



Stamp duty and land tax:

Tips and ‘trips’ you need to know, but perhaps don’t!

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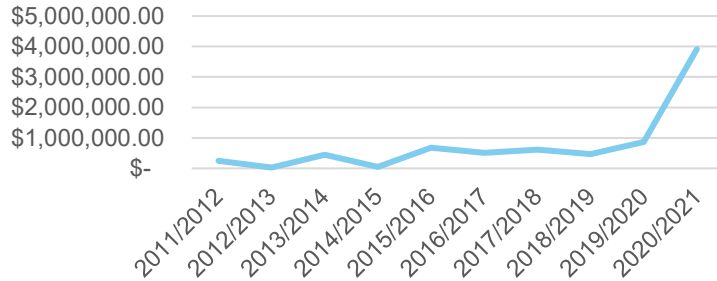
22 July 2021

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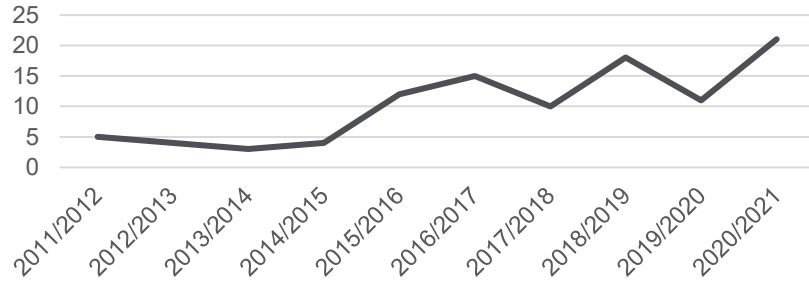
LPLC Alert – spike in duty claims in the last 12 months

- Cost of claims has increased dramatically
- Two aspects of stamp duty law significantly contributing to the recent rise in claims:
 1. Sub-sales involving nomination and land development
 2. Foreign purchasers

Cost of duty claims



Number of duty claims



Source: LPLC Alert ([12 July 2021](#)), *Spike in duty claims from conveyancing transactions*

Agenda

1. Foreign / absentee surcharges
 - a) stamp duty and land tax
 - b) traps for discretionary trusts
 - c) opportunities for exemption
2. Double duty risk on nominations
3. Stamp duty on business / entity acquisitions
4. Q&A

Foreign / absentee surcharges

Victoria's foreign purchaser additional duty (FPAD)

8% additional
duty on
acquisitions of
**residential
property** by a
**foreign
purchaser**

- Victoria was the first Australian jurisdiction to introduce a foreign duty surcharge on 1 July 2015 (originally 3%)
- Beware:
 1. Broad definitions of 'foreign purchaser' and 'residential property' in the *Duties Act 2000* (Vic)
 2. Intention at and post settlement is important
 3. Discretionary trusts may be deemed 'foreign trusts'
 4. Can also apply to indirect acquisitions in residential property (i.e. landholder duty)

$$\begin{array}{ccccc} \mathbf{8\%} & + & \mathbf{6.5\%} & = & \mathbf{14.5\%} \\ \text{CURRENT VIC FPAD} & & \text{MAX. BASE DUTY RATE IN} & & \text{MAX. STAMP DUTY RATE} \\ \text{RATE} & & \text{VIC (APPLIES ABOVE \$2M)} & & \text{FOR FOREIGN PURCHASERS} \end{array}$$

What is 'residential property'?

- Interests in land that are used or intended to be used **solely or primarily for residential purposes**.
- Includes land or buildings already capable of lawful use as a residential property or on which building construction / refurbishment or land development is undertaken (or intended) to enable such use.
- Does not include land or buildings to be lawfully used solely or primarily as a commercial residential premises, a residential care facility, a supported residential service or a retirement village.

Change of intention

No
FPAD

At settlement foreign purchaser (FP) acquires non-'residential property'

Post-settlement FP forms an intention to refurbish, extend, construct or undertake land development for use of the land / building as 'residential property'

FPAD
may
apply

FP must notify SRO within 14 days of the change of intention

What is a 'foreign purchaser'?

