COMMISSIONER’S GUIDELINE

**CG-SD-017 – Cancelled and rescinded conveyances**

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Purpose

1. The *Stamp Duty Act* (“the Act”) generally provides that there is no requirement for conveyees to lodge a dutiable instrument that does not proceed, i.e. has been cancelled or rescinded. However, the Act imposes obligations on conveyees to lodge and seek remission of stamp duty from the Territory Revenue Office (TRO) on certain specified conveyances that do not proceed.
2. This Guideline explains which instruments receive a remission of stamp duty without the need to be lodged with TRO and provides an overview of the process for seeking a refund or remission on cancelled conveyances that have been lodged with TRO.

Overview

1. Dutiable instruments are generally required to be lodged with TRO for assessment of duty within 60 days of a liability to duty arising. Refer to Commissioner’s Guideline [CG-SD-001](http://www.treasury.nt.gov.au/PMS/Publications/TaxesRoyaltiesGrants/StampDuty/CG-SD-001.pdf): *Document lodgement and payment periods* for more detail on when documents are required to be lodged with TRO.
2. Section 9(3A) of the Act provides that there is generally no requirement to lodge a dutiable instrument that does not proceed, i.e. has been cancelled or rescinded.
3. However, conveyees are still required to lodge cancelled and rescinded conveyances where:
4. the conveyance arises from put and call options under Part 3, Division 8AB of the Act. Refer to Commissioner’s Guideline [CG‑SD‑005](http://www.treasury.nt.gov.au/PMS/Publications/TaxesRoyaltiesGrants/StampDuty/CG-SD-005.pdf): *Put and call options* for details of the rules applying to these option arrangements; or
5. a subsequent sale or other disposition of the dutiable property the subject of the transaction (“the relevant transaction”) is either:
	1. a sub-sale or transaction having the effect of a sub-sale, even if the subsequent conveyance is executed by the person who was the vendor in the relevant transaction; or
	2. is the result of a conveyance by direction, whether in writing or not, initiated by the conveyee in the relevant transaction.
6. More details on what transactions are considered to comprise sub-sales and conveyances by direction are provided later in this Guideline.
7. An “eligible conditional agreement” (see Commissioner’s Guideline [CG-SD-002](http://www.treasury.nt.gov.au/PMS/Publications/TaxesRoyaltiesGrants/StampDuty/CG-SD-002.pdf): *Eligible conditional agreements – extension of time to lodge instrument and pay duty*) that is not carried into effect because of the non-fulfilment of a condition is not liable for duty and there is no requirement to lodge the document with TRO or apply for duty on the transaction to be remitted.
8. In order to provide a conveyee with certainty that duty is not payable, conveyees have the option of lodging the instrument with TRO, and following the steps outlined below at “Refund and remission process” in order to have TRO endorse the instrument as not being subject to stamp duty.
9. Alternatively, where a conveyee determines that they are not required to lodge a cancelled or rescinded instrument with TRO, they should make a notation on the instrument using the words “not liable to duty – section 9(3A)”. The conveyee should also retain sufficient evidence to validate that the dutiable instrument has been cancelled or the transaction rescinded.

Examples of when instruments are not required to be lodged with TRO

An agreement for the sale of land requires the conveyee to pay the purchase price at settlement in exchange for the conveyor delivering possession of the property. At settlement, the conveyee does not tender the purchase price even though the conveyor is able to settle.

The conveyor terminates the contract due to the conveyee’s breach and retains the deposit paid under the agreement.

In this instance the conveyance did not proceed, so there is no requirement to lodge the agreement with TRO or pay duty.

An agreement for the sale of land is subject to the conveyee obtaining finance. The conveyee is unable to obtain finance approval.

The parties decide to terminate the agreement due to the conveyee being unable to obtain finance.

As the agreement was terminated and the conveyance did not proceed, there is no requirement to lodge the agreement with TRO or pay duty.

