

EXPLANATORY MEMORANDUM

DUTIES AMENDMENT (OFF-THE-PLAN CONCESSION AND FOREIGN PERSONS EXEMPTIONS) BILL 2023

The Duties Amendment (Off-the-Plan Concession and Foreign Persons Exemptions) Bill 2023 (the Bill) amends the *Duties Act 2008* (Duties Act) to:

- implement the off-the-plan duty concession announced in the 2023-24 State Budget for agreements to purchase a new apartment before development commences;
- implement the off-the-plan duty concession announced on 10 October 2023 for agreements to purchase a new apartment under construction; and
- expand the circumstances in which a refund of foreign buyers duty is available for residential developments.

Off-the-plan duty concession

Concessional pre-construction agreements

The Off-the-Plan Duty Rebate Scheme currently provides a duty rebate for purchasers who buy an off-the-plan apartment before construction commences. The rebate has been operating as an administrative scheme for eligible contracts entered into from 23 October 2019 and was due to end on 24 October 2023.

In the 2023-24 Budget, the Western Australian Government announced that the rebate will be converted to a legislated duty concession from 31 August 2023 and extended to 30 June 2025. It was also announced that from 11 May 2023, purchasers will benefit from an increase to the property value thresholds.

A 100 per cent duty concession (capped at \$50,000) will apply to properties valued up to \$650,000 (formerly \$500,000); phasing down to a 50 per cent duty concession (capped at \$50,000) for properties valued at more than \$750,000 (formerly \$600,000).

The pre-construction duty concession applies to off the-plan agreements that are:

- for the purchase of a lot in a multi-tiered scheme on which there will be a new residential unit or apartment;
- entered into before development for the scheme commences; and
- entered into in the period beginning on 23 October 2019 and ending on 30 June 2025.

These agreements are referred to as concessional pre-construction agreements.

Once the amendments commence, concessional pre-construction agreements will receive an upfront concession on the duty payable instead of a rebate paid after settlement. For eligible agreements entered into before this date for which the rebate has not been paid, the Commissioner will reassess the duty payable to apply the concession. The concession amount will be based on the thresholds and rate that applied when the contract was signed.

Off-the-plan agreements for which a rebate has already been paid are not eligible for the duty concession. The concession also does not apply to agreements where the development has been completed and the agreement did not meet the eligibility criteria for the rebate scheme.

The Minister for Finance made a pre-enactment determination notice under section 130 of the *Taxation Administration Act 2003* (Taxation Administration Act) to allow the Commissioner to administer the pre-construction duty concession from 31 August 2023 before the Bill is passed.

Concessional under construction agreements

On 10 October 2023, the Western Australian Government announced the off-the-plan duty concession will be extended to agreements to purchase a new apartment under construction.

The under construction duty concession applies to off the-plan agreements that are:

- for the purchase of a lot in a multi-tiered scheme on which there will be a new residential unit or apartment;
- entered into after development for the scheme commences but before it is completed; and
- entered into in the period beginning on 31 August 2023 and ending on 30 June 2025.

These agreements are referred to as concessional under construction agreements.

A concession of 75 per cent of the duty payable, capped at \$50,000, will be available for properties valued up to \$650,000. The concession phases down to 37.5 per cent, capped at \$50,000, for properties valued at \$750,000 or more.

The Minister for Finance will not make a pre-enactment determination notice for the under construction concession amendments because it is expected that the required system changes will not be ready until the Bill has passed.

Concessional under construction agreements signed from 31 August 2023 will be assessed at the general rate and will be reassessed to apply the duty concession once the legislation has been enacted.

The under construction duty concession does not apply to agreements that are eligible for the administrative Off-the-Plan Rebate Scheme for Under-construction Contracts entered into between 4 June 2020 and 31 December 2020.

Foreign buyers duty exemptions

Additional duty of seven per cent applies to purchases of residential property by foreign persons. A foreign person can apply for a refund of this duty if 10 or more dwellings are constructed or refurbished on the land, or the land is subdivided for the purpose of constructing 10 or more dwellings, within five years after the land is purchased.

For the construction or refurbishment exemption to apply, the land cannot have a residential property on it at the time of purchase. For the subdivision exemption, the land must be vacant, or substantially vacant. Industry has raised concerns that these requirements disincentivise urban infill development. The Bill amends the Duties Act to remove these requirements.

The Bill also contains minor amendments to clarify that the refurbishment exemption only applies if the foreign person completes substantial refurbishment of a building or part of a building to provide 10 or more dwellings and does not include minor refurbishment works made to existing dwellings.

Similar amendments are made to the equivalent foreign landholder duty provisions.

These amendments will apply retrospectively from 1 January 2023.

Clause 1: Short Title

The Bill when passed will be cited as the *Duties Amendment (Off-the-Plan Concession and Foreign Persons Exemptions) Act 2023*.

Clause 2: Commencement

This clause provides the commencement dates for the Bill. Sections 1 and 2 commence on the day the Act receives the Royal Assent and the rest of the Act commences on the day after that day.

Clause 3: Act amended

This clause provides that this Act amends the *Duties Act 2008*.

Clause 4: Section 205ZA amended

Additional duty of seven per cent applies to land acquired for residential development by foreign persons. 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.

Section 205ZA provides an exemption and refund of foreign transfer duty if the foreign person starts to construct, refurbish, or completes the construction or refurbishment, of 10 or more dwellings on the land within five years of the transaction. A requirement of the exemption is that the land must not contain any residential property at the time of the purchase.

This clause amends section 205ZA to remove this requirement, which prevents the exemption from applying when a foreign developer acquires land with established residential property for the purposes of a residential development.

This clause also inserts a definition for ***substantial refurbishment*** and amends the wording of the refurbishment exemption to ensure that it does not apply to minor refurbishment works to existing dwellings.

Section 205ZA provides an exemption if the foreign person refurbishes 10 or more dwellings on the parcel of land or completes the refurbishment of 10 or more dwellings on the land.

The reference to 'refurbish' and 'refurbishment' is intended to cover circumstances where the person purchases land with a non-residential building and refurbishes the building to produce 10 or more dwellings. For example, a person may purchase a building used for commercial purposes such as a disused warehouse, or a dilapidated building, to convert into a residential building with 10 or more dwellings.

Under the proposed amendments to section 205ZA to remove the requirement for the land to not have a residence, there is a risk that

a foreign person could acquire 10 or more established residential properties and apply for an exemption after completing minor refurbishment works. This is not a risk under the current exemption provisions because the foreign person is not eligible for the exemption if they purchase established residential property.

It is not the intent for a foreign person to be eligible for the exemption if they are only doing minor renovation or refurbishment works. The exemption should only apply if the refurbishment consists of substantial works to convert a building or part of a building from a non-residential use into 10 or more dwellings.

Subclause (1) addresses this risk by inserting subsection (1A) to clarify that in the section, **substantial refurbishment** does not include minor works to a building or part of a building. Minor works made to a building that do not require major changes to the structure, for example, painting or replacing floor coverings, blinds, or light fixtures do not constitute substantial refurbishment.

Subclause (2) deletes section 205ZA(2)(a), which has the requirement for the land not to have a building, or part of a building, capable of being used as a place of residence when the land was acquired.

The effect is that an exemption and refund of foreign transfer duty can apply if the land acquired by the foreign person had a residential property and that land is developed within five years of the transaction to provide 10 or more dwellings.

Subclause (2) also deletes section 205ZA(2)(b) and inserts new subsection (2)(a). New subsection (2)(a) replicates the requirements that were in subsection (2)(b) for the foreign person intending to construct, refurbish or complete the construction or refurbishment of 10 or more dwellings on the parcel of land.

However, the wording of the refurbishment exemption has been amended in new subsection (2)(a) to clarify that the person must provide 10 or more dwellings by carrying out, or completing the carrying out of, substantial refurbishment of a building, or part of a building, that is not capable of being used solely or dominantly as a place of residence.

