

20 November 2019

The Hon. Tim Pallas MP  
Treasurer  
By email: [tim.pallas@parliament.vic.gov.au](mailto:tim.pallas@parliament.vic.gov.au)

Dear Treasurer,

***Duties Act 2000* and Elder Financial Abuse**

The Law Institute of Victoria ('LIV') writes to follow up on our previous letter, dated 5 July 2019, as we are yet to receive a reply. Our previous letter is **attached**.

The LIV is concerned that the *Duties Act 2000* (Vic) ('**Duties Act**') can impact unfairly on victims of elder financial abuse. Specifically, in circumstances where the abuse of an older person results in the transfer of property from the older person to a third party (usually the person exerting undue influence over the older person). Examples of such abuse can be found in our original letter at Schedule 3.

Section 44 of the Duties Act allows a transfer of dutiable property, made solely because of a breakdown of a marriage or domestic relationship, to be exempt in particular circumstances and on the provision of relevant supporting evidence. The LIV proposes that s 44 be used as a framework for a similar elder financial abuse exemption, with similar relevant evidence in support. You can find a suggestion for such a provision in Schedule 2 of our original letter.

The LIV considers this would be an important reform in dealing with, what the Minister for Housing has described as, the "silent scourge" of elder abuse in Victoria.<sup>1</sup>

We look forward to receiving your response. Please contact Michelle Luarte, Lawyer to the Elder Law Section (03 9607 9413 or [MLuarte@liv.asn.au](mailto:MLuarte@liv.asn.au)), or Alexander Laurence, Paralegal (03 9607 9565 or [ALaurence@liv.asn.au](mailto:ALaurence@liv.asn.au)), to discuss this further.

Yours sincerely,

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<sup>1</sup> Minister for Housing (Vic), 'Protecting older Victorians from elder abuse' (Media Release, 1 May 2018).

A handwritten signature in blue ink that reads "Stuart Webb". The signature is written in a cursive style with a large initial 'S'.

Stuart Webb  
**President**  
Law Institute of Victoria

5 July 2019

The Hon. Tim Pallas MP  
Treasurer  
By email: [tim.pallas@parliament.vic.gov.au](mailto:tim.pallas@parliament.vic.gov.au)

### ***Duties Act 2000* and Elder Financial Abuse**

The Law Institute of Victoria ('LIV') is concerned that the *Duties Act 2000* (Vic) ('**Duties Act**') can impact unfairly on victims of elder financial abuse in circumstances where the abuse of an older person results in the transfer of property from the older person to a third party (usually the person exerting undue influence over the older person).

Although prima facie it is the transferee who is liable to pay duty in accordance with s 12 of the Duties Act, in circumstances of abuse it is often the elder person who is pressured to cover the payment of duty. The unfair operation of the Duties Act arises where, once property recovery proceedings have been commenced and resolved, the older person is required to pay duty on the transfer of the property from the third party back to the older person, as no existing exemptions within the Duties Act apply. Often these transfers to return the property to the older person occur within a short period of time (no longer than seven years). The practical outcome is that the victim of elder abuse is required to pay stamp duty twice in order to have their property returned to them.

This correspondence includes three schedules:

- Schedule 1: case study examples provided by LIV members;
- Schedule 2: a proposed exemption provision; and
- Schedule 3: a proposed refund provision.

Whilst this correspondence, and the remedies proposed, are concerned with elder abuse, there is nothing inherent in the draft provisions which requires them to be limited to the elderly. The provisions may equally apply to other persons the subject of undue influence and unconscionable conduct.

