



COMMISSIONER'S PRACTICE DA 11.2

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

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 a licence, permit or authority which is issued, granted or given under:

- (a) 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
- (b) 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 which includes an authorisation or entitlement under the FRMA.

Under section 136 of the Duties Act, nominal duty is chargeable on the dutiable transaction of a business licence held under the FRMA if the Commissioner is satisfied 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 transfer¹ of the whole or part of an entitlement under an authorisation in accordance with section 141 of the FRMA is an excluded transaction unless the transfer gives rise to the transfer of a beneficial interest in the authorisation.

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

¹ This applies to a temporary transfer entered into on or after 20 September 2013.

Fish Resources Management Act

The FRMA, administered by the Department of Fisheries, 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 section 140 of 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 under section 141 of that Act.

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

- *T1 Application for the Transfer of an Authorisation* - used for a transfer of an authorisation to another person as provided in section 140(1)(a) of the FRMA;
- *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(1)(b) of the FRMA; and
- *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.

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.

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. Where a unit entitlement is leased to another authorisation holder for one or more seasons, the transfer of the unit entitlement to the lessee pursuant to the terms of the lease agreement is subject to transfer duty. For transfers that are not effected by an instrument in hard copy form, a [transfer duty statement](#) must be completed.

Transfers using the T3 Form

2. These transfers relate to a temporary arrangement for the current season as the unit entitlement effectively remains with the original holder from the end of the season.
 - 2.1 Where a transfer does not result in the transfer of a beneficial interest in the entitlement, 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.
 - 2.2 If the transfer is part of an arrangement to pass a beneficial interest in the entitlement, the transfer is 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

For six fishing seasons, Person A uses T3 forms to enter into a temporary transfer of part of an entitlement under their authorisation to another authorisation held by Person B for the duration of each fishing season. At the end of each fishing season the temporary transfer ceases and the whole of the entitlement is conferred back against Person A's MFL for the new season. A new T3 form is completed at the commencement of each season.

This arrangement evidences a current commercial practice in which a beneficial interest in the authorisation is not 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 agrees to sell 50 units of his entitlement under his authorisation to Person B.

Persons A and B agree that, while a T3 form will be used to temporarily transfer the units at the commencement of each fishing season, a T1 form will be completed to effect the permanent transfer if Person B directs Person A to do so.

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

Example 3

Person A agrees to sell 50 units of his entitlement under his authorisation to Person B.

Persons A and B agree that a T3 form will be used to temporarily transfer the units at the commencement of each fishing season for an indeterminate period until Person B directs Person A to permanently transfer the units.

Person B enters into an agreement to on-sell the 50 units to Person C and instructs Person A to complete a T1 form to transfer the 50 units directly to Person C.

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

In addition, 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

3. Where a T2 form is used pursuant to a written lease agreement:
 - 3.1 if the Commissioner is satisfied the 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 there is no passing of a beneficial interest in the unit entitlement, the transfer will be charged with nominal duty under section 136 of the Duties Act; and
 - 3.2 at the expiration of the lease, another transfer duty statement must be provided in respect of the transfer of the unit entitlement back to the original holder.

4. Where a T2 form is used in the absence of a written lease agreement:
 - 4.1 sufficient documentary evidence must be provided to satisfy the Commissioner the transaction has not, and will not, result in a passing of a beneficial interest in the unit entitlement; and
 - 4.2 where the evidence provided does not satisfy the Commissioner in accordance with paragraph 4.1, 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 27 May 2016.

Nicki Suchenia
 COMMISSIONER OF STATE REVENUE
 27 May 2016

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
DA 11.2	27 May 2016	27 May 2016	Current