AUSTRALIAN STAMP DUTY

THE EXTRA-TERRITORIAL DRIVE - COSTLY CONFUSION

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Peter Green's paper is a thorough and thoughtful approach to a number of central issues affecting not only bankers who look to turn debt into equity but anyone having to concern themselves with the myriad of stamp duty legislation throughout this country in any business transaction.

His paper highlights the possibility of double duty being imposed in one transaction as a result of the determination as to the location of a particular asset. The point which I would like to take up with a little more detail arises out of the paper namely the problems we all face as a result of states and territories competing against each other for stamp duty dollars and the way in which the lack of harmony between all of the Acts exacerbates not only the costs in many transactions to the business community but also to the offices of State Revenue Commissioners and Comptrollers in attending to compliance.

But before moving to that I would like to make one or two comments on s54A of the Queensland Act and to reinforce a point Peter makes in relation to goodwill particularly the difference for accounting and legal purposes.

So far as s54A of the Queensland Act is concerned, it seems to me that this is a good piece of "fuzzy" legislation. It was introduced into the Act in 1968 and has never been the subject of judicial comment. It is drafted in wide terms and has been the graveyard of many a proposal for stamp duty minimisation. It is very cute in the way in which it at the one moment concentrates on activities to attract its operation then switches to a bundle of assets used in an activity and if that stratagem does not work then it just simply says that land is going to be deemed to be a business. Long before we all had the delights of trying to work out how capital gains tax would apply to a partnership (whether you look at the assets or whether you look at the chose in action) s54A did not worry about those niceties - in sub-s(7) it just sweeps up the chose in action and deems it to be a business and for the purposes of attracting the duty then looks to the underlying assets for its quantum.

So it is a very effective section. I agree with Peter Green's comment "That a business ... is a complex relationship involving activity ...". It always seems to me that this is the best way to approach the section: ask the question whether the person who is alleged to be caught by the section has commenced to conduct the commercial activities previously conducted by someone else. But as I have just mentioned, even if you get a negative answer to that, it is still important to ask whether the acquisition of sufficient of the assets triggers the section, whether someone has acquired a chose in action or additional

chose in action or whether as a result of sub-s(8) or (9) land is now deemed to be a business.

One thing which is still a bit of a mystery with the section is whether you can be caught by the section even though you have no intention to conduct a business. My experience has indicated that sub-sections like (8) and (9) are usually looked on as anti-avoidance provisions. But since you acquire a business if you acquire sufficient of the assets to carry on a business, theoretically if you buy all of the assets of a company in liquidation at auction perhaps you are caught. I have never seen the Commissioner use it in that way thankfully.

So far as goodwill is concerned, I support very much what Peter Green has said on the importance of distinguishing between goodwill for accounting and legal purposes. Accountants appear to approach a situation and to say that goodwill is acquired if an amount more than market value is paid. Now this is not to criticise that approach: at the end of the day I am not too sure whether if we all had out time again goodwill should be accorded the description of legal property. I say that because it is so inextricably tied up with a business and a business is so hard to define that it is pretty hard to say whether you have got it or not. The legal approach is to define it in a positive way - you have got it, now value it - while the accounting approach is to define it in a negative way - you have valued it so therefore we must have it. Both lawyers and accountants need to be aware of each other's difficulties and to appreciate the difference. But the difference is extremely important in such circumstances as trying to determine whether a company is land rich.

As I said earlier, Peter Green's paper throws up the issue of circumstances in which double duty could be levied and the problems that we as practitioners have in trying to work through commercial transactions when we have eight different sets of stamp duty legislation, all competing for stamp duty dollars. I would like to develop that theme. I have written a short paper (which you will get at the end of this session) on what I have described as "The Extraterritorial Drive - Costly Confusion". Now this problem has been highlighted before but as far as I know only in relation to security duty and cross border leasing. But the problem is wider than that.

THE EXTRA-TERRITORIAL DRIVE - COSTLY CONFUSION

INTRODUCTION

A study of the various States and Territories' stamp duty legislation over the last ten or so years reveals a growing tendency to concern themselves with the underlying transaction which instruments reflect rather than just simply with the instruments themselves and with a ready eye focused very much on what happens outside the State or Territory affecting property or other matters within the State or Territory.

These two developments reflect a legislative answer to perceived avoidance practices. It is no doubt legitimate for a State or Territory to ensure that its revenue legislation is effective. It is most certainly suggested here that it is legitimate for taxpayers to organise their affairs to ensure that their tax bills are reduced. The result is that there is a necessary conflict between both of those legitimate aims. In the middle of the two of them is the practitioner. The practitioner's role in all of this is a fairly delicate one (see *Statutory and Ethical Obligations of Revenue Law Advisers*, J G Mann, Queensland Legal Symposium Papers, 1989). Not only must the practitioner ensure that his or her actions are totally defensible but that the practitioner also has to ensure that his or her advice is complete to ensure that the revenue implications of any one or more States or Territories impacting on a transaction or instrument are fully explained. Therefore, a practitioner

has to be aware of the possible impact of other States or Territories' revenue statutes may have on that transaction or instrument.

