CIRCULAR 18

DUTIES ACT 2008
LAND TAX ASSESSMENT ACT 2002
PAY-ROLL TAX ASSESSMENT ACT 2002
TAXATION ADMINISTRATION ACT 2003

REVENUE LAWS AMENDMENT BILL 2018
TAXATION ADMINISTRATION AMENDMENT BILL 2018

The Revenue Laws Amendment Bill 2018 was introduced into the Legislative Assembly on 29 November 2018. The Bill contains amendments to address significant duty leakage, ensure certain taxpayer exemptions and concessions apply correctly, and improve the efficiency of the State's taxation legislation. A summary of the key amendments is provided below.

Part 2 Divisions 1 and 2 of the Bill are proposed to come into operation on the day after Royal Assent. Part 3 Division 1 is proposed to come into operation on 1 July 2019.

The Bill is complemented by the Taxation Administration Amendment Bill 2018, which was also introduced into the Legislative Assembly on 29 November 2018. This Bill contains amendments to improve the administrative and enforcement arrangements in the *Taxation Administration Act 2003*. A summary of these amendments is also available below.

Part 2 of this Bill is proposed to come into operation on the day after Royal Assent.

The information provided in this circular is not an exhaustive explanation of the amendments. For full details, please refer to the Bills and the Explanatory Memoranda available on the Parliament website (www.parliament.wa.gov.au).

These changes are subject to the passing of the Bills by the Parliament and the granting of Royal Assent.

Revenue Laws Amendment Bill

Landholder duty

Under the *Duties Act 2008* (Duties Act), landholder duty applies to a relevant acquisition in a *landholder*. A *landholder* is a company or unit trust that is entitled to land in Western Australia of $2 million or more. Duty is assessed on the value of land and chattels held by the landholder and any linked entities in proportion to the interest being acquired.

Acquisitions resulting from one arrangement

The Bill introduces new grouping provisions to apply duty to the following acquisitions or transactions that result from one arrangement:

- 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 have a land value of $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 aggregated with a landholder acquisition.
- Acquisitions in two or more entities that together have a direct or indirect interest of 50 per cent or more in a landholding entity.

These amendments will only apply where all acquisitions or transactions occur after commencement day.

Linked entities

A landholder's entitlement to land may be held indirectly through a linked entity. Under the current provisions, an entity is linked to another entity if it has:

- for listed entities – an interest in the other entity of at least 90 per cent; and
- for unlisted entities – an interest in the other entity of at least 50 per cent.

The Bill broadens the provisions to link an entity to an unlisted entity where the first entity has a total direct or indirect interest of 50 per cent or more in the other entity. This includes where the interest is held through a combination of direct or indirect interests or through multiple ownership chains. This means land held by an unlisted entity is included for landholder purposes where the main entity has a total direct or indirect interest in that entity of at least 50 per cent.

Relevant acquisitions and related persons

A defect in the current provisions means that acquisitions between related persons are not always subject to duty. This is an unintended outcome of the transition to the landholder model in the Duties Act from the land rich model under the *Stamp Act 1921*. The Bill restores the policy intent by applying duty to relevant acquisitions between related persons.

The legislation defines when persons are related for landholder purposes. The Commissioner has discretion to treat related persons as unrelated in certain circumstances. Amendments will:

- 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.

Other amendments

These and other amendments address minor technical issues and improve the general administration of the provisions.

- Landholder duty will apply where one or more merging corporations holds land indirectly through a subsidiary.
- 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.

Exemptions for connected entities

The connected entities exemption provides relief from duty on certain transactions between tightly controlled corporations and unit trust schemes that qualify as a family.

Automatic revocation of exemption

The purpose of the exemption is to promote more efficient group structures. However, the exemption is currently being used to package business assets into a company structure so that a third party can acquire them without paying duty. A direct acquisition of these assets is dutiable, but duty does not apply if the assets are acquired indirectly through the purchase of shares in a company or units in a unit trust.

To address this issue, the Bill introduces an automatic revocation of exemption if the transferee entity:

- is removed from the family within three 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.

After an exemption is automatically revoked for a transaction, the Commissioner will issue a transfer duty assessment for the dutiable property still held by the entity. The duty will be reduced by any landholder duty on the acquisition of the transferee entity to the extent it relates to land that was previously exempt.

Other amendments

These and other amendments address minor technical issues and improve the general administration of the exemption.

