

7 July 2009

Property Law e-alert

Gotcha! Adding to the pile of ramshackle taxes and unintended consequences

An Important Warning for all Landlords, Tenants and Developers

Many lease transactions are now taxed at the same rate as land transfers, *even if only one day of the lease remains*.

The rate of duty for land transfers is the higher of the consideration paid and 5.5% of the land value where the land value is over \$960,000. Lesser rates apply to lower value land, but most commercial land is valued over \$960,000.

The Victorian State Government's Duties Amendment Bill 2008 came into force on 7 July 2009 but with **retrospective effect from 21 November 2008**. Landlords and tenants are now taxed on all transfers and assignments of a lease and on the granting of a lease for which any consideration is payable, other than "rent reserved". "Rent reserved" is defined in terms of recurrent rent and outgoings. It does not matter whether the "consideration" (which is not rent reserved) is payable by the landlord or the tenant. The consideration does not need to be monetary and can arguably include a rent holiday.

The legislation makes the following lease transactions liable for duty at land transfer rates:

1. All transfers and assignments of leases;
2. Sales of businesses where there is a grant or assignment of a lease;
3. Leases and assignments that include rights of first refusal and options to purchase the premises;
4. Leases and assignments that include a licence, contract, scheme or arrangement; where a right or interest in the leased land is obtained by the tenant, an assignee or an associated person of the tenant or assignee;
5. Leases with rent incentives;
6. Leases where the tenant undertakes capital works. Examples include where the tenant constructs premises or carries out major refurbishment whether in exchange for lower rent or delayed rent commencement or not. It is common for commercial leases to have these types of obligations by either party;
7. Leases where the landlord is required to make capital payments or carry out capital works;
8. Leases where the landlord pays the tenant for capital work undertaken by the tenant;
9. Leases which provide that certain fixtures (eg. service station fuel tanks) are to be transferred to a tenant's associate;
10. Leases that require the landlord to give the tenant's financier a licence to enter the land to remove the tenant's fixtures and stock in the event of default;
11. Leases that give an associated party of the landlord the right to enter the land at any time to conduct an environment audit;
12. Sales of land and leasebacks of developed premises (also popular with public authorities as well as commercial tenants). These projects will now incur **double** duty unless they are a lease to an exempt public authority;
13. Almost all grants and assignments of Alpine leases;
14. Most leases of retirement villages and caravan parks (but not individual units retirement village or caravan park sites); and
15. All residential leases which include the payment of a bond.

It is understood that the State Revenue Office intends to issue a ruling to "clarify" many of the unintended consequences of this legislation. It is a travesty of drafting that such a ruling is required in the first place, but any mitigation of some of the intended and all of the unintended consequences of Parliament is welcomed.

Those involved in or intending to enter into lease arrangements should seek advice as to the reach of these amendments.

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