



COMMISSIONER'S PRACTICE DA 24.0

DUTIES - LANDHOLDER DUTY - RELATED PERSONS - COMMISSIONER'S DISCRETION

Commissioner's Practice History

Commissioner's Practice	Issued	Dates of effect	
		From	To
DA 24.0	15 July 2011	1 July 2008	15 December 2016

This Commissioner's practice outlines the factors the Commissioner will consider in deciding whether to exercise his discretion under section 162(2) of the *Duties Act 2008* ("Duties Act") to determine whether any persons (apart from related corporations) are not related, for the purposes of determining if a relevant acquisition has occurred.

Background

Chapter 3 of the Duties Act imposes duty in respect of a relevant acquisition of an interest in an entity that is a landholder.

Sections 163 and 164 of the Duties Act define when an acquisition by a person of an interest in an entity is a relevant acquisition. For the purpose of determining if an acquisition is a relevant acquisition, consideration is given to any interest in the entity that is held by a person related to the person making the acquisition.

Section 162(1) of the Duties Act lists the persons or entities that are related persons for the purposes of sections 163 and 164 of the Duties Act.

Section 162(2) of the Duties Act provides that if the Commissioner is satisfied, in respect of a particular acquisition, that subsection (3) applies to persons (other than related corporations) who would otherwise be related persons by virtue of subsection (1), he may determine that those persons are not related persons for the purposes of sections 163 and 164 of the Duties Act.

Section 162(3) of the Duties Act applies to persons if:

- a. they are not acting in concert with each other in respect of the acquisition; and
- b. their interests in the entity:
 - i. were acquired independently and are, and will be, employed independently; and
 - ii. were not acquired for a common purpose and are not, and will not be, employed for a common purpose.

Acting in Concert

The phrase “acting in concert” is not defined in the Duties Act. At common law, the phrase is generally interpreted as involving knowing conduct, the result of communication between the parties, and not merely actions occurring contemporaneously: *Tillmanns Butcheries Pty Ltd v Australian Meat Industry Employees’ Union* (1979) 42 FLR 331.

In *Adsteam Building Industries Pty Ltd v Queensland Cement and Lime Company Ltd (No 4)* [1985] 1 Qd R 127 McPherson J held that it was not possible for persons to act in concert unless there was at least an understanding between them as to their common purpose or object.

The understanding can be informal and unenforceable, and may be inferred from the circumstances surrounding the transaction and from what the parties have done, as well as by direct evidence: *Bank of Western Australia v Ocean Trawlers Pty Ltd and Others* (1995) 16 ACSR 501.

Application of Other Commissioner’s Practices

Commissioner’s Practice DA 2 sets out the practice to be followed when determining whether persons who acquire interests in a landholder under a public float or public offering are not related persons for the purposes of sections 163 and 164 of the Duties Act.

Commissioner’s Practice DA 23 outlines the factors the Commissioner will consider when determining if persons or entities are related persons within the meaning of section 162(1)(h) or (i) of the Duties Act.

Commissioner’s Practice

1. The practical onus of satisfying the Commissioner that the qualifications set out in section 162(3) of the Duties Act apply to persons in respect of a particular acquisition is borne by the taxpayer.
2. In making a determination as to whether section 162(3) applies, the Commissioner will have regard to the facts and circumstances of each particular acquisition.

Not Acting in Concert

3. The factors the Commissioner will consider in order to be satisfied that persons are not acting in concert with each other in respect of an acquisition include, but are not limited to:
 - 3.1 the circumstances surrounding the transaction;
 - 3.2 the persons' actions;
 - 3.3 any communications between the persons; and
 - 3.4 other facts and circumstances considered appropriate by the Commissioner.
4. Where there is evidence demonstrating an understanding between the persons as to a common purpose or object, even where that understanding is informal or unenforceable, or has been inferred from the circumstances rather than direct evidence, the Commissioner will not be able to be satisfied that those persons were not acting in concert with each other.

Acquired and Employed Independently

5. The factors the Commissioner will consider in order to be satisfied that the persons' interests in the entity were acquired independently and are, and will be, employed independently include, but are not limited to:
 - 5.1 the existence of any agreement, arrangement or understanding between any of the persons relating to the acquisitions or employment of the interests;
 - 5.2 the extent to which one acquisition was dependent upon another acquisition, whether expressly stated or not;
 - 5.3 the extent to which the acquisitions were negotiated independently or not;
 - 5.4 if the interests being acquired are to be used interdependently and for a common purpose;
 - 5.5 if any interests previously held by the acquirers are or were used interdependently and for a common purpose;
 - 5.6 whether the persons will exercise their rights as shareholders independently; and
 - 5.7 other facts and circumstances considered appropriate by the Commissioner.

Not Acquired and Employed for a Common Purpose

6. The factors the Commissioner will consider in order to be satisfied that the persons' interests in the entity were not acquired for a common purpose and are not, and will not be, employed for a common purpose include, but are not limited to:

- 6.1 the existence of any agreement, arrangement or understanding (either orally or in writing) between any of the persons relating to the purpose(s) for which the interests were acquired and are to be employed;
- 6.2 the purpose(s) for which each of the interests was acquired and is to be employed;
- 6.3 whether the acquisitions of the interests will result in the persons occupying positions on the board of management of the landholder; and
- 6.4 other facts and circumstances considered appropriate by the Commissioner.

Date of Effect

This Commissioner's practice takes effect from 1 July 2008.

Bill Sullivan
COMMISSIONER OF STATE REVENUE

15 July 2011

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