STAMP DUTY

Stamp Duty Rewrite — Update

Financial Institutions Duty — Current Developments

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THE NEED FOR A REWRITE

It is widely recognised that the stamp duty statutes across Australia are due for a rewrite. Stamp duty legislation in New South Wales is 75 years old, which is a considerable lifetime for any set of legislation, let alone one as complex and far-reaching as this. Legislation in other States dates back as far as 1894 and some of the legislation remains in its original form.

Australia has experienced enormous change between 1894 and the present day in the way people and organisations transact their business. Most stamp duty jurisdictions in Australia have attempted to keep pace with the change by patching existing legislation as the need arises. Until recent times, the jurisdictions tended to do so without consultation with each other or in some cases without any consultation at all.

Given its age and the current climate it has to work in, the stamp duty legislation in operation around Australia has reached the stage where it is no longer appropriate to merely patch up existing provisions in order to keep pace. Rather than drag an old, worn out body of legislation into the next century, it was felt that it would be better to approach the future from a new start, with a unified structure, style and content more suited to the 21st century.

THE PROCESS

In order to achieve this end New South Wales, Victoria, South Australia, Tasmania and the Australian Capital Territory agreed to team up for this project to progressively rewrite the Stamp Duties Act to achieve legislation which:

- is contemporary and reflects modern business practice;
- is simple, fair and equitable;
- achieves the governments' revenue targets;
- minimises the cost of administration both for taxpaying clients and the Revenue Office;

- achieves harmony (but not necessarily uniformity) across participating jurisdictions in respect of property taxed, rates, concessions and exemptions.

While all of these issues are important, the real stand out feature of this exercise will be the last point.

So far, and there is still room for negotiation in some areas, I would estimate that the new draft will achieve a consistency rate of at least 95%.

The Responses

The Taxation Institute of Australia (TIA) offered to collate all responses to the exposure draft. Industry groups and professional organisations responded on drafting and policy issues. This resulted in over 240 specific recommendations being made by the TIA.

The Project Director and rewrite teams have almost completed the task of addressing every specific (or numbered) issue.

The Issues

The circulation of the rewrite exposure draft has resulted in widespread comment from the industry groups. The following is an outline of the major issues which have come out of the consultation process.

Acquisition duty

What is an acquisition?

Of all the policy and legal issues surrounding the rewrite, the meaning of acquisition or conveyance will receive the greatest focused attention from tax advisors and their clients.

In hindsight, the understanding or meaning of acquisition in the exposure draft was too wide. The original intention was to cast the net sufficiently wide to establish the boundaries of the tax **and then** provide some relief through the exemption and trust provisions.

The draft states an acquisition to occur "whenever dutiable property is transferred to or vests in, or accrues to, any person."

While this meaning is short, it is also very wide. That is where most of our criticism has fallen. The concern is that the legislation would ultimately require a never ending list of exemptions or exceptions.

The rewrite team has undertaken a review of this definition and the next draft will include a somewhat narrower definition of acquisition.

Some of the feedback from the original exposure draft suggested a single idea of an "acquisition" could not be achieved and a better approach was to maintain the existing NSW model of instruments/conveyances supported by a Clayton contract provision.

However the intention of the participating Commissioners is still to pursue the original concept.

I believe that a different outcome would produce an unsatisfactory result and a marvellous opportunity would be missed.

Intellectual property

Industry groups in the areas of media, publishing, information technology and computer software have expressed concern regarding the inclusion of intellectual property as "dutiable property" in the rewrite draft. They have submitted that the administrative burdens on both the taxpayers and the taxing authorities would be relatively high compared with the level of duty which would be collected and in most cases would be extremely difficult to administer in a practical sense. They have also submitted that as intellectual property is not resident in any State, federal constitutional problems would exist in attempting to impose a tax under State legislation.

Furthermore, the groups have submitted that the imposition of duty on intellectual property would act as a disincentive to both foreign and local investment and would have a disastrous affect on the computer software industry.