A 'foreign purchaser' is a:

1. foreign natural person;
2. foreign corporation; or
3. trustee of a foreign trust.

Foreign natural person

not:

- an Australian citizen
- permanent visa holder
- New Zealand citizen with a special category visa

Foreign trust

- more than 50% of the beneficial interests in the capital of the trust are held by one or more 'foreign purchasers', including interests of any associated persons (Australian or foreign)
- note integrity rule if 50% or less

Foreign corporation

- incorporated outside Australia; or
- more than 50% of the voting power / potential voting power / issued shares in the corporation are held by one or more 'foreign purchasers', including interests of any associated persons (Australian or foreign). Note integrity rule if 50% or less



Swanson Pty Ltd signed a contract to acquire a residential property in Victoria in its capacity as trustee for a discretionary trust established for the benefit of Mr Swanson and his family, all of whom are Australian citizens based in Victoria.

The classes of beneficiaries under the trust deed are typical for a discretionary trust and are drafted widely as follows:

1. Mr Swanson and his spouse (*specified beneficiaries*);
2. any descendant or relative of a specified beneficiary;
3. any entity in which a specified beneficiary holds an interest; and
4. any charitable organisation nominated by a specified beneficiary.

The trustee of the trust does not intend to ever make distributions to any foreign beneficiary (and it has not done so historically).

Is the purchaser a ‘foreign purchaser’ under Victoria’s FPAD rules?

- a) Yes – the purchaser is a trustee of a foreign trust
- b) No – the purchaser is not a trustee of a foreign trust
- c) I need more information in order to advise

Discretionary trusts – what you need to know

Any person or member of a class under a trust deed is taken to have a beneficial interest in the maximum percentage of the capital of the trust that the trustee of the discretionary trust is empowered to distribute to that person.

- Effectively, a discretionary trust will be a ‘foreign trust’ if the trust has **any foreign beneficiary or object**
- Previously, the SRO took a ‘practical approach’ with family discretionary trusts – this approach ceased from 1 March 2020
- The SRO has now adopted a hard line approach. Parties need to ensure that there are no potential foreign beneficiaries or objects in order for a discretionary trust to not be treated as a foreign trust.
 - Any required amendments to a trust deed must be validly effected prior to the dutiable transaction.
 - Practitioners need to consider stamp duty, income tax and commercial consequences of potential amendments (e.g. Will the amendments cause a ‘resettlement’ of the trust? Would the amendments work commercially?).

Victoria's absentee owner land tax surcharge (AOS)

2% annual
land tax
surcharge on
all taxable
land owned by
an **absentee**
owner

- Victoria was the first state to introduce a foreign land tax surcharge for the 2016 land tax year (originally 0.5%, now 2%)
- Beware – unlike FPAD:
 - The AOS is not limited to residential property
 - 'Absentee owner' definitions under the *Land Tax Act 2005* differ from 'foreign purchaser' definitions under the *Duties Act 2000*

$$\begin{array}{ccccc} \mathbf{2\%} & + & \mathbf{2.55\%} & = & \mathbf{4.55\%} \\ \text{CURRENT AOS RATE} & & \text{MAX. 2022 BASE LAND TAX} & & \text{MAX. 2022 LAND TAX RATE} \\ & & \text{RATE IN VIC (APPLIES ABOVE} & & \text{FOR FOREIGN PURCHASERS} \\ & & \text{\$3M)} & & \end{array}$$

What is an 'absentee owner'?

An 'absentee owner' is an 'absentee person' and includes a:

1. natural person absentee;
2. absentee corporation; or
3. trustee of an absentee trust

Natural person absentee

- not an Australian citizen or resident; and
- does not ordinarily reside in Australia; and
- was not in Australia on 31 Dec or for a period/s totalling at least 6 months in the year immediately preceding the land tax year.