What this short paper seeks to do is:

(a) to highlight how intrusive the various States and Territories' stamp duty legislation can be into acts effected within another's borders;

(b) to point out the consequences of that approach;

(c) to see what the various States and Territories' legislation does to moderate the consequences;

(d) to underscore the necessity to have regard to that legislation in the other States or Territories as a result;

(e) to suggest that it is about time the States and Territories sat down and worked at a sensible common approach to ensure a balance between the legitimate exercise of their taxing powers and its impact on the taxpaying community in a modern federal state.

THE GOOD OLD DAYS

It is not so many years ago that one could feel comfortable in the knowledge that in general retention of an instrument in your State or Territory or out of your State or Territory would relieve you of worrying about your or another State's stamp duty legislation (see Chart 1).

When the essential principle by which dutiability or otherwise was determined was the dictum of Isaacs J in **Commissioner of Stamps (Q) v Weinholt** ((1915) 20 CLR 531 at 541), things were relatively uncomplicated and predictable.

THE EXTRA-TERRITORIAL DRIVE

A perception that duty was being avoided by the retention out of the State or Territory of instruments affecting property or activities which would if they were in the State or Territory have been subject to duty prompted State "me-tooism" with the result that in a period of two years the five mainland States introduced sections to clearly give their stamp duty legislation an extra-territorial intent and in a period of just under ten years all States and Territories of Australia have adopted that approach (see Chart 2).

Now this is not to suggest that there are not in several quarters arguments that nothing has changed since the good old days. There are those who (for example) argue quite forcefully that s4 of the Queensland Stamp Act 1894-1991 operates exactly as it used to and that the effect of s4(2) introduced in 1982 is simply to regulate the relevant duties which are to be applied when an instrument finally comes into Queensland.

But it is suggested that the more widely accepted and correct approach is that the introduction of the relevant sections indicates a clear legislative intent for that legislation to apply wherever an instrument is executed. One must of course quickly point out that many other sections in the relevant legislation have their own extra-territorial operation so that an examination of relevant extra-territorial intent and validity has to be applied to each of them quite separately.

TRADITIONAL FORMULA

Now when one looks at the statements in **MacLeod v Attorney-General for New South Wales** ([1891] AC 455) and in **Pearce v Florenca** ((1976) 135 CLR 507 at 518) there is obviously a vast difference on the extent of State extra-territorial power. That principle has been the subject of much judicial and academic comment (see *Extra-territorial Operation of State Revenue Legislation*, J G Mann, 1983, Australian Legal Convention Papers, pp406-425). The classic statement of Dixon J in **Broken Hill South Ltd v Commissioner of Taxation (NSW)** ((1936) 56 CLR 337 at 375) contains the traditional formula on the extent of that power (see Chart 3).

This statement encapsulated the limits of State constitutional power up to at least the Australia Acts 1986. Now opinions can differ on the effect of s2 of those Acts: see **Moshinsky** ((1987) 61 *ALJ* 779) and **Gilbert** ((1987) 17 *FL Rev* 25) (see Chart 4). Do the States now have extra-territorial power in the same way as the UK or Commonwealth Parliaments? Or has nothing changed? The better view (it is suggested) is that the Australia Act 1986 really has changed nothing (see: **Union Steamship Co of Australia Pty Ltd v King** (1988) 82 ALR 43 at 50-51; **MacDonnell Professional Fishermen's Association Inc v South Australia** (1988) 168 CLR 340; **Polyukhovich v Commonwealth** 101 ALR 545 at 552 and 631; and **Boath v Wyvill** (1989) 85 ALR 621 at 636-637; see also **Seymour-Smith v Electricity Trust of South Australia** (1989) 17 NSWLR 648 at 655. But contra **Building Construction Employees and Builders Labourers Federation (NSW) v Minister of Industrial Relations** (1986) 7 NSWLR 372 at 384 and 421). The Dixonian formula has simply been reflected in s2(1) of those Acts (see discussion in *Constitutional Law in Australia* (Butterworths) 1991 by Peter Hanks at ppl78-180).

The search for a "relevant connection" with the State is still required. But the High Court in the **Union Steamship** case did endorse the comments of Gibbs J in **Pearce v Florenca** ((1976) 135 CLR 507 at 518; subsequently endorsed in **Port MacDonnell Professional Fishermen's Association Inc v South Australia** (1989) 168 CLR 340 at 372): "... the requirement for a relevant connection between the circumstances on which the legislation operates in the State should be liberally applied and that even a remote and general connection between the subject matter of the legislation and the State will suffice".