Refunds of duty already paid on cancelled or rescinded contracts

1. Different circumstances apply if duty on a conveyance has either been paid or assessed by TRO and then the instrument is cancelled or rescinded. In particular, section 56A of the Act provides that if duty has been paid or is payable on a conveyance then TRO must refund or remit the duty payable if the conveyance does not proceed because:
2. of non-execution by an essential party, non-fulfilment of a condition precedent or the operation of some provision of the instrument; or
3. the entitlements purportedly conferred by the conveyance are extinguished by rescission, cancellation or annulment of the conveyance.
4. An exception to this is a conveyance to which the put and call option provisions at Part 3, Division 8AB of the Act apply. Refer to Commissioner’s Guideline [CG‑SD‑005](http://www.treasury.nt.gov.au/PMS/Publications/TaxesRoyaltiesGrants/StampDuty/CG-SD-005.pdf): *Put and call options* for details of the rules applying to these option arrangements
5. Section 56A of the Act also sets out the process that a conveyee must undertake in order for TRO to refund the duty paid or remit the duty payable on a cancelled conveyance that has been assessed. This process is detailed in the section “Refund and remission process” below.
6. Similar to section 9(3A) of the Act, section 56A(4) provides that there will be no remission or refund when a subsequent sale or other disposition of the dutiable property the subject of the cancelled transaction:
7. is a sub-sale or a transaction having the effect of a sub-sale, notwithstanding that the subsequent conveyance may be executed by the person who was the vendor in that first-mentioned transaction; or
8. is the result of a conveyance by direction, whether in writing or not, initiated by the conveyee in that transaction.
9. More details on what transactions are considered to comprise sub-sales and conveyances by direction are provided below.

Sub-sales and conveyances by direction

1. While it is not possible to provide a comprehensive catalogue in this Guideline, TRO considers that a novation, a nomination or a direction to the vendor to convey dutiable property to a third party instead of the original (or first) purchaser, can all fall within the scope of subsequent sales or other dispositions contemplated by sections 9(3A) and 56A(4) of the Act.

***Sub-sales***

1. Where a dutiable instrument is cancelled to give effect to a subsequent dutiable instrument, the original instrument will be endorsed as cancelled if TRO is satisfied that the instrument was not cancelled to give effect to a sub-sale. In considering whether a sub-sale has occurred, TRO looks primarily at the intention of, and the benefit passing to, the original conveyee as a result of the cancellation of the original dutiable instrument.
2. One factor to be considered is whether or not a benefit passes from the substituted conveyee (or a person associated with the substituted conveyee) to the original conveyee (or a person associated with the original conveyee) in the nature of a benefit which ordinarily passes to a vendor pursuant to a sale. A sum of money passing from a substituted conveyee to the original conveyee would suggest that there was, in fact, more than one sale. However, the benefit passing to the original purchaser does not need to be monetary. For example, a builder may “on sell” a vacant lot to a client at the same price or a lower price than the original purchase price, but as part of an arrangement under which the builder will be engaged to construct a home for the new purchaser. A sale to the new purchaser in the form of a novation from the original vendor would be regarded as a sub-sale from the builder even though there was, on the face of it, no profit passing to the builder from the new purchaser pursuant to that sub-sale.
3. If the only benefit passing to the original conveyee is the benefit of being released from obligations under the original dutiable instrument, this would not generally be sufficient to characterise the substituted dutiable instrument as a sub-sale. For example, if an original conveyee is unable to raise the finance necessary to complete an intended purchase, but locates an alternative conveyee and persuades the vendor to accept this substituted conveyee by way of novation of the agreement, TRO would not generally view this as a sub-sale.
4. On the other hand, the inclusion of a novation or nomination clause in the original agreement, whereby the original conveyee could require the vendor to accept a substituted conveyee by way of novation or assignment, may indicate that the original conveyee intended to on-sell the property. In such circumstances, TRO may consider that a substituted agreement is a sub-sale.

