

# OPTION DEEDS: ASSIGNMENT, NOMINATION & NOVATION

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## 1 General Overview

Option Deeds, particularly in respect of real property, are becoming more common in light of the number of clients seeking to profit from property development.

There is good reason for their popularity; they provide developers with flexibility and assist in managing cash flow and liabilities in the development process.<sup>1</sup>

But the assignment, nomination or novation of such deeds raises problems from a stamp duty, and other Commonwealth taxes, point of view. The problems are often not known to the clients nor, unfortunately, considered significant enough to justify the time or cost in dealing with them. Often a short calculation of the stamp duty or tax costs of getting them wrong is enough to ensure the client's become aware of their importance.

The issue arises because of the tension between obtaining flexibility in dealing with property and triggering adverse stamp duty, income tax or GCT, or GST liabilities. For instance:

- the assignment of rights under a call option may result in call option assignment duty under s 107 of the *Duties Act 1997* (NSW) (the '**Duties Act**'), which is assessed on the value of the underlying property; and
- the novation, assignment or nomination of an option will attract duty under s 9B of the Duties Act, though here a credit for this duty will be applied to any later duty payable when the underlying property is acquired via the option.

This paper will consider the following issues:

1. What are option deeds?
2. What is an assignment of, a nomination under, or a novation of an option deed?

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<sup>1</sup> Common uses of option deeds include:

- a) to secure development rights over a potential site without having to pay stamp duty or buying time to enable the developer to assemble the site and obtain development consent;
- b) to defer stamp duty where a development may not be completed before the deadlines for purchase contracts for sale;
- c) to secure purchase rights over a property and lock in a price but defer duty to a future tax year;
- d) to gain the exclusive right to market lots for sale for specified period of time;
- e) to permit flexibility in choosing the actual entity that will purchase the property; and
- f) as sale guarantees to a developer if a buyer cannot be found on the open market.

3. When does stamp duty arise in relation to an option deed, its execution or the assignment of, a nomination under, or a novation of an option deed?
4. How do the put and call option provisions apply?
5. The importance of carefully drafting option deeds.
6. Valuation of option deeds.
7. What income tax and CGT concerns arise for option deeds?
8. What GST concerns arise for option deeds?
9. Case report: *CTI Joint Venture Company Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWSC 20.

As the Supreme Court's decision led to amendments in the way option deeds are assessed for stamp duty, it is appropriate to consider that case before turning to how the stamp duty regime now applies to option deeds.

It will be seen that option deeds are useful tool in a property developer's arsenal – and, indeed, can be a profitable form of property investment in their own right – but that the duty legislation is cognizant of these facts and will apply unless the options are carefully prepared and dealt with.

Although beyond the scope of this paper, developers considering using option deeds should also give consideration to how they manage their liability, for instance in relation to the statutory warranties for residential building work under the *Home Building Act* 1999 (NSW) and other relevant legislation.

## 2 Option Deeds

An option is a right conferred by agreement to buy, or to sell, certain property within a specified time period. An option is generally categorized as a:

- call option, which provides for the purchase of the specified property;
- put option, which provides for the sale of the specified property; or

- a put and call option, which provides one party with the right to require the sale, and the other with the right to require the purchase, of the specified property.

The types of options will be separately considered below.

It is to be noted that an option may be a call option, or a put option and call option together, but, in relation to real property, it is less common to have a put option on its own.

## 2.1 Nature of Option Deeds

There has been judicial discourse, and commentary of academics and the profession, on the legal nature of options. The issue is whether they are properly characterized as:

- an irrevocable offer (*Karaguleski v Vasil Bros & Co Pty Ltd* [1981] 1 NSW:R 2677 and *Commissioner of Taxes (Qld) v Camphin* (1937) 57 CLR 127 at 132), that is, an offer to sell with an agreement not to revoke; or
- a conditional contract (*Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57), that is, an agreement to sell upon a condition.

In *CTI Joint Venture Company Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWSC 20 at [33] Gzell J said:

It has been suggested that the view that commands most support in Australia is that of an irrevocable offer coupled with a promise by the grantor not to revoke the offer for a given period (JW Carter, Elisabeth Peden and GJ Tolhurst, *Cases and Materials on Contract Law in Australia*, 5<sup>th</sup> ed (2007) LexisNexis Butterworths at [8-31]).

Presumably his Honour was endorsing that view.

Whether a particular option is an irrevocable offer or a conditional contract is a matter of construction of the instrument creating it. Relevant factors include:

- the drafting of the instrument by the parties;
- the nature of the property (see below); and

- whether the option allows a right of nomination to the grantee as, if it does, it suggests an irrevocable offer on the basis that an offer can be made to the world at large but can be accepted only by a definite person or persons.

Unless the context requires otherwise an option is not a transfer, for no existing property moves to the grantee of the option; nor for the same reason is there a sale: *Commissioner of Taxes (Qld) v Camphin* (1937) 57 CLR 127. The option, if specifically enforceable, may operate to create in the grantee an equitable interest (see point 2.2.1 below), but that interest is not sold to the grantee.

However, in the correct circumstances the granting of an option has been held to be an agreement for sale. In *A Raptis & Sons Holdings Pty td v Commissioner of Stamp Duties (Qld) (No 2)* (1997) 97 ATC 4842 an option to purchase shares exercisable within 99 years (with only a nominal amount payable on exercise), coupled with a power of attorney enabling the grantee to exercise the rights of a shareholder, was held to effect a disposition of the shares, although not a sham.

## **2.2 Commercial Aspects of Option Deeds**

There are some commercial factors that must be borne in mind when using options to purchase or sell property.

### **2.2.1 Caveatable Interest**

As to the nature of the property, the High Court held that an option to purchase land will normally be regarded as a conditional contract creating proprietary rights in the grantee: *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57. This is significant for the grantee of a call option as it will enable the grantee to lodge a caveat on the title of the specified property: *Laybutt v Amoco Australia Pty Ltd*; see also *Mackay v Wilson* (1947) 47 SR (NSW) 315 at 325.

If, however, the option deed specifically expresses itself to be personal to the parties there is a personal contract only and an interest in land may not be created. This, in turn, means that there is probably no caveatable interest on the part of the grantee.

### **2.2.2 No Cooling Off Period**

The use of an option deed – whether it is to create a call option only, a put option only or a put and call option – to ultimately acquire property is contemplated by the *Conveyancing Act 1919* (NSW) (the ‘**Conveyancing Act**’).

Section 66T of the *Conveyancing Act* provides that there is no cooling off period in relation to a contract for the sale of residential property if the contract is made in consequence of the exercise of an option to purchase the property, other than an option that is void under s 66ZG. That later section provides for options for residential property being void unless granted by way of exchange of counterparts and if it is exercisable within 42 days after it is granted.

Section 66ZB of the *Conveyancing Act* provides that there is a cooling period for every option to purchase residential property. The cooling off period may be shortened by a provision in the option, or by separate written or oral agreement of the parties, which provision or agreement only takes effect once a s 66ZF certificate is provided. This can occur before, at or after the time the option is granted. As the provision does not speak of a waiver of the cooling off period it seems s 66ZF certificates merely reduce the cooling off period from 5 business days to nil business days. If the certificate is provided before the cooling off period would otherwise have started there will be no cooling off period.

The Courts are yet to resolve whether wording in these provisions, of “option to purchase” restricts these provisions to “Call options”, or the call option component of a “Put and Call Option”, rather than to “Put Options” also.

### **2.3 What is a Call Option?**

The common option to purchase property (usually referred to as a call option) can be characterized as follows:

- it is a right granted by a person owning property (the ‘**grantor**’) to another person (the ‘**grantee**’) to purchase that property on terms and conditions set out in the instrument creating the option.
- the right is usually exercisable only for a specified time (the ‘**option period**’).

