STAMP DUTY

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There have been some significant developments in stamp duty over the last twelve months, not the least of which is the passing of the Duties Act 1997 (NSW).

Others have already commented on that Act and it is not intended in this paper to cover that same ground again.

What this paper is directed to is to look at some of the other legislative and case developments in the subject but also to make some comments in relation to some familiar concepts which, although familiar are unfortunately, so far as the drafting of revenue legislation is concerned, far too shadowy for the efficient administration and collection of revenue.

Accordingly the paper is divided into four parts:

Part 1 – State and Territory Round Up;

Part 2 – Share Buy Backs: The *Coles Myer* Decision;

Part 3 – Beneficial Ownership: A Misleading Concept?

Part 4 – Rulings: Are They Not Binding?

PART 1 – STATE AND TERRITORY ROUND UP

A. LEGISLATION

Only items of potential interest are noted here.

New South Wales

State Revenue Legislation Amendment Act 1997 extended the intergenerational transfers in section 66H so that it now applies to transfers between siblings and to the granting of leases and the transfer of leases and permits which come within the guidelines approved from time to time by the Treasurer.

There were also some amendments with respect to crop and livestock insurance and motor vehicles registrations.

State Revenue Legislation Further Amendment Act 1997 made amendments to loans security duty as a result of the uniform consumer credit legislation. Further, new sections 97ADJ-97ADN were inserted to overcome the potential to avoid duty on takeovers of New South Wales public companies by means of a capital reduction or rights alteration of shares and the replacement of paragraph (h) of the exemptions under the heading "Transfer of Shares" in the Second Schedule which relates to share buy-backs.

The new Duties Act 1997 is set to commence on 1 July 1998.

Victoria

State Taxation Acts (Further Amendment) Act 1997 inserted a new section 137MC "Exemption for Refinanced Loans" and abolished deed duty.

State Taxation Acts (Amendment) Act 1997 amended section 67A to include de facto spouses in the definition of "relative" and amended section 137F to remove the exclusion of mortgages of land from the credit contracts now regulated by the Consumer Credit (Victoria) Code which are to be exempt from duty.

State Taxation (Amendment) Act 1997 inserted new subdivision 5D very much along the lines of new sections 97ADJ-97ADN introduced by New South Wales State Revenue Legislation Further Amendment Act 1997. Further section 63(3) now has the effect of including chattels which are transferred to the transferor or related person by reason of an agreement to transfer real property. Significantly, section 63 is amended in relation to agreements or arrangements which have the effect of reducing the value of the property being transferred. A new section 64B introduces a similar "Clayton contract" provision to that in other states in relation to changes in beneficial ownership. Further, a new section 71 is introduced to grant an exemption of certain transfers of real property used for private production to relatives.

Queensland

Revenue Laws Amendment Act 1997 introduced a new section 68AA. This is the new section promised consequent on the decision in *Citisecurities Limited v Commissioner of Stamp Duties (Qld)* (95 ATC 4471). Further, the concession previously introduced for principal place of residence (sections 69K and 69L) was deleted. The system introduced by that Act was simply unworkable.

Revenue and Other Legislation Amendment Act 1997 amended section 54AB to reinforce the Court of Appeal's decision in *Suncorp Insurance and Finance v Commissioner of Stamp Duties* (97 ATC 4826). Further, the land rich provisions were amended to reflect the New South Wales case of *Mertune Pty Ltd v Chief Commissioner of Stamp Duties (NSW)* (94 ATC 4458).

Body Corporate and Community Management Act 1997 inserted a new exemption into the First Schedule in relation to a transfer of a lot in exchange for a surrender of shares in a community titles company.

South Australia

Stamp Duties (Rates of Duty) Amendment Act 1997 inserted a new section 71CD to exempt a conveyance by the official trustee or registered trustee to a bankrupt or former bankrupt from duty, inserting a new section 71DA(1)(a)(1a) to clarify exemptions in relation to conveyances between superannuation funds and reducing the rate of duty payable on gifts of marketable securities.

Western Australia

Revenue Laws Amendment (Taxation) Act 1997 and Revenue Laws Amendment (Assessment) Act 1997 effected changes to ensure that the decision in *Bradney Pty Ltd v Commissioner of State Revenue (Vic)* (96 ATC 5130) does not apply, ensuring that duty is not avoided on a conversion of ordinary share capital to redeemable preference shares and tidying up the provisions raised in the acquisition of property on the liquidation of a company.

Tasmania

Revenue Legislation (Miscellaneous Amendments) Act 1997 introduced a refinancing exemption for loans used for primary production purposes, any commercial business undertaking or secured by a charge over residential property where the borrower is the same person.

Northern Territory

Stamp Duty Amendment Act provides a concession from duty for first home purchasers under Home Start or Home Share Housing Assistance Scheme.

ACT

Taxation (Administration) (Amendment) Act 1997 directs that refunds of tax can be obtained only where a court is satisfied that the refund will not represent a win or a gain to the taxpayer but will be returned to the person who bore the duty or tax.

Stamp Duties and Taxes (Amendment) Act 1997 provides concessions on some transfers with respect to superannuation funds and some transfers affecting de factos.

B. CASES

1. Void instrument not a "settlement"

***Dalla Vecchia v Commissioner of Stamp Duties (Qld)* (97 ATC 4356)**

Facts

A Deed of Variation was executed which had the effect of adding a party as a beneficiary under a Deed of Settlement. That party was also the trustee. The Deed of Settlement contained a power to amend which provided that the trustee might "by Deed revoke, add to, release, delete or vary all or any of the trust or powers herein before declared ..." subject however to a proviso that the trustee did not "have any power to revoke, add to, release, delete or vary any of the trusts or powers hereof so that ... the Trustee ... may acquire a beneficial interest in the Trust Fund or any part thereof. ..."

Issue

Was the Deed of Variation properly assessable to ad valorem duty as a settlement?

Decision

The Court of Appeal answered that question, no.

Reasons

The President of the Court of Appeal noted (at 4357) that clause 9.2:

> "... did not empower Mr Dalla Vecchia to add himself as a beneficiary under the Deed of Settlement and it was not suggested that he had power to do so from any other source. It follows that Mr Dalla Vecchia did not add himself as a beneficiary under the Deed of Settlement by the Deed of Variation, and ... the Deed of Variation did not operate as a settlement of the property the subject of the Deed of Settlement."

McPherson JA was in agreement. After referring to the terms of the Deed of Settlement, he said (at 4357):

> "There is now a body of authority to the effect that if, through defect or invalidity, an instrument is void or fails to operate at all, it is incapable of being assessed to duty as if it were an effective instrument of kind sought to be charged. See *Kent v Commissioner of Stamps* ((1927) St R Qd 407-408) which was applied in *O'Donohue v Comptroller of Stamps* ([1969] VR 431, 443-444) and in *Kern Construction (Townsville) Pty Ltd v Commissioner of Stamp Duties* (81 ATC 4147; (1981) 12 ATR 250, 253). See also *Glennon v FC of T* (72 ATC 4181; (1972) 127 CLR 502) which involved a similar question but on an appeal against an assessment of gift duty."

