# Foreign Landholder Duty

**effective 1 January 2019**

Under the *Duties Act 2008* ('Duties Act'), landholder duty is imposed on certain acquisitions of an interest in a corporation or unit trust that holds land in Western Australia valued at $2 million or more.

From 1 January 2019, the Duties Act imposes additional duty on certain acquisitions by a foreign person, or someone related to a foreign person, of an interest in a landholder that holds residential property (a residential landholder).[1] The additional duty is calculated at a rate of 7% based on the value of residential property and associated chattels held by the landholder and the extent of the interest acquired by the foreign person or a foreign related person.

See Duties Fact Sheet 'Landholder Duty' for information about landholder duty.

## Foreign Person

A foreign person can be:

(a) a foreign individual; or

(b) a foreign corporation; or

(c) a foreign trustee.

To determine whether a corporation or a trustee is foreign, the relevant interests in the corporation or trust held by foreign persons and all their associates will be aggregated, regardless of whether the associates are foreign persons or are associates of one another.

### Foreign Individual

Individuals who are not Australian citizens are foreign individuals unless they hold a permanent or special category visa, as determined by the Department of Home Affairs.[2]

- A *permanent visa* is a visa to remain in Australia indefinitely.  Holders of permanent visas are commonly referred to as Australian permanent residents.
- A *special category visa* refers to a visa for New Zealand citizens who wish to visit, stay or work in Australia.

### Foreign Corporation

A foreign corporation is:

- a corporation that was incorporated outside Australia; or
- a corporation in which foreign persons have a controlling interest.

Foreign persons are taken to have a controlling interest in a corporation if one or more foreign persons or their associates directly or indirectly control at least 50 per cent of the voting or potential voting power,[3] or hold at least 50 per cent of the issued shares in the corporation.[4]

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1 *Duties Act 2008* Chapter 3A inserted by the *Duties Amendment (Additional Duty for Foreign Persons) Bill 2018.*

2 https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/special-category-visa-subclass-444

3 As defined in the *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 4.

4 *Duties Act 2008* s 205C.

Voting power in a corporation refers to the number of votes that might be cast at a general meeting of a corporation.  Potential voting power in a corporation refers to the voting power based on the assumption that the votes:

- may exist in the future because of an exercise of a right, and
- if they came into existence, could be cast at a general meeting of a corporation.[5]

**Example 1**

XYZ Pty Ltd has five shareholders:

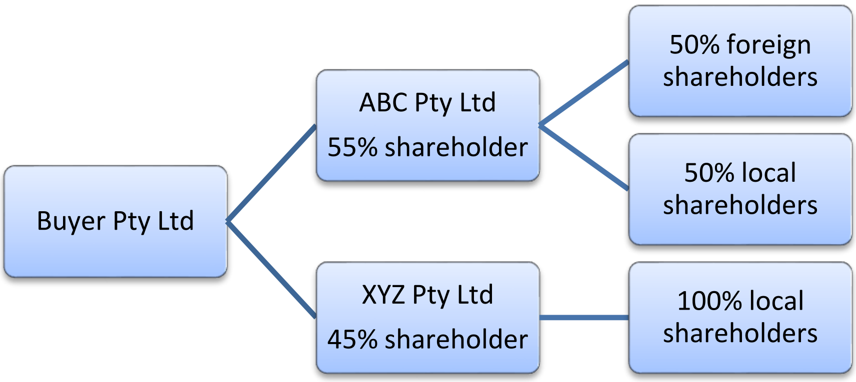
- Shareholder 1 – Local (10 per cent)
- Shareholder 2 – Foreign (15 per cent)
- Shareholder 3 – Local (30 per cent)
- Shareholder 4 – Foreign (25 per cent)
- Shareholder 5 – Local (20 per cent)

To determine whether a corporation is a foreign corporation, the interests of all foreign shareholders are aggregated. The aggregated interests of foreign shareholders 2 and 4 in XYZ Pty Ltd is 40 per cent.

Shareholders 3 and 5 are spouses of shareholders 2 and 4 and are therefore deemed to be associates.  Their 50 per cent interest must be aggregated with those of the foreign shareholders.

XYZ Pty Ltd is a foreign corporation because the aggregated interest of foreign persons and their associates is 90 per cent.

**Example 2**




Buyer Pty Ltd has acquired a 100% interest in a corporation which holds residential land in Western Australia valued at $5 million.

To determine whether Buyer Pty Ltd is a foreign corporation, the Commissioner will consider whether its shareholders are foreign.  Buyer Pty Ltd's majority shareholder, ABC Pty Ltd, has 50 per cent foreign ownership and is considered a foreign corporation.

