

EXPLANATORY MEMORANDUM

DUTIES AMENDMENT (ADDITIONAL DUTY FOR FOREIGN PERSONS) BILL 2018

The Bill amends the *Duties Act 2008* to implement the foreign buyers surcharge (surcharge) announced by the Government as an election commitment and committed to in the 2017-18 Budget.

The proposed amendments impose an additional amount of transfer duty (foreign transfer duty) or landholder duty (foreign landholder duty) at a rate of seven per cent on transactions arising from the direct or indirect acquisition of residential property in Western Australia by a foreign person. The surcharge applies from 1 January 2019.

The Bill introduces two new concepts to the Duties Act for the purposes of imposing the surcharge, being definitions of 'foreign person' and 'residential property' on which the surcharge will be imposed.

'Foreign person' means a foreign individual, a foreign corporation or the trustee of a foreign trust.

Generally, residential property is land in Western Australia that is capable of being, or is intended to be, used solely or dominantly for residential purposes, but does not include retirement villages, aged care facilities and commercial residential premises such as hotels and motels. Residential property includes established homes and apartments, land on which a person intends to construct residential property, land on which there is a building that a person intends to convert into residential property, land for residential developments, and vacant land zoned solely for residential purposes.

The surcharge will not apply to commercial or industrial property, or mixed use properties used primarily for commercial purposes.

The surcharge will be applied to land acquired for a residential development, however, a reassessment will be made and the surcharge refunded if construction, refurbishment or subdivision of the property commences or is completed within five years of completion of the transaction and the development will produce 10 or more dwellings, or lots on which 10 or more dwellings can be constructed.

The surcharge will also apply to relevant acquisitions of landholders who are entitled to residential property in Western Australia. Foreign acquirers are entitled to a reassessment of the surcharge applied to a relevant acquisition if the landholder, a linked entity or their associate, commences development on residential property to which the landholder was entitled at the time of the acquisition.

The surcharge provisions adopt the transfer duty and landholder duty frameworks with modifications. Transactions that are exempt from duty or receive nominal duty concessions will be exempt from the surcharge, unless otherwise expressly provided.

- Clause 1** **Short title**
- This clause provides the short title of the Act is the *Duties Amendment (Additional Duty for Foreign Persons) Act 2018*.
- Clause 2** **Commencement**
- This clause provides sections 1 and 2 of the Act come into operation on the day the Act receives the Royal Assent. The rest of the Act comes into operation on 1 January 2019.
- Clause 3** **Act amended**
- This clause provides this Act amends the *Duties Act 2008*.
- Clause 4** **Section 3 amended**
- This clause inserts the terms foreign dutiable transaction, foreign landholder duty, foreign transfer duty and residential property into the general definitions at section 3.
- Clause 5** **Section 147A amended**
- Section 147A(1) currently defines 'residential property' for the purposes of the residential rate concession. This clause replaces the reference to 'residential property' with 'residential land' so that 'residential property' will only be defined once at proposed section 205E for the purposes of foreign transfer duty and foreign landholder duty.
- As a result, the other references to 'residential property' in Division 4A of Chapter 2 Part 6, which have a different meaning, are replaced with 'residential land'. The amendments have no other effect.
- Clause 6** **Section 147C amended**
- Clause 6 replaces 'property' in section 147C(1) with 'land' so the reference to 'residential property' in that subsection is to 'residential land'.
- Clause 7** **Section 147D amended**
- This clause replaces 'residential property' in section 147D with 'residential land'.
- Clause 8** **Chapter 3A inserted**
- This clause inserts new Chapter 3A into the Duties Act. The new chapter sets out the rules for imposing foreign transfer duty and foreign landholder duty on direct and indirect acquisitions of residential property in Western Australia on or after 1 January 2019.

Chapter 3A – Additional duty for foreign persons

Part 1 – Preliminary

205A. Terms used

Subsection (1) defines the terms used in Chapter 3A, or sets out the section where the definition of a term is provided.

Foreign person is defined to mean a foreign corporation, a foreign individual, or a foreign trustee. A foreign individual is defined to mean an individual who is not an Australian citizen, the holder of a permanent visa such as a permanent resident, or the holder of a special category visa.

A special category visa is granted to eligible New Zealand citizens on arrival in Australia and allows the holder to reside permanently in Australia. The special category visa serves the same purpose for New Zealand citizens as the permanent visa for migrants from other countries. This treatment of New Zealand citizens who hold a special category visa is consistent with other jurisdictions that impose additional duty on foreign persons.

This subsection provides that a foreign corporation is defined in section 205C, a foreign trustee is a trustee of a foreign trust, and a foreign trust is defined in section 205D(1).

Subsection (2) provides the terms defined in section 9 for transfer duty have the same meaning for Chapter 3A, unless the contrary intention appears.

Subsection (3) provides the terms defined in section 148 for landholder duty and the definition of significant interest in section 161 [as applied by section 205ZE(1)] have the same meaning in Chapter 3A, unless the contrary intention appears.

205B. Associate

In determining whether a corporation or trust is a foreign person, it will be necessary to aggregate the interests in the corporation or trust that are held by foreign persons and their associates. Section 205B sets out the definition of associate.

Subsection (1) sets out the circumstances under which persons will be treated as associates of each other. A person will be an associate of another person if the person is a family member of the other person under section 100, the person and the other person are related persons under section 162(1)(c) to (g), or the person and the other person are partners in the same partnership.

Subsection (2) treats a trustee of a trust, other than a unit trust scheme or a discretionary trust, as an associate of a person if a beneficiary of the trust is an associate of that person under subsection (1).

For example, John is a foreign individual who holds 25 per cent of the issued shares in a corporation. Jane is an Australian citizen and is the spouse of John. Jane arranges for 25 per cent of the issued shares in the same corporation to be held on trust for her by a company in which she is the sole shareholder. As Jane and John are associates under subsection (1), the trustee company and John are associates of each other.

205C. Foreign corporation

Subsection (1) defines voting power and potential voting power for the purposes of the section. These terms take their meaning from section 4 of the *Foreign Acquisitions and Takeovers Act 1975* (Cth).

Subsection (2) defines a foreign corporation to be a corporation incorporated outside Australia or a corporation in which foreign persons have a controlling interest.

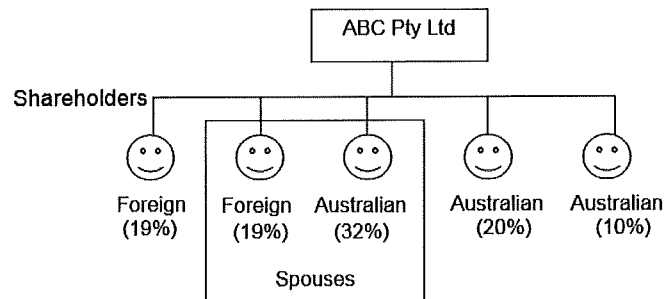
Subsection (3) provides foreign persons are taken to have a controlling interest in a corporation if one or more foreign persons or their associates control at least 50 per cent of the voting power or potential voting power, or hold at least 50 per cent of the issued shares in the corporation.

The interests held by all foreign persons and their associates (regardless of whether the associates are foreign or not) are aggregated to determine if the 50 per cent threshold has been reached in ascertaining whether the corporation is controlled by foreign persons.

Subsection (4) defines control broadly for the purposes of determining whether a person controls voting power or potential voting power to include indirect control and control exercisable by means of arrangements or practices.

Example 1

The following example demonstrates how shareholders' interests are aggregated to determine if foreign persons control a corporation.



The aggregated interests of foreign persons and their associates total 70 per cent which means that foreign persons have a controlling interest in ABC Pty Ltd. ABC Pty Ltd is therefore taken to be a foreign corporation. This is notwithstanding that one of the foreign persons is not related to the other foreign person (as interests of all foreign persons are aggregated) and the associate of the foreign person is an Australian.

In this example, the aggregated interests of the foreign and Australian shareholder who are spouses of each other are sufficient to classify ABC Pty Ltd as a foreign corporation.

205D. Foreign trust

Subsection (1) defines a foreign trust.

A discretionary trust is foreign if the trust is controlled by a foreign person or if one or more foreign persons that are takers in default, together with their associates, hold at least a 50 per cent interest in the discretionary trust. The terms 'taker in default' and 'interest in a discretionary trust' are defined at section 9.

A trust, other than a discretionary trust, is foreign if one or more foreign persons, together with their associates, hold beneficial interests in at least 50 per cent of the trust income or property.

Subsection (2) provides a discretionary trust is controlled by a foreign person if the person is in a position to influence, either directly or indirectly, the vesting of the capital of the trust property or the distribution of income from the trust property. This includes a trustee or a person with a power to appoint a trustee.

205E. Residential property

Section 205E defines residential property for the purposes of imposing the foreign transfer duty and foreign landholder duty.

Subsection (1) provides, subject to subsection (3), residential property is:

- (a) Land that is, or is capable of being, used solely or dominantly for residential purposes such as established homes and apartments.

Land that is intended to be used solely or dominantly for residential purposes is also residential property. This includes land on which there is a commercial building that a person intends to refurbish for residential use, land on which a home or apartment will be built, and land a person intends to develop or subdivide to enable another person to construct a home or apartment on the land.

- (b) Vacant land, or substantially vacant land, zoned solely for residential purposes regardless of the intent of the foreign buyer. This is to ensure a foreign person pays foreign transfer duty or foreign landholder duty on the acquisition of vacant land that can only be used for residential purposes even if the foreign person does not intend to construct a residence on the land.

- (c) In the case of land described in paragraph (a) or (b) above, any estate or interest in the land and anything that is part of the land as a fixture.

The effect of paragraph (c) is the term 'land' referred to in paragraphs (a) and (b) is to be read more narrowly than the general definition of land in section 3. Land, for the purposes of the definition of residential property, is any estate or interest in land and anything that is part of the land as a fixture. It does not include other land listed in the general definition such as a mining tenement and any fixtures that are fixed to the land the subject of the mining tenement under the authority of that tenement (for example, mining accommodation located on a mining tenement).

Mixed used properties where the land is not used, or intended to be used, solely or dominantly for residential purposes, is not chargeable with foreign transfer duty or foreign landholder duty. There is no apportionment of the foreign transfer duty or foreign landholder duty for a property where part of the land is used for residential purposes and another part is used for commercial purposes.

Whether land is used solely or dominantly for residential purposes will turn on the facts of the transaction and will be considered on a case-by-case basis. Each individual legal lot acquired under a transaction is evaluated on its own facts.

For example, a foreign buyer purchases six lots in a residential apartment building with a retail component. Four lots are used solely for residential purposes while the remaining two lots are used solely for commercial purposes. The two commercial lots will not be subject to foreign transfer duty.

Subsection (2) provides, for the purposes of the foreign transfer duty provisions, residential property includes certain chattels if, under section 37, a dutiable transaction involving a chattel is aggregated with a dutiable transaction in respect of the residential property and treated as a single dutiable transaction. This only applies to chattels, the use of which is directly linked to, or is incidental to, the use of the property for residential purposes.

