Stamp Duty
Land Holder
Guide to Legislation
2020

This is a general guide to the provisions of Part 4 of the *Stamp Duties Act 1923*.

Part 4,Stamp Duties Act 1923

RevenueSA
DEPARTMENT OF TREASURY AND FINANCE

Government of South Australia

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This is the third edition of the Stamp Duty Land Holder Guide to Legislation, which provides a general guide to the provisions of Part 4 of the *Stamp Duties Act 1923* (the "SDA"), more commonly known as the 'land holder provisions'.

Similar to previous releases, this guide is not intended to be a complete statement of the law, in place at the date of release or at any other particular time, and must not be construed to waive or modify any legal obligation provided in the SDA.

This edition incorporates information relating to the transfer, issue or redemption of units in a unit trust scheme.

For historical information please refer to:

2018 Guide to Legislation: Stamp Duty Land Holder

2016 Guide to Legislation: Stamp Duty Land Holder

2014 Guide to Legislation: Stamp Duty Land Holder

In this Guide:

- all references made to sections, parts, divisions, schedules or clauses relate to the SDA, unless otherwise specified; and
- a reference to the Commissioner is a reference to the Commissioner of State Taxation.

For further details on any matters relating to the Acts or Regulations mentioned in this Guide, please feel free to contact RevenueSA on (08) 8226 3750.

Julie Holmes
COMMISSIONER OF STATE TAXATION
6 January 2020

Further Information

Further information can be obtained from RevenueSA.

Website revenuesa.sa.gov.au **Email** stamps@sa.gov.au **Telephone** (08) 8226 3750

Authorised copies of the SDA can be purchased from the Service SA, EDS Centre, 108 North Terrace, Adelaide.

Online versions of state legislation are available at the South Australian legislation website:

legislation.sa.gov.au

Contents

Introduction

Land holder duty is imposed and collected in South Australia in accordance with the provisions of the SDA and the *Taxation Administration Act 1996* (the "TAA").

The Commissioner of State Taxation (the "Commissioner") is responsible for the administration of the SDA and the TAA.

No liability to duty arises in relation to a conveyance or transfer of an interest in non-residential and non-primary production land ("qualifying land") executed on or after 1 July 2018 (subject to the conveyance or transfer of an interest not arising from a contract of sale or other transaction entered into before 1 July 2018) [Section 105A]. Qualifying land means land that is being used other than for residential purposes or for primary production, as defined by Section 105A. Accordingly, only conveyances or transfers of an interest in residential and primary production land remain liable to duty. Further information regarding qualifying land (and the phased reduction of the rates applicable to qualifying land from 7 December 2015 to 30 June 2018) is available in **Information Circular 86**.

From 1 July 2018, if a unit trust scheme holds either residential or primary production land in South Australia, the transfer, issue or redemption of units in the trust scheme is liable to land holder duty under Part 4 of the SDA.

The land holder provisions contain the following core criteria:

- if a person or a group acquires an interest of 50% or more of the shares of a private company or units of a private unit trust scheme and that entity holds, directly or indirectly, local land assets, **conveyance rates of duty will apply**; or
- if a person or a group acquires 90% or more of the shares of a listed company or units of a public unit trust scheme **conveyance duty will apply at a rate of 10% of the amount of duty otherwise payable**.

The administrative provisions relating to assessments and collection of duty and any interest and/or penalty tax, lodgement of objections and appeals, and the appointment of liquidators, trustees and agents are found in the TAA.

General principle of liability to duty

A person or group that acquires a prescribed interest, or increases a prescribed interest, in a land holding entity notionally acquires an interest in the underlying local land assets of the entity and is liable to duty in respect of the notional acquisition [**Section 100(1)**].

Transactions are dutiable as a result of a person or group:

- acquiring or having a prescribed interest in a land holding entity; or
- increasing a prescribed interest already held in a land holding entity [**Section 100(2)**].

A transaction, as a result of which a person or group has a prescribed interest or increases a prescribed interest, is dutiable even if the person or group is not a party to the transaction or has only a passive role in the transaction [**Section 100(3)**].

For example, any of the following is capable of being a dutiable transaction:

- an allotment of shares in a company or units in a unit trust scheme;
- the variation or abrogation of rights attaching to shares in a company or units in a unit trust scheme;
- the redemption, surrender or cancellation of shares in a company or units in a unit trust scheme; or
- the addition or retirement of a partner in a partnership with assets comprising shares in a company or units in a unit trust scheme [**Section 100(4)**].

If a relevant entity (i.e. a private company, a private unit trust scheme, a listed company or a public unit trust scheme) acquires a local land asset and pays conveyance rates of duty on the acquisition, and as a result of the acquisition becomes a land holding entity, the transaction is not liable to duty under Part 4 [**Section 100(5)**].

If a person acquires or holds an interest in a land holding entity as a trustee for two or more trusts, any interest in the entity acquired or held by the person for different trusts are to be treated as if they were acquired by separate persons [**Section 100(6)**]

Foreign persons (natural persons and corporations) or foreign trusts that notionally acquire an interest in residential land are liable to pay a foreign ownership surcharge of 7% of the value of the interest of the interest notionally acquired. The foreign ownership surcharge applies to transactions liable to duty under Part 4 entered into from 1 January 2018 and is payable in addition to the landholder duty that is otherwise payable on a transaction.