## Elder Financial Abuse

1. The Australian Law Reform Commission 2017 report *Elder Abuse – A National Legal Response* (ALRC Report 131) ('ALRC report'), confirms that elder financial abuse includes "threatening, coercing or forcing an older person into handing over an asset" (see 2.51) or "failing to care for someone, after agreeing to do so, in exchange for ... property" (see 2.53).
2. The LIV notes the concerning prevalence of elder abuse within the community. Nationally, a number of initiatives have been implemented to address elder abuse, including the ALRC report, the creation of the federally-funded body Elder Abuse Action Australia in 2018, the launch in 2019 of the \$18M National Plan on elder abuse, and the current 2019 Royal Commission into Aged Care Quality and Safety.
3. The LIV notes that the Victorian Government is also taking steps to protect older Victorians from the "silent scourge" of elder abuse, most notably the creation of the Elder Abuse Prevention and Response Initiative, and funding commitments in the Victorian Budget 2018/19 to tackle elder abuse.<sup>1</sup>
4. In its 2015 report,<sup>2</sup> Seniors Rights Victoria recorded that one third of all telephone calls to its Helpline were to report financial elder abuse.<sup>3</sup> Of the clients who reported abuse, 61% reported financial abuse. The financial abuse occurrences included a number of property related incidents:<sup>4</sup>
  - threatening, coercing or forcing an older person into handing over an asset (e.g. signing paperwork concerning property): 12.9%;
  - use of pressure or force on the older person to enter into disadvantages financial arrangements (e.g. house transfer): 8.2%;
  - threats of undue pressure on an older person to sell the house or handover assets: 5%
  - pressuring older person to enter disadvantageous/uncertain granny flat or joint ownership arrangements: 5%; and
  - appropriating proceeds of sale of older person's home with false promise of providing future accommodation or care, then not providing it: 2.5%.
5. The LIV considers that protecting the real property of older Victorians should be a policy area of priority for the Victorian Government. For many older people, their home is their primary asset, bringing them joy by allowing them to continue to live independently in their

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<sup>1</sup> Minister for Housing (Vic), 'Protecting older Victorians from elder abuse' (Media Release, 1 May 2018)

<sup>2</sup> National Ageing Research Institute in partnership with Seniors Rights Victoria, *Profile of elder abuse in Victoria: Analysis of data about people seeking help from Seniors Rights Victoria*, Summary Report June 2015

<sup>3</sup> *Ibid*, 8.

<sup>4</sup> Above n 2, 19.

family home, keeping them connected to neighbours and their community, and reducing the demand on the aged care sector. It is important that the rights and dignity of older Victorians is valued and protected by the community they have contributed to for so many years.

6. The LIV is therefore of the view that the Victorian Government ought to review how to improve outcomes for vulnerable older persons, and facilitate them being able to remain in their own home. In effect, elder transferors are procured, by unconscionable conduct or undue influence, into entering into transactions to transfer dutiable property for nil or inadequate consideration. In principle, exemptions should be available to a transferee on the re-transfer of their property or new property to rightfully restore their financial position as original transfers were entered into without informed consent. The validity of the instrument is therefore defeated.
7. Often the victim of elder financial abuse is deprived of the benefit of property owned by them in favour of a third party. The victim may have also had their financial resources depleted in order to pay stamp duty on the transfer of property for the benefit of a third party.

#### **Current Exemptions under the Duties Act**

8. In some instances, the victim of elder financial abuse is able to recover their asset either in whole or in part. The recovery of property and its transfer back into the elderly victim's name is prima facie subject to stamp duty. The Duties Act contains limited relevant exemptions at present, most particularly ss. 34 and 59.
9. **Section 34** allows the Commissioner of the State Revenue Office to exempt a transfer of real property where the transfer from the registered proprietor as nominee/trustee to the real purchaser where the real purchaser has provided the purchase money for the dutiable property.

Section 34 can be applied in some but not all circumstances. Generally, in order to obtain the benefit of section 34 a victim of elder abuse would need to litigate in order to secure the return of a property asset and obtain concessions from the defendant/s by way of Deed or Court order that they hold the property on trust for the elderly victim. This is not always possible or in the older person's best interests due to individual financial restrictions and the costs of litigation.

10. **Section 59** allows the Commissioner discretion for one-off pensioner exemptions or concessions for holders of the eligible concession cards at the date of the transfer.

Older clients who are the victims of elder financial abuse cannot necessarily take advantage of the section 59 exemption / concession if, for example, the subject property is

over a certain value or if the transfer of property back into their name is for a value that is not market price.

