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AN AUTHORITATIVE NEWSLETTER FOR LAWYERS, CLIENTS AND ASSOCIATES

## New Stamp Duty on Leases

The Victorian Government abolished stamp duty on Leases in 2001.

### Changes

In July 2009 the Duties Act was amended to impose stamp duty in some Lease transactions, and is effective from 21 November 2008.

The Amending Act introduces two important changes:

- it imposes duty on certain leasing arrangements and
- it expands the definition of beneficial ownership to overcome any avoidance structures

The change is in part designed to catch long term leases (15+ years) which have the "guise of a transfer of ownership" and which avoid ad valorem stamp duty. The changes address the concern that leasing arrangements are being used to circumvent the payment of duty in property transfers.

Duty is now payable on a grant, transfer or assignment of a lease, where any consideration other than rent reserved is paid or agreed to be paid for:

- the lease or transfer or assignment of a lease
- a right to purchase the land or a right to a transfer of the land
- an option to purchase the land or transfer of the land

or an associated person of the tenant, obtains any right or interest in the land that is the subject of the lease other than the leasehold estate.

Additionally a surrender of a lease where consideration was paid for the grant of the lease or various other rights, options or arrangements is now dutiable. The effect is that a surrender of a lease (being one where consideration was paid for the grant of the lease or various other rights, options or arrangements) is now dutiable.

Unfortunately the Act does not recite the objective which means there is uncertainty as to its precise applicability.

### What is Dutiable?

Duty will now be imposed 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 land.

The Act makes a distinction between money paid as consideration and money paid as rent reserved. The term rent reserved is defined as 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.

- a right to first refusal in respect of the sale or transfer of the land or
- any other lease, licence, contract, scheme or agreement by which the tenant

"Rent Reserved" includes:

- Rates
- Charges
- Taxes
- Maintenance
- utilities
- Legal costs paid by the Lessee on behalf of the Lessor in relation to the grant of the lease
- Insurance premiums
- Marketing costs
- Car park contributions

It is not clear whether:

- payment of outgoings such as incentive payments or payment for purchase of an existing fit-out are covered by the definition of rent reserved, or whether rent paid in a lump sum up front will be deemed consideration rather than rent reserved
- transfers of business which include an assignment of a lease are dutiable where additional payments for fixtures are made - such additional payments could be deemed consideration rather than rent reserved
- consideration paid for goodwill of the business and assets of the business with consideration for the lease is covered by the definition.

Under s.7(1)(b)(va) the Act provides that the transfer or assignment of a lease for which any consideration is paid or agreed to be paid in respect of the transfer or assignment or in respect of various other rights, options or arrangements will be subject to duty. This means that all assignments of lease where there is a sale of a business may be assessable and liable for duty as there is consideration payable for the business (which is outside of the definition "rent reserved").



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### What Duty is Payable and When?

The dutiable value will be the greater of:

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

The liability may be significant where consideration is nominal or insignificant compared to the value of the leased land. For example where a \$5000 lease premium is paid in respect of a lease of land which is worth \$2 million, duty of \$110,000 is payable as duty will be calculated on the land value.

Duty is payable at the same rate as a transfer of land. Where a leasing arrangement is deemed to be dutiable, the burden of payment falls on:

- the tenant for a lease
- the assignee or transferee for an assignment or transfer of a lease and
- the landlord on a surrender of a lease

Duty is payable within 90 days of being assessed.

### Recommendation/Advice

In view of the uncertain position caused by the amending Act it is advised that the Lease/Assignment should either be lodged for assessment or a private ruling should be sought on the dutiability of the transaction. If dutiable, the document is stamped.

Appropriate provision should be made for the stamp duty if the transaction is dutiable.



### Non-Stamping Risks

Risks of not stamping are:

- Inability to have the Lease registered
- Inability to have the Lease brought into evidence in Court
- penalty tax and interest for late stamping

### Considerations

In particular it is important to note that:

- any leasing arrangement requiring payment of a premium will be dutiable, regardless of the minimum term. It will be important to consider whether the proposed lease can be restructured to avoid payment of a premium
- an assignment or transfer of any lease for monetary consideration will result in full duty being paid on the value of the underlying land value
- transactions involving a transfer of business will need to be carefully drafted

- so that it is clear that consideration paid for the business assets and goodwill is not attributable to the lease assignment landlords should not surrender a lease unless it is established that the lease is not a dutiable transaction. Alternatively, where there is a surrender of a dutiable lease, the landlord may require the tenant to reimburse it for any duty payable and
- any exposure to duty on transactions entered into before 7 July 2009 must be disclosed and paid by 7 October 2009 to avoid interest and penalties.



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