Because ABC Pty Ltd is a foreign corporation and owns 55 per cent of the shares in Buyer Pty Ltd, Buyer Pty Ltd is also considered to be a foreign corporation.

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5 For example, a shareholder who holds 30 per cent of the general shares in a corporation and an option to acquire a further 5 per cent is said to have 35 per cent potential voting power (assuming all shares have equal voting rights).

## Foreign Trustee

A foreign trustee is a trustee of a foreign trust. An individual or corporation acting as trustee for a foreign trust is considered a foreign trustee, irrespective of whether they are a foreign person in their own capacity.

A foreign trust is:

- a discretionary trust controlled by a foreign person; or
- a discretionary trust where one or more foreign persons that are takers in default, together with their associates, hold at least 50 per cent interest in the discretionary trust; or
- a trust other than a discretionary trust where one or more foreign persons, together with their associates, hold beneficial interests in at least 50 per cent of the income of the trust.

A person controls a discretionary trust if they are in a position to directly or indirectly influence the vesting of the capital of the trust property or the distribution of income from the trust property.

**Example 3**

John Smith, an Australian citizen, is trustee for the Smith Family Trust ('the Trust'). He is also one of the takers in default of the Trust. John's wife, Jean Smith, is a foreign individual and is the other taker in default.

John's father, who is also foreign, is the appointor of the Trust.

The Trust is a foreign trust for the following reasons:

1. Jean as one of the takers in default of the Trust holds 50% of the interest in the Trust.
2. John is an associate of Jean because they are husband and wife. Together they hold 100 per cent of the interest in the Trust.
3. The Trust appointer who controls the appointment of new trustees is a foreign individual.

Any one of the above factors would make the Trust a foreign trust.

**Example 4**

John Smith, an Australian citizen, is trustee for the Property Investment Unit Trust ('the Trust') which has a total of 100 units.

Sixty units are held by foreign persons and their associates, which gives them a beneficial interest in 60 per cent of the trust's income and property.

John Smith acquires an interest in a residential landholder on behalf of the Trust.

John Smith is considered to be a foreign trustee because foreign persons and their associates hold beneficial interests in at least 50 per cent of the trust income or property. Foreign landholder duty is chargeable on the acquisition.

## Associates

A person is an associate[6] of another person if they are:

- family members;[7] or
- partners in the same partnership; or

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6 *Duties Act 2008* s 205B.

7 *Duties Act 2008* s 100.

- related corporations;[8] or
- trustees sharing a common beneficiary; or
- an individual and corporation where that individual is a majority shareholder[9] of the corporation; or
- a trustee and a beneficiary of the same trust; or
- a corporation and a trustee of a trust where the corporation or its majority shareholder is a beneficiary; or
- a corporation and a trustee of a trust where a related corporation is a beneficiary.

If a beneficiary of a trust, other than a unit trust scheme or a discretionary trust, is an associate of a person, the trustee of the trust is also treated as an associate of that person.

**Example 5**

ABC Pty Ltd has two shareholders, Jane Smith who holds 45% of the shares and David Clark who holds 55% of the shares as bare trustee for John Smith. Jane Smith and John Smith are husband and wife. As Jane and John are associates, David as trustee for John is also an associate of Jane.

## Residential Landholder

For the purposes of foreign landholder duty, an entity is a residential landholder if it is a landholder,[10] and it is entitled to residential property, or a linked entity is entitled to residential property.

### Residential Property

Residential property is land:

(a) capable of being (or intended to be) used solely or dominantly for residential purposes; or

(b) vacant (or substantially vacant) and zoned solely for residential purposes,

and includes any estate or interest in land or anything that is part of the land as a fixture.

Example of properties that are capable of being (or intended to be) used solely or dominantly for residential purposes include:

- established homes and apartments;
- commercial property that a person intends to convert into a residence;
- land on which a person intends to construct a residence;
- land which a person intends to develop into residential properties or subdivide to enable another person to construct a home or apartment on the land; or
- partially constructed residences which a person intends to complete.

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8 Related corporation has the same meaning as related body corporate, as defined in the *Corporations Act 2001* (Cth) s 50.

9 *Duties Act 2008* s 3.

10 A corporation or unit trust is a landholder if it has a total entitlement to land in Western Australia (either directly or through one or more linked entities) valued at $2 million or more.

### Excluded Residential Property

Certain property is specifically excluded[11] from being residential property for the purposes of determining whether an entity is a residential landholder:

- land that is intended to be used solely or dominantly for the purposes of an aged care facility as defined in the *Land Tax Assessment Act 2002* section 38A(1);
- land that is intended to be used solely or dominantly for the purposes of commercial residential premises[12] as defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) section 191-1;
- land that is intended to be used solely or dominantly for the purposes of a retirement village as defined in the *Retirement Villages Act 1992* section 3(1);
- an easement;
- a security interest; and
- a carbon right or carbon covenant registered under the *Carbon Rights Act 2003*.

