



## 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 for landholder purposes and
- whether to exercise the discretion to treat persons as not being related for a particular 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 an interest of at least 90 per cent in a listed landholder<sup>2</sup> or otherwise an interest of at least 50 per cent.<sup>3</sup> A *further interest* means an interest in a landholder acquired by a relevant acquisition to which section 163(1)(c) or (d) of the Duties Act applies.<sup>4</sup>

Under section 163(1) 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 acquirer does not have a significant interest and immediately after the acquisition the acquirer has a significant interest or
- the aggregated group interest in the landholder does not amount to a significant interest and immediately after the acquisition it amounts to a significant interest or
- the acquirer has a significant interest and as a result of the acquisition the acquirer's interest increases or
- the aggregated group interest is a significant interest and as a result of the acquisition the aggregated group interest increases.

*Aggregated group interest* means the aggregate of the interest (if any) of the acquirer and the interests of any related persons.<sup>5</sup>

### Related persons

Section 162(1) of the Duties Act defines related persons for the purposes of determining if there has been a relevant acquisition in a landholder. This includes:

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<sup>1</sup> An entity is a *landholder* if it or a linked entity is entitled to land assets in Western Australia valued at \$2 million or more. An entity is also a landholder if it or a linked entity is entitled to land assets in Western Australia valued at less than \$2 million and the acquisition is part of a relevant arrangement under section 155(4): Duties Act s 155. A *land asset* means land, a fixed infrastructure control right, a derivative mining right and, subject to section 204A, a fixed infrastructure access right: Duties Act s 148(1).

<sup>2</sup> A *listed landholder* means a corporation or unit trust scheme listed on a prescribed financial market: Duties Act s 148(1).

<sup>3</sup> Duties Act s 161.

<sup>4</sup> Duties Act s 148.

<sup>5</sup> Duties Act s 163(2).

- individuals who are spouses or de facto partners, parents, children, or step-children<sup>6</sup>
- related corporations<sup>7</sup>
- trustees of trusts with common beneficiaries and <sup>8</sup>
- an individual and company if the individual is a major shareholder, director or secretary of the company or a related company.<sup>9</sup>

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

Under subsections (1)(h) and (i) respectively, persons or entities are also related if they acquire interests in a landholder by acquisitions that:

- together form, evidence, give effect to or arise from substantially one arrangement or
- arise from those persons or entities acting in concert with each other.

These subsections do not apply where the acquisitions result from a public float<sup>10</sup> or a listed demerger or hybrid demerger.<sup>11</sup> This means the acquirers in these circumstances will not be related persons unless they are related for other reasons, for example, where there are related corporations.

### *Substantially one arrangement*

Revenue Ruling [DA 25 'Substantially One Arrangement'](#) sets out how the Commissioner interprets the term 'substantially one arrangement' for landholder duty purposes.

### *Acting in concert*

The term 'acting in concert' is not defined in the Duties Act. At common law, it is generally interpreted as involving knowing conduct the result of communication between the parties and not merely actions occurring contemporaneously.<sup>12</sup>

It is not possible for persons to act in concert unless there is at least an understanding between them about their common purpose or object.<sup>13</sup> The understanding can be informal and unenforceable and may be inferred from the circumstances surrounding the transaction and what the parties have done, as well as by direct evidence.<sup>14</sup>

### **Commissioner's discretion**

Subject to the conditions in section 162(3) being met, section 162(2) of the Duties Act gives the Commissioner discretion to treat persons that are related under subsection (1) as not related for the purposes of a particular acquisition.

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<sup>6</sup> Duties Act s 162(1)(a) – (b), s 6(4).

<sup>7</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>8</sup> Duties Act s 162(1)(d).

<sup>9</sup> Duties Act s 162(1)(e).

<sup>10</sup> Duties Act s 162(1A). A *public float* means an entity's securities being offered for sale or issue to the public for the purpose of listing the entity on a prescribed financial market or the securities being listed on a prescribed financial market within 12 months after being offered to the public: Duties Act s 257(1).

<sup>11</sup> See regulations 2A, 5 and 8A of the *Duties Regulations 2008*.

<sup>12</sup> *Tillmanns Butcheries Pty Ltd v Australian Meat Industry Employees' Union* (1979) 42 FLR 331.

<sup>13</sup> *Adsteam Building Industries Pty Ltd v Queensland Cement and Lime Company Ltd (No 4)* [1985] 1 Qd R 127.

<sup>14</sup> *Bank of Western Australia v Ocean Trawlers Pty Ltd and Others* (1995) 16 ACSR 501.

The discretion cannot apply to related corporations or to persons or entities that are related because they acquired their interests as part of one arrangement or were acting in concert with each other.<sup>15</sup>

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

- were acquired independently and are, and will be, employed independently and
- 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. Revenue Ruling [DA 25 'Substantially One Arrangement'](#) provides guidance on determining whether acquisitions together form, evidence, give effect to or arise from substantially one arrangement.
2. The following paragraphs provide guidance on the factors the Commissioner will consider when determining if persons are acting in concert. The Commissioner will request further information about the facts and circumstances of an acquisition where necessary.
3. To determine if persons or entities are acting in concert with each other, the Commissioner will consider:
  - 3.1 the circumstances surrounding the transaction, including whether any interests in the landholder already held by the acquirers are used interdependently and for a common purpose
  - 3.2 the persons' or entities' actions and
  - 3.3 any communications between the persons or entities.
4. The Commissioner will consider persons or entities are acting in concert when there is direct or indirect communication between the parties that shows an understanding (either in writing or orally) between them of a common purpose or object for acquiring the interests in the landholder.
5. Persons or entities may be acting in concert with each other about their acquisitions even if they have acquired, and will use, their interests independently. Similarly, persons or entities can be acting in concert even if 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 the conditions for exercising the discretion are met, the Commissioner will usually determine the acquirers are not related unless there are exceptional and unusual circumstances to not treat them as unrelated.