- the grant is generally irrevocable by the grantor during the option period without the grantee's consent, to distinguish it from an offer to sell.
- The option is usually exercised by the grantee giving a notice of exercise to the grantor, and normally the option instrument specifies that this notice must be in writing.
- Often, especially in relation to land, the option will specify that, on exercise, the grantee must also pay a deposit and/or deliver a duly executed counterpart of an agreement for the sale of the property.
- For the grant of the option the grantee often pays a sum of money (the '**option fee**') which is either (a) merely the cost of the option regardless of its being exercised or not, (b) forfeited to the grantor if the option is not exercised or (c) credited towards the purchase price if the option is exercised.

## 2.4 What is a Put Option?

A put option is an option granted by a potential purchaser of property (the '**grantor**') to the owner of property (the '**grantee**') permitting the grantee at its election to require the grantor to purchase the property. That is, the roles of the property owner and the potential purchaser in a put option are reversed from their roles in a call option.

Otherwise, the characteristics set out in relation to call options generally apply equally to put options. However, unlike a call option, a put option can never be characterized as the grant of a right in property as the grantee already owns the subject property.

## 2.5 Options that are Puts and Call Options

An option deed may contain both a put option and a call option, commonly known as a "Put and Call".

A put and call option is an agreement between the potential vendor of a property and prospective purchaser pursuant to which:

- the grantor gives the grantee a call option to buy the property from the grantor;  
and
- the grantee gives the grantor a put option to sell the property to the grantee.

This creates the effect of a contract for sale, whilst delaying the formation of the final contract. They have become increasingly common (though they might be subject to the duty discussed at point 6 below) because they permit:

- the purchaser to determine whether to purchase the property at all, for instance where the property is intended to be part of a proposed multiple lot development and it is unclear whether all other relevant lots can be purchased or whether development approval will be obtained; and
- there is an intended 'on-sale', usually via a nomination process (though again not point 6 below).

The call option is normally exercisable within a defined period. Often the put option period follows the call option period, to enable the grantor to compel the grantee to buy the property in the event that the grantee does not exercise the call option.

Under the *Stamp Duties Act 1920* (NSW) the duty on agreements of the sale of property could be deferred by the granting of a simultaneous put and call option. So long as the transaction was a real one and not a sham transaction, duty was deferred until one or other party exercised the option, thereby creating for the first time an agreement for the sale or conveyance of the property which had been the subject of the options. To overcome this device former s 40B was inserted. It provided that where there was both a put and a call option in force at the same time involving the same parties, any instrument creating the options was liable to ad valorem duty as if a conveyance. If both options expired the duty paid was refundable under former s 40C. This anti-avoidance device has not been inserted in the Duties Act.

## **2.6 Stamp Duty Approach to Option Deeds**

Under the *Stamp Duties Act 1920* (NSW) put and call options over any property other than stock or marketable securities were rendered dutiable under then s 40A. This approach was strange in that it first deemed the interest created by the option agreement to be property before subjecting the option agreement to duty as if it were an agreement for the sale or conveyance of that property. This may well have been intended to do away with arguments which might otherwise have arisen as to whether a particular option agreement in fact created an interest in property.

Under the stamp duty rewrite the grant of an option, whether a put option or a call option, is not itself a dutiable transaction. The list of dutiable transactions in s 8 of the Duties Act does not include the grant of an option. Instead, options over real property are treated as dutiable property so that an agreement for sale or transfer, or a transfer of an option will be subject to duty.

The current taxing regime of the Duties Act is discussed at points 5 and 6 below.

### **3 Assignment, Nomination and Novation**

Before considering the stamp duty consequences of option deeds and dealings with them it is necessary to discuss the nature of executing an option, assigning an option, nominating under an option and novating an option.

#### **3.1 Execution / Grant of Option**

A distinction must be drawn between the granting of an option, which creates rights, and the assignment of it, nomination under it or novation of it which deals with the rights created on the initial grant.

It is uncontroversial that the Duties Act does not extend the concept of sale or transfer to the granting of an option, which creates the rights, rather than those rights being transferred: *CTI Joint Venture Company Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWSC 20 at [24] and [29].

In *Commissioner of Taxes (Qld) v Camphin* (1937) 57 CLR 127 at 133-134 Latham CJ said:

The result of giving an option for value is that the person to whom the option is given acquires an equitable interest. But this equitable interest has not, in my opinion, been sold to him. The equitable interest is measured by what a court of equity would decree in an action for specific performance. The right of the person who may be called the owner of the option is a right to prevent the owner of the property in question from disposing of it inconsistently with the option, together with a right, if he exercises the option, to compel the owner of the property to carry out the contract which has been made by the exercise of the option. This right of the optionee is a right which has been created by the option, but it is not a right which the owner of the property ever possessed. He has created a new right in the optionee which is a right of property, but he has not transferred to the optionee any right which previously belonged to him as the owner of the property in relation to which the option was given. Thus there has been no sale of any property.

In the context of this paper, therefore, there is therefore no need to further consider the granting of the options.

### **3.2 Assignment**

The Court of Appeal has confirmed that Party A to a contract can prospectively authorize Party B to that contract to transfer Party B's rights and obligations under the contract without Party A being a party to the arrangement between Party B and the transferee: *CSG Ltd v Fuju Australia Pty Ltd* [2011] NSWCA 335 at [134].

If the option is assigned it is likely to be a 'transfer' on which duty.

### **3.3 Nomination**

Option deeds often include a right for the grantee to "nominate" the entity that will be the purchaser under the contract that comes into existence on the exercise of an option. This right enables the grantee to negotiate to assign the benefit of the option and to nominate the assignee as the purchaser when exercising the option.

In *Nguyen v Taylor* (1992) 27 NSWLR 48 at 60-61 Meagher JA said (emphasis added):

There is nothing formal, complicated or mysterious about making a “nomination” for the purposes of exercising an option given in favour of the grantee “or his nominee”. It need not even be in writing... *The making of a nomination of itself does not dispose of or create any interest in property: cf Re Danish Bacon Co Ltd Staff Pension Fund Trusts* [1971] 1 WLR 248; [1971] 1 All ER 486. *At the moment of making a nomination the interests of both grantor and grantee of an option remain exactly what they were before the nomination.* All that is involved in the making of a nomination by a grantee of an option is the signification by him that on exercise of the option the purchaser will be some person or persons other than himself.

This passage was cited with approval in a passage quoted by Gleeson CJ (with whom the other members of the Court agreed) in *Trust Company of Australia Ltd v Commissioner of State Revenue* [2003] HCA 23 at [112].

The significance of Meagher JA statement is that there is no transfer of the option or the rights under the option where a nomination is made by the grantee to the person in whose favour the nomination was made.

To avoid any difficulties of interpretation it is prudent to insert express provisions in the terms of the option deed itself as to how and when nomination rights may be used. But not point 7.4 below.

It is common to see options deeds provide that the right to nominate can only occur at the time the option is exercised; that is, the entity exercising the option to become the purchaser under the contract is the nominee. This reduces the likelihood of the nomination triggering a duty liability as being some type of transfer of dutiable property. It also places some control with the grantor as to the number of times the right to nominate can be used.

### **3.4 Novation**

After considering novations, and some of what is set out below, Gzell J succinctly states in *CTI Joint Venture Company Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWSC 20 at [41] a common reason for novations:

It is common ground [in that case] that the benefit of a contract can be transferred but the burden of a contract cannot. That requires novation.

In its simplest sense a novation refers to a circumstance where a new contract takes the place of the old. By a novation, the grantor accepts that the original grantee no longer has any interest in the option rights and that, by the terms of this novation, some new party has the rights formerly vested in the original grantee.

