# Applying for a Connected Entities Exemption

1. This ruling sets out how the Commissioner of State Revenue (Commissioner) interprets certain terms relevant to applying for a connected entities exemption under the *Duties Act 2008* (Duties Act).

## Background

2. Chapter 6 of the Duties Act provides an exemption from duty for *relevant transactions*[1] between corporations and unit trust schemes that are members of a *family*.[2] This exemption can be revoked automatically following certain events, or at the discretion of the Commissioner.[3]

### *Pre-transaction decision requests*

3. Following a request in the approved form, the Commissioner must provide a decision as to:
   (a) if a proposed relevant transaction is entered into – whether it would be exempted[4] or
   (b) if a proposed transaction is entered into – whether the exemption granted for a separate relevant transaction would be revoked.[5]

4. The Commissioner may refuse a request if it doesn't differ materially from one made previously or if the applicant doesn't provide requested information about the proposed transaction.[6] The Commissioner must refuse a request if the transaction to which the request relates has been entered into.[7]

5. If a decision is provided, the relevant transaction is subsequently entered into and an application for exemption is made, the Commissioner is bound by the decision unless:
   (a) the transaction, or a circumstance relating to it, differs materially from the transaction or circumstances to which the request related
   (b) information relevant to the transaction, or to any circumstance relating to it, differs materially from the information given to the Commissioner or
   (c) the Commissioner considers there was not a full and true disclosure of information in relation to the pre-transaction decision request.[8]

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1 Duties Act s 257.

2 Duties Act s 258.

3 Duties Act s 265. The Commissioner's practice dealing with the exercise of the discretion to revoke a connected entities exemption is set out in CP TAA/DA 48 'Revocation of Connected Entities Exemption'.

4 Duties Act s 261(2).

5 Duties Act s 261(4).

6 Duties Act s 261(7).

7 Duties Act s 261(7A).

8 Duties Act s 261(10).

### *Notifiable events*

6. Under section 264 of the Duties Act, the Commissioner must be notified about certain events involving the *transaction group* that occur within three years after the date of an exempt relevant transaction (a *notifiable event*).[9] The *transaction group* means:[10]
   (a) for a relevant consolidation transaction – the head entity and the affected entity or
   (b) for a relevant reconstruction transaction – the family members that are parties to the transaction and any other family members necessary to establish the relationship between the parties.[11]

7. Section 264(2) of the Duties Act provides the following are notifiable events (unless section 264(3) applies):
   (a) the controlling entity is wound up and does not have a major holder when the winding up begins[12] or
   (b) the controlling entity, or the major holder if the controlling entity is wound up and has a major holder when the winding up begins, ceases to directly or indirectly –[13]
      i. hold more than 50 per cent of the securities of a member of the transaction group or
      ii. control (either by being able to cast or to control the casting of) more than 50 per cent of the maximum number of votes that may be cast at a general meeting of a member of the transaction group or
   (c) when entities are family members because their securities are stapled – those securities cease to be stapled.[14]

8. Section 264(3) of the Duties Act provides the following are not notifiable events:
   (a) winding up of a member of the transaction group that is not the controlling entity or
   (b) a relevant transaction the subject of an application made under section 262 or
   (c) an acquisition by one family member from another of an interest in an entity as long as landholder duty is not chargeable on the acquisition or
   (d) a prescribed event.[15]

9. The taxpayer must lodge Form FDA23 'Relevant Consolidation and Reconstruction Transactions – Notice of Notifiable Event' within two months after the date of the event.[16]

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9 Duties Act s 264(4).

10 Duties Act s 257(1).

11 This includes all of the intervening entities in a chain of ownership between a parent and its subsidiaries.

12 Duties Act s 264(2)(a).

13 Duties Act s 264(2)(b).

14 Duties Act s 264(2)(c).

15 Duties Act ss 264(3)(a)-(d).

16 Duties Act s 264(4).

### *Automatic revocation*

10. Under section 264A of the Duties Act, the exemption for an exempt relevant reconstruction transaction is automatically revoked if:

    (a) the notifiable event involves the controlling entity ceasing to directly or indirectly hold more than 50 per cent of the securities and control more than 50 per cent of the votes that may be cast at a general meeting of a member of the transaction group and

    (b) that member holds, or is entitled to, any of the property to which the relevant reconstruction transaction related.