Examples of chattels that may be directly linked to, or incidental to, the use of the residential property include household furniture, electrical appliances, gardening equipment, barbecues, and swimming pool cleaning equipment such as pool filtration pumps.

The effect is the dutiable value of the chattels will be included in the dutiable value of the residential property for the purposes of calculating foreign transfer duty. This is consistent with the transfer duty treatment of chattels that are transferred with residential property.

However, the reference to residential property in sections 205S(2)(b), (h) and 205X does not include a chattel. The effect of excluding section 205X from subsection (2) is an acquisition of a partnership interest by a foreign person will only be a residential partnership acquisition if the partnership directly or indirectly holds residential property. It is irrelevant whether the partnership holds chattels. This is the same as for transfer duty where a partnership acquisition occurs if a person acquires an interest in a partnership that directly or indirectly holds land.

Subsection (3) expressly excludes from the definition of residential property land intended to be used solely or dominantly for an aged care facility, a retirement village and commercial residential premises such as hotels, motels, inns, hostels or boarding houses, and premises used to provide accommodation in connection with a school.

This is generally consistent with how the surcharge operates in most other jurisdictions and limits any negative impact on job creation and investment in existing and new residential property operated as part of a commercial enterprise.

This subsection also excludes from the definition of residential property an interest that is an easement, security interest, a carbon right or a carbon covenant registered under the *Carbon Rights Act 2003*, and any land prescribed for the purposes of the subsection.

Part 2 – Foreign transfer duty

This part imposes foreign transfer duty on foreign dutiable transactions.

Division 1 – Preliminary

205F. Terms used

Subsection (1) defines the terms used in Part 2 of Chapter 3A or sets out the section for where the definition of a term is provided.

Subsection (2) provides a dutiable transaction is foreign transfer duty endorsed if the transaction record for it is foreign transfer duty endorsed.

Subsection (3) provides a transaction record or a duplicate of a transaction record is foreign transfer duty endorsed if it is duty endorsed and the endorsement indicates that foreign transfer duty has been paid on the transaction or that foreign transfer duty is not chargeable on the transaction.

Division 2 – Imposition of foreign transfer duty

205G. Foreign transfer duty imposed

Section 205G imposes foreign transfer duty on foreign dutiable transactions. The term 'foreign dutiable transaction' is defined at section 205H.

Division 3 – Foreign dutiable transactions

205H. Foreign dutiable transaction

Subsection (1) sets out the foreign dutiable transactions on which foreign transfer duty is imposed. The only dutiable transaction for the purposes of transfer duty, as set out in section 11(1), that is not also a foreign dutiable transaction is a farm-in agreement, because it only relates to mining tenements.

Generally, a foreign dutiable transaction is a dutiable transaction that relates to residential property and the purchaser or transferee is a foreign person.

Subsection (2) specifies the transactions that are not foreign dutiable transactions. These transactions are also excluded as dutiable transactions for transfer duty under section 11(2). The excluded transactions are a transaction involving a right, unless there is consideration paid for the transaction, an assignment of a lease, unless there is consideration paid for the assignment, and any transaction prescribed as an excluded transaction.

As a general rule, transactions that are not dutiable transactions for transfer duty will not be subject to foreign transfer duty. Consistent with this theme, this subsection excludes those transactions relating to residential property that are expressly excluded from transfer duty under section 11(2).

Subsection (3) provides the rules in section 12 apply in determining what constitutes a vesting of property by statute law for the purposes of subsection (1)(d)(i).

205I. New residential property

This section defines new residential property for the purposes of subsection 205H(1)(f). New residential property listed in this section is based on new dutiable property set out in section 17.

Subsection (1) provides, subject to subsection (2), new residential property includes residential property, an option to acquire residential property, a right to acquire residential property and any other right prescribed for the purposes of the subsection.

Such property is also new dutiable property for transfer duty. The effect is foreign transfer duty is chargeable on the creation, grant or issue of residential property or rights relating to residential property if the transaction is chargeable with transfer duty.

It should be noted that proposed section 205H(2) provides a transaction the subject of which is a right is only dutiable if consideration is given for the transaction. This is consistent with the transfer duty treatment.

Subsection (2) provides a lease is not new residential property if no consideration is paid, or agreed to be paid, for the grant of the lease, and any other residential property prescribed as excluded for the purposes of this section is not new residential property.

This aligns the treatment of such leases with transfer duty.

Division 4 – Collection of foreign transfer duty

205J. When liability for duty arises

Section 205J provides the liability for foreign transfer duty arises when the liability for transfer duty arises under section 19. If a general conditional agreement that evidences a foreign dutiable transaction is not liable for transfer duty under subsection 19(2) because it is terminated on relevant grounds before the required lodgment date, then the agreement is not liable for foreign transfer duty.

205K. Who is liable to pay duty

Subsection (1) provides the person liable to pay foreign transfer duty on a foreign dutiable transaction is the foreign person who is liable to pay the transfer duty.

Subsection (2) aligns the person liable to pay foreign transfer duty on a residential trust acquisition or surrender, or a share disposition in a corporate trustee, with the person liable to pay transfer duty on the transaction, even if that person is not a foreign person.

The person liable to pay transfer duty on a residential trust acquisition or surrender is the trustee of the discretionary trust, who may not necessarily be a foreign trustee. Subsection (2) aligns the person liable to pay foreign transfer duty with the person liable to pay transfer duty on the transaction. This will assist with recovery of foreign transfer duty where the foreign person who acquired or surrendered the trust interest is domiciled outside of Australia.

Similarly, the person liable to pay transfer duty on the disposition of a share in a corporate trustee is each shareholder of the corporate trustee, who may not all be foreign persons. This subsection aligns the person liable to pay foreign transfer duty with the person liable to pay transfer duty on a share disposition in a corporate trustee that is part of a scheme or arrangement that results in a foreign person acquiring or increasing a beneficial interest in the residential property held by the trust.

Subsection (3) ensures an individual or a corporation who is acting in the capacity of trustee of a non-foreign trust is not liable to pay foreign transfer duty even if the trustee is otherwise a foreign individual or foreign corporation.

For example, a foreign corporation is acting as trustee of a unit trust scheme that is not a foreign trust as defined in section 205D. The foreign corporation, as trustee of the unit trust, enters into an agreement to purchase residential property. The foreign corporation is not liable to pay foreign transfer duty on the transaction as it is acting in the capacity as a trustee of a non-foreign trust.

This subsection cannot apply to a foreign individual or a foreign corporation acting as trustee of a discretionary trust. This is because a discretionary trust will be a foreign trust if it is controlled by a foreign person in accordance with subsection 205D(1). A foreign individual or foreign corporation acting as trustee of a discretionary trust will not satisfy section 205K(3)(b) as they will be a foreign trustee.

205L. Joint tenants to be treated as tenants in common in equal shares

The section provides that, for the purposes of assessing foreign transfer duty, joint tenants of residential property are taken to hold their interest as tenants in common in equal shares.

205M. Foreign transfer duty declaration to be lodged

This section requires a declaration to be lodged by the person liable to pay foreign transfer duty for the purpose of identifying foreign persons and to inform whether a transaction is subject to foreign transfer duty.

Subsection (1) provides the person liable to pay foreign transfer duty must lodge a foreign transfer duty declaration within two months of the day on which liability for duty arises. This aligns with the period in which instruments evidencing a dutiable transaction or a transfer duty statement must be lodged for the assessment of transfer duty.

Failure to comply constitutes an offence that carries a penalty of a \$5,000 fine. This is consistent with the penalty for failing to lodge an instrument or transfer duty statement within the two month lodgment period set out in section 23.

Subsection (2) provides an exception to the lodgment requirement. A person does not need to lodge the declaration if liability to duty does not arise under section 19(2) because the dutiable transaction is a general conditional agreement that is terminated on relevant grounds before the due date for lodgement.

205N. When duty must be paid

The due date for payment of foreign transfer duty is aligned with the due date for payment of transfer duty as set out in section 25.

Subsection (1) provides foreign transfer duty must be paid within one month of the date on the assessment notice, unless a later date is provided for under subsection (2) or (3).

Subsection (2) extends the due date for payment to 12 months after the liability date for conditional agreements, and a transfer or agreement for the transfer of residential property, a declaration of trust over residential property, or a vesting of residential property if the instrument relating to the transaction is registrable under the *Registration of Deeds Act 1856* or the *Transfer of Land Act 1893*. This subsection does not apply if subsection (3) applies.

Subsection (3) extends the due date for payment of foreign transfer duty to three years after the liability date for a foreign dutiable transaction that is a subdivision conditional agreement or an issue of title conditional agreement. These are typically off-the-plan sales contracts.

205O. Rate of foreign transfer duty

This section provides the rate of foreign transfer duty chargeable on a foreign dutiable transaction is seven per cent of the dutiable value of the foreign dutiable transaction.

205P. Dutiable value

This section provides the rules for determining the dutiable value of dutiable transactions set out in Chapter 2 Part 4 Division 5 apply to determine the dutiable value of foreign dutiable transactions, with the appropriate modifications.

As with transfer duty, the general rule is that the dutiable value of a foreign dutiable transaction is the consideration provided for the transaction or the unencumbered value of the residential property if the value is greater than the consideration, the consideration cannot be ascertained or if no consideration is paid or payable.

Example 2

Jane and John purchase a residential property as tenants in common in equal shares for \$500,000. Jane is a foreign person and John is an Australian citizen. The foreign dutiable transaction is the transfer of a half interest in the residential property to Jane, the foreign person.

The dutiable value of the dutiable transaction is \$500,000, and the transfer duty payable at the residential rate is \$17,765.

The dutiable value of the foreign dutiable transaction is \$250,000, being 50 per cent of \$500,000. The foreign transfer duty payable on the transaction is \$17,500, being seven per cent of \$250,000.

The total duty payable is \$35,265 (calculated as \$17,765 plus \$17,500).

Subsection (1) provides Chapter 2 Part 4 Division 5, with the appropriate modifications, applies to foreign transfer duty in the same way as it applies to transfer duty.

The effect is that the transfer duty rules relating to the dutiable value of certain dutiable transactions also apply to the equivalent foreign dutiable transactions (unless the provision is expressly excluded as a relevant provision). Such transactions include a transfer of corporation or unit trust scheme property on winding up, contingent consideration and changes in consideration, exercise of options, and partitions.

Sections 31(5), 37, 39(3) and 40 are not relevant provisions for the purposes of foreign transfer duty.

Under section 31(5), a person must lodge either the instrument that effected or evidenced an increase in consideration or a transfer duty statement if the consideration for a transaction is increased after an agreement is made but before the property is transferred.

If an instrument or statement is lodged under section 31(5) for a transaction that also evidences a foreign dutiable transaction, the Commissioner of State Revenue will assess the increase in consideration for both transfer duty and foreign transfer duty without requiring lodgment of an additional instrument or statement in respect of the foreign dutiable transaction. Excluding this as a relevant provision ensures a person only commits one offence if they fail to comply with section 31(5).