### **Current Exemptions and Circumstances of Elder Abuse**

11. Some examples of scenarios that LIV members have dealt with in recent years are set out in Schedule 3 **enclosed**.

### **Proposed New Exemption**

12. Section 44 of the Duties Act allows a transfer of dutiable property made solely because of a breakdown of a marriage or domestic relationship to be exempt in particular circumstances and on the provision of relevant evidence in support.
13. It is the LIV's suggestion that s 44 may be reviewed or considered as a framework for a similar elder financial abuse exemption with similar relevant evidence in support. A suggestion for a provision applicable to the transfer of dutiable property made solely as a result of elder financial abuse is set out in Schedule 2 **enclosed**.

### **Proposed New Refund Criteria**

14. In addition, or in the alternative, the State Government may consider a refund system whereby stamp duty paid by an older person on the transfer of property from that person to a transferee in circumstances where the transaction amounts to elder financial abuse is refunded, if the property is subsequently transferred from the transferee back to the older person and particularly where there is strong evidence that the disposition of the property and payment of the stamp duty was not a free and voluntary exercise of the victims will. A suggestion for such a provision is set out at Schedule 3 **enclosed**.

### **Effect on Revenue**

15. The LIV does not expect that these changes will have any significant effect on the state's revenue. Moreover, any minor effect would be outweighed by the benefit to the greater community.

The LIV would be pleased to receive your response to the matters identified in this letter.

Should you have any queries, please contact me, or Alexander Laurence, Paralegal to the Elder Law Section on 03 9607 9565 or [ALaurence@liv.asn.au](mailto:ALaurence@liv.asn.au).

I look forward to hearing from you.

Yours sincerely

A handwritten signature in blue ink that reads "Stuart Webb". The signature is written in a cursive style with a large initial 'S'.

Stuart Webb  
**President**  
Law Institute of Victoria

## **SCHEDULE 1: Case Examples**

### **Scenario 1 – Duties Act exemption did not apply**

A LIV member acted for a 93 year old client with cognitive decline living in residential aged care. The client's son took her out for a coffee, stopped at a pharmacy on the way and procured her signature on a transfer of land form. The client's son (who was a validly appointed attorney at the time) lodged the transfer and used the client's funds to pay the stamp duty. VCAT subsequently appointed an administrator to manage the client's affairs. The administrator became aware of the transfer of the property for no value. The administrator sought the son's agreement to voluntarily transfer the property back to the older client, which was refused. County Court proceedings were subsequently issued on behalf of the older client seeking orders that the property transfer be overturned on the basis that the transfer was brought about as a result of unconscionable conduct. The dispute ultimately resolved although the terms of settlement were confidential and no admissions of liability were made. The solicitor asked the Commissioner to exercise discretion to exempt stamp duty on transfer of property from the son to the older client, which was declined on the basis that no applicable exemptions existed within the Duties Act. The transfer of property back to the older client occurred and stamp duty was paid for by the older client. The property was worth in excess of \$2million and stamp duty was not an inconsiderable amount. The property transfers occurred within 5 years of each other.

### **Scenario 2 – Duties Act exemption did not apply**

A LIV member acted for a 72 year old client who was reliant on a Centrelink aged care pension. Her son was a property developer and had been estranged from her for many years. He started to visit more often and pay her more attention. He offered to look after her for the rest of her life, and suggested that he could renovate and improve her property and make sure she had nothing more to worry about financially. She transferred her property into his name. The solicitor who effected the transfer acted on the son's instructions, although appeared to act for both parties. The property was transferred into the son's name for no consideration, and the elderly client paid the stamp duty. The matter was resolved by agreement and without needing to issue legal proceedings, however, the elderly client paid stamp duty again on the transfer of the property back into her name. The elderly client had paid stamp duty twice within a period of 3 years. She was not entitled to the pensioner concession because she did not pay market value for the property on the transfer of it back into her name.

### **Scenario 3– Duties Act exemption did not apply**

A LIV member acted for a client in her early 70s who lived in a rundown farmhouse in Gippsland. Her nephew was a farmer in the area. Her nephew suggested that she should transfer the farm into his name, and in exchange he would buy her a townhouse in the nearby regional centre as well as pay her a stipend to assist with living expenses. A local solicitor effected the transfer and drew up an agreement, although the agreement was never signed. The elderly client paid all legal costs and stamp duty to effect the transfer of the property into her nephew's name. The nephew never did buy the townhouse for the elderly client, and only made 1 or 2 stipend payments. Legal proceedings were issued for breach of contract, the matter resolved at mediation. The property remained in the elderly client's nephew's name, and he paid her an amount of money to fund the purchase of a townhouse in her name. The amount paid by the nephew to the elderly client was not sufficient to meet the cost of a townhouse plus stamp duty and transaction costs, although it was a reasonable outcome on commercial terms. The elderly client did not hold an eligible concession card so did not qualify for an exemption from duty.