11. Automatic revocation does not apply if the notifiable event results from a public float or certain kinds of demergers from listed entities.[17]

### *Exemption applications*

12. An exemption application must be made in the approved form not later than 12 months after the transaction date.[18]

13. If the Commissioner is satisfied a relevant transaction has been entered into, the Commissioner must exempt the transaction from duty unless:

    (a) the Commissioner is satisfied the transaction is part of a scheme or arrangement that has been or will be carried out for the purpose of avoiding or reducing any liability for duty, or for the sole or dominant purpose of avoiding or reducing any liability for a tax other than duty

    (b) the Commissioner is satisfied the exemption would be revoked under section 264A because of the occurrence of a notifiable event referred to in that section[19] or

    (c) any member of the family has an outstanding tax liability.[20]

14. The *Taxation Administration Act 2003* (TAA) provides a five-year period for applying for a reassessment after an original assessment is made.[21] If a relevant transaction is originally assessed for duty, an exemption application cannot subsequently be made under section 262 of the Duties Act by applying for a reassessment under the TAA.[22]

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17 Duties Act s 264A(3)(b). Duties Regulations 2A and 8A prescribe demergers of listed entities for the purposes of s 264A(3)(b).

18 Duties Act s 262(3).

19 Duties Act s 264A(1)(a).

20 Duties Act s 263(4).

21 TAA s 17(1).

22 Duties Act s 262(2).

## Ruling

### *Timeframe for lodging an exemption application*

15. An exemption application will only be considered if it is lodged using the approved form within 12 months after the relevant transaction date.

    (a) The relevant transaction date is the date liability to duty arose on the transaction under the Duties Act,[23] for example, the date the agreement for transfer is made or the date the acquisition of an interest in a landholder is taken to have occurred.

    (b) The lodgment date is the date the application is received by RevenueWA.

16. The Commissioner doesn't have discretion to extend the lodgment period. Any relevant transaction the subject of an application lodged more than 12 months after the relevant transaction date will be assessed for duty.

17. The approved form is: [24]

    (a) if the exemption application is lodged without a pre-transaction ruling –[25]

        i. FDA24 'Relevant Consolidation Transaction' or

        ii. FDA25 'Relevant Reconstruction Transaction'

        or

    (b) if the Commissioner has made a pre-transaction ruling that the transaction will be exempt – the completed application form the Commissioner provided to the taxpayer when the ruling was made.

### *Effective date of transaction*

18. Liability to duty arises on a transfer of dutiable property when the property is transferred, and on an agreement to transfer when the agreement is made.[26] An agreement to transfer is usually made before the property is transferred under the agreement. In some cases, including where the transaction involves business assets, the agreement executed by the parties may provide that:

    (a) the transfer of property happened before the document was executed or

    (b) the effective date of the transaction is a date prior to the date the document was executed.

19. If the transfer happens before the parties execute an agreement documenting the transaction, the relevant transaction for duties purposes is a transfer of dutiable property. In this case, the relevant transaction date is when the transfer took place rather than the date of the agreement.

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23 See Duties Act ss 19 and 20, Schedule 1; Duties Act s 176.

24 Forms are available from the Duties Forms and Publications page on our website at WA.gov.au/service/financial-management/taxation-and-duty/find-duties-forms-and-publications

25 Including where a determination has been made that if an exemption is granted it will not be revoked.

26 Duties Act, Schedule 1.

20. An agreement that effects or evidences a relevant transaction may provide for the effective date of the transaction to be a date prior to the date the instrument was executed. Parties may agree to an earlier effective date for a number of commercial reasons, including fixing a date based on the availability of reliable financial data. In this case, if the transfer of property did not occur prior to the agreement being executed, the effective date is considered to be a fiction agreed to between the parties and is not the date of the transaction for duties purposes. In these circumstances, the dutiable transaction is an agreement to transfer and liability to duty arises when the agreement is made.

21. When an earlier effective date is nominated in an agreement and the transfer does not require any further documentation to be effected, the Commissioner will treat the date of the agreement as the transaction date if:

(a) the terms of the agreement and any other relevant transaction documents support that the date of the agreement is the transaction date, for example, the terms of the agreement do not provide for completion to take place before the agreement is executed

(b) there is probative evidence that supports the date of the agreement as the transaction date, for example, director's minutes, correspondence with external parties such as banks, and accounting records and

(c) there is a commercial explanation for the adoption of the earlier date as the effective date.

*Example 1*

An instrument evidences the transfer of business assets between corporations that are family members. The instrument was executed on 1 September 2020, however, it provides the effective date of the transfer was 30 June 2020. On 30 August 2021, the transferee lodges an application for a connected entities exemption.

