RECENT DEVELOPMENTS — STAMP DUTY

EQUIPMENT LEASING

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INTRODUCTION

A significant proportion of capital equipment and inventory requirements of business is financed by leasing. Whether a motor vehicle lease or a complex leveraged lease, leasing attracts *ad valorem* stamp duty in each of the States and in the Northern Territory. The Australian Capital Territory is alone in not taxing equipment leasing. However, the treatment of equipment leases under the stamp duties legislation is far from satisfactory. The stamp duty legislation is not uniform: not only are the rates of duty different but also the basis of calculating duty varies considerable between jurisdictions.

In "Stamp Duties — The Road to Micro-economic Reform", a joint submission prepared by several peak industry bodies,[1] it was noted that leasing transactions with a minimal connection with a State may be liable to duty thereby creating a disincentive to enter into transactions in some States. The joint submission recommended that rental business and hiring arrangement duty should be imposed with reference to rent paid in the jurisdiction in which the goods are located at the time the rent is paid.

This paper will focus on recent stamp duty developments relating to equipment leasing. It is intended to highlight some current issues arising out of recent legislative changes and case law and the move by the revenue authorities towards uniformity in this area.[2]

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1 Joint submission by the Australian Equipment Lessors Association, the Australian Finance Conference, the International Banks & Securities Association of Australia, the Australian Society of CPAS, the Australian Stock Exchange, the Corporate Tax Association, Institute of Chartered Accountants, the Law Council of Australia and the Taxation Institute of Australia — October 1993.

2 References to legislation in this paper are to the following: Victorian Act: *Stamps Act* 1958; New South Wales Act: *Stamp Duties Act* 1920; Queensland Act: *Stamp Act* 1894; South Australian Act: *Stamp Duties Act* 1923; Western Australian Act: *Stamp Act* 1921; Tasmanian Act: *Stamp Duties Act* 1931; Northern Territory Act: *Taxation (Administration) Act* 1978.

OVERVIEW OF RENTAL BUSINESS AND HIRING ARRANGEMENT DUTY

In general terms, there are four forms of stamp duty applicable to equipment leasing.

Rental Business Duty

The stamp duties legislation in Victoria, Queensland, South Australia, Western Australia and Tasmania is broadly similar.[3] A person who carries on rental business in the State, or advertises or holds itself out as carrying on rental business in the State, is obliged to register with the revenue authority of that State, lodge monthly returns and pay duty in respect of amounts received by that person in connection with its rental business.

The amounts to be disclosed in the return "include" amounts received in respect of the use of goods where:

- the right to use the goods was granted in the State;
- any negotiations by or on behalf of the registered person with respect to the grant of the right to use the goods were undertaken in the State; or
- the goods were delivered in the State to the grantee of the right to use those goods;

but excluding any amounts in respect of any business transacted by the registered person outside the State if:

- none of the negotiations leading to the transaction of the business took place in the State; and
- the goods obtained by the other party to the transaction were obtained for the purpose of being used exclusively outside the State.

Where the lessee is domiciled or resident in the State and transacts or offers to transact any rental business with a person carrying on any rental business (whether within or outside the State) who is not registered, the lessee is required to prepare a statement of the transaction and pay duty on it.

The rates of duty vary between these States — 2% in Tasmania, 1.8% in South Australia and Western Australia, 1.5% in Victoria and 0.43% in Queensland.

Hiring Arrangement Duty

Hiring arrangement duty is payable in New South Wales and the Northern Territory[4] in respect of an arrangement under which goods are or may be used by any person other than the lessor where:

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3 Sections. 131AA-131AG (Subdivision (13A)) of the Victorian Act; sections 35-37G of the Queensland Act; sections 31b-31n of the South Australian Act; sections 112I-112P (Part IVB) of the Western Australian Act; sections 57-59E (Division 3AA) of the Tasmanian Act.

4 Sections 74D-74H (Division 15), Schedule 2 "Hiring Arrangement" of the New South Wales Act; sections 71-80 (Division 13) of the Northern Territory Act and Item 19, Schedule 1 "Hiring Arrangement" of the Stamp Duty Act 1978 (NT)

- the arrangement is entered into in the jurisdiction;
- the goods are (or are agreed to be) supplied or delivered in the jurisdiction; or
- the goods may be used in the jurisdiction.

The lessor is obliged to prepare a statement setting out details of the hiring arrangement and pay duty on it. Where the lessor is resident outside the jurisdiction, then the lessor is not required to submit a statement where the hiring arrangement is only subject to duty because the goods may be used in the jurisdiction. Instead of paying duty on a statement, the lessor may elect to pay the duty by return.

Where the lessor is not resident in the jurisdiction or is not bound by that jurisdiction's stamp duty legislation, but the lessee is resident or domiciled in the jurisdiction, then the lessee is required to prepare a statement of the transaction and pay duty on it unless duty has previously been paid on the hiring arrangement.

The rate of duty in New South Wales is 1.5%. In the Northern Territory the rate is 1.5% up to a maximum of $7,500.

Hiring Agreement Duty

Queensland has a separate head of duty for a "hiring agreement".[5] Unlike rental business and hiring arrangement duty, hiring agreement duty is imposed on the agreement. Duty under this head is imposed on an agreement (or an instrument constituting or evidencing the terms and conditions of an agreement) for the letting or hiring of goods (but excludes an instalment purchase agreement — see below). A hiring agreement is not subject to this duty where the amount payable under the agreement is received by a person who is registered as carrying on rental business in Queensland. The rate of duty on a hiring agreement is 0.43%.

Instalment Purchase Duty

Victoria, Queensland and Tasmania impose duty on "instalment purchase agreements".[6] In the case of Queensland and Tasmania, "instalment purchase agreement" is defined to mean a credit purchase agreement, a hire-purchase agreement or a rental agreement. The owner of the equipment is obliged to prepare a statement of the transaction in the prescribed form at or before the time of making the agreement and pay the duty on it. In Victoria, duty under the "instalment purchase agreement" heading is imposed on a "rental agreement" only. In each of these States, a "rental agreement" is basically a bailment under which nominal or no rent is payable after not less than two instalments of rent have been paid.

The rate of duty on an instalment purchase agreement in Queensland is 0.43%; in Tasmania the rate is 2% up to a maximum of $4,000; and in Victoria the rate is 1.2%.

Queensland and Tasmania impose duty on hire-purchase agreements while all other Australian jurisdictions (with the possible exception of South Australia) have abolished duty on hire-purchase agreements.

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5 Section 2 and Schedule 1 "Hiring Agreement" of the Queensland Act.

