

## Legal Practitioners' Liability Committee

### DUTY AND SUB-SALES: NEW APPROACHES, NEW RISKS

#### Introduction

The *State Taxation Acts (General Amendment) Act 2005* introduced a new Part 4A into Chapter 2 of the *Duties Act 2000* ("Act"). The new part ("new provisions") commenced on 29 June 2005 and replaces section 31 ("old provisions").

#### Old provisions: Section 31

Under the old provisions, where the vendor agreed to transfer land to a named person under a contract of sale and the vendor transferred the land to a different person, the transfer was treated as a "sub-sale". The transfer was liable to duty as two distinct dutiable transactions, **unless** one of the specified exemptions applied.

These exemptions involved strict requirements which were literally interpreted. Claims were received by the LPLC because of a failure by practitioners to ensure compliance with these requirements, resulting in duty being imposed on both the named purchaser and the ultimate transferee despite what was intended to be a single purchase of land.

In essence, the old provisions provided for "double duty" unless the transaction fell squarely within an exemption.

#### New provisions: Part 4A

The new provisions turn this approach on its head - transactions involving a party who is not the initial purchaser taking an interest in land do **not** attract additional duty unless the transactions are of a certain type.

The following three transactions will be treated as sub-sales, because they reflect a dutiable commercial arrangement:

1. Transfers involving *additional consideration*; or
2. Transfers resulting from *land developments*; or
3. Transfers resulting from *options*.

#### *Additional consideration*

Where:

- the vendor agrees to transfer land to a named person ("first purchaser") under a contract of sale; and
- another person ("subsequent purchaser") obtains a right to take a transfer of the land ("transfer right"); and
- the subsequent purchaser or an associate pays additional consideration for that right; and
- the vendor transfers the land to the subsequent purchaser

the transfer is treated as a dutiable “sub-sale”. It is immaterial whether the subsequent purchaser obtains the transfer right by assignment, novation, nomination or some other means or as part of a chain of subsequent purchaser transactions.

Additional duty will only be levied under the new provisions where the subsequent purchaser pays or is liable to pay more consideration than the first purchaser under the contract of sale.

Separate duty will be levied on the first purchaser on the dutiable value of the contract of sale (as if it had been completed) **and** on the subsequent purchaser on the **whole** dutiable value of the subsequent transaction - not just on the value of the additional consideration.

“Additional consideration” is the amount of monetary consideration (or the value of non-monetary consideration) that exceeds the consideration given or to be given to the vendor under the contract of sale. Certain defined costs are not included as additional consideration (for example, legal costs, selling agents’ fees and survey and valuation fees) as they represent reimbursement of the costs of on-sale.

If there is a transfer right obtained from a subsequent purchaser by a further subsequent purchaser, the rules need to be applied in each case to each subsequent purchaser.

**You should carefully consider the new provisions to ensure your clients do not inadvertently enter into transactions that may involve (directly or indirectly) giving additional monetary or non-monetary consideration and, hence, incur additional duty.**

### *Land developments*

Additional duty will be levied where there is a subsequent purchaser and land development (as defined) occurs **between** signing the contract of sale and transfer of the land. Duty is levied on both the dutiable value of the contract of sale (usually the consideration stated in the contract) and the dutiable value of the subsequent transaction (being the unencumbered value of the land as improved).

“Land development” is defined broadly and includes:

- preparing a plan of subdivision or taking steps to have it registered;
- applying for or obtaining a planning permit;
- applying for or obtaining a building permit or approval;
- doing anything on the land for which a building permit or approval would be required; and
- developing or changing the land in any way which would increase its value.

The new provision is very broad in its application. Common activities of the vendor such as completing subdivision and strata-titling, and activities outside the control of the parties (for example, local council works), may invoke operation of the provision.

There are complex exemptions to the land development provisions. Firstly, duty will **not** be charged on the dutiable value of the contract of sale if:

- The consideration given by the **first purchaser** under the contract of sale **includes** consideration for the land development. For example, the land development is

undertaken by the vendor as part of the contract of sale (typical in off-the-plan contracts).

Note: this exemption will not apply if the first purchaser undertakes or participates in the land development at any time **before** a subsequent transaction occurs (ie before a subsequent purchaser obtains a transfer right).

OR

- The land development occurs **after** a subsequent transaction.

Secondly, duty will **not** be charged on the dutiable value of the subsequent transaction if:

- The consideration given by the **subsequent purchaser** or an associate to obtain the transfer right **includes** the consideration for the land development. The meaning of this is unclear. We understand the SRO may read this as though the words “by the vendor” are added after “land development”. If you seek to rely on this part, you should check with the SRO as to its then current thinking on the matter.

OR

- The land development does **not** occur while the subsequent purchaser holds the transfer right.

**You should:**

- **Ensure your clients do not inadvertently invoke this provision by consenting to or undertaking land development activities prior to settlement of the contract of sale.**
- **If land development is contemplated, include in any unexecuted contract of sale the details of the land development and the component of consideration applying to it.**
- **In cases where the contract is executed before you are instructed, identify the existence or otherwise of such provisions and warn clients of the risk of being caught in this category or falling outside the exemptions.**

### *Transfers resulting from options*

Additional duty will be levied on a transfer that results from the exercise of a put or call option (or both) where land development occurs. The grant of the option does not itself attract duty - what attracts the duty is land development activities during the term of the option which then constitutes a sub-sale upon transfer of the land to the subsequent purchaser of the transfer right.