In *Olsson v Dyson* (1969) 120 CLR 365 at 388-389 Windyer J described it thus:

In my view the facts establish a novation of the contract between Dyson and the Company. That the result of a novation may be the same, or much the same, as if there had been an effective assignment is not surprising. At one stage of the history of our law, when debts were not freely assignable at law, novation was a common method of circumventing the common law rule and accomplishing the same result as can now be accomplished directly by assignment pursuant to the statute. Novation can still be used as it was in earlier times. It can still be the means to the end which the law now allows to be reached by other means. The ultimate distinction, in juristic analysis, between a transfer of a debt by assignment and by novation is simple enough. Novation is the making of a new contract between a creditor and his debtor in consideration of the extinguishment of the obligations of the old contract: if the new contract is to be fully effective to give enforceable rights or obligations to a third person he, the third person, must be a party to the novated contract. The assignment of a debt, on the other hand, is not a transaction between the creditor and the debtor. It is a transaction between the creditor and the assignee to which the assent of the debtor is not needed. The debtor is given notice of it; for notice is necessary to complete an assignment pursuant to the statute or in the case of an equitable assignment to preserve priorities. But the debtor's assent is not required. He is not a party to the transaction.

In *Scarf v Jareine* Lord Selborne said novation "means this – the term being derived from the civil law – that there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties; the consideration mutually being the discharge of the old contract". In that sense "novation" means simply a new contract standing the place of the old. It may be a new contract between the parties to the old contract, A (in this case Dyson) and B (in this case the company); or it may be a contract between them and a new party, or parties, e.g., between A, B and C (in this case the respondent). It is in the later sense that the word is most often used in common law countries in connexion with the transfer of debts from one creditor to another.

The High Court in *ALH Group Property Holdings Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2012) 86 ALJR 287 at [12] confirmed this by explaining that a novation, in its simplest sense, refers to a circumstance where a new contract takes the place of the old.

It is therefore incorrect to describe a novation as involving the succession of a third party (or the same party where it remains only A and B) to the rights of the purchaser under the original contract. Nor is it correct to describe a third party undertaking the obligations of the purchaser under the original contract as a novation.

The effect of a novation is upon the obligations of both parties to the original, executory, contract.

The inquiry in determining whether there has been a novation is whether it has been agreed that a new contract is to be substituted for the old and the obligations of the parties under the old agreement are to be discharged. This is a broad question that renders attempts to avoid stamp duty from a novation difficult to obtain. Further, whether there has been a substitution of new for old and a discharge of obligations under the old agreement may, if not expressed in the agreement, be inferred from conduct or as a matter apparent from the agreement: see *ALH Group Property Holdings Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2012) 86 ALJR 287 at [32] to [38].

As to “inferred” and “apparent” the following comments from *Hillam v Iacullo* [2015] NSWCA 196 are relevant:

[51] Where a later contract between the same parties deals with the whole of the subject matter of the former in a way that is inconsistent with the continued existence of the former, then it must necessarily rescind the former by implication even in the absence of express language.

...

[64] However plain and unambiguous contractual terms may be in themselves they are always capable of being controlled by an inconsistent context.

If the new contract is to be fully effective, the third person must be a party to the novated contract. However, it does not follow that it is impossible for one party to a contract to prospectively authorize a novation to be made by another party unilaterally: *Leveraged Equities Ltd v Goodridge* (2011) 191 FCR 71 at [299]-[302] and also *CSG Ltd v Fuji Xerox Australia Pty Ltd* [2011] NSWCA 335 at [134].

Indeed, in *CTI Joint Venture Company Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWSC 20 at [78] to [81] Gzell J expressly rejected the argument that a nomination notice being bipartite, it followed that there must have been a transfer. His Honour considered that the initial other party to the initial option deed – having authorized in that deed the power to assign, novate or nominate – resulted in their being the tripartite nature of the transaction.

#### ***4 CTI Joint Venture Company Pty Ltd v Chief Commissioner of State Revenue***

*CTI Joint Venture Company Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWSC 20 is significant because the current regime of how options are liable to duty arose in response to it. The judgment at [1] made plain the issues being there considered:

The review in this matter is of narrow compass. The question is whether the substitution of one party for another as the holder of call options was effected by transfer or by novation.

This had relevance because of ss 11(1)(k) and 8(1)(b)(i) of the Duties Act which provide that an option to purchase land in New South Wales is ‘dutiable property’ and an agreement for sale or transfer of it is a ‘dutiable transaction’. Should a transfer have occurred duty would follow; if a novation, rather than a transfer, occurred there would be no duty.

##### **4.1 Facts**

Transport for New South Wales (as grantor) entered into four call option deeds, all of which contained materially the same terms. The deeds were in favour of CRI Chatswood Pty Ltd (‘CRI’) (as grantee) over contiguous parcels of land at Chatswood in New South Wales. The option deeds were granted as part of a wider transaction whereby Transport granted development rights to CRI in respect of developing the area in and around Chatswood railway station.

The option deeds were amended by substantially the same terms. Under the option deeds, the call option fee was \$10, the price for the land was \$1.00 and the contract was to be the form annexed to the deeds.

There were two option exercise periods and CRI was able to exercise the call options granted in each of these periods or nominate another party to exercise them. If CRI nominated another person to exercise the call options, CRI was required by clause 10.1 of the option deeds to give a 'Call Option Nomination Notice' to Transport. Clause 10.1 also noted that:

- CRI guarantee the performance of the nominee's obligations under the call option deeds; and
- the nominee assumes CRI's obligations under the call option deeds and the land contracts subsequently entered into.

In November 2010, CRI entered into a nomination deed with CTI Joint Venture Company Pty Ltd ('CTI') whereby CRI nominated CTI as the 'nominee' under each of the option deeds. A nomination fee of \$60,518,675 was paid by CTI to CRI. CTI was the taxpayer in this dispute.

Later in November 2010 CTI executed, under each of the option deeds, the following:

- a nomination notice;
- a call option exercise notice; and
- the land contract.

In early December 2010, the nomination notices were delivered to CRI for execution and CRI, after executing them, delivered them to Transport.

CTI lodged the four land contracts, with the appropriate transfers, for stamping with the Chief Commissioner of State Revenue of New South Wales (the '**Chief Commissioner**'). It paid stamp duty assessed on the contract of \$3,524,641 and \$40 on the associated transfers. This was based on the dutiable value equating to the nomination fee of \$60,518,675 (plus GST) and the aggregate consideration payable on the contracts of \$3,829,461.90. There was no dispute as to these amounts.

## 4.2 Submissions

As noted above, it was not disputed that the rights under the call option deeds were dutiable property under s 11(1)(k) of the Duties Act.

The Chief Commissioner submitted that the nomination notices under which CRI nominated CTI as grantee under the call option deeds were agreements for the transfer of dutiable property and therefore dutiable under the Duties Act. This was because they could not amount to a novation on the basis that the nomination clauses in the call option deeds did not operation so that a new contract was entered into replacing the original call option contracts, which remained in place. Further, the nomination process in question was said to be a bipartite arrangement between CRI and CTI, which therefore did not involve Transport, a party to the option deeds. The Chief Commissioner submitted that for a novation a tripartite agreement is required to ensure the new agreement replaces the old.

At [42] of the judgment Gzell J summarized the Chief Commissioner's position as follows:

It is not in issue that the rights held by CRI under each Call Option Deed were dutiable property. The Chief Commissioner raises two issues:

- Whether the Nomination Deed constituted a dutiable transaction as an agreement for the sale or transfer of the Call Options under s 8(1)(b)(i) of the [Duties] Act; and
- Whether each Call Option Nomination Notice constituted a transfer of dutiable property under s 8(1)(a) of the Act.