No doubt the draftsman of the 1988 amendments to the Queensland Stamp Act took great heart from these words. Sub-sections (4), (5), (6), (7) are so wide in their possible application that the draftsman thought it wise to put in a safety valve in sub-s(8):

> "Where the Commissioner is of the opinion that the connexion between a trust, an instrument or a transaction, direct or indirectly, and property in Queensland or any matter or thing done or to be done in Queensland is inconsiderable, sub-ss(4) and (5) shall not apply".

The shorter Oxford English Dictionary defines "inconsiderable" as "1. incalculable; 2. not to be considered; beneath notice; insignificant hence a very small value, amount or size; 3. inconsiderate, thoughtless".

No doubt before this sub-section would be applied, not only would the connection but any resulting duty otherwise payable in Queensland would have to be inconsiderable!

CONNECTING FACTORS

On the basis therefore that the Australia Acts 1986 have changed nothing, the States and Territories therefore still have to have regard to connecting factors. In the **Union Steamship** case it was registration of the ship in New South Wales which was sufficient. In **MacDonnell**, the management of a finite resource provided the connection. So what types of connecting factors have the State and Territory stamp duty legislation selected? (see Chart 5).

The connecting factors currently include:

(a) property;

(b) matter or thing done or to be done;

(c) incorporation;

(d) residence or domicile;

(e) conduct of a business;

(f) supply/use/receipt of goods, money or documents;

(g) existence or a risk inside or outside a State or Territory;

(h) subscription for debentures;

(i) discount accommodation;

(j) advertising conduct of a business;

(k) the repayment of money;

(l) negotiations;

(m) an arrangement.

Some of the principal extra-territorial sections of the States and Territories specifically refer to the execution of an instrument within its borders.

TRACING OR DEEMING PROVISIONS

However some of the States and Territories have not been content to leave it to courts to find a relevant connection. No doubt concern that a court might come to a conclusion that it was never intended that a slight connection in an indirect way back to a State or Territory could not have been intended, tracing provisions (and in some cases deeming provisions) have been included (see Chart 6).

The statement of Gibbs J in **Pearce v Florenca** referred to above is most assuredly put to the test. A liberal interpretation is one thing but to deem something is surely another.

It is of course still possible for a taxpayer to argue that not only is the connection insufficient but that the tax has not been levied by reference to that connection. Surely this sort of argument could be raised in relation to such sections as Queensland s71 which deem a security to be secured on property in Queensland where the property

secured is shares in a company incorporated in Queensland. Why can it not be argued that under s4(2) stamp duty is levied upon the execution (out of Queensland) of an instrument affecting Queensland property but under s71 it is levied on the execution of an instrument affecting non-Queensland property: in other words, s71 could only be constitutionally valid if the duty was placed upon a Queensland company since that it is the connecting factor with that State.

PROBLEMS CREATED

It is right to question whether any of those connecting factors would be held sufficient and so valid by the High Court: in Peter Hanks' book *Constitutional Law in Australia* (*supra*) this important observation is made (at p180): "Significantly, in the light of the federal considerations referred to in the **Union Steamship** case, the Court noted that the South Australian legislation did not claim to extend into waters with which Victoria might have an equal or stronger connection". What then would the High Court do with stamp duty legislation of several States all trying to tax the same instrument where multiple duty was thence levied?

If we assume that all of these various connecting factors are sufficient for constitutional validity and if we do not worry about problems about the duty being levied by reference to the connecting factor, it is obvious that problems can arise because of this extra-territorial drive of the States and Territories (see Chart 7).

Surely these problems include:

(a) the possibility that multiple duty will be levied on the one instrument or one transaction by several States or Territories claiming that that transaction or instrument has some connection back to it and that the State or Territory has a legitimate right to tax it in order to protect its revenue base;

(b) taxpayers and their advisers are going to have to worry about the operation of this various legislation with an inevitable increase in cost which must end up being charged back to the community;

(c) the various Offices of State Revenue and Commissioners and Comptrollers are going to have to worry as to whether they are properly exercising their statutory responsibilities in collecting all of the revenue which they quite naturally would think their relevant legislatures wanted them to collect in relation to transactions or instruments having no obvious connection with their State or Territory.

The final economic benefit of all of this to the Australian community must be seriously questioned. Protagonists of States' rights must suffer some nervousness in seeing this sort of confusion and cost created.

MODERATING THE CONFUSION?

