

Queensland Duties and Land Tax update

by Bronwyn Clarkson, Partner and Johanna Kennerley, Solicitor

The imposition of Stamp Duty and Land Tax potentially affects all businesses and companies operating in Queensland. Here we provide a short update and summary of some recent developments.

Aggregation of dutiable transactions

The Queensland Treasury Department issued Public Ruling DA030.1.1 on 24 February 2009 (the **Public Ruling**) in order to clarify s 30 of the *Duties Act 2001* (Qld) (the **Duties Act**).

Section 30 states that where transactions that together form what is substantially one arrangement, the duty payable is calculated in the aggregate and is treated as a single dutiable transaction.

All 'relevant circumstances of the transactions' must be taken into account in order to determine whether the dutiable transactions should be aggregated. Relevantly, s 30(4) of the Duties Act also provides a list of circumstances that should be taken into account; however this list is not exhaustive.

The Public Ruling provides some helpful examples of how s 30 of the Duties Act applies in different situations. Below is a short summary of the examples provided in the Public Ruling.

Aggregation – same parties

Where one purchaser enters into two or more separate contracts with the same vendor, it is likely that the transaction will be aggregated.

Aggregation – different parties

Where one purchaser enters into two or more separate contracts with different but related vendors, it is likely that

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the transaction will be aggregated. It should also be noted that the definition of related parties under the Duties Act is somewhat extended in comparison to the *Corporations Act 2001* (Cth).

No aggregation

The purchaser enters into two separate contracts with the same vendor, but at different times. Where the contracts are not conditional, are negotiated separately, and no discount was given to the purchaser by the vendor for the purchase of the second property, it is unlikely that the transaction will be aggregated.

Effect of aggregation

As Queensland's transfer duty rate varies depending on the consideration amount, aggregated transactions will attract a higher amount of duty than if the transactions had been separately assessed. Parties should always be alert to the possibility of aggregation whenever there are two or more transactions occurring in parallel with the same party, or where there are a number of transactions or elements within a wider project.

Land Tax and Transfer Duty reforms

Since the 2008-2009 State Budget was delivered, slower economic activity in Queensland has led to substantial downward revision of expected taxation revenue.

However, the Bligh Government's release of the Mid Year Fiscal and Economic Review in December 2008 was accompanied with promises of growth for the Queensland economy, despite the global economic crisis.

The Mid Year Fiscal and Economic Review introduced some new policy measures said to ensure continued growth in the Queensland economy by increasing revenue.

Two of the new policies are particularly relevant in the commercial and property sphere – an increase in land tax for land rich individuals and companies, and the postponement of the abolition of transfer duty on the sale of business assets.

In Brief

§ With Stamp Duty and Land Tax potentially affecting all businesses and companies operating in Queensland – get up to date with the changes.

§ Requirements for long term leases of part of land in Qld – the potential impacts of the Victorian decision of *Equuscorp Pty Ltd v Belperio* are discussed.

by Bronwyn Clarkson, Partner

This follows other recent revision of duties payable in Queensland, such as the abolition of mortgages duty from 1 July 2008.

Increase in Land Tax

From 1 July 2009, a surcharge of 0.5% will be applied to the rate of Land Tax payable by all land holders whose aggregate land holdings exceed \$5 million in unimproved land value.

Accordingly, the Land Tax rate payable from 1 July for affected companies, trusts and non-resident individuals (estimated to be about 1,800 taxpayers) will be \$75,000 plus 2% of the unimproved land value exceeding \$5 million.

Land tax payable for resident individuals (estimated to be about 130 taxpayers) will increase to \$62,500 plus 1.75% of the unimproved land value exceeding \$5 million.

It is estimated that this measure will provide an additional \$93 million in 2009-2010 financial year.

Delay in abolition of transfer duty on sale of business assets

In the 2005-2006 Budget, the State Government announced a timetable for abolishing many duties imposed on transactions in Queensland. Transfer duty of the sale of core business assets was intended to be halved from 1 January 2010, and completely abolished from 1 January 2011.

The Mid Year Fiscal and Economic Review has deferred the abolition of this duty until 1 July 2012.

Conclusion

Understanding the duty implications on Queensland transactions is vital in the current climate. Similarly, businesses need to factor in updated land tax rates as a cost of land holdings and future acquisitions. With the recent Queensland election having seen a return of the previous government, we will await the possibility of further changes or reforms for the 2009/2010 budget.