2. Employee share scheme application dutiable as a "mortgage"

***Broken Hill Proprietary Company Limited v Commissioner of Stamp Duties* (Qld) (97 ATC 4456)**

Facts

The appellant had established a share incentive scheme for employees. Each year the appellant issued a prospectus setting out the terms and conditions of the scheme. Those terms and conditions included provision for a loan to be made to employees to enable them to pay for the shares. The form of application for shares incorporated an application for a loan from the appellant. An employee was also asked to sign a blank transfer form of the shares subscribed for. The instruments contained a term that if the employee defaulted in payment of any instalment of the loan then the appellant could sell the shares by completing the details in the signed transfer. The appellant advised employees by letter of its acceptance of applications.

The Commissioner has assessed a share subscription, loan application and letter of acceptance for duty as a "mortgage" under section 65(1)(c) of the Stamp Act 1894 (Qld) which provides that the term "mortgage" includes:

> "(c) any agreement, contract, or bond, accompanied with a deposit of title deeds for making a mortgage, or any other security or conveyance as aforesaid, of any lands, estate, or property comprised in the title deeds, or for pledging or charging the same as security and any instrument by which any property whatsoever is charged with or rendered liable as a security for the payment or repayment of any sum of money."

Issue

Did the applications and acceptance constitute a "mortgage" within that provision?

Decision

The Court of Appeal held, yes.

Reasons

The reasons of the court were delivered by McPherson JA.

McPherson JA noted (at 4457):

> "... that the loan agreement does not constitute a 'mortgage' within the technical meaning of that expression, as involving an outright transfer of property as security for repayment of a loan subject to a condition for re-transfer or redemption on repayment."

But reference was then made to the terms of section 65(1) and commented (at 4458) that:

> "... there appears to be little difficulty in bringing the subject loan agreement within the terms of at least the last part of section 65(1)(c)."

In finally deciding that that provision applied, the following points were made:

- It did not matter for that provision to apply that the relevant shares were not issued immediately:

  > "It is the agreement to subscribe followed by allotment and entry on the register that makes a person a shareholder." (at 4458)

- "The shares subscribed for in the present case are, within the terms of section 65(1)(c) of the Act, readily capable of being described as property 'rendered liable as security' in ..." the sense described in *Singer v Williams* ([1921] 1 AC 41 at 49). (at 4458)

- "... in addition, the shares answer the description of property 'charged ... as a security' in section 65(1)(c)." (at 4458)

- A mortgage within the meaning of the subsection can only be created if intended. (at 4459)

- "In the absence of any indication of [an intention not to create a charge over the shares], the loan agreement must receive its ostensible effect, which is to confer an equitable charge over the shares to secure the loan arising from the agreement to subscribe." (at 4459)

- "Whether or not [an instrument] is a 'mortgage' within the introductory portion of section 65(1), an instrument that answers the description of sections 65(1)(c) is specifically included as a mortgage under section 65(1)." (at 4461)

- Whether or not the loan agreements infringed section 205(1) of the Corporations Law, it was not "... a function of the Commissioner to be satisfied with the existence of an approved scheme before proceeding to assess the loan agreement instruments to such duty as, according to their tenor, they ought to bear." (at 4461)

3. Redemptions of units dutiable as a "transfer"

***MSP Nominees Pty Ltd v Commissioner of Stamps (SA)* (97 ATC 4523)**

Facts

The appellant was a trustee of a unit trust. Units were redeemed by the appellant. Minutes evidenced the redemptions of two unit holders, Budget and Galaxy, which were recorded in the relevant register of the trust.

The Commissioner assessed the register to duty in respect of each of the redemptions.

Issue

Did each of the redemptions constitute a "transfer" within section 71 of the Stamp Duties Act 1923 (SA)?

At first instance the appeal was allowed, the court holding that the monetary value of the trust property fell by an amount equal to the amount paid on the redemptions.

Decision

The Full Court answered the question, yes.

Reasons

The decision of the court was delivered by Doyle CJ.

Doyle CJ made note of the reasoning of the judge at first instance as follows:

- "... because Budget and Galaxy each received the full value of the units redeemed, neither redemption increased the rate of the interest or the value of the units of the remaining beneficiaries (or remaining beneficiary, after the Galaxy redemption). That was because after each redemption the remaining unit holders held the same number of units as before, and because the value of the trust assets fell by the value of the units redeemed. In short, the value of the units remaining after each redemption was not altered by the redemption."

- "... nothing was transferred to the other unit holders by the redemption of units."

- "... the redemption did not involve a surrender or a renunciation of Budget's or Galaxy's beneficial interest in the trust property. Budget and Galaxy each acquired, by the act of redemption 'the beneficial interest in the trust property to which it was entitled, namely the value of the units redeemed ...'."

- "... stamp duty is not payable on a redemption if the unit holder receives full value for the units redeemed."

Doyle CJ however came to a different view (at 4526):

> "In my opinion section 71(3) is intended to expand the concept of 'conveyance', which concept is the basis of section 60 of the Act. ... To my mind, the redemption of units at the request of a unit holder can be described as a surrender by that unit holder of the beneficial interest previously held. The redemptions have terminated the beneficial interest in the trust assets as previously held by Budget and by Galaxy. That has happened at their request. That looks to me like a surrender of their beneficial interest. By that I mean a surrender of a beneficial interest in the sense of giving it up or yield it up."

As to the argument that Budget and Galaxy had each received their entitlement under the trust, Doyle CJ was of the view that that argument (at 4527):

> "... is neither here nor there. If a redemption on request can be regarded as a surrender of a beneficial interest, then a surrender occurs whether it is for the value of the interest or something less than the value of the interest. ... The fact that a redemption does not alter the value of units does not establish that there has been no loss of a beneficial interest."

Further, Doyle CJ was of the view that the remaining unit holders' "... beneficial interest in the trust fund was increased. In my opinion the redemption of the units involved a termination of a beneficial interest previously held by a unit holder, and resulted in an increased (although no more valuable) beneficial interest on the part of the remain unit holders."

4. Tobacco taxes duties of excise within section 90 of the Constitution

Ha and Anor v State of New South Wales; Walter Hammond and Associates Pty Ltd v State of New South Wales **(97 ATC 4674)**

Facts

The plaintiffs in the first action conducted a duty free store in Sydney from which they sold by retail tobacco products. Neither held a retailers' licence under the Business Franchises Licences (Tobacco) Act 1987 (NSW). The second plaintiff carried on the business of selling tobacco for resale in New South Wales.

Issue

Were the provisions of the Business Franchises Licences (Tobacco) Act 1987 (NSW) imposing a liability to pay assessments issued by the Commissioner, duties of excise within the meaning of section 90 of the Commonwealth Constitution?

Decision

The High Court (by majority of four to three), held, yes.

Reasons

The majority of the High Court were of the view that to impose an amount equal to 75 or 100 per cent of the value of tobacco sold during the relevant period could not conceivably be regarded as a mere fee for a licence under a regulatory scheme for the control of businesses selling tobacco. Since duties or excise are taxes on production, manufacturer, sale or distribution of goods, whether of foreign or domestic origin, there are taxes on some steps taken in dealing with goods, the provisions of the Act would be on power.

The decision of the High Court raises a number of issues:

- what are the principles of the decision?
- what are the decision's implications?
- when one looks at some of the provisions of (for example) the Queensland Stamp Act, can one say whether any of the sections may be invalid?
- can section 90 produce unexpected results?
- how did government react to the decision?

