

**REVENUE CIRCULAR DAA015.1**

Commercial Leases: Duty Payable on Lease Premiums – *Duties Act 1999*

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## **Introduction**

Chapter 2 of the *Duties Act 1999* (the Act) imposes duty on certain transactions, including a transfer of dutiable property, an agreement for the sale or transfer of dutiable property and the grant of a Crown lease. Dutiable property is defined as, among other things, land in the ACT, a Crown lease, a land use entitlement and an interest in any such dutiable property.

Duty on short-term franchise agreements was abolished from 30 June 2006 and on short term commercial leases from 30 June 2009 (short term being less than 30 years). Dutiable property continued to include long-term commercial lease and franchise arrangements (leases or franchises with a term of 30 years or more). A term of 30 years or more was considered a de facto transfer of land and the provisions were intended as an anti-avoidance measure.

Including these long-term arrangements as dutiable property resulted in conveyance duty being levied on genuine commercial lease arrangements, where no avoidance intention was present. The provisions were found to negatively impact on the ACT's current and potential commercial leasing agreements.

Long-term lease duty was removed as dutiable property from section 10 of the Act, and substituted with provisions that levy duty on a premium paid (above market rent) for the lease (effective 29 April 2014). Duty on long-term franchise agreements has been fully abolished.

This circular clarifies the duty payable for commercial leases where a premium is paid or agreed to be paid, and explains the method of lodging a grant of a commercial lease with a premium for the assessment of duty.

## **Duty on commercial leases with a premium**

Section 10 of the Act imposes duty on a commercial lease with a premium. The payment of a premium on the grant or transfer of a commercial lease indicates that a de facto transfer of land may be occurring as part of the leasing arrangement.

A commercial lease is a lease that is used for commercial purposes which does not include residential purposes, or for the purposes of primary production (that is, rural land). Mixed-use leases will have the duty liability imposed on the percentage of the lease that is used for a commercial purpose. Commercial use includes retail, business use or industrial use (for example, supermarkets, department stores and commercial accommodation).

The existence of a premium for a commercial lease may not necessarily represent an avoidance of conveyance duty. In certain circumstances, the payment of a premium will represent part of a reasonable commercial arrangement (for example, in a competitive market). It is not the intention to levy duty in such instances.

Section 6A of the Act provides that a commercial lease with a premium is a commercial lease in relation to which there is a premium that is more than the amount determined by the Commissioner for ACT Revenue (the Commissioner) by disallowable instrument. The current threshold is 25 per cent above market rent over the term of the lease.

The determination of this threshold ensures that leases where a minor premium is paid, due to factors such as market competition, are not liable for duty; only a lease with a substantial premium paid will become liable to duty.

A lease with a large premium paid is a key characteristic of a leasing arrangement intending to avoid conveyance duty, for what is essentially a transfer of dutiable property. By levying duty on such a premium, these provisions capture 'back door' transfers as dutiable.

If there is a duty liability on a commercial lease with a premium, the lessee will be liable to pay duty on the entire premium component, which will be levied at the conveyance duty rate as at the date the lease was entered into.

The total premium amount will be dutiable irrespective of whether it is paid up front by the lessee to the lessor, or paid over the term of the leasing agreement.

### **Meaning of 'premium'**

Section 6 of the Act defines a premium as any consideration paid, or agreed to be paid in relation to a commercial lease, other than rent reserved. The consideration includes both monetary and the value of non-monetary consideration.

Rent reserved includes the rent paid or payable during the term of the lease that is market rent (see below), as well as any reasonable amount paid or payable for the right to use the land under the lease.

A commercial lease with a premium will become liable for duty on the entire premium component once the consideration paid exceeds 25 per cent above market rent over the term of the lease.

The value of the premium is determined after all reasonable consideration paid (or agreed to be paid) for the lease by the lessee has been deducted from the total consideration (for example, reasonable rent reserved payments). If there is remaining consideration after reasonable deductions (for example, amounts for outgoings), in excess of 25 per cent of the market rent over the term of the lease, this entire remaining amount is considered a premium amount, and will be liable to duty at conveyance rates.

When duty is liable on a commercial lease with a premium, the entire premium component will be liable to duty, not only the consideration that exceeds the determined threshold amount. That is, the dutiable value of a commercial lease with a premium is the total amount of the premium.