Absentee trust

At least one absentee beneficiary:

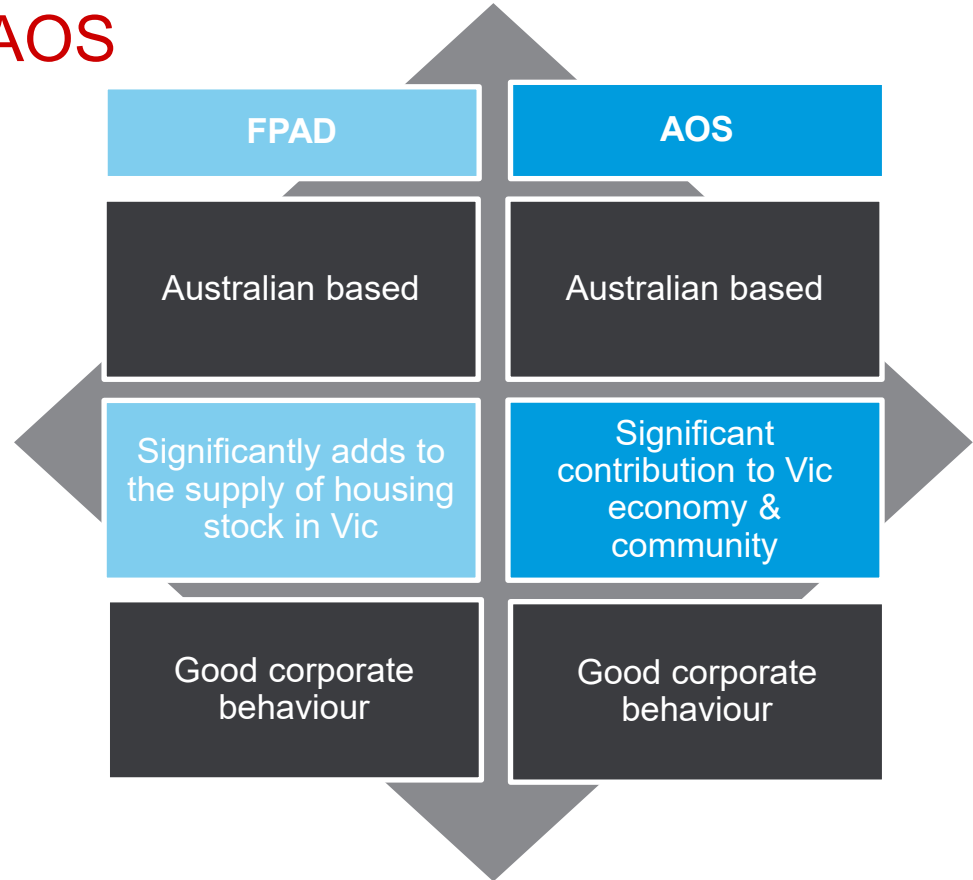
- has a beneficial interest in land subject to a fixed trust; or
- is a unitholder in a unit trust; or
- is a specified beneficiary of a discretionary trust

Absentee corporation

- incorporated outside Australia; or
- absentee person/s (acting alone or together):
 - control the composition of the board; or
 - have more than 50% voting power or control; or
 - hold more than 50% of the issued share capital

Exemptions for FPAD / AOS

Victorian Treasurer has issued guidelines and delegated a **discretion** to the Commissioner of State Revenue to grant an exemption for certain **companies and trusts** from FPAD or AOS (as applicable)



Foreign / absentee surcharges across Australia

Stamp duty	Surcharge rate for foreign purchasers of residential land	Possible relief from foreign surcharge
NSW	8%	✓
VIC	8%	✓
QLD	7%	✓
WA	7%	✓
SA	7%	✓
ACT	x	N/A
NT	x	N/A
TAS	8% (residential) 1.5% (primary production)	Only if underlying transaction subject to relief (e.g. PPR)

Land tax	Surcharge rate for foreign/ absentee owners	Possible relief from foreign / absentee owner surcharge
NSW	2% (residential land)	✓
VIC	2% (all taxable land – not just residential)	✓
QLD	2% (all taxable land – not just residential)	✓
WA	x	N/A
SA	x	N/A
ACT	0.75% (residential land)	Only if exempt from land tax (e.g. PPR)
NT	x	N/A
TAS	x	N/A

Double duty on nominations



Nominations under a contract of sale / option to acquire land





What does 'additional consideration' capture?

