

DUTY CALLS . . . STILL

A continuing trend of land transfer duty claims prompts LPLC to remind practitioners to update their processes and precedents for advising on duty in conveyancing transactions.

The State Revenue Office (SRO) has continued its rigorous auditing of property purchases and transfers in Victoria to check the correct amount of land transfer duty has been paid. In line with this audit activity and additional duty assessments being made to purchasers, professional negligence claims continue to eventuate against practitioners alleging a failure to advise clients of the specific duty implications of the transaction.

The top three duty traps resulting in the claims LPLC sees are:

- sub-sales involving nominations and land development
- foreign purchasers of residential property
- spousal property transfers.

In most instances the claims could have been avoided had advice been provided at the right time.

LPLC reminds practitioners handling conveyancing matters to review their processes and precedents to ensure they are current and raise relevant issues and warnings about duty in these areas with their clients. Land transfer duty calculations are not just a tick the box exercise as the circumstances of each transaction and client are unique.

Nominations and sub-sales

The most frequent duty claim scenario occurs where purchaser clients have made an application for a planning permit after signing the land sale contract and before nominating a new purchaser. In this situation, practitioners have failed to advise the client that the planning application constitutes land development under the *Duties Act 2000* (Vic) and nomination following land development will trigger a sub-sale such that the nominated purchaser will be liable to pay a second amount of duty.

In many cases, the additional duty claims could have been avoided or defended if practitioners had provided clear advice to the purchaser at the beginning of the retainer about the duty implications associated with the timing of lodging planning applications and other land development and nominations, and/or then again before nomination.

Foreign purchasers

A second recurring area for claims is where practitioners have not properly turned their mind to whether the client is a “foreign purchaser” for the purposes of the *Duties Act* and may be liable to pay foreign purchaser additional duty (FPAD).

Individuals are treated as foreign purchasers if they are not Australian citizens or permanent residents, or New Zealand citizens with a Special Category Visa (subclass 444). A common trap is not understanding that if the special category visa holder is not physically present in Australia at the time of settlement, the visa will cease

TIPS

- There is no cookie cutter approach to calculating land transfer duty. Every transaction and client is different.
- Create clarity by providing written advice about the duty implications of the transaction and the specific requirements and criteria for obtaining exemptions.
- When advising on duty exemptions such as the 12-month PPR rule, ensure you warn clients of their ongoing compliance obligations
- Duty laws change regularly. Always check the legislation and SRO website and regularly review your processes and precedents.

and they will be regarded as a foreign purchaser and potentially liable to pay FPAD. This trap can be avoided with timely advice.

LPLC also sees claims where the practitioner has provided no or inadequate advice about the circumstances in which a foreign purchaser may be exempt from paying duty. A common scenario is where the foreign purchaser buys a principal place of residence (PPR) with their spouse/domestic partner who is not a foreign person. The practitioner then fails to advise that for the PPR exemption to apply, they must live in the house for a continuous period of 12 months, starting within 12 months of settlement. It transpires that the client does not live in the property for the required period and the SRO issues a duty assessment following a compliance audit.

Spousal property transfers

The third area LPLC has seen a rise in duty claims is following the transfer of property between spouses.

In these matters the practitioner has typically assisted the client to claim an exemption to spousal transfer duty when they have not met the exemption criteria. Similar to FPAD claims, a common mistake is failing to advise clients that at least one person in the relationship must live in the property being transferred as their PPR for a continuous period of 12 months and commencing within 12 months of the transfer. Duty claims have arisen where the SRO has conducted a compliance audit and identified that the clients have not lived in the property for the required period.

Risk management measures every practitioner should implement

Calculating duty payable on a transaction is not straightforward and should be handled with care. Don't rely on your memory and always check the legislation and SRO website.

Clients should always be provided with clear written advice about the duty implications of the conveyancing transaction and the specific requirements and criteria for obtaining exemptions. Developing good checklists and precedent letters of advice will assist in making this exercise more time and cost efficient.

When advising clients on the requirements for duty exemptions such as the 12-month PPR rule, ensure you warn clients of their ongoing compliance obligations, and that the SRO may audit the transaction to determine whether the entitlement to any exemption is valid and that this audit may occur many years after the transaction.

It is important practitioners keep up to date in this fraught area. To help keep on top of changes, SRO has a free subscription service that provides information and alerts about state taxes. ■

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