CTI submitted that the nomination notices were not agreements for the transfer of dutiable property as they gave effect to a novation, and not a transfer, of the call option deeds because new call option deeds were substituted for the original call option deeds with the latter expiring. Accordingly, on the basis that the nomination notices gave effect to a novation and not a transfer of rights under the existing call option deeds, it followed that a novation was not a transfer or a sale and the nomination notices were not agreements to transfer or sell dutiable property. There therefore were said not to be agreements for the sale or transfer of dutiable property or otherwise subject to liability under the Duties Act.

## 4.3 The Decision

Justice Gzell agreed with CTI's submission (at [43] and [55]) and, in so doing, examined the various clauses of the option deeds and the nomination process.

His Honour also examined the difference between a novation and a transfer and held that a novation does not amount to a transfer. His Honour relied on the High Court's reasoning in *ALH Group Property Holdings Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2012) 86 ALJR 287 and found:

- The effect of a novation is upon the obligations of both parties to the original, executor, contract. The Chief Commissioner was therefore incorrect in submitting the nomination process was bipartite; because Transport had given the nomination rights under the option deed it was a party to the nomination process.
- It is incorrect to describe a novation as involving a succession of a third party to the rights of the party under the original contract (*ALH Group* at 346,[12]).
- It is common ground, and well established, that the benefit of a contract, but not the burden, can be transferred. To transfer the burden a novation is required.
- As a transfer requires the passing of right from one party to another, so as to vest those rights in that person, a novation cannot be a transfer as there is no passing of rights as part of the novation process. One contract comes to an end and a new contract is entered.
- The inquiry in determining whether there has been a novation is whether it was agreed that a new contract be substituted for the old and the obligations under the old agreement are to be discharged. In undertaking this inquiry a broad commercial view is to be preferred.

In the result CTI was not liable for stamp duty on the nomination process.

## **5 Stamp Duty being Imposed**

The Duties Act was amended in 2014 to change the way stamp duty is imposed on assignments, novations, nominations and other transfers of options in New South Wales. These amendments arose in response to the Supreme Court's decision in *CTI Joint Venture Company Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWSC 20.

## 5.1 Options Are Dutiable Property

By s 11(1)(k) of the Duties Act '*Dutiable property* is... an option to purchase land in New South Wales'. Should a 'dutiable transaction' occur in relation to it, therefore, stamp duty will arise.

Prior to s 9B being introduced into the Duties Act it was only the transfer of an option that created a liability to duty.

For there to be a transfer the same rights must exist in the transferee after the transfer as existed in the transferor before the transfer. In *Coles Myer Ltd v Commissioner of State Revenue* [1998] 4 VR 728 at 730 Ormiston JA, with whom Winneke P agreed, defined transfer as follows:

There are two parties to every transfer, the transferor who disposes of all rights in the transferred property and the transferee who receives or acquires them so as thereafter to have the power to exercise effectively the same rights in the future. For an instrument properly to be characterised as a 'transfer' one must be able to find that the property has passed from transferor to transferee so that the property is vested in a transferee who for all practical purposes is then capable of exercising the same rights as were capable of being exercised by the transferor before the transfer was executed.

His Honour concluded at 740:

Thus, however broadly the word "transfer" be defined, it requires at the least that the transferee should, at the end of the transaction, have substantially the same right or interest in the subject matter as did the transferor before the transfer took place.

The nomination under an option deed, or the novation of it, would therefore not otherwise be a transfer but for s 9B. Nor would it be an assignment: the definition of assign is "to transfer property to" another: Bird R, *Osborn's Concise Law Dictionary*, 7<sup>th</sup> ed, Sweet & Maxwell, London, 1983 at 35.

## 5.2 The Amendments

The *State Revenue Legislation Further Amendment Bill* 2014 (NSW) received royal assent as the *State Revenue Legislation Further Amendment Act* 2014 (NSW) and came into effect on 23 October 2014, amending legislation that included the Duties Act. These amendments have significant implications for how stamp duty is assessed on assignments, novations, nominations and other transfers of options in New South Wales. They apply to options granted before or after the 23 October 2014.

In short the amendments have the effect that:

- transfers (including novations, assignments and nominations) of any option that includes an option to purchase land will be subject to duty;
- the amount of duty payable by the transferee on the transfer or assignment of an option to purchase land will be consideration for the transfer or assignment (i.e. a nomination fee or assignment fee payable by the transferee) plus ad valorem duty on the value of the underlying land; and
- purchasers of land under a contract for sale that arises as a consequence of the exercise of a call option (whether it was a “Call Option” or the call option component of a “Put and Call Option”) will receive a credit for duty paid by the transferee on the transfer or assignment of the option when stamping the contract for sale.

The effect of the amendments is to bring forward the time for paying the stamp duty.

The amendments also dealt with “call option assignment duty”, which is dealt with separately at point 6 below.

An important timing issue (though possibly less relevant now) is where the option was entered into prior to 1 July 1998 (the move to the Duties Act from the *Stamp Duties Act* 1920 (NSW)) and exercised after that date. In these circumstances no credit against duty payable on the contract or transfer is available. The contract will be dutiable under the Duties Act, but no credit is provided for duty paid on an option. The credit previously provided by s 40A of the *Stamp Duties Act* 1920 (NSW) will not be available because that section does not apply to contracts entered into after 30 June 1998: see Item 2.2(1) of Schedule 2 to the Duties Act.

### 5.3 New Section 9B of the Duties Act

The 2014 amendments introduce into the Duties Act the current s 9B, which provides:

**9B Transfer of option occurring on nomination or other change**

- (1) A transfer of an option to purchase land in New South Wales is taken to occur if, for valuable consideration:
  - (a) another person is nominated to exercise the option, or
  - (b) another person is nominated as purchaser or transferee of the land the subject of the option on or before the exercise of the option, or
  - (c) the option holder agrees to a novation of the option, or otherwise relinquishes rights under the option, so that another person obtains a right to exercise the option or to purchase the land.
- (2) For the purposes of this Act, in a case referred to in subsection (1) (a) or (b):
  - (a) the option is taken to be transferred when the nomination is made (and a reference in this Act to the time at which a transfer occurs includes a reference to such a time), and
  - (b) the person nominated is taken to be the transferee of the option (and a reference in this Act to a transferee includes a reference to such a person).
- (3) For the purposes of this Act, in a case referred to in subsection (1) (c):
  - (a) the option is taken to be transferred when the option holder agrees to the novation or otherwise relinquishes rights under the option (and a reference in this Act to the time at which a transfer occurs includes a reference to such a time), and
  - (b) the person who obtains a right to exercise the option or to purchase the land is taken to be the transferee of the option (and a reference in this Act to a transferee includes a reference to such a person).
- (4) This section applies regardless of when the option is exercisable.
- (5) For the purposes of this section, anything done by a person under a power of appointment or other authority granted by an option holder is taken to have been done by the option holder.
- (6) To avoid doubt, a person who has a right to accept an offer to sell land has a right to purchase the land.

- (7) To avoid doubt, a transfer of an option to purchase land that is taken to occur under this section is a transfer of dutiable property and a reference in this Act to a transfer of dutiable property or a dutiable transaction includes a reference to such a transfer.
- (8) In this section:
- option holder*, in relation to an option to purchase land in New South Wales, means a person who has a right to purchase the land under the option (whether vested or contingent).

There are a number of aspects of this provision requiring consideration

### ***5.3.1 Land Only***

These provisions are limited to options in relation to land in New South Wales; they do not apply to options concerning other types of property (dutiable or otherwise).

### ***5.3.2 Grouping as a Transfer***

The most significant aspect of s 9B of the Duties Act is the deeming of a nomination or novation of the option deed as a transfer such that a dutiable transaction arises. The notation in s 8 of the Duties Act confirms this approach.

