

Guideline

Duties Act 2001

First Home Buyer and Pensioner's Duty Concessions - Commissioner's Discretions

Introduction

The [Duties Act 2001](#) (the Act) provides that first home buyers and pensioners are entitled to pay a concessional rate of duty for real property transfers where certain conditions are satisfied. The Act allows the Commissioner of State Revenue to exercise various discretions in relation to these concessions. In particular, the Commissioner has discretion to:

- reduce certain residency periods for both the pensioner duty concession and the first home buyer duty concession;
- treat an ineligible transferee as an eligible first home buyer for the first home buyer duty concession;
- exempt a non-complying transferee from the residence requirement, when the first home buyer duty concession is sought to be relied upon; and
- exempt a transaction from the ownership requirement, where the pensioner duty concession is sought to be relied upon.

This guideline provides a summary of the Commissioner's approach to interpreting and applying these discretions. This document is a guide only. Any application for the Commissioner to exercise a discretion will be treated on a case-by-case basis and determined on the facts of the applicant's situation. In the event the details in this document are inconsistent with any provisions under the Act, the Act will prevail.

Meaning of 'good reasons' when exercising discretion

In some circumstances, in exercising a discretion the Commissioner must have 'good reasons' to exercise the discretion. In interpreting the phrase 'good reasons' in other statutory regimes, courts and tribunals have noted the phrase must be coloured by its statutory contextⁱ and understood in accordance with the underlying policy objectives and purpose of the relevant legislation.ⁱⁱ

The pensioner duty concession and first home buyer duty concession were added to the Act by the *Taxation Related Legislation (Housing Availability and Payroll Relief) Act 2018* (HAPR Act). The housing provisions of the HAPR Act entered into law to improve housing access and security, increase supply and manage demand of housing in Tasmania and to improve housing affordability. More specifically, the pensioner duty concession seeks to encourage pensioners to 'downsize' and, in turn, free up larger family homes. Whereas, the first home buyer duty concession seeks to provide assistance to eligible first home buyers who purchase established properties as their first home.

In considering whether there are 'good reasons' to exercise a discretion under the Act, the Commissioner adopts an approach which is consistent with these underlying policy objectives.

Additionally, the above provisions and the Act more widely exists within a statutory and administrative context where the Commissioner generally affords more favourable treatment to taxpayers that are honest and take responsibility to understand and comply with their obligations.ⁱⁱⁱ Accordingly, the Commissioner is more likely to consider there is a good reason to exercise a discretion in a given situation, where the taxpayer has sought to understand their obligations, acted reasonably (with due care), and contacted the State Revenue Office in the first instance.

First home buyer duty concession

Residency periods

Section 46F(1) of the Act states that a first home buyer must occupy the home to which the transaction relates as their principal place of residence for a continuous period of at least 6 months, commencing within the 12 month period immediately after the eligible transaction (ie immediately after the transfer of the land on which the established home is situated).

Your principal place of residence is the home in which you intend to stay on a long term basis as your settled abode rather than as a temporary or transient residence. It is commonly defined as “the place you usually eat and sleep” and properties “used simply for storage or the occasional stay-over” are not normally considered an owner’s principal residence.

Pursuant to section 46F(2) of the Act, where the Commissioner is satisfied that there are good reasons, the Commissioner may reduce (but not fully waive) the 6-month period that a transferee must occupy the home as their principal place of residence. The Commissioner will consider there are good reasons and will exercise the discretion where:

- a reasonable explanation can be provided as to why the occupation period was required to be shortened; and/or
- the evidence suggests the first home buyer has or will occupy the home as their principal place of residence. The Commissioner may require objective evidence to support either explanation.

The Commissioner is more likely to exercise this discretion where the first home buyer was unaware at the time of the property purchase that they would be unable to meet the residency conditions specified in the Act and the inability to meet the residency requirement is not the result of intentional decisions of the transferee.

The following explanations are likely to be considered favourably by the Commissioner when determining an application to exercise this discretion:

- the health of the transferee (e.g. hospitalisation, rehabilitation, nursing home care, requirement of care for physical or mental illness);
- the health of a relative where the transferee is required to care for them;
- domestic violence and / or other circumstances where the personal safety of a transferee is at risk;
- unintentional damage to the home that renders it uninhabitable; or
- involuntary change in location of employment or loss of employment of the transferee or their spouse, resulting from, for example, forced transfers or closure of a local business.

