



## Landholder Duty – Related Persons and Commissioner's Discretion

This Commissioner's practice outlines the factors the Commissioner will consider when deciding:

- if persons or entities are related persons to determine whether there has been a relevant acquisition in a landholder; and
- whether to exercise the discretion to treat related persons as not being related for a particular landholder acquisition.

### Background

Chapter 3 of the *Duties Act 2008* ('Duties Act') imposes duty on a *relevant acquisition* of a *significant interest* or a further interest in a *landholder*.<sup>1</sup>

A *significant interest* means a 90 per cent or greater interest in a listed landholder or a 50 per cent or greater interest in an unlisted landholder.<sup>2</sup>

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, any interests in the entity held by a person related to the acquirer are taken into account.

Under section 163 of the Duties Act, an acquisition by a person of an interest in a landholder is a relevant acquisition if:

- immediately before the acquisition the interest of the person (if any) and any related person (if any) does not amount to a significant interest; and
- after the acquisition the interest of the person and any related person amounts to a significant interest.

Section 164 of the Duties Act provides an acquisition by a person of an interest in a landholder is also a relevant acquisition if:

- immediately before the acquisition the interest of the person, or the person and any related person, or a related person, is a significant interest; and
- by the acquisition the person or any related person acquires, or the person and any related person acquire, a further interest.

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<sup>1</sup> A *landholder* is a corporation or unit trust scheme that is entitled, either directly or through a linked entity, to land in Western Australia valued at \$2 million or more: Duties Act s 155. An *interest in a landholder* means an entitlement to the surplus property of the landholder (or other entity) if it were to be wound up: Duties Act s 153.

<sup>2</sup> Duties Act s 161.

## ***Related persons***

Section 162(1) of the Duties Act prescribes the persons or entities that are related persons for the purposes of determining whether there has been a relevant acquisition and includes:

- individuals who are spouses or de facto partners, or parents and children;<sup>3</sup>
- related corporations;<sup>4</sup>
- trustees of trusts with common beneficiaries;<sup>5</sup>
- persons or entities that acquire interests in a landholder by acquisitions that together form or arise from substantially one transaction or one series of transactions;<sup>6</sup> and
- persons or entities that acquire interests in a landholder by acquisitions that arise from those persons or entities acting in concert with each other.<sup>7</sup>

Revenue Ruling [DA 9 'Landholder Duty – Meaning of Entitlement'](#) provides further information on when trustees will be treated as related persons.

### *Substantially one transaction or one series of transactions*

Case law establishes the following principles in determining whether there is substantially one transaction or one series of transactions.

- The word 'substantially' has considerable importance. The Commissioner 'is required to look at "the substance" of the several transactions, and determine whether they are, "in substance", one [transaction] although masquerading as several.'<sup>8</sup>
- For two or more acquisitions to form or arise from substantially one transaction or series of transactions they require 'some essential unity, some oneness, some unifying factor'.<sup>9</sup> There must exist 'a relationship or connection or interdependence between the transactions that gives to them the essential unity'.<sup>10</sup> The unifying factors must not be just 'fortuitous ones'.<sup>11</sup> There will be no 'oneness' if the transactions are 'separate and independent [and] unconnected with the others'.<sup>12</sup>
- Interdependence of transactions refers to the circumstance where a transaction will only be completed if a second transaction, either between the same or different persons, is also completed.

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<sup>3</sup> Duties Act s 162(1)(a) – (b).

<sup>4</sup> Duties Act s 162(1)(c). *Related corporation* has the meaning *related body corporate* is given in the Corporations Act section 9: Duties Act s 3.

<sup>5</sup> Duties Act s 162(1)(d).

<sup>6</sup> Duties Act s 162(1)(h).

<sup>7</sup> Duties Act s 162(1)(i).

<sup>8</sup> *Jeffrey v Commissioner of Stamps* (1980) 23 SASR 398 at [406].

<sup>9</sup> As above.