Is the nominee or any 'associates' providing 'additional consideration' for the nomination?

- **Monetary or non-monetary consideration** that exceeds the consideration given (or agreed to be given) by the first purchaser
 - E.g. nomination fee
- **Includes** a 'parallel arrangement', broadly being an arrangement under which the nominee (or an associate) has engaged (or will engage) the first purchaser (or an associate) to construct or arrange for the construction of improvements on the property for consideration
 - May be entered into before, at the time or within 12 months of nomination
- **Excludes** reimbursement of costs reasonably incurred by the first purchaser as part of the sale contract
 - E.g. legal costs, selling agent's fees, survey / valuation payments, GST except where credits are available



To mitigate the risk of double duty applying under the Victorian sub-sale rules, parties must ensure that no 'land development' activity occurs:

- a) Prior to signing the contract
- b) Between signing the contract and making the nomination
- c) After making the nomination and prior to settlement

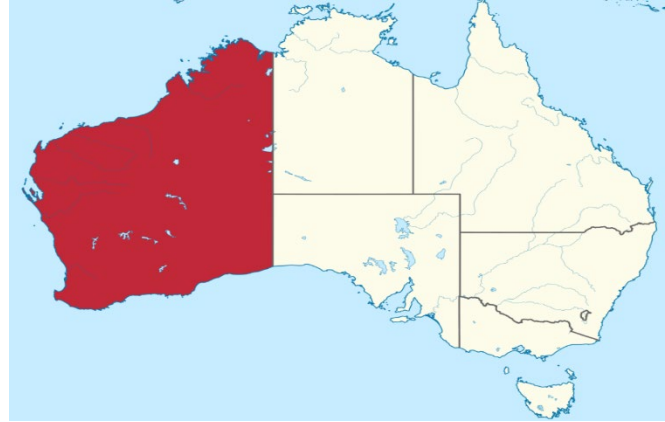
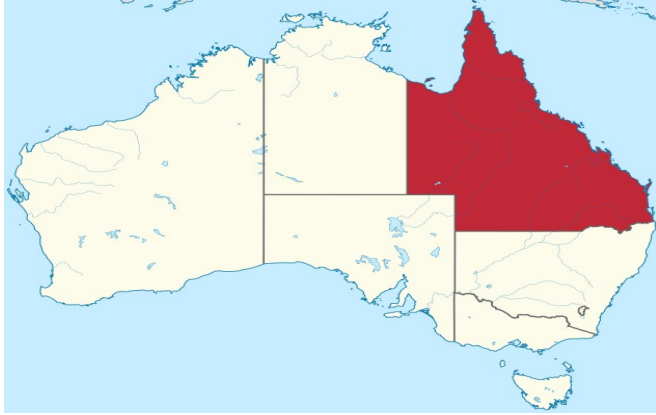
What does 'land development' capture?


Has there been or is there an intention to undertake '**land development**' after signing and prior to the nomination?

- 'Land development' defined broadly in the *Duties Act 2000* (Vic)
 - Preparing a **plan of subdivision** or taking steps to register the plan
 - Applying for or obtaining a **planning permit** in relation to the use or development of the land
 - Requesting a **planning authority** to prepare an amendment to a planning scheme that would affect the land
 - Applying for or obtaining a **building permit**
 - Doing any **building works** that would require a permit or approval
 - **Developing or changing the land** in any other way that would enhance the value of the land
- Does not matter if the permit / approval is not obtained – SRO's view is that an application is enough
- Does it matter who undertakes the activity?