Section 37 allows the Commissioner to aggregate certain related dutiable transactions and treat them, and their total dutiable value, as a single dutiable transaction for the purposes of assessing transfer duty. As transfer duty is calculated on a sliding scale, the effect is the imposition of a greater amount of transfer duty than would generally be charged if the transactions were not aggregated. This section is excluded as a relevant provision because foreign transfer duty is charged at a flat rate and therefore aggregation would have no effect.

Section 39(3) is excluded as a relevant provision, however, if nominal duty is payable on a transaction that effects a partition pursuant to section 39(3), the transaction is exempt from foreign transfer duty under section 205Y(2).

Section 40 is not a relevant provision as section 205P(4) deals with the dutiable value of a foreign dutiable transaction effecting an exchange of residential property to a foreign person.

Subsection (2) provides, without limiting subsection (1), Chapter 2 Part 4 Division 5 applies to foreign transfer duty as if the modifications listed in the subsection are made to the provisions.

It is noted the effect of the modification in section 205P(2)(f) is that foreign transfer duty is not payable on a transfer of corporation or unit trust scheme property to a foreign shareholder or a unit holder on the winding up of the corporation or unit trust scheme if nominal duty would be chargeable on the dutiable transaction under section 29(4).

Subsection (3) treats a foreign dutiable transaction as having taken place at the time referred to in section 37(4) if a dutiable transaction that is also a foreign dutiable transaction is aggregated with another dutiable transaction.

Section 37(4) treats aggregated dutiable transactions as a single dutiable transaction that took place at the time the last of the aggregated transactions took place. This date is relevant for determining the due date for payment of transfer duty for certain conditional agreements or transactions involving a registrable instrument.

This provision is to ensure the transfer duty and foreign transfer duty payable on a transaction that is aggregated under section 37 is due for payment on the same day.

Subsection (4) applies to a transaction effecting an exchange of residential property to a foreign person. When residential property transferred to a foreign person is exchanged for dutiable property, the consideration for the foreign dutiable transaction is taken to be the unencumbered value of the residential property the subject of the transfer.

The result is that the dutiable value for a foreign dutiable transaction effecting an exchange of residential property to a foreign person is the same as the dutiable value for transfer duty under section 40.

205Q. No double foreign transfer duty

The 'no double duty' provisions in Chapter 2 Part 4 Division 6 exempt particular dutiable transactions relating to the same dutiable property from transfer duty in certain circumstances. This section applies the 'no double duty' rules for transfer duty to foreign transfer duty, with the appropriate modifications.

Subsection (1) provides the 'no double duty provisions' in Chapter 2 Part 4 Division 6, with the appropriate modifications, apply to foreign transfer duty in the same way as they apply to transfer duty.

The exception is section 42(15) which is not relevant to foreign transfer duty as it provides relief from double duty on the transfer of a mining tenement under a farm-in agreement.

Subsection (2) provides, without limiting subsection (1), the relevant provisions of Chapter 2 Part 4 Division 6 apply to foreign transfer duty as if modifications listed in this subsection are made to the provisions.

The effect is that the rules in sections 41 and 42 that provide relief from double duty on a subsequent dutiable transaction also apply to provide relief from double foreign transfer duty in the same circumstances.

Section 41, as applied by section 205Q(1), ensures foreign transfer duty is only imposed once in relation to a transaction over residential property if it constitutes more than one foreign dutiable transaction for the property.

If the transfer is in conformity with an agreement for the transfer of residential property and the agreement has been foreign transfer duty endorsed, the transfer is not chargeable with foreign transfer duty under section 42(1) as applied by section 205Q(1).

If a transfer of residential property to a foreign person is not in conformity with an agreement because the transferee is different to the purchaser and section 42(2), (4), (4B), (5), or (7) applies to provide relief from transfer duty on the transfer, the effect is foreign transfer duty will not be chargeable on the transfer if the agreement is foreign transfer duty endorsed. The agreement will only be foreign transfer duty endorsed if the purchaser named in the agreement is a foreign person.

Example 3

John is a foreign person who enters into an agreement to purchase a residential property on 2 January 2019. The agreement is lodged for assessment and is endorsed to indicate transfer duty and foreign transfer duty paid on the transaction.

John then decides to substitute his name on the transfer with that of his sister, Denise, who is a foreign person. The requirements of section 42(2) are satisfied and no further transfer duty is payable on the transfer of the residential property to Denise.

Section 42(2) as applied by section 205Q(1) exempts foreign transfer duty on the transfer because John and Denise are related persons at the time liability for foreign transfer duty on the agreement arises and the agreement is foreign transfer duty endorsed. If not for the application of section 42, foreign transfer duty would be chargeable on the transfer of the residential property to Denise.

A requirement of sections 42(2), (4), (4B), (5) and (7), as applied by section 205Q(1), is the agreement must be foreign transfer duty endorsed.

An agreement will be foreign transfer duty endorsed if it evidences a foreign dutiable transaction. If the purchaser named on an agreement for the transfer of residential property is not a foreign person, the transaction is not a foreign dutiable transaction and the agreement will not be foreign transfer duty endorsed. Section 42(2), (4), (4B), (5) or (7), as applied by section 205Q(1), will not apply to exempt the transfer from foreign transfer duty even if transfer duty is not chargeable on the transfer under the provisions of section 42.

This is to prevent a foreign person from arranging for a related foreign person to enter into an agreement to purchase the property and then using one of the 'no double duty' provisions in section 42 to avoid paying foreign transfer duty on the subsequent transfer of the property to the foreign person.

Example 4

Michael is an Australian citizen who enters into an agreement to purchase residential property on 2 January 2019. The agreement is lodged for assessment and is endorsed to indicate transfer duty paid on the transaction.

Michael then decides to substitute his name on the transfer with his brother, Daniel, who is a foreign person. The requirements of section 42(2) are satisfied and no further transfer duty is payable on the transfer of the residential property to Daniel. However, the transfer is chargeable with foreign transfer duty. Section 42(2) [as applied by section 205Q(1)] does not exempt foreign transfer duty on the transfer because the agreement is not foreign transfer duty endorsed.

205R. Interim assessment of foreign transfer duty

Under section 44A of the Duties Act, the Commissioner may make an interim assessment of transfer duty in certain circumstances based on a portion of the dutiable value of the transaction while determining the full dutiable value of the property. Interim assessments are usually issued for complex transactions, where there may be a delay of six months or more in issuing a complete assessment.

Subsection (1) provides the Commissioner may make an interim assessment of foreign transfer duty if an interim assessment is made for transfer duty under section 44A.

Subsection (2) allows the portion of the dutiable value of the foreign dutiable transaction to be used instead of the full dutiable value for the purposes of charging foreign transfer duty under section 205O.

Division 5 – Application of Chapter 2 Part 5 to certain transactions

205S. Application of Chapter 2 Part 5 to foreign dutiable transactions

Chapter 2 Part 5 sets out the transfer duty rules for simultaneous put and call options, trust acquisitions and surrenders, share dispositions in a corporate trustee and partnerships.

This section applies those rules, with modifications, to foreign dutiable transactions of the same kind.

Subsection (1) provides Chapter 2 Part 5, with the appropriate modifications, applies to foreign transfer duty in the same way as it applies to transfer duty, except for section 70 and Divisions 5 and 6.

Section 70 provides that dutiable property for the purposes of the partnership provisions is limited to land and chattels. Section 70 is effectively replaced by the modification in section 205S(2)(b) that has the effect of applying the partnership provisions as if a reference to dutiable property were a reference to residential property and a chattel, the use of which is directly linked to, or is incidental to, the use of the property for residential purposes.

Division 5 is excluded as a relevant provision because it deals with Western Australian business assets which are not subject to foreign transfer duty.

Division 6 defines conditional agreements and provides an exemption from transfer duty under section 88A for a general conditional agreement that is terminated on relevant grounds. While section 88A has been excluded from the application provision, section 205Y(2)(a) provides a corresponding exemption from foreign transfer duty.

Subsection (2) provides that, without limiting subsection (1), the relevant provisions in Chapter 2 Part 5 apply as if the modifications listed in the subsection are made to those provisions.

The modifications listed in subsection (2) replace the references to trust acquisition, trust surrender and partnership acquisition with residential trust acquisition, residential trust surrender and residential partnership acquisition. These terms are defined at sections 205T, 205U and 205X respectively.

205T. References to residential trust acquisition

This section defines a residential trust acquisition as an acquisition by a foreign taker in default of an interest in a discretionary trust that holds residential property or an indirect interest in residential property. In applying the relevant provisions of Chapter 2 Part 5, the definition of trust acquisition in section 55 is replaced with this section.

205U. References to residential trust surrender

This section defines a residential trust surrender as a surrender by a taker in default of an interest in a discretionary trust that holds residential property or an indirect interest in residential property, if the surrender results in a foreign person acquiring an interest in the discretionary trust. In applying the relevant provisions of Chapter 2 Part 5, the definition of trust surrender in section 56 is replaced with this section.

205V. Dutiable value of residential trust acquisition or residential trust surrender

Section 205V sets out how to determine the dutiable value of a residential trust acquisition and a residential trust surrender.

Subsection (1) provides the dutiable value of a residential trust acquisition is:

- a) the consideration paid for the acquisition to the extent that it relates to residential property held by the trust or a linked entity;
or
- b) the value of the taker in default's interest in the discretionary trust if there is no consideration, the consideration cannot be ascertained, or if the value of the interest is greater than the consideration.

This is consistent with how the dutiable value is calculated when assessing transfer duty on a trust acquisition.

Subsection (2) provides the dutiable value of a residential trust surrender is the consideration for the surrender so far as the consideration relates to residential property directly or indirectly held by the discretionary trust and the interests acquired by the foreign person as a result of the surrender.

If there is no consideration, the consideration is not ascertainable or the value of the taker in default's interest is greater than the consideration, the dutiable value of the residential trust surrender is the value of the foreign person's interest in the discretionary trust immediately after the liability for foreign transfer duty on the surrender arises less the value of their interest immediately before the liability for foreign transfer duty arises.

The provisions operate to capture the increase in value of the interest held by the foreign person as a result of the residential trust surrender by a taker in default.

The value of the taker in default's interest in the discretionary trust is determined in accordance with section 61, as applied by section 205S, which relates to the value of the residential property held directly and indirectly by the discretionary trust.

205W. Share disposition taken to be agreement for transfer of trust property

Section 205W replaces section 67 in Chapter 2 Part 5, as applied by section 205S. The section charges foreign transfer duty on a disposition of a share in a corporate trustee where the transaction is a scheme or arrangement to change the beneficial interest of the residential property held by the discretionary trust to the benefit of a foreign person.

Subsection (1) provides a disposition of a share in a corporate trustee of a discretionary trust that holds residential property is treated as an agreement for the transfer of residential property that is liable to foreign transfer duty if the disposition is a scheme or arrangement that results in a foreign person acquiring a beneficial interest in the property.

Subsection (2) provides that subsection (1) does not apply to a disposition of a share in a corporate trustee to a beneficiary as the result of administration of a deceased estate.