Principles of the decision

One can discern two definitions of an excise:

- "... Duties or excise are taxes on the production, manufacture, sale and distribution of goods, whether of foreign or domestic origin"; or
- "... [Duties or excise are] a tax on a step and the production or distribution of goods to the point of receipt by the consumer ..." (at 4679 quoting Brennan J in the *Phillip Morris Limited* case).

But there is evident a substantive approach to the issue (at 4682):

> "When a constitutional limitation or restriction on power is relied on to invalidate a law, the effect of the law in and upon the facts and circumstances to which it relates – its practical operation – must be examined as well as its terms in order to ensure that the limitation or restriction is not circumvented by mere drafting devices."

This really boils down to a question of characterisation:

- "... [T]he proximity of the relevant period to the licence period, the shortness of the licence period, the size of the tax imposed ad valorem and the fact that it is to be borne only once in the course of distribution ..." (at 4685); or
- "If the theory on which the States and Territories acted was that a 'fee for a licence to carry on the business' ... quantified by reference to the value of the quantity of [the commodity] sold during a period preceding that in respect of which the licence is granted (the *Dennis Hotels* formula) denied any impost the character of a duty of excise, the theory was misunderstood. Such a proposition fails to take account of the important qualification which Kitto J himself expressed in *Dennis Hotels* namely, that the exaction is 'not in respect of any particular act done in the course of the business'." (at 4685); or
- "The States and Territories have far overreached their entitlement to exact what might properly be characterised as fees for licences to carry on businesses." (at 4686)

A possible test may well therefore be:

> "... once a State tax imposed on the seller of goods and calculated on the value or quantity of goods sold cannot be characterised as a mere licence fee, the application of section 90 must result in a declaration of its invalidity." (at 4686)

Decision's implications

The States may well however not be totally precluded from having taxes on goods. There will be no excise duty if:

- it is not on goods: *Peterswald v Bartley* ((1904) 1 CLR 497), *Andersen's Pty Ltd v Victoria* ((1964) 111 CLR 353), *Ha's* case (supra);
- not on new goods: *Western Australia v Chamberlain Industries Pty Ltd* ((1970) 121 CLR 1);
- not on consumption: *Dickenson's Arcade Pty Ltd v Tasmania* ((1974) 130 CLR 177), *Ha's* case (supra);
- not on value or quantity: *Anderson's Pty Ltd v Victoria* ((1964) 111 CLR 353), *Ha's* case (supra);
- not on a person: *Anderson's Pty Ltd v Victoria* ((1964) 111 CLR 353), *Matthews v Chicory Marketing Board (Vic)* ((1938) 60 CLR 263);
- not capable of being characterised as such: *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* (93 ATC 5053), *Ha's* case (supra).

Some examples

When one looks at the various provisions of the Queensland Stamp Act, for example, perhaps the following can be considered:

Example	Section	Valid / Invalid	Reason	Case
Conveyance on goods	section 49	Valid	Tax on method of disposal	*Anderson's*
Conveyance on land and goods	section 49	Valid	Tax on method of disposal	*Anderson's*
Acquisition of business	section 54A	Invalid?	Tax on goods	*Dickenson's Arcade, Hamersley Iron, Chamberlain Industries*
Company Acquisition	section 54(4)	Invalid?	Tax on goods	*Dickenson's Arcade, Hamersley Iron, Chamberlain Industries*
Hiring Agreement	Schedule	Valid	No disposal	*Anderson's*
Instalment Purchase Agreement	section 32A	Valid	Tax on method of disposal; tax on seller	*Anderson's*
Credit or Rental business	sections 35-35H	Valid	Tax on method of disposal; no disposal	*Anderson's*
Motor Vehicle Registration	section 57A	Valid	Tax on consumer	*Dickenson's Arcade*

In this area particular circumstances may produce unexpected results as is evident in the decisions in *State of Western Australia v Hammersley Iron Pty Ltd (No 1)* ((1969) 120 CLR 1), *State of Western Australia v Chamberlain Industries Pty Ltd*; *State of Victoria v IAC (Wholesale) Pty Ltd* ((1970) 121 CLR 1).

If a court goes looking for what it considers an impost does in reality, the result can mean invalidity. For example, a receipt duty is not safe in that exercise:

> "A tax upon the supplier of iron ore in respect of the receipt of money (or supposedly the receipt of document) for such supplying was a duty of excise. The Act was the Stamp Act 1921-1968 (WA). Other States had similar receipt duty legislation. The iron ore had been won in the taxing State, and the supplier was also the producer; the tax, called a stamp duty, was at the rate of 1¢ for every $10 received. To be precise, the tax was imposed at the point of receipt of money, one of the elements in a sale. Through that medium the tax was fed back into the overall sale, into the supply (another element in a sale), into the goods. But the majority (and the minority also) went behind the paraphernalia of deemed receipts: there was not really a tax on documents, the usual stamp duty. The majority continued their peering. They went behind the actual receipt of money (for the minority a liability arose at this early stage), on to the overall sale, on to the goods, and at last they arrived at a tax on goods – at any rate 'in effect', 'in substance' or 'in truth'." (*Lane's Commentary on the Australian Constitution*, Law Book Co, 2nd ed, pages 680-681.)

Criterion of liability is placed second to substance. Much will depend on the particular facts of a case which may get to the High Court – for example, if the relevant goods are new or used.

Government's reaction

The Commonwealth passed a number of Acts:

- the Franchise Fees Windfall Tax (Collection) ACT 1997;
- the Franchise Fees Windfall Tax (Imposition) Act 1997;
- the Franchise Fees Windfall Tax (Consequential Amendments) Act 1997;
- the Sales Tax (Customs) (Alcoholic Beverages) Act 1997;
- the Sales Tax (Excise) (Alcoholic Beverages) Act 1997;
- the Sales Tax (General) (Alcoholic Beverages) Act 1997;
- the Sales Tax Assessment Amendment Act 1997;
- the Excise Tariff Amendment Act (No 3) 1997; and
- the Customs Tariff Amendment Act (No 3) 1997.

The Queensland Government passed the:

- Fuel Subsidy Act 1997;
- Consequential Amendments (Act) 1997;
- Sales Tax (Customs) (Alcoholic Beverages) Act 1997;
- Sales Tax (Excise) (Alcoholic Beverages) Act 1997.

5. Transfer of mortgage and collateral security within item (1)(a) (Qld)

***A Raptis & Sons Holdings Pty Ltd v Commissioner of Stamp Duties (Qld) (No 1)* (97 ATC 4824)**

Facts

An instrument assigned property consisting of four mortgages of land and a security incidental to them.

Issue

Was the instrument within the concessional rate of duty under item (1) of the "Conveyance or Transfer" head of charge in the schedule to the Stamp Act 1894 (Qld)?

Decision

The Court of Appeal held, yes.

Reasons

The Commissioner contended that the concessional rate was not applicable on the basis that the instrument not only related to mortgages but also related to a security incidental to them. The Commissioner emphasised the word "solely" in the provision. In other words, to get the concession the parties should have used two instruments, one relating to mortgages under item (1)(a) and other relating to items under item (1)(c) of the "Conveyance or Transfer" head of charge.