Registering Consecutive Leases - Does *Equuscorp Pty Ltd v Belperio* apply in Queensland?

by Bronwyn Clarkson, Partner and Johanna Kennerley, Solicitor

Queensland planning legislation prevents the registration of leases of part of a lot for over ten years without the requisite planning approvals.

There has been a growing practice in Queensland, and indeed in other jurisdictions that have similar planning legislation, whereby two or more leases of just under ten years are registered concurrently, for consecutive terms. This provides the lessee with registration of a lease of part

of a lot for a term of longer than ten years, without planning approval.

However, a 2006 decision in Victoria may impact on this practice, and find that such leases are in fact in breach of the *Integrated Planning Act 1997* (Qld) (the **Planning Act**).

The ultimate question, therefore, is whether, despite registration, consecutive leases nonetheless constitute a breach of the requirement to obtain approval for 'reconfiguration of a lot' pursuant to the Planning Act.

Queensland legislation

Section 65 of the *Land Title Act 1994* (Qld) (**the Land Title Act**) provides the requirements for registration of leases. By subsection 65(3A), if a lease triggers the definition of 'reconfiguration of a lot' under the Planning Act, the lease must generally be approved by the relevant local government pursuant to the requirements of the Planning Act.

Reconfiguration of a lot is defined in section 1.3.5 of the Planning Act as:

'Dividing land into parts by agreement (other than a lease for a term, including renewal options, not exceeding ten years...) rendering different parts of a lot immediately available for separate disposition or separate occupation.'

Accordingly, a lease of part of lot for a term of more than ten years cannot be registered, and the Titles Office will not register such a lease, without the required development approvals.

Part 4.3.1 of the Planning Act makes it an offence to carry out assessable development, such as reconfiguration of a lot, without a permit. The maximum penalty for this offence is 1,665 penalty units, being currently a maximum fine of \$166,500.

Further, if a company is found to have breached the requirements of the Planning Act, pursuant to part 4.4.3, each director is deemed to have also committed a separate offence – namely the offence of failing to ensure that the corporation complies with the provisions of the Planning Act.



Equuscorp Pty Ltd v Belperio

Equuscorp Pty Ltd v Belperio [2006] VSC 14 (**Equuscorp**) dealt with consecutive leases of land in NSW. The tenants were members of a group of investors, who each took long term consecutive leases of part of a lot in NSW that was used for growing timber. The tenants were applying to the court for a declaration that the leases were void pursuant to the NSW planning legislation in order for the tenants to be released from their liability to pay rent.

The relevant NSW legislation dealing with the requirement for subdivision approval for leases of part of land over a certain period of years is similar to that of Queensland, and accordingly, the decision is highly relevant within the Queensland jurisdiction.

Using a “substance over form” argument, it was held that consecutive leases are in fact and in purpose one singular lease, divided for the purposes of circumventing legislation, and as such are unenforceable.

It is also relevant to note that it appears none of the leases in this Victorian case were registered on title (although this is not entirely clear from the judgement).

While it appears that this case, given the similarity of the legislation in question, would apply to Queensland leases, the decision has not been judicially considered in Queensland. However, there are some Queensland decisions that should be noted, particularly in relation to indefeasibility of such leases where registration has occurred.

Indefeasibility

The case of *Benmar Properties Pty Ltd v Makucha & Ors* (unreported, Court of Appeal, Qld No 211/1993) (**Benmar**) dealt with two leases over two lots for 99 years each. The lessee had obtained Council Approval for the lease with a plan attached and the lease was registered.

The landlord, who wanted to terminate the leases, argued that the Registrar of the Titles Office should not have registered the leases as they were not compliant with some minor technical requirements for registration of a lease, and accordingly, argued that the leases were invalid, void and of no effect.

The court held that the leases were enforceable and valid for a number of reasons:

- there was substantial compliance with the legislation;
- there was good faith in the lessee's (and the Council's and the Registrar of Titles') reliance on registration of the lease that the legislation had been complied with and therefore the leases would be enforceable; and
- there was no intent on the part of the legislation that such an omission should render invalid the subdivision or the lease by overriding the indefeasibility obtained by the tenant on registration.