6 Sections 131A-131G (Subdivision (14)) and Heading XIX, Third Schedule of the Victorian Act; sections 32A and Schedule 1 "Instalment Purchase Agreement" of Queensland Act; sections 57-59E (Division 3AA) Items 8, 9 and 13 of Schedule 2 of the Tasmanian Act.

SCOPE OF PROVISIONS

A source of considerable difficulty with the rental business and hiring arrangement provisions is determining whether the transaction is a "business of giving rights to use goods" or an "arrangement under which goods are or may be used" by a person other than the owner (as required by the statutory definitions). The critical question under both the rental business and hiring arrangement formulations is whether the transaction involves a "use of goods" or something else like, for example, the provision of services. If the transaction gives the lessee the use of goods, the next question is whether that right is sufficient to trigger a liability to duty.

Two recent cases have shed light on these questions. The first case dealt with "wet hires" under the hiring arrangement provisions; and the second dealt with floor plan financing or bailments under the rental business provisions.

Wet Hires

A "wet hire" is a hiring of equipment accompanied by a driver or operator. The issue is whether these arrangements should be characterised as an arrangement for the provision of goods (which is dutiable) or an arrangement for the provision of services only (which is not dutiable).

The position in New South Wales has been clarified by excluding from the definition of "hiring arrangement" "any arrangement under which an operator is provided by the owner of the goods to operate the goods for the hirer".

The question whether a "wet hire" falls within the definition of hiring arrangement in the Northern Territory recently arose in *Brambles Australia Limited v Commissioner of Taxes (NT)*.[7] In that case the Court of Appeal of the Northern Territory considered whether the wet hire of mobile cranes owned by Brambles were "hiring arrangements" as defined in section 4(1) of the Northern Territory Act. Generally speaking, these cranes were made available to Brambles' customers with an employee of Brambles who operated the cranes at the customer's direction.

The preliminary question was whether the definition of "hiring arrangement" is exhaustive or inclusive. Morling J (with whom Angel J concurred) found that the definition of "hiring arrangement" is inclusive. Morling J concluded that:[8]

> "It seems reasonably clear that the draftsman deliberately used 'means' when he intended a definition to be exhaustive and 'includes' when his intention was that a definition should not be exhaustive. In my opinion, the definition of 'hiring arrangement' is not exhaustive."

However, Mildren J disagreed with this view. He thought that the intention of the draftsman was to provide an exhaustive definition. In his Honour's view, the words "includes an arrangement...owner of those goods" are intended to enlarge the meaning of "hiring arrangement" in that there is only a requirement that the goods "may be used", even if in fact, they were not so used.

In the end, the decision did not turn on whether the definition of "hiring arrangement" is exhaustive or inclusive. The court held that Brambles' wet hires were each a "hiring arrangement" in both the ordinary meaning of the expression and the inclusive words of the statutory definition.

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7 (1993) 93 ATC 4888.

8 *Ibid* at 4895.

Brambles argued that a hiring arrangement cannot come into existence in the absence of a bailment by the owner of a chattel to the person who hires it, and that a bailment cannot occur in the absence of the passing possession of the chattel and that since possession of the crane does not pass under a wet hire arrangement, such an arrangement is not, in law, a hiring arrangement. The court thought that exclusive possession was not determinative of the issue. Rather the issue was whether the hirers exercised real control over the cranes in the tasks they were employed to perform, or whether the facts pointed to the provision of services only. On the facts, the court concluded that Brambles' customers were in possession of the cranes since they determined what work a crane was to perform, where it was to work and the periods when it was to be operated.

Brambles also argued that there was a distinction between goods which may be "used by" a person other than the owner, and goods which may be "used for" a person other than the owner. The court considered that Brambles' customer who hires a crane with an operator used the crane for its own purpose (ie to carry out the building operations on which they are engaged).

As an alternative argument, Brambles submitted that even if the wet hires were liable to duty as hiring arrangements, the Commissioner wrongly exercised his discretion under section 96(6) of the Northern Territory Act when considering whether he should remit the penalty duty which Brambles became liable to pay for its failure to disclose particulars of the wet hires in its returns. Brambles contended that similar legislation in New South Wales had been construed by the New South Wales revenue authority as not rendering wet hire arrangements liable to duty, that this had been publicised in circulars and rulings issued by it, and that this was a powerful circumstance that should have led to the Northern Territory Commissioner to further remit the penalties. The court rejected this argument saying that the ruling did not state that wet hires were not dutiable but stated instead that the issue was the extent to which the hired goods are in the control of the hirer. Since it was an open question whether the cranes were in the control of its customer, the court found that Brambles was not entitled to treat the rulings of the New South Wales Commissioner as confirming its view that its wet hires were not dutiable.

The case highlights that it is the degree of control exercised by the "hirer" over the equipment that determines whether the arrangement is a hiring arrangement. The provision of an operator with the equipment does not have any bearing on the issue. Furthermore, it is not necessary that the hirer should have exclusive possession or control of the equipment. The case suggests that the only circumstance in which the arrangement would not be a hiring arrangement is where the hirer has no control over the equipment and its operation; that is, where the equipment is employed to undertake a specific task in the manner determined by the operator.

Floor Plan Financing

In *Esanda Finance Corporation Limited v Commissioner of Stamps (SA)*,[9] the Supreme Court of South Australia considered whether a floor plan financing arrangement constituted rental business under the rental business provisions of the South Australian Act.

Esanda Finance Corporation Limited ("Esanda") and Esanda (Wholesale) Pty Ltd ("Wholesale") entered into two types of bailment agreements with motor vehicle dealers. Under the first type of bailment agreement, Esanda as the owner of the motor vehicle permitted the dealer to place motor vehicles on display at the dealer's business premises for the purpose of sale but prohibited the dealer from using the vehicles or permitting them to be used in any way whatsoever (whether for the dealer's benefit or otherwise). Wholesale guaranteed to Esanda the performance of the dealer's obligations under the bailment agreement. In consideration of the guarantee by Wholesale, the dealer agreed to pay to

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9 (1992) 92 ATC 4418.

Wholesale on demand any amount paid by Wholesale under the guarantee, and a fee calculated on Wholesale's potential liability. The guarantee fee was calculated as a percentage of the capital value of the motor vehicles the subject of the bailment agreement.

The second type of bailment agreement was in identical terms to the first except that the roles of Esanda and Wholesale were transposed.

Both Esanda and Wholesale were registered pursuant to section 31e of the South Australian Act as persons carrying on rental business in South Australia. Esanda and Wholesale lodged a combined statement in respect of the guarantee fees collected by both of them from motor vehicle dealers. The Commissioner of Stamps assessed the statement as liable to duty.

