (Submission 94)

  Albany Chamber of Commerce and Industry (Submission 105)

  Urban Development Instititute of Australia (Western Australian Division) (Submission 125)

  - Each submission recommends that conveyance duty should be imposed on the GST exclusive price of property.

CURRENT POSITION

Since the introduction of the GST, when calculating the stamp duty payable on an instrument there has been no discount for the amount of GST payable, in accordance with section 4A of the *Stamp Act 1921* (with the exception of hire of goods duty which is imposed on GST exclusive prices to be consistent with the regimes in other jurisdictions).

The GST inclusive approach in relation to other stamp duties is consistent across the other Australian jurisdictions as each Australian jurisdiction applies stamp duty to GST inclusive prices.

The application of stamp duty to GST inclusive values continues arrangements that existed before the introduction of the GST. Before the GST replaced wholesale sales tax (WST), stamp duties applied to values inclusive of WST.

ANALYSIS OF ISSUE

Currently, hire of goods duty is imposed on GST exclusive amounts. However, motor vehicle duty, insurance duty and conveyance duty are all imposed on GST inclusive amounts. While adopting a GST exclusive approach across all stamp duties may sound simple in theory, it is not simply a matter of discounting one eleventh of the price and then applying stamp duty to that remaining amount. If this suggestion were adopted, it would have significant compliance and administrative costs for taxpayers and the Office of State Revenue. Note: There would also be revenue costs but these are part of the Reference Group process, and are not considered here, except to highlight that the methodology put forward in some submissions appears flawed. These costs and the problems associated with adopting this proposal will be discussed in further detail below.

Adopting a GST exclusive approach has implications for motor vehicle duty, insurance duty and conveyance duty, as discussed below.

Motor Vehicle Duty

In the case of new cars, a GST exclusive price regime would complicate the new list price regime. This regime was recently introduced at the request of the motor vehicle industry, in order to simplify the stamp duty calculation process. For new vehicles, stamp duty is assessed on the retail-selling price, in Western Australia, for that make and model. The retail selling price of that make and model is taken directly from the price fixed by the manufacturer,

importer or principal distributor. Duty is not payable on accessories, other than those prescribed.

This price is structured on the basis that GST is payable on every vehicle (as is luxury car tax where applicable) and, accordingly, stamp duty is paid on the retail-selling price, regardless of whether the supply of the vehicle is GST-free or not. To abandon the list price regime and introduce a GST exclusive regime will significantly increase compliance costs.

Certain cars (generally the more expensive models) are also charged with luxury car tax. Luxury car tax is calculated on the GST inclusive price. If stamp duty were to be assessed on GST exclusive price, a corresponding issue also arises regarding whether the stamp duty should be payable on luxury car tax exclusive prices. Implementing a GST and luxury car tax exclusive regime would further increase compliance costs for the motor trade industry.

Furthermore, in the case of motor vehicles, the replacement of WST with the GST has generally resulted in lower prices. This is because WST was applied at a substantially higher rate than the 10% GST. Thus, the stamp duty paid on a motor vehicle purchased under the current arrangements is lower than it would have been under the WST regime.

However, the Motor Trade Association supports the proposal to apply motor vehicle duty to GST exclusive prices.

Insurance Duty

Part IIIF of the Stamp Act, which contains provisions relating to the duty payable in respect of policies of insurance, was recently rewritten as the Western Australian provisions were out of step with the regimes operating in other jurisdictions, which was causing significant compliance issues for the insurance industry. The *Stamp Amendment (Assessment) Act 2005* and the *Stamp Amendment (Taxing) Act 2005* will implement a legislative scheme that aligns Western Australia's insurance duty regime with those of the other States. To adopt a GST exclusive approach in relation to insurance duty would be inconsistent with the objective of the proposed provisions, as all other jurisdictions apply duty to the GST inclusive amount.

The adoption of a GST exclusive approach to stamp duty on insurance would appear to involve relatively simple amendments to the Stamp Act to implement and is unlikely to have any significant administration costs for the Office of State Revenue as insurance duty is self-assessed. However, this regime could significantly increase compliance costs for insurers, who would be required to amend computing systems and administrative processes to

accommodate a regime that is unique to Western Australia. However, the Insurance Council of Australia supports the proposal to apply insurance duty to GST exclusive insurance premiums. There would need to be sufficient time between the passage of any amending legislation and the commencement of the amendments to allow for such changes to be made. Therefore, commencement part way through a financial year may need to be considered if this recommendation were to be supported.

While applying stamp duty to the GST exclusive insurance premium would be inconsistent with the regimes operating in other jurisdictions, it would reduce taxpayers' costs in obtaining insurance. Although the Stamp Act states that insurers are liable to pay insurance duty, insurers usually pass the duty directly on to the insured. Thus applying duty on the GST exclusive insurance premium would reduce taxpayers' insurance costs.

Conveyance Duty

The most significant issues with adopting a GST exclusive approach to stamp duty arise in relation to conveyance duty. In particular, there appears to be considerable issues with determining what the GST exclusive value of a contract actually is. Currently, stamp duty is calculated on the consideration specified in a contract. However, it is not simply a matter of reducing the consideration by one-eleventh to calculate the GST exclusive value. There are complexities in the GST legislation that would increase administration costs considerably for taxpayers and their agents that self assess their stamp duty liability, and for officers of the Office of State Revenue who assess documents lodged with the Office, or conduct investigations to determine compliance with the legislation. These complexities would make it extremely difficult for any person that does not have specialist knowledge of the GST legislation to determine what the GST exclusive value of a contract should be. This is best highlighted by the example included in the attachment, which relates to the margin scheme. This example demonstrates the difficulties involved with adopting a GST exclusive approach in relation to conveyance duty. It should be noted that this example is based on a preliminary examination of the *A New Tax System (Goods and Services Tax) Act 1999* ('GST Act'), and as such, may benefit from the knowledge of practitioners on the State Tax Review Technical Committee who practice in the GST area.

An alternative proposal that would avoid these problems is to provide stamp duty relief via a reduction in the rate scales equivalent to the duty that would be raised in respect of the GST component of the consideration.

However, the Technical Committee considered that the proposal could be achieved, but that changes to REIWA and Office of State Revenue forms

would be necessary to identify the GST exclusive value, and tax invoices would need to be provided as evidence of GST liabilities.

The Technical Committee also noted that applying conveyance duty to GST exclusive prices was likely to only benefit new residential property purchasers and vacant land purchasers as other sales (such as sales of businesses and residential property) are generally GST-free. Therefore, a general conveyance duty reduction would provide tax relief for a larger number of taxpayers. Although, it was noted that providing a rate reduction would not eliminate the perceived unfairness of a tax on a tax.

Should a policy decision be made to provide relief to this limited group through adopting a GST exclusive approach to conveyance duty, further examination as to how it could be achieved would be required, especially in relation to the more complex conveyance duty transactions and those not involving the REIWA forms.

TECHNICAL COMMITTEE CONCLUSION

The Technical Committee considers the proposal could be achieved should it be considered appropriate. However, further examination of implementation issues would be required.

ATTACHMENT 1

The following example demonstrates the complexities associated with determining the GST exclusive value of a transaction.

GST and the margin scheme

The margin scheme is a method of calculating GST on the sale of an interest in real property. The margin scheme complicates the calculation of the GST-exclusive value of real property because it is not simply a matter of reducing the consideration by one-eleventh to determine the GST-exclusive value on which stamp duty should be calculated. Under the margin scheme, for real property acquired before 1 July 2000 that is sold as a taxable supply, GST may be calculated as one-eleventh of the difference between the selling price and the price paid to acquire the real property. This is known as the 'consideration method'. Alternatively, GST may be calculated on the difference between the selling price and a valuation of the real property at 1 July 2000. This is known as the 'valuation method'. For real property acquired after 1 July 2000 that is sold as a taxable supply, GST may be calculated as one-eleventh of the difference between the consideration for the supply and the consideration for the acquisition of the real property.

Difficulties associated with the margin scheme arise because the choice to apply the margin scheme does not need to be detailed in the contract of sale, and may be made at any time up to the date of settlement. Therefore, when a contract of sale is assessed for stamp duty, there may not be any evidence that the margin scheme has been applied, or the decision to apply the margin scheme may not have even been made at that time. Further, the method of calculating the margin for the supply may be changed at any time until the due date for lodgement of the BAS for the tax period in which the GST on the supply is attributable. These timing differences would increase administration costs for taxpayers and their agents that self assess their liability to duty, and is likely to significantly increase the workload of the Office of State Revenue to issue reassessments in cases where the margin scheme is subsequently applied after the contract has been assessed, or the method of calculating the margin is subsequently varied.

While it would be possible to calculate the GST exclusive value as one-eleventh of the consideration unless evidence that the margin scheme has been applied is provided, this would not reduce the administrative overhead in having to investigate matters and issue reassessments to take the margin scheme into account. Further, as GST is self assessed, evidence that a particular method of calculating the margin has been applied, such as a BAS lodged with the Australian Tax Office, does not necessarily mean that the GST has been calculated correctly and in accordance with the requirements of the GST legislation. For example, it would not be possible to determine from a BAS whether other costs have been included in the value of the

consideration which should have been excluded, or whether the valuation of the property is valid. Checking the information in the BAS would significantly increase administrative costs for taxpayers and their agents that self assess their duty liability and for the Office of State Revenue, and would require extensive knowledge of the application of GST legislation.

2. Hiring Duty Abolition Transitional Issues

ISSUE

Should a policy decision be made to abolish hire of goods duty, a potential issue exists in relation to the compliance costs that would be incurred by the financing industry arising from the need to recalculate repayment amounts to take account of the removal of the hire of goods duty liability.

The particular issue raised in the submission was:

- **Australian Equipment Lessors Association** (Submission 131)
    - The Australian Equipment Lessors Association suggests that the abolition of hire of goods duty should only apply to new hire contracts entered into on or after the abolition date.

CURRENT POSITION

The *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations* (IGA) provided that a review of the need for certain duties was to occur by 2005. Stamp duty on credit arrangements, instalment purchase arrangements and rental arrangements were within the list of duties that were to be reviewed as part of the IGA. This review was conducted in Western Australia and it was determined that it was necessary to retain hire of goods duty at that time.

However, if hire of goods duty were to be abolished in the future, a potential issue exists in relation to the compliance costs that would be incurred by the financing industry arising from the need to recalculate repayment amounts to take account of the removal of the hire of goods duty liability.

ANALYSIS OF ISSUE

The Australian Equipment Lessors Association (AELA) submission states that the abolition of hire of goods duty could raise significant operational issues and result in unnecessary costs on its members and customers.

When hiring contracts are initially negotiated, both GST and stamp duty costs are taken into account to determine the repayment amounts. If hire of goods duty were to be abolished in relation to all contracts (including those entered into before the abolition date), it would necessitate the re-calculation

of the monthly repayments, including the incidence of GST, and potentially require the issuing of new GST Tax Invoices with hire duty exempt figures for each equipment lease and hire-purchase contract in existence in Western Australia at the abolition date.

Changes in direct debiting arrangements and cash/cheque payment methods may also be required, together with an obligation to notify customers of the reduced monthly repayment amounts. The Australian Equipment Lessors Association has stated that failure to make the adjustment may make hirers open to potential pricing liability issues under the Commonwealth *Trade Practices Act 1974*.

The AELA suggests that if hire of goods duty were to be abolished, it would significantly increase compliance costs for its members. The submission proposes that hire of goods duty should only be abolished in relation to contracts entered into on or after the abolition date (new contracts). This would mean that hire of goods duty would still be payable in relation to hire contracts entered into prior to abolition (existing contracts), for the life of the contract.

It should be noted, however, if hire of goods duty were to be abolished, community expectation may be that duty would be abolished on all contracts, whether in existence at the date of abolition or otherwise. This approach would therefore not deliver the expected outcome for the broader community. In addition, abolishing hire of goods duty only for new hire contracts would create an inequity with the treatment of existing contracts. As a result, a person who hires a good under an existing contract would pay more to hire the good than a person that hires the same good under a new contract.

Abolishing hire of goods duty only on new contracts would also result in ongoing administrative costs for the Office of State Revenue (OSR) in continuing to collect hire of goods duty on these contracts for an unlimited period of time (potentially years into the future). To enable an efficient collection of revenue, computing and administrative systems would have to be maintained and updated as necessary. Legislation and other publications would also need to be maintained and updated. Resources would be required to ensure staff are adequately trained and customers are well informed. Further, compliance resources would be required to ensure compliance with the legislation. These costs would take up resources within the OSR that could otherwise be more efficiently utilised.

Abolishing hire of goods duty only on new contracts may also raise compliance issues, as the total amount of hiring charges on existing contracts may not exceed the duty-free threshold. Currently, a hirer is not liable for

duty if the total amount of hiring charges does not exceed $50 000 per annum. For example, large equipment financiers could be above the threshold for the period immediately following the abolition date, however, as existing contracts expire these equipment financiers may fall below the duty-free threshold, as the total amount of hiring charges no longer exceeds $50 000 per annum. Therefore, a re-calculation of monthly repayments would be required and GST Tax Invoices may also require reissuing. To alleviate this increase in compliance costs, a transitional provision would be needed. This transitional provision could state that the duty-free threshold does not apply where a contract is entered into prior to the abolition date.

The AELA submission indicates that the average hiring period for equipment financing contracts is three years. However, these contracts can continue for considerably longer periods. In light of this, consideration was given to delaying the abolition of duty on existing contracts until three years after the abolition of duty on new contracts. This would have meant that duty would not be payable on new contracts entered into after the abolition date for new contracts, but that duty would still be payable in relation to contracts entered into prior to this date for a period of three years. It was thought that this would allow the majority of contracts to cease by the time total abolition occurs, removing the bulk of the compliance burden on financiers, as a reduced number of contracts would be affected. It would also have ensured that the OSR needed to administer the duty for a period of three years, which would have minimised the administrative costs outlined above.

However, the AELA do not support the delayed abolition on existing contracts as the administrative requirements, associated costs and the need to recalculate repayment amounts to determine the duty liability, would remain. A delay would only result in fewer contracts and fewer customers to notify, but AELA has advised that the compliance burden would remain.

The Technical Committee suggested that any proposal to abolish duty on existing contracts be implemented at the same time as the abolition on new contracts. The members did not consider that the compliance costs justified continuing to impose additional costs on end users. Further, if other States proceed with abolition on all contracts, the compliance costs associated with changing computing systems and so on may already have been incurred.

The governments of Victoria, Queensland, Northern Territory, ACT and South Australia each made 2005/06 budget announcements that indicated an intention to abolish hire of goods duty (note: Tasmania has already abolished hire of goods duty). The Victorian and Queensland Governments provided an abolition date of 1 January 2007. The Northern Territory and ACT provided an abolition date of 1 July 2007, while the South Australian

Government indicated that it would phase out duty by reducing the rate by a third from 1 July 2007, with final abolition occurring from 1 July 2009. Victoria has legislated amendments to abolish duty on both new and existing contracts. This approach was also taken in Tasmania when hire of goods duty was abolished in 2002. South Australia has enacted the legislation to implement the abolition framework and in doing so, provided a transitional provision to limit abolition to new contracts.

TECHNICAL COMMITTEE CONCLUSION

The Technical Committee considers the proposal in relation to the abolition of duty on new and existing contracts is technically sound, and believes that concurrent abolition on new and existing contracts would be of more benefit in the event the Government wished to abolish hire of goods duty.

3. Payroll Tax Consistency Issues

ISSUE

A number of submissions have suggested improved consistency in various matters relating to pay-roll tax.

The particular issues raised in the submissions were:

- **Fehily Loaring Pty Ltd** (Submission 48)
    - Provide a definition of "employee" for pay-roll tax purposes and align this with other legislation such as that for workers' compensation insurance and the superannuation guarantee.
- **Taxpayers Australia Inc – Western Australian Divisional Council** (Submission 51)
    - Align certain State tax legislation definitions with Federal tax legislation definitions.
    - Align the grouping provisions with the Federal income tax legislative provisions for the small business CGT Concessions Net Asset Value test.
- **Master Builders Association of Western Australia** (Submission 63)
    - Revise and rewrite the grouping provisions for more practical operation and greater certainty for business.
- **CPA Australia** (Submission 69)
    - Harmonise the pay-roll regime with its equivalent in other States, this may be achieved through national forums such as COAG.
    - Eliminate anomalies in the pay-roll tax regime in respect to the grouping provisions to reduce compliance costs.
- **The Chamber of Commerce and Industry of Western Australia** (Submission 81)
    - The Western Australian Government should take the lead in seeking to harmonise pay-roll tax with uniform definitions and exemptions across all jurisdictions. Similar administration and compliance procedures would also substantially reduce costs.

- **The Chamber of Minerals & Energy Western Australia** (Submission 82)
    - Amend the *Pay-roll Tax Assessment Act 2002* with respect to the assessment of employee share acquisition schemes.
- **The Small Business Development Corporation** (Submission 94)
    - Adjust the lodgement timeframe for monthly pay-roll tax returns to the 21st day of the month following the month to which the return relates.
- **Submission no. 119**
    - Adjust the lodgement date for monthly pay-roll tax returns to the 21st day of the month following the month to which the return relates.
- **The Institute of Chartered Accountants in Australia** (Submission 124)
    - Amend the pay-roll tax treatment of employee share acquisition schemes to reflect the NSW provisions.

CURRENT POSITION & ANALYSIS

These submissions point to a range of inconsistencies:

- inconsistency between concepts and definitions in the pay-roll tax regimes of the various State and Territory jurisdictions;
- inconsistency between concepts and definitions in the pay-roll tax regime and the workers' compensation regime operating within Western Australia; and
- inconsistency between concepts and definitions in the Western Australian pay-roll tax legislation and those used in certain Commonwealth legislation (e.g. superannuation guarantee legislation).

Since the States and Territories took over administration of pay-roll tax in 1971, the legislative and administrative requirements to which employers are subject has diverged across Australia, particularly with the introduction of legislation to expand or protect the tax base. These include measures relating to groups, fringe benefits, superannuation, various allowances, certain

exemptions, and employee share acquisition schemes. As a consequence, employers who pay wages in different jurisdictions are subject to different requirements in respect of each jurisdiction, resulting in significant inefficiencies and compliance costs to both the taxpayer and revenue offices.

The submissions raise a number of issues, in particular that of inter-jurisdictional consistency. The problem can be illustrated by reference to brief inter-jurisdictional comparisons in relation to four of the specific matters raised.

Employee Share Acquisition Schemes

An employee share acquisition scheme means a scheme by which an employer provides shares, rights to acquire shares, units in a unit trust or rights to acquire units in a unit trust, whether directly or indirectly, to, or in relation to, an employee in respect of services performed or rendered by the employee.

Western Australia, New South Wales, the Northern Territory, and the Australian Capital Territory have specific legislative provisions to the effect that the value of contributions made to employee share acquisition schemes are subject to pay-roll tax. The legislation sets out the value of the employee share acquisition benefit to be included in a pay-roll tax return. The remaining States rely on general definitions of wages to capture some or all of these forms of remuneration.

In Western Australia, pay-roll tax is assessed on the value of a contribution made by an employer in relation to an employee share acquisition scheme at the time the option, right or share is given to the employee, regardless of the existence of any restrictions or contingencies which may preclude the option or right from being exercised. In New South Wales, the legislation provides that the employer may choose to defer payment of the pay-roll tax until the point in time at which the shares are vested, or the options are exercised.

New South Wales and the Australian Capital Territory have most recently introduced specific provisions relating to employee share acquisition schemes. These provisions are similar to those in the Northern Territory and Western Australia. As suggested in the submissions, the recently enacted legislation of New South Wales may provide a suitable model, however, allowing deferment of payment of pay-roll tax in respect of shares and options increases compliance costs and poses a risk to revenue.

Lodgement Periods

Since 1971, the due date for lodgement and payment of pay-roll tax returns has been the 7th of the month following the month in which taxable wages were paid or payable. The majority of jurisdictions require that returns be lodged and paid on the 7th of the month, with the exception of the Northern Territory, for which the due date has recently been amended to the 21st of the month.

A move towards a date of the 21st of each month would be consistent with the due date for returns required by the Australian Taxation Office ("ATO") in respect of Pay-As-You-Go and the Business Activity Statement. The case for extending the time in which to lodge and remit pay-roll tax to 21 days after the end of the month to which the return relates has not been conclusively demonstrated. However, no employer would be disadvantaged by the later due date which, in any event, would not prevent earlier lodgement and payment. It should be noted that additional compliance costs may be incurred by taxpayers in respect of amending systems to cater for the later lodgement and payment date.

Grouping

Grouping provisions were initially introduced in all jurisdictions in the mid 1970s to prevent pay-roll tax avoidance – the practice of creating multiple "businesses" and splitting the pay-roll among them so that all businesses are eligible to claim the deduction or threshold. Over time, there has been a broadening of their application away from solely anti-avoidance, particularly where deeming of control is involved.

The application of the existing grouping provisions can be complex and differs slightly in each State and Territory. Despite the potential complexity of these provisions when applied to certain business structures and practices, their application is transparent and straightforward for the majority of employers. This provides a measure of clarity and certainty for taxpayers in a self-assessment regime.

All jurisdictions provide for the grouping of employers that are linked through common ownership or control, trading connections or shared employees. The following situations usually result in businesses being part of a group:

- employers are related corporations under the Commonwealth *Corporations Act 2001*;
- employers use the same employees across different businesses;

- the same persons have controlling interests in a number of businesses; and

- in Western Australia and Queensland, groups can also be defined as two businesses where one is a branch, agency or subsidiary managed by a head or parent business.

- in certain circumstances, the Commissioner may exclude an employer from a group; however, the Commissioner may not exclude a member of the group where ownership is more than 50%.

While the grouping provisions of the States and Territories are broadly similar, it remains the case that a group of employers as defined by the Western Australian *Pay-roll Tax Assessment Act 2002,* may not constitute a group for pay-roll tax purposes in another jurisdiction. This raises significant inefficiencies and compliance costs and is the source of a certain amount of confusion.

Workers' Compensation and Superannuation Guarantee "Employee" Definition Consistency

Workers' Compensation

WorkCover WA administers the *Workers' Compensation and Injury Management Act 1981,* which raises a levy on workers' compensation insurance premiums paid by employers. The value of these contributions to the General Fund may be assessed based upon the wages, salaries or other remuneration paid to workers.

Pay-roll tax is levied on the wages paid by an employer. As a result, two agencies currently operate in similar domains: one to ascertain premium calculations for the purpose of workers' compensation insurance and the other to ascertain a tax liability. It may be possible to reduce compliance costs for taxpayers and the State if a mutually agreed view of what constitutes wages for both purposes could be determined.

While there is a superficial similarity between many of the concepts used in the two Acts (e.g. wages), the objects of the *Pay-roll Tax Assessment Act 2002* and the *Workers' Compensation and Injury Management Act 1981* are quite different. The degree of complexity involved with investigation into an alignment of the terms should not be underestimated.

It should be noted that the workers' compensation insurance legislation is different in each jurisdiction and hence, across Australia, there is a wide divergence of definitions with which a national employer must contend in

order to meet their obligation in this area. If Western Australia were to align pay-roll tax and workers' compensation insurance legislation, this may not necessarily address the issue of national consistency.

Should an agreed position be arrived at in terms of a definition of wages, this would potentially have an impact on revenue and require significant customer re-education both in terms of pay-roll tax and workers' compensation legislation. In addition, there would necessarily be a flow-on effect with regards to workers' compensation issues.

Superannuation Guarantee

The ATO administers the Commonwealth *Superannuation Guarantee (Administration) Act 1992* and the *Superannuation Guarantee Charge Act 1992* which require employers to provide superannuation support for their eligible employees. Employers make contributions relative to an employee's earnings base, which generally includes salary, wages, allowances, commissions, bonuses, holiday pay and redundancy payments.

The Commonwealth legislation provides definitions of the terms "employee" and "employer". Although not identical to the pay-roll tax definition of "wages", there is a high degree of correlation between the forms of remuneration captured under the pay-roll tax legislation and the Commonwealth definition of "salary or wages" for the purposes of the superannuation guarantee. Additionally, the superannuation guarantee legislation does provide a number of exemptions for particular employees.

Commentators have noted that the Commonwealth definition of employee is easy to avoid, thus indicating that further detailed consideration of all relevant issues would be required to determine whether this would provide a suitable model for the pay-roll tax base.

Summary

The theme common to the submissions is inter-jurisdictional consistency, particularly in the areas of grouping employers, lodgement dates for monthly returns, and the pay-roll tax treatment of employee share acquisition schemes. A greater degree of consistency between the legislation of the different jurisdictions would result in reduced compliance costs for taxpayers that operate across jurisdictional boundaries.

While consistency with workers' compensation issues and wages for pay-roll tax purposes has also been identified, pursuing this aim purely within the Western Australian context may run counter to the attempt to align pay-roll tax legislation on a nation-wide basis.

For this reason, it is suggested that a process of engagement be established with other jurisdictions with a view to maximising inter-jurisdictional consistency in respect of pay-roll tax. Areas of initial examination should include:

- when pay-roll tax is required to be paid;
- the taxation treatment of benefits provided under employee share acquisition schemes; and
- grouping provisions.

It is also suggested that the Department of Treasury and Finance (through the Office of State Revenue) and WorkCover, examine and report on the viability of greater alignment between the concepts used in the pay-roll tax and workers' compensation legislation.

In undertaking both of these exercises, regard should be had to relevant existing definitions and concepts in place in Commonwealth legislation.

Clearly, the first of these proposals will rely on the commitment of other jurisdictions to become involved. If such a commitment is obtained, it is proposed that any unilateral change by Western Australia in relation to definitional matters be put on hold until such time as that cross-jurisdictional work is complete. It should be emphasised that this would not extend to consideration of rate or threshold issues pertaining to pay-roll tax in the interim.

TECHNICAL COMMITTEE CONCLUSION

The Technical Committee members agree with the approach outlined in this paper.

ATTACHMENT 1

COMMISSIONER'S PRACTICE
PT 1.0

PAY-ROLL TAX – TREATMENT OF SUPERANNUATION BENEFITS UPON THE INCORPORATION OF PROFESSIONS

Commissioner's Practice History

Commissioner's Practice	Issued	Dates of effect	
		From	To
PT 1.0	21 October 2003	21 October 2003	Current

This Commissioner's practice clarifies the treatment of superannuation benefits for pay-roll tax purposes following an incorporation of professional persons.

Background

The Australian Taxation Office (ATO) has issued Income Tax Rulings IT 25 and IT 2503 regarding professional persons incorporating for superannuation benefits.

As a result, any professional person whose governing body allows its members to conduct their professional activities through incorporated bodies may form companies to obtain superannuation benefits.

However, the ATO has placed restrictions on such incorporated entities as follows:

- amounts deducted for superannuation are governed by the provisions of section 82AAT of the *Income Tax Assessment Act 1936*;
- taxable income can be distributed by way of a franked dividend up to the limit credited to a franking account after which the top marginal rates of tax and penalties apply; and
- the remaining profit of the incorporated entity must be paid to the professional as a salary or bonus.

Commissioner's Practice

1. The profit of the incorporated entity is to be treated as a bonus and therefore, subject to pay-roll tax, unless the taxpayer can confirm that the ATO has approved a franked dividend. ATO approval can be confirmed by checking the taxpayer's income tax return, which will include the dividend distributed as part of income earned.

2. Taxpayers have until the end of October in the following financial year to calculate and advise the Office of State Revenue of any bonus earned and distributed.

3. Where appropriate, any contractor issues must be examined pursuant to the definition of "wages" in clause 2(1) of the Glossary and section 21 of the *Pay-roll Tax Assessment Act 2002*.

Date of Effect:

This Commissioner's practice takes effect from 21 October 2003.

Bill Sullivan
COMMISSIONER OF STATE REVENUE

21 October 2003

ATTACHMENT 2

COMMISSIONER'S PRACTICE
PT 2.0

PAY-ROLL TAX – GROUPING EXCLUSIONS

Commissioner's Practice History

Commissioner's Practice	Issued	Dates of effect	
		From	To
PT 2.0	23 December 2003	23 December 2003	Current

This Commissioner's practice outlines the major factors to be taken into account when considering an exclusion from grouping for an employer. As the factors vary for each type of exclusion, they are dealt with separately in this practice.

Background

Where an employer is grouped under section 31, section 32 or section 35 of the *Pay-roll Tax Assessment Act 2002* ("the Act"), the ability exists for the Commissioner to exclude that employer from the application of the grouping provisions, either of his own volition or upon application by a taxpayer.

Section 38 of the Act provides the mechanisms to allow the Commissioner to exclude a person from a group under sections 31(4), 32(3) and 35(2) of the Act.

<u>Grouping where employees used in another business</u>

Section 31(1) and (2) of the Act groups an employer and another person where the employer's employees are engaged in another business.

Where businesses are grouped pursuant to section 31(1) or (2) of the Act, the Commissioner may consider the provisions of section 31(4).

Section 31(4) authorises the Commissioner to consider exclusion where he is satisfied that it would not be just and reasonable, having regard to the nature and degree of the duties performed and any other relevant matters, to group the employer and the other person.

Grouping commonly controlled businesses involving discretionary trusts

Section 32 operates to group two employers where the same person has, or the same persons together have, a controlling interest in two businesses.

Section 33(4) provides that persons have a controlling interest in a business carried on under a trust, if those persons, whether or not as trustees of another trust, are beneficiaries in respect of more than 50% of the value of the interests in that trust.

Section 33(9) deems that where persons are beneficiaries under a trust in respect of more than 50% of the interests in that trust and the trustees have a controlling interest in a business, those beneficiaries have a controlling interest in that business.

Section 34 provides that where a person, as a result of the exercise of a power or discretion by the trustee of a discretionary trust or by any other person, may benefit under that trust, they shall be deemed for the purposes of section 33 to be a beneficiary in respect of more than 50% of the value of the interests in that trust. Therefore, all potential beneficiaries of a discretionary trust will have a controlling interest in any business carried on under that trust.

The Commissioner may consider excluding a person from a group where that person has been included in the group as a consequence of a person (or persons) having a controlling interest, pursuant to section 33(4) or 33(9) of the Act, in a business because they are a beneficiary (or beneficiaries) under a discretionary trust.
After considering:

- the nature and degree of ownership and control of the businesses;
- the nature of the businesses; and
- any other matter that the Commissioner considers relevant,

the Commissioner may exclude that person from the group if he is satisfied that -

- the business carried on by that person operates substantially independently to the business carried by any other member of the group; and
- it is just and reasonable to exclude that person from the group.

Grouping head and branch businesses

Section 35(1) provides that two businesses constitute a group where:

- one of the businesses is the head or parent business;
- the second business is a branch, agency or subsidiary of the head or parent business; and

- the head or parent business exercises managerial control, whether administrative, financial or procedural, over the branch, agency or subsidiary.

Section 35(2) authorises the Commissioner to consider exclusion where he is satisfied that it would not be just and reasonable to group the businesses.

Commissioner's Practice

1. In determining whether an employer may be excluded from a group under the applicable sections, the Commissioner will consider all cases on their own merits.

Section 31(4) exclusion where employees used in another business

2. The nature and degree of the duties performed will be an important factor in determining whether exclusion should be allowed under section 31(4). To determine the nature and degree of duties performed, the business activities of each employer will be evaluated and the nature of the work completed by the employees in the other business examined. Factors considered concerning the business activities of each employer and the nature of the work completed by the employees include:

    2.1. the proportion of work completed by the employees for each employer;

    2.2. the integration of the duties completed by the employees to the operations of the other employer; and

    2.3. whether a commercially realistic payment has been made for the duties completed by the employees.

3. Other relevant matters (for example managerial control, ownership, commercial and financial arrangements, and sharing of common resources) will also be important factors to be considered when making an exclusion determination.

4. The Commissioner will generally not exclude an employer from a group where any of the following situations occur:

    4.1. one business was created or exists solely to provide support services for another business, for example, a service trust;

    4.2. the business could not operate in its own right. An example is a separate private entity providing substantially all of its services to a single client; or

4.3. a single business splits its operations into separate but related activities (eg. manufacturing and selling) with the intention of avoiding pay-roll tax.

Section 32(3) exclusion involving discretionary trusts

5. The factors listed in paragraphs 6, 7 and 8 are relevant to the Commissioner's consideration of the nature and degree of ownership and control of the businesses, the nature of the businesses and other relevant matters.

The nature and degree of ownership and control of the businesses

6. The factors to be considered by the Commissioner include the following:

6.1. distribution of funds to beneficiaries;

6.2. entitlement to the capital of the trust;

6.3. relationship of beneficiaries to the trustee;

6.4. extent of control that may be exercised by the appointer or guardian;

6.5. level of involvement by the beneficiaries in the activities of the trust, including responsibility for the management and executive decisions of the businesses; and

6.6. extent of the beneficiary's relationship to the trust (remoteness of the beneficiary), including:

6.6.1. where the beneficiary is a recognised public benevolent or charitable institution;

6.6.2. where the beneficiary is included solely because other beneficiaries have an interest in them (for example, the beneficiary is a publicly listed company and is a beneficiary only because another named beneficiary holds shares in that company); and

6.6.3. where several beneficiaries of a trust have a controlling interest in another business.

Nature of the businesses

7. The nature of the relationship between the businesses will be established by the following factors:

7.1. the type of industry and the operations of each business within those industries;

7.2. any activities of each business and the extent to which they are integral to the operations of the other business; and

7.3. whether the businesses are complementary.

Other relevant matters

8. Other relevant matters will be determined on a case-by-case basis, but will include the following and will provide additional support for making the determination:

8.1. the type and amount of trade between the businesses;

8.2. the service and purchasing arrangements relating to the businesses;

8.3. the commerciality of the agreements and contractual obligations between the businesses;

8.4. whether there are any common representative arrangements between the businesses; and

8.5. whether there are any common credit arrangements for the businesses.

9. After taking into account the matters in paragraphs 6, 7 and 8, the Commissioner will determine whether the businesses are operating substantially independently and whether it is just and reasonable to exclude them or one of them from grouping.

In circumstances where the beneficiary is a recognised public benevolent or charitable institution or publicly listed company, the Commissioner will generally consider that it would be just and reasonable to exclude any business carried on by that beneficiary from the group.

In circumstances where the beneficiary (or all the beneficiaries together) of a trust business have a controlling interest in another business (even where the businesses are different) or exercise common management or executive control in another business, the Commissioner will generally consider that it would not be just and reasonable to exclude the business from the group.

10. Although there may be circumstances where two businesses are carried on substantially independently, it will not necessarily follow that it will be just and reasonable to exclude the persons who carry on those businesses from constituting a group.

Section 35(2) exclusion of head and branch businesses

11. Where the provisions of section 35(1) apply, the nature and degree of managerial control exercised by the head or parent business will be established by the following:

    Administrative

    11.1. This relates to responsibility for executive control or the bookkeeping, payroll and other general clerical functions that form an essential part of the branch's operations.

    Financial

    11.2. This relates to responsibility for the financial aspects relating to the branch's operations including banking procedures, profit sharing and goodwill.

    Procedural

    11.3. This relates to the day-to-day running of the branch's operations including reporting functions and instruction manuals, and also includes whether the branch has a reporting responsibility to the parent relating to its operations.

12. In point 11, it is the nature and degree of managerial control by the parent over the branch that constitutes the primary basis for exclusion under section 35(2).

13. The determination of whether or not a business is a branch or agency of another business will vary with each set of circumstances.

14. In determining what is just and reasonable in relation to a section 35(2) exclusion, the Commissioner will have regard to the extent of managerial control exercised by the parent over the branch business.

Date of Effect

This Commissioner's practice takes effect from 23 December 2003.

Bill Sullivan
COMMISSIONER OF STATE REVENUE

23 December 2003

4a. Conveyance Duty – Shared Equity Home Purchases

ISSUE

It has been suggested that the stamp duty treatment of the purchase of further interests or tranches in homes owned under shared equity arrangements with the Department of Housing and Works (DHW) requires consideration.

The particular issue raised in the submission was:

- **Department of Housing and Works** (Submission 96)
    - DHW provides shared equity loans to people on low, Homeswest-eligible incomes. The underlying philosophy is that customers will purchase DHW's equity share at a later date when they can afford to do so. Customers are encouraged to purchase the DHW share either in one transaction or, if necessary, in multiple transactions. It is suggested that the first home owner stamp duty concession should be provided on the purchase of additional interests of equity from DHW.

CURRENT POSITION

A shared equity purchase occurs when DHW assists home buyers who are unable to finance the entire purchase price of their intended home by buying some of the equity in that home as tenants in common with the home buyer. The home buyer then has the opportunity, sometime after the initial purchase, to acquire further interests in their home.

Many of these initial purchases result in no duty being payable as section 75AG of the *Stamp Act 1921* (copy attached) provides, subject to certain criteria being met, for a complete reduction of duty for first home buyers where the property is valued up to $250,000. In addition, a reduced amount of duty is payable where the property is valued between $250,000 and $350,000. To qualify for the concession, the purchaser must be eligible to receive the first home owner grant (or would have been eligible if consideration had been paid for the property).

When a shared equity purchase of property is made with the DHW, stamp duty is apportioned in accordance with section 119 of the Stamp Act (copy attached). This section allows for the portion of property acquired by DHW to be exempt (as DHW is a Government Department), while the other

purchaser remains liable to duty on their interest in the home. For example if an eligible first home buyer on their own purchased a $300,000 property, they would pay $6,600 in stamp duty on the purchase. If the same eligible purchaser bought a 50% interest under a shared equity arrangement with DHW, they would pay $3,300 in stamp duty (50% of $6,600).

When purchasing a further interest in the home, the person does not qualify for a reduction of duty under section 75AG of the Stamp Act as the person is not eligible to receive a first home owner grant in respect of the purchase of the subsequent interest. Using the example in the previous paragraph, assuming that there had not been an increase in the value of the property, the home buyer would pay $4,200 in stamp duty on the purchase of the remaining 50% interest (assuming the 50% interest was still valued at $150,000).

However, given that by the time a shared-equity purchaser is able to purchase a further interest in a property it is almost certain that the property would have increased in value, the duty payable by the purchaser on the subsequent interest is likely to be considerably more than $4,200.

ANALYSIS OF ISSUE

Under the current stamp duty scheme, a person who can afford to finance all of the purchase of their first home will, if eligible, receive a stamp duty concession in relation to the entire purchase.

A person who cannot afford to finance all of the purchase of their first home and enters into a shared equity purchase with DHW will only receive a concession in respect of their initial equity in that home. Any subsequent interests purchased will be subject to stamp duty at conveyance rates on the value of that interest at the time of that further purchase.

Should it be considered desirable to provide a stamp duty concession in relation to the purchase of subsequent interests from DHW under a shared-equity arrangement, the first home owner concession could be extended to the purchase of subsequent interests in a property from DHW, where the value of the property at the time of the initial purchase was below the concession thresholds and the person received the concession on the initial purchase.

It could be possible to achieve this outcome by deeming subsequent purchases of interests to be reassessments of the initial purchase, irrespective of the consideration paid for the further interest. Duty would be calculated on the total interest in the home held at the time of the subsequent purchase. Any duty paid on the initial purchase would be credited when making the reassessment.

In relation to the previous example, if the remaining 50% interest were acquired by the home buyer in a single transaction, duty would be calculated by first calculating the duty that would have been payable on the 100% now held (being $6,600), with a credit given for the $3,300 that has been paid in relation to the original acquisition.

This would ensure that a person who purchases a home under a joint equity arrangement with DHW and subsequently purchases the remaining interest in the home, would not pay more stamp duty than if they had purchased the entire property initially.

Members of the Committee raised the possibility that the thresholds for the First Home Owner rate may in the future increase. However, the suggested proposal is that further relief would only be available to buyers who were entitled to the First Home Owner rate of stamp duty at the time that they purchased their initial interest in their residence. It was not suggested that first home buyers who were ineligible for the First Home Owner rate on their initial purchase, could be eligible for the concessional rate on the purchase of further interests. Further, the rate of duty imposed on the purchase of any subsequent interests would be the same rate that applied at the time of the initial purchase, regardless of whether the rate has changed since that time.

However, to ensure the effective phase out of the concession when the consideration is between $250,001 and $350,000, the marginal rate of duty that applies to properties within this range is $13.20 per $100. Given the relatively high marginal rate of duty in this range, there is a possibility that a purchaser of a property valued in this range may be financially disadvantaged by such an amendment.

This could occur where a person purchases a relatively small subsequent interest in a property. If section 75AG were to be extended as proposed, the purchase of the remaining interest would be subject to duty at a rate of 13.2 per cent on the value of the interest at the time the property was initially purchased. However, if the purchaser didn't avail themselves of the first home owner concession, the rate applied could be as low as two per cent on the value of the home at the time of the subsequent purchase. Depending on how much the value of the interest has increased over time, the purchaser

may be disadvantaged if they sought to access the first home owner concession on the subsequent purchase.

The attached chart shows the duty implications of a range of scenarios, which demonstrates that it is unlikely that the purchaser would pay more duty under the proposal, but that it is possible. The chart shows shared equity purchases of different percentages on various valued properties, and the different duty outcomes that could result when the remaining DHW equity is purchased, assuming the property has increased in value by $100,000.

This is a very preliminary analysis and is only intended to highlight that the potential for the issue exists. Further examination and advice from DHW is required on this matter. However, any amendments could be drafted on the basis that the purchaser must apply to access the concessional rate of duty on subsequent purchases, which would allow the purchaser to choose the most favourable method of assessment.

Some safeguards may be required to ensure that further relief is only available where the subsequent purchase is made by the same person in relation to the same property.

It may also be considered prudent to place a limit on the length of time that a shared equity owner would be eligible for the concession on the purchase of further interests. Such a limit would act as an incentive for the person to purchase further interests as soon as it becomes affordable for them to do so, allowing DHW to realise its assets more quickly.

Members of the Committee raised the issue of other joint equity schemes that may be in existence, such as those where mining companies assist purchasers as a way of incentive to work for the company and live in remote areas. Also raised were proposed schemes where banks would take equity in properties with purchasers.

However, the only shared equity scheme that is eligible for a First Home Owner Grant is the shared equity scheme involving the State Housing Commission (Homeswest). As joint equity purchases made with banks or mining companies would not qualify for a First Home Owner Grant, such purchases are not eligible for assessment at the First Home Owner rate of stamp duty.

TECHNICAL COMMITTEE CONCLUSION

The Technical Committee considers the proposal is technically sound should the Government wish to adopt the policy position.

ATTACHMENT 1

119. Certain exemptions where the State of Western Australia etc. is a party

(1) In this section —

"exempt body" means —

(a) the State of Western Australia or the Crown in right of Western Australia;

(b) an agent or instrumentality of the Crown, or a government authority, declared to be an exempt body by the Minister by notice published in the *Gazette*; or

(c) a local government, except when it acts in its capacity as the trustee of a superannuation fund.

(2) If an exempt body is the only party that would be liable to pay the duty that would, but for this subsection, be chargeable on an instrument, the instrument is exempt from duty.

(3) If an exempt body is not the only party liable to pay the duty on an instrument the Commissioner shall apportion the duty chargeable on the instrument between those parties in accordance with subsection (4) or (5) (as the case requires).

(4) If the instrument is chargeable with duty under item 4 of the Second Schedule, the portion of the duty payable by a party shall bear the same proportion to the whole of the duty chargeable as the interest in the property acquired by the party bears to the whole of the interest acquired by the parties liable to pay the duty on the instrument.

(5) If the instrument is chargeable with duty under an item of the Second Schedule other than item 4, the portion of the duty payable by a party shall be as determined by the Commissioner.

(6) An instrument referred to in subsection (3) is exempt from that portion of the duty chargeable on it that would, but for this subsection, be payable by an exempt body.

[(7) repealed]

(8) An exempt body is not liable to pay the duty charged on an instrument referred to in subsection (3).

[Section 119 inserted by No. 20 of 1996 s. 43; amended by No. 57 of 1997 s. 113(5); No. 2 of 2003 s. 138; No. 66 of 2003 s. 86.]

ATTACHMENT 2

75AG. Reduction of duty or refund for first home owner

(1) Duty on an instrument of transfer of property referred to in the Second Schedule item 4(2) or (3) becomes chargeable at the rate set out in the respective subitem when the transferee, or each transferee, if there are more than one —

> (a) is paid a first home owner grant in relation to the property or becomes a person to whom a first home owner grant is or will be payable, in relation to the property; or
>
> (b) becomes a person to whom a first home owner grant would be, or would have been, payable in relation to the property if consideration had been given for the transfer of the property.

(1a) Subsection (1) does not apply to an instrument of transfer of property referred to in the Second Schedule item 4(2) or (3) if —

> (a) the unencumbered value of the land and home (in the case of property referred to in item 4(2)) exceeds $350 000; or
>
> (b) the unencumbered value of the land (in the case of property referred to in item 4(3)) exceeds $200 000.

(2) The transferee may apply to the Commissioner for the amount of duty chargeable on the instrument to be assessed under this section.

(3) If there is more than one transferee, the application must be made jointly by each transferee.

(4) The application may only be made within the period —

> (a) beginning on the commencement date of the eligible transaction to which the application relates; and
>
> (b) ending 12 months after the completion of the eligible transaction.

(5) The application must —

> (a) be in an approved form; and
>
> (b) include the information necessary to enable the Commissioner to decide whether duty on the instrument is chargeable under this section.

(6) For the purposes of this section and for the purposes of applying the Administration Act in relation to the operation of this section —

(a) the FHOG Act is to be treated as if it were a taxation Act;

(b) the FHOG Act applies to and in relation to an application under this section, to the extent that it can be applied for those purposes, as if a reference in the FHOG Act to an application or an applicant were a reference to the application or applicant under this section; and

(c) this Act and the Administration Act apply in relation to any information given to the Commissioner for the purposes of the FHOG Act by a person who is an applicant under this section as if the information had been given to the Commissioner for the purposes of this section.

(7) Information provided by an applicant in or in connection with an application under this section must, if the Commissioner so requires, be verified by statutory declaration or supported by other evidence required by the Commissioner.

(8) If the instrument of transfer is or was chargeable under the Second Schedule Item 19, this section does not apply unless the Commissioner is satisfied that the duty was or will be (as the case requires) paid by a transferee.

(9) If a transferee is required to repay an amount under section 51 of the FHOG Act, or would be required to repay an amount if a first home owner grant had been paid to the transferee, duty on the instrument of transfer is not, or is no longer (as the case requires) chargeable under this section.

(10) Despite section 17 of the Administration Act, the Commissioner must make any reassessment necessary to give effect to this section.

(11) An expression used in this section that is defined in the FHOG Act has the same meaning in this section as it has in that Act.

(12) In this section, unless the contrary intention appears —

"Administration Act" means the *Taxation Administration Act 2003*;

"FHOG Act" means the *First Home Owner Grant Act 2000*;

"instrument of transfer" includes —

(a) an instrument of conveyance;

(b) an instrument on which duty is chargeable under the Second Schedule Item 19; and

(c) any other instrument that is chargeable as a conveyance or transfer;

"transferee", in relation to property, means a person to whom the property is conveyed or transferred, except —

(a) a person who, under the FHOG Act, would not be required to join in making an application for a first home owner grant; or

(b) a prescribed person.

[Section 75AG inserted by No. 12 of 2004 s. 20; amended by No. 11 of 2005 s. 10.]
*[**75B.** Repealed by No. 48 of 1996 s. 41.]*

ATTACHMENT 3

initial tranche purchased is 25%						
consideration	initial duty	assumed value of property for 2nd tranche purchases	assumed dutiable value for second tranche purchase	duty on 2nd tranche of 75%	duty if 2nd tranche is treated as a reassessment of initial contract	difference
$250,000	$0.00	$350,000.00	$262,500.00	$8,825.00	$0.00	$8,825.00
$275,000	$825.00	$375,000.00	$281,250.00	$9,765.00	$2,475.00	$7,290.00
$300,000	$1,650.00	$400,000.00	$300,000.00	$10,700.00	$4,950.00	$5,750.00
$325,000	$2,475.00	$425,000.00	$318,750.00	$11,640.00	$7,425.00	$4,215.00

initial tranche purchased is 50%						
consideration	initial duty	assumed value for 2nd tranche purchases	assumed dutiable value for second tranche purchase	duty on 2nd tranche of 50%	duty if 2nd tranche is treated as a reassessment of initial contract	difference
$250,000	$0.00	$350,000.00	$175,000.00	$5,200.00	$0.00	$5,200.00
$275,000	$1,650.00	$375,000.00	$187,500.00	$5,700.00	$1,650.00	$4,050.00
$300,000	$3,300.00	$400,000.00	$200,000.00	$6,200.00	$3,300.00	$2,900.00
$325,000	$4,950.00	$425,000.00	$212,500.00	$6,700.00	$4,950.00	$1,750.00

initial tranche purchased is 75%						
consideration	initial duty	assumed value for 2nd tranche purchases	assumed dutiable value for second tranche purchase	duty on 2nd tranche of 25%	duty if 2nd tranche is treated as a reassessment of initial contract	difference
$250,000	$0.00	$350,000.00	$87,500.00	$1,825.00	$0.00	$1,825.00
$275,000	$2,475.00	$375,000.00	$93,750.00	$2,014.00	$825.00	$1,189.00
$300,000	$4,950.00	$400,000.00	$100,000.00	$2,200.00	$1,650.00	$550.00
$325,000	$7,425.00	$425,000.00	$106,250.00	$2,452.00	$2,475.00	-$23.00

4b. Conveyance Duty - House and Land Packages/Spec Homes

ISSUE

Submissions to the State Tax Review have outlined concerns in relation to the inequality in the application of stamp duty to certain newly built homes. Each submission details the inequity that arises due to the fact that houses, as part of new house and land packages, are subject to duty on the value of the house and land, while contract built houses are subject to duty on the land component only.

The particular issues raised in the submissions were:

- **Submission no. 35**
    - The submission raises concerns over the imposition of stamp duty on house and land packages, while contract built homes are not assessed with stamp duty.
- **Master Builders Association (MBA)** (Submission 63)
    - The MBA suggests that stamp duty should only be imposed on the land component of a house and land package.
    - Alternatively, the MBA suggests that the nil duty threshold and the sliding scale cap for first home owners should be increased. This suggestion is beyond the scope of this issues paper and will be considered by the Reference Group.
- **Alcock Brown-Neave Group of Companies (ABN)** (Submission 65)
    - The ABN submission suggests that duty should only be imposed on the land component of a house and land package.
- **Housing Industry Association (HIA)** (Submission 86)
    - The HIA suggests that stamp duty incurred by a builder when initially acquring the vacant land be deferred until the house and land package is on-sold to the homeowner.
    - The HIA suggests builders/developers be exempt from the aggregation provisions contained within section 75AF.

- The HIA also suggests that put and call options entered into by developers and builders be exempt from the simultaneous put and call option provisions contained with the Act.

- **Department of Housing and Works** (Submission 96)
  - The Department of Housing and Works suggests that duty should only be imposed on the land component of the house and land package. It is proposed that this should apply to house and land packages under $250,000 with a gross floor area of 170m^2 or less.

- **The Urban Development Institute of Australia (WA Division) (UDIA)** (Submission 125)
  - The UDIA suggests that duty should only be imposed on the land component of a house and land package.
  - The UDIA suggests that the nil duty threshold for first homebuyers be increased to $500,000, or alternatively removed altogether. This suggestion is beyond the scope of this issues paper and will be considered by the Reference Group.
  - The UDIA also suggests that land acquired by builders or developers be treated as part of their trading stock and therefore exempt from stamp duty.

CURRENT POSITION

Stamp duty is charged on the conveyance of property. Generally, the calculation of duty is based on the amount or value of consideration given for any property. If a person contracts to buy an established home, duty is chargeable on the value of the property, which is the aggregated value of the house and land. Similarly, if a person contracts to buy a newly constructed house together with land (referred to by the housing industry as a "spec home", "house and land package" or "newly built home"), duty is chargeable on the value of the property, which is the aggregated value of the house and land. If a person contracts to buy land but enters into a separate contract to build a house (a "contract built home"), duty is chargeable on the value of the property, which is the value of the land alone. This is because a conveyance of a house and land in one single contract or agreement is wholly assessed with duty on the basis of the unencumbered value of the property being transferred under the contract (being the house and the land). Whereas, if a

new home buyer purchases a house and land using two separate and independent contracts, the property being transferred under the contract is the land, and only the conveyance of the land is dutiable in accordance with the *Stamp Act 1921*.

ANALYSIS OF ISSUE

Each submission proposes seemingly more equitable solutions to the house and land package issue. The solutions are based on achieving equitable treatment of house and land packages and contract built homes. However, each suggestion raises further inequity issues to those that currently exist, as any attempt to align the duty treatment of house and land packages and contract built homes will result in inequity with the treatment of established homes. The proposals include abolishing duty on the house component of the house and land package, deferring stamp duty (similar to that which applies to the motor vehicle industry) and providing builders and developers with an exemption from the aggregation provisions and put and call option provisions contained within the Act.

Stamp Duty on Land Value Alone

The Department of Housing and Works, ABN, UDIA and MBA have proposed that duty should only be assessable on the land component of a house and land package, to be consistent with the duty treatment of contract built homes.

However, it should be recognised that this approach would create further inequity between newly built homes and established homes. For example, if a homeowner, who has just purchased a house as part of a house and land package, had instead bought an established house, the value of the established house would be included in the dutiable value of the property, and that homeowner would pay duty on the aggregated price of the house and land. Charging duty on only the land component of a house and land package would therefore create a distortion in the market towards building new homes over buying established homes, the consequences of which would need to be fully considered.

The Technical Committee agreed that this proposal would favour the new home market, to the detriment of the established home market, and also suggested that the effect on the availability of vacant land would need to be examined.

Administratively, such a proposal appears to be relatively simple to implement and easy to comply with. However, the Office of State Revenue (and settlement agents) would need to be able to identify the cost associated with the land component of a house and land package. There are also potential tax avoidance issues that would need to be addressed, such as the potential to attribute more value to the house, and less to the land, so as to minimise duty on the land component of the package. This potential weakness in the legislation is obviously undesirable. Detecting cases of such avoidance may be difficult in the case of contracts that are self assessed and are not presented to the Office of State Revenue for stamping.

While the Department of Housing and Works suggests that the land component of a house and land package should be exempt from conveyance duty, the Department places restrictions on this exemption. The Department suggests that the land component of a house and land package be exempt from duty only where the package is under $250,000 and the gross floor area is less than 170m^2. This proposal places additional compliance costs on settlement agents and taxpayers, as the floor area of each property must be accurately measured and recorded. Furthermore, avoidance opportunities could also emerge if this proposal were to be introduced, as taxpayers could potentially give false area measurements to reduce their duty liability. Ensuring taxpayers are compliant with the provisions would result in the need for additional resources for the Office of State Revenue and possibly the Office of Valuation Services.

The Technical Committee noted that applying stamp duty to the land value only in the case of the sale of a house and land package as suggested, is inconsistent with the principle underlying the Stamp Act, which is that duty applies to the value of the property being transferred under the contract. In the Committee's view, there is a fundamental difference between what is being transferred under a contract involving a house and land package, compared to what is being transferred under a contract for the purchase of vacant land on which a home is to be built under a separate contract.

However, the Committee was of the view that providing stamp duty relief in relation to house and land packages is a matter of Government policy and if it were considered appropriate, it could be achieved.

However, it was also noted that the different stamp duty treatment of house and land packages compared to contract built homes was exacerbated by the current conveyance duty rate scales, and could be partly overcome by adjusting the rate scales.

"Deferral" of Stamp Duty

A house and land package involves a developer/builder purchasing land, building a house on that land, and finally on-selling that package to the homebuyer. Currently, the developer/builder pays stamp duty on the initial transfer, being the purchase of the vacant land. The homebuyer then pays duty on the second transfer, being the purchase of the house and land. Duty is assessed on the aggregated price of the house and land. The HIA and the UDIA have suggested that an arrangement similar to that which is in place for the motor vehicle industry (in accordance with section 76D) be implemented for the housing industry. This arrangement would allow stamp duty to be "deferred" on house and land packages, with duty on the initial transfer being removed and duty only collected when the package is on-sold to the homebuyer.

The proposal suggested by the HIA is effectively an exemption for developers on the purchase of land, and a readjustment of the land value when the house and land is on-sold so that duty is assessed on only the original land value. This would result in the homebuyer paying stamp duty on the value of the land when it was acquired by the developer, with no duty being payable in relation to the increase in land value over the time that it takes to construct a new residence or the residence itself. There would be no link between the duty payable and the value of what is actually being acquired as a result of the transaction.

This suggestion raises similar equity issues to the previous proposal, as purchasers of newly constructed residences would receive a significant reduction in their conveyance duty, while buyers of established homes must pay duty on the aggregated value of the house and land at its current market value.

Furthermore, this suggestion differs from the provisions of section 76D. Section 76D of the Stamp Act provides that no duty is payable on the transfer of a motor vehicle licence to a motor vehicle dealer (that is, the transfer is exempt) where the vehicle is acquired solely for the purpose of reselling the vehicle to another person. Section 76D applies to all grants or transfers of a motor vehicle licence, whereas, if the same deferment was allowed for the housing industry as suggested, it would only apply to a small number of developers, creating an inequity with the treatment of established homes.

The HIA suggests that duty apply to the value of the land at the time the developer/builder purchased the land. Land values are not static and tend to increase over time, whereas the new car price is the price set by the manufacturer. Hence, providing an exemption to developer/builders would

result in a significant loss of State revenue, as the increase in land value is not dutiable.

Again, the Technical Committee noted that this would be inconsistent with the principle of applying stamp duty to the value of property transferred under a contract at the time it is transferred. The Committee also questioned whether the stamp duty benefit would be passed on to the end purchaser through a reduction in purchase price.

The Technical Committee suggested that an alternative would be to provide the purchaser of the completed home with a stamp duty rebate equivalent to the stamp duty paid by the builder/developer in relation to the land. However, as builders/developers often purchase land in large lots (and often the aggregation provisions are applicable to that purchase) it would be difficult to calculate the stamp duty applicable to one individual parcel of land that the homeowner eventually purchases.

Aggregation Provisions

Section 75AF provides that where two or more instruments together form, or arise from, substantially one transaction, ad valorem duty is charged on the total of the amounts on each instrument. This section was inserted to minimise potential tax avoidance opportunities associated with contract splitting. Before this section was introduced, taxpayers were able to avoid paying a higher aggregated rate of duty by transferring property using a number of different instruments. The HIA has suggested that developers/builders, who purchase separate lots of land in the same development for individual resale as part of a house and land package, should be exempt from the aggregation provisions.

It should be noted that such an exemption exists in the Australian Capital Territory's *Duties Act 1999*. Section 24(2)(a) of the Duties Act states that transactions for the purpose of acquiring two or more blocks of land in the same subdivision for developing the blocks for resale are exempt from the aggregation provisions.

Again, it should be recognised that this proposal would, while assisting developers/builders, create an inequity between the treatment of developers/builders and an individual who purchases more than one parcel of land, as the individual would still be subject to the aggregation provisions.

This proposal would also raise questions as to the definition of developer/builder. Determining who does and does not qualify for an exemption to the aggregation provisions would be administratively burdensome. For example, a person who is not primarily a

developer/builder but develops property as an ancillary activity to their primary business may not be classified as a developer/builder and may be subject to the aggregation provisions, creating further inequity. The Technical Committee agreed that an appropriate definition would be required, which would be difficult. Alternatively, repealing the aggregation provisions would re-introduce serious tax avoidance opportunities and place the State's revenue at risk.

Put and Call Option Provisions

The HIA submission states that it is commonplace for a builder to secure land from a developer by way of a put and call option. The HIA considers that these arrangements are not a sub-sale of land as the builder merely has possession of the land. Therefore, the HIA submits that these arrangements be exempt from the put and call provisions.

A call option is a contract that operates for a specific period of time that gives the right to buy property at a fixed price. A put option is a right held by a person to sell property during a certain period at a fixed price. If a put option and a call option are in existence over the same property at the same time, they effectively create a contract for sale. Effective 1 January 2004, where a put and call option is in existence at the same time, over the same property for a given consideration (whether documented or undocumented), duty is payable on the call option as if it were an agreement to convey the property.

It would seem unlikely that a builder would merely take possession of a developer's land (as the HIA suggests) if the builder were to build on the property, rather than secure the property through a transfer. This would not provide the builder with any security over the property (and the house which the builder has constructed) and would leave the builder with few legal remedies if the developer were to default on the arrangement. Instead, it would seem more probable that the put and call option would effectively lock in the transfer of the property from the developer to the builder. It is therefore equitable for these options to be assessed with duty as if they were an agreement to convey the property. Exempting the described put and call options from duty would raise equity issues, as similar put and call options transferring established homes would still be subject to duty.

It should also be noted that with the introduction of the conditional contract provisions which allow longer time limits for the payment of duty in certain circumstances, the commercial need to enter into put and call option arrangements to defer the payment of stamp duty should not exist.

The Technical Committee noted that the put and call option provisions were inserted to eliminate this deferral of duty and did not support any amendments to the put and call option provisions.

TECHNICAL COMMITTEE CONCLUSION

The Technical Committee generally did not support changes to the current arrangements, as the current arrangements are simple and well understood. However, the Committee recognises that the issues raised are a matter of Government policy and should Government wish to provide assistance to the building industry as suggested, the technical issues raised could be overcome.

4c. Conveyance Duty - Alignment of Duty Treatment of Entities

ISSUE

Where a person buys an interest in land situated in Western Australia, stamp duty is payable at conveyance rates under item 4 of the Second Schedule of the *Stamp Act 1921*. These rates range from 2% to 5.4% of the unencumbered value of the interest in the land and any chattels being transferred with the land.

However, where the same person was to acquire an equivalent beneficial interest in the land by acquiring an interest in a company, trust or partnership that owns the land, the amount of stamp duty payable will vary depending on the type of entity that is interposed between the land and the purchaser.

A number of submissions have suggested that there should be greater consistency between the varying stamp duty treatments of transfers of interests in different business structures, and the stamp duty treatment of the direct transfer of the underlying assets of a business structure.

The particular issues raised in the submissions were:

- **Western Australian Divisional Council – Taxpayers Australia Inc** (Submission 51)

  Small Business Development Corporation (Submission 94)

  - Unit trust structures provide similar characteristics to company structures, therefore there should be no difference in the treatment of unit trusts and unit holders, to the treatment of companies and shareholders.

- **Master Builders Association of Western Australia** (Submission 63)

  - The treatment under the stamp duty law of the transfer of shares in a company and units in a unit trust is inconsistent. Both are common trading vehicles and from a commercial perspective, there is no reason for the distinction.

  - The land-rich tests of $1 million of land and 60% land to property ratio should be increased.

- **The Chamber of Minerals and Energy Western Australia (CME)** (Submissions 42 and 82)

    - By applying the listed land-rich provisions to those listed companies whose holdings of land (including mining tenements) exceed a certain percentage of their total assets, takeovers of similarly sized companies (in terms of capitalisation) are treated differently dependent on their asset mix, which may be a product of the industry in which the particular company operates.

    - The nature of the assets that are excluded from the total assets for the purposes of determining if a company's land exceeds a certain percentage of total assets is such that the listed land-rich provisions unfairly target the mining industry.

    - For these reasons, CME submitted that the listed land-rich provisions should be repealed.

- **Mr Grahame Young, Barrister** (Submission 99)

    - There are widely differing amounts of duty assessable depending on whether the property sold is the asset, shares in a company, interests in a trust or a partnership interest. It is submitted that there ought to be similar outcomes for financially equivalent transactions.

- **The Law Society of Western Australia** (Submission 123)

    - The differential treatment of transfers of interests in different types of entity, i.e. partnerships, companies or trusts and also on the transfer of the underlying assets cannot be justified.

A number of other technical issues have been raised in relation to the operation of the land-rich provisions, which will be dealt with in a separate paper.

CURRENT POSITION

Where a person buys an interest in land situated in Western Australia, stamp duty is payable at conveyance rates (item 4 of the Second Schedule). These rates range from 2% to 5.4% of the unencumbered value of the land and any chattels being transferred with the land.

However, where essentially the same transaction is conducted, but with an entity such as a company, trust or partnership interposed between the land and the buyer and seller of the land, the amount of stamp duty payable will vary depending on the type of entity that is interposed and how the acquisition of the land is structured.

Traditionally, the conveyance of a marketable security, such as a share, was charged with duty at a lower rate than the conveyance of land. Following abolition of marketable securities duty, no duty is payable on such conveyances. This creates the opportunity for a person wishing to sell land to structure the transaction by placing the ownership of the land into a holding entity that is then sold to the prospective purchaser. In doing this, the purchaser may obtain the benefit of a reduced amount of stamp duty payable on the acquisition of the land, and would theoretically be prepared to pay a higher price to acquire the land than if the land was being acquired directly.

In 1982, the Stamp Act was amended to provide that the disposition of units in certain unit trusts would attract duty at conveyance rates, and that the value of the units would be calculated with reference to the unencumbered value of any land held by the unit trust, plus the otherwise non-dutiable assets (net of total liabilities).

Further amendments were made to the Stamp Act in 1987 to provide that where a majority acquisition of shares in a non-listed company occurs within a prescribed period and the company holds land, the value of which is greater than a specified level and comprises more than a specified percentage of the total value of assets held by the company, the acquisition of the shares attracts duty at the conveyance rate on the unencumbered value of the proportion of the land and chattels being indirectly acquired. Where the land held by the company falls below a certain level, or below a certain percentage, no duty is payable.

Both these amendments were made as anti-avoidance measures, with the intention of applying duty at the conveyance rate to indirect transfers of interests in land in certain circumstances. Subsequent amendments have seen the operation of the provisions move from anti-avoidance to revenue raising in relation to the indirect acquisition of land.

However, it should be noted that an interest in a partnership has always been treated as property that is subject to duty. The value of the partnership will be the unencumbered value of any land held by the partnership plus the value of otherwise non-dutiable assets (net of unsecured liabilities).

The result of these various amendments is that the stamp duty treatment of the acquisition of land differs greatly depending on whether the land is acquired directly or indirectly, as illustrated below:

Asset Level:

Where an interest in land is held directly by a person, and that interest, or part of that interest, is transferred to another person, the transferee (or donor, in the case of gifted land) is liable to pay stamp duty at conveyance rates on the greater of the purchase price or the unencumbered value of the land and chattels that are transferred. The conveyance rates of stamp duty range from 2% to 5.4%.

Trust Level:

If that same interest in land were held by a trustee of a unit trust and the person holds the units in the trust, and the transfer of the interest in the land was effected by transferring the units in the trust to another person, rather than transferring the land itself, the stamp duty treatment would vary dependent on whether the trust was a public unit trust or a private unit trust.

Generally, no duty applies to the disposition of units in a public unit trust. The exception to this is where an acquisition results in the units in the trust being owned by less than 50 unit holders, or 20 or less own 75% or more of the units, in which case the trust would convert to a private unit trust and all acquisitions by that person that were part of the same arrangement would be subject to duty as if the trust had always been a private unit trust.

In addition, duty will not apply to the disposition of units in private unit trusts that are registered pooled investment trusts or equity trusts, except, in the case of registered pooled investment trusts, where the disposition results, or is part of a series of dispositions occurring within the previous three years that result, in a majority interest of 50% or more of the units in the pooled investment trust being acquired. In this case, the disposition(s) would be subject to duty as if the trust was a private unit trust.

A disposition of units in a private unit trust that changes the entitlement of the unit holders to the property of the trust is liable to stamp duty on the value of the units subject to the disposition. The value of the units is the proportional entitlement of the units to the sum of the unencumbered value of the land and chattels, and the amount by which the balance of the trust's assets (after the value of the land and chattels has been deducted) exceeds the trust's total liabilities.

Company Level:

Where a company holds the interest in land, the stamp duty treatment would vary dependent on the extent of the acquisition and the proportion of land to other assets that the company holds.

If the company is not listed, duty will apply only where a person (or a group of related persons) acquires a majority or further interest, and the company is a land-rich corporation.