If a person or group has a prescribed interest in a relevant entity, which becomes a land holding entity only as a result of the removal of the $1 million local land assets threshold from 1 July 2018, no liability to duty arises under **Part 4**.

Prescribed interest

A prescribed interest is defined to mean:

- in relation to a private company or private unit trust scheme – a proportionate interest in the entity of 50% or more; and

- in relation to a listed company or a public unit trust scheme – a proportionate interest of 90% or more [**Section 91(1)**].

A proportionate interest in a relevant entity (a private company, private unit trust scheme, listed company or a public unit trust scheme) means:

- for a person or group that has a direct interest or an indirect interest in the entity – the percentage representing the extent of that interest; or
- for a person or group that has both a direct interest and an indirect interest in the entity – an aggregate percentage representing the extent of both those interests [**Section 91(1)**].

A person or group has a **direct interest** in an entity if the person or group holds a share or unit in the entity [**Section 93(1)**]. For the purposes of **Part 4**, a person holds a share or unit in a relevant entity if the person:

- is registered as the holder;
- is beneficially entitled to the share or unit; or
- controls the exercise of rights attached to the share or unit [**Section 91(1)**].

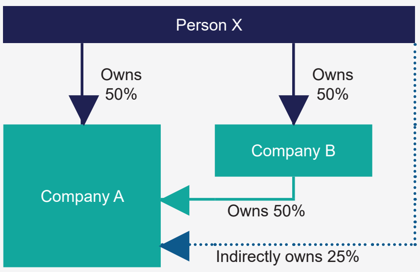
A person or group has an indirect interest in a private company or private unit trust scheme (entity B) if the person or group has a direct interest in a private company or private unit trust scheme (entity A) which is a **related entity** to entity B [**Section 95**].

Two relevant entities are related entities if one has a direct interest in the other, or a series of such relationships can be traced between them through another or other related entities (intermediate entities) [**Section 94**].

The direct and/or indirect interest that a person or group has in a relevant entity is expressed as a proportionate interest [**Section 93(2)** and **Section 95(2)**].

Example

Person X owns 50% of the shares in Company A and also owns 50% of the shares in Company B, which owns 50% of the shares in Company A.



Person X then has a direct interest in Company A of 50% and an indirect interest in Company A of 25%. Person X therefore has a proportionate interest in Company A of 75%.

The proportionate interest of a person or group is the highest of the following:

- a percentage representing the proportion of votes that the person or members of the group would be entitled to exercise (or control) at a general meeting of shareholders or unit holders assuming all shareholders or unit holders exercised their voting rights;
- a percentage representing the extent to which a person or member of the group is entitled to participate in dividends or distributions of income; or
- a percentage representing the extent to which the person or members of the group would be entitled to participate in the distribution of assets on a winding up of the relevant entity [**Section 93(3)**].

The proportionate interest of a person or group in a relevant entity is to be determined as if any power that the person has, or the members of the group or any of them have, to increase the extent of an interest (by varying the constitution documents of the relevant entity or in any other way) has been exercised so as to maximise the relevant interest in the relevant entity [**Section 93(4)**].

Example

Person X owns 48% of the 100 issued voting shares in Company A and also owns 56% of the 100 non-voting convertible preference shares in Company A.

The constitution of Company A provides that the owner of non-voting convertible preference shares may convert these shares to ordinary voting shares.

A conversion of the non-voting convertible preference shares would result in Person X owning 52% of the issued voting shares in company A.

Accordingly, Person X's proportionate interest in Company A is 52%, calculated as follows:

Voting shares	48
Non-voting shares	56
Total shares	104

Proportion of shares owned

$$\frac{104 \text{ (total shares owned)}}{200 \text{ (total shares available)}} = 52\%$$

Unit trust scheme

A unit trust scheme is an arrangement under which investors may acquire rights to participate, as beneficiaries under a trust, in profits, income or distribution of assets arising from the acquisition, holding, management, use or disposal of property. [**Section 91(1)**].

Property is deemed to be held beneficially by a unit trust scheme if it is held by the trustee of the scheme for the unit holders [**Section 91(2)**].

A relevant entity can have an interest in land directly as the beneficial owner, or indirectly through a related entity (refer to 'land holding entity' section), a discretionary trust or a partnership. A part or the whole of such land held indirectly is attributed to the relevant entity.

Discretionary trust

A relevant entity or other person that is an object of a discretionary trust is deemed to be beneficially entitled to the trust property unless:

(a) the relevant entity or other person satisfies the Commissioner that such deeming operates unreasonably in the circumstances of a particular case [**Section 91(3)(a)**]; and

(b) the Commissioner determines that the relevant entity or other person is not, in the circumstances of the particular case, to be regarded as beneficially entitled to the trust property [**Section 91(3)(b)**].