<sup>10</sup> *Grafton v Commissioner of State Revenue* [2011] WASAT 180 at [30], [41].

<sup>11</sup> *Khoury v Chief Commissioner of State Revenue* [2010] NSWADT 13 at [28].

<sup>12</sup> *Brianco Nominees Pty Ltd & Ors v Commissioner of State Revenue (Taxation)* [2008] VCAT 999 at [36].

- If there are other factors present to suggest acquisitions arise from substantially one transaction or one series of transactions, it is not necessary for the acquirers or the vendors to be the same, or related, persons.

### *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.<sup>13</sup>

It is not possible for persons to act in concert unless there is at least an understanding between them as to their common purpose or object.<sup>14</sup> 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.<sup>15</sup>

### **Commissioner's discretion**

Section 162(2) of the Duties Act allows the Commissioner to treat persons that are related persons under subsection (1) as not being related for the purposes of a particular acquisition if the Commissioner is satisfied subsection (3) applies to those persons.

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

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

### **Commissioner's Practice**

#### ***Determining if persons are related***

1. The following paragraphs provide guidance on the factors the Commissioner will consider when determining whether acquisitions form or arise from substantially one transaction or one series of transactions or whether persons are acting in concert. The Commissioner will request further information about the facts and circumstances of an acquisition where necessary.

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<sup>13</sup> *Tillmanns Butcheries Pty Ltd v Australian Meat Industry Employees' Union* (1979) 42 FLR 331.

<sup>14</sup> *Adsteam Building Industries Pty Ltd v Queensland Cement and Lime Company Ltd (No 4)* [1985] 1 Qd R 127.

<sup>15</sup> *Bank of Western Australia v Ocean Trawlers Pty Ltd and Others* (1995) 16 ACSR 501.

### *Substantially one transaction or one series of transactions*

2. Factors relevant to determining whether acquisitions together form or arise from substantially one transaction or one series of transactions include:
  - 2.1 the existence of any agreement, arrangement or understanding between any of the acquirers relating to the acquisitions or the proposed use of the interests in the landholder;
  - 2.2 the extent to which one acquisition was dependent upon another acquisition, whether expressly stated or not;
  - 2.3 the extent to which the acquisitions were negotiated or documented independently;
  - 2.4 the extent to which the persons from whom the interests were acquired are the same or related persons or entities;
  - 2.5 whether the interests being acquired are to be used interdependently and for a common purpose; and
  - 2.6 whether any interests already held by the acquirers in the landholder are used interdependently and for a common purpose.

### *Acting in concert*

3. To determine if persons are acting in concert with each other in respect of an acquisition the Commissioner will consider:
  - 3.1 the circumstances surrounding the transaction, including whether any interests already held by the acquirers in the landholder are used interdependently and for a common purpose;
  - 3.2 the persons' actions; and
  - 3.3 any communications between the persons.
4. The Commissioner will consider persons or entities to be acting in concert where there is direct or indirect communication between the parties which shows an understanding (either in writing or orally) between those parties of a common purpose or object for the acquisitions of the interests in the landholder.
5. Persons or entities may be acting in concert with each other in respect of the acquisitions of their interests in the landholder even if they have acquired, and will employ, their interests independently and not for a common purpose. Similarly, persons or entities can be acting in concert although their interests in the landholder were acquired at different times.

### ***Commissioner's discretion***

6. The following paragraphs provide guidance on the factors the Commissioner will consider when deciding whether to exercise the discretion to treat related persons as not being related.

7. If satisfied section 162(3) of the Duties Act applies to persons in the case of a particular acquisition, the Commissioner will usually determine the acquirers are not related unless there are exceptional and unusual circumstances not to exercise the discretion to treat them as unrelated.
8. Paragraphs 3 – 5 apply to determine whether persons were acting in concert with each other in respect of the acquisition.