A majority interest occurs when an entitlement on winding up to more than 50% of the property is acquired within a three-year period. A land-rich corporation is one which has an interest in land in Western Australia worth more than $1m, and the proportion of the total value of all the land to which the company is entitled is 60% or more of the total value of all its property, other than excluded property.

Duty is then payable at conveyance rates on the proportional unencumbered value of the land and chattels held by the company, and any subsidiary, that would be dutiable if acquired directly.

If the company is listed, duty will apply only where a person (or a group of related persons) acquires a controlling or additional interest, and the company is a land-rich corporation. A controlling interest occurs when an entitlement on winding up of 90% or more of the property is acquired.

Partnership Level:

A partnership interest is a chose in action, and is therefore dutiable property in itself. The value of a partnership will be the amount of the capital account that is being acquired or released, plus any liabilities that are assumed.

Effectively, the unencumbered value of all of the assets of the partnership will therefore contribute to the dutiable value, whether those assets would have been dutiable or not if transferred directly, although in practice the Commissioner allows liquid assets to be set off against the unsecured liabilities of the partnership.

Western Australia's current position can be summarised as follows:

- Duty is payable on the unencumbered value of land and chattels held where an interest of 90% or greater in a listed land-rich company is acquired.

- No duty is payable on acquisitions of a public unit trust, even where the trust is land-rich, unless it becomes private as a result of the transaction.

- Duty is payable on the unencumbered value of land and chattels held where a greater than 50% interest in an unlisted land-rich company is acquired.

- Duty is payable on the unencumbered value of land and chattels held by a private unit trust, and any residual net value of the otherwise non-dutiable assets, irrespective of the extent of the acquisition or whether the unit trust is land-rich.

- Duty is payable on the unencumbered value of the land and other assets that contribute to the value of the partnership, irrespective of the extent of the acquisition or whether the partnership is land-rich.

This information is represented in the table included as Attachment 1.

As can be seen from the preceding discussion, the acquisition of land can have very different duty outcomes depending on how the transaction is structured. The difference in the duty outcome is not a result of any clear policy decision to treat entities differently. Rather, the duty treatment has resulted from amendments being made at different times to deal with different issues. The result is a highly inconsistent duty regime that lacks a clear policy setting.

Although the preceding discussion focussed solely on the acquisition of land by varying entities, the Technical Committee noted that the issue of varying duty outcomes is applicable in respect of all dutiable property that is held or transferred indirectly, and the desired outcome of equity between differing entities will only be partially achieved if the treatment of differing entities is aligned solely in relation to transfers of land. It was, however, noted that if stamp duty were to be abolished on transfers of non-real property business assets, there would be little left in the way of dutiable property other than land.

ANALYSIS OF ISSUE

It is acknowledged that different treatments of different types of entities creates inequities and contributes to high compliance costs, with taxpayers and practitioners needing to be familiar with the requirements of a number of different regimes. The land-rich provisions, applicable only to companies, create additional compliance cost burdens, in that it is necessary to carry out valuations of property that would otherwise not be dutiable in order to ascertain if a liability exists.

The Department of Treasury and Finance (DTF) preferred method of dealing with these issues would be to adopt a land-holder regime that would have consistent application to companies, trusts and partnerships.

A land-holder regime would operate on the principle that where land in Western Australia is held by an entity, and an interest in that entity is acquired, the dutiable property held is traced through indirect ownership, and duty is then charged on the proportion of the gross value of the indirectly owned dutiable property equivalent to the interest being acquired. There would be no testing of the percentage of land to total property in order to ascertain if a liability exists.

The treatment of partnerships, companies and trusts would be, where possible, the same.

However, it is considered that a differential treatment of acquisitions in listed companies and trusts to unlisted companies and trusts may be necessary. This is because the high volume of small value transactions would result in administrative inefficiencies in terms of the cost of compliance and collection. In addition, the nature of trading in publicly-listed companies and trusts is such that the transferor and transferee are not likely, in ordinary circumstances, to be able to readily identify the value of the underlying dutiable property as at a given date.

It is anticipated that the treatment of listed companies and trusts could be governed by a separate regime that only sought to apply duty on property being indirectly acquired in instances of a takeover. In this regard, it is considered that the 90% acquisition threshold that currently applies to listed land-rich companies would be appropriate, given that it is consistent with the point at which remaining shares can be compulsorily acquired under the *Corporations Act 2001*. However, by applying this test to both listed companies and trusts and removing the percentage of land to total assets test, consistency among listed companies and trusts will be improved.

In addition, it is recognised that there may also be a need to limit the volume of low-dutiable-value transfers of interests in partnerships and unlisted companies and trusts that are subject to duty in order to remove those transactions that would be inefficient to assess in terms of the administration and compliance costs compared to the duty collected per transaction.

This could be achieved through the introduction of two threshold tests:

1. Exclude transactions from the land-holder regime where the value of the dutiable Western Australian property that is directly or indirectly owned by the entity subject to the transaction, or the proportion of the value of the dutiable property that is directly or indirectly owned by the entity equivalent to the proportion of the entity that is being acquired, is below a certain value threshold.

2. Exclude transactions from the land-holder regime where the interest that is being acquired is below a certain percentage threshold. In order for this test to be effective and not open to manipulation, there would need to be an aggregation of acquisitions that occur within a given period.

With regard to the second of these threshold tests, concern was raised at the Technical Committee meeting that if the threshold were to be set below 50% (as it is in New South Wales in respect of acquisitions of private unit trusts), the transferee would not necessarily have ready access to information pertaining to the assets held by the trust and their value. However, a contrary view was also put forward at the meeting to the effect that, in respect of private companies and unit trusts, if the percentage acquisition threshold were to be set at a level of 20% or higher, it would be expected that any prospective purchaser would have carried out substantial investigation of the financial position of the company or trust prior to acquisition. It was also noted that under the current regime, all transfers of units in private unit trusts require a valuation of land, regardless of the percentage of the acquisition.

Broadly speaking, the principles to be applied to unlisted trusts and companies and partnerships would be to:

- assess duty on acquisitions of interests in companies, trusts and partnerships only where that company, trust or partnership owns land in Western Australia;

- assess duty on acquisitions of interests in all land-holding companies, trusts and partnerships, either where the value of the dutiable property held exceeds a certain level or where the value of the interest in the dutiable property being acquired exceeds a certain level;

- assess duty on acquisitions of interests in land-holding companies, trusts and partnerships where that acquisition results in, or the acquirer already has, an interest that exceeds a certain percentage threshold; and

- calculate duty on the unencumbered value of the proportion of dutiable property held by the company, trust or partnership equivalent to the proportion of the interest being acquired.

It should be noted that currently, wholesale unit trusts may be registered with the Commissioner, and dispositions in these unlisted trusts are exempt from duty, apart from where a disposition results in 50% or more of the trust being acquired. Depending on whether a percentage of acquisition threshold is adopted, and at what level it is set, wholesale unit trusts may or may not need to be treated separately from other unlisted entities.

In addition, it should be noted that if the position was adopted, as a matter of policy, that there should be consistency between the differing entities in respect of the assessment of duty, then consideration would need to be given to whether it was practicable to apply a similar policy position to the corporate reconstruction exemptions, and extend those exemptions beyond transactions solely involving companies.

It is acknowledged that to adopt a land-holder model would be inconsistent with the regimes operating in other jurisdictions. However, it should be noted that there is no single land-rich/unit trust model operating in the other jurisdictions, nor is there likely to be in the short term. There are already variations of the land-holder model operating in the ACT and Northern Territory. The regimes operating in the other jurisdictions are highly complex with varying treatment for companies, trusts and partnerships, as can be demonstrated by the diagrams in Attachment 2, which illustrate the models operating in other jurisdictions. There is therefore no clear model for Western Australia to follow to achieve uniformity with other jurisdictions, which would also deal with concerns in relation to the inconsistent treatment of indirect acquisitions depending on the entity involved.

It is also acknowledged that adoption of a land-holder model could be perceived as an attempt to expand the revenue base, contrary to the intention of the IGA. However, the contrary view is that land is already part of the revenue base of every jurisdiction, and clause 5(x) of Schedule 1 to the IGA states that "nothing in this clause will prevent any Party from introducing anti-avoidance measures that are reasonably necessary to protect its remaining tax base…". Therefore, a land-holder regime would be the most effective way to counter the potential for avoidance of duty on transfers of land through indirect structures, and would also have the lowest compliance cost for taxpayers and administration costs for revenue offices. Further, the ACT and Northern Territory already have land-holder regimes, which seems to counter the view that such a regime is contrary to the IGA.

However, it is likely that a land-holder regime would create a liability in relation to transactions that otherwise would not be dutiable, such as in relation to unlisted companies that would otherwise not be land-rich. It is also likely that a number of transactions in relation to private unit trusts and partnerships will no longer be dutiable under a land-holder regime. A land-holder model would therefore result in an incidence shift in relation to the liability to duty. However, a land-holder model would more equitably distribute the duty liability over a greater number of taxpayers, with the potential benefit of a reduced rate of duty for those that are already in the duty base and being burdened with a disproportionate duty liability.

The Technical Committee raised the issue that by distributing the duty liability over a greater number of taxpayers, the cost of compliance would necessarily increase, although the degree to which the costs increased would be dependent upon the level at which the threshold levels were set.

Concern was also raised by the Technical Committee that extending the current land-rich provisions would adversely affect competitiveness and the State's ability to attract capital investment. However, it was noted that while the base would be broader in respect of companies, this would be offset by the application of the threshold tests, which would narrow the base in respect of unit trusts and partnerships. In addition to this, any adverse effect on competitiveness as a result of the overall broadening of the base would be offset by the positive effect that a resultant reduction in the rate of duty would bring.

It was considered that any rate reduction to offset the effect of the broader base should not be determined solely on the basis of future modelling, as there was the potential for the land-holder model to increase the revenue take, depending on the accuracy of predictions used. It was suggested that there needs to be built into the model mechanisms for the duty paid under the model to be tracked over a period of time and for the rates of duty to be reviewed and possibly adjusted to maintain the revenue neutrality of the model.

The solutions suggested in the submissions to achieve more equitable duty treatment of indirect interests are not preferred methods of achieving the desired outcome. In particular, it has been suggested in a number of submissions that the duty treatment of unit trusts should be aligned with that of companies. While it is agreed that this is a desirable outcome and one which the land-holder model seeks to achieve, the method of aligning the duty treatment proposed is to adopt a land-rich regime in relation to unit trusts. This solution fails to recognise the significant compliance and administrative costs that would be placed on unit holders to determine

whether a land-rich liability exists. The submissions do not deal with partnership interests, however, the same compliance burden would be created if partnerships were afforded the same duty treatment.

A further suggestion for the alignment of the duty treatment of differing entities was advanced at the Technical Committee meeting, in which the existing land-rich provisions remained and the treatment of unit trusts and partnerships was aligned with the treatment of the transfers of direct interests in property. However, it was noted that neither of these alternatives represented fundamental changes and would give little scope for any form of rate reduction.

By removing the land-rich percentage test, the land-holder model considerably reduces the complexity of the provisions. It also deals with concerns raised in other submissions in relation to the inequitable duty treatment as a result of different asset mixes, which unfairly impacts on particular industries. Further, depending on whether threshold tests are adopted in relation to the percentage of acquisition and value of land held, the land-holder model may remove the smaller value unit trust transactions from the duty base (in a similar way as currently occurs in the land-rich provisions due to the $1 million threshold) which would accommodate suggestions that the exemption afforded to companies should also be provided to unit trusts.

It has also been suggested that the land-rich tests of $1 million of land in Western Australian and 60% land to property ratio should be increased. The appropriateness or otherwise of the $1 million land threshold would need to be considered as part of the overall design of a land-holder model, and it is recognised that it is likely that this threshold would need to be increased. However, any land to property ratio (whether set at 60% or otherwise) significantly increases compliance and administration costs, merely shifts the arbitrary boundaries of the provisions, is open to manipulation and creates inequities. In particular, if a person were to acquire $10 million of land through the acquisition of shares in a $100 million company, no duty would be payable under a land-rich model. However, if that same person acquired $10 million of land through the acquisition of shares in a $10 million company, then duty would be payable on the land acquired. There is no clear policy rationale for the differing duty treatment and any land to property ratio, regardless of where it is set, would perpetuate this inequity.

One submission also suggests that the listed land-rich provisions should be repealed on the basis that they unfairly target the mining industry, will reduce takeover activity in the mining sector and will generate more revenue than the budgeted amount of $6.1 million.

The extension of the land-rich provisions of the Stamp Act to listed companies was a recommendation of the Business Tax Review (BTR). The basis for that recommendation was that full control of a company, and any property that it owns, could be obtained through the acquisition of shares in a listed company for the payment of no duty. The recommendation therefore sought to ensure that direct and indirect acquisitions of property are treated consistently, and this policy rationale is still valid.

The listed land-rich provisions were not intended to specifically target the mining industry, although it is acknowledged that the provisions impact on the mining industry due to the high value of the land (including mining tenements) that mining companies tend to hold. However, the broader package of reforms implemented by the BTR contained measures that were specifically designed to assist the mining industry, such as the measure to legislate the treatment of mining tenement farm-ins. This involved legislating the Office of State Revenue's long-standing practice of assessing interests earned through expenditure on a mining tenement (i.e. a "farm-in"). Other BTR measures which were designed to assist business more generally included the abolition of stamp duty on workers' compensation insurance, the introduction of a single rate of pay-roll tax, various stamp duty measures to accommodate modern business practices and a number of measures to improve tax administration.

In relation to the revenue estimate of $6.1 million, conveyance duty is a transactions-based tax and it was always acknowledged that revenue from a single transaction involving a large mining corporation might significantly exceed this figure. Data has been provided by the CME indicating the potential revenue that would have been raised if the listed land-rich provisions had operated in the 2000/01, 2001/02 and 2002/03 financial years would have been $31.5 million, $219.7 million and $13.3 million respectively. While no opinion can be offered on the reliability of the data, the figures demonstrate the potential volatility of the revenue raised from this measure. The mere possibility of such transactions occurring cannot be built into the revenue estimates.

Further, the assertion that this increased transaction cost will create a barrier to acquisition activity in Western Australia is not supported by any data. There has been no evidence that takeovers of listed companies have not proceeded as a direct result of the listed land-rich provisions. The Technical Committee did express the view, however, that the listed land-rich provisions had affected behaviour, through reduced share prices as part of takeover bids.

Conclusion

It is acknowledged that the differing duty treatment of acquisitions of land depending on the entity involved is inequitable and has no clear policy basis. A number of submissions have highlighted this issue and have suggested means of achieving seemingly more equitable treatment. However, the preferred approach to achieving consistent treatment of entities would be the land-holder model suggested by DTF. This would provide consistent treatment of entities, including partnerships, while at the same time significantly reducing compliance and administration costs, distributing the stamp duty burden more equitably across a greater number of transactions, and potentially allowing a reduction in the rate of conveyance duty.

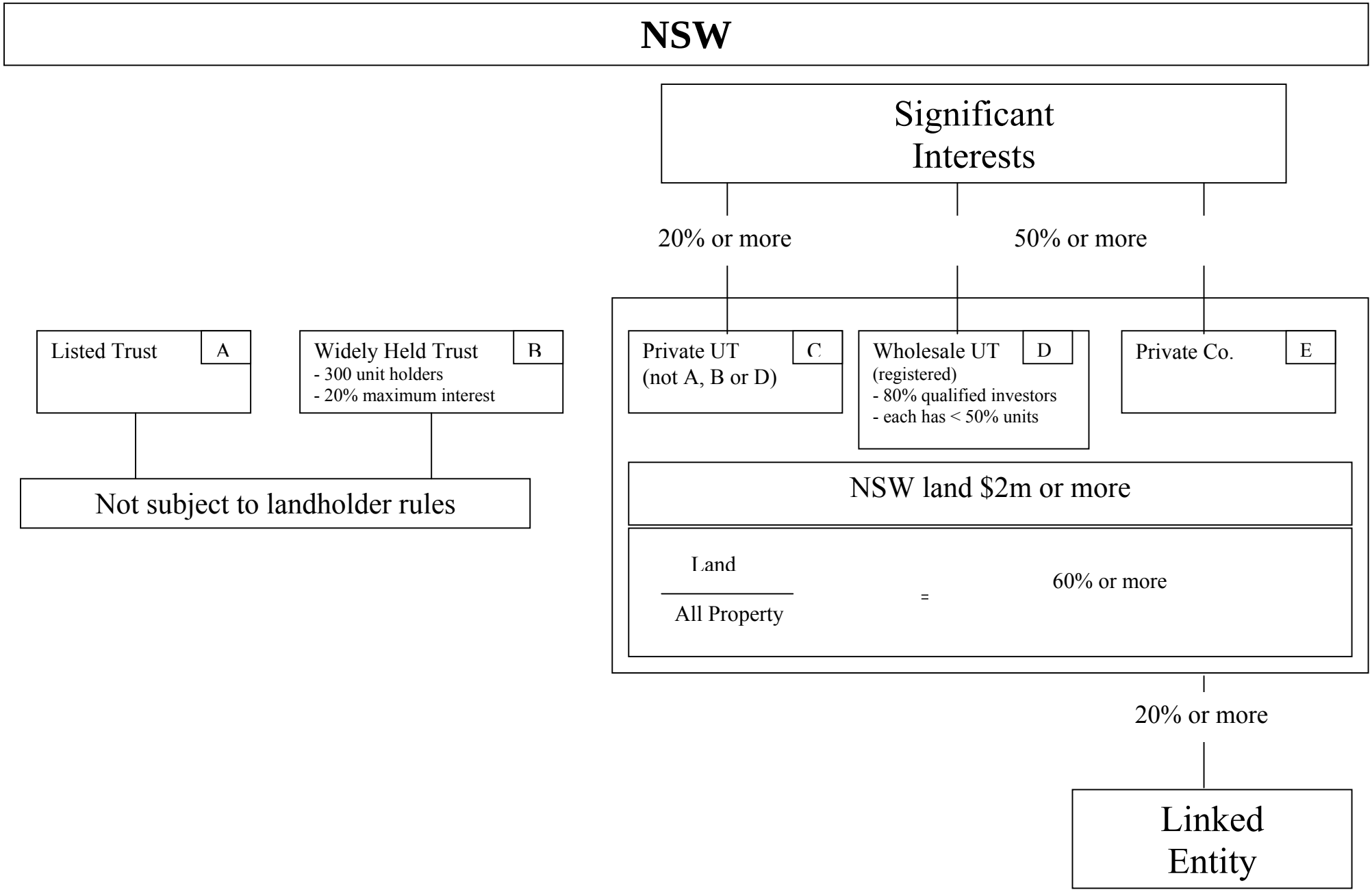
TECHNICAL COMMITTEE CONCLUSION

The Technical Committee considered that a land-holder model was administratively workable and provided a greater degree of equity for taxpayers, and supported advancing the model. It was, however, noted that the thresholds would need to be set at levels that were palatable, taking into account the effect on compliance costs and that any broadening of the base should be offset by rate reductions.

ATTACHMENT 1

	Listed land-rich	Unlisted land-rich	Public unit trust	Private unit trust	Partnership
% acquisition	Equal to or greater than 90%	Greater than 50%	N/A (unless it causes the trust to convert to private)	Any (unless the trust is converting to a public unit trust)	Any
Land value	$1m	$1m	N/A	Any	Any
Land to asset ratio	60%	60%	N/A	Any	Any
Duty payable on	Land and chattels	Land and chattels	N/A	Land, chattels and residual net value	Land, chattels and residual net value

ATTACHMENT 2



VIC

Significant Interests

20% or more

50% or more

Listed Trust	A

Widely Held Trust	B
- registered MIS - units issued to public - 300 unit holders - 20% maximum interest	

Not subject to land holder rules

Private UT (not A, B or D)	C

Wholesale UT	D
(registered) - not for particular investor - 80% qualified investors - each has < 50% units - additional alternative min. land holding/subscription criteria	

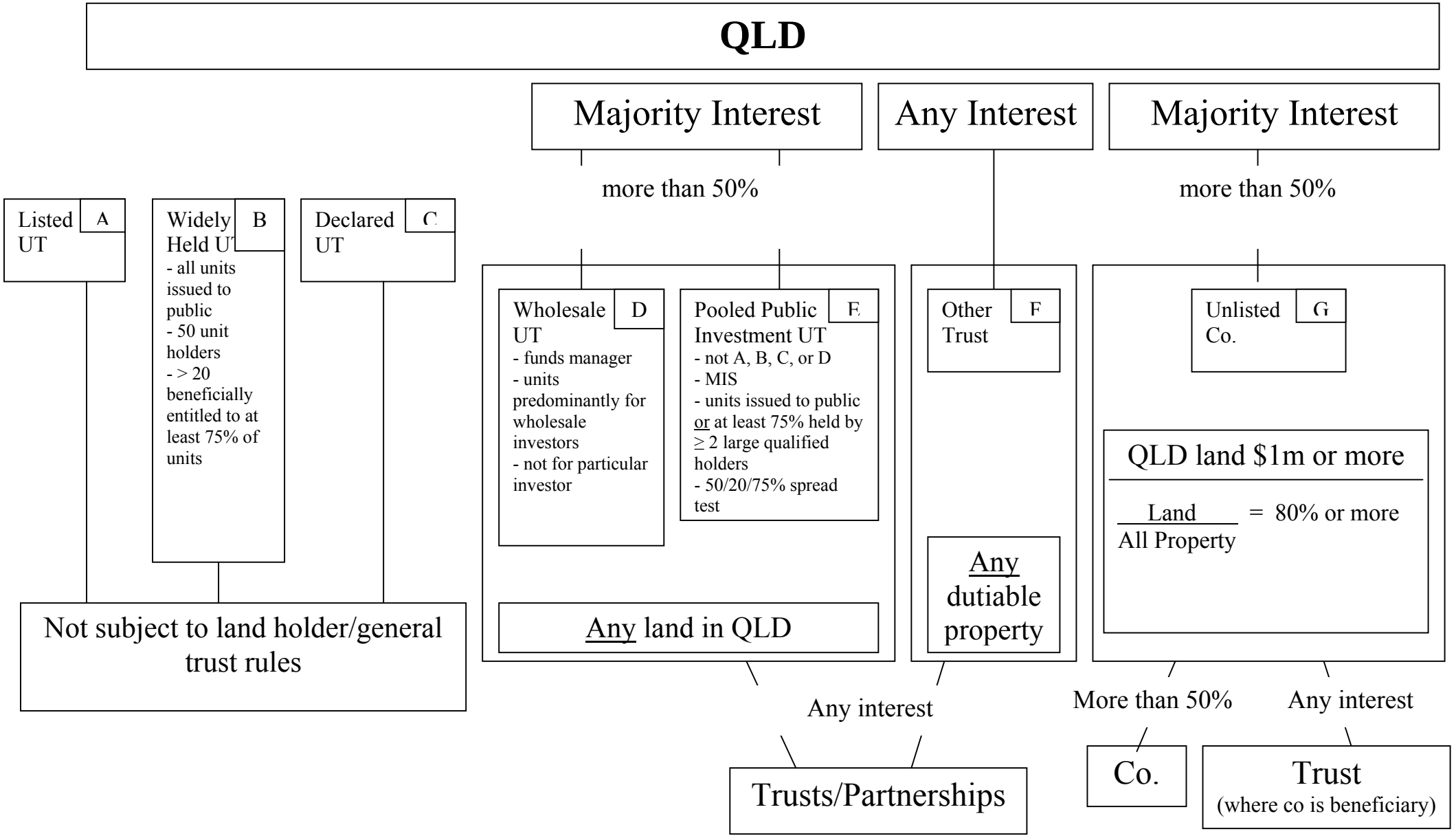
Private Co.	E

VIC land $1m or more

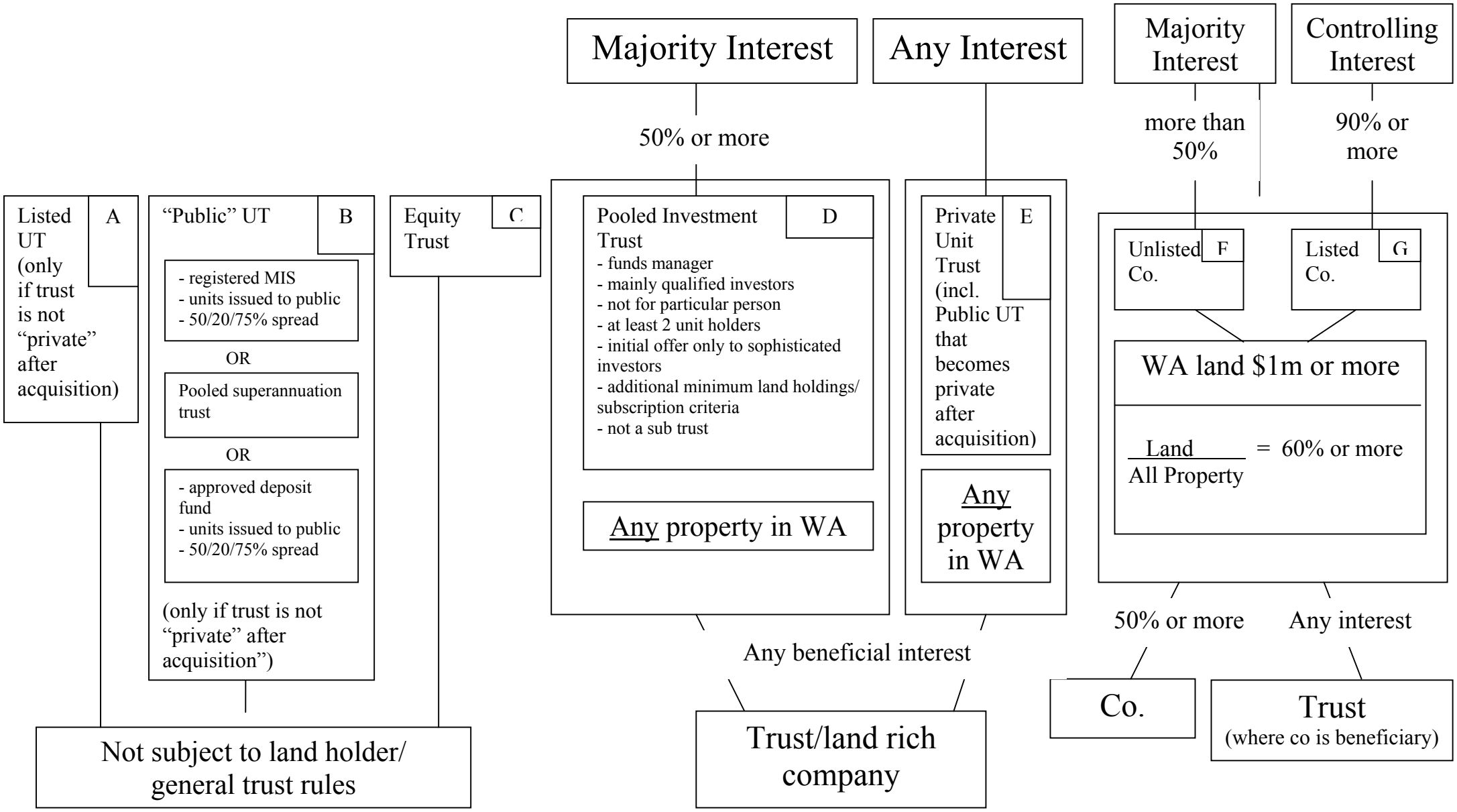
$$\frac{\text{Land}}{\text{All Property}} = 60\% \text{ or more}$$

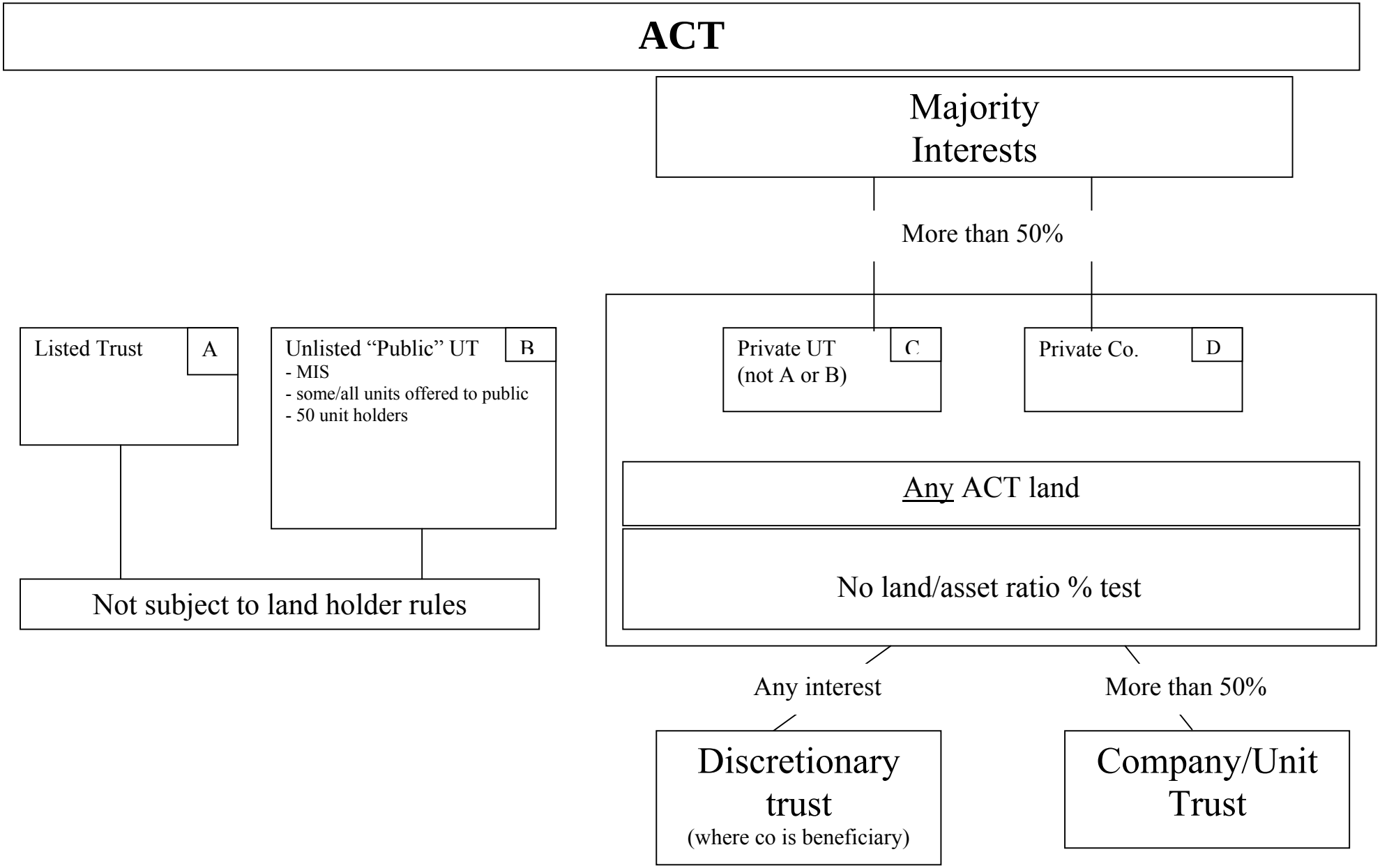
20% or more

Linked Entity

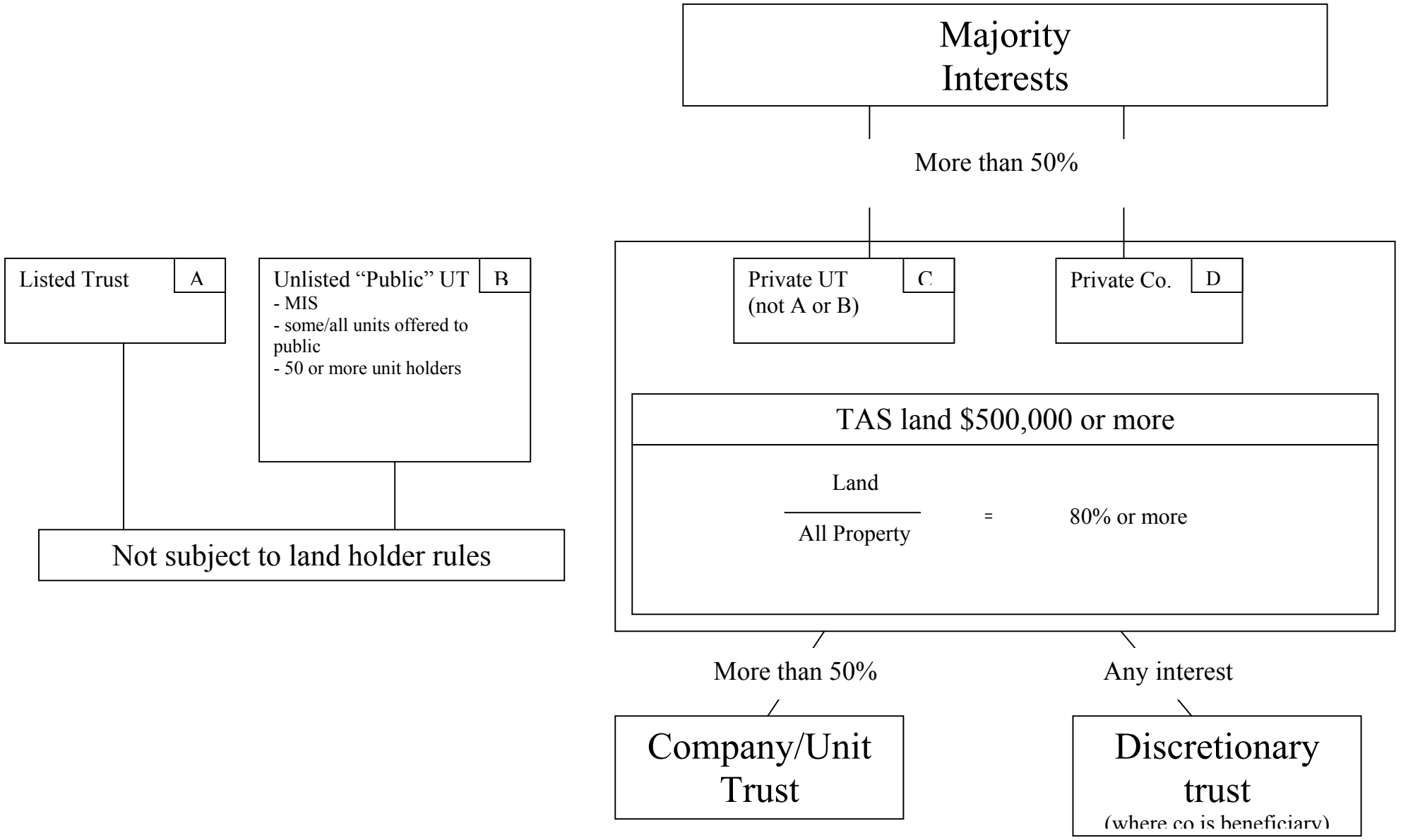

QLD
Majority Interest
Any Interest
Majority Interest
more than 50%
more than 50%
Listed UT
A
Widely Held UT
B
- all units issued to public
- 50 unit holders
- > 20 beneficially entitled to at least 75% of units
Declared UT
C
Wholesale UT
D
- funds manager
- units predominantly for wholesale investors
- not for particular investor
Pooled Public Investment UT
E
- not A, B, C, or D
- MIS
- units issued to public or at least 75% held by ≥ 2 large qualified holders
- 50/20/75% spread test
Other Trust
F
Unlisted Co.
G
QLD land $1m or more
Land / All Property = 80% or more
Not subject to land holder/general trust rules
Any land in QLD
Any dutiable property
Any interest
More than 50%
Any interest
Trusts/Partnerships
Co.
Trust
(where co is beneficiary)

WA

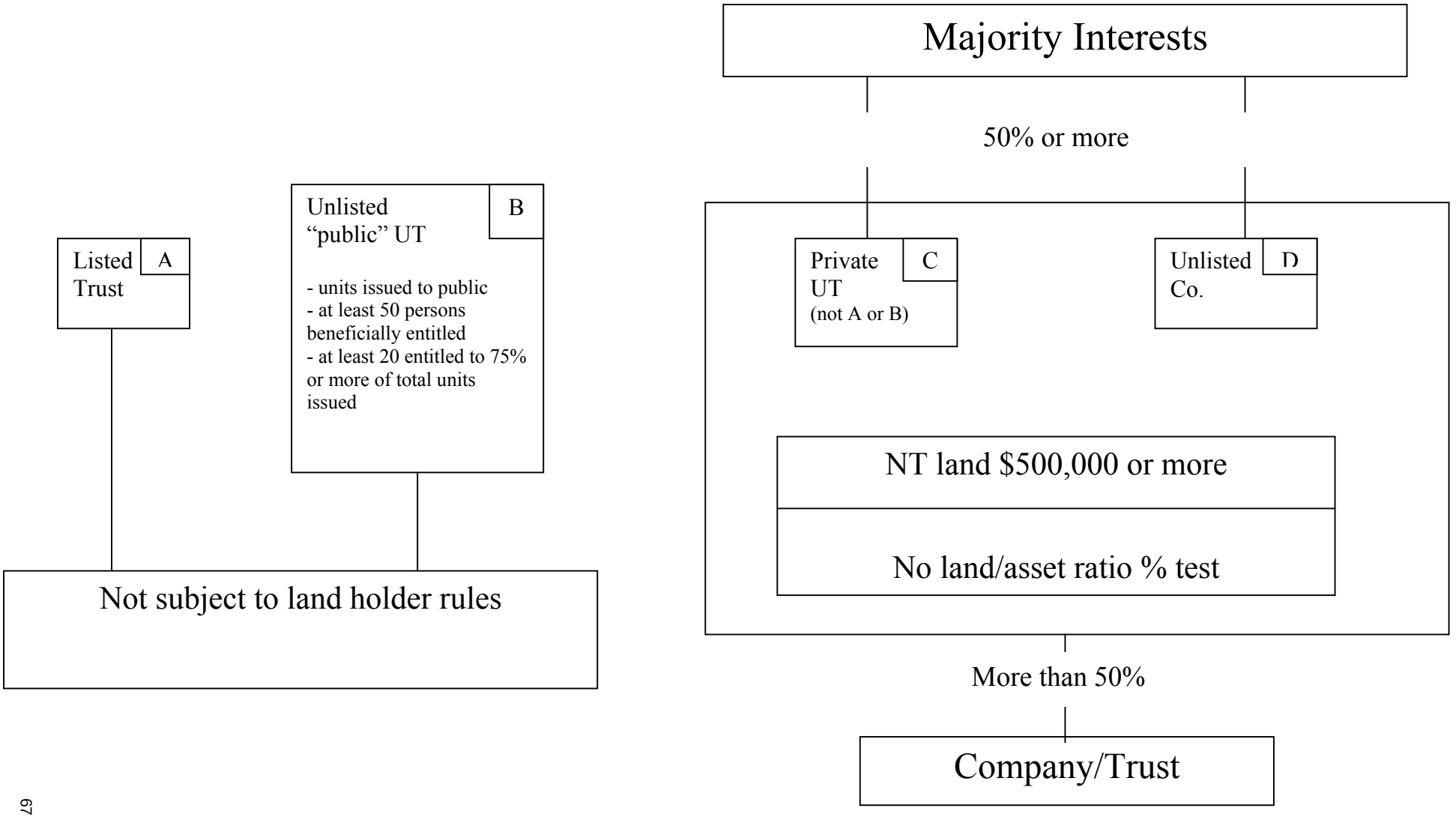

Majority Interest
Any Interest
Majority Interest
Controlling Interest
50% or more
more than 50%
90% or more
Listed UT (only if trust is not "private" after acquisition) A
"Public" UT B
- registered MIS
- units issued to public
- 50/20/75% spread
OR
Pooled superannuation trust
OR
- approved deposit fund
- units issued to public
- 50/20/75% spread
(only if trust is not "private" after acquisition")
Equity Trust C
Pooled Investment Trust D
- funds manager
- mainly qualified investors
- not for particular person
- at least 2 unit holders
- initial offer only to sophisticated investors
- additional minimum land holdings/ subscription criteria
- not a sub trust
Any property in WA
Private Unit Trust (incl. Public UT that becomes private after acquisition) E
Any property in WA
Unlisted Co. F
Listed Co. G
WA land $1m or more
Land / All Property = 60% or more
Any beneficial interest
50% or more
Any interest
Co.
Trust (where co is beneficiary)
Not subject to land holder/ general trust rules
Trust/land rich company


ACT
Majority Interests
More than 50%
Listed Trust
A
Unlisted "Public" UT
B
- MIS
- some/all units offered to public
- 50 unit holders
Private UT
(not A or B)
C
Private Co.
D
Any ACT land
No land/asset ratio % test
Not subject to land holder rules
Any interest
More than 50%
Discretionary trust
(where co is beneficiary)
Company/Unit Trust

TAS


Majority Interests
More than 50%
Listed Trust
A
Unlisted "Public" UT
B
- MIS
- some/all units offered to public
- 50 or more unit holders
Private UT (not A or B)
C
Private Co.
D
TAS land $500,000 or more
Land
All Property
=
80% or more
Not subject to land holder rules
More than 50%
Any interest
Company/Unit Trust
Discretionary trust
(where co is beneficiary)

NT


Majority Interests
50% or more
Listed Trust
A
Unlisted "public" UT
B
- units issued to public
- at least 50 persons beneficially entitled
- at least 20 entitled to 75% or more of total units issued
Private UT
(not A or B)
C
Unlisted Co.
D
NT land $500,000 or more
No land/asset ratio % test
Not subject to land holder rules
More than 50%
Company/Trust

SA

Any Interest

Unit Trust — C

(Excludes:
- registered MIS
- ADF
- pooled super trust)

Any property in SA

Majority Interest

more than 50%

Private UT (not A or B) — D

Private Co. — E

SA land $1m or more

$$\frac{\text{Land}}{\text{All Property}} = 80\% \text{ or more}$$

More than 50%

Private Co./Trust

Listed Trust — A

Unlisted "Public" UT — B

- 50 unit holders
- at least 20 entitled to 75% of total units issued

Approved deposit fund

OR OR

Pooled superannuation trust

Not subject to land holder/ general unit trust rules

4d. Conveyance Duty – Pooled Investment Trusts and Provisional Public Trusts

ISSUES

Submissions received have raised specific issues with respect to the provisions contained within the *Stamp Act 1921,* which relate to pooled investment trusts and provisional public trusts.

The particular issues raised in the submissions were:

- **Mr Richard Giannone, Freehills** (Submission 49)
    - Submits the criteria for registration as a pooled investment trust under the Stamp Act should be amended to include Crown entities, charitable and public benevolent institutions and universities, any person having more than $10 million invested in pooled investments trusts or wholesale unit trusts, and a company wholly owned by a foreign investor which is itself a Permitted Investor.
    - Submits that the requirement that 90% of unit holders in a pooled investment trust be Permitted Investors should be reduced to 80%.
- **Mr Grahame Young, Barrister** (Submission 99)
    - Mr Young suggested the provisions relating to provisional public trusts are not uniform with other jurisdictions, leading to compliance problems and anomalies.

ANALYSIS OF ISSUES

It is suggested that no further analysis on these issues be undertaken until such time as a policy decision is made in relation to whether a land holder model is to be implemented, as the parameters of that model will impact on whether the pooled investment trust and provisional public trust provisions will still be required.

These issues will need to be re-examined once a decision in relation to the land holder model is made.

However, the Technical Committee members did note that should it be considered desirable to allow further classes of investors to hold units in a pooled investment trust, this could be achieved through the prescription power that currently exists in section 63AB(2)(c)(xii) of the Stamp Act.

TECHNICAL COMMITTEE CONCLUSION

The Technical Committee members agreed with the analysis provided in the paper.

4e. Conveyance Duty – Land-Rich Provisions

ISSUES

A number of submissions received have raised specific issues with respect to the operation of the land rich provisions contained within Part IIIBA of the *Stamp Act 1921*.

The particular issues raised in the submissions were:

- **The Chamber of Minerals and Energy of Western Australia (CME)** (Submissions 42 and 82)
    - The definition of "land" should not include exploration tenements.
    - The list of excluded assets in WA should be amended to align with the excluded assets in all other Australian jurisdictions.
    - The indirect back door method of listing a land rich company should not be subject to conveyance duty.
    - The definition of "acquire" should be amended to exclude acquisitions of land rich companies that have been exempted from stamp duty pursuant to the provisions of section 74A of the Stamp Act.
    - The period of time to lodge a land rich statement should be extended to six months.
- **Property Council of Australia (WA Division) (PCA)** (Submission 113)
    - The back door listing of a private land rich company should be exempted from conveyance duty.
- **The Institute of Chartered Accountants in Australia (ICAA)** (Submission 124)
    - The Stamp Act should be amended to remove mining tenements and an interest in tenements from the definition of "land" for the purposes of the land rich provisions.

CURRENT POSITION

Part IIIBA was originally inserted into the Stamp Act in 1987 to address an avoidance practice that involved placing high value property into a company structure and selling the property by transferring the shares in the company rather than transferring the property itself.

This resulted in the transaction attracting substantially less stamp duty than if the land were transferred directly, as the lower marketable security rate of duty was applied, and the duty calculated on the net value of the shares rather than on the gross value of the land.

However, the focus of the land rich provisions has broadened over time. It was noted as part of the Review of State Business Taxes that "the focus of the land rich provisions as an anti-avoidance measure should be broadened to a revenue collection measure that protects the integrity of the real property base".

The provisions of Part IIIBA operate such that where an acquisition in a land rich company is made, the land and chattels of the company are subject to duty at conveyance rates, if three tests are met. Those three tests are:

- the company owns land in Western Australia valued at $1 million or more;
- 60% of the property of the company comprises land; and
- the transaction involves the acquisition of a "majority interest" (greater than 50%) or "further interest" in an unlisted company, or a "controlling interest" (90% or more) or "additional interest" in a listed company.

ANALYSIS OF ISSUES

The Definition of Land should not include Mining Tenements or Exploration Tenements

For the purposes of Part IIIBA, "land" is defined in section 76 to include an estate or interest in a mining tenement. The CME and ICAA have suggested that the definition be amended to exclude mining tenements and exploration tenements.

Mining tenements are included in the definition of land on the basis that an individual who has an interest in a mining tenement has a proprietary right

to occupy, sell and perform certain operations upon that tenement, in most cases to the exclusion of all others.

These proprietary rights exist in the same manner for an owner who has an interest in land other than a mining tenement. The only distinction is the nature of the allowable land use. As such, mining tenements have been included within the definition of "land" for the purposes of Part IIIBA.

Exploration tenements are a type of mining tenement, which grants the holder the right to explore on land open for mining. It is neither a land use nor a development activity, as significant mining may only be carried out under a mining lease. The owner of an exploration tenement has an interest in land as the person has certain rights in relation to that tenement in accordance with the *Mining Act 1978* (WA).

To maintain ownership of an exploration tenement, the holder must spend a certain amount of money on its development, with the amount payable depending upon its size. Other expenses may include payment of royalties, rent, and application fees.

As there is no significant mining activity being undertaken, there is no income derived from an exploration tenement. However, the benefit lies in the holder's exclusive right to detect the existence of mineral deposits, with the right to take out a mining lease if significant mineral deposits are detected.

Although the nature of the allowable uses of an exploration tenement differs from that of any other type of tenement, an exploration tenement, just like any other type of tenement, is an interest in land. As such, exploration tenements have been included within the definition of "land" in Part IIIBA.

The Technical Committee members noted that the artificial nature of the land rich provisions will always create difficulties, depending on how concepts are defined and where parameters are set. However, members were of the view that it was a policy decision as to whether it is considered desirable to assist companies engaged in mining or exploration activities through a change to the definition of land. However, it could be achieved without any technical difficulties if it were considered appropriate to do so.

Exemption for Back Door Acquisition of Land Rich Companies

A back door acquisition of an unlisted land rich company occurs when a public company, which is relatively inactive, acquires a private company's shares and allots shares in the public company to the shareholders of the

private company. The listed company then takes on the identity of the private company.

The costs associated with listing the private company in this manner are substantially lower than listing a newly created company. However, the acquisition of a private company that is land rich raises a stamp duty liability under Part IIIBA of the Stamp Act.

Both CME and PCA view this method of listing as achieving the same outcome as an initial public offering, or the conversion of a unit trust from private to public, both of which do not attract stamp duty. As such, it is suggested that the back door listing of a private land rich company should be treated in the same manner.

However, this view looks at the end result and not the substance of the transaction, which is that a company with substantial land holdings in Western Australia is being acquired.

Members of the Technical Committee agreed with the view that a back door acquisition of a land rich company was not equivalent to the listing of a unit trust (for which an exemption is provided under the Stamp Act), even though the outcome was the same.

In the case of the conversion of a private unit trust to a public unit trust, there is no acquisition occurring as the allotment of units to new unit holders represents their capital investment in the trust, prior to any acquisition of a freehold interest in land by the unit trust, on which stamp duty would be payable. An exemption for the conversion of a private unit trust to a public unit trust exists in section 63ADA of the Stamp Act.

The Technical Committee noted that this was not comparable to a back door listing as although both transactions achieve the same result, the substance of a back door listing is that a company with substantial land holdings in Western Australia is being acquired.

A more comparative scenario is where a public unit trust acquires a private unit trust with substantial land holdings, and then allots units in the public unit trust to the original unit holders in the private unit trust. Again, this would achieve the same result as that of a back door listing or a conversion from a private to a public unit trust, however, the acquisition of the units in the private unit trust would be subject to conveyance duty.

To provide a stamp duty exemption for a back door listing would create an inequity with the treatment of acquisitions of other land rich companies and private unit trusts.

Excluded Assets
Definition of "Acquire"
Time Period for Lodgement of Land Rich Statement

It is suggested that no further analysis on these issues be undertaken until such time as a policy decision is made in relation to whether a land holder model is to be implemented.

These issues will be re-examined once a decision in relation to the land holder model is made.

TECHNICAL COMMITTEE CONCLUSION

The Definition of Land should not include Mining Tenements or Exploration Tenements

The Technical Committee members agreed with the analysis provided and noted that this issue was a matter of policy as to whether the Government wished to extend relief to companies engaged in mining exploration. While this would be likely to have significant revenue consequences, it could be achieved without any technical difficulties.

Exemption for Back Door Acquisition of Land Rich Companies

The Technical Committee members were of the view that given the change in focus of the land rich provisions from an anti-avoidance measure to a revenue raising measure, there was no clear justification for providing an exemption in the circumstance requested, and to do so would create an inequity with the treatment of private unit trusts.

4f. Conveyance Duty – Application of Stamp Duty to Petroleum Titles

ISSUE

Currently, State petroleum titles are not included within the definition of "land" contained in section 33(4) of the *Stamp Act 1921*. In this section, land includes an interest in freehold land, a Crown lease, a mining tenement, or any buildings or fixture annexed to any such land.

As a result, transfers of interests in petroleum titles (except for onshore pipelines) are exempt from stamp duty[1]. While a 1.5% fee (in lieu of stamp duty) is payable upon the registration of a dealing which creates or effects an interest in a petroleum title in accordance with State and Commonwealth legislation, the rate has not been reviewed since inception.

Moreover, the fee is only payable upon a change in registration of the direct ownership of an interest in a petroleum title. Indirect changes in the ownership of petroleum titles are not liable for the transfer fee. For example, a change in ownership of a company that remains the registered holder of an interest in a petroleum title would not be liable for the transfer fee.

The particular issue raised in the submission was:

- **Department of Treasury and Finance**
    - The Department of Treasury and Finance recommends that a review of the arrangements that give rise to the 1.5% ad valorem rate be conducted to consider the efficiency and effectiveness of those arrangements.

CURRENT POSITION

Offshore Petroleum Titles

When exploration for offshore petroleum commenced during the late 1950s, there was considerable doubt regarding the powers of the States to enact

[1] For the purposes of this discussion, petroleum titles include an authority to prospect, exploration permit, retention lease, and a production licence as defined within the *Petroleum Act 1967*. This view has been adopted to allow for consistency with the treatment of mining tenements and petroleum titles, as a dutiable mining tenement also includes a prospecting licence, exploration licence, retention licence, mining lease, general licence and miscellaneous licence in accordance with section 8 of the *Mining Act 197*8.

laws dealing with petroleum exploration and production. As a result, the constitutional validity of the State's petroleum Acts was questioned[2].

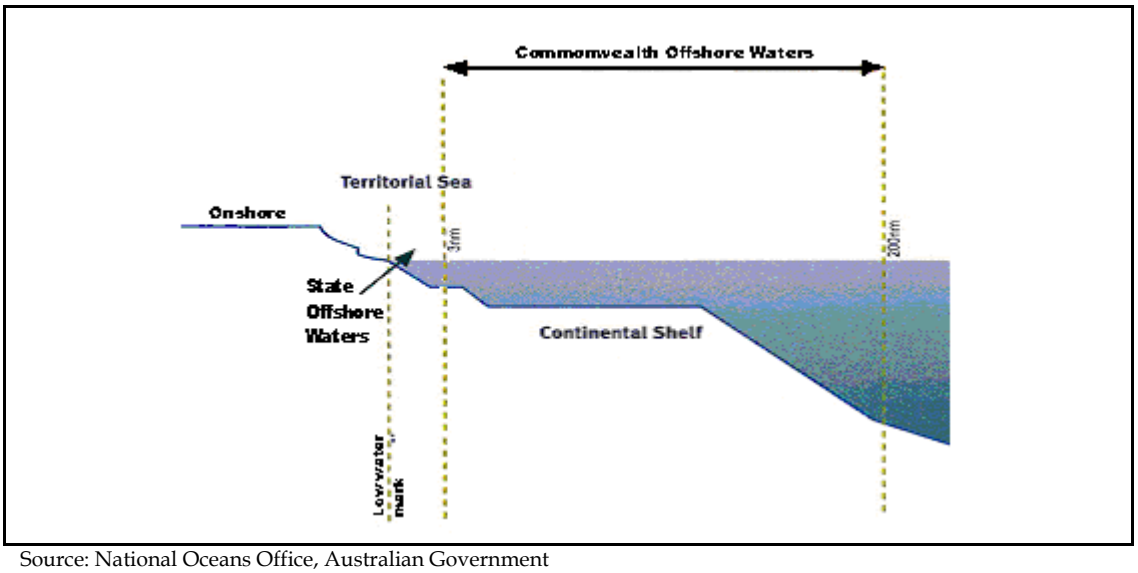
In 1962, upon the first discovery of commercial deposits of petroleum, negotiations began between the Commonwealth and the State governments in an effort to overcome these jurisdictional problems. The resulting 1967 agreement provided the basis for a joint State-Commonwealth administration of offshore petroleum exploration and production activities (without immediate need for resolution of the jurisdictional conflict). The agreement was formalised by way of the Commonwealth's *Petroleum (Submerged Lands) Act 1967*. The Commonwealth Act introduced a 1.5% ad valorem fee payable upon the registration of any direct transfer of a petroleum title.

In 1973, to resolve the jurisdictional conflict that remained, the Commonwealth Parliament enacted the *Seas and Submerged Lands Act*. This Act gave the Commonwealth sovereignty over all offshore waters and exclusive legislative and proprietary rights for the all offshore waters.

In 1980, the Commonwealth Parliament passed legislation that transferred legislative and proprietary rights over the area between the low water mark and the three mile limit to the States (referred to as State Offshore Waters in the diagram below). The area beyond the three mile limit to the two hundred mile boundary remained the exclusive jurisdiction of the Commonwealth (referred to as Commonwealth Offshore Waters in the diagram below). Note: the State's offshore jurisdiction extends beyond the three nautical mile limit in certain areas, as evidenced in Attachment 1.

[2] The *Mineral Resources (Adjacent Submarine Areas) Act 1964* (Qld), the *Mining (Amendment) Act 1963* (NSW), the *Mining Act 1962* (Tas), the *Petroleum Act 1936-54* (WA), the *Mining (Petroleum) Act Amendment Act 1963* (SA) and the *Underseas Mineral Resources Act 1963* (Vic).

Australia's Maritime Zones



Source: National Oceans Office, Australian Government

In 1982, each State and the Northern Territory enacted "mirror" legislation to the Commonwealth Petroleum (Submerged Lands) Act 1967 to apply to State offshore waters. The ad valorem fee was developed to ensure uniformity and consistency of the taxation of petroleum titles within coastal waters (which would otherwise be subject to State stamp duty) and Commonwealth offshore waters (which would otherwise be subject to Commonwealth tax laws).

It should be noted that the Commonwealth's Petroleum (Submerged Lands) Act and supporting legislation is in the process of being rewritten as the Offshore Petroleum Bill 2005. The rewrite process has been editorially focused rather than policy focused, and a number of policy issues have been reserved for later consideration. The Bill has been passed by the House of Representatives and now is waiting passage in the Senate.

Onshore Petroleum Titles

In 1967, in an effort to provide consistency with exploration and production activities for offshore and onshore petroleum titles, the Western Australian Parliament enacted the *Petroleum Act 1967*. The Petroleum Act is also mirrored on the Commonwealth Petroleum (Submerged Lands) Act. The Petroleum Act also mirrored the 1.5% ad valorem fee payable upon the registration of any direct transfer of a petroleum title. Western Australia is the only Australian jurisdiction that has a petroleum arrangement common to both its onshore and offshore areas. The arrangement varies little between the offshore and onshore, and only where it is necessary to recognise the requirement of other land tenures and usage.

Ad Valorem Transfer Fee

Under the arrangement, transfers of both onshore and offshore State petroleum titles are exempt from stamp duty. However, a 1.5% ad valorem fee is payable upon the registration of a transfer of an interest in a petroleum title under the following legislation:

- The *Petroleum (Submerged Lands) Act 1967* (Cth) applies to the submerged lands of the continental shelf beyond the coastal waters' edge to the two hundred mile limit (Commonwealth offshore petroleum titles);
- The *Petroleum (Submerged Lands) Act 1982* (WA) applies to the submerged lands from the low water mark to the three mile limit (State offshore petroleum titles); and
- The *Petroleum Act 1967* (WA) covers all onshore areas of the State, including its islands (onshore petroleum titles).

Both the Petroleum Act 1967 (WA) and the Petroleum (Submerged Lands) Act 1982 (WA) are administered solely by WA, while the Commonwealth Act, in respect to the Western Australian adjacent area, is administered by a Joint Authority. This Joint Authority comprises both the Commonwealth and State Ministers responsible for petroleum administration. The division of State and Commonwealth Waters occurs at the three nautical mile mark.

ANALYSIS OF ISSUE

In 1967, the petroleum title transfer fee rate of 1.5% was broadly equivalent to the standard rate of conveyance duty in each State. This rate represents a significant concession compared to the current maximum conveyance duty rate (5.4%), which applies to other property transactions (including transfers of interests in mining tenements and onshore petroleum pipelines).

The revenue raised by the 1.5% ad valorem fee is retained by the State to offset the costs of administering petroleum titles in both the State's coastal waters and the Commonwealth's offshore waters. This revenue is collected by the Department of Industry and Resources. The revenue raised from direct transfers of interests in State petroleum titles and direct transfers of interests in Commonwealth petroleum titles are tabled below.

REVENUE FROM STATE PETROLEUM TITLE REGISTRATION FEES - $ [a]

	2001-02	2002-03	2003-04	2004-05
1.5% ad valorem rate	$1,103,000	$16,000	$173,000	$260,000

(a) Includes State onshore and offshore petroleum titles.
Source: Department of Industry and Resources

REVENUE FROM COMMONWEALTH PETROLEUM TITLE REGISTRATION FEES - $

	2001-02	2002-03	2003-04	2004-05
1.5% ad valorem rate	$1,376,000	$1,833,000	$9,921,000	$10,758,000

Source: Department of Industry and Resources

It should be noted that the revenue raised from direct transfers of interests in both State petroleum titles and Commonwealth petroleum titles is relatively small and volatile.

As previously stated, the 1.5% transfer fee is payable upon registration of a dealing which creates or affects an interest in a petroleum title. This fee is only payable upon the change in the registration of the direct ownership of an interest in a petroleum title. Changes in the beneficial ownership of an interest, where the legal ownership remains unchanged, do not have to be registered under the Petroleum (Submerged Lands) Acts or the Petroleum Act. The figures tabled above would significantly increase if the transfer fee were to apply to indirect transfers of petroleum titles. Furthermore, there is potential for revenue to be captured by aligning the transfer fee to a rate that is broadly equivalent to the highest conveyance rate (currently 5.4% in Western Australia). Aligning the transfer fee to a rate broadly equivalent to the highest conveyance rate and extending the transfer fee to include indirect transfers would restore equity with the duty treatment of over conveyances and significantly increase the State's revenue, thus, allow for a general reduction in the conveyance rate for all transfers.

The Commonwealth and State's petroleum legislation also provides an exemption to the transfer fee for any transfer of a petroleum title between related bodies corporate, where the transfer was executed for the primary purpose of a reorganisation of the corporations. This corporate reconstruction exemption is significantly wider than the current corporate reconstruction exemption that exists in the Stamp Act and does not have the same restrictions imposed, such as the pre- and post-association tests.

As stated, each State has adopted identical Petroleum (Submerged Lands) Acts, as part of the 1967 Commonwealth-State agreement. However, Western Australia is the only jurisdiction to enact 'mirror' legislation for onshore petroleum exploration and production. Therefore, as both State and Commonwealth offshore petroleum titles are exempt from duty, onshore

petroleum titles have been exempted from duty. Section 86 of the Petroleum Act provides this exemption from stamp duty.

It should be noted that the regulation and administration of onshore pipelines is governed by Western Australia's *Petroleum Pipelines Act 1969*. A petroleum pipeline is defined as one that conveys naturally occurring hydrocarbons in high-pressure pipelines. As the Petroleum Pipelines Act is silent about its own registration fee, the dealing and/or transfer of pipeline licences are assessed under the provisions of the Stamp Act at the normal conveyance rates of up to 5.4%.

Summary

The current treatment of transfers of Commonwealth offshore petroleum titles, State offshore petroleum titles and onshore petroleum titles should be reviewed as part of the State Tax Review.

Commonwealth Offshore Petroleum Titles

As Western Australia has no jurisdiction in Commonwealth waters, it is not possible for the Western Australian Parliament to unilaterally amend any provision of the Commonwealth Petroleum (Submerged Lands) Act 1967.

It should be noted that the preamble of the Commonwealth Petroleum (Submerged Lands) Act 1967 states, "the Commonwealth, the State and the Northern Territory should endeavour to maintain, as far as practicable, common principles, rules and practices…" Therefore, to amend the current transfer fee rate so that it is broadly aligned with the highest conveyance rates of the States and Northern Territory may require unanimous agreement and co-operation from the Commonwealth, the States and the Northern Territory. Similarly, amending the Act so that all indirect transfers of offshore petroleum titles are subject to the transfer fee may require unanimous agreement by the Commonwealth, States and Northern Territory.

Nevertheless, a review of the Commonwealth-State arrangement that gives rise to the 1.5% ad valorem rate that applies to transfers of offshore petroleum titles is required. This review could focus on the fact that the initial intention of the arrangement was for the transfer fee to be in lieu of the equivalent rate of stamp duty and currently the fee and the stamp duty rate are inconsistent. Also, as indirect changes in ownership have become increasingly more common in commercial practices, the review should consider extending the arrangement to ensure indirect ownership changes are brought into the revenue net.

Further, the current corporate reconstruction exemption that exists in the Commonwealth's petroleum legislation is inconsistent with the corporate reconstruction provisions operating in Western Australia and other jurisdictions. This matter should also be reviewed.

State Offshore Petroleum Titles

As stated, in 1980 the Commonwealth Parliament gave the States and the Northern Territory legislative and proprietary rights over the territorial seas. Western Australia therefore, has the legislative power to amend its Petroleum (Submerged Lands) Act so that the transfer fee is broadly equivalent to the highest conveyance rate. Amendments could also be made to ensure that indirect transfers attract the transfer fee. Again, this may be inconsistent with the terms of the 1967 agreement as evidenced from the preamble above.

Alternatively, a review of the current Commonwealth-State arrangements could be undertaken to ensure uniformity with the treatment of transfers of all offshore petroleum titles. This review could focus on the fact that the initial intention of the arrangement was for the transfer fee to be in lieu of the equivalent rate of stamp duty and currently the fee and the stamp duty rate are inconsistent. Also, as indirect changes in ownership have become increasingly more common in commercial practices, the review should consider extending the arrangement to ensure indirect ownership changes are brought into the revenue net.

Further, the current corporate reconstruction exemption that exists in the State's petroleum legislation is inconsistent with the corporate reconstruction provisions operating in the Stamp Act. This matter should also be reviewed.

Onshore Petroleum Titles

Onshore petroleum titles are within the exclusive jurisdiction of Western Australia. As such, it is possible for the Western Australian Parliament to include onshore petroleum titles within the definition of "land" for the purposes of the Stamp Act. Including onshore petroleum titles within the definition of land would ensure that all direct and indirect transfers would be subject to conveyance duty. Furthermore, including onshore petroleum titles within the definition of land with ensure that transfers of onshore petroleum titles are aligned with the duty treatment of other transfers and eliminate the need to continuously amend the Petroleum Act so that the transfers of onshore petroleum titles are subject to the same treatment as other transfers.

Alternatively, to maintain consistency with the offshore petroleum regime, the current transfer fee could be reviewed, so that it better reflects the current rates of conveyance duty. This would also minimise the discrepancy between the treatment of transfers of onshore petroleum titles (which are currently subject to the 1.5% ad valorem transfer fee) and onshore pipelines (which are currently subject to the normal conveyance rates of up to 5.4%). Also, as indirect changes in ownership have become increasingly more common in commercial practices, the review should consider extending the arrangement to ensure indirect ownership changes are brought into the revenue net.

Further, the current corporate reconstruction exemption that exists in the State's petroleum legislation is inconsistent with the corporate reconstruction provisions operating in the Stamp Act. This matter should also be reviewed.

Conclusion

The revenue raised by the 1.5% ad valorem fee gives an indication of the value of petroleum titles transferred directly. For example, in 2004-05 the value of State offshore and onshore petroleum titles transferred by direct means was $17.3 million, and the value of Commonwealth offshore petroleum titles (in Western Australian adjacent waters) was $717.6 million. These are significant values, but represent only a small proportion of the value of petroleum titles being transferred each year, as these figures only include direct transfers. It is likely that the majority of petroleum titles are not held by individuals, but rather are held by another entity. It is therefore likely that petroleum titles are being transferred indirectly (such as through share transfers) without incurring the transfer fee. As a result, there is the potential for a significant amount of revenue to be raised if the transfer fee was set at the same level as the highest conveyance duty rate, and indirect transfers of petroleum titles were subject to the fee in the same way that indirect transfers of land are subject to stamp duty.

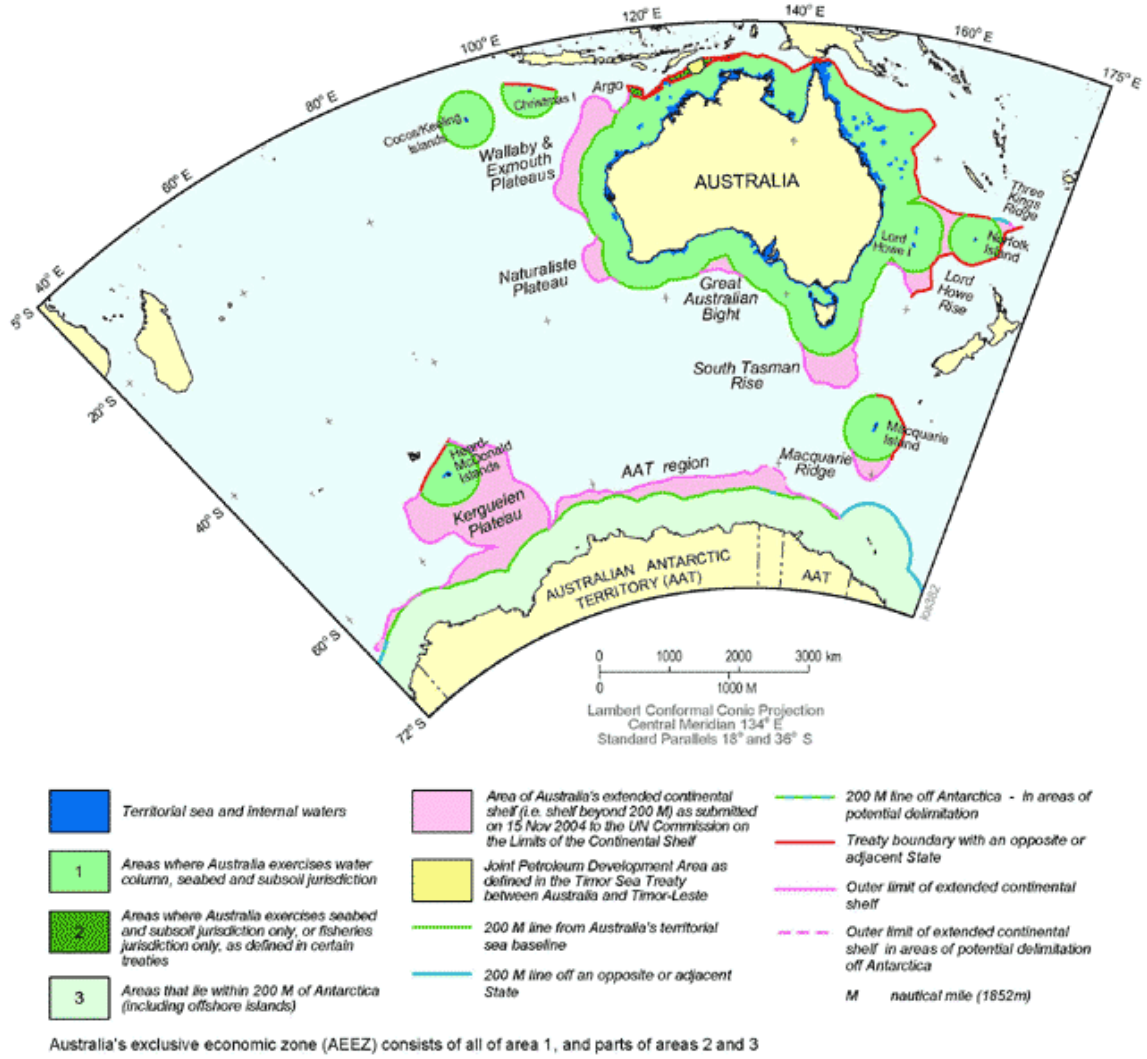
It should be noted that the additional revenue raised from increasing the transfer fee and broadening the tax base to include indirect transfers of onshore and offshore petroleum titles could be used to fund a reduction in general conveyance duty rates.

TECHNICAL COMMITTEE CONCLUSION

The Technical Committee members agreed with the analysis of the issues provided in the paper. The Technical Committee members noted that the issues presented in the paper were a matter of Government policy.

ATTACHMENT 1

Map of Australia's marine jurisdiction



Source: Geoscience Australia, Australian Government

4g. Conveyance Duty – Farm-in Arrangements

ISSUE

Extending the farm-in stamp duty concession where the earning of an interest includes the right to extract minerals.

The particular issue raised in the submissions was:

- **Chamber of Minerals and Energy (CME)** (Submission 82)
    - A concession is currently provided where a farm-in agreement is with the owner of a mining tenement. A concession is not given for the earning in of a right to extract minerals from the tenement where the holder of the right is not the tenement owner. CME submits this would not be Parliament's intended outcome and that the concessional stamp duty treatment of the earning of an interest in a mining tenement should be expanded to include the earning in of a right to extract minerals.

CURRENT POSITION

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

It was the long-standing practice of the Office of State Revenue that farm-in or joint venture agreements were charged with nominal duty. The basis for this treatment was that there was no consideration paid to the tenement owner. Monies payable were to third parties in developing the tenements for the benefit of the owner and the party farming-in.

As part of the Business Tax Review recommendations, this practice was given legislative support through the insertion of section 73G into the *Stamp Act 1921*, effective from 1 January 2004.

To be assessed with nominal duty, the agreement must be between the owner of the tenement and another person, and that other person must spend the money on the tenement after the agreement is entered into. It cannot be a reimbursement of previous expenses of the owner. A further

requirement is that an interest in the tenement will continue to be held by the owner of the mining tenement after the farm-in, so that the person does not acquire a 100% interest in the tenement through this process.

A sale of an interest or an agreement to farm-in to a right to extract minerals is treated as a conveyance and assessed at rates up to 5.4%.

ANALYSIS OF ISSUE

The submission seeks to have the concession extended from the current position where it applies to a farm-in between the owner of a tenement and another person, to an agreement between the holder of the rights to extract minerals from a tenement and another person, on the basis that this would have been Parliament's intended outcome.

The members of the Technical Committee noted that the arrangement whereby a person farms-in to a right to extract minerals is very similar to the arrangement covered by section 73G of the Stamp Act.

However, as stated above, the purpose of inserting the provisions in relation to farm-in agreements was to legislate the OSR's long-standing practice of applying nominal duty to such arrangements. This is clearly articulated in the extrinsic material that accompanied the legislation enacted in Parliament. As it was not part of the OSR practice at the time, it could clearly not have been Parliament's intention to extend the nominal duty treatment to other types of arrangements that were subject to ad valorem duty, such as rights to extract minerals.

Therefore, the amendment to the farm-in provisions proposed by the CME would be an extension beyond the scope of Parliament's intended operation of the provisions. Any decision to provide further relief in relation to the mining industry is a matter of Government policy, that would need to take into account the precedent it would set for providing relief for other industries involved in development activities.

Of the other jurisdictions, only South Australia has a similar concession to that provided in Western Australia. This is contained in section 71D of the *Stamp Duties Act 1923* entitled "Concessional duty to encourage mineral or petroleum exploration activity". This concession applies only to tenements or interests in tenements.

However, should it be considered appropriate to extend the farm-in provisions to rights to extract minerals, there does not appear to be any reasons why this could not be achieved by using section 73G as a model and imposing similar conditions on the farm-in agreement.

TECHNICAL COMMITTEE CONCLUSION

The Technical Committee members noted that there would be no legislative impediments to adopt the proposed changes, as section 73G provides a model that could be replicated. However, such an amendment would be a change of policy that would need to be considered by Government.

ATTACHMENT 1

73G. Farm-in agreements relating to mining tenements

(1) In this section —

"exploration amount", in relation to a farm-in agreement, means an amount to be expended, after the agreement is made, on exploration or development of the mining tenement carried out after the agreement is made;

"farm-in agreement" means an agreement between the owner of a mining tenement and another person that, after the other person expends the exploration amount specified in the agreement, that other person will have a right to acquire an interest in the mining tenement that is —

(a) specified in the agreement; and

(b) to be held with the owner of the mining tenement;

"mining tenement" means —
(a) a mining tenement held under the *Mining Act 1978*, being a mining tenement within the meaning of that Act or the *Mining Act 1904* 3; and

(b) a mining tenement or right of occupancy continued in force by section 5 of the *Mining Act 1978*;

"payment" does not include payment of an exploration amount.

(2) An instrument evidencing or effecting a farm-in agreement is —

(a) to the extent that —

(i) the instrument evidences or effects a farm-in agreement; and

(ii) no payment has been made or is payable in respect of the right to acquire the interest, or the acquisition of the interest, specified in the farm-in agreement,

chargeable with duty at the rate set out under item 8 of the Second Schedule; and

(b) to the extent that —

(i) the instrument provides for the acquisition of an interest in a mining tenement otherwise than pursuant to a farm-in agreement; or

(ii) payment has been made or is payable in respect of the right to acquire the interest, or the acquisition of the interest, specified in the farm-in agreement,

chargeable with duty at the rate set out in item 4 or 19 of the Second Schedule, as the case requires.

(3) If the Commissioner is satisfied that —

(a) a conveyance or transfer evidences or effects the acquisition of an interest in a mining tenement pursuant to a farm-in agreement;

(b) the amount specified in the farm-in agreement to be expended on exploration or development of the mining tenement has been expended accordingly; and

(c) any duty chargeable under subsection (2) in respect of the instrument has been paid,

then —

(d) to the extent that —

(i) the conveyance or transfer evidences or effects the acquisition of the interest; and

(ii) no payment has been made or is payable in respect of the acquisition, the conveyance or transfer is chargeable with duty under item 6 of the Second Schedule; and

(e) to the extent that —

(i) the conveyance or transfer provides for the acquisition of an interest in a mining tenement otherwise than pursuant to the farm-in agreement; or

(ii) payment has been made or is payable in respect of the acquisition of the interest specified in the farm-in agreement and duty in respect of that acquisition was not paid under subsection (2)(b), the conveyance or transfer is chargeable with duty under item 4 or 19 of the Second Schedule, as the case requires.

[Section 73G inserted by No. 66 of 2003 s. 34.]

4h. Conveyance Duty – Family Farm Exemption Issues

ISSUE

A number of submissions have suggested amendments to the current arrangements that provide an exemption from conveyance duty for family farm transfers and extending it to all business sales within families.

The particular issues raised in the submissions were:

- **Submission no. 41**
    - The family farm exemption should be extended to transfers of farm land from a company to its shareholders.
- **Taxpayers Australia (Inc) (TAI)** (Submission 51) & **Small Business Development Corporation (SBDC)** (Submission 94)
    - The family farm exemption should be extended to transfers of businesses between family members.
- **Pastoralists and Graziers Association of WA (Inc) (PGA)** (Submission 71)
    - The family farm exemption should be extended to transfers between "related" discretionary trusts.
    - The requirement that the transferee continue to farm the land for an exemption to be granted be extended from the transferee to "a related entity".
- **Rural Business Development Corporation (RBDC)** (Submission 72)
    - When a farmer sells and buys farm land, duty should only be levied on the net gain in land. The benefit of this would be more efficient and profitable farm businesses that will continue to add to the prosperity of the State of Western Australia.

CURRENT POSITION

Transfers of property are generally subject to stamp duty at conveyance rates of up to 5.4%. However, transfers of farming property are exempt in certain circumstances.

Part IIIBAA of the *Stamp Act 1921* ("the Act") allows for an exemption from stamp duty for certain transfers of farming property and interests therein when transferred between defined family members.

This exemption was introduced in 1994 to remove the stamp duty barrier to a farmer transferring ownership of the family farm to the younger generation. It was aimed at enhancing the younger generation's incentive to improve the property and introduce more efficient farming techniques.

The exemption applies to transfers of farming property and interests in farming companies and partnerships.

To obtain an exemption under this Part, the transferor and transferee must be related as defined in the Act, and the transferee must intend to continue to use the property in the business of primary production.

The provisions require that the transferor be a natural person and with the exception of transfers to trustees of discretionary trusts, so must the transferee.

ANALYSIS OF ISSUE

Extending Family Farm Exemption for Transfers of Farming Land from a Company to Individuals

Submission no. 41 seeks to allow the family farm exemption to apply to a transfer of farming property from a company to natural persons who are shareholders in the company.

While the long term aims of these taxpayers is to have a structure whereby each brother can pass their interest in the farming operation down a generation, it is not the immediate intention of either brother to do so.

This submission seeks an exemption for a restructure of the ownership of farming property from an indirect ownership vehicle to the natural persons who control that vehicle, without any intergenerational change.

The current exemption was enacted to cover the most common arrangements that involve a transfer of farming property to younger generations of a family, not to provide farmers with a general opportunity to restructure their affairs.

To extend the exemption to the transfer of farms into or out of companies would create avoidance opportunities. These opportunities could involve exploitation of the existing reduced stamp duty on the distribution of the assets of a company in liquidation to the shareholders, and the potential for family member shareholders to arrange for shares to be issued to unrelated parties who could then put the company in liquidation.

Subject to certain criteria being satisfied, section 74A of the Act allows a reduction in stamp duty, when a company is liquidated and the assets owned by the company are transferred to its shareholders in proportion to their shareholding. This may be an alternative mechanism to achieve the aim specified in this submission. However, as the family farm exemption was only intended to apply to transfers from natural persons, it would be inconsistent with the policy of the exemption to allow farming companies to unwind their corporate structures in circumstances that do not satisfy the criteria in section 74A.

Further, it would create inequities with the treatment of companies not engaged in farming activities that must comply with the requirements of section 74A.

The Technical Committee recognises that a transfer from a company to an individual who is related to the shareholders can be achieved by firstly liquidating the company and then transferring the property from the shareholders to the related person pursuant to Part IIIBAA of the Act. To provide certainty to taxpayers contemplating such transactions, the Technical Committee suggests that a Commissioner's practice be issued clarifying the Commissioner's position on section 74A(3) of the Act when farming property is involved. This section allows the Commissioner to have regard to the length of time that a person has been a shareholder in a company prior to allowing a reduced assessment of duty on a company liquidation.

Extending Family Farm Exemption to Family Businesses

The TAI and SBDC submissions seek to extend the family farm exemption to all business assets transferred between family members.

As outlined above, the exemption for transfers of the family farm was introduced to remove the stamp duty barrier to the transfer of ownership of the family farm to the younger generation. It was aimed at increasing the

incentive for the younger generation to improve the property and introduce more efficient farming techniques.

To extend the exemption to family businesses would broaden the intended scope of the exemption to apply to businesses that may not face the same challenges in relation to intergenerational transfers that were the reason for the introduction of the family farming exemption. The exemption also reflected the low level of return on capital associated with farms, which other businesses may not experience.

As farms are generally more land intensive than other businesses the benefits of this submission and perceived inequities between the farming industry and other sectors of business may disappear if stamp duty on non-real business assets were abolished. The Technical Committee supported this position.

Extending Family Farm Exemption to Transfers between Related Discretionary Trusts

The PGA submission seeks to extend the family farm exemption to include transfers of farming property between "related discretionary trusts".

Currently, the Act exempts transfers of farming property from a natural person to a discretionary trustee where all the persons who have a share or interest in the trust property, or who may benefit from the discretionary trust, are family members of the transferor. In addition, the transferor cannot control the discretionary trust.

The existing exemption arrangements do not allow transfers from non-natural persons as to do so would amount to a restructuring concession wider than the corporate reconstruction exemption that is already available and would inevitably lead to claims from all sectors of industry for similar treatment. Such a scheme would be highly complex to comply with and administer as it would require legislation that combines the family farms provisions and an amended version of the corporate reconstruction provisions that relates to trusts.

Notably, transfers from farming companies or partnerships to family members do not qualify for the exemption under existing arrangements, so any extension in this regard for discretionary trusts would lead to an inconsistency and would create a precedent.

The Technical Committee noted that subject to certain conditions being met, a discretionary trustee can vest its property for nominal duty to beneficiaries who are natural persons and, that using Part IIIBAA, these persons could

then transfer property to a discretionary trustee. The Technical Committee proposes that a Commissioner's practice be issued clarifying this course of action.

Allow a Related Entity to Farm the Land where an Exemption is sought for Shares in a Farming Company

The PGA submission relates to transfers of shares in a farming company and seems to indicate that a 'farming company' must solely farm and not conduct other activities or business unrelated to farming. This is not correct as Part IIIBAA allows for an exemption to the extent of the value of the farming property when a transfer of shares in a farming company is dutiable.

It should also be noted that, except for land rich companies that are catered for in section 75I of Part IIIBAA, share duty was abolished effective from 1 January 2004. Therefore, shares in a farming company would only be dutiable when the company is land rich.

It is also proposed that it should not necessarily be the company that farms the land after a transfer of shares takes place, but could be a related entity. The restriction that the transferee receiving the benefit of the exemption continue to use the farming property in the business of primary production was put in place to ensure that the person who received the farm was to continue to work the farm and the operation of the farm stayed within a family, thereby achieving the policy intent of the exemption.

The exemption was not designed to encourage transfers whereby the son or daughter received the farm, then leased it to another person who enjoyed the use of the land. This point was emphasised in the Second Reading speech when the legislation was introduced in 1994 when it was stated that "However, in all cases the family members to whom the farming property is transferred must themselves, or through their acquired interest in the partnership or company, continue to undertake a business of primary production".

The Technical Committee suggested that the current requirement that the transferee must farm the land was too restrictive as commercial reality is that in many cases the ownership of the farming land and the business of farming on that land are run by separate, albeit, related entities. The Technical Committee suggested that an entity, where all members of that entity are related to the transferee, be allowed to conduct the business of farming on the land and not jeopardise the receipt of an exemption under Part IIIBAA by the transferee.

Assess only on the Net Land Gain when Farming Land is Bought and Sold

The RBDC submission suggests that when farming land is sold and more purchased in its place, that stamp duty only be imposed on the net gain in land from the sale to the purchase. The submission suggests that this type of concession would encourage more transactions and the duty impact may be positive, as it would promote consolidation in the farming industry.

The suggestion that the underlying principle of consolidation in the farming industry is desirable to the whole of the rural community would require further analysis before this proposal could be supported.

Further, the argument that this proposal will encourage consolidation would need further examination, as it seems that the benefit to a farmer only arises when part of their current farm land is sold and more purchased in its place.

However, it should be noted that it would create an inequity where, for example, a person trying to expand their land holdings may be disadvantaged if he were to buy a property compared to another farmer buying the same property, but selling off existing land holdings. It could also disadvantage a first time farm buyer competing with an existing farmer for the same property.

It should also be noted that such a scheme would be difficult to administer in that the submission assumes the same cost basis for both the property sold and the property purchased. It is unclear as to how the exemption would apply where the value of the land sold differed from the land purchased.

Further, the submission does not address the duty treatment of other assets that comprise the farm such as the residences and other non-farming property that is bought and sold and what value would be attributed to those assets.

The Technical Committee agreed that this submission would be technically very difficult to legislate and administer, and that it does not reflect current Government policy.

TECHNICAL COMMITTEE CONCLUSION

Subject to the comments above, the Technical Committee agreed with the analysis provided.

4i. Conveyance Duty – Corporate Reconstruction Issues

ISSUE

A number of submissions have suggested that the exemptions provided for corporate reconstructions should be broadened and/or aligned with provisions in other jurisdictions.

The particular issues raised in the submissions were:

- **Western Australian Divisional Council – Taxpayers Australia Inc** (Submission 51)

  Small Business Development Corporation (Submission 94)

  - The stamp duty exemption should extend to all business reconstructions where there is no underlying change in ownership. For example, relief should be available in the instance where assets are transferred in the event of a partnership incorporating and the shareholding reflects the ownership percentages in the original partnership.

- **The Chamber of Minerals and Energy Western Australia** (Submission 82)

  - The pre-association test should contain a degree of flexibility to allow the Commissioner to reduce the length of the test where there is a need to undertake a series of transactions, and those transactions are undertaken for the genuine purpose of corporate reconstruction.

  - The length of the post-association test should be aligned with that of New South Wales, which has a one-year post-association test.

  - The claw-back provisions should not be triggered when the post-association test is broken because of a public float.

- **Mr Grahame Young, Barrister** (Submission 99)

  The Law Society of Western Australia (Submission 123)

  - Both submissions suggested that the corporate reconstruction provisions should be consistent with capital gains tax rollover exemptions.

CURRENT POSITION

Part IIIBAAA of the *Stamp Act 1921* provides for exemptions from conveyance duty for corporate reconstructions. This exemption applies to transfers of property and motor vehicles between associated corporations.

There are two types of exemptions available under these provisions. Section 75JA allows for the interposition of a holding company between a company and its shareholders. Section 75JB allows for the transfer of assets between associated companies.

The purpose of the exemption is to facilitate a more efficient on-going structure for a group of companies. It was not intended to apply to reconstructions for the purpose of stripping the assets of previously unrelated companies, for packaging group assets of previously unrelated companies or for packaging group assets for on-sale to unrelated parties.

For these reasons, a pre-association test of up to three years must be met to ensure the relief is provided only to companies that have had a significant on-going relationship, and a post-association test of five years must be met to prevent the packaging of assets for the purpose of on-sale.

The intentions of the exemption scheme, as explained above, were outlined in the Explanatory Memorandum to the *Revenue Laws Amendment (Assessment) Bill 2000,* in which the Commissioner's power to claw back duty in circumstances where the five year post-association test was not met was strengthened. That Memorandum stated:

"*The amendments in this Bill are consistent with the overall policy of the exemption, but reinforce the integrity of the conditions that the body corporate receiving the exemption for an asset transfer should have a 3 year pre-association and remain associated with the corporate group for a period of 5 years after the transfer.*"

The exemptions are limited to transfers between companies and do not extend to other structures such as partnerships or trusts, and there is a requirement that the companies have a significant level of association (90% common ownership and control).

ANALYSIS OF ISSUES

Increase Flexibility of Pre-association Test

The CME has submitted that the Queensland corporate reconstruction regime contains a degree of flexibility in that the pre-association test may be reduced in circumstances where a corporate group would need to undertake a series of transactions to qualify for a corporate reconstruction exemption, and has proposed that a similar degree of flexibility be included in the Western Australian provisions.

The exceptions to the three year pre-association test included in the Western Australian provisions are similar in effect to the exceptions contained in the Queensland *Duties Act 2001.*

The effect of section 75JB(2)(a)-(c) of the Stamp Act is essentially to provide that where dutiable property is transferred between associated companies, and the transferor and transferee were associated for the whole of the time that the property was first owned by the transferor, the three year pre-association period is reduced to the period that the property was owned. A similar reduction is provided for in section 407(1)(a)-(b) of the Duties Act.

Section 75JB(1)(d)(i) of the Stamp Act provides that where there is a new company interposed between an existing company and its shareholders, and the interposition qualified for exemption under the corporate reconstruction provisions, then a transfer of property from the existing company to the new company will also qualify for exemption without having to meet the three year pre-association period. This is similar to the provision contained in section 407(1)(c) of the Duties Act.

Section 75JB(1)(d)(iii) of the Stamp Act provides that where a company is acquired to the extent that it becomes an associated company, and duty under the land-rich provisions is paid on that acquisition, a transfer of property from the newly acquired company will qualify for exemption without having to meet the three year pre-association period. This is similar to the provision contained in section 407(1)(d) of the Duties Act.

Section 407(1)(e) of the Duties Act also provides that where 90% or more of a listed company is acquired, and at least 70% of the shares were acquired as a result of a takeover bid, a transfer of property from the newly acquired company will qualify for exemption without having to meet the three year pre-association period. Although there is no direct equivalent provision to this in the Stamp Act, the listed land-rich provisions result in section 75JB(1)(d)(iii) operating to enable transfers of property to qualify for

exemption in instances where the newly associated listed company was land-rich, and land-rich duty was paid on the acquisition of the listed company.

The three year pre-association test exists because the corporate reconstruction scheme is not intended to apply to the packaging of assets of previously unrelated companies, although the three year period is reduced in instances where the assets are brought into the group as a result of a transaction on which duty was payable. The Commissioner considers that the exceptions to the pre-association period of three years, in instances where a corporate group would need to undertake a series of transactions in a corporate reconstruction, provide an appropriate level of flexibility within the bounds of the policy intent of the corporate reconstruction provisions. Furthermore, these would seem to be similar to the exceptions contained in the Queensland legislation.

However, further clarification and specific examples may need to be sought from the CME as to the circumstances in which it is believed that the three year period should also be reduced.

Reduce Length of Post-association Test

The CME has submitted that a post-association test of one year would exclude all transactions that do not reflect a purpose of a group restructure, and that the anti-avoidance provisions contained in section 75JDA of the Act could be utilised if it was found that the transfer was for a purpose other than to restructure the group.

However, the length of the post-association was set at five years as a result of consultation during the development of the corporate reconstruction provisions because it was considered that in some cases, five years was within the tax-minimisation planning horizon. However, members of the Technical Committee expressed the view that the association requirement of up to eight years (a result of the combination of the three year pre-association test and the five year post-association test) was too onerous and well beyond normal tax planning horizons.

The policy intent of the exemption was not to apply to all restructures. For example, a restructure involving the packaging of assets into an entity to be sold outside the group was not intended to be given the benefit of the exemption. The exemption was intended to facilitate more efficient *on-going* structures. A reduction in the post-association period would be inconsistent with the policy intent of the exemption. Further, the same concerns over tax avoidance that resulted in the five year period being set are equally valid today.

The issue with reducing the post-association test to one year and using the anti-avoidance provisions to enable the Commissioner to determine to not grant an exemption in instances of tax avoidance is that the eligibility for relief would be dependent on the Commissioner's opinion as to the taxpayer's intentions.

This would make the provisions difficult to administer and enforce, and would greatly reduce the degree of certainty that a taxpayer would have, unless a series of unambiguous and objective tests that applied to measure the intentions of a taxpayer could be developed.

Exclude Public Floats from Triggering the Claw-back Provisions

As noted above, the policy intent of the exemption is to facilitate a more efficient on-going structure for a group of companies, and is not intended to provide an exemption for the packaging of group assets for on-sale to unrelated parties.

The transfer of assets from one company to an associated company with the expectation that an interest in the associated company will subsequently be disposed of falls outside the intended scope of the exemption.

Align Corporate Reconstruction Provisions with Capital Gains Tax Rollover Provisions

Two submissions noted that the capital gains tax regime of the Commonwealth provides relief in instances of corporate reconstruction, and pointed out that having two separate sets of qualifying criteria inhibits the efficient conduct of business.

The capital gains tax is a different scheme to the stamp duty scheme. Capital gains tax seeks to tax the profit made on assets that were acquired after a certain date, whereas stamp duty is a duty on the value of dutiable property transferred.

The capital gains tax rollover provisions are designed to either preserve the pre-CGT status of an asset (in the case of assets acquired before 20 September 1985) or defer the payment of capital gains tax, whereas the corporate reconstruction provisions provide an exemption from duty that would otherwise be payable, rather than a deferral of liability.

Because of the different purposes of the two regimes, it is difficult to see that the two could be completely aligned without compromising one scheme or the other.

The Technical Committee members acknowledged that the two regimes have different purposes, but were of the view that closer alignment of the two could be achieved.

However, as noted below, scope may exist to broaden the corporate reconstruction provisions should it be decided at a policy level that indirect interests should be treated more equitably across differing types of entities through the adoption of a land-holder model. However, this issue will be more fully considered once that policy decision has been made.

Extension of Exemption to Encompass Reconstructions involving Unit Trusts and Partnerships

The corporate reconstruction provisions were drafted to restrict the relief to reconstructions solely involving corporate entities because of difficulties in administering the pre- and post-association tests in the absence of regulatory authority-maintained registers of ownership interests in the case of unit trusts, and any obligatory register at all in the case of partnership interests.

In limiting those particular provisions to corporate entities, the differing nature of differing entities was acknowledged, as was the fact that there were existing provisions to provide for concessionary treatment of transfers where there was no change in beneficial ownership.

However, if the position was adopted, as a matter of policy, that there should be consistency between the differing entities in respect of the assessment of duty, then consideration would need to be given to whether it will be practicable to apply a similar policy position to the corporate reconstruction exemptions, and extend those exemptions beyond transactions solely involving companies.

It is suggested that further analysis of this issue be undertaken when a policy decision is made in relation to whether a land-holder model is to be implemented, as the outcome of the decision on whether to proceed with a land-holder model, and the form that the land-holder model takes, is likely to be relevant to any decision to broaden the existing corporate reconstruction provisions.

TECHNICAL COMMITTEE CONCLUSION

Members of the Technical Committee expressed the view that the issues raised in submissions concerning the corporate reconstruction provisions were the result of an apparent chasm between the Office of State Revenue's perception of the Government's policy behind the corporate reconstruction exemption provisions, and industry's perception of what the basic rationale of the policy should be. The Technical Committee was of the view that the perception in the business community is that it is unfair to charge conveyance duty where there is no change in the underlying economic ownership of property, notwithstanding in other cases the benefits provided by the corporate veil should be available for use.

It was suggested that a re-examination of the policy of the corporate reconstruction provisions should be undertaken by the Reference Group, with a view to making recommendations on whether that policy is still appropriate. If the policy position ultimately does not alter, the Technical Committee considered it would be desirable for the Commissioner to communicate the Government's policy basis for the exemption to the business community more clearly.

4j. Conveyance Duty – Family Law, Superannuation and Trust Issues

ISSUE

Part IVD of the *Stamp Act 1921* provides for a nominal rate of stamp duty to apply to certain transfers of property between spouses or de facto partners upon the breakdown of the marriage or de facto relationship, where the transfer is made pursuant to a maintenance agreement or Court order. Submissions received as part of the State Tax Review have recommended amendments to the stamp duty treatment of such transfers.

The particular issues raised in the submissions were:

- **Mr Grahame Young** (Submission 99)
    - Mr Young's submission suggests that certain transfers to and from family trusts and superannuation funds upon marriage and de facto relationship breakdowns should be assessed with nominal duty.
- **Paterson & Dowding** (Submission 103)
    - Paterson & Dowding suggests that transfers pursuant to Part IVD of the Act should be exempt from all duty.
- **Shelter WA** (Submission 115)
    - Shelter WA suggests that tranfers to custodial parents and children upon marriage dissolution should be exempt from duty.

CURRENT POSITION

The State Tax Review submissions relating to Part IVD of the Stamp Act, particularly Mr Young's submission, suggest extending the scope of that Part. Currently, Part IVD provides for a nominal rate of duty to apply to certain property transfers between individual parties to the marriage or de facto relationship. Mr Young suggests that the scope of Part IVD should be extended to include transfers to and from family trusts and superannuation funds. Therefore, the current duty treatment of trusts and superannuation funds, as well as family law instruments, will be examined in this paper.

Trusts

Generally, ad valorem duty is payable on the creation or termination of a trust over dutiable property, as well as trust acquisitions and trust surrenders. However, nominal duty treatment applies where the transaction does not involve a change in the beneficial ownership of the trust property. Section 73AA of the Stamp Act provides limited circumstances where nominal duty is to apply on transfers involving trust property not passing a beneficial interest in the trust property. However, the Technical Committee noted that the operation of section 73AA was limited by section 66 of the Stamp Act, which states that conveyances in consideration of a debt or subject to a future payment are to be charged with ad valorem duty.

A transfer, or agreement for the transfer, of dutiable property to a trustee will be assessed with nominal duty to the extent that the transfer represents the transferor's interest in the property, in accordance with section 73AA(1)(f). In addition, where dutiable property is held by the trustee of a discretionary trust, dutiable transactions that consist of a transfer, or agreement for the transfer, of dutiable property, to the extent that it represents the beneficiary's trust interest on a distribution by a trustee under the trust, are assessed with nominal duty, provided the beneficiary was named or described at the time the trustee acquired the trust property, in accordance with section 73AA(1)(d).

Superannuation

Compulsory superannuation was introduced to Australia in 1992 and superannuation contributions currently stand at 9% of an eligible employee's salary. Further to compulsory employer contributions, individuals can make additional contributions to superannuation funds. The federal government encourages voluntary contributions through tax incentives. Contributions are generally paid into a complying superannuation fund[3] and that trust fund invests the contributions in a range of property, such as realty and shares.

Federal legislation generally requires superannuation funds to be in a trust structure. Therefore, superannuation funds are subject to the same duty treatment as other trusts. Instruments creating or terminating a trust over dutiable property, trust acquisitions and trusts surrenders generally attract ad valorem duty. However, section 73AA(1)(f) of the Stamp Act provides that an instrument of conveyance or transfer of property is to be assessed with nominal duty where the Commissioner is satisfied that the conveyance

[3] Complying superannuation fund means:

a) a complying superannuation fund under the Commonwealth's *Superannuation Industry (Supervision) Act 1993*, section 42 or 42A; or
b) an exempt public sector superannuation scheme under that Act.

or transfer does not pass a beneficial interest in the property conveyed or transferred.

Commissioner's Practice SD 5.0 (copy attached) provides the guidelines for cases where property is sold to a superannuation fund and it is claimed that the instrument satisfies section 73AA(1)(f) of the Stamp Act. Commissioner's Practice SD 5.0 states that the Commissioner may make a nominal assessment of duty where all the provisions of section 73AA(1)(f) are met and the following criteria are satisfied at the time of executing the instrument

- the transfer instrument represents a sale of property to a fund and either:
    - the membership of the superannuation fund holding is restricted to the transferor, and cannot be altered; or
    - the trustee must specifically hold the property for the transferor (the superannuation rules must prohibit any other member obtaining an interest in the property in the future); and
- the superannuation fund must either provide the property to the member as a retirement benefit, or sell the property and distribute the cash proceeds to the member.

Section 73AA(1)(f) and the accompanying Commissioner's Practice SD 5.0 effectively assess transfers to superannuation funds with nominal duty, provided the property is held for the benefit of the transferor. However, a "roll over" of superannuation, which is a transfer of property from the trustee of one superannuation fund to another, may be assessed with ad valorem duty as the members of the two funds may be different. A transfer of property from the trustee of one superannuation fund to another fund with differing members would be a change in beneficial ownership (unless the trustee held the property specifically for the transferor), and the transfer would be subject to ad valorem duty.

Section 75AB of the Stamp Act also allows the Commissioner to exempt an instrument gifting money or property to a superannuation fund from ad valorem duty in limited circumstances. Section 75AB allows the Commissioner to exempt gifts to funds, where the fund is established for making superannuation payments to employees upon termination, illness and other prescribed events.

Any transfer, or agreement for the transfer, of superannuation property not within the scope of sections 73AA(1)(f) or 75AB is subject to ad valorem duty.

Family Law Instruments

Part IVD of the Stamp Act provides for a nominal rate of stamp duty to apply to certain transfers of property between spouses or de facto partners upon the breakdown of the marriage or de facto relationship.

In accordance with Part IVD of the Stamp Act, maintenance agreements and Court orders effecting a transfer or conveyance can be assessed with nominal duty provided:

- the agreement or order provides for the maintenance of one of the parties or their dependent children (section 112UA);
- the parties are separated or divorced (section 112UB);
- the parties are entitled to, or liable to provide, maintenance under the Family Court Act or Family Law Act (section 112UB);
- the agreement or order does not evidence a sale of property (section 112UC); and
- the property is to be conveyed or transferred from one party of the relationship to the former spouse or dependent children or both.

In the absence of one or more of the above criteria, the transfer would be subject to the normal rates of conveyance duty upon that transfer.

It is possible for certain property held in a trust structure to be transferred pursuant to a maintenance or Court order (or financial agreement – see discussion below) and attract only nominal duty if the requirements of section 73AA are first met. If a trustee is holding the property on trust for either of the parties to the marriage and the requirements of section 73AA have been met, then the transfer of property would be subject to nominal duty.

Recent Family Law Amendments

It should be noted that the Stamp Act does not currently reflect the new terminology introduced as part of the *Family Law Amendment Act 2000* (Cth) (FLAA). The FLAA amended the *Family Law Act 1975* (Cth) (FLA), so that maintenance agreements, as previously defined by the FLA, could no longer be approved or registered by order of the Court.

The FLAA inserted a new Part VIIIA, which allows married persons to enter into agreements as to the division of property and financial resources in the event of a marriage breakdown[4]. Part VIIIA of the FLA provides for parties to a marriage to make binding written agreements either before (section 90B of the FLA), during (section 90C of the FLA) or after the marriage (section 90D of the FLA), about how all or part of the property or financial resources of the parties are to be dealt with upon marriage breakdown. Parties to a marriage are also able to make binding written agreements covering maintenance of either of them during the marriage and/or after dissolution of the marriage. Agreements made in such terms under Part VIIIA of the FLA are referred to as "financial agreements".

The *Family Court Amendment Act 2001* amended the *Family Court Act 1997* (FCA) to provide similar provisions for de facto relationships.

The *Family Law Legislation Amendment (Superannuation) Act 2001* (Cth) amended the FLA by inserting a new Part VIIIB, which provides for the splitting of superannuation benefits on a marriage breakdown. Parties to a marriage are able to make binding written agreements before, during or after the marriage, about how their superannuation interests are to be dealt with upon marriage breakdown. These agreements are referred to as "superannuation agreements", and can be stand alone agreements or part of a broader "financial agreement".

Currently, the Stamp Act makes no specific provision for these financial agreements. However, Commissioner's Practice SD 11.1 Maintenance Agreements and Orders (copy attached), provides that binding financial agreements, along with maintenance agreements and Court orders, will be assessed in accordance with section 112UD of the Stamp Act.

Any transfer of property executed by separated or divorced spouses in accordance with a financial agreement will be assessed with nominal duty provided:

- the Commissioner is satisfied that the parties have been married and are now separated or divorced from each other;

- the binding financial agreement states that it is intended to constitute a binding financial agreement as referred to in sections 90B, 90C or 90D of the FLA; and

[4] It should be noted that "property and financial resources", as defined by the FLA, includes property in a company or trust structure.

- the binding financial agreement meets the conditions specified in section 90G.

In the absence of one or more of the above criteria, the transfer would be subject to conveyance duty upon that transfer.

Any transfer of property executed by former de facto partners in accordance with a financial agreement will be assessed with nominal duty provided:

- the Commissioner is satisfied that a de facto relationship existed, in accordance with section 205Z of the FCA;

- the Commissioner is satisfied that the de facto relationship has ended; and

- a statement to this effect accompanies the financial agreement.

In the absence of one or more of the above criteria, the transfer would be subject to conveyance duty upon that transfer.

ANALYSIS OF ISSUE

Part IVD was introduced into the Stamp Act in 1982 to ameliorate the problems associated with property transfers as a result of a marriage breakdown. It was considered appropriate to provide stamp duty relief to involuntary transfers that arose as a consequence of a marriage breakdown. However, when the Part was introduced, Parliament did not intend the stamp duty relief to extend to situations where matrimonial property was held in a trust structure, or where matrimonial property was to be transferred to a trust structure. During the Parliamentary debate, the Leader of the Upper House, Hon Ian Medcalf, stated that, "The Government is not prepared to exempt transactions between people who are not parties to the marriage." Nominal duty only applies to transfers between the parties to the marriage or de facto relationship and their dependent children.

However, since the introduction of Part IVD, it has become more common for assets to be held in trust structures, especially in relation to superannuation. It is suggested that the Reference Group give consideration as to whether the current arrangements that provide limited relief in relation to trusts and superannuation funds are appropriate. While this paper does not seek to provide a view in this regard, it does provide an analysis of the issues that need to be considered if extending the current arrangements was considered desirable, and how this could best be achieved.

Transfers to and from Trusts

Mr Young's submission has proposed that property transferred to or from family trusts pursuant to a maintenance agreement or Court order should be assessed with nominal duty.

In relation to transfers of property from trust ownership, as stated previously, relief is not available under Part IVD for the transfer of property that is held on trust. Further, relief under section 73AA(1)(d) for transfers of property to beneficiaries of discretionary trusts applies in limited circumstances.

It should be noted that South Australia, New South Wales, Tasmania and Australian Capital Territory (ACT) have amended their duties legislation to reflect the changes to the FLA. These jurisdictions adopt the terminology used in the FLA and state that a transfer, pursuant to a financial agreement, made before the marriage, during the marriage and after the marriage are exempt from duty. As previously stated, a financial agreement, as defined by the FLA, includes any property or financial resources of the spouses, which may include property held in company or trust structure. However, to limit the financial agreement exemption provisions in these jurisdictions, "matrimonial property" is defined as property of the parties to the marriage or de facto relationship. Therefore, a transfer of property from a company or trust structure, pursuant to a financial agreement, is subject to ad valorem duty, as company or trust property is not considered to be property of the parties to the marriage. The other jurisdictions that have not yet updated their duties legislation also do not provide relief where property is transferred out of a trust structure pursuant to a family law instrument.

As previously stated, it is possible for certain property held in a trust structure to be transferred for nominal duty under section 73AA(1)(d) if the requirements of that section are met. One of the restrictions imposed by section 73AA(1)(d) is that the beneficiary must have been named at the time the trustee acquired the trust property. Extending relief to transfers from trust structures, as suggested by Mr Young, would result in nominal duty being applied in the case of a transfer pursuant to a financial agreement where property was acquired prior to the beneficiary being named in the trust deed. This therefore raises the policy issue of whether transfers of property upon marriage or de facto relationship breakdowns should be subject to the "no change in beneficial ownership" requirement which applies to other trust property transfers in accordance with section 73AA.

It should be noted, however, that extending relief to transfers of trust property as suggested could create the potential for avoiding duty by adding a beneficiary to the trust immediately prior to vesting the trust property.

Anti-avoidance provisions may be required to prevent the exemption from being used to facilitate such transfers. However, such provisions would be difficult to develop and enforce, as it would be necessary to determine the intentions of the party to the transaction to distinguish between genuine transfers and those seeking to avoid duty.

Members of the Technical Committee noted that it is now common practice for property to be held in trust structures, and considered it appropriate for relief to be available for transfers of property from a trustee to the parties to the marriage or de facto relationship (or their children). However, it was also recognised that such relief would need to be tightly controlled in order to limit avoidance opportunities.

While there is no precedent in other jurisdictions for exempting transfers from trustees (with the exception of superannuation transfers – see discussion below), a number of Australian jurisdictions provide exemptions for transfers of matrimonial property from a former spouse to a trust. For example, section 44 of the Victorian *Duties Act 1999* provides that no duty is chargeable in respect of a declaration of trust or a transfer of dutiable property to a trustee, if -

- the declaration of trust or the transfer has been made because of the marriage breakdown; and
- the transferor was a party to the marriage; and
- no person other than a party to the marriage or a child of a party to the marriage is a beneficiary of the trust.

A similar provision is included in the ACT *Duties Act 1997* and the Tasmanian *Duties Act 2001*. These provisions attempt to minimise any tax avoidance opportunities by specifying that only a party to the marriage, or a child of a party to the marriage, may be a beneficiary of the trust.

Again it should be noted that providing such an exemption raises the policy issue of whether transfers of property to a trust structure should be subject to the "no change in beneficial ownership" requirement of section 73AA, which provides for nominal duty treatment to the extent that the transfer represents the transferor's interest in the property. It needs to be determined whether marriage or de facto relationship breakdowns should be restricted by the same requirement.

Should it be considered appropriate to provide a similar exemption for transfers to trusts, the potential to avoid duty liabilities through later including additional beneficiaries would exist. However, this would be

minimised by the requirement in section 73AA(1)(d) that the beneficiary must be named or described at the time the trustee acquired the trust property for the vesting of the property to the beneficiary to be charged with nominal duty. Any other transfer or agreement for a transfer would be assessed with ad valorem duty. Section 73AA would therefore seem to prevent beneficiaries avoiding their duty liabilities by the addition of a beneficiary into the trust at a later date. However, there is the potential for beneficiaries to gain the benefit of distributions of income from the trust during the time that they are nominated as beneficiaries until the property is vested. There is, therefore, the potential that extending the exemption to transfers to trusts could create the opportunity to restructure property ownership and delay the payment of stamp duty.

To minimise this avoidance opportunity, a claw-back provision may need to be included within the Act. This provision would need to state that duty is chargeable on a transfer in the above circumstances if a person other than a former spouse or child of a former spouse becomes entitled to a share or interest in the trust, or otherwise benefits from the trust. However, ensuring that taxpayers are compliant with this claw-back provision would be extremely difficult.

The Technical Committee members agreed that any relief in respect of transfers of property to a trust structure should only apply where the beneficiaries of that trust are the parties to the marriage or de facto relationship (or their children). Therefore, the members acknowledged that limitations as to the beneficiaries of trusts would be required if relief was provided for transfers of property into trust structures upon marriage or de facto relationship breakdowns.

It is important to note that Part VIIIA of the FLA does not expressly state that third parties cannot be parties to a financial agreement. A financial agreement may stipulate that during a marriage or after a marriage, property may be transferred to a third party. The jurisdictions that have updated their duties legislation to reflect the FLA amendments limit the relief available in these cases by stating that the matrimonial property must be transferred to a party to the marriage, or child of that person.

It is suggested that regardless of the policy position that is taken in relation to extending the application of Part IVD to trust transfers, the provisions relating to the concessional treatment of transfers between spouses and de facto partners should be updated. The amended provisions should use updated terminology and be harmonised with other jurisdictions where possible, while using a coherent structure and plain language, in the aim of

reducing the complexity of the provisions, and thus, reducing compliance costs.

Superannuation

Mr Young's submission has also proposed that property transferred to and from superannuation funds pursuant to a maintenance agreement or Court order should be assessed with nominal duty. It should be noted that this proposal raises issues beyond Part IVD, as it also involves issues in regard to the current superannuation provisions contained within the Stamp Act.

As previously stated, the Stamp Act does not contain a specific exemption for transfers to and from trustees of superannuation funds. Rather, sections 73AA(1)(f) and 75AB provide circumstances where transfers are assessed with nominal duty.

With the exception of the Northern Territory, each Australian jurisdiction provides superannuation funds with an exemption or concession from transfer duty on certain transactions. Each jurisdiction has legislation that is considerably more coherent and understandable than the current provisions of the Stamp Act which relate to superannuation.

South Australia provides a concession for transfers of property between trustees of superannuation funds (on the proviso that the conveyance is in connection with a person ceasing to be a member of one superannuation fund and becoming a member of another).

Queensland also applies nominal duty to transfers between trustees of superannuation funds to effect a merger, or the splitting of a superannuation fund, and certain instruments that vary or reconstitute superannuation funds.

New South Wales, ACT, Victoria and Tasmania have mirror legislation for the concessional treatment of superannuation funds (referred to in this paper as "the mirror legislation"). The mirror legislation provides that certain instruments are exempt from duty, transfers from trustees of one superannuation fund to another are exempt from duty, and transfers to trustees of superannuation funds are exempt from duty. This legislation is coherent and easily understood and could be used as a model if amendments to clarify the superannuation provisions of the Stamp Act were considered appropriate.

Instruments Relating to Superannuation

The mirror legislation provides that certain instruments relating to superannuation are exempt from duty. This provision includes:

- an instrument that establishes, or amends provisions governing, a fund or trust;
- an instrument under which an employer agrees to participate in a complying superannuation fund; and
- an instrument that varies or sets out the terms of a custodial arrangement concerning a fund or trust.

The Western Australian Stamp Act currently provides that these instruments are to be assessed with nominal duty in accordance with item 8 of the Second Schedule. Item 8 applies nominal duty to a deed or declaration not otherwise chargeable with duty. However, a specific provision dealing with these instruments could be considered.

Transfers of Property from One Superannuation Fund to Another

The mirror legislation provides that no duty is chargeable in respect of a transfer of dutiable property from trustees of one superannuation fund to another, provided that no other person is entitled, or could be entitled, to a benefit in respect of the fund to which the property is transferred.

The provision also lists the accompanying documentation that must be provided to Commissioner.

Section 73AA(1)(f) of the Stamp Act provides a similar exemption. Section 73AA(1)(f) provides that an instrument of conveyance or transfer of property is to be assessed with nominal duty where the Commissioner is satisfied that the conveyance or transfer does not pass a beneficial interest in the property transferred or conveyed. However, a specific provision similar to that contained in the mirror legislation, incorporating the requirements of Commissioner's Practice SD 5.0, could be considered.

Transfers to Trustees or Custodians of Superannuation Funds or Trusts

The mirror legislation provides that no duty is chargeable in respect of a transfer of dutiable property made without monetary consideration to a trustee or custodian of a complying superannuation fund, where there is no change in beneficial ownership.

Section 75AB of the Stamp Act provides a similar exemption. That section allows the Commissioner to exempt an instrument gifting money or property to a superannuation fund from ad valorem duty in limited circumstances.

To minimise avoidance opportunities, each jurisdiction states that the concessions (outlined above) are dependent on the superannuation fund being or becoming a complying superannuation fund within one year after the merger, split or creation of the trust.

While Western Australia and the other Australian jurisdictions (with the exception of the Northern Territory) provide superannuation funds with an exemption or concession from transfer duty on certain transactions, only South Australia provides an additional exemption for certain transfers executed between trustees of superannuation funds as a result of marriage breakdown. The South Australian legislation provides an exemption for instruments executed by the trustee of a superannuation fund, for the distribution of property between the spouses, consequential upon a financial agreement, to the trustee of another superannuation fund, provided that no other person is entitled to an interest or becomes entitled to an interest in the property[5]. Effectively, this legislation applies nominal duty to a transfer that splits superannuation property between superannuation trustees of the former spouses. All other jurisdictions, including Western Australia, would apply ad valorem duty to such transfers (except to the extent the transfer represents no change in beneficial ownership).

Members of the Technical Committee agreed that there were no clear reasons why transfers of superannuation property upon a marriage or de facto relationship breakdown should be treated any differently to transfers of property to other types of trusts (such as family trusts). However, members of the Technical Committee noted that there were extensive restrictions and regulation of superannuation funds, in comparison to the restrictions and regulation of other types of trusts. Therefore, the level of protection from avoidance that would be required in relation to superannuation funds may be of a different nature than that required for other trusts.

The Stamp Act does not contain specific provisions for transfers involving superannuation property, therefore, consideration could be given to amending the current provisions to insert specific superannuation provisions, similar to those operating in other jurisdictions. Aligning the Stamp Act superannuation provisions with the provisions operating in other jurisdictions would reduce taxpayer's compliance costs. In addition, consideration should be given to including an exemption for the splitting of

[5] It should also be noted that this legislation reflects the relevant changes to the FLA as a result of the Family Law Legislation Amendment (Superannuation) Act.

superannuation upon the dissolution of marriage or de facto relationships, similar to the current South Australian provisions.

Summary

Mr Young's submission raises a number of issues beyond the scope of Part IVD in relation to the current duty treatment of transfers of trust property and superannuation property. As a result, consideration should be given to the following policy issues:

- providing an exemption within Part IVD for transfers from trustees, where matrimonial property is held on trust, to spouses;

  If a trustee is holding the property on trust for either of the parties to the marriage and the requirements of section 73AA (property not passing a beneficial interest) have been met, then the transfer of property would be subject to nominal duty. All other transfers are subject to ad valorem duty, regardless of the fact that the transfer is a result of a marriage breakdown.

- providing an exemption within Part IVD for transfers to trustees, where a party to the marriage or child of that party is a beneficiary;

  Transfers to a trustee are assessed with nominal duty, to the extent that the transfer represents that transferor's interest in the property. All other transfers are subject to ad valorem duty, regardless of the fact that the transfer is a result of a marriage breakdown.

- providing an exemption within Part IVD for certain transfers of superannuation upon the dissolution of a marriage.

  The Stamp Act does not provide a concession for the splitting of superannuation property upon the dissolution of a marriage.

Further, regardless of the decisions in relation to the above policy issues, it is suggested that the following amendments be made to clarify the operation of Part IVD and the treatment of transfers of trust property and superannuation property:

- update Part IVD of the Stamp Act to reflect the recent changes to the FLA;

  Currently, certain transfers made pursuant to a financial agreement are assessed with nominal duty in accordance with Commissioner's Practice SD 11.1 Maintenance Agreements and Orders. Part IVD requires updating to incorporate the new terminology.

- update the concessional treatment of transfers of trust property more generally;

  Currently, the concessions for certain instruments relating to the creation and termination of a trust, and certain trust acquisitions and surrenders, is ad hoc and lacks consistency.

- update the concessional treatment of transfers of superannuation property;

  The Stamp Act does not contain a specific exemption for transfers to and from superannuation funds. Rather, sections 73AA(1)(f) and 75AB provide circumstances where transfers are assessed with nominal duty. Provisions similar to the mirror legislation could be used as a model, which include providing specific exemptions for -

  - *certain instruments that establish, amend or vary a fund or trust;*
  - *transfers of dutiable property from the trustee of one superannuation fund to the trustee of another (provided no additional person is entitled to a benefit in respect of the fund); and*
  - *gifts to a trustee of a superannuation fund, where the transfer represents no change in beneficial ownership.*

Part IVD Transfers Exempt from Nominal Duty

The Paterson & Dowding submission suggests that Part IVD transfers should be exempt from duty (rather than charged with nominal duty). The submission states that it was the intention of the Commonwealth Parliament to make family law instruments exempt from State duty, as evidenced by section 90 of the FLA (Certain intruments not liable to duty). However, while this may have been the intention of the Commonwealth Parliament, the High Court decided in *Gazzo v Comptroller of Stamps (Vict)* (1981) 149 CLR 227 that the section, in its attempted application to a State duty or charge, was not a valid law under the Commonwealth.

The Paterson and Dowding submission infers that all maintance agreements and orders attract nominal duty. However, many of these agreements and orders are subject to ad valorem duty rates. Examples of agreements that do not qualify for a nominal duty assessment include where the property being transferred is held either by a family company or trust. These transfers are subject to ad valorem duty. Agreements and orders to sell property also attract ad valorem duty. Because many family instruments are subject to ad valorem duty, it is considered necessary for these instruments to be

presented and stamped by the Office of State Revenue to protect the State's revenue base.

As stated, Paterson & Dowding suggest that family law instruments be exempt from all duty as this will reduce taxpayers' and solicitors' compliance costs. However, it should be noted that if Family Law instruments, which are currently assessed with nominal duty, were to be exempt from all duty, these instruments would still be required to be presented to Office of State Revenue for stamping if they are to result in a registerable transfer being prepared. The Registrar of Titles will not register an unstamped document, in accordance with section 28 of the Stamp Act.

Transfers to Custodial Parents and Children

Shelter WA suggests that transfers to custodial parents and children should be exempt from duty upon marriage dissolution. However, as mentioned above, Part IVD of the Stamp Act currently provides that maintenance agreements and Court orders effecting a transfer or conveyance are to be assessed with nominal duty, provided it satisfies the criteria outlined above.

TECHNICAL COMMITTEE CONCLUSION

The Technical Committee agreed with the analysis provided in the paper. However, it was recognised that any decision to extend the relief for transfers of property on a marriage or de facto relationship breakdown is a matter of Government policy.

ATTACHMENT 1

COMMISSIONER'S PRACTICE
SD 5.0

STAMP DUTY – CONVEYANCE OF PROPERTY TO A SUPERANNUATION FUND - CLAIM OF NO CHANGE IN BENEFICIAL OWNERSHIP

Commissioner's Practice History

Commissioner's Practice	Issued	Dates of effect	
		From	To
SD 5.0	21 October 2003	21 October 2003	Current

This Commissioner's practice provides guidelines for cases where property is sold to a superannuation fund, and it is claimed the instrument of conveyance or transfer satisfies section 73AA(1)(f) of the *Stamp Act 1921* ("Stamp Act").

Background

Section 73AA(1)(f) of the Stamp Act provides for nominal assessment duty to be assessed on an instrument of conveyance or transfer of property where the Commissioner is satisfied that the conveyance or transfer:

- does not pass a beneficial interest in the property conveyed or transferred;
- is not made in contemplation of the passing of a beneficial interest therein; and
- is not part of, or made pursuant to, a scheme whereby any beneficial interest in the property conveyed or transferred, whether vested or contingent, has passed or will or may pass.

Section 75AB of the Stamp Act allows the Commissioner to exempt from *ad valorem* duty an instrument gifting money or property to a superannuation fund.

However, for commercial reasons, the property is usually sold rather than gifted to the superannuation fund.

Commissioner's Practice

1. If nominal duty is to be assessed, the taxpayer must provide sufficient and appropriate evidence to satisfy the Commissioner that all of the provisions in section 73AA(1)(f) have been met.

2. The Commissioner may make a nominal assessment of duty where the following criteria are satisfied at the time of executing the instrument:

    2.1. the conveyance or transfer instrument represents a sale of the property to a fund and:

        2.1.1. the membership of the superannuation fund holding is restricted to the transferor, and cannot be altered; and

        2.1.2. the trustee must specifically hold the property for the transferor. The property cannot be pooled with another member's or members' contributions or fund assets. The superannuation fund rules must prohibit any other member obtaining an interest in the property in the future; and

    2.2. the superannuation fund must either provide the property to the member as a retirement benefit, or sell the property and distribute the cash proceeds to the member.

3. Where the above criteria are not met, an instrument of conveyance or transfer of property will be assessed for *ad valorem* duty, as the potential addition of new members means the beneficial interest in the property conveyed may pass in the future.

Date of Effect

This Commissioner's Practice takes effect from 21 October 2003.

Bill Sullivan
COMMISSIONER OF STATE REVENUE

21 October 2003

ATTACHMENT 2

COMMISSIONER'S PRACTICE
SD 11.1

STAMP DUTY – PART IVD – MAINTENANCE AGREEMENTS & ORDERS

Commissioner's Practice History

Commissioner's Practice	Issued	Dates of effect	
		From	To
SD 11.0	21 October 2003	21 October 2003	25 November 2003
SD 11.1	26 November 2003	26 November 2003	Current

This Commissioner's practice explains how maintenance agreements, binding financial agreements and orders subject to the *Family Law Act 1975* (Commonwealth) ("FLA") or the *Family Court Act 1997* ("FCA") are to be assessed for stamp duty purposes.

Background

Part IVD of the *Stamp Act 1921* ("Stamp Act") provides for a nominal rate of duty to apply to certain transfers of property between spouses or de facto partners upon the breakdown of a marriage or de facto relationship.

The legislation provides for nominal duty to apply to a "maintenance agreement" entered into for the purposes of the FCA or the FLA or an "order".

The terms "de facto relationship", "maintenance agreement" and "order" are defined in section 112UA of the Stamp Act.

In general terms, a maintenance agreement or order effecting a transfer or conveyance can be assessed for nominal duty where:

- it is pursuant to either the FLA or the FCA (after 1 December 2002, when amendments to that Act concerning de facto relationships took effect)*;*

- it provides for the maintenance of one of the parties or their dependant child or the child of one of them;

- the parties to the agreement or the subject of the order are divorced or separated or the de facto relationship has ended;

- the parties are entitled to, or liable to provide, maintenance under the FCA or the FLA;

- it does not evidence a sale of property; and

- the property is to be conveyed or transferred from one party of the relationship to the former spouse or dependant children or both.

New sections were inserted into the FLA in 2001 to provide for parties to enter into financial agreements. Financial agreements are made for the disposal of property in contemplation of, or at the time of, a break down of the relationship. For the agreements to be binding, they must meet the conditions specified in section 90G. The new sections that deal with binding financial agreements (BFA) are:

- Section 90B – Financial Agreements Before Marriage;

- Section 90C – Financial Agreements During Marriage; and

- Section 90D – Financial Agreements After Dissolution of Marriage.

Amendments to the FCA were proclaimed on 1 December 2002. From that date, section 205Z(1) of the FCA provides that a court may make an order in relation to a de facto relationship if satisfied that:

- there has been a de facto relationship between the partners for at least two years;

- there is a child of the de facto relationship who has not yet attained the age of 18 years and failure to make the order would result in serious injustice to the partner caring or responsible for the child; or

- the de facto partner who applies for the order made substantial contributions of a kind mentioned in section 205ZG(4)(a),(b) or (c) and failure to make the order would result in serious injustice to the partner.

New sections 205ZN, 205ZO and 205ZP have been inserted into the FCA to allow for binding financial agreements in relation to de facto relationships.

Commissioner's Practice

Binding financial agreements

1. An instrument of conveyance or transfer between the parties to a marriage, pursuant to sections 90B, 90C or 90D of the FLA, will be

assessed at nominal duty under section 112UD of the Stamp Act, provided the Commissioner is satisfied that the parties have been married and are now separated or divorced from each other.

2. A BFA must state it is intended to constitute a financial agreement as referred to in sections 90B, 90C or 90D of the FLA and meet the conditions specified in section 90G.

3. When deciding if the provisions of Part IVD of the Stamp Act apply to BFAs or orders relating to de facto couples, the Commissioner is to consider whether the relationship existed for at least two years, whether a dependant child exists from the relationship and whether substantial financial contributions have been made by a partner to the relationship. In addition, the Commissioner must be satisfied that the de facto relationship between de facto partners has ended.

4. A statement that the parties to the marriage are separated or divorced or the de facto relationship between the parties has ended must accompany a BFA.

Mortgages

5. Part IVD of the Stamp Act does not allow for a nominal assessment of duty on the making or transferring of mortgages in connection with a maintenance agreement or order.

6. The making or transfer of mortgages is assessable to *ad valorem* duty under item 13 of the Second Schedule to the Stamp Act.

Meaning of "sale"

7. As noted above, nominal duty applies to transfers and conveyances under an order, maintenance agreement or BFA providing there is no transfer of property by way of "sale".

8. For the order, maintenance agreement or BFA to be assessable with *ad valorem* duty under items 4 or 4A of the Second Schedule to the Stamp Act, the instrument must specifically refer to the transfer of property as a "sale" or contain the words "… for a consideration …" of a sum of money.

External parties

9. The transfer of any property from a person who is not a party to the relationship, for example, a family trust or company to a former spouse or dependant child, will be subject to *ad valorem* duty under item 14A of the Second Schedule to the Stamp Act.

10. The transfer of property to a party who is not entitled to maintenance under the agreement or order, for example an adult child or third party, will be subject to *ad valorem* duty under item 14A of the Second Schedule.

Date of Effect

This Commissioner's practice takes effect from 26 November 2003.

Bill Sullivan
COMMISSIONER OF STATE REVENUE

26 November 2003

4k. Conveyance Duty – Incorporation of Legal Practices

ISSUE

The assessment of stamp duty on goodwill, particularly upon the incorporation of legal practices.

The particular issue raised in the submission was:

- **The Law Society of Western Australia (the Law Society)** (Submission 123)
    - The submission suggests that legal practices do not recognise goodwill as a partnership asset because, at most, it is reflective of the personal goodwill of the practitioners and is not representative of repeat business tied to the firm. Legal practices that have incorporated have been issued with assessments of stamp duty that often bear no relationship to the true commercial value of the goodwill. The Law Society submits that the previous provisions of the *Stamp Act 1921* that only assessed duty on goodwill where there was a transfer that was documented or for which consideration is given, be reinstated.

ANALYSIS OF ISSUE

It is suggested that no further analysis on this issue be undertaken until such time as a decision is made as to whether stamp duty will continue to be levied on non-real business conveyances, as this issue would cease to exist if duty on non-real business conveyances were abolished.

If a decision is made to continue to impose duty on non-real business conveyances, this issue should be re-examined.

It is noted that in the interim, bilateral discussions are occurring between the Law Society and the Office of State Revenue on the appropriate treatment of goodwill under the law as it stands.

TECHNICAL COMMITTEE CONCLUSION

The members of the Technical Committee noted that while the abolition of duty on non-real business conveyances in the future would resolve this issue, until that decision is made, the issue of the valuation of goodwill in legal practices still needs to be addressed in Western Australia in the short term. It is understood that the bilateral process between the Commissioner and the Law Society is still in progress. It was also noted that the abolition of duty on non-real business assets in the longer term was a matter of policy to be considered by Government.

41. Conveyance Duty – Unsecured Loans and Mortgage Duty Issues

ISSUE

A concern has been raised with respect to the assessment of conveyance duty on a transfer or assignment of a lender's interest in an unsecured loan.

The particular issue raised in the submission was:

- **Young and Young Lawyers and Mediators** (Submission 118)
    - This submission questions the policy rationale for charging a transfer or assignment of a lender's interest in an unsecured loan with conveyance duty, while the transfer or assignment of a mortgage is charged with nominal duty.

However, consideration of this issue raises further issues in relation to potential avoidance opportunities that may currently exist in respect of a transfer by way of security, and that would exist should mortgage duty be abolished in the future or should mortgages be able to be executed electronically in the future. These issues are also considered in this paper.

CURRENT POSITION

A transfer or assignment of a mortgage represents a transfer of property for the purposes of the *Stamp Act 1921*, with the property transferred being the rights of the creditor created by the mortgage documentation, which secures the underlying benefit.

A transfer or assignment of a mortgage is assessed under section 72 of the Stamp Act and charged with nominal duty of $20 under item 13(3)(a) of the Second Schedule, where the mortgage is transferred or assigned by way of sale for a consideration in money or money's worth for not less than market value.

This concession was originally inserted into the Second Schedule in 1983 and supporting legislation, in the form of section 72, was inserted into the Stamp Act in 1996. The purpose of the concession in 1983 was to encourage the development of a secondary market in mortgages in Western Australia.

At that time, the concession referred to the transfer of a mortgage, the definition of which was taken to have the widest possible meaning to include unsecured loans, where they had been stamped with mortgage duty under item 13 of the Second Schedule.

However, as a part of the rewrite of the mortgage duty provisions resulting from the Business Tax Review, the definition of a mortgage in section 82(1) of the Stamp Act was amended to "a security by way of mortgage or charge over property that is wholly or partly in Western Australia at the liability date."

The purpose of the amendment was to narrow and simplify the mortgage duty base and duty sharing arrangements between the States.

As a result of the amendment to the definition of "mortgage", unsecured loans were no longer liable for mortgage duty, which then excluded the transfer of an unsecured loan from nominal duty treatment under section 72.

A loan is a form of property that is a chose in action, being an intangible personal property right recognised by law that has no physical existence and does not confer possession of a tangible asset.

The transfer of property by way of sale is dutiable under section 63 of the Stamp Act. The amount or value of the consideration paid is assessable at the corresponding rate of duty set out in item 4(1) of the Second Schedule.

While not included in the Young and Young submission, full consideration of the policy issue surrounding the duty treatment of the transfer or assignment of mortgages or unsecured loans requires discussion on the transfer of property by way of default or foreclosure and by way of security, in order to ensure all avoidance concerns are adequately dealt with.

Some peripheral issues have also been identified from recent changes to the Consumer Credit Code in relation to electronic mortgages.

Conveyance of Property on Default or Foreclosure

In the majority of cases under the terms of a mortgage or loan that secures real property, and in accordance with section 108 of the *Transfer of Land Act 1983,* a lender has the right to apply to the Department of Land Information (DLI), in order to invoke a power of sale where a borrower is in default or alternatively, an order of the court may be sought, which is the only mechanism to exercise a power of sale in the case of old system land (land that does not come under the Torrens Title System). A sale may be conducted

by way of private treaty or public auction in order to recover the amount defaulted under the loan.

In order to prove that a mortgagor is in default, the mortgagee must provide a statutory declaration to the Department of Land Information (DLI). The information to be provided in the declaration is set out in the Land Titles Registration Practice Manual under item 2.2.5 (attachment 1).

If the mortgagee is unsuccessful in their attempts to sell the land, they may under section 121 of the Transfer of Land Act, make application to become a registered proprietor of the land formerly mortgaged, but only after DLI has offered the land for sale and a number of requirements have been fulfilled. These requirements are listed under item 3.6.3 of the Land Titles Registration Practice Manual (attachment 2).

Where this is the case, a transfer of land is required to be executed between the parties and must be stamped prior to registration by DLI, providing further protection to the revenue in these circumstances.

Accordingly, the mechanisms that currently exist within the Transfer of Land Act and the Stamp Act are considered to provide adequate protection from conveyance duty avoidance activity in relation to the use of mortgages and loans that secure land.

However, where a mortgage or loan secures non-land property that would be dutiable when transferred, avoidance opportunities could arise if mortgage duty were abolished. These opportunities are currently being examined.

Conveyance of Property by way of Security

Section 86 of the Stamp Act charges mortgage duty on the amount secured by a mortgage, in accordance with item 13 of the Second Schedule. Where property is transferred as security for a mortgage, an exemption from conveyance duty is provided, subject to the Commissioner being satisfied that the transfer of the interest in property is intended principally or solely as security under, or in accordance with, a mortgage.

Further, a person cannot give effect to, recognise, register or record an instrument that transfers an interest in property as security under, or in accordance with, a mortgage unless mortgage duty has been paid on the instrument of mortgage.

These provisions effectively exclude a transfer of property as security for, or in accordance with, a mortgage from being chargeable with conveyance duty in the first instance, but also allows the Commissioner to impose conveyance duty where he is not satisfied that this is the case.

The requirement to pay mortgage duty prior to registration creates an obligation on the taxpayer to lodge the document(s) for assessment, so the Commissioner is aware of such transactions and is able to make an assessment.

If mortgage duty were to be abolished in the future, avoidance issues would also arise in respect of a transfer of property under the terms of a mortgage (or supplemental agreement thereto), as the anti-avoidance provision in section 86(5) would no longer exist.

Again for the same reasons as discussed above in relation to a transfer by way of default or foreclosure, this issue is likely to only arise with respect to non-land property.