## Market rent

Market rent is defined by the Australian Property Institute as:

*The estimated amount for which a property, or space within a property, should lease on the date of the valuation between a willing lessor and a willing lessee on appropriate lease terms in an arm's-length transaction, after proper marketing wherein the parties had each acted knowledgeably, prudently, and without compulsion. (Spencer v Commonwealth of Australia [1907] HCA 82)*

The Commissioner will consider the above definition when determining the existence of a commercial lease with a premium. Related or associated parties may not act severally and independently in forming an agreement in the same manner as arm's length parties would normally do.

Lease agreements that are entered by parties not acting at arm's length and involving a premium paid or payable for the lease (which is either monetary or non-monetary) should always be submitted to the Commissioner for consideration.

In determining the market rent payable on a commercial lease, the Commissioner may require the taxpayer to provide a declaration of the market rent payable for the lease, issued by a competent valuer. If no evidence is provided to substantiate the market rent of the lease, the Commissioner may request a valuation to determine the market rent. The Commissioner may choose to recover the cost of obtaining a valuation from the taxpayer (section 251A of the Act).

## Rent reserved

In determining whether a premium has been paid for a commercial lease, the following factors will be considered. The listing below shows payments that can be deducted from the total consideration paid, or agreed to be paid for the lease. The remaining figure after all reasonable rent reserved payments have been removed will assist in determining any premium paid.

Examples of payments for the right to use the land include (but are not limited to):

- market rent;
- maintenance and repairs;
- services and utilities;
- legal costs payable by the lessee on behalf of the lessor in relation to the grant of the lease;
- insurance premiums;
- car park contributions;
- fit-out costs;
- security;
- land rent;
- gardening and landscaping;
- lifts;
- administration;
- turnover rent;
- rates.

This list is not exhaustive and is intended to provide guidance of the payments that may be taken into account when determining consideration that reasonably forms rent reserved.

Section 20 (3) of the Act provides for determining the dutiable value for a mixed-use lease. As the dutiable amount for the grant or transfer of a commercial lease is the amount of the premium, for a mixed-use lease the dutiable value is the premium amount with reference to the percentage of the land the subject of the lease that is used for commercial purposes (the dutiable value multiplied by the percentage of the lease that is commercial).

## **Assessment procedure and documentation**

### **Barrier Free model**

The *Revenue Legislation Amendment Act 2017*, effective 18 September 2017, introduces the Barrier Free model for the payment of conveyance duty. Under the Barrier Free model property buyers will no longer pay their duty before the settlement of a property.

Dutiable transactions which do not affect the register under the Land Titles Act, or do not cause a change to the register in every case, are treated as being outside the Barrier Free model as 'non-Barrier Free transactions'.

The grant of a commercial lease with a premium is a non-Barrier Free transaction because the registration of commercial leases is not mandatory – an unregistered lease could potentially be a dutiable transaction if it has a premium exceeding the threshold.

Therefore, the ACT Revenue Office requires all grants of a commercial lease with a premium to be lodged directly via SmartForm, within 90 days of execution, in order to be assessed in compliance with the legislation.

The SmartForm to lodge a commercial lease with a premium for the assessment of duty is available on [www.revenue.act.gov.au](http://www.revenue.act.gov.au).

All leases with a premium in excess of 25 per cent of the market rent over the term of the lease are subject to conveyance duty and must be lodged.

In addition, if the parties are not at arm's length and any premium is paid for the lease, documents regarding the transaction should be lodged with the Commissioner for review to determine whether those documents are dutiable.

For more information on lodging commercial leases with a premium outside the Barrier Free model, see the information under the 'Barrier Free Conveyancing' tab on [www.revenue.act.gov.au](http://www.revenue.act.gov.au).

### **Required documents**

The lessee or their representative must attach copies of the following documents to the SmartForm:

- the lease agreement; and
- any documentation or arrangement separate to the lease agreement that is applicable to the payment (or agreement for payment) of a premium for the lease.

The Commissioner may also request additional documents to be provided.

The determination of the dutiable value of a commercial lease with a premium will be considered on the basis of all the relevant facts and circumstances of the particular case.

## **Criminal penalties**

Giving false or misleading information is a serious offence. For details of the serious criminal offences of making, giving or producing false or misleading statements, information or documents, see the *Criminal Code 2002*.

Signed

Kim Salisbury  
Commissioner for ACT Revenue  
18 September 2017