



COMMISSIONER'S PRACTICE DA 11.1

DUTIES – DUTIABLE TRANSACTIONS INVOLVING A UNIT ENTITLEMENT UNDER THE *FISH RESOURCES MANAGEMENT ACT 1994* - CLAIM OF NO PASSING OF A BENEFICIAL INTEREST

SUPERSEDED

Commissioner's Practice History

Commissioner's Practice	Issued	Dates of effect	
		From	To
DA 11.0	1 July 2008	1 July 2008	7 November 2013
DA 11.1	8 November 2013	8 November 2013	26 May 2016

This Commissioner's practice describes the transfer duty treatment of a dutiable transaction involving a unit entitlement under the *Fish Resources Management Act 1994* ('FRMA'), which it is claimed does not result in the passing of a beneficial interest.

Background

Section 79 of the *Duties Act 2008* ('Duties Act') defines a business licence as meaning a licence, permit or authority which is issued, granted or given under:

- a written law and which is required by a written law to be held by a person carrying out an activity for gain or reward; or
- a law of the Commonwealth and which is required by a law of the Commonwealth to be held by a person carrying out an activity in Western Australia for gain or reward.

Transfer duty is chargeable on a dutiable transaction involving a business licence. A business licence includes an authorisation or entitlement under the FRMA.

Section 136 of the Duties Act provides that nominal duty is chargeable on a dutiable transaction, the subject of which is a business licence held under the FRMA, if the Commissioner is satisfied that the transaction has not, and will not, result in the passing of a beneficial interest in the business licence.

Section 11(2)(e) of the Duties Act provides that a transaction prescribed as an excluded transaction for the purposes of that section is not a dutiable transaction.

Regulation 4(1)(c) of the *Duties Regulations 2008* prescribes that a temporary transfer for the whole or part of an entitlement under an authorisation in accordance with section 141 of the FRMA is an excluded transaction under section 11(2)(e) of the Duties Act, unless the transfer gives rise to the transfer of a beneficial interest in the authorisation. This applies to a temporary transfer entered into on or after 20 September 2013.

Section 22 of the Duties Act provides that the person liable to pay duty on a dutiable transaction must make a transfer duty statement in the approved form within the time provided under section 23 of the Duties Act for lodging the statement with the Commissioner unless the transaction is effected, or evidenced, by an instrument in hard copy form.

Fish Resources Management Act 1994

The FRMA is administered by the Department of Fisheries and regulates the management of commercial fisheries.

In accordance with the FRMA:

- an *authorisation* means a permit or licence;
- a *managed fishery licence* ('MFL') authorises a person to engage in a fishing activity;
- an *entitlement* is an entitlement that a person has from time to time under an MFL. The entitlement of the licence is the extent to which the licence authorises a person to engage in the fishing activity;
- an entitlement is expressed in terms of a number of units. The entitlement to fishing under a licence is limited to the total value of units;
- a *unit* in relation to an entitlement means a unit as defined from time to time in the relevant management plan; and
- a *security interest* in relation to an authorisation or aquaculture lease means an interest in the authorisation or aquaculture lease (however arising) which secures payment of a debt or other pecuniary obligation or the performance of any other obligation.

Under the FRMA, an authorisation and a unit entitlement may be transferred on a permanent basis. A unit entitlement may also be transferred for a limited period.

The following Department of Fisheries forms are used to effect a transfer:

- *T1 Application for the Transfer of an Authorisation* - used for a permanent transfer of an authorisation as provided in section 140(1) of the FRMA:
 - an authorisation of an MFL to another person; or
 - part of an entitlement under an authorisation to another authorisation;

- *T2 Application for the Transfer of Part of an Entitlement* - used for a permanent transfer of part of a unit entitlement under an authorisation to another authorisation holder in accordance with section 140 of the FRMA;
- *T3 Application for the Temporary Transfer of Part of an Entitlement* - used for a transfer of the whole or part of a unit entitlement under an authorisation to another authorisation holder for a limited period in accordance with section 141 of the FRMA; and
- *V2 Application for the Variation of an Authorisation* - used for the variation of an authorisation in accordance with section 142 of the FRMA.

Unit entitlements must be conferred under an MFL. It is not unusual for an MFL holder to enter into an agreement relating to the beneficial interest in part or all of the unit entitlement conferred by an MFL. The Department of Fisheries records only the holder of the MFL, rather than any person claiming to have any beneficial interest in the unit entitlement. A person claiming a beneficial interest in the unit entitlement of an MFL may protect their interest by recording a security interest against the MFL.