***Conveyance by direction initiated by conveyee***

1. TRO cannot approve a refund or remission of duty on a dutiable instrument if a conveyor chooses, or is obliged, to follow a conveyee’s written or verbal direction to convey dutiable property to a third party, even if a sub-sale of that property between the conveyee and the third party does not take place.
2. However, if an original conveyee is unable to raise the finance necessary to complete an intended purchase, but locates an unrelated alternative conveyee and persuades the vendor to accept this substituted conveyee by way of novation of the agreement, TRO would not generally view this as a conveyance by direction.
3. An agreement for the sale of dutiable property may specify that the named purchaser, who is a party to the contract, may nominate substitute or additional unidentified transferees. For example, an agreement where the purchaser is John Smith may express the transferee as being “John Smith and/or nominees”. If a named purchaser makes use of the ability to nominate one or more additional or substitute transferees, this usually results in a conveyance by direction and conveyance duty at ad valorem rates is payable on both the original agreement and any subsequent instrument that evidences the conveyance to the transferee(s) (such as a Transfer of Lot).
4. A different situation arises where:
5. the substitute or additional conveyee is specifically named in a nomination clause (for example “John Smith and/or his nominee Joe Bloggs”). In this instance, Joe Bloggs has been named as a potential conveyee in the original instrument, so a conveyance to him alone or together with John Smith will generally not be regarded as a conveyance by direction, and would likely be treated as in conformity with the original agreement for conveyance;
6. the substitute or additional transferee is “related” to the original purchaser. This is because section 17A(2A) of the Act allows for the substitution or addition to a transfer of a person who is related to the original purchaser, subject to certain conditions being met. See Commissioner’s Guideline [CG-SD-014](http://www.treasury.nt.gov.au/PMS/Publications/TaxesRoyaltiesGrants/StampDuty/CG-SD-014.pdf): *Stamp duty for substituting a related purchaser* for further information;
7. the substitute conveyee is a corporation that was, at the date of the original agreement, yet to be incorporated or acquired by the original purchaser in circumstances where TRO is satisfied the original purchaser entered into the agreement for conveyance on behalf of that corporation. In this instance, section 17A(2)(c)(i) of the Act will treat the conveyance to the corporation as in conformity with the original agreement for conveyance; or
8. the substitute conveyee is a trust that was, at the date of the original agreement, yet to be established by the original purchaser in circumstances where TRO is satisfied the original purchaser entered into the agreement for conveyance on behalf of that trust. In this instance, section 17A(2)(c)(ii) of the Act will treat the conveyance to the trust as in conformity with the original agreement for conveyance.

***Novation***

1. Cancellation of a conveyance often arises in the context of a novation, being the substitution of a “new” agreement for an “old” agreement in consideration of the discharge of the “old” agreement. In the case of the sale of land, it involves the original vendor, the original purchaser and a substituted purchaser. Usually, the terms of the agreements are the same and the only change is the substitution of the purchaser or the addition of a further purchaser. Following novation, the liabilities, obligations and interests of all the parties under the “old” agreement are ended.
2. Regardless of the instruments involved, novation involves two dutiable instruments that affect a conveyance of dutiable property - the original dutiable instrument and the substituted dutiable instrument. Duty is payable on the substituted dutiable instrument as a dutiable transaction. The original dutiable instrument is also chargeable with ad valorem duty if section 56A(4) of the Act applies (i.e. for example, the novation effects a sub-sale) – refer to paragraph 13 of this Guideline.
3. In certain cases, the Act allows a conveyee under an agreement to substitute a “related” party to take a transfer of the property instead of, or in addition to, that conveyee without the imposition of two lots of ad valorem duty. See Commissioner’s Guideline [CG-SD-014](http://www.treasury.nt.gov.au/PMS/Publications/TaxesRoyaltiesGrants/StampDuty/CG-SD-014.pdf): *Stamp duty for substituting a related purchaser* for further information on these provisions.

Examples of novations where refund or remission will generally be approved

**Novation at the initiative of the vendor** - This goes to the facts of the individual conveyance, and may not be apparent from the documents involved. However, on any view of the term “sub-sale” it must mean, in the context of a novation, a sale (or notional sale) from the original purchaser to a substituted purchaser. If the novation takes place at the initiative of the vendor and the original purchaser withdraws at the request of the vendor, the Commissioner would not generally regard the substituted agreement as amounting to a sale from the original purchaser to a substituted purchaser. Further, this would not generally be considered to be a “conveyance by direction, whether in writing or not, initiated by the conveyee”.

**Novation to comply with government requirements** - An example of this would be where Entity X, a foreign person or corporation, enters into an agreement to purchase a property subject to Foreign Investment Review Board approval. Where this approval is obtained, but subject to Entity X joining an Australian person or corporation in a joint venture in the purchase of the property and the original agreement is novated so that Entity X and an Australian third party were substituted as co-purchasers to comply with the Foreign Investment Review Board’s requirements, the Commissioner’s view would generally be that there is no sub-sale. This is provided that no benefit consistent with a sale passes from the Australian third party to Entity X.

**Novation to obtain finance** – An example of this would be where Company A enters into an agreement to purchase a property that is subject to them obtaining finance. Company A is unsuccessful in its finance application, so cannot complete the purchase. The vendor allows Persons B and C, who are the directors of Company A, to purchase the property instead.

**Novation to comply with superannuation legislation requirements** - The *Superannuation (Industry Supervision) Act* (Cth) requires the trustee of complying superannuation funds to use a different trustee to hold property on their behalf when the property is being purchased using borrowed funds.