But the States and Territories are obviously alive to the problems which they create. Attempts have been made to moderate this confusion (see Chart 8) by, for example:

(a) directing that the Act will not apply when the degree of connection is inconsiderable: Queensland s4(8);

(b) directing that no duty will be paid on property outside the State or Territory: Queensland s54A(10), s56B(4), s56C(8)(c); Tasmania s70(6B), Schedule 4 Item 4; ACT s64A;

(c) directing that there should be a reduction of duty where it has been paid in another State or Territory by a person other than a person resident in that State or a company incorporated or registered in that State: Queensland s67A;

(d) directing that there will be a reduction in duty where duty or a proportion of part of it has been paid in another State, Territory or Country: Queensland s31H, s31I, s71(4); New South Wales s74E(3C), s74F(7C), s84B, s84EA, s93, s96A(3), s96B(3), s99F(2); Western Australia s31B(5), s112HAA; ACT s24, s53;

(e) directing that duty will only be collected on a proportion of the money secured as is equal to the proportion of property in the relevant State or Territory: New South Wales s84F; South Australia s81b; Tasmania Schedule 4 Item 3(g).

It is difficult to see any consistency of thought behind the way in which these provisions have been framed. One gets the impression that the relevant legislature in some of those provisions makes up its mind to look only within its own borders for relevant duty but in other cases is very concerned with what happens and how much duty is paid in another State or Territory (eg Queensland s70(1)).

SOME EXAMPLES

One of the questions to ask in all of this is whether the extra-territorial drive of the States makes any sense from a cost-effectiveness point of view. There do not appear to be any figures or statistics which one can look at in making any comment on that question. But as practitioners we well know that there is a cost which has to be borne by the community as a result of this legislation. Clients have to be advised of the implications of a stamp duty impact from several jurisdictions.

When one looks at some examples (see Chart 9.1-9.6) such as:

(a) an agreement (executed out of the State or Territory) for sale of units in a unit trust where trust assets include property in the State/Territory and other States/Territories;

(b) an agreement (executed out of the State/Territory) for sale of business and land where business/land conducted/situated in the State/Territory and other States/Territories;

(c) offer/application (made out of the State/Territory) to lend money (which is accepted by conduct) and money lent into the State;

(d) mortgage debenture (executed out of the State/Territory) charging assets in the State/Territory and other States/Territories;

(e) declaration of trust (executed out of the State/Territory) and other States/Territories;

(f) resettlement (executed out of the State/Territory) of land in the State/Territory and other States/Territories;

It is evident that in most cases the relevant States and Territories are only concerned to extract duty on the property within their boundaries and to that extent incidence of double duty does not often arise. But double duty can arise such as an offer or an application made out of Queensland to lend money (which is accepted by conduct) and money is lent into that State and declarations of trust or resettlements affecting property

in that State and in other States or Territories. But that full blooded approach is not reflected in other provisions of the Queensland Act affecting property in and out of that State such as s56B (dealing with unit trusts), s56C (dealing with shares in trustee companies). Why? And why be nosy about the amount of duty paid on a mortgage in another State under s70(1) when you are not when units are transferred in a unit trust with property in and out of the State? And Queensland is not alone in this type of inconsistency. Some other States are still very interested to make sure that taxpayers do in some circumstances pay some duty or at least what they would have paid if the whole thing had been happening inside its boundaries: for example, s137DA(2) in Victoria, s84(2) in Western Australia and New South Wales s93. And why in some cases give a credit for duty paid in another country (eg Qld s31H) but not in others (eg Qld s4(9))? It can be important from the point of view of the total duty bill for an instrument or transaction to ensure that the right sequence of stamping in the States or Territories is observed: eg Qld s67A and WA s31B(5) with respect to offers/applications to lend/borrow and mortgages: eg Qld s70(1) and WA s84(2).

One thing which should always be kept sight of in all of this is that the duty paid in another country is rarely thought to be relevant.

RESOLVING THE CONFUSION

So, what can one suggest as a result of all of this?

Perhaps one could suggest (in descending order of resolution of the problem and in descending order of expectation that something will be done about that problem) that (Chart 10):

(a) stamp duty be abolished in all States and Territories; or

(b) the States should transfer their stamp duty taxing powers to the Commonwealth so that uniform legislation is enacted and it is collected by a central body; or

(c) the States should agree amongst themselves that taxpayers only have to submit instruments or report transactions to their particular State collection authority who can then remit duty to other States where relevant; or

(d) the States should agree on uniform Acts and uniform rates; or

(e) tracing/deeming provisions particularly the Queensland ones should be abolished;

(f) the States should restrict the imposition of duties to assets/transactions/instruments in that particular State or Territory or having clearly a substantial connection with it;

(g) someone should test the extra-territorial provisions (particularly the tracing and deeming provisions of the Queensland Act) in the High Court to see if the Australia Acts have changed anything so far as revenue laws are concerned.