There would otherwise be no “transfer”.

### ***5.3.3 Time and Person Liable***

If s 9B of the Duties Act applies the person liable to pay the duty is the person who is nominated as purchaser or transferee of the land or who acquires the right to exercise the option. The duty is payable within three months of the event that triggers s 9B of the Duties Act occurring.

### ***5.3.4 Need for Consideration***

However, for s 9B to operate valuable consideration is required and the absence of valuable consideration passing from transferee to transferor would seem, prima facie, not to enliven the section.

### ***5.3.5 Basis of Liability***

Where s 9B of the Duties Act applies duty is calculated on the higher of the consideration provided for the nomination or novation (which will include any non-monetary consideration) and the value of the option. The basis of valuing options is discussed at point 8 below.

### ***5.3.6 Is it a Mere Timing Issue?***

If the option is exercised – whether by the entity nominated by, or introduced through novation of, the original grantee of the option – the consideration for the transfer of the land is taken to include the consideration provided by ultimate purchaser. There is then a reduction of the duty payable on the contract formed upon exercise of the option by the amount of duty paid by the ultimate purchaser: s 64D of the Duties Act. That section provides:

The duty chargeable in respect of a transfer of land in New South Wales that occurs as a consequence of the exercise of an option to purchase land is to be reduced by the amount of duty (if any) paid by the transferee on the transfer of the option to the transferee.

However, there is still additional duty payable because of s 9B than would otherwise be the case for someone who acquires rights (whether through a novation or a nomination) and then exercises the option.

If the nominated entity, or the entity introduced by the novation, ultimately:

- exercises the option there will be duty payable, directly under s 9B, on that step and then later on the transfer of the underlying property;
- does not exercise the option there will be duty payable that will not have otherwise been paid prior to the introduction of s 9B of the Duties Act; and
- sells the option – whether by way of further nomination or further novation – for valuable consideration there will be duty payable (on the initial nomination or novation) that will not have otherwise been paid prior to the introduction of s 9B of the Duties Act.

If there are a series of nominations or novations duty will be applied to each level of the series and the ultimately exercising entity of the option (if it be exercised) will obtain the credit under s 64D of the Duties Act.

### ***5.3.7 The Option Holder***

The width of the definition of “option holder” in s 9B(8) is to be noted. It extends the whole operation of s 9B to rights to purchase which are either vested or contingent. Such a contingent right would include a right vested in a person whose right to exercise the option or to nominate the buyer is subject to some condition precedent.

### ***5.3.8 First Right of Refusal***

It is here necessary to recall the juridical discussion of the nature of the option deeds. In that context there is a theoretical difference there is often no practical one for stamp duty purposes. One area it is practically different.

Generally speaking, the giving of an option to purchase land prima facie implies a continuing offer to sell, it has more than a contractual operation, and confers upon the option holder an equitable interest in the land, but a right of “first refusal” confers no immediate right upon the prospective purchaser. The right is purely contractual and confers no equitable interest in land: see *Mackay v Wilson* (1947) 47 SR (NSW) 315 at 325 per Street J and see also *Pritchard v Briggs* [1980] 1 All ER 294 at 305 where Goff LJ adopted Street’s J observations.

Hence a right of first refusal is not within the purview of s 9B of the Duties Act.

## **6 New Put and Call Option Duty Provisions**

It was noted at point 2.5 above that there is no equivalent in the Duties Act of former ss 40B and 40C of the *Stamp Duties Act 1920* (NSW). There is now, however, a regime that creates multiple and significant stamp duty liabilities. It was introduced by the *State Revenue Legislation Amendment act 2005* (NSW).

### **6.1 Part 2 of Chapter 3**

Part 2 of Chapter 3 of the Duties Act, comprises sections 106 to 111, provides for ‘call option assignment duty’ and ‘surcharge call option assignment duty’. The provisions are set out in Annexure A to this paper.

The Office of State Revenue’s website succinctly outlines this duty as follows:

... upon the assignment of a call option over dutiable property in respect of which a put option is also in existence, the assignment of the call option will be liable to duty as if it were an agreement for the sale or transfer of the underlying option property. The person liable to pay the duty is the assignor.

If more than one assignment occurs, each assignment would trigger a liability to duty. However the duty paid by the assignor is reduced to by the duty already paid (if any) by that person under Chapter 2 on the assignment of the option to them.

**Example:**

B grants A a call option that confers a right on A (or any assignee of A) to purchase land from B. A also grants B a put option that confers on B a right to require A (or any assignee of A) to purchase the land from B. No duty is payable at this point.

A then transfers the call option to C. Duty is payable as follows:

- (a) A (as the option holder) must pay call option assignment duty as if the transfer of the option were a transfer of the land. Duty is payable on the dutiable value of the land.
- (b) C (as the transferee of the option) must pay duty under Chapter 2 on the transfer of the option. Duty is payable on the dutiable value of the option (Determined as provided for by Chapter 2).
- (c) C then transfers the option to D. C (as the option holder) is required to pay call option assignment duty as if the option were a transfer of the land. However, in this case C will receive a credit for the duty paid by C on the transfer of the option to C. D (as the transferee of the option) is required to pay duty under Chapter 2 on the transfer.
- (d) If D then exercises the option it would pay duty under Chapter 2 on the agreement as purchaser of the property.

The dutiable value of the dutiable property that is subject to a call option assignment is taken to be the greater of:

- (a) the sum of the consideration for the assignment of the call option and the consideration payable in the event that the call option is exercised (being in either case the amount of monetary consideration or the value of non-monetary consideration); and
- (b) the unencumbered value of the dutiable property.”

Some specific aspects of this duty need to be considered.

## 6.2 “Relinquishment” of Rights

In addition to the “creation” of call option assignment duty under s 107(1) of the Duties Act, s 107(2) of the Duties Act introduces the concept of a “relinquishment” of rights and deems a relinquishment of rights as being an “assignment” of rights.

This is the area of most concern for “put and call options”. This is because it results in **double duty** on the same transaction.

### 6.2.1 *Call Option Assignment Duty*

The option holder who relinquishes their rights under the option pays this duty: s 108(1) of the Duties Act. Section 108(2) provides:

Accordingly, the option holder is taken, for the purpose of charging duty under Chapter 2, to be the transferee of the dutiable property.

That is, there is double duty. Section 108(3) provides:

The call option assignment duty payable by the option holder is additional to the duty (if any) payable under Chapter 2 by a transferee on the transfer of an option to purchase land in New South Wales.

There is, however, a credit for any duty paid by the option holder under Chapter 2 on the transfer of the call option to the option holder: s 108(4) of the Duties Act. There will therefore be a cascading duty liability if a series of transfers occur and the option’s value increases on each transfer.

### 6.2.2 *Surcharge Call Option Assignment Duty*

A further duty, in addition to the call option assignment duty, is payable in certain circumstances. Section 107(1A) of the Duties Act provides:

Duty under Chapter 2A is also chargeable on the assignment if A is a foreign person and the dutiable property concerned is residential-related property. The duty chargeable on that assignment is additional to call option assignment duty and is referred to in this Part as ***surcharge call option assignment duty***.

The foreign person who assigned the rigs under the call option is liable to the duty: s 108A(1) of the Duties Act. Section 108A(2) provides:

Accordingly, the option holder is taken, for the purpose of charging duty under Chapter 2A, to be the transferee of the residential-related property.

That is, there is double duty. Section 108A(3) provides:

The duty payable by the foreign option holder is additional to the duty (if any) payable under Chapter 2A by a transferee on the transfer of an option to purchase residential land in New South Wales.

There is, however, a credit for any duty paid by the option holder under Chapter 2A on the transfer of the call option to the option holder: s 108A(4) of the Duties Act. There will therefore be a cascading duty liability if a series of transfers occur and the option's value increases on each transfer.