The requirement for refurbishment to be of a building or part of a building that is not capable of being used solely or dominantly as a place of residence ensures the exemption does not apply if a foreign person acquires established residential properties and only completes minor refurbishment works on those properties.

Subclause (3) amends section 205ZA(3). The amendments align the wording with the language used in proposed section 205ZA(2)(a) in relation to substantial refurbishment of a building. Technical amendments have also been made to reduce the length of each of the paragraphs in section 205ZA(3), which do not affect the practical effect of the provisions.

Section 205ZA(3)(c), which relates to a dwelling a foreign person intends to complete the construction or refurbishment of, has been split into two separate paragraphs in proposed sections 205ZA(3)(c) and (d).

Clause 5: Section 205ZB amended

Section 205ZB provides an exemption and refund of foreign transfer duty if the foreign person starts to subdivide, or completes the subdivision of, a parcel of land for the purpose of constructing 10 or more dwellings on the land, within five years of the transaction.

The exemption was intended to apply when a foreign person acquires vacant residential land and subdivides the land into lots for sale. As such, a requirement of the exemption is that the land must be vacant or substantially vacant when the land is acquired.

This requirement prevents the exemption from applying when a foreign developer acquires land with a building with the intention of demolishing it and subdividing the land for the purposes of constructing dwellings.

This clause deletes section 205ZB(2)(a) to remove the requirement for the land to be vacant or substantially vacant at the time when liability for foreign transfer duty on the transaction arises.

The effect is that an exemption and refund of foreign transfer duty can apply if the land acquired by the foreign person had a residential property and that land is subdivided within five years of the transaction to construct 10 or more dwellings on the land.

Clause 6: Section 250ZO amended

Under Part 3 of Chapter 3A of the *Duties Act 2008*, foreign landholder duty applies to relevant acquisitions of interests in a landholder¹ if the landholder is entitled to residential property (a residential landholder) and the acquirer is a foreign person. Foreign landholder duty is payable at seven per cent of the value of the foreign acquirer's interest in the residential landholder.²

The foreign landholder duty provisions have similar exemptions to sections 205ZA and 205ZB if the residential landholder, linked entity, or associate develops land to provide 10 or more dwellings.

Under section 205ZO, an acquisition of an interest in a residential landholder is exempt if the landholder, linked entity, or associate intends to construct or refurbish 10 or more dwellings, or complete

¹ The landholder duty provisions in Chapter 3 of the Duties Act charge landholder duty in relevant acquisitions of an interest in a landholder. A landholder is a corporation or unit trust scheme entitled, either directly or indirectly through a linked entity, to land in WA of \$2 million or more.

² Duties Act s 205ZA. The value of the interest is based on the value of the residential property and associated chattels held by the residential landholder or any linked entities.

construction or refurbishment of 10 or more dwellings, on land that the residential landholder or linked entity is entitled to.

Section 205ZO(1)(a) requires that at the time when the acquisition occurs, the residential landholder or 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.

This clause amends section 205ZO to make similar amendments to those made to section 205ZA to remove the requirement for the parcel of land not to have a building, or part of a building, capable of being used solely or dominantly as a place of residence for the exemption to apply, and to ensure the refurbishment exemption does not apply to minor refurbishment of existing residential properties.

Subclause (1) inserts subsection (1A) to provide that in the section **substantial refurbishment** does not include minor works to a building or part of a building.

Subclause (2) deletes section 205ZO(1)(a), which provides that an acquisition is exempt if 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 as a place of residence.

The effect is that an exemption and refund of foreign landholder duty can apply if at the time of the acquisition, the landholder was entitled to land that had a residential property and the land is developed within five years of the acquisition to provide 10 or more dwellings.

Subclause (2) also deletes section 205ZO(1)(b) and inserts new subsection (1)(a). New subsection (1)(a) replicates the requirements that were in subsection (1)(b) for the landholder, linked entity, or an associate to intend to construct, refurbish or complete the construction or refurbishment of 10 or more dwellings on the parcel of land.

However, the wording of the refurbishment exemption has been amended in new subsection (1)(a) to clarify that the landholder, linked entity or associate must provide 10 or more dwellings by carrying out, or completing the carrying out of, substantial refurbishment of a building, or part of a building, that is not capable of being used solely or dominantly as a place of residence.

The requirement for refurbishment to be of a building or part of a building that is not capable of being used solely or dominantly as a place of residence ensures the exemption does not apply to an acquisition if the landholder, linked entity, or an associate completes only minor refurbishment works on existing residential properties that the landholder is entitled to.

Subclause (3) amends section 205ZO(2). The amendments align the wording with the language used in proposed section 205ZO(1)(a) in relation to substantial refurbishment of a building. Technical amendments have also been made to reduce the length of each of the paragraphs in section 205ZO(2), which do not affect the practical effect of the provisions.

Section 205ZO(2)(c), which relates to a dwelling a foreign person intends to complete the construction or refurbishment of, has been split into two separate paragraphs in proposed sections 205ZO(2)(c) and (d).

Clause 7: Section 205ZP amended

Section 205ZP exempts an acquisition where the residential landholder, linked entity or associate intends to subdivide, or complete subdividing, a parcel of land for the purpose of constructing 10 or more dwellings on the land. Section 205ZP(1)(a) requires that at the time the acquisition occurs, the residential landholder or a linked entity is entitled to a parcel of land that is vacant or substantially vacant.

This clause amends section 205ZP to make similar amendments to those made to section 205ZB to remove the requirement for the land to be vacant or substantially vacant.

The effect is that an exemption and refund of foreign landholder duty can apply if at the time of the acquisition, the landholder was entitled to land that had a residential property and the land is subdivided within five years of the acquisition to construct 10 or more dwellings on the land.

Clause 8: Chapter 6A inserted

This clause inserts a new chapter for the off-the-plan duty concession for pre-construction agreements and under construction agreements.

Chapter 6A – Off-the-plan concession for transfer duty and foreign transfer duty

Section 266E. Terms used

This section defines the following terms used in the new Chapter:

cancelled transaction has the meaning given in section 107(1).

community titles (building) scheme has the meaning given in section 11(7) of the *Community Titles Act 2018* (Community Titles Act).

concessional off-the-plan agreement means a concessional pre-construction agreement or a concessional under construction agreement. Provisions in new Chapter 6A that refer to concessional off-the-plan agreements apply in the same way to both

concessional pre-construction agreements and concessional under construction agreements.

concessional pre-construction agreement has the meaning given in section 266F.

concessional under construction agreement has the meaning given in section 266FA.

concession amount means the concession amount for a concessional off-the-plan agreement determined under sections 266L to 266N.

concession day has the meaning given in section 266H. The concession day is relevant to determining the concession amount that applies to a concessional off-the-plan agreement.

dutiable value takes its meaning from section 9.

lot, for a strata scheme, means a lot in a strata scheme as defined in section 3(1) of the *Strata Titles Act 1985* (Strata Titles Act) and, for a community titles (building) scheme, has the meaning given in section 3(1) of the Community Titles Act.

multi-tiered scheme means a strata scheme or a community titles (building) scheme, except for a scheme in which no part of a floor of a lot or part of a lot in a building forms or joins the ceiling of another lot or part of a lot in a building.

This term is relevant to the definitions of a concessional pre-construction agreement and concessional under construction agreement. The duty concession only applies to pre-construction or under construction agreements to purchase a new residential unit or apartment in a multi-tiered development. It does not apply to agreements to purchase a property such as a townhouse or a villa that is part of a single-tier strata or community titles (building) scheme in which no lot is below or above another lot.

For multi-tiered schemes that comprise a mix of an apartment building and townhouses, the townhouses will qualify for the concession as they are part of a multi-tiered scheme. This is consistent with the policy of the administrative rebate scheme.

new residential unit or apartment has the meaning given in section 266G(1) and (2).