LIVING WITH REALITY

The reality no doubt will be that States and Territories will continue to look outside their borders for revenue which they consider is rightly theirs and it is unlikely that there is going to be uniformity of legislation and rates.

In his article (*supra* pp43-44) Professor Gilbert comments:

> "... many of the pressing problems that have arisen partly from the modern, more liberal doctrine of extra-territoriality have now been resolved by Commonwealth - State agreements ... Nonetheless, cases such as **Millar v Commissioner of Stamp Duties**, **Cox v Tomat** and **Johnson v Commissioner of Stamp Duties** show that difficulties still continue to arise when States attempt to attach legislative consequences to facts or circumstances occurring within the land borders of other States. In this area there is still potential for conflict between the colliding policies of different States. Here there is still a need for some mechanism to determine when an extra-territoriality - legislating State has gone too far ... [T]o allow States an unfettered power to legislate within the borders of their neighbours would be a recipe for political and legal confusion, ruffled sensibilities, and inter-State conflict."

Professor Gilbert offers the Dixonian formula as the solution. But more is required. If it is legitimate for States or Territories to get stamp duty in relation to instruments/transactions which truly have a significant impact on State's sovereignty, then it is equally legitimate in a sensible federation to require that the result is not complexity, commercial confusion and unnecessary cost to the Australian community.

What all this opens up is the whole question of how the revenue cake of this country is to be cut up. Obviously that is a large issue. It cannot be debated here.

But surely the very least that we can ask for is that (Chart 11):

(a) no double duty situation should ever arise;

(b) the States and Territories should select only truly substantial or relevant connecting factors for the purposes of their legislation so that provisions like s4(8) of the Queensland Act are unnecessary;

(c) the States and Territories should sit down and agree on a uniform approach to connecting factors and the way in which credits/exemptions will be worked out between them;

(d) if they cannot do that, then unilaterally each should ensure uniformity of approach so that (eg) the present position in relation to the stamping of securities is avoided.

It is heartening to see that the New South Wales Commissioner is pushing for agreement amongst the States and Territories in relation to loan security duty. Hopefully the discussion will spread to all areas of the Acts.

Since preparing this paper, the author's attention has been directed to Chapter 29 of the Review of the State Tax System undertaken by the NSW Tax Taskforce chaired by Professor David Collins in 1988 (Collins Report). In that chapter, the need to achieve tax harmonisation between the States and Territories was emphasised:

> "Tax harmonisation should involve a form of co-operative federalism in which States commit themselves to consultation with each other on the definitions of tax bases to be implemented and undertake to minimise the degree of tax competition. It has to be recognised that different States will want to implement different tax rates, but differing tax rates will be much less detrimental if they are

> applied to bases which are consistent in interstate terms. Of course, the closer the tax rates, the better".

The Collins Report saw the problem so significant that it recommended exploring the possibility of establishing an Interstate Tax Commission to promote interstate tax harmonisation. One cringes at the idea of yet another commission.

But micro-economic reform of the stamp acts around Australia to achieve such tax harmonisation should be implemented as soon as possible and if this can only be achieved by a commission, then so be it. Foreign and domestic investment in this country could well depend on inter-state tax harmonisation.

CHART 1

THE EXTRATERRITORIAL DRIVE: GOOD OLD DAYS

"... it is the concrete existing instrument itself within the jurisdiction, and not the abstract incident of execution, which is the subject of taxation."

- per Isaacs J in
Commissioner of Stamps (Qld) v Weinholt
((1915) 20 CLR 531 at 541).

CHART 2

THE EXTRATERRITORIAL DRIVE: STATUTORY STAMPEDE

STATE	DATE	PRINCIPAL SECTIONS
South Australia	18 December 1980	Section 5b
Victoria	23 December 1980	Section 17(4)
New South Wales	20 October 1982	Section 25
Western Australia	26 October 1982	Section 16(3)
Queensland	13 December 1982	Section 4(2)
Tasmania	12 November 1985	Section 10C
Northern Territory	1 August 1987	Section 9B
Australian Capital Territory	25 June 1990	Section 17A

CHART 3

THE EXTRATERRITORIAL DRIVE: TRADITIONAL FORMULA

"... [I]t is within the competence of the State legislature to make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition upon any person concerned therein of a liability to taxation or of any other liability. It is also within the competence of the legislature to base the imposition of liability on no more than the relation of the person to the territory. The relation may consist of presence within the territory, residence, domicile, carrying on business there, or even remoter connections. If a connection exists, it is for the legislature to decide how far it should go in the exercise of its powers. As in other matters of jurisdiction or authority courts must be exact in distinguishing between ascertaining that the circumstances over which the power extends exist and examining the mode in which the power has been exercised. No doubt there must be some relevance to the circumstance in the exercise of the power. But it is of no importance upon the question of validity that the liability imposed is, or may be, altogether disproportionate to the territorial connection or that it includes many cases that cannot have been foreseen."

