

2014

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

DUTIES (COMMERCIAL LEASES) AMENDMENT BILL 2014

EXPLANATORY STATEMENT

DUTIES (COMMERCIAL LEASES) AMENDMENT BILL 2014

Summary

The *Duties (Commercial Leases) Amendment Bill 2014* amends the *Duties Act 1999*.

Overview

In the ACT, conveyance duty on short-term commercial leases (less than 30 years) was abolished, effective from 1 July 2009. However, conveyance duty continues to be charged on long-term commercial leases by the *Duties Act 1999* (the Duties Act). A lease term of 30 years or more is considered to be a de facto transfer of land; the provisions are thus intended as an anti-avoidance measure.

The Duties Act charges duty on a commercial lease or franchise arrangement with a term granted for longer than 30 years, or an initial term of 30 years or less, but with an option/s for renewal that would, taken together with the initial term, exceed 30 years. In addition, if a lease is granted for less than 30 years but is subsequently extended to exceed 30 years, a duty liability could be triggered.

It has become evident that these provisions are resulting in conveyance duty being levied on genuine commercial arrangements where the term of the commercial lease, or a combination of several consecutive lease terms, extends over 30 years, yet there is no intention of duty avoidance.

The long-term lease duty provisions in the Duties Act do not work effectively or as intended, and negatively impact on the Territory's current and potential commercial leasing agreements. The current provisions therefore create a lack of certainty for taxpayers and the local business community.

In all other jurisdictions there is no defined length of time for the term of the lease; the de facto transfer of land issue is addressed by levying duty on a 'premium' (or consideration other than rent) paid above the market rent value for the grant or transfer of a lease. With this Bill, the ACT is adopting this premium approach, while repealing duty in relation to long-term lease and franchise arrangements, purely as a result of the term.

A premium is an indication that a de facto transfer of land may be occurring as part of the arrangement. These provisions ensure necessary anti-avoidance measures are maintained.

The amendments in this Bill introduce a premium-based method for assessing duty on commercial leases, being leases that have only a commercial purpose, or more than one purpose including commercial purposes. Examples of commercial activities include (but are not limited to) retail outlets, supermarkets, department stores, service stations and commercial accommodation, such as a hotel. Residential or Primary production leases are excluded from this duty.

The dutiable value of a dutiable transaction that is the transfer of a commercial lease for which a premium is paid is the amount of the premium. However, if the lease is granted for more than one purpose including commercial purposes, the dutiable value is determined as the percentage of the land the subject of the lease that may be used for commercial purposes.

Any duty liability will therefore only apply to the commercial aspect of a lease transaction, and not, for example, any residential component.

Duty will be levied once the premium amount exceeds an appropriate threshold amount. The Bill provides that the Commissioner for ACT Revenue may determine the threshold value via disallowable instrument. This threshold will ensure that where a minor premium is paid for a lease (for example, in a competitive market) the transaction will not become liable for duty. The threshold is important in relation to eliminating a duty liability for commercial leasing arrangements where there is no intent to avoid conveyance duty. Where the threshold has been exceeded, duty is payable on 100 per cent of the premium and not just the component above the threshold.

The Bill stipulates that the Commissioner may require a person who is liable to pay duty under these provisions to provide a declaration by a competent valuer, or other evidence, of the market rent for the lease. In this way, the Commissioner may ascertain if a premium value is involved in the leasing arrangement.

These amendments will prevent the imposition of conveyance duty on Canberra's long standing businesses (both large and small), conducting successful and long-term commercial leasing arrangements. It is also possible that businesses who have previously considered investing in lengthy commercial leasing arrangements in the ACT will now see Canberra as a more attractive taxation (and thus business) environment.

The amended provisions will align the ACT with the approach taken to commercial leases in other jurisdictions and will provide greater certainty to the Territory's business community.

The Bill was developed in consultation with the ACT business community and other key stakeholders.

Commencement Date

The amendments will be effective 14 days after notification.

Details of the Duties (Commercial Leases) Amendment Bill 2014

Clause 1 – Name of Act

This is a technical clause that provides the title of the Act. The name of the Act is the *Duties (Commercial Leases) Amendment Bill 2014*.

Clause 2 – Commencement

The Act commences 14 days after notification.

Clause 3 – Legislation amended

This is a technical clause stating that the legislation being amended is the *Duties Act 1999*.