Off-the-Plan Duty Rebate Scheme means the administrative scheme for the payment of duty rebates known as the Off-the-Plan Duty Rebate Scheme.

replacement transaction, in relation to a cancelled transaction, takes its meaning from section 107(1).

strata scheme takes its meaning from section 9 of the Strata Titles Act.

subsale transaction, in relation to a cancelled transaction, takes its meaning from section 107(1).

unadjusted duty amount has the meaning given in section 266I.

Section 266F. Concessional pre-construction agreement

This section defines a ***concessional pre-construction agreement*** eligible for the pre-construction duty concession.

An agreement is a concessional pre-construction agreement if it is:

- an agreement to purchase from the owner of the land being developed, a lot in a multi-tiered scheme on which there will be a new residential unit or apartment once the development is completed;
- entered into before development for the scheme commences; and
- entered into in the period beginning on 23 October 2019 and ending on 30 June 2025.

An agreement will also be eligible for the concession if it is entered into to replace a concessional pre-construction agreement that has been terminated, the new agreement is entered into after construction has commenced, and the new agreement is substantially similar to the terminated agreement except that the seller is different.

This ensures that a purchaser can still receive the concession on the new agreement where a concessional pre-construction agreement is novated after construction has commenced and the seller is replaced by another person under the new agreement.

An agreement is not a concessional pre-construction agreement eligible for the concession if:

- a rebate has already been paid for that agreement under the Off-the-Plan Duty Rebate Scheme;
- the agreement was not eligible for a rebate under the Off-the-Plan Duty Rebate Scheme and development of the residential unit or apartment has been completed;
- the agreement is a replacement transaction in relation to a cancelled transaction, for example, the agreement was entered into to reduce the duty payable on a transaction;
- the agreement is a subsale transaction in relation to a cancelled transaction, for example, the agreement was entered into to change the purchaser under the agreement; or
- the agreement is between all the same parties as the parties to, and is substantially similar to, a cancelled transaction, and was entered into for the sole or dominant purpose of obtaining the duty rebate or a higher amount of rebate under the Off-the-Plan Duty Rebate Scheme; or

- the agreement is substantially similar to a cancelled transaction that was entered into before 23 October 2019, and is between all the same parties as the parties to the cancelled transaction except that the seller was different.

Subsection (1) provides that an agreement for the transfer of dutiable property is a **concessional pre-construction agreement** if it meets the following requirements.

- a) It is an agreement to purchase from the owner of the land being subdivided by the registration of a multi-tiered scheme or an amendment of a multi-tiered scheme, of a lot in the scheme on which there will be a new residential unit or apartment once construction is completed.

A multi-tiered scheme is defined in section 266E as a strata scheme or a community titled (building) scheme, other than one in which no part of a floor of a lot or part of a lot in a building forms or joins the ceiling of another lot or part of a lot. This excludes single-tiered schemes in which no lot is above or below another lot.

Under the Strata Titles Act and Community Titles Act, land can be subdivided by the registration of an amendment of a scheme, for example, to effect a re-subdivision of lots, common property or both. The reference to land being subdivided by the registration of an amendment of a multi-tiered scheme is to cater for situations where an existing scheme is amended to allow for the construction of a new apartment building.

- b) The agreement is entered into before development for the subdivision commences.

The concession for pre-construction agreements only applies if the agreement was entered into before development commences. This is to incentivise off-the-plan apartment sales and to assist developers with meeting pre-construction sales commitments. Development for the subdivision commences when relevant construction works commence on the land (see section 266J).

- c) The agreement is entered into in the period beginning on 23 October 2019 and ending on 30 June 2025. The Commissioner will reassess the transaction to apply the duty concession for eligible pre-construction agreements entered into since 23 October 2019 that have not been paid the rebate under the administrative scheme.

Subsection (2) caters for situations where a concessional pre-construction agreement is novated after construction has commenced and the seller is replaced by another person, such as a related entity of the seller. At law, the effect of a novation is the original agreement is terminated and a new agreement is created between the purchaser and the new seller. In these situations, the purchaser should still receive the concession on the new agreement. This subsection preserves the concession the purchaser was entitled to under the terminated agreement by

providing that the new agreement is a concessional pre-construction agreement.

The provision is drafted broadly so that it still applies where there may not technically be a novation, but the purchaser has entered into a new agreement that is substantially similar to the terminated agreement with a seller who has taken the place of the previous seller under the terminated agreement.

The subsection provides an agreement (the ***new agreement***) is also a ***concessional pre-construction agreement*** if the new agreement is:

- a) an agreement to purchase, from the owner of the land that will be subdivided by the registration of the multi-tiered scheme or an amendment of the scheme, of a lot on which there will be a new residential unit or apartment;
- b) substantially similar in effect to an earlier cancelled transaction that was a concessional pre-construction agreement between the same parties as the new agreement, except that the seller was different; and
- c) entered into after development for the subdivision commences, but before development for the subdivision is completed.

Example 1

Tom enters into a concessional pre-construction agreement to purchase an apartment from the seller, Developer A Pty Ltd.

Six months after construction of the apartment building commences, a re-structure occurs within the seller's corporate group and the land the subject of the development is transferred to a related entity of the seller, Developer B Pty Ltd.

The original agreement between Tom and Developer A Pty Ltd is terminated. Tom enters into a new agreement to purchase the apartment from Developer B Pty Ltd on the same terms as the original agreement.

The new agreement is a concessional pre-construction agreement under section 266F(2) even though construction has commenced at the time the agreement is entered into.

The concession that applies to the new agreement will be based on the concession amount that applied on the date the terminated concessional pre-construction agreement was entered into (see section 266H).

Subsection (3) sets out when an agreement is not a concessional pre-construction agreement. It provides that despite subsections (1) and (2), an agreement (the ***relevant agreement***) is not a concessional pre-construction agreement in the following circumstances.

- a) A rebate has already been paid under the administrative scheme for the relevant agreement.

- b) The development for the subdivision of the land by the registration of the multi-tiered scheme or an amendment of the scheme is completed before 31 August 2023 and the relevant agreement does not satisfy the eligibility criteria for the administrative rebate scheme. If a person is not entitled to a rebate for the purchase of their new residential apartment or unit that has been completed, they cannot apply for the duty concession for that transaction.
- c) The relevant agreement is a replacement transaction in relation to a cancelled transaction. Under section 107(1), a replacement transaction is another dutiable transaction between the same parties that is substantially similar in effect to the cancelled transaction and considered by the Commissioner to be a scheme or arrangement, or part of one, for which the sole or dominant purpose is to avoid, reduce or defer the payment of tax.

If a person cancels an earlier agreement to purchase a new residential apartment or unit and enters into another agreement that is substantially similar to the earlier agreement just to obtain the off-the-plan duty concession, or a more favourable concession amount, the new agreement is a replacement transaction entered into for the sole or dominant purpose of reducing the payment of tax.

The replacement transaction is not eligible for the off-the-plan duty concession, however, the concession may still apply to the earlier agreement if it meets the requirements of a concessional pre-construction agreement. See example 2.

- d) The relevant agreement is a subsale transaction in relation to a cancelled transaction that was a concessional pre-construction agreement.

Under section 107(1), a subsale transaction is another dutiable transaction that results in a beneficial interest in the same property being held by:

- a person who is not party to the cancelled transaction, a result which is contemplated or provided for under the cancelled transaction;
- 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
- 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).

The duty concession does not apply to an agreement that is a subsale transaction in relation to a cancelled transaction. In this

case, duty is payable on both the earlier transaction because it is not an exempt cancelled transaction under section 107 and also on the subsale transaction.

If the earlier transaction meets the eligibility criteria to be a concessional pre-construction agreement, the duty concession will apply to that transaction. However, the duty concession will not apply to the subsale transaction. Otherwise, it may provide an incentive for taxpayers to enter into a subsale transaction to change the purchasing entity if they receive a duty concession for both transactions. See example 3.