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<sup>15</sup> Duties Act s 162(2A).

### *Acquired and employed independently*

8. Factors the Commissioner will consider to determine if interests in a landholder were acquired independently and are, and will be, used independently include:
  - 8.1 any agreement, arrangement or understanding between any of the persons relating to the acquisition or use of the interests
  - 8.2 the extent to which one acquisition was dependent upon another acquisition, whether expressly stated or not
  - 8.3 the extent to which the acquisitions were negotiated independently
  - 8.4 if any interests previously or currently held by the acquirers in the landholder are or were used interdependently and for a common purpose and
  - 8.5 whether the persons will independently exercise their rights as shareholders.
9. Without any other factors, the fact that all acquirers will be shareholders in a company is not sufficient to support the conclusion the parties are related.

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

10. Factors the Commissioner will consider to determine whether interests in a landholder were acquired for a common purpose or are, or will be, used for a common purpose include:
  - 10.1 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 used
  - 10.2 the purpose(s) for which each of the interests was acquired and is to be employed and
  - 10.3 whether the acquisition of the interests will result in the persons occupying positions on the landholder's management board.

### *Exercise of discretion*

11. The following examples provide guidance about when the Commissioner will exercise the discretion to treat acquirers as unrelated.

#### *Example 1*

Smith Pty Ltd T/F the Smith Family Trust owns 60 per cent of the shares in Property Investment Co Pty Ltd, which owns land assets in Western Australia valued at \$15 million.

Jones Pty Ltd T/F Jones Family Trust acquires 20 per cent of the shares in Property Investment Co from an unrelated party. The consideration for the purchase of the shares matches a recent valuation of Property Investment Co.

The Smith Family Trust and the Jones Family Trust have a wide range of potential beneficiaries, with 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.

There is no evidence that:

- Smith Pty Ltd and Jones Pty Ltd communicated about Jones Pty Ltd's plan to acquire an interest in Property Investment Co
- there is an arrangement or understanding between Smith Pty Ltd and Jones Pty Ltd about the conduct of the company
- the trustees have a common purpose or
- the interests were not acquired, and will not be used, independently.

Assuming there are no exceptional or unusual circumstances, the Commissioner would exercise the discretion in this case to determine that Smith Pty Ltd and Jones Pty Ltd were not related persons.

On that basis, Jones Pty Ltd T/F Jones Family Trust has not acquired a significant interest in a landholder and there is no relevant acquisition.

#### *Example 2*

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. 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.

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 that they intend to begin a major upgrade of its mining operations.

In this case, the Commissioner would determine that the acquisitions arose from one arrangement and that the acquirers were acting in concert about their acquisitions. As a result, the Commissioner cannot make a determination that the companies are not related.

As the aggregated group interest of Nickel Co and Nickel Asset Co is 100 per cent after the acquisition, there is a relevant acquisition.

#### *Example 3*

Iron Pro Pty Ltd owns mining tenements in Western Australia valued at \$15 million. Sanjita Singh owns 10 per cent of the shares in Iron Pro.

Sanjita is also one of seven directors of Ironplate Ltd, which is listed on the Australian Stock Exchange. Based on publicly available information and their own industry expertise, Ironplate's board of directors believe Iron Pro represents an attractive investment option with potential for significant returns and an increase in asset values.

At a general meeting, the board of directors decide Ironplate will make unsolicited offers to Iron Pro's existing shareholders. Due to a perceived conflict of interest, Sanjita excused herself from discussion and voting about the offers.

Through a partial uptake of these offers, Ironplate acquires 43 per cent of the shares in Iron Pro from several unrelated parties. Sanjita chose to retain her 10 per cent interest. The consideration for the purchase of the shares matches a recent valuation of Iron Pro undertaken by Ironplate as part of its due diligence.

As Sanjita is a director of Ironplate, Sanjita and Ironplate are related for the purposes of section 162 of the Duties Act.

The Commissioner would take into account the following:

- As director, Sanjita's primary duty is to make decisions in the best interests of Ironplate's shareholders.
- Sanjita has a statutory obligation under the *Corporations Act 2001* to not improperly use her position to gain an advantage or cause a detriment to Ironplate.
- Sanjita did not solicit investment in Iron Pro by Ironplate.
- Sanjita's 10 per cent interest was acquired before she became a director of Ironplate.
- Sanjita excused herself from all decision-making and due diligence processes in relation to Ironplate's investment in Iron Pro; and
- Sanjita and Ironplate's interests were acquired and will be used independently.

Assuming there are no further circumstances which suggest that Sanjita influenced Ironplate's decision to invest in Iron Pro, the Commissioner would exercise the discretion in this case to determine that Sanjita and Ironplate were not related persons.

On that basis, Ironplate has not acquired a significant interest in a landholder and there is no relevant acquisition.

## Date of effect

This Commissioner's practice takes effect from 27 October 2021.

Marcelyn Nicolaou

COMMISSIONER OF STATE REVENUE

27 October 2021

## Document history

Commissioner's Practice	Issued	Dates of effect	
		From	To
DA 2.0	27 June 2008	1 July 2008	14 July 2011
DA 2.1	15 July 2011	15 July 2011	15 December 2016
DA 2.2	16 December 2016	16 December 2016	26 October 2021
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