Duty is levied on both the dutiable value of the option as defined (being the consideration payable under the contract of sale or the land’s unencumbered value) **and** on the subsequent transaction.

Again, there are complex exemptions. Duty will **not** be charged on the dutiable value of an option if:

- The consideration given by the **first purchaser** for the option **includes** consideration for the land development.

Again, this exemption will not apply if the first purchaser or an associate undertakes or participates in the land development at any time **before** a subsequent transaction occurs.

OR

- The land development occurs **after** a subsequent transaction.

Duty will **not** be charged on the dutiable value of a subsequent transaction if:

- The consideration given by the **subsequent purchaser** or an associate to obtain the transfer right **includes** consideration for the land development. The meaning of this is unclear. We understand the SRO may read this as though the words “by the vendor” are added after “land development”. If you seek to rely on this part, you should check with the SRO as to its then current thinking on the matter.

OR

- The land development does **not** occur while the subsequent purchaser holds the transfer right.

### **Exclusion: Relatives**

The provisions of the new Part 4A do not apply to transactions between relatives (as defined in section 3 of the Act) and certain trustees for relatives (see section 32W of the Act).

Specifically, duty will not be charged under the new provisions if:

- In the case of a contract of sale or an option, the first purchaser is acting on his or her own behalf and is a relative of the vendor or is a trustee of a fixed trust, the only beneficiaries of which are relatives of the vendor; or
- In the case of a subsequent transaction, the subsequent purchaser is acting on his or her own behalf and is a relative of the first purchaser or is a trustee of a fixed trust, the only beneficiaries of which are relatives of the first purchaser.

This means there will not be additional duty even if the subsequent transaction involves additional consideration or land development **provided** the parties are relatives.

“Relatives” is specifically confined to a limited class of relatives. For example, the first purchaser can transfer to a sibling or a child of a sibling, but not a grandchild of a sibling. Again, the first purchaser can transfer to a relative of a domestic partner, but only if that domestic partner relationship exists at the time of transfer. Further, step children of the first purchaser are included only while their parent is a “partner” of the first purchaser. Upon death or separation/divorce of the partner, the step child ceases to be eligible.

**You should establish the relationship between the vendor, the first purchaser and the subsequent purchaser at the time of nomination and at the settlement date. Contracts of sale with extended settlement dates are of particular risk as some relationships may change in between. However, you will not need to rely on the relatives exclusion unless your client is caught under the additional consideration, land development or option provisions.**

### **Exclusion: General Exemptions & Concessions**

The general exemptions and concessions in Chapter 2 of the Act continue to apply to each contract of sale, option and subsequent transaction. These include the transfers of farms to relatives and transfers on the breakdown of marriage or a domestic relationship exemption and the land and building refurbishment concession.

### **Notification to SRO**

Where a contract of sale is signed or an option is granted **on or after 29 June 2005**, the new provisions will apply. The ultimate transferee must lodge a statutory declaration (Form 6A) with the SRO for the purposes of determining any liability to duty.

The LPLC appreciates the current difficulties with the approved SRO Form 6A but care should be exercised in completing the form to ensure your client's transaction is not inadvertently made subject to additional duty.

### **Transitional: special care needed**

The new provisions provide that if a contract of sale is entered into **before 29 June 2005**, but the transfer occurs **on or after 29 June 2005**, the old provisions will apply imposing "double duty" unless the transaction falls within the section 31 exemptions. However, all parties liable to duty **may elect** in the prescribed form to have any liability determined under the new provisions.

It may be beneficial to elect for the new provisions to apply. For example, if in your client's transaction:

- a written agency appointment was not executed before signing the contract of sale;
- instructions were not given to a lawyer or accountant to incorporate the transferee company before signing the contract of sale; or
- the transferee trust was not established before signing the contract of sale

"double duty" would be applicable under the old provisions but not under the new.

**You should carefully examine the nature of the transaction and the status of the parties to the transaction when advising clients on the best option. Where there is no additional consideration, land development or option involved, electing to have the new provisions apply may circumvent the strict requirements of the old provisions.**

The relevant statutory declaration is SRO Form 6A for sub-sale transactions and the election should be made on SRO Form 6B.

## **How to manage the risks**

While the new approach in Part 4A should result in fewer claims arising from sub-sale transactions, the LPLC recommends that, in order to avoid the new risks, you should:

- **Fully acquaint yourself with the new provisions of part 4A of Chapter 2 of the *Duties Act 2000*.**
- **Ensure you are aware of the context of your clients' transactions.**
- **Exercise particular care when advising clients where land development is contemplated and warn of the risks of additional duty arising.**
- **Access the information provided on the SRO website ([www.sro.vic.gov.au](http://www.sro.vic.gov.au)) particularly *Duties Act Bulletin 02/05* and relevant Forms 6A and 6B.**
- **Fully brief and train your firm's law clerks about the new provisions and notification requirements.**
- **Take special care in advising on the best option in relation to elections under the transitional provisions.**

## **Other Changes**

Finally, practitioners should note that the amending Act repealed other exemptions previously available under:

- Section 49: transfers to shareholders due to reductions in capital
- Section 50: transfers to shareholders due to company voluntary winding up
- Section 55: vesting of land due to foreclosure of mortgage.

**Legal Practitioners' Liability Committee  
August 2005**