This deeming provision enables:

- the tracing of direct and indirect interests through a discretionary trust, as a relevant entity that is the object of a discretionary trust, is deemed to be beneficially entitled to the property of the discretionary trust;
- a relevant entity's notional interest in the assets of other private companies or private unit trust schemes, to be traced through a discretionary trust, as a relevant entity that is the object of a discretionary trust is deemed to be beneficially entitled to the property of the discretionary trust.

Without this 'look through', the aggregation of the direct and indirect interests of a person in a land holding entity, or a relevant entity's notional interest in the underlying South Australian land, would be blocked by the placing of a discretionary trust interest holder in a chain of relevant entity interest holders.

The objects are deemed to be beneficially entitled to any South Australian land of the discretionary trust. Any relevant entity that is an object of the discretionary trust will be a land holding entity for the purposes of **Part 4**, unless they satisfy the Commissioner that this deeming provision operates unreasonably.

If a discretionary trust acquires a prescribed interest or increases a prescribed interest in land holding entity, a relevant entity or other person that is an object of the discretionary trust, is deemed to hold that prescribed interest or increased interest and will be liable to duty under Part 4 of the SDA, unless they satisfy the Commissioner that this deeming provision operates unreasonably.

Partnership

A relevant entity or other person that is a partner in a partnership is deemed to be beneficially entitled to a proportionate share in each and every asset of the partnership, determined according to the greater of either the relative entitlement to participate in the surplus property of the partnership or the relative capital contribution of the partner (being equity and any loan capital) [**Section 91(4)** and **(5)**].

The Commissioner has the discretion to determine the proportionate share of a partner on a basis other than participation in surplus property or relative capital contribution [**Section 91(6)(a)(ii)**].

The Commissioner will take into account the terms of any partnership agreement and any instrument effecting a change in a partnership, which clearly stipulate each partner's proportionate share in partnership assets.

In determining the relative capital contribution of partners, any loan to the partnership is considered to be loan capital and a capital contribution unless the Commissioner is satisfied that the loan was entered into as part of a 'genuine business arrangement'. Such a loan will bear the hallmarks of an open market loan such as a specified interest rate, terms of repayment, security, if any, and it will rank in priority to the equity capital in the event of dissolution of the partnership.

Loan capital is any loan provided by a partner to attain or maintain a partner's proportionate share in the partnership. Such loans, generally long term in nature, will be aggregated with the partner's equity to determine the relative capital contribution of the partner for the purposes of determining the partner's proportionate share in the partnership.

The entitlements attaching to the partner's loan will be considered in each situation to determine whether the loan is part of an arrangement to avoid or reduce duty under **Part 4**.

The following example illustrates this distinction:

Example

According to the ABC Partnership Agreement, A (a relevant entity), B and C are equal partners and carry on various investment activities. Each partner was required to contribute $100 capital on the formation of the partnership. The Balance Sheet of the Partnership after the first year of trading is as follows:

Assets	
Land	$60
Bonds	$200
Shares	$240 (100% of land holding entity XYZ Pty Ltd)
Liabilities	
Loan - Partner B	$50
Accounts payable	$100
Provision for Taxes	$100

Partnership Funds

Partner A	$100
Partner B	$50
Partner C	$100

In the present circumstances, the loan from Partner B to the Partnership increases Partner B's proportionate share so that all partners would be treated as having an equal interest in the Partnership. In this case the individual interest in land of each partner, including relevant entity A, is $20 (being 1/3 of the land assets value) plus an interest in the land of XYZ Pty Ltd.

Now assume that the partnership is facing cash-flow issues, however, only Partner C is in a position to provide funds to the Partnership during this difficult financial period. Partner C therefore lends the Partnership $75 on an arm's length basis, so that the Balance Sheet looks as follows:

Assets

Cash at Bank	$75
Land	$60
Bonds	$200
Shares	$240 (100% of land holding entity XYZ Pty Ltd)

Liabilities

Loan - Partner B	$50
Loan - Partner C	$75
Accounts payable	$100
Provision for Taxes	$100

Partnership Funds

Partner A	$100
Partner B	$50
Partner C	$100

In these circumstances, the loan from Partner C to the Partnership will not be treated as a capital contribution. The Commissioner will consider whether this loan is part of an arrangement to avoid or reduce duty. The Partners' individual interest in land of the Partnership is $20 plus an interest in the land of XYZ Pty Ltd.

Group

A group for the purposes of **Part 4** is a 'group of associates' [**Section 91(1)**] and the relationships that can give rise to associate status are drafted broadly to capture acquisitions by different persons, acting for a common commercial purpose. The grouping of acquisitions of associates ensures, amongst other things, that contrived ownership splitting is not employed to avoid the payment of stamp duty when control of South Australian land is effectively passed.

A person is an associate of, or associated with, another if:

- they are married or in a close personal relationship;
- one is the parent, child, brother or sister of the other;
- they are in a partnership;
- they are companies which are related bodies corporate for the purposes of the *Corporations Act 2001* (Cwlth);
- one is a company and the other is a director or executive officer of, or shareholder in, the company;
- they are both trustees of a trust or one is a trustee of the trust and the other is a beneficiary of the trust; or
- a chain of relationship can be traced between them under one or more of the above points.

