

DUTIES LEGISLATION AMENDMENT BILL 2013

EXPLANATORY MEMORANDUM

This Bill contains amendments to unwind the scheduled abolition of transfer duty on non-real business assets such as business licences, goodwill and intellectual property. The abolition will be revisited when its cost can be better accommodated in the State's Budget.

Western Australia previously undertook to abolish this duty from 1 July 2010, as part of the GST agreement between the Commonwealth and all States and Territories. This abolition was legislated for in the *Duties Legislation Amendment Act 2008*.

However, in 2009, the impact of the global financial crisis compelled the State Government to defer the abolition date by three years to 1 July 2013. This was given effect in the *Revenue Laws Amendment Act 2010*.

In light of the current financial position facing the State, this Bill seeks to retain transfer duty on non-real business assets while at the same time retaining the concessional rate of transfer duty that applies to certain small business and principal place of residence transactions valued below \$200,000.

It is expected that these amendments will improve the State's finances by around \$120 million per year.

Transfer duty on non-real business assets is the only State tax identified in the GST agreement with the Commonwealth that has yet to be abolished in Western Australia.

Other jurisdictions, including New South Wales, Queensland, South Australia and the Northern Territory have also deferred the abolition of this duty in light of a generally constrained fiscal environment, low growth in the GST nationally, and/or other funding priorities.

If this Bill receives Royal Assent before 1 July 2013, it will amend the *Duties Legislation Amendment Act 2008* and the *Duties Act 2008*, to repeal the provisions that would otherwise abolish duty on non-real business assets.

If the Bill is assented to on or after 1 July 2013, the original provisions imposing duty on non-real business assets will be re-enacted and transitional provisions will apply to dutiable transactions over business assets that were entered into on or after 1 July 2013 and before the commencement of the re-enacted provisions.

Part 1 – Preliminary

Clause 1: Short title

This clause provides that the short title of this Act is the *Duties Legislation Amendment Act 2013*

Clause 2: Commencement

This clause provides the commencement dates for the Act

Subclause (1) provides the dates that the different Parts of the Bill come into operation

Paragraph (a) provides that Part 1 of this Act comes into operation on the day the Act receives the Royal Assent

Paragraph (b) provides that, if the Royal Assent is received prior to 1 July 2013, Part 2 of this Act comes into operation on the date that the Royal Assent is received. This will result in duty on Western Australian business assets continuing to be imposed on and after 1 July 2013

Paragraph (c) provides that, if the Royal Assent is received on or after 1 July 2013, Part 3 comes into operation on the day after the Royal Assent is received. In this case the transitional provisions in clause 18 will apply duty to dutiable transactions over business assets entered into on or after 1 July 2013 and before the commencement of Part 3

Subclause (2) provides that if the Royal Assent is not received before 1 July 2013, Part 2 will not operate. It also provides that if the Royal Assent is received prior to 1 July 2013, Part 3 will not operate

Part 2 – Royal Assent before 1 July 2013

Division 1 – *Duties Legislation Amendment Act 2008* amended

Clause 3: Act amended

This clause provides that the amendments in this Division are to the *Duties Legislation Amendment Act 2008*

Clause 4: Section 2 amended

Section 2(c) of the *Duties Legislation Amendment Act 2008* provides that Part 2 Division 2 Subdivision 3 of that Act, which is the Division repealing the provisions of the *Duties Act 2008* (Duties Act) relating to non-real business assets, comes into operation on 1 July 2013

This clause deletes section 2(c) of the *Duties Legislation Amendment Act 2008*, to prevent the repeal of the relevant provisions taking effect on 1 July 2013. Clause 5 of this Bill deletes Part 2 Division 2 Subdivision 3 of the *Duties Legislation Amendment Act 2008*

Clause 5: Part 2 Division 2 Subdivision 3 deleted

Part 2 Division 2 Subdivision 3 of the *Duties Legislation Amendment Act 2008* amends the provisions of the Duties Act that relate to non-real business assets to abolish transfer duty on transactions over non-real business assets

This clause deletes Part 2 Division 2 Subdivision 3 of the *Duties Legislation Amendment Act 2008*. The effect of this clause and clause 7 is that transfer duty will continue to be imposed on dutiable transactions over non-real business assets under the Duties Act

Division 2 – Duties Act 2008 amended

Clause 6: Act amended

This clause provides that the amendments in this Division are to the *Duties Act 2008*

Clause 7: Schedule 3 Division 3 deleted

Schedule 3 Division 3 of the Duties Act contains transitional provisions associated with the abolition of transfer duty on non-real business assets, which was to have taken effect on 1 July 2013

This clause deletes these transitional provisions as duty will continue to be imposed on non-real business assets.