The court noted that (at 4825):

> "... there is no sense in allowing a concessional rate for transfers effected by two documents while exacting ad valorem duty of words to precisely the same effect they use in just one."

In the course of its judgment, the Court of Appeal had regard to extrinsic material and the purposive rule of construction referred to by McHugh JA in *Kingston v Keprose Pty Ltd* ((1988) 6 ACLC 226 at 241-242) and section 14A(1) of the Acts Interpretation Act (at 4826):

> "The words granting the concession should be interpreted to avoid absurdity. It should be held that the concession is available where, as in this case, the instrument transfers only property of the nature described in subparagraph 1(a) or in subparagraphs 1(a) and (c)."

Comment

But what if the instrument transfers property referred to in item (1)(a) and, for example, shares or land or debt? Certainly so far as shares or land is concerned there could be problems. So far as debt is concerned, if it is the debt secured by the mortgage there should be no difficulties since is that not part of the mortgage? Or is it?

6. Share options in section 56C (Qld) company dutiable

A Raptis and Sons Holdings Pty Ltd v Commissioner of Stamp Duties (QLD) (No 2) **(97 ATC 4842)**

Facts

The company was a trustee of a trust. Two issued shares were held by different people. Each granted an option for a dollar to the appellant to purchase the shares with each option remaining open for 99 years. If the option was exercised then the price payable was a dollar. The shareholder also executed powers of attorney enabling the appellant to exercise certain rights.

Issue

Was each option subject to duty under section 56C in the Stamp Act 1894 (Qld)?

Decision

The Court of Appeal answered that question, yes.

Reasons

The President noted:

- section 56C was constitutionally valid (at 4843);

- the appellant obtained an equitable interest in each share because of the rights it obtained against the shareholders pursuant to the option document (at 4844);

- since the appellant could obtain each of the shares for an outlay of a dollar in each case, the value of its interest is substantially equivalent to the value of the share (at 4844);

- accordingly, section 56C(8A)(a) applied: "While it is by no means clear to me what is meant by 'value' in that provision, there is no reason to doubt that in the present case the respective shares of [the grantors of the options] each represented half of the value of the total issued capital of [the trustee company] or that the interest in each share which the appellant acquired was approximately the same proportion of the total issued capital of [the trustee company]." (at 4844)

Derrington and Byrne JJ noted:

- "'disposition' is a word of very wide meaning and the words 'disposed of' are not technical words but extend to a disposition in a commercial sense." (at 4845);

- accordingly, when used in section 56C "disposition" "bears no narrow meaning." (at 4845);

- "... the deeds and their complementary powers of attorney have passed to the appellant every valuable incident of ownership for at least about four generations. From the moment the deeds were created, there was no realistic prospect that the grantors would in future ever derive a benefit from, or be entitled to exercise any of the rights attaching to ownership. In short, in 'a commercial sense', as the High Court put it in *Henty House*, the deeds effect or else evidence a relevant 'disposition'." (at 4846);

- the fact that duty will be payable again if the options were ever exercised was answered: "It is scarcely to be presumed that the legislature would be discomforted by the prospect that instruments such as these may yet succeed in increasing the receipts to the revenue beyond the ordinary burden imposed by the Act upon the relinquishment of a share effected by section 56C." (at 4846);

- section 56C is constitutionally valid.

Comment

With respect, the approach of the President is preferred. Surely, even though "disposition" is a word of wide import, how can one speak in terms of a disposition of a share which remains with the grantor of an option?

7. Section 56B(1A) and section 56(16) (Qld) no help to transaction

***Thakral Fidelity Pty Ltd v Commissioner of Stamp Duties (Qld)* (97 ATC 4927)**

Facts

T was appointed the trustee of a unit trust in place of G. T obtained Australian Securities Commission approval on 3 May 1994 to an amendment to the trust. An application was made to the Commissioner in April 1994 for a determination that section 56B(1A) applied. This subsection has the effect of excluding a unit trust from section 56B where the Commissioner is satisfied that the trust will, within the subsequent twelve months, otherwise fall within the definition of "public unit trust". Shares in G were subsequently transferred. Units in the unit trust were allotted to the appellant and other units were redeemed. Subsequently units were issued to over 4,000 unit holders and the units were listed on the Australian Stock Exchange.

Issue

Was the issue and redemption of the units dutiable under section 56B (such that section 56B(1A) did not apply)? Further, was the transfer of the shares subject to duty under section 56C (such that section 56C(16) did not apply)?

Decision

As the matter came before the court by way of applications for judicial review, the hearing was before a single judge.

Muir J answered the first question, yes. The second question, yes.

Reasons

Muir J noted:

- section 56B(1A) can only operate where an approved deed is already in existence (at 4933); in this case the relevant dispositions of units giving rise to the disputed assessment was made prior to the approval of the Australian Securities Commission to the relevant deed;
- section 56B(1A) extends to an issue of units even though those units do not involve an issue to the public (at 4935);
- the words "trustee of a trustee" in section 56C can apply to a bare trustee and can apply even though there is no trust formally constituted by an instrument in writing;
- section 56C(16) did not apply apparently because the dispositions of units and transfers of shares were all made as part of one transaction (at 4938).

Comment

The view that section 56B(1A) is predicted on the existence of an approved deed is unconvincing. It refers to "... within twelve months of the date of the approval of a deed", not "the deed". But the subsection is so badly drafted that any view is defensible. For example, can the Commissioner revoke the approval? What happens to dispositions during the twelve month period if the relevant spread is not obtained? Is there retrospective assessment?

As to the new application of section 56C(16), the decision must be doubted. Surely that subsection was inserted to relieve from duty the type of case there in issue.

8. When is a licence really a "lease"?

***Commissioner of State Revenue (Vic) v KJRR Pty Ltd* (97 ATC 5079)**

Facts

The respondent entered into a franchise agreement and at the same time into a licence agreement with respect to premises but which licence argument conferred no right of exclusive possession and which recorded that the licensee obtained no proprietary estate or interest in the premises. The respondent was however obliged to comply with all the provisions of the lease under which the licensor held the premises. The respondent was obliged to maintain the premises, keep them in good and tenantable repair, maintain safety, cleanliness, take out insurance and enabled the lessor to enter and inspect the premises.

Issue

Did the license really confer a right of exclusive possession and was it dutiable as a "lease" within the meaning of the Stamps Act 1958 (Vic)?

Decision

Gillard J answered the question, yes.

Reasons

Gillard J referred to *Radaich v Smith* ((1959) 101 CLR 209) and *Street v Mountford* ([1985] AC 809) and said (at 5086) that:

- "In my opinion the High Court case of *Radaich* and the House of Lords decision in *Street* firmly established that the court is concerned to consider the agreement in its context and to determine the nature of the rights to possession created by the instrument. One is concerned with substance and effect and not form. Words cannot change the effect. An express term seeking to foreclose the issue is of little weight and will not stand in the way of a finding of lease when on a proper construction it is established there is exclusive possession for a term with periodical rental. Also a factor of some weight in the exercise is a reservation of the right to the owner to enter and inspect the premises. This points to a tenancy."

