

Double duty and nominations



Claims involving duty have increased significantly in the last few years. The most common mistake involves not understanding that land development, particularly applying for a planning permit before nominating a new purchaser, will result in a sub-sale and incur a second amount of duty.

Section 32J of the Duties Act 2000 (Vic) sets out the basis on which duty will be payable on transfers. While somewhat difficult to follow, it essentially says that double duty will be payable when a vendor agrees to transfer land to an original purchaser and then to a subsequent purchaser, often through nomination, in two circumstances:

1. The original purchaser undertook or participated in land development' before the new purchaser was nominated.
2. The subsequent purchaser pays or is liable to pay more consideration than the original purchaser.

'Land development' is defined broadly and includes:

- preparing a plan of subdivision or taking steps to have it registered
- applying for or obtaining a planning permit
- applying for or obtaining a building permit or approval
- doing anything on the land for which a building permit or approval would be required
- requesting an amendment to a planning scheme that would affect the land
- developing or changing the land in any way which would increase its value.

Claims

Claims commonly arise where the law firm knows their purchaser client is about to, or has, lodged a planning application before a related company or entity is nominated as purchaser, but fails to warn the client of the double duty exposure. Sometimes the failure is due to a lack of knowledge about the current law, and sometimes there is a gap between when the planning application is lodged and when the nomination occurs and the practitioner does remember the application was made.

Risk management

- Best risk management is to always speak to your purchaser client at the start of a retainer and ask them what they intend to do with the property so you can discuss the risks of taking development steps before nominating.
- Include advice in your initial precedent letter to purchaser clients about the risks of double duty when nominating if any land development, including lodging planning applications, has occurred.

Suggested wording

If you decide to nominate an additional or substitute purchaser there are several issues you need to consider including:

- additional duty may be payable if you undertake any land development **before** you nominate a new purchaser. Land development can include:
 - applying for a planning or building permit
 - preparing or registering a plan of subdivision
 - requesting an amendment to a planning scheme
 - doing any building works that would require a permit
 - developing or changing the land in any way that would enhance its value.
- additional duty may be payable if the nominee gives you money and or some other consideration for the nomination
- you need to comply with any conditions in the contract of sale about nomination.
- a fee may be payable to the vendor for a nomination.
- we will need to prepare nomination document(s) which is outside the current scope of work we have given you.

Please contact us if you wish to discuss any nomination.

- If you are later asked to assist a purchaser client with a planning application, warn them in writing again about double duty if they want to nominate a new purchaser later.
- Likewise, if you are later asked to assist a purchaser client with a nomination, warn them in writing about double duty if any planning applications or other development work has been done.

For more information about extra duty claims, particularly for foreign purchasers and transfers between beneficiaries and trusts, see our articles [Taxing times in conveyancing](#) and [Nomination woes – GST, foreign investment and stamp duty.](#)