#### *Acquired and employed independently*

9. Factors the Commissioner will consider to determine if interests in a landholder were acquired independently and are, and will be, employed independently include:
  - 9.1 the existence of any agreement, arrangement or understanding between any of the persons relating to the acquisition or employment of the interests;
  - 9.2 the extent to which one acquisition was dependent upon another acquisition, whether expressly stated or not;
  - 9.3 the extent to which the acquisitions were negotiated independently;
  - 9.4 if any interests previously or currently held by the acquirers in the landholder are or were used interdependently and for a common purpose; and
  - 9.5 whether the persons will independently exercise their rights as shareholders.
10. In the absence of any other factors, the fact that all acquirers will be shareholders in a company, and therefore engaged in the common enterprise carried out by the company, is not sufficient to support the conclusion the parties are related.

#### *Not acquired and not employed for a common purpose*

11. Factors the Commissioner will consider to determine if interests in a landholder were not acquired for a common purpose and are not, and will not be, employed for a common purpose include:
  - 11.1 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;
  - 11.2 the purpose(s) for which each of the interests was acquired and is to be employed; and
  - 11.3 whether the acquisition of the interests will result in the persons occupying positions on the board of management of the landholder.

#### **Public floats or public offerings**

12. A 'public float' is an initial capital raising through the public subscription of securities in an entity, which usually occurs where the shares or units will be listed for sale on a financial market, for example, the Australian Stock Exchange ('ASX').<sup>16</sup> A 'public offering' takes place when shares or units in an entity are offered to the public under a public disclosure document.<sup>17</sup>

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<sup>16</sup> In the landholder duty context, a *listed corporation* or *listed unit trust scheme* is a corporation or unit trust scheme on the official list of a *prescribed financial market*. Duties Act s 148. *Prescribed financial market*

13. The regulations governing public floats and public offerings require the shares to be made available to all investors on the same terms.<sup>18</sup> This typically takes place under the public disclosure document where all shares or units are issued at the same time once the offering completes or when the minimum subscription has been reached.
14. Persons or entities that acquire interests in a landholder as the result of a public float or public offering are considered related persons under section 162(1)(h) of the Duties Act because the acquisitions arise from or form substantially one transaction or series of transactions. The inclusion of a minimum subscription requirement for a public float or public offering, so each acquirer is dependent on the other acquirers also subscribing, supports the conclusion the parties are related.
15. Where persons or entities acquiring interests under a public float or public offering are related solely because of section 162(1)(h) of the Duties Act, the Commissioner will determine they are not related if satisfied that:
  - 15.1 the acquisitions arose from a genuine public float or public offering of the securities of the landholder concerned; and
  - 15.2 the persons or entities would not be related persons except for the fact they were subscribers to the public float or public offering.
16. Persons who acquire interests under a public float or public offering may still be related under another paragraph of section 162(1), for example, related corporations.

#### ***Acquisitions involving related persons***

17. The acquisition of an interest in a landholder involving related persons will be a relevant acquisition when:
  - 17.1 the acquisition results in the increase of the aggregated interests of the acquirer and the related persons, including where the acquirer previously had no interest in the landholder; or
  - 17.2 if the acquirer and the related persons are treated as unrelated for the purpose of the acquisition, the interest acquired is a significant interest.

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means a financial market as defined in section 767A(1) of the Corporations Act that is prescribed: Duties Act s 3. Financial markets are prescribed in section 3 of the *Duties Regulations 2008*.

<sup>17</sup> See [www.asx.com.au](http://www.asx.com.au)

<sup>18</sup> See, for example, the *Corporations Act 2001* (Cth) and the ASX Listing Rules as they relate to public floats on the ASX.

18. Section 162 of the Duties Act applies for the purposes of section 163 and section 164 of that Act. On that basis, the Commissioner may exercise the discretion to treat related persons as unrelated to determine whether an acquisition between related persons is a relevant acquisition. The Commissioner cannot apply this discretion to related corporations.<sup>19</sup>
19. The Commissioner will apply paragraphs 6 – 11 to determine whether to exercise the discretion in the case of an acquisition between related persons.
20. The following examples provide guidance on when the Commissioner will exercise the discretion to treat related persons as being unrelated.

