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Commercial and Property Law e-alert

Future of the Duties Amendment Bill 2008

The *Duties Amendment Bill 2008* (Vic) ("**Bill**") was introduced into Parliament on 2 December 2008 to make various amendments to the *Duties Act 2000* (Vic). The Bill was passed by the Legislative Assembly for debate in the Legislative Council on 26 February 2009. The Bill attempts to overcome potential duties loopholes and clarify some of the ambiguities in the Supreme Court decision *Trust Company of Australia Ltd (at the Clayton 3 Trust) –v– Commissioner [2007] VSC 451*. The Bill proposes to:

- "(a) ensure that leases are not used as a mechanism for avoiding duty;
- (b) to clarify when duty is payable in relation to changes in beneficial ownership;
- (c) to reduce the time period for the payment of duty from the liability date to 14 days."

However, in application, the proposed amendments attract many unintended consequences that extended beyond purposes of the Bill.

Duty on certain leases

In Victoria, long-term lease arrangements have been deliberately used to acquire rights which are equivalent to ownership and avoid the need to pay stamp duty. The Bill attempts to close this loophole by providing that a 'lease' will be a dutiable transaction if consideration other than rent is provided for either the lease or any arrangements by which the lessee or an associated person obtains any interest in the land. The Bill defines the term 'lease' as "a lease of land in Victoria or an agreement for lease in Victoria".

The changes will be retrospective to 21 November 2008 and the duty payable is calculated as the greater of:

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

The Bill however also states that no duty arises on the subsequent transfer of the land to the lessee, transferee or assignee if duty has already been paid for the lease.

A potential issue with this amendment is that an unprecedentedly large volume of leases could attract duty. This is because many leases have consideration payable outgoings and allowances for fit outs which are considered items other than rent. Furthermore, as the duty is calculated as the higher of the consideration or the value of the underlying land, many lessees would be burdened with paying duty as if they had purchased the land subject to the lease.

Beneficial Ownership

The Bill attempts to clarify what is a dutiable change in beneficial ownership in response to the ambiguities created by the Supreme Court decision *Trust Company of Australia Ltd (as trustee for the Clayton 3 Trust) –v– Commissioner of State Revenue [2007] VSC 451*.

The Bill amends the definition of 'beneficial ownership' to include ownership of dutiable property by a person as trustee of a trust. The Bill deems that a 'change in beneficial ownership' of land will occur upon the creation or extinguishment of dutiable property, dutiable property becoming the subject of a trust or ceasing to be the subject of a trust, and a change in equitable interests in dutiable property.

Payment of Duty

The Bill reduces the period for payment of duty from 3 months to 14 days. This amendment makes the timeframe for duty payment shorter than any other Australian jurisdiction. It will impact land purchasers who will only have 14 days to pay duty from the date of settlement. Duty arising from the execution of a deed will also need to be paid within 14 days. This amendment is proposed to come into effect from the day the Bill receives Royal Assent and would place an unprecedented burden on rural and regional transactions as well as more complex sales which involve multiple purchasers and/or sellers.

The Future of the Bill

The Bill was withdrawn from Parliament on 10 March 2009 after the Victorian Liberal Nationals Coalition with support of the Greens and the DLP MP voted in opposition of the Bill. The unintended consequences which would flow from the Bill have been heavily debated. However, the Bill has only been amended slightly to exclude its application to retirement village leases since its introduction.

The Government has noted that this is a disappointing result which will continue to allow corporate entities to avoid paying duty on large property deals. However, it has also been forced to admit that it had not consulted with stakeholders prior to the Bill entering Parliament.

Whether or not the Bill will be extensively rewritten prior to its reintroduction into Parliament is yet to be seen. Hopefully, the Government will undertake extensive public consultation this time around to minimise unintended consequences as much as possible.

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