INTRODUCTION

1. This memorandum has been prepared by the Scottish Government to assist the Delegated Powers and Law Reform Committee in its consideration of the Land and Buildings Transaction Tax (Amendment) (Scotland) Bill. This memorandum describes provisions in the Bill conferring power to make subordinate legislation which were introduced, amended or removed from the Bill at Stage 2. The memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

DELEGATED POWERS

Paragraph 14(2) within new schedule 2A inserted by section 1(3) – Power to amend threshold figure in paragraphs 2(1)(aa), 3(1)(aa) and 9(3) of schedule 2A

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>the Scottish Ministers</th>
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<tbody>
<tr>
<td>Power exercisable by:</td>
<td>order made by Scottish statutory instrument</td>
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<tr>
<td>Parliamentary procedure:</td>
<td>provisional affirmative</td>
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<tr>
<td>Change at Stage 2:</td>
<td>change to parliamentary procedure; restructure of threshold figure</td>
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Provision

3. The Delegated Powers and Law Reform Committee’s 11th Report of 2016 concluded that, “The Committee recommends that the Scottish Government brings forward an amendment at Stage 2 to make exercise of the power in paragraph 14(2) subject to the “provisional affirmative” procedure.” The Scottish Government accepted that recommendation and the application of the provisional affirmative procedure is now provided for in section 2(1)(c)(ii) of the Bill.

4. Separately what had been a single £40,000 figure in paragraph 9(3) within new schedule 2A inserted by section 1(3) has now become three figures within paragraphs 2(1)(aa), 3(1)(aa) and 9(3) respectively. There are now 2 £40,000 thresholds in paragraph 2 and 3 relating to consideration paid in a chargeable transaction so that only transactions with chargeable consideration of £40,000 or more are relevant to the schedule (chargeable consideration is
This document relates to the Land and Buildings Transaction Tax (Amendment) (Scotland) Bill as amended at Stage 2 (SP Bill 85A)

defined in section 17 of and schedule 2 to the 2013 Act). The existing £40,000 threshold in paragraph 9(3) of proposed schedule 2A refers to the market value of the dwelling and while that concept works well in considering existing ownership, it was seen as the most appropriate measure in relation to properties being purchased where conceivably the market value could be legitimately different for the consideration paid, with the latter being the appropriate measure. All figures are amendable through the same paragraph 14(2) power.

Reason for taking power

5. The Scottish Government’s reasons for accepting the Committee’s recommendations as to parliamentary procedure were set out in the Deputy First Minister’s response to the Finance Committee’s Stage 1 report. In particular the Scottish Government was persuaded with the DPLRC’s argument that “the power to change the £40,000 threshold is not merely administrative in nature, but is fundamental to the question of tax liability under the Bill”.

6. The Scottish Government considers that it is a natural result of the splitting out of the £40,000 figures referred to that the existing delegated power should apply to each reference to £40,000. This can be viewed as a consequential modification with there being no policy to expand delegated powers in this regard.

Choice of procedure

7. The Scottish Government considers that no new issues arise from the splitting out of the £40,000 figure and therefore the provisional affirmative procedure is appropriate for the amendment of the figures in paragraphs 2(1)(aa), 3(1)(aa) and 9(3). It is likely that any future change would be applied to each of the figures at the same time however it is not inconceivable that in the future Scottish Ministers would want to vary one but not the other. For example, Scottish Ministers may wish to keep the thresholds in (2)(1)(aa) and 3(1)(aa) at £40,000 to be in line with the figure for notification, but there may be issues around valuations and properties not being ‘counted’ for the purpose of the Land and Buildings Transaction Tax (“LBTT”) supplement so they may decide to reduce this threshold accordingly to effectively ensure all properties are counted. There may also be a decrease in property valuation at some point at which point it may be preferable to have different thresholds for consideration paid in (2)(1)(aa) and 3(1)(aa) and for the value for property in 9(3).

Paragraph 14(3A) within new schedule 2A inserted by section 1(3) – Power to amend certain aspects of schedule 2A

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<tr>
<td>Change at Stage 2:</td>
<td>new power</td>
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Provision

8. Paragraph 14(3A) is a new regulation-making power to amend particular aspects of schedule 2A. These aspects are:

- Part 4 as regards partnerships and trusts;
This document relates to the Land and Buildings Transaction Tax (Amendment) (Scotland) Bill as amended at Stage 2 (SP Bill 85A)

- Part 6 which provides for what counts as ownership (except paragraph 9(3) which is separately amendable by the delegated power in paragraph 14(2) earlier mentioned); and
- Paragraph 15 which sets out defined terms for interpreting schedule 2A.