Consumer Credit Code

Amendments have been made to the Electronic Transactions Act Regulations (WA), which previously exempted the Consumer Credit (WA) Code from the operation of the *Electronic Transactions Act (WA) 1999*. Section 7 of the Electronic Transactions Act provides that a transaction is not invalid merely because it is in an electronic format.

The Consumer Credit (WA) Code Regulations prevent electronic mortgages being made while they are liable for duty in Western Australia and as such, transactions that fall under the Consumer Credit Code cannot be in electronic form as the transaction would be liable for mortgage duty under the Stamp Act.

However, if mortgage duty were to be abolished in the future, electronic mortgages can be made and with that, the potential for conveyance duty avoidance may increase.

Again, this issue will only arise with respect to non-land property as a mechanism currently exists within section 33 of the *Property Law Act 1969* which states that all conveyances of land or interests in land are void for the purpose of conveying or creating a legal estate unless they are made by deed.

In the case of non land property, section 31B does not create a requirement to lodge a dutiable statement as an instrument (although electronic) is in existence.

ANALYSIS OF ISSUES

Assessment of Assignment of a Loan under Section 72

There does not appear to be any clear policy rationale for assessing assignments of unsecured loans with conveyance duty, when assignments of mortgages are assessed with nominal duty. Extending the application of section 72 to apply nominal duty to the assignment of unsecured loans would be consistent with the amendments to the mortgage duty base. However, in making any decision to extend the application of this concession to unsecured loans, the prevalence of these types of arrangements and the commercial reasons for entering into them should be identified. It should also be noted that specific provisions will be necessary to ensure that any potential for avoidance by the use of contrived foreclosures and conveyances by way of security is controlled.

Members of the Technical Committee identified cases where unsecured loans might be transferred, including the sale of debts to a debt collection agency (although the transfer of trade debts is already exempt) and the sale of a business with assets consisting of unsecured loans. It was not considered that transfers of unsecured loans arising from intra-group transfers were very likely due to Commonwealth taxation consolidation rules, and the fact that such matters could be dealt with by journal entries.

Members of the Technical Committee also noted that this does not seem to be a widespread issue, as other mechanisms may be used that do not have the same duty consequences.

Conveyance of Property by way of Default or Foreclosure and by way of Security and the Consumer Credit Code

If a decision is made to abolish mortgage duty in the future, appropriate mechanisms will need to be put in place to prevent the avoidance of conveyance duty through the use of electronic mortgages under the Consumer Credit Code, in addition to the transfer of property by way of security and by way of default or foreclosure.

If mortgage duty were to be abolished prior to the introduction of the rewritten stamp duties legislation, consideration would need to be given to amending the Stamp Act to deal with these issues.

In relation to electronic mortgages, the Stamp Act could be amended to require the preparation and lodgement of a statement in respect of electronic instruments under the Consumer Credit Code. This could be achieved by amending section 31B to apply to transactions involving non land property, including the transfer of shares in land rich companies, units in a private unit trust and policies of insurance. Such changes would not capture partnership interests under the Stamp Act in its current form. As noted above, such provisions would not need to apply to transactions involving land.

In relation to the avoidance opportunities that would exist if transfers of unsecured loans were subject to concessional duty and mortgage duty were to be abolished, there seems to be two approaches to counter the avoidance of conveyance duty.

One approach would be to make the transfer of an unsecured loan or mortgage dutiable in the first instance. However, where the transfer is by way of security and the property is subsequently retransferred, a reduction of duty to a nominal fee could then be applied to provide a concession for bona fide arrangements.

Such reassessment provisions exist within section 53 of the Australian Capital Territory (ACT) *Duties Act 1999*, section 51 of the New South Wales (NSW) *Duties Act 1997*, section 32 of the Queensland (QLD) *Duties Act 2001*, section 60C of the South Australian ('SA') *Stamp Duties Act 1923,* section 34 of the Tasmanian *Duties Act 2001* and in section 32 of the Victorian (VIC) *Duties Act 2000,* but only in respect of land.

A potential problem with this approach is that transfer duty is imposed upfront. This would require the lender to incur a stamp duty burden in relation to non-land property, or incur the stamp duty burden until the loan is repaid and the property is re-transferred in the case of land, which may not occur for a number of years after the original transfer.

Another possible solution would be to include a provision such as that which currently exists in section 86(5) of the Stamp Act, which excludes a transfer of property by way of security, from being charged with conveyance duty, subject to the Commissioner being satisfied that the transfer of the interest in property is intended principally or solely as security under, or in accordance with, a mortgage. Such a provision would need to be extended to also apply to transfers in accordance with unsecured loans. This would deal with avoidance concerns in the short term, and this issue could be more fully

considered as part of the rewrite to ensure that the stamp duty base is adequately protected.

It is suggested that adequate protection in relation to transfers by way of defaults or foreclosures currently exists within the Transfer of Land Act and the Stamp Act. However, it is suggested that this could be improved and clarified as a part of the re-write of the Stamp Act by adopting the position that exists in the stamp duty legislation of New South Wales, Queensland and Tasmania, which specify a foreclosure of a mortgage over dutiable property to be a dutiable transaction. These provisions act as an anti-avoidance mechanism against parties entering into a loan or mortgage arrangement (and in some instances a supplemental agreement) with the intention of defaulting on the loan in order to transfer dutiable property without the imposition of transfer duty.

TECHNICAL COMMITTEE CONCLUSION

The Technical Committee acknowledged that issues in relation to transfers of mortgages and unsecured loans exist, and recommended that further analysis of the issues be undertaken as a part of the Stamp Act rewrite.

ATTACHMENT 1

Land Titles Registration Practice Manual 2 - 15 Edition 7.1 (January 2004)

2.2.5 TRANSFER BY MORTGAGEE EXERCISING POWER OF SALE

There is a special form printed for this purpose - Transfer form T4 (see Example 25 in Appendix A).

The mortgagee may exercise the power to sell, where the mortgagor defaults in payment or the observance of the covenants of the mortgage. The sale may be the whole or part of the land, by public auction or private treaty, with power in the mortgagee to subdivide and/or create easements.

A mortgagee's power to sell arises as a consequence of an expressed or implied right to do so by virtue of:

- section 57(1)(a) of the Property Law Act, where the mortgage, which must be a deed, has not been registered under the TLA (ie: may have been registered in the Deeds Office); or
- section 108 of the TLA, where the mortgagor has defaulted in payment of the principal sum and/or interest or has defaulted in the performance or observance of any covenant, express or implied, in a mortgage that has been registered under the TLA.

A condition precedent to a valid exercise by a mortgagee of the power to sell is the service of a notice on the mortgagor. This notice must clearly specify the default complained of and provide the mortgagor with an opportunity to remedy the default within the specified time of one month as required by Section 108 of the TLA, or such other period as may be provided for in the mortgage.

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The TLA also provides for a second form of notice to be served on the mortgagor in relation to "on demand" mortgages. There are two distinctly specific types of "on demand" mortgages:

- where the mortgage requires monies to be payable within a specific period. Failure to pay the monies within that period converts the mortgage into a "demand" mortgage where monies then become payable on demand; and
- where the mortgage is a "demand" mortgage in the first instance and monies are payable on demand. In such a case, the mortgage usually requires that if the mortgagor pays within a specific period, the mortgagee will refrain from issuing a demand notice calling up the principal sum and any interest outstanding.

Alternatively a demand mortgage may contain provisions requiring no repayment of either principal or interest until demand is made.

In both cases Section 107 of the TLA provides that a demand in writing pursuant to the mortgage requiring all monies to be paid immediately, is equivalent to a notice in writing.

The legal position is therefore as follows:

Where:

- a notice of default (issued pursuant to Section 106 of the TLA for a fixed term mortgage which provides for a specific period before default has occurred), or a written demand (issued pursuant to a Section 107 demand mortgage which requires that the principal and interest owing by the mortgagor are payable immediately); and
- the mortgagor has failed to pay the sum demanded or rectified the default specified; either
  - after the end of the period specified under Section 106 (being one month or such other period specified in the mortgage); or
  - after the demand has been made under Section 107; then, and in such a case, the mortgagee is entitled to exercise the power to sell under Section 108 of the TLA.

It must also be noted that, although many demand mortgages call for payment immediately or forthwith, in practice a period of at least one day must be allowed before a mortgagee exercises its power of sale.

This period of at least one day need not be specified in the notice. However to enable the Registrar of Titles to be satisfied that Sections 106 and 107 of the TLA have been complied with, the Registrar requires that a minimum period of at least one day elapses before a mortgagee exercises its power of sale pursuant to the demand notice.

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The required notice may be served:

- by personal delivery on the mortgagor(s); or
- by registered post sent to the address of the mortgagor(s) in the Register. It is Office practice to accept a later address if it is included in the mortgage (as part of the Register). Where there is more than one mortgagor separate notices to each must be sent. (Irving v Commissioner of Titles 1963 W.A.L.R. 67). Where the mortgagor is a corporation in liquidation, service of the default notice may be made on the Liquidator at the registered office of the Liquidator; or
- by registered post sent to the current address of the mortgagor(s); or
- by sending it to a facsimile number specified to the mortgagee by the mortgagor(s) in writing as being an address for the service of notices issued under this section; or
- by leaving the notice on some conspicuous part of the mortgaged premises.

When the mortgagee's transfer is lodged, it must be supported by a statutory declaration providing proof to the Registrar that the sale has occurred in strict compliance both with the terms of the mortgage, and the provisions of the TLA.

The statutory declaration is best made by the registered mortgagee, but may be made by the mortgagee's solicitor or agent who must then declare his or her means of knowledge for the statements made in the declaration to the satisfaction of the Registrar.

If the mortgage is granted to a number of mortgagees, the statutory declaration must be made by each of the mortgagees. If the mortgage is made to a bank or a corporate body, the statutory declaration must be made by a responsible officer for and on behalf of that bank or corporate body, who must declare that proper authority exists to make the statutory declaration on behalf of the bank or corporate body and that the declarant has a proper means of knowledge.

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The statutory declaration must state:

- the identity, authority and means of knowledge of the declarant;
- that a default (clearly specified in the notice or demand in writing) under the terms of mortgage has occurred, ie:
  - default in the payment of principal or interest (or both) and the date of default; and/or
  - failure to perform or observe the mortgagor's covenants in the mortgage setting out the default complained of and the date of default;
- that, in accordance with the terms of the mortgage, notice to remedy the default or demand to repay the monies secured was made on (date) and the default complained of has continued for one month or such other period specified in accordance Section 106 of the TLA after the service of a notice of the default;
- that the notice stated that unless the default was remedied within the time referred to above, that the mortgagee may exercise the mortgagee's power of sale;
- that the default complained of continued up to and including the date of sale. (the date of sale is defined as the date on which an unconditional and binding contract for sale came into effect); and
- that the default notice or demand in writing had been properly served in accordance with section 106 of the TLA by ..... (insert the specific mode of service used, as authorised under section 106.)
- that the mortgage is not affected by the Consumer Credit (Western Australia) Act 1996 or the Consumer Credit (Western Australia) Code.

It should be clear from the statutory declaration that the notice to the mortgagor clearly sets out the nature of the obligation imposed by the mortgage and the consequences of not

complying with these obligations.
If the statutory declaration does not clearly include the above, evidence supporting that statutory declaration will be requested. This evidence may include copies of the demand in writing or default notice and evidence of service in accordance with Section 106 of the TLA. It is not necessary to produce any other proof as to the manner in which the statutory notice is given but care should be taken to ensure that proper procedures are carried out and the evidence preserved. Where an application is made for an Order for Foreclosure, strict proof of service of notice is a necessary part of the application.
The effect of registration of a transfer by way of a mortgagee's sale is to remove any encumbrance notified on the certificate of title to the land sold which was lodged after the mortgage under which the power of sale was exercised.
The following are exceptions to the above general rule:

- absolute Caveats (subject to claim caveats may be shown as an encumbrance);
- memorials lodged pursuant to certain statutory provisions prohibiting dealing with the estate and interest of the registered proprietor. See Chapter 11 for a detailed list of Statutes;
- leases and easements to which the mortgagee has given an unqualified consent (Section 110); and
- notice of intention to take under the Land Administration Act 1997. Caveats must be withdrawn, or removed pursuant to Sections 138, 138B or 141A of the Transfer of Land Act.

Memorials must be withdrawn or the consent in writing of the body lodging the memorial obtained as an endorsement on the document itself. Where a consent is obtained, the memorial must be noted as an encumbrance. The leases and easement referred to above must be noted as encumbrances in common with encumbrances lodged prior to the mortgage under which the power of sale was exercised.
The consent of the taking authority or its delegate is required in cases where the land is encumbered by a Notice of Intention to Take (see paragraph 11.2.5).
Where the mortgagee sells parts of the mortgaged land and registers transfers at different times, a statutory declaration containing statements similar to those set out above must be produced with each transfer.
Where mortgagees sell land on the authority of a "double interest" mortgage (see paragraph 2.6.10), separate transfers for each interest will be required.
The mortgagee must not include any further consideration in the transfer, eg: by direction to another person or by love and affection etc. The power of the mortgagee to transfer is limited to the estate or interest of the mortgagor and does not extend to any further transaction. A further sale must be by separate transfer.
Where the defaulting mortgagor is one of two or more joint tenants, the exercise of the power of sale of the mortgagee would sever the joint tenancy and result in the issue of a separate title for the transferee for the share of the former proprietor converted to a tenancy in common with the remaining tenant(s).
The mortgagee may not be the purchaser in pursuance of a power of sale. The right to "buy in at auction" afforded by the TLA is only designed to protect the mortgagee at auction sales where the sale price might be too low to cover the mortgage debt. Should the mortgagee be unable to sell the land by public auction and default continues for six months, the mortgagee is entitled to apply to the Commissioner for an Order for Foreclosure.
It is recommended that a mortgagee's sale be by public auction and if that sale is unsuccessful the auctioneer's certificate should be obtained at that time.

Note: Where a mortgage has been registered under the TLA, the use of the power of attorney provisions in the mortgage by the mortgagee to appoint an attorney (when default has occurred) to sell the land is discouraged. The Registrar of Titles will only register a transfer by a mortgagee exercising a power of sale in strict accordance with the processes of the TLA.
If the mortgagees power of sale is in relation to a mortgage under the Consumer Credit (Western Australia) Code, see paragraph 2.2.6.

ATTACHMENT 2

3.6.3 REQUIREMENTS

Before a foreclosure order may be granted it must be proved that:

- default had occurred and continued for a period of six months after the time for payment of the mortgage;
- the land had been offered for sale at public auction and no bid or an insufficient bid (state the highest amount) had been received;
- notice of the intention to apply for a foreclosure order had been served on the mortgagor (registered proprietor); and
- notice of intention to apply for a foreclosure order had been served on every encumbrancer subsequent to the mortgage the subject of the application and, in the case of memorials, that these have either been withdrawn or the written consent of the body lodging the memorial has been obtained.

4m. Conveyance Duty – Lodgement and Payment Provisions

ISSUE

Submissions have been made as part of the State Tax Review to amend the current lodgement and payment provisions contained within the *Stamp Act 1921*, particularly in relation to conditional contracts. The submissions each outline concerns with the current provisions and propose amendments to the lodgment and payment provisions and the conditional contract provisions.

The particular issues raised in the submissions were:

- **Australian Institute of Conveyancers WA Division (AIC)** (Submission 106)
    - The AIC recommends that liability for stamp duty should arise on the date of settlement of the property transaction.
    - Furthermore, this submission proposes that duty should be payable within three months of settlement date.
- **Real Estate Institute of Western Australia (REIWA)** (Submission 84)
    - REIWA recommends that the payment of stamp duty should be required on the date of settlement of the property transaction.
- **Mr Grahame Young** (Submission 99)
    - Mr Young recommends that all contracts, whether or not conditional, should be lodged within two months of execution.
    - Furthermore, this submission proposes that the duty on conditional contracts should be payable:
        - within one month of assessment if possession is taken or the contract completed before that time;
        - within seven days of taking possession or completing the contract thereafter;
        - but in any event, within two years of first execution of the contract.

- **Chamber of Minerals and Energy of Western Australia (CME)** (Submission 82)
    - The CME recommends that the definition of "eligible conditional contract" should be extended to all transactions which are liable for ad valorem duty, such as agreements to pay lease premiums.
- **The Law Society of Western Australia** (Submission 123)
    - The Law Society suggests that the current conditional contract provisions should be simplified and be aligned with the time periods that commercially apply to due diligence and approval periods.
- **The Urban Development Institute of Australia (WA Division) (UDIA)** (Submission 125)
    - The UDIA recommends that the payment provisions should be extended to a maximum period of three years after the date on which the contract was first executed.
    - Furthermore, the UDIA recommends that the current simultaneous put and call option provisions should be amended so that they are a form of conditional contract, and subject to the alternative lodgement and payment periods.

CURRENT POSITION

Prior to the development of the *Taxation Administration Act 2003* and the subsequent Stamp Act amendments, any contract (conditional or otherwise) had to be lodged within three months of first execution or the occurrence of the transaction or event to which the statement related. The duty was then required to be paid within a further three month period of the date of the assessment notice.

As part of the Taxation Administration Act development, the Stamp Act lodgement and payment periods were shortened. When the Bill was introduced into Parliament, a taxpayer had a total of four months to lodge an instrument and pay duty. However, in response to issues raised during consultation, the Government replaced this with a two month lodgement and one month payment requirement. Section 17B(2) of the Stamp Act provided that a person who is, or may be, liable to pay duty on an instrument must lodge the instrument with the Commissioner within two months after the

date on which the instrument was first executed. Section 17A(2) of the Stamp Act provided that duty was payable within one month after the date of the assessment notice. The Commissioner then has the power to approve an arrangement to extend the time for the payment of stamp duty under section 47 of the Taxation Administration Act.

To address concerns with the shortened periods, Revenue Ruling SD 30.1 was introduced as an interim measure to allow extensions of time to pay stamp duty for certain types of conditional contracts. Following the conduct of a review involving extensive consultation, amendments were introduced from 1 July 2004, to legislate alternative lodgement and payment periods for certain conditional contracts. The provisions were designed to take account of specific industry identified issues. In addition, the design of the provisions removed the need to lodge cancellation requests in respect of the majority of conditional contracts, resulting in the removal of a substantial overhead being carried by the conveyancing industry in relation to failed transactions (with no income generated from this activity).

These alternative lodgement and payment arrangements operate such that contracts that meet the definition of an "eligible conditional contract" and fall into one of five specific categories are able to access the alternative arrangements. An eligible conditional contract is a contract for the sale of property where completion of the contract is conditional on the happening of one or more events that are beyond the control of the parties, or related parties, to the contract except to the extent that they are required to use their best endeavours to assist the happening of the event.

Five categories of eligible conditional contracts were identified, with specific lodgement and payment arrangements applying to each to accommodate the industry identified need of each taxpayer group. These are detailed below.

1. General Conditional Contract

A general conditional contract is:

- an eligible conditional contract, as defined; and
- a contract, where its completion is conditional on the happening of one or more events specified in the contract.

If one or more "event" is present in a conditional contract, and the contract is also an eligible conditional contract, the contract is eligible for the alternative arrangements for general conditional contracts. The "events" are outlined in the legislation and include conditions such as the sale of another property by the purchaser and the obtaining by the purchaser of approval from a regulatory body.

The alternative arrangements that apply to general conditional contracts are:

- the due date for lodgement of the instrument is the earlier of one month from the date the contract becomes unconditional or twelve months from the date of execution; or

- if the contract becomes unconditional within one month of the date of execution, the instrument is to be lodged within two months of execution. This condition has been inserted to prevent situations where taxpayers could be disadvantaged by the alternative periods in relation to conditional contracts that become unconditional in a short period following execution.

In addition to the extended lodgement periods, general conditional contracts not carried into effect within twelve months from the date of execution due to the non-fulfilment of a condition were made exempt from the requirement to be lodged for cancellation. Also, the liability to pay duty was removed on these contracts.

Conditional contracts where the parties to the contract (that is, a vendor and a purchaser) are related are required to be lodged within two months of execution of the instrument. This condition has been included as it is usual for the Office of State Revenue to require additional information for valuation of property and calculation of duty before an assessment can be issued.

2. Off-the-plan Conditional Contract

During the consultation period for the conditional contract provisions, industry groups indicated that the lodgement and payment provisions applicable to general conditional contracts did not reflect the special need of off-the-plan conditional contracts. As such, differing lodgement and payment provisions were inserted.

To be an off-the-plan conditional contract, the conditional contract must be:

- dependent for completion on the happening of one or more of the events contained in the definition of general conditional contract; and

- a contract that includes provision for the sale of a strata lot and the construction of a unit on the lot after the contract is executed. The unit can be for residential, commercial or mixed-use purposes.

The general conditional contract provisions did not take into account that off-the-plan contracts were increasingly common, and date of execution of the contract and date of occupancy were often distant. As such, lodgement and payment of duty in accordance with the general conditional contract provisions was burdensome, as many homeowners would not have occupancy or finance.

Off-the-plan conditional contracts are required to be lodged within two months of the date of execution and have a date for payment of the assessment that is two years from the date of execution.

Requiring the contract to be lodged within two months of execution was considered necessary to protect the revenue from possible avoidance from the use of on-sales in the period prior to the contract being required to be lodged with the Office of State Revenue.

The period of two years from execution of the instrument to pay the duty assessed is a reflection of the amount of time normally required before titles can be issued to purchasers. There is also an expectation that assessments may be paid earlier so that transfers of the property can be effected.

3. Subdivision Conditional Contract

During the consultation period for the conditional contract provisions, industry groups indicated that the lodgement and payment provisions applicable to general conditional contracts did not reflect the special need of subdivision conditional contracts. As such, differing lodgement and payment provisions were inserted.

Subdivision conditional contracts have the following characteristics:

- completion of the contract is dependent on the happening of one or more of the events contained in the definition of general conditional contract; and

- completion is also conditional on approval from the relevant authorities to subdivide the land or part of the land. The approval is to be obtained by the purchaser.

Approvals that are to be obtained include those for the Metropolitan Regional Scheme, Town Planning Scheme, rezoning and subdivision.

Subdivision conditional contracts are to be lodged within two months of the date of execution and have a date for payment of the assessment that is two years from the date of execution.

Requiring the contract to be lodged within two months of execution was considered necessary to protect the revenue from possible avoidance from the use of on-sales in the period prior to the contract being required to be lodged with the Office of State Revenue.

The period of two years from execution of the instrument to pay the duty assessed is a reflection of the amount of time normally required before titles can be issued to the purchaser. There is also an expectation that assessments may be paid earlier so that transfers of the property can be effected.

4. Farming Land Conditional Contract

To be a farming land conditional contract, the conditional contract must be:

- dependent for completion on the happening of one or more of the events contained in the definition of general conditional contract; and

- a contract that is solely or principally for the sale of farming land, or a primary produce contract.

A primary produce contract is defined as a contract, completion of which is affected by, or subject to, an activity that constitutes primary production. Examples of activities that constitute primary production include growing and harvesting of crops, shearing and selling sheep and medicating animals and completing a quarantine period before being able to sell them.

Farming land conditional contracts are to be lodged within two months of the date of execution and have a date for payment of the assessment that is twelve months from the date of execution.

Requiring the contract to be lodged within two months of execution was considered necessary to protect the revenue given the often high value of such transactions.

During the consultation period for the conditional contract provisions, farming groups indicated that there are specific periods of the year where farms are offered for sale and then settled, which corresponds with the harvest season. As a result, the farming land conditional contract provisions reflect a twelve month period to cover the amount of time normally taken for primary activities to be completed prior to settlement taking place.

5. Mining Tenement Conditional Contract

The definition of a mining tenement conditional contract requires a conditional contract to be:

- dependent for completion on the happening of one or more of the events contained in the definition of general conditional contract; and

- a contract for the sale of a mining tenement or a right held under the *Mining Act 1978* or the *Mining Act 1904*. Alternatively, the contract may be for the sale of a mining tenement or right held under a law of the Commonwealth, another State or another country.

Mining tenement conditional contracts are to be lodged within two months of the date of execution and have a date for payment of the assessment that is twelve months from the date of execution.

Requiring the contract to be lodged within two months of execution was considered necessary to protect the revenue given the often high value of such transactions.

The period of twelve months from execution of the instrument to pay the duty assessed is based on the time required for valuation purposes. There is also an expectation that assessments may be paid earlier so that transfers of the property can be effected.

ANALYSIS OF ISSUE

Stamp Duty Liability to arise at Date of Settlement

The AIC has suggested that the stamp duty liability on all contracts arise at the date of settlement, however, this proposal represents significant risk to State revenue. In particular, sales occurring between the offer and acceptance date and settlement date may not be charged with duty if the duty is assessed at the date of settlement. For example, if a person buys a unit in an uncompleted off-the-plan development, the person is generally unable to proceed to settlement until the property is completed and a title is issued. During the completion period, the person owns the rights to the property which are protected by the contract. The purchase price is locked in at the contract date, but the value of the property generally increases during the completion period of the development. Should the person wish to speculate and realise that value increase, the interest in the property can be on-sold to another person prior to settlement taking place. Under the current system (where stamp duty is linked to the date of the offer and acceptance contract)

two stamp duty liabilities arise, on the basis that two completed transactions take place (one where the "property" is the interest in the contract, and the other where the property is the completed development). If the duty liability were to arise at the date of settlement, duty on a genuine sale could be completely avoided by structuring the transfer documents to reflect a transfer of property from the vendor in the first transaction to the purchaser in the second transaction. This would likely result in significant revenue loss as parties structure transactions and settlements to take advantage of a legislative weakness.

It should also be noted that the Stamp Act does not necessarily require stamp duty to be paid by or at the time of settlement. Documents that are lodged with the Commissioner are not released without duty being paid. However, in the case of the majority of eligible conditional contracts, it is not the Stamp Act that requires duty to be paid before settlement. For example, in the case of a general conditional contract that becomes unconditional within twelve months of execution, the Stamp Act requires the document to be lodged within one month of it becoming unconditional. However, if settlement occurred within a month of the contract becoming unconditional, but before the document is required to be lodged with the Office of State Revenue, there is nothing in the Stamp Act that would require the duty to be paid prior to settlement.

However, the Act does require stamp duty to be paid before the document is registered and places an obligation on any person whose duty it is to receive or register a document to ensure that it is stamped prior to accepting the document for registration. In the context of property conveyances, stamp duty must be paid at the time a document is lodged with the Registrar of Titles for the transfer to be registered on the title to the property.

While the Stamp Act requirement relates to the registration of a document by the Registrar of Titles, there are a number of commercial practices within the industry which require a purchaser to pay stamp duty before the settlement of the property takes place. In particular, it seems many of these practices are driven by the financial institutions that will not accept an unstamped instrument at settlement due to potential risks that may result in the financial institution not having adequate security over the property. Furthermore, the Joint Form of General Conditions for the Sale of Land (REIWA/Law Society of Western Australia publication) states that duty must be paid before settlement, in accordance with clause 3.3. Unless this condition is overwritten by agreement between the parties, the payment of duty prior to settlement becomes a contractual issue between the parties.

A further issue with changing the point of liability to the settlement date is the risk to the revenue of stamping documents prior to settlement so that settlement can proceed, without stamp duty having been paid at the time of stamping. There would be significant risk to the revenue if an interest could be transferred on the title without the payment of stamp duty. If the stamp duty assessment was not subsequently paid, the only way the stamp duty could be recovered would be to lodge a memorial in the case of land (which is currently only possible where a cheque is dishonoured), which would be costly and time-consuming. If the property involved was property other than land, the stamp duty could only be recovered through a debt collection process, which would involve significant administration costs for the Office of State Revenue. There is a serious risk to the revenue posed by this suggestion that none of the submissions have covered, but is likely to be at the forefront of any Government decision to adopt the alternate approach suggested.

Stamp Duty to be Payable at Date of Settlement

REIWA has suggested that stamp duty be payable at the date of settlement for a property transaction. Currently, liability on an instrument arises when the instrument is first executed and duty is payable within one month after the date of the assessment notice. Payment of stamp duty may therefore be required before settlement takes place in some instances where there is a longer settlement period (however, the conditional contract provisions aim to accommodate these situations where possible).

This proposal would create significant administrative problems, as the date of settlement is often subject to change. It would therefore be difficult to determine the appropriate date for the payment of stamp duty when issuing an assessment notice, and there would also be difficulties if the settlement date was changed after the assessment notice had been issued. It is likely that avoidance practices could be structured by avoiding the need to settle (ie. novating contracts, powers of attorney etc).

Lodgement and Payment - Conditional Contracts

Submissions to the State Tax Review regard the current conditional contract provisions as unreasonably burdensome and complicated. The AIC provide examples of situations where taxpayers have incorrectly considered a contract as a general conditional contract, whereas it is actually an off-the-plan conditional contract. As the contract is still conditional twelve months after execution, the taxpayer must lodge the document as the extended time period for lodgement has expired. To utilise the twenty-four month extension of time to pay period applicable to off-the-plan conditional contracts, the taxpayer must pay late lodgement penalties, as the contract has

been lodged outside the two month lodgement period. This confusion specifically relates to contracts that are conditional on the vendor registering a plan of subdivision or strata plan (section 8(1)(j)), off-the-plan conditional contracts (section 10), and subdivision conditional contracts (section 12). While there is confusion in relation to sections 8(1)(j) and 12, there is a clear distinction between the two sections. Section 8(1)(j) relates to the vendor registering a plan, while section 12 relates to the purchaser obtaining approval to subdivide land.

The Office of State Revenue (OSR) considers that aligning the lodgement and payment provisions for sections 8(1)(j), 10 and 12 would further increase confusion and result in increased compliance costs to taxpayers and settlements agents. Since the introduction of the conditional contract provisions, the number of documents lodged in accordance with the incorrect section has steadily decreased, representing an increased understanding of the provisions by settlement agents.

However, it has recently been identified that a number of conditional contracts that were incorrectly identified as general conditional contracts up to 12 months ago have been lodged, with penalties imposed for late lodgement. This has highlighted the fact that certain taxpayers and settlement agents may still not fully understand the differences in the conditional contract lodgements and payment provisions. In a continuing effort to clarify the lodgement and payment requirements for eligible conditional contracts, the Office of State Revenue has issued Circular 82 - Lodgement and Payment Requirements for Certain Conditional Contracts (copy attached). The circular is intended to provide taxpayers and settlement agents with further information to help them distinguish between general conditional contracts and off-the-plan conditional contracts. The circular also refers to OSR offering a number of customer education sessions on conditional contracts. This is part of the OSR's continuing efforts to educate customers in relation to the conditional contract provisions to further minimise the number of incorrectly lodged documents.

The CME has suggested that the definition of an "eligible conditional contract" be extended so that all transactions that are liable for ad valorem conveyance duty are included within the definition, such as agreements to pay lease premiums. This suggestion appears to be consistent with the policy of the conditional contract provisions and is unlikely to cause any significant problems. It should be noted that Draft Revenue Ruling TAA 1.0 (copy attached) would effectively extend the payment period for duty on lease premiums, provided the extension is not unreasonable. Revenue Ruling TAA 1.0 states that if an instrument is assessed with duty as a lease (premium) and would have been classified as an eligible conditional contract had the

instrument been a contract for sale, the duty may be subject to a tax payment arrangement.

The Law Society of Western Australia suggests that the conditional contract provisions be aligned with the time periods that commercially apply to due diligence and approval periods. However, it should be noted that the current conditional contract provisions allow a contract conditional on due diligence enquires and a range of other conditions to be lodged one month after due diligence conditions have been met or within twelve months of execution (whichever is earlier). These conditions and the corresponding lodgement and payment periods were developed in consultation with a number of industry groups and represents a balance between reducing administrative costs and protecting the revenue base. There is also an ability to prescribe other events to allow other classes of conditional contracts to access the alternate lodgement and payment periods. To date there have been no requests to prescribe other types of contracts. However, should it be identified that other specific conditional contracts should be able to access these alternate arrangements, then the current list of conditions could be amended. However, it should be recognised that extending the time for payment may potentially put the State's revenue at risk as a taxpayer may not be able to meet their tax obligations in the future (such as because of bankruptcy).

Mr Young's submission to the State Tax Review suggests the conditional contract provisions be replaced with a single two month lodgement provision for all contracts, conditional or unconditional. However, it should be acknowledged that the 1 July 2004 conditional contract amendments have reduced the compliance costs of taxpayers and the administrative costs of the Office of State Revenue associated with applications for extension of time arrangements and reductions of duty on conditional contracts that do not proceed due to non-fulfilment of a condition. Before the 1 July 2004 amendments, contracts that did not proceed due to the non-fulfilment of a condition of the contract were required to be presented to the Commissioner for reassessment of the duty liability to nil, provided that no “benefit” was received from the cancellation of the contract. The new arrangements have reduced this considerable administrative burden, as such contracts are no longer required to be lodged for the cancellation to be endorsed.

Furthermore, Mr Young suggests that payment be made within one month of assessment if possession is taken or the contract completed before that time, or within 7 days of taking possession or completing the contract thereafter. It should be noted that as stated above, other commercial requirements may make this suggestion impractical as many financial institutions are unlikely to accept an unstamped (and thus not capable of immediate registration)

document. Unstamped documents do not provide the financial institution with sufficient security over the property, and the financial institution may not allow the homeowner to take possession of the property without a stamped document.

Extending the Payment Period

The UDIA has suggested that the payment period for all eligible conditional contracts be extended to three years rather than the current one or two year periods. During the consultation period for the 2004 amendments, industry groups agreed that a maximum payment period of two years was appropriate on the basis that they reflected commercial practices at that time. It should be noted that any decision to extend these periods may potentially put the State's revenue at risk, as taxpayers may not be able to meet their tax obligations in the future.

Put and Call Options

The UDIA has suggested that put and call option arrangements be treated as a form of conditional contract so that the stamp duty liability does not become payable until the contract becomes unconditional.

A call option is a contract that operates for a specific period of time that gives the right to buy property at a fixed price. A put option is a right held by a person to sell property during a certain period at a fixed price. If a put option and a call option are in existence over the same property at the same time they effectively create a contract for sale.

Amendments to the Stamp Act were made as part of the Business Tax Review to change the method of assessment of simultaneous put and call options. Before the amendments were introduced, put and call option arrangements could be used to delay the payment of stamp duty. When the option agreement was first executed, duty was payable only in relation to the option fee. Conveyance duty on the purchase price of the property was not payable until the transfer was executed. Thus, taxpayers were able to defer the payment of conveyance duty until the property was transferred, rather than when the put and call option was first executed.

Effective 1 January 2004, where a put and call option is in existence at the same time, over the same property for a given consideration (whether documented or undocumented), duty is payable on the call option as if it were an agreement to convey the property.

However, with the introduction of the conditional contract provisions, the need to enter into put and call option arrangements to defer the payment of

stamp duty should not exist. It is therefore not clear as to whether there are any genuine commercial reasons that would necessitate extending the time for payment of duty on simultaneous put and call options. Further, such a suggestion is inconsistent with the intention behind the put and call option provisions, which was to prevent such arrangements being used to delay the payment of stamp duty.

TECHNICAL COMMITTEE CONCLUSION

Members of the Technical Committee expressed differing views as to the perceived complexities of the conditional contract provisions. However, the Technical Committee members agreed that an effective education strategy was necessary to reduce instances of instruments being lodged in accordance with the incorrect provision, and a more accommodating penalty policy should be considered where instruments were not lodged within required timeframes because of an error in identifying the type of contract involved.

Members of the Technical Committee also noted that the requirement for stamp duty to be paid prior to settlement posed a financial burden on purchasers, who may not have access to funds to meet their stamp duty liability prior to settlement. One solution to overcome this problem would be for the Government to allow a transfer to be registered prior to stamp duty being paid. However, it was acknowledged that this would place a significant amount of State revenue at risk. It was also noted that the requirement for stamp duty to be paid prior to settlement may not necessarily be created by the Stamp Act, but may be a result of the commercial requirements of financial institutions or the conditions of REIWA's Joint Form of General Conditions. Therefore, the members of the Technical Committee suggested that this issue might benefit from a workshop with representatives from REIWA, the Law Society, financial institutions and settlement agents to discuss ways in which the financial burden on purchasers to meet their stamp duty obligations prior to settlement could be alleviated.

ATTACHMENT 1

REVENUE RULING TAA 1.0

ADMINISTRATION TAX PAYMENT ARRANGEMENTS

RULING HISTORY

Revenue Ruling	Issued
TAA 1.0	Xxxx 2006

INTRODUCTION

1. This revenue ruling deals with the exercise of the Commissioner of State Revenue's discretion under section 47 of the *Taxation Administration Act 2003* ("TAA") to approve arrangements for extensions of time to pay tax and arrangements for the payment of outstanding tax by instalments (collectively referred to as "tax payment arrangements").

2. Tax is due for payment on the date fixed by or worked out in accordance with the relevant taxation Act and, if the relevant taxation Act does not make provision for the date of payment, the tax is due for payment on the date specified in the assessment notice [TAA, section 45]. Where tax is payable as a result of a reassessment, the due date for payment must be at least 28 days after the date specified in the assessment notice [TAA, section 24(5a)].

3. If tax is not paid by the due date, the taxpayer is liable to pay penalty tax equal to 20% of the amount outstanding on the due date [TAA, section 27].

4. The Commissioner may commence legal proceedings (in any court of competent jurisdiction) to recover tax that is not paid by the due date [TAA, section 60].

5. The fact that the taxpayer may dispute the assessment does not suspend or defer their obligation to pay the disputed tax by the due date [TAA, section 33] and the Commissioner is entitled to pursue legal proceedings to recover the outstanding tax notwithstanding that the taxpayer has lodged an objection to the assessment or has applied to the State Administrative Tribunal for a review.

6. If a taxpayer requests more time to pay the tax (whether the

assessment is disputed or not), the taxpayer may apply to the Commissioner for approval of an arrangement to extend the time for payment or approval of an arrangement for payment of the outstanding tax by instalments. An application may be made at any time, either prior to the due date for payment of the tax or after the due date has passed.

7. If a tax payment arrangement is approved, the Commissioner will normally refrain from commencing or continuing legal proceedings to recover the outstanding tax provided that the taxpayer makes payments in accordance with the arrangement and complies with all other conditions of the arrangement.

8. Tax payment arrangements may include:

   8.1 conditions agreed with the taxpayer providing for the payment (and allowing for the remission) of interest at the prescribed rate or some other rate fixed by or under the arrangement with the agreement of the taxpayer; and

   8.2 any other conditions the Commissioner considers appropriate.

9. This revenue ruling specifies the guidelines that the Commissioner will follow when considering whether to approve a tax payment arrangement and also when considering the conditions to be included in a tax payment arrangement. However, these guidelines are not intended to restrict the exercise of the Commissioner's discretion under section 47 of the TAA and, with each application for approval, the merits of the particular case will be considered by the Commissioner.

RULING

General matters

10. All applications for approval of a tax payment arrangement should be made in writing (including by email), with the exception of matters specified in paragraph 29.

11. Where an application for approval of a tax payment arrangement is made after the due date for payment of the tax has passed, the taxpayer is liable for penalty tax under section 27 of the TAA. This amount should be included in the application seeking approval of the tax payment arrangement.

12. An application seeking approval of a tax payment arrangement must set out the reasons that the taxpayer wants more time to pay the outstanding tax [TAA, section 47(2)].

13. Generally, tax payment arrangements are approved where:

   13.1 the applicant demonstrates an inability to raise sufficient

funds to pay the outstanding amount by the due date;

13.2 the applicant demonstrates that payment of the outstanding amount by the due date would cause financial hardship;

13.3 the applicant advances other convincing reasons for requiring a tax payment arrangement; or

13.4 in the case of stamp duty, the instrument or transaction has been assessed with duty as a lease (premium) and would have been classified as a general conditional contract that is either a farming land conditional contract, off the plan conditional contract, mining tenement conditional contract or subdivision conditional contract, if the instrument or transaction had been a contract for the sale of property as required by section 6 of the *Stamp Act 1921*.

14. The Commissioner will also take into account the following matters when considering whether or not to approve a tax payment arrangement:

14.1 the past payment history of the taxpayer;

14.2 whether or not the prospects of recovery of the full amount of the tax debt in the longer term will be diminished;

14.3 whether or not the amount of the taxpayer's total tax debt(s) is likely to increase in the future; and

14.4 any other matter the Commissioner considers relevant in the circumstances of the particular case.

15. Tax payment arrangements will not usually be approved where the taxpayer has an unsatisfactory history of compliance in relation to the payment of tax and/or the lodgement of instruments or returns under a taxation Act. However, each case will be considered on its merits.

16. The application should include information concerning the availability of funds to pay the outstanding tax and any other information or documents the taxpayer considers relevant. Where the Commissioner considers that further investigation into the financial status of the taxpayer is necessary, detailed financial statements will usually be required.

17. In each case the applicant must demonstrate a capacity to pay the outstanding amount in accordance with the proposed tax payment arrangement.

18. A tax payment arrangement will generally only be approved where the taxpayer agrees to the payment of interest on the outstanding tax at the prescribed rate under the *Taxation Administration Regulations 2003*.

19. Where the tax payment arrangement covers penalty tax, interest will generally apply to both the primary tax payable and the penalty tax

payable.

20. A tax payment arrangement may include other conditions the Commissioner considers appropriate. For example, the taxpayer may be required to provide the Commissioner with an acceptable form of security for the outstanding tax, or the taxpayer may be required to provide the Commissioner with financial or other relevant information at regular intervals.

21. A tax payment arrangement may also include a condition that the Commissioner is able to amend the tax payment arrangement at any time by notice to the taxpayer [TAA, section 47(4)]. For example, the Commissioner may wish to be able to adjust the amount or timing of instalment payments in circumstances where the taxpayer's financial situation improves or deteriorates.

22. Tax payment arrangements will generally be confined to the shortest period that is consistent with the ability of the taxpayer to meet the repayment obligations.

23. In general, tax payment arrangements will be approved for a fixed period of time rather than for an indeterminate period.

24. Where the term of the proposed tax payment arrangement is longer than six months, detailed financial statements in support of the application for approval will usually be required.

25. In the circumstances specified in paragraph 13.4 relating to stamp duty on a lease (premium), tax payment arrangements seeking an extension of time to pay will generally be approved for a period up to 12 months from the date of execution of the instrument or of the date of the relevant transaction.

26. Where the taxpayer does not provide sufficient information to enable the Commissioner to make an informed decision on the application for approval, and the taxpayer has failed to provide additional information on request by the Commissioner within a reasonable period, the application will be denied.

Pay-roll tax and stamp duty on hire of goods and insurance

27. Tax payment arrangements for pay-roll tax, stamp duty on hire of goods and stamp duty on insurance policies will usually only be approved in respect of the payment of Commissioner's assessments that relate to tax payments for past years and/or periods.

Land tax

28. The *Land Tax Assessment Regulations 2003* set out arrangements for the payment of land tax in one discounted payment [regulation 6]; in two instalments [regulation 7]; and in three instalments [regulation 8]. In addition, regulation 9 sets out other arrangements for paying the assessed amount of land tax. Nothing in the regulations affects

the payment of land tax under a tax payment arrangement [regulation 4].

29. As noted in paragraph 10, applications for approval of a tax payment arrangement should be made in writing (including by email). However, where an extension of one month or less to pay land tax is proposed, applications do not need to be made in writing, but the taxpayer must provide sufficient information to allow the Commissioner to determine whether paragraphs 13 and 14 of this ruling would apply to the request.

30. Where an application made before the due date for an extension of time of one month or less is approved, the approval will be noted on the OSR computer system, but written notice will not be given to the taxpayer unless it is requested.

31. Where an approval is granted under paragraph 30, the penalty tax applicable under section 27(1) of the TAA will generally be remitted entirely, if the full amount of outstanding tax is paid on or before the extended due date.

32. Where an application made after the due date for an extension of time of one month or less is approved, the amount will include applicable penalty tax. The approval will be noted on the OSR computer system, but written notice will not be given to the taxpayer unless it is requested.

33. In addition, where approval is granted under paragraphs 30 or 32, the Commissioner will generally agree to fix the interest rate at 0%.

34. Where an approval is granted under paragraphs 30 or 32, but the full amount outstanding is not paid on or before the extended due date, the tax payment arrangement will be cancelled and the full amount of primary tax and penalty tax will become immediately due and payable.

35. A tax payment arrangement may also be approved for the payment of land tax where:

    35.1 the taxpayer receives a land tax assessment notice within nine months from the date of issue of the previous year's assessment notice;

    35.2 the taxpayer has not contributed to the delay in making either assessment; and

    35.3 the taxpayer applies for approval of a tax payment arrangement indicating difficulty in meeting the payment obligations in these circumstances.

36. If a tax payment arrangement is approved under paragraph 35, the date for payment of the amount due, or where applicable, the last payment date of an instalment arrangement, will generally be

calculated in accordance with the following table:

NUMBER OF MONTHS BETWEEN ASSESSMENT NOTICES	TAX PAYMENT ARRANGEMENT DUE DATE FOR PAYMENT OF THE LAST AMOUNT DUE OR LAST INSTALMENT
Greater than 0, but less than or equal to 1	11 months from issue date of assessment notice
Greater than 1, but less than or equal to 2	10 months from issue date of assessment notice
Greater than 2, but less than or equal to 3	9 months from issue date of assessment notice
Greater than 3, but less than or equal to 4	8 months from issue date of assessment notice
Greater than 4, but less than or equal to 5	7 months from issue date of assessment notice
Greater than 5, but less than or equal to 6	6 months from issue date of assessment notice
Greater than 6, but less than or equal to 7	5 months from issue date of assessment notice
Greater than 7, but less than or equal to 8	4 months from issue date of assessment notice
Greater than 8, but less than or equal to 9	3 months from issue date of assessment notice

37. The Commissioner will usually only approve a tax payment arrangement under paragraph 35 on the condition that the taxpayer agrees to pay interest at the prescribed rate. However, if payment is made by the due date (or each of the due dates in the case of an instalment arrangement) as set out in the tax payment arrangement, the interest will usually be remitted in full.

38. Where the Commissioner approves a tax payment arrangement, the discounted payment under regulation 6 of the Land Tax Assessment Regulations is no longer available, as regulation 6 only applies in the circumstances where the taxpayer makes the payment on or before the original due date.

Remission of interest

39. In addition to the circumstances specified elsewhere in this ruling, the Commissioner may remit some or all of the interest payable under a tax payment arrangement if compelling evidence of exceptional circumstances is provided. Each case will be considered on its merits, however, situations such as the death of the taxpayer (or an immediate family member) or hospitalisation of the taxpayer due to a medical emergency may be considered as exceptional circumstances.

40. In respect of tax payment arrangements relating to stamp duty on a lease (premium) referred to in paragraph 13.4, a tax payment arrangement will usually only be approved on the condition that the taxpayer agrees to pay interest at the prescribed rate. However, the interest will generally be remitted in full if the entire amount of the tax owing is paid on or before the due date specified in the tax payment arrangement.

41. If the total amount of interest payable under a tax payment arrangement is $20 or less, it will usually be remitted in full, unless there are exceptional circumstances.

Where objection lodged

42. Where an application for approval of a tax payment arrangement is made by a taxpayer who lodges an objection, the guidelines referred to in relevant paragraphs above will apply as well as the following paragraphs.

43. Subject to paragraph 45, where a taxpayer lodges an objection against an official assessment or a reassessment within the 60 days or further period approved by the Commissioner under section 36 of the TAA, and applies for approval of a tax payment arrangement to extend the time for payment until their objection is determined by the Commissioner, the following will usually apply:

    43.1 approval will be given to a tax payment arrangement extending the time for payment of the tax until the objection is determined, unless the Commissioner considers that the objection is not genuine and was only lodged in order to defer the time for payment;

    43.2 approval of the tax payment arrangement will be subject to the taxpayer agreeing to pay interest under the arrangement at the prescribed rate;

    43.3 the payment date for the tax payment arrangement will be 14 days from the date of the notice determining the objection;

    43.4 where the objection is subsequently disallowed, any penalty tax payable for late payment under section 27 of the TAA will

usually be remitted in full provided that the tax is paid by the date specified in the tax payment arrangement (or each of the dates specified in cases where an instalment arrangement is involved).

44. Where a tax payment arrangement has been approved, and the objection is subsequently disallowed, there will generally be no remission of any interest required to be paid under the tax payment arrangement.

45. Return based taxes usually involve an ongoing requirement to lodge returns and pay tax on a regular basis. When a dispute arises, granting extensions of time in relation to the taxpayer's current and/or ongoing tax liabilities puts the revenue at risk in relation to the tax that is in dispute. Accordingly, where a taxpayer lodges an objection to a pay-roll tax assessment, an insurance duty assessment or a hire of goods duty assessment, a tax payment arrangement to extend the time for payment until the objection is determined will usually only be approved in exceptional circumstances.

State Administrative Tribunal reviews and certain land tax appeals

46. Where an application for approval of a tax payment arrangement is made by a taxpayer who applies to the State Administrative Tribunal for review of the Commissioner's decision on their objection, or where an appeal is lodged with the Minister in accordance with section 20 of the *Land Tax Assessment Act 2002*, the guidelines referred to in the relevant paragraphs above will apply as well as the following paragraphs:

46.1 the Commissioner may approve a tax payment arrangement extending the time for payment where the taxpayer demonstrates that they will suffer financial hardship if required to pay the tax in dispute prior to the determination of the review or appeal;

46.2 the Commissioner will generally not approve a proposed tax payment arrangement that extends the time for payment until the time when the review or appeal is determined. The Commissioner will usually only approve a tax payment arrangement that:

(a) extends the time for payment for a fixed period or the determination of the review/appeal (whichever occurs first);

(b) includes a condition requiring the taxpayer to provide the Commissioner with financial or other relevant information at regular intervals;

(c) includes a condition requiring the taxpayer to take all reasonable steps to have the review/appeal heard as

soon as possible.

47. Where a tax payment arrangement has been approved and the application for review or appeal to the Minister (as the case may be) is subsequently dismissed, there will generally be no remission of any interest required to be paid under the tax payment arrangement.

Appeal of SAT decision

48. Where a taxpayer appeals the State Administrative Tribunal decision and the taxpayer applies for approval of a tax payment arrangement to extend the time for payment while their appeal is pending, the guidelines referred to in relevant paragraphs above will apply as well as the following paragraphs:

    48.1 the Commissioner will generally only approve a tax payment arrangement extending the time for payment in exceptional circumstances;

    48.2 where this occurs, the Commissioner will generally not approve a proposed tax payment arrangement that extends the time for payment until the time when the review or appeal is determined. The Commissioner will usually only approve a tax payment arrangement that:

        (a) extends the time for payment for a fixed period or the determination of the review/appeal (whichever occurs first);

        (b) includes a condition requiring the taxpayer to provide the Commissioner with financial or other relevant information at regular intervals;

        (c) includes a condition requiring the taxpayer to take all reasonable steps to have the review/appeal heard as soon as possible.

49. Where a tax payment arrangement has been approved and the appeal is subsequently dismissed, there will generally be no remission of any interest required to be paid under the tax payment arrangement.

Case stated

50. Where an application for approval of a tax payment arrangement is made by a taxpayer in circumstances where the Commissioner has stated a case to the Supreme Court, the guidelines referred to in the relevant paragraphs above will apply as well as the following paragraphs.

51. Where the Commissioner states a case on a question of law to the Supreme Court and the taxpayer applies for approval of a tax payment arrangement to extend the time for payment while the case

stated is pending:

52. the Commissioner may approve a tax payment arrangement extending the time for payment where the taxpayer demonstrates that they will suffer financial hardship if required to pay the tax in dispute prior to the determination be paid under the tax payment arrangement.

Registration of memorial in relation to land

53. Under sections 76 and 77 of the TAA, the Commissioner is authorised to lodge a memorial with the Registrar of Titles in relation to land in certain cases:

    53.1 to secure land tax that is unpaid by the due date specified in the assessment notice;

    53.2 to secure unpaid stamp duty where the cheque given in payment is dishonoured;

    53.3 where stamp duty payable as a result of a reassessment under section 75AG of the Stamp Act is not paid by the due date specified in the assessment notice;

    53.4 where stamp duty payable under Part IIIBA of the Stamp Act is not paid by the due date specified in the assessment notice; or

    53.5 where an assessment has been made under section 76AA of the Stamp Act.

54. The Commissioner is able to lodge a memorial in relation to the taxpayer's land in the cases referred to above, notwithstanding that the taxpayer may have applied for approval of a tax payment arrangement. Also, the Commissioner may lodge a memorial (in the cases referred to above) at any time after a tax payment arrangement has been approved.

Cancellation of a tax payment arrangement

55. Where a taxpayer fails to make a payment in accordance with an approved tax payment arrangement, or where a taxpayer fails to comply with any other condition of an approved tax payment arrangement, the Commissioner may cancel the arrangement by notice to the taxpayer [TAA, section 47(5)].

56. If a tax payment arrangement is cancelled, the whole of the tax outstanding under the arrangement (together with interest) becomes due and payable as from the date of cancellation of the arrangement or the original due date for the payment of tax to which the arrangement relates (whichever is the later) [TAA, section 47(6)].

57. Interest will continue to accrue after cancellation of a tax payment arrangement, until the outstanding tax to which the arrangement

formerly applied is paid [TAA, section 47(7)].

58. If the whole of the outstanding tax (together with interest) is not paid in full within 14 days of the notice of cancellation of the tax payment arrangement, the Commissioner will pursue whatever course of action is appropriate in the circumstances of the case (including legal proceedings) to recover the outstanding amount.

4n. Conveyance Duty – Lease for Life Arrangements for Retirement Villages

ISSUE

A concern has been raised as to the stamp duty treatment of a lease for life and accompanying loan arrangements in relation to retirement villages.

The particular issue raised in the submission was:

- **Master Builders Association of Western Australia (MBA)** (Submission 63)
    - The submission suggests that the administrative practice in relation to the stamp duty treatment of a lease for life and accompanying loan arrangements for retirement villages is inconsistent with the law and should be made law to create certainty for taxpayers.

CURRENT POSITION

Instruments that evidence leases for life and unsecured loans in relation to retirement villages, are generally no longer dutiable under the *Stamp Act 1921* as a result of the changes brought about by the Business Tax Review (BTR), which abolished stamp duty on leases and unsecured loans from 1 January 2004.

Further, following the BTR amendments, specific exemptions from deed duty were inserted into the Third Schedule of the Stamp Act. The exemption for a deed that evidences a lease or an agreement to lease is contained within item 3(9)(a) of the Third Schedule and the exemption for a deed that evidences a bond, debenture, covenant, bill of sale, guarantee, lien or other instrument of security that is not subject to duty under item 13 of the Second Schedule is contained within item 3(9)(b) of the Third Schedule.

Therefore, instruments that evidence leases for life and unsecured loans in relation to retirement villages are generally not chargeable with any duty under the Stamp Act. However, where a premium is payable for the grant of a lease, conveyance duty is charged on the amount of the premium in accordance with section 77 and item 12 of the Second Schedule of the Stamp Act.

It should be noted that retirement village arrangements that involve an instrument creating a right to reside i.e. a mere licence, which does not confer an exclusive possession to an individual, are also not chargeable with duty. Prior to the BTR changes, a right to reside was chargeable with mortgage duty, as an agreement to pay money. However, as the payments are generally unsecured, instruments evidencing a right to reside are also no longer chargeable with duty as a result of the BTR.

It should also be noted that section 112Q of the Stamp Act provides an exemption for certain residential agreements whether by lease or licence, where the agreement is between a charitable or similar organisation and a qualified person. These instruments are not required to be lodged with the Commissioner for assessment.

A qualified person is defined within subsection 112Q(2) of the Stamp Act to mean a person with a disability within the meaning of section 3 of the *Disability Services Act 1993* or a person who is over 55, or is the spouse, de facto partner (of 2 years or more), former de facto partner or surviving de facto partner of the person.

This section was inserted in 1997 to standardise and extend the exemption provisions, which previously applied to residency agreements for the aged and disabled. Prior to this, lease instruments or mortgage instruments made for charitable purposes, in particular the relief of the aged, were exempted under sections 90A and 80A of the Stamp Act.

ANALYSIS OF ISSUE

Stamp Duty Treatment of a Lease for Life and Loan Arrangements in Relation to Retirement Villages

The MBA has indicated that retirement village arrangements involving leases for life and accompanying unsecured loans are being assessed as a deed, which is chargeable at the fixed rate of duty set out in item 8 of the Second Schedule of the Stamp Act as a deed of any other kind not otherwise chargeable with duty. The MBA has requested that this duty treatment should be legislated to provide certainty to taxpayers.

However, as discussed above, the abolition of lease duty and mortgage duty on unsecured loans was legislated as part of the BTR amendments, and exemptions from deed duty were subsequently inserted into the Third Schedule of the Stamp Act to provide certainty to taxpayers.

It should be noted, however, that it is the practice of some taxpayers to continue to present these documents to the Office of State Revenue for endorsement. Whilst there is no requirement to lodge these instruments, the Commissioner must, if requested to do so by a taxpayer, endorse the instrument as exempt in accordance with section 17C of the Stamp Act, citing the appropriate Third Schedule exemption.

TECHNICAL COMMITTEE CONCLUSION

Members of the Technical Committee suggested that greater education of those involved in the retirement village industry may overcome some of the confusion in relation to how different arrangements are treated. Members also noted that further training should be provided to revenue officers to ensure that deeds are not charged with nominal duty where they are specifically exempt from deed duty.

4o. Conveyance Duty - Administrative Issues

ISSUE

The Department of Treasury and Finance has made a number of administrative recommendations as part of the State Tax Review. These recommendations are aimed at promoting a fair and equitable taxation system and should be considered as part of the State Tax Review.

The particular issues raised in the submission were:

- **Department of Treasury and Finance**

  The Department of Treasury and Finance recommends that:

  - a retrospective amendment should be made to the *Stamp Act 1921* so that transfers from a bankrupt to the Official Trustee are not subject to ad valorem duty;
  - the liable party on conveyances and transfers executed as gifts should be changed from the donor to the donee; and
  - the onus of proof on review under the *Taxation Administration Act 2003* ("TAA") should be reinstated.

CURRENT POSITION & ANALYSIS OF ISSUE

Transfers to the Official Trustee in Bankruptcy

Amendments contained in the *Business Tax Review (Assessment) Act (No. 2) 2003* have resulted in transfers from a bankrupt to the Official Trustee being subject to ad valorem duty. Effective from 1 January 2004, all transfers from a bankrupt to the Official Trustee are subject to ad valorem duty, in accordance with section 31B of the Stamp Act. The State Tax Review could consider amendments to the Stamp Act to rectify this unintended consequence of the Business Tax Review amendments.

On bankruptcy, the property of a bankrupt vests in the Official Trustee under section 58(1) of the Commonwealth *Bankruptcy Act 1966*. Section 58(2) provides that where a law requires transmission (which includes a transfer) of property to be registered, and allows the Official Trustee to be registered, the Official Trustee only obtains an equitable interest on bankruptcy. The legal interest is transferred upon registration.

The equitable interest held by the Official Trustee is limited to the right to be registered as the legal owner. The Official Trustee at all times holds the property on trust for the creditors. Beneficial ownership of the property vests in the creditors upon bankruptcy, without documentation, by operation of section 58(1).

Prior to the 1 January 2004 amendments, the change in beneficial ownership that occurred under the operation of the Bankruptcy Act did not constitute a "transaction" for the purposes of section 31B of the Stamp Act (which charged duty on undocumented transactions) and was not subject to ad valorem duty.

The subsequent documented transfer of the legal estate in the property by the bankrupt to the Official Trustee occurred after the change in beneficial ownership of the property had already taken place, and as such, the document was only stamped with nominal duty of $20.

Section 31B, as amended effective from 1 January 2004, no longer requires there to be a "transaction" for the obligation to prepare a dutiable statement to arise. Section 31B now operates such that the obligation to prepare a dutiable statement (and assess ad valorem duty thereon) arises upon the "acquisition" of an interest in certain property. Consequently, the transfer of property by a bankrupt with respect to the acquisition of beneficial ownership by the creditors is an acquisition to which section 31B applies.

While this was the intended effect of the amendments for other vestings or transfers that occur under various other statutes, the State Tax Review should consider whether the application of the amendments in the case of transfers to the Official Trustee in Bankruptcy are appropriate.

It is also worth noting that this matter was identified in the course of updating the Office of State Revenue's internal procedures and has not been raised as a result of taxpayer enquiries or a "live" case. Unless the Commissioner specifically acts to advise persons of the need to lodge the statements, it is considered that the matter will not arise through voluntary lodgement of a statement.

Many of the Duties Acts operating in the other Australian jurisdictions make express exclusions from duty in respect of a transfer of otherwise dutiable property as a result of the appointment of a trustee in bankruptcy. The relevant sections for these jurisdictions are as follows:

- Australian Capital Territory – *Duties Act 1999*, section 71
- New South Wales – *Duties Act 1997*, section 65

- Tasmania – *Duties Act 2001*, section 52
- Victoria – *Duties Act 2000*, section 48

These provisions could be used as a basis for amendment if it is considered appropriate to amend the Stamp Act.

To remedy the unintended outcome of making transfers to the Official Trustee in bankruptcy subject to ad valorem duty, amendments to the Stamp Act could be considered. Retrospective amendments should be considered, with effect from 1 January 2004, to ensure that transfers from a bankrupt to the Official Trustee are not subject to ad valorem duty.

Changing the Liable Party on Gifts to the Donee

Amendments to the Stamp Act could be considered to change the liable party on gifts. The liable party on traditional property conveyances is the purchaser or transferee. Therefore, to allow for greater consistency throughout the legislation, amendments could be considered so that a gift donee is the liable party.

Ad valorem duty is chargeable on every conveyance made as a voluntary disposition, in accordance with section 75 of the Stamp Act. As these conveyances are for less than full consideration, section 75 provides that duty is chargeable in respect of the unencumbered value of the property disposed of. Item 19 of the Second Schedule specifies that the donor is the party liable to pay the duty on conveyances made for less than full consideration.

The 1993 Final Report of the Western Australian Government Working Group made recommendations to change the liable party on gifts from the donor to the donee.

Minor consequential amendments may be necessary with the first home owner duty rate, as this currently allows the lower rate to apply where the donee actually pays the duty, despite not being liable. However, the Technical Committee noted that such amendments would reduce the complexities associated with the first home owner rate of stamp duty.

It is expected that charitable institutions may benefit from this change, in that people who may consider gifting property to charitable organisations may currently be discouraged from doing so due to the associated stamp duty cost. As charitable organisations are exempt from duty, changing the liable party on gifts to the donee would enable gifts to charities to be exempt from duty.

The Technical Committee raised the concern that in some instances the donee would receive the gift with passive acceptance, and may feel aggrieved that a liability was being imposed on them without any action on their part. However, it was noted that the option was open to the donee to reject the gift. Moreover, it was noted that under the current regime, in some instances the donor would feel aggrieved, as they are not the party benefiting from the transaction. The Technical Committee supported the analysis and noted that in every other jurisdiction the donee was the liable party. The proposal was supported on the basis that it was consistent with the principle that the recipient is the liable party on which the remainder of the Stamp Act is based.

However, it will be necessary to ensure that where property is received by the donee with passive acceptance, that recovery action is not limited because the property has been gifted pursuant to an instrument to which the donee is not a party.

Onus of Proof

As a result of the repeal of section 43(2) of the TAA, there is no provision in either the TAA or the *State Administrative Tribunal Act 2004* ("SAT Act") which expressly imposes the burden of proving that an assessment is incorrect on the taxpayer at the stage when the assessment is being reviewed by the State Administrative Tribunal (SAT).

This is quite unusual as tax legislation typically contains an express provision imposing the burden of proof upon the taxpayer at the appeal stage (see discussion below). It appears that the basis for imposing the burden of proof on the taxpayer (rather than the tax Commissioner) is that the taxpayer is more likely to be in a position to provide the court or tribunal with all relevant documents, materials and information. Consequently, in other jurisdictions the burden of proof has been legislatively imposed upon the taxpayer at the appeal stage.

Prior to 1 July 2003, the various Western Australian taxation Acts contained no provision in relation to the burden of proof at the objection stage. However, if an objection proceeded to appeal, the taxpayer had the burden of proof.

The TAA (which commenced operation on 1 July 2003) provided for the taxpayer to have the burden of proof at the objection stage (section 37(2)) and also at the appeal stage (section 43(2)). Section 43(2) provided:

> "The onus of establishing that an enactment or decision to which the appeal relates is invalid or incorrect lies on the taxpayer".

The amendments which conferred jurisdiction on SAT and which took effect on 1 January 2005 also repealed section 43(2) of the TAA. Section 43(2) of the TAA was repealed by section 1177 of the *State Administrative Tribunal (Conferral of Jurisdiction) Amendment & Repeal Act 2004* (SAT – AR Act).

Accordingly, at the present time, the legislation expressly imposes the burden of proving that an assessment/decision is incorrect or invalid on the taxpayer at the objection stage but not at the review stage. This is a somewhat illogical position.

It is not clear why the repeal of section 43(2) of the TAA was considered necessary. It is possible that, because under the SAT Act the rules of evidence do not apply to hearings in SAT, it was considered it would be inconsistent or inappropriate for the taxpayer to have the burden of proof. Alternatively, it may have been assumed that the taxpayer would have the burden of proof in hearings before SAT without an express provision to that effect. These issues are discussed below.

The burden of proof in tax legislation in other jurisdictions

As noted above, it is quite common for tax legislation to contain an express provision imposing the burden of proof on the taxpayer at the appeal stage. We note that under the Victorian *Taxation Administration Act 1997*, there is an express provision to the effect that on a review or an appeal the taxpayer has the onus of proving the taxpayer's case.[1] The Tasmanian *Taxation Administration Act 1997* contains an express provision that, on a review or an appeal the taxpayer has the onus of proving their case.[2] Under the Queensland *Taxation Administration Act 2001,* there is an express provision that on appeal the appellant has the onus of proving their case.[3]

The South Australian *Taxation Administration Act 1996* contains an express provision that on an appeal the appellant has the onus of proving their case.[4] Under the ACT *Taxation (Administration) Act 1999,* there is an express provision that on appeal the burden of proving that any assessment objected to is excessive lies on the objector[5]. The New South Wales *Taxation Administration Act 1996* contains an express provision that on an application for review the applicant has the onus of proving their case[6]. In the Northern Territory, the *Taxation (Administration) Act* provides that on appeal, the burden of proving a decision or determination of the decision maker is incorrect, or an assessment made by the decision maker is excessive, is on the taxpayer[7].

It is also worth noting that the *Taxation Administration Act 1953* (Cth) contains an express provision that, if a taxpayer appeals a disallowance of objection to either the Federal Court or the Administrative Appeals Tribunal, the taxpayer has the burden of proof.

Policy for placing the burden of proof on the taxpayer

The policy behind provisions which expressly impose the burden of proof on the taxpayer at the appeal/review stage has been judicially considered in relation to other tax legislation. Generally, courts have accepted that the reason for placing the onus of proof on the taxpayer in relation to taxation appeals/reviews is that any matter or information relevant to establishing that an assessment is incorrect is exclusively within the knowledge of the taxpayer and outside the knowledge of the relevant Commissioner of Taxation. That is, taxpayers are, or should be, acquainted with their own affairs and are therefore in the best position to provide information relevant to a taxation assessment. In *Federal Commissioner of Taxation v Clarke* (1927) 40 CLR 246 in the context of an objection to an income tax assessment, Isaacs ACJ of the High Court stated at (251):

> "The Act provides by sec. 39 of the 1922-1925 Act (sec 35 of the 1915-1918 Act) that in a proceeding of this nature the Commissioner's assessment is to be taken prima facie as correct. It follows, therefore, that the burden of proving to the satisfaction of the Court that the sum in question was not income, but capital transformed, and that it was not his income, rests on the respondent. *The justice of that burden cannot be disputed. From the nature of the tax, the Commissioner has, as a rule, no means of ascertainment but what is learnt from the taxpayer, and the taxpayer is presumably and generally, in fact, acquainted with his own affairs.* The onus may prove to be dischargeable easily or with difficulty according to circumstances. Where, as here, a taxpayer has failed to keep any records of considerable dealings while engaged in profit-making transactions relied on by him to avoid the taxation ordinarily incident to such profits, and where, as here, he has entangled those transactions, and has given discordant, and in some cases inconsistent, accounts and explanations of them, the onus is of the heaviest character." (emphasis added)

The passage from *Federal Commissioner of Taxation v Clarke* italicised has been cited with approval by the High Court in *George v Federal Commissioner of Taxation* (1952) 86 CLR 183 at 201 per Dixon CJ, McTiernan, Williams, Webb and Fullagar JJ, the Victorian Supreme Court in *Footscray Football Club Ltd v Commissioner of Pay-Roll Tax* [1983] 1 VR 505 at 511 per Luch J and the Federal Court in *McCauley v Federal Commissioner of Taxation* (1988) ATC 4605 at 4612 per Lockhart J who stated at 4613:

> It is for the taxpayer to prove that the assessment is excessive and the onus lies on the taxpayer to prove that funds to acquire the assets in question were not derived from undisclosed income. The source of these funds is peculiarly within the knowledge of the taxpayer. It is true that the Commissioner must conduct his investigations properly and explore avenues of information available to him to fulfil his statutory duties of making assessments, but it is for the taxpayer to establish that the unexplained increment in his wealth is due to betting wins.