Section 31f of the South Australian Act requires a registered person to disclose in its statement the "total amount received by him as rent...in respect of his rental business" (Section 31f was amended in 1991 to require the statement to disclose "the total amount received...in respect of his or her rental business (including amounts for services incidental or related to that business)".)

The Commissioner argued that the transactions entered into under the bailment agreements constituted rental business within the meaning of the South Australian Act, that the bailment agreements gave the dealer the right to use goods for the purpose of the dealer's business and that the guarantee fees constituted rent, being moneys received in respect of the use of goods. Esanda and Wholesale objected on the grounds, first that the amount payable by the dealer under the bailment agreement was a fee for guaranteeing the dealer's obligations under the bailment agreement rather than rent; and secondly that Esanda was not carrying on rental business because it did not grant the dealers any right to use the vehicles.

Perry J held that the guarantee fees were not amounts received "in respect of rental business". The fees were paid to Esanda in it capacity as a guarantor and the payments did not have the character of rent. In other words, the fees were not paid to the entity conducting the rental business and therefore could not be characterised as rent. In reaching this conclusion, Perry J was of the view that Esanda and Wholesale were not carrying on a joint business.

This was sufficient to dispose of the case. However, his Honour then went on to deal with the question whether the type of business carried out under Esanda's bailment agreements was rental business. His Honour found that the word "use" in the definition of "rental business" is a word of wide import and would ordinarily include a dealer using a vehicle for display in its showroom. On the other hand, Perry J likened the bailment arrangement to a contract for the placement of goods on consignment. His Honour thought that although the display of vehicles by the dealer constitutes "use" of the vehicles, it does not follow that the giving of such use constitutes the conduct of a "rental business". He remarked that:[10]

> "In such a case, and in a case such as the present, while the 'use' of the goods given by the bailor is a use which is capable of coming within the meaning of that word in the definition of 'rental business', it does not follow that the giving of such use constitutes the conduct of a 'rental business' within the meaning of the Act.
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> On the contrary, if the business being conducted is that of a financier, for example, or that of a wholesaler of goods, the 'giving of rights to use' the goods to a retailer for the purpose of sale, does not mean that the business, or an aspect of the business, becomes a 'rental business'. If the 'giving of the rights to use', albeit for a fee charged for that use, is merely an incidence of the business of a financier or a wholesaler in arranging the disposal of goods, I doubt that it

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10 *Ibid* at 4423, 4424.

> could properly be said that the financier or wholesaler is conducting a 'rental business' within the meaning of the Act. Where the commercial objective of the transaction is the sale or disposal of the goods, it would be a strained, and in my view, wrong process of construction to characterise the incidental bailment of the goods as the carrying on of a rental business, even allowing for the wide definition of those words to be found in the Act."

While the South Australian Act was amended by the *Stamp Duties (Penalties, Reassessments and Securities) Amendment Act* 1992 (SA) to overcome the decision in the Esanda case, the case is of interest because the South Australian rental business provisions prior to these amendments were materially the same as the rental business provisions in Victoria, Queensland, Western Australia and Tasmania.

The case is important because it shows that the word "use" extends to passive or incidental use of goods. It also indicates that scope of the rental business provisions may be limited by what the courts see as the real business conducted by the lessor or the commercial objective of the transaction. While the case is a timely reminder to the revenue authorities that not all businesses involving the leasing of goods are caught by the rental business provisions, it is questionable whether the decision extends beyond inventory financing to other forms of lease financing.

The decision in the *Esanda* case also confirms that if amounts payable by a lessee in connection with a leasing arrangement are diverted to an associate of the lessor, there would not be an obligation on the lessor to pay rental business duty. If the lessor is carrying on rental business (because its activity satisfies the business test), it need not register if it does not receive any amount "in respect of rental business for or in relation to the use of goods". The associate of the lessor may not be carrying on "rental business" since it is neither "giving rights to use goods", nor acquiring the rights of the lessor under the lease. Furthermore, the lessee would not be required to complete a note or memorandum of the transaction and to pay duty on it if the lessor is registered as a person who carries on rental business.

The definition of "rental business" in the South Australian Act was substantially amended with effect from 14 December 1992. The new definition of "rental business" in broad terms seeks to overcome the effect of the *Esanda* case in relation to tripartite bailment arrangements.

"Rental business" is defined to mean —

(a) the business of conferring rights to the possession or use of goods under a contractual bailment;

(b) the business of acquiring the rights of the bailor under a contractual bailment;

(c) the business of providing financial accommodation under a bailment plan; or

(d) the business of guaranteeing the obligations of a bailee under a contractual bailment or a bailment plan,

but does not include business of a class exempted by regulation from the ambit of the definition.

"Bailment Plan" is defined to mean an arrangement under which —

(a) a financier provides financial accommodation for the business carried on by a trader;

(b) the financier retains or acquires title to trading stock as security for the financial accommodation provided; and

(c) the trader has possession of the trading stock by virtue of a contractual or non contractual bailment.

The expression "contractual bailment" is defined as a contract or agreement under which a person who owns, or is entitled to the possession of, goods confers on another a right to possession or use of the goods, but does not include a contract or agreement under which a right to the possession or use of goods is conferred incidentally to a lease of, or licence to occupy, land.

Following pressure from the Australian Finance Conference, floor plan financing arrangements were taken out of the ambit of the South Australian rental business provisions in circumstances "where each item of trading stock covered by a floor plan financing agreement is identified by a unique number".[11]

The position in New South Wales it is that floor plan financing is not dutiable as a hiring arrangement if no rent, charges or fees are actually paid by the dealer for the use of the goods. While the New South Wales Chief Commissioner takes the view that such arrangements are within the definition of "hiring arrangement", he is prepared to accept that they should be treated differently, despite the terminology used in the bailment agreements.[12]

In Victoria, the Commissioner follows the *Esanda* case and accepts that bailments fall outside the scope of the rental business provisions.

LEASE FACILITIES

In New South Wales, a maximum of $10,000 duty is chargeable in respect of any one hiring arrangement but only if the hiring arrangement precludes the inclusion within it of other goods in replacement of, or in addition to, the original goods to which it relates (whether the other goods are of a class the same as, or of a class different from, the original goods).

In Victoria and Tasmania, a leasing agreement which qualifies as a "special rental agreement" is chargeable with a maximum of $4,000 duty. The term "special rental agreement" is defined to mean an agreement for the letting, bailing or otherwise giving rights to use goods where the aggregate amount paid or payable under the agreement exceeds $266,667 (Tasmania: $200,000), but does not include an agreement under which the goods to which it relates at any time may in whole or in part be replaced by other goods or have other goods added to them whether of the same or a different class.