205X. References to residential partnership acquisition

Section 205X defines a residential partnership acquisition. A residential partnership acquisition occurs when a foreign person acquires an interest in a partnership that holds residential property or an indirect interest in residential property. If the partnership does not own residential property, the partnership acquisition will not be subject to foreign transfer duty.

Under section 205E(2), the reference to 'residential property' in section 205X does not include chattels that are directly linked to, or are incidental to, the use of residential property for residential purposes. Whether the partnership owns chattels is not relevant in determining a residential partnership acquisition.

However, the value of any chattels, the use of which is directly linked to, or is incidental to, the use of residential property for residential purposes, is taken into account when determining the dutiable value of a residential partnership acquisition.

Section 205S applies the relevant partnership provisions in Chapter 2 Part 5 Division 4 (except section 70), with the appropriate modifications, to residential partnership acquisitions in the same way as they apply to partnership acquisitions.

The dutiable value of a residential partnership acquisition is the greater of the consideration paid for the acquisition so far as it relates to the residential property and chattels linked to the use of the property, and the value of the partnership interest (section 76 as applied by section 205S).

The value of a partnership interest the subject of a residential partnership acquisition is an amount determined by applying the partner's partnership interest to the unencumbered value of the residential property and chattels linked to the use of the property owned directly and indirectly by the partnership (section 77 as applied by section 205S).

Example 5

Matthew and Melissa each have a 50 per cent interest in a partnership that owns land and chattels valued at \$1 million. The land includes residential property and chattels that are directly linked to the use of the residential property, with a combined value of \$500,000.

Adam, a foreign person, acquires Melissa's 50 per cent interest in the partnership for consideration of \$500,000. As the partnership owns residential property, the acquisition is a residential partnership acquisition.

The dutiable value of the residential partnership acquisition is \$250,000, being the consideration for the acquisition so far as it relates to the residential property and linked chattels owned by the partnership. Foreign transfer duty of \$17,500 is chargeable on the residential partnership acquisition.

Division 6 – Exemptions and reassessment

Subdivision 1 – Exempt transactions

205Y. Transactions on which minimum, nominal or no transfer duty payable

This section provides an exemption for transactions that effect a partition on which nominal duty is chargeable, transactions that are exempt from transfer duty under Chapter 2 Part 5 Division 6 or Part 6 Division 1, or transactions chargeable with nominal duty under Chapter 2 Part 6 Division 2.

Subsection (1) provides a transaction that effects a partition on which nominal duty is payable under section 39(3) is exempt from foreign transfer duty.

Under section 39(3), nominal duty of \$20 is payable on a transaction that effects a partition if a person receives property with a value that is equal to or less than the person's interest. If nominal duty is payable, the transaction is exempt from foreign transfer duty under this subsection.

Subsection (2) sets out the general rule that, subject to the exceptions in subsection (3), foreign transfer duty is not chargeable on a foreign dutiable transaction to the extent the transaction is exempt from transfer duty or chargeable with nominal duty.

If a transaction partially qualifies for an exemption from transfer duty or nominal duty concession, foreign transfer duty is chargeable on the proportion of the dutiable value that does not qualify for the exemption or concession.

Example 6

A will provides that Bill and Barbara are to be gifted one undivided half share each in residential property, having an unencumbered value of \$500,000. Bill is a foreign individual.

Barbara agrees for Bill to take the whole share in the residential property in return for Bill paying \$250,000 to Barbara. The residential property is transferred to Bill.

The half share to which Bill is entitled under the will is chargeable with nominal duty of \$20 and is therefore exempt from foreign transfer duty. The other half share transferred to Bill is chargeable with transfer duty of \$6,935 at the residential rate and foreign transfer duty of \$17,500 (seven per cent of \$250,000).

It should be noted the first home owner duty concession (Chapter 2 Part 6 Division 4) and residential concession (Chapter 2 Part 6 Division 4A) only apply to transfer duty. Foreign transfer duty is chargeable even if no, or a reduced rate of, transfer duty is payable on a transaction because of these concessions.

Subsection (3) is to prevent avoidance of foreign transfer duty by structuring a transaction in a way that takes advantage of the general rule set out in subsection (2). The exceptions are:

- a) section 97, which exempts a transfer, or agreement for the transfer, of certain residential property between spouses or de facto partners, if foreign transfer duty was not chargeable when the transferor acquired the residential property.

The exclusion of the exemption in these circumstances is to prevent a non-foreign person from acquiring residential property solely in their name and transferring a half interest in the property to their foreign spouse or de factor partner without paying foreign transfer duty.

- b) section 114, which charges nominal duty on a transfer, or agreement for the transfer, of dutiable property to a taker in default on the vesting or termination of a discretionary trust, if foreign transfer duty was not chargeable on the acquisition of the residential property by the trustee or on any acquisition of a trust interest by the taker in default.

This is to prevent an opportunity for a foreign taker in default to acquire residential property on the vesting of the discretionary trust without the trust paying foreign transfer duty on the acquisition of the property (for example, if the discretionary trust is not a foreign trust) or without the taker in default paying foreign transfer duty on acquiring a trust interest.

- c) section 115, which charges nominal duty on a transfer, or agreement for the transfer, of dutiable property to a beneficiary of a discretionary trust where the trustee is acting under a power of appointment, if foreign transfer duty was not chargeable on the acquisition of the residential property by the trustee of the discretionary trust.

This is to prevent a trustee of a discretionary trust from acquiring residential property without paying foreign transfer duty (for example, because the discretionary trust was not foreign when the residential property was acquired) then transferring the property to a foreign beneficiary who pays nominal duty on the transaction but does not pay foreign transfer duty in the absence of this provision.

- d) section 116, which charges nominal duty on a transfer, or agreement for the transfer of, dutiable property by the trustee of a trust (other than a discretionary trust or a unit trust scheme) to a beneficiary, if the declaration of trust referred to in that section has not been foreign transfer duty endorsed.

This ensures a transfer, or agreement for the transfer, of residential property to the beneficiary of a trust that is not a discretionary trust or unit trust is only exempt from foreign transfer duty if the declaration of trust has been foreign transfer duty endorsed.

- e) section 117(1)(a) or 117(1)(b) which charges nominal duty on certain dutiable transactions where property is vested in an 'apparent purchaser' to be held for the real purchaser who provided the consideration to acquire the property, if the real purchaser is a foreign person and foreign transfer duty was not chargeable on the acquisition of the residential property by the 'apparent purchaser'.

This ensures that, where an 'apparent purchaser' is not a foreign person and the instrument is not foreign transfer duty endorsed, any subsequent declaration of trust naming a foreign person as the beneficial owner of the property or subsequent transfer of the property to a foreign real purchaser would result in the declaration of trust or transfer being chargeable with foreign transfer duty.

Section 205Y(3) is to be read in conjunction with the transitional provision at proposed clause 43(4) in Division 8 of Schedule 3, inserted by clause 15 of this Bill. The effect of clause 43(4) is that foreign transfer duty is not chargeable in the circumstances described in section 205Y(3) if the spouse or de facto partner, trustee of the discretionary trust, or apparent purchaser acquired the residential property before 1 January 2019.

205Z. Transactions relating to agreements for transfer of residential property

This section provides an exemption from foreign transfer duty on an agreement for the transfer of residential property in certain circumstances where the transferee is not a foreign person at the time of the transfer.

Subsection (1) exempts an agreement for the transfer of residential property from foreign transfer duty where the purchaser on the agreement is foreign, the transferee is not a foreign person, and one of the following sections apply to the transfer:

- a) Section 42(2), which provides transfer duty is not chargeable on the transfer of property to a person who is related to the purchaser under an agreement for the transfer of the property.
- b) Section 42(4), which provides transfer duty is not chargeable on the transfer of property if the purchaser named in the agreement was acting as agent for the transferee when liability for duty on the agreement arose.
- c) Section 42(4B), which provides transfer duty is not chargeable on a transfer where the purchaser under an agreement takes a transfer of the property as the trustee for a related beneficiary.
- d) Section 42(5), which provides transfer duty is not chargeable on a transfer to a corporation where the purchaser enters into an agreement to acquire dutiable property with the intention of transferring the property to a corporation which was in the process of being incorporated, or a dormant corporation which was in the process of being acquired.

Example 7

Sue, a foreign individual, enters into an agreement to purchase a residential property on 2 January 2019 as agent for Chris, an Australian citizen. The agreement is lodged for assessment and is endorsed to indicate transfer duty and foreign transfer duty paid on the transaction.

Chris is named as the transferee on the transfer of the residential property. The Commissioner is satisfied that at the time liability for duty arose, Sue was acting as agent for Chris and transfer duty is not chargeable on the transfer under section 42(4).

A reassessment is made and the foreign transfer duty paid on the agreement is refunded as the agreement is exempt under section 205Z(1).

Subsection (2) exempts an agreement for the transfer of residential property from foreign transfer duty if the transfer is in conformity with the agreement and the transferee is no longer a foreign person when the property is transferred.

Example 8

Alice, a foreign individual, enters into an agreement to purchase a residential property on 1 January 2019. The agreement is lodged for assessment and is endorsed to indicate transfer duty and foreign transfer duty paid on the transaction.

After the agreement is entered into but before the residential property is transferred, Alice becomes the holder of a permanent visa within the meaning of section 5(1) of the *Migration Act 1958* (Cth).

The residential property is transferred to Alice. As the transfer is in conformity with the agreement and Alice is no longer a foreign individual when the property is transferred, she is entitled to apply for a reassessment and refund of the foreign transfer duty paid on the agreement.

Subdivision 2 – Exemptions relating to construction, refurbishment and subdivision

Land acquired for residential developments by foreign persons will be exempt from foreign transfer duty in certain circumstances where the development will produce 10 or more dwellings, or lots on which 10 or more dwellings can be constructed.

Land acquired for residential development by a foreign person falls within the definition of residential property under section 205E as land that is intended to be used solely or dominantly for residential purposes. The acquisition of the land will therefore be subject to foreign transfer duty in the first instance.

The foreign person is entitled to apply for a reassessment of foreign transfer duty paid on acquiring the land if the requirements of section 205ZA or 205ZB are satisfied.

205ZA. Exemptions relating to construction or refurbishment of 10 or more dwellings

This section provides an exemption for a foreign dutiable transaction if the foreign person constructs, refurbishes or completes the construction or refurbishment of 10 or more dwellings on a parcel of land the subject of the transaction.

Subsection (1) provides foreign transfer duty is not chargeable on a foreign dutiable transaction to the extent the transaction relates to a parcel of land to which this section applies.

The exemption applies to all foreign dutiable transactions that relate to a parcel of land that satisfies the requirements in subsection (2). This includes a residential partnership acquisition, a residential trust acquisition or surrender, and a share disposition in a corporate trustee that is treated as an agreement for the transfer of residential property, if the partnership or discretionary trust is entitled to a parcel of land to which this section applies.

'Parcel of land' is defined in section 205A to mean a lot as defined in the *Land Tax Assessment Act 2002* or two or more such lots which have common boundaries and which, in the opinion of the Commissioner, should be treated as a single lot for the purpose of this Chapter.