*Example 1*

Smith Pty Ltd T/F the Smith Family Trust owns all the shares in Farming Co Pty Ltd, which owns farming land in Western Australia valued at \$15 million. Smith Pty Ltd, in its capacity as trustee of the trust, operates a farming business on the land through Farming Co.

Smith Pty Ltd wishes to sell the farming land and business and advertises them for sale. Jones Pty Ltd T/F Jones Family Trust wants to acquire the land and business and negotiates to buy all the shares in Farming Co, rather than purchase the assets directly, to preserve the well-established business structure already in place. The consideration for the purchase of the shares matches a recent valuation of Farming Co.

The Smith Family Trust and the Jones Family Trust both have a wide range of potential beneficiaries, and there are some common beneficiaries of both trusts. This means that Smith Pty Ltd and Jones Pty Ltd are related for the purposes of section 162 of the Duties Act.

After completing the acquisition, Mr and Mrs Jones, the directors of Jones Pty Ltd, replace Mr and Mrs Smith as the directors of Farming Co. Mr and Mrs Jones retain all employees of Farming Co, however some are transferred to new roles.

In this case, there is no evidence that Smith Pty Ltd and Jones Pty Ltd were acting in concert because there was no communication between them regarding Jones Pty Ltd's plan to acquire Farming Co. Further, although Smith Pty Ltd conducted the farming business through Farming Co before the acquisition and Jones Pty Ltd will conduct the business through Farming Co after the acquisition, this is not a common purpose of the two trustees. Similarly, the trustees acquired, held and used or will use their interests in Farming Co independently.

Assuming there are no exceptional or unusual circumstances, based on these factors the Commissioner would exercise the discretion to determine Smith Pty Ltd and Jones Pty Ltd were not related persons. As Jones Pty Ltd T/F Jones Family Trust has acquired a significant interest of 100 per cent in Farming Co there is a relevant acquisition under section 163 of the Duties Act and landholder duty will apply to the acquisition.

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<sup>19</sup> See Duties Act s 162(2).

### *Example 2*

The Perth Property Trust is a unit trust with four unit holders each holding 25 per cent of the issued units. The unit holders are not related to each other by blood or marriage and are not related corporations.

The property trust holds various commercial properties with a total value of \$12 million. The properties are all leased and are generating rental income. The properties are managed by an independent property manager and the unit holders are not involved in the day-to-day operations of managing the properties.

One of the unit holders decides to dispose of his units to realise his investment in the trust. The terms of the unit trust deed allow the remaining unit holders to approve a buy back by the trustee of the departing unit holder's units at a unit price based on the current value of the properties.

The trustee contacts each of the remaining unit holders separately to seek their respective approval for the trust to buy back the units from the departing unit holder. The unit holders do not communicate or otherwise discuss the buyback with each other and each provide their agreement directly to the trustee.

As a result of the unit buyback, each of the remaining unit holders increases their interest in the trust from 25 per cent to 33.3 per cent.

The three remaining unit holders are related persons under section 162 of the Duties Act because each acquisition of a further interest in the trust arose from substantially one transaction (the unit buyback). However, the facts do not indicate the unit holders were acting in concert with each other because there was no communication between the unit holders about the planned buyback. Each unit holder holds their units for individual investment purposes, but this is not a collective common purpose of the three unit holders. Similarly, the interests in the trust are not commonly held or used by the three unit holders.

Assuming there are no exceptional or unusual circumstances, in this case the Commissioner would exercise the discretion to treat the unit holders as being unrelated. As none of the individual unit holders acquired a significant interest there is no relevant acquisition under section 163 of the Duties Act and landholder duty will not apply to the acquisitions.

