

# Duties Act Bulletin

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The *Duties Amendment Act 2009* (the Amending Act) received Royal Assent on 7 July 2009. The Amending Act introduces a number of changes to the *Duties Act 2000* (the Duties Act) to ensure certain leasing arrangements are not used as a mechanism for avoiding duty, and to clarify when duty is payable on a change in beneficial ownership. These changes, which are anti-avoidance in nature, apply from **21 November 2008** (the date of the Treasurer's media release which foreshadowed the changes).

## Imposition of duty on certain leasing arrangements

Although Victoria abolished lease duty in April 2001, section 7(1)(b)(v) of the Duties Act continued to impose transfer duty on the granting of a lease of land in Victoria for which any consideration other than the rent reserved was paid or agreed to be paid, and which contained a covenant or agreement for the future transfer or sale of the fee simple.

The Amending Act replaces the previous section 7(1)(b)(v) with a new section 7(1)(b)(v) and 7(1)(b)(va) to ensure duty is chargeable on leasing arrangements which effectively transfer ownership of the underlying land, similar to a sale and purchase transaction. The new section 7(1)(b)(v) of the Duties Act imposes duty on the grant of a lease where consideration other than rent reserved is paid or agreed to be paid either in respect of the lease, certain other rights or options, or an arrangement whereby the lessee or an associated person obtains an interest in the underlying land.

**Rent reserved** is defined in the Amending Act 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 Amending Act lists the following as examples of the types of payments that may be made pursuant to a lease which will be treated as payments for the use of the land, and therefore 'rent reserved':

- (a) rates
- (b) charges
- (c) taxes
- (d) maintenance
- (e) utilities
- (f) legal costs required to be paid by the lessee on behalf of the lessor in relation to the grant of the lease
- (g) insurance premiums
- (h) marketing costs
- (i) car park contributions.

The new section 7(1)(b)(va) provides that the transfer or assignment of a lease for which any consideration is paid or agreed to be paid, either in respect of the transfer or assignment, or in respect of various other rights, options or arrangements, will be subject to duty.

The definition of dutiable property in section 10 has also been amended to reflect the changes made to section 7 of the Duties Act. The Amending Act repeals section 10(1)(a)(iv) of the Duties Act, and inserts a new section 10(1)(ab) which provides that a lease is dutiable property, if the lease is of a kind referred to in section 7(1)(b)(v) or 7(1)(b)(va).

The Amending Act replaces section 7(1)(b)(ii) of the Duties Act. Previously that section provided that the surrender of an estate in land in Victoria, other than the surrender of a lease, a discharge of a mortgage, or a redemption of units in a unit trust scheme, was a dutiable transaction. However, as a result of the amendments, section 7(1)(b)(ii) of the Duties Act now provides that the surrender of dutiable property is a dutiable transaction. The effect of this change is that the surrender of a lease (being one where consideration was paid in respect of the grant of the lease or in respect of various other rights, options or arrangements) is now dutiable.

The Amending Act inserts a new section 20(3) into the Duties Act, which specifies that the dutiable value of a lease that is the subject of a dutiable transaction is the greater of:

- the consideration (other than the rent reserved) that is paid or agreed to be paid, and
- the unencumbered value of the land the subject of the lease.

## Exemptions, Exclusions and Transitional Provisions

The Amending Act inserts the following exemptions and exclusions into the Duties Act in respect of leasing arrangements.

- An exemption on the grant, transfer or surrender of a lease of a site or a site and a caravan in a caravan park registered under the *Residential Tenancies Act 1997*, provided the caravan is used or intended to be used, as the principal place of residence of the lessee (section 49).  
'Caravan' has the same meaning as in the *Residential Tenancies Act 1997*. This definition extends the application of this amendment to sites in a caravan park on which a cabin or other moveable dwelling is located.

- Where duty has been paid on a leasing arrangement under section 7(1)(b)(v) or (va), no duty is chargeable in respect of the subsequent transfer of land to the lessee, transferee or assignee. In addition, where the lease granted or transferred contains a provision allowing the enlargement of the term into fee simple under section 153 of the *Property Law Act 1958*, no duty is chargeable on the subsequent enlargement of the term into fee simple, provided duty was paid on the grant or transfer of that lease under section 7(1)(b)(v) or (va) (section 57).
- The granting, transfer, assignment or surrender of a lease creating or giving rise to a residency right in a retirement village within the meaning of the *Retirement Villages Act 1986* is excluded from being a dutiable transaction under the Duties Act (section 7(3AAB)).

The Amending Act also inserts a transitional provision for leases with options to renew. Section 7(3AAB) of the Duties Act provides that the granting of a lease is not a dutiable transaction if the lease was granted as a result of the exercise of an option for a further term where the option was provided in the original lease granted prior to 21 November 2008 and the lessee is compelled under the terms of that lease to pay consideration to the lessor for the exercise of the option.

## Changes in beneficial ownership

As a result of the recent decision of the Supreme Court of Victoria in *Trust Company of Australia Ltd (atf the Clayton 3 Trust) v Commissioner* [2007] VSC 451, some uncertainty has arisen as to whether certain trust arrangements are dutiable on the basis that there is a change in beneficial ownership of dutiable property. Although the Commissioner considers the *Trust Company* case is confined to its facts, the Amending Act amends the Duties Act to clarify when a change in beneficial ownership may occur. The amendments close any potential loopholes in the charging provisions that may have arisen due to the *Trust Company* case, and ensure that the charging provisions operate in accordance with the underlying policy intent.

Some of the features of the amendments include:

- clarification that the term 'beneficial ownership' can include ownership of dutiable property by a person as trustee of a trust
- clarification that the term 'change in beneficial ownership' can include the creation or extinguishment of dutiable property, a change in equitable interests in dutiable property and dutiable property becoming the subject of a trust or ceasing to be the subject of a trust, and
- the extension of the definition of 'dutiable property' to include an interest in any dutiable property.

## Three month period for payment of duty remains

When the Duties Amendment Bill 2008 was introduced into the Legislative Assembly it contained amendments to reduce the period for payment of duty, and lodgement of documents, from 3 months to 14 days. Following House Amendments agreed to in the Legislative Council, the relevant clauses were omitted from the Bill.

Consequently the position in Victoria continues to be that duty must be paid on a dutiable transaction (including a land rich transaction), and documents lodged with the Commissioner, within 3 months of the dutiable transaction occurring.

## Further information

For further information on these changes, please contact the SRO:

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