The provision only prevents the duty concession from applying to a subsale transaction where the cancelled transaction was a concessional pre-construction agreement. If the earlier cancelled transaction is not a concessional pre-construction agreement eligible for the duty concession, for example, because it is entered into before 23 October 2019, the duty concession can apply to the subsale transaction if it is a concessional pre-construction agreement.

- e) The relevant agreement is between all the same parties as the parties to, and is substantially similar in effect to, an earlier cancelled transaction and in the Commissioner's opinion, the sole or dominant purpose of any party entering into the agreement is to obtain a rebate, or a higher amount of rebate, under the administrative scheme.

The duty concession does not apply to an agreement that is substantially similar to an earlier cancelled transaction if the agreement was entered into for the sole or dominant purpose of obtaining a rebate or a higher rebate amount.

In this case, section 266F(3)(c) does not apply to the agreement because it is not a replacement transaction as defined in section 107(1). As the purchaser is liable to pay the same amount of duty, the agreement is not a scheme or arrangement, or part of one, for which the sole or dominant purpose of the parties is to avoid, reduce or defer the payment of tax. At the time the agreement was entered into, the sole or dominant purpose of the transaction is to obtain a rebate or a more favourable rebate amount.

The earlier cancelled transaction can be exempt from duty under section 107 because it was not cancelled so that a replacement transaction can be entered into. Duty at the general rate applies to the second agreement and the pre-construction duty concession does not apply. See examples 4 and 5.

- f) The relevant agreement is substantially similar to an earlier cancelled transaction that was between all the same parties as the parties to the relevant agreement, except that the seller was

different, and the cancelled transaction was entered into before 23 October 2019.

This provision is to ensure that a novated agreement is not eligible for the pre-construction duty concession if the original agreement was entered into before 23 October 2019 and the seller is substituted for another party under the novation.

For the purposes of the concession, the new agreement is treated as a continuation of the original terminated agreement. If the original agreement was not eligible for the concession because it was entered into before 23 October 2019, the new agreement should not receive the duty concession just because the seller has changed.

This is consistent with the policy that eligibility for the duty concession for novated agreements is determined by the date of the original agreement.

Example 2 – replacement transaction

On 8 May 2023, Susan enters into an off-the-plan agreement to purchase an apartment for \$650,000 before construction commences. The rebate amount payable once construction is complete is 50 per cent of the duty payable, capped at \$50,000.

On 11 May 2023, it is announced in the 2023-24 Budget that the rebate will be converted into a duty concession and the concession will be increased to 100 per cent of the duty paid for agreements entered into from 11 May 2023 for apartments valued at \$650,000 or less.

On 15 May 2023, Susan arranges with the property developer to terminate the first agreement and enter into another agreement before construction commences to purchase the same apartment for the sole purpose of obtaining the 100 per cent duty concession.

The first agreement is not an exempt cancelled transaction under section 107 because it is cancelled to enter into a replacement transaction, the sole or dominant purpose of which is to avoid, reduce or defer the payment of tax. Duty of \$24,890 applies to the first agreement.

Duty of \$24,890 also applies to the second agreement. The duty concession does not apply to the second agreement because it is not a concessional pre-construction agreement as it is a replacement transaction.

However, the pre-construction duty concession can apply to the first agreement to reduce the duty payable by 50 per cent to \$12,445 if the agreement meets the requirements of a concessional pre-construction agreement.

Example 3 – subsale transaction

On 1 September 2023, Chan enters into a concessional pre-construction agreement to purchase an apartment for \$750,000. After entering into the agreement, Chan seeks financial advice and decides to acquire the property through the trustee of her family trust instead.

Chan arranges with the property developer to cancel the first agreement and enters into a second agreement on 30 September 2023 to purchase the same apartment for the same purchase price in the name of the trustee.

The first agreement is not an exempt cancelled transaction under section 107 because the transaction has been cancelled so that a subsale transaction can be entered into. Duty of \$29,740.50 applies to the first agreement. As the first agreement is a concessional pre-construction agreement, the duty concession applies to reduce the duty payable by 50 per cent to \$14,870.25.

Duty of \$29,740.50 also applies to the second agreement. The duty concession does not apply to the second agreement because it is a subsale transaction.

Example 4 – agreement entered into to obtain rebate

On 21 October 2019, Vincent enters into an off-the-plan agreement to purchase an apartment for \$600,000 prior to construction commencing.

On 23 October 2019, it is announced that a duty rebate is available for 75 per cent of the duty paid, capped at a maximum of \$50,000 for pre-construction contracts entered into on or after that date.

On 25 October 2019, Vincent arranges with the property developer to cancel the first agreement and enter into a second agreement to purchase the same apartment for the sole purpose of obtaining the duty rebate.

The first agreement is an exempt cancelled transaction under section 107 because it is not cancelled to enter into a replacement transaction to avoid, reduce or defer the payment of tax. The second agreement was entered into for the sole or dominant purpose of obtaining the duty rebate.

Duty at the general rate of \$22,515 applies to the second agreement. The development of the apartment is completed in September 2023 and Vincent applies for a reassessment of duty on the second agreement to apply the duty concession.

The pre-construction duty concession does not apply to the second agreement because it is a transaction entered into for the sole or dominant purpose of obtaining the duty rebate.

Example 5 – agreement entered into to obtain higher rebate

On 10 May 2022, Amelia enters into an off-the-plan agreement to purchase an apartment for \$480,000 prior to construction commencing. The rebate amount payable once construction is

completed is 50 per cent of the duty paid, capped at a maximum of \$50,000.

On 12 May 2022, it is announced as part of the 2022-23 Budget that the rebate will be increased to 100 per cent of the duty paid for apartments valued below \$500,000 from 1 June 2022.

On 1 June 2022, Amelia arranges with the property developer to cancel the first agreement and enter into another agreement to purchase the same apartment for the sole purpose of obtaining the higher rebate amount.

The first agreement is an exempt cancelled transaction under section 107 because it is not cancelled to enter into a replacement transaction to avoid, reduce or defer the payment of tax. The second agreement was entered into for the purpose of obtaining a higher rebate amount.

Duty of \$16,815 is payable on the second agreement. The development of the apartment is completed in November 2023 and Amelia applies for a reassessment of duty on the second agreement.

The pre-construction duty concession does not apply to the second agreement because it was entered into for the sole or dominant purpose of obtaining a higher rebate amount.

Subsection (4) provides that for the purposes of subsection (3)(b)(ii), the eligibility criteria for the administrative Off-the-plan Duty Rebate Scheme is the criteria set out in the application form “Form FDA49 – Off-the-Plan Rebate: Pre-construction Contract” as published on the Commissioner’s website on 31 August 2023.

Subsection (5) requires the Commissioner to ensure the application form setting out the rebate eligibility criteria remains published on the Commissioner’s website.

Section 266FA. Concessional under construction agreement

This section defines a ***concessional under construction agreement*** eligible for the under construction duty concession.

An agreement is a concessional under construction agreement if it is:

- an agreement to purchase from the owner of the land being developed, a lot in a multi-tiered scheme on which there will be a new residential unit or apartment once the development is completed;
- entered into after development for the scheme commences but before it is completed; and
- entered into in the period beginning on 31 August 2023 and ending on 30 June 2025.

An agreement will also be eligible for the under construction concession if it is entered into to replace a concessional under construction agreement that has been terminated and the new agreement is substantially similar to the terminated agreement except that the seller is different.

This ensures that a purchaser can still receive the concession on the new agreement where a concessional under construction agreement is novated after 30 June 2025 and the seller is replaced by another person under the new agreement.