### **Scenario 4 – Duties Act exemption did not apply**

A LIV member acted for a client in her late 80s. Under pressure from her daughter, in circumstances where there were doubts about the client's cognitive capacity, the client had transferred her property to a company controlled by her daughter. The daughter alleged the company held the property as bare trustee for the benefit of the client. The client had paid the stamp duty on the transaction. The property had subsequently been sold by the trustee company and there was significant uncertainty that the proceeds had been used solely to benefit the client. The LIV member was able to secure the resignation of the trustee and the appointment of an independent trustee to manage the trust going forward. Neither amounts expended inappropriately from the trust nor the stamp duty paid on the original transaction were able to be recovered from the defendant or the outgoing trustee.

### **Scenario 5 - s 34 exemption applied**

A LIV member acted for a client in her late 80s. The client's former attorney had:

- i. entered into a contract of sale for the client's property. The client owned that property solely and outright;
- ii. entered into a contract to buy another property in 3 joint names including the client as to one third.
- iii. directed solicitors to use the proceeds of sale of the client's original property to settle the purchase of the second property.
- iv. transferred the balance of the proceeds of sale of the original property to a third party.

Accordingly, the client had provided all of the money to fund the purchase of the second Property. In the course of litigation the LIV member was able to: recover a portion of the proceeds of sale transferred to the third party, secure a transfer of the second property into the sole name of the client and obtain declarations from the defendants in a deed of settlement that they held their interest in the second property on trust for the client.

## SCHEDULE 2: Suggested Exemption Provision

DUTIES ACT 2000 - SECT 44 A

### Re-transfer of Dutiable Property as a Consequence of Financial Abuse

- (1) No duty is [chargeable](#) under this Chapter in respect of a transfer of dutiable property to a person if the [Commissioner](#) is satisfied that—
- (a) the transfer has been made to remedy a prior transfer of dutiable property, subject to the conditions in subparagraph (1)(b);
  - (b) the prior transfer of dutiable property was procured as the result of unconscionable conduct or undue influence of a person in circumstances where:
    - (i) the person or an associated person received a direct or indirect interest in the dutiable property;
    - (ii) the prior transfer was made for no or inadequate consideration; and
  - (c) the transferor is a person who obtained an interest in dutiable property as a consequence of unconscionable conduct or undue influence as set out in subparagraph (1)(b);
  - (d) the transferee is—
    - (i) a previous owner of the dutiable property the subject of the prior transfer; or
    - (ii) a previous owner of a separate dutiable property the proceeds of sale of which resulted from unconscionable conduct or undue influence and were used to purchase the dutiable property ; or
    - (iii) a trustee of a trust of which no person is a beneficiary other than a person referred to in subparagraph (i) or (ii); or
    - (iv) the Legal Personal representative of a person referred to in subparagraph (i) or (ii); and
  - (e) no other [person](#) takes or is entitled to take an [interest](#) in the dutiable property the subject of the transfer.
  - (f) the transfer to the person is not part of a sale or other arrangement in which there exists any consideration for the transfer to the person.

- (2) Without limiting section 44A(1), the Commissioner may issue a reassessment of duty in excess of 5 years from an initial assessment in accordance with section 9(3)(c) of the Taxation Administration Act 1997 (TAA).

### **SCHEDULE 3: Suggested Refund Provision**

DUTIES ACT 2000 - SECT 240A

Entitlement to Refund for Victims of Financial Abuse

- (1) A [person](#) is entitled to a refund of duty paid by the [person](#) in connection with a dutiable transaction if—
- (a) *the re-transfer of dutiable property to a person arises as a consequence of another procuring the dutiable property by unconscionable conduct or undue influence of the person; or*
  - (b) *the purchase and transfer of dutiable property to another has been made from the proceeds of sale of dutiable property procured by way of unconscionable conduct or undue influence and for nil or inadequate consideration.*