- per Dixon J in
Broken Hill South Ltd v Commissioner of Taxation (NSW)
((1936) 56 CLR 337 at 375)

CHART 4

THE EXTRATERRITORIAL DRIVE: AUSTRALIA ACTS SECTION 2

2. (1) It is hereby declared and enacted that the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extraterritorial operation.

(2) It is hereby further declared and enacted that the legislative powers of the Parliament of each State include all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act for the peace, order and good government of that State but nothing in this subsection confers on a State any capacity that the State did not have immediately before the commencement of this Act to engage in relations with countries outside Australia.

CHART 5

THE EXTRATERRITORIAL DRIVE: CONNECTING FACTORS

TYPE OF CONNECTING FACTOR	QLD	NSW	VIC	SA	WA	TAS	ACT	NT
1. Property	4(2), 46, 54(5), 54AB, 56B, 56C, 56FL	29, 40A, 41, 44, 65, 76, 83(1), 84F, 91, 96A, 96B, 99A	17(4), 60H, 75I, 137DA, Heading IV of Sch.3	5b, 59b, 91, 94	16(3), 31B, 73D(4), 76AI, 76AP, 92A, Schedule	10C, 35	17A, 30	8C, 4 ("dutiable property"), 9B, 56N, 83A
2. Matter or thing done/to be done	4(2)	29, 98(3)	17(4), 111B(2), 120	5b	16(3)	10C	–	9B
3. Incorporation	31H, 31J, 54(4), 67A	44(1)(1), 44(1A)(b), 44(2), 91, 96A, 96B, 97C, 98(3)	60H, Heading IV of Sch.3	59b	112HA	48, 69A	50	–
4. Residence/domicile	31A, 35E, 42B, 46, 67A	44(1A)(b), 84D(4), 88G, 88H, 91	131AF, 137M	90a	31B, 73E, 92, 92A, 112A, 112P	48, 49, 52, 59C, 60A, 60D, 65	30	44A, 44B, 69F
5. Business	31D, 31J, 35A, 42B, 46F, 54A	44(1)(c), 88A, 88I, 97A, 97AA, 97D, 98(3), 99A	59A, 60B, 96, 131AB	31d, 33, 36, 71e	73E, 108, 112J	48, 58, 60B	64C	4 ("dutiable property"), 18, 41, 45, 47
6. Supply/use/receipt of goods, money, documents	38, 67A, 68A, 70(3)	74D, 88J, 96, 98(3)	99, 111B(3), 131AC	48(5)	50C, 50D, 31B	50, 52	30	4 ("dutiable property"), 44A, 67, 71
7. Risk inside/outside	46	88	99(1), 110A	42aa	92a, 92aaa	48, 49	–	–
8. Subscription for debentures	–	84D	137D, 137M	–	–	–	–	–
9. Discount accommodation	35A	74A(1)	–	–	–	–	–	–
10. Advertising conduct of business	46F	–	96(1), 131AB(1)	31d	–	60B	–	–

CHART 5 (contd)

THE EXTRATERRITORIAL DRIVE: CONNECTING FACTORS

TYPE OF CONNECTING FACTOR	QLD	NSW	VIC	SA	WA	TAS	ACT	NT
11. Repay money	67A	-	-	-	31B	-	-	-
12. Negotiations	35A, 35B, 67A	-	131AB	31d	112J	58	-	-
13. Arrangement	-	74D(1)	-	-	-	-	-	71
14. Execution in State/Territory	4(2), 68A	29, 83(1)	30	-	16(3)	10C	-	9(1A)

CHART 6

THE EXTRATERRITORIAL DRIVE: TRACING OR DEEMING PROVISIONS

	QLD	NSW	VIC	SA	WA	TAS	ACT	NT
TRACING BACK TO THE STATE/ TERRITORY DOCUMENTS/ TRANSACTIONS PRIMA FACIE UNCONNECTED WITH IT.	4(4)-(8), 56C	44(1)(e)	-	-	-	-	-	4 ("dutiable property"), 83A(1)(d)
	QLD	**NSW**	**VIC**	**SA**	**WA**	**TAS**	**ACT**	**NT**
DEEMING PROPERTY/DOCUMENT OR ACTIVITY TO BE WITHIN OR CONNECTED WITH A STATE OR TERRITORY.	2B, 35A(2), 46C, 54A(10), 56FL(6),67A(3), 71, 56C	83(5), 99A	75N(4), 75I(5)	92(2)	73DA, 84A, 88A	-	-	56N(5)