Clause 4 – Definitions – chapter 2 Section 6, new definitions

This clause provides definitions for:

a commercial lease, meaning a lease granted for commercial purposes only; or more than one purpose including commercial purposes.

commercial purposes does not include residential purposes or the purposes of primary production.

market rent, in relation to a lease, meaning the rent that would be charged by the lessor if the land the subject of the lease was leased by a willing lessor to a willing lessee—

- (a) dealing with each other at arm's length; and
- (b) each of whom had acted knowledgeably, sensibly and without compulsion.

premium, in relation to a commercial lease, meaning any consideration (being the amount of monetary consideration or the value of a non-monetary consideration) that is paid or agreed to be paid in relation to the lease, other than rent reserved.

primary production means—

- (a) production resulting directly from—
 - (i) cultivation of land; or
 - (ii) keeping animals for their sale, their bodily produce or natural increase; or
 - (iii) fishing operations; or
 - (iv) forest operations; and
- (b) the manufacture of dairy produce by the person who produced the raw material used in that manufacture.

rent reserved, in relation to a commercial lease, meaning—

- (a) the rent paid or payable during the term of the lease that is market rent; and
- (b) any reasonable amount paid or payable for the right to use the land under the lease.

Clause 5 – New Section 6A

This clause provides a new section for the meaning of a commercial lease with premium. *Commercial lease with premium* means a commercial lease in relation to which there is a premium that is more than the amount (if any) determined by the commissioner. The clause also states that a determination is a disallowable instrument.

Clause 6 – Imposition of duty on certain transactions concerning dutiable property
Section 7 (1) (b) (iv) and (v)

This clause removes long-term lease and franchise arrangements from being liable for duty under Section 7 of the Act. The existing provisions have been replaced with ‘a grant of a commercial lease with premium’ as a transaction for which duty is imposed, under Section 7 (1) (b) (iv).

Clause 7 – Imposition of duty on dutiable transactions that are not transfers
Table 8, items 4 and 5

Under this clause items 4 and 5 from Table 8 have been replaced with a singular item that allows for the imposition of duty on the grant of a commercial lease with a premium. It also provides that the lessee is liable to pay the duty, as the lessee will be the party that pays the premium for a lease.

Clause 8 – Dutiable property
Section 10 (1) (d) to (g)

A commercial lease with premium is added to dutiable property and all forms of long-term lease and franchise arrangements as dutiable property have been omitted.

Clause 9 – Section 10 (1) (k)

This clause is a technical amendment that removes references to long-term leases in respect of dutiable property.

Clause 10 – Section 10 (2)

This is a technical amendment that removes a provision relating to associated parties of a long-term lease transaction.

Clause 11 – Section 10 (3), definition of *intellectual property*, paragraph (b)

This is a technical amendment that removes franchise arrangements from the definition of intellectual property.

Clause 12 – No double duty
Section 17 (7) and (8)

This clause removes the provisions regarding no double duty in relation to long-term leases, where any duty paid under chapter 5 on the lease instrument is reduced from the duty liability on the grant of a long-term lease.

Clause 13 – What is the *dutiable value* of dutiable property?
Section 20 (1) (b) (i)

This is a technical amendment that removes long-term leases from the determination of the dutiable value of dutiable property.

Clause 14 – Section 20 (3)

This clause substitutes the existing provision under section 20 (3) regarding the dutiable value of long-term leases. The new provision provides that the dutiable value of a dutiable transaction that is the grant or transfer of a commercial lease with premium is the amount of the premium in relation to the lease (if the premium exceeds the determined threshold).

Section 20 (3A) is used if a commercial lease is granted for more than one purpose including commercial purposes, and provides the calculation method used for determining the dutiable value in this instance. The dutiable value is calculated with reference to the percentage of the land the subject of the lease being used for a commercial purpose.

Clause 15 – Transfers etc – long-term leases for residential purposes Section 73D

This clause omits section 73D. This section provided that long-term leases for residential purposes were not dutiable. Section 73D is no longer required as a result of this Bill, which removes reference to all long-term leases.

Clause 16 – New section 251A

This clause inserts section 251A which provides the method for how market rent will be assessed on a commercial lease with a premium. Under this section the commissioner may require the liable party to provide a declaration by a competent valuer of the market rent of the subject lease. The commissioner may assess duty by taking into account other evidence provided and the commissioner can have the market rent calculated if the commissioner is not satisfied with the information provided (the commissioner may recover the cost of having the market rent calculated).

Clause 17 – Dictionary, new definitions

Signpost definitions of a *commercial lease* and *commercial purposes* are added by this clause (see clause 4). *Commercial lease with premium* is defined under clause 5.

Clause 18 – Dictionary

This clause omits the definitions of *franchise*, *franchise arrangement*, *franchisee* and *long-term lease* which are no longer used in the Act.

Clause 19 – Dictionary, new definition of *market rent*

Clause 19 provides new signpost definitions for *market rent* (with a definition provided at clause 4).

Clause 20 – Dictionary, definition of *premium*

Clause 20 provides an additional signpost definition for *premium* in respect to transactions concerning dutiable property.

Clause 21 – Dictionary, new definitions of *primary production* and *rent reserved*

Signpost definitions are provided for *primary production* and *rent reserved*. These clauses are defined under clause 4.