WA introduces amending legislation to make significant stamp duty changes

4 December 2018

On 29 November 2018, the *Revenue Laws Amendment Bill 2018* (**Bill**) was introduced into the Western Australian (**WA**) Parliament. The Bill amends the *Duties Act 2008* (**Duties Act**), the *Land Tax Assessment Act 2002* and the *Pay-roll Tax Assessment Act 2002*. The Bill is complemented by the *Taxation Administration Amendment Bill 2018*.

- The Bill includes some of the most significant changes to stamp duty in Australia since the commencement of the Duties Act in 2008. The Bill will have an important impact on the types of transactions subject to duty in WA, what is included in the duty base, and on transactions between members of a corporate group.
- The Bill has had its Second Reading in the Legislative Assembly. If passed by Parliament, the amendments to the Duties Act will come into effect the day after Royal Assent, subject to the operation of other duties related amendment Acts. Given there are only 2 sitting days left for this year, it is not clear when the Bill will be passed.

The Duties Act key amendments are summarised in the table below.

Provision	Current	Proposed
Landholder duty		
1. Change to linking of unlisted entities	An entity is linked to another entity if it has: • for listed entities – an interest in the other entity of at least 90%; and • for unlisted entities – an interest in the other entity of at least 50%.	An entity will be linked to an unlisted entity where the first entity has a total direct or indirect interest of at least 50% in the other entity. This includes where the interest is held through a combination of direct or indirect interests or through multiple ownership chains.

2. Aggregation of acquisitions resulting from one arrangement	A landholder is any corporation or unit trust scheme that has an entitlement, either directly or through a linked entity, to land in Western Australia with an unencumbered value of $2m or more. When calculating duty, the value of a landholder is taken to be: • the unencumbered value of land and chattels in WA to which the landholder is entitled; plus • the same % of the unencumbered value of land and chattels held by any linked entity as the % of the landholder's interest in that entity.	The following acquisitions or transactions that result from substantially one arrangement will be aggregated: • An acquisition in a landholder and another entity that only holds chattels. The other entity will be treated as a landholder and duty will be assessed on the total value of land and chattels of both entities. • Acquisitions in two or more entities that are not landholders but together are entitled to land valued at $2 million or more. The entities will be treated as landholders and duty will be assessed on the combined land value. • A transfer of chattels where it is part of the same arrangement as a landholder acquisition. • Acquisitions in two or more entities that together have a direct or indirect interest of 50% or more in a landholding entity. Unless the Commissioner is satisfied otherwise, the following transactions are deemed to be part of one arrangement if they occur within 12 months: • acquisitions in two or more entities by the same person; or • a transfer of chattels and a landholder acquisition by the same person. A transaction or an acquisition that becomes dutiable as a result of another acquisition occurring is retrospectively liable and will be assessed or reassessed for duty as required.
3. Relevant acquisitions and related persons – codification of parts of Commissioner's Practice DA2.2 insofar as the Commissioner's discretion not to aggregate	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. The Commissioner can treat persons that are related persons as not being related for a particular acquisition if the Commissioner is satisfied: • 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.	Amendments in this Bill: • provide that persons will not be related where their acquisitions arise from a public float or in other prescribed circumstances; and • prevent the discretion from applying to persons who are related because they were acting in concert or acquired their interests as part of one arrangement.

4. Other Amendments		• Where there is an agreement for an acquisition in an entity, the acquisition is taken to occur when the agreement is made. • Landholder duty will apply where one or more merging corporations holds land indirectly through a subsidiary. • Acquisitions made between group entities (and other types of related persons) now more likely to incur duty, subject to applicable exemptions and concessions. • The Commissioner can disregard an uncompleted agreement for the sale or purchase of land (or an interest in an entity) that is cancelled or completed before landholder duty is assessed. • Duty will apply to a terminated agreement for an acquisition where the Commissioner is satisfied the agreement was cancelled, rescinded or terminated to achieve the acquisition another way. • An *excluded interest* is clarified to mean an interest held at the time of the relevant acquisition that does not form part of the acquired interest. • A partial exemption will apply if a direct transfer of the land would have been partly exempt from transfer duty or received a partial transfer duty concession. • There will be no obligation to lodge an acquisition statement if an agreement for a landholder acquisition is lodged. • An acquisition statement will not need to include prescribed information. • The definition of *discretionary trust* will exclude a unit trust scheme.
Connected entities exemption		
5. Automatic revocation of exemption – reintroduction post association requirement	There is a requirement to notify the Commissioner if, within 3 years of the exempt transaction, the transition parties cease to be 50% or more owned or controlled by the same parent entity. The exemption can be revoked where the Commissioner determines that the exempt transaction is part of a scheme or arrangement entered into or carried out for duty or tax avoidance purposes.	An automatic revocation of exemption if the transferee entity: • is removed from the family within 3 years after an exempt transaction; and • still holds any of the dutiable property for which the exemption was received. The exception will be where this is the result of a public float, which is consistent with the Commissioner's current practice to not revoke an exemption in these circumstances.
6. Other amendments		• The Commissioner will not be able to grant an exemption if satisfied the exemption would be revoked. • The meaning of 'security' is extended to include interests in an entity that are akin to issued shares, which will allow certain hybrid entities to access the exemption.