CHART 7

THE EXTRATERRITORIAL DRIVE: PROBLEMS CREATED

1. MULTIPLE DUTY
2. TAXPAYER'S COSTS
3. OSR/CSD COSTS

CHART 8

THE EXTRATERRITORIAL DRIVE: MODERATING THE CONFUSION

Assume an instrument/transaction is dutiable in several States/Territories

Types of Moderation	Operation/Conditions Required	Examples
1. Non application of Act	Degree of connexion with State "inconsiderable".	Qld - s4(8)
2. Exemption	Degree of connection insufficient.	Qld - s54AB(4A)
3. Exemption	Property outside the State.	Qld - s54A(10), s56B(4), s56C(8)(c) Tas - s70(6B), Sch 4 item 4 ACT - s64A
4. Reduction	Degree of connection insufficient and duty paid/will be paid in another State or Territory.	Qld - s4(9)
5. Reduction	Duty paid/will be paid in another State or Territory other than by a Qld resident or Qld incorporated/registered company.	Qld - s67A
6. Reduction	Duty (or a proportionate part) paid in another State, Territory or country.	Qld - s31H, s31I, s71(3), s71(4) Vic - s55A NSW - s74E(3C), s74F(7C), s83(5), s84B, s84EA, s93, s96A(3), s96B(3), s99F(2) WA - s31B(5), s112HAA ACT - s24, s53
7. Reduction	Duty paid in another State or Territory - degree of connection with the State and nature of insurance considered.	Qld - s46D
8. Reduction	Duty payable proportionate to part of sum insured relating to risks, lives, or property inside/outside the State.	Qld - s46(3) Vic - s99(1), s110A(2) SA - s42aa

CHART 8 (contd)

THE EXTRATERRITORIAL DRIVE: MODERATING THE CONFUSION

Types of Moderation	Operation/Conditions Required	Examples
9. Reduction	Duty payable reduced by an amount proportionate to risks, lives or property outside the State and duty payable in another State or Territory.	Qld - s46A
10. Reduction	Lesser of duty paid/payable in another State or Territory and duty otherwise payable in the State or Territory proportionate to property charged in the other State or Territory.	Qld - s70(1), s70(4) Vic - s137DA(2) WA - s84(2)
11. Reduction	Lesser of duty paid/payable in another State or Territory and duty otherwise payable in the State or Territory.	Qld - s70(2)
12. Reduction	Duty only on proportion of money secured equal to proportion of property in the State or Territory.	NSW - s84F SA - s81b Tas - Sch 4 item 3(f)
13. Reduction	Duty on part of amount secured expressed as being secured on property in Territory.	NT - s6(11)
14. Reduction	Nominal duty where security on property wholly outside the State or Territory.	Vic - s137DA(5) NSW - s84F SA - s81b Tas - Sch 4 item 3(g) (where duty paid elsewhere)

CHART 9.1

THE EXTRATERRITORIAL DRIVE: SOME EXAMPLES

Agreement (executed out of the State/Territory) for sale of units in a unit trust where trust assets include property in the State/Territory and other States/Territories

State/Territory	Result	Section(s)	Exemption/Reduction
Queensland	Dutiable	s4 and s56B	Duty on Qld property only
New South Wales	Dutiable if register in State or if register outside State, where manager is a NSW incorporated company or NSW resident	s25 and s91	Duty on full value or consideration with reduction for duty paid in another State, Territory or country
Victoria	Dutiable if register in State only; if "land rich", dutiable wherever register situate.	s17(4)	Apart from "land rich", duty on assets wherever situate at marketable security rates on net worth
South Australia	Dutiable	s5b	Duty on SA property only
Western Australia	Dutiable	s16(3) and s73D	Duty on WA property only
Tasmania	Dutiable if register in State	N/A	(a) Transfer: Duty on all assets except if landrich company duty on land only (s38) (b) Agreement: $20 under Item 11 of Sch 2
Australian Capital Territory	Dutiable	s44, s50 and Deter.67 of 90	Duty on ACT property only
Northern Territory	Dutiable if register in NT; and if land in NT, wherever the register	s9B and s56T	Duty on value of units; duty on NT land only

CHART 9.2

THE EXTRATERRITORIAL DRIVE: SOME EXAMPLES

Agreement (executed out of the State/Territory) for sale of business and land where business/land conducted/situated in the State/Territory and other States/Territories.