The Commissioner requires evidence to be satisfied the effective date of 30 June 2020 is not the transaction date, which would mean the application for exemption should have been lodged by 30 June 2021.

The parties to the transaction provide evidence that:

- the parties adopted an earlier effective date because it was the time at which the most reliable information was available for determining the asset values
- there were no asset transfers recorded or reflected in the parties' financial documents and systems until after the agreement was executed and
- the director's minutes reflect both the agreement to transfer being made on the execution date and the reasons for adopting the earlier effective date.

In this case, the Commissioner accepts 1 September 2020 (the date of the agreement) as the transaction date. This means the application for exemption was lodged within 12 months after the transaction.

22. An agreement that deems an effective date earlier than the date of the agreement and provides that completion of the transaction also predates the date of the agreement will not be accepted as taking place on the date the agreement was executed. In this case, the completion date is taken to be the date of the transaction.

### *Material difference*

23. The Commissioner is not bound by a pre-transaction decision that a proposed transaction would be exempt if it was entered into if there is a *material difference* between the actual transaction and the information given about the proposed transaction in the pre-transaction decision request.

24. For a difference to be *material* it is necessary for it to change the substance of the proposed transaction. These changes may be to the parties, the property, or other significant aspects of the transaction.

25. Examples of differences that would not usually be considered material include:

    (a) changes to the date of a transaction, unless the date change results in transactions occurring in a different order

    (b) minor changes to the consideration for a transaction as contemplated by the agreement or resulting from a change in currency exchange rates or the balance of an outstanding loan

    (c) minor changes to the chattels that are transferred with land or business assets as a result of changes to plant and equipment in the normal course of business and

    (d) the addition of a newly granted mining tenement to a transaction relating to other mining tenements in the same mineral field.

### *Outstanding tax liability*

26. An exemption will not be granted if any of the family members has an outstanding tax liability,[27] including members who are not parties to the transaction.

27. An 'outstanding tax liability' is not defined in the Duties Act or the TAA. The Commissioner interprets the term to mean all tax that is unpaid after the due date specified in an assessment notice or because a return has not been lodged as required under a special tax return arrangement, including any amount subject to a tax payment arrangement under section 47 of the TAA. This does not include any land tax that remains payable as instalments under a land tax assessment notice.[28]

28. The requirement to satisfy all outstanding tax liabilities exists at the time an exemption is granted. If an outstanding tax liability exists at the time a pre-transaction decision is made, the taxpayer will be notified that an exemption will only be granted if the outstanding liability is paid at that time.

29. Before granting an exemption for a relevant transaction, the Commissioner will review RevenueWA's tax records for each family member and request that any outstanding tax liabilities be paid.

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[27] Tax refers to Western Australian state taxes and includes penalty tax and costs of obtaining a valuation under section 23A of the TAA.

[28] Under the *Land Tax Assessment Regulations 2003* a taxpayer has the option to discharge a liability to pay land tax in specified instalments.

30. Tax liabilities in other jurisdictions such as the Commonwealth or other States are not included within the meaning of 'outstanding tax liability' and do not affect the availability of the connected entities exemption.

> *Example 2*
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> Company A has various landholdings and receives a land tax notice of assessment for the current financial year. The notice of assessment is issued on 8 October 2021 with a due date for payment on 26 November 2021. The notice of assessment gives the taxpayer three payment options.
>
> Company A opts to pay its land tax liability over three instalments. The first instalment is paid on 26 November 2021 with the second instalment due on 7 April 2022. During February 2022, Company A purchases land from a wholly owned family member and immediately applies for a connected entities exemption from duty.
>
> Although the second and third instalments for Company A's land tax liability have been recorded as debits against its tax records, the due date for payment of both instalments has not yet passed and there are no outstanding tax liabilities to be paid. Providing all other requirements under Chapter 6 of the Duties Act have been satisfied, a connected entities exemption will be granted.

### *Notifiable events*

31. When determining whether an exemption applies to a relevant transaction, the Commissioner will consider any notifiable events that have occurred at the time the decision is made. This may include a notifiable event that occurred after the application was made.

32. An agreement to sell shares or units in a subsidiary corporation or unit trust will not normally be a notifiable event at the time the agreement is made; until the agreement is completed, the parent entity will continue to hold the shares or units and retain the ability to control the associated votes. There may be a notifiable event at the time of the agreement if the agreement contains provisions allowing the purchaser control of the subsidiary before completion.

