

NEWSLETTER

Legal Up-Date

March 2005

IMPORTANT CHANGES TO NEW SOUTH WALES LAND TAX

Do you or a trust you are involved in own an investment property? If so, are you aware that land tax may now be payable even though none was payable before?

The State Revenue Legislation Amendment Act 2004 introduced significant changes to taxes imposed by the New South Wales government. Some of the changes which relate to land tax involve the method in which land tax is assessed. You may recall that for the 2004 tax year, the land tax threshold was \$317,000.00. This means that no land tax was payable if the aggregate value of all non-exempt land owned by the taxpayer did not exceed the threshold. However, this threshold has now been abolished for the 2005 tax year. As a result, all land which is not exempt will be subject to land tax regardless of the value of the land. These changes have significantly increased the number of taxpayers who are liable for land tax in New South Wales. It remains to be seen whether they will also increase the net revenue collected by the government for land tax.

Land tax in 2005 is calculated on a tiered scale as follows:

Total Value of Land	Rate of Land Tax Payable
Not more than \$400,000.00	0.4 cents for each \$1.00
More than \$400,000.00 but not more than \$500,000.00	\$1,600.00 plus 0.6 cents for each \$1.00 over \$400,000.00 up to \$500,000.00
More than \$500,000.00	\$2,200.00 plus 1.4 cents for each \$1.00 above \$500,000.00

A different rate applies to all non-exempt land owned by non-concessional companies and special trusts.

For taxpayers who are liable for land tax for the first time as of midnight 31 December 2004, a registration form must be lodged with the Office of State Revenue by 28 February 2005 if the taxpayer is intending to lodge the form individually, or by 31 March 2005 if the taxpayer is lodging the form through a tax adviser.

If you suspect that you or an entity with which you are associated might be liable for land tax under the new regime, please contact Norbert Schweizer or Marita Fisher of this office.

INCORPORATING AN EXPERT DETERMINATION CLAUSE INTO COMMERCIAL CONTRACTS

It is quite common these days for commercial contracts to provide for alternative dispute resolution (ADR) procedures in order to avoid the costly and protracted process of litigation. Such alternatives are not simply confined to mediation and arbitration. In fact, depending on the commercial arrangement, some parties may find that a more appropriate and cost effective alternative is to refer disputes to experts for determination.

The appointment of experts in alternative dispute resolution processes is generally governed by the NADRAC Expert Determination Rules ("Rules") which define the role of the expert as follows:

- (1) the Expert shall determine the dispute as an expert in accordance with the Expert Determination Rules;
- (2) the Expert is not an arbitrator and does not act in an arbitral capacity;
- (3) the Expert shall adopt procedures suitable to the circumstances of the particular case;
- (4) the Expert shall be independent of, and act fairly and impartially between, the parties; and
- (5) the Expert shall determine any matters concerning the Expert Determination Rules or the expert determination process.

Non-adherence to the Rules by an appointed expert may lead to a challenge of the decision by the parties involved.

It is imperative that the parties choose an appropriate expert carefully. Also, to ensure a commercially workable result for the parties, it is essential that the letter of engagement appointing the expert is properly drafted and that all pertinent information is made available to the expert.

In certain instances, expert determination may be a more appropriate process than, say, arbitration or mediation. The appointment of an expert to resolve a dispute has the advantage that the process is simplified. Also, the dispute in question may be something that requires knowledge in a given field and the availability of that knowledge may assist in reducing the amount of time required for a decision to be made. It may also help in achieving a solution that is workable for the parties involved.

If you require advice on preparing an appropriate ADR clause for incorporation in commercial contracts, please do not hesitate to contact us.

LIABILITY OF DIRECTORS FOR INSOLVENT TRADING

The number of cases involving allegations of insolvent trading by directors in the past two years has, not surprisingly, given rise to some concerns by directors regarding their legal position under the Corporations Act ("Act").

While it is true that there has been a high volume of such cases recently, in reality, only 103 cases have been prosecuted in the last 40 years since the insolvent trading provisions have been in force. However, a staggering 75% of these cases have resulted in a judgement against the director concerned.

The current provision dealing with a director's duty to prevent insolvent trading is set out in section 588G of the Act. Under the section, a director will be guilty of insolvent trading when the following criteria are satisfied:

- a person is a director of the company when the company incurs a debt;
- the company is insolvent at that time, or becomes insolvent by incurring that debt or by incurring at that time debts including that debt; and
- at that time, there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent, as the case may be.

Contravention of section 588G carries a civil penalty. A person commits a criminal offence if the director's failure to prevent the company incurring the debt involved dishonesty on the part of the director. "Dishonest" is defined in section 1041G of the Act as:

- "(a) dishonest according to the standards of ordinary people; and*
(b) known by the person to be dishonest according to the standards of ordinary people."

The terminology used in section 588G is quite nebulous. Its field of application is also deceptively wide. For example, the reference to "debt" is not confined to debts in the traditional sense, but includes any obligation to pay money, be it in the form of dividends, making a reduction of share capital or issuing redeemable preference shares.

While dishonesty may be difficult for the prosecution to prove (as this would involve proof of a person's state of mind), the civil penalties that may be imposed on a person who is found to have contravened the section can nevertheless be quite hefty. Records indicate that the maximum compensation a director was ordered to pay by a court was \$96.7 million while the minimum was only \$517.00. The amount of compensation imposed has a direct co-relation to the amount of outstanding debts owing to creditors.

Given the likely severity of the penalties that may be imposed on an offender, it is prudent for the directors of companies to implement proper risk management procedures.

Although there are defences available for breaches of section 588G, in reality, directors have only been able to successfully avail themselves of the defences in about 11% of cases.

The types of risk management procedures that should be implemented will largely depend on the reporting procedure, if any, that is in place for the particular company. In any case, directors should ensure that they are kept up to date about all affairs of the company. They should also scrutinise anything that may lead an ordinary person to enquire further, particularly if this is likely to impact on the company's ability to pay creditors when debts fall due. Further, directors who have special skills or particular expertise must employ those skills and expertise in their role as directors. At the end of the day, directors who are diligent in ensuring that they are kept informed of the company's overall performance and its day-to-day functions, whether by personally attending to the matters themselves or through careful and supervised delegation, may be assured that they have properly discharged their duty under section 588G.

INTRODUCING ALISON DRAYTON:



Alison is a Senior Associate and an Accredited Specialist in Commercial Litigation. Having joined Schweizer Kobras in 2004, Alison heads the firm's litigation practice.

Alison has over fifteen years experience initially as a barrister and then as a solicitor. She has extensive experience in commercial litigation including acting for a major bank and franchisees and in industrial relations disputes. Alison specialises in commercial and equity matters, and appears in a range of jurisdictions.

We are delighted to welcome Alison on board. Please do not hesitate to contact Alison if you have any queries concerning commercial litigation.

Areas of Practice

- Insolvency
- Commercial Litigation
- Intellectual Property Litigation
- Trade Practices Disputes
- Employment law

Languages: English and French

YOUR FEEDBACK

If you have any comments about this newsletter, suggestions for improvement or would like to see any particular areas of law which interests you covered, please drop us a line at:

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