The exemption is only available for a transaction to the extent it relates to a parcel of land that satisfies the requirements. If other land that is not a parcel of land to which this section applies is acquired under the same transaction, a refund is only available for the foreign transfer duty paid that relates to the parcel of land.

If the requirements of this section are satisfied, a reassessment will be made and the foreign transfer duty paid for all lots that form the parcel of land will be refunded even if a portion of the parcel has not been developed yet.

Example 9

A foreign corporation enters into an agreement to purchase two adjacent vacant lots on which it is intended to construct an apartment complex of 15 dwellings. Under the same agreement, the corporation purchases a home from the same vendor to accommodate some of its employees. The agreement is lodged for assessment and is endorsed to indicate transfer duty and foreign transfer duty paid on the transaction.

The foreign corporation begins construction within five years of the completion of the transaction and the other requirements of section 205ZA are satisfied. The foreign corporation is entitled to apply for a reassessment and a refund of the foreign transfer duty paid on the dutiable value of the two adjacent lots. The corporation is not entitled to a refund of foreign transfer duty paid on the dutiable value of the home.

Subsection (2) provides foreign transfer duty is not chargeable on a parcel of land in accordance with section 205ZA if all of the following apply:

- a) At the time when liability for foreign transfer duty on the transaction arises, there is no building, or part of a building, capable of being used solely or dominantly as a place of residence (such as a house or apartment). This applies regardless of any subsequent development.
- b) The foreign person or their associate intends to construct, refurbish, or complete the construction or refurbishment of 10 or more dwellings on the parcel of land.

The reference to refurbishing a dwelling includes the conversion of a commercial property into a residential property. 'Dwelling' is defined in section 205A(1) to mean a building, or part of a building, that is or is intended to be used solely or dominantly as a place of residence.

This requirement will also be satisfied if there are partially constructed or refurbished dwellings on the parcel of land and the foreign person or their associate intends to complete the construction or refurbishment.

- c) Within the period of five years of the completion of the transaction, the foreign acquirer or their associate complies with subsection (3). Where the transaction is an agreement for the transfer of residential property, completion of the transaction occurs when the agreement to purchase the residential property is completed, which usually occurs at settlement.

This is to give the foreign person more time to satisfy the requirement in subsection (3). For other transactions, completion is when the transaction occurs.

- d) The parcel of land must, in the Commissioner's opinion, be suitable for 10 or more dwellings. An example of a situation where a parcel of land may not be suitable for 10 or more dwellings is where planning or zoning laws do not permit the development of 10 or more dwellings on that land.

Subsection (3) sets out the requirements the foreign person or their associate must comply with within five years from the completion of the transaction in order to satisfy section 205ZA(2)(c). The event or events that must be undertaken by the foreign person or their associate depends on the nature of the development.

A person or an associate complies with subsection (3) in relation to:

- a) a dwelling the person or associate intends to construct – if the person or associate begins construction of the dwelling;
- b) a dwelling the person or associate intends to refurbish – if all necessary licences, approvals, registrations, exemptions and authorisations required to refurbish the dwelling have been issued, granted or obtained; or
- c) a dwelling the person or associate intends to complete the construction or refurbishment of – if the dwelling is ready for occupation as a place of residence provided the construction or refurbishment was completed by the person or the associate.

If a foreign person or associate intends to develop 10 or more dwellings through a combination of constructing, refurbishing, or completing the construction or refurbishment, the foreign person or their associate must comply with each of the relevant requirements in subsection (3) within five years of the completion of the transaction.

Provided the person or their associate intends to construct, refurbish or complete construction or refurbishment of 10 or more dwellings and complies with the relevant requirements in subsection (3) for one dwelling, the foreign person is entitled to a refund of all foreign transfer duty paid relating to the parcel of land even if a portion of the parcel has yet to be developed.

Example 10

A foreign corporation enters into an agreement to acquire a parcel of land comprising two lots with common boundaries. On one of the lots there is a partially constructed apartment complex which will consist of five dwellings once completed, and the other lot is vacant. The foreign corporation intends to complete the construction of the partially constructed building and construct an apartment complex comprising five dwellings on the vacant lot.

The foreign corporation pays foreign transfer duty on the transaction as they are acquiring residential property that is land intended to be used solely or dominantly for residential purposes.

Within five years of the completion of the agreement, the foreign corporation complies with section 205ZA(3) by completing construction of the partially constructed apartment and commencing construction of the apartment complex on the other lot. The Commissioner is satisfied the parcel of land is suitable for 10 or more dwellings.

The parcel of land satisfies the requirements of section 205ZA(2).

The foreign corporation is entitled to apply for a reassessment of foreign transfer duty paid in relation to the parcel of land within the timeframe set out in section 205ZA(5), notwithstanding that 10 or more dwellings have yet to be constructed.

Subsection (4) provides that, for the purposes of subsection (3), construction of a dwelling begins on the day on which laying the foundations for the dwelling begins or another day the Commissioner considers appropriate in the circumstances of the case.

Subsection (5) sets out the period in which an application must be made for reassessment under section 205ZC. The application must be made within five years of the completion of the transaction or within one year of the date on which the person or associate complies with subsection (3), whichever is later.

The effect is that where the person or their associate complies with subsection (3) less than one year before the end of the five year period, the foreign person has one year to apply for reassessment.

205ZB. Exemption relating to subdivision for purpose of constructing 10 or more dwellings

This section provides an exemption for a transaction relating to a vacant parcel of land if the foreign person or their associate intends to subdivide, or complete subdividing, the land for the purpose of a person constructing 10 or more dwellings.

Subsection (1) provides foreign transfer duty is not chargeable on a foreign dutiable transaction to the extent that it relates to a parcel of land to which this section applies. The exemption is only available for a parcel of land acquired under a transaction that satisfies the requirements of section 205ZB.

Subsection (2) provides that section 205ZB applies to a parcel of land if all of the following requirements are satisfied:

- a) At the time when liability for foreign transfer duty on the transaction arises, the parcel of land is vacant or substantially vacant.
- b) The person liable to pay foreign transfer duty on the transaction or an associate of that person intends to subdivide or complete the subdivision of the parcel of land for the purpose of constructing 10 or more dwellings on the land.
- c) Within five years of completion of the transaction, the person or associate begins subdividing the land or, if subdivision has begun when the transaction is completed, completes subdividing the parcel of land. Subsection (4) sets out when a person begins subdividing land, which in most cases is generally when a plan of subdivision of land or a strata plan is approved by the Western Australian Planning Commission.
- d) The parcel of land is, in the Commissioner's opinion, suitable for 10 or more dwellings.

Subsection (3) provides an application for reassessment must be made within the later of the period of five years from the completion of the foreign dutiable transaction or within one year of the date on which the person or associate begins subdividing the parcel of land, or completes subdividing the land if subdivision has already begun when the transaction is completed.

Subsection (4) sets out when a person is taken to begin and complete subdividing land for the purposes of subsection (2)(c) and (3)(a).

A person begins subdividing land on the day on which the land is subdivided under clause 3 of the Glossary to the Land Tax Assessment Act. A person completes subdividing land on the day on which a new certificate of title is created and registered for the subdivided land.

Subdivision 3 – Reassessment

205ZC. Reassessment

Subsection (1) provides that, if the Commissioner is required to reassess the liability to transfer duty of a transaction which would be exempt from foreign transfer duty because of section 205Y, the Commissioner, on the application of a taxpayer, must reassess the liability to foreign transfer duty on the transaction.

For example, a taxpayer pays transfer duty and foreign transfer duty on an agreement for the transfer of residential property. The agreement is subsequently cancelled and the taxpayer makes an application for a reassessment of transfer duty under section 107(5). The Commissioner, on the application of the taxpayer, must also reassess the liability to foreign transfer duty on the agreement.

The limitation as to time (if any) that applies to the reassessment of transfer duty also applies in respect of the reassessment of foreign transfer duty. For example, section 107(7) which alters the effect of section 17(1) of the Taxation Administration Act in relation to a reassessment of transfer duty on a cancelled transaction also applies to the reassessment of foreign transfer duty.

The application for reassessment of foreign transfer duty must be made in the approved form if the transaction is exempt because of section 107.

Subsection (2) provides the Commissioner, on the application of a taxpayer, must reassess the liability to foreign transfer duty on a foreign dutiable transaction that is exempt under section 205Z, 205ZA or 205ZB.

Subsection (3) provides the time limits in section 17 of the Taxation Administration Act do not apply in respect of a reassessment because of sections 205ZA and 205ZB. This is required as the time limit referred to at sections 205ZA and 205ZB could extend beyond the standard five year period that usually applies to reassessments.

Subsection (4) provides an application for reassessment of a foreign dutiable transaction because of section 205ZA or 205ZB must be made in the approved form.

Part 3 – Foreign landholder duty

Generally, foreign landholder duty applies to a relevant acquisition in a landholder that occurs on or after 1 January 2019 in which the landholder is entitled to residential property and the acquirer is a foreign person. Foreign landholder duty is also triggered if a relevant acquisition in a landholder entitled to residential property results from the aggregation of interests of related persons and any of the related persons is foreign.

This part imposes foreign landholder duty on a foreign landholder acquisition of an interest in a corporation or unit trust scheme that is a residential landholder. An entity is a residential landholder if it is a landholder that is directly or indirectly entitled to residential property.

Once it is determined an acquisition is a foreign landholder acquisition, foreign landholder duty is payable at seven per cent of the value of the foreign acquirer's interest in the residential landholder immediately after the acquisition. The value of the foreign acquirer's interest is based on the value of the residential landholder, which includes the value of the residential property and chattels, the use of which is directly linked to, or incidental to, the use of the residential property, held by the residential landholder or any linked entities.

Division 1 – Preliminary

205ZD. Terms used

Subsection (1) defines the terms foreign acquirer, foreign landholder acquisition and residential landholder.

'Foreign acquirer' is defined to include a foreign person that acquires an interest in a residential landholder by a foreign landholder acquisition and a foreign person that is a related person to a person that acquires an interest in a residential landholder by a foreign landholder acquisition.

Paragraph (b) of the definition of foreign acquirer refers to a foreign person related to the acquirer of an interest in a residential landholder by a foreign landholder acquisition described in sections 205ZH(2) and 205ZI(2).

Subsection (2) provides that a reference to a provision of the landholder duty provisions in Chapter 3 that is applied by section 205ZE(1) is a reference to that provision as so applied. For example, the reference to sections 188(1) and 189(1) in section 205ZJ is to sections 188(1) and 189(1) as applied by section 205ZE(1).

Division 2 – Application of Chapter 3

205ZE. Application of Chapter 3

This section applies the landholder duty rules, with the appropriate modifications, to foreign landholder duty.

Subsection (1) provides that the provisions of Chapter 3, except the provisions set out in the Table, apply to foreign landholder duty in the same way they apply to landholder duty but with the appropriate modifications made to the sections.

Subsection (2) sets out the modifications to be made to Chapter 3 for the provisions to apply to foreign landholder duty, however, they do not limit subsection (1).