This is an additional layer of duty on foreign investors.

### **6.2.3 Dutiable Value**

By s 109 of the Duties Act, for the purposes of "call option assignment duty" or "surcharge call option assignment duty" the dutiable value is taken to be the greater of:

- the sum of the consideration for the assignment of the right under the call option and the consideration payable in the event that the call option is exercised (being in either case the amount of monetary consideration or the value of non-monetary consideration); and
- the unencumbered value of the dutiable property.

This is significant as the value can be the consideration paid for to the option holder for relinquishing their rights *together with* what the underlying real property will be bought for if exercised. This can obviously make many put and call options uncommercial.

## **6.3 Exemptions**

Section 111 of the Duties Act provides limited exemptions to this duty. The exemption applies if the Chief Commissioner is satisfied that one of the following circumstances applies:

- the option was created for the sole purpose of obtaining finance;
- the put and call options form part of a scheme used by a business for the sole purposes of facilitating the continuation of the business by one or more of the proprietors and can only be exercised on the occurrence of a specified event that would cause the continuing proprietors to seek to acquire the interest of the outgoing proprietors;<sup>2</sup>
- the option relates to underlying land on which the assignee who is authorized to do residential building works under the *Home Building Act* 1989 (NSW).

The exemption does not apply to the duty otherwise payable under s 9B: s 111(2) of the Duties Act.

## 7 The Importance of Drafting

Option deeds are technical, often involve significant sums of money and can be drafted in a myriad of ways. They are therefore liable to cause unintended consequences if not carefully prepared and implemented.<sup>3</sup>

### 7.1 Commercial Documents

An important point to bear in mind is that option deeds are likely to arise in a commercial context. As Gzell J said in *CTI Joint Venture Company Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWSC 20 at [70], ‘This is a commercial transaction and is to be construed as such.’

There is no particular form for the drafting of options – whether call options, put options or put and call options – that must be employed. The drafting should be bespoke to the client’s needs.

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<sup>2</sup> That is, insurance to permit business partners to buy out each other.

<sup>3</sup> Although in a development agreement context, the high Court’s decision in *Commissioner of State Revenue v Lend Lease Development Pty Ltd & Ors* [2014] HCA 51 on the stamp duty payable on a development agreement is a timely reminder of the need for clarity in drafting.

For instance, if the option deed specifically expresses itself to be personal to the parties there is a personal contract only and an interest in land may not be created. This, in turn, means that there is probably no caveatable interest on the part of the grantee. If a caveatable interest was intended the agreement must not a personal one only.

## 7.2 Disclosure Requirements

Option deeds for residential property must comply with the disclosure requirements outlined in the Part 4 of the *Conveyancing (Sale of Land) Regulation 2010* (NSW). By r 13 this includes Part 2 of Schedule 3 to those regulations, which is set out at Annexure B to this paper.

Although this does not affect the stamp duty liability of options, it is a useful reference point.

## 7.3 Meeting the Client's Commercial Needs

It is trite to say but another important factor in drafting option deeds is seeking to ensure that they reflect the commercial goal the client seeks.

For instance, property owners will be primarily concerned with commercial and practical matters, such as:

- Does the put and/or call option confirm the appropriate price for the sale of the specified property?
- Does the option fee count towards the consequential purchase price of the specified property? It is common for the developer's draft agreement to provide for the option fee to be refundable if the transaction does not proceed. This may be unacceptable to most property owners.
- Will the developer pay the property owner's costs of negotiating and entering into the option arrangement? This is a common expectation of property owners and one developers often resist.
- With whom is the property owner actually dealing? Who is liable to pay the property owner? This can be unclear at times, especially where a nomination provision exists.

- If there are any nomination rights, can they be exercised anytime or only at the time of exercising the option?

The can be complex issues and often involve significant sums, making it important to ensure the client's objectives are kept in mind when drafting the option deeds.

#### **7.4 Beware Requirements for Exercise**

To avoid any difficulties of interpretation it is prudent to insert express provisions in the terms of the option deed itself as to how and when nomination rights may be used.

But when drafting options it is important to be ware of any requirements provided for the exercise of the option to be effective. It can be the case that strict compliance is necessary.

In *Comdox No 24 Pty Ltd v Robins* [2009] NSWSC 367 at [23] Bryson AJ used an interesting hypothetical example to make this point:

An option is said to be “a ticklish thing”, and as much case law shows, if particular means for exercising an option are intended to be essential for effective exercise, compliance with the prescribed means is necessary if the stated contractual relationship is to result. It does not matter whether observing the prescribed means is objectively important: what matters is whether the words used show that they were intended to be essential. If the language used really means that it is a condition of effective exercise of option that the notice must be on blue paper and delivered by a man in a clown suit, pink paper or a woman in a pixy suit will not be effective. There must be compliance; there is no allowance for taking some other non-complying course, even if it appears to achieve the same result. I do not see any value in speaking of strict compliance or exact compliance; compliance is required, the fair meaning of the contractual requirement should be understood and given effect, and undue exactitude or the creation of difficulties which the language does not yield on a fair reading are not appropriate. It is inherently likely that requirements for compliance with provisions of the existing lease, for written notice of exercise of option and for exercise within defined periods are conditions compliance with which is essential. References to means of communication and matters of details are unlikely to be intended to be essential; but they are essential if it clearly appears that they are intended to be. The Court does not spell out conditions from slight or incidental references.

It may not be obvious from the option deed whether a particular requirement is essential; or even if it is obvious that it is not, a court may later take a different view. It is therefore prudent to assume, in all cases, that the requirement is essential.

That case concerned leases but the point remains relevant.

## 8 Valuing Option Deeds

In former *Ruling SD130*, the Chief Commissioner discusses the question of the valuation of options for the purposes of calculating stamp duty under s 40A of the *Stamp Duties Act 1920* (NSW).

The ruling notes that an option agreement granted for consideration will be assumed to have been made at arm's length unless on its face the option agreement shows to the contrary or the lodging parties disclose such a relationship. The ruling continues:

- (5) The value of an option will be the amount by which the value of the property over which the option is granted exceeds the expressed exercise price. If there is no difference, or the exercise price exceeds the property value, the option will be taken to have a nominal value.
- (6) Should the exercise price be lower than the value of the property over which the option is granted, duty will be assessed on the amount of consideration **or** the difference between the expressed exercise price and the value, whichever is the greater.

While the value of an option will approximate the difference between the value of the property over which the option is granted and the exercise price, that difference will rarely give the true value of the option. Other factors that need to be considered would be the prospective profit that an arm's length purchaser acquiring the property might make, but more significantly, the period over which the option is capable of exercise and the expected growth in the value of the property over that period. The value of an option exercisable in the future will be depended upon the prospective valuation of that property at the time the option is exercised: cf *Donaldson v Commissioner of Taxation* [1974] 1 NSWLR 627.

There are no rulings made under the Duties Act for the purposes of valuing options; *Revenue Ruling DUT 12* considers evidentiary requirements for dutiable transactions but it does not address options specifically.

## 9 Income Tax & CGT and Option Deeds

If a taxpayer is sufficiently involved in property development, or investing, that they derive income from the activity, as opposed to holding that property on capital account, any income derived from the use of option deeds would be assessable income.

However, if the taxpayer is holding the option deeds (and indeed, and underlying property) on capital account there will be two specific CGT Events that occur in relation to the option deeds.

On the creation of rights, such as when the option is granted, or the extension or renewal of a previously granted option, in relation to real property CGT Event D2 will occur: s 104-35 of the *Income Tax Assessment Act 1997* (Cth) (the '1997 Act'). This will occur even if the grantor of the option does not own the underlying property at the time of the granting the option. There will be a capital gain from the CGT Event D2 if the capital proceeds exceed the expenditure incurred in allowing the event to occur. No general discount in Division 115 of the 1997 Act is available for the happening of CGT Event D2: s 115-25(3) of the 1997 Act.