Part 3 – Royal Assent on or after 1 July 2013

Clause 8: Act amended

This clause provides that the amendments in this Part are to the *Duties Act 2008*

Clause 9: Section 9 amended

Section 9 sets out definitions of terms used in Chapter 2, the Transfer Duty Chapter, or signposts to definitions located in other sections

Clause 9 reinstates the definitions of a 'Western Australian business' and a 'Western Australian business asset'. The definitions are self-explanatory.

Clause 10: Section 15 amended

Section 15 defines dutiable property. Before 1 July 2013, a Western Australian business asset is dutiable property

This clause reinstates a Western Australian business asset as dutiable property

Clause 11: Section 17 amended

Section 17 relates to section 11(1)(f), which specifies that an acquisition of new dutiable property on its creation, grant or issue, is a dutiable transaction. Section 17 sets out what constitutes new dutiable property, and what is excluded from being new dutiable property.

This clause reinstates paragraph (c) in section 17(1), which provides that certain Western Australian business assets are new dutiable property. The business assets specified in this paragraph (being intellectual property, a restraint of trade arrangement and a business identity) represent only a limited class of the business assets included in the definition of that term set out in section 79. Transactions involving these business assets will only be dutiable in the circumstances set out in section 81(4) and (5).

Clause 12: Chapter 2 Part 5 Division 5 inserted

This clause reinstates Division 5 of Chapter 2 Part 5. This Division is to be deleted on 1 July 2013.

Section 79 defines terms that are used in this Division.

The definitions contained in the Bill are the same as are currently used in the Duties Act.

Section 80 deems an agreement to relinquish a business licence, or an agreement not to apply for a renewal of a business licence, so that it, or another business licence in respect of the same kind of activity, can be issued, granted or given to another person, to be an agreement for the transfer of a Western Australian business asset.

This is necessary as such an agreement may not otherwise be considered to be a dutiable transaction and could be used to avoid the duty that would otherwise be chargeable on an agreement for the transfer of a business asset.

Section 81 describes the circumstances in which particular transactions relating to certain Western Australian business assets are not dutiable transactions.

Subsection (1) of section 81 provides that a transfer, or an agreement for the transfer, of a business asset from a franchisor to a franchisee in accordance with a franchise arrangement is not a dutiable transaction when the franchise is first created. This does not affect the liability to duty of an agreement for the transfer, or a transfer of, an existing franchise arrangement from the franchisee to another person, including where certain actions have the same effect as a transfer. This may occur where a person relinquishes, or agrees not to extend, the franchise agreement so that another person can acquire the business assets comprised in a new franchise.

Subsection (2) provides that a transaction is not a dutiable transaction if the only dutiable property the subject of the transaction is intellectual property. This ensures that the acquisition of intellectual property by itself does not give rise to a transfer duty liability.

Subsection (3) provides that a transaction over intellectual property referred to in subsection (2) is a dutiable transaction if under section 37, it is aggregated with a dutiable transaction for another Western Australian business asset and treated as a single dutiable transaction.

Subsection (4) clarifies that an acquisition of new dutiable property that is a Western Australian business asset referred to in section 17(1)(c) (being intellectual property, a restraint of trade arrangement or a business identity) is not a dutiable transaction under section 11(1)(f) unless subsection (5) applies.

Subsection (5) of section 81 provides that the creation of intellectual property, a restraint of trade arrangement or a business identity will be an acquisition of new dutiable property for the purposes of section 11(1)(f) in the circumstances specified.

Those circumstances are where a person carries on a business (referred to as the 'first business') and intellectual property, a restraint of trade arrangement or a business identity that is related to the first business is created for the purpose of the carrying on of the first business or another business by another person. The creation of the intellectual property, restraint of trade arrangement or business identity will be an acquisition of new dutiable property by that other person.

Section 82 specifies how the dutiable value for certain transactions involving business assets is to be determined. It sets out the particular section that should apply in particular circumstances.

Paragraph (a) provides that the dutiable value of a dutiable transaction should be determined under section 83 where the business asset the subject of the transaction is a business licence under Commonwealth legislation, and the Western Australian business to which the business asset relates is the carrying out of an activity in Western Australia for gain or reward under that licence.

Paragraph (b) provides that the dutiable value of a dutiable transaction should be determined under section 84 where the business asset the subject of the transaction is a business licence under Western Australian legislation.

Paragraph (c) provides that the dutiable value of a dutiable transaction should be determined under section 85 or 86, depending on where the head office or principal place of business is located.

Paragraph (d) allows the Commissioner to determine the dutiable value of a dutiable transaction on another basis if it is considered that it is not appropriate to determine the dutiable value under sections 83, 84, 85 or 86.