Whilst it is strictly not necessary, most equipment leases contain a clause expressly prohibiting the addition and the replacement of goods for the purpose of qualifying for the cap.

There is frequently a difference of opinion between lessors and the stamp duty authorities as to what leasing arrangements qualify for the cap. A master lease containing the terms and conditions upon which a lessor may from time to time lease to a lessee equipment of an aggregate value not exceeding a specific limit where the equipment is identified by a separate schedule clearly will not have the benefit of the cap. The question is, however, whether each schedule might qualify for the cap as being a "special rental agreement" or "one hiring arrangement". Both the Victorian Commissioner and New South Wales Commissioner are prepared to treat each schedule as a separate rental agreement or a single arrangement respectively.

A more difficult problem of characterisation arises where the lease identifies the equipment to be leased but the equipment is to be progressively brought into use. For example,

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11 Regulation 15A of the Stamp Duties Regulation 1991 (inserted by Regulation No 239 of 1993 published in Government Gazette No 105 dated 27 October 1993).

12 NSW Revenue Ruling SD60 dated 25 June 1987.

equipment leased in relation to construction projects may be brought into use in stages throughout the construction phase of the project. The delivery of each item of equipment to the lessor is normally evidenced by production of a separate schedule or certificate. The lease agreement itself may identify the equipment and provide for the method of calculating the rental payments and the lease term for each item of equipment to be leased.

In New South Wales, the position has been clarified by Revenue Ruling SD249 issued by the Chief Commissioner. The Chief Commissioner states that a hiring arrangement will be "one hiring arrangement" if the following criteria are in existence when the hiring arrangement is made:

- the owner and the hirer are identified;
- the nature or character of the goods is identified, including the number of the items;
- there is an agreed means of calculating the payments to be made in respect of the use of the goods the subject of the arrangement; and
- there is an agreed means of determining the period for the use of the goods.

According to the Ruling, the arrangement will not cease to be "one hiring arrangement" because the date of commencement of hiring, the date of termination of hiring or the period of hiring is not specified or is not the same for each item of equipment.

The Ruling also states that a hiring arrangement which permits or requires the replacement of one or more items of goods (or parts of those goods) only in circumstances where the item or items (or part or parts) fail or malfunction or are damaged or destroyed for a reason other than the normal course of operation of the goods is not precluded from the benefit of the $10,000 maximum duty.

In Victoria, the Commissioner takes a different position. In the Commissioner's view, there is no leasing agreement until the schedule or delivery certificate is delivered; and that each schedule or certificate is a lease agreement and liable to duty accordingly. The certificate will, however, qualify as a special rental agreement where the rental threshold is exceeded for the goods subject to the schedule or certificate and the conditions regarding the replacement or addition of goods are satisfied. A lease agreement will have the benefit of the concession even though the leased goods or parts of the goods may be replaced by others because of damage or destruction. It is, therefore, possible to have a lease agreement that qualifies for the cap in New South Wales but is subject to duty at the normal rate in Victoria.

INTERSTATE TRANSACTIONS

As each State's stamp duties legislation potentially applies to leasing transactions conducted across borders, interstate leasing transactions will be liable to multiple lots of duty unless the parties to the transaction carefully confine their arrangements to one jurisdiction. If, for example, a leasing transaction involves the conduct of negotiations in more than one jurisdiction or the delivery of leased equipment to a lessee who carries on business in more than one jurisdiction, duty may be payable in each of those jurisdictions in which the negotiations are conducted or the equipment is delivered (subject to any provisions allowing for a credit for duty paid elsewhere).

Each of the revenue authorities acknowledges the difficulty encountered by lessors in complying with their obligations under legislation. Most of the authorities have now agreed to introduce provisions that will avoid multiple duty being incurred on interstate leasing transactions. It is understood that these provisions were to be modelled on the Western Australian provisions. It is true to say that both the lessors and revenue authorities have tended to ignore the double duty problem to date. But the introduction of these provisions signals the authorities' intention to increase vigilance in this area.

Rental Business Duty Jurisdictions

(a) Western Australia

In Western Australia, the lessor is not required to disclose in its rental business statement any amount received in respect of rental business where stamp duty has been paid at the rate that is not less than the Western Australian rate of 1.8%. (This would exclude leasing transactions where duty is paid in South Australia or Tasmania.) Where the rate of duty paid in another jurisdiction is less than the Western Australian rate, the amount of duty to be paid in Western Australia in respect of that rental business is determined by deducting the duty paid elsewhere from the Western Australian duty.

(b) Queensland

No credit is available in Queensland in respect of like duty paid or payable elsewhere.

(c) Victoria

Until recently, the Victorian Act did not allow any credit for hiring arrangement or rental business duty paid in another Australian jurisdiction in relation to the same leasing transaction.

The *Stamps (Further Amendment) Act* 1993 (Vic), which came into effect on 23 November 1993, allows a lessor to claim a credit for duty paid interstate on rental business transactions which are also dutiable in Victoria. The provisions are similar to the Western Australian provisions.

The new provisions provide that where rental business duty or hiring arrangement duty is paid in another Australian jurisdiction in relation to a leasing arrangement (other than a "special rental agreement") at a rate equal to or exceeding the Victorian rate of 1.5%, the lessor is not obliged to disclose the leasing transaction in its rental business statement. In effect, the only jurisdictions that would not qualify are the Australian Capital Territory (which does not impose rental business or hiring arrangement duty) and Queensland (which imposes duty at the rate of 0.43%). For all other States in which duty is paid in respect of the leasing transaction, the lessor, if it is registered or required to be registered in Victoria, is not required to disclose the transaction in its return and accordingly is not liable to Victorian duty in respect of that transaction.

On the other hand, where rental business or hiring arrangement duty is paid elsewhere in respect of a leasing arrangement (other than a "special rental agreement") at a rate less than the Victorian rate of 1.5%, the lessor is required to separately disclose in its return the total amount received in the preceding month in respect of that leasing arrangement and pay Victorian duty on an amount determined by deducting the stamp duty paid elsewhere from the amount equal to 1.5% of the amount (if any) by which the amount received exceeds the "prescribed amount". The "prescribed amount" is $80,000. The transactions covered by this provision are those leasing transactions subject to duty in Queensland.

The effect of the new provisions should be noted.

First, a credit will not be available where the leasing arrangement qualifies as a "special rental agreement" in Victoria. There might, however, be advantages in drafting a lease agreement so that it does not qualify as a "special rental agreement" in Victoria. For example, if the lease agreement is a "special rental agreement" and is dutiable in both Victoria and South Australia (on the basis that it was entered into in Victoria but the equipment was delivered and will be used in South Australia), duty at the rate of 1.8% will be payable in South Australia and duty up to a maximum $4,000 will be payable in Victoria. On the other hand, if the lease agreement did not qualify as a "special rental agreement" in Victoria, duty will be payable only in South Australia and not in Victoria.