State/Territory	Result	Section(s)	Exemption/Reduction
Queensland	Dutiable	s4 and s54A	Duty on Qld property only
New South Wales	Dutiable	s25 and s65	Duty on NSW property only
Victoria	Agreements not dutiable unless a Deed ($10)	s17(4)	Duty on transfer of land and other assets (double duty could apply)
South Australia	Dutiable	s5b	Duty on SA property only
Western Australia	Dutiable	s16(3), s74 and s31B(1)(d)	Duty on WA property only
Tasmania	Dutiable	s10C and s70(6B)	Duty on Tas. property only
Australian Capital Territory	Dutiable	s64A and Deter.4 of 1990	Duty on ACT property only
Northern Territory	Dutiable	s9B; "dutiable property"	Duty on NT property only

CHART 9.3

THE EXTRATERRITORIAL DRIVE: SOME EXAMPLES

Offer/application (made out of the State/Territory) to lend money (which is accepted by conduct) and money lent into the State.

State/Territory	Result	Section(s)	Exemption/Reduction
Queensland	Dutiable	s67A	Exemption only if: (a) duty paid in another State/ Territory, AND (b) the offer/application is not executed by a Qld resident/ company.
New South Wales	No	N/A	N/A
Victoria	No	N/A	N/A
South Australia	No	N/A	N/A
Western Australia	Dutiable	s31B(1)(c)	Reduction of duty by amount paid/will be paid in another State/Territory
Tasmania	Dutiable	s70D	Nil
Australian Capital Territory	No	N/A	N/A
Northern Territory	No	N/A	N/A

CHART 9.4

THE EXTRATERRITORIAL DRIVE: SOME EXAMPLES

Mortgage debenture (executed out of the State/Territory) charging assets in the State/Territory and other States/Territories.

State/Territory	Result	Section(s)	Exemption/Reduction
Queensland	Dutiable	s4 and s70(1)	Lesser of other States/Territories duty and duty on Qld proportion of assets
New South Wales	Dutiable	s25 and s84F	Duty on NSW proportion of assets
Victoria	Duitiable	s17(4)	Lesser of other States/Territories duty and duty on Vic proportion of assets
South Australia	Dutiable	s5b	Duty on SA proportion of assets
Western Australia	Dutiable	s16(3), s84	Lesser of other States/Territories duty and duty on WA proportion of assets
Tasmania	Dutiable	s10C, Rule 3(f) of Sch.4	Duty on Tas. proportion of assets
Australian Capital Territory	No	N/A	N/A
Northern Territory	Dutiable	s9B	Duty on part amount only if so expressed in security

CHART 9.5

THE EXTRATERRITORIAL DRIVE: SOME EXAMPLES

Declaration of Trust (executed out of the State/Territory) and other States/Territories.

State/Territory	Result	Section(s)	Exemption/Reduction
Queensland	Dutiable	s4	Duty on all property wherever situated
New South Wales	Dutiable	s25 and s65	Duty on NSW property only
Victoria	Dutiable	s17(4)	Duty on all property wherever situated
South Australia	Dutiable	s5b	Duty on SA property only
Western Australia	Dutiable	s16(3)	Duty on WA property only
Tasmania	Dutiable	s10C and Item 25 of Sch.2	Duty on Tas. property only
Australian Capital Territory	Dutiable	s17A	Duty on ACT property only
Northern Territory	Dutiable	s9B; "dutiable property"	Duty on NT property only

CHART 9.6

THE EXTRATERRITORIAL DRIVE: SOME EXAMPLES

Resettlement (executed out of the State/Territory) of land in the State/Territory and other States/Territories.

State/Territory	Result	Section(s)	Exemption/Reduction
Queensland	Dutiable	s4	Duty on all property wherever situated
New South Wales	Dutiable	s25 and s65	Duty on NSW property only
Victoria	Dutiable	s17(4)	Duty on all property wherever situated
South Australia	Dutiable	s5b	Duty on SA property only
Western Australia	Dutiable	s16(3)	Duty on WA property only
Tasmania	Dutiable	s10C	Duty on Tas. property only
Australian Capital Territory	Dutiable	s17A	Duty on ACT property only
Northern Territory	Dutiable	s9B; "dutiable property"	Duty on NT property only

CHART 10

THE EXTRATERRITORIAL DRIVE: RESOLVING THE CONFUSION

1. Abolish stamp duty.
2. Commonwealth should collect stamp duty.
3. States to collect on behalf of others.
4. States to agree on uniform Acts and rates.
5. States to abolish tracing/deeming provisions.
6. States to clearly abide by the traditional formula.
7. Test extraterritorial provisions especially tracing/deeming provisions.

CHART 11

THE EXTRATERRITORIAL DRIVE: LIVING WITH REALITY

1. No double duty.
2. States to select only substantial/truly relevant connecting factors.
3. States to agree on connecting factors and credits/exemptions.
4. States to ensure uniform approach on credits/exemptions.