- Taking into account the obligations referred to above, the right in the lessor to the licensor to enter the premises, together with the obligation of the licensee to comply with the lease, "... the true effect of the licence agreement taking into account the surrounding circumstances including the lease and franchise agreement, lead to the conclusion that the right granted to the respondent by the agreement was an interest in the land which gave it exclusive possession." (at 5088)

- Other indicia in the licence agreement also pointed to the same conclusion particularly the covenant by the licensee to use the premises at its own risk and not being permitted to assign the licence without the written consent of the licensor. "... the documents clearly established the criteria which the House of Lords place great weight on in *Street v Mountford*, namely, exclusive possession to conduct a business for a term at a rental. In addition, the reservation of the right to enter and inspect is also another weighty factor." (at 5088)

- The fact that the licence agreement purported to provide that it was not an interest in land was "... a pretence and does not give effect to the common intention of the parties. It can be ignored." (at 5088)

Comment

The decision gives some direction in assisting the draftsman endeavouring to ensure an instrument is not a "lease" for duty purposes. But there appears no one element which distinguishes a licence from a lease.

9. What is "beneficially entitled" for landrich provisions?

***Tokyo City Pty Ltd v Commissioner of State Taxation (WA)* (98 ATC 4036)**

Facts

R Pty Ltd entered into an agreement to purchase land in Western Australia. The contract contained a number of conditions including a condition that R Pty Ltd would obtain unconditional town planning approval. Prior to that approval being granted and prior to settlement, the appellant acquired the shares in R Pty Ltd.

Issue

Was R Pty Ltd "beneficially entitled" to the land within the Western Australia landrich provisions as at the date of the acquisition of those shares by the appellant?

Decision

The court answered that question, yes.

Reasons

After referring to *Brown v Heffer* ((1967) 116 CLR 344) and *Legione v Hateley* ((1982-1983) 152 CLR 406 at 446), Scott J applied the reasoning of Malcolm CJ in *Kuper v Key-West Constructions Pty Ltd* ((1993) WAR 419 at 430-432) and stated (at 4043):

> "In my opinion, applying *Kuper v Key-West Constructions Pty Ltd* to the present case, [R Pty Ltd] could have obtained an order for specific performance in the sense of requiring the Vendor of the Land to do all of the things necessary to be done to procure the issue of the relevant title so that the Land could be transferred to [R Pty Ltd]."

Scott J also made reference to unreported judgments of *Lee Henderson; ex parte Harburg* (Queensland Court of Appeal, 1993) and *Hussey v Oliver* (WA Supreme Court, 1990).

In essence, Scott J held that "beneficially entitled" includes not only a situation in which a purchaser has the right to claim specific performance of an obligation to convey or transfer the actual land but also to the case in which a court would order specific performance by a vendor of "... all things necessary to be done to procure registration [of the relevant plans] as well as restraining the vendor by injunction in dealing with the land inconsistently with the purchasers right to specific performance of the contract both in the special sense and subject to fulfilment of the condition, in the ordinary sense" (quoting Malcolm CJ in *Kuper v Key West Constructions Pty Ltd* (supra) at 4043).

Comment

It is suggested that this approach may find authority by reference to other ares of the law. But where duty is or is not payable depending on how one looks at this issue, it seems, bearing in mind that the relevant conditions may not be fulfilled but taxpayers may have to find large sums of money to pay an assessment in the meantime, that sections in Stamp Acts refunding duty if those conditions are not fulfilled, are a poor substitute for suggesting that "beneficially entitled" in landrich provisions should be specially interpreted to cover unconditional contracts only.

10. When is a business acquired for section 69H (Tas) purposes?

***Zeekap (No 56) Pty Ltd v Commissioner of State Stamp Duties (Tas)* (98 ATC 4044)**

Facts

The appellant agreed to buy a fishing vessel and equipment together with licenses and permits held in relation to the vessel. The vessel and the licenses were sold subject to an existing lease. The purchaser was to obtain the benefit of that arrangement on completion of the agreement.

Issue

Did the appellant acquire a business within the meaning of section 69H of the Stamp Duties Act 1931 (Tas)?

Decision

The Tasmanian Supreme Court answered that question, yes.

Reasons

Notwithstanding that the appellant "... procured no present right to conduct a fishing business nor did it gain any right to immediate possession of the vessel and its equipment, nor to the benefits and privileges conferred by the licences" (at 4046), it is apparent that in the court's view it is sufficient to come within section 69H of the Act that a party acquires the means of conducting a business "... in the sense of owning the assets without which such a business could not have been carried on and which are specifically designed for that purpose." (at 4046) The fact that the appellant had to wait for termination of the lease before the appellant was in the position to carry on the business was irrelevant:

> "The means or assets necessary to the carrying on of a fishing business were agreed to be sold by the owner of them, subject to the temporary rights of a lessee to use them for a certain period upon payment of rent, and the purchaser acquire those assets and the capacity to carry on the business at the termination of the lease. In the meantime it was to receive the reserved rent. Stamp duty is payable on the sale of a business, notwithstanding the vendor may not be able to give the immediate right to carry it on. The agreement to transfer the assets and the right to use them at the expiration of any prior interests amounts from an agreement for the sale of the business which is dutiable."

Comment

This case is of importance to sections like section 54A of the Stamp Act 1894 (Qld) which includes a "sufficiency of assets" test to determine exigibility to duty.

11. When is there a change of "beneficial ownership"?

***ISPT Pty Ltd v Chief Commissioner of Stamp Duties (NSW)* (98 ATC 4084)**

Facts

CMPI was the owner of land in New South Wales. Unit trusts were established, neither of which was settled with any property. CMPI paid to the trustee ISPT an amount in excess of the market value of the land in exchange for an allotment of units in each trust. "CMPI then held a complete beneficial interest in the assets of the fund of each of the trusts" (per Studdert J at page 4087). ISPT then made offers in writing as trustee of the relevant trusts to purchase from CMPI the

properties. The letter of offer indicated that it could be accepted verbally and provided (inter alia) that "once the purchase price is paid in full, CMPI is appointed to hold the property as nominee for the trustee for so long as CMPI remains the registered proprietor." The offers to purchase were accepted orally. The trustee then endorsed the cheques it had earlier received for the allotment of the shares and CMPI was appointed to hold the property as a nominee under the trust. Subsequently units were allotted to other parties and ISPT redeemed CMPI units. CMPI also was removed as nominee of the trustee in relation to the lands.

Issue

Was the Commissioner's view that "... contracts for sale and purchase of land, created by acceptance of the written offers dated 27 January 1995, caused or resulted in a change in the beneficial ownership of land situated in New South Wales" required statements to be lodged under section 44A of the Stamp Duties Act correct?

Decision

Studdert J answered that question, no.

Reasons

There was no change in beneficial ownership on the acceptance of the written offer. The test applied was whether equity would have intervened at that point bearing in mind that CMPI was the only unit holder. After reviewing what had been said in *Stern v McArthur* ((1987-88) 165 CLR 489 at 522-523) and *Chan v Cresdon Pty Ltd* ((1989) 168 CLR 242 at 252-253) and in particular *Coran v Patton* ((1989-90) 169 CLR 520 at 579), Studdert J was of the view that equity would not have intervened on behalf of CMPI to protect its interests which, notwithstanding the provisions of the relevant deed of trust, could have immediately been bought to an end by CMPI. Accordingly, there had been no change in the beneficial ownership of the land on the oral acceptance of the written offer.