Secondly, where the leasing transaction is dutiable in Victoria and Queensland, duty is only payable in Victoria in respect of the amount of rentals received during the preceding month for the transaction (and any other leasing transaction in respect of which rental business or hiring arrangement duty is paid at a rate less than 1.5%) which exceeds $80,000 for that month. If the monthly rentals received by the lessor from these interstate leasing transactions do not exceed $80,000 per month, no Victorian duty will be payable.

Thirdly, the new provisions permit the lessor to exclude from its return amounts in respect of "rental business (other than special rental agreements) in respect of which stamp duty of a similar nature has been paid under a law...of another State...at a rate that equals or exceeds" the rate of 1.5%. The provision operates as an exemption where duty is paid at the 1.5% rate or more. The provision does not operate to offset duty against the payable in Victoria. If, for example, less than full duty is paid in a State which imposes duty at the rate of 1.5% or more, the lessor would not be obliged to disclose the transaction in its return in Victoria. The requirements of the Victorian provisions are satisfied as duty would have been paid in the other jurisdiction at a rate of at least 1.5%.

Fourthly, no credit is available where a Victorian lessee pays rental business duty in relation to an interstate transaction undertaken with an unregistered lessor. The lessor may not be bound by the Victorian Act or may not be carrying on rental business in Victoria (although elsewhere) but may have paid duty interstate. And yet, the Victorian lessee cannot obtain relief from duty under the crediting provision. On the other hand, the lessee's liability to Victorian duty is limited to $4,000 (unless the total amount payable for the use of the leased equipment is not capable of being determined at the time when the statement is prepared).

(d) South Australia

The *Stamp Duties (Concessions) Amendment Act* 1994 (SA), which is expected to be assented to on 26 May 1994, amends (amongst other things) section 31i of the South Australian Act by introducing a provision which allows for a credit for interstate duty paid on rental business. This amendment will come into operation on 1 June 1994 in relation to rental business transacted on and after that date. The concession is similar to the Victorian provision but is available only upon application to the South Australian Commissioner who has a discretion whether or not to grant the concession.

The amendments provide that where rental business duty or hiring arrangement duty is paid in another Australian jurisdiction in relation to a leasing arrangement at a rate that is not less than the South Australian rate of 1.8% and the Commissioner is satisfied that it would be reasonable to allow the lessor to have the benefit of the concession, the lessor is not obliged to disclose the transaction in its rental business statement. This concession is available only where rental business duty is also payable in Western Australia or Tasmania.

Where rental business or hiring arrangement duty is paid elsewhere at a rate that is less than the South Australian rate of 1.8% and the Commissioner is satisfied that it would be reasonable to allow a deduction to be made, the lessor is entitled to a deduction from the duty that would otherwise be payable the duty paid in respect of the same leasing transaction in the other Australian jurisdiction.

In order to satisfy the Commissioner that the concession applies, the lessor must make an application to the Commissioner "in a manner and form determined by the Commissioner". In making a decision on the application, the Commissioner can take into account any matters as he thinks fit including (but not limited to):

- the proper law governing the transaction regardless of the parties' choice of law for the arrangement;

- the extent to which the transaction is connected with the other jurisdiction;

- the extent to which it appears to the Commissioner that the lessor has arranged or structured its rental business to avoid the payment of South Australian duty.

The effect of the new provisions is that, if the South Australian Commissioner is satisfied that it would be reasonable to allow the lessor to have the benefit of the provisions, interstate leasing transactions involving Western Australia and Tasmania would not be dutiable in South Australia; and interstate transactions involving the other jurisdictions (except for the Australian Capital Territory) would be dutiable in South Australia only to the extent the difference between the South Australian rate and the rate of the other jurisdiction. For example, where a lease is entered into with a Victorian lessee, duty would be paid in Victoria at the 1.5% rate and in South Australia at the rate of 0.3% (being the difference between the South Australian and Victorian rates). There lies the problem. In view of the South Australian Commissioner's discretion in the matter, one can foresee situations in which the Commissioner would be reluctant to grant the concession if he believes that South Australian Government is "missing out" on its fair share of the revenue on interstate transactions.

Not surprisingly, the South Australian Commissioner does not propose to follow the scheme prescribed by the legislation. The Commissioner proposes to administer the new provisions to allow only a proportional deduction from the South Australian duty for rental business or hiring arrangement duty paid elsewhere irrespective of whether the duty paid is in a higher or lower taxing jurisdiction. The Commissioner proposes to invoke what he calls "the convention of principal nexus". In essence, the principal nexus will be taken to be the place at which the goods are used for the duration of the leasing transaction. It is understood that the Commissioner will collect full duty in South Australia (without any offset) only when he considers the principal nexus to be South Australia.

Where it is not possible to determine the principal nexus because of the mobility of the leased goods, the Commissioner will determine nexus by reference to the following factors:

- the place of execution of the lease agreement;
- the location of the business of the lessor;
- the duration of the lease agreement;
- the use of "nexus shifting" arrangements to avoid duty.

In broad outline, where duty is payable in South Australia and elsewhere in respect of the same leasing transaction, the lessor will be required to declare the total rental in its return and apply to the Commissioner for a deduction from the South Australian duty of an amount equal to the proportion of the duty paid in the other jurisdiction referable to the period during which the goods are used in the other jurisdiction.

While the Commissioner's proposal tries to give effect to the recommendations in the submission on "Stamp Duties — The Road to Micro-economic Reform" by imposing duty by reference to where the goods are located, this is not the test to be applied under the legislation in determining where the rental business is carried on. Furthermore, the new provisions require the Commissioner to exercise his discretion so that, if he is satisfied that the lessor's request is reasonable, the deduction is to be allowed in whole. There is no basis for allowing a proportional deduction under the new provisions. Finally, neither the new provisions nor the Commissioner's proposal address the situation where the lessee pays the duty because it is dealing with an unregistered lessor.

(e) Tasmania

Like Queensland, Tasmania does not allow a credit for rental business or hiring arrangement duty paid in another State in respect of the same leasing transaction. The Tasmanian Commissioner is not convinced that the crediting provisions introduced by the mainland States will solve the multiple duty problems of interstate transaction. There is also a concern

that Tasmania could be financially disadvantaged if only the difference between its rate and the rate paid to the mainland States can be collected in duty.