Business / entity acquisitions

THE ROGUE STATES





Common dutiable transactions as part of business acquisitions

- Unlike Victoria, most other states and territories will treat an agreement to acquire dutiable property as a dutiable transaction (i.e. not just the transfer of dutiable property itself)
- **Transfers of land & goods** – *look at physical location*
 - Freehold land
 - Lease for consideration or premium
 - Plant and equipment in any way fixed to the land
 - Moveable plant and equipment
- **Transfer of business assets** – *look at physical location but also location (residence) of customers during the past 12 months*
 - Goodwill
 - Intellectual Property
 - Trading Stock
 - Customer Contracts
 - Receivables (look at residence of debtor)

POLL



Facts:

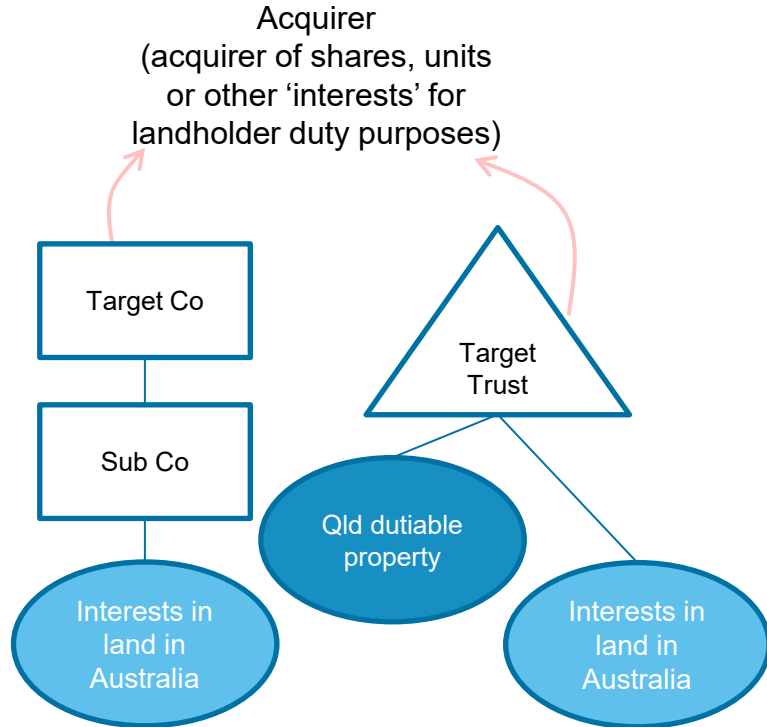
1. On 6 June 2021, Ollie Pty Ltd signs an agreement to acquire all of the assets used to conduct Orange Grove Pty Ltd's toy manufacturing and sales business. The agreement completes on 30 June 2021.
2. The assets of the Orange Grove business are limited to those in the table adjacent (with the head office, principal place of business and all tangible assets located in Victoria).
3. As part of the transaction, the lease is to be assigned to Ollie Pty Ltd for \$1 (assume that the lease is not dutiable and that there are no other interests in land or fixtures that are the subject of the transaction).
4. The market value of the underlying land that is the subject of the lease is \$5m. Freehold title will be retained by a related party of Orange Grove Pty Ltd.
5. The business is very profitable and it makes sales in Victoria (80%), NSW (10%) and Queensland (10%).

Asset	Market Value
Plant and equipment	\$3,000,000
Trading stock	\$100,000
Goodwill	\$2,000,000
Lease	\$1

Q: In which States will stamp duty apply on the acquisition of Orange Grove's business?

- a) Vic, NSW, and Qld
- b) Vic and Qld
- c) Vic only
- d) Qld only

Entity acquisitions



- There is a landholder regime in every state and territory
 - Market value of underlying (direct or indirect) interests in land must generally equal or exceed a particular \$ threshold
 - not limited to freehold land
 - Must acquire, or begin to hold, a 'significant interest'
 - either alone, together with 'associated persons' or under an 'associated transaction'
 - not limited to transfers of shares/units – can acquire an interest by any means
 - Different thresholds apply in each state and territory
- Trust acquisition regime in Queensland
 - Acquire or begin to hold an interest in a trust that has a direct or indirect interest in dutiable property
 - Generally no *de minimis* thresholds

Questions?

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