

Risk Alert

New stamp duty on leases!

The *Duties Act* 2000 (Vic) has recently been amended by the *Duties Amendment Act* 2009 (Vic). While the amending Act received royal assent on 7 July 2009, the changes take effect from 21 November 2008. For transactions that are affected by the changes and occurred between 21 November 2008 and 7 July 2009 there is a moratorium on penalty tax and interest until 7 October 2009.

What has changed?

The most significant amendment is the change to the imposition of stamp duty payable on leases. Subsection 7(1)(b) of the *Duties Act* lists the transactions for which duty will be charged. The new subsections 7(1)(b)(v) and (va) are:

- (v) *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 in respect of –*
- (A) *a right to purchase the land or a right to a transfer of the land;*
 - (B) *an option to purchase the land or an option for the transfer of the land;*
 - (C) *a right of first refusal in respect of the sale or transfer of the land;*
 - (D) *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;*
- (va) *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 –*
- (A) *a right to purchase the land or a right to a transfer of the land;*
 - (B) *an option to purchase the land or an option for the transfer of the land;*
 - (C) *a right of first refusal in respect of the sale or transfer of the land;*
 - (D) *any other lease, licence, contract, scheme or arrangement by which the transferee or assignee, or an associated person of the transferee or assignee, obtains any right or interest in the land that is the subject of the lease other than the leasehold estate;*

On a literal interpretation of subsection (v) above, duty will be chargeable on the granting of **any lease for which there is consideration other than rent reserved (for example, a lease in relation to which a premium is payable)**. The lease will be dutiable if the consideration, other than rent reserved, is paid in respect of either the grant of the lease, **or** any of the events listed in (A) to (D). It may not be necessary for the lease to contain any of the rights or options referred to in (A) to (D) to attract duty. Consideration may include non-monetary consideration and there is no restriction on the type of lease, so it could include residential, commercial or retail.

‘Rent reserved’ is defined in section 3 to be “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”. An example is given and includes rates, charges, taxes, maintenance, utilities, legal costs required to be paid by the lessee on behalf of the lessor in relation to the grant of the lease, insurance premiums, marketing costs and car park contributions. While the example is helpful it should not be read as an exhaustive list.

Similarly, subsection (va) provides that stamp duty will be payable on **any transfer or assignment of lease for which any consideration is paid or agreed to be paid**. Any monetary or non-monetary contribution made to facilitate a transfer or assignment will arguably make the transaction dutiable.

Are there any exemptions?

There are exemptions for leases, assignments, transfers and surrenders of leases in relation to retirement villages (see subsection 7(3AA)). Under a transitional provision, leases entered into before 21 November 2008 which provided for an option for renewal and required extra consideration to be paid in order to exercise that option are also excluded from the scope of the new provisions (see subsection 7(3AAB)).

The same exemptions which exist for transfer duty will also be available for these lease transactions (as these lease transactions are now another type of 'dutiable transaction').

What duty is payable?

The stamp duty payable in respect of leases or transfers or assignment of leases in section 7(1)(b)(v) and (va) is assessed on **the greater of** the amount of consideration (or value of non-monetary consideration) other than the rent reserved that is paid **or the unencumbered value of the land** that is the subject of the lease (subsection 20(3)). This is the particularly serious aspect of these amendments; where a lease is granted, or assigned, though even nominal non-rent consideration is paid, the duty payable will be calculated by reference to, not the consideration for the lease, but the market value of land at the time of the lease (or assignment of the lease).

Are there any rulings?

The Commercial Law Section of Law Institute of Victoria has been in consultation with the Acting Commissioner for State Revenue in relation to the preparation of rulings. Practitioners should consider those rulings when they are produced. If relying on a ruling, practitioners should advise their clients that while the rulings can give some certainty to the duty payable, rulings are not binding on the SRO or a court.

What should practitioners do?

Practitioners who do any leasing work should carefully read all of the recent amendments to the *Duties Act*.

When handling a lease transaction (including assignment and transfers) carefully assess whether there is any consideration being offered other than rent reserved and if so advise the client of the possible broad interpretation of the new amendments. Clients should be advised that:

- if there is any concern about whether duty will be payable they should seek a private ruling from the State Revenue Office and then ensure that the instrument is stamped accordingly.
- the risk of not having the lease properly stamped include:
 - being unable to have the lease registered on title; and
 - being unable to have the lease produced in court as evidence in the event of a dispute between landlord and tenant (or with any other party); and
 - having to pay penalty tax and interest if stamped late.
- State Revenue Office rulings provide limited certainty but are not binding on the SRO. As such, rulings have no status before a court: it is the correct interpretation of the legislation which will be decisive if a dispute goes to court.

Record all oral advice in a file note, including any reasons the client gave for wanting to proceed with the transaction, and confirm all advice in a letter.

**Legal Practitioners' Liability Committee
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