The modification in paragraph (h) ensures the value of chattels, the use of which is directly linked to, or is incidental to, the use of residential property for residential purposes, is included in determining the value of an acquirer's interest in a foreign residential landholder.

The effect of the modification in paragraph (j) is that, when calculating foreign landholder duty, it is only the interest of the foreign acquirer and any related person that is a foreign person that is taken into account.

Paragraph (k) replaces the reference to 1 July 2008 in section 189(6) with a reference to 1 January 2019. The effect is that an interest held before 1 January 2019 is an excluded interest unless the acquisition is as a result of an earlier arrangement and was for the purpose of avoiding or reducing the foreign landholder duty payable.

Division 3 – Imposition of foreign landholder duty

205ZF. Foreign landholder duty imposed

This section imposes foreign landholder duty on a foreign landholder acquisition of an interest in a residential landholder. Residential landholder is defined in section 205ZG and foreign landholder acquisition is defined in sections 205ZH and 205ZI.

Division 4 – Residential landholders to which this Part applies

205ZG. Which entities are residential landholders

Subsection (1) provides this section applies to determine whether an entity is a residential landholder for the purposes of section 205ZH or 205ZI.

Subsection (2) provides a corporation is a residential landholder if it is a landholder under section 155 and it is directly, or indirectly through a linked entity, entitled to residential property.

Section 155 provides a corporation or unit trust scheme is a landholder if it is entitled to land, or a linked entity is so entitled, and the total value of the land is \$2 million or more.

Example 11

XYZ Pty Ltd is an unlisted corporation. XYZ Pty Ltd is entitled to land in Western Australia consisting of commercial property with a value of \$1.5 million and a residential property valued at \$600,000.

XYZ Pty Ltd is a landholder under section 155 as it is entitled to land in Western Australia with a value of \$2 million or more. XYZ Pty Ltd is also a residential landholder under section 205ZG as it is a landholder that is entitled to residential property.

Subsection (3) provides a unit trust scheme is a residential landholder if the trustee is a landholder under section 155 and the unit trust scheme is directly, or indirectly through a linked entity, entitled to residential property.

Subsection (4) provides the rules for determining if a partnership or a unit trust scheme linked to either a corporation or unit trust scheme is entitled to residential property. These are the same as the rules for determining if a partnership or a unit trust scheme is linked to either a corporation or unit trust scheme for the purposes of determining whether an entity is a landholder.

Division 5 – Acquisitions to which this Part applies

Division 5 sets out the acquisitions that are foreign landholder acquisitions.

205ZH. Acquisition of significant interest in residential landholder

Section 205ZH describes an acquisition that results in a foreign person, or a group of related persons at least one of whom is foreign, obtaining a significant interest in a residential landholder.

As with landholder duty, significant interest is defined in section 161, as applied by section 205ZE(1), to mean 90 per cent or greater interest in the case of a listed residential landholder and 50 per cent or greater interest in the case of any other residential landholder. The definition of related persons for landholder duty also applies for foreign landholder duty [section 162 as applied by section 205ZE(1)].

Subsection (1) provides that an acquisition is a foreign landholder acquisition where a foreign person acquires a significant interest in a residential landholder either on their own or when aggregated with any interest of a related person.

The effect is an acquisition of a significant interest in a landholder that is entitled to residential property, which triggers landholder duty under section 163, is a foreign landholder acquisition if the acquirer is a foreign person.

Example 12

XYZ Pty Ltd is an unlisted corporation that is a residential landholder. Jane holds a 20 per cent interest in XYZ Pty Ltd. The remaining 80 per cent interest in XYZ Pty Ltd is held by persons who are not related to Jane.

Jane's spouse, John, is a foreign individual who acquires a 30 per cent interest in the residential landholder from an unrelated party. John has made a foreign landholder acquisition under section 205ZH(1) because the interest held by John when aggregated with the interest of a related person, Jane, amounts to a significant interest of 50 per cent.

Subsection (2) provides an acquisition of an interest in a residential landholder by a non-foreign person is a foreign landholder acquisition if paragraphs (a) and (b) are satisfied. Paragraph (a) provides that, for an acquisition to be a foreign landholder acquisition under this subsection, immediately before the acquisition the entity is a residential landholder in which the interest of the person and of any related person did not amount to a significant interest.

Paragraph (b) requires that, after the acquisition, the person and at least one related person that is a foreign person has an interest in the residential landholder and the person holds a significant interest, either in their own right or with related persons whose interests amount to a significant interest.

This subsection provides an acquisition of a significant interest in a residential landholder by a non-foreign person is a foreign landholder acquisition if a related person who is foreign holds an interest in the residential landholder.

Example 13

ABC Pty Ltd is an unlisted corporation that is a residential landholder. Immediately prior to the acquisition, John, a foreign individual, holds a 10 per cent interest in ABC Pty Ltd. The remaining 90 per cent interest is held by persons who are not related to John. John's spouse, Jane, who is an Australian citizen acquires a 50 per cent interest in ABC Pty Ltd from an unrelated party. After the acquisition Jane holds a 50 per cent interest and John holds a 10 per cent interest.

Immediately before the acquisition, Jane and any related persons did not have a significant interest in ABC Pty Ltd. By the acquisition, Jane has acquired a significant interest in a residential landholder in which a related person who is foreign (John) also holds an interest. Therefore, Jane has made a foreign landholder acquisition under section 205ZH(2).

205ZI. Acquisition of further interest by holder of significant interest

Section 205ZI defines further acquisitions in a residential landholder that are also foreign landholder acquisitions.

Subsection (1) provides an acquisition of an interest in a residential landholder by a foreign person is also a foreign landholder acquisition if paragraphs (a) and (b) are satisfied.

Paragraph (a) requires that, immediately before the acquisition, the entity is a residential landholder in which the interest of the foreign person, a related person or a foreign person when aggregated with the interest of a related person, is a significant interest.

Paragraph (b) requires that, by the acquisition, the foreign person, the related person, or the foreign person and any related person acquire a further interest in the residential landholder.

The effect is that a relevant acquisition of a further interest in a landholder under section 164 is a foreign landholder acquisition if the landholder is entitled to residential property and the acquirer is a foreign person.

Example 14

John is a foreign individual who holds a 50 per cent interest in ABC Pty Ltd, an unlisted corporation that is a residential landholder. The remaining 50 per cent interest is held by persons who are not related to John. John acquires a further 20 per cent interest in the residential landholder from an unrelated party.

John's acquisition is a foreign landholder acquisition under section 205ZI(1) as he is a foreign person that held a significant interest in ABC Pty Ltd immediately before the acquisition and, by the acquisition, John acquires a further interest.

Subsection (2) describes a foreign landholder acquisition in circumstances where a further interest in a residential landholder is acquired and the person making the acquisition is not a foreign person.

The subsection provides an acquisition of an interest in a residential landholder by a person who is not a foreign person is also a foreign landholder acquisition if paragraphs (a) and (b) are satisfied.

Paragraph (a) requires that, immediately before the acquisition, the entity is a residential landholder in which a foreign person who is related to the acquirer holds an interest and in which the interest of the acquirer, a related person, or the acquirer when aggregated with any interest of a related person, amounts to a significant interest.

Paragraph (b) requires that, by the acquisition, the acquirer or a related person, or the acquirer and a related person, acquire a further interest in the residential landholder.

Example 15

ABC Pty Ltd is an unlisted corporation that is a residential landholder. Immediately prior to the acquisition, Jane, an Australian citizen, holds a 50 per cent interest in ABC Pty Ltd. Jane's spouse, John, who is a foreign person, also holds a 10 per cent interest in ABC Pty Ltd before the acquisition.

Jane acquires a further 10 per cent interest in ABC Pty Ltd from an unrelated party. Jane has made a foreign landholder acquisition under section 205ZI(2) as, immediately before the acquisition, Jane held a significant interest in ABC Pty Ltd and one foreign person who is related to Jane also holds an interest in the residential landholder, and by the acquisition Jane acquires a further interest in ABC Pty Ltd.

It is noted that although a non-foreign person's interest in a residential landholder is taken into account in determining whether there is a foreign landholder acquisition, foreign landholder duty is not calculated on the value of the non-foreign person's interest.

Foreign landholder duty is only calculated on the value of the interest held by a foreign person, or related foreign persons, in the residential landholder immediately after the acquisition. The effect of section 205ZE is that the provisions relating to the calculation of landholder duty in Chapter 3 Part 6 Division 5, with the appropriate modifications listed in section 205ZE(2), apply to calculate foreign landholder duty in the same way they apply to calculate landholder duty.

That is, pursuant to section 188(1), an amount of foreign landholder duty is first calculated by applying seven per cent to the value of the interest of the foreign acquirer in the residential landholder immediately after the foreign acquisition, and then, if applicable, a reduction is made under section 189. The resulting amount is the foreign landholder duty payable on the acquisition.

For the purposes of calculating foreign landholder duty, a reference to the interest of the foreign acquirer in a residential landholder includes the interest of an acquirer who is a foreign person and any related persons who are foreign, and the interests of any foreign persons related to a non-foreign person that acquires an interest in a residential landholder under section 205ZH(2) or 205ZI(2).

The value of the foreign acquirer's interest is based on the value of the residential landholder. Pursuant to section 186, the value of a residential landholder is taken to be the sum of:

- a) the unencumbered value of the residential property and chattels, the use of which is directly linked, or incidental to, the use of the property, to which the residential landholder is entitled; and
- b) the same percentage of the unencumbered value of residential property and chattels, the use of which is directly linked, or incidental to, the use of the property, held by any linked entity as the percentage of the residential landholder's interest in that entity.

In accordance with section 189, the amount calculated under section 188(1) is then reduced by an amount determined by applying seven per cent to the value of the excluded interest or the sum of the values of each excluded interest.

Under section 189(2) as applied by section 205ZE, the excluded interest is:

- a) any interest held by the foreign acquirer or a related foreign person, or by the person and a related foreign person, three years prior to the foreign landholder acquisition unless the acquisition was made as a result of an earlier arrangement entered into during the period prescribed in section 189(5);
- b) where a further interest is being acquired, any interest acquired by a foreign landholder acquisition if foreign landholder duty was chargeable in respect of that acquisition;

- c) any interest acquired prior to the residential landholder or any linked entity having an entitlement to residential property in Western Australia; or
- d) any interest held by the foreign acquirer or a related foreign person, or by the foreign acquirer and a related foreign person, before 1 January 2019 unless the acquisition is as a result of an earlier arrangement entered into during the period prescribed in section 189(5) and, in the Commissioner's opinion, was for a purpose of avoiding or reducing the amount of foreign landholder duty payable.

Section 189(2)(b) as applied by section 205ZE ensures that where a further interest is acquired by a non-foreign person under section 205ZI(2), the interest held by the related foreign person is excluded if foreign landholder duty has already been paid on the interest.

Example 16

ABC Pty Ltd is an unlisted corporation that is a residential landholder. ABC Pty Ltd is entitled to land and chattels in Western Australia with a value of \$4 million. The value of the residential property and chattels that are directly linked to the use of the property is \$1 million.

