



## Landholder Duty – Meaning of Entitlement

### Introduction

1. An acquisition of an interest in an entity that is a landholder is subject to landholder duty under Chapter 3 of the *Duties Act 2008* (Duties Act) if it is a relevant acquisition.
2. This ruling:
  - (a) outlines the Commissioner's interpretation of the word 'entitlement' for the purposes of section 153 of the Duties Act and
  - (b) clarifies the treatment of relevant acquisitions by trustees and custodians.

### Background

#### Relevant acquisitions

3. An acquisition of an interest in an *entity*<sup>1</sup> that is a landholder will generally be a *relevant acquisition*<sup>2</sup> if the acquirer or aggregated group<sup>3</sup> acquires a *significant interest*<sup>4</sup> or a *further interest*<sup>5</sup> in the entity.
4. Under section 153(1) of the Duties Act, a reference in Chapter 3 to an interest (other than a reference to an indirect interest) in a landholder or other entity is to an 'entitlement' to the surplus property of the landholder or other entity if it were to be wound up.
5. Section 162(1) of the Duties Act sets out when persons or entities are related persons for the purposes of determining whether there has been a relevant acquisition.<sup>6</sup>
6. Section 162(2) of the Duties Act provides that if subsection (3) applies to persons, the Commissioner may determine in the case of a particular acquisition that the persons are not related persons.<sup>7</sup> Section 162(3) of the Duties Act applies to persons if their interests in the entity were acquired, and will be used, independently and not for a common purpose.

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<sup>1</sup> *Entity* is relevantly defined in the Duties Act s 152(1) to mean a corporation and a unit trust scheme.

<sup>2</sup> Duties Act s 163.

<sup>3</sup> *aggregated group interest* means the aggregate of the interest (if any) that the acquirer has in the landholder and, if one or more related persons have an interest in the landholder, all of those interests: Duties Act s 163(2).

<sup>4</sup> A *significant interest* in a landholder is an interest of at least 90 per cent if the landholder is listed on a prescribed financial market and at least 50 per cent if it is unlisted: Duties Act s 161.

<sup>5</sup> A *further interest* means an interest in a landholder acquired by a relevant acquisition to which section 163(1)(c) or (d) applies.

<sup>6</sup> Persons or entities are not related under section 162(1)(h) or (i) if their acquisitions result from a public float or a listed demerger: Duties Act s 162(1A) and Duties Regulations 2A and 5.

<sup>7</sup> The discretion cannot apply to related corporations or to persons or entities that acquired their interests from what is substantially one arrangement or by acting in concert with each other: Duties Act s 162(2A).

## Custodian and bare trustees

7. Some trustees have the power to appoint custodian trustees of part or all of the trust fund for the more effective management of the trust property.<sup>8</sup> A custodian trustee's duties will depend on the terms of the contract or legislation by which it is appointed and will be carried out on direction from the managing trustee(s).<sup>9</sup> A custodian trustee has a fiduciary obligation to the managing trustee(s).<sup>10</sup>
8. Custodian trustees are commonly appointed for regulated trusts such as trusts established under the *Corporations Act 2001* (Cth) (managed investment schemes) or the *Superannuation Industry Supervision Act 1993* (Cth) (superannuation funds).
9. A bare trustee is a trustee who is merely a fiduciary agent for the beneficiary and must obey any directions given by the beneficiary.<sup>11</sup> A bare trustee has no interest in the trust assets other than to hold the legal title of the property and has no active duties to perform other than to transfer the property to the beneficiary at the beneficiary's direction.<sup>12</sup> Trustees with active duties (including powers of management) cannot be considered bare trustees.<sup>13</sup>

## Ruling

### Meaning of 'entitlement'

10. While 'entitlement' is not defined in the Duties Act, *entitled* is defined in section 3 to mean:
  - (a) in relation to a person as trustee of a unit trust scheme or other trust – entitled for the purposes of the scheme or trust and
  - (b) otherwise – beneficially entitled.
11. Section 9 of the *Interpretation Act 1984* provides that where a word or phrase is defined in a written law, other parts of speech and grammatical forms of that word or phrase have corresponding meanings.
12. In *Affinity Health Ltd v Commissioner of State Revenue*<sup>14</sup> the Court held that an 'entitlement' was only acquired on the registration of the shares in the share register. However, an alternative interpretation was considered in *Commissioner for ACT Revenue v Francey*<sup>15</sup> where the Tribunal held that 'entitlement' may mean a clearly enforceable though indirect entitlement. In this case, the Tribunal considered the person's capacity as beneficial owner of the shares to readily become the full owner of the shares gave them an entitlement to a distribution on winding up of the corporation.

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<sup>8</sup> Thomson Reuters, *Ford and Lee: The Law of Trusts*, (at 29 July 2015) Trustees, Introduction and capacity to be trustee, 'Custodian trustees' [8070].

<sup>9</sup> As above.

<sup>10</sup> As above.