Where the holder of a unit entitlement registered against an MFL wishes to lease their unit entitlement for one season to a person on another MFL, a T3 form can be used.

However, instances arise where an arrangement is intended to continue for more than one season. A T3 form cannot be used to accommodate the transfer of unit entitlements, as the use of this form will only effect a temporary transfer for one season. In such circumstances, a T2 form may be used.

Commissioner's Practice

1. A lease agreement whereby a unit entitlement is leased to another authorisation holder for one or more seasons is not itself subject to duty under the Duties Act. It is the transfer of the unit entitlement to the lessee pursuant to the terms of the lease that attracts transfer duty. As that transfer is not effected by an instrument in hard copy form, a [transfer duty statement](#) is required to be made in all cases.

Transfers using the T3 Form

2. These transfers only contemplate a temporary arrangement for the current season, as the unit entitlement effectively remains with the original holder from the end of the season. Where a transfer does not result in the transfer of a beneficial interest in the authorisation, the transfer will be an excluded transaction under section 11(2)(e) of the Duties Act and no documents are required to be lodged with the Commissioner.
3. If the transfer is part of an arrangement to pass a beneficial interest in the authorisation, the transfer does constitute a dutiable transaction and a [transfer duty statement](#) must be lodged with the Commissioner together with details of the arrangement effecting the change in the beneficial interest.

Example 1

Person A is an authorisation holder and agrees to enter into a temporary transfer of part of an entitlement under his authorisation to another authorisation held by Person B for the duration of the fishing season. At the end of the fishing season Person A's authorisation is renewed, and the whole of the entitlement is conferred against Person A's MFL for the new season.

Persons A and B agree to repeat this arrangement for the following six fishing seasons and use a T3 application to facilitate each further temporary transfer of entitlements between their respective authorisations.

As this arrangement evidences a current commercial practice it is not considered to be an arrangement where a beneficial interest in the authorisation is passed to Person B. Accordingly, each of the temporary transfers is considered to be an excluded transaction under Duties Regulation 4(1)(c) and is not required to be lodged with the Commissioner for assessment.

Example 2

Person A is an authorisation holder and is seeking to dispose of part of his entitlement under his authorisation to another authorisation holder. Person B is seeking to acquire further units to be held under his authorisation.

Person A agrees to sell 50 units to Person B.

Persons A and B agree that a T3 application will be used to facilitate the temporary transfer of the units at the commencement of each fishing season on the understanding that should Person B direct Person A to do so, a T1 application will be completed to effect the permanent transfer.

In this example the initial T3 application between Person A and Person B would be subject to transfer duty at the general rate of duty as it is considered by the Commissioner to be an arrangement that passes a beneficial interest in the authorisation.

Example 3

Person A is an authorisation holder and is seeking to dispose of part of his entitlement under his authorisation to another authorisation holder. Person B is seeking to acquire further units to be held under his authorisation.

Person A agrees to sell 50 units to Person B.

Persons A and B agree that a T3 application will be used to facilitate the temporary transfer of units at the commencement of each fishing season for an indeterminate period until Person B directs Person A to effect a permanent transfer of the units.

Person B enters into an agreement to on-sell the 50 units to Person C. Person B then directs Person A to enter into a T1 application to transfer the 50 units to Person C.

In this example the initial temporary transfer between Person A and Person B would be subject to transfer duty at the general rate of duty as it is considered by the Commissioner to be an arrangement that passes a beneficial interest in the authorisation.

The transfer from Person A to Person C at the direction of Person B would also be subject to transfer duty at the general rate of duty.

Transfers using the T2 Form Pursuant to a Written Lease Agreement

4. Where the Commissioner is satisfied that a T2 form is being used solely to give effect to a lease of a unit entitlement to another authorisation holder rather than to effect a permanent transfer, and that there is no passing of a beneficial interest in the unit entitlement, the transfer duty statement will be charged with nominal duty of \$20 under section 136 of the Duties Act.
5. At the expiration of the lease, a further transfer duty statement must be provided in respect of the transfer of the unit entitlement back to the original holder.

Transfer using the T2 Form in the Absence of a Written Lease Agreement

6. Sufficient documentary evidence must be provided to satisfy the Commissioner that the transaction has not, and will not, result in a passing of a beneficial interest in the unit entitlement.
7. Where the evidence provided does not satisfy the Commissioner in accordance with paragraph 5, the transfer duty statement will be assessed with transfer duty based on the dutiable value of the transaction.

Date of Effect

This Commissioner's Practice takes effect from 8 November 2013.

Bill Sullivan
COMMISSIONER OF STATE REVENUE

8 November 2013

SUPERSEDED