In circumstances where a person has an interest in a land holding entity and other persons who are associated with the person together have acquired a prescribed interest in the entity, the group will be liable to duty under Part 4, unless the person satisfies the Commissioner that the association with the other persons has not arisen from a common commercial interest and the persons in the relationship will act entirely independently of each other [**Section 91(8)**].

A corporate group, including the parent entity and its related bodies corporate and those bodies corporate that can be traced to the parent entity through a chain of relationships, constitute a group of associates.

A married couple will be associated unless they establish to the Commissioner's satisfaction that their association has not arisen as a result of a common commercial interest or purpose and they will act entirely independently of each another.

The executive officer of a company means a person who is concerned in, or takes part in, the management of the company (regardless of the person's designation and whether or not the person is a director of the company) [**Section 91(1)**].

Although this definition is potentially quite wide it will generally be taken not to apply, for example, to a human resources manager or an administrative assistant unless they have a significant role in managing the company.

A company and the shareholders of the company are associated and form a group. In exercising the discretion to disregard the association between a listed company and shareholders in the company, shareholders with small parcels of shares in the company will be considered to be acting independently and not sharing a common interest or purpose with the company, unless another basis for the association exists.

The Commissioner does not accept that each person needed to link associated persons to form a group of associates must also hold a proportionate interest in a land holding entity. A director common to two companies that each holds shares in a land holding entity may be sufficient to link the two companies as a group of associates, for the purposes of **Section 91(8)**. The director need not also be a shareholder in the landholding entity.

Land holding entity

A relevant entity is a 'land holding entity' if the relevant entity holds **local land assets** [**Section 98**].

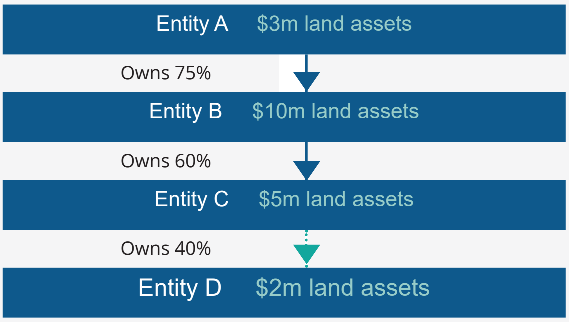
A 'local land asset' is a land asset consisting of an interest in land in South Australia [**Section 92(2)**].

The **underlying local land assets** of a relevant entity include the land assets held beneficially by the entity and its notional interests in the land assets of related entities [**Section 91(1)**].

A relevant entity has a notional interest in a land asset held beneficially by a private company or private unit trust scheme if the relevant entity holds a proportionate interest of 50% or more in the private company or private unit trust scheme, or if a chain of such proportionate interests of 50% or more can be traced between the relevant entity and the private company or private unit trust scheme [**Section 96(1)**]. A significant interest for the purposes of this calculation is a proportionate interest of 50% or more [**Section 91(1)**].

Example

Entity A holds a 75% proportionate interest in Entity B which has land assets of $10M. Entity B in turn holds a 60% proportionate interest in Entity C which has land assets of $5M. Entity C in turn holds 40% proportionate interest in Entity D which has land assets of $2M.



In this case Entity A has a notional interest in the land assets held beneficially by Entity B and Entity C but not in the land assets held by Entity D as the chain of 50% proportionate interests is broken between Entity C and Entity D.

Entity A has a notional interest in the land assets of Entity B i.e. 0.75 x $10m	=	$7.5 million
Entity A has a notional interest in the land assets of Entity C i.e. 0.75 x 0.60 x $5m	=	$2.25 million
Entity A also owns $3 million land directly.	=	$3 million
Entity A therefore, for the purposes of Part 4, has land assets of:		$12.75 million

Land assets

No liability to duty arises in relation to a conveyance or transfer of an interest in qualifying land (i.e. land that is being used other than for residential purposes or for primary production) from 1 July 2018 onwards. Accordingly, only conveyances or transfers of an interest in residential and primary production land remain liable to duty. Further information regarding qualifying land (and the phased reduction of rates applicable to qualifying land from 7 December 2015 to 30 June 2018) is available in **Information Circular 86**.

Sections 2 (4) to (6) define the following, amongst other things, as taken to be within the concept of land:

- an estate or interest in land (including land covered by water); and
- an option to acquire land; subject to **Section 31**, a right to acquire an estate or interest in land; any other right or interest prescribed by the regulations.

Any other interest excluded from the application of **Sections 2(4)** and **(5)** by the regulations are not taken to be within the concept of land, for duty purposes.

In addition, **Part 4** provides specific definitions in relation to land assets:

> 'land asset' is an interest in land other than a mortgage, lien or charge or an interest under a warrant or writ [**Section 92(1)**].

A relevant entity's interest in land will include an interest in anything fixed to the land, including anything:

- separately owned from the land (other than where the separation of ownership occurs by virtue of or as a result of the operation of other legislation or law); or
- fixed to the land but notionally severed or considered to be legally separate to the land by virtue of or as a result of the operation of other legislation or law [**Section 92 (3)**].

Land assets includes all items fixed to the land whether or not they constitute fixtures at law; and all fixtures at law are taken to be land assets [**Section 92(4)**].

In relation to an interest in land that is separately owned from the land, the Commissioner may determine that the interest will not be included if the separate ownership of the interest is not part of an arrangement to avoid duty under the land holder provisions [**Section 92(5)(a)**].

An interest in land of the relevant entity that is notionally severed or legally separated by operation of other legislation or law will not include an interest that is owned by another entity unless the entities are related and a person or group holds a significant interest in both, or either entity holds a significant interest in the other, either directly or through a chain of other entities [**Section 92(5)(b)**].

Example - Wind Farms

A company owns land upon which it carries on a business of primary production.

An electricity generation company, which has no common shareholders with the land owning company, has installed a series of power generating wind turbines on part of the land. The wind turbines are fixed to the land but are not considered to be owned by the land owning company due to the operation of the *Electricity Act 1996*.

In the event of the sale of a prescribed interest in the land owning company, the value of the wind turbines would not be aggregated with the value of the land.

In the event that a person acquires a prescribed interest in the electricity generation company, the value of the wind turbines would be included in the value of land assets of the electricity generation company.

Aggregation of certain interests acquired by persons who are not associates

If a person or group acquires an interest in a land holding entity (a later transaction) that, when aggregated with an interest in the entity acquired by another person as a result of an associated transaction on the same day or within the preceding three years (a prior transaction), amounts to a prescribed interest in the entity, then the person or group is deemed to acquire that prescribed interest in the entity through that later transaction [**Section 101(1)(a)**].

The person or group and any other person acquiring an interest as a result of the associated transaction are jointly and severally liable for the payment of duty in respect of the acquisition [**Section 101(1)(b)**].

An 'associated transaction' is defined to mean, in relation to the acquisition of an interest in a land holding entity by a person or associated person, an acquisition of an interest in the entity by another person in circumstances in which:

- those persons are acting in concert; or
- the acquisitions form, evidence, give effect to or arise from substantially one arrangement, one transaction or one series of transactions [**Section 101(2)**].

Transactions captured involve two or more persons who are not 'associated' for duty purposes, under these provisions, but who in substance are acting for the same commercial or economic purpose or objective.

The Commissioner considers that two or more persons will be acting in concert where there is evidence showing a common purpose, object, an understanding, agreement or plan regarding the persons' acquisitions of interests in a land holding entity.

Where there has been no communication, directly or indirectly, or a tacit understanding, between persons, yet the transactions appear to arise spontaneously, the persons will not be considered to be acting in concert.

In considering whether acquisitions of interests in a land holding entity constitute 'substantially one arrangement, one transaction or one series of transactions', the Commissioner will consider the substance of the several acquisitions and in particular seek to determine whether there is some essential unity, some oneness, some unifying factor between the acquisitions.

Where it can be shown that transactions are separate and independent they will not be regarded as associated transactions.

The Commissioner will have regard to the following factors when determining whether acquisitions constitute 'associated transactions':

- the nature of any agreements, understandings or arrangements between the parties to the acquisitions of interests in the land holding entity;
- any association between the parties to any agreements, understandings or arrangements relating to one or some of the acquisitions of any interest in the land holding entity;
- whether there is any interdependence between the acquisitions including whether there was any contingency that one or some of the acquisition would not take place without the completion of others; and
- the timing of any acquisitions.

Example

Two persons, who are not associates, enter into an arrangement to acquire a prescribed interest, where Person A acquires 40% and Person B acquires 20%.

Without associated transaction provisions, neither Persons A nor B would have been liable to duty on the acquisition, however, these provisions operate to aggregate the acquisitions of Person A and Person B, so that Persons A and B have jointly acquired a prescribed interest of 60%, for the purposes of determining the notional acquisition that is liable to duty.

In the past, concerns have been raised that the aggregation provisions might operate to aggregate the interests of existing shareholders or unit holders in a land holding entity in circumstances where the company or unit trust scheme makes a *pro rata* issue of shares or units.

As a *pro rata* issue of shares or units does not result in any change in the relative proportionate interest of any shareholder or unit holder, RevenueSA does not regard such issues as giving rise to an associated transaction.

The provisions have yet to be applied by the Commissioner and are considered to be an effective deterrent to those persons whom might otherwise use this approach to reduce their stamp duty liability.

Calculation of tax payable

Initial dutiable transaction on prescribed interest acquisition

The duty in respect of a transaction under which a person or group acquires a prescribed interest in a land holding entity is:

- where the entity is a private company or a private unit trust scheme – the **duty payable on a conveyance of land** with the unencumbered value equivalent to the value of the acquirer's notional interest in the entity's underlying local land assets [**Section 102A(1)(a)**]; or
- where the entity is a listed company or a public unit trust scheme – 1**0% of the duty payable on a conveyance of land** with the unencumbered value equivalent to the value of the acquirer's notional interest in the total of the entity's underlying local land assets [**Section 102A(1)(b)**].

Subsequent dutiable transaction on an increased prescribed interest acquisition

Duty on a transaction under which a person or group increases its prescribed interest in a land holding entity is calculated as follows:

$$D = d1 - d2$$

Where

D is the amount of the duty

d1 is the amount payable if the whole interest was acquired in a single transaction at the time of the acquisition

d2 is the amount payable if the pre-existing interest was acquired in a single transaction at the time of the increase [**Section 102A(2)**].

Value of notional interest

The value of the notional interest acquired in the underlying local land assets is as follows:

$$NV = TV \times P$$

Where

NV is the value of the notional interest acquired

TV is the total unencumbered value of all the entity's underlying local land assets

P is the fraction representing the proportionate interest of the person or group in the entity [**Section 102(1)**].

Example

Person X increases a prescribed interest in private Company A, which has total unencumbered local land valued at $1 million, from 50% to 60%.

D = d1 – d2

d1 = value of whole notional interest acquired **x** conveyance duty rate

($1 million x 60%) **x** conveyance duty rate

$600 000 **x** conveyance duty rate

$26 830

d2 = value of pre-existing notional interest **x** conveyance duty rate

($1 million x 50%) **x** conveyance duty rate

$500 000 **x** conveyance duty rate

$21 330

D = $26 830 - $21 330

$5500 (duty payable)

Foreign ownership surcharge

Foreign persons (natural persons and corporations) or foreign trusts that notionally acquire an interest in residential land are liable to pay a foreign ownership surcharge of 7% of the value of the interest of the interest notionally acquired.

The foreign ownership surcharge applies to transactions liable to duty under Part 4 entered into from 1 January 2018 and is payable in addition to the landholder duty that is otherwise payable on a transaction.

Further information regarding the foreign ownership surcharge is available from the RevenueSA website.

Determination of value

Upon the acquisition of a prescribed interest in a land holding entity, the value of local land assets, is to be determined. The value is the market value of the asset at the time that the question of value falls to be determined and such market value must be based on the unencumbered value [**Sections 99(2)** and **(6)**].

Further information regarding valuations of land, interests in land and land holder interests is available in **Information Circular 102**.

Further, in determining the value of an asset or interest, it is to be assumed that a hypothetical purchaser would, when negotiating the price for any asset or interest, have knowledge of all existing information relating to the asset or interest; and no account is to be taken of any amount that a hypothetical purchaser would have to expend to reproduce, or otherwise acquire a permanent right of access to and use of, existing information relating to the asset or interest [**Section 99(7)**].

These provisions allow the Commissioner to cause a valuation of an asset or interest to be made in circumstances where there is no evidence or there is unsatisfactory evidence provided as to the value of the asset or interest and, depending upon the merits of the case, pass the cost of making a valuation on to any person who is liable to pay duty in respect of the transaction, under **Part 4** [**Section 99(3)**].

102B Return Statement

Where a person or group acquires or increases a prescribed interest in a land holding entity, the acquirer is required to lodge a return with the Commissioner and the payment of the relevant amount of duty within two months of the date of the dutiable transaction.

The Section 102B Return is available on **www.revenuesa.sa.gov.au** and needs to be completed and submitted to RevenueSA with the transfer or other transaction documents and other supporting documentation for assessment [**Section 102B(1)**].

Reductions and rebate

Section 102A(4): prior holdings in a land holding entity

If a person or group holds an interest in a relevant entity and the relevant entity acquires land so as to become a land holding entity, and *ad valorem* duty was paid on the land acquisition and subsequently the person or group acquires a prescribed interest in the entity, a reduction is available.

Duty is reduced in accordance with the following formula:

$$D = d1 - d2$$

Where

D is the amount of the duty

d1 is the amount payable if the whole interest was acquired in a single transaction at the time of the acquisition

d2 is the amount payable on a conveyance of the interest in the South Australian land (held by the landholding entity at the time that the person or group acquires a prescribed interest in the land holding entity) corresponding to the interest held by the person or group at the time the entity became a land holding entity.

Example

Persons A and B each hold four of the 10 issued shares in Company X and Person C holds two of the 10 issued shares in Company X. Company X acquires South Australian land with an unencumbered valued of $10 million and pays duty on the land acquisition at *ad valorem* rates (i.e. duty amounting to $543 830). Shortly after the acquisition, Person A purchases the shares in Company X held by Person B resulting in Person A holding a prescribed interest in Company X, (which is now a land holding entity) of 80%.

A has a notional interest of $8 million in the South Australian land held by Company X upon which duty calculated under Section 102A(1) is $433 830.

The Section 102A(4) reduction formula applies:

D	=	d1 – d2
d1	=	$433 830
d2	=	is the duty payable on a hypothetical acquisition of the interest held by Person A when company X became a land holding entity i.e. = (4/10th of $10 million) x conveyance rate = $213 830
D	=	$433 830 - $213 830
		$220 000 (duty payable)

Section 102A(5): three year rule

If any part of a prescribed interest in a land holding entity was acquired by the relevant person or group more than three years before the date of a dutiable transaction (the earlier transaction), duty will be rebated on the acquisition of a prescribed interest only by the percentage representing the extent of the earlier acquisition as a proportion of the prescribed interest as a whole.

Example

Company X, a land holding entity, owns South Australian land with an unencumbered value of $10 million. Person A has held a 25% interest in Company X for more than three years before acquiring a further 50%.

Person A has a notional interest of $7.5 million in the South Australian land of Company X upon which duty calculated under Section 102A(1) is $406 330 (i.e. duty on $7.5 million).

The Section 102A(5) rebate applies to the extent of 25% for the interest held for more than three years:

Rebate	=	$\frac{25\%}{75\%}$ x $406 330
	=	$135 443.30
Duty Payable	=	$406 330 - $135 443.30
		$270 886.70

In so far as **Sections 102A(4)** and **(5)** both apply to an acquisition of a prescribed interest in a particular land holding entity, the provision that provides the higher benefit to the acquiring person or group will apply [**Section 102A(6)**].

Section 102A(7): double duty

If a person or group acquires or increases a prescribed interest in a land holding entity and duty has been paid under the SDA in respect to the transaction for the acquisition of, or increase in, the interest, the duty calculated under this section is to be reduced by the amount of duty paid under the SDA.

Exemptions and related matters

Section 102F(1): exemption applies if equivalent transaction in land is exempt (or does not attract *ad valorem* duty)

A transaction under which a person or a group acquires an interest in a land holding entity is exempt from duty under the land holder provisions if it takes place in circumstances in which a conveyance of an interest in the underlying local land assets would not attract *ad valorem* duty.

Example

Husband owns 100% of the shares of Company A whose only asset is the shared residence of Husband and Wife which is valued at $1.2 million.

Husband transfers the shares to his Wife.

As the transfer of the land between Husband and Wife would be exempt under Section 71CB, the transfer of the shares does not attract duty under Part 4.

Example

Company L acquires 100% of the shares in a land holding entity, Company A, as new trustee of a trust to effectuate the retirement of Company M.

The shares are not transferred as part of a scheme for conferring a benefit, in relation to the trust property, upon Company L or any other person.

As the transfer of the land between Company L and Company M would be exempt under Section 71(5)(d), the transfer of the shares does not attract duty under Part 4.

A transaction involving the transfer of shares in a land holding company, which results in the acquisition of a prescribed interest or increase in such an interest in the company, will be exempt pursuant to **Section 102F** of the SDA, if a transfer of the land of the company, between the parties to the share transfer, would be exempt, pursuant to **Section 71CC**. To gain the benefit of the exemption for such a transaction a completed Section 102B Return will need to be submitted for opinion assessment of the Commissioner.

Example - Family Farm

Section 71CC provides an exemption from stamp duty on the transfer of an interest in certain land from a natural person or the trustee for the natural person to a relative of the natural person, or a trustee for a relative of the natural person, if the Commissioner is satisfied:

- that the land to which the transfer relates is used wholly or mainly for the business of primary production and is not less than 0.8 hectares in area; and
- that the sole or principal business of the natural person who, or whose trustee, is the transferor is (immediately before the instrument) the business of primary production.

The exemption under Section 102F(1) will be available to the transfer of shares in a company that owns the family farm if:

- the land of the landholder is not less than 0.8 hectares in area;
- the land is 'used wholly or mainly for the business of primary production';
- the land holder owns more than one property, those properties must all be used for primary production;
- the transferor of the interests in the land holder and the transferee should have had, for 12 months preceding the transfer, a business relationship with respect to the use of the property for the business of primary production;
- the transferor of the shares should be a natural person or the trustee for that natural person; and
- the transferee of the shares should be a relative of the natural person transferor or that natural person's trustee or a lineal ancestor or spouse or domestic partner of the transferee natural person.

Section 102F(2): creditors schemes or arrangements

An acquisition of an interest in a land holding entity that takes place solely as a result of the making of a compromise or arrangement with the creditors of the land holding entity under Part 5.1 of the *Corporations Act 2001* (Cwlth) is exempt.

It should be noted that shareholder schemes of arrangement no longer qualify for exemption under this provision.

Multiple incidence of duty

Section 102G(1): maximising revenue

If it is possible under the land holder provisions to assess the incidence of duty in different ways in respect of the same transaction, duty will be assessed so as to maximise the return to the revenue but not so as to extend the incidence of duty beyond a single person or group identified in the assessment.

Example

As part of a single transaction, Person A acquires 60% and Person B acquires 40% of the shares in private company X, which holds more South Australian land. Person A and Person B are associates

Person A has acquired a prescribed interest of 60% in company X and is liable to duty under Part 4 on that acquisition. The Group of associates, comprised of Person A and Person B, has acquired a prescribed interest of 100% in company X and is liable to duty under Part 4 on that acquisition.

In this case, an assessment will be raised identifying the Group and Person A will not be separately charged with duty.

Section 102G(2): multiple prescribed interests

If a person or a group acquires a prescribed interest in a land holding entity, and another person or group later acquires a prescribed interest in the land holding entity without diminishing the former prescribed interest, the Commissioner may, if satisfied that it is just and equitable to do so, exempt the later acquisition, wholly or partly, from duty under the land holder provisions.

Example

The shares of X Pty Ltd, a land holding entity, are divided into Class A and Class B shares.

The Class A shares confer rights to dividends but no rights to share in the distribution of assets on winding up of the company. The Class B shares confer no rights to dividends but do confer rights to share in the distribution of assets on the winding up of the company.