In *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* [1983] 1 NSWLR 1, Hunt J of the Federal Court observed as follows (at 12) in the context of a challenge to an income tax assessment, the correctness of which depended upon the purpose for which the taxpayer had purchased certain property:

> The reason why the statute places the burden upon the taxpayer is obvious: he is usually the person best able to give evidence of his purpose in acquiring the property in question; and quite often he is the only person so able to give that evidence as the facts are peculiarly within his own knowledge. That is a circumstance, which the common law (as well as the legislative) takes into account in determining where the *incidence* of the burden should lie: *Williamson v Ah On* (1926) 39 CLR 95, at pp 113-115.

Therefore, as any matter or information relevant to establishing that an assessment is incorrect is exclusively within the knowledge of the taxpayer and outside the knowledge of the Commissioner, courts have accepted that the burden of proof should be placed on the taxpayer.

Is it inappropriate for legislation to expressly impose a burden of proof upon a taxpayer in a jurisdiction where there are no rules of evidence?

An issue for consideration is whether it would be inconsistent or inappropriate to impose a burden of proof upon taxpayers in a jurisdiction where there are no rules of evidence.

As outlined above, in relation to Victoria, Tasmania, the Northern Territory, New South Wales, the Australian Capital Territory and the Commonwealth, the taxation administration legislation contains an express provision imposing the onus of proof on taxpayers in relation to taxation appeals/reviews *even though* that legislation provides that the court/tribunal conducting the appeal/review is not bound by the rules of evidence.

Accordingly, it would appear to be accepted in these jurisdictions that a provision placing the onus of proof on taxpayers in relation to taxation

appeals/reviews is not inconsistent with the rule that the body hearing the appeal/review is not to be bound by the rules of evidence.

Inconsistency with the assessment powers contained in revenue legislation

There are specific provisions that exist in the TAA and the Stamp Act that give the Commissioner the express power to assess tax in the absence of full information. These powers support the fact that in some cases, taxpayers are not forthcoming with the information necessary for the Commissioner to prove that a tax liability exists.

Specifically, section 19 of the TAA authorises the Commissioner to assess tax where he "suspects on reasonable grounds that a tax liability exists". This power was considered at length by the Parliament when the Taxation Administration Bill was passed, and amendments were made to the section in the Legislative Council following a report by the Standing Committee on Legislation.

The estimate assessment power in section 37(3) of the TAA is then balanced by specific rules in relation to the level of proof placed on the taxpayer in relation to the determination of an objection relating to assessments made under section 19.

Section 76AA of the Stamp Act also directs the Commissioner to use sections 19 and 20 of the TAA where the Commissioner suspects that a corporation is required to lodge a statement under Division 3 of Part IIIBA, but does not do so.

These specific powers expressly authorise the Commissioner to assess tax in the absence of complete information. Such action is then supported through the objection process, where the onus of proof to establish that an objection is incorrect or invalid lies on the taxpayer (subject to the operation of section 37(3)).

The absence of a corresponding onus of proof provision in the review process effectively nullifies the operation of substantive provisions of the taxation Acts, and needs to be urgently addressed.

A view was expressed by some members of the Technical Committee that taking the onus of proof from the taxpayer was an intentional consequence of the legislation enabling the State Administrative Tribunal. However, DTF members of the Committee indicated that there is little support to indicate that this was explicitly considered by the Parliament.

The Committee acknowledged that the SAT was supposed to deal with the matter standing in the shoes of the Commissioner to reach the preferable and correct decision, rather than acting as a review body on the decision of the Commissioner on an objection.

However, the DTF members of the Committee believe that this role, by its nature, does not in any way preclude the onus of proof being on the taxpayer. This is evidenced by the position in all other jurisdictions.

The Commissioner's major concern is the significant increase in the expenditure of public funds that has arisen to comply with the SAT procedures, that appear to follow from the onus of proof being shifted.

Some Committee members commented that this was the situation that the taxpayer had previously faced. However, what was not apparent was whether the taxpayer had a resultant reduction in the resources they have to expend in having a matter examined, or whether SAT had merely increased the resources required for the Commissioner to deal with this new process.

The Commissioner also noted that certain taxpayer behaviour is emerging whereby information is not being freely provided by the taxpayer to allow an assessment to be made based on all the facts. This, combined with the effect of removing the taxpayer's onus of proof, is likely to necessitate greater use of the coercive powers available under the legislation at the audit and objection stages in the future. It may also be necessary for taxpayers to be prosecuted for failure to provide information. At present, in these circumstances, reliance is placed on making a default assessment based on available information to draw out the required information, rather than coercion through prosecution.

Overall, it appears unlikely that agreement will be reached between the revenue authority and practitioners on this proposal.

TECHNICAL COMMITTEE CONCLUSION

Transfers to the Official Trustee in Bankruptcy

The Technical Committee considers the proposal is technically sound should the Government wish to adopt the policy decision.

Changing the Liable Party on Gifts to the Donee

The Technical Committee supported the analysis and noted that in every other jurisdiction the donee was the liable party. The proposal was

supported on the basis that it was consistent with the principle that the recipient is the liable party and reduced the complexities associated with the first home owner rate of stamp duty.

Onus of Proof

The issue was discussed by the members of the Committee, however, no agreed position was reached.

5. Abolition of Duty on Deeds and Assignments of Leases

ISSUE

A number of submissions have suggested that stamp duty on deeds and assignments of leases should be abolished.

The particular issues raised in the submissions were:

- **The Chamber of Commerce and Industry of Western Australia (CCI)** (Submission 81)
    - CCI suggests that stamp duty on deeds is a nuisance tax that costs more to collect than the revenue raised, and as such should be abolished.
- **The Chamber of Minerals & Energy Western Australia (CME)** (Submission 82)
    - CME suggests that stamp duty on deeds is an inefficient tax that costs more to raise than it collects, and that its abolition would substantially reduce the number of documents lodged for assessment.
- **The Real Estate Institute of Western Australia (REIWA)** (Submission 84)
    - REIWA suggests that greater equity and efficiency would be achieved in the process of paying stamp duty and the negotiation of deeds of assignment of lease, if duty were to be abolished on all deeds of property leases.

CURRENT POSITION

Deeds

Item 8(1) of the Second Schedule to the *Stamp Act 1921* ("the Act") charges nominal duty of $20.00 on deeds. In particular, item 8(1) charges duty on a "deed of any kind not otherwise chargeable with duty". Further, the Act specifically charges deed duty on farm-in agreements that are not assessable with ad valorem duty (under section 73G) and maintenance agreements and orders that are not assessable with ad valorem duty (under section 112UC).

Historically, deed duty has also been charged on several other types of instruments, such as:

- superannuation deeds;
- franchise agreements;
- certain types of unit trust deeds;
- agreements under seal;
- amending deeds; and
- certain instruments that agree to convey property but are not assessable at ad valorem rates.

There are also many other instruments that are styled or titled as deeds that are liable to duty at ad valorem rates, such as:

- deeds of sale;
- deeds of family arrangement; and
- deeds of mortgage.

Assignments of Lease

Item 6 of the Second Schedule to the Act charges nominal duty of $20.00 on certain conveyances or transfers that are not otherwise chargeable with ad valorem duty.

An assignment of lease for which no consideration is being paid for the assignment is assessed as a transfer under item 6 of the Second Schedule to the Act. If there is consideration for the assignment, duty is charged at ad valorem rates under item 4 of the Second Schedule.

ANALYSIS OF ISSUE

Abolition of Duty on Deeds

The CCI & CME submissions both suggest that deed duty should be abolished on the basis that it is a nuisance tax, and the cost of stamping a deed would be greater than the revenue raised.

However, it should be noted that there are currently many types of instruments that are potentially liable to ad valorem duty, but may be charged with deed duty if certain conditions are satisfied. Examples of such instruments include:

- Family Court agreements and orders;
- vestings of discretionary and unit trusts; and
- farm-in or joint venture agreements.

When an instrument, such as the three listed above, result in the preparation of a registrable transfer of land or mining tenements the risk to revenue is minimised as the Department of Land Information or the Department of Minerals and Energy will not register an unstamped transfer. However, the risk still exists in instruments such as deeds relating to family arrangements or partnership dissolutions that may not result in registrable transfers, but still convey dutiable property.

Accordingly, the Technical Committee agreed that requiring deeds to be stamped serves as an important compliance tool to ensure only those deeds that satisfy the necessary conditions are charged with nominal duty.

It was also noted by the Technical Committee that registries that note such documents might require the stamping of deeds prior to their registration. Therefore, even if deed duty were abolished, certain deeds would still need to be presented to the Office of State Revenue to be stamped as exempt. The Technical Committee also noted that the stamping of deeds provides certainty to taxpayers as to the extent of their liability to stamp duty.

There is the potential, particularly in the self assessment regime, for a person to unintentionally avoid duty and leave themselves liable to penalties by not lodging a deed that is liable to ad valorem duty because they were of the mistaken belief that it was a deed and not liable to ad valorem stamp duty.

However, the Technical Committee noted that the limitation of the classes of documents that a registered person is allowed to assess mitigates the opportunity for a person to inadvertently under-assess or fail to assess correctly.

It was suggested by the Technical Committee that certain classes of "nuisance deeds" that were of a kind that would not be subject to ad valorem duty could be exempted to avoid the compliance and administration costs of having them stamped. An example of such a deed suggested by the Technical Committee is deeds creating superannuation funds.

If deed duty were to be abolished, a mechanism may need to be established to ensure that ad valorem duty continues to be imposed in cases where the deed does not satisfy the necessary conditions for nominal duty treatment.

Abolition of Duty on Assignments of Leases

The REIWA submission suggests that assignments of leases that are assessed as a transfer of any other kind under item 6 of the Second Schedule to the Act should be exempt from duty.

The REIWA submission raises similar concerns in relation to compliance costs as those pertaining to deed duty.

The vast majority of assignments of lease are assessed with nominal duty as "transfers of any other kind". However, an interest in a lease is considered to be property and if any consideration is given for the assignment, then ad valorem duty is payable. Therefore, as in the case of deed duty, imposing nominal duty on assignments of leases serves as a compliance tool to ensure that any liability to ad valorem duty is met.

Similar to the suggestion relating to deeds, the Technical Committee suggested that assignments of lease, where there is no valuable consideration paid for the assignment, could be exempted from the payment of transfer duty.

TECHNICAL COMMITTEE CONCLUSION

It was suggested by the Technical Committee that should duty on deeds remain payable (even in limited cases as suggested by the Technical Committee), that the definition of deeds contained in the archived Commissioner's Practice 41.0 relating to the assessment of deeds on leases and mortgages, should be published in a new Commissioner's Practice.

Other than the issues highlighted above, the Technical Committee agreed with the analysis provided.

6a. Land Tax - Issues Relating to Taxation Barriers for People with Disabilities

ISSUE

Issues relating to taxation barriers for people with disabilities.

The particular issues raised in the submissions were:

- **Nulsen Haven Association** (Submission 3)
    - Trusts established for the benefit of a family member with a disability to be exempt from stamp duty, capital gains and gifting provisions.
    - Where a beneficiary with disabilities occupies trust property as his or her principal place of residence, the same exemption be applied as if that beneficiary owned the property in his or her own right.
    - In the case of a person eligible for a Disability Support Pension, trust income intended and used solely to purchase support services to be considered not taxable.
- **Submission no. 8**
    - First Home Owner Grant to apply to property bought in trust for a person with disabilities where it is the person's first home.
    - Land tax should not apply to this property as it is not an investment.
- **Brian O'Hart** (Submission 37)
    - Depart from the key principle of ownership for parents providing independent residences for their intellectually impaired adult sons and daughters, so that land tax exemptions and rates and charges concessions will apply to residences held by the parents for the children.
    - Provide the opportunity to parents to provide short term leases to their intellectually impaired (Disability Support Pensioners) sons and daughters to secure land tax exemptions and rebates.

- Rebates and concessions on residences to be afforded to parents providing independent accommodation for their intellectually impaired adult sons and daughters who are in receipt of a Disability Support Pension; or have a disability as defined in section 3 of the *Disability Services Act 1993*; or are under the *Administration (Guardianship and Administration) Act 1990*.

- **Developmental Disability Council of WA (Inc)** (Submission 53)
  - Extensions of concessions for land tax and rates and charges to parents who provide property for their children with a disability.

- **Kevin Guhl** (Submission 54)
  - Tax relief to be provided regarding rates, any gifting provision or capital gains relating to the purchase of a house for children with disabilities.

- **People With Disabilities (WA)** (Submission 74)
  - Stamp duty relief/rebates for housing built or for the additional features required for people with disabilities as an inducement for those going down universal design principles.

- **Taxation Institute of Australia** (Submission 93)
  - Amend the *Land Tax Assessment Act 2002* by including an exemption for land owned by an individual and used by a person with disabilities who is a relative of the individual as his or her primary residence and no financial benefit is received by the individual as a result of this use.

- **Eric Moxham** (Submission 109)
  - Concessions on residences should be afforded to parents providing accommodation for their intellectually impaired adult sons and daughters who are in receipt of the Disability Support Pension; or have a disability as defined in section 3 of the *Disability Services Act 1993*; or are under the *Administration (Guardianship and Administration) Act 1990*.
  - Legislative changes should be introduced in relation to land tax and concessions to ensure that equity and fairness, without discrimination, is administered to parents who provide

independent housing for their intellectually impaired Disability Support Pensioner adult sons and daughters.

- Trusts established for the benefit of a family member with a disability to be exempt from stamp duty, capital gains and gifting provisions.
- Where a beneficiary with disabilities occupies trust property as his or her principal place of residence, the same land tax exemption be applied as if that beneficiary owned the property in his or her own right.
- In the case of a person eligible for a Disability Support Pension, trust income intended and used solely to purchase support services to be considered not taxable.
- Where the intention of the proposed trust is solely to benefit the person with a disability during their lifetime, then payment of certain taxes or duties be deferred until the trust is wound up.

CURRENT POSITION

Land Tax

Section 21 of the *Land Tax Assessment Act 2002* ("LTAA") provides an exemption from land tax for private residential property (except property held in trust) if it is owned by an individual who uses it as his or her primary residence.

Section 26 of the LTAA provides an exemption from land tax if the land is held in trust for one or more disabled beneficiaries and at least one disabled beneficiary uses the property as their primary residence. It is not necessary for all the beneficiaries of the trust to be disabled. It is only necessary for at least one of the beneficiaries of the trust to be disabled and a disabled beneficiary uses the property as their primary residence.

Commissioner's Practice "LT 7.0 – Exemption For Trust Property Used By Disabled Beneficiary" provides guidance on the Commissioner's requirements for an exemption to apply in these circumstances. (See copy attached.)

An examination of other jurisdictions' legislation shows that no other jurisdiction has comparable exemptions for land tax or stamp duty.

Stamp Duty

Section 75AE of the *Stamp Act 1921* provides for a concessional rate of duty to apply to a conveyance or transfer of residential property to a trustee who is acquiring and intends to hold the property in trust for one or more disabled beneficiaries and at least one of the disabled beneficiaries will use the property as their principal place of residence. It is not necessary for all the beneficiaries to be disabled. The criteria for the concessional rate of duty to apply includes that the value of the property must not exceed $200,000.

Commissioner's Practice "SD 3.0 – Stamp Duty - Conveyance or Transfer of Property to a Trustee Pursuant to Section 73AA(1)(f)" provides at paragraphs 4 and 5 for the transfer of property from a property owner under a permanent disability to a trustee for nominal stamp duty. (See copy attached.)

Nominal stamp duty applies where the property owner is unable to discharge the rights and obligations of property ownership, for example, due to mental incapacity, and a legal administrator holds the land in a trustee capacity by executing a declaration that the land is held on trust for the specified beneficiary.

Commissioner's Practice "SD 9.1 - Stamp Duty – Unit and Discretionary Trust Deeds" clarifies the method of assessing a discretionary trust deed, the primary purpose of which is to create a trust involving the settlement of property. (See copy attached). This practice provides that any instrument establishing a discretionary trust will be assessed to duty under item 19(1) of the Second Schedule to the Stamp Act by reference to the value of the property settled.

In circumstances where a first home owner grant (FHOG) applies, see below, the first home owner rate of stamp duty may also apply. The first home owner rate of duty provides for no duty to be payable on property valued at $250,000 or less and a concessional rate of duty applies for property valued between $250,000 and $350,000.

First Home Owner Grant Act 2000

An equitable interest is a relevant interest for a FHOG when it is the interest of a person under a legal disability for whom the guardian holds the interest on trust. A guardian is defined by this Act to include a trustee. The person under a legal disability must be the only beneficiary of the trust.

Rates and Charges (Rebates and Deferments) Act 1992

Under the Rates and Charges (Rebates and Deferments) Act, an eligible person can apply to the relevant administrative authorities to have their entitlement to any land belonging to them registered for the purpose of accessing the concessions under the Act. These concessions relate to local authority rates, water rates and the emergency services levy.

A person's eligibility depends on their eligibility to hold a pensioner concession card or a State concession card.

Under section 27(1) of the Act, the land belonging to an eligible person includes an estate in fee simple in which the person has a relevant interest whether or not the interest is held by the person solely or jointly with another person or persons.

A relevant interest in land is defined in section 29(1) and includes the situation where an eligible person being by reason of ill-health, frailty or other cause dependent for care on others, occupies that land under the terms of a deed, or of a trust, which was, in the opinion of the administrative authority, entered into to safeguard the interests of that person. The concessions available under the Act will apply in these circumstances although the person with the relevant interest is not the owner of the property.

Capital Gains Tax

The Technical Committee discussed the capital gains tax implications of creating a life interest and of granting a right of residency.

The Committee considered that the granting of a life estate to a child with disabilities is likely to trigger a capital gains tax liability but a grant of a right of residency might be created in a way that would not result in a capital gains tax liability.

The Committee further considered this to be a very complex area of law which is outside the scope of the paper and is an issue that a taxpayer would take into consideration when deciding whether to structure arrangements so that access can be gained to a land tax exemption and a concession for rates and charges.

ANALYSIS OF ISSUE

This paper does not consider the merits of providing the relief suggested. That is a policy decision for Government. This analysis considers issues as to how such relief could be provided, should the Government wish to do so. Issues regarding social security, capital gains and income tax are out of scope of this document.

Where a Disabled Beneficiary Occupies Trust Property as his or her Principal Place of Residence, the same Exemption from Land Tax to apply as if the Beneficiary Owned the Property in their Own Right.

Submission no. 8 and the submissions from the Nulsen Haven Association and Mr Moxham seek to provide exemptions from land tax where a disabled beneficiary occupies trust property as their principal place of residence.

A land tax exemption is currently available for property held in trust for disabled beneficiaries if the beneficiary resides in the property as their principal place of residence. Section 26 of the LTAA provides that private residential property held in trust is exempt for an assessment year if the land is owned by a trustee who holds the land in trust for one or more disabled beneficiaries and at least one disabled beneficiary of the trust uses the property as his or her primary residence.

Accordingly, it would be possible for the land owner to access an exemption from land tax by granting a life estate in the property to the intellectually impaired child by deed inter vivos. However, capital gains tax legislation may apply to the creation of a trust which would more than likely negate the benefit of any land tax exemption. Stamp duty liabilities would also arise.

A suggestion has been made that the LTAA could be amended so that deeds, granting people with disabilities a right to reside in a property, can be used to gain access to land tax exemptions. However, capital gains tax legislation may apply to the creation of a right to reside which would, again, be likely to negate any land tax exemption. In general, stamp duty liabilities would not arise in this situation.

Provide a Land Tax Exemption and Rates and Charges Concessions for Residences held by the Parents for the Purposes of Independent Accommodation for their Intellectually Impaired Sons and Daughters.

The submissions from Mr O'Hart, the Developmental Disability Council of WA (Inc), the Taxation Institute of Australia, Mr Guhl and Mr Moxham seek to extend the exemption from land tax for property held in trust for a disabled beneficiary, to property held by parents for their intellectually

impaired child who occupies the property as their principal place of residence. In addition, an extension of the rates and charges concessions is also sought in the same circumstances. Mr O'Hart also seeks to provide an opportunity for short term leases to be exempt from land tax and be eligible for concessional rates and charges treatment. However, this will not be an issue if the option discussed below is adopted.

An option to be considered is to amend the LTAA to allow for an exemption to apply in circumstances where the property is in the parents', grandparents' or siblings' name and an adult child with disabilities occupies the property as their principal place of residence. The owners should not derive any rent or other income from the property while the adult child occupies the home as their principal place of residence. To allow rent or other income to be derived would be inconsistent with other residential exemptions such as the continuation of an exemption after the death of a resident in section 23, the exemption during renovation of a private residence in section 25 and the rebate available where moving from one residence to another in section 27. Furthermore, if the property is owned by the family member for the person with a disability and the owner receives rent from that person, or another person residing in that property, then the situation is no different than a rental property used for investment purposes. The submissions do not indicate that this restriction would prevent families in these circumstances from accessing the proposed exemption. The definition of a "disabled beneficiary", paragraphs (a) and (b) only, currently provided by the Glossary to the LTAA, (see copy attached) should also apply to the adult child with disabilities for the proposed exemption.

An amendment could also be made to the Rates and Charges (Rebates and Deferments) Act so that an eligible adult child (that is, in receipt of the Disability Support Pension) with disabilities as defined above for the proposed land tax exemption, occupies the land under an arrangement with their parents, grandparents or siblings who are the owners of the property and who occupy a different principal place of residence. The arrangement is to be entered into to safeguard the interest of the child, who occupies the property as their principal place of residence, who will have a relevant interest for the purposes of the concessions available under the Act. Section 29(1)(c) of the Act currently provides for persons where by reason of ill health, frailty or other cause dependent for care on others, occupies the land under a deed or trust. (See copy attached).

It is immaterial whether the adult child is adopted or a stepchild of the family, it is only necessary that the parents, grandparents or siblings have an arrangement to provide an adult child with disabilities as defined, with independent accommodation.

As the liability for land tax and eligibility for rates concessions are determined at midnight on 30 June for the following financial year, any proposed amendments would need to be made to the LTAA and the Rates and Charges (Rebates and Deferments) Act so that they apply to the 2005/06 year of assessment.

This proposal was considered workable by the Technical Committee and would avoid the need to enter into arrangements that would have potential capital gains tax implications. The Committee also noted that the creation of a right of occupancy under a Deed (in the form of a lease or licence), where no premium is payable for the granting of the right, would be unlikely to attract stamp duty.

The First Home Owner Grant should apply to Property Bought in Trust for a Disabled Person where it is the Disabled Person's First Home.

Submission no. 8 seeks to apply the provisions of the *First Home Owner Grant Act 2000* to property bought in trust for a disabled person where the property will be the occupant's first home.

Currently, the *First Home Owner Grant Act 2000*, provides that an equitable interest is a relevant interest for the purposes of the provision of the grant where it is the interest of a person under a legal disability for whom a guardian holds the interest on trust.

A "guardian", in relation to a person under a legal disability, is defined as a trustee who holds property on trust for the person under an instrument of trust or by order or direction of a court or tribunal; or an administrator of the person's estate appointed under the *Guardianship and Administration Act 1990.*

Section 51 of the *Guardianship and Administration Act 1990* places an obligation and responsibility on a guardian to act in the best interests of a represented person including in a manner that is least restrictive of the rights, while consistent with the proper protection, of the represented person.

Accordingly, FHOG (and any corresponding stamp duty rate concessions) are already available where a person has a legal disability. Where this is not the case, providing access to the grant is only considered to be workable in circumstances of direct ownership. This is due to the equity and administrative difficulties in determining what type of trust situations would be eligible without the determining factor of a legal disability.

Stamp Duty Relief for Trusts Established for the Benefit of a Family Member with a Disability or for Housing Built for Disabled People.

Submissions from the Nulsen Haven Association, People with Disabilities (WA) and Mr Moxham seek to provide stamp duty relief on trusts established for the benefit of a family member with a disability or for housing built for disabled people.

It is considered that the request for stamp duty relief for trusts should be linked with the proposed amendment to the Commonwealth gifting provisions expected to commence from 20 September 2006. This amendment will enable families with a son or daughter with disabilities, to establish a trust which will be exempt from the income and assets test for the purposes of the Age Pension. The family will be able to contribute funds without any impact on the son or daughter's income support payments.

Stamp duty relief could be provided where a specific trust is established solely to provide for the care and accommodation needs of a person with disabilities and property is conveyed or transferred to the trust.

A definition of an adult child with disabilities, linked to the land tax exemption and rates and charges concessions definition, will be required for the stamp duty relief to apply. The stamp duty relief will be limited to trusts established for the provision of care and support of the person with a disability, whose beneficiary has a fixed entitlement and the person with a disability is the only beneficiary of the trust.

Prior to the proposed Commonwealth amendments, stamp duty relief would probably not be required.

The stamp duty relief or a stamp duty rebate for the additional costs of providing housing or additional features to properties for persons with disabilities, is proposed as a strategy to promote universal design principles that will in turn promote truly sustainable housing, encompassing elements of social, economic and environmental sustainability. It would appear that additional costs for providing housing or additional features for persons with disabilities, may not incur stamp duty.

Payment of Certain Taxes or Duties to be Deferred until the Trust is Wound Up

The submission from Mr Moxham seeks to amend revenue legislation so that land tax and stamp duty incurred by the establishment of a trust, where the trust is solely to benefit the person with a disability during their lifetime, can

be deferred until the trust is wound up, presumably when the property is no longer to be occupied by the disabled person.

A precedent for deferment can be found in Part 4 of the Rates and Charges (Rebates and Deferments) Act which provides for circumstances where deferment may be allowed. However, risks have been identified with the deferment of land tax or stamp duty which include the possibility of unacceptable costs to the State, large amounts of tax being payable which may not be collectable, a requirement for records to be kept by the Office of State Revenue for an unidentifiable period of time and the perception that the collection of large amounts of tax or duty at the time of a person's death may be seen to be a de facto death duty.

TECHNICAL COMMITTEE CONCLUSION

The Technical Committee considers the proposal to be technically sound should the Government wish to adopt the policy position.

ATTACHMENT 1

COMMISSIONER'S PRACTICE
LT 7.0

LAND TAX - EXEMPTION FOR TRUST PROPERTY USED BY DISABLED BENEFICIARY

Commissioner's Practice History

Commissioner's Practice	Issued	Dates of effect	
		From	To
LT 7.0	29 October 2003	29 October 2003	Current

This Commissioner's practice addresses the circumstances when the Commissioner will grant an exemption from land tax on private residential land held in trust for a disabled beneficiary.

Background

Section 26 of the *Land Tax Assessment Act 2002* ("the Act") provides that private residential property held in trust is exempt for an assessment year if at midnight on 30 June in the financial year before the assessment year:

- the land is owned by a trustee who holds the land in trust for one or more disabled beneficiaries; and
- at least one disabled beneficiary of the trust uses the property as his or her primary residence.

The term "disabled beneficiary" is defined in the Glossary to the Act as a person who:

- has a disability as defined in Section 3 of the *Disability Services Act 1993* and has been independently assessed by an appropriate assessor as requiring full-time care;
- is mentally incapacitated; or
- is a minor, who is also an orphan.

Section 3 of the *Disability Services Act 1993* defines disability as:

"a disability -

(a) which is attributable to an intellectual, psychiatric, cognitive, neurological, sensory or physical impairment or a combination of those impairments;

(b) which is permanent or likely to be permanent;

(c) which may or may not be of a chronic or episodic nature; and

(d) which results in –

(i) a substantially reduced capacity of the person for communication, social interaction, learning or mobility; and

(ii) a need for continuing support services."

Commissioner's Practice

1. In order to grant an exemption, the Commissioner needs to be satisfied that:

1.1 a trust exists and the person residing on the land is a beneficiary of that trust;

1.2 the property was purchased as an asset of the trust; and

1.3 the beneficiary is a disabled beneficiary.

2. The following documents must be sighted:

2.1 a stamped copy of the trust deed;

2.2 a stamped copy of the offer and acceptance or contract of sale showing that the trustee purchased the property on behalf of the trust; and

2.3 a report or statement from a medical or health professional.

3. The Commissioner may seek further documentation, information and corroboration in relation to any application for exemption under these provisions.

Date of Effect

This Commissioner's practice takes effect from 29 October 2003.

Bill Sullivan
COMMISSIONER OF STATE REVENUE

29 October 2003

ATTACHMENT 2

COMMISSIONER'S PRACTICE
SD 3.0

STAMP DUTY – CONVEYANCE OR TRANSFER OF PROPERTY TO A TRUSTEE PURSUANT TO SECTION 73AA(1)(f)

Commissioner's Practice History

Commissioner's Practice	Issued	Dates of effect	
		From	To
SD 3.0	21 October 2003	21 October 2003	Current

This Commissioner's practice addresses the circumstances of when a conveyance or transfer will be accepted as satisfying section 73AA(1)(f) of the *Stamp Act 1921* ("Stamp Act").

Background

In accordance with section 73AA(1)(f) of the Stamp Act, nominal duty of $20.00 under item 6 of the Second Schedule to the Stamp Act may be applied to a conveyance or transfer of property to a trustee where the Commissioner is satisfied that the conveyance or transfer:

- does not pass a beneficial interest in the property conveyed or transferred;
- is not made in contemplation of the passing of a beneficial interest therein; and
- is not part of, or made pursuant to, a scheme whereby any beneficial interest in the property conveyed or transferred, whether vested or contingent, has passed or will or may pass.

Commissioner's Practice

1. Every conveyance or transfer of property to the trustee of a trust is closely scrutinised and considered on the basis of the individual facts and merits of the case. The following examples will generally be accepted as satisfying section 73AA(1)(f).

Property subdivision

2. Under the *Transfer of Land Act 1893*, land must be in common ownership before application may be made for new certificates of title on the subdivision of land.

3. Transfers of land to effect common ownership for the purposes of a subdivision will be assessed with nominal duty under section 73AA(1)(f) where the taxpayer is able to provide evidence to confirm that:

    3.1. the transfer is solely for the purpose of facilitating the subdivision; and

    3.2. the parties will receive the same piece of land after subdivision, as they owned previously.

Property owner under a permanent disability

4. Where a property owner is unable to discharge the rights and obligations of property ownership, for example, due to mental incapacity, a legal administrator may hold the land in a trustee capacity by executing a declaration that the land is held on trust for the specified beneficiary.

5. When lodging the instrument of transfer and declaration of trust, the legal administrator will need to provide:

    5.1. a copy of the order from the Guardianship Board appointing the trustee as Administrator for the disabled person; and

    5.2. a medical report confirming the disabled person is unable to manage his or her own financial affairs.

Other circumstances

6. Any other circumstances where the taxpayer is able to satisfy the Commissioner under section 73AA(1)(f).

Date of Effect

This Commissioner's practice takes effect from 21 October 2003.

Bill Sullivan
COMMISSIONER OF STATE REVENUE

21 October 2003

ATTACHMENT 3

COMMISSIONER'S PRACTICE
SD 9.0

STAMP DUTY – UNIT AND DISCRETIONARY TRUST DEEDS

Commissioner's Practice History

Commissioner's Practice	Issued	Dates of effect	
		From	To
SD 9.0	12 November 2003	12 November 2003	Current

This Commissioner's practice clarifies the method of assessing a discretionary or unit trust deed, the primary purpose of which is to create a trust that involves the settlement of property.

Background

The *Stamp Act 1921* ("Stamp Act") provides for duty to be charged on a deed of any kind not otherwise chargeable with duty under item 8(1) of the Second Schedule to the Stamp Act.

Item 19(1) of the Second Schedule to the Stamp Act provides for duty to be charged on the amount or value of the property concerned in respect of an instrument where any property is settled or there is agreement to settle the property, in any manner whatsoever.

Section 19 of the Stamp Act provides for an instrument containing or relating to several distinct matters to be charged as if it were a separate instrument, with duty in respect of each of the matters.

Unit Trust Deeds

Generally there are two types of unit trusts:

- "Founder Unit Trust"; or a
- "Unitholder Initiated Trust".

In a founder unit trust, a founder, who is not related to the intended unitholders, gifts the settlement sum (usually $100) to the trust.

In the case of a unitholder initiated trust, the initial unitholders contribute an initial sum in return for the issue of equivalent units.

Discretionary Trust Deed

A discretionary trust is a trust under which the beneficiaries are to be chosen from a "pool" or "range" of specified persons. The discretion may exist for capital or income or both. It is common for a discretionary trust to be established with a small amount of money which is furnished, not by the "head of the family" for which the trust is set up but by a friend or relative.

Commissioner's Practice

Founder Unit Trust Deed

1. A "Founder Unit Trust Deed" is assessed as a gift on the value of the settled sum under item 19 of the Second Schedule to the Stamp Act and on each issue of units to each unitholder under section 73D of the Stamp Act.

Example

The settled sum gifted by the founder to create the XYZ Unit Trust is $100. The net value of the unit trust under section 73D is therefore $100. The two initial unitholders are issued with 50 units each.

Duty on the settled sum is $2.30 (ie. $100 @ $2.30 per $100)

Duty on the issue of 100 units is $4.60 (ie. $50 @ $2.30 per $100 or part thereof x 2)

Total duty payable is $6.90 (ie. $2.30 + $4.60)

Unitholder Initiated Trust Deed

2. As there is no settlement of property, a unitholder initiated trust deed is assessed as a deed under item 8 of the Second Schedule to the Stamp Act. The deed is also assessed as a "conveyance of any other kind" under item 6 of the Second Schedule to the Stamp Act on each issue of units to each unitholder.

Example

The contribution by each unitholder to create the ABC Unit Trust is $50 each. The two initial unitholders are issued with 50 units each.

Duty on the deed is $20.00

Duty on the issue of 100 units is $40.00 (ie. 2 x $20.00)

Total duty payable is $60.00

Discretionary Trust Deed

3. Any instrument establishing a discretionary trust will be assessed to duty under item 19(1) of the Second Schedule to the Stamp Act by reference to the value of the property settled. If the instrument is in the form of a deed, it will not also be assessed with duty as a deed under item 8(1) of the Second Schedule to the Stamp Act.

Example

A settlor settles on a trustee an amount of $100 in order to create a discretionary trust.

The trustee declares that it will hold all the property and assets of the trust subject to the provisions of the trust deed.

In this case, duty is charged on the value of the property being settled, ie. $100

Total duty payable is $2.30

Date of Effect

This Commissioner's practice takes effect from 12 November 2003.

Bill Sullivan
COMMISSIONER OF STATE REVENUE
12 November 2003

ATTACHMENT 4

Land Tax Assessment Act 2002

Glossary

1. Definitions
Unless the contrary intention appears —

"disabled beneficiary", in relation to land held in trust, means a person who has a beneficial
interest in the trust, whether the interest is contingent or otherwise, and who —

(a) has a disability as defined in section 3 of the *Disability Services Act 1993* and has been independently assessed by an appropriate assessor as requiring full-time care;

(b) is mentally incapacitated; or

(c) is a minor who is an orphan;

ATTACHMENT 5

Rates and Charges (Rebates and Deferments) Act 1992

29. Relevant interests

(1) Where an eligible person —

(a) …

(b) …

(c) being by reason of ill-health, frailty or other cause dependant for care on others, occupies that land under the terms of a deed, or of a trust, which was, in the opinion of the administrative authority, entered into to safeguard the interests of that person;

(d) …

6b. Land Tax – Removal of Aggregation/Separate Assessments for Jointly Owned Properties

ISSUE

A number of submissions suggested that land tax aggregation should be abolished and that land tax on jointly owned property should be assessed separately for all natural persons (with married couples to be assessed jointly), or if it is not possible for this to apply generally, then it should be introduced for self-funded retirees only.

The particular issues raised in the submissions were:

- **G.M. Miocevich** (Submission 1)
    - Joint assessment of land tax is unfair as it causes people to be taxed on land they do not own.
    - Separate assessments of land tax for all natural persons (with married couples to be assessed jointly) should be introduced, or if it is not possible for this to apply generally, then it should be introduced for self-funded retirees.
- **Mair & Co.** (Submission 6)
    - Aggregation is unfair and discriminatory and discourages people from investing in property.
    - The aggregation provisions may operate inequitably if separate entities could be used to circumvent these provisions.
- **N Lennox** (Submission 34)
    - Aggregation should be abolished.
- **Submission no. 46**
    - Multiple property owners should have each of their properties assessed separately.
- **Submission no. 58**
    - The combination of land tax aggregation and the contractual relationships between landlords and tenants may lead to inequity and affect investment decisions.

- As it may be possible to use artificial ownership structures in order to circumvent aggregation, inequity may result for landlords that cannot afford these structures.

- The aggregation provisions do not take into account the economies of scale that may exist in owning one property rather than multiple properties.

- **REIWA** (Submission 84)

  - Separate assessments may stimulate greater investment and efficiency, particularly in residential rental property.

- **J C Hanrahan A.M.** (Submission 100)

  - It may be possible to circumvent the aggregation provisions by holding property in different names and through different companies.

- **Property Council of Australia (WA Division) (**Submission 113)

  - Remove aggregation.

  - Removing aggregation would bring WA into line with the majority of Australian States.

  - Aggregation reduces jobs and business growth, restricts Western Australia's ability to attract capital, and acts as a disincentive to investment.

  - Owners and tenants of property that is subject to aggregation may face cost disadvantages.

  - Aggregation may lead to inefficiency as the assessment process creates an artificial premium that is being taxed.

- **Mrs Kerry Carroll** (Submission 133)

  - As there has been an increase in the value of land in Western Australia over the past two years, aggregation is inequitable to multiple property owners because of the rates of land tax they are liable to pay.

CURRENT POSITION

Land tax is an annual tax based on ownership and usage of land at midnight on 30 June and is levied in respect of the financial year immediately following that date. For example, the owner of land at 30 June 2005 is assessed in respect of the 2005/2006 financial year (year of assessment).

A tax-free threshold of $130,000 exists for land tax and the rates increase incrementally with the unimproved value of the land.

Land owned jointly is assessed separately from any land owned solely, and from any land owned with any other person.

For example, if Jim Smith owned one lot alone, and owned a second lot jointly with Jon Citizen, and a third lot jointly with Mary Citizen, each of those lots would be assessed separately. That is to say, a separate assessment for land tax would be issued to Jim Smith, Jim Smith and Jon Citizen, Jim Smith and Mary Citizen.

The amount of land tax payable is calculated on the basis of the aggregated unimproved value of taxable land owned. For example, if a person owned two taxable properties at 30 June 2005, valued at $200,000 and $80,000, the tax is assessed on the combined value of $280,000.

Whether land ownership is through a company, trust or as a joint owner, the amount of land tax payable is calculated on the basis of the aggregate unimproved value of the property owned by the entity.

All land owned by a particular entity is aggregated for the purposes of determining the land tax payable. However, aggregation does not occur on the basis of an interest in land held by a particular individual or entity, that does not constitute a lot or parcel of taxable land. For example, if John Jones held a 50% interest in land with Mary Jones, and a 60% interest in land with Kim Lee, then his individual interests of 50% and 60% would not be aggregated.

Other Jurisdictions

While the Property Council has suggested that Western Australia should remove the aggregation provisions so as to align with the majority of Australian states, a form of land tax aggregation exists in all Australian jurisdictions that impose land tax, except the Australian Capital Territory. However, rates and tax-free thresholds vary across jurisdictions. Importantly, the Australian Capital Territory has never employed aggregation due to the unique characteristics of that jurisdiction, including

the small property base and the fact that introducing a tax-free threshold (which generally exists along with aggregation) would cause an excessive reduction in the land tax revenue base.

ANALYSIS OF ISSUE – AGGREGATION

It has been suggested that aggregation be abolished for a number of reasons, including that it is discriminatory, discourages investment in property and reduces jobs and business growth.

In considering removal of the aggregation provisions, a number of significant equity, revenue, and administrative issues arise.

Equity Issues

The current aggregation provisions are intended to ensure equity between taxpayers with land holdings of the same unimproved value. For example, an owner of one property valued at $300,000 would be liable for the same amount of land tax as an owner of three properties, which in aggregate were valued at $300,000.

In the absence of aggregation, an inequity would arise between an owner of one high value property and an owner of multiple low value properties. For example, an owner of one property valued at $300,000 would be liable for a greater amount of land tax than an owner of three properties, which, in aggregate, were valued at $300,000. This would be the case as each of the three properties would be entitled to a tax-free threshold and thus any liability to land tax that may arise would do so at the lowest rate on the progressive land tax scale, for each separate property.

Another situation where inequity may arise is in the treatment of a single owner of multiple lots or parcels of taxable land as opposed to the treatment of a joint owner that owns one share in a lot or parcel of taxable land. In particular, if an owner's lots or parcels of taxable land were not subject to aggregation, each lot or parcel would be entitled to a tax-free threshold whereas a joint owner would always share a tax-free threshold with the other joint owners. This may lead joint owners to claim that their part shares in a lot or parcel of taxable land should also be assessed separately so that each of their part shares would be entitled to a tax-free threshold. The issue of separate assessments for jointly owned property is discussed in detail below.

Submission no. 58 has suggested that the combination of aggregation and the variety of contractual arrangements, in particular the arrangements regarding whether the landlord or the tenant bears the cost of land tax, creates inequity and influences investment decisions. While a variety of arrangements exist regarding the amount of land tax that can be passed on directly, land tax is only one of a range of costs that would be taken into consideration by a lessor when determining the amount of the ongoing lease payments under the terms of a lease.

Mair & Co, J C Hanrahan A.M. and submission no. 58 have suggested that aggregation may be circumvented by owning property through the use of various legal entities, trusts, and companies and also by owning property in different names. While there may be limited potential for taxpayers to abuse the provisions that cover the assessment of taxable land owned through such structures, there remain valid equity reasons for assessing land tax in this way, as outlined above. The possible introduction of an anti-avoidance provision to address contrived abuse of the aggregation provisions has been discussed in the paper "Land tax anti-avoidance provision".

Also, if aggregation were to be removed, consideration would need to be given to the implications for conveyance duty under the aggregation provisions of section 75AF of the *Stamp Act 1921*.

The only way that equity could be maintained would be with a single rate of tax with no threshold. However, this would bring significant incidence shifts and large increases in administration costs.

Revenue Issues

The submissions seem to suggest that aggregation could be removed to the benefit of all. However, any decision to remove the aggregation provisions would have significant revenue implications if the base and the rates and thresholds (including the tax-free threshold) remained the same.

If the aggregation provisions were to be removed and the current level of revenue maintained, adjustments to the rates may be required, or the base may need to be broadened by, for example, reducing the tax-free threshold or removing some of the current exemptions. However, the recent Review of State Business Taxes found that practical constraints prohibit any significant broadening of the land tax base beyond the removal of the land developers' concession, which has now been abolished.

Any reduction in the tax-free threshold may have an adverse effect on small investors, mum and dad investors that are saving for retirement, those entering the real property investment market, or others with a reduced

capacity to pay land tax, by bringing them into the land tax base. Taxing those with a reduced capacity to pay may lead to an increase in defaults on payment of land tax and hence higher recovery costs.

In addition, removing the aggregation provisions may provide an incentive for taxpayers to minimise their land tax liability by investing in multiple land holdings rather than in a single land holding. While not strictly a revenue issue, this may also influence the property market, for example, the supply of rental properties in higher value suburbs and the rents charged for those properties could be influenced by the tax system. It is also possible that owners may subdivide their land holdings in order to gain the benefits associated with separate assessments for land tax, however any costs associated with subdivision of the land would act as a disincentive to subdividing land to avoid land tax.

Administrative Issues

As discussed above, the removal of the aggregation provisions may lead taxpayers to change their land ownership. It could also lead taxpayers to subdivide land in order to minimise their liability to land tax. Should this occur, the number of valuations required may increase. Amendments to the land tax regime which encourage subdivision of land, and ownership of smaller lots of land, or lower value lots would necessarily require an increase in the number of valuations of land required each year. Any increase in the number of valuations would have an adverse impact on land tax as the annual valuation process is a significant component of the administration cost of the land tax regime that makes land tax one of the costlier State taxes to administer.

Furthermore, the need for separate assessments and any broadening of the land tax base would lead to a significant increase in the number of assessments. Any change that led to a large number of assessments of low amounts would be undesirable as the costs (e.g. recovery) of administering such assessments may reduce or even outweigh the revenue generated.

As removing the aggregation provisions would represent a major change to the current land tax regime, a number of unforseen complexities may also arise.

General Issues

While aggregation may be unpopular with some taxpayers, the aggregation provisions have been a long-standing feature of the land tax regime. As a result, these provisions are well understood by taxpayers and can therefore be factored into financial arrangements made by landowners. Any changes

to these provisions would therefore involve disruption to such arrangements and large-scale taxpayer re-education.

While the maintenance of records to reflect a landowner's holdings is a significant administrative burden, the data are readily available from records held by other government agencies, for example the Department of Land Information.

While it is plausible that removing the current aggregation provisions may strengthen business growth, job creation, and Western Australia's ability to attract capital as suggested by REIWA and the Property Council, it is questionable whether removing aggregation, as opposed to measures such as reducing rates or increasing the tax-free threshold, would be the most appropriate means of providing such relief. In addition, any alternative provisions that may be introduced to replace the aggregation provisions, and protect revenue, may mitigate any relief provided.

It is true that recent increases in property values, coupled with the aggregation provisions, have increased land tax liability for certain land owners to some extent. However, a reduction in land tax rates, or thresholds, may be a more equitable means of reducing the land tax burden, than the removal of the aggregation provisions. Even though this may be the case, such measures may not address the underlying community perceptions regarding aggregation.

ANALYSIS OF ISSUE – JOINT ASSESSMENTS

The Miocevich submission suggests that land tax should not be assessed based on joint ownership by natural persons, but that the tax should be assessed according to a natural person's interest in taxable land with only a husband and wife to be assessed jointly. It is also submitted that this change be introduced for self-funded retirees only, if it is not possible for the change to apply generally. Importantly, there has been no suggestion made in the submission that the method of assessing land tax should be altered in the case of trusts or companies.

Introducing separate assessments for joint owners of land would represent a major change from the current administration of land tax which would have, among other things, significant impacts for the legislation, the valuation system, the assessment and collection computer systems and procedures for recovery and lodging of memorials.

The information required to conduct separate assessments for each joint owner would be well beyond the information resources currently available to the Office of State Revenue. In particular, information on the proportion of ownership in each lot or parcel of taxable land owned by each joint owner would be required, and a method of automatically obtaining this information is not currently available.

In certain circumstances, some individuals would be worse off if individual interests were to be aggregated. For example, in the case mentioned earlier, where Jim Smith owns one lot alone, owns a second lot jointly with Jon Citizen, and a third lot with Mary Citizen, he may not have a land tax liability because individual assessments would be issued for each of the three lots. However, if his individual interests in the jointly owned property were to be separated, his proportionate interests in each of the three lots would be aggregated, and he would potentially have a land tax liability. In this respect, the suggested change in treatment of jointly owned property is likely to mostly benefit those parties who own a part interest in a single property, while those that own other property in addition to the joint interest could potentially be worse off.

Additionally, it may be considered to be inequitable for natural persons to be treated differently from trusts or companies for land tax purposes. Inequity may also arise if lots or parcels of land owned by a natural person were aggregated while interests in land were not aggregated for such taxpayers.

A comprehensive analysis of the composition of the methods of ownership of land in Western Australia would be required to ascertain the revenue effects of introducing separate assessments for natural persons.

As an alternative, Miocevich has suggested that separate assessments for land tax for natural persons, with married couples to be assessed jointly, should be allowed only for self-funded retirees. This suggestion raises all of the issues outlined above, plus additional issues such as the criteria for defining a "self-funded retiree" and the precedent that would be set for others in similar circumstances. To define a "self-funded retiree" may require the application of means testing and an examination of a person's sources of income, thus introducing significant compliance costs and possibly an unpopular and intrusive examination of a person's financial affairs.

The introduction of concessions or exemptions to the land tax regime adds complexity to the administration of the tax and reduces the overall equity of the tax by reducing the tax base.

TECHNICAL COMMITTEEE CONCLUSION

The Technical Committee considered that the problems associated with aggregation as set out in the submissions are a result of the land tax system being one with only partial aggregation, rather than the alternative systems of full grouping based on beneficial ownership or no aggregation with no threshold and a flat rate.

In this regard, although the aggregation of individual interests may attempt to address a perceived inequity in the current operation of the aggregation provisions, other inequities would arise as a result, and the incidence of land tax liability would be shifted in unforseen and unintended directions. This, in conjunction with the increased administrative burden of maintaining records in respect of individual interests in land, makes the aggregation of individual interests an undesirable option.

The Technical Committee recognised that the current system is imperfect, however, the magnitude of the perceived inequities is not so great as to warrant the adoption of alternatives, such as aggregation on the basis of individual interests, which in itself may produce further distortions of the land tax regime and significant incidence shifts in terms of taxpayer liabilities.

6c. Land Tax – Twelve Month Exemption for New Residences

ISSUE

Twelve month exemption from land tax for new residences.

The particular issues raised in the submissions were:

- **John Quigley LLB MLA (Submission 40)**
    - Whether the current land tax provisions that allow for an exemption for a period of one assessment year for persons constructing or renovating their property are adequate considering the time it currently takes to construct a dwelling due to the economic boom.

CURRENT POSITION

The *Land Tax Assessment Act 2002* allows an exemption from land tax for one assessment year for persons constructing (section 24) or renovating (section 25) a home. The exemption applies where the residence is not completed at 30 June, but is completed and used as the principal place of residence prior to the following 30 June.

Section 24 of the Act provides that private residential property (except property held in trust) that is owned by an individual is exempt for an assessment year if:

- the construction of the private residence that forms part of the property is completed during the assessment year;
- at midnight on 30 June in the previous financial year, the individual owned the land on which the private residence is constructed;
- the individual is the first occupant of the private residence; and
- the individual uses the private residence as his or her primary residence during the assessment year.

However, the property is not exempt if any other private residential property owned by the same individual is exempt for the assessment year under Division 2 of Part 3 of the Act as a result of its use by the individual as his or her primary residence.

Section 25 of the Act provides for an exemption from land tax for private residential property (other than property held in trust) if:

- the property is owned by an individual;
- at midnight on 30 June in the financial year before the assessment year, the private residence that forms part of the property was unoccupied, but only because the individual had ceased occupation, or not taken up occupation, to enable the private residence to be refurbished;
- the individual takes up occupation of the private residence during the assessment year, and is the first occupant of the private residence since the refurbishment; and
- no rent or other income was derived from the property by anyone in respect of the period between the beginning of the assessment year and the time when the property was reoccupied.

However, the property is not exempt if any other private residential property owned by the same individual is exempt for the assessment year under another provision of Division 2 of Part 3 of the Act, as a result of its use by the same individual as his or her primary residence as defined in clause 1 of the Glossary of the Act.

The purchaser of land will not be liable for land tax during any period from the date of purchase until midnight on the following 30 June. Therefore, despite an exemption being available for one assessment year only, some additional time may be available for the taxpayer to fulfil the requirements for an exemption.

Commissioner's Practice LT 5.1 addresses the application of an exemption from land tax for newly constructed residences and Commissioner's Practice LT 6.1 addresses the application of exemption from land tax during renovation of a private residence. These Commissioner's Practices also outline the circumstances where demand for payment of land tax will be deferred, during an assessment year, where an owner does not immediately qualify for the exemption but anticipates that they will fulfil all the requirements for exemption within the assessment year. Copies of the Commissioner's Practices are attached.

The Act also makes provision under section 27, for a rebate of land tax where two residences are owned at 30 June in transitional circumstances. It provides for a rebate for an assessment year if:

- The property is exempt from land tax for the assessment year as a result of its use by an individual at midnight on 30 June in the previous financial year as his or her primary residence;

- At midnight on 30 June in the financial year before the assessment year the owner also owned a second private residential property that would have been exempt or eligible for exemption under Division 2 of Part 3 of the Act for the assessment year if the individual had used the second property instead of the exempt property as his or primary residence;

- The owner became the owner of either the exempt property or the second property during the financial year before the assessment year;

- The same individual used the second property as his or her primary residence either in the financial year before the assessment year (before using the exempt property for that purpose), or in the assessment year (after using the exempt property for that purpose);

- During the assessment year the owner sold or otherwise disposed of whichever of the two private residential properties the owner had first acquired, and delivered possession to the new owner in that year; and

- While the owner owned both properties, nobody derived any income from whichever property was not being used as the primary residence of the individual.

The amount of the rebate is the amount by which the liability of the owner would have been reduced if the second private residential property had been exempt for the assessment year because of its use by the individual as his or her primary residence.

Commissioner's Practice LT 8.1 addresses this issue and a copy is attached.

ANALYSIS OF ISSUE

Timing of Home Construction

John Quigley MLA has submitted that due to Western Australia's current economic boom, the process of moving from land purchase to house occupancy is well in excess of 12 months. He has also submitted that a

countless number of land purchasers may be affected if an extension to the length of the current exemption for people purchasing land with the sole intention of building a dwelling as their primary place of residence is not provided.

Some evidence of the time taken to construct a home during the current economic boom has been gathered from industry representatives and is outlined below:

- representatives from the Housing Industry Association (HIA) and Plunkett Homes consider that during periods of "normal" demand one year is sufficient time to construct a residence;
- the Master Builders' Association (MBA) advised that the process could take up to eighteen months for larger residences;
- anecdotal evidence from the MBA, the HIA and Plunkett Homes indicates that the time taken from purchasing a vacant lot to occupation of a residence may still range between one and two years;
- construction times depend on factors such as the size of the residence being constructed and the location; and
- the main reasons cited for the delays in construction include the shortages of skilled labour and building supplies (especially the availability of bricks).

Other Jurisdictions

More flexible arrangements exist in some jurisdictions, for example, New South Wales, which allows a period of up to two years for individuals to construct or renovate their property. Furthermore, the Chief Commissioner of Revenue in New South Wales is allowed a degree of discretion to further extend the land tax exemption (beyond two years) if the land owner is able to prove that the delay in construction or renovation is beyond their control.

However, the exemption in circumstances where two homes are owned in transitional circumstances requires that the former residence be disposed of within six months of the relevant taxing date and that the person occupy the new residence as the principal place of residence by the next taxing date.

Introduction of Similar Powers of Discretion to Western Australia

While the OSR is not aware of any substantial increase in persons receiving land tax bills due to construction delays, anecdotal evidence from the real estate and building industries indicates that it is currently taking up to two years to construct a home.

To alleviate the land tax burden for persons building or renovating a principal place of residence, the legislation could be amended to provide the Commissioner of State Revenue with a discretion to extend the current one year period allowed under sections 24 and 25 to two years, where a person could demonstrate that the delay in construction or renovation was beyond their control.

However, there may be difficulty in determining what constitutes "a delay that is beyond the control of the owner". While there is no documented procedure for addressing this issue in NSW, this jurisdiction requires taxpayers to produce evidence of the steps they have taken to ensure that the conditions of the exemption were met prior to applying for an additional exemption. If, from the time of acquisition of the land the taxpayer made every effort to fulfil the requirements but failed to do so for reasons such as, for example, engineering problems or problems with a council or builder, an additional exempt period would be granted. If delays occurred due to factors within the control of the owner, for example a lack of funds to complete construction, an additional exempt period would not be granted. If it becomes apparent that the taxpayer will not fulfil the requirements, land tax is payable for the period of exemption provided.

Should the Commissioner of State Revenue be provided with a discretion similar to that of the New South Wales Commissioner, the issue of determining what constitutes "a delay that is beyond the control of the owner" could be addressed by outlining specific circumstances in a Commissioner's Practice.

Rather than provide an extended period in limited circumstances and granting it subject to the discretion of the Commissioner, an alternative approach would be to extend the current one year limit to two years in all cases where construction or refurbishment of a residence is involved.

The exemption would operate such that:

New Private Residences (Section 24)

Where, at 30 June in the previous financial year, the individual owned land on which a residence is to be constructed;

- the owner enters into a building contract or commences construction as an owner builder during the financial year and makes an application for an exemption;
- the exemption will apply for the financial year and the following financial year.

However, if the owner fails to use the private residence as their primary residence during that following financial year, the land tax that has been exempted for the previous two years will be clawed back.

Other existing criteria, such as the owner being the first occupant and not being in receipt of a residential exemption in respect of any other property would be retained.

Exemptions During Renovation of Private Residence (Section 25)

Where at 30 June in the previous financial year, a private residence is unoccupied because the owner has ceased occupation, or not taken up occupation, to enable the private residence to be refurbished;

- the owner enters into a building contract or commences renovations as an owner builder during the financial year and makes an application for an exemption;
- the exemption will apply for the financial year and the following financial year.

However, if the owner fails to use the private residence as their primary residence during that following financial year, the land tax that has been exempted for the previous two years will be clawed back.

Other existing criteria, such as the owner being the first occupant, not deriving rent or other income from the property and not being in receipt of a residential exemption in respect of any other property would be retained.

Rebate if Moving from one Residence to Another (Section 27)

This provision could be changed to allow an exemption (rather than a rebate) on the following basis:

- where an individual is entitled to a land tax exemption for a financial year in respect of a property because that property is used as their primary residence at 30 June prior to the financial year;
- the individual also owns land (which may include a house which is to be demolished), acquired during the previous financial year, on which a new private residence is to be built;
- the owner enters into a building contract or commences building as an owner builder during the financial year and makes an application for an exemption;
- the first home must be sold before the end of the two year period (i.e. 30 June),

then the exemption will apply for the financial year and the following financial year.

However, if the owner fails to use the new private residence as their primary residence during that following financial year, the land tax that has been exempted for the previous two years will be reassessed by way of a claw-back.

Other existing criteria, such as the owner not deriving rent or other income from either property, would be retained.

The proposal in respect of section 27 is illustrated in the attached flowchart.

The Technical Committee considers that providing a Commissioner's discretion in respect of the current 12 month exemption would not provide certainty and would be difficult to administer.

The Committee agrees that a change to section 27 to provide an exemption rather than the current rebate regime would simplify the process for taxpayers and administrators by removing the requirement to pay the land tax and seek a rebate.

The Committee suggested that section 27 be split so that it operates in its current form in respect of established homes. A new provision could then deal with circumstances where the second property is a new home being constructed or a home being refurbished.

Administrative Issues

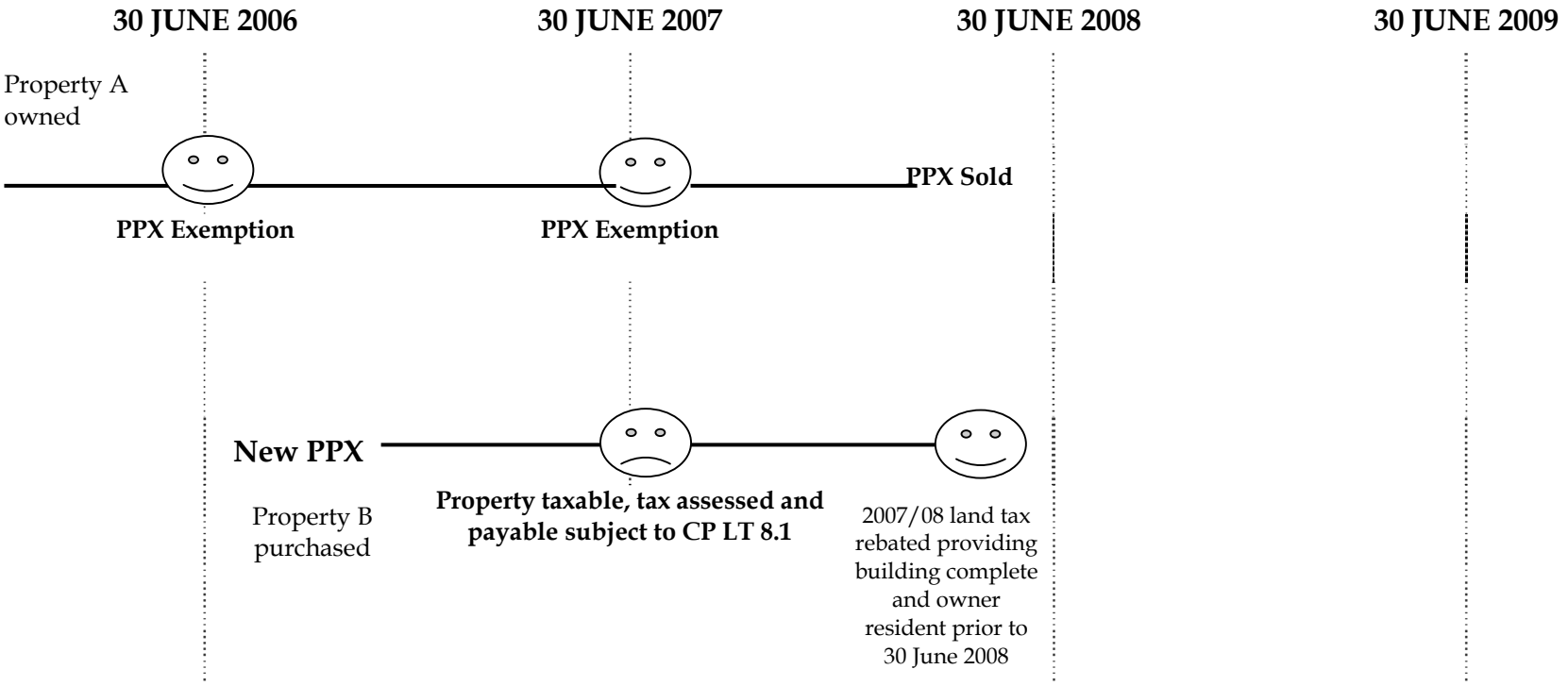
The earliest any changes to the relief provisions could apply is 2006-07 as land tax is an annual tax based on ownership and usage of land at midnight on 30 June and is levied in respect of the financial year immediately following that date.

TECHNICAL COMMITTEE CONCLUSION

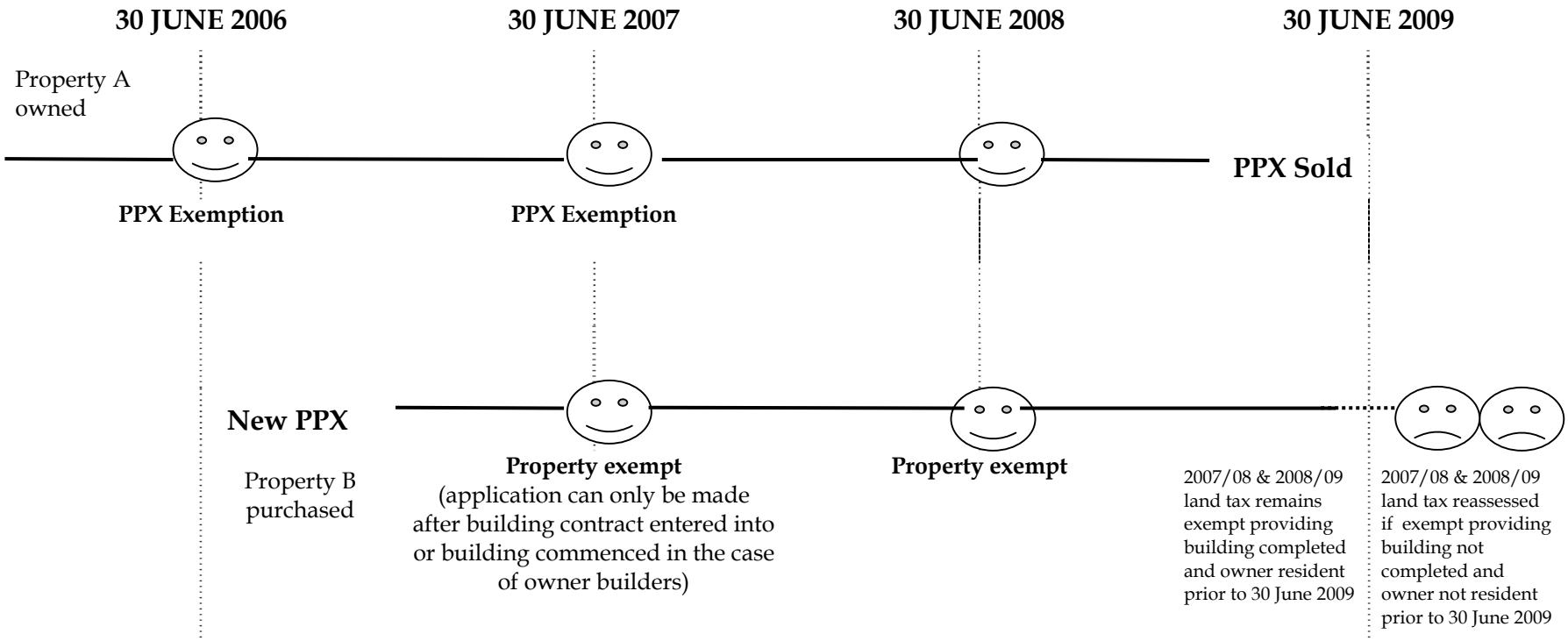
The Technical Committee considers the proposal is technically sound should the Government wish to adopt the policy position.

ATTACHMENT 1

SECTION 27 LAND TAX ASSESSMENT ACT – CURRENT OPERATION



SECTION 27 LAND TAX ASSESSMENT ACT – PROPOSED OPERATION



ATTACHMENT 2

COMMISSIONER'S PRACTICE
LT 5.1

LAND TAX - NEWLY CONSTRUCTED RESIDENCES

Commissioner's Practice History

Commissioner's Practice	Issued	Dates of effect	
		From	To
LT 5.0	29 October 2003	29 October 2003	24 November 2005
LT 5.1	25 November 2005	25 November 2005	Current

This Commissioner's practice addresses the application of an exemption from land tax for land on which there is a newly constructed private residence, where the residence is not completed at the time the land tax assessment notice is issued.

Background

Section 24 of the *Land Tax Assessment Act 2002* ("the Act") provides that private residential property (except property held in trust) that is owned by an individual is exempt for an assessment year if:

- the construction of the private residence that forms part of the property is completed during the assessment year;
- at midnight on 30 June in the previous financial year, the individual owned the land on which the private residence is constructed;
- the individual is the first occupant of the private residence; and
- the individual uses the private residence as his or her primary residence during the assessment year.

However, the property is not exempt if any other private residential property owned by the same individual is exempt for the assessment year

under another provision of the Act as a result of its use by the individual as his or her primary residence.

Commissioner's Practice

1. An application for exemption will be considered when the residence is complete and the owner has taken up occupation.

2. However, where an application for exemption is received from an owner who does not immediately qualify for the exemption, the Commissioner will defer a demand for payment of the land tax assessment, providing:

   2.1 the land tax assessment is for a single lot;

   2.2 none of the owners are entitled to a residential exemption on any other land for the year of assessment;

   2.3 construction of the new residence has commenced; and

   2.4 the owners intend to move into the completed residence on or before midnight on the following 30 June.

3. Upon occupying the new residence, the owners are required to notify the Commissioner and finalise their application for exemption. Should the Commissioner not be notified on or before midnight on the following 30 June that the owners are now in residence, payment of the land tax assessment will become due.