Hiring Arrangement Duty Jurisdictions

(a) New South Wales

In New South Wales, section 74E(3C) of the New South Wales Act requires the Chief Commissioner to credit against the duty otherwise payable on a hiring arrangement that is subject to duty under section 74E(2) or (3) of the New South Wales Act any similar duty paid or payable on the hiring arrangement in another Australian jurisdiction. At present, the credit is only available where the lessor is resident outside New South Wales and either the hiring arrangement is entered into, or the goods are (or are agreed to be) supplied or delivered, in New South Wales, or if the lessor is resident outside of New South Wales or is not bound by the New South Wales Act, where the lessee is resident or domiciled in New South Wales.

The *State Revenue Legislation (Amendment) Bill* 1994 (NSW), which was introduced into the New South Wales Parliament on 3 May 1994, proposes to insert a new section 74E(3C) in the New South Wales Act which will extend the availability of the credit to all cases where duty is paid or payable in another jurisdiction. (There is a corresponding replacement of section 74F(7C) which deals with hiring arrangement duty paid by return.)

There is a practical difficulty with section 74E(3C) (and with the crediting provisions in general). Where a credit is sought for duty paid in jurisdictions which impose rental business duty, it is not clear whether this duty will treated by the New South Wales Commissioner as though it were paid or payable on the hiring arrangement. Often it is not possible to separately identify the transaction on a rental business return for which a credit is sought in New South Wales. The credit might not be available in New South Wales where the rental business return itself does not sufficiently identify the particular hiring arrangement for which a credit is sought or the lessor is otherwise unable to satisfy the New South Wales Commissioner as to the quantum of duty paid on the hiring arrangement outside New South Wales. The problem is exacerbated where a duty threshold applies to the return made in another State in relation to a leasing transaction for which a credit is sought in New South Wales. For example, the first $80,000 of rental business transacted in Victoria by a registered lessor during a financial year is free of duty. This concession applies to the lessor, not to the particular lease transaction. This situation will surely give rise to disputes with the New South Wales Commissioner as to which leasing transaction interstate duty was or was not paid on.

(b) Northern Territory

The corresponding provision in the Northern Territory Act operates differently from the New South Wales provision. Section 71(5) of the Northern Territory Act applies the operative provisions of the NT Act to a lessor who is resident outside the Northern Territory if the hiring arrangement is entered into in the Northern Territory, or if the goods are supplied or delivered, or agreed to be supplied or delivered, in the Northern Territory and hiring arrangement duty or duty of a like nature has not been paid or is not payable in another Australian jurisdiction.

Section 71(6) of the Northern Territory Act provides that in the case of a hiring arrangement where the lessor either is resident outside Northern Territory or is not bound by the Northern Territory Act, the lessee (who is resident or domiciled in the Northern Territory) shall lodge a return with the Commissioner and pay duty on the return as if it were a hiring arrangement, unless hiring arrangement duty or duty of a like nature has been paid on the hiring arrangement in another Australian jurisdiction.

Thus, a lessor will not be obliged to prepare a statement of a hiring arrangement having the requisite connection with the Northern Territory and pay hiring arrangement duty in the Northern Territory where the following conditions are satisfied:

- the lessor is not registered under the hiring arrangement provisions of the Northern Territory Act;
- the lessor is resident outside the Northern Territory;
- the hiring arrangement is entered into outside the Northern Territory; and
- the goods:
  (a) are not supplied or delivered, or agreed to be supplied or delivered, in the Northern Territory; or
  (b) are supplied or delivered, or agreed to be supplied or delivered, in the Northern Territory, but hiring arrangement duty or duty of a like nature is paid or payable on the hiring arrangement in another Australian jurisdiction.

Furthermore, a lessee is not obliged to a lodge with the Commissioner a return and to pay hiring arrangement duty where:

- the lessor is not registered under the hiring arrangement provisions of the Northern Territory Act;
- the lessor is resident outside the Northern Territory or is not bound by the Northern Territory Act; and
- the lessee is:
  (a) resident and domiciled outside the Northern Territory; or
  (b) resident or domiciled in the Northern Territory but hiring arrangement duty has been paid in the Northern Territory or similar duty has been paid in another Australian jurisdiction.

(c) Queensland

In Queensland, there is no exemption or concession available where hiring arrangement or rental business duty is paid or payable in relation to the leasing transaction in another jurisdiction.

SECURITY FOR LESSEE'S OBLIGATIONS

Sometimes a lessor under a leasing transaction takes security from the lessee or a third party for the rent payable under the lease. The security might be subject to *ad valorem* duty if it is within the "mortgage, bond, debenture and covenant" head of duty, or the "loan security" head of duty in New South Wales.

Queensland

The question whether a mortgage securing an equipment lease was a "mortgage" was recently considered in *B & B Leasing (Vic) Pty Ltd v Commissioner of Stamp Duties (Qld).*[13] The Full Court of the Supreme Court of Queensland held that a mortgage over land, given in consideration of the granting of an equipment lease, to secure the payment of all sums of money payable under the lease was not assessable under the "Mortgage, Debenture, Bond and Covenant" heading in the First Schedule to the Queensland Act. The mortgage pre-dated

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[13] (1993) 93 ATC 4688

the making of the equipment lease by two days. The mortgage did not contain a covenant for the payment of money.

The court said that the mortgage was not security for the payment of moneys advanced or lent as it secured future payments under the lease which had not been entered into at the time the mortgage was given. The mortgage did not secure money previously due and owing or forborne to be paid because, at the time it was executed, there was no money due and owing or forborne to be paid. Further, it was not a security for the repayment of money to be thereafter to be lent, advanced or paid because the lease did not provide for money to be lent, advanced or paid by the lessor to the lessee.

The court held that the mortgage was not a debenture on the basis that it did not create or acknowledge an existing debt, nor did it make provision for the repayment of a loan to be made thereafter. The court also found that the mortgage was not a bond, covenant or other instrument under the "Mortgage" head of duty as it did not secure "financial accommodation" as defined in section 2 of the Queensland Act. The court rejected the argument that the equipment lease was a transaction which in substance effected a loan.

The decision turned on the fact that the mortgage was entered into prior to the execution of the lease. However, the analysis applied by the court should not be different because the mortgage was entered into contemporaneously with or subsequent to the execution of the lease. The mortgage would not be within the definition of "mortgage" in the Queensland Act as it would not secure "the payment of any definite and certain sum of money...previously due or owing" unless when the mortgage is executed the lessee was in default under the lease.

Victoria

The Victorian definition of "mortgage" in section 137D(1) of the Victorian Act is broadly the same as the Queensland definition. A mortgage given to secure the payment of moneys payable under a lease is not a "mortgage" as defined in Victoria.