If an option expires without being exercised CGT Event C2 will happen: s 104-25 of the 1997 Act. This can only occur the lapse or effluxion of time; it cannot occur by voluntary termination: *Taxation Determination TD 1999/76*.

## 10 GST and Option Deeds

It is convenient to discuss GST generally before considering a particular problem of option deeds in a property context when applying the GST provisions.

### 10.1 General GST Approach to Option Deeds

If someone is granted a right or option to acquire something, including real property, that is a supply. If the option is later exercised, that is a further supply. The amount paid, if any, for each supply is separately treated.

This means, for example, that the second supply is not subject to GST unless there is an extra amount payable on the exercise of the option: s 9-17 of the *A New Tax System (Goods and Services) Tax Act 1999* (Cth) (the ‘**GST Act**’).<sup>4</sup>

GST will also potentially apply where an option is assigned or renewed for consideration, but apparently not where the option simply expires.

If the supply is GST-free the supply of a right to that supply is itself GST-free. Similarly, if a supply is input taxed, the supply of a right to that supply is itself input taxed: s 9-30 of the GST act. See here *Interpretative Decision ID 2005/182*, *Interpretative Decision ID 2005/183* and *Interpretative Decision ID 2005/184*.

Whether the supply is a taxable supply will depend on the circumstances. The supply of a right to receive a taxable supply (e.g. commercial property) is itself taxable if it meets the usual requirements as to consideration, connection with Australia et cetera.

## 10.2 Margin Scheme Problem

A significant issue for the use of option deeds is how the margin scheme in Division 75 of the GST Act applies to their use.

The Commissioner of Taxation’s view is that any amount paid for the option (that is, the option fee) is not part of the costs of acquisition of the land if the option is ultimately exercised. Therefore any application of the margin scheme does not include the amount paid for the option itself. See s 75-102) of the GST Act.

In *Goods and Services Tax Ruling GSTR 2014/2* the Commissioner of Taxation uses the following example:

*2. Martin is registered for GST and for a fee of \$22,000 he grants a call option to SlamRock Constructions (SlamRock) to purchase vacant land for \$660,000 (exclusive of the call option fee).*

*3. SlamRock exercises the call option and pays \$660,000 for the purchase of the land. Martin and SlamRock agree in writing that the margin scheme is to apply to the supply of the vacant land.*

*4. The supply of the call option and the supply of the vacant land are two separate taxable supplies and as a consequence of subsection 9-17(1),*

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<sup>4</sup> It should be noted that this does not apply to certain redeemable vouchers, which issue is not further relevant to this paper.



## 11 Annexure A

### Part 2 Transactions involving put and call options

#### 106 Definitions

In this Part:

*assign* or *assignment* includes transfer, and a reference to the assignment of a right under a call option includes a reference to a transfer of the call option.

*call option* means a right to require a person to sell dutiable property that is conferred by an agreement or arrangement (being an agreement or arrangement that is not a dutiable transaction).

*put option* means a right to require a person to purchase dutiable property that is conferred by an agreement or arrangement (being an agreement or arrangement that is not a dutiable transaction).

*residential land* has the same meaning as in Chapter 2A.

#### 107 Assignment of rights under call option dutiable as transfer

- (1) If a person (*A*) who has a right under a call option to require another person (*B*) to sell dutiable property assigns that right, so that the option is exercisable by a third person (*C*), duty under Chapter 2 is chargeable on that assignment as if the assignment were a transfer of the dutiable property concerned. The duty chargeable on that assignment is referred to in this Part as *call option assignment duty*.
- (1A) Duty under Chapter 2A is also chargeable on the assignment if *A* is a foreign person and the dutiable property concerned is residential-related property. The duty chargeable on that assignment is additional to call option assignment duty and is referred to in this Part as *surcharge call option assignment duty*.
- (2) For the purposes of this section:
  - (a) if *A* enters into an agreement or arrangement under which *A*, for valuable consideration, relinquishes the right under a call option to require *B* to sell dutiable property and a call option to require *B* to sell the dutiable property is granted to a third person (*C*), *A* is to be treated as having assigned that right under the call option so that the option is exercisable by *C*, and

- (b) if, on or in connection with the exercise of a call option, A, for valuable consideration, enters into an agreement or arrangement under which A nominates a third person (C) as the purchaser or transferee of dutiable property the subject of a call option, A is to be treated as having assigned the right under the call option to require B to sell the dutiable property so that the option is exercisable by C.
- (3) An assignment is chargeable with duty as a consequence of this Part only if the person who may be required under the call option to sell the dutiable property (that is, B) has a right under a put option to require A, an associated person of A or an assignee of A to purchase the dutiable property.
- (4) If the assignment is chargeable with call option assignment duty, Chapter 2 applies in respect of the assignment in the same way as it applies to other transfers of dutiable property, and a reference in this Act to a dutiable transaction includes such an assignment, subject to this Part.
- (4A) If the assignment is chargeable with surcharge call option assignment duty, Chapter 2A applies in respect of the assignment in the same way as it applies to other transfers of residential-related property, and a reference in this Act to a surcharge duty transaction includes such an assignment, subject to this Part.
- (5) For the purposes of Chapters 2 and 2A, the transfer of dutiable property (including dutiable property that is residential-related property) is taken to occur when the assignment is made.
- (6) This section applies regardless of when the call option or put option is exercisable.
- (7) An assignment of a right under a call option to purchase dutiable property, as referred to in subsection (1) or (2), is referred to in this Part as a ***call option assignment***.

### **108 Person liable to pay call option assignment duty**

- (1) The call option assignment duty chargeable on a call option assignment is payable by the person who assigns the right under the call option to require another person to sell dutiable property (***the option holder***).
- (2) Accordingly, the option holder is taken, for the purpose of charging duty under Chapter 2, to be the transferee of the dutiable property.
- (3) The call option assignment duty payable by the option holder is additional to the duty (if any) payable under Chapter 2 by a transferee on the transfer of an option to purchase land in New South Wales.
- (4) However, the call option assignment duty payable by the option holder as a consequence of this Part is to be reduced by the amount of duty (if any) paid by the option holder under Chapter 2 on the transfer of the call option to the option holder.

## (5) (Repealed)

**Note.** The following is an example of how this Part operates:

B grants A a call option that confers a right on A (or any assignee of A) to require B to sell land. A also grants B a put option that confers on B a right to require A (or any assignee of A) to purchase the land from B. No duty is payable at this point.

A then transfers the call option to C. Duty is payable as follows:

- (a) A (as the option holder) must pay call option assignment duty, as a consequence of this Part, as if the transfer of the option were a transfer of the land. Duty is payable on the dutiable value of the land (determined as provided for by this Part),
- (b) C (as the transferee of the option) must pay duty under Chapter 2 on the transfer of the option. Duty is payable on the dutiable value of the option (determined as provided for by Chapter 2).

C then transfers the option to D. C (as the option holder) is required to pay call option assignment duty as if the option were a transfer of the land. However, in this case C will receive a credit for the duty paid by C on the transfer of the option to C. D (as the transferee of the option) is required to pay duty under Chapter 2 on the transfer.

**108A Person liable to pay surcharge call option assignment duty**

- (1) Surcharge call option assignment duty on a call option assignment is payable by any foreign person who assigns the right under the call option to require another person to sell residential-related property (*the foreign option holder*).
- (2) Accordingly, the foreign option holder is taken, for the purposes of charging duty under Chapter 2A, to be the transferee of the residential-related property.
- (3) The duty payable by the foreign option holder is additional to the duty (if any) payable under Chapter 2A by a transferee on the transfer of an option to purchase residential land in New South Wales.
- (4) However, the duty payable by the foreign option holder as a consequence of this Part is to be reduced by the amount of duty (if any) paid by the foreign option holder under Chapter 2A on the transfer of the call option to the foreign option holder.