4. Where considered necessary, the Commissioner will inspect properties and/or seek documentary evidence to verify completion of construction and owner occupation.

Date of Effect

This Commissioner's practice takes effect from 25 November 2005.

Bill Sullivan
COMMISSIONER OF STATE REVENUE

25 November 2005

ATTACHMENT 3

COMMISSIONER'S PRACTICE
LT 6.1

LAND TAX - EXEMPTIONS DURING RENOVATION OF A PRIVATE RESIDENCE

Commissioner's Practice History

Commissioner's Practice	Issued	Dates of effect	
		From	To
LT 6.0	29 October 2003	29 October 2003	24 November 2005
LT 6.1	25 November 2005	25 November 2005	Current

This Commissioner's practice addresses the circumstances when an exemption from land tax will be granted for unoccupied private residential property (as defined in the Glossary of the *Land Tax Assessment Act 2002* ("the Act")) during renovation.

Background

Section 25 of the Act provides for an exemption from land tax for private residential property (other than property held in trust) if:

- the property is owned by an individual;
- at midnight on 30 June in the financial year before the assessment year, the private residence that forms part of the property was unoccupied, but only because the individual had ceased occupation, or not taken up occupation, to enable the private residence to be refurbished;
- the individual takes up occupation of the private residence during the assessment year, and is the first occupant of the private residence since the refurbishment; and

- no rent or other income was derived from the property by anyone in respect of the period between the beginning of the assessment year and the time when the property was reoccupied.

However, the property is not exempt if any other private residential property owned by the same individual is exempt for the assessment year under another provision of Division 2 of Part 3 of the Act, as a result of its use by the same individual as his or her primary residence as defined in clause 1 of the Glossary of the Act.

Commissioner's Practice

1. An application for exemption will only be considered once the renovation is complete and the owner has occupied the residence.

2. However, where an application for an exemption under these provisions is received from an owner who does not immediately qualify for the exemption, the Commissioner will defer a demand for payment of the land tax assessment, providing:

    - the land tax assessment is for a single lot;
    - none of the owners are entitled to a residential exemption on any other land for the year of assessment;
    - renovation of the residence has commenced; and
    - the owners intend to occupy the residence on or before midnight on the following 30 June.

3. Upon occupying the residence following the renovation, the owners are required to notify the Commissioner and finalise their application for exemption. Should the Commissioner not be notified on or before midnight on the following 30 June that the owners are now in residence, and taxes remain payable, payment of the land tax assessment will become due.

4. Where considered necessary, the Commissioner will inspect properties and/or seek documentary evidence to verify completion of renovation and owner occupation.

Date of Effect

This Commissioner's practice takes effect from 25 November 2005.

Bill Sullivan
COMMISSIONER OF STATE REVENUE

25 November 2005

ATTACHMENT 4

COMMISSIONER'S PRACTICE
LT 8.1

LAND TAX - REBATE IF MOVING FROM ONE RESIDENCE TO ANOTHER

Commissioner's Practice History

Commissioner's Practice	Issued	Dates of effect	
		From	To
LT 8.0	29 October 2003	29 October 2003	24 November 2005
LT 8.1	25 November 2005	25 November 2005	Current

This Commissioner's practice addresses the granting of a rebate of land tax where two residences are owned at 30 June in transitional circumstances.

Background

The *Land Tax Assessment Act 2002* ("the Act") provides for an exemption from land tax on land that is used by the owner as his or her primary residence as defined in clause 1 of the Glossary to the Act.

Section 27 of the Act provides for a rebate of land tax for an assessment year if:

- the property is exempt from land tax for the assessment year as a result of its use by an individual at midnight on 30 June in the previous financial year as his or her primary residence;
- at midnight on 30 June in the financial year before the assessment year the owner also owned a second private residential property that would have been exempt or eligible for exemption under Division 2 of Part 3 of the Act for the assessment year if the individual had used the second property instead of the exempt property as his or her primary residence;

- the owner became the owner of either the exempt property or the second property during the financial year before the assessment year;
- the same individual used the second property as his or her primary residence either in the financial year before the assessment year (before using the exempt property for that purpose), or in the assessment year (after using the exempt property for that purpose);
- during the assessment year the owner sold or otherwise disposed of whichever of the two private residential properties the owner had first acquired, and delivered possession to the new owner in that year; and
- while the owner owned both properties, nobody derived any income from whichever property was not being used as the primary residence of the individual.

The owner may apply for the rebate, in the approved form:

- after the sale or other disposition and delivery of possession of the first acquired property; and
- not later than three months after the end of the assessment year, or three months after the issue of the assessment notice, whichever is the later.

The amount of the rebate is the amount by which the liability of the owner would have been reduced if the second private residential property had been exempt for the assessment year because of its use by the individual as his or her primary residence.

All of the above qualifications have to be satisfied before a rebate under section 27 of the Act may be granted. An application may not be made before the sale and delivery of possession of the original home to the purchaser.

Commissioner's Practice

1. Where an application for a rebate is received from a landowner who does not immediately qualify for the rebate because construction of a new residence, or refurbishment of an existing dwelling, is not yet completed, the Commissioner will defer the demand for payment of the land tax assessment, providing;

    - the land tax assessment is for a single taxable lot or parcel;
    - construction or renovation of the residence has begun; and
    - the owner intends to occupy the residence on or before midnight on the following 30 June.

2. Upon occupying the new residence, the owner is required to notify the Commissioner and finalise the application for a rebate. Should

the Commissioner not be notified on or before midnight on the following 30 June that the owner is now in residence, payment of the land tax assessment will become due.

3. The Commissioner will consider an application for a rebate where the ownership of the two private residences is not identical. It is sufficient for one owner to have an interest in both residences for a rebate to apply. Should one of the owners of the new home be entitled to a residential exemption on any other land for the year of assessment, a partial rebate will be given, in accordance with section 18 of the Act.
4. Where considered necessary, the Commissioner will inspect properties and/or seek documentary evidence to verify completion of conditions.

Date of Effect

This Commissioner's practice takes effect from 25 November 2005.

Bill Sullivan
COMMISSIONER OF STATE REVENUE

25 November 2005

6d. Land Tax – Clawback Provisions and Liability After Settlement

ISSUE

A number of submissions have suggested changes to the clawback arrangements that apply to land developers and to land tax liability after the sale of the land.

The particular issues raised in the submissions were:

- **Mair & Co Real Estate Agents** (Submission 6)
    - When land is sold the vendor of land should not be liable for land tax after the settlement date.
- **The Urban Development Institute of Australia (WA Division) Inc** (Submission 125)
    - The clawback of land tax where land is subdivided should only apply retrospectively where a developer has control over land that enjoyed a rural business exemption or concession prior to the land being acquired for subdivision.

CURRENT POSITION & ANALYSIS OF ISSUE

Clawback Arrangements

Sections 14, 15, and 15A of the *Land Tax Assessment Act 2002*, provide for up to five years' retrospective taxation of land that is subdivided after a concession has been allowed in previous assessment years. Clawback provisions also protect land tax exemptions provided in respect of land used by religious and educational institutions. These provisions are intended to deter schemes that take advantage of the exemption or concession. The clawback provisions apply to the subdividing owner of the property.

The submissions suggest that the clawback provisions in respect of newly subdivided rural business land are inconsistent with the government's policy of promotion of homes for all Western Australians, in that paying land tax retrospectively for five years on land that was not held by a developer inhibits the developer's ability to assist Government in the implementation of that policy. It is suggested that developers have no control over the use of

land prior to purchasing the land, do not enjoy any concession, and may not even know if the concession has been claimed.

While it is true that a developer does not have control of the use of land prior to its purchase, it would be expected that a developer would factor the land tax clawback into the negotiation for the purchase of the land and into the ultimate purchase price. Purchasers who intend to subdivide land that carries the concession can reasonably be expected to be aware of the land tax liabilities associated with the land and would take that into account in their commercial negotiations. In addition, the burden of the clawback may not be borne by the subdividing owner, rather it may be borne by the person who enjoyed the concession because a slightly lower price will be offered by the purchaser in the knowledge that land tax will be payable if the land is subdivided. Making adjustments to rates, charges, and land tax liability during negotiations for the sale of land is a common feature of the transactions involved when ownership of land is transferred from vendor to purchaser. These arrangements are a private matter between the vendor and purchaser.

The existing clawback provisions in relation to newly subdivided rural business land are consistent with the clawback provisions relating to newly subdivided private residential property and newly subdivided dwelling park land. It would be inequitable to remove the clawback provision in respect of rural business land, but retain that in respect of land used for dwelling parks and private residential property.

The assertion that the provisions for retrospective taxation in section 15 of the *Land Tax Assessment Act 2002* inhibit a developer's ability to assist Government policy of housing for all Western Australians is not supported by accompanying quantitative data.

Liability to Land tax when Land is Sold

Land tax is levied on the unimproved value of taxable land owned at midnight on 30 June preceding the year of assessment and is payable annually by the land owner. Taxable land for land tax purposes includes commercial and industrial properties, residential rental land, and vacant land.

A person who sells land in early July, and who owned the land on the previous 30 June, is liable for the land tax in respect of that land for the financial year, despite not owning the land for most of the year following 30 June. For example, as illustrated in the submission,

> *Party A owns an investment house which has been rented out for several years. He decides to sell the property and it is sold to an owner/occupier with settlement taking place on 15 July. The owner/occupier is not liable for land tax and so the vendor has to pay land tax for the whole of the financial year even though he has only owned the property for the first 15 days of that particular financial year.*

In many cases, the land tax may be adjusted between the vendor and the purchaser at the time the land is sold and may be reflected in an adjusted sale price. These adjustments are a private arrangement between the vendor and purchaser, and do not affect the primary liability to land tax of the person who owned the land on 30 June. The *Joint Form of General Conditions for the Sale of Land* adopted both by The Law Society of Western Australia and The Real Estate Institute of Western Australia Inc. clearly identifies land tax as a matter for consideration at the time of sale of land.

It is suggested that the owner of land should not be liable to land tax after settlement as, in certain circumstances, an adjustment of the land tax may not be possible between the vendor and purchaser. This is most often the case where the new owner of the land receives a concession, or exemption, in respect of land tax; for example, as illustrated above, where the land in question is the purchaser's primary residence, but was previously owned by someone for whom the land was an investment.

Ownership of land as at 30 June is a key element of the land tax regime, and provides a specific, verifiable, transparent, and administratively efficient point in time at which to ascertain liability to land tax of a particular land owner.

To implement the suggested proposal would necessitate a capacity to apportion the land tax for a financial year according to ownership during that year. Due to the effects of aggregation, if apportionment of the land tax for a financial year were to occur, this would result in numerous reassessments being issued to taxpayers who own several pieces of land. In particular, land developers, who enter into many land sale transactions in a year, would receive a reassessment of land tax whenever land was purchased or sold. Furthermore, such a scheme would be administratively cumbersome and require significant compliance activity to maintain its integrity.

The corollary of the suggestion that the vendor of land should not be liable for land tax after the settlement date, is that the purchaser should be liable for land tax after the settlement date. If purchasers were to be made liable for land tax from the date of acquisition of the land, then this would also result

in numerous reassessments for purchasers of land, especially where the purchaser owned several pieces of land.

As a matter of equity, the vendor of land, having realised the investment, is usually in a better position than the purchaser to pay the land tax, especially where the property is sold to a person who will in fact be exempt from land tax.

To ensure that developers and subdividers can effectively plan their business affairs when contemplating purchasing land with a view to subdivision, one option may be to engage in an appropriate education strategy which enables taxpayers to effectively factor the clawback of land tax into their negotiations at the time of sale.

TECHNICAL COMMITTEE CONCLUSION

The Technical Committee considered there to be no technical impediment to the removal of the clawback provisions. However, such a change would be a change of policy that would need to be considered by Government.

The Technical Committee members considered that the current arrangements, which allow for vendors and purchasers to make adjustments relating to land tax in negotiations surrounding the sale price in respect of a particular property, were more efficient and flexible than the onerous administrative arrangements and reassessments which would arise from a regime based on cessation of liability upon date of settlement.

ATTACHMENT 1

COMMISSIONER'S PRACTICE
LT 2.0

LAND TAX - NEWLY SUBDIVIDED RESIDENTIAL PROPERTY

Commissioner's Practice History

Commissioner's Practice	Issued	Dates of effect	
		From	To
LT 2.0	29 October 2003	29 October 2003	Current

This Commissioner's practice addresses the assessment of newly subdivided private residential land under section 14 of the *Land Tax Assessment Act 2002* ("the Act").

Background

Land tax is payable in accordance with section 14 of the Act when private residential property is subdivided (as defined in Clause 3 of the Glossary of the Act) if:

- the property was exempt or partially exempt from land tax for any of the five financial years reckoned retrospectively from, and including, the financial year in which the land was subdivided; and

- the area of the property is greater than 2.0234 hectares.

Land tax is payable by the subdividing owner of the property on the unimproved value of the taxable portion of the property for each of the five financial years reckoned retrospectively from and including the financial year in which the land is subdivided.

The amount of land tax payable for each of those five financial years is assessed, at the rate applicable for that year under the *Land Tax Act 2002*, as if the taxable portion of the property were the only land of the subdividing owner on which land tax was payable for that year.

However, if land tax has already been levied on any part of the taxable portion of the property under another provision of the Act for any of those five financial years, then:

- if a partial exemption did not apply to that part of the taxable portion for the year no land tax is payable on that part for that year; or

- if a partial exemption applied to that part of the taxable portion, or an interest in it, for that year land tax is payable for that year on the part of the property to which the partial exemption applied.

The taxable portion of the property is the portion that remains after subtracting from the whole area of the property the greater of the following areas:

- the area of the lot or parcel or portion of land on which the private residence was situated at the time of the subdivision;

- 2.0234 hectares.

The unimproved value of the taxable portion of the property is the amount that bears to the unimproved value of the whole of the property the same proportion as the area of the taxable portion bears to the whole area of the land.

Section 47(3) of the *Taxation Administration Act 2003* provides that the Commissioner may approve a tax payment arrangement including conditions for the remission of interest.

Commissioner's Practice

1. A retrospective assessment is raised for the relevant five-year period, irrespective of when the current owner (ie. the owner at the time of the subdivision) acquired the land.

2. The Commissioner will offer the taxpayer the opportunity to pay the tax assessed by instalments.

3. Where approved by the Commissioner, an extension of time for payment of the land tax assessment will be allowed with the applicable interest remitted to nil.

4. The Commissioner will not raise a retrospective assessment when a subdivision occurs primarily for any of the following reasons:

4.1 *The resumption of land*

Where a subdivision has occurred solely for the purpose of the resumption of land by a statutory authority, then an assessment will not be made. Furthermore, an assessment will not be made where approval to subdivide has been given as part of a compensation measure for the original resumption.

4.2 *The realignment of boundaries*

Where a subdivision is carried out for the sole purpose of redefining the boundaries of existing lots and the area of the lots remains almost the same, an assessment will not be made.

4.3 *The merging of land*

Where the same owner holds two or more lots and they are merged to form one lot, an assessment will not be made.

4.4 *To identify owner's portion of land*

Where land is jointly owned and a subdivision occurs for the purpose of defining each owner's interest, and each owner receives an identifiable lot to the same proportion as they held in the original land, an assessment will not be made.

Date of Effect

This Commissioner's practice takes effect from 29 October 2003.

Bill Sullivan
COMMISSIONER OF STATE REVENUE

29 October 2003

ATTACHMENT 2

COMMISSIONER'S PRACTICE
LT 3.0

LAND TAX - NEWLY SUBDIVIDED RURAL BUSINESS LAND

Commissioner's Practice History

Commissioner's Practice	Issued	Dates of effect	
		From	To
LT 3.0	29 October 2003	29 October 2003	Current

This Commissioner's practice addresses the retrospective assessment of newly subdivided rural business land under section 15 of the *Land Tax Assessment Act 2002* ("the Act").

Background

Land tax is payable in accordance with section 15 of the Act when rural business land is subdivided (as defined in Clause 3 of the Glossary of the Act) if:

- the land was exempt from land tax or subject to a concession for any of the five financial years reckoned retrospectively from and including the financial year in which the land was subdivided; and

- the subdivision was not carried out only for the purpose of defining an area of land to be taken or resumed under an enactment relating to the compulsory acquisition of land.

Land tax is payable by the subdividing owner of the land on the unimproved value of the taxable portion of the land for each of the five financial years reckoned retrospectively from and including the financial year in which the land is subdivided.

The taxable portion of the land is the area that remains after subtracting from the whole area of the land:

- the area of any part of the land that is exempt, immediately after the subdivision is completed as a result of the subdividing owner's ownership or use of the land; and

- the area of any part of the land that immediately after the subdivision is completed, consists of a lot of 2.0234 hectares or more that is zoned for rural purposes under a town planning scheme.

The amount of land tax payable for each of those five financial years is assessed, at the rate applicable for that year under the *Land Tax Act 2002*, as if the taxable portion of the land were the only land of the subdividing owner on which land tax was payable for that year.

If an amount of land tax has already been charged on any part of the taxable portion of the land under another provision of the Act for any of those five financial years, the amount of land tax payable for that year under this section is reduced by the amount already charged.

The unimproved value of the taxable portion of the land is the amount that bears to the unimproved value of the whole of the land the same proportion as the area of the taxable portion bears to the whole area of the land.

Section 47(3) of the *Taxation Administration Act 2003* provides that the Commissioner may approve a tax payment arrangement including conditions for the remission of interest.

Commissioner's Practice

1. A retrospective assessment is raised for a five year period, irrespective of when the current owner (i.e. the owner at the time of the subdivision) acquired the land.

2. The Commissioner will offer the taxpayer the opportunity to pay the tax assessed by instalments.

3. Where approved by the Commissioner, an extension of time for payment of the land tax assessment will be allowed with the applicable interest remitted to nil.

4. The Commissioner will not raise a retrospective assessment when a subdivision occurs primarily for any of the following reasons:

   4.1 *The resumption of land*

   Where a subdivision has occurred solely for the purpose of the resumption of land by a statutory authority, then an assessment will not be made. Furthermore, an assessment will

not be raised where approval to subdivide has been given as part of a compensation measure for the original resumption.

4.2 *The realignment of boundaries*

Where a subdivision is carried out for the sole purpose of redefining the boundaries of existing lots and the area of the lots remains almost the same, an assessment will not be made.

4.3 *The merging of land*

Where the same owner holds two or more lots and they are merged to form one lot, an assessment will not be made.

4.4 *To identify owner's portion of land*

Where land is jointly owned and a subdivision occurs for the purpose of defining each owner's interest, and each owner receives an identifiable lot in the same proportion as they held in the original land, an assessment will not be made.

Date of Effect

This Commissioner's practice takes effect from 29 October 2003.

Bill Sullivan
COMMISSIONER OF STATE REVENUE

29 October 2003

6e. Land Tax - Anti-Avoidance Provision

ISSUE

The Department of Treasury and Finance is concerned that some owners with multiple land holdings are attempting to avoid paying tax at a higher aggregated land tax rate by transferring a small portion of each property to different (but related) ownership.

The particular issues raised in the submission were:

- **Department of Treasury and Finance**
    - This issue was raised by the Department of Treasury and Finance. A specific anti-avoidance provision should be inserted into the *Land Tax Assessment Act 2002* (LTAA), such that if a "scheme", arrangement or understanding has the effect of obtaining, or contriving to obtain, a reduction in tax, the Commissioner may make an assessment of the tax that would have been payable but for the scheme, arrangement or understanding.

CURRENT POSITION

Section 12(3) of the LTAA provides that: -

> "The assessment for the land is to be kept separate and distinct from an assessment for any land that is owned –
>
> (a) by any one of the joint owners individually; or
>
> (b) by any of them as a joint owner with any other person."

This subsection operates so that in assessing joint owners of land, no account shall be taken of any land owned by them individually or with any other person. In other words, only land owned by the same joint owners can be aggregated and subject to a joint assessment.

For example, Fred and Joanne Smith own an investment villa in Leeming with an unimproved value of $105,000. Fred also inherited a holiday home in Mandurah, with an unimproved value of $170,000. Section 12(3) means that the Leeming property owned by Fred and Joanne cannot be aggregated with the Mandurah property owned by Fred.

The Office of State Revenue (OSR) is concerned about a scheme that has emerged which structures property holdings to rely on section 12(3), so that each land item is assessed separately, thus avoiding the aggregation of the property holdings for land tax purposes.

For example, on 30 June 2002, Company A (a family company) owned 10 pieces of land and paid land tax and metropolitan region improvement tax on the aggregated value of these properties. Prior to 30 June 2003, Company A transferred a 1/1000th share of each property to a separate family member. Therefore, for the 2003/04 year of assessment, section 12(3) operates so that each item is assessed separately, with the exemption threshold applying to each land item.

As awareness, and in some cases, marketing of this scheme grows, there is an increasing risk to the revenue.

ANALYSIS OF ISSUE

Land Tax Assessment Act – section 45 – Contracts ineffective to alter the incidence of land tax

Section 45 of the Land Tax Assessment Act provides that any contract or agreement which has the effect of altering or removing the incidence of an exemption or tax may be voided by the Commissioner. The section also provides that the contract, agreement, or understanding, although voided by the Commissioner, is enforceable for all other purposes. An example of where the section would be used is in a claim by a vendor that the purchaser is now solely liable for land tax as a result of a clause in a sale agreement. Another example is an agreement not to declare a trust to the Office of State Revenue in order to gain a residential exemption.

While consideration could be given to applying section 45 to the suspected avoidance scheme, it may be difficult to establish that the avoidance arrangements have the effect of altering the operation of an assessment of land tax.

Grouping Provisions

One way of dealing with this issue would be to introduce grouping provisions into the legislation, such that, in addition to the aggregation provisions already contained within the legislation, land held by related owners would be grouped, with all of the land held by members of the group aggregated.

However, a preliminary examination of this issue indicates that this is not a feasible option and would be very costly to administer with a large degree of uncertainty for taxpayers. Furthermore, the introduction of grouping provisions into the Act is likely to increase land tax liabilities for many land owners whose land is held in various structures for legitimate reasons, rather than address schemes related to land tax avoidance.

Members of the Technical Committee did not support the introduction of grouping provisions into the legislation as this was considered to be likely to add a large degree of complexity.

Anti-avoidance Provision

As it is uncertain as to whether section 45 could be successfully applied to the suspected avoidance scheme, it would be preferable to include an anti-avoidance provision in the Act such that if a "scheme" obtains, or contrives to obtain, a reduction in tax, the Commissioner may make an assessment for the tax that would have been payable but for the scheme. Precedents exist in the *Stamp Act 1921* (s76AV) for such a provision and could provide a basis for the development of a land tax anti-avoidance provision.

Since section 45 already deals with the issue of removing, qualifying or altering an assessment, it could be expanded to include provisions for arrangements or schemes, as well as a contract, agreement or understanding. A specific reference could be made regarding schemes or arrangements put in place to avoid paying a higher aggregated land tax rate.

A Commissioner's Practice could be developed to accompany any anti-avoidance provision inserted or contained within the LTAA. This could provide practical guidance on any issues that arise from administering the provision.

No other jurisdictions appear to have an anti-avoidance provision in their respective land tax acts. However, in the ACT, provisions are included in their *Taxation Administration Act 1999* (TAA) that state that if the Commissioner is satisfied that a person has used a tax avoidance scheme, the Commissioner may make the necessary assessments to give the determination effect. The benefit of having such a provision in the TAA is to remove duplication of provisions in related legislation (i.e. Stamp Act, Land Tax Assessment Act).

As this issue has now been publicly raised by the Department of Treasury and Finance through the State Tax Review process, it is likely that awareness of the scheme will grow throughout the taxpaying community. Accordingly, it is imperative that an effective deterrent is put in place before the liability date of the next land tax assessment year on 30 June 2006.

The Technical Committee raised concerns that general anti-avoidance provisions are too broad and do not provide certainty for taxpayers. The Committee suggested that it is preferable for any anti-avoidance provision to be targeted at the specific avoidance activity that needs to be addressed.

The Committee suggested that a possible solution would be to aggregate land holdings by disregarding minor interests up to a certain percentage (a figure of 10% was suggested). Disaggregation could be considered upon application to the Commissioner where commercial reasons for the structure can be sustained. The Committee suggested that this be examined further.

TECHNICAL COMMITTEE CONCLUSION

The Technical Committee acknowledges the need for an effective deterrent to be in place before the liability date of the next land tax assessment year on 30 June 2006.

The Committee suggests that the possibility of a provision directly targeting the avoidance activity be examined.

7a. Motor Vehicles – Amendment to Definition of New Vehicle and Market Value in Respect of Certain Demonstration Vehicles

ISSUE

Issues have been raised in relation to the motor vehicle transfer duty provisions of the *Stamp Act 1921* and the treatment of demonstration vehicles and vehicles acquired by a dealer for sale or re-sale.

The particular issues raised in the submissions were:

- **Mr Terry Redman MLA - Member for Stirling** (Submission 79)
    - This submission raises concern with the inclusion of certain demonstration vehicles within the definition of "new vehicle", for which motor vehicle transfer duty is assessed on the retail selling price. It is suggested that demonstration vehicles have a lower market value to that of a new vehicle which has never been used and as such, should be distinguished for the purposes of assessing stamp duty.
- **Mr Grahame Young** (Submission 99)
    - This submission suggests that the dealer's exemption is difficult to interpret and audit, leading to artificial distinctions. The submission proposes that a more simple time and kilometre-based system, which currently operate in other jurisdictions, would bring certainty and ease compliance burdens.

CURRENT POSITION

Amendment to Definition of "New Vehicle"

Section 76D of the Stamp Act charges motor vehicle transfer duty on the grant or transfer of a licence at the rate set out under Item 14 of the Second Schedule. For the purpose of making the assessment, the Director General of the Department for Planning and Infrastructure must determine the market value of the vehicle and the amount of duty payable.

The "market value" in relation to a new vehicle is defined in section 76B and means the price fixed by the manufacturer, importer or principal distributor as the retail selling price in Western Australia of a vehicle of that make and model and any optional features of the vehicle. The market value in relation to any other vehicle (referred to in this paper as a "used" vehicle) is the amount for which the vehicle might reasonably be sold, free of encumbrances, in the open market.

These definitions were inserted into the Stamp Act on 1 March 2004 as a result of audit activity conducted by the Office of State Revenue (OSR), which had revealed a considerable amount of confusion within the industry in relation to determining the market value of new vehicles. The move to the manufacturer's retail selling price was developed in consultation with the Motor Trade Association of Western Australia and aimed to provide clarity and reduce dealer's compliance costs. At the same time, an exemption was provided to exclude the value of accessories added to the vehicle at the time of purchase.

The definition of a "new vehicle" in section 76B means a vehicle that has never been used, and also a vehicle that has only been used for the purpose of selling it in the ordinary course of a dealer's business, demonstrating it to prospective purchasers, or loaning it to a charitable organisation or for other specified purposes. However, where a vehicle has been used for the purpose of demonstrating it to prospective purchasers, or as a loan vehicle to charitable organisations or for other specified purposes, for a period of more than three months, it is no longer considered to be a "new vehicle" for the purposes of determining the market value.

Amendment to Dealer's Exemption

Section 76D(4) of the Stamp Act provides that no duty is payable on the transfer of a licence to a dealer where the vehicle was acquired for the purpose of re-selling it to another person in the ordinary course of the dealer's business.

Section 76D(5) of the Stamp Act provides that no duty is payable on the grant of a licence to a dealer where the vehicle was acquired for the purpose of selling it to another person in the ordinary course of the dealer's business, or for demonstrating it to prospective purchasers.

Section 76D(5a) of the Stamp Act provides that no duty is payable on the grant or transfer of a licence to a dealer if the dealer loans the vehicle to be used for charitable or other specified purposes.

For an exemption to be granted under sections 76D(4), 76D(5) or 76D(5a), the application for the grant or transfer of the licence is to be accompanied by a certificate stating that while the applicant holds the licence, the vehicle will be used solely for the purposes referred to in those sections.

Further, section 76B(2) provides that vehicles used for selling or re-selling purposes, or loaned for charitable or other specified purposes as described in subsections 76D(4), 76D(5) and 76D(5a), may also be used for minor incidental purposes.

However, audit activity by the OSR also identified that there was confusion in the industry as to what constituted a "minor incidental purpose" and that there had been some instances where dealers had incorrectly claimed an exemption on the grant or transfer of a licence in respect of vehicles used within the dealership. To clarify the interpretation of "minor incidental purpose", Revenue Ruling SD 33.0 was issued on 1 July 2005. The ruling details specific uses that constitute a minor incidental purpose, including:

- commuting purposes, where the vehicle is available for demonstration and sale on authorised premises during business hours;
- the use of vehicles drawn from stock on the day for use as loan vehicles for a period generally not exceeding two days;
- driving the vehicle from the dealership to a service centre to be repaired or prepared for sale; and
- driving the vehicle to a potential customer's residence or place of business from the dealership and return.

Other uses, such as the use of a vehicle as a parts delivery vehicle, courtesy vehicle, mobile service vehicle, hire vehicle or promotional vehicle, or for the personal use of a dealer principal, staff or family member, are not considered to be minor incidental purposes.

If these uses were considered within the scope of the dealer's exemption, it would create an inequity with taxpayers that are not able to access the exemption, but use a vehicle for one of these purposes. For example, car hire companies would be disadvantaged if motor vehicle dealers were able to claim an exemption for vehicles used for hiring purposes.

If an exemption was previously granted under section 76D(4) or 76D(5) and the vehicle was used other than for the purposes of sale or resale, or for a purpose other than a minor incidental purpose, the grant or transfer of the licence would then be liable for motor vehicle transfer duty in accordance

with section 76I. This section deems the grant or transfer of the licence never to have been exempt from duty, and the duty otherwise payable, together with penalty tax, is payable within one month of an assessment notice being issued.

Furthermore, the issue of the ruling highlighted that the dealer's exemption was also being claimed for vehicles being loaned for charitable purposes. As a result, amendments were made to the Stamp Act to provide legislative support for the exemption to apply in cases where a dealer loans the vehicle to other parties to be used for charitable or other specified purposes. These amendments were made retrospective to 23 August 2000.

ANALYSIS OF ISSUES

Amendment to Definition of "New Vehicle"

Mr Redman's submission suggests that demonstration vehicles should be distinguished from new vehicles, such that duty should be payable in relation to the market value of a demonstration vehicle, rather than the vehicle's retail selling price.

The provisions currently operate such that vehicles used for the purpose of demonstration to prospective purchasers, or as loan vehicles to charitable organisations or for other specified purposes, for less than three months are included in the definition of a "new vehicle". The three month test was adopted for simplicity and to eliminate potential avoidance opportunities.

In the absence of the three month rule, a potential avoidance opportunity would exist where a vehicle could be used for demonstration purposes, or loaned to charitable organisations to be driven for a short period of time, and be classified as a used vehicle, with duty then calculated on the market value rather than the retail selling price.

Although the dealer is not liable to pay the stamp duty on the sale of a vehicle, it would give the dealer an advantage over competitors as the dealer is able to offer the same vehicle to a prospective purchaser with less stamp duty payable by classifying it as a used vehicle.

However, it is recognised that it is possible for demonstration and loan vehicles to be used to varying degrees in the three month period, resulting in the market value differing in each case. Therefore, basing an assessment of stamp duty on the retail selling price may not be appropriate in all circumstances.

For example, a demonstration or loan vehicle which is frequently driven, resulting in higher kilometres and increased wear and tear, is likely to have a lower market value compared to a vehicle driven less frequently. If both vehicles were used for demonstration purposes for less than three months, then the current provisions would impose duty on the same retail selling price for both vehicles. This may be inequitable when one vehicle has done a substantially higher number of kilometres.

It is therefore suggested that in addition to the three month rule, a kilometre test could be introduced to better determine whether a demonstration or loan vehicle is a new or used vehicle for the purpose of determining the value on which stamp duty is assessed.

Under this approach, a vehicle would be classified as a used vehicle if it was used for demonstration or loan purposes for less than three months, but more than a specified number of kilometres. The vehicle would then be treated as a used vehicle for stamp duty purposes, and the grant or transfer of the licence would be assessed on the market value of that vehicle.

Demonstration or loan vehicles used for less than three months and less than the specified number of kilometres would be classified as new vehicles, with stamp duty assessed on the retail selling price of the vehicle.

It is considered that this would largely address the concern in relation to the inequitable treatment of new and used vehicles, while not creating avoidance opportunities.

Amendment to Dealer's Exemption

Mr Young's submission suggests that the dealer's exemption is difficult to interpret and audit, and suggests that a time and kilometre based system which exists in other States would result in more certainty and ease compliance burdens.

The South Australian motor vehicle duty provisions were examined as an example of a time and kilometre based system. RevenueSA Circular No. 211 sets out the criteria for the dealer exemption.

The South Australian provisions allow a dealer's exemption for stock and demonstrator vehicles that are readily available for sale, for a maximum period of 12 months. However, these vehicles may be used by dealer staff on a limited basis. The Commissioner takes the view that the criteria for the exemption have been met where the exempt vehicles are used occasionally for purposes other than directly related to the sale or demonstration of the vehicle, and the total vehicular use is less than a specified number of

kilometres (which varies according to whether the dealer is metropolitan or non-metropolitan). In relation to demonstrator vehicles, the kilometre limit is supplemented by a time limit, such that a demonstrator vehicle will qualify for the exemption where its use is less that a specified number of kilometres, or less that a specified period of time (which also varies according to whether the dealer is metropolitan or non-metropolitan), whichever occurs first. Vehicles used by the principals of a dealer for personal use (such as after hours) are not subject to these conditions, as long as the vehicles are readily available for demonstration or sale at all times.

Further, if a vehicle is used for certain specified purposes, it does not qualify for a dealer's exemption. Such purposes include vehicles provided to organisations as promotional aids, vehicles used by dealers that have the dealer's name or logo written thereon, and vehicles primarily used by dealers for parts delivery, and courtesy and loan vehicles.

It is unclear as to whether a time and kilometre based system such as the one operating in South Australia would significantly increase certainty or reduce compliance costs. The South Australian provisions require that the exempt vehicles may be used "occasionally for purposes other than directly related to the sale or demonstration of the vehicle", as well as meet the time and kilometre test. There does not seem to be any guidance as to what constitutes "occasional" use. This would therefore seem to increase the uncertainty for dealers.

Restrictions also exist in terms of what the vehicle may be used for, similar to those set out in Revenue Ruling SD 33.0. Further, vehicles used by principals of a dealer for personal use must be readily available for sale or demonstration at all times, which is consistent with the position taken in Revenue Ruling SD 33.0.

Given the uncertainty associated with the "occasional use" test that is part of the time and kilometre test, and that the policy rationale behind the dealer exemption seems to be similar under both approaches, it is unclear as to what the benefits would be of moving to a time and kilometre test. It is suggested that further information in relation to the compliance and administrative benefits of a time and kilometre test would be required to justify a change in the current approach.

TECHNICAL COMMITTEE CONCLUSION

Amendment to Definition of "New Vehicle"

The Technical Committee considers the proposal is technically sound should the Government wish to adopt the policy position.

Amendment to Dealer's Exemption

The Technical Committee agreed with the analysis provided and did not consider any changes to the dealer's exemption were necessary.

7b. Motor Vehicles – Written-Off/Stolen Vehicles and Anti-Avoidance Provision

ISSUE

In addition to the various submissions in relation to motor vehicle transfer duty rates and thresholds, suggestions have been made to improve the administration of the motor vehicle transfer duty regime.

The particular issues raised were:

- **Department of Treasury and Finance**
    - It has been suggested that relief could be provided for duty imposed on the grant or transfer of a vehicle licence in respect of replacement vehicles, for vehicles stolen or written-off a short time after they are acquired. It is considered that this duty can often impose unreasonable hardship on a taxpayer for an event outside of their control.
    - It has also been suggested that an anti-avoidance provision could be considered to mitigate the potential avoidance practice of licensing a vehicle in another State where the stamp duty rate is lower than Western Australia, and subsequently having the vehicle re-licensed in Western Australia, thus minimising the duty paid.

CURRENT POSITION

Stamp Duty Relief for Re-licensing Replacement Vehicles, for Vehicles Stolen or Written-off

Section 76D of the *Stamp Act 1921* charges duty on the grant or transfer of a licence at the rate set out in item 14 of the Second Schedule. No relief currently exists in the Stamp Act for duty imposed on the grant or transfer of a licence for a replacement vehicle, where the original vehicle is stolen or written-off a short time after it was acquired.

Anti-avoidance Provision for Vehicles Licensed in other States

It has been suggested that a practice has emerged in the motor vehicle industry which seeks to minimise the amount of motor vehicle transfer duty paid in Western Australia.

This practice involves a Western Australian garaged vehicle being licensed in another State (such as Queensland) at a rate which is less than the Western Australian stamp duty rate.

The vehicle is subsequently licensed in Western Australia utilising item 9(2) of the Third Schedule of the Stamp Act, which provides for an exemption from motor vehicle transfer duty on a licence granted to a person for a vehicle which was previously licensed in that person's name, under a corresponding State law.

This practice may be made worthwhile by the differential between the duty payable in States such as Queensland, and that payable in Western Australia.

ANALYSIS OF ISSUES

Stamp Duty Relief for Re-licensing Replacement Vehicles, for Vehicles Stolen or Written-off

Where a vehicle is stolen or written-off a short time after it is acquired, the taxpayer will often seek to replace the vehicle (through a claim on their insurance policy or purchasing a new vehicle) and will consequently incur a second stamp duty liability on the grant or transfer of the vehicle licence, for the replacement vehicle. This has the effect of imposing a second amount of duty on the taxpayer to acquire a vehicle, as a result of an event outside of their control.

It is suggested that consideration be given to providing relief from motor vehicle transfer duty in such instances to restore the taxpayer to their original position. To do this, a credit could be given for the duty paid on the stolen or written-off vehicle, which would then be offset against the duty payable on the acquisition of the replacement vehicle by the same person.

If the market value of the replacement vehicle were greater than that of the original vehicle, the credit would not fully offset the duty raised and the taxpayer would be required to pay any additional duty. If the market value of the replacement vehicle were lower than that of the original vehicle, the credit would be limited to the amount of duty payable on the acquisition of

the replacement vehicle. It is not intended to offer a refund of duty under this scheme.

To be consistent with the intention of the scheme, protect against avoidance, and reduce administration costs though the difficulty in obtaining required information over time, eligibility under the scheme may need to be limited to vehicles that are stolen or written-off a short time after they are first licensed in the owner's name.

The Technical Committee suggested that further research is required to determine a suitable period of time for which an individual would be eligible for the relief by taking into account the time required to process insurance claims, but without creating the potential for avoidance.

One alternative would be to limit the time period between the date of the grant or transfer of the licence for the original vehicle, and the date of that vehicle being stolen or written-off. However, a problem with this approach is that a taxpayer would be eligible to apply for the relief for an unlimited period of time after the event, which could increase the administrative costs associated with the scheme.

Another alternative would be to limit the time period between the date of the grant or transfer of the licence of the original vehicle, and the date of the grant or transfer of the licence of the replacement vehicle. A problem with this approach could be that it may cause a taxpayer who would otherwise be eligible for the relief, to fall outside of the timeframe due to delays caused by insurance claims and/or purchasing a replacement vehicle.

If it were considered desirable to provide relief in these situations, consultation with the motor vehicle industry and insurance industry would be required to ascertain a reasonable timeframe to protect the integrity of the scheme.

The Technical Committee noted that in instances where insurance policies cover all costs (including stamp duty) associated with the replacement of a stolen or written-off vehicle, the relief should not be available to the insurance company. However, initial indications are that only a small number of policies provide for stamp duty costs to be reimbursed.

The commencement date of the scheme would need to take into account the time necessary to determine and implement the administrative requirements of the scheme. Discussions with the Department for Planning and Infrastructure (DPI) would need to address issues including, but not limited to, who would make the determination for eligibility, what information

would be required, how the advice would be communicated between the agencies and any system changes required to accommodate the scheme.

Anti-avoidance Provision for Vehicles Licensed in other States

Data obtained from DPI for the period 1 January 1999 to 30 June 2005 detailing the number of vehicles that were exempted from duty under item 9(2) of the Third Schedule of the Stamp Act indicates that the avoidance practice outlined above may not be as widespread as has been suggested.

In particular, it has been suggested that this practice is utilised mainly for luxury, heavy and hire vehicles. However, the data received from DPI for these vehicles indicates that there has only been a slight increase in the number of luxury vehicles re-licensed (which in turn makes up a very small percentage of the total number of vehicles licensed in Western Australia), and the number of heavy vehicles re-licensed has largely decreased since the rates were lowered in 2003. There is also no evidence of an increase in the number of hire vehicles that have been re-licensed in Western Australia.

While the data does show an increase in the total number of vehicles re-licensed in Western Australia under item 9(2) of the Third Schedule of the Stamp Act, figures released by the Federal Chamber of Automotive Industries indicate record sales of new motor vehicles have occurred Australia-wide over the past three years, which would have contributed to the increase in the number of vehicles re-licensed, along with other factors such as employment growth in Western Australia.

There has been a positive growth in employment in Western Australia as a result of the resource sector boom. It is likely that interstate migration to take up positions offered would have contributed to the increase in the number of vehicles being re-licensed in Western Australia under item 9(2) of the Third Schedule of the Stamp Act. The data received from DPI for the period 1 January 1999 to 31 December 2002 suggests that of the total percentage of vehicles re-licensed, Queensland vehicles represented 17%-18% which is consistent with Queensland's population, accounting for 19% nationally.

Members of the Technical Committee raised doubts as to the extent that this avoidance activity exists, and it was suggested that further analysis be undertaken to substantiate industry claims of widespread avoidance. This could be achieved by examining recent statistics in relation to vehicles which were initially licensed interstate and subsequently licensed in Western Australia. It was suggested that the Reference Group should be satisfied that this avoidance activity does exist before any anti-avoidance provision is contemplated.

Each Australian jurisdiction provides an exemption from duty for any licence granted to a person for a vehicle licensed under a corresponding State law. The relevant sections for each jurisdiction are as follow:

- Australian Capital Territory – *Duties Act 1999*, section 218
- New South Wales – *Duties Act 1997*, section 268
- Northern Territory – *Stamp Duty Act 1978*, Second Schedule, Item 37
- Queensland – *Duties Act 2001*, section 386
- South Australia – *Stamp Duties Act 1923*, Second Schedule, Item 2(2)
- Tasmania – *Duties Act 2001*, section 200
- Victoria – *Duties Act 2000*, section 237
- Western Australia – *Stamp Act 1921*, Third Schedule, Item 9(2).

Only the Victorian Duties Act makes this exemption conditional upon the Commissioner being satisfied that the vehicle was not registered outside of Victoria for the purposes of avoiding duty under Victorian legislation.

One of the ways in which the perceived avoidance of duty through interstate licensing could be discouraged is through the introduction of a specific motor vehicle duty anti-avoidance provision.

Such an anti-avoidance provision would need to be carefully designed to ensure it did not fall foul of sections 90 and 92 of the Commonwealth Constitution.

Section 92 of the Constitution provides that trade, commerce and intercourse among the States shall be absolutely free, preventing the making of laws or government actions that discriminate against interstate trade in a protectionist sense.

In Bath v Alston Holdings Pty Ltd 78 ALR 669, the High Court expressed the view that "equalising taxes" would be likely to fall within the ambit of section 92 of the Constitution.

Section 90 of the Constitution provides that the Commonwealth Parliament has exclusive power to impose customs and excise.

The legislative arrangements that exist in Victoria may be a solution to the avoidance practice which would not raise any Constitutional validity issues.

If it was decided that such a provision was required, the Technical Committee highlighted the need for legitimate cases where a vehicle was licensed interstate and subsequently re-licensed in Western Australia, to be excluded. Examples of such instances include where an individual wishes to access a greater range of vehicles at a better price, which in some cases is only available in the eastern states due to the greater number of dealers, and the "grey nomads" (being persons who travel extensively around the country, particularly in a recreational vehicle).

A further provision may also be necessary to void an exemption granted under item 9(2) of the Third Schedule of the Stamp Act and allow for a reassessment on the grant of the licence in Western Australia, where the Commissioner subsequently discovers a vehicle was originally registered outside of Western Australia for the purposes of avoiding duty under the Stamp Act. The imposition of penalty tax and the requirement to make payment within one month of the assessment notice being issued could also be included in this provision.

Members of the Technical Committee suggested that vehicles re-licensed in Western Australia utilising item 9(2) of the Third Schedule of the Stamp Act could receive a credit for the duty paid when the vehicle was initially licensed (rather than an exemption), which would then be offset against the duty which would have otherwise been payable if the vehicle was originally registered in Western Australia. However, difficulties in administering this could arise when considering the valuation upon which the Western Australian calculation would be based.

The Technical Committee noted that an anti-avoidance provision for interstate licensing may not be necessary if rates of duty in Western Australia were consistent with rates in other jurisdictions.

TECHNICAL COMMITTEE CONCLUSION

Stamp duty Relief for Re-licensing Replacement Vehicles, for Vehicles Stolen or Written-off

The Technical Committee considers the proposal is technically sound should the Government wish to adopt the policy position.

Anti-avoidance Provision for Vehicles Licensed in Other States

The Technical Committee considers the proposal is technically sound should it be determined that avoidance activity exists and the Government wishes to adopt the policy position.

8a. Tax Administration - Assessments

ISSUE

Various issues dealing with assessments have been raised in submissions to the State Tax Review.

The particular issues raised in the submissions were:

- **Mr Grahame Young** (Submission 99)
    - It is suggested that duty should not be charged in relation to a transfer of property for which no consideration is given when the transaction is entered into on an arms length basis, particularly in relation to the goodwill of a business.
- **Chamber of Minerals & Energy (CME)** (Submission 82)
    - CME recommends that the Commissioner have a period of 40 days from the date of lodgement of an instrument or statement to increase any valuation of property provided to the Commissioner, unless otherwise agreed with the taxpayer.
    - Further, CME recommends that a requirement be incorporated within the Office of State Revenue's Customer Charter that all non-routine documents be assessed in a timely manner.
- **Urban Development Institute of Australia (WA Division) Inc (UDIA)** (Submission 125)
    - It is suggested that if the consideration for a transfer of property is reduced, then stamp duty should be charged on the reduced consideration, rather than the original consideration.
- **Master Builders Association of Western Australia (MBAWA)** (Submission 63)
    - Not enough explanation of how the assessment is made is given to the person liable to pay the assessment. Further information should be included on the notice of assessment, or separate advice providing the basis of the assessment should be included with it.

- There is not enough time to put forward a comprehensive objection submission within the required 60 days, as an explanation of assessment only needs to be given within 30 days of inquiry.

- **Institute of Chartered Accountants (ICA)** (Submission 2)
  - The time period for assessments or reassessments for state taxes should be 4 years.

- **Fehily Loaring Pty Ltd** (Submission 48)
  - The time period for retrospective assessment (reassessment) should only be 3 years plus the current year.

- **Chamber of Commerce and Industry of Western Australia (CCIWA)** (Submission 81)
  - The time period for retrospective adjustment only to be 3 years plus the current year.

CURRENT POSITION & ANALYSIS

Valuations – Goodwill

Section 22 of the *Taxation Administration Act 2003* (TAA) and section 33 of the Stamp Act provide the authority for the Commissioner to value property. This authority applies regardless of whether the parties are related or unrelated. However, Commissioner's Practice TAA 8.0 provides that a valuation will be required for stamp duty purposes where the parties to a transaction involving real property are related or not otherwise dealing at arms length. Other Commissioner's practices deal with the valuation of specific types of property such as mining tenements, pastoral leases and goodwill.

Mr Young's submission suggests that duty not be charged where no consideration is given for a transaction if the parties are dealing at arms length. This would mean that no valuation of the property would be undertaken and the property the subject of the transaction would be taken to have no value for stamp duty purposes.

Using the payment of consideration for the transfer of property as the basis for determining the property's value is not a sound valuation method and would not necessarily reflect the true market value of property. Further, such

a proposal would create significant opportunities for avoidance by structuring transactions such that the consideration is not evidenced in the transfer agreement.

Whether or not duty is payable in relation to a transfer of property also has implications for the duty treatment of other property transferred as part of the same transaction. In particular, section 70 of the Act charges stamp duty on chattels only when they are conveyed in conjunction with other dutiable property. As there is a potential loss of duty on the associated chattels being conveyed, it is important for the Commissioner to be satisfied that there is no goodwill being transferred when assessing sales of businesses.

An issue has also been raised by the Law Society (submission 123) in relation to the value of goodwill in the case of the sale or incorporation of legal practices. This issue is being dealt with in a separate technical paper.

Valuations - Timeliness

There is currently no limit on the length of time that the Commissioner may take to obtain valuations of property. The CME submission proposes that the Commissioner should have 40 days to increase a valuation of property submitted to him.

The Commissioner usually relies on licensed valuers from the Valuer General's Office or private practice to provide him with valuations of property, with some of the valuations requiring property outside Western Australia (and in some cases outside Australia) to be valued.

Many of the matters for which the Commissioner requires valuations are of a highly complex nature and it is impractical for deadlines to be placed on the services of external valuers.

With matters such as Part IIIBA dealing with the land rich provisions, the valuation of the land and other property are the determining factors as to whether the matter is dutiable at all. It is of the upmost importance that the correct values are obtained in these matters to ensure that the correct revenue is collected. These are often highly complex transactions requiring a large number of global assets required to be valued.

However, it is acknowledged that in some cases there have been lengthy delays in obtaining valuations from the Valuer General's Office. The Commissioner of State Revenue is currently discussing this situation with the Valuer General in order to identify ways in which these delays could be minimised.

Non-Routine Assessments - Timeliness

There is currently no statutory limit on the length of time that the Commissioner may take to make an assessment of duty. The CME submission suggests that the Commissioner incorporate in the Office of State Revenue's Customer Charter a requirement that all non-routine documents be assessed in a timely manner.

With reference to stamp duty assessing, the Customer Charter only sets goals for service requirements in respect of the public counter assessing service. While every endeavour is made to process all work in a timely manner, both the uncertainty of the amount of incoming work and the high degree of complexity of some of this work will always lead to lengthy time periods for some assessments to be made.

While it would be ideal to assess all instruments in a timely manner, the delays are sometimes outside the control of the Commissioner and can be the result of obtaining further information from taxpayers and obtaining legal advice or valuations as described above.

A recent impediment to the timeliness of issuing assessments relating to complex matters has been the requirements of the State Administrative Tribunal relating to the onus of proof. All issues relating to an assessment or an objection, even those not in dispute, need to be fully investigated and documented. This lengthens the time taken in both making assessments and determining objections. Until this issue is resolved, timeliness is likely to become more of an issue in relation to non-routine assessments.

Reductions in Consideration

Commissioner's Practice SD 8.1 governs the current treatment of matters whereby the consideration for a transaction is reduced. This practice states that an instrument becomes liable to duty when it is executed. Any subsequent reduction in purchase price, whether by amendment to the original contract or by an amending deed, is considered to be a new instrument.

No further duty is payable on the new instrument, as there is no increased liability associated with the reduction of the purchase price. However, a reassessment of the duty payable on the lower figure is not available in these situations.

The ACT, NSW and Tasmanian Duties Acts all contain provisions that allow for a reassessment of duty when the consideration for a transfer of property is reduced prior to the transfer of the property.

Specifically, section 27 of the Tasmanian *Duties Act 2001* provides that where the consideration for a sale or transfer of property is reduced prior to the property being transferred and the reduced consideration is not less than the unencumbered value of the property, the duty will be assessed on the lower figure.

A reduction in the purchase price is common in situations such as where a sale of property is conditional on certain things being verified by the vendor, such as a satisfactory white ant or building inspection. If the inspection identifies that work needs to be carried out, the parties to the contract may negotiate a lower purchase price on the basis that the purchaser agrees to be responsible for the costs associated with undertaking the necessary work.

In situations such as these, it would seem reasonable to allow for a reassessment where the purchase price is reduced prior to settlement. A provision similar to the Tasmanian model could be adopted to achieve this.

Expanded Grounds of Assessment

Section 25 of the TAA provides that an assessment notice may include a statement of grounds on which the assessment was made. Where the assessment notice does not include the grounds of assessment, a taxpayer may request a statement of the grounds, which the Commissioner must provide within 30 days of receipt of the request.

The explanatory memorandum of the *Taxation Administration Bill 2001* provides the reasons for section 25 as follows:

"This section provides a mechanism for the taxpayer to obtain an explanation from the Commissioner of the basis upon which an assessment has been made. This power was inserted to accommodate concerns raised during the consultation process and will assist taxpayers in preparing objections."

The MBAWA submission suggests that an expanded statement of grounds be included with a notice of assessment. While it is true that information provided for basic assessments is minimal, in situations where assessments are complex, comprehensive statements of the grounds of assessment are in fact included.

The submission also suggests that since an objection must be lodged within 60 days, there is not enough time to lodge a comprehensive objection when considering the 30 day period for statement of grounds to be provided. This is not the case. Where a taxpayer has requested a statement of grounds within 30 days of the issue of the assessment, section 36(1)(c) of the TAA provides that the 60 days allowed to lodge an objection commences on the date on which the Commissioner serves the statement of grounds. Accordingly, in these cases the taxpayer is not disadvantaged.

This does not apply to circumstances where a taxpayer requests a statement of grounds later then 30 days after the issue of the assessment. However, section 36 also allows a taxpayer to apply to the Commissioner, within 12 months after the date on which the objection was to have been lodged, for an extension of time in which to lodge an objection.

While it may be ideal to provide extensive grounds for every assessment, this would lead to lengthy time periods for assessments to be made. The OSR seeks to provide a comprehensive explanation in the case of complex assessments, while the legislation protects the rights of taxpayers to request additional information.

However, the Technical Committee did suggest that assessments of stamp duty relating to more than one instrument be issued in the order that they are listed on the Stamp Duty Assessment Request form. Also advice that grounds of assessment could be sought and that the objection period would start from the date that the grounds of assessment are served on the taxpayer, should be highlighted on the notice of assessment.

Retrospective Adjustments

Section 17 of the TAA prescribes a period of reassessment of up to five years. This includes upon application by the taxpayer or reassessment by the Commissioner. Section 17(3) provides that a reassessment of pay-roll tax can be made in relation to any of the five financial years that precede the year in which the assessment is made. The provisions are extended by section 17(2), which allows the Commissioner to make a reassessment at any time after the previous assessment was made if the course of review proceedings have directed the Commissioner to make the reassessment, or, there are reasonable grounds for suspecting an evasion of tax, or that the previous assessment was made on the basis of false or misleading information.

The submission by ICA suggests that the time period for reassessments for State taxes be aligned to the federal tax position, which is four years but is being considered to be amended to two. No State or Territory currently adopts a period of four years. There would be no point for WA to change to a

four year period unless all States and Territories agreed to do the same, to do so would not lead to consistency with the Commonwealth, nor would it make WA consistent with any other State or Territory jurisdiction.

Fehily Loaring and CCIWA suggest a reassessment period of three years plus the current year unless there has been fraud or evasion. These submissions suggest that the five year period that is allowed is too onerous for taxpayers when penalties are added. However, in circumstances where a large tax debt has arisen because of reassessment, in situations of genuine error the Commissioner applies leniency to the taxpayer in relation to penalty tax. Should the error have occurred as a result of intentional or reckless actions by the taxpayer, and as a result, the taxpayer has incurred a large penalty, this has been applied to discourage such practices.

A substantial amount of public consultation occurred over a long period in developing the TAA. Initially this included consultation with the relevant accounting bodies, including the ICA, the Law Society of WA and the Taxation Institute of Australia. Adjustments to the initial draft of the TAA were made then a further draft was released to the public, which was followed by further consultation with peak industry bodies.

The five year reassessment period is consistent with the five years allowed for an application for refund by taxpayers under section 54 of the TAA, and the record-keeping requirement of five years under section 87. It should also be noted that this five year period for reassessment aligns with several other jurisdictions, including the ACT, Queensland and South Australia. Other jurisdictions apply a three year period in which reassessments may take place.

As both taxpayer and Commissioner alike have an opportunity to be reassessed or apply for reassessment within the five year period, it is both fair and equitable to continue the use of the five year period and this provides consistency with at least some of the other jurisdictions.

TECHNICAL COMMITTEE CONCLUSION

The Technical Committee members agreed with the analysis of the issues provided in the paper.

ATTACHMENT 1

CUSTOMER CHARTER

The Office of State Revenue is a business unit of the Department of Treasury and Finance. It provides an essential service to the Government and community, through the administration of revenue laws and grant and subsidy schemes in a fair and equitable manner. These laws and schemes include stamp duty, land tax, pay-roll tax and the first home owner grant scheme.

This Charter, which complements the Customer Service Charter of the Department, details our commitment to providing a high level of customer service. The Charter specifies how our officers will conduct themselves and the standards we endeavour to meet.

Information relating to our products and services is available through our website, speaking with an officer by telephone or via counter services, or in writing by letter or email. Where required, information sessions are offered or may be requested, which provide a further opportunity to clarify your obligations.

Should we fail to satisfy the above commitments, we encourage your feedback. We are committed to listening to your concerns and where appropriate, will make changes to the way we operate.

This Charter was developed in consultation with our customers. It will be reviewed annually, along with our performance against our service standards. A report detailing our performance will be published on our website.

SERVICE FOCUS

We provide quality customer service and information that is easy to understand, accurate and delivered in a timely manner.

Specifically, we endeavour to:

- Attend to at least 80% of customers in less than 10 minutes via our counter service;
- Determine a first home owner grant application within 7 working days, upon receipt of all supporting documentation;
- Answer 80% of telephone calls to our enquiry lines within 40 seconds;
- Action pay-roll tax correspondence within 20 working days. Where this is not possible, contact will be made to organise alternate arrangements;
- Return telephone messages by the end of the following business day, if the person responsible is unavailable to assist immediately;
- Ensure suitable contact details are provided with all written communications from the Office;
- Approve stamp duty refunds within 20 working days, once all necessary information is provided;

- Provide on-line lodgement and payment services for various tax lines, including stamp duty, pay-roll tax and land tax; and

- Respond to all complaints and suggestions within 21 days.

FAIRNESS, EQUITY & ACCOUNTABILITY

- We will act with integrity and impartiality to ensure all customers are treated equally.

- Upon request, we will provide a written statement within 30 days, detailing the grounds of an assessment.

- We will acknowledge and rectify where an error has occurred.

- Where a complaint is received, we will take active steps to resolve the issue and advise you of the outcome.

CUSTOMER AWARENESS

The Office provides information regarding our business processes and practices, to assist you in meeting your statutory obligations. This includes information on eligibility, application and assessment processes. Where any uncertainty exists, we are committed to providing clear and accurate explanations.

Targeted information sessions are provided to customer and industry groups. Further, a *Customer Assistance Program* is in place that offers consultation visits to newly registered and existing pay-roll tax clients, along with customers of other self-assessed tax schemes.

OBJECTION & APPEAL

An objection may be made at no cost and will be responded to within 90 days of receiving all relevant information. A senior officer, independent of the original decision maker, will review the assessment and determine your objection. A written response will be provided outlining the reasons for the decision.

Where an objection is allowed, wholly or in part, a refund of the overpayment together with interest will be provided where appropriate.

Should you have concerns regarding the process surrounding an objection, you may contact the Office for advice on the options available to you.

Please be aware that the Office must receive a written objection within 60 days of the assessment being issued. Where an objection is pending the assessment remains payable by the due date, unless otherwise notified.

Where you are dissatisfied with the outcome of an objection, you have the right to appeal the decision via the State Administrative Tribunal or the Supreme Court.

AUDITS & INVESTIGATIONS

We perform audits and investigations that assist you in meeting your statutory obligations. In most cases, we will provide notice of our intent to undertake an audit or investigation and indicate its scope and nature. We will explain our requirements concerning access to your information and records.

The audit or investigation process will be explained to you and completed in a timely manner. The outcomes of the audit or investigation will be fully explained to ensure that you understand any issues identified.

PRIVACY & CONFIDENTIALITY

We will respect your privacy in relation to all information held by this Office. Our officers are legally bound by secrecy provisions, which ensure that access to your information is restricted. In addition, we will only provide access to and/or disclose your information where required by law.

OUR EXPECTATIONS OF YOU

To assist us in helping you in your dealings with the Office, we expect you to:

- Be honest and cooperative;
- Provide complete and accurate information; and
- Establish, maintain and allow access to your records as required by law.

IMPROVING OUR SERVICE

The Office of State Revenue values professional, timely and efficient service. Please let us know when our standards fall below those outlined in this Charter.

Your feedback is part of our ongoing approach to improving customer service. With the introduction of our Complaints Feedback System, our aim is to provide information that is easy to read, easy to locate, current and relevant to you. We appreciate any comments and will respond promptly to your concerns about our performance. Similarly, we would appreciate your feedback when our service exceeds your expectations.

Contact information on our Customer Charter is available on our website. For further details please **click here.**

BILL SULLIVAN
COMMISSIONER OF STATE REVENUE
JULY 2005

ATTACHMENT 2

COMMISSIONER'S PRACTICE
SD 8.1

STAMP DUTY – REDUCTION OF CONSIDERATION

Commissioner's Practice History

Commissioner's Practice	Issued	Dates of effect	
		From	**To**
SD 8.0	21 October 2003	21 October 2003	31December 2003
SD 8.1	20 January 2004	1 January 2004	Current

This Commissioner's practice sets out the assessment practice in situations where the instrument does not require a valuation to be performed and the parties have varied an instrument by reducing the purchase price.

Background

Section 17A(1) of the *Stamp Act 1921* ("Stamp Act") provides that the liability to pay duty on an instrument arises at the time the instrument is executed. Where the Stamp Act requires a taxpayer to lodge a dutiable statement in respect of a transaction or event, the liability to duty arises on the occurrence of the transaction or event.

After execution of an instrument, the parties may negotiate a lower consideration and either:

- alter the instrument; or
- execute a secondary instrument which amends the original instrument to reflect the reduced consideration.

Where an instrument is executed and then altered in a material way, the altered instrument is considered a new instrument for stamp duty purposes. The variation of a contract that consists of, or includes a reduction in, the purchase price constitutes a material alteration.

Commissioner's Practice

1. Where the consideration is reduced by altering the instrument after first execution but before it has been lodged for assessment, the duty will be assessed on the consideration payable at the time of execution of the instrument (ie. the amount initially agreed to be paid).

2. Where a subsequent variation reduces the purchase price, the contract is considered to be a "new" instrument. No further duty is payable in respect of the "new" instrument, as there is no increased liability in relation to the reduction of the purchase price.

3. Where the consideration is agreed to be reduced after the instrument has been executed and lodged for assessment, the instrument will be assessed on the consideration payable at the time of execution of the instrument (ie. the amount initially agreed to be paid). Any subsequent alteration to the instrument after stamping would only need to be lodged if it results in the duty payable on the instrument being increased.

4. Where the consideration is reduced by the execution of an amending instrument (eg. a deed of variation), the original instrument and the amending instrument must be lodged with the Commissioner for assessment. Duty will be assessed on the original instrument on the consideration payable at the time of its execution (ie. the amount initially agreed to be paid). If the amending instrument is in the form of a deed, duty under item 8(1) of the Second Schedule to the Stamp Act would be payable.

Date of Effect

This Commissioner's practice takes effect from 1 January 2004.

Bill Sullivan
COMMISSIONER OF STATE REVENUE

20 January 2004

ATTACHMENT 3

Extract from the Tasmanian Duties Act 2001

27. Effect of alteration in purchase price

(1) If after an agreement for the sale or transfer of dutiable property is entered into and before the property is transferred –

> **(a)** the consideration under the agreement is reduced and the reduced consideration is not less than the unencumbered value of the dutiable property when the consideration was reduced; or
>
> **(b)** the consideration under the agreement is reduced because the parties have agreed not to transfer some of the dutiable property previously agreed to be transferred and the reduced consideration is not less than the unencumbered value of the dutiable property that remained to be transferred when the consideration was reduced; or
>
> **(c)** the consideration under the agreement is increased and the dutiable value when the consideration was increased is greater than the dutiable value when the agreement was entered into –

the Commissioner must assess or reassess the liability to duty of the agreement in accordance with the change in the consideration.

(2) The liability to pay additional duty arising from an increase in the consideration occurs on the date the consideration is agreed to be increased

8b. Tax Administration – Compromise Assessments

ISSUE

The particular issues raised in the submission are:

- **Department of Treasury and Finance (DTF)**
    - Currently, the Commissioner has no discretionary power to settle taxpayer disputes, alter an assessment or accept a lesser amount in payment of a taxation liability.
    - Legal advice provided to the Office of State Revenue (OSR) has indicated that an approach similar to that adopted by other jurisdictions in respect of compromise assessments, or that adopted by the Australian Taxation Office (ATO) in respect of negotiated settlements, may be a more efficient and effective manner of resolving certain disputes with taxpayers.

The Commissioner of State Revenue has a statutory duty to assess tax correctly. He is required to make a genuine attempt to ascertain the relevant information and calculate the correct amount of tax.

In some cases, it may be difficult for the Commissioner to undertake this process without undue expense or delay (for example, because of the complexity of the case, the volume of work that must be undertaken by taxpayers and assessors or investigators, or uncertainties associated with the case). In these situations it would be desirable for the Commissioner to have the power to reach an agreement with the taxpayer as to their tax liability, that is, the amount or basis of the proposed assessment.

Where such an agreement is reached, the tax authority would subsequently issue an assessment or reassessment ("compromise assessment") on the basis of the agreement.

The principle referred to above concerning the power to settle disputes with taxpayers is regarded as part of the wider principle known as the "good management rule" and the courts have recognised that this principle may extend beyond disputes in individual cases. It has been accepted for some time that settling matters is consistent with good management of the tax system, overall fairness and best use of the taxing authorities and other community resources.

Such a power would enable better management of the limited resources of the OSR and would ensure timeliness of decisions, certainty and a cost effective end to a dispute for the taxpayer. As an example, if the amount of tax in dispute is small and disproportionate to the costs that the taxpayer and the OSR would have to incur (for example, valuation costs, legal costs, expert witness costs) in pursuing the matter, and the OSR accepts that the taxpayer has some prospects of success, it would be desirable that an efficient manner of reaching a mutually acceptable outcome be found.

It is expected that if the OSR had the power to settle disputes, there would be fewer disputes that would proceed to review in the State Administrative Tribunal (SAT) and this would result in a considerable saving in terms of the resources of the taxpayer, the OSR and the State Solicitor's Office.

CURRENT POSITION

All other jurisdictions, except the Northern Territory, have enacted an express power to issue compromise assessments. Section 12 of the *Taxation Administration Act 1996* (NSW) provides that, if it is "difficult or impracticable for the Chief Commissioner to determine a person's liability under a taxation law without undue delay or expense because of the complexity or uncertainty of the case or for any other reason", the Chief Commissioner may, with the agreement of the taxpayer, "assess liability in an amount specified in or determined in accordance with, the agreement" (compromise assessment).

Section 12 of the *Taxation Administration Act 1997* (Vic) contains a similar provision to the New South Wales' provision regarding compromise assessments. Section 12 of the *Taxation Administration Act 2000* (Qld) contains similar provisions as do section 22 of the *Taxation Administration Act 1997* (Tas) and section 12 of the *Taxation Administration Act 1999* (ACT).

However, section 13 of the *Taxation Administration Act 1996* (SA) is slightly different to the other jurisdictions' provisions as that Act provides for the Commissioner to make an assessment of a tax liability in accordance with a written agreement between the Commissioner and the taxpayer in order to settle a dispute or to avoid undue delay or expense.

Copies of the provisions concerning compromise assessments for each of the above States and the ACT are included in the attachment to this paper.

Section 19 of the *Taxation Administration Act 2003* (WA) ("TAA") enables the Commissioner to issue an assessment based on an estimated or suspected liability (see copy attached.) However, this provision may not apply to a situation where the relevant information is in fact available to the Commissioner, but it would be difficult or impracticable to determine the liability without undue delay or expense (for example, would involve a lengthy investigation by the OSR).

