

JULY 2009

## DUTIES AMENDMENT BILL 2008... Landlords and tenants must take exceptional care

Landlords and tenants will need to take exceptional care in drafting leases since the Upper House of the Parliament of Victoria passed the *Duties Amendment Bill 2008 (Vic)* on 25 June 2009. The Bill was first introduced to the Legislative Assembly on 4 December 2008. In its original form it had three aims:

- to ensure leases are not used as a mechanism for avoiding duty;
- to clarify when duty is payable on changes in beneficial ownership; and
- to reduce the time period for payment of duty from the liability date to 14 days.

The original Bill did not pass the Legislative Council. However, on 25 June an amended version was passed and has now become law. The major difference between the Bill in its original form and the one passed by the

Legislative Council is that the time for payment of stamp duty was not reduced to 14 days and will remain at the existing period of 90 days. That means stamp duty remains payable on a transaction 90 days after the date on which the transaction is given effect.

### Operative date

Notwithstanding the date Parliament passed the Bill, most of the operative provisions in the *Duties Amendment Act (Act)* will be deemed to have come into operation on 21 November 2008. Accordingly, the Act will retrospectively impact on any transactions after that date.

### Imposition of duty on granting of leases

Duty will be imposed on the granting of a lease for which any consideration, other than 'rent reserved', is paid or agreed to be paid either in respect of the lease or for:



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- a right to purchase the land or a right to a transfer of the land;
- an option to purchase the land or an option for the transfer of the land;
- a right of first refusal on the sale or transfer of the land; and
- any other lease, licence, contract, scheme or arrangement by which the lessee or an associated person of the lessee obtains any right or interest in the land that is the subject of the lease other than the leasehold estate.

A dutiable transaction will occur when there is a transfer or an assignment of a lease for which any consideration is paid in the same circumstances.

The new sections are anti-avoidance in nature and are intended to apply broadly. The liability for duty will arise where leases are used to effectively transfer rights in the underlying land and/or the economic benefits of the land. The rights and benefits obtained by the lessee in

those circumstances are seen as equivalent to the rights and benefits obtained by a person who acquires property rights by way of transfer of land.

Rent reserved on a lease is said to mean the rent paid or payable during the term of the lease and any amount paid or payable for the right to use the land under the lease. The Act includes examples of amounts paid or payable for the right to use the land under the lease as follows:

- Paragraph (a) – Rates
- Paragraph (b) – Charges
- Paragraph (c) – Taxes
- Paragraph (d) – Maintenance
- Paragraph (e) – Utilities
- Paragraph (f) – Legal costs required to be paid by the lessee on behalf of the lessor in relation to the grant of a lease
- Paragraph (g) – Insurance premiums
- Paragraph (h) – Marketing costs
- Paragraph (i) – Car park contributions.

Accordingly it is intended that most ordinary commercial leases will fall outside the scope of dutiable transactions covered by the Act unless additional consideration is paid.

## Duty payable

Duty will be calculated on the higher of the consideration paid (other than the rent reserved) and the unencumbered value of the leased land. The duty payable will be at the same rate as that payable for a transfer of land.

## Exemptions

The Act specifically excludes the operation of the Act for leases, licences or other documents creating residency rights in a retirement village within the meaning of the *Retirement Villages Act 1986*.

The Act also exempts the granting, transfer, assignment or surrender of a lease if the lease is for a site or a site and caravan in a registered caravan park in circumstances where a caravan is located or is to be located on the site which is then to be used or intended for use as a principal place of residence of the proposed lessee.

The granting of a lease as a result of the exercise of an option for a further term where the option required the payment of consideration for the exercise is not a dutiable transaction provided that the option was granted before 21 November 2008.

In the event that duty is paid on a lease, under the provisions set out in the Act, no further duty will be paid for a subsequent transfer of the land to the lessee or a conversion of the term into fee simple.

## Changes in beneficial ownership

The Act also seeks to make dutiable the transactions like those referred to in the case of *Trust Company of Australia Limited (ATF The Clayton Three Trust) v The Commissioner for State Revenue [2007] VSC451*. The amendments are said to clarify the operation of the ability to charge duty in transactions where there is a dutiable change in beneficial ownership.

To establish a dutiable transaction, beneficial ownership is now defined to include, but is not limited to, the ownership of dutiable property by a person as trustee of a trust. A change of beneficial ownership now



includes, but is not limited to:

- the creation of dutiable property;
- the extinguishment of dutiable property;
- a change in equitable interests in dutiable property;
- dutiable property becoming the subject of a trust; or
- dutiable property ceasing to be the subject of a trust.

Ordinary transactions in the operation of unit trusts are exempted from the provisions. These are:

- purchase, gift, allotment or issue of a unit in a unit trust scheme;
- cancellation, redemption or surrender of a unit in a unit trust scheme;
- aggregation or alteration of a right pertaining to a unit in a unit trust scheme;
- payment of amount owing for a unit in a unit trust scheme; or
- any combination of the transactions.

## Time for payment of duty

The proposed Part 3 of the Act reducing the period for payment of duty after liability arises was removed from the Act before its passage through the Legislative Council and, accordingly, those time periods have not been changed.

## What it means for landlords and tenants

Landlords and tenants will now need to take exceptional care in drafting leases to ensure they do not, either knowingly or inadvertently, include a provision in a lease which would make the lease subject to duty under

the terms of the Act. The granting of options to purchase and rights of first refusal have regularly been features of commercial leases. If these provisions are to be included in a lease then the lease should expressly state that no additional consideration is imposed other than the rent reserved and amounts paid for the right to use the land under the lease. We think the parties should be careful to ensure it is not left open to the Commissioner of State Revenue to argue that the rent has been artificially increased above the ordinary market rent to include such consideration.

## Concerns with the legislation

It is difficult to argue with the policy of the Act as an instrument to close an anti-avoidance loophole. The legislation as drawn, however, does leave open certain areas of concern including:

- How will the Commissioner treat obligations on tenants to undertake works or surrender tenant's fitouts on expiry of leases? Again, these provisions are commonly included in leases but now could be seen to be additional consideration.
- How will the Commissioner deal with transfers of a lease as part of the sale of a business where payment is made by the transferee to the transferor?
- If duty is to be levied then it would be fairer to calculate duty on the value of the right being acquired by the lessee rather than based on the full value of the property.
- Is it fair to pay duty in circumstances where the premium paid is a minor amount or in circumstances where an option or right of first refusal is never actually exercised?

Time will tell how the Commissioner of State Revenue chooses to enforce the legislation but meanwhile extreme care needs to be taken by both landlords and tenants when entering into lease arrangements.

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