		• The Commissioner will be unable to grant an exemption where part or all of the consideration for a relevant transaction is or will be provided by a non-family member. This does not include:
		  ○ consideration provided by a non-family member as a loan; or
		  ○ for consideration required to effect a corporate consolidation, consideration that is the acquisition of shares in the affected entity and an associated acquisition of shares in another entity.
		• All methods of causing a landholder acquisition (such as the cancellation or redemption of shares or units) will qualify for an exemption.
		• Correcting a drafting defect will allow an exemption for the surrender of a mining tenement if the surrender is part of an agreement that the tenement be granted to another family member.

7. Transitional provisions		The new provisions apply in relation to an exemption regardless of the date of the application is made or the date the transaction occurred. However, the new automatic revocation provisions do not apply to a relevant transaction that occurred before commencement day. The Commissioner is not bound by a pre-transaction decision made before commencement day if a different decision would have been made had the new revocation provisions been in effect. In addition, a person is not prevented from making a pre-transaction decision request for a proposed transaction if a similar request was made before commencement day. This allows a person to seek a decision regarding the impact of the new revocation provisions before entering into a transaction.
Fixed to Land		
8. Change to fixed to land model	Transfer duty and landholder duty: • Things on land that are common law fixtures, such as buildings and infrastructure, are part of the underlying land, and duty applies to the value of the fixtures when the land is acquired. • If things on land are not fixtures (including because of statutory severance), duty only applies if they are acquired with the land.	Introduction of a fixed to land model to apply to direct and indirect acquisitions of things fixed to land, regardless of whether they are common law fixtures or if they are being acquired independently from the underlying land. The meaning of *land* is extended to include anything fixed to land, whether or not that thing: • constitutes a fixture at law; or • is owned separately from the land; or

	Transfer duty does not apply if the chattels are acquired without the underlying interest in the land. For landholder duty, the value of the chattels cannot be included when determining if the landholder threshold is met (but if the threshold is met, the chattels are included in the duty base).	• is notionally severed or considered to be legally separate from the land as a result of how a State or Commonwealth law operates.
9. Certain rights now dutiable assets	Not currently dutiable assets.	Rights that allow people to control, access or operate fixed infrastructure are also included as dutiable assets, together with statutory licences authorising the ownership, operation or control of infrastructure. Duty applies where a person effectively acquires ownership of fixed infrastructure through a licence or contractual arrangement rather than through an outright purchase. Fixed infrastructure control rights, fixed infrastructure access rights, and fixed infrastructure statutory licences are included as dutiable property. Such rights are included as land assets for landholder duty purposes.
Derivative Mining Rights		
10. Dutiable property – category of new right	Under the *Mining Act 1978*, the holder of a mining tenement may authorise another person to explore for and mine specific minerals on the holder's tenement.	The Bill brings contractual mining rights back into the duty base. A *derivative mining right* is a new category of right that is defined to mean an authorisation of a kind described in section 118A of the *Mining Act 1978* (whether or not the authorisation purports to be made under that section). Duty will apply to: • the transfer or grant of a derivative mining right, regardless of whether there is consideration for the transaction; and • the surrender of a derivative mining right if there is consideration for the surrender. A derivative mining right is included as a land asset for landholder duty purposes.

Other	
11. Other	Pastoral leases: clarifies that pastoral leases are land under the Duties Act. Duties family farm exemption: amendments to ensure the exemption better accommodates modern farming business structures and succession planning arrangements. Partnership acquisitions: clarifies duty calculations where partnership property is transferred to or retained by a partner on their retirement from, or dissolution of, a partnership. Amendments to certain nominal duty transactions: • a transfer of property to a person to hold as bare trustee for the transferor (specifically when nominal duty applies to and from the bare trustee and the beneficiary); • a transfer of property to a person under the Guardianship and Administration Act 1990; and • transfers of property to facilitate a subdivision (specifically when nominal duty applies on a transfer of non-subdivided land and the re-transfer of subdivided land). Incorporated associations: a duties exemption for certain transfers of property under the *Associations Incorporation Act 2015* (which will apply to transfers of property by not-for-profit associations as a result of winding up, transfer of incorporation, or amalgamation).

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