### *Example 3*

Mining Co Ltd owns mining tenements in Western Australia valued at \$50 million. On the same day, Nickel Co Pty Ltd agrees to buy 60 per cent of the shares in Mining Co and Nickel Asset Co Pty Ltd agrees to buy the other 40 per cent of the shares in Mining Co. Completion of each share purchase agreement is conditional upon the other agreement also being completed. Nickel Co and Nickel Asset Co are not related corporations.

Following signing of the agreements, Nickel Co and Nickel Asset Co issue a joint statement to their respective shareholders announcing they have been successful in joint negotiations to take over Mining Co Ltd and they intend to begin a major upgrade of its mining operations.

In this case, the Commissioner would determine Nickel Co and Nickel Asset Co are related persons for landholder duty purposes because the acquisitions arose from the one transaction.

In deciding whether the discretion could be applied, the facts surrounding the acquisitions support the view Nickel Co and Nickel Asset Co were acting in concert with each other about the acquisitions, that they acquired their interests for a common purpose (being the upgrade of the mining operations) and planned to use their interests dependently.

As the discretion could not be applied, the interests of Nickel Co and Nickel Asset Co would be aggregated and landholder duty would apply to the 100 per cent interest.

### *Example 4*

Sam owns a 50 per cent interest in Land Co Pty Ltd, which owns land in Western Australia valued at \$10 million. Sam originally bought the shares in Land Co for investment purposes. He is not a director of the company or involved in any other way in the management of the company.

Sam decides to gift his shares to his son, Luke. As Sam and Luke are related persons under section 162 of the Duties Act, the Commissioner must determine whether the discretion can be exercised to treat them as unrelated for the purposes of Luke's acquisition.

In this case there are no factors to indicate Sam and Luke were acting in concert about the acquisition or that Luke's interest was acquired for a common purpose with his father. Assuming there are no exceptional or unusual circumstances, the Commissioner would exercise the discretion to treat Sam and Luke as not being related persons for the purposes of Luke's acquisition.

As Luke has acquired a significant interest of 50 per cent in his own right, there is a relevant acquisition under section 163 of the Duties Act and landholder duty will apply to his acquisition.

### *Example 5*

John is the sole shareholder of J Co Pty Ltd, which owns land valued at \$5 million. John and his daughter Jane are in partnership together running a property development business through J Co Pty Ltd. John is the CEO of the business and Jane is the managing director.

John wants to implement a succession management strategy for the business and has his lawyer prepare a number of options. After discussing these options, Jane agrees to acquire a 50 per cent interest in J Co to give her greater control of the business. Their existing partnership agreement is amended to reflect Jane will own a share of the company.

John and Jane are related persons under section 162 of the Duties Act because they are father and daughter. The Commissioner must then determine whether the discretion can be exercised to treat John and Jane as not being related for the purposes of Jane's acquisition.

The facts evidence that John and Jane knowingly communicated and took action to achieve a common purpose, being Jane's acquisition of an equal percentage of J Co to ensure the succession of the property development business.

In this case, the Commissioner would determine that John and Jane were acting in concert in relation to Jane's acquisition. On that basis, the criteria in section 162(3) of the Duties Act are not met and the Commissioner cannot exercise the discretion to treat John and Jane as being unrelated.

As the aggregated interest of John and Jane was 100 per cent both before and after Jane's acquisition, there is no relevant acquisition under section 164 and landholder duty will not apply to Jane's acquisition.

### **Date of Effect**

This Commissioner's practice takes effect from 16 December 2016.

Nicki Godecke

COMMISSIONER OF STATE REVENUE

16 December 2016

### **Commissioner's Practice History**

<b>Commissioner's Practice</b>	<b>Issued</b>	<b>Dates of Effect</b>	
		<b>From</b>	<b>To</b>
DA 2.0	27 June 2008	1 July 2008	14 July 2011
DA 2.1	15 July 2011	15 July 2011	15 December 2016
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