Section 83 provides for the calculation of the dutiable value of a dutiable transaction for a business asset that is a business licence under Commonwealth legislation, and the Western Australian business to which the business asset relates is the carrying out of an activity in Western Australia for gain or reward under that licence.

The dutiable value is the greater of the value of the business licence so far as it authorises the carrying out of an activity in Western Australia, and the portion of the consideration for the transaction that relates to the carrying out of an activity in Western Australia under the authority of the business licence.

It should be noted that where the Western Australian business to which the business licence relates is the supply of commodities or the provision of services in Western Australia, the dutiable value is determined under section 85 or 86, as the case requires

Section 84 provides for the calculation of the dutiable value of a dutiable transaction for a business asset that is a business licence under Western Australian legislation

The dutiable value is

- the consideration for the dutiable transaction; or
- the unencumbered value of the business licence that is the subject of the dutiable transaction if.
 - there is no consideration for the transaction, or
 - the consideration cannot be ascertained, or
 - the unencumbered value is greater than the consideration

The unencumbered value of the property is calculated at the date liability to duty arises

Section 85 provides the formula for calculating the dutiable value of a dutiable transaction for a business asset where the principal place of business or head office of the business is situated in Western Australia. The effect of the formula is that it includes the value of overseas sales made by the business when calculating the dutiable value, but excludes the gross amount of commodities and services supplied to customers in States other than Western Australia

The formula uses the greater of the consideration for the transaction or the unencumbered value of the business assets the subject of the transaction

Section 86 provides the formula for calculating the dutiable value of a dutiable transaction for a business asset where neither the principal place of business nor the head office of the business is situated in Western Australia. This formula only takes into account commodities delivered and services provided by the business to customers in Western Australia as a proportion of all commodities delivered and services provided by the business

The formula uses the greater of the consideration for the transaction or the unencumbered value of the business assets the subject of the transaction

Clause 13: Section 136 inserted

This clause reinstates section 136 which provides that a dutiable transaction the subject of which is a business licence issued under the *Fish Resources Management Act 1994* is chargeable with nominal duty if the Commissioner is satisfied that there is no passing of a beneficial interest in the business licence

This provision accommodates the situation in the fishing industry, whereby licences are leased for the duration of a fishing season and then revert to the registered owner at the end of the season without any change in the beneficial interest in the licence

Clause 14: Chapter 2 Part 6 Division 4 inserted

This clause reinstates the concessional rate of duty for home and small business buyers, which was provided for in section 147 of the Duties Act and is to be deleted on 1 July 2013

Subsection (1) provides that a concessional transaction for the purposes of this section, is one where an instrument that effects or evidences the transaction, had it been first executed before 1 July 2008 (the commencement date of the Duties Act) would have been charged with duty under section 75AE of the *Stamp Act 1921* at the rates set out in item 4(5) of the Second Schedule to the Stamp Act.

The criteria for the concession, as set out in section 75AE of the Stamp Act, differ between residential or business property

In relation to residential property, the criteria which must be satisfied are as follows:

- (a) the property the subject of the dutiable transaction includes a dwelling house,
- (b) the value of the property does not exceed \$200,000;
- (c) the purchaser or transferee satisfies the definition of an 'eligible purchaser' or a combination of eligible purchasers and government bodies. An eligible purchaser means
 - (i) an individual (that is, a natural person) who occupies or will occupy the property as his or her principal place of residence for an indefinite period, or
 - (ii) an individual who is an agent, trustee or otherwise acquiring property on behalf of one or more disabled beneficiaries, if the beneficiary occupies or will occupy the property as his or her principal place of residence for an indefinite period, and
- (d) the property has not been received as a gift.

In contrast to the concession for residential property, the concession for business property is not limited to natural persons and is available to a company and trustees of trusts. The criteria which must be satisfied are as follows.

- (a) the business property includes a business undertaking,
- (b) the value of the dutiable property does not exceed \$200,000;
- (c) the purchaser or transferee satisfies the definition of an 'eligible purchaser' An eligible purchaser is a person who
 - (i) is not a government body,
 - (ii) after acquiring the property, will carry on the business undertaking that is or is part of the property, and
 - (iii) intends to carry on that business for an indefinite period,
- (d) the purchasers are all eligible purchasers, and
- (e) the property has not been received as a gift

Subsection (2) provides that duty is chargeable on concessional transactions at the concessional rates provided for in Schedule 2

Subsection (3) addresses problems that may arise with the interaction between the concession under this Division and the residential concession in Division 4A

Subsection (3) specifies that if a dutiable transaction is a concessional transaction under Division 4A and Division 4, the taxpayer may choose which concession is to apply. The Commissioner may then, with the consent or at the request of the taxpayer, treat an application for assessment or reassessment under each Division as an application under the alternative Division