The Commissioner can also extend the time within which the occupation of a home as a principal place of residence must commence. The Commissioner will generally be informed by the abovementioned factors. However, given that section 46F(1)(b) does not require any ‘good reason’ to seek an extension, the Commissioner will also consider a wider range of requests that are reasonable in the circumstances.

Ineligible first home buyers

Section 46D(1)(b) of the Act provides that one requirement of an eligible transaction is that each transferee to the transaction must be an ‘eligible first home buyer’. An ‘eligible first home buyer’ is defined in section 46C(1) as a person that the Commissioner is satisfied:

- is a natural person; and
- has attained the age of 18 years; and
- is an Australian citizen or a permanent resident (if there is more than one transferee to a transaction and one of the transferees is an Australian citizen or a permanent resident, it is not necessary for the other transferees to be Australian citizens or permanent residents).

Section 46C(4) of the Act further states that a person will not be an eligible first home buyer, even where the other requirements are satisfied, if the person or their spouse:

- had previously owned a home in Tasmania (or elsewhere in Australia);
- had previously been paid a grant under the *First Home Owner Grant Act 2000*; or
- had previously received a duty concession under Division 2A of Part 5 of the Act.

Section 46D(2) of the Act provides that a transferee does not need to be an eligible first home buyer, where the Commissioner is satisfied that there are good reasons for a transferee to not be so.

The Commissioner will consider there is a good reason and will generally only exercise the discretion in limited circumstances. For example:

- the ineligible person is the Director of Housing, who takes an interest in the home via a home ownership assistance scheme, such as HomeShare or Streets Ahead;
- the ineligible person holds a minority interest in the home and only holds an interest to assist the majority owner obtain finance from a financial institution; or
- the ineligible person holds an interest in the home due to being a trustee of a “special disability trust” within the meaning of section 1209L of the *Social Security Act 1991* (Cwlth).

However, the Commissioner will also consider other circumstances where a reasonable explanation can be provided that explains why exercising the discretion is consistent with the purpose and policy objectives of the first home buyer duty concession.

For completeness, it is noted that under section 46C(2) of the Act the Commissioner will generally regard a person under the age of 18 years old to be an eligible home buyer where:

- the person is otherwise an eligible home buyer;
- the person will comply with the residence requirement in relation to that home; and
- the transfer of land to the person does not form part of a scheme to circumvent requirements affecting eligibility for the first buyer duty concession.

Exempt a non-complying transferee from residency

Section 46F(4) of the Act states the Commissioner may exempt a transferee from the residence requirement if:

- the relevant transferee is one of two or more transferees;
- at least one transferee complies with the residence requirement; and
- there are good reasons to exempt the relevant transferee.

Generally, the Commissioner is more likely to exercise this discretion where:

- the transferees were unaware at the time of the transaction that they would be unable to meet the residency conditions specified in the Act;
- a reasonable explanation can be provided, which explains why the relevant transferee cannot satisfy the residence requirement; and
- the other transferee has an ongoing connection with the home as their principal place of residence.

The following are some of the factors that are likely to be considered favourably by the Commissioner when determining an application to exercise this discretion:

- court orders preventing a transferee from living in the property;
- divorce and relationship breakdowns;
- domestic violence and / or other circumstances where the personal safety of a transferee is at risk;
- health problems requiring a transferee to live away from the property; or
- involuntary change in location of employment or loss of employment of a transferee such as forced transfers or closure of local business.

Pensioner duty concession

Residency periods (new home)

Section 46M(b) of the Act provides that an eligible pensioner must intend to occupy the home to which the transaction relates as their principal place of residence for a continuous period of at least 6 months, commencing within the 12 month period immediately after the transaction.

Your principal place of residence is the home in which you intend to stay on a long term basis as your settled abode rather than as a temporary or transient residence. It is commonly defined as “the place you usually eat and sleep” and properties “used simply for storage or the occasional stay-over” are not normally considered an owner’s principal residence.

Whilst the Commissioner can extend the time within which an eligible pensioner must intend to commence occupation of the home as their principal place of residence, the Commissioner does **not** have any discretion to reduce or waive the period (the minimum 6 months period) that a transferee intends to occupy the home as their principal place of residence. In reviewing the eligibility of a transaction, the Commissioner may require objective evidence to support a transferee’s ‘intention’.

