



Cancelled Transactions

Sections 88A and 107 of the *Duties Act 2008*

As at 23 October 2017

Introduction

Transfer duty is not chargeable on certain dutiable transactions that are cancelled.

Cancelled transaction

Section 107 of the *Duties Act 2008* ('Duties Act') provides that duty is not chargeable on a cancelled transaction. A cancelled transaction is a dutiable transaction that has not been, and will not be, carried into effect; however, the following dutiable transactions are not cancelled transactions:

- a call option of a simultaneous put and call option taken to be an agreement for the transfer of the option property under section 45 of the Duties Act;
- an assignment of a call option taken to be an agreement for the transfer of the option property under section 49 of the Duties Act; or
- a terms contract if the person liable to pay the duty under the contract obtained exclusive use or control of the dutiable property, whether or not the contract is not fully carried into effect for any reason.

A **terms contract** includes an agreement for transfer where the purchaser is entitled to possession or occupation of a property prior to the property being transferred to the purchaser. An example of a terms contract that is not a cancelled transaction is where a purchaser buys vacant land under a vendor finance arrangement. The purchaser takes exclusive possession of that land and begins to develop it, but will not be registered on the title until the vendor is fully paid. If the purchaser subsequently defaults on the arrangements, the transaction remains chargeable with duty as it is not a cancelled transaction.

When duty is chargeable on a cancelled transaction

Duty is chargeable on a cancelled transaction if the transaction has been cancelled so that a **replacement transaction** or a **subsale transaction** can be entered into.

A **replacement transaction** is another dutiable transaction that is between all of the same parties as the cancelled transaction, is substantially similar in effect to the cancelled transaction and is considered by the Commissioner to be a scheme or arrangement, or part of a scheme or arrangement, for which the sole or dominant purpose of any party is to avoid, reduce or defer the payment of duty.

For example, A and B enter into an agreement for the transfer of dutiable property and then cancel the agreement so they can enter into another agreement for the transfer of the same property when lower rates of transfer duty come into effect. The Commissioner is likely to consider the second transaction is a replacement transaction and duty would therefore remain chargeable on the first transaction.

If another similar transaction is entered into by the same parties for reasons other than to avoid, reduce or defer the payment of duty, then duty would not be chargeable on the first transaction. For example, X and Y enter into an agreement for the transfer of dutiable property that is

conditional on Y obtaining finance, but finance is not obtained. The agreement between the parties comes to an end. However, Y is subsequently able to obtain finance from another source, so X and Y enter into another agreement for the transfer of the same property. The Commissioner is unlikely to consider the second transaction to be a replacement transaction and therefore duty would not be chargeable on the first transaction.

A **subsale transaction** means another dutiable transaction which results in a beneficial interest in the dutiable property that was the subject of the cancelled transaction being held by:

- a) a person who is not a party to the cancelled transaction, a result which is contemplated or provided for under the cancelled transaction; or
- b) a person who is not party to the cancelled transaction, a result which is substantially similar in effect to the effect of the cancelled transaction; or
- c) another person, as a result of an agreement, arrangement or understanding between a person liable to pay duty on the cancelled transaction and any other party to the transaction (including any other person liable to pay duty on the cancelled transaction).

Therefore, duty would be chargeable on a transaction that is cancelled so that a novation, or a subsale to a person who is not a party to the transaction, or between parties to the transaction, can occur.

For example, A and B enter into an agreement for the transfer of dutiable property in their individual capacity and then cancel the agreement so they can enter into another agreement for the same property in the name of their discretionary trust. The Commissioner is likely to consider the second transaction to be a subsale transaction and duty would remain chargeable on the first transaction.

Termination of general conditional agreements

A **general conditional agreement is terminated on relevant grounds** if:

- it is not carried into effect because of the non-fulfilment of a condition (of a type referred to in section 88A(2) of the Duties Act) to which it was subject; and
- duty is not chargeable on the agreement under section 107 of the Duties Act because it is a cancelled transaction, i.e., it was not cancelled to enable a replacement transaction or subsale transaction to be entered into.

A general conditional agreement that is terminated on relevant grounds within two months of the date of execution is not liable to duty and a transaction record for the transaction is not required to be lodged with the Commissioner. In these circumstances there is no requirement to apply for an exemption for a cancelled transaction.

Where a general conditional agreement is terminated on relevant grounds after it is required to be, or has been, lodged with the Commissioner, a request to reassess the transaction may be made using Form FDA16 'General Conditional Agreement - Terminated on Relevant Grounds'. An agreement may only be reassessed as terminated on relevant grounds prior to payment being made, or the date for payment falling due. In all other instances, an application can only be made using Form FDA1 'Exemption for Cancelled Transactions' or FDA10 'Reduction of Stamp Duty if Matter Not Carried Into Effect' and remains subject to the relevant provisions.

A general conditional agreement that is lodged in Online Duties (ROL) may also be terminated on relevant grounds. For more information on processing the terminated transaction, refer to the [Online Duties - Frequently Asked Questions](#).

For more information on general conditional agreements please refer to Duties Fact Sheet '[Conditional Agreements](#)', which is available from the State Revenue website at www.osr.wa.gov.au.

Assessment or reassessment for cancelled transactions

On the application of a taxpayer, the Commissioner will reassess the liability to duty of a dutiable transaction if is satisfied the transaction is not liable to duty because of section 107 of the Duties Act. An application must be made using Form FDA1 'Exemption for Cancelled Transactions', which is available from the website at www.osr.wa.gov.au. The application must be accompanied by the original transaction record for the transaction, together with any other record upon which duty has been endorsed, e.g., contract for sale or transfer of land.

In accordance with section 54 of the *Taxation Administration Act 2003* ('TAA'), the Commissioner may then refund any duty that has already been paid.

Where the dutiable transaction is currently lodged with the Commissioner, only the application form and the assessment notice need to be forwarded to the OSR.

Transaction records lodged but not endorsed in ROL may also apply to be cancelled. For more information on processing cancelled transactions, refer to the Online Duties - Frequently Asked Questions.

If the transaction record was duty endorsed through ROL, the application form and original transaction record, together with any other transaction record that has been duty endorsed and all Certificates of Duty, must be forwarded to the OSR.

Where the cancelled transaction is an agreement for the transfer of dutiable property, a person is not entitled to apply for a reassessment under section 107 of the Duties Act more than five years after the original assessment was made, or more than 12 months after the day on which the agreement became a cancelled transaction, whichever is the later.

For all other dutiable transactions, section 17 of the TAA provides that a person is not entitled to apply for a reassessment more than five years after the original assessment was made.

Where stamp duty has been paid or is payable on an instrument under the *Stamp Act 1921*, an application must be made under section 20 of that act using Form FDA10 'Reduction of Stamp Duty if Matter Not Carried Into Effect', which is available from the website at www.osr.wa.gov.au.

Offence

If an application contains false or misleading information, the person or persons commit an offence under the *Taxation Administration Act 2003* and are liable to a penalty not exceeding \$20,000 plus three times the duty that was or might have been avoided.

Contact the Office of State Revenue

Office	200 St Georges Terrace PERTH WA 6000	Telephone	(08) 9262 1100 1300 368 364 (WA country callers only – local call charge)
Postal	Office of State Revenue GPO Box T1600 PERTH WA 6845	Web enquiry Website	www.osr.wa.gov.au/DutiesEnquiry www.osr.wa.gov.au

Note: The information contained in this DUTIES FACT SHEET is issued for guidance purposes only. It is not an exhaustive explanation of the provisions of the *Duties Act 2008* and reference should be made to the Act for complete details.