- The Commissioner will be unable to grant an exemption if satisfied the exemption would be revoked.
- 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.
- 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.
- 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.

Transitional provisions

The amended provisions apply in relation to an exemption regardless of the date 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. However, 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 proposed transaction.

Fixed to land

The Bill introduces a fixed to land model into the Duties Act. This applies duty 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.

At a high level, duty will apply as follows:

Asset acquired	Property for duty purposes
Land only	Land plus common law fixtures
Land plus a thing fixed to land	Land plus the thing fixed to land plus any common law fixtures (other than the thing fixed to land)
A thing fixed to land (separate from the underlying land)	The thing fixed to land
Control rights, access rights, or a statutory licence relating to fixed infrastructure	• Control rights • Access rights or statutory licence if the related fixed infrastructure or fixed infrastructure control rights also acquired

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
- is notionally severed or considered to be legally separate from the land as a result of how a State or Commonwealth law operates.

A thing is not fixed to land if it is:

- acquired without the underlying land also being acquired and the purchaser permanently removes the thing within 90 days after it is transferred (or a longer period approved by the Commissioner);
- temporarily fixed to land for construction purposes; or
- not a fixture at law and is used in a primary production business.

A transaction involving the acquisition of a thing fixed to land (either with or without the land it is fixed to) will attract transfer duty. If a thing fixed to land is not a common law fixture, duty will not apply to the thing if a person acquires the underlying land but not the thing.

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. *Fixed infrastructure control rights*, *fixed infrastructure access rights*, and *fixed infrastructure statutory licences* are included as dutiable property, new dutiable property, and special dutiable property.

Duty will apply to:

- the transfer or grant of a fixed infrastructure control right;
- the transfer or grant of a fixed infrastructure access right or fixed infrastructure statutory licence if the related fixed infrastructure or fixed infrastructure control rights are also acquired; and
- the surrender of these rights if there is consideration for the surrender.

Things fixed to land and fixed infrastructure rights are included as land assets for landholder duty purposes. The value of things fixed to land and fixed infrastructure control rights will be included when determining a landholder's entitlement to land and in the value of the landholder when calculating duty.

Fixed infrastructure access rights will only be taken into account when determining an entity's entitlement to land if an entitlement to the related fixed infrastructure of a related fixed infrastructure control right is held by the entity or certain associated entities. A fixed infrastructure statutory licence will be included in the value of land assets and chattels for the purposes of calculating landholder duty in the same circumstances.

Fixed to land assets and fixed infrastructure rights will also be dutiable property in the partnership provisions.

Derivative mining rights

These amendments bring contractual mining rights back into the transfer duty base following a Court of Appeal decision in 2014 that determined these rights are not an interest in a mining tenement.[1] They also allow these rights to be included for landholder duty purposes.

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 purposes 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. The value of the rights will be included when determining a landholder's entitlement to land and in the value of the landholder when calculating duty.

In certain cases, the unencumbered value of a mining tenement will be determined taking into account the effect of a derivative mining right (existing or proposed) on the value of the tenement. Other provisions will provide relief from duty in certain circumstances where derivative mining rights must be re-granted.

Derivative mining rights will also be dutiable property in the partnership provisions.

Pastoral leases

The Bill clarifies that pastoral leases are land under the Duties Act. A transitional validation provision will support assessments made from 1 July 2008 on dutiable transactions involving these leases.

---

1 *Commissioner of State Revenue v Abbotts Exploration Pty Ltd* [2014] WASCA 211.

Duties family farm exemption

The duties family farm exemption applies to certain transfers of farming property between family members. These amendments ensure the exemption better accommodates modern farming business structures and succession planning arrangements. The exemption will apply where:

- a farmer transfers farming property to a related discretionary trust under which the farmer is a beneficiary;
- a farmer transfers farming property to a family member and retains an interest in the entity conducting the farming business on the land;
- a farmer who previously conducted a farming business is not doing so immediately prior to a transfer of land to a family member, but a family member (or a related entity) is;
- the partnership that conducts a farming business includes non-family members;
- a farmer and their spouse (transferors) and the farmer's sibling and their spouse (transferees) are parties to a transaction or have an interest in the entity conducting the farming business; and
- if a transferee is a bare trustee, the beneficiaries hold an interest in the related entity that conducts the farming business.

Partnership acquisitions

The Bill ensures the correct duty outcome where partnership property is transferred to or retained by a partner on their retirement from, or dissolution of, a partnership.

