

26 May 2008

## Property Law E-alert

# Stamp Duty "Off the Plan" Changes

The *State Taxation Acts Amendment Bill 2008* ("Bill") was introduced into Parliament on 6 May 2008. The Bill amends the *Duties Act 2000* to provide for greater certainty in relation to the calculation of duty for properties that are sold off the plan.

### 1. Off the plan concessions

Section 21 of the *Duties Act 2000* provides a duty concession for purchasers of 'off the plan' units or houses yet to be constructed or partially constructed, or for refurbished units/apartments/flats, that are yet to be refurbished or are partially complete as at the date of the contract of sale.

The calculation of the duty concession is based on the percentage of construction completed, or refurbishment completed, as at the date of the contract of sale. This is why purchasing property off the plan is a tax incentive because a purchaser only pays stamp duty on the land component (plus the partially constructed/refurbished building if applicable) notwithstanding that the vendor or its builder intends to construct a building after the contract of sale.

### 2. Changes to off the plan concessions

Notwithstanding that the Act is expected to receive Royal Assent in June 2008, it is our understanding that these provisions will be effective from 1 October 2008. The changes can be summarised as follows:

#### 2.1 Clause 3:

Clause 3(1) removes the word "exclusively" from section 21(4). This amendment clarifies that, for the purpose of the concession as it applies to multi-lot refurbishments, the consideration calculation will be based on the whole project (or stage) of building works completion figures and does not relate exclusively to any particular lot. This ensures that calculations take into account proportions attributable to common property such as stairwells and lifts.

A whole project approach is in line with current market practice and will ensure simplicity of calculations and certainty and clarity for both the vendor and purchaser.

Clause 3(1) also repeals section 21(4)(d), which is re-enacted in a new section 21(4A). Clause 3(2) inserts section 21(4A) which requires certain documents (referred to below) to be lodged with the Commissioner before the duty concession in section 21(3) or (4) can be claimed.

#### Section 21(4A)

Subsections (3) or (4) do NOT apply unless the transfer, when presented/lodged with the Commissioner, is accompanied by:

- A copy of the building permit or approval;
- A copy of the contract with the transferee for the construction or refurbishment;
- A statutory declaration in the approved form by the transferor as to any prescribed matter and as to whether or not the transferor has entered into any agreement with the transferee in respect of works (other than construction or refurbishment) to be undertaken in relation to the land or the lot before the transfer.

In addition the Commissioner may require:

- A statutory declaration in the approved form by the transferee declaring that the transferee has not entered any contract, other than the one declared for the construction of the building or refurbishment of the lot; and
- A statutory declaration by the person that issued the building permit or approval.

The approved forms are attached for your information, however it should be noted that these forms are subject to change as of 1 October 2008.

## 2.2 Clause 4:

Clause 4 inserts new sections 21A, 21B 21C, 21D and 21E in order to improve the administration of the off the plan duty concession by simplifying and standardising the calculation process.

### Section 21A Commissioner may publish a fixed percentage

Section 21A provides that the Commissioner may fix percentages for the land component and building component, with different percentages applying to different building types. This is to ensure certainty and clarity for all parties and simplify the calculation process. Purchasers are to be made aware of the minimum dutiable value based on whether they are purchasing a freestanding house or unit.

However, these provisions still recognise some transferors may elect to provide a declaration of the actual costs of construction rather than use the fixed percentages.

A Revenue Ruling is expected to be published by the State Revenue Office around 1 October 2008 setting out the fixed percentages.

### Section 21B Records must be kept

Section 21B provides that, if a transferor of dutiable property makes a declaration under section 21(4A), the transferor must keep, or cause to be kept, all records that are necessary to enable the duty payable on that transfer to be assessed.

*Penalty: 500 penalty units in the case of an Owners Corporation, 100 penalty units in any other case.*

Requiring transferors to keep records ensures responsible action on the part of the transferor/developer when calculating percentage of works completed at the date of the contract.

### Section 21C Period of retention

A transferor who is required to keep records under section 21B must do so for a period not less than 5 years after the date it was made or obtained or the date on which the dutiable transaction occurred, whichever is the later.

*Penalty: 500 penalty units in the case of an Owners Corporation; 100 penalty units in any other case.*

### Section 21D Power to require documents

The Commissioner, may by written notice, require a person to produce to the Commissioner a document that is required to be kept under section 21B. That person must comply with the notice within the period specified in the notice or any extended period allowed by the Commissioner.

*Penalty: 200 penalty units in the case of an Owners Corporation; 40 penalty units in any other case.*

### Section 21E Joint and severally liable for additional duty

Currently, purchasers are solely liable for any unpaid duty as a result of incorrect calculations about the value of the concession. To ensure all care in providing accurate information with respect to the percentage of construction or refurbishment completed at the date of the contract, section 21E imposes joint and individual liability on both vendors and purchasers for any additional duty arising because of incorrect information supplied.