Comment

This case is discussed separately in this paper.

12. Trust variation – value of trust fund dutiable?

***Chief Commissioner of Stamp Duties (NSW) v Buckle* (98 ATC 4097)**

Facts

The appellant was the trustee of a trust. The trustee's children were takers in default. A deed of variation was subsequently executed effecting the rights of the children on default of appointment. The Commissioner assessed the deed as a conveyance.

Issue

Was duty to be calculated by reference to the unencumbered value of the property conveyed by the deed or the unencumbered value of the whole of the trust fund?

Decision

The High Court ultimately answered that question, the former.

Reasons

A joint judgment was delivered by the High Court. In the course of that judgment, it was said (at 4103):

> "... in the present case ... there is no call for any refined analysis to determine whether the Supplemental Deed is to be classified as an 'appointment' or 'settlement' within the opening words of section 65. The issue is one of identification of that property in New South Wales which, by means of the instrument, was transferred to or vested in or accrued to [the children]. To that extent only was there a conveyance within section 65 of the Act."

Later (at 4103):

> "In the present case, under the Deed of Settlement as it stood before the Supplemental Deed, no interests in corpus had vested. The Trust Fund was vested in the trustee, impressed with such trusts as were created by or pursuant to the Deed of Settlement. There was no hiatus or gap as to any outstanding beneficial interest in the Trust Fund. The assets comprising the Trust Fund were not impressed with trusts which gave rise to equitable interests therein which were so extensive as to leave the trustee with no more than the bare legal title. The trustee might accurately be described as the owner of those assets, but as subjected to the equitable obligations imposed by the Deed of Settlement. The second and third respondents had no vested interests in corpus but they did enjoy rights to due administration of the trusts of the Deed of Settlement which a court of equity would protect."

The High Court was of the view that the Supplement Deed only had the effect of causing "... the vesting in the [children] not of the Trust Fund but of interests of a lesser nature" (at 4104). Further, it was not accurate "... to identify the legal operation of the Supplemental Deed as a 'settlement' of the entirety of beneficial interests which then existed in the Trust Fund as a whole ..." (at 4104).

The result was that "... the property conveyed by the Supplemental Deed was such that, as was conceded an argument, only a minimal amount of stamp duty was exigible."

The High Court made two other important points:

- as to "unencumbered value" in section 66(1) of the Act: "unencumbered" is used "... not in a loose sense but to refer to security interests in, or charges or other liabilities which attach to, the property in question." (at 4105);

- trustees right of indemnity: "The interests of the beneficiaries are not 'encumbered' by the trustee's right of exoneration or reimbursement. Rather, the trustee's right to exoneration or recoupment 'takes priority over the rights in or in reference to the assets of beneficiaries or others who stand in that situation'. ... It is not a security interest or right which has been created, whether consensually or by operation of law, over the interest of the beneficiaries so as to encumber them in the sense required by section 66(1) of the Act. In valuing the interests of beneficiaries which are conveyed by an instrument, there is no encumbrance which the Act will require this to be disregarded." (at 4106).

Comment

So far as Queensland is concerned, there is no indication from the Commissioner that Revenue Ruling S/D 5 is going to be changed. No doubt this is on the basis that *Buckle's* case is concerned with what was conveyed whereas in Queensland the question is whether an instrument is a "settlement". It should be recalled also that in Queensland under section 2A debts and other liabilities of trustees is to be disregarded in determining the value of trust interests.

13. Limits of section 54A (Qld)

***G E Crane and Sons Limited v Commissioner of Stamp Duties (Qld)* (98 ATC 4149).**

Facts

Two subsidiaries of Burns Philp and Co Limited (Hardware and Plumbing) conducted a business of supplying goods to the public. Those goods were acquired from another subsidiary (Purchasing) which did not itself supply in any direct sense to the public. An agreement was executed for the sale of goodwill and assets other than stock in favour of the appellant; Purchasing sold the stock to a company associated with the appellant, Postruby.

Issue

Could stock be regarded as included in the description of "goods ... appertaining to the business" within the meaning of section 54A(1) of the Stamp Act 1894 (Qld)?

Decision

A majority of Court of Appeal answered that question, no.

Reasons

The majority of the Queensland Court of Appeal were of the view that the relevant stock came within the expression "appertaining to the business: the stock was that which the owners were in the business of selling." (at 4156)

The majority noted however:

> "But that is not the real problem for the Commissioner. Only properly [sic] 'acquired or agreed to be acquired from the owner of the business' is within the scope of section 54A(1). Further, only persons who acquire or agree to acquire a business are obliged to deliver a statement under subsection (2). If the appellant is right, then the stock, although sold by the same deed by which other property appertaining to the business were sold, was not acquired or agreed to be acquired from the owner of the business, because it was acquired or agreed to be acquired from Purchasing, which was not an owner of the business. Further, if the appellant is right, it was Postruby which acquired or agreed to acquire the stock and Postruby was not a person which acquired or agreed to acquire a business; therefore, on the appellant's contention Postruby had no obligation to deliver or be a party to the delivery of a statement such as is required by section 54A(2)." (at 4156)

Later [at 4156]:

> "It is common ground that Purchasing owned the stock which was acquired from it under the deed; the question is that which we have stated; was Purchasing the 'owner of the business' within the meaning of section 54A(1)?"

The majority held that none of the relevant companies had any interest in each other's business and there was no reason on the material before the court to infer the existence of any partnership between them. Accordingly, the relevant stock did not fall within the description "acquired or agreed to be acquired from the owner of the business" in section 54A. "... it seems to us clear enough that subsection (1) shows an intention that only property acquired from the owner of the business is to be included." (at 4158)

Other point made by the majority included:

- Acquisition of the stock only could hardly fulfil the extended definition of "business" in subsection 7 (namely a transaction by which sufficient of the assets of the business are acquired or agreed to be acquired to enable the person acquiring the same to carry on the business) (at 4158);

- it could not be said that there were two businesses (at 4158);

- the contingency principle as enunciated in *Independent Television Authority and Anor v Inland Revenue Commissioner* ([1961] AC 427 at 443) and as applied in *Pacific Fair Shopping Centre Pty Ltd v Commissioner of Stamp Duties* ((1979) Qd R 410) can have no application where duty is charged on value of property, not the consideration as is the case under section 54A(5) (at 4160); this point was also found favourable with Macrossan CJ (at 4154);

- the other important issue raised in the case was whether section 90 of the Commonwealth Constitution prevented section 54A from validly applying so as to enable the exaction of duty in respect of an agreement for the sale of a business and, in particular, in respect of goods the stock of the business. That matter has been removed to the Hight Court.

Comment

The interest in this case revolves around what may be the outcome of the reference to the High Court.

14. Limits of section 54A (Qld) – again

***Campbells Hardware and Timber Pty Ltd v Commissioner of Stamp Duties (Qld)* (98 ATC 4273)**

Facts

Campbells Hardware & Timber Pty Ltd (Campbells) entered into a Sale of Business Agreement with James McEwan Limited (Receiver & Manager Appointed) (McEwan) to purchase the goodwill of certain retail hardware shop businesses, specified plant and equipment and other assets. The form S(a) required to be filed under section 54A subsequently lodged disclosed "nil" for the value of stock in trade acquired. An assessment issued on those facts. Subsequently, the Commissioner amended the form S(a) to insert a value for stock in trade.

