

# International Tax Webinar Series

## Evidentiary issues and processes in international tax and transfer pricing matters

Presented by Kristie Schubert, Partner and Jacqueline McGrath, Special Counsel

Wednesday, 1 December 2021

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## International Tax Webinar Series

- Session 1 - Base Erosion and Profit Shifting: Overview and current status of implementation of BEPS measures in Australia (Wednesday, 6 October 2021)
- Session 2 - Taxing the Digital Economy: Pillars One and Two (Wednesday, 20 October 2021)
- Session 3 - International tax disputes (Wednesday, 3 November 2021)
- Session 4 - Interpretation of Double Taxation Agreements (Wednesday, 17 November 2021)
- **Session 5 - Evidentiary issues and processes in international tax and transfer pricing matters (Wednesday, 1 December 2021)**

To view the recording of sessions already delivered, please visit  
<https://hwlebsworth.com.au/international-tax-webinar-series-2021/>

# Outline



Information and evidence gathering in transfer pricing matters

Commercial and Financial relations

Economically significant activities

Issues with contracts

Witness evidence

Questions

# Information and evidence gathering

- Functional analysis and characterisation
- Tangible / intangible / services, financing
- Group structure / relationships
- Market, business strategies and geography



## Commercial and Financial relations

- The contractual terms (remember substance over form)
- The functions performed by each of the parties (incl. assets used and risks assumed)
- The economic circumstances of the parties
- The market in which the parties operate
- Business strategies pursued by the parties

## Economically important activities

- represent a significant proportion of operating costs
- may be subject to a distinctive set of cost drivers
- may be performed by competitors in different ways
- may be important in differentiating one competitor from another

# Contract renegotiations

## **Gather information and evidence on the following:**

- the terms of the new agreement
- the changed circumstances which have led to the need for the revision or renegotiation
- the analysis undertaken to support the revised transfer price or terms of the arrangement
- the basis upon which it is considered that the revision or renegotiation is consistent with what arm's length

## No written agreement?

### Gather information and evidence on the following:

- Where the transaction hasn't been formalised, all aspects would need to be determined from available evidence of the **conduct of the parties** (analysis of functions, assets and risks)
- Other **business records** of the company



## Identifying economically important activities

- what is the nature of the business – **what does it do?**
- what **assets** does the business use (does it own the assets)?
- how does this enterprise **add value**?
- are there any **unique factors in the success** of the business (consider internal and external factors)?
- what are the **key business strategies**?
- what **transfers of value** (people, resources, assets) have been made to and from the enterprise?
- What **market** does it operate in (mature or emerging), are there any **market dynamics** impacting the business?
- **Where is the business placed** in the market?

# Expert witnesses

The role of an expert witness is critical – they provide relevant and impartial evidence in their area of expertise which the Court will consider in reaching its conclusions.

- An expert must be qualified in their area of expertise, training and specialised knowledge (e.g. economists, subject matter experts, other qualified professionals)
- An expert may give **opinion evidence** in the proceeding or in certain circumstances, express an opinion that may be relied upon in ADR
- An expert may also be appointed as an independent adviser to the Court
- Evidence Act 1995 (including Part 3.3) and Part 23 of the Federal Court Rules 2011 (Rules)
- Harmonised Expert Witness Code of Conduct (Code) (Federal Court)

## Practical considerations

- the number of experts
- the issues that it is proposed each expert will address
- how expert evidence may best be managed

## Expert evidence: bear traps

- Witness should be **impartial and objective**
- The witness needs to have the relevant **expertise, qualifications** and **experience**
- You need to ask the **correct question**
- Test the **assumptions**
- Witness needs to **stay within their field of expertise**
- They are **not an advocate**
- Endorsement of another witness - inappropriate where they are not an expert in that area themselves

Thank you



## Team Contacts



**Kristie Schubert**

Partner

P +61 2 9334 8976

E [kschubert@hwle.com.au](mailto:kschubert@hwle.com.au)



**Jacqueline McGrath**

Special Counsel

P +61 3 8644 3413

E [jamcgrath@hwle.com.au](mailto:jamcgrath@hwle.com.au)

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The logo for HwL Ebsworth Lawyers is centered on a dark blue background. The background features a series of thin, light blue lines that intersect to form a grid-like pattern, with some lines being slightly brighter than others, creating a sense of depth and movement. The text 'HWL' is in a large, white, sans-serif font. To its right, 'EBSWORTH' is written in a smaller, white, sans-serif font. Below 'EBSWORTH', the word 'LAWYERS' is written in an even smaller, white, sans-serif font.

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