On 1 January 2018, X Pty Ltd, a foreign corporation, acquires a 50 per cent interest in ABC Pty Ltd from an unrelated party. X Pty Ltd pays landholder duty on the acquisition. On 10 January 2019, Y Pty Ltd, a foreign corporation that is related to X Pty Ltd, acquires a 20 per cent interest in ABC Pty Ltd from an unrelated party.

Y Pty Ltd has made a foreign landholder acquisition under section 205ZI(1). Pursuant to section 188(1), as applied by section 205ZE, foreign landholder duty is calculated by applying seven per cent to the value of the interest of the foreign acquirer and any related foreign person in the residential landholder immediately after the acquisition. The foreign landholder duty payable under section 188(1) is calculated as:

$$70 \text{ per cent} \times \$1,000,000 \times 7 \text{ per cent} = \$49,000$$

This amount is then reduced by an amount calculated under section 189(1) on the value of the excluded interest of the foreign acquirer or any related foreign person. As X Pty Ltd acquired its 50 per cent interest prior to 1 January 2019, the interest is an excluded interest. The foreign landholder duty payable under section 189(1) is calculated as:

$$50 \text{ per cent} \times \$1,000,000 \times 7 \text{ per cent} = \$35,000$$

The foreign landholder duty payable on Y Pty Ltd's acquisition of 20 per cent in the residential landholder is \$14,000 (calculated as \$49,000 less \$35,000).

Division 6 – Collection of foreign landholder duty

205ZJ. Rate of foreign landholder duty

This section provides foreign landholder duty is chargeable by reference to the value referred to in section 188(1) or 189(1), as the case requires, and at the rate of seven per cent of that value.

205ZK. Calculation of foreign landholder duty where landholder duty calculated under section 193

Under section 201 of the Duties Act, the Commissioner may approve the lodgment of periodical statements for relevant acquisitions of further interests in landholders. A periodical statement is usually lodged when interests in a listed landholder are being compulsorily acquired and it is expected a number of relevant acquisitions of interests will occur over a period of time.

Section 193(3) enables the Commissioner to treat relevant acquisitions of further interests contained in a periodical statement as a single acquisition and to calculate a single amount of duty, rather than perform a separate calculation in respect of each acquisition.

This section allows the Commissioner to calculate a single amount of foreign landholder duty if a periodical statement includes more than one foreign landholder acquisition.

Subsection (1) provides this section applies to the calculation of foreign landholder duty if the Commissioner calculates landholder duty on an acquisition in accordance with section 193(3).

Subsection (2) allows the Commissioner to perform a single calculation of foreign landholder duty at the end of the statement period if the single acquisition referred to in section 193(3) includes more than one foreign landholder acquisition.

Division 7 – Interim assessment of foreign landholder duty

205ZL. Interim assessment of foreign landholder duty

Under section 195A of the Duties Act, the Commissioner may make an interim assessment of landholder duty in certain circumstances based on a portion of the value of the landholder while determining the full value of the land and chattels of the landholder. Interim assessments are usually issued for complex transactions, where there may be a delay of six months or more in issuing a complete assessment.

Subsection (1) provides the Commissioner may make an interim assessment of foreign landholder duty if an interim assessment is made for landholder duty under section 195A.

Subsection (2) provides the foreign landholder duty payable in respect of an interim assessment is calculated as if the portion of the value of the residential landholder were the full value of the residential landholder for the purposes of calculating duty.

Subsection (3) provides, for the purposes of making an interim assessment, the Commissioner can determine only a portion of the value of the foreign landholder acquisition.

Division 8 – Exemptions and reassessment

This Division sets out the exemptions relating to foreign landholder duty. Section 205ZE(2)(h) has the effect of applying sections 165 and 166 to the exemptions in this Division. The effect is that, if an acquisition is exempt, it is not a foreign landholder acquisition, and the interest acquired is not taken into account in calculating foreign landholder duty and is not an excluded interest.

It is noted that section 205ZE also applies the reassessment provisions at sections 195 and 196 (with the appropriate modifications) to foreign landholder duty in the same way they apply to landholder duty.

Subdivision 1 – Exempt acquisitions

Section 205ZM. Exemption if foreign transfer duty would not be chargeable

Section 205ZM provides an exemption from foreign landholder duty if foreign transfer duty would not be chargeable if the acquirer had acquired the residential property directly. This section is the equivalent of section 168 for landholder duty.

Subsection (1) defines, for the purposes of this section, 'acquiring person' to mean the person making the acquisition and 'relinquishing person' to mean the person from whom the interest in the landholder was acquired.

Subsection (2) provides an acquisition is exempt if it is made in circumstances where no foreign transfer duty would have been charged if the acquirer had instead acquired the land of the landholder or linked entity directly from the relinquishing person.

An exception to this rule is where no foreign transfer duty would have been charged because of a connected entity's exemption under Chapter 6. The effect of the exception is that any relief from foreign landholder duty must be granted in accordance with the rules set out in Chapter 6 and not under this section.

Subsection (3) provides, for the purposes of subsection (2), the acquiring person in respect of an acquisition described in section 205ZH(2) or 205ZI(2) is to be treated as if they were a foreign person.

In sections 205ZH(2) and 205ZI(2), the acquiring person is not a foreign person. This subsection is required to treat the acquiring person as if they were foreign when applying subsection (2). In the absence of this provision, an acquisition under section 205ZH(2) or 205ZI(2) would always be exempt as foreign transfer duty would not be chargeable if the non-foreign person had acquired the residential property directly, which is not the intent of subsection (2).

Subsection (4) provides, where an acquisition has occurred other than by a direct transfer of an interest in the residential landholder, the reference to the relinquishing person is a reference to the person whose interest is decreased because of the acquisition, or whose decrease in interest resulted in the acquisition.

Section 205ZN. Exemption for certain acquisitions treated as made under agreement referred to in s.176(2)

Under section 176(2), where there is an agreement for an acquisition of an interest in a residential landholder, the acquisition is taken to occur at the time the agreement is made for the purposes of assessing duty.

This section exempts an acquisition if foreign landholder duty has been assessed on such an agreement, the acquirer is no longer a foreign person when the agreement is completed, and no liability to foreign landholder duty would have arisen if the agreement had not been treated as completed under section 176(2).

Subdivision 2 – Exemptions relating to construction, refurbishment and subdivision

205ZO. Exemption relating to construction or refurbishment of 10 or more dwellings

This section exempts an acquisition of an interest in a residential landholder if the residential landholder, linked entity or an associate of the landholder intends to construct, refurbish or complete the construction or refurbishment of 10 or more dwellings on a parcel of land.

Subsection (1) provides an acquisition is exempt if the following requirements are met:

- a) At the time the acquisition occurs, the residential landholder or a linked entity is entitled to a parcel of land on which there is no building, or part of a building, capable of being used solely or dominantly as a place of residence (such as a house or apartment).
- b) The landholder, linked entity or an associate of the landholder intends to construct, refurbish or complete the construction or refurbishment of 10 or more dwellings on the parcel of land.
- c) Within the period of five years beginning on the day on which the acquisition occurs, the landholder, linked entity or associate complies with subsection (2) in relation to 10 or more dwellings.
- d) The acquirer has not disposed of the interest in the acquirer at the time the landholder, linked entity or associate complies with subsection (2).
- e) The parcel of land is, in the Commissioner's opinion, suitable for 10 or more dwellings.

It is noted the landholder, linked entity or associate does not need to construct, refurbish or complete the construction or refurbishment of 10 or more dwellings in order to satisfy subsection 205ZO(1)(c).

As long as the landholder, linked entity or the associate intends to construct, refurbish or complete construction or refurbishment of 10 or more dwellings and complies with the relevant requirements in subsection (2) for one dwelling, the foreign acquirer is entitled to apply for a reassessment of the foreign landholder duty paid on the acquisition.

Subsection (2) sets out the requirements the residential landholder, linked entity or an associate of the landholder must comply with within five years of the acquisition in order to satisfy section 205ZO(1)(c).

A residential landholder, linked entity or associate of the landholder complies with subsection (2) in relation to:

- a) a dwelling the landholder, linked entity or associate intends to construct – if the landholder, linked entity or associate begins construction of the dwelling or another dwelling on the parcel of land;
- b) a dwelling the landholder, linked entity or associate intends to refurbish – if all licences, approvals, registrations, exemptions and other kinds of authorisation necessary to refurbish that dwelling or another dwelling on the parcel of land are issued, granted or obtained; or
- c) a dwelling the landholder, linked entity or associate intends to complete the construction or refurbishment of – if the dwelling or another dwelling is ready for occupation as a place of residence provided the construction or refurbishment was completed by the landholder, linked entity or associate.

Subsection (3) provides, for the purposes of subsection (2)(a), construction of a dwelling begins on the day on which laying the foundations for the dwelling begins or another day the Commissioner considers appropriate in the circumstances of the case.

Subsection (4) sets out the period in which a person must apply for a reassessment because of this section. The application must be made within one year of the day on which the residential landholder, linked entity or associate complies with subsection (2) or within five years of the day on which the acquisition occurs, whichever is later.

The effect is that, where the entity complies with subsection (2) less than one year before the end of the five year period, the acquirer has a year from that day to apply for reassessment.

205ZP. Exemption relating to subdivision for purpose of constructing 10 or more dwellings

This section exempts an acquisition where the residential landholder, linked entity or associate intends to subdivide, or complete subdividing, a vacant parcel of land for the purpose of constructing 10 or more dwellings on the land.

Subsection (1) provides that an acquisition is exempt if the following requirements are met:

- a) At the time when the acquisition occurs, the residential landholder or a linked entity is entitled to a parcel of land that is vacant or substantially vacant.
- b) The landholder, linked entity or an associate of the landholder intends to subdivide or complete subdividing the parcel of land so that 10 or more dwellings can be constructed on the land.
- c) Within the period of five years beginning on the day on which the acquisition occurs, the landholder, linked entity or associate begins subdividing the parcel of land or if subdivision has begun, completes subdividing the parcel of land.
- d) The acquirer has not disposed of the interest in the residential landholder when subdivision of the land begins or is completed.
- e) The parcel of land is, in the Commissioner's opinion, suitable for 10 or more dwellings.

Subsection (2) provides that an application for reassessment because of this section must be made on or before the later of:

- a) the last day of the one year period beginning on the day on which the landholder, linked entity or associate begins subdividing the parcel of land, or completes subdividing if subdivision has already begun when the transaction is completed; or
- b) the last day of the five year period beginning on the day on which the acquisition occurs.

Subsection (3) sets out that a person is taken to begin subdividing land on the day the land is subdivided under clause 3 of the Glossary to the Land Tax Assessment Act. A person is taken to complete subdividing land on the day on which the new certificate of title is created and registered for the subdivided land.

205ZQ. Calculation of duty where some land of landholder not part of parcel of land

This section provides a partial exemption where a residential landholder is entitled to a parcel of land referred to in section 205ZO or 205ZP and other residential property.