Prior to 1 July 2003, the *Stamp Act 1921*, the *Pay-roll Tax Assessment Act 1971* and the *Land Tax Assessment Act 1976* gave the Commissioner "the general administration of the Act". The relevant sections were repealed with effect from 1 July 2003 when the TAA commenced operation.

The TAA does not contain a similar provision to give the Commissioner the general administration of the taxation Acts but instead, under section 7, provides that the Commissioner is responsible to the Minister for applying and giving effect to the taxation Acts. This section also provides that the Commissioner is not subject to Ministerial control or direction in relation to the interpretation of a taxation Act or the exercise of a power under a taxation Act. As outlined in the explanatory memorandum at the time of its introduction:

> "This provision will statutorily remove any doubt that the Commissioner could be subject to Ministerial control or direction in the administration of taxation Acts. This principle is not explicitly stated in the existing taxation Acts, however, the general administration power in each of those Acts has been interpreted on the basis of the principles explicitly stated in this Bill.
>
> It should be noted that this power does not remove any responsibility the Commissioner has to report to the Minister on the efficacy of the tax laws, or any powers the Minister has with regard to the efficient administration of government Departments."

This section appears to grant a narrower power than the general power to administer the taxation Acts and it is questionable whether, under this provision, the Commissioner would have the power to settle disputes with taxpayers about their tax liability before or after assessment. A copy of section 7 of the TAA is attached.

The general rule, therefore, is that the Commissioner does not forego tax properly payable (including penalty and interest where appropriate) and will, with minimal delay, seek to collect as near as practicable that tax. However, there will be circumstances where it would be desirable that the strictness of this general rule be tempered by the need for sensible

administration and good management of the tax system, and this has been supported by the courts.

ANALYSIS OF ISSUE

It would be fair and equitable to provide the Commissioner with the ability to negotiate a compromise assessment in settlement of a taxpayer's liability prior to assessment and, also, the ability to negotiate a settlement when an assessment is in dispute following the issue of the assessment. This will also assist in providing the taxpayer with a high level of service. However, as recognised by taxation authorities worldwide, there is a need to achieve a proper balance between enforcement of revenue legislation on one hand, and customer service and taxpayer rights on the other.

Ability to Negotiate a Compromise Assessment

It is proposed that a specific compromise assessment power to settle disputes should be included in the TAA. Amending legislation, similar to that of other jurisdictions, will provide the Commissioner with an ability to negotiate a compromise assessment with taxpayers, prior and post assessment.

The following provisions could be considered when providing a compromise assessment making power:

- the Commissioner may make an assessment in accordance with compromise assessments provisions, in circumstances where it is difficult or impracticable for the Commissioner to properly determine the amount of the taxpayer's liability;

- the taxpayer's written agreement should be obtained before a compromise assessment of the taxpayer's liability is issued;

- the reassessment of a taxpayer's liability can be made by a compromise assessment with the agreement of the taxpayer. However, the taxpayer's agreement is not required if, in the opinion of the Commissioner, a previous compromise assessment was procured by fraud or there was a deliberate failure to disclose material information;

- a compromise assessment or reassessment, made with the taxpayer's agreement, should be a non-reviewable decision. That is, there is to be no process of formal objection and amendment available to a taxpayer as the compromise assessment was decided with the agreement of the taxpayer;

- it follows that no court, tribunal or other administrative body should have jurisdiction or power to review the validity or correctness of the compromise assessment decision. As part of the compromise assessment process, in circumstances where the assessment is made with the taxpayer's written agreement, the agreement could include the acceptance by the taxpayer that no rights of review of the decision, including the application of Freedom of Information legislation to the documentation, will apply to the assessment;

- the Commissioner should not be required to make a compromise assessment for a taxpayer;

- where the Commissioner may make an assessment by way of estimation, the compromise assessment provisions should not limit that power.

The power to negotiate settlements should be restricted to circumstances where it may be an appropriate way to resolve a matter including where the Commissioner considers that:

- on an objective assessment, the costs of litigating for both the taxpayer and the Commissioner, are out of proportion to the possible benefits;

- there are complex factual or quantum issues in contention, sufficient to make the case problematic in outcome or unsuitable for resolution by the SAT or the courts as the issue is peculiar to the particular taxpayer and the opposing positions are each considered reasonably arguable;

- the settlement will achieve compliance by the taxpayer, group of taxpayers or section of the public, for current and future years in a cost effective manner, that is, certain of the taxpayer's previous tax assessments will not be amended (as in an amnesty or voluntary disclosure).

Circumstances where it may be appropriate to enter into a compromise assessment with a taxpayer include where it is difficult to agree on the market value of a motor vehicle for stamp duty purposes, where it would be too resource intensive to establish whether all workers for an employer are employees or contractors for pay-roll tax purposes and where the Valuer General's Office does not have the expertise to value goodwill, a value could be negotiated.

Confer the Power of General Administration on the Commissioner

As discussed above, all of the other jurisdictions, except for the Northern Territory, have enacted additional provisions which authorise them to issue "compromise assessments". All other jurisdictions give the Commissioner (Chief Commissioner in NSW) the power of general administration of the taxation Acts.

However, Western Australia does not give the power of general administration of the taxation Acts to the Commissioner.

The decisions in *Grofam Pty Ltd v FC of T* (1997) 36 ATR 493, *Ross Randall Knuckey v The Commissioner of Taxation of the Commonwealth of Australia* [1997] 939 FCA, *Hutchins v Commissioner of Taxation* (1996) 65 FCR 269 and *Precision Pools Pty Ltd v Commissioner of Taxation* (1992) 37 FCR 554 all determined that the general administration of the taxation laws (Commonwealth) rests with the Commissioner and his general administrative powers are very wide.

It is clear that, once there is a formal dispute between the parties (an objection, application to the SAT or an appeal to a court) then it should be open to the parties, and at times highly desirable, to resolve the dispute by means of settlement.

The Full Federal Court held in *Grofam Pty Ltd v FCT*:

> "The Commissioner's power to settle or compromise proceedings to which he is a party derives from section 8 of the Act which provides that the Commissioner shall have the general administration of the Act…."

In that case, the court cited the earlier observation of Spender J in *Precision Pools Pty Ltd v Commissioner of Taxation* where he said:

> "That administration has to be bona fide and for the purposes of the Act, but it is a grant of a wide power and would encompass, for instance, the power to compromise proceedings in which he was a party or to make agreements or arrangements concerning the efficient management of a dispute in which he was involved."

In formulating what has been called "the good management rule", the courts have recognised that it should be open to the Commissioner to make sensible decisions having regard to the best use of limited resources available. The Commissioner should not be obliged to relentlessly pursue every last tax dollar where that would clearly be uneconomic or where the outcome is at best problematic.

The TAA should be amended to provide the Commissioner of State Revenue with the general administration of the taxation Acts, the position that previously applied under the repealed legislation.

Proposed Guidelines for Compromise Assessments

After the proposed amending legislation to provide for compromise assessments is implemented, a revenue ruling should be issued, providing an analysis of the Commissioner's interpretation of the legislation and the circumstances where it may be appropriate for him to enter into a compromise assessment with a taxpayer.

The delegation of the exercise of the power to negotiate settlements and enter into compromise assessments should be restricted to a limited range of OSR officers. These officers will be required to balance competing considerations and apply discretion and good sense so that any compromise assessment is capable of withstanding objective scrutiny and be justifiable on the facts and circumstances of the particular case.

TECHNICAL COMMITTEE CONCLUSION

The Technical Committee members supported the submission and expressed the view that it is a sensible proposition.

ATTACHMENT 1

Compromise Assessment Provisions of other States and the ACT:

Australian Capital Territory – *Taxation Administration Act 1999* s.12

(1) If it is difficult or impracticable for the commissioner to determine a person's tax liability under a tax law without undue delay or expense because of the complexity or uncertainty of the case or for any other reason, the commissioner may make an assessment in accordance with this section.

(2) The commissioner may, with the agreement of the taxpayer, assess liability in an amount specified in, or determined in accordance with, the agreement.

(3) Despite section 9, the commissioner shall not make a reassessment of a tax liability assessed in accordance with this section unless—

(a) the taxpayer agrees to the reassessment; or

(b) the assessment under this section was procured by fraud or there was a deliberate failure to disclose material information.

(4) This section does not limit the power of the commissioner to make an assessment by way of estimate under section 11.

New South Wales – *Taxation Administration Act 1996* s.12

(1) If it is difficult or impracticable for the Chief Commissioner to determine a person's tax liability under a taxation law without undue delay or expense because of the complexity or uncertainty of the case or for any other reason, the Chief Commissioner may make an assessment in accordance with this section.

(2) The Chief Commissioner may, with the agreement of the taxpayer, assess liability in an amount specified in, or determined in accordance with, the agreement.

(3) Despite section 9, the Chief Commissioner cannot make a reassessment of a tax liability assessed in accordance with this section:

(a) except with the agreement of the taxpayer; or

(b) unless the assessment under this section was procured by fraud or there was a deliberate failure to disclose material information.

(4) (Repealed)

(5) This section does not limit the power of the Chief Commissioner to make an assessment by way of estimate under section 11.

Queensland – *Taxation Administration Act 2001* s.12

(1) This section applies if, in assessing a taxpayer's liability for tax, it is difficult or impracticable for the commissioner to properly determine the amount of the taxpayer's liability because of a complexity or uncertainty or for another reason.

(2) The commissioner may make an assessment of the taxpayer's liability under a written agreement with the taxpayer (a "compromise assessment").

(3) The compromise assessment is a non-reviewable decision.

(4) Nothing in this part requires the commissioner to make a compromise assessment for a taxpayer.

South Australia – *Taxation Administration Act 1996* s.13

(1) The Commissioner may, if the Commissioner considers it appropriate to do so to settle a dispute or to avoid undue delay or expense or for some other reason, make an assessment of a tax liability in accordance with a written agreement between the Commissioner and the taxpayer.

(2) If the Commissioner has made an assessment of a tax liability of a taxpayer under this section, the Commissioner cannot make a reassessment of the taxpayer's liability except-

(a) with the agreement of the taxpayer; or

(b) where the assessment under this section was procured by fraud or there was a deliberate failure to disclose material information.

(3) An assessment or reassessment made under this section with the agreement of a taxpayer (a "compromise assessment") is a non-reviewable decision.

Tasmania – *Taxation Administration Act 1997* s.22

(1) If it is difficult or impracticable for the Commissioner to determine a person's tax liability under a taxation law without undue delay or expense because of the complexity or uncertainty of the case or for any other reason, the Commissioner may make an assessment of that liability in accordance with this section.

(2) The Commissioner, with the agreement of a person, may assess the person's tax liability in an amount specified in, or determined in accordance with, the agreement.

(3) The Commissioner must not make a reassessment of a tax liability assessed under this section –

(a) except with the agreement of the taxpayer; or

(b) unless, in the opinion of the Commissioner –

(i). the assessment under this section was procured by fraud; or

(ii). there was a deliberate failure to disclose material information.

(4) An assessment or reassessment made under this section with the agreement of a taxpayer is a non-reviewable decision.

Victoria – *Taxation Administration Act 1997* s.12

(1) If it is difficult or impracticable for the Commissioner to determine a person's tax liability under a taxation law without undue delay or expense because of the complexity or uncertainty of the case or for any other reason, the Commissioner may make an assessment in accordance with this section.

(2) The Commissioner, with the agreement of the taxpayer, may assess liability in an amount specified in, or determined in accordance with, the agreement.

(3) Despite section 9, the Commissioner cannot make a reassessment of a tax liability assessed in accordance with this section—

(a) except with the agreement of the taxpayer; or

(b) unless, in the opinion of the Commissioner—

(i). the assessment under this section was procured by fraud; or

(ii). there was a deliberate failure to disclose material information.

(4) An assessment or reassessment made under this section with the agreement of a taxpayer is a non-reviewable decision.

(5) This section does not limit the power of the Commissioner to make an assessment by way of estimate under section 11.

ATTACHMENT 2

Western Australia – *Taxation Administration Act 2003* s.19

(1) If the Commissioner suspects on reasonable grounds that a tax liability exists, the Commissioner may make an assessment on the basis of that suspicion and the Commissioner's estimate of the amount of the liability.

(2) If a tax liability exists, but the Commissioner is not satisfied with the adequacy or reliability of information available to make an assessment, the Commissioner may make an assessment on the basis of the Commissioner's estimate of the amount of the liability.

ATTACHMENT 3

Western Australia – *Taxation Administration Act 2003* s.7

(1) The Commissioner is responsible to the Minister for applying and giving effect to the taxation Acts.

(2) The Commissioner is not subject to Ministerial control or direction in relation to -

(a) the interpretation of a taxation Act; or

(b) the exercise of a power under a taxation Act.

8c. Tax Administration – General Anti-Avoidance Provision

ISSUE

Enacting a general anti-avoidance provision to cover all State taxes.

The particular issue raised in the submission was:

- **Department of Treasury and Finance (DTF)**
    - The Business Tax Review (BTR) in 2002 recommended that an effective general anti-avoidance provision should be introduced into the Stamp Act. In addition, the BTR noted that:

      > "Legal tax avoidance through minimisation practices and tax planning have become accepted practice in the last ten years or so, to the extent that practitioners can be subjected to negligence actions for not advising clients of legal tax avoidance mechanisms".

      The DTF submission suggests that a general anti-avoidance provision be developed to cover all State taxes.

CURRENT POSITION

Currently, a general anti-avoidance provision that covers all State taxes does not exist. Further, a general anti-avoidance provision that covers a particular State tax (such as stamp duty, payroll tax or land tax) does not exist.

However, the *Stamp Act 1921* contains numerous specific provisions that allow the Commissioner to make determinations that certain actions are aimed at an avoidance of tax and consequently charge duty or deny exemptions that, without these provisions, would have resulted in a different duty outcome.

The broadest anti-avoidance provision contained in the Stamp Act is in section 76AV that relates to Part IIIBA (the land rich provisions). This section gives the Commissioner the power to make a determination that but for a scheme, a person would have had an obligation to lodge a statement under the land rich provisions. In making such a determination, the Commissioner may have regard to:

- the way in which the scheme was entered into and carried out;
- the form and substance of the scheme, including the legal rights and obligations involved in the scheme and the economic and commercial substance of the scheme;
- when the scheme was entered into and the length of the period during which the scheme was carried out;
- any change to a person's financial position, or any other consequence, that has resulted, will result, or may reasonably be expected to result, from the scheme's having been entered into and carried out;
- the circumstances surrounding the scheme; and
- any other matter that the Commissioner considers relevant.

The Commissioner is then able make an assessment for the amount of duty that would have been payable if the statement had been lodged.

The following provisions also contain powers for the Commissioner to make determinations that certain actions are to be disregarded if he is of the opinion that they are made for the purpose of reducing duty or defeating the objects of the Act:

- 6(2)(c), relating to conditional contracts;
- 63AA(2)(b), 63AD(6), 63ADA(2)(b) and 63ADB(5), relating to public unit trust schemes;
- 73DD(6), relating to private unit trust schemes;
- 76AI(2), 76AP(2), 76ATB(2) and 76ATI(2), relating to determining a company or corporation is land rich;
- 75JDA, relating to corporate reconstruction applications; and
- 112NA, relating to hire of goods arrangements.

There are also specific provisions in the Stamp Act that could be characterised as anti-avoidance provisions, such as section 75AF that defeats contract splitting and section 31B that that counters undocumented acquisitions.

A problem with relying on specific anti-avoidance provisions is that when a new scheme or method of avoidance is detected, it can only be shut down by a legislative amendment. This is generally a lengthy process and unless the amendment is made retrospectively, the revenue to the State is lost. Further, once a specific avoidance scheme is shut down, variations of that scheme tend to emerge that are effective in avoiding duty, until that scheme is shut down, and so on. All the while, the tax burden falls increasingly on those who are meeting their tax obligations.

There have recently been nine separate transactions that the Commissioner has identified that have resulted in the loss of an estimated $50 million of revenue to this State. A general anti-avoidance provision may have countered this loss of revenue.

Precedents for a general anti-avoidance provision already exist in the Australian Capital Territory, Queensland and Victoria. It is clear, therefore, that other jurisdictions have recognised that concerted efforts by taxpayers and their advisers to avoid their obligations under State revenue laws have resulted in a general anti-avoidance provision being necessary to deter such attempts and to protect the revenue base. However, it should be noted that the anti-avoidance provisions in these jurisdictions have not yet been tested in Court. In addition, the Australian Taxation Office relies on Part IVA of the income tax legislation to deter the avoidance of income tax obligations.

The Queensland provisions apply to the entire Duties Act. Victoria has two sets of anti-avoidance provisions, one that deals with the transfer duty regime and the other that covers the land rich provisions. The ACT has provisions in its Taxation Administration Act that covers all taxes collected in that Territory.

ANALYSIS OF ISSUE

Tax avoidance was described by the Ralph Committee (Review of Business Taxation)[1] as follows:

> "The misuse or abuse of the law rather than a disregard for it. It is often driven by the exploitation of structural loopholes in the law to achieve tax outcomes that were not intended by the Parliament but

[1] It should be noted that the Review considered that specific anti-avoidance provisions were preferable to general anti-avoidance provisions. Nonetheless, the Australian Taxation Office has continued with the general anti-avoidance provision approach through the operation of Part IVA of its income tax legislation.

> also includes manipulation of the law and a focus on form rather than substance. The way things are done in order to take advantage of structural loopholes, or dress up or characterise something to satisfy form but not substance can also stamp an arrangement as avoidance. Tax avoidance represents a serious threat to the integrity of the tax system and to the revenue. It is also a form of subsidy from those paying their fair share of tax according to the intention of the law."

The need for anti-avoidance provisions in State taxation legislation was highlighted in a paper delivered to the Fifth Annual States' Taxation Conference in July 2005 when the late Justice Graham Hill expressed the view that, "It is obvious that in those jurisdictions without anti-avoidance provisions there will be vulnerability to stamp duty avoidance unless the Courts of those jurisdictions adopt the fiscal nullity doctrine and further that that doctrine leaves exposed, when applied, a situation where duty would be payable".

Justice Hill also noted that the doctrine of fiscal nullity may provide some protection from stamp duty avoidance in those jurisdictions without general anti-avoidance provisions. Fiscal nullity allows a Court to disregard a transaction where its purpose is directed to the avoidance of tax. The doctrine was designed to overcome artificial steps which serve no commercial purpose and are only undertaken to avoid tax. However, whether the doctrine of fiscal nullity could be effectively applied in the context of stamp duty is by no means certain. It should be noted that the Courts have not yet applied the doctrine of fiscal nullity to stamp duty in Australia.

In order to adequately protect the revenue of this State and ensure that taxpayers meet their obligations under State revenue laws, it is suggested that an anti-avoidance provision is required to deter blatant avoidance.

Members of the Technical Committee questioned whether a general anti-avoidance provision would be necessary if more rigour was adopted in examining legislation and developing legislative proposals. However, the view of the OSR was that there are difficulties associated with developing legislation without the contextual background of transactions, and that the resources available to the OSR in examining legislation is less than that generally available to taxpayers in the case of many high value commercial transactions. It was further noted that a range of other jurisdictions, including the Commonwealth, have had difficulties in this regard that have resulted in general anti-avoidance provisions being necessary.

This paper seeks to identify the issues that need to be examined in designing an effective anti-avoidance provision should the Government decide that the introduction of a general anti-avoidance provision is appropriate. These issues include the form of the provision, its commencement, whether specific provisions are developed for specific taxes or whether a provision could be developed so that it covers all State taxes (and be located in the *Taxation Administration Act 2003* ("the TAA")), whether existing anti-avoidance provisions will be maintained and the impact of such a provision on certainty for taxpayers.

Form of the Anti-avoidance Provision

There are several factors that need to be considered in the form and design of a general anti-avoidance provision to ensure that it achieves the intended outcome. These are discussed below.

Scheme

The application of an anti-avoidance provision should rely on a "scheme" being entered into or carried out.

The "scheme" is the method or instrument used to achieve the tax avoidance and is defined in jurisdictions with anti-avoidance provisions along similar lines. For example, the Victorian definition is:

> "scheme" includes the whole or any part of—
>
> (a) a contract, agreement, arrangement, understanding, promise or undertaking (including all steps and transactions by which it is carried into effect)—
>
> (i) whether made or entered into orally or in writing;
>
> (ii) whether express or implied;
>
> (iii) whether or not enforceable;
>
> (b) a plan, proposal, action, course of action or course of conduct, whether or not unilateral;
>
> (c) a trust.

When enacting an anti-avoidance provision, the definition of "scheme" must be broad enough to capture the means by which the avoidance is achieved.

Important aspects of the above definition are that it allows for each step of a scheme to be examined in determining the existence of a scheme and not just the final step that may implement the scheme. Further, it does not restrict a scheme to matters committed to writing.

Similar definitions to the Victorian definition above are used in other jurisdiction's anti-avoidance provisions. It is suggested that these be used as a model for the Western Australian provision.

The members of the Technical Committee noted that the definition of "scheme" is generally consistent across general anti-avoidance provisions and is generally interpreted to cover a wide range of steps that make up the scheme. It was therefore not considered to be a key aspect that would affect the operation of the provision.

Purpose Test

One of the issues in terms of the design of an anti-avoidance provision that needs to be determined is whether the provision should rely on an "any purpose" or a "sole or dominant purpose" test before being invoked to address a scheme of avoidance.

These two tests can be described as follows:

- "sole or dominant purpose" test – A provision would apply if it is reasonable to conclude that an entity, whether alone or with others, entered into or carried out a scheme or part of a scheme for the sole or dominant purpose of enabling the entity or another entity to obtain a duty benefit from the scheme.

- "any purpose" test – A scheme will be regarded as a tax avoidance scheme if it has tax avoidance as its purpose, or as one of its purposes, as long as that purpose is not merely incidental to another purpose

A further issue for consideration identified by the members of the Technical Committee was whether the test related to the "purpose" or the "effect" of the scheme. The view of the members was that the "effect" of a scheme related to its outcome, whereas the "purpose" of a scheme related to its intention or object. The members of the Technical Committee were of the view that a test that was based on the effect of a scheme was a much broader test than one based on the purpose of a scheme, and would create further uncertainty from a taxpayer's point of view by providing a wide discretion to the Commissioner.

The more effective anti-avoidance approach, from a revenue protection point of view, is the "any purpose" test, as this approach allows for invoking anti-avoidance provisions if "any purpose" of the scheme is aimed at the avoidance of duty. This approach is more effective than a "sole or dominant purpose" test as a sole or dominant purpose test creates an additional test to be satisfied that is, in itself, open to manipulation. The OSR noted cases of avoidance where a sole or dominant purpose test would have resulted in a general anti-avoidance provision not being applicable. Members of the Technical Committee noted that the ATO adopts a sole or dominant purpose test in Part IVA, which appears to operate effectively and the Courts have not been restrictive in its application. The members were of the view that there was sufficient case law to allow a sole or dominant purpose test to operate effectively in a State taxation context.

However, the OSR expressed concerns in relation to demonstrating that stamp duty avoidance was the sole or dominant purpose of a scheme, as it was the general view of the Technical Committee members that stamp duty is not the major consideration when structuring a transaction because Federal tax implications are generally more important. Members of the Technical Committee noted this difficulty, but were of the view that if each step in the scheme were considered, it is likely that at least one of those steps would have an effect in relation to State taxation. It was noted that this was reliant on the Court's adopting a wide interpretation of a scheme. An alternative solution that could be considered was to refer to the purpose of avoiding "any tax".

In relation to the provisions operating in other jurisdictions, Queensland relies on a "sole or dominant purpose" test, while the ACT and Victoria rely on "any purpose tests".

There is no clear model to follow to achieve consistency. However, a precedent already exists in the Stamp Act with the "any purpose" test adopted in the land rich anti-avoidance provision of the Act (section 76AV) and the provisions relating to unit trust schemes.

It was recognised that an "any purpose" test would be the most robust from a revenue protection point of view. However, this needs to be balanced with minimising the level of uncertainty for taxpayers.

Tax Avoidance

Another element of the anti-avoidance provision that is required is that the tax payable is reduced as a result of the scheme being entered into or carried out. Victoria achieves this through its definition of "tax avoidance", which is:

(a) an elimination or reduction in the liability of a person for duty under this Chapter;

(b) a postponement in the liability of a person to pay duty under this Chapter.

Queensland has taken a different approach in its provisions by using the concept of a "duty benefit", which is described in its legislation as follows:

(1) An entity obtains a *duty benefit* if an amount of duty payable by the entity under this Act apart from this chapter is, or could reasonably be expected to be, less than it would have been apart from the scheme or a part of the scheme.

(2) The amount of the duty benefit is the difference between the amount of duty payable and the amount of duty that would have been payable apart from the scheme or part of the scheme.

While the wording of these provisions is quite different, the models of "tax avoidance" and "duty benefit" are similar.

However, one of the differences between these two models is that the Victorian provision includes a postponement in liability as avoidance. An example of a postponement in liability would be a scheme that defeated section 74B of the Act that charges duty where there are simultaneous put and call options in existence over property and deferred the payment of the duty until the options were exercised. It is unclear whether the Queensland provision would capture such a scheme. It is therefore suggested that a provision that covers a reduction or elimination in duty, as well as a postponement in duty, would be the most effective.

The members of the Technical Committee agreed that a general anti-avoidance provision should cover the postponement of duty and that the postponement of a tax liability was covered by the operation of Part IVA.

The *Victorian Duties Act 2001* goes on to link the use of the terms "purpose", "scheme" and "tax avoidance" with the definition of a "tax avoidance scheme" as follows:

> For the purposes of this Part, a "tax avoidance scheme" is a scheme that directly or indirectly—
>
> (a) has tax avoidance as its purpose or effect; or
>
> (b) has tax avoidance as one of its purposes or effects, if the purpose or effect of tax avoidance is not merely incidental to another purpose or effect of the scheme—
>
> whether the scheme had that effect at the time that it was entered into, or only subsequently.

The important aspect of this definition is that it clarifies that the scheme may have tax avoidance as its effect at the time the scheme is entered into, or subsequently. This makes it clear that the provision cannot in itself be avoided by manipulating the scheme so that the avoidance of tax occurs after the scheme is entered into.

Regardless of whether the Victorian or Queensland approach is adopted, the Western Australian anti-avoidance provision should be triggered where a person is able to eliminate, reduce or postpone their duty liability at the time the scheme is entered into or subsequently.

Members of the Technical Committee expressed the view that the current approach to anti-avoidance provisions adopted in the Stamp Act of referring to avoidance as "defeating the object" of the relevant provision created uncertainty as it was not always clear what the "object" of the provision was intended to be, and that such an approach would be undesirable in a general anti-avoidance provision.

Factors

Both the ACT and Queensland anti-avoidance provisions contain matters that the respective Commissioners must consider when making a determination that a scheme has been entered into to avoid tax. These lists are similar to the list shown earlier in this paper relating to the anti-avoidance provision in section 76AV of the Act, with the exception that the WA list allows the Commissioner to have regard to "any other matter that the Commissioner considers relevant". The Victorian provision does not contain such a list and consideration needs to be given as to whether such a list enhances the effectiveness of anti-avoidance provisions.

It is suggested that the inclusion of a list of factors to be considered by the Commissioner provides guidance to taxpayers and their advisers as to how the provision will be applied, and a similar list of factors to those in the section 76AV should be included in the anti-avoidance provision.

Further, it is suggested that an anti-avoidance provision should not operate to prevent a taxpayer legitimately accessing exemptions and concessions that are provided for in the relevant legislation. Queensland has dealt with this issue in its duty benefit model by including in the matters to be considered in determining whether a duty benefit has been obtained, the following:

> "the duty benefit is not attributable to an exemption or concession under this Act for duty".

Consideration should be given to including a similar provision in the anti-avoidance provision to protect taxpayers legitimately accessing concessions and exemptions. Members of the Technical Committee noted that Part IVA also applies to access to concessions and exemptions. However, members also noted that difficulties may arise in defining "legitimate" access to a concession or exemption. Nonetheless, the members agreed that the anti-avoidance provision should still apply where a taxpayer has entered into a scheme that has resulted in gaining access to an exemption or concession to which they otherwise would not be entitled.

Operation

Once the Commissioner is satisfied that a scheme has been entered into that has resulted in a taxpayer avoiding their tax obligations, provisions are required to set out how the anti-avoidance provision is to be applied.

The Victorian provisions operate such that if the Commissioner considers that a person has participated in a tax avoidance scheme, he can assess or reassess the matter without having regard to the scheme. Similarly, in Queensland, the Commissioner may decide that the amount of the duty benefit is payable as duty.

The effect of these provisions is that the person who would have been liable to pay duty but for the operation of the scheme becomes liable to pay the duty avoided, or using the Queensland model, the amount of the duty benefit.

Careful consideration needs to be given to how the provisions deal with imposing duty once a decision has been made to apply the anti-avoidance provision. In some circumstances, particularly in relation to the land rich provisions, it may not be sufficient to simply disregard the operation of a scheme. It may be necessary to recreate a transaction on which to charge duty. For example, in relation to the land rich provisions, it may be necessary to deem a relevant acquisition to have taken place so that duty can be charged in relation to that acquisition. The drafting of the provision will need to ensure that a mechanism exists to charge the duty that has been avoided.

Members of the Technical Committee also noted that problems may arise in relation to reconstructing the transaction that would have occurred but for the scheme, as given the transaction specific nature of stamp duty, in some cases it could be argued that the transaction would not have occurred if the scheme had not been utilised.

Members of the Technical Committee also suggested that consideration should be given to addressing compensating adjustments in any general anti-avoidance provision. Compensating adjustments allow other taxpayers who may be disadvantaged by the application of the general anti-avoidance provision to request the Commissioner to reduce their tax liability, and any decision in this regard is subject to review. It should be noted that Queensland includes such a provision in its general anti-avoidance provision, whereas Victoria does not.

The Queensland legislation then requires the Commissioner "to give notice of the decision, and the reasons for the decision to the avoider".

Provisions in the TAA already exist to require the Commissioner to supply a statement of grounds of assessment if requested by the taxpayer. Further, the land rich anti-avoidance provision requires the Commissioner to provide reasons why he has made a determination under 76AV that duty has been avoided. It is suggested that a similar requirement be placed on the Commissioner to provide reasons why the anti-avoidance provision has been applied.

In Victoria, unless there is a case of misleading information proved, penalties are not imposed in cases where the anti-avoidance provisions are invoked. The members of the Technical Committee advised, however, that the ATO imposes penalties when Part IVA is applied, at a higher rate than would be applied in other cases. Consideration will need to be given to the appropriateness or otherwise of the imposition of penalties through this provision, and through those already in existence in the Taxation Administration Act.

Commencement

Should it be decided to enact a general anti-avoidance provision, consideration needs to be given to its date of commencement.

The Queensland provisions apply to a scheme started on or after the commencement of the legislation. The disadvantage of this approach is that it is open to manipulation and would not capture a scheme that originated prior to commencement. This could be easily achieved by ensuring that initial advice in relation to tax avoidance was provided before the commencement date. If the definition of a scheme includes "all steps and transactions by which it is carried into effect" it could be argued that such an anti-avoidance provision would not operate to capture a scheme that had its origins prior to the enactment of the anti-avoidance provision, but was not used until after the enactment.

The Victorian provisions commenced one day after the Bill received Royal Assent. Advice received from the Victorian State Revenue Office is that the provisions could apply to a scheme where some of the steps and transactions occurred prior to the date of Assent, but some after that date.

The commencement date of the anti-avoidance provision contained in the land rich provisions of the Stamp Act was linked to a relevant acquisition occurring on or after the commencement date of the provisions. Therefore, under this provision, it is irrelevant when the scheme was entered into as long as the relevant acquisition occurred on or after commencement. It is considered that a similar approach should be taken in the general anti-avoidance provision, so that it applies to any transaction, transfer or acquisition that occurs on or after commencement, regardless of when the scheme was entered into.

It is acknowledged that such an approach may be construed as retrospective legislation, as transactions are generally structured a certain way because of legislation that exists at that time. If a general anti-avoidance provision is subsequently enacted, it could be applied to a transaction that was structured in reliance on the legislation that existed prior to the enactment of the anti-avoidance provision, but that wasn't carried out until after commencement of the anti-avoidance provision. Members of the Technical Committee expressed concerns in relation to this issue as it was considered to increase the uncertainty associated with the general anti-avoidance provision.

However, given that industry representatives and practitioners are likely to be involved in any decision to enact a general anti-avoidance provision through the Technical Committee and Reference Group consultation, and that any provision is likely to be in the public arena for a considerable period

of time as a result of the State Tax Review and subsequent Parliamentary processes, it is likely that those involved in such transactions would be aware that the general anti-avoidance provision could be applied to transactions that are being contemplated prior to enactment of the general anti-avoidance provision. Therefore, a general anti-avoidance provision that can be applied on or after commencement regardless of when the scheme is entered into is still considered appropriate.

Location of the Anti-avoidance Provision

While it would be preferable for a general anti-avoidance provision to be located in the TAA and apply to all State taxes, the diverse range of taxes covered by the TAA and the contentious matters it may be required to address or remedy, may make it impractical for such a provision to be effectively drafted.

The difficulty of covering a wide range of taxes by one provision is evidenced by the fact that Victoria has developed separate anti-avoidance provisions in its transfer duty and land-rich chapters.

Consider the following avoidance scheme that could be countered by a general anti-avoidance scheme described below.

ABC Ltd was a land rich company for the purposes of Part IIIBA of the Act. All of the company's land holdings were held in subsidiaries. The company's parent wished to dispose of the Australian operations and these were offered for sale by tender. DEF Ltd was the successful bidder for the acquisition of the company. The day prior to acquiring all the issued shares in ABC Ltd, DEF Pty Ltd as trustee for the DEF Trust acquired a 50% interest in all subsidiaries owned by ABC Ltd through share allotments. The next day DEF Pty Ltd acquired a 100% interest in ABC Ltd.

It was argued that Part IIIBA was not applicable, as ABC Ltd only owned a 50% interest in the land owning companies and these were no longer subsidiaries. ABC Ltd was therefore no longer entitled to the land held by its previous subsidiaries and the land could not be taken into account for determining whether Part IIIBA was applicable.

Using a general anti-avoidance provision as suggested in this paper, it could be argued that the issuing of the shares in ABC Ltd's subsidiaries through share allotments prior to DEF Pty Ltd acquiring the interests in ABC Ltd was part of a "scheme" (note that a "scheme" includes a contract, agreement, arrangement, understanding, promise or undertaking including all steps and transactions by which it is carried into effect.) The Commissioner would therefore argue that a "purpose" of the "scheme" was "tax avoidance" and apply the general anti-avoidance provision. The Commissioner would

disregard the share allotments made to the DEF Trust, which would mean that the land holdings of ABC Ltd's subsidiaries would be taken into account in determining whether ABC Ltd was land rich.

This example demonstrates the complex issues just within the stamp duties legislation that a general anti-avoidance provision would need to cover. Whether an anti-avoidance scheme that dealt with an issue such as the one described above could also be applied to other matters such as pay-roll tax issues dealing with overseas wages, or the transferring of minor interests in land to reduce a land tax liability, is questionable.

Given the uncertainty as to whether a provision can be drafted to adequately cover all State taxes, it is suggested that initially a general anti-avoidance provision should be developed only in relation to stamp duty (which would needs to cover all heads of duty). Once a model has been developed, it is suggested that it be considered whether the provision could apply to pay-roll tax and land tax with minimal changes to the model, or whether the nature of payroll tax and land tax would prevent such a broad approach.

Members of the Technical Committee also expressed concerns that a general anti-avoidance provision could be drafted broadly enough to apply to all taxes, and agreed that a provision should be drafted in relation to stamp duties in the first instance, before its application to other taxes is considered.

Existing Anti-avoidance Provisions

As described above, there are several anti-avoidance provisions currently contained in the Stamp Act. The need for these provisions will have to be examined if a decision is taken to enact a general anti-avoidance provision. However, a carefully designed general anti-avoidance provision may remove the need for many of these specific provisions.

Certainty

Common arguments against the enacting of general anti-avoidance provisions are that such provisions create uncertainty for taxpayers, and that the preferred approach would be to legislate specific anti-avoidance provisions once a revenue authority identifies an avoidance scheme.

It is acknowledged that certainty can be enhanced by legislating to counter specific avoidance schemes. However, this is a lengthy process that, unless it is done retrospectively, places the State's revenue at risk and adds complexity to the legislation.

Further, often legislative amendments to counter specific schemes merely result in a variation of the scheme emerging that again allows the duty that was intended to apply to be avoided, until another legislative amendment is made. The OSR is continually engaging in "catch-up" and all the while the State is losing revenue.

The issue regarding certainty was raised when the corporate reconstruction exemption was enacted in 1996. As a result of industry consultation where concerns in relation to certainty were expressed, a provision that would have disallowed exemptions that weren't in the public interest was removed. However, continual attempts to circumvent the provisions resulted in a general anti-avoidance provision being enacted in the corporate reconstructions provisions. When section 75JDA, the anti-avoidance provision, was subsequently enacted in 2000, the then Minister assisting the Treasurer said in the Second Reading speech:

> "Industry considered that an anti-avoidance provision created uncertainty in the exemption, with parties to transactions never having any degree of comfort that qualifying transactions would be exempted. It is apparent from the transactions that triggered these amendments that, in the absence of an anti-avoidance provision of the type proposed, the black-letter law was not robust enough to repel concerted efforts by practitioners operating in this area to defeat the association requirements of the exemption. Those practitioners who are unhappy with the new requirements associated with this exemption, including the uncertainty created by the anti-avoidance provision, should look firstly to their own to cast blame."

It is also noted that a precedent for a general anti-avoidance provision exists in other jurisdictions, as well as the Australian Taxation Office. It appears that businesses are still able to operate effectively despite the inclusion of such provisions in taxation legislation.

Further, a general anti-avoidance provision would only be applied in cases of blatant avoidance, where contrived arrangements have been entered into to avoid the payment of duty. In such cases, it is likely that the parties to a transaction and their advisers are fully aware that the schemes or arrangements involved in structuring a transaction are blatant avoidance techniques. Further, any decision to apply the general anti-avoidance provision would be made by senior officers within the Department to ensure that it is applied appropriately.

Conclusion

In conclusion, this paper suggests that a Western Australian general anti-avoidance provision should specify:

- a definition of a "scheme" that includes all the steps that form part of a scheme, but does not require the scheme to be in writing;
- that the provision will apply where any purpose of a scheme is "tax avoidance" (or similar terminology);
- a definition of "tax avoidance" that includes eliminating, reducing or postponing a duty liability, whether at the time the scheme is entered into or subsequently;
- a list of factors that the Commissioner must consider when making a determination that there is a tax avoidance scheme;
- that legitimately accessing an exemption or concession does not constitute tax avoidance;
- a mechanism for charging duty (and re-creating a transaction on which to charge duty where necessary);
- that the Commissioner is to provide the reasons why the anti-avoidance provision has been applied; and
- a commencement provision that allows for schemes entered into prior to the commencement date to be covered by the anti-avoidance provision.

TECHNICAL COMMITTEE CONCLUSION

Members of the Technical Committee recognised that any decision to implement a general anti-avoidance provision was a matter of Government policy. However, members expressed concerns in relation to the uncertainty for taxpayers that a general anti-avoidance provision would introduce and were of the view that should a general anti-avoidance provision be considered desirable, that attempts should be made through the design of the provision to minimise the uncertainty as much as possible.

8d. Tax Administration – Disclosure Rules

ISSUE

Tax avoidance through minimisation practices and tax planning have increasingly become accepted practice as the tax laws have become subject to intense scrutiny by persons searching for loopholes or weaknesses. When combined with the general interpretation principle that tax law should be read in favour of the taxpayer when a provision is unclear, the result is significant revenue loss and increasingly complex law. The Department of Treasury and Finance suggests that provisions are required to minimise the revenue losses in some areas.

The particular issue raised in the submission was:

- **Department of Treasury and Finance**
    - The Department of Treasury and Finance suggests that a notification requirement on taxation avoidance schemes, similar to the provisions contained within the United Kingdom's *Finance Act 2004*, should be introduced into the *Taxation Administration Act 2003* (TAA).

CURRENT POSITION

As the legislation stands, there is no disclosure requirement in relation to avoidance schemes within the TAA. Introducing a notification requirement into the TAA will enable the Office of State Revenue to make a more effective and timelier response to any avoidance schemes identified. It is intended that the disclosure rules will operate in conjunction with the proposed general anti-avoidance provisions to mitigate the effect of the avoidance schemes.

ANALYSIS OF ISSUE

Tax avoidance has resulted in a very significant loss of revenue to the United Kingdom (UK) Government. While that Government has focused on identifying and addressing specific loopholes, attempts continue to be made to find new areas of legislation to exploit.

As a result, the UK Government enacted amendments to the Finance Act which introduced new obligations on promoters and, in some cases, users of certain tax schemes to report details of these schemes to the UK Inland Revenue Department. These disclosure rules initially applied to all direct taxes, including income tax, corporation tax and capital gains tax. However, in the 2005 Budget it was announced that from 1 August 2005, the disclosure rules would extend to stamp duty land tax (the equivalent of Western Australia's stamp duty regime).

The disclosure rules, contained in sections 306 to 319 (Part 7) of the Act (copy attached), are a new tool to tackle avoidance by increasing transparency in the avoidance market. They provide Inland Revenue with earlier information about potential tax avoidance schemes and arrangements and enable the Government to make a swifter and better targeted response. The rules will act as a disincentive to the creation of contrived and elaborate schemes that rely on confidentiality and whose main purpose is to avoid tax.

The primary legislation sets out the broad test that determines if an arrangement must be disclosed. Any arrangement where the main benefit, or one of the main benefits, from using the scheme is obtaining a tax advantage must be disclosed in accordance with the legislation.

Non-UK based promoters are also subject to the rules. The rules apply only to the extent that promoters market or design tax schemes to individuals and companies that can expect to obtain UK tax advantages from their use.

The disclosure rules apply to taxpayers that use schemes disclosed by promoters and to schemes a taxpayer designs and implements without involving any person who is a promoter (known as "in-house" tax schemes).

It should be noted that while the disclosure rules apply to stamp duty land tax arrangements, the rules are limited to arrangements where the subject matter of the schemes is commercial property with an aggregated market value of at least £5 million.

Overview of Disclosure Rules

The objective of the tax avoidance disclosure rules is to deter, by making discovery more certain, the use of tax schemes that are abusive or rely upon artificiality and to ensure that where such tax schemes are marketed and used, they are disclosed.

In keeping with the objectives, a tax scheme is only to be disclosed by a promoter where:

- it will enable or expect to enable any person to obtain a *tax advantage*; and

- that tax advantage is the *main benefit*, or one of the main benefits, of the scheme.

The legislation also gives the term "promoter" a broad scope. Under section 307 of the Act, a person is a promoter if, in the course of providing services relating to taxation, he or she makes available for implementation or design proposals and arrangements of a type prescribed within the regulations. Inland Revenue expects that mainly accountants and lawyers, along with a number of boutique tax planning businesses, will be "promoters". A person is not a promoter unless any advice they provide is directly connected to the expected tax advantage and where a disclosure is required, the time limit is determined by whether the promoter markets schemes (makes available) or designs them.

The expectation that a tax scheme will result in a tax advantage is fundamental to whether or not a promoter or user has an obligation to disclose under the rules. Section 318 defines an advantage to include relief from tax, deferral of tax and the avoidance of an obligation to deduct tax.

In determining when a tax advantage will be regarded as one of the main benefits of the scheme, an objective test will consider the value of the expected tax advantage compared to the value of any other benefits likely to be enjoyed. The disclosure rules are described further in Attachment 1.

Although the disclosure rules are relatively recent amendments to the Finance Act, the UK Inland Revenue Department indicated to the Department of Treasury and Finance that they had received a significant number of disclosures under the scheme. The Inland Revenue Department also indicated that the legislation was effective in sending an important message on tax avoidance.

It should also be noted that the Federal Government has introduced similar legislation that aims to deter promoters of tax avoidance schemes. The legislation, the Tax Laws Amendment (2006 Measures No. 1) Bill 2006, was first read in the House of Representatives on 16 February 2006.

The federal legislation aims to deter the promotion of "tax exploitation schemes" and the implementation of schemes on a representation that a product ruling is applicable where the implementation of the scheme is "materially different" to that described in the product ruling. The legislation imposes significant civil penalties to individuals and corporations that engage in prohibited conduct. The legislation is to be contained in proposed

Division 290 of Schedule 1 of the *Taxation Administration Act 1953*. It is suggested that further analysis of the legislation be undertaken as more details become available. However, the concept behind the amendments seems to be similar to that of the UK disclosure rules.

It is suggested that a similar notification provision could be introduced into the TAA to assist with the detection of avoidance schemes and to assist in ensuring an even playing field for all taxpayers. The disclosure rules would work in conjunction with the proposed general anti-avoidance provision. The disclosure rules will effectively ensure that the Office of State Revenue is notified of avoidance schemes, enabling the general anti-avoidance provisions to operate as intended to mitigate the potential revenue lost from the avoidance schemes.

TECHNICAL COMMITTEE CONCLUSION

Members of the Technical Committee noted that it was unclear from the Technical Paper when disclosure of a tax avoidance scheme was required. Members of the Technical Committee stated that the triggers for disclosure would have to be clearly identified so that taxpayers and their advisers were aware of their obligations. The Technical Committee agreed that the paper was at a preliminary stage, and further examination of the UK and Federal notification requirements should be undertaken to develop the proposal if Government supported the need for this type of provision.

ATTACHMENT 1

Which Schemes must be Disclosed?

The primary legislation (Part 7 of the Finance Act 2004) requires a tax scheme to be disclosed only where:

- Its use might be expected to give rise to a tax advantage;
- That tax advantage is the main benefit, or one of the main benefits, that might be expected to arise from using the scheme; and
- The arrangements fall within a description prescribed in the regulations.

The arrangements are prescribed in the Stamp Duty Land Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2005 No. 1868. The described arrangements in relation to Stamp Duty Land Tax (SDLT) are those:

- Whose subject matter does not consist wholly of residential property; and
- In respect of which the aggregate value of the chargeable interest in such property is at least £5 million at the time any requirement to notify arises; and
- Which fall outside certain exemptions listed in the regulations.

A person who discloses a scheme will not have to make a further disclosure of the same scheme, or a scheme that is substantially the same (s312).

Tax Advantage and Main Benefit

The expectation that a scheme will result in tax advantage is the fundamental principle as to whether or not a scheme has to be disclosed. However, even where a scheme is expected to result in a tax advantage, disclosure need only be made where the advantage is expected to be the main benefit of the scheme.

"Tax advantage" in widely defined within section 318 of the primary legislation.

Exempted Arrangements

The Schedule to Regulation No. 1868 contains a list of six steps, and disclosure is not required if one or more of the steps is satisfied. However, this is subject to certain restriction detailed below.

The purpose of the exemptions is to remove the need to notify certain schemes that Inland Revenue is already fully aware of, so disclosure would serve no purpose.

The exemptions recognize that certain transactions, when done independently, are legitimate. However, the exemptions reflect the fact that

certain transactions, when completed in conjunction, do require disclosure, as there is a potential that the main benefit of the transactions/scheme is to obtain a tax advantage.

The way to approach the steps is as follows:

- identify all the single listed steps comprised in the scheme;
- identify any unlisted steps in the scheme that are necessary to secure the expected SDLT advantage (if there are any such steps, the scheme is not exempted from disclosure);
- if the scheme involves a combination of steps, or more than one instance of the same step, refer to Rules 1 and 2 to see if that combination or multiple falls within the arrangements exempted from disclosure.

Rule 1
Arrangements involving Steps B, D, E and F are excluded arrangements, unless Rule 2 applies.

Rule 2
Arrangements are not excluded arrangements if they –

(a) involve all, or at least two of, steps A, C and D ; or
(b) involve more than one instance of step A, C or D.

The listed steps are:

- **Step A -** The acquisition of a chargeable interest in land by a special purpose vehicle (SPV)[6];
- **Step B** - Claims to certain listed reliefs;
- **Step C** - The sale of shares in a SPV which holds chargeable interests in land, to a person who is not connected to either the SPV or the vendor;
- **Step D** - Not electing to waive the exemption from value added tax (i.e. not "opting to tax");
- **Step E** - Structuring a transaction as the transfer of a going concern for value added tax purposes; and
- **Step F** - The creation of a partnership to which a property, which subject to a land transaction, is to be transferred.

Who is Required to Disclose the Scheme?
The primary legislation determines who is required to disclose the scheme. The requirement to notify normally falls upon the promoter of the scheme. There are three exceptions where the obligation falls upon the user. These are where:

- The promoter is offshore and does not disclose the scheme;
- There is no promoter (i.e. the scheme has been designed in-house); and
- The promoter is a lawyer prevented by legal privilege from making a full disclosure of the information required.

[6] A special purpose vehicle is a company created for the purpose of acquiring an interest in land.

When Must the Scheme be Disclosed?
The applicable disclosure time limits are prescribed by the Tax Avoidance Schemes (Information) Regulations 2004 No. 1864. For promoters and users required to notify schemes promoted by offshore promoters, the time limits are as follows:

- A promoter must disclose a notifiable proposal within 5 days of either the date the proposal is made available for implementation or the date on which the promoter becomes aware of any such transaction forming part of the arrangements;
- A promoter must disclose notifiable arrangements within 5 days of the date on which they become aware of any transaction forming part of those arrangements;
- A user of a scheme promoted by an offshore promoter must disclose notifiable arrangements within 5 days of entering the first transaction forming part of those arrangements.

For users of in-house schemes and users who are required to notify a scheme as a consequence of legal professional privilege applying to a promoter, the user of the scheme is required to notify it within 30 days, beginning with the day on which the user enters the first transaction forming part of those arrangements.

What Information is Required?
The information required is prescribed by the Tax Avoidance Schemes (Information) Regulations 2004 No. 1864. The information required is as follows:

- Name of the promoter or other person required to make the disclosure (promoters are not required to provide details of clients or users of the scheme);
- Details of which makes the scheme notifiable under Regulation No. 1868;
- A summary of the proposal/arrangements and the name by which it/they are known;
- Information explaining the elements and how the expected tax advantage arises; and
- The statutory provisions on which the tax advantage is based.

Penalties
Persons who fail to notify a scheme will be liable to an initial penalty of up to a maximum of £5000. Continuing failure to notify after the initial penalty has been imposed will be liable to a further daily penalty up to £600 per day.

Legal Professional Privilege
Tax schemes promoted by lawyers are within the scope of the disclosure rules. However, as legal professional privilege may apply to certain advice

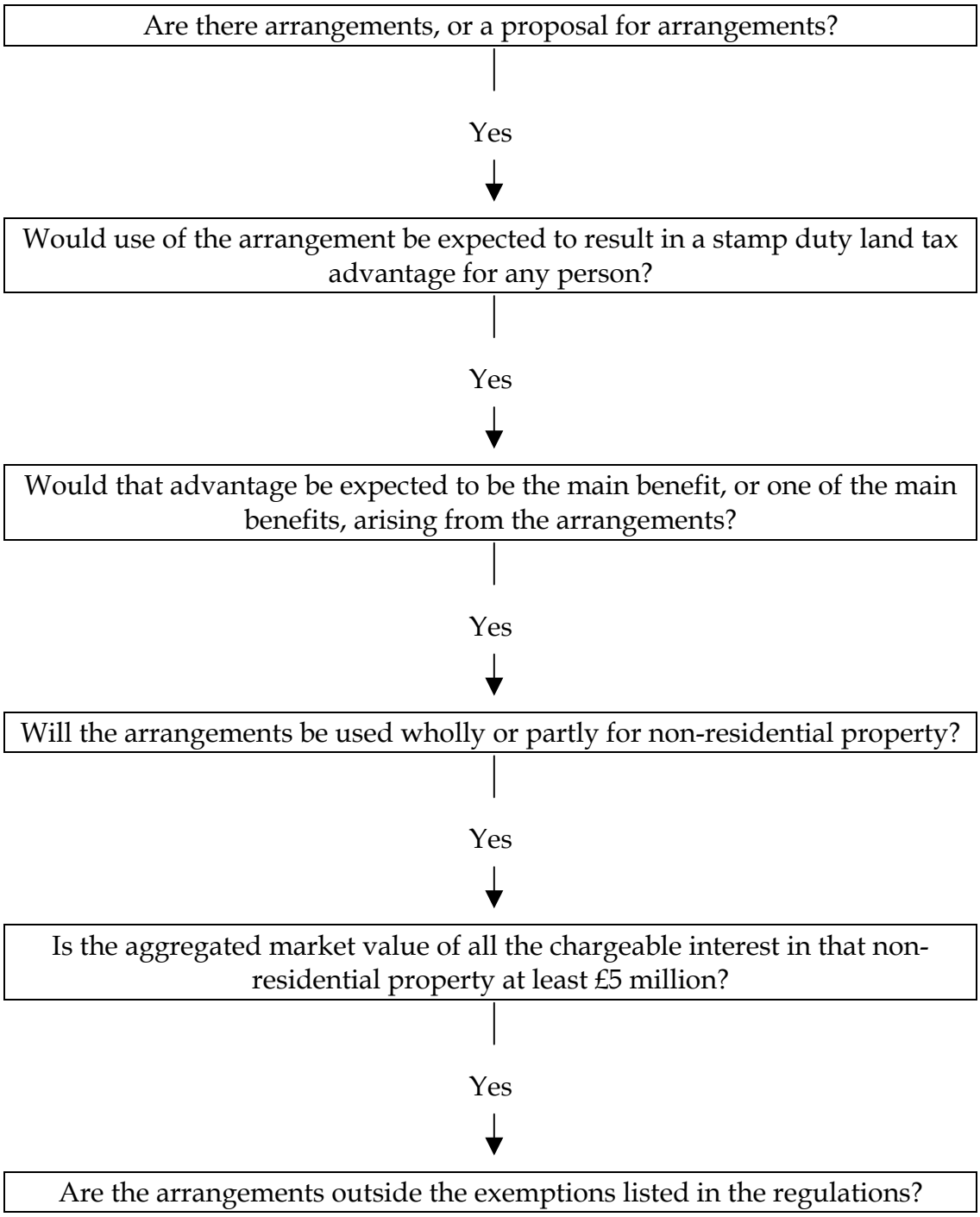
given by lawyers to their clients, section 314 of the primary legislation provides that no disclosure is required of any legally privileged information. A user of a tax scheme promoted by a lawyer has the option of waiving any rights to legal privilege. The lawyer is then required to disclose the scheme.

Where a lawyer is marketing a tax scheme with no specific client in mind, the lawyer cannot assert legal professional privilege. This means that such marketing is subject to the disclosure obligations.

Further Information
Relevant legislation, regulations and guidance can be found at:
www.hmrc.gov.uk/aiu/index.htm

Disclosure Rules Flow Chart

The primary legislation and the regulations provide a series of tests that must be satisfied before disclosure of a scheme is required. The flow chart below summarises these tests. Should any of the answers to the questions below be No then disclosure is not required.



ATTACHMENT 2

FINANCE ACT 2004 (UK)

PART 7 DISCLOSURE OF TAX AVOIDANCE SCHEMES

306 Meaning of "notifiable arrangements" and "notifiable proposal"

(1) In this Part "notifiable arrangements" means any arrangements which-

(a) fall within any description prescribed by the Treasury by regulations,

(b) enable, or might be expected to enable, any person to obtain an advantage in relation to any tax that is so prescribed in relation to arrangements of that description, and

(c) are such that the main benefit, or one of the main benefits, that might be expected to arise from the arrangements is the obtaining of that advantage.

(2) In this Part "notifiable proposal" means a proposal for arrangements which, if entered into, would be notifiable arrangements (whether the proposal relates to a particular person or to any person who may seek to take advantage of it).

307 Meaning of "promoter"

(1) For the purposes of this Part a person is a promoter-

(a) in relation to a notifiable proposal, if, in the course of a relevant business-

(i) he is to any extent responsible for the design of the proposed arrangements, or

(ii) he makes the notifiable proposal available for implementation by other persons, and

(b) in relation to notifiable arrangements, if he is by virtue of paragraph (a)(ii) a promoter in relation to a notifiable proposal which is implemented by those arrangements or if, in the course of a relevant business, he is to any extent responsible for-

(i) the design of the arrangements, or

(ii) the organisation or management of the arrangements.

(3) In this section "relevant business" means any trade,

profession or business which-

(a) involves the provision to other persons of services relating to taxation, or

(b) is carried on by a bank, as defined by section 840A of the Taxes Act 1988, or by a securities house, as defined by section 209A(4) of that Act.

(3) For the purposes of this section anything done by a company is to be taken to be done in the course of a relevant business if it is done for the purposes of a relevant business falling within subsection (2)(b) carried on by another company which is a member of the same group.

(4) Section 170 of the Taxation of Chargeable Gains Act 1992 (c. 12) has effect for determining for the purposes of subsection (3) whether two companies are members of the same group, but as if in that section-

(a) for each of the references to a 75 per cent subsidiary there were substituted a reference to a 51 per cent subsidiary, and

(b) subsection (3)(b) and subsections (6) to (8) were omitted.

(5) A person is not to be treated as a promoter for the purposes of this Part by reason of anything done in prescribed circumstances.

308 Duties of promoter

(1) The promoter must, within the prescribed period after the relevant date, provide the Board with prescribed information relating to any notifiable proposal.

(2) In subsection (1) "the relevant date" means the earlier of the following-

(a) the date on which the promoter makes a notifiable proposal available for implementation by any other person, or

(b) the date on which the promoter first becomes aware of any transaction forming part of notifiable arrangements implementing the notifiable proposal.

(3) The promoter must, within the prescribed period after the date on which he first becomes aware of any transaction forming part of any notifiable arrangements, provide the Board with prescribed information relating to those arrangements, unless those arrangements implement a proposal in respect of which notice has been given under subsection (1).

(4) Where two or more persons are promoters in relation to the

same notifiable proposal or notifiable arrangements, compliance by any of them with subsection (1) or (3) discharges the duty under either of those subsections of the other or others.

(5) Where a person is a promoter in relation to two or more notifiable proposals or sets of notifiable arrangements which are substantially the same (whether they relate to the same parties or different parties), he need not provide information under subsection (1) or (3) if he has already provided information under either of those subsections in relation to any of the other proposals or arrangements.

309 Duty of person dealing with promoter outside United Kingdom

(1) Any person ("the client") who enters into any transaction forming part of any notifiable arrangements in relation to which-

(a) a promoter is resident outside the United Kingdom, and

(b) no promoter is resident in the United Kingdom,

must, within the prescribed period after doing so, provide the Board with prescribed information relating to the notifiable arrangements.

(2) Compliance with section 308(1) by any promoter in relation to the notifiable arrangements discharges the duty of the client under subsection (1).

310 Duty of parties to notifiable arrangements not involving promoter

Any person who enters into any transaction forming part of notifiable arrangements as respects which neither he nor any other person in the United Kingdom is liable to comply with section 308 (duties of promoter) or section 309 (duty of person dealing with promoter outside the United Kingdom) must at the prescribed time provide the Board with prescribed information relating to the notifiable arrangements.

311 Arrangements to be given reference number

(1) Where a person complies with section 308(1) or (3), 309(1) or 310 in relation to any notifiable proposal or notifiable arrangements, the Board may within 30 days-

(a) allocate a reference number to the notifiable arrangements or, in the case of a notifiable proposal, to the proposed notifiable arrangements, and

(b) if it does so, notify the person of that number.

(2) The allocation of a reference number to any notifiable arrangements (or proposed notifiable arrangements) is not to be regarded as constituting any indication by the Board that the arrangements could as a matter of law result in the obtaining by any person of a tax advantage.

(3) In this Part "reference number", in relation to any notifiable arrangements, means the reference number allocated under this section.

312 Duty of promoter to notify client of number

(1) Any promoter who is providing services to any person ("the client") in connection with notifiable arrangements must, within 30 days after the relevant date, provide the client with prescribed information relating to any reference number that has been notified to the promoter by the Board-

(a) in relation to those arrangements, or

(b) in relation to arrangements which are substantially the same as those arrangements (whether made between the same parties or different parties).

(2) In subsection (1) "the relevant date" means-

(a) the date on which the promoter first becomes aware of any transaction forming part of the notifiable arrangements, or

(b) if later, the date on which the number is notified to the promoter under section 311.

313 Duty of parties to notifiable arrangements to notify Board of number, etc.

(1) Any person who is a party to any notifiable arrangements must provide the Board with prescribed information relating to-

(a) any reference number notified to him under section 311 by the Board or under section 312 by the promoter, and

(b) the time when he obtains or expects to obtain by virtue of the arrangements an advantage in relation to any relevant tax.

(2) For the purposes of subsection (1) a tax is a "relevant tax" in

relation to any notifiable arrangements if it is prescribed in relation to arrangements of that description by regulations under section 306.

(3) Regulations under subsection (1) may-

(a) in prescribed cases, require the number and other information to be included in any return or account which the person is required by or under any enactment to deliver to the Board, and

(b) in prescribed cases, require the number and other information to be provided separately to the Board at the prescribed time or times.

(4) A person is not liable to a penalty under-

(a) section 95 of the Taxes Management Act 1970 (c. 9) (incorrect return or accounts for income tax or capital gains tax),

(b) paragraph 8 of Schedule 2 to the Oil Taxation Act 1975 (c. 22) (incorrect returns and accounts for purposes of petroleum revenue tax),

(c) section 247 of the Inheritance Tax Act 1984 (c. 51) (provision of incorrect information for purposes of inheritance tax),

(d) any provision relating to incorrect or uncorrected returns made under section 98 of the Finance Act 1986 (c. 41) (administration of stamp duty reserve tax),

(e) paragraph 20 of Schedule 18 to the Finance Act 1998 (c. 36) (incorrect or uncorrected return for corporation tax),

(f) paragraph 8 of Schedule 10 to the Finance Act 2003 (c. 14) (incorrect or uncorrected return for purposes of stamp duty land tax), or

(g) any other prescribed provision,

by reason of any failure to include in any return or account any reference number or other information required by virtue of subsection (3)(a) (but see section 98C of the Taxes Management Act 1970 for the penalty for failure to comply with this section).

314 Legal professional privilege

(1) Nothing in this Part requires any person to disclose to the Board any privileged information.

(2) In this Part "privileged information" means information with respect to which a claim to legal professional privilege, or, in Scotland, to confidentiality of communications, could be maintained in legal proceedings.

315 Penalties

(1) After section 98B of the Taxes Management Act 1970 insert-

"98C Notification under Part 7 of Finance Act 2004

(1) A person who fails to comply with any of the provisions of Part 7 of the Finance Act 2004 (disclosure of tax avoidance schemes) mentioned in subsection (2) below shall be liable-

(a) to a penalty not exceeding £5,000, and

(b) if the failure continues after a penalty is imposed under paragraph (a) above, to a further penalty or penalties not exceeding £600 for each day on which the failure continues after the day on which the penalty under paragraph (a) was imposed (but excluding any day for which a penalty under this paragraph has already been imposed).

(2) Those provisions are-

(a) section 308(1) and (3) (duty of promoter in relation to notifiable proposals and notifiable arrangements),

(b) section 309(1) (duty of person dealing with promoter outside United Kingdom),

(c) section 310 (duty of parties to notifiable arrangements not involving promoter), or

(d) section 312(1) (duty of promoter to notify client of reference number).

(3) A person who fails to comply with section 313(1) of the Finance Act 2004 (duties of parties to notifiable arrangements to notify Board of reference number, etc.) shall be liable to a penalty of the relevant sum.

(4) In subsection (3) above "the relevant sum" means-

(a) in relation to a person not falling within paragraph (b) or (c) below, £100 in respect of each scheme to which the failure relates,

(b) in relation to a person who has previously failed to comply with section 313(1) on one (and only one) occasion during the period of 36 months ending with the date on which the current failure to comply with that provision began, £500 in respect of each scheme to which the current

failure relates (whether or not the same as the scheme to which the previous failure relates), or

(c) in relation to a person who has previously failed to comply with section 313(1) on two or more occasions during the period of 36 months ending with the date on which the current failure to comply with that provision began, £1,000 in respect of each scheme to which the current failure relates (whether or not the same as the schemes to which any of the previous failures relates).

(5) In subsection (4) above "scheme" means any notifiable arrangements within the meaning of Part 7 of the Finance Act 2004."

(2) In section 100 of that Act (determination of penalties by officer of Board) at the end of subsection (2) (penalties to which subsection (1) of the section does not apply) insert ", or

(f) section 98C(1)(a) above."

(3) In section 100C of that Act (penalty proceedings before Commissioners) after subsection (1) insert-

"(1A) In its application to a penalty under section 98C(1)(a) above, subsection (1) above has effect with the omission of the words "General or"."

316 Information to be provided in form and manner specified by Board

The information required by section 308(1) or (3), 309(1), 310, 312(1) or 313(1) must be provided in a form and manner specified by the Board.

317 Regulations under Part 7

(1) Any power of the Treasury or the Board to make regulations under this Part is exercisable by statutory instrument.

(2) Regulations made by the Treasury or the Board under this Part may contain transitional provisions and savings.

(3) A statutory instrument containing regulations made by the Treasury or the Board under any provision of this Part is subject to annulment in pursuance of a resolution of the House of Commons.

318 Interpretation of Part 7

(1) In this Part-

"advantage", in relation to any tax, means-

(a) relief or increased relief from, or repayment or increased repayment of, that tax, or the avoidance or reduction of a charge to that tax or an assessment to that tax or the avoidance of a possible assessment to that tax,

(b) the deferral of any payment of tax or the advancement of any repayment of tax, or

(c) the avoidance of any obligation to deduct or account for any tax;

"arrangements" includes any scheme, transaction or series of transactions;

"corporation tax" includes any amount which, by virtue of any of the provisions mentioned in paragraph 1 of Schedule 18 to the Finance Act 1998 (c. 36) (company tax returns, assessments and related matters) is assessable and chargeable as if it were corporation tax;

"notifiable arrangements" has the meaning given by section 306(1);

"notifiable proposal" has the meaning given by section 306(2);

"prescribed", except in section 306, means prescribed by regulations made by the Board;

"promoter", in relation to notifiable arrangements or a notifiable proposal, has the meaning given by section 307;

"reference number", in relation to notifiable arrangements, has the meaning given by section 311(3);

"tax" means-

(a) income tax,

(b) capital gains tax,

(c) corporation tax,

(d) petroleum revenue tax,

(e) inheritance tax,

(f) stamp duty land tax, or

(g) stamp duty reserve tax.

(2) Subject to subsection (1), expressions which are defined in the Taxes Act 1988 for the purposes of the Tax Acts, as defined in

section 831(2) of that Act, have the same meaning in this Part.

319 Part 7: commencement and savings

(1) The following provisions of this Part come into force on the passing of this Act-
sections 306 to 315, so far as is necessary for enabling the making of any regulations for which they provide, and sections 317 and 318 and this section.

(2) Except as provided by subsection (1), the provisions of this Part come into force on 1st August 2004.

(3) Section 308 does not apply to a promoter in the case of-

(a) any notifiable proposal as respects which the relevant date, as defined by subsection (2) of that section, fell before 18th March 2004,

(b) any notifiable arrangements which implement such a proposal, or

(c) any notifiable arrangements which include any transaction entered into before 18th March 2004.

(4) Sections 309 and 310 do not apply in relation to notifiable arrangements which include any transaction entered into before 23rd April 2004.

(5) Section 313 does not apply in relation to any notifiable arrangements in respect of which, by virtue of subsection (3) or (4), none of the duties imposed by sections 308 to 310 arises.

8e. Tax Administration – Remove the Right to Sue Lawyers for not Giving Tax Avoidance Advice

ISSUE

Remove the right to sue lawyers for not giving tax avoidance advice

The particular issue raised in the submission was:

- **Department of Treasury and Finance**
    - Remove the right to sue lawyers for not giving unsolicited tax avoidance advice to their clients.