A conveyance of intellectual property has always attracted stamp duty in New South Wales - subject to being reduced to writing and a nexus with the jurisdiction - (see *2Day FM Australia Pty Ltd v CSD (NSW)*). Once the cover of restriction to instrument is lifted, complications arise. This is acknowledged. The project was never about widening the tax base, increasing taxpayer uncertainty or increasing compliance costs for the tax administrator.

One option for the rewrite is to restrict the duty on change of ownership of copyright, patents etc to transactions where it is part of an acquisition of a business.

The consequential problem here is to define what a "business" is.

Land rich provisions

It is now public knowledge that the "land holder" provisions in the draft legislation will not be pursued in the rewritten legislation. Obviously this means that the current land rich provisions with the basic tests will be re introduced into the next draft.

Dutiable property list

The idea of having a list of distinct dutiable property was first introduced by the Northern Territory. While this seems a clearer approach for any jurisdiction, it has an added benefit where five jurisdictions are introducing a new code with some differences among the participating jurisdictions.

Leases

Oral leases

The original exposure draft included the concept that whenever dutiable property was transferred, regardless of the method, the acquisition duty should be payable.

If this concept was good enough for acquisition, the rewrite team considered this rationale could be applied to leases.

Therefore the exposure draft sought to capture duty on oral leases - the only exception being leases worth less than $3,000 per annum.

Comments regarding the treatment of leases in the rewrite draft have been reviewed and it has been observed that if the participating were to proceed with oral leases then relief would have to be given to leases "in house" or within the corporate group. Industry groups argue that this approach at least would recognise the business practice of a lessor wanting to tie up the head of a group for its own protection, and then the lessee could sublet within the group to use the leased premises for its purposes. Furthermore, relief would have to be provided for inter family farming leases and service leases between partners.

The comments received thus far have indicated that leases are generally reduced to writing (with the exception of intra group transactions) and that the revenue collected by extending the legislation to oral leases is not enough to justify the compliance issues for either the taxpayer or the tax office.

Again similar to the acquisition concept, the rewrite team introduced the concept of duty on value or consideration (rent) whichever is the greater. This will correct a deficiency or "loophole" in the current legislation.

Holdover leases

From the comments obtained, it would appear that all leases have a holdover clause which provides that should the lessee wish to remain in occupancy after expiration of the term they may do so subject to the terms and conditions of the lease. This would constitute another lease and under existing legislation produces a result that is not economical to recover. Likewise the duty under the rewrite draft would be negligible with the cost of compliance far outweighing the revenue generated.

However, some jurisdictions are considering giving special treatment to leases that are held over for a period of longer than one year.

Loan security

The fundamental features of loan security duty should remain. These are:

- instrument based;
- recognition that more than one security may be given to secure the same advance;
- additional advances only liable where previous (stamped) limit is exceeded.

The four participating jurisdictions intend to recommend the following additional features that should be consistent among the rewrite participants:

- common definitions of "advance" and "mortgage";
- adopt a principle of strict pro rata where security given covers property in more than one jurisdiction for the same advance;
- to the extent possible adopt a common nexus for secured property;
- remove the duty on debentures where no property is secured in the jurisdiction.

Consistency will mean Victoria adopting new provisions in two important areas:

- duty will be payable on loan securities that are capable of being used to recover advances, such as amounts payable by guarantors or indemnifying parties under another instrument;
- duty will be payable on loan securities that are used to recover an advance made under a bill facility arrangement. This is regardless of whether bills are accepted or endorsed and purchased by the person providing the funds or whether one person accepts or endorses the bill and the bill is discounted to another person.

Other features to be added by Tasmania, South Australia and Victoria are:

- transferred loan securities will be liable where there is an advance in relation to the transferred security;

- caveats in which an estate or interest is claimed under an unregistered mortgage will be treated as a loan security.

Hiring arrangements

The rewrite proposes a duty on "hire of goods" to replace the existing "hiring arrangement" duty in New South Wales, and "rental business" duty in Victoria, South Australia and Tasmania. Whereas the current New South Wales provisions are document based, the proposal concentrates on the transaction. The current option of paying duty by return is made mandatory for persons in the business of hiring goods, with duty payable on statements in other cases.

