

# Primary industries levies: solicitors beware!

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As of 1 January 2000, amendments<sup>1</sup> to the *Primary Industries (Levies and Charges Collection) Act 1991* (PILCCA) allowed the Commonwealth to outsource to solicitors the function of calculating and collecting a levy on livestock, being cattle, sheep, lambs and goats (the 'livestock transaction levy').

While the primary obligation to pay the levy is on the solicitor for the vendor, if one is engaged, this article examines the legislation and its implications from the perspective of the purchaser's solicitor who is, in reality, most 'at risk' of personal liability.

The Law Council of Australia is currently lobbying to have the legislation changed.

In the meantime, practitioners are alerted to its current requirements, the issues arising and how to address them.

## Current requirements

Levy is imposed by the *Primary Industries (Excise) Levies Act 1999* (the Excise Act). Collection of levy is regulated by the PILCCA.

Due dates for payment and the requirements for return forms for levy are set out in the PILCCA Regulations (the Regulations).

The due date for payment is one month and 28 days after the end of the month in which a transaction attracting levy occurs, after which late payment penalty applies by section 15 PILCCA.

Section 7(1) PILCCA imposes an obligation to pay the livestock transaction levy, plus any penalty for late payment, on a selling agent or buying agent<sup>2</sup>.

Section 4 includes solicitors in the definition of 'buying agent' and 'selling agent'.

## Issues for solicitors

A true appreciation of the issues for solicitors can be gained from considering that sales of land carrying beasts are often big; prices of \$10-20m are not unusual.

There may be 10,000 to 50,000 head of cattle on such properties.

At \$3.50 per head for 50,000 cattle, the levy works out to \$175,000.

The last owner was traditionally the party responsible to pay the levy, and section 7 of the Excise Act still purports to impose liability on such owner.

Section 7 PILCCA now makes the first purchaser of livestock also liable to pay, if there is no selling agent or buying agent involved in the transaction.

If a solicitor is acting for such a purchaser, the solicitor is liable to pay.

## Addressing the issues

Compliance is best achieved by solicitors including clauses in the contract to effect the following:

1. Make the levy an adjustable item on settlement;
2. Require the vendor to give the purchasers solicitor appropriate information (in particular a completed 'Return of Cattle and Live-stock Purchased/Sold/Delivered' form) to enable the levy to be calculated and paid;
3. Give the purchaser the right to enter and inspect the property and any books kept as to the accuracy of the information supplied or on the form;
4. Authorize the purchaser's solicitor to pay it upon settlement, giving notice of payment to the vendor at settlement;
5. A warranty from the vendor as to the accuracy of the information and an indemnification in favor of the purchaser for any further levy required to be paid.

Nothing in PILCCA says the levy is to be paid before settlement, but given the amounts involved, a purchaser's solicitor would be at great risk of personal liability in allowing the vendor to pay it after settlement.

## Risk areas

In the unfortunate case of a purchaser's solicitor not knowing about the levy and facing the prospect, post settlement, of a demand from the Commonwealth for payment, unless the solicitor can secure payment voluntarily from the vendor, such solicitor should not continue to act.

There is a clear conflict of interest in advising the purchaser to pay (if the vendor can't or won't pay) as section 7 PILCCA makes the solicitor liable.

In that circumstance, an independent solicitor may well advise a purchaser that payment is the former solicitor's responsibility.

Solicitors are aware of how highly the courts regard legal professional privilege.

There are many revenue cases where it has attached to documents on a file communicating legal advice about legal implications of the transaction in question<sup>3</sup>.

It will not be abrogated without very clear words in a statute, expressly saying it does not apply.

While there are no such words in the PILCCA, indicating that such privilege still exists in relation to documents on solicitor's files communicating legal advice about transactions, solicitors must however be mindful of the limited extent of the privilege.

It will not, for example, extend to contracts, agreements or evidence of a transaction<sup>4</sup>, accounting information<sup>5</sup>, or correspondence that does not communicate legal advice. Information about stock numbers on a property may not be within the ambit of the privilege, and might be validly seized, thus forming the basis of an

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### *Advocacy, from page 13*

If the matter is a serious matter then you should face up to it. The plea of guilty acknowledges that an offence of a particular level of seriousness has been committed and if that offence is incorrectly characterised as "serious" then you, as counsel, should acknowledge it to be so.

The court relies upon both prosecution and defence counsel at all times but this is particularly so in the making of a plea in mitigation. The court will accept a lot of information from the bar table based upon the unchallenged assertions of counsel.

It follows that counsel must take great care in presenting information to the court to ensure that the court is not misled or left under a misapprehension as to the circumstances of the offence or the offender or as to the impact of any legislative or other authority upon the matter at hand.

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assessment, either against the purchaser or the solicitor, for the levy payable.

Perhaps the greatest risk arises from ignorance.

No material was distributed by the administering department to solicitors, or their industry associations, prior to the amendments being proclaimed.

#### **Conclusion**

While the conveyancing process may be a convenient point for government to 'snag' levies not otherwise paid, it is, to say the least, unfair to use the process without giving solicitors full and frank information about their role, what they need to do to discharge it, and some protection to cover the increased risk the role entails.

The new measure may be part of an outsourcing trend, an indication of government seizing upon the conveyancing process, and the solicitors who facilitate it, to discharge its own functions, but without first educating solicitors.

Without the benefit of the compliance powers granting by legislation, and also the protections afforded in the exercise of them, solicitors should, at the very least, be educated about any 'compliance roles' put upon them.

- 1 By omnibus legislation, the *Agriculture, Fisheries and Forestry Legislation Amendment Act (No. 2) 1999*, which scheduled amendments to a number of statutes about primary production, including PILCCA. Schedule 2, containing the PILCCA amendments amended, by s 2 and 9 the definitions of buying agent and selling agent.
- 2 When it has not already been paid at another stage in the life of a beast, e.g. under s 7(2), a receiver or processor can pay it when the beast is sent to abattoir.
- 3 *Baker v Campbell* (1983) 153 CLR at 126, *Balabel v Air India* (1988) 2 All ER 246, *Crown Court Ex Parte Baines* (1987) 3 All ER 1025
- 4 *O'Reilly v State Bank of Victoria* (1983) 153 CLR 1
- 5 *Packer v FCT* (1985) 1 QR 275

## **News Brief**

Federal Attorney-General Daryl Williams says the Protective Security Coordination Centre's Watch Office will be a permanent facility as part of Australia's response to the new security environment.

The Howard Government has allocated \$14.4 million over four years to make the Office continuously active. ①

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