**Reason for taking power**

9. **Partnerships and trust** arrangements can be very complex and give rise to some of the most difficult aspects of LBTT policy and practice. There are existing regulation making powers in the Land and Buildings Transaction Tax (Scotland) Act 2013 to amend the LBTT treatment of partnerships and trusts (sections 49(2) and 50(2) respectively) but these do not extend to schedule 2A for the supplement. The Scottish Government’s amendments at Stage 2 have clarified the position of partnerships and trusts under schedule 2A but it is considered to be prudent to have power to make any further changes that might be required as circumstances develop. This will be particularly relevant if there is a future proposal to invoke sections 49(2) and/or 50(2) referred to, and there being a need to make consequential amendments to schedule 2A.

10. On reflection, the Scottish Government considers it to be appropriate for the order making powers in relation to partnerships and trusts to allow for the amendment of Part 2 as well as Part 4. The Government proposes to bring forward an amendment at Stage 3 to allow for that. Paragraph 3 in Part 2, as amended at Stage 2, contains provisions relating to trusts and partnerships. Part 4 has provisions relating to trusts and currently does not have provisions relating to partnerships however the Scottish Government considers that that flexibility should be available should there be relevant partnership-related changes to schedule 17 of the 2013 Act or Part 2 of proposed schedule 2A.

11. The Scottish Government brought forward Stage 2 amendments to expand, clarify and improve on the provisions of Part 6 of schedule 2A in relation to what counts as ownership. Although there is no direct precedent for the new power proposed the Scottish Government considers this to be an area of particular complexity, given the need to take into account ownership arrangements outside Scotland, and additionally the need to guard against artificial arrangements constructed to mask ownership. For example, a particular aspect of a legal system could emerge that means a form of ownership in a particular jurisdiction was not being counted for the purposes of the schedule and the Scottish Government may want to bring forward an amendment to ensure that it is counted as ownership. Alternatively the complex rules for deemed ownership could conceivably be abused to allow avoidance the supplement. Again, the Scottish Government may want to bring forward an amendment to close off any avoidance opportunity, in parallel to action under the General Anti-Avoidance Rule or otherwise by Revenue Scotland.

12. Part 6 relates to ownership of dwellings and includes different instances of deemed ownership. At Stage 2 on 2 March 2016 the Finance Committee debated two groups comprising a total of 11 amendments\(^1\) which materially amended existing paragraphs 9, 11 and 13 within Part 6 and introducing three new paragraphs (11A to 11C). In speaking to these groups the Deputy First Minister referenced the complexities that can arise when less-common forms of

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\(^1\) Group headings: “Ownership”: trusts, exeucturies, long leases, liferents; Ownership of dwellings situated outside Scotland.
ownership are in issue. One reason for taking the power for the whole of Part 6 is to enable the introduction of a new type of deemed ownership should it be necessary to do so, for example when future scenarios arise in practice or as a result of UK tax changes. Part 6 now contains provisions in respect of numerous separate complex forms of ownership (trustees, beneficiaries, long leases, proper liferents, what counts as ownership outside of Scotland) and new issues could emerge that affect any of these.

13. In terms of interpretative provisions, the principal policy intention is to allow for the definition of “dwelling” in paragraph 15(2) to be amendable by regulations, should it become necessary to decouple the definition from the definition in Part 6 of schedule 5 to the 2013 Act. For example, should a change be made to schedule 5 that is not wanted for schedule 2A purposes it would be necessary to decouple the definition. There is an alternative definition of “dwelling” in paragraph 18 of schedule 4. The Scottish Government considers that the most relevant precedent is the existing power in section 27(3) of the 2013 which allows for the amendment of any of the relief schedules (schedules 3 to 16C), since that allows for definitions of “dwelling” within to be fully amendable. The new power also allows for changes to the definitions of “bare trust”, “settlement” and “relevant interest” which the Scottish Government considers prudent to allow the supplement to be administered in the months and years ahead without the need for further primary legislation.

Choice of procedure

14. The Scottish Government considers that affirmative procedure provides for an appropriately strong level of parliamentary scrutiny given that the powers allow for the amendment of primary legislation and could impact on taxpayers’ liability to the supplement.
LAND AND BUILDINGS TRANSACTION TAX (AMENDMENT) (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM