



## EXEMPTIONS FOR TRANSFER DUTY: CANCELLED AGREEMENTS

AUTHORS // PAUL O'DEA & MATTHEW ARMSTRONG

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It is often a misconception that the liability for transfer duty only arises once an agreement for dutiable property, such as a contract for the sale and purchase of land, becomes unconditional.

Under the *Duties Act 2001* (“Act”) transfer duty is imposed on an agreement for dutiable property, whether conditional or not.

In fact, the liability for transfer duty arises as soon as an agreement is made and the liability to pay transfer duty to the Commissioner of State Revenue, subject to some limited extension exceptions, is within 30 days after the liability arises (ie the contract date).

Without the appropriate drafting in the agreement, the liability timeframes under the Act can lead to unpaid interest tax accruing on overdue transfer duty fairly quickly.

Therefore, as the liability for transfer duty and the payment of that liability under the Act often occurs prior to settlement, the Act operates to exempt certain agreements that are cancelled and also provides for a reassessment if payment has been made to the Commissioner of State Revenue.

Under the Act, transfer duty is not imposed on an agreement for dutiable property that is cancelled for the following reasons:

### 1. BREACH

Transfer duty is not imposed on an agreement for dutiable property that is cancelled due to the breach of one of the parties to it.

### *Example*

A buyer under a contract for the sale and purchase of land tenders for settlement and is ready, willing and able to settle the contract.

On the settlement date, the seller fails to produce a release of mortgage from their outgoing financier capable of immediate registration. The buyer may have a right of termination under the contract due to a breach of its terms by the seller.

If the buyer elects to terminate the contract due to the breach of the seller the contract will be exempt from transfer duty under the Act.

### 2. NON FULFILMENT OF A CONDITION PRECEDENT

Transfer duty is not imposed on an agreement for dutiable property that is cancelled due to non fulfillment of a condition precedent.

### *Example*

A contract for the sale and purchase of a residential dwelling is subject to the buyer being satisfied in its absolute discretion with the results of a building and or pest inspection.

After obtaining and reviewing the building and pest inspection report, the buyer notifies the seller that it is not satisfied with the contents of the building and pest inspection report and elects to terminate the contract.

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If the buyer elects to terminate the contact pursuant to that condition precedent, the contract will be exempt from transfer duty under the Act.

3. FRUSTRATION

Transfer duty is not imposed on an agreement for dutiable property that is cancelled due to frustration.

Frustration occurs when an unexpected event fundamentally or radically affects the performance of an agreement or the benefits the parties would have reasonably anticipated.

*Example*

A contract for the sale and purchase of an industrial warehouse and associated business and assets is entered into between a buyer and seller. After the contract date a cyclone completely destroys the warehouse and all of its contents. The contract is frustrated and automatically terminated.

The contract will be exempt from transfer duty under the Act.

4. AGREEMENT

Transfer duty is not imposed on an agreement for dutiable property that is cancelled by agreement between the parties to it and there is no resale agreement.

*Example*

A contract for the sale and purchase of an off the plan residential apartment is entered into between a buyer and seller. After the contract date, the buyer requests the seller to agree to the spouse of the buyer being added as a party to the contract.

The seller agrees to the request subject to a deed of rescission of contract being entered into between all parties. The first contract is cancelled, a new contract is entered into by all parties on the same terms as the first contract with no amendments other than the new buyer entity being added and the deed of rescission documents that agreement.

On the basis that there is no resale agreement the first contract will be exempt from transfer duty under the Act and the liability for transfer duty will arise on the new contract.

5. RESALE AGREEMENT

A resale agreement occurs if the dutiable property that is cancelled is, or will be transferred or agreed to be transferred, and the buyer under the cancelled agreement or a related person of the buyer receives, or will receive, directly or indirectly, a financial benefit other than:

- the release from the cancelled agreement; or
- an interest in the dutiable property to the extent that the unencumbered value of the interest does not represent a profit for the buyer because of the resale agreement.

In essence, the buyer in the above example cannot receive a financial benefit or profit from the agreement to cancel the contract and enter into the new contract.

Careful documentation is required when entering into a deed of rescission to cancel an agreement for dutiable property. ClarkeKann have significant expertise in documenting such agreements.

6. CANCELLATION BEFORE TRANSFER DUTY ASSESSED AND PAID

Typically, no further action will be required unless there is a resale agreement or the Commissioner of State Revenue requires lodgement or additional information.

7. CANCELLATION AFTER TRANSFER DUTY ASSESSED AND PAID

Under the Act the Commissioner of State Revenue must reassess transfer duty that has been paid under the Act on a cancelled agreement for dutiable property that is not liable for transfer duty if an application is made within six months after the agreement is cancelled.

As a registered self assessor with the Commissioner of State Revenue, ClarkeKann can assist with an application for the prompt reassessment and refund of transfer duty on cancelled agreements.

ClarkeKann are available to assist with any query you have regarding the liability for transfer duty and any reassessments.

FOR MORE INFORMATION, PLEASE CONTACT:



PAUL O'DEA // Partner

T // 61 7 3001 9243

E // p.odea@clarkekann.com.au



MATTHEW ARMSTRONG // Senior Associate

T // 61 7 3001 9256

E // m.armstrong@clarkekann.com.au