An agreement is not a concessional under construction agreement eligible for the duty concession if:

- the agreement is a novated concessional pre-construction agreement under section 266F(2) which will be eligible for the pre-construction duty concession;
- the agreement is a replacement transaction in relation to a cancelled transaction, for example, the agreement was entered into to reduce the duty payable on a transaction;
- the agreement is a subsale transaction in relation to a cancelled concessional off-the-plan agreement, for example, the agreement was entered into to change the purchaser under the cancelled agreement; or
- the agreement is substantially similar to a cancelled transaction that was entered into before 31 August 2023, and is between all the same parties as the parties to the cancelled transaction except that the seller is different.

Subsection (1) provides that an agreement for the transfer of dutiable property is a **concessional under construction agreement** if it meets the following requirements.

- a) It is an agreement to purchase from the owner of the land being subdivided by the registration of a multi-tiered scheme or an amendment of a multi-tiered scheme, of a lot in the scheme on which there will be a new residential unit or apartment once construction is completed.

A multi-tiered scheme is defined in section 266E as a strata scheme or a community titled (building) scheme, other than one in which no part of a floor of a lot or part of a lot in a building forms or joins the ceiling of another lot or part of a lot. This excludes single-tiered schemes in which no lot is above or below another lot.

The reference to land being subdivided by the registration of an amendment of a multi-tiered scheme is to cater for situations where an existing scheme is amended to allow for the construction of a new apartment building.

- b) The agreement is entered into after development for the subdivision commences but before development for the subdivision is completed.

Development for the subdivision commences when relevant construction works commence on the land (see sections 266J(2) and (3)). Development for a subdivision is completed when the land is subdivided by the registration of the multi-tiered scheme or the amendment of the multi-tiered scheme (see section 266J(4)).

- c) The agreement is entered into in the period beginning on 31 August 2023 and ending on 30 June 2025.

After the Bill is enacted, eligible under construction agreements entered into since 31 August 2023 that have been assessed at the general rate can be reassessed to apply the duty concession.

Subsection (2) provides an agreement (the **new agreement**) is also a **concessional under construction agreement** if:

- a) subsections (1)(a) and (b) apply to the new agreement; and
- b) the new agreement is substantially similar in effect to an earlier cancelled transaction that was a concessional under construction agreement between the same parties as the new agreement, except that the seller was different.

Subsection (2) caters for situations where a concessional under construction agreement is novated after 30 June 2025 and the seller is replaced by another person. In these situations, the novated agreement is technically a new agreement entered into outside the eligibility period and the original agreement is terminated. Section 266FA(2) preserves the concession the purchaser was entitled to under the terminated agreement by providing that the new agreement is a concessional under construction agreement.

Subsection (3) sets out when an agreement is not a concessional under construction agreement. It provides that despite subsections (1) and (2), an agreement (the **relevant agreement**) is not a concessional under construction agreement in the following circumstances.

- a) The relevant agreement is a concessional pre-construction agreement under section 266F(2). Section 266F(2) ensures that a concessional pre-construction agreement is still eligible for the duty concession if the agreement is novated after development commences and the seller is substituted by another party.

There could be overlap between concessional pre-construction agreements to which section 266F(2) applies and concessional under construction agreements. This is resolved by excluding agreements that are concessional pre-construction agreements under section 266(2) from being a concessional under construction agreement.

- b) A relevant agreement that is a replacement transaction as defined in section 107(1) in relation to a cancelled transaction.

For example, a person cancels an earlier agreement entered into before 31 August 2023 to purchase a new apartment under

construction and enters into another agreement on or after 31 August 2023 that is substantially similar to the cancelled agreement just to obtain the under construction duty concession. The new agreement is a replacement transaction entered into for the sole or dominant purpose of reducing the payment of tax and is not eligible for the duty concession.

- c) A relevant agreement that is a subsale transaction as defined in section 107(1) in relation to a cancelled transaction that was a concessional off-the-plan agreement.

This will mean that if a person cancels a concessional pre-construction agreement or a concessional under construction agreement eligible for a duty concession and enters into an under construction agreement to purchase the same property but with a different purchasing entity, the second agreement will not be eligible for the under construction duty concession. The cancelled agreement will not be exempt under section 107 but it may be eligible for a pre-construction or under construction duty concession (whichever is relevant).

- d) A relevant agreement that is substantially similar to an earlier cancelled transaction entered into before 31 August 2023, except that the seller was different. This is to exclude novated agreements where the original agreement was entered into before the eligibility period.

For the purposes of the concession, the new agreement is treated as a continuation of the original terminated agreement. If the original agreement was not eligible for the concession because it was entered into before 31 August 2023, the new agreement should not receive the under construction duty concession just because the seller has changed.

Section 266G. New residential unit or apartment

The off-the-plan duty concession applies to concessional off-the-plan agreements to purchase a lot on which there will be a new residential unit or apartment to be used solely or dominantly for residential purposes. Section 266G defines ***new residential unit or apartment*** for the purposes of the concession.

The concession does not apply to lots intended to be used for commercial purposes such as shops, hotels and motels or to mixed use properties where the land is not intended to be used solely or dominantly for residential purposes. The concession also does not apply to a refurbished unit or apartment.

Subsection (1) provides that a ***new residential unit or apartment*** is a building, or part of a building, that –

- a) may lawfully be used as a place of residence;
- b) in the Commissioner’s opinion, is suitable to be used as a place of residence;

- c) is intended to be used solely or dominantly as a place of residence; and
- d) is not an existing building or part of an existing building. This ensures that the residential unit or apartment that will be acquired is newly constructed. Subsection (3) defines existing building.

Subsection (2) provides that a building or part of a building is not a new residential unit or apartment if it is intended to be used as a hotel, motel, hostel, lodging house, boarding house or serviced apartment, or of a prescribed class. If necessary, the regulation-making power allows other residential premises to be excluded from the definition of new residential unit or apartment if it is not within the policy to provide a concession for that type of property.

Subsection (3) defines **existing building** for the purposes of subsection (1)(d) as a building that has already been constructed when development for the subdivision commences, whether or not refurbishment of the building is undertaken as part of that development. Section 266J provides that development for the subdivision commences when relevant construction works commence on the land.

The definition of existing building makes it clear that a building refurbished as part of the development is also an existing building. This ensures the concession does not apply to concessional off-the-plan agreements to purchase a refurbished residential unit or apartment in a wholly refurbished development, such as a building used for commercial or industrial purposes that is converted to a residential building.

Section 266H. Concession day for agreement

Section 266H defines **concession day** for concessional off-the-plan agreements. The concession amount that applies to a concessional off-the-plan agreement is determined by the concession day, which is generally the date on which the agreement is entered into.

Subsection (1) provides the concession day for a concessional off-the-plan agreement is:

- a) the day on which the agreement is entered into if subsection (2) does not apply. For most concessional off-the-plan agreements, the day on which the agreement is entered into will be the concession day; or
- b) the day on which the cancelled transaction is entered into if subsection (2) applies.

Subsection (2) only applies if the concessional off-the-plan agreement (the **new agreement**) was entered into to replace an earlier cancelled agreement that is substantially similar to the new agreement, except that the seller is different. This may occur where

the contract is novated and the seller is replaced by a different person under the new agreement.

If this occurs, the concession day is the date the original cancelled agreement was entered into and not the date the new agreement was entered into.

This preserves the concession eligibility and amount at the date of the earlier cancelled agreement. Otherwise, a purchaser would be disadvantaged, if for example, a concessional pre-construction agreement is novated to replace the seller, and the new agreement is entered into on a date where the concession amount that applies is less than the amount that would have applied to the cancelled agreement or after 30 June 2025.

Subsection (3) provides that if there is more than one cancelled agreement of the kind referred to in subsection (2), the concession day is the date that the first cancelled agreement was entered into.

