



## **CIRCULAR 2**

## **DUTIES ACT 2008 CERTAIN EXEMPTIONS FOR CONNECTED ENTITIES**

The following is a general summary of Chapter 6 of the *Duties Act 2008*, (“the Duties Act”) which sets out the exemption from duty for certain transactions that occur in relation to entity restructuring. Reference should be made to the Duties Act and the explanatory memorandum for further details. The Duties Act comes into operation on 1 July 2008.

These provisions represent a major redesign of the corporate reconstruction arrangements that currently exist in the Stamp Act 1921 (“the Stamp Act”). While the policy of facilitating more efficient business structures still underlies the new regime, the parameters of the previous exemption have been relaxed due to the introduction of the landholder duty model.

As part of the development of the landholder duty model contained in Chapter 3 of the Duties Act, the policy underlying the corporate reconstruction exemption provided by the Stamp Act was reconsidered. It was identified that with landholder duty being introduced, the availability of the exemption could be extended, and some of the restrictions that currently exist in relation to eligibility for the exemption could be removed.

Landholder duty seeks to achieve greater consistency between the stamp duty treatment of interests in companies and unit trusts. Similarly, the entity restructuring provisions remove the previous limitation that only applied the exemption to transactions involving companies, such that it applies to both companies and unit trusts.

This has been achieved by defining an “entity” as a corporation or a unit trust scheme. An exemption is available for certain transactions between entities that are family members. Entities may constitute a “family” where the relationship between the entities is that of parent entity and subsidiary. An entity is a parent entity if it directly or indirectly holds at least 90% of the issued shares or units of another entity, and controls at least 90% of the maximum number of votes that may be cast at a general meeting of that other entity. That other entity is a subsidiary of the parent entity.

The second major shift in policy that has been incorporated in the entity restructuring provisions is the removal of the three-year pre-association test. Under the Stamp Act, bodies corporate must be associated (that is, one body corporate must be at least 90% owned by the other body corporate, or a third body corporate must own 90% of the two bodies corporate) for the qualifying period, which is generally a three year period, before being eligible for the exemption.

The current pre-association period was intended to prevent a corporate group acquiring a company without a duty liability (a non land-rich company) and then stripping its assets through a corporate reconstruction exemption. However, this three year association requirement does not apply if duty has been charged under the land-rich provisions on the acquisition of the body corporate.

The implementation of the landholder duty regime means that the acquisition of a corporation or unit trust scheme will, in most cases, attract landholder duty if the corporation or unit trust scheme holds land. The exception to this will be in the case where the value of the land is below the landholder value threshold. As the three year pre-association test would be waived in most cases, the need for the pre-association test is obviated and it has been removed in the provisions.

Therefore, the only requirement that must be satisfied before the exemption is granted is that there is a “relevant transaction”. A “relevant transaction” is defined as a relevant reconstruction transaction or a relevant consolidation transaction.

A “relevant reconstruction transaction” is:

- a dutiable transaction on which transfer duty is imposed that involves dutiable property moving from one member of a family to another;
- a transfer of a licence for a motor vehicle on which vehicle licence duty is imposed that involves a transfer of a licence from one member of a family to another;
- a relevant acquisition on which landholder duty is imposed which involves an acquisition by one member of a family of an interest in another member of the family; or
- a relevant acquisition on which landholder duty is imposed which involves an acquisition of an interest in an entity from one member of a family to another.

A “relevant consolidation transaction” is a transaction whereby a company or unit trust is interposed between an entity and its security holders. A relevant consolidation transaction will be any of the transactions necessary to give effect to the interposition, being the issue of shares or units in the new head entity to the shareholders or unit holders of the affected entity, and the transfer of the shares or units in the affected entity to the new head entity. Without the relevant consolidation transaction exemption, these transactions would constitute an acquisition under the landholder duty provisions and may be subject to landholder duty.

An application for exemption may be made in respect of a relevant consolidation transaction or a relevant reconstruction transaction within 12 months after the date of the transaction. An application to the Commissioner is required using an approved form and providing any required information.

The other major policy change incorporated in the entity restructuring provisions is the removal of the current five-year post-association test following the grant of an exemption. Currently, bodies corporate must remain associated for a period of five years after the exemption is granted. This is intended to prevent the packaging of assets in a body corporate for sale in a structure that would not be dutiable under the land-rich provisions, such as packaging the assets of a company so that it does not satisfy the 60% land-rich test.

The landholder duty regime will result in duty being imposed on the purchase of most corporations or unit trusts that hold Western Australian land, with the exception of those entities that hold land valued at below the landholder value threshold, or where the interest acquired is less than the landholder acquisition threshold. Given that the sale of most corporations and unit trusts will therefore be brought to duty under the landholder duty provisions, it is considered that the post-association test places unnecessary restrictions on these entities.

The removal of the post-association test also recognises that the divestment of particular assets may be necessary to achieve a more efficient group structure. The post-association test may be a disincentive to creating efficiencies through the sale of assets. Its removal is therefore consistent with the long standing principle, underlying the corporate reconstruction exemption, of facilitating more efficient business structures.

However, it is not considered appropriate for the entity restructuring exemption to be used to facilitate the avoidance of duty or other taxes. To address concerns with the possible avoidance opportunities that may arise, these provisions contain a notification regime, whereby certain persons must notify the Commissioner of certain transactions that result in a change in the group's structure.

This serves as a compliance tool for the Commissioner to determine, firstly, whether there is any liability in relation to the event that triggered the notification, and secondly, whether the exemption was part of a scheme or arrangement to avoid duty on another transaction or to avoid another tax.

Generally, if duty has been paid in relation to the notifiable event, then it is likely that the Commissioner would be satisfied that there had been no scheme entered into to avoid duty. However, if duty has not been paid, the Commissioner could consider whether the exemption was used to facilitate the avoidance of duty.

The provisions then enable the Commissioner to revoke the exemption if he is of the opinion that it was part of a scheme or arrangement to avoid duty on another transaction or to avoid another tax. Penalty and offence provisions are included to support the notification and revocation provisions.

In order to provide certainty to people who are proposing to enter into a relevant transaction, the provisions contain a process for a request to be made to the Commissioner to determine if an exemption would be granted in respect of the proposed transaction. If a further transaction is proposed, then a request may be made for a determination as to whether the Commissioner would consider that the exemption was part of a scheme or arrangement to avoid duty or another tax, and therefore revoke the exemption.

Where a request for a determination has been made, the Commissioner will be bound by that determination, except in cases where the facts surrounding the actual transaction are materially different from those disclosed in respect of the proposed transaction, or where there was not a full and true disclosure of information in relation to the request.

## **HOW TO OBTAIN FURTHER INFORMATION**

The Duties Act, together with the explanatory memorandum, is available on the Department of Finance website at [www.osr.wa.gov.au](http://www.osr.wa.gov.au)

An extensive taxpayer awareness and education campaign, including new publications and a free customer education program, will be undertaken by the Office of State Revenue to assist taxpayers in meeting their obligations under the Duties Act.

The Department of Finance website will be updated regularly as new publications and education seminars become available.

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