**109 Determination of dutiable value of transfer**

For the purposes of Chapters 2 and 2A, the *dutiable value* of dutiable property (including residential-related property that is dutiable property) that is subject to a call option assignment is taken to be the greater of:

- (a) the sum of the consideration for the assignment of the right under the call option and the consideration payable in the event that the call option is exercised (being in either case the amount of monetary consideration or the value of non-monetary consideration), and
- (b) the unencumbered value of the dutiable property.

### **110 Stamping or endorsement of transactions**

- (1) If an instrument that effects or evidences a transfer of an option to purchase land in New South Wales also effects or evidences a call option assignment, and it is stamped under this Act to indicate payment of duty, it must be stamped in a manner approved by the Chief Commissioner to indicate the type of duty (that is, purchaser duty, surcharge purchaser duty, call option assignment duty or surcharge call option assignment duty) that has been paid.
- (2) If an instrument that effects or evidences a transfer of an option to purchase land in New South Wales also effects or evidences a call option assignment, and it is endorsed under this Act to indicate payment of duty, it must be endorsed in a manner approved by the Chief Commissioner to indicate the type of duty (that is, purchaser duty, surcharge purchaser duty, call option assignment duty or surcharge call option assignment duty) that has been paid.
- (3) An instrument that effects or evidences a transfer of an option to purchase land in New South Wales and a call option assignment is not duly stamped unless it is stamped or endorsed in accordance with this section.
- (4) In this section:

***purchaser duty*** means the duty (if any) payable under Chapter 2 by a transferee on the transfer of an option to purchase land in New South Wales.

### **111 Exemptions**

- (1) No duty is chargeable as a consequence of this Part on a call option assignment if the Chief Commissioner is satisfied that:
  - (a) the call option and put option were granted by the parties concerned for the sole purpose of obtaining finance, or
  - (aa) the call option is assigned to a body established solely for the purpose of raising funds in relation to an investment scheme promoted by the person who assigns the call option, or
  - (b) the call option and the put option form part of a scheme of call options and put options granted by proprietors of a business that:

- (i) were granted for the sole purpose of facilitating the continuation of the business by one or more of the proprietors (***the continuing proprietors***), and
    - (ii) are not exercisable except on the occurrence of a specified event that would cause the continuing proprietors to seek to acquire the interest of one or more of the other proprietors of the business, or
  - (c) the dutiable property the subject of the call option is land and the call option is assigned by a person authorised to contract to do residential building work under the *Home Building Act 1989* who:
    - (i) has built or is building residential premises on the land for the purposes of sale, or
    - (ii) has an agreement with the person to whom the call option is assigned to build residential premises on the land, or
  - (d) the call option is assigned by a corporation that is a member of a group of corporations to another corporation that is a member of the same group.
- (2) This section does not affect the duty payable under Chapter 2 or 2A (if any) by the transferee on a transfer of an option to purchase land in New South Wales.
- (2A) For the purposes of this section, corporations are members of the same ***group of corporations*** if:
- (a) one corporation is a wholly owned subsidiary of the other corporation (that is, the other corporation holds, otherwise than as trustee, not less than 90% of the issued share capital of the first corporation and is in a position to control not less than 50% of the maximum number of votes that might be cast at a general meeting of the first corporation), or
  - (b) the corporations are wholly owned subsidiaries (within the meaning of paragraph (a)) of the same corporation.
- (2B) If a corporation that is a wholly owned subsidiary (within the meaning of subsection (2A) (a)) of another corporation (the ***parent corporation***) holds shares, otherwise than as trustee, in a third corporation, then, for the purposes of determining whether the parent corporation and the third corporation are members of the same group of corporations, the shares held by the wholly owned subsidiary in the third corporation are taken also to be shares held by the parent corporation in the third corporation.

**Note.** The effect of subsection (2B) is that the third corporation will be considered to be a wholly owned subsidiary of the parent corporation if the shareholdings of the parent corporation in the third corporation (if any) together with the shareholdings of any wholly owned subsidiary in the third corporation are sufficient to satisfy subsection (2A) (a).

(3) In this section:

*proprietor* of a business means:

- (a) in the case of a business carried on by a partnership, a partner, or
- (b) in the case of a business carried on by a company, a shareholder, or
- (c) in the case of a business carried on by a unit trust scheme, a unit holder, or
- (d) in any other case, a person the Chief Commissioner determines to be a proprietor of the business.

**112–123 (Repealed)**

## 12 Annexure B

### *Conveyancing (Sale of Land) Regulation 2010 (NSW) - Part 2 of Schedule 3*

#### **Part 2 Warranty in option**

- 3 The vendor warrants that, as at the date of the option and except as disclosed in the option:
- (a) the land is not subject to any adverse affectation, and
  - (b) the land does not contain any part of a sewer belonging to a recognised sewerage authority, and
  - (c) the section 149 certificate attached to the option specifies the true status of the land the subject of the option in relation to the matters set out in Schedule 4 to the *Environmental Planning and Assessment Regulation 2000*, and
  - (d) there is no matter in relation to any building or structure on the land (being a building or structure that is included in the sale of the land) that would justify the making of any upgrading or demolition order or, if there is such a matter, a building certificate has been issued in relation to the building or structure since the matter arose, and
  - (e) if the land is burdened or purports to be burdened by a positive covenant imposed under Division 4 of Part 6 to the *Conveyancing Act 1919*, no amount is payable under section 88F of that Act in respect of the land, and
  - (f) the land is not subject to an annual charge for the provision of coastal protection services under the *Local Government Act 1993*.

- 4 For the purposes of this warranty:
- (a) land is **subject to an adverse affectation** if anything listed in Part 3 of Schedule 3 to the *Conveyancing (Sale of Land) Regulation 2010* applies in respect of the land, and
  - (b) an authority or other entity has a proposal in respect of land if, and only if, the authority or entity has issued a written statement the substance of which is inconsistent with there being no proposal of the authority or entity in respect of the land, and
  - (c) without limiting the way in which it may otherwise be disclosed, an adverse affectation is taken to be disclosed in an option if any of the following is attached to the option:
    - (i) a document stating or illustrating the effect of the adverse affectation,
    - (ii) a document, issued by an authority or other entity, to the effect that the authority or entity, or another authority or entity, has a proposal referred to in Part 3 of that Schedule,
    - (iii) a copy of the order, notice, declaration or other instrument giving rise to the adverse affectation,
    - (iv) a copy of the page of the Gazette in which the order, notice, declaration or other instrument giving rise to the adverse affectation was published, and
  - (d) **upgrading or demolition order** means any of the following:
    - (i) order No 2 in the Table to section 121B of the *Environmental Planning and Assessment Act 1979*, being an order made in the circumstances referred to in paragraph (a) or (d) relating to that order,
    - (ii) order No 12, 13 or 14 in the Table to section 121B of the *Environmental Planning and Assessment Act 1979*,
    - (iii) order No 1 in the Table to section 124 of the *Local Government Act 1993*, being an order made in the circumstances referred to in paragraph (d) relating to that order,
    - (iv) order No 3 in the Table to section 124 of the *Local Government Act 1993*, being an order made in the circumstances referred to in paragraph (c) relating to that order, and

- (e) without limiting any other manner in which disclosure may occur, the vendor may disclose that land is subject to an annual charge for the provision of coastal protection services under the *Local Government Act 1993* by attaching a section 603 certificate relating to the land to the option.