As an example, ABC Pty Ltd as trustee for the ABC Superannuation Fund, a complying superannuation fund, enters into an agreement to purchase a property using borrowed funds. Prior to entering into the contract, XYZ Custodian Pty Ltd had declared that it will purchase the property on trust for ABC Pty Ltd in its capacity as trustee for the ABC Superannuation Fund. Prior to settlement, ABC Pty Ltd realises that the purchaser under the contract should have been XYZ Custodian Pty Ltd. The original agreement is terminated, and a new agreement is entered into under which the purchaser is XYZ Custodian Pty Ltd as trustee for ABC Pty Ltd in its capacity as trustee for the ABC Superannuation Fund.

In this instance, the declaration of trust was entered into before the agreement to purchase. By not having XYZ Custodian Pty Ltd as the purchaser, the original agreement did not properly reflect the transaction that was occurring. Accordingly, entry into the new agreement, which has XYZ Custodian Pty Ltd as purchaser, will not be viewed as a conveyance by direction.

Of note, had the declaration of trust been made after the original agreement to purchase, entry into the new agreement may be considered to be a conveyance by direction, and so should be lodged with TRO for consideration.

*Examples of novations where refund or remission will not generally be approved*

**Novation to enable purchase by associated entity** – An example of this would be where Company A enters into an agreement to purchase a property. The directors of Company A subsequently decide that they would prefer to use an associated company, Company B, to complete the purchase. Companies A and B are not “related” for the purposes of section 17A(2A) of the Act. The original contract with Company A is terminated and a new contract with Company B is entered into. The deposit paid by Company A is not refunded, but instead used as the deposit for Company B’s contract.

**Novation to obtain tax benefit** – An example of this would be where Company A enters into an agreement to purchase a property. The directors of Company A subsequently receive advice that it would be more advantageous, from an income tax perspective, to purchase the property using a trust structure. Trust B is formed. The original contract with Company A is terminated and a new contract with Trust B is entered into. The deposit paid by Company A is not refunded, but instead used as the deposit for Trust B’s contract.

Refund and remission process

1. Where dutiable instruments have already been assessed by TRO, or duty has been paid, a conveyee must make an application for the Commissioner to make a refund or remit duty.
2. The application must be made using form [F-SD-014](http://www.treasury.nt.gov.au/PMS/Publications/TaxesRoyaltiesGrants/StampDuty/F-SD-014.pdf): *Refund or remission of stamp duty on cancelled conveyance*. The application must be:
3. made within 90 days after it first became apparent that the conveyance would not proceed (which, in the case of cancellation, will be taken to be the date of the cancellation); and
4. supported by all documents relevant to the application and such other evidence as is required, generally being:
	1. where the duty has been paid:
	* the original stamped instrument;
	* all stamped duplicates or counterparts of that instrument; and
	* all other instruments on which payment of the duty has been denoted, for example, transfers, duplicates and counterparts;
	1. where the duty has not been paid and no assessment has been issued:
	* the original instrument; and
	* all duplicates and counterparts of the instrument;
	1. where the instrument is the subject of a current assessment, the relevant lodgement number; and
	2. copies of any deeds of rescission or similar instruments.
5. TRO may allow a conveyee more than 90 days to apply for a refund or remission if reasonable cause is shown.
6. Once TRO has approved a refund, or granted a remission, section 56A(3) of the Act provides that the dutiable instrument is to be endorsed by TRO, after which time the instrument will have no effect in law or in equity to convey dutiable property.

Commissioner’s ability to reinstate liability

1. Section 56A(5) of the Act applies where TRO has provided a refund or remission of duty and subsequently forms the opinion that there was actually a sub-sale or conveyance by direction of the property underlying the original conveyance. Where this occurs, TRO is able to reassess duty on the relevant dutiable instrument as if the refund or remission had never been approved.
2. TRO is able to make this reassessment even if the usual 5-year period for making a reassessment has passed. This recognises that, in such cases, the conveyee was not entitled to a refund or remission, and that no limitation should exist to prevent TRO from recouping the duty that is rightfully payable.

Commissioner’s Guidelines

1. Commissioner’s Guideline [CG-GEN-001](http://www.nt.gov.au/ntt/revenue/pdf/CG-GEN-001.pdf), which sets out information on the revenue publication system, is incorporated into and is to be read as one with this Guideline. All Circulars and Guidelines are available from the TRO website.

Date of effect

1. This version of the Guideline takes effect from 1 July 2009.



Grant Parsons

**COMMISSIONER OF TERRITORY REVENUE**

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| For further information please contact the Territory Revenue Office: |
| GPO Box 1974Darwin NT 0801Email: ntrevenue@nt.gov.au | Phone: 1300 305 353Website: [www.revenue.nt.gov.au](http://www.revenue.nt.gov.au) |