Person A acquires all the Class A shares and pays duty under the land holder provision on the acquisition of a prescribed interest in the company. Person B then acquires all the Class B shares.

In this case, the Commissioner could, if satisfied that it would be just and equitable to do so, grant relief to Person B under the above Section.

Miscellaneous

Valuation of interest under contract or option to purchase land

If an interest in land consists of an interest arising under a contract or option to purchase the land, the interest is to be valued, for the purposes of the land holder provisions, by subtracting from the market value of the land the amount that the purchaser, under the contract or the holder of the option, would be required to pay in order to complete the purchase [**Section 102D**].

Example

Entity A contracts to purchase South Australian land from Entity B, for $10 million. Entity A pays a deposit of $1 million. The value of Entity A's interest in land arising under the contract is $10 million - $9 million = $1 million.

Concession for life insurance companies

If a person who acquires an interest in a land holding entity is a life company, any interests in the land holding entity acquired or held by the life company for different statutory funds are to be treated as if they were acquired or held independently by separate persons.

If a life company acquires or holds an interest in a land holding entity otherwise than for a statutory fund, that interest is to be treated as if it were acquired or held independently of, and by a separate person to, any interest acquired or held by the life company for a statutory fund.

For the purposes of the land holder provisions, a life company, its statutory funds, and any trustee, are not to be treated as associates except in a case where the Commissioner determines that particular dealings between them (in any combination) form substantially one arrangement.

For the purpose of this concession, 'life company' and 'statutory fund' have the same meaning as in the *Life Insurance Act 1995* (Cwlth) [**Section 102E**].

Corporate group exemptions

A transaction whereby a member of a corporate group notionally acquires from another member of the same corporate group an interest in the underlying local land of a land holding entity is entitled to an exemption under Part 4AA of the SDA if the Commissioner is satisfied that:

- the corporate group's interest in the property the subject of the transaction is not diminished as a result of the transaction;
- the purpose, or one of the purposes, of the transaction is:
  - to change the structure of the corporate group; or
  - to change the holding of property within the corporate group;
- the transaction does not result in the property of the corporate group being held by a member of the corporate group as trustee of an ineligible trust; and
- the transaction is not part of a tax avoidance scheme within the meaning of Part 6A of the TAA [**Section 102K**].

Tax avoidance schemes

Part 6A of the TAA contains provisions which seek to deter artificial, blatant or contrived schemes to reduce or avoid liability for tax [**Section 40A TAA**].

A person is liable to pay the amount of tax avoided by the person as a result of a tax avoidance scheme that is of an artificial, blatant or contrived nature [**Section 40B(1) TAA**].

For the purposes of Part 6A, a tax avoidance scheme is any scheme that a person, whether alone or together with others, enters into, makes or carries out for the sole or dominant purpose of enabling liability for tax to be avoided or reduced [**Section 40C (1) TAA**].

Recovery

If a person or group fails to pay duty as required under the land holder provisions, the Commissioner may recover the duty, as a debt, from the relevant entity.

Instead of, or as well as, proceeding against the relevant entity for recovery of duty as a debt, the Commissioner may register a charge on any of its land for the amount of the unpaid duty.

The Commissioner must give written notice of the registration of a charge to:

- the registered proprietor of the land; and
- the person in default, or each member of the group in default.

A charge will rank as a first charge on the relevant land.

If the duty remains unpaid six months after the registration of the charge, the Commissioner may apply to the District Court for an order for the sale of the land.

On an application, the Court may make an order for sale of the land by public auction and, in that event, the proceeds of sale are to be applied in the following order:

1. In payment of the costs of the sale and other costs of proceeding under the land holder provisions of the SDA.
2. In discharging the liability to duty.
3. In discharging other liabilities secured by registered instrument.
4. In discharging other liabilities as directed by the Court.
5. In payment to the registered proprietor of the land immediately before the completion of the sale.

If the Commissioner recovers duty, the relevant entity may recover the amount paid to, or recovered from, the entity from the person or persons principally liable for the payment of the duty [**Section 102C**].

Legislative history

The land holding entities provisions were introduced to the SDA by *Statutes Amendment (Land Holding Entities and Tax Avoidance Schemes) Act 2011* and applied from 1 July 2011.

The *Statutes Amendment and Repeal (Budget 2015) Act 2015* introduced, with effect from 18 June 2015, amendments to Part 4, particularly to provide changes to the definitions of land asset and goods to provide consistency with amendment to equivalent terms in the SDA. Two of the three Subsections which provided exemption for multiple incidence of duty, at **Section 102G** of the SDA, were deleted. Effective from 1 July 2018, the $1 million local land assets threshold was removed.

The *Stamp Duties (Budget 2016) Amendment Act 2016* deleted goods from inclusion in any assessment of duty under Part 4 of the SDA, with effect from 1 July 2016.

The *Stamp Duties (Foreign Ownership Surcharge) Amendment Bill 2017* introduced a foreign ownership surcharge under Part 4 of the SDA for transactions liable to duty under Part 4, with effect from 1 January 2018.