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## Communication of transactional risks to clients in commercial matters

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In recent times Law Claims has received a number of claims which highlight the need for practitioners involved in commercial matters to consider all aspects of the transaction on which they are advising and give appropriate warnings to clients of any risks perceived in the transaction proceeding in the manner proposed.

### Case 1 Example

The practitioner was acting for a company client in its acquisition of all of the shares in two interstate companies. Company 1 carried on business growing, fermenting and processing grapes and producing and distributing wine. Company 2 held the brand which it licenced to company 1. That was all company 2 owned. Company 1 owned land upon which there had been constructed a winery, along with other buildings and structures including substantial storage tanks.

In advising the client on the transaction, the practitioner's advice was to the effect that the plant and equipment on the land, including the substantial plant and equipment comprising the winery and storage tanks, were not fixtures, and therefore were not to be considered part of the land being transferred for the purposes of the interstate *Duties Act*. In short, in determining whether this was a "land rich" company for the purposes of duty under the *Duties Act*, the practitioner formed and expressed the view that these items of plant and equipment were chattels, not fixtures.

Under the *Duties Act*, "land rich duty" was not leviable if the unencumbered land holdings of the company whose shares were to be transferred represented less than 60% of the total value of the company's assets. The practitioner's advice was to the effect that the company's "landholdings" were confined to freehold land, buildings and vines only, being around 29% of the acquisition value. Therefore, no duty was said to be payable.

The practitioner's client subsequently informed the practitioner (via new lawyers) of an investigation being carried out into the transaction by the relevant State Revenue Office ("SRO"). The SRO reached the view following a review of the Sale Contract, valuations and a site inspection, that the transfer was one of an interest in a land rich entity and therefore should have been subject to "land rich duty".

Further the SRO concluded that the dutiable value of the transfer was approximately \$6.45 million, representing 71% of the sale consideration. The SRO regarded plant and equipment to be a fixture and therefore formed part of the company's land. Reference was made by the SRO to a Full Court decision of the Supreme Court of Western Australia namely, *National Dairies WA Ltd v Commissioner of State Revenue* (2001) WA SCA112 ("*National Dairies case*"). In the *National Dairies case*, the Court found that all items of a milking plant were fixtures because they were interconnected by a complex and fixed system of pipes. In the case of items that were not fixed to the land, other than by being connected to items of plant and equipment which were fixed or items supported by their own weight, it was found that the inter-relationship between those items, in the context of the use of the land for the purpose of a milk factory, meant that they were also fixtures, being put to use for the better enjoyment of the land.

All commercial lawyers will be aware of the issue surrounding the characterisation of items as fixtures or chattels. There are many cases which deal with the questions arising either in the context of valuation, taxation or stamp duties cases. All the cases emphasise that each particular matter will turn on its own facts.

In this case what appeared lacking was a careful and considered analysis by the practitioner of not only the competing cases, including the *National Dairies case* which was simply overlooked, but a "chattels' revenue ruling" from the SRO's own website.

The decisions and the ruling should have been identified, examined and expressly factored into any advice given to the client.

### **Case 2 Example**

The practitioner was acting for a client who had appointed receivers and managers in relation to an interstate property development.

The practitioner advised the client that the State Taxation Office required payment of land tax on all properties owned by a company in receivership not only the properties being sold by the client, before those properties being sold could be transferred.

The allegation subsequently made against the practitioner was not that the advice was incorrect, but that, had an extension for settlement been recommended then the client could have availed itself of a discretionary "practice" of the State Taxation Office. This "practice" was to allow dispensation, and only require payment of land tax for the properties being sold, rather than to press any charge over the remaining properties not being sold.

### **Conclusion**

The above two examples highlight the need for practitioners when advising on diverse cross-border transactions, to not only fully understand the relevant jurisdictional and multidisciplinary taxation issues, but also the importance of raising the risks that may arise for a client in a particular matter. This will enable the client to be aware of all potential consequences of the transaction and then to make a fully informed decision on how to proceed (and indeed, if at all) before implementing it.

**For any queries about this, or other Risk Management Services offered by Law Claims,  
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