CURRENT POSITION

It has been put to the Office of State Revenue that lawyers have a duty of care established in common law and tort law to provide advice, including tax avoidance advice, to clients regardless of whether it is included in their retainer. The following cases were quoted in support of this contention:

- *Bayer v. Balkin* 1995 31 ATR 93
- *Briar Holdings Pty Ltd v. Capolingua* (WA Supreme Court, 17 July 1997)
- *Hurlingham Estates v. Wilde* [1997] 1 Lloyds 5, 25.

ANALYSIS OF ISSUE

In the course of administering the State's major revenue statutes, the role of a legal advisor in providing aggressive tax avoidance advice has sometimes been the subject of debate with those advisors. In such situations, solicitors have often advised the Commissioner, sometimes in writing, that they have no choice but to provide this type of advice, given the common law position established in the cases listed above.

The cases above found that to advise clients on how to avoid tax in certain situations, regardless of whether this advice was solicited by the client, is within a lawyer's duty of care under the law of torts.

It was noted in *Bayer v Balkin* that "whether we like it or not, we are obliged to warn the client on the potential taxation implications of what it is doing and to advise them how to avoid or minimise tax." This and other cases have provided that such advice should be given in situations where it would be reasonable to expect the lawyer to be knowledgeable in such matters. For instance, in the case of *Hurlingham Estates v Wilde*, the solicitors were found to have breached their duty of care by failing to give advice on the tax implications of a conveyancing transaction. This was found to be within the duty of care as any reasonably competent solicitor practising in this field should have been aware of such implications.

While this judicial view is recognised, it is questionable as to whether such a situation is consistent with the behaviours that the general community would consider appropriate. It is recognised that tax minimisation or avoidance is not illegal, however, there appears to be a developing reliance on this case law to justify the behaviour of legal advisors in providing aggressive minimisation advice. Supported by these decisions, legal practitioners operating in this field have advised the Commissioner that they have no choice but to provide tax avoidance advice, even though it may not have been specifically solicited.

This submission proposes to eliminate that obligation by removing a client's right to sue legal advisers for failing to give tax avoidance advice, unless specifically required by the client. The duty of care under both tort law and common law would be overridden by specific legislation in relation to State revenue legislation. This power would not make it illegal to provide tax avoidance or minimisation advice, but would merely mean that solicitors would no longer be obligated to provide this type of advice where they are not specifically asked for it. As such, legal advisers engaging in this field would do so by choice, not obligation.

The removal of a client's right to sue a legal practitioner for not providing such unsolicited advice would be complementary to other anti-avoidance measures being considered as part of the State Tax Review. As a whole, these powers would collectively support an environment where legal tax avoidance through minimisation practices and tax planning is viewed as not acceptable, rather than obligatory and a legitimate means of pushing the tax burden on to those taxpayers who comply with the spirit and intent of the law.

Interestingly, this approach appears to be consistent, at least in part, with the principles set out in the professional conduct rules of the Law Society of Western Australia under part 27.1 (see copy attached). This provision makes it clear that Law Society professional standards and ethos do not support the

promotion or marketing of a tax scheme or arrangement which has the predominant purpose of avoidance of tax by the exploitation of revenue law.

The intention of the proposal is to support legal practitioners by providing them with a choice when giving unsolicited taxation advice. Legal practitioners could choose whether or not to provide unsolicited tax avoidance advice without the prospect of being sued by the client for failing to provide it.

TECHNICAL COMMITTEE CONCLUSION

The Technical Committee had concerns that if this were to be adopted, clients could be disadvantaged because of a legal practitioner's failure to provide tax advice. Furthermore, it could allow a legal practitioner without expertise in tax matters to hide behind it.

The Technical Committee agreed that before this issue is finally deliberated upon by the Reference Group, the views of the Law Society should be sought both as to the profession's view in this State on the implications of the case law, and how the proposed response would impact on the profession and its clients.

Furthermore, some members of the Technical Committee indicated that they did not believe the case law meant a lawyer had no choice but to give unsolicited tax avoidance advice.

ATTACHMENT 1

27. Tax avoidance

27.1 A practitioner must not promote or market or intentionally assist, by the giving of advice or otherwise, in the promotion or marketing of a tax scheme or arrangement which has the predominant purpose of avoidance of tax by the exploitation of revenue law.

27.2 A practitioner must not have a financial interest in a business organization (whether incorporated or otherwise), which promotes or markets any tax scheme or arrangement described in rule 27.1.

8f. Tax Administration – Binding Rulings

ISSUE

A number of submissions have raised the issue of obtaining sufficient information regarding the operation of the State's taxation laws to provide certainty in respect of the tax consequences of a transaction. In particular, some submissions have suggested that the State introduce a system of private binding rulings to enable parties to better understand their taxation liability. Such an understanding was considered to be a fundamental feature of a good taxation system.

The particular issues raised in the submissions were:

- **WA Divisional Council of Taxpayers Australia** (Submission 51)
    - The ATO's private binding ruling process demonstrates a time and cost effective way to provide taxpayers (and their advisers) with a level of certainty regarding their tax affairs.
    - The submission suggests that the OSR implement a private binding ruling process along similar lines to that currently administered by the ATO.
- **Master Builders Association of WA** (Submission 63)
    - There is no process, formal or informal, to obtain advice or confirmation as to the stamp duty implications of a transaction prior to entering into that transaction.
    - An advance ruling system should be introduced into the stamp duty administration, equivalent to the private binding rulings available under Federal income tax law in respect of transactions in "serious contemplation" by a taxpayer.
- **Chamber of Minerals and Energy** (Submission 82)
    - Introduce binding revenue rulings and increase number of revenue rulings issued.
    - Introduce a private binding ruling system. The failure to implement such a system places an unreasonable burden on taxpayers and represents a failure by Government to accept responsibility for a fair and accessible system.

- A private binding ruling system should be introduced where the Commissioner will have authority to disregard the ruling if the transaction is undertaken in a different manner to that described in the application.

- **Small Business Development Corporation WA** (Submission 94)
  - While not containing a specific recommendation, the submission pointed out that small businesses are less likely than larger businesses to have ready access to expert taxation advice to deal with the compliance and administrative burdens of the tax system, and the costs of compliance fall disproportionately on the sector.

- **Grahame Young** (Submission 99)
  - There is no system of private binding rulings giving the taxpayer certainty as to proposed transactions or transactions which have been entered into and assessed but which are subject to reassessment. This system has been instituted for Commonwealth income taxes and GST with significant benefits and is in place at least for stamp duty in other Australian jurisdictions.

- **Australian Institute of Conveyancers WA Division** (Submission 106)
  - Taxpayers require assistance in order to comply with the legislation. A system must be introduced to remove the current burden on the taxpayer and agents.

- **The Law Society of WA** (Submission 123)
  - Introducing private binding rulings will provide certainty for parties to understand their duty liability prior to entry into a transaction and can be limited in a manner similar to that applying for corporate reconstruction predeterminations.

- **The Institute of Chartered Accountants in Australia** (Submission 124)
  - The submission expressed concern that there are no provisions in the Taxation Administration Act that either empowers the Commissioner to issue rulings or to protect taxpayers who act in accordance with them.

CURRENT POSITION

Current Information Provision by the Office of State Revenue

The Office of State Revenue (OSR) disseminates an increasing amount of information about the interpretation and administration of the State's tax laws. Public revenue rulings and Commissioner's practices are published for the benefit of taxpayers and staff of the OSR in an effort to improve the transparency and accountability of the administration of the State's revenue laws.

Revenue rulings provide an overview of the Commissioner's interpretation of various provisions of the State's taxation legislation. These revenue rulings include details of the OSR's administrative procedures and practices associated with specific aspects of revenue administration that are not related to the assessment of tax.

Further, Commissioner's practices are issued. These are addressed to the staff of the OSR to describe how a statutory discretion directly relating to the assessment of tax is to be exercised, and to provide guidance on how to deal with practical issues that directly impact on, or arise out of, the assessment of tax.

Both revenue rulings and Commissioner's practices are available to the public and can be viewed on the OSR website. Section 16(5) of the *Taxation Administration Act 2003* provides that where an assessment is based on a particular interpretation of the applicable law or a particular practice of the Commissioner that was generally applied to assessments 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. In a sense, therefore, a limited binding public ruling system is already in place in Western Australia, at least in relation to reassessments.

Moreover, the State Revenue Liaison Committee, with representation from taxation practitioners and peak industry bodies, has a standing invitation to identify areas where there is a perceived deficiency in the level of information provided, and request that rulings or Commissioner's practices be published to overcome any such deficiency.

Private Rulings

A private ruling is the Commissioner of State Revenue's view on how a tax law applies to a certain proposed transaction, arrangement, or set of circumstances. As a general rule, the Commissioner of State Revenue in

Western Australia does not provide private rulings to individuals or their representatives.

There are a number of exceptions to this general rule including advice provided by the OSR to a financial institution or insurance company regarding a new instrument to be introduced for widespread use.

Advice may also be provided regarding the liability for stamp duty on a particular draft or unexecuted instrument, or proposed transaction, where the instrument or transaction is of a kind where the stamp duty position is well established and generally well known.

Revenue Ruling SD 8 – 'Advice on Unexecuted Instruments' (copy attached) sets out the procedure for advice on unexecuted instruments and states that:

"As a general rule, advice will not be given when a request is received about the stamp duty implications of a particular unexecuted or draft instrument, or of a proposed transaction unless the instrument or transaction is of a kind for which the stamp duty position is well established and generally well known."

In addition, advice is provided on transactions involving corporate reconstructions due to specific legislative support for such a practice.

Section 75JC of the *Stamp Act 1921* provides that a person acting on behalf of a body corporate that proposes to be party to a transaction or transfer that would give rise to an instrument or statement which might be exempt from duty under section 75JA or 75JB (exemptions for corporate reconstructions), may request the Commissioner to determine whether a draft of that instrument or statement, if executed or finalised, would be exempt. If the Commissioner is given sufficient information, the Commissioner is required to make the requested determination and will be bound by this determination unless:

- the executed instrument or finalised statement differs in a material particular to the draft provided;
- circumstances relating to the executed instrument or finalised statement differ materially from those that related to the draft provided; or
- the Commissioner is of the opinion that there was not a full and true disclosure of the relevant information and evidence in the request for the determination.

Furthermore, as a result of the Business Tax Review legislation, advice is provided on completed transactions involving land rich entities.

Section 76AB of the Stamp Act allows a taxpayer to request that the Commissioner make a determination as to whether a dutiable statement must be lodged with respect to a transaction under Part IIIBA of the Act (duty on change of control of certain land-owning corporations). This enables taxpayers to obtain certainty about their obligation to lodge a statement where a transaction has occurred which may give rise to an obligation to pay duty under the land rich provisions in this Part of the Act.

Other Jurisdictions

The approach taken by other Australian jurisdictions to the provision of private rulings is mixed. While many jurisdictions are required by law to provide private binding rulings in specific cases (such as in respect of corporate reconstructions), the Australian Taxation Office (ATO) is the only tax office which is required by law to issue private rulings more generally.

This does not appear to be clearly understood by many of those making submissions, where it appeared from comments made that there exists a belief that private binding ruling systems are widespread across Australia.

By way of summary:

- the Queensland, Victorian, New South Wales and Tasmanian revenue offices have a formal policy of providing private rulings in certain circumstances, though generally not on unexecuted instruments or proposed transactions;

- South Australia has no formal policy in regards to private rulings, but does issue them on an ad hoc basis; and

- the Northern Territory and Australian Capital Territory revenue offices have a formal policy of not providing private rulings or similar advice.

Even in jurisdictions where formal policies have been issued, it is not always clear when a private ruling, or other advice on a proposed transaction or arrangement, can be sought and what the status of such a ruling or advice is, once provided.

ANALYSIS OF ISSUE

Underlying Need for a System of Private Binding Rulings

The need for adequate information regarding how the tax laws are to apply, and an effective system to disseminate that information is acknowledged. This is particularly the case where a taxpayer is self assessing.

In Western Australia, the OSR has recently been provided additional resources to boost customer education and will shortly be looking to increase the extent of partnering with industry and professional representative bodies in designing mechanisms to more effectively deliver that information service.

While the desirability of greater certainty is acknowledged, the OSR sees its role as one of providing information, not advice. It is considered that this position is generally consistent with that applying to State and Territory revenue offices elsewhere, particularly in respect of transactions that are contemplated, rather than those that have been carried into effect.

What is contained in a number of submissions is a request for:

- private rulings, specific to individual transactions;
- rulings to be made in relation to transactions that are contemplated, in advance of the actual transaction which may or may not proceed; and
- the Commissioner to be bound by such rulings.

What is not contained in those submissions is any detailed substantiation of the need for such a solution. In particular, clarification should be sought as to which taxes such rulings should apply to, which types of transactions affected by those taxes are currently problematic, and why current mechanisms are not sufficient to provide the certainty required.

The need for the Commissioner to be legislatively bound is also unclear. The submission from the Institute of Chartered Accountants in Australia stated:

"There have been reported cases where the Commissioner has not given relief to taxpayers who acted in accordance with his ruling on the basis that he is not legally bound to do so".

As the Commissioner was not aware of any recent reported cases where relief had not been given to taxpayers who acted in accordance with a ruling provided by him, he wrote to the ICAA requesting details of the "reported cases".

In their response, the ICAA provided a reference to the judgement of Franklyn J in *Commissioner of State Taxation (WA) v Merifield Cooksey Holdings Pty Ltd* 95 ATC 4590. In this case, the document that was the subject of the litigation was executed on 23 March 1990. At this time, OSR procedures were not the same as procedures currently followed by staff. Revenue Ruling SD 8, as discussed above, was issued in October 1990 to advise that the Commissioner will not provide advice about the stamp duty liability in respect of unexecuted instruments.

What has currently been put forward is only one possible solution. The benefit of this additional information is that it will allow a better understanding of the issues and consideration of a fuller set of potential solutions.

A short analysis of some of the possible issues associated with private binding rulings based on the OSR's understanding of the current situation is outlined below.

Viability

Private rulings could be very costly to provide (depending on how widely they were to be made available) and could not be supported within the existing Department of Treasury and Finance budget. Transactions or arrangements which are likely to be the subject of private rulings tend to be complex or unique. If they were not, then a settled tax position would more than likely exist in relation to the transaction and no further advice would be necessary. Thus, it is likely that significant amounts of time and expertise would be required to address the issues raised in requests for private rulings.

Given the relative size of the ATO (which has around 90 times the number of employees of the Western Australian OSR), the economies of scale allow it to provide a system of private binding rulings, although not without its own problems. Currently, there have been four reports issued following review of the administrative problems being experienced by the ATO. The reports are:

1. *Report of an Internal Review of the Systems and Procedures relating to Private Binding Rulings and Advance Opinions in the Australian Taxation Office*, Tom Sherman, 7 August 2000.

2. *The Australian Taxation Office's Administration of Taxation Rulings*, Australian National Audit Office, Audit Report No. 3 2001-02.

3. *Issues Paper No. 3. Self-Assessment*, Inspector- General of Taxation, 2003.

4. *Report on the Aspects of Income Tax Self Assessment*, Department of the Treasury, August 2004.

The above reports identified numerous issues with the administration of the private binding rulings system, including the following:

- The principal cost in producing private binding rulings is the direct staff time spent drafting, reviewing and publishing them.
- Certain highly sensitive information is not recorded. This leads to duplication of effort as the information could be required for future private binding rulings.
- A very large amount of costs are associated with maintaining separate reporting systems required for security of taxpayer information.
- There is a priority for solid technical skills and accuracy of advice. This puts additional demand on the skills of staff particularly in the editing process.
- Businesses struggle to understand why the ATO cannot make 'real-time' decisions when businesses are required to do so as a matter of course.
- Taxpayers and practitioners have a legitimate expectation that the advice they receive from the ATO will be accurate and unbiased. However, they assert the ATO adopts a pro-revenue position particularly in large complex cases and that the ATO is not objective when providing advice.
- Delays in responses, especially in relation to more complex requests, are so prevalent that they seriously threaten the usefulness of the private binding ruling system. Apart from lack of certainty, the lengthy period means that private binding ruling applications can become a costly exercise for tax agents to pursue on behalf of their clients. Many tax agents now rarely use private binding rulings.
- The ATO can only rule on the information provided in the taxpayer's private binding ruling application. This means that where the ATO has access to additional information that might be relevant, they cannot use it, but must instead request the applicant to provide it.
- Qualifying statements in private binding rulings, combined with their length and technical references, can make them hard to understand, especially where the audience does not have a high level of tax expertise.

- The ATO is not in the business of being a paid tax adviser to individuals and it should not feel obligated to provide its general advice in a way that only suits a minority.

Prior to any consideration of a binding ruling system for the OSR, these issues should be analysed in the context of their application to the administration of a State system.

As well as boosting customer education, the OSR is committed to improving the expertise of its staff and has been increasingly focusing on technical training. However, in order to provide private rulings, the resources that would have to be directed towards this service would be those staff members with substantial experience and expertise. The effect of any diversion of this expertise away from existing work areas, such as assessments and review, is likely to be significant and not possible without a substantial decline in the work already being carried out in those areas.

Implications of a Binding System of Rulings

If private rulings were required to be binding, it would be necessary to determine, and provide for in legislation, the circumstances in which a private ruling will be binding, and on whom it will be binding.

However, there is also a need to balance this aspect of certainty for taxpayers with the need for equity. For example, if a taxpayer may rely on a private ruling, even if it is found to be inconsistent with legislation or a court decision on the matter, but other taxpayers are not able to also rely on the ruling, then an inequitable situation will arise. In addition, if rulings are binding in this way, then a concern emerges that the administrators of the laws are able to usurp some of the power of the legislature and courts in the making of taxation laws.

The introduction of a binding rulings system may also affect the relationship between the makers and administrators of the State's tax laws. Private rulings provide the Commissioner's interpretation of the law as it relates to a specific set of circumstances. In doing so, this provides an additional avenue for taxpayers to challenge how the laws are interpreted in addition to what the interpretation of the laws should be. In doing so, this would remove from the control of Parliament the decision-making power in respect of this aspect of the administration of the State's tax laws.

The approach taken by other jurisdictions which provide private rulings is that, rather than have the status of law, private rulings are regarded as binding on the Commissioner. However, this does not necessarily remove the concern of administrators taking on law-making power.

If an incorrect ruling is provided and the Commissioner is unable to amend an assessment which has been made in accordance with the ruling, then an individual taxpayer may be able to rely on an assessment that is inconsistent with the State's tax laws. If this assessment imposes a greater burden on the taxpayer, then they may appeal the assessment and allow a correct assessment to be made. However, if the assessment reduces the liability of the taxpayer, then it is unlikely that the assessment would be challenged if the Commissioner is unable to do so. This may provide scope for inequitable treatment of taxpayers under the State's taxation laws.

Regardless of the status given to private rulings, provision may also need to be made for the possibility that an officer of the OSR may act outside their authority and provide rulings that are either inconsistent with the State's taxation laws or are designed to assist particular taxpayers.

Other related matters which will need to be addressed include whether, and in what circumstances:

- the Commissioner may revoke rulings; and
- rulings will be published.

As private rulings are issued in relation to a particular transaction or arrangement, they only relate to the specific circumstances of that transaction or arrangement. Another matter requiring consideration is whether other taxpayers may rely on a ruling given to a particular taxpayer with similar circumstances to their own. It is generally the case that only the taxpayer to whom a ruling relates may rely on the ruling, however, tax practitioners are likely to use previous rulings as a precedent when advising other taxpayers. Given this, the status of a ruling in this regard would need to be clearly outlined.

In the case of revenue rulings and Commissioner's practices, the OSR has systems in place to ensure that they are amended to take account of any relevant changes to the State's taxation laws or the administration of those laws. It would not be appropriate or practical to amend private rulings in the same manner. As a result, the certainty that can be placed on a private ruling by tax practitioners or taxpayers other than that to which the ruling relates is limited.

Avoidance

Another concern, which was recognised by the submission of the Taxation Institute and Law Society to the Business Tax Review, was that the provision

of rulings on transactions and arrangements in advance of execution, increases the scope for tax avoidance.

It is not considered appropriate that a taxpayer may request rulings on numerous unexecuted forms of the same transaction or arrangement for the purpose of finding a means of effecting the arrangement or transaction which will result in the least tax liability.

The OSR is responsible for the due administration of the State's revenue laws and collection of revenue pursuant to these laws. While the OSR understands the desire of taxpayers to minimise their taxation liability, the employment of its resources to assist individual taxpayers to minimise their tax liability is not considered to be the role of the OSR.

Certainty

A number of submissions request the provision of a binding rulings system for taxpayers and business advisers who are not able to proceed with any certainty on contentious taxation issues.

The provision of quality advice is an important way to reduce uncertainty. Quality advice can be defined as high quality in terms of its reliability, timeliness, accuracy and accessibility.

The provision of such high quality advice would require the resources of the more experienced officers of the OSR. In the absence of additional resources, this would reduce the number of complex assessments and reviews that could be completed, as these are the areas where the more experienced OSR officers are currently situated.

In addition, any decision made in response to a request for a private binding ruling would be reviewable, both under the objection provisions of the *Taxation Administration Act 2003* and the appeal provisions under the State Administrative Tribunal ("SAT") Act. As discussed elsewhere, the onus of proof has been recently transferred to the Commissioner and the SAT decides each matter brought before it de novo. Therefore, this would require all facts and details to be collected and thoroughly researched before the Commissioner could provide a decision under a binding ruling application. It is submitted that the period of time this process would require, may negate the benefit of certainty that a ruling that was binding on the Commissioner, would provide.

Tax Advisor Responsibility

While the provision of private binding rulings would undoubtedly be of benefit to tax advisors in reducing the risk or uncertainty inherent in advice they provide, it is the view of the OSR that providing advice to taxpayers on the potential tax implications of specific transactions and arrangements is the responsibility of tax advisors.

TECHNICAL COMMITTEE CONCLUSION

The members of the Technical Committee noted that the practitioners' view is that while the ATO's system is imperfect, it is better than no system at all. Practitioners also believe that although the duty of clarity imposed on the Commissioner is in part addressed by public revenue rulings and Commissioner's practices, these are not sufficiently binding on the Commissioner to provide certainty prior to complex assessments involving potentially large revenue consequences.

Although section 16(5) of the *Taxation Administration Act 2003* provides that the Commissioner cannot make a reassessment based on the grounds that the interpretation or practice is or was erroneous, there is no similar provision for assessments, and therefore, section 16(5) is not the answer.

It was considered that more in depth analysis of the drivers for a binding ruling system would be useful as it is not clear what were the specific areas of the taxation regime where this uncertainty existed.

It was also recognised that to put a rulings system in place would take time and would be potentially resource hungry. Moreover, the provision of additional funding for resources to provide a binding ruling system may not be the solution to problems identified by the OSR.

While there is a strong push in relation to the need for certainty, the Technical Committee members recognise that the issues considered are legitimate problems that are preventing the implementation of a binding ruling system. Nonetheless they are still of the opinion that such a system is desirable and the Reference Group should give consideration as to whether a private binding ruling system is desirable from a policy point of view.

ATTACHMENT 1

OFFICE OF STATE REVENUE

DEPARTMENT OF TREASURY AND FINANCE

MT NEWMAN HOUSE, 200 ST GEORGE'S TERRACE, PERTH
GPO BOX T1600 PERTH WA 6845

REVENUE RULING **SD8**

OCTOBER 1990

STAMP DUTY **ADVICE ON UNEXECUTED INSTRUMENTS**

INTRODUCTION

1. The State Revenue Department is occasionally requested to provide advice about the stamp duty liability in respect of unexecuted instruments. In many cases it is apparent that the enquiries are concerned with attempts to avoid or minimise stamp duty.

2. The State Revenue Department's principal function in relation to stamp duty is to ensure that dutiable instruments are duly stamped and that duty payable on the basis of returns is correctly remitted.

3. The Department's role does not include the provision of advice to individuals to enable them to arrange their affairs in such a way as to use the provisions of the Stamp Act to the best advantage.

RULING

4. As a general rule, advice will not be given when a request is received about the stamp duty implications of a particular unexecuted or draft instrument, or of a proposed transaction unless the instrument or transaction is of a kind for which the stamp duty position is well established and generally well known.

8g. Tax Administration – Objections and Appeals

ISSUE

Various issues dealing with objections and appeals have been raised in submissions to the State Tax Review.

- **Chamber of Minerals and Energy of Western Australia (CME)** (Submission 82)
    - Introduce an extension of time to pay an assessment which is subject to an objection or appeal.
    - Objections are generally determined without any input from legally qualified people. It is recommended that the Commissioner consult legally qualified people to assist in interpreting the law in determining an objection.
- **Australian Institute of Conveyancers (WA Division) (AICWA)** (Submission 106)
    - When a matter is under review on objection, the stamp duty assessment should not be payable until the objection is determined.
- **The Law Society of Western Australia (LSWA)** (Submission 123)
    - The Society supports the expansion of the jurisdiction of the State Administrative Tribunal (SAT) to cover general administrative law issues.
    - Presently, SAT's jurisdiction simply replaces the role of the Supreme Court on appeals.
    - To be truly effective, SAT needs to have the capacity to review a broader range of administrative decisions, along the lines of the AAT.

CURRENT POSITION AND ANALYSIS OF ISSUE

Payment Arrangements where Objection / Appeal Lodged

Section 33(1) of the *Taxation Administration Act 2003* (TAA) states that an obligation to pay tax is not suspended or deferred by an objection or case stated or by review proceedings. Furthermore, subsection (2) prevents an order in review proceedings from being made if it would have the effect of suspending or deferring an obligation to pay tax before those proceedings are finally determined. No State or Territory provides for the automatic deferral or suspension of an obligation to pay tax when an objection or an appeal is pending.

However, section 47(1) of the TAA provides that the Commissioner may approve an arrangement (with or without amendment) extending the time for paying tax or providing for the payment of tax in specified instalments. Under subsection (2), an application for approval of a proposed tax payment arrangement must set out the reasons why the taxpayer wants more time to pay the tax. Every other jurisdiction has provisions similar to this allowing the Commissioner to extend time for payment of tax or provide for payment in instalments.

The submission by CME suggests that prior to the introduction of the TAA, the Commissioner would allow an extension of time to pay duty in situations of dispute. Formerly section 34C(2a) and (b) (see copy attached) of the *Stamp Act 1921*, which was repealed on the introduction of the TAA on 1 July 2003, allowed for the Commissioner to extend the time for payment of duty until a time the Commissioner thought fit, in circumstances of objection or appeal. However, no interest was payable on the extension of time arrangement, unlike the existing arrangement under section 47(3) of the TAA.

Where a taxpayer lodges an objection against an assessment or reassessment within 60 days after the assessment notice is issued or such further period approved by the Commissioner under section 36 of the TAA, and applies for approval of a tax payment arrangement to extend the time for payment until their objection is determined, approval will generally be granted unless the Commissioner considers the objection is not genuine and was only lodged in order to defer the time for payment.

Approval of the tax payment arrangement will be subject to the taxpayer agreeing to pay interest under the arrangement at the prescribed rate. It is not unreasonable that a taxpayer should agree to pay interest in situations where an objection is pending if the taxpayer believes they have a genuine objection. If the objection is allowed in full or in part, the liability will be

reassessed resulting in no interest being payable by the taxpayer. Only if the objection is disallowed in full, will interest ultimately be payable.

Returns based taxes usually involve an ongoing requirement to lodge returns and pay tax on a regular basis. When a dispute arises, granting extensions of time in relation to the taxpayer's current and/or ongoing tax liabilities, puts the revenue at risk in relation to the tax that is in dispute. Accordingly, where a taxpayer lodges an objection to a pay-roll tax assessment, an insurance duty assessment, or a hire of goods duty assessment, a tax payment arrangement to extend the time for payment until the objection is determined will usually only be approved in exceptional circumstances.

Where an application for approval of a tax payment arrangement is made by a taxpayer who applies to the State Administrative Tribunal for review of the Commissioner's decision on their objection, or where an appeal is lodged with the Minister in accordance with section 20 of the *Land Tax Assessment Act 2002*, the Commissioner will generally only approve a tax payment arrangement where the taxpayer demonstrates that they will suffer financial hardship if required to pay the tax in dispute prior to the determination of the review or appeal. Where a tax payment arrangement is approved, the Commissioner will usually only approve the arrangement for a fixed period and include a condition requiring the taxpayer to take all reasonable steps to have the review or appeal heard as soon as possible.

A draft revenue ruling outlining these arrangements has been released for consultation and will be made available on the OSR website when final adjustments have been made.

Overall, it is considered that the current provisions provide an acceptable balance between extending the time for payment on objection and protection of the revenue.

Legally Qualified People Determining Objections

Section 34 of the TAA provides that a taxpayer may object to an assessment or another decision under a taxation Act that affects the taxpayer's liability to taxation.

Section 37 of the TAA requires the Commissioner to consider and determine an objection having regard to the grounds set out in the objection, any other relevant written material submitted by the taxpayer, and any other information obtained by the Commissioner that is relevant to considering the objection.

As advised in the Office of State Revenue ("OSR") Customer Charter, when an objection is received, a senior officer, independent of the original decision maker, will review the assessment and determine the objection. The senior officers who determine objections are some of the most experienced officers of the OSR.

It is not considered necessary in the majority of cases to consult legally qualified people in order to properly interpret the law to determine an objection. The OSR has established procedures and has access to precedents, including previous advice, and court decisions at all levels which are relied on. However, in cases where an assessment is contentious or concerns very complex areas of the law not previously examined, the advice of the State Solicitor's Office is generally sought.

Expansion of Jurisdiction of the State Administrative Tribunal

Section 34 of the TAA provides that a taxpayer may object to an assessment or another decision under a taxation Act, that affects the taxpayer's liability to taxation.

Section 40(1) of the TAA provides that a person who is dissatisfied with the Commissioner's decision on an objection, or on an application for an extension of time for lodging an objection, may apply to the SAT for a review of the decision.

The AAT was established by the *Administrative Appeals Tribunal Act 1975* ("AAT Act") and commenced operations in 1976. The AAT Act and the *Administrative Appeals Tribunal Regulations 1976* set out the Tribunal's powers, functions and procedures.

Decisions made under other enactments are reviewable under Part IVC of the *Taxation Administration Act 1953* ("Cwlth Act"). This Act governs merits review of most decisions of the Commissioner of Taxation under Commonwealth taxation laws. A number of Acts and Regulations provide that a person dissatisfied with particular decisions may object against those decisions in the manner set out in Part IVC of the Cwlth Act. An application may be made to the Tribunal under section 14ZZA of the Cwlth Act for the review of reviewable objection decisions, the review of extension of time refusal decisions and AAT extension applications, subject to certain processing modifications.

The SAT's functions and powers were established by the *State Administrative Tribunal Act 2004*. Its jurisdiction is governed by more than 130 Acts (known as enabling Acts) named in the *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004* and is also conferred occasionally by specific enabling Acts.

The design and implementation of the SAT was a whole of government initiative, intended (in the context of revenue matters) to replace the varying appeal and review processes that operated across the relevant Acts. It was not intended to give the SAT the power to review all decisions made by an agency. Nevertheless, once the unproclaimed sections of the TAA referring to directly reviewable decisions are proclaimed, following a minor amendment being made to one of these sections, the SAT will have jurisdiction to review the majority of decisions made by the Commissioner that affect a taxpayer.

It is apparent that the AAT does not have the capacity to review a broader range of administrative decisions than the SAT. Both Tribunals provide merits review of administrative decisions through a mechanism of review that is fair, just, economical, informal and quick. The Tribunals are not bound by the rules of evidence and can inform themselves in any manner they consider appropriate.

It is understood that the law providing for the judicial review of administrative decisions is being currently reviewed and that the Attorney General is looking to implement the recommendations of the Law Reform Commission of Western Australia.

TECHNICAL COMMITTEE CONCLUSION

The Technical Committee agreed with the analysis of the issues provided in the paper.

ATTACHMENT 1

34C. Liability to pay duty subject to objection, appeal or case stated

(1) Subject to subsection (2), the fact that an objection, appeal or case stated under this Act is pending with respect to an assessment shall not affect the liability of any person to pay any duty pending determination of the objection, appeal or case stated.

(2) The Commissioner may if —

(a) he is requested by a person liable to pay any duty which is the subject of an objection, appeal (including an appeal under section 34A) or case stated; and

(b) the request is made before the time for payment of the duty, extend the time for payment of the duty for such time as the Commissioner thinks fit.

[Section 34C inserted by No. 81 of 1984 s. 12.]

8h. Tax Administration – Penalty Provisions

ISSUE

Penalty provisions

Various issues dealing with penalty tax have been raised in submissions to the State Tax Review.

- **The Chamber of Minerals and Energy (CME)** (Submission 82)
    - The Commissioner should extend his guidelines to apply his discretion to remit penalty tax to greater areas, such as the imposition of penalty tax on the claw-back of duty pursuant to the corporate reconstruction provisions.
    - The Commissioner should be more flexible in the application of his discretion to remit penalty tax especially where the parties to the transaction have acted in a proper manner.
- **Australian Institute of Conveyancers WA Division (AICWA)** (Submission 106)
    - Government should only seek reimbursement of the implicit interest rate foregone, rather than penalise genuine errors and omissions.
    - WA should utilise a system similar to that of the ATO or Queensland OSR and apply an unpaid tax interest rather than a penalty tax where genuine errors arise.

CURRENT POSITION

Section 26 of the *Taxation Administration Act 2003* (TAA) provides for penalty tax to be paid in certain circumstances, including where a taxpayer does not lodge an instrument in accordance with a taxation Act. A copy of section 26 is attached. The amount of penalty tax payable is the amount equal to the amount of the primary liability, or the amount that the taxpayer would have been liable to pay if the circumstances, giving rise to the liability to penalty tax, had not occurred.

Section 27 provides that where tax is not paid by the due date, the taxpayer is liable to pay an amount of penalty tax for late payment equal to 20% of the amount outstanding on the due date.

Section 28 of the TAA limits the amount of penalty tax that can be applied, to an amount equal to the amount of the primary liability. Section 29 of the TAA provides that the Commissioner may remit penalty tax wholly or in part.

Section 30 requires the Commissioner to publish the policy followed when deciding whether or not to remit penalty tax.

Commissioner's practices TAA 1, 2, 3, 4, 5, 6 and 17 have been published to provide details of the policy that is followed when the Commissioner decides whether or not to remit penalty tax that has been assessed under section 26 or 27 of the TAA.

Sections 76I and 76J of the *Stamp Act 1921* ("Stamp Act") provide for penalty tax to be payable equal to the amount of duty chargeable, on the grant or transfer of a vehicle licence, in circumstances where a dealer or a licensee has contravened the provisions of Part IIIC.

Section 112NA of the Stamp Act is an anti-avoidance provision that recognises certain payments made under a hiring agreement, may not be included as part of hiring charges in an assessment, and permits the Commissioner to include those payments in an assessment. In addition, the Commissioner may include an amount of penalty tax equal to the amount included in the assessment.

The corporate reconstruction provisions contained in Part IIIBAAA of the Stamp Act include at sections 75JE(1)(b) and (2)(b) and 75JF(b) the imposition of penalty tax equal to 20% of the duty chargeable when a claw-back of the exempted duty is applicable.

The penalty tax provisions contained in the Stamp Act and discussed above are included in the definition of "penalty tax" contained in the Glossary to the TAA. Accordingly, the Commissioner may remit these penalties wholly or in part under section 29 of the TAA. In addition, section 30 will apply to require the Commissioner to publish the policy followed when deciding whether or not to remit the penalty.

ANALYSIS OF ISSUE

The TAA currently imposes a rate of 20% penalty tax in situations of late payment, however, under section 26 the Commissioner may impose a 100% penalty for any type of default. Section 28 of the TAA limits the amount of penalty tax payable to the amount of the primary liability. Remission of penalty tax of up to 100% may be applied under the Commissioner's discretion in section 29. This allows for the flexibility and discretion with regard to remission suggested by the submissions above.

The amount of penalty tax to be remitted in particular circumstances is a matter relating to the administration of tax.,

However, the Commissioner has commenced a comprehensive review of the Commissioner's practices that set out how penalty remissions should be structured.

TECHNICAL COMMITTEE CONCLUSION

The Technical Committee agreed with the analysis of the issues provided in the paper.

ATTACHMENT 1

26. Penalty tax for contravention of taxation Act

(1) A taxpayer is liable to pay penalty tax in the following circumstances —

[(a) deleted]

(b) where the taxpayer does not lodge an instrument in accordance with a taxation Act;

(c) where any other contravention of a taxation Act occurs and, as a result, the taxpayer —

(i) avoids or delays the payment of tax; or

(ii) avoids or delays the submission of information required for the assessment of tax;

(d) where there is a material misstatement or omission in an instrument submitted to the Commissioner by or for the taxpayer under a taxation Act;

(e) where the taxpayer fails to provide information required under a taxation Act or (intentionally or unintentionally) provides information that is incorrect, incomplete or misleading;

(f) where the taxpayer makes an underestimation to avoid, delay or reduce the payment of tax;

(g) where the taxpayer fails to pay (or underpays) tax for which the taxpayer is liable.

(2) If there are reasonable grounds for suspecting that a taxpayer is liable to pay penalty tax,

the Commissioner may assess the amount of penalty tax payable by the taxpayer.

(3) The amount of penalty tax payable is the amount equal to —

(a) the amount of the taxpayer's primary liability; or

(b) the amount that the taxpayer would have been liable to pay if the circumstances giving rise to the liability to penalty tax had not occurred,

as the case requires.

[Section 26 amended by No. 66 of 2003 s. 95(4).]

8i. Tax Administration – Other Issues

ISSUE

Various issues dealing with administrative issues have been raised in submissions to the State Tax Review.

The particular issues raised in the submissions were:

- **The Law Society of Western Australia (the Law Society)** (Submission 123)
    - The Law Society submission suggests that the requirement in section 35 of the *Stamp Act 1921* for an independent person to lodge an unstamped instrument of transfer of property, or to notify the Commissioner of it where the person has custody or control of the instrument, should not be imposed on the legal profession.
- **Department of Treasury and Finance**
    - The Department of Treasury and Finance recommends that the relevant provisions of the Taxation Administration Act be amended to enable the Commissioner to register a memorial over a mining tenement.
    - Once lodged, a single memorial should suffice for any amount of land tax that remains unpaid, and for subsequent liabilities incurred after the lodgement of the original memorial.
    - Amounts of $5 or over should be transferred to the Treasurer under the *Unclaimed Money Act 1990* after a period of two years**.**
    - Small amounts, that is $5 or less, should be written off after a period of two years.
    - Administrative efficiencies could be gained by locating owners through publishing details of the amounts if matters of confidentiality can be adequately dealt with.
    - Section 34(4) of the *Taxation Administration Act 2003* has not been proclaimed, however, an amendment is required to the section to allow for verbal approval for an extension of time to pay a land tax assessment for no greater than one month. This issue was not raised in the DTF submission.

CURRENT POSITION & ANALYSIS

Unlodged Transfers

Section 35 of the Stamp Act relating to unlodged transfers was inserted in 2003 as part of the Taxation Administration Act amendments. It was largely based on a provision from the repealed Queensland stamp duty legislation.

The section operates as a compliance tool by creating an obligation on a person who has control over an unstamped "transfer of property" that has passed its due date for lodgement to lodge that document with the Commissioner, or notify the Commissioner of its existence.

The application of this provision was narrowed as a result of the consultation process associated with the Taxation Administration Act amendments. The provision was originally intended to apply to all instruments on which stamp duty is payable. However, as a result of the consultation process, it was agreed that the application of the provision would be limited to instruments that were chargeable with "conveyance duty". However, an oversight in the drafting of the amended provision resulted in the provision capturing only "transfers of property".

The result of this narrow term is that it does not apply to agreements for sale that are assessable under section 74(1) of the Act, sales of businesses, or any other dutiable instruments other than transfers of property.

Given the narrow application of this section to a small range of documents that are generally routine in nature, it should be relatively simple for practitioners to identify that a transfer document is liable to duty. Further, the requirement to either lodge the document or notify the Commissioner of its existence is not considered to impose a significant compliance burden on the legal profession.

Further, the Law Society submission does not suggest any alternatives as to how the perceived burden on practitioners could be reduced, while still ensuring that the revenue of the State is protected.

As pointed out above, the application of this provision has been unintentionally limited and even in its current form has restricted application.

Lodging Memorials over Mining Tenements

Section 77 of the Taxation Administration Act provides the circumstances where a memorial may be registered against land. This section lists a number of items in the Second Schedule to the Stamp Act under which duty on an instrument in relation to land may be charged. If duty assessed under any of those items is not paid by the due date, the Commissioner is able to lodge a memorial and create a charge on the land.

Although section 77 of the Taxation Administration Act allows the Commissioner to lodge a memorial and create a charge on land, the section states that that Commissioner must lodge the memorial with the "Registrar of Titles". While it is appropriate to lodge a memorial with the Registrar of Titles for all other circumstances prescribed in the section, memorials lodged by the Commissioner in relation to mining tenements must be lodged with a mining registrar within the meaning of the *Mining Act 1978.*

With recent changes to the law to charge duty on indirect property acquisitions (particularly in relation to land-rich companies), it is becoming more common for companies owning mining tenements to be subject to the provisions. Further, the current situation creates an inequity in that the ability to secure the amount of duty payable under the land-rich provisions applies only in relation to land other than mining tenements. Therefore, a land-rich company that holds mining tenements is treated differently for the purposes of lodging a memorial.

It is considered necessary on the grounds of revenue protection and administrative efficiency to enable a memorial to be lodged in relation to mining tenements.

Lodging Memorials to Secure Payment of Land tax

Under section 76 of the Taxation Administration Act, unpaid land tax is a first charge on land. Where the tax is not paid by the due date, the Commissioner may lodge a memorial of the charge with the Registrar of Titles to secure the land tax. The memorial is subsequently withdrawn when the outstanding land tax is paid. An administrative fee is incurred for each lodgement and withdrawal of a memorial. OSR practice has been to lodge one memorial in respect of a property to secure the land tax, and where the land tax accumulates and remains unpaid for more than one assessment year, the Commissioner will not consent to the lifting of the memorial until all the outstanding tax is paid.

It has been suggested that a separate memorial should be lodged to secure the land tax for every assessment year for which the tax remains unpaid. This may arise where the amount originally secured by the memorial at the time of lodgement is paid, and the taxpayer requests that it be lifted. When this occurs, the Commissioner would need to lodge a further memorial to ensure that land tax arrears that have arisen post lodgement of the original memorial are covered. If adopted, this practice would be administratively onerous and result in the imposition of numerous fees as additional memorials are lodged and withdrawn in respect of the same land.

Additionally, the issue is made more complex by the fact that, in certain circumstances, the lodgement of a memorial may be detrimental to the expeditious recovery of unpaid land tax, as dealings in land may be impeded thus reducing the land owner's capacity to pay land tax.

It is suggested that once lodged, a single memorial should suffice for any amount of land tax that remains unpaid, and for subsequent liabilities incurred after the lodgement of the original memorial. Appropriate amendments could be made to the Taxation Administration Act to clarify this matter.

Small Tax Credits

Section 54 of the *Taxation Administration Act 2003* ("TAA") provides for the Commissioner to refund tax to a taxpayer if as a result of a reassessment it appears an overpayment of tax has been made, or the Commissioner is satisfied an overpayment of tax has been made or the Commissioner is required by a taxation Act to make a refund of tax. The taxpayer is required to apply for a refund within 5 years of the date when the overpayment was made.

In addition, instead of refunding any overpayment of tax of $50 or less, the Commissioner may credit the amount of refund against the taxpayer's existing and future tax liabilities.

A problem has been identified by the Office of State Revenue ("OSR") in relation to large numbers of small credits held for taxpayers in its taxing system. These amounts relate primarily to land tax and accumulate in varying circumstances, but mainly because taxpayers remit an incorrect amount when making a payment. In many cases, these small amounts are not refunded, but held as a credit until the next year's land tax assessment notice is issued, when the amount is deducted from the taxpayer's account.

However, over a number of years, these amounts have not been cleared in cases where taxpayers do not have a future tax liability (e.g. they sold their only investment property and do not have other liabilities). Where the amounts are significant, attempts are made to refund the amounts to the taxpayer. However, in some cases, the taxpayer cannot be located.

Options are being considered in relation to the *Unclaimed Money Act 1990* for amounts over $5. It would appear that overpayments of tax would fall within the description of "prescribed retained money" in section 9(1)(r)(ii) in Part 3 of the *Unclaimed Money Act 1990*. Section 9(3) provides that regulations may be made requiring the holder of "prescribed retained money" to notify the Treasurer of the details of the money in question. Regulation 2 of the *Unclaimed Money Regulations 1991* provides that the date for the making of a notification of "prescribed retained money" is 31 January next following the date on which the money concerned became prescribed retained money.

However, it was recently brought to the Commissioner's attention that the provision of information to the Treasurer could be a breach of confidentiality. Specific amendment may be required to either section 114 of the TAA or the *Taxation Administration Regulations 2003*, so that disclosure of certain information about the relevant taxpayer's affairs could be made to the Treasurer.

Amendments to the TAA would also be required for small tax credits of $5 or over to be paid to the Consolidated Fund. It is proposed that the credits should initially be held by the Commissioner, who will attempt to refund the credit to the taxpayer. After the end of the assessment year following the year of overpayment, the amount would then be transferred to unclaimed money.

However, it is considered that the above option is not viable in relation to small refund amounts. For example, OSR has identified around 1,200 refund amounts of less than one dollar.

It is therefore recommended, for smaller refund amounts less than $5, where the Commissioner cannot offset these amounts against other liabilities within the above term, the amounts should be written off. However, should a taxpayer request a refund of credit owing to them (regardless of the amount) within the five year period allowed by the TAA, the write off will be reversed and the amount paid to the taxpayer.

Unproclaimed Section 34(4) Taxation Administration Act

Section 47 of the TAA provides that the Commissioner may approve an arrangement extending the time for paying tax or providing for the payment of tax in specified instalments.

Section 47(8) of the TAA is yet to be proclaimed. This provision makes a decision of the Commissioner under section 47 directly reviewable by the State Administrative Tribunal ("SAT"). A copy of section 47 of the TAA is attached.

Section 34(4) of the TAA is also yet to be proclaimed. Once this occurs, the SAT will have jurisdiction to consider directly reviewable decisions.

Aside from the requirement in section 34(4), there is no other requirement in the TAA for the Commissioner to provide the taxpayer with written notification of his decision on applications for approval of tax payment arrangements. However, section 20(1) of the SAT Act does impose such a requirement, albeit that section 20(2)(b) of the SAT Act provides the ability to prescribe certain decisions to be excluded from the requirement to give written notice of a decision and the right to have the decision reviewed. A copy of section 20 of the SAT Act is attached for information.

Accordingly, once sections 34(4) and 47(8) of the TAA have been proclaimed, the Commissioner will be required to give written notice to the taxpayer of his decision on the application, and the taxpayer's right to have the decision reviewed by the Tribunal, including where the taxpayer is granted an extension of time to pay.

In addition, section 34(4) of the TAA will require the Commissioner to provide notification in writing to the taxpayer of decisions that are directly reviewable.

Currently, all applications for the Commissioner's approval of a tax payment arrangement are made in writing, with one exception. Where an extension of one month or less to pay land tax is proposed, applications do not need to be made in writing but the taxpayer must provide sufficient information to allow the Commissioner to determine whether the requirements for the approval of a tax payment arrangement, would apply.

Where an application for an extension of time of one month or less is approved, the approval is noted on the Office of State Revenue computer system but written notice is not given to the taxpayer unless it is requested. These arrangements are set out in Draft Revenue Ruling TAA 1.0 (see copy attached).

To ensure that the current practice of providing verbal approval to taxpayers, who request an extension of time of no greater than one month to pay land tax, can continue following proclamation, it is proposed to amend section 34(4) to provide that the Commissioner's decision regarding these cases, is not required to be given in writing.

In addition, it is proposed that an amendment to the SAT regulations to ensure written notice is not required to be given by the Commissioner where verbal approval is given for an extension of time for the payment of land tax of no greater than one month, is also provided.

TECHNICAL COMMITTEE CONCLUSION

The Technical Committee agreed with the analysis of the issues provided in the paper.

ATTACHMENT 1

Western Australia

Taxation Administration Act 2003

47. Arrangements for instalments and extensions of time

(1) The Commissioner may approve an arrangement (with or without amendment) —

(a) extending the time for paying tax; or

(b) providing for the payment of tax in specified instalments.

(2) An application for approval of a proposed tax payment arrangement must set out the reasons that the taxpayer wants more time to pay the tax.

(3) A tax payment arrangement may include —

(a) conditions agreed with the taxpayer providing for the payment (and allowing for the remission) of interest at the prescribed rate or at some other rate fixed by or under the arrangement with the agreement of the taxpayer; and

(b) any other conditions the Commissioner considers appropriate.

(4) The Commissioner may, by notice to the taxpayer, amend a tax payment arrangement —

(a) by agreement with the taxpayer; or

(b) as provided in the conditions of the arrangement.

(5) The Commissioner may, by notice to the taxpayer, cancel a tax payment arrangement if —

(a) a payment is not made in accordance with the arrangement; or

(b) the taxpayer does not comply with any other condition of the arrangement.

(6) On cancellation of a tax payment arrangement, the whole of the tax outstanding under the arrangement (together with interest) becomes due and payable as from the date of cancellation or the original due date for payment of the tax to which the arrangement relates (whichever is the later).

(7) Despite cancellation of a tax payment arrangement, interest continues to accrue at the prescribed rate (or the other rate fixed by or under the arrangement) until the outstanding tax to which the arrangement formerly applied is paid.

[(8) has not come into operation 2]

*[**48.** has not come into operation 2.]*

ATTACHMENT 2

Western Australia

State Administrative Tribunal Act 2004

Subdivision 2 — Information about reviewable decision

20. Advice of decision and right to have it reviewed

(1) If this subsection applies to a reviewable decision, the decision-maker is to give any person who has a right under an enabling Act or section 44(3) to have the decision reviewed by the Tribunal written notice of —

(a) the decision; and

(b) that right.

(2) Subsection (1) applies to any reviewable decision unless —

(a) the decision does not adversely affect the interests of the person who has that right and —

(i) it is a decision not to impose a liability, penalty, or any kind of limitation, on a person; or

(ii) it is made under an enabling Act that establishes several categories of entitlement to a monetary or other benefit, and it determines a person to be in the most favourable of those categories;

or

(b) the decision is prescribed by the regulations for the purposes of this paragraph.

(3) If the persons who have to be given notice under subsection (1) are not readily identifiable, the decision-maker is to take steps that are reasonable in the circumstances to give the notice.

(4) A contravention of this section does not affect the validity of the decision.

(5) If subsection (1) applies in a case in which a person has failed to make a decision within the time limit for making the decision, the person may, if the enabling Act permits, make the decision instead of giving notice under subsection (1).

ATTACHMENT 3

REVENUE RULING TAA 1.0

ADMINISTRATION TAX PAYMENT ARRANGEMENTS

RULING HISTORY

Revenue Ruling	Issued
TAA 1.0	Xxxx 2006

INTRODUCTION

1. This revenue ruling deals with the exercise of the Commissioner of State Revenue's discretion under section 47 of the *Taxation Administration Act 2003* ("TAA") to approve arrangements for extensions of time to pay tax and arrangements for the payment of outstanding tax by instalments (collectively referred to as "tax payment arrangements").

2. Tax is due for payment on the date fixed by or worked out in accordance with the relevant taxation Act and, if the relevant taxation Act does not make provision for the date of payment, the tax is due for payment on the date specified in the assessment notice [TAA, section 45]. Where tax is payable as a result of a reassessment, the due date for payment must be at least 28 days after the date specified in the assessment notice [TAA, section 24(5a)].

3. If tax is not paid by the due date, the taxpayer is liable to pay penalty tax equal to 20% of the amount outstanding on the due date [TAA, section 27].

4. The Commissioner may commence legal proceedings (in any court of competent jurisdiction) to recover tax that is not paid by the due date [TAA, section 60].

5. The fact that the taxpayer may dispute the assessment does not suspend or defer their obligation to pay the disputed tax by the due date [TAA, section 33] and the Commissioner is entitled to pursue legal proceedings to recover the outstanding tax notwithstanding that the taxpayer has lodged an objection to the assessment or has applied to the State Administrative Tribunal for a review.

6. If a taxpayer requests more time to pay the tax (whether the assessment is disputed or not), the taxpayer may apply to the Commissioner for approval of an arrangement to extend the time for payment or approval of an arrangement for payment of the outstanding tax by instalments. An application may be made at any time, either prior to the due date for payment of the tax or after the due date has passed.

7. If a tax payment arrangement is approved, the Commissioner will normally refrain from commencing or continuing legal proceedings to recover the outstanding tax provided that the taxpayer makes payments in accordance with the arrangement and complies with all other conditions of the arrangement.

8. Tax payment arrangements may include:

   8.1 conditions agreed with the taxpayer providing for the payment (and allowing for the remission) of interest at the prescribed rate or some other rate fixed by or under the arrangement with the agreement of the taxpayer; and

   8.2 any other conditions the Commissioner considers appropriate.

9. This revenue ruling specifies the guidelines that the Commissioner will follow when considering whether to approve a tax payment arrangement and also when considering the conditions to be included in a tax payment arrangement. However, these guidelines are not intended to restrict the exercise of the Commissioner's discretion under section 47 of the TAA and, with each application for approval, the merits of the particular case will be considered by the Commissioner.

RULING

General matters

10. All applications for approval of a tax payment arrangement should be made in writing (including by email), with the exception of matters specified in paragraph 29.

11. Where an application for approval of a tax payment arrangement is made after the due date for payment of the tax has passed, the taxpayer is liable for penalty tax under section 27 of the TAA. This amount should be included in the application seeking approval of the tax payment arrangement.

12. An application seeking approval of a tax payment arrangement must set out the reasons that the taxpayer wants more time to pay the outstanding tax [TAA, section 47(2)].

13. Generally, tax payment arrangements are approved where:

13.1 the applicant demonstrates an inability to raise sufficient funds to pay the outstanding amount by the due date;

13.2 the applicant demonstrates that payment of the outstanding amount by the due date would cause financial hardship;

13.3 the applicant advances other convincing reasons for requiring a tax payment arrangement; or

13.4 in the case of stamp duty, the instrument or transaction has been assessed with duty as a lease (premium) and would have been classified as a general conditional contract that is either a farming land conditional contract, off the plan conditional contract, mining tenement conditional contract or subdivision conditional contract, if the instrument or transaction had been a contract for the sale of property as required by section 6 of the *Stamp Act 1921*.

14. The Commissioner will also take into account the following matters when considering whether or not to approve a tax payment arrangement:

14.1 the past payment history of the taxpayer;

14.2 whether or not the prospects of recovery of the full amount of the tax debt in the longer term will be diminished;

14.3 whether or not the amount of the taxpayer's total tax debt(s) is likely to increase in the future; and

14.4 any other matter the Commissioner considers relevant in the circumstances of the particular case.

15. Tax payment arrangements will not usually be approved where the taxpayer has an unsatisfactory history of compliance in relation to the payment of tax and/or the lodgement of instruments or returns under a taxation Act. However, each case will be considered on its merits.

16. The application should include information concerning the availability of funds to pay the outstanding tax and any other information or documents the taxpayer considers relevant. Where the Commissioner considers that further investigation into the financial status of the taxpayer is necessary, detailed financial statements will usually be required.

17. In each case the applicant must demonstrate a capacity to pay the outstanding amount in accordance with the proposed tax payment arrangement.

18. A tax payment arrangement will generally only be approved where the taxpayer agrees to the payment of interest on the outstanding tax at the prescribed rate under the *Taxation Administration Regulations 2003*.

19. Where the tax payment arrangement covers penalty tax, interest will generally apply to both the primary tax payable and the penalty tax payable.

20. A tax payment arrangement may include other conditions the Commissioner considers appropriate. For example, the taxpayer may be required to provide the Commissioner with an acceptable form of security for the outstanding tax, or the taxpayer may be required to provide the Commissioner with financial or other relevant information at regular intervals.

21. A tax payment arrangement may also include a condition that the Commissioner is able to amend the tax payment arrangement at any time by notice to the taxpayer [TAA, section 47(4)]. For example, the Commissioner may wish to be able to adjust the amount or timing of instalment payments in circumstances where the taxpayer's financial situation improves or deteriorates.

22. Tax payment arrangements will generally be confined to the shortest period that is consistent with the ability of the taxpayer to meet the repayment obligations.

23. In general, tax payment arrangements will be approved for a fixed period of time rather than for an indeterminate period.

24. Where the term of the proposed tax payment arrangement is longer than six months, detailed financial statements in support of the application for approval will usually be required.

25. In the circumstances specified in paragraph 13.4 relating to stamp duty on a lease (premium), tax payment arrangements seeking an extension of time to pay will generally be approved for a period up to 12 months from the date of execution of the instrument or of the date of the relevant transaction.

26. Where the taxpayer does not provide sufficient information to enable the Commissioner to make an informed decision on the application for approval, and the taxpayer has failed to provide additional information on request by the Commissioner within a reasonable period, the application will be denied.

Pay-roll tax and stamp duty on hire of goods and insurance

27. Tax payment arrangements for pay-roll tax, stamp duty on hire of goods and stamp duty on insurance policies will usually only be approved in respect of the payment of Commissioner's assessments that relate to tax payments for past years and/or periods.

Land tax

28. The *Land Tax Assessment Regulations 2003* set out arrangements for the payment of land tax in one discounted payment [regulation 6]; in two instalments [regulation 7]; and in three instalments [regulation

8]. In addition, regulation 9 sets out other arrangements for paying the assessed amount of land tax. Nothing in the regulations affects the payment of land tax under a tax payment arrangement [regulation 4].

29. As noted in paragraph 10, applications for approval of a tax payment arrangement should be made in writing (including by email). However, where an extension of one month or less to pay land tax is proposed, applications do not need to be made in writing, but the taxpayer must provide sufficient information to allow the Commissioner to determine whether paragraphs 13 and 14 of this ruling would apply to the request.

30. Where an application made before the due date for an extension of time of one month or less is approved, the approval will be noted on the OSR computer system, but written notice will not be given to the taxpayer unless it is requested.

31. Where an approval is granted under paragraph 30, the penalty tax applicable under section 27(1) of the TAA will generally be remitted entirely, if the full amount of outstanding tax is paid on or before the extended due date.

32. Where an application made after the due date for an extension of time of one month or less is approved, the amount will include applicable penalty tax. The approval will be noted on the OSR computer system, but written notice will not be given to the taxpayer unless it is requested.

33. In addition, where approval is granted under paragraphs 30 or 32, the Commissioner will generally agree to fix the interest rate at 0%.

34. Where an approval is granted under paragraphs 30 or 32, but the full amount outstanding is not paid on or before the extended due date, the tax payment arrangement will be cancelled and the full amount of primary tax and penalty tax will become immediately due and payable.

35. A tax payment arrangement may also be approved for the payment of land tax where:

    35.1 the taxpayer receives a land tax assessment notice within nine months from the date of issue of the previous year's assessment notice;

    35.2 the taxpayer has not contributed to the delay in making either assessment; and

    35.3 the taxpayer applies for approval of a tax payment arrangement indicating difficulty in meeting the payment obligations in these circumstances.

36. If a tax payment arrangement is approved under paragraph 35, the date for payment of the amount due, or where applicable, the last payment date of an instalment arrangement, will generally be calculated in accordance with the following table:

NUMBER OF MONTHS BETWEEN ASSESSMENT NOTICES	TAX PAYMENT ARRANGEMENT DUE DATE FOR PAYMENT OF THE LAST AMOUNT DUE OR LAST INSTALMENT
Greater than 0, but less than or equal to 1	11 months from issue date of assessment notice
Greater than 1, but less than or equal to 2	10 months from issue date of assessment notice
Greater than 2, but less than or equal to 3	9 months from issue date of assessment notice
Greater than 3, but less than or equal to 4	8 months from issue date of assessment notice
Greater than 4, but less than or equal to 5	7 months from issue date of assessment notice
Greater than 5, but less than or equal to 6	6 months from issue date of assessment notice
Greater than 6, but less than or equal to 7	5 months from issue date of assessment notice
Greater than 7, but less than or equal to 8	4 months from issue date of assessment notice
Greater than 8, but less than or equal to 9	3 months from issue date of assessment notice

37. The Commissioner will usually only approve a tax payment arrangement under paragraph 35 on the condition that the taxpayer agrees to pay interest at the prescribed rate. However, if payment is made by the due date (or each of the due dates in the case of an instalment arrangement) as set out in the tax payment arrangement, the interest will usually be remitted in full.

38. Where the Commissioner approves a tax payment arrangement, the discounted payment under regulation 6 of the Land Tax Assessment Regulations is no longer available, as regulation 6 only applies in the circumstances where the taxpayer makes the payment on or before the original due date.

Remission of interest

39. In addition to the circumstances specified elsewhere in this ruling, the Commissioner may remit some or all of the interest payable under a tax payment arrangement if compelling evidence of exceptional circumstances is provided. Each case will be considered on its merits, however, situations such as the death of the taxpayer (or an immediate family member) or hospitalisation of the taxpayer due to a medical emergency may be considered as exceptional circumstances.

40. In respect of tax payment arrangements relating to stamp duty on a lease (premium) referred to in paragraph 13.4, a tax payment arrangement will usually only be approved on the condition that the taxpayer agrees to pay interest at the prescribed rate. However, the interest will generally be remitted in full if the entire amount of the tax owing is paid on or before the due date specified in the tax payment arrangement.

41. If the total amount of interest payable under a tax payment arrangement is $20 or less, it will usually be remitted in full, unless there are exceptional circumstances.

Where objection lodged

42. Where an application for approval of a tax payment arrangement is made by a taxpayer who lodges an objection, the guidelines referred to in relevant paragraphs above will apply as well as the following paragraphs.

43. Subject to paragraph 45, where a taxpayer lodges an objection against an official assessment or a reassessment within the 60 days or further period approved by the Commissioner under section 36 of the TAA, and applies for approval of a tax payment arrangement to extend the time for payment until their objection is determined by the Commissioner, the following will usually apply:

    43.1 approval will be given to a tax payment arrangement extending the time for payment of the tax until the objection is determined, unless the Commissioner considers that the objection is not genuine and was only lodged in order to defer the time for payment;

    43.2 approval of the tax payment arrangement will be subject to the taxpayer agreeing to pay interest under the arrangement at the prescribed rate;

    43.3 the payment date for the tax payment arrangement will be 14 days from the date of the notice determining the objection;

43.4 where the objection is subsequently disallowed, any penalty tax payable for late payment under section 27 of the TAA will usually be remitted in full provided that the tax is paid by the date specified in the tax payment arrangement (or each of the dates specified in cases where an instalment arrangement is involved).

44. Where a tax payment arrangement has been approved, and the objection is subsequently disallowed, there will generally be no remission of any interest required to be paid under the tax payment arrangement.

45. Return based taxes usually involve an ongoing requirement to lodge returns and pay tax on a regular basis. When a dispute arises, granting extensions of time in relation to the taxpayer's current and/or ongoing tax liabilities puts the revenue at risk in relation to the tax that is in dispute. Accordingly, where a taxpayer lodges an objection to a pay-roll tax assessment, an insurance duty assessment or a hire of goods duty assessment, a tax payment arrangement to extend the time for payment until the objection is determined will usually only be approved in exceptional circumstances.

State Administrative Tribunal reviews and certain land tax appeals

46. Where an application for approval of a tax payment arrangement is made by a taxpayer who applies to the State Administrative Tribunal for review of the Commissioner's decision on their objection, or where an appeal is lodged with the Minister in accordance with section 20 of the *Land Tax Assessment Act 2002*, the guidelines referred to in the relevant paragraphs above will apply as well as the following paragraphs:

46.1 the Commissioner may approve a tax payment arrangement extending the time for payment where the taxpayer demonstrates that they will suffer financial hardship if required to pay the tax in dispute prior to the determination of the review or appeal;

46.2 the Commissioner will generally not approve a proposed tax payment arrangement that extends the time for payment until the time when the review or appeal is determined. The Commissioner will usually only approve a tax payment arrangement that:

(a) extends the time for payment for a fixed period or the determination of the review/appeal (whichever occurs first);

(b) includes a condition requiring the taxpayer to provide the Commissioner with financial or other relevant information at regular intervals;

(c) includes a condition requiring the taxpayer to take all reasonable steps to have the review/appeal heard as soon as possible.

47. Where a tax payment arrangement has been approved and the application for review or appeal to the Minister (as the case may be) is subsequently dismissed, there will generally be no remission of any interest required to be paid under the tax payment arrangement.

Appeal of SAT decision

48. Where a taxpayer appeals the State Administrative Tribunal decision and the taxpayer applies for approval of a tax payment arrangement to extend the time for payment while their appeal is pending, the guidelines referred to in relevant paragraphs above will apply as well as the following paragraphs:

48.1 the Commissioner will generally only approve a tax payment arrangement extending the time for payment in exceptional circumstances;

48.2 where this occurs, the Commissioner will generally not approve a proposed tax payment arrangement that extends the time for payment until the time when the review or appeal is determined. The Commissioner will usually only approve a tax payment arrangement that:

(a) extends the time for payment for a fixed period or the determination of the review/appeal (whichever occurs first);

(b) includes a condition requiring the taxpayer to provide the Commissioner with financial or other relevant information at regular intervals;

(c) includes a condition requiring the taxpayer to take all reasonable steps to have the review/appeal heard as soon as possible.

49. Where a tax payment arrangement has been approved and the appeal is subsequently dismissed, there will generally be no remission of any interest required to be paid under the tax payment arrangement.

Case stated

50. Where an application for approval of a tax payment arrangement is made by a taxpayer in circumstances where the Commissioner has stated a case to the Supreme Court, the guidelines referred to in the relevant paragraphs above will apply as well as the following paragraphs.

51. Where the Commissioner states a case on a question of law to the Supreme Court and the taxpayer applies for approval of a tax payment arrangement to extend the time for payment while the case stated is pending:

52. the Commissioner may approve a tax payment arrangement extending the time for payment where the taxpayer demonstrates that they will suffer financial hardship if required to pay the tax in dispute prior to the determination be paid under the tax payment arrangement.

Registration of memorial in relation to land

53. Under sections 76 and 77 of the TAA, the Commissioner is authorised to lodge a memorial with the Registrar of Titles in relation to land in certain cases:

    53.1 to secure land tax that is unpaid by the due date specified in the assessment notice;

    53.2 to secure unpaid stamp duty where the cheque given in payment is dishonoured;

    53.3 where stamp duty payable as a result of a reassessment under section 75AG of the Stamp Act is not paid by the due date specified in the assessment notice;

    53.4 where stamp duty payable under Part IIIBA of the Stamp Act is not paid by the due date specified in the assessment notice; or

    53.5 where an assessment has been made under section 76AA of the Stamp Act.

54. The Commissioner is able to lodge a memorial in relation to the taxpayer's land in the cases referred to above, notwithstanding that the taxpayer may have applied for approval of a tax payment arrangement. Also, the Commissioner may lodge a memorial (in the cases referred to above) at any time after a tax payment arrangement has been approved.

Cancellation of a tax payment arrangement

55. Where a taxpayer fails to make a payment in accordance with an approved tax payment arrangement, or where a taxpayer fails to comply with any other condition of an approved tax payment arrangement, the Commissioner may cancel the arrangement by notice to the taxpayer [TAA, section 47(5)].

56. If a tax payment arrangement is cancelled, the whole of the tax outstanding under the arrangement (together with interest) becomes due and payable as from the date of cancellation of the arrangement or the original due date for the payment of tax to which the arrangement relates (whichever is the later) [TAA, section 47(6)].

57. Interest will continue to accrue after cancellation of a tax payment arrangement, until the outstanding tax to which the arrangement formerly applied is paid [TAA, section 47(7)].

58. If the whole of the outstanding tax (together with interest) is not paid in full within 14 days of the notice of cancellation of the tax payment arrangement, the Commissioner will pursue whatever course of action is appropriate in the circumstances of the case (including legal proceedings) to recover the outstanding amount.