The proposal will provide a single nexus based on use of the goods in the jurisdiction, with apportionment of duty in the case of transactions involving use in more than one jurisdiction. This will eliminate double duty without the need to maintain credit provisions. A number of exemptions are also provided, including hire between related corporations, and sub-hires under novated leases of motor vehicles.

Marketable securities

On market - broker provisions

- Reflects industry practice:

  1) client orders - where person receives the order;

  2) location of principal trading book.

- Principal trading/hedging provisions to be included in legislation of all participating jurisdictions.

- Common scrip lending exemption.

Off market - part of acquisitions duty

- Shares and units - dutiable property.

- Common nexus.

- **Chess** - special provisions.

FINANCIAL INSTITUTIONS DUTY

In recent years, there has been an increasing number of calls for reform of financial transactions taxes. Most have argued for complete abolition of FID, and its replacement with a new tax or an expanded debits tax. However, it should be remembered that FID raises approximately $500 million revenue per annum in New South Wales, and that debits tax raises a further $320 million. The scope for adopting changes which abolish FID or amalgamate FID and debits tax are therefore limited.

Three reviews of financial transactions taxes are currently under way.

Heads of Treasury Review

A review by the Heads of Treasury has been under way for some time, and has been developing high level principles for any reform or replacement of existing taxes. Given the revenue constraints referred to above, and the unlikelihood of the involvement of Queensland in any

uniform national restructuring of FID, that review is currently concentrating on reform of debits tax. On the basis that FID is to be retained in the short or medium term, the State and Territory Tax Commissioners have a responsibility to deal with the current inequities and inefficiencies in FID. The Heads of Treasury Review will continue to have an interest in ensuring that any reform of FID is consistent with the longer term objectives in reform of financial taxes.

FID Forum

As a result of detailed proposal put forward by a number of groups, including a working group established by the revenue offices, a FID Consultative Forum was convened on 31 January 1996 between the State and Territory Tax Commissioners and a number of industry representatives, including representatives of banks and other financial institutions. The Forum met to consider issues of concern to both industry and revenue offices, and agreed to work co-operatively to help bring about greater national consistency, reduced compliance costs, simplicity, and the elimination of the incidence of double duty. To achieve these ends, four working groups were established to develop solutions to four priority issues:

1. The need for FID to be more closely aligned with current developments in electronic payment systems. Issues include the revenue effects and tax incidence of:

   - aggregating electronic transactions;
   - settlement arrangements;
   - stored value cards;
   - computer banking; and
   - EFTPOS.

2. FID payable on interjurisdictional funds transfers, particularly the removal of double duty by adopting a single point of liability.

3. The need for consistency between all jurisdictions on definitions which affect liability for duty. This includes the definitions of:

   - "receipt";
   - "money";
   - "the crediting of an account";
   - "account";
   - "internal account"; and
   - "financial institution".

   The group will also consider uniform provisions for passing on duty and for the requirements to register and to lodge returns.

4. The treatment of short term money market dealings and exemptions. Issues include:

   - anomalies in the definition of short term dealing;
   - inconsistency between the short term concession and the liability to the primary rate of duty; and

- the liability to duty of Queensland receipts or liabilities.

These working groups are committed to formulating proposals for consideration by governments, and are working towards resolution of issues by 30 June 1996. As these four working groups effectively cover most issues of concern to revenue offices and taxpayers, only a limited number of proposals will be resolved within this time frame. A wider range of issues will be considered over the ensuing 18 months.

Commissioners' Working Group

Revenue offices have also been conducting a more detailed review of FID over the last two years. Originally established to consider a number of issues of concern to revenue authorities, its role has been redefined as a result of the establishment of the FID Forum. The Working Group's functions now include:

- co-ordination of issues raised by revenue offices, particularly duty avoidance;
- co-ordination of issues raised, and recommendations made, by the Forum working groups, to attempt to adopt a uniform approach;
- maintaining uniformity of policy, legislation and rulings.

THE FUTURE OF FID

As previously indicated, FID is here to stay in the short to medium term. However, given the overwhelming support for the replacement of FID with a simpler and more efficient tax, there will undoubtedly be substantial reform of FID in the near future.