Where dutiable property is transferred to a retiring partner, duty will apply if the value of the transferred property and any retained property exceeds the value of the person's partnership interest in the property. Where dutiable property is retained by a person who held it for the partnership, there is deemed to be a transfer of that item to that person. Duty applies on the deemed transfer if the value of the property exceeds the value of the person's partnership interest in the property.

Certain nominal duty transactions

Subject to certain conditions, a duties concession is usually available for the following transactions:

- a transfer of property to a person to hold as bare trustee for the transferor;
- a transfer of property to a person under the *Guardianship and Administration Act 1990*; and
- a transfer of property to facilitate a subdivision.

This Bill introduces specific provisions for these concessions to reflect that the transactions are fundamentally different legal and commercial concepts. The new provisions are broadly consistent with the Commissioner's longstanding practice for providing a concession for these transactions. However, the provisions have been drafted prescriptively to provide certainty about how the concessions apply and to address concerns about duty avoidance.

Incorporated associations

These amendments introduce a duties exemption for certain transfers of property under the *Associations Incorporation Act 2015* that result from the restructure of not-for-profit associations through amalgamation, winding-up, or transfer of incorporation.

Other duties amendments

These and other amendments correct minor technical issues and improve the general administration of the Duties Act.

- A partnership acquisition may qualify for the deceased estates concession.
- The vehicle licence duty exemption for transfers between spouses is retrospectively reinstated from 1 July 2014.
- The daughter-in-law, son-in-law and step-parents of a purchaser are included as eligible related persons who can be substituted transferees that receive a concession on the transfer of property.

Land tax amendments

A land tax exemption applies in certain circumstances where a person constructs or refurbishes a private residence, moves between two private residences, or constructs or refurbishes a second private residence. The Bill ensures these exemptions apply to land that is subdivided or amalgamated during an assessment year. These amendments will apply from 1 July 2019 unless construction or refurbishment started before that date.

The following amendments deal with minor technical issues:

- A minor amendment to the primary production exemption requires all beneficiaries of a trust (other than a unit trust scheme) to be family members of the nominated beneficiary to qualify for the exemption. Taxpayers will have until 30 June 2020 to amend their trust deeds to comply with this requirement and be entitled to the exemption for 2019-20.
- New apportionment provisions set out how the Commissioner will determine the taxable value of land that is partly used for an exempt purpose. Special rules have been included for apportioning the taxable value of land that includes a multi-storey building that is partly used for an exempt purpose. Both methods are consistent with the Commissioner’s long-standing practice for apportioning taxable value in these circumstances.
- A residential exemption will apply where a person with a disability lives in a home owned by their child.
- A regulation-making power will allow retrospective regulations to be made where they benefit taxpayers.

Payroll tax amendments

A minor amendment is made for the purposes of calculating the exempt component of a motor vehicle allowance. The reference to the rate prescribed in the income tax regulations is replaced with a reference to the rate prescribed in the payroll tax regulations.

Taxation Administration Amendment Bill

The key amendments in the Taxation Administration Amendment Bill strengthen the Commissioner's powers to recover unpaid tax as follows:

- The recovery provisions for dishonoured payments are expanded to include electronic payments such as BPay and BPoint.
- With the taxpayer's consent, the Commissioner can lodge a memorial against land or mining tenements transferred to a taxpayer after payment of an interim transfer duty assessment. The memorial will remain in place until the final assessment is paid.
- The Commissioner can lodge a memorial against land or mining tenements owned by a taxpayer to secure unpaid duty that results from a reassessment of the taxpayer's liability on the purchase of that property.
- The Commissioner can recover from a taxpayer the costs of withdrawing a memorial after the payment of outstanding tax.
- The Commissioner can lodge a memorial to create a charge on land for any unpaid foreign transfer duty or foreign landholder duty.

These and other minor amendments reduce red tape and improve administration.

- Costs for lodging and withdrawing a memorial, and legal costs associated with recovery action, can be included in a tax payment arrangement
- The service of documents by fax is removed.
- The requirement to give notice of new and amended Commissioner's practices in the *Government Gazette* is replaced by a requirement to publish them on the State Revenue website.
- Interest will be payable on a refund of tax as the result of a successful objection under the *Valuation of Land Act 1978* to a value used in a land tax assessment. A transitional validation provision will support interest payments made from 1 July 2003 in these circumstances. The Commissioner must also refund any incurred memorial costs to the taxpayer.