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Property and Commercial Law e-alert

The Great Victorian Lease Tax Debacle

Some practical mitigation measures

Last month we drew attention to the unintended consequences of the new “anti-avoidance” measures Victorian Duties Act. These anti-avoidance measures are commercially horrific. They make dutiable all leases for a day or more and assignments of lease for which any consideration is payable other than rent and outgoings.

The rate of duty is at land transfer rate. This is up to 5.5% of the market value of land over \$960,000. (\$25,070 for land valued at \$500,000 and \$55,000 for land valued at \$1M.)

The legislation has retrospective effect from 21 November 2008 even if the agreement for lease or the agreement to sell the business occurred before to that date.

The new legislation catches a wide range of transactions including:

- Residential leases where the tenant cleans the carpet or fixes the garden.
- Each renewal of a dutiable lease results in a new liability for duty even for a rolling weekly tenancy.
- Many commercial leases and assignments
- Most alpine properties and sales of businesses
- Leases and subleases will each be subject to duty even if they are basically for the same term.
- Transfers of shares in companies and units in trusts which hold leases and fall under the “land rich” provisions of the Act
- Mortgages of leases. They are particularly and regularly used for financing businesses and alpine properties.) Most mortgages of leases will result in double or triple liabilities for duty because they generally operate as an assignment of lease and sublease or a sub-lease and sub-sub-sublease.

Discussions with the State Revenue Office indicate that these are quite unintended consequences notwithstanding the language of the legislation. A number of industry bodies such as the Law Institute of Victoria and the Property Council of Australia are presently negotiating with the State Revenue Office to find a practical solution. The interim solution is likely to be rulings from the State Revenue Office to the effect that certain transactions will be treated

as not dutiable. This will not affect the transactions being liability at law but it is likely to mean that penalties and interest will not be imposed.

The matter remains very unclear and uncertain. The alternatives available for persons who are or were purchasers of businesses, tenants or assignees of leases and others caught by the changes for dutiable transactions after 21 November 2008 are:

1. lodge the document for assessment of duty and hope that the document is assessed as not dutiable. The State Revenue Office has stated that it will not impose penalties and interest if full disclosure and payment is made by 7 October 2009 even if the transaction is dutiable;
2. not submit the document for assessment of duty and hope that:
 - (a) the document never needs to be submitted to the State Revenue Office or a court, and
 - (b) the State Revenue Office continues to assert or imply that there is no material change in the legislation other than anti-avoidance for long term leases, and
 - (c) no penalties or interest will be imposed by the State Revenue Office if it changes its position and acknowledges having changed its position.

The penalties are very draconian. The penalties range between 25% and 75% of the duty plus interest which is presently 15.9% per annum. It is impossible to properly advise clients at present when the rule of law is apparently so disparate from its purported application. The latest ruling from the State Revenue Office is that a moratorium will be allowed for submitting and payment of duty until 7 October 2009.

We recommend to our clients that they contact us well before 7 October 2009 if they propose to await developments until then, but otherwise submit any document and pay the duty before that date if there are no further amendments to the legislation foreshadowed to rectify the situation.

We recommend that you contact us well in advance of this date if there is a likelihood that you wish us to submit the documents for assessment before to that date.

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Disclaimer: This is a very brief summary only and does not purport to cover all or specific transactions. We suggest that you read the Hunt & Hunt e-alerts of 7 July 2009 and 14 July 2009 for more detail on some of the issues.

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