## Foreign Landholder Acquisitions

For the acquisition of an interest in a residential landholder to be chargeable with foreign landholder duty, it must be a foreign landholder acquisition. A foreign landholder acquisition is either the acquisition of a significant interest in a residential landholder, or of a further interest in a residential landholder.

### Acquisition of a significant interest in a residential landholder

An acquisition of an interest by a person in a residential landholder will be a foreign landholder acquisition if:

- before the acquisition, the interest of the person (if any) and any related person in the landholder was not a significant interest; [13]
- after the acquisition, the interest of the person, or the interest of the person combined with any interest of a related person, in the landholder is a significant interest; and
- either the person is foreign, or the person is not foreign but a related person who held an interest in the landholder after the acquisition is foreign.

### Acquisition of a further interest in a residential landholder

An acquisition of an interest by a person in a residential landholder will be a foreign landholder acquisition if:

- before the acquisition, the interest of the person (if any) and any related person was a significant interest; [14]
- by the acquisition the person or a related person acquires a further interest in the landholder; and
- either the person is foreign, or the person is not foreign but a related person who held an interest in the landholder after the acquisition is foreign.

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11 Because it is not residential property for the purposes of section 205E(1) of the Duties Act.

12 Includes hotels, motels, inns, hostels and boarding houses. For a full definition, see *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 191-1.

13 A significant interest is a 50% or greater interest in an unlisted landholder and 90% or greater interest in a listed landholder.

14 A significant interest is a 50% or greater interest in an unlisted landholder and 90% or greater interest in a listed landholder.

**Example 6**

ABC Pty Ltd is an unlisted corporation that is a residential landholder. Foreign Investor Pty Ltd is a foreign corporation that does not hold any shares in ABC Pty Ltd and is unrelated to any shareholder.

Foreign Investor Pty Ltd buys 50% of the issued shares in ABC Pty Ltd. As this is a significant interest the acquisition is a foreign landholder acquisition.

**Example 7**

XYZ Investment Trust is a unit trust scheme that is a residential landholder.

Foreign Investor Pty Ltd is a foreign corporation that owns 30% of the units in the XYZ Investment Trust and is unrelated to any other unitholder.

Ms White is an Australian permanent resident who is a director of Foreign Investor Pty Ltd. Ms White buys 30% of the units in XYZ Investment Trust from an unrelated unitholder.

This will be a foreign landholder acquisition as:

- Ms White is related to Foreign Investor Pty Ltd
- The combined interest of Ms White and Foreign Investor Pty Ltd is now 60%, which is a significant interest
- A related person of the acquirer holds an interest in the residential landholder and is foreign.

**Example 8**

DEF Pty Ltd is a corporation that is a residential landholder. Smith Pty Ltd holds 50% of the shares in DEF Pty Ltd as trustee of the Smith Family Trust, which is a foreign trust.

DEF Pty Ltd issues additional shares to Smith Pty Ltd as trustee for the Smith Family Trust, increasing its interest to 75%. This will be a foreign landholder acquisition as it is the acquisition of a further interest in a residential landholder by a foreign person.

## Calculation of Foreign Landholder Duty

The value of a residential landholder is the sum of:

- the unencumbered value of residential property to which the residential landholder is entitled;
- the percentage of the unencumbered value of residential property to which a linked entity[15] of the landholder is entitled equal to the percentage interest of the landholder in that linked entity;
- the unencumbered value of chattels that are used with residential property, and to which the residential landholder is entitled;
- the percentage of the unencumbered value of chattels that are used with residential property, and to which a linked entity of the residential landholder is entitled equal to the percentage interest of the landholder in that linked entity.

15 For more information on linked entities see Duties Fact Sheet 'Landholder Duty'.

Duty on a foreign landholder acquisition is calculated as:

> (7% x (Value of Residential Landholder) x (Interest of foreign person and foreign related persons)) – (7% x (Value of Residential Landholder) x (Excluded interest of foreign person and foreign related persons)).

An excluded interest is any of the following:

- An interest held for more than three years before the foreign landholder acquisition
- An interest held before 1 January 2019
- An interest held before the residential landholder was entitled to residential property in Western Australia
- An interest on which foreign landholder duty was previously chargeable

**Example 9**

ABC Pty Ltd is a landholder which holds residential land valued at $10 million. Ms Jones (who is foreign) acquires 100% of the shares in ABC Pty Ltd from an unrelated party.