Section 266I. Unadjusted duty amount for agreement

This section defines *unadjusted duty amount* for concessional off-the-plan agreements to be:

- a) the transfer duty that would apply to the agreement if the concession did not apply; or
- b) if foreign transfer duty is payable, the total transfer duty and foreign transfer duty that would apply to the agreement if the concession did not apply.

The unadjusted duty amount is relevant to determining the concession amount for a concessional off-the-plan agreement.

Section 266J. Determining when development for subdivision of land commences and is completed

Section 266J sets out when development of the multi-tiered scheme commences and is completed.

The pre-construction duty concession only applies to an agreement to purchase a new residential unit or apartment in a multi-tiered scheme if the agreement is entered into before development of the scheme commences while the under construction concession only applies if the agreement is entered into after development commences but before it is completed.

Development generally commences when excavation or works associated with the construction of the apartment building commences. Development is completed when the strata titles scheme or community titles scheme is registered with Landgate.

Subsection (1) provides that this section applies in determining for the purposes of Chapter 6A when development for the subdivision of

land by the registration of a multi-tiered scheme or an amendment of the scheme commences and is completed.

Subsection (2) provides that development commences when relevant construction works commence on the land. This does not include anything done prior to construction commencing such as obtaining permits or approvals to commence works on the land or remediating pollution or contaminants from the land in preparation for excavation or construction to commence.

Subsection (3) defines **relevant construction works** for the purposes of subsection (2) to mean:

- a) excavation or works associated with the construction of a building or structure that is necessary for the subdivision; but
- b) does not include excavation or works consisting of:
 - (i) demolishing an existing building or structure;
 - (ii) clearing a site for development; or
 - (iii) installing temporary fencing or structures, transportable buildings (such as a sales office) or advertising materials.

Subsection (4) provides that development is completed when the multi-tiered strata titles or community titles (building) scheme, or an amendment of the scheme, is registered with Landgate and the land is subdivided.

Section 266K. Reduction of duty on concessional off-the-plan agreement

This section sets out how the duty concession reduces the transfer duty and foreign transfer duty (if applicable) payable on a concessional off-the-plan agreement.

Subsection (1) provides the transfer duty and foreign transfer duty (if applicable) payable on a concessional off-the-plan agreement is to be reduced by the concession amount as set out in this section.

Subsection (2) provides if foreign transfer duty is not payable on the agreement, the transfer duty is reduced by the concession amount.

Subsection (3) provides that if transfer duty and foreign transfer duty are payable on the agreement, the transfer duty is reduced by the concession amount first and the foreign transfer duty is reduced by the rest of the concession amount (if any) after the transfer duty is reduced to nil.

Example 6

Ben is a foreign person. He enters into a concessional pre-construction agreement on 1 November 2023 to purchase an apartment for \$1,000,000.

The total duty payable on the transaction is \$112,615.50, which consists of transfer duty of \$42,615.50 and foreign transfer duty of \$70,000.

Under section 266L, the concession amount is \$50,000 (being the lesser of 50 per cent of the unadjusted duty amount of \$112,615.50 and \$50,000).

Under section 266K, the transfer duty payable of \$42,615.50 is reduced to nil. The remainder of the concession amount is \$7,384.50.

The foreign transfer duty of \$70,000 is reduced by the remainder of the concession amount to \$62,615.50.

Section 266L. Concession amount

This section sets out the concession amount that applies to concessional off-the-plan agreements. For concessional pre-construction agreements, the concession amount is between 50 and 100 per cent of the duty payable on the agreement depending on the value of the property and the date of the agreement, capped at \$50,000.

For concessional under construction agreements, the amount is between 37.5 and 75 per cent of the duty payable on the agreement depending on the value of the property, capped at \$50,000.

Subsection (1) provides the concession amount for a concessional pre-construction agreement is the lesser of:

- a) \$50,000; and
- b) the amount calculated by determining the percentage under the Table based on the dutiable value and concession day of the agreement, and multiplying that percentage by the unadjusted duty amount, that is, the total duty payable on the agreement if the concession did not apply.

This is subject to sections 266M(2) and 266N(2)(b) which set out how the concession amount is calculated for an agreement to purchase two or more properties and for agreements that are aggregated under section 37.

Item	Concession day	Dutiable value	Concession percentage (%)
1.	23 October 2019 to 23 October 2021	Any dutiable value	75
2.	24 October 2021 to 31 May 2022	Any dutiable value	50

Item	Concession day	Dutiable value	Concession percentage (%)
3.	1 June 2022 to 10 May 2023	\$500,000 or less	100
4.	1 June 2022 to 10 May 2023	More than \$500,000 but less than \$600,000	X calculated under subsection (2)
5.	1 June 2022 to 10 May 2023	\$600,000 or more	50
6.	11 May 2023 to 30 June 2025	\$650,000 or less	100
7.	11 May 2023 to 30 June 2025	More than \$650,000 but less than \$750,000	Y calculated under subsection (3)
8.	11 May 2023 to 30 June 2025	\$750,000 or more	50

Example 7

On 1 July 2022, James enters into a concessional pre-construction agreement to purchase an apartment in a multi-tiered scheme for \$680,000.

The unadjusted duty amount, that is, the transfer duty payable on the transaction if the concession did not apply, is \$26,315. The concession percentage is 50 per cent.

Under section 266L(1), the concession amount is \$13,157.50 (being the lesser of 50 per cent of the unadjusted duty amount and \$50,000).

The transfer duty payable on the agreement is reduced to \$13,157.50.

Subsection (2) provides the formula for calculating the concession percentage for item 4 of the Table to subsection (1):

$$X = 100 - \left(\frac{V - 500\,000}{100} \times 0.05 \right)$$

where V is the dutiable value of the concessional pre-construction agreement.

This formula determines a concession percentage between 50 and 100 per cent of the duty payable for properties valued at more than \$500,000 but less than \$600,000 where the concessional pre-construction agreement was entered into between 1 June 2022

and 10 May 2023. The 100 per cent duty concession reduces at a rate of 0.05 per cent for every \$100 in dutiable value that exceeds \$500,000, capped at \$50,000.

Example 8

Sarah enters into a concessional pre-construction agreement on 1 July 2022 to purchase an apartment for \$515,000. The transfer duty assessed on the agreement is \$18,477.50.

The development of the multi-tiered scheme is not completed until June 2024. Prior to settlement, the Commissioner reassesses the duty payable on the transaction and applies the pre-construction duty concession.

The concession percentage is calculated as follows:

$$X = 100 - \left(\frac{515,000 - 500,000}{100} \times 0.05 \right)$$

$$X = 92.5 \text{ per cent}$$

The concession amount is \$17,091.68 being 92.5 per cent of the transfer duty payable if the concession did not apply. The duty payable on the transaction is reassessed to \$1,385.82.

Subsection (3) provides the formula for calculating the concession percentage for item 7 of the Table to subsection (1):

$$Y = 100 - \left(\frac{V - 650\,000}{100} \times 0.05 \right)$$

where V is the dutiable value of the concessional pre-construction agreement.

This formula determines a concession percentage between 50 and 100 per cent of the duty payable for properties valued at more than \$650,000 but less than \$750,000 where the concessional pre-construction agreement was entered into between 11 May 2023 and 30 June 2025. The 100 per cent duty concession reduces at a rate of 0.05 per cent for every \$100 in dutiable value that exceeds \$650,000, capped at \$50,000.

Example 9

Jack enters into a concessional pre-construction agreement on 1 February 2024 to purchase an apartment for \$700,000. The transfer duty payable on the agreement if the concession did not apply is \$27,265.

The agreement is eligible for the pre-construction duty concession.

The concession percentage is calculated as follows:

$$X = 100 - \left(\frac{700,000 - 650,000}{100} \times 0.05 \right)$$

$$X = 75 \text{ per cent}$$

The concession amount is \$20,448.75 being 75 per cent of the transfer duty payable if the concession did not apply. The duty payable on the transaction is \$6,816.25.