In considering whether to extend the time within which the occupation of a home as a principal place of residence must commence, the Commissioner will generally be informed by the factors outlined under ‘First home buyer duty concession - residency periods’. However, given that section 46M(b)(ii) does not require any ‘good reason’ to seek an extension, the Commissioner will also consider a wider range of requests that are reasonable in the circumstances.

Residency periods (former property)

The pensioner duty concession also imposes residency requirements on the eligible pensioner’s former residence. That is:

- if the home is sold before the eligible transaction, the former property was the eligible pensioner's principal place of residence for the six-month period immediately before he or she transferred that former property (section 46N(1)(b) of the Act); or
- if the home is sold after the eligible transaction, the former property was the eligible pensioner's principal place of residence for the 6-month period immediately before he or she transferred that former property or the eligible transaction (section 46O(1)(b) of the Act).

Under sections 46N(2) and 46O(2) of the Act, where the Commissioner is satisfied that there are good reasons, the Commissioner may reduce (but not waive) the period that an eligible pensioner must have occupied the former property as their principal place of residence. In considering whether there are good reasons to reduce the residency period, the Commissioner will be informed by the factors outlined under ‘First home buyer duty concession - residency periods’.

Ownership of former property and eligible property

Sections 46N(1)(d) and 46O(1)(d) of the Act requires the ownership of the eligible property to be in the same name(s) as the ownership of the former property of the transferee(s).

However, under sections 46N(4) and 46O(4) of the Act, the Commissioner may still treat a transaction as being an eligible transaction, where the Commissioner is satisfied that there are good reasons why the ownership of the eligible property is not in the same name or names as the ownership of the former property.

The Commissioner will consider there are good reasons and will exercise the discretion where:

- a reasonable explanation can be provided that explains why the properties are not in the same name(s); and
- a reasonable argument can be provided that explains why exercising the discretion is consistent with the purpose and policy objectives of the pensioner duty concession.

A situation that is akin to one of the following scenarios is likely to be considered favourably by the Commissioner when determining an application to exercise this discretion:

- The former property is in the name of the transferee and their spouse. The spouse has passed away and, in turn, the spouse is not able to be on the title of the eligible property.
- The former property is in the name of the transferee and their spouse. The spouse has relocated to a nursing home for medical reasons. As a result, the spouse is not able to be on the title of the eligible property.
- The former property is in the name of the transferee and their former spouse. The transferee and the former spouse have separated or divorced and sold the former property as a consequence. As a result, the spouse is not on the title of the eligible property.
- One transferee (who is an eligible pensioner under section 46L of the Act at the time of eligible transaction) purchases a property before entering into a relationship with their spouse (the other transferee). The couple live in the property together, but do not change the title. The property is sold and a new property (the eligible property) is purchased with both the transferees on its title.
- The former property is in the name of the transferee and their spouse. They are advised by a financial planner when buying a new property, it should be solely in the name of the transferee for estate planning purposes. The couple act on the advice and, as a result, the spouse is not on the title of the eligible property.

Applying for the Commissioner to exercise a discretion

Applications for an exercise of a discretion must be made as soon as a transferee is aware that they may not be able to comply with a condition of the concession.

Applications should be made in writing and include the following:

- a detailed explanation of the situation that has resulted in the need to request an exercise of the discretion;
- the applicant's full name, State Revenue Office account number (if known) and property address;
- copies of relevant contracts such as the contract to purchase the property or the contract to sell; and
- relevant evidence and documentation supporting the request, such as copies of court orders, evidence of change of employment and estate planning advice.

More information

Email: dutyhelp@treasury.tas.gov.au
Telephone: (03) 6166 4400 or 1800 001 388
(weekdays, 9:00am to 5:00pm)
Website: www.sro.tas.gov.au/property-transfer-duties
In person: Appointment only
Ground floor
Salamanca Building Parliament Square
4 Salamanca Place HOBART TAS 7000
(weekdays, 9:00am – 5:00pm)
Mail: The Commissioner of State Revenue
GPO Box 1374
HOBART TAS 7001

ⁱ *Deputy Commissioner of Taxation v Clark* [2003] NSWCA 91, [115].

ⁱⁱ *O'Hara v Chief Commissioner of State Revenue* [2011] NSWADT 289, [29]; *Kozman v Chief Commissioner of State Revenue* [2013] NSWADT 143, [42].

ⁱⁱⁱ See e.g. *State Revenue Office, Taxpayer Charter*.