The Victorian Commissioner acknowledges that a mortgage securing only the payment of moneys payable under a lease is not usually within the definition of "mortgage" in section 137D(1) of the Victorian Act. The mortgage will be stamped with duty of $10 if it is executed as a deed. However, the Commissioner considers that if the mortgage is executed at the time when any moneys are in arrears under the lease, the mortgage would be required to be stamped to cover the amount then owing.

New South Wales

In New South Wales, section 84(3) of the New South Wales Act provides that a "loan security" (as defined in section 83(1) of the New South Wales Act) which is not expressed to be limited to a definite and certain sum of money is stampable with duty of $5 but if an advance, or the total of an advance and additional advances made under or secured by the loan security exceeds $16,000, additional duty of $4 for every $1,000 of the total amounts advanced under or secured by the loan security is payable.

The term "advance" is defined to include the provision of funds by way of financial accommodation. The term "financial accommodation" is defined in section 83(1) of the New South Wales Act to include funds provided by means of a loan or a bill facility and funds provided under any other obligation "except an obligation imposed by a lease or a hiring arrangement within the meaning of section 74D". In effect, an "all moneys" loan security granted by a lessee to secure its obligations under a lease or a hiring arrangement is not stampable in respect of the payments made under the lease.

The position is the same where the mortgage granted to the lessor secures the mortgagor's obligations under a guarantee or indemnity which is given by the mortgagor to the lessor to secure a lessee's obligations under a lease. The effect of section 84(3C) of the New South

Wales Act is that where an guarantee, indemnity or other instrument is security for advances and the guarantee, indemnity or other instrument is supported by a loan security, the loan security is liable to duty as if the contingent liability under the guarantee, indemnity or other instrument were an advance. Revenue Ruling SD147 notes that section 84(3C) does not apply because funds provided under a lease or a hiring arrangement are excluded from the definition of "financial accommodation". (This has been further clarified by the insertion in the New South Wales Act of section 84(3CA).) The Ruling goes on to state that an "all moneys" mortgage given to secure a guarantee of an equipment lease is *prima facie* liable to duty of $5 under section 84(3) of the New South Wales Act.

It is apparent, however, that the exclusion of a lease or hiring arrangement from the definition of "financial accommodation" does not mean that all mortgages given in support of equipment leases are liable to nominal duty only in New South Wales.

The definition of "hiring arrangement" is territorially limited to hiring arrangements entered into in New South Wales, or under which the goods are supplied or delivered (or agreed to be supplied or delivered) in New South Wales or under which the goods may be used in New South Wales. In the case where the leasing arrangement is entered into by all parties outside New South Wales and the relevant goods are supplied or delivered to the lessee outside New South Wales, it will then be a question whether, given the nature of the relevant goods, the goods "may be used" in New South Wales. It should be noted that the New South Wales Commissioner takes the view that the words "within the meaning of section 74D" limit the exclusion from the definition of "financial accommodation" to funds provided under a hiring arrangement which has the specified connection with New South Wales. In other words, unless the equipment lease is subject to duty in New South Wales, the Chief Commissioner considers that a mortgage that secures the lease will be chargeable with duty as a loan security.

Nonetheless there are a number of arguments that can be raised against the Commissioner's view. In the first place, an equipment lease which does not fall within the definition of "hiring arrangement" in the NSW Act may come within the exclusion from the definition of "financial accommodation" as a "lease". Section 76(1) of the New South Wales Act defines "lease" in the following terms:

> "For the purposes of this Act the expression 'lease' includes any promise of or agreement for a lease of any property, and includes any instrument (not being an instrument liable to *ad valorem* duty as a conveyance) whereby a right to use at or during any time or times any property in New South Wales for any purpose whatever is conferred on or acquired by any person (who shall be deemed to be the lessee), but does not include...a hiring arrangement as defined in section 74D of this Act."

The statutory definition is not confined to Division 18 (Leases) of the New South Wales Act. There may be an argument that although the particular leasing arrangement does not qualify as a "hiring arrangement" (because it does not have a New South Wales nexus), it might be a "lease" at general law or otherwise within the statutory definition. The definition of "lease" in the New South Wales Act is inclusive and therefore extends to a lease within its ordinary meaning. The ordinary meaning of lease is not necessarily confined to land. It is also arguable that the statutory definition is not territorially limited to property in New South Wales.

Secondly, there is an argument that the payment of rental under a leasing arrangement does not impose an obligation on the mortgagor to upstamp a collateral "all moneys" loan security. The definition of "advance" requires there to be "funds provided". To give rise to a stamping liability under section 84(3) of the New South Wales Act, the "funds provided" must be made "under or secured by" the loan security. This points to the requirement that the funds provided "under or secured by" the loan security must be made in circumstance giving rise to a right of repayment. However, where the "funds provided" under a lease are an original payment obligation, the payment is not made "under or secured by" the loan security. Rather it is the obligation to make the payment which is secured by the loan security.

Thirdly, a mortgage securing an equipment lease may not be a "mortgage" as defined in the New South Wales Act. The term "mortgage" is defined inclusively in section 3(1) of the New South Wales Act:

> "'Mortgage' includes a security by way of mortgage or charge —
>
> (a) for the payment of any definite and certain sum of money advanced or lent at the time or previously due or owing, or forborne to be paid, being payable; and
>
> (b) for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current together with any sum already advanced or due, or without, as the case may be."

The definition of "mortgage" is inclusive. The definition, therefore, extends to a mortgage in the ordinary sense. Section 83(1) includes an extended definition of "mortgage" for the purposes of the "Loan Security" head of duty.

If a loan security given in support of a leasing arrangement does not come within the extended definition of "mortgage" in section 83(1) of the New South Wales Act, arguably the loan security is not a "mortgage" as defined in section 3(1). The references to moneys "advanced or lent" in the definition of "mortgage" in section 3(1) do not appear to have the extended meaning of "loan" and "advance" in section 83(1). The definition of "advance" in section 83(1) extends the ordinary meaning of "advance" only where that word appears in Division 21 (Loan Security) and under the "Loan Security" heading in the Second Schedule to the New South Wales Act since the introductory words of section 83(1) are so limited. For this reason, the definition of "advance" in section 83(1) does not extend to the use of the word in the definition of "mortgage" in section 3(1). The Chief Commissioner seems to have acknowledged the correctness of this argument in Revenue Rulings SD77 and SD87.

I should add that the New South Wales Office of State Revenue does not accept any of these arguments. In fact, there is a matter listed before the Supreme Court for hearing on 23 June 1994 on the question of what constitutes an "advance" under the New South Wales Act. It will be interesting to see whether the Office of State Revenue's position is vindicated by the court.