The landlord in *Benmar* appealed the decision of the Supreme Court (*Makucha v Benmar Properties Pty Ltd* (unreported, Court of Appeal, Qld No 211/1993). The Court of Appeal upheld the decision. While the Supreme Court, in hearing the matter at first instance, focussed on

the lessee's 'substantial compliance' with the legislation, the Court of Appeal focussed more on the principle of indefeasibility (referring to the precursor legislation to the Land Title Act, the *Real Property Act (1877)*):

'It is now beyond argument that the indefeasibility provisions of the Real Property Act have the affect that, upon registration of a lease, the lessee obtained title to the interest specified in the lease notwithstanding that the instrument by which he or she became registered is void and ineffective.'

This principle of law was accepted in 1971 by the High Court of Australia in *Breskvar v Wall* (1971) 126 CLR 376 where all five judges agreed that the registration of a void instrument will result in indefeasibility of the registered interest.

Conclusion

It appears that there is a strong argument that registration of consecutive leases will result in indefeasibility of the lease interest despite the leases themselves otherwise breaching both the Planning Act and the Land Title Act. Therefore registered consecutive leases will be effective and enforceable by the tenant as against the landlord or any other third parties.

However, given the Victorian decision of *Equuscorp*, it is possible that consecutive leases for a total of ten years or more, whether registered or not, will be deemed to be one single lease for the purposes of the Planning Act, and thereby constitute “reconfiguration of a lot”, thus requiring a development permit. In light of this, there is a risk that such consecutive leases will breach the Planning Act, and penalties may be imposed on those who breach its provisions.

The key point is that achieving registration of the leases will not give protection from any breach of the Planning Act if development approval is required.

Amendments to the Acquisition of Land Act 1967 (Qld)

Legislation was passed on 12 February 2009 amending the provisions of the *Acquisition of Land Act 1967* (Qld).

Major amendments include:

- limited interest in relation to a right to claim compensation;
- disturbance as a separate head of claim;
- consequential costs for investment properties; and
- amendments to the requirements for notices to resume for strata titled properties.

These amendments are primarily a result of the Queensland Court of Appeal decision of *Sorrento Medical Services Pty Ltd v Chief Executive, Department of Main Roads* (2007) QCA 73.

Please see next property newsletter for further updates.

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Carter Newell wins the Queensland Law Society Employer of Choice Award 2008

Carter Newell was awarded 'Employer of Choice' by the Queensland Law Society at the annual President's Cocktails and Awards function in December 2008.

In presenting the award, Megan Mahon made reference to Carter Newell's strong values, flexible work/life balance and the firm's long standing commitment and support of staff and in particular staff participating in the Job Placement Disability Employment Network.

"Your selection as a finalist reflected well on the hard work that you had put into your culture over the past five to ten years and your selection as the Award recipient certainly proves that the hard work was well worth it", said Megan Mahon, Queensland Law Society President.

The award aims to encourage the efforts of Queensland legal practices to promote diversity of staff and accommodation of staff lifestyle needs, with the judging based on promotions of initiatives that enhance employment or career development opportunities for legal practitioners and initiatives that help balance work and family/life responsibilities.

"The team at Carter Newell is extremely honoured to have received this award", said Paul Hopkins, Senior Partner.



(LtoR): The Honourable Paul de Jersey AC Chief Justice of Queensland, Paul Hopkins - Senior Partner Carter Newell Lawyers, Hon Kerry Shine MP Attorney-General of Queensland, Megan Mahon QLS President

Staff news...

Leah Mangano has been elevated to Associate within Carter Newell's Corporate & Commercial team.

Leah specialises in both resources and property law and has recently participated in a short-term secondment in an in-house legal advisory role within a national publicly listed petroleum producer.

Carter Newell congratulates Leah on this achievement.



Upcoming presentation...

Justin McInally, Senior Associate will be presenting at the LexisNexis Queensland: 6th Annual Conveyancing Forum on 12th May at the Marriot Hotel. Justin's topic, *Practical guide to making your contract enforceable*, will cover:

- 10 tips and tactics for conducting a commercial conveyance
- What you need to do to meet your disclosure obligations under the Environment and Protection Act
- Differences when dealing with vacant land and notices required by PAMDA
- Having the right checklist of what you need to consider for starting, enforcing and ending a contact

For further information visit <http://www.lexisnexis.com.au> or contact Catherine Humphery, chumphery@carternewell.com.



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