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|---|---|
| Foreign Landholder Duty | = 7% x $10 million x 100% |
| | = $700,000 |

**Example 10**

ABC Pty Ltd is a landholder which holds residential land valued at $10 million. Ms Jones (who is foreign) acquires 40% of the shares in ABC Pty Ltd from an unrelated party on 1 July 2018. On 1 July 2019 Ms Jones increases her interest to 60%.

The 40% interest acquired on 1 July 2018 is an excluded interest as it was held before 1 January 2019.

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|---|---|
| Foreign Landholder Duty | = (7% x $10 million x 60%) – (7% x $10 million x 40%) |
| | = $420,000 - $280,000 |
| | = $140,000 |

**Example 11**

XYZ Pty Ltd is a landholder which owns 60% of the issued units in a property development unit trust. The trust holds several residential properties plus some furniture used in those properties. The combined value of the land and furniture is $6 million.

Mr Tan, who is foreign, acquires 50% of the shares in XYZ Pty Ltd from an unrelated person.

| | |
|---|---|
| Foreign Landholder Duty | = 7% x (60% x $6 million) x 50% |
| | = $126,000 |

## Exempt Acquisitions

### Where direct transfer would be exempt

A foreign landholder acquisition will be exempt from foreign landholder duty if the corresponding direct transfer of the residential property would be exempt from foreign transfer duty.

See Duties Fact Sheet 'Foreign Transfer Duty' for more information on transactions that are exempt from foreign transfer duty.

**Example 12**

Jack Brown is an Australian permanent resident who holds 100% of the shares in Brown Pty Ltd, a corporation which holds several residential properties with a value of $10 million.

Jack dies with a will leaving all of the shares in the company to his sister Jane, who is a foreign person. The executor of Jack's will transfers the shares to Jane in conformity with Jack's will.

If the acquisition had instead been a direct transfer of residential property from the executor to Jane it would have been exempt from foreign transfer duty. The acquisition is therefore exempt from foreign landholder duty.

## Residential Developer Exemptions

A foreign landholder acquisition will be exempt from foreign landholder duty in the following circumstances:

### *Landholder intends to construct or refurbish dwellings*

- The residential landholder or a linked entity is entitled to land that does not have a building suitable to be used as a residence;
- the landholder, linked entity or associate intends to construct or refurbish 10 or more dwellings on the land; and
- within five years after the acquisition, construction or refurbishment (whichever is applicable) has commenced.[16]

### *Landholder intends to complete construction or refurbishment of dwellings*

- The residential landholder or a linked entity is entitled to land that does not have a building suitable to be used as a residence;
- the landholder, linked entity or associate intends to complete construction or refurbishment of 10 or more dwellings on the land; and
- within five years after the acquisition, construction or refurbishment (whichever is applicable) is completed.[17]

### *Landholder intends to subdivide for purpose of construction*

- The residential landholder or a linked entity is entitled to land that is vacant;
- the landholder, linked entity or associate intends to subdivide the land so 10 or more dwellings can be constructed on the parcel of land; and
- within five years after the acquisition subdivision has commenced.[18]

### *Landholder intends to complete subdivision*

- The residential landholder or a linked entity is entitled to land that is vacant;
- the landholder, linked entity or associate has commenced subdividing the land so 10 or more dwellings can be constructed on the parcel of land; and
- within five years after the acquisition subdivision has completed.[19]

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[16] For eligibility criteria and application timeframes, refer to section 205ZO of the *Duties Act 2008*.

[17] For eligibility criteria and application timeframes, refer to section 205ZO of the *Duties Act 2008*.

[18] For eligibility criteria and application timeframes, refer to section 205ZP of the *Duties Act 2008*.

[19] For eligibility criteria and application timeframes, refer to section 205ZP of the *Duties Act 2008*.

Where the residential landholder holds some land that is not eligible for this exemption, a partial exemption will apply.

A taxpayer who is eligible for an exemption may apply for a reassessment and refund of duty by submitting form FDA44 'Foreign Landholder Duty – Developer Exemption' available on the State Revenue website.

## Contact the Office of State Revenue

<table>
<tr><td rowspan="1">Office</td><td>Office of State Revenue<br>200 St Georges Terrace<br>PERTH WA 6000</td><td rowspan="2">Telephone<br><br>Enquiries<br><br>Website</td><td rowspan="2">9262 1100<br><br>http://www.osr.wa.gov.au/DutiesEnquiry<br><br>www.finance.wa.gov.au</td></tr>
<tr><td>Postal</td><td>Office of State Revenue<br>GPO Box T1600<br>PERTH WA 6845</td></tr>
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