South Australia

The definition of "mortgage" in section 76 of the South Australian Act was fundamentally changed in December 1992. "Mortgage" is defined to mean:

> "(a) an instrument creating, acknowledging, evidencing or recording a legal or equitable interest in, or change over, real or personal property by way of security for a liability; or
>
> (b) an instrument creating, acknowledging, evidencing or recording a liability in respect of which an instrument of title is or is to be pledged or deposited by way of security,
>
> (and includes an instrument that would, assuming the fulfilment of a condition to which the instrument is subject, fall into one of the above categories)."

"Liability" is defined to mean a present, future or contingent monetary liability.

The effect of this change means that mortgages given to secure non-debt liabilities, such as payments under equipment leases, are subject to *ad valorem* duty in South Australia.

Section 79 of the South Australian Act deals with the stamping of mortgages which secure future or contingent liabilities. If the mortgage is limited to a particular amount, it is

chargeable with *ad valorem* duty as if it where a security for that amount. If the mortgage is not so limited, it is chargeable, in the first instance, with *ad valorem* duty on the basis of an estimate of the highest amount to be secured (to be made on the assumption that all contingencies to which the mortgage or liability is subject will actually happen). On submitting the mortgage for stamping, the parties must make a fair estimate of the highest amount to be secured ignoring any contingencies.

Importantly, section 79(5) of the South Australian Act grants the Commissioner a discretion to stamp a mortgage securing a contingent liability for an amount less than the highest amount to be secured:

> "The Commissioner has a discretion, in the case of a mortgage securing a contingent liability, to permit the mortgage to be stamped for an amount that is less than the full amount of that liability, but, if the contingency subsequently happens, further duty becomes chargeable on the mortgage as from the date of the happening of the contingency and the amount of that further duty is to be calculated as follows:
>
> (a) duty is to be calculated on the mortgage on the basis of the full amount of the liability as if the mortgage were a new and separate instrument made on the date of the happening of the contingency; and
>
> (b) the further duty is then to be calculated by subtracting the amount of duty already paid from the amount of duty calculated under paragraph (a)."

It is to be noted that section 79(5) gives the Commissioner a discretion only in relation to "contingent liabilities" secured by a mortgage. Furthermore, section 79(5) operates only to defer the payment of duty until such time (if any) that a default occurs under the mortgage.

In November 1993, the Commissioner issued guidelines setting out the circumstances in which he will exercise his discretion under section 79(5) of the South Australian Act. These guidelines have not been published as a circular of the Commissioner.

In relation to a mortgage securing a liability arising under an equipment lease, the guidelines state that the Commissioner will consider it sufficient compliance with section 79 of the South Australian Act:

- where the rental is payable on a periodic basis of one month or less, if the mortgage is stamped to secure an amount equivalent to three month's rent payable under the terms of the lease;

- where the rental is payable on a periodic basis greater than one month, if the mortgage is stamped to secure an amount that is the greater of either an amount equivalent to one periodic payment or an amount equivalent to three month's rent calculated on a *pro rata* basis.

In relation to floor plan or bailment facilities, a mortgage that secures those facilities need only be stamped to an amount that is equivalent to 20% of the maximum limit permitted by the financier in respect of that facility. However, where the total exposure in respect of the floor plan or bailment facility temporarily exceeds the maximum limit by no more than 10% of that maximum limit and that situation exists for no more than 28 days in succession, the Commissioner has determined that (but only on the condition that the maximum limit has not been similarly exceeded within the preceding three months) it will be sufficient compliance with section 79 of the South Australian Act if the mortgage is stamped to an amount equivalent to 20% of the maximum limit permitted by the financier. The guidelines provide that in all other cases where the maximum limit has been exceeded outside the terms of the guidelines or there is an increase in the maximum limit the mortgage must be upstamped to an amount equivalent to 20% of the total exposure or 20% of the new maximum limit (as the case may be).

Western Australia

Item 13 ("Mortgage" etc) of the Second Schedule to the Western Australian Act is very broad and includes not only a "mortgage" (as defined in section 81) but also an "instrument of security of any kind whatsoever". This head of duty is wide enough to include a lease agreement. However, Item 7 (1) of the Third Schedule exempts the lease agreement from mortgage duty.

A mortgage that secures payments under a lease will be subject to duty under Item 13 of the Second Schedule. If the mortgage is limited in amount, it is chargeable with duty on that amount. If the mortgage is not limited in amount, the mortgage is chargeable with mortgage duty on an amount being the greater of $2,000 and the total amount secured or to be ultimately recoverable under the mortgage. When an advance or loan is made in excess of the amount of duty denoted on the mortgage or the indebtedness secured by the mortgage is increased, further *ad valorem* duty is chargeable on the mortgage in respect of that excess or increased indebtedness.

The Western Australian Commissioner takes the view that an unlimited or "all moneys" mortgage that secures payment obligations under a lease needs to be stamped to cover the aggregate amount of payments to be made by the lessee under the lease. But is this view correct? It is abundantly clear that rental payments secured by the lease are not "advances" or "loans". The indebtedness secured by the mortgage would increase when the rental payment becomes due for payment and further duty would be payable to cover the amount of this payment. However, if the rental payment is made and a further rental payment becomes due for payment, is the indebtedness secured by the mortgage "increased"? The position might be different if the lessee were in default under the lease.

Tasmania

Item 18 of Schedule 2 to the Tasmanian Act imposes *ad valorem* duty on a mortgage of property, whether real or personal, including "any instrument whereby any security is given over any such property for the payment of any money".

Unlike the position in other States, the term "mortgage" is not defined in the Tasmanian Act. Item 3 of Schedule 4 to the Tasmanian Act does, however, deem certain instruments to be a "mortgage" where they are made as security for the payment of any sum of money. Accordingly, securities on which mortgage duty is payable in Tasmania appear to be broader than the concept of "mortgage" in the Victorian and Queensland Acts. Unless exempted from mortgage duty, a mortgage that secures the obligations of a lessee under a lease could be subject to *ad valorem* duty in Tasmania.

Section 59E of the Tasmanian Act exempts the mortgage from duty. Section 59E provides that nominal duty is payable on any instrument which is expressed to be collateral to and is intended to secure any moneys owing under a "rental agreement" to which a person registered under the Tasmanian rental business provisions is a party. The exemption technically applies where:

- either the mortgagee or the mortgagor is registered under the Tasmanian rental business provisions; and
- rental business duty is not paid in Tasmania in respect of the rental agreement.

Northern Territory

Since 1 October 1993, the Northern Territory no longer imposes loan security or mortgage duty. A mortgage that has a relevant nexus with the Northern Territory is, however, liable to duty of $5 if it is executed as a deed.