Subsection (4) provides the concession amount for a concessional under construction agreement is the lesser of:

- a) \$50,000; and
- b) the amount calculated by determining the percentage under the Table based on the dutiable value of the agreement, and multiplying that percentage by the unadjusted duty amount, that is, the total duty payable on the agreement if the concession did not apply.

This is subject to sections 266M(2) and 266N(2)(b) which set out how the concession amount is calculated for an agreement to purchase two or more properties and for agreements that are aggregated under section 37.

Item	Dutiable value	Concession percentage (%)
1.	\$650,000 or less	75
2.	More than \$650,000 but less than \$750,000	Z calculated under subsection (5)
3.	\$750,000 or more	37.5

Subsection (5) provides the formula for calculating the concession percentage for item 2 of the Table to subsection (4):

$$Z = 75 - \left(\frac{V - 650\,000}{100} \times 0.0375 \right)$$

where V is the dutiable value of the concessional under construction agreement.

This formula determines a concession percentage between 37.5 and 75 per cent for properties valued at more than \$650,000 but less than \$750,000.

Example 10

Jeff enters into an off-the-plan agreement on 1 November 2024 to purchase an apartment under construction for \$690,000. The transfer duty payable on the agreement if the concession did not apply is \$26,790.

The agreement is eligible for the under construction duty concession.

The concession percentage is calculated as follows:

$$Z = 75 - \left(\frac{690,000 - 650,000}{100} \times 0.0375 \right)$$

X = 60 per cent

The concession amount is \$16,074 being 60 per cent of the transfer duty payable if the concession did not apply. The duty payable on the transaction is reduced to \$10,716.

Section 266M. Concession amount for concessional off- the-plan agreement relating to 2 or more properties

If more than one new residential unit or apartment is being acquired under a concessional off-the-plan agreement, the pre-construction duty concession or under construction duty concession (whichever is relevant) can apply to the duty payable for each property. This section sets out how to calculate the concession amount for each property being acquired under a concessional off-the-plan agreement.

Subsection (1) provides this section applies to a concessional off-the-plan agreement for the purchase of two or more new residential unit or apartments in a multi-tiered scheme.

Subsection (2) provides the concession amount for the agreement is the total of the concession amounts for each property determined under subsection (3).

Subsection (3) provides that the concession amount for each of the properties is determined as follows:

- a) the first step is to apportion the dutiable value of the concessional off-the-plan agreement between each of the properties being purchased under the agreement as decided by the Commissioner;
- b) the second step is to apportion the unadjusted duty amount, being the total duty payable if the concession did not apply, between each of the properties according to the proportion that the dutiable value apportioned to the property bears to the dutiable value of the agreement;
- c) the third step is to determine the concession amount for each property under section 266L as if:
 - (i) the property was being acquired under a separate concessional pre-construction agreement or concessional under construction agreement (whichever is relevant);
 - (ii) the dutiable value of the agreement is the amount apportioned to the property under the first step; and
 - (iii) the unadjusted duty amount for the agreement is the duty amount apportioned to that property under the second step.

Example 11

On 1 September 2023, Polly enters into a concessional pre-construction agreement to purchase two apartments in the same strata complex for a total purchase price of \$800,000. The pre-construction duty concession applies to the duty payable on both properties.

The Commissioner apportions \$400,000 of the dutiable value between each of the properties based on their advertised sale price.

The unadjusted duty amount if the concession did not apply to the agreement is \$32,315.50. The Commissioner apportions duty of \$16,157.75 to each property based on the percentage that the apportioned dutiable value of \$400,000 bears to the total dutiable value of \$800,000 (that is, 50 per cent).

Under section 266L, the concession amount for each property is 100 per cent of the duty payable, capped at \$50,000, based on the apportioned value for each property of \$400,000.

The duty payable on both properties is reduced to nil.

Section 266N. Aggregation of transactions

This section sets out how duty applies to a concessional off-the-plan agreement that is aggregated under section 37 with another concessional off-the-plan agreement or other dutiable transaction.

Section 37 allows dutiable transactions to be aggregated and treated as a single dutiable transaction for the purposes of charging duty if they are substantially one arrangement.

Aggregated transactions incur a greater amount of duty than if each transaction was assessed separately. When transactions are aggregated, duty applies to the total of the dutiable values of each of the dutiable transactions that form the aggregated transaction and is apportioned between the transactions as determined by the Commissioner.³

If a concessional off-the-plan agreement is aggregated under section 37 with another dutiable transaction, duty at the general rate will apply to the total dutiable value of the aggregated transactions and the pre-construction duty concession or under construction duty concession (whichever is relevant) will apply to the duty apportioned to the concessional off-the-plan agreement only.

If two or more concessional off-the-plan agreements are aggregated and treated as a single transaction, a pre-construction duty concession or under construction duty concession (whichever is relevant) will apply to the duty apportioned to each of the agreements.

³ Duties Act s 37(6).

Subsection (1) provides that subsection (2) applies if the following transactions are aggregated under section 37 and treated as a single dutiable transaction:

- a) two or more concessional off-the-plan agreements; or
- b) one or more concessional off-the-plan agreements and one or more other dutiable transactions.

Subsection (2) provides the duty payable on the aggregated transactions is determined as follows:

- a) the first step is to determine and apportion between the transactions the transfer duty payable on each of the aggregated transactions under section 37 if none of the transactions were a concessional off-the-plan agreement;
- b) the second step is to determine the concession amount under section 266L (or sections 266L and 266M if there is a concessional off-the-plan agreement for the purchase of two or more eligible properties being aggregated with another concessional off-the-plan agreement) for each of the concessional off-the-plan agreements, treated as a separate transaction, as if the unadjusted duty amount were:
 - (i) the transfer duty apportioned to the agreement under section 37 (the **apportioned transfer duty amount**) if foreign transfer duty is not payable on the agreement; or
 - (ii) the total of the apportioned transfer duty amount and foreign transfer duty payable on the agreement if foreign transfer duty is payable on the agreement; and
- c) the third step is to reduce under section 266K the transfer duty and foreign transfer duty (if applicable) payable on each concessional off-the-plan agreement by the concession amount determined under the second step as if the transfer duty payable on the agreement were the apportioned transfer duty amount.

Example 12

On 30 November 2023, Charlie enters into a concessional pre-construction agreement to purchase an apartment in a strata complex. The apartment is on the market for \$400,000. Charlie considers purchasing a commercial unit on the ground floor of the same complex as an investment property for \$350,000.

The developer advises Charlie that the purchase price for both properties will be reduced by \$50,000 if Charlie buys them both. Charlie agrees to buy both properties and enters into separate agreements to purchase the residential apartment for \$350,000 and the commercial unit for \$300,000.

The agreements provide that completion of each transaction is conditional upon completion of the other. The Commissioner considers the transactions are substantially one arrangement. The dutiable transactions are aggregated under section 37.

Based on a dutiable value of \$650,000, the duty payable on the aggregated transactions if the concession did not apply is \$24,890.

The Commissioner apportions duty of \$13,440.60 to the purchase of the residential apartment and \$11,449.40 to the purchase of the commercial unit based on the proportion that the dutiable value of each property bears to the total dutiable value of \$650,000 (that is 54 per cent and 46 per cent respectively).

Under section 266L, the concession amount for the purchase of the apartment is determined to be \$13,440.60 (being the lesser of 100 per cent of the unadjusted duty amount or \$50,000).

The duty payable on the concessional pre-construction agreement to purchase the apartment is reduced to nil.

The transfer duty payable on the agreement to purchase the commercial unit is \$11,449.40. This does not get reduced because the transaction is not a concessional pre-construction agreement.

Example 13

Using the facts in example 12, if Charlie had entered into another concessional pre-construction agreement to purchase another residential apartment as an investment property for \$300,000 instead of the commercial unit, both transactions would be eligible for the pre-construction duty concession.