Campbells and McEwan also entered into an "Agency Agreement" dealing with stock. The overall purpose of which was to "engage Campbells ... as bailee for the Vendors on a consignment basis."

Issue

This case focuses on the meaning of "acquired" in section 54A (Qld).

Decision

Byrne J found for the Commissioner.

Byrne J said:

> "... 'acquire' and its derivatives [in the expression 'acquired or agreed to be acquired'] import to 'get as one's own'. Merely to take possession of goods is not to 'acquire' them as

> that word is used in section 54A. The evident intent of section 54A is to exact duty in respect of arrangements which, so far as trading stock is concerned, partake of the nature of a 'transfer of the property', as sub-section (5) expresses it.
>
> ... The question is whether, according to the true legal character of the arrangements, the applicant agreed to get the stock as its own. To arrive at the answer, in this case it is necessary to 'look at what the contract really was, and not at what the payee says it was'."

Byrne J held that:

> "... in substance though not in terms, it was agreed that the applicant should become the new owner."

In arriving at that conclusion his Honour took into account the following:

1. Although the Agency Agreement referred to an advance being made to the Vendor of the estimated value of the stock on the completion date, the "ultimate expense the applicant was to bear for the rights acquired in respect of this stock might have been more or less than that substantial 'advance'." The proceeds of sale of this stock by clause 10 was the applicants and not the vendors; if the applicant received less from selling this stock then the applicant suffered a deficiency.

2. The risk of accidental loss was to be borne by the applicant.

3. The applicant was likely to sell to a multitude of purchasers where the purchaser would not be aware of any agency.

4. The applicant was required to pay for the rights acquired at fixed times irrespective of the extent of any retail sales.

5. The applicant was entitled to sell at whatever price it thought fit.

6. The applicant had the power to deal with this stock in relation to its other stock.

7. At completion the applicant took possession with the right to it indefinitely entirely free of the vendor's control.

8. The applicant was entitled to exclusive possession of this stock permanently and in circumstances where the vendors agreed to the extinguishment of all their rights.

Campbells appealed.

Decision

The Court of Appeal dismissed the appeal.

Reasons

The President reviewed the relevant documents: "In my opinion, the appellant did not agree to acquire the trading stock by the Sale of Business Agreement and the Agency Agreement" (at 4279). However, subsequent dealings by the appellant with the stock such as mixing the stock with the appellant's other stock and the right of the appellant to sell stock to itself, meant that the President concluded that the stock had been acquired within the meaning of the section.

Davies JA however was of the view that the documents themselves exhibited a number of provisions which together led to the conclusion that the Agency Agreement "... was in substance an agreement under which property in the trading stock was intended to pass to the appellant" (at 4282), particularly the provisions relating to price (by which the advance of the appellant to

McEwan was repayable in limited circumstances) and the provisions relating to the stock (by which the property in the stock effectively passed to the appellant on completion).

Fryberg J was of a similar view.

Comment

Again the question as to whether section 90 of the Commonwealth Constitution applied was raised. The court required the parties either to remove the matter to the High Court or to elect to await the judgment in *G E Crane and Sons Limited v Commissioner of Stamp Duties (Qld)* (supra). Although apparently the parties at first elected the later option, the judgment of Fryberg J refers to the respondent Commissioner making application to remove the matter to the High Court.

15. What is "consideration" for ACT Determination?

***Lion Nathan Brewing Investments Pty Ltd v Commissioner for ACT Revenue* (97 ATC 5025)**

This case examines what is "consideration" for the purposes of the Stamp Duties (Marketable Securities) Determination 1990 (ACT).

Facts

Shortly, certain shares in Bond Brewing were transferred to M a subsidiary of Bell Resources. M agreed to procure a transfer to a Lion Nathan subsidiary of half of the shares Bond Brewing had agreed to transfer to it. M directed Bond Brewing to transfer the shares accordingly. The consideration paid to Bond Brewing for the transfer of the shares was $697 million but the market value of the shares was no more than $90.2 million. At first, in relation to the transfer of the shares to the appellant, the Commissioner assessed duty on 50% of the market value of the shares, that is, $45.1 million. Later however the Commissioner amended the assessment and determined that duty should be assessed as if the shares transferred to the appellant were valued at 50% of the price M had agreed to pay for them, that is, on $345.541 million.

Issue

Did the term "consideration" in the 1990 Determination refer to the price paid by the transferee or more broadly to the price paid to the transferor for the transfer whether or not that price was paid by the transferee or another person?

Higgins J held that it refers to the consideration received by the transferor.

Decision

The Full Federal Court allowed the appeal.

Miles J noted that Determination Number 67 of 1990 provided for the assessment of the amount of stamp duty on "the consideration paid or payable for the marketable security." On that basis the only question was what had been paid by the transferee. Since on the facts, no consideration passed from the transferee, it was only the unencumbered market value of the security which was in question and not the consideration paid.

Cooper J and Finn J were of similar views (at 5033 and 5040): "the consideration given for [the shares] was Lions' participation in the joint venture. ..."

16. Limits of section 54AB (Qld)

***Suncorp Insurance and Finance v Commissioner of Stamp Duties (Qld)* (97 ATC 4826)**

Facts

Two unit trusts were established with the appellant not only being the trustee but also being one of the unit holders. The appellant acquired units in both trusts and later land in Queensland owned by the taxpayer became subject to the terms of each of those trusts.

Issue

Was there a transaction within the meaning of section 54AB(2) of the Stamp Act 1894 (Qld)?

Decision

The Queensland Court of Appeal answered that question, no.

Reasons

Davies JA (within whom Fryberg J agreed) said (at 4838):

> "The question which must be resolved in the context of section 54AB is whether the interest which Suncorp has in the real property after the transaction was obtained as a result of it. This requires determination of the character of that interest and how it arose."

After reviewing each of the steps, Davies JA said in relation to the payment by Suncorp to itself in order to subject the relevant real property to the terms of the trust (at 4839):

> "For the Commissioner to succeed it must be correct to describe what occurred by paying money to itself as the obtaining by Suncorp of a beneficial interest in property and I do not think that that is so. It is more accurate, in my view, to describe it, vis-a-vis Suncorp, as the restriction upon its absolute enjoyment of the property in consequence of its acceptance of the imposition upon it of a trust in respect of that property in favour of [the other unit holder]."

The President reviewed the authority and in particular passages in *Gartside v The Inland Revenue Commissioner* ([1968] AC 553):

> "While *Gartside* is somewhat equivocal ... it is at least consistent with the conclusion that each of the appellant [and the other unit holder] have a sufficient interest in the land included in the 'trust funds' to satisfy subsection 54AB(1A)(a)." (at 4835)

Later, the President had acknowledged that the appellant obtained a "new estate or interest" but then noted (at 4836):

> "What is of current significance is whether such a transaction is, within the meaning of subsection 54AB(1)(a), one 'which results in a person' that is the original registered proprietor, 'obtaining a estate or interest in any real property', that is, the lesser 'estate or interest'. In my opinion that question should be answered in the negative. ... In my opinion, the evident purpose of subsection 54AB(1)(a) is to extend liability to duty to transactions which result in a person obtaining an additional 'estate or interest' in land, not to transactions which result in that person's 'estate or interest' being reduced."