Subsection (1) provides this section applies to an acquisition referred to in section 205ZO or 205ZP if the residential landholder or a linked entity is entitled to a parcel of land that satisfies the requirements of section 205ZO or 205ZP and other residential property.

Subsection (2) provides section 166 does not apply to the acquisition. The effect is that the acquisition will still be a foreign landholder acquisition and the interest will not be disregarded when calculating foreign landholder duty.

Subsection (3) provides that, when calculating the foreign landholder duty on the partially exempt acquisition, the parcel of land referred to in section 205ZO or 205ZP is to be disregarded when determining the value of the residential landholder.

Subdivision 3 – Reassessment

205ZR. Reassessment

Subsection (1) provides the Commissioner, on the application of the taxpayer, must reassess the liability to foreign landholder duty on an exempt acquisition because of section 205ZN, 205ZO, or 205ZP.

Subsection (2) provides an application for reassessment must be made in the approved form.

Subsection (3) provides the usual five year period that applies to reassessments under section 17 of the Taxation Administration Act does not apply to a reassessment because of section 205ZO or 205ZP.

Division 9 – Lodgment of declaration

205ZS. Foreign landholder duty declaration to be lodged

This section requires a foreign landholder duty declaration to be lodged to identify foreign acquirers and to inform whether there is a foreign landholder duty acquisition.

Subsection (1) requires a foreign landholder duty declaration to be lodged for a foreign landholder acquisition.

Subsection (2) provides the foreign landholder duty declaration must be lodged by the same day an acquisition statement is required to be lodged under section 200(3), 201(6), or 202(2) in respect of the acquisition.

205ZT. Failure to lodge foreign landholder duty declaration

This section provides it is an offence if a foreign landholder duty declaration is not lodged in accordance with section 205ZS(2), and provides a penalty of a \$5,000 fine.

The persons who would commit an offence are the same as the persons who are liable to pay foreign landholder duty (section 179 as applied by section 205ZE). These persons are listed as:

- a) the foreign acquirer;
- b) if the landholder is a corporation – the corporation;
- c) if the landholder is a unit trust scheme – the trustee of the scheme;
and
- d) any related person whose interest was taken into account under section 205ZH or 205ZI in determining that a foreign landholder acquisition had occurred, except a person whose interest is an excluded interest under section 189.

Clause 9 **Section 259 amended**

Chapter 6 provides a connected entities exemption for relevant transactions between related corporations or unit trusts that are part of the same corporate group. A 'relevant transaction' is defined in section 257(1) to mean a relevant reconstruction transaction and a relevant consolidation transaction.

This clause amends section 259(2), which describes a relevant consolidation transaction, to include a reference to foreign landholder duty.

The effect is that any foreign landholder duty chargeable on an acquisition made solely for the purpose of a corporate consolidation will be exempt provided the relevant requirements set out in Chapter 6 are satisfied. 'Corporate consolidation' is defined at section 259(1) as the formation of a new family by inserting a new head entity between an entity and the shareholders or unitholders of that entity.

Clause 10 **Section 260 amended**

Section 260 describes what constitutes a relevant reconstruction transaction that is eligible for an exemption under Chapter 6. This clause amends section 260 to include transactions on which foreign transfer duty or foreign landholder duty is chargeable as relevant reconstruction transactions.

Subclause (1) inserts paragraph (aa) after section 260(1)(a), which lists certain foreign dutiable transactions as relevant reconstruction transactions that are eligible for a connected entities exemption. The foreign dutiable transactions correspond to the dutiable transactions that are eligible for an exemption from transfer duty listed in section 260(1)(a).

Subclause (2) amends section 260(1)(d) to include a reference to foreign landholder duty. This means an acquisition by one member of a family of an interest in an entity from another member of the family will be a relevant reconstruction transaction eligible for an exemption if the acquisition is chargeable with landholder duty or foreign landholder duty.

Subclause (3) inserts subsection (2A) which provides a transaction listed in subsection (1)(aa) is not a relevant reconstruction transaction if the residential property is being transferred from, or to, a trustee of a discretionary trust.

Clause 11 **Section 272 amended**

Section 272 sets out when a dutiable transaction and transaction record is duty endorsed.

This clause deletes section 272(2)(a) and inserts a new paragraph (a) which provides that if a dutiable transaction is also a foreign dutiable transaction, the transaction record is only duty endorsed if it is endorsed under section 272(2), (3), (4), or 274(2) and endorsed in accordance with the newly inserted section 273(2A).

Clause 12

Section 273 amended

This clause amends section 273 which sets out how the Commissioner is to endorse transaction records.

Subclause (1) deletes the definition of duty in section 273(1). The effect is that the reference to duty in section 273 in relation to a dutiable transaction or transaction record includes foreign transfer duty.

Subclause (2) amends the definition of 'required duty' in section 273(1) to include foreign transfer duty (if any) chargeable on the transaction.

Subclause (3) deletes subsection (2) and inserts a new subsection (2) and (2A).

Subsection (2) sets out how the Commissioner is to endorse a transaction record for a dutiable transaction if transfer duty is chargeable on the transaction, if transfer duty is not chargeable on the transaction because of an exemption, or if transfer duty is not chargeable on the transaction other than because of an exemption.

It is noted the Commissioner is only required to endorse a transaction record under subsection (2) if any required duty has been paid in full. This includes foreign transfer duty. For example, if a transaction is exempt from transfer duty but is chargeable with foreign transfer duty, the Commissioner is not required to endorse the transaction record to indicate the transaction is exempt from transfer duty until the foreign transfer duty has been paid.

Subsection (2A) sets out how the Commissioner is to endorse a transaction record for a foreign dutiable transaction if foreign transfer duty is chargeable on the transaction, if foreign transfer duty is not chargeable on the transaction because of an exemption, or if foreign transfer duty is not chargeable on the transaction other than because of an exemption.

As with subsection (2), the Commissioner is only required to endorse a transaction record for a foreign dutiable transaction if any required duty has been paid in full. A transaction record for a dutiable transaction that is also a foreign dutiable transaction will only be duty endorsed if it has been endorsed in accordance with subsections (2) and (2A).

The Commissioner is not required to endorse a transaction record in accordance with subsection (2A) if the transaction is not a foreign dutiable transaction.

Subclause 4 replaces 'subsection (2)' in section 273(3A) with 'subsections (2) and (2A)'. The effect is that, despite the endorsement provisions in subsections (2) and (2A), the Commissioner is not required to but may endorse a transaction record to indicate the transfer duty or foreign transfer duty paid as a consequence of an interim assessment.

Clause 13 Section 275 amended

This clause amends section 275(a)(ii) to include 'foreign transfer duty (if any)'. The effect is that a duty endorsement is evidence of any transfer duty and foreign transfer duty paid in relation to a transaction record that evidences a dutiable transaction and a foreign dutiable transaction.

Clause 14 Schedule 2 amended

This clause replaces the reference to 'residential property' with 'residential land' in Schedule 2 Division 2 which sets out the residential concessional rate of duty for section 147E.

Clause 15 Schedule 3 Division 8 inserted

This clause inserts a new Division 8 in Schedule 3 that provides the transitional arrangements for the amendments in this Bill.

Division 8 – Provisions for *Duties Amendment (Additional Duty for Foreign Persons) Act 2018*

39. Terms used

This clause provides that a term used in this Division that is used in Chapter 3A has the same meaning in this Division as it has in that Chapter.

40. When Chapter 3A Part 2 starts to apply

Clause 40 provides that Chapter 3A Part 2, which relates to foreign transfer duty, applies to transactions that occur on or after 1 January 2019.

41. Agreements entered into before 1 January 2019

Subclause (1) provides that, where an agreement for the transfer of residential property is entered into before 1 January 2019, foreign transfer duty is not chargeable on the transfer of the residential property if the transfer is in conformity with the agreement.

Subclause (2) provides foreign transfer duty is not chargeable on a transfer of residential property to a transferee on or after 1 January 2019 if the agreement was entered into before 1 January 2019 and the purchaser named in the agreement was acting as agent for the transferee.

42. Declaration of trusts made before 1 January 2019

This clause sets out transitional rules for certain transactions relating to the declaration of trusts.

Subclause (1) provides foreign transfer duty is not chargeable on a transfer of residential property to a trustee where the declaration of trust relating to the residential property was made before 1 January 2019.

Subclause (2) provides if a transfer, or an agreement for the transfer, of residential property, declares a trust over residential property before 1 January 2019, foreign transfer duty is not chargeable on a subsequent declaration of the same trust.

Subclause (3) provides a declaration of trust is not chargeable with foreign transfer duty if the declaration replaces another declaration of trust made before 1 January 2019, the declaration is made in favour of the same beneficiary, and the residential property the subject of the declaration of trust is the same, or represents the proceeds of re-investment of the property that was the subject of the superseded declaration of trust.

43. Other transactions before 1 January 2019

Subclause (1) provides foreign transfer duty is not chargeable on a transfer of residential property made pursuant to a vesting as a consequence of a court order or statute law if the vesting occurred before 1 January 2019.

Subclause (2) provides foreign transfer duty is not chargeable on a transfer of residential property in accordance with a foreclosure order that was made before 1 January 2019.

Subclause (3) provides a transfer of residential property is not chargeable with foreign transfer duty if the transfer is in accordance with a partnership acquisition that occurred before 1 January 2019.

Subclause (4) provides foreign transfer duty is not chargeable on a foreign dutiable transaction in the circumstances described in section 97, 114, 115, 116 or 117 if the transferor under the transaction acquired the residential property before 1 January 2019.

The proposed section 205Y(3) sets out the exceptions to the rule that foreign transfer duty is not chargeable if a transaction is exempt from transfer duty or is chargeable with nominal duty. The exception applies to transactions described in sections 97, 114, 115, 116 or 117 in certain circumstances.

The effect is that, despite section 205Y(3), the transactions described in that section will be exempt from foreign transfer duty if the residential property was acquired by the transferor who is the spouse or de facto partner, trustee or apparent purchaser before 1 January 2019.

44. When Chapter 3A Part 3 starts to apply

Subclause (1) provides the foreign landholder duty provisions in Chapter 3A Part 3 apply to a foreign landholder acquisition only if the acquisition occurs on or after 1 January 2019.

Subclause (2) provides the time that an acquisition of an interest in a residential landholder is taken to occur is determined by section 176 as applied by section 205ZE(1). The general rule in section 176 is that an acquisition occurs when the agreement is made if there is an agreement for the making of the acquisition, whether conditional or not.

The exception to the rule is that if the entity is not a residential landholder when the agreement is made but is a residential landholder at completion of the agreement, the acquisition occurs when the agreement is completed.

45. Application of some Ch. 8 provisions

Subclause (1) provides the endorsement provisions at sections 272(2) and 273 that were in force before the commencement of the amendments in clause 15 of this Bill, apply to dutiable transactions that took place before 1 January 2019. The amended provisions only apply to dutiable transactions from 1 January 2019 onwards.

Subclause (2) provides the endorsement provision at section 273(2A) applies to a foreign dutiable transaction only if that transaction takes place on or after 1 January 2019.