While the relief under this concession is available in wider circumstances, the concession under Division 4 (which links back to section 75AE of the Stamp Act) will be more beneficial to taxpayers where the value of the principal place of residence purchased is less than \$116,000

Clause 15: Section 277 inserted

This clause reinstates section 277 which prohibits a person from performing certain functions involving business licences associated with registration, unless the dutiable transaction relating to the business licence is duty endorsed

Subsection (1) provides that the term 'business licence' has the same meaning as it has in the Transfer Duty Chapter It includes a licence, permit or authority which is granted, issued or given under a Western Australian or Commonwealth law and which is required by that law to be held by a person carrying out an activity for gain or reward

Subsection (2) prohibits a person from giving effect to, receiving, accepting, approving or recognising a dutiable transaction the subject of which is a business licence under a written law, or registering or recording the dutiable transaction or transaction record for the dutiable transaction, unless the dutiable transaction has been duty endorsed or an instrument effecting the dutiable transaction has been lodged for duty endorsement. Contravention of this subsection is an offence, which carries a maximum penalty of \$20,000. This subsection prohibits, for example, the receipt of certain applications involving business licences unless the dutiable transaction for the business licence has been duty endorsed.

Subsection (3) ensures that if a person is charged with an offence under subsection (2), they can plead as a defence that they did not know, and could not reasonably be expected to have known, that the transaction involving the business licence was a dutiable transaction, that the transaction was not duty endorsed or that an instrument effecting the transaction had not been lodged for duty endorsement.

Clause 16: Schedule 2 Division 2 amended

This Division sets out the concessional rates of duty that apply to concessional transactions in the Transfer Duty Chapter.

This clause reinstates the concessional rate of duty that applies to certain residential or business transactions set out in Chapter 2 Part 6 Division 4.

Clause 17: Schedule 3 Division 3 amended

Schedule 3 Division 3 of the Duties Act sets out the transitional arrangements in relation to the abolition of duty on non-real business assets on 1 July 2013.

Clause 30(3) of Schedule 3 is an anti-avoidance provision that was inserted to ensure that transactions that took place after the abolition of duty on non-real business assets on 1 July 2013, would still be liable for duty as if they had taken place prior to the abolition date if the sole or principal purpose of postponing the transaction was the avoidance of duty.

This clause deletes clause 30(3) as it is proposed to retain Western Australian business assets as dutiable property.

Clause 18: Schedule 3 Division 6 inserted

This clause inserts new clause 36, which provides transitional provisions relating to the treatment of transactions over non-real business assets that occur on or after 1 July 2013 and before Part 3 of the Bill commences.

Subclause (1) provides definitions for 'amending provisions' and 'commencement day'

The term 'amending provisions' means the provisions in the *Duties Legislation Amendment Act 2008* that provide for the abolition of duty on non-real business assets.

The term 'commencement day' means the date on which the *Duties Legislation Amendment Act 2013* Part 3 comes into operation

Subclause (2) provides that this clause only applies to transactions relating to business assets that occur on or after 1 July 2013 and before 'commencement day'.

Subclause (3) provides that if a transaction referred to in subclause (2) is a dutiable transaction, the person liable for duty on the transaction is liable as if the 'amending provisions' had not come into operation

For example, a person purchased land and Western Australian business assets on 15 July 2013 and this Bill had not yet received the Royal Assent. The purchase of the land would have at all times been dutiable. However, on 'commencement day' the business assets component of the transaction is liable to duty

If an assessment had been made in respect of the land component of the transaction, a reassessment of the transaction will be made to reflect that the business assets are also dutiable property, because the transaction is liable for duty as if the 'amending provisions' had not come into operation. The *Taxation Administration Act 2003* provides the powers for the Commissioner of State Revenue to make reassessments

Subclause (4) provides that if a transaction referred to in subclause (2) is not a dutiable transaction because the 'amending provisions' came into operation, the person who would have been liable for duty in respect of the transaction is liable to duty as if the 'amending provisions' had not come into operation

For example, DEF Pty Ltd purchased Western Australian business assets on 15 July 2013. If the *Duties Legislation Amendment Act 2013* receives the Royal Assent on 1 August 2013, DEF Pty Ltd becomes liable to duty on the transaction because of the operation of this subclause.

Subclause (5) provides that a liability for duty under clause 36 arises on 'commencement day'.

The person who is liable for duty on a dutiable transaction must, within two months of a liability to duty arising, lodge with the Commissioner of State Revenue a transaction record

Following on from the example used in subclause (4), if 'commencement day' was 1 August 2013, DEF Pty Ltd must lodge a transaction record with the Commissioner by 1 October 2013