<sup>11</sup> Thomson Reuters, *Ford and Lee: The Law of Trusts*, (at 29 July 2015) Trustees, Introduction and capacity to be trustee, 'Bare trustees' [8075].

<sup>12</sup> *CGU Insurance Ltd v One.Tel Ltd (in liq)* (2010) 242 CLR 174; [2010] HCA 26 [36].

<sup>13</sup> See, eg, *Schalit v Nadler* [1933] 2 KB 79 at 81-2; *Herdegen v Federal Commissioner of Taxation* (1988) 20 ATR 24; 84 ALR 271 per Gummow J at 282; cf *Chief Commissioner of Stamp Duties (NSW) v ISPT Pty Ltd* (1998) 45 NSWLR 639; 41 ATR 29; 99 ATC 4066 per Mason J at 651; *ISPT Nominees Pty Ltd v Chief Commissioner of State Revenue* (2003) 59 NSWLR 196; 53 ATR 527; [2003] NSWSC 697 at 192 ff; *Burns v Steel* [2005] NZHC 469; [2006] 1 NZLR 559 at [41].

<sup>14</sup> (2005) NSW SC 663.

<sup>15</sup> *Commissioner for ACT Revenue v Francey* [2014] ACAT 67 [30]. The Tribunal considered the terms of sections 83 and 84 of the *Duties Act 1999* (ACT) and the use of the word 'entitlement' in section 83, which refers to an *interest* [in a landholder] as an entitlement to a distribution of property on winding up or otherwise.

13. The Commissioner interprets the word 'entitlement' in section 153 of the Duties Act in accordance with the decision in *Commissioner for ACT Revenue v Francey* as it is consistent with the definition of *entitled* in section 3 of the Duties Act. This interpretation is also consistent with section 154 of the Duties Act which calculates an interest in a landholder on the basis that all powers and discretions have been exercised.

#### ***Interests held by custodians and bare trustees***

14. A bare trustee does not have an entitlement for the purposes of section 153 of the Duties Act because it is entitled for the purposes of the trust only to the extent of the legal interest in the property.
15. The Commissioner will usually treat a custodian as a bare trustee because it is only entitled to the legal interest in the property and carries out all its duties on direction from the managing trustees.
16. Where an interest in an entity is held or acquired by a custodian or bare trustee, the person who has the entitlement under section 153 of the Duties Act is:
- (a) for a custodian – the managing trustee that appointed the custodian (for example, unit trustee or superannuation fund trustee) and
  - (b) for a bare trustee – the beneficiary of the trust.
17. If a person submits that a custodian or bare trustee has an entitlement for the purposes of section 153 of the Duties Act, they must satisfy the Commissioner in this regard, for example, by reference to the specific terms of the trust deed or relevant legislation under which the trustee is appointed.

#### ***Interests held by trustees (excluding custodians and bare trustees)***

18. A person has an interest in an entity as a trustee when the person has an entitlement to the surplus property of the entity if it were to be wound up and that entitlement is held by the person for the purposes of a scheme or trust.
19. A person that holds or acquires interests in an entity on behalf of different trusts is considered a separate person in relation to each trust. On that basis, interests held by a person or acquired on behalf of different trusts will be treated as if they were held or acquired by separate persons.
20. An interest held or acquired by a trustee for separate trusts will not be aggregated to determine if there has been a relevant acquisition unless section 162(1) of the Duties Act applies to the trustee in its separate capacities, such as where:
- (a) the trusts have common beneficiaries or
  - (b) the interests held or acquired on behalf of each trust were acquired by acquisitions that together form, evidence, give effect to or arise from what is substantially one arrangement.

### *Example*

Family Pty Ltd acquires a 25 per cent interest in a landholder as trustee for the Smith Trust and a 25 per cent interest in a landholder as trustee for the Jones Trust. Family Pty Ltd is treated as a separate acquirer in relation to each trust.

If Family Pty Ltd T/F Smith Trust and Family Pty Ltd T/F Jones Trust are not related under section 162(1) of the Duties Act, the interests will not be aggregated to determine if there has been a relevant acquisition in the landholder.

If Family Pty Ltd T/F Smith Trust and Family Pty Ltd T/F Jones Trust are related persons, the Commissioner can determine that they are not related unless:

- the interests in the landholder were acquired as part of substantially one arrangement or
- Family Pty Ltd in its capacity as trustee for the Smith Trust was acting in concert with Family Pty Ltd in its capacity as trustee for the Jones Trust.

If related, the interests will be aggregated. This means there is a relevant acquisition in a landholder.

21. Further information about related persons is provided in Commissioner's Practice [DA 2 'Landholder Duty – Related Persons and Commissioner's Discretion'](#) which is available from the website at [WA.gov.au](http://WA.gov.au)

### **Ruling history**

Revenue Ruling	Issued	Effective date	
		From	To
DA 9.0	October 2008	October 2008	8 May 2016
DA 9.1	9 May 2016	9 May 2016	11 October 2017
DA 9.2	12 October 2017	12 October 2017	11 December 2019
DA 9.3	12 December 2019	12 December 2019	Current