33. If, at the time the Commissioner determines an application, a notifiable event has not occurred but there is an agreement, arrangement or understanding that a notifiable event will occur, the Commissioner will not take this event into account in determining whether the event would result in automatic revocation under section 264A (which would prevent the Commissioner from granting an exemption under section 263(4)(b)). However, such an agreement, arrangement or understanding may be taken into account in determining whether the relevant transaction is part of a scheme or arrangement for a purpose of avoiding duty or other tax.

*Example 3*

Company B holds a variety of mining tenements in different regions across Western Australia. To allow investors to invest in a particular project, B registers a new subsidiary, C Pty Ltd, and agrees to transfer a group of exploration licences valued at $5 million to C on 1 July 2022.

On 2 August 2022, B's lawyer lodges the agreement with RevenueWA along with an application for a connected entities exemption. The lawyer advises that B is in negotiations with an external investor to sell an interest in C, but that there is no agreement in place.

On 16 August 2022, B's lawyer advises that B has agreed to sell a 60 per cent share in C to an individual, D, for $3 million. The agreement is expected to complete in October 2022. When the agreement completes it will be a notifiable event as B will no longer hold more than 50 per cent of the issued shares in C.

On 30 August 2022, the Commissioner determines the application and grants an exemption for the agreement to transfer the exploration licences to C. At the time the application is determined, the agreement has not completed so the notifiable event has not yet occurred. The Commissioner grants an exemption for the transaction.

When the agreement completes, B or C must advise the Commissioner of the event. This will result in automatic revocation of the exemption. A reduction in duty will apply based on the amount of landholder duty paid by D on the acquisition of an interest in C.

### *Notifiable events and pre-transaction decision requests*

34. When someone requests a ruling on a proposed transaction and advises the Commissioner that a notifiable event is expected to occur after the relevant transaction, the Commissioner will determine the request assuming the notifiable event will occur before the exemption is determined. This means if the notifiable event would result in automatic revocation of the exemption, the applicant will be advised the exemption will not be granted.

*Example 4*

Just Iron Ltd is a mining company listed on the ASX. Just Iron decides to demerge certain mining tenements relating to non-iron assets. To accomplish this, Just Iron intends to restructure then demerge non-iron assets to a new ASX listed entity.

Just Iron requests a ruling from the Commissioner regarding the proposed restructure, noting the planned demerger. In providing a ruling, the Commissioner assumes the demerger has occurred before a decision is made on the exemption.

The Commissioner determines the planned demerger would not result in automatic revocation and advises Just Iron that an exemption would apply to the proposed restructure.

If the Commissioner had determined the planned demerger would result in automatic revocation of the exemption for the proposed restructure, Just Iron would be advised the proposed restructure would not be granted an exemption.

35. A person applying for a ruling on a proposed transaction may specifically request the Commissioner to provide a ruling on whether an exemption would be granted if a decision is made before the notifiable event occurs.

36. When someone requests a ruling on a proposed transaction and advises the Commissioner that a particular event may occur after the proposed transaction, but there is insufficient detail of the event to determine whether it will impact the Commissioner's decision, the Commissioner will determine the request without considering the potential event. This will be noted in the ruling provided to the applicant.

*Example 5*

Property Developer Co intends to transfer some land to a subsidiary unit trust to assist with financing development of the land. They request a ruling from the Commissioner on whether the transfer will be exempt from duty.

Property Developer Co advises the Commissioner they are in negotiations with an external investor, who may purchase units in the subsidiary unit trust after the property is transferred. At this stage of the negotiations it is not clear if the external investor will acquire an interest in the subsidiary and, if they do, what that interest will be.

The Commissioner will provide a ruling on the proposed transfer to the subsidiary unit trust without considering the potential impacts of any future transaction between Property Developer Co and the external investor. The details are not sufficiently clear to determine whether this transaction is expected to occur or, if it did, whether it would result in revocation of the exemption.

The Commissioner will note in the ruling that the decision does not take into account the possible acquisition by the external investor.

## Ruling History

| Revenue Ruling | Issued | Dates of effect | |
|---|---|---|---|
| | | From | To |
| DA 19.0 | 5 December 2017 | 5 December 2017 | 16 July 2019 |
| DA 19.1 | 17 July 2019 | 17 July 2019 | 7 August 2022 |
| DA 19.2 | 8 August 2022 | 8 August 2022 | Current |