17. Share buy backs dutiable?

Coles Myer Ltd v Commissioner of State Revenue (Vic) **(unreported judgment dated 30 April 1998)**

Facts

Coles Myer Ltd and K-Mart entered into a share Buy Back Agreement pursuant to section 206CB of the then Corporations Law. The Agreement was followed by the execution of a Transfer Deed. Completion was directed to take place in Victoria.

Issue

Was the buy back subject to duty as a transfer of a marketable security within the meaning of Heading 4 of the Third Schedule of the Stamps Act 1895 (Vic)?

Decision

A majority of the Victorian Court of Appeal answered that question, no. Further, because documents required completion in Victoria, the Victorian Act applied.

Reasons

Ormiston JA (with whom Winneke P agreed) held (at 12) that:

> "Although the word 'transfer' is not a term of art it is a word of wide connotation, to my way of thinking it is the passing of rights to another, so as to vest them in that other person, which is essential to a transfer, properly understood. It is not a mere disposition, a ridding of oneself of the right or interest, it is the vesting in the transferee of that right or interest, precisely or substantially, which is necessary to effect the transfer, as ordinarily understood in the law."

Earlier in his judgment, Ormiston JA said (at page 2):

> "Here no doubt K-Mart rid itself of all right and interest in these shares and received good money for doing so, but Coles Myer received nothing over which it could exercise any rights of ownership or the like in the future; it received only a paper transfer which enabled it to write off those duties and obligations which the company had formerly owed to the transferor and which it would otherwise continue to owe to the registered holder of the shares in the future, but it received nothing over which it was capable of exercising rights as a shareholder, nor could it transfer any rights in the shares to any other person to enable them to be exercised thereafter."

On the other hand, Phillips JA held the transfer dutiable, saying (at page 23):

> "Section 206BL emphasises that the transfer of shares is critical to the transaction and that the transfer is effective upon registration – although the Buy Back Agreement itself is complete when all the consideration under it has been provided. By section 206PC it is only 'after a transfer to a company of shares in the company is registered by the company' that the shares are cancelled and all rights extinguished."

Later (at page 25):

> "In short, it seems to me that the Corporations Law, ... does not deny to the document which serves to attract those consequences the character of a transfer of shares. The document in question purports to be a transfer of shares and the legislation talks in terms of a transfer of shares to the company by whom those shares were issued. The Corporations

> Law has itself adopted the transfer of marketable securities as the means whereby to achieve, in the end, a reduction of the company's issued capital; but that being the means whereby the result is achieved I see no reason to treat the document otherwise than does the Corporations Law itself. Cases on determining the substance of the transaction do not appear to meet to assist at all; for the substance of the transaction is not in doubt. The only question is whether the creature of Division 4B can be recognised as a transfer of shares within the contemplation of Heading IV(A) that is simply a question of statutory construction. ... I am of the opinion that the Transfer Deed is a transfer of marketable securities within the meaning of Heading IV(A) of the Third Schedule."

Comment

The decision is treated separately in this paper. But it is still relevant to share buy backs regulated by Division 4B sections 206A-206K of the Corporations Law.

18. When are trees chattels for section 31A(sa) purposes?

***Seas Sapfor Ltd v Commissioner of Stamps (SA)* (97 ATC 4535)**

Facts

A transfer of land was executed in favour of the appellant. The consideration shown on the transfer was apportioned between land and "trees grown and cultivated thereon". The appellant contended that the relevant trees had been grow on the land for primary production purposes with a view to them being harvested by filling, docking and delivery to a mill.

Issue

Were the trees chattels within the meaning of section 31(a) of the Stamp Duties Act 1923 (SA) the consideration for which should be excluded from assessment?

Decision

The South Australian Court of Appeal answered the question, no.

Reasons

Williams J delivered the judgment of the court.

During the course of the judgment, the following points were made (at 4540):

> "Where a purchaser of land agrees to take the crops (then growing) together with the land, it is a question of construction whether the contract is entire (so that the crops are part of the land) or severable – in which case the crops are sold as goods (see *Benjamin on Sale of Goods*, 3rd ed, at para 93). However this issue can only arise with respect to *fructus industriales* and not in the case of *fructus naturales*. *Fructus industriales* constitute an exception to the general rule that things growing on the land are part of the land and only become chattels upon actual severance (see *Re Ainslie* (1885) 30 Ch D 485 and *Australian Softwood Forest v AG (NSW)* (1981) 148 CLR 121 at 130 per Mason J).
>
> The possibility that growth on the land might be severed from the land upon the sale of land and crop together within the one contract is canvassed in *Pasley v Commissioner of Inland Revenue (NZ)* (1957) 11 ATD 485; (1957) 7 AITR 292 (in the Supreme Court of New Zealand). Where there is an out and out sale of a farm from an absolute owner to a purchaser then the crops in the ground pass with the land 'in the ordinary way'. However, the manner of treatment of the growing crops in the contract may indicate that severance

from the land was intended. *Saunders v Pilcher* [1949] 2 All ER 1097 at 1105 contains examples of situations where severance of *fructus industriales* from the land may occur; typically the purchaser may have bid separately for the land and its produce or the purchaser of the land may have agreed to take and pay for a crop at valuation (upon a deferred basis) when the crop has ripened.

In the present case, although a separate consideration has been fixed for the growing trees and although the contract treats the trees as chattels forming part of the contract, I doubt whether there has been sufficient to effect a severance from the land. This is not a case in which the purchaser's entitlement to take the crop has been disengaged from the concurrent acquisition of the land. The contract deals with both land and growing trees, stipulates for one overall settlement upon the transaction and provides that possession generally will be given at that time. It appears to me that the Real Proper (sic) Act transfer will carry with it the growing crops.

I will continue to follow through the essence of the appellant's argument that the pines are *fructus industriales* but on the face of the present contract I remain to be persuaded that (in manner discussed in *Saunders v Pilcher* above) the parties have severed the trees from the land."

Later, it was noted (at 4540):

"*Fructus industriales* are corn or other annual produce of the earth produced not spontaneously but by labour and industry; they have been described (see *Benjamin on Sale of Goods* (8th ed) at 175-176) as the fruits or crops produced in the year, by the labour of the year in sowing and reaping, planting and gathering – for example corn and potatoes. Whilst growing in the ground this class of produce is not treated as part of the land but has the character of a personal chattel which passes to the executor and not to the heir (see *English Hop Growers v Dering* [1928] 2 KB 74 at 179 per Scrutton LJ).

Fructus industriales are to be distinguished from *fructus naturales* – being the natural growth of the soil such as grass, timber and fruit on trees which are regarded at common law as being part of the soil (see *Benjamin on Sale of Goods* (3rd ed) at para 91)."

An intermediate class of produce was also acknowledged (at 4541):

"There is an intermediate class of produce which do not produce a crop within the year. In such a case (where no crop is produced for several years after planting or affording a succession of crops before being exhausted) any crop after the first year is regarded as *fructus naturales*. The production of hops is subject to the peculiar nature of its growth from ancient roots and its style of cultivation; in such a case, the year runs from the time at which the additional expense is incurred which is necessary to make the hops grow (see *Graves v Weld* (1833) 39 Rev