

## Commercial Property and Leasing Client Alert

7 October 2009

### DUTIES ACT AMENDMENTS AND DUTY ON LEASES

Clients will be aware of the recent amendments to the Duties Act 2000 as highlighted in our recent Commercial Leasing Newsletter and seminar (“**Act**”). The State Revenue Office (“**SRO**”) has now published information on its website as a guide to how the SRO intends to interpret these provisions (“**SRO Guidelines**”).

#### 1 Background

The following are now dutiable transactions:

- 1.1 the granting of a lease for which any consideration other than rent reserved is paid or agreed to be paid either:
  - 1.1.1 in respect of the lease; or
  - 1.1.2 in respect of a right to purchase, option to purchase, right of first refusal, or any scheme or arrangement by which the tenant obtains any right or interest in the land that is the subject of the lease other than the leasehold estate;
- 1.2 the assignment of a lease for which any consideration is paid or agreed to be paid either:
  - 1.2.1 in respect of the assignment; or
  - 1.2.2 in respect of a right to purchase, option to purchase, right of first refusal, or any scheme or arrangement by which the tenant obtains any right or interest in the land that is the subject of the lease other than the leasehold estate; or
- 1.3 the surrender of any lease which is dutiable.

#### 2 Rent reserved

The term “rent reserved” is defined in the Act as rent paid or payable and any amount paid or payable for the right to use the land under the lease. The Act lists an example of payments which are deemed to be payments made for the right to use the land being payments for rates, charges, taxes, maintenance, utilities, insurance premiums, marketing costs, car park contributions and legal costs required to be paid by the tenant on behalf of the landlord in relation to the grant of the lease.

The **SRO Guidelines** state that the following could also be included in the definition of “rent reserved”:

- 2.1 a bond or guarantee paid by a tenant to a landlord to secure the tenant’s obligations under the lease;
- 2.2 amounts paid by the tenant to a landlord in respect of the installation or upgrade of services and utilities (such as gas, water, telephone, electricity);
- 2.3 contribution to expenses pertaining to the maintenance of common areas; or
- 2.4 other costs required to be paid by the tenant on behalf of the landlord in relation to the grant of the lease.

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The information contained in this alert is intended as general commentary and should not be regarded as legal advice. Should you require specific advice on this topic, please contact the author/s directly.

### 3 Consideration

The **SRO Guidelines** confirm that the reference to “consideration” includes non-monetary consideration. The SRO Guidelines specifically refer to circumstances where a lease requires a tenant to undertake structural work, construct improvements or undertake a tenancy fit out and the improvements or fit out become the property of the landlord at the end of the lease, stating that this may amount to the agreement to pay consideration other than rent reserved. In determining whether such a lease is dutiable the Commissioner will have regard to all of the circumstances, including the term of the lease and the expected date of reversion to the landlord.

### 4 Timing of payment of duty – option or right to purchase

Duty is payable within 3 months of the occurrence of the dutiable transaction.

Under the Act the grant or assignment of a lease for which consideration has been paid or agreed to be paid in respect of a right or option to acquire the underlying land is a dutiable transaction and duty must be paid within 3 months of the time of the grant or assignment of the lease irrespective of whether such right or option has been exercised at that time.

However, the **SRO Guidelines** provide that where additional consideration equivalent to the full unencumbered value of the land is required to be paid upon or following the exercise of the right or option the SRO will generally only require a taxpayer to pay the duty liability if and when the right or option to acquire the land has been exercised. This concession on the part of the SRO as set out in the SRO Guidelines should be treated with caution, as the Guidelines are not binding on the SRO, and this statement is inconsistent with the Act. We suggest that where parties are intending to enter into these types of transactions they seek a private ruling from the SRO.

### 5 Sale of business

The **SRO Guidelines** provide that where a tenant enters into a business sale agreement with respect to the business conducted from leased premises and under the business sale agreement the purchase price has been apportioned between the business assets with a nominal consideration of \$1.00 allocated to the assignment of the lease, provided that the lease is of itself not dutiable, the assignment of the lease will not be dutiable. This is the case even though consideration, other than rent, has been paid in respect of the assignment. Again, this is inconsistent with the Act and should therefore be treated with caution.

Although the **SRO Guidelines** seem to indicate that the SRO is taking a more lenient approach to the interpretation of the Act in relation to the imposition of duty on leases, we recommend that this be treated with caution as the Guidelines are not binding on the SRO, and in certain circumstances are inconsistent with the Act. We suggest that where parties anticipate entering into these types of transactions where there is uncertainty as to whether duty is payable, that they seek a private ruling from the SRO.

If you have any queries or would like more information on these provisions please contact us.



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