Based on the dutiable value of \$650,000, the duty payable on the aggregated transactions if the concession did not apply is \$24,890.

The Commissioner apportions duty of \$13,440.60 to the purchase of the first apartment and \$11,449.40 to the purchase of the apartment that will be Charlie's investment property based on the proportion that the dutiable value of each property bears to the total dutiable value of \$650,000 (that is 54 per cent and 46 per cent respectively).

Under section 266L, the concession amount for the concessional pre-construction agreement to purchase the first apartment is \$13,440.60 and for the agreement to purchase the investment property is \$11,449.40 (being the lesser of 100 per cent of the unadjusted duty amount or \$50,000).

The transfer duty payable on both concessional pre-construction agreements is reduced to nil.

Example 14

On 1 September 2023, Adrian enters into an agreement to purchase an apartment for \$650,000 before development commences. The agreement is a concessional pre-construction agreement.

Adrian considers buying the adjoining apartment. The developer agrees to discount the purchase price of the second apartment by \$50,000 if Adrian buys both apartments. On 1 October 2023,

Adrian enters into a separate agreement to purchase the adjoining apartment for \$600,000 after development has commenced. The second agreement provides that settlement is conditional upon the completion of the first agreement. The second agreement is a concessional under construction agreement.

The transactions are aggregated under section 37 and treated as a single dutiable transaction. Based on the dutiable value of \$1,250,000, the duty payable on the aggregated transactions is \$55,490.50.

The Commissioner apportions duty of \$28,855.05 to the concessional pre-construction agreement and \$26,635.45 to the concessional under construction agreement based on the proportion that the dutiable value of each property bears to the total dutiable value of the transactions (that is 52 per cent and 48 per cent respectively).

The concession amount for the concessional pre-construction agreement is \$28,855.05, being the lesser of \$50,000 or 100 per cent of the duty payable.

The concession amount for the concessional under construction agreement is \$19,976.60, being the lesser of \$50,000 or 75 per cent of the duty payable. The duty payable on the concessional pre-construction agreement is reduced to nil and the duty payable on the concessional under construction agreement is reduced to \$6,658.85.

Section 37(3) provides that transactions cannot be aggregated unless they are all chargeable with the same rate of duty, are all chargeable with nominal duty, or are all exempt transactions. Exempt transaction is defined in section 9 to mean a dutiable transaction on which duty is not chargeable.

Subsection (3) clarifies that a concessional off-the-plan agreement is not an exempt transaction for the purposes of section 37(3)(c) just because the transfer duty payable on the agreement is reduced to nil by the duty concession. This ensures that a concessional off-the-plan agreement can be aggregated with other transactions under section 37 even if no duty is chargeable on the agreement because of the concession.

Section 266O. Application for off-the-plan concession

This section sets out the process for applying for a duty concession under the Chapter 6A. An application for an assessment or reassessment to apply the pre-construction duty concession or under construction duty concession must be made within 12 months of settlement.

Subsection (1) provides that an application for assessment or reassessment of duty for a concessional off-the-plan agreement must be made in the approved form no later than 12 months after the

day on which the agreement is completed. A concessional off the plan agreement is completed when settlement occurs.

Subsection (2) provides that despite the five-year time limit for reassessments set out in section 17 of the Taxation Administration Act, an application for reassessment of the duty liability under this Chapter must be made within 12 months of settlement and the Commissioner can only reassess if the taxpayer made the application within that time.

Clause 9 Schedule 3 Division 12 inserted

This clause inserts the transitional provisions for the amendments in this Bill at the end of Schedule 3 of the Duties Act.

Division 12 – Provisions for *Duties Amendment (Off-the-Plan Concession and Foreign Persons Exemptions) Act 2023*

75. Terms used

Proposed clause 75 defines the term ***commencement day*** used in the transitional provisions to mean the day on which section 3 of the *Duties Amendment (Off-the-Plan Concession and Foreign Persons Exemptions) Act 2023* comes into operation.

76. Provisions relating to amendments to Chapter 3A

Proposed clause 76 sets out the transitional provisions for the amendments relating to the foreign transfer duty and foreign landholder duty construction, refurbishment and subdivision exemptions in Chapter 3A.

The transitional provisions apply the amendments to transactions or acquisitions that occur on or after 1 January 2023, or to transactions or acquisitions that occurred before that date if the person satisfies the requirement to begin or complete construction, refurbishment or subdivision (whichever is relevant) on or after that date.

Subclause (1) defines the following terms used in the clause:

amended exemption provisions means sections 205ZA, 205ZB, 205ZO and 205ZP, as amended by clauses 4 to 7 of this Bill.

relevant exempt transaction or acquisition means a foreign dutiable transaction or an acquisition that would be exempt under the amended exemption provisions if the transaction or acquisition:

- a) occurs on or after 1 January 2023; or
- b) occurred before that date but the requirement to begin or complete construction, refurbishment or subdivision within five years of the transaction or acquisition is satisfied on or after 1 January 2023.

Subclause (2) provides that the amended exemption provisions apply to a relevant exempt transaction or acquisition even if it occurred before commencement day.

Subclause (3) provides that the Commissioner may, on application by the taxpayer or the Commissioner's own initiative, reassess the duty payable on a transaction or acquisition in accordance with the amended exemption provisions.

Subclause (4) provides the taxpayer must apply for a reassessment under subclause (3) in the approved form on or before the later of:

- a) five years of the completion of the transaction or acquisition;
- b) one year of the date on which the person satisfies the requirement to begin or complete construction, refurbishment or subdivision (whichever is relevant); or
- c) 12 months after the commencement day.

Subclause (5) clarifies that subclauses (3) and (4) above apply despite the general five-year reassessment time limit in section 17 of the Taxation administration Act.

Subclause (6) provides for the purposes of this clause, when an acquisition occurs is determined under section 176 as applied by section 205ZE(1). The general rule in section 176 is that an acquisition occurs when the agreement for the making of the acquisitions is made, whether conditional or not.

77. Provisions relating to Chapter 6A.

Proposed clause 77 sets out the transitional provisions for the amendments relating to the pre-construction duty concession and under construction duty concession in new Chapter 6A.

Subclause (1) provides that if a term used in this clause is given a meaning in section 266E, it has the same meaning in this clause.

Subclause (2) clarifies that Chapter 6A applies to the imposition of duty on a concessional pre-construction agreement even if it was entered into in the period beginning on 23 October 2019 and ending immediately before commencement day.

If a concessional pre-construction agreement was entered into before the amendments come into effect and a rebate has not been paid for the agreement, the Commissioner can reassess duty payable on the agreement to apply the pre-construction duty concession.

The notes for the subclause clarify that the following agreements are not a concessional pre-construction agreement under section 266F to which the concession applies:

- a) an agreement entered into before 23 October 2019;

- b) an agreement in relation to which a rebate has been paid under the Off-the-Plan Duty Rebate Scheme; and
- c) an agreement that was not eligible for the rebate scheme where the development is completed before 31 August 2023.

Subclause (2A) clarifies that Chapter 6A applies to the imposition of duty on a concessional under construction agreement even if it was entered into in the period beginning on 31 August 2023 and ending immediately before commencement day.

The notes for the subclause clarify that an agreement entered into before 31 August 2023 is not a concessional under construction agreement under section 266FA to which the concession applies.

Subclause (3) allows the Commissioner to reassess duty on a concessional off-the-plan agreement entered into before commencement day to apply the pre-construction duty concession or under construction duty concession (whichever is relevant).

Subclause (4) allows a taxpayer 12 months after the completion of the transaction or 12 months after the amendments come into effect (whichever is latest) to apply for a reassessment under subclause (3), despite the 12-month timeframe for reassessment in section 266O.

Subclause (5) clarifies that subclauses (3) and (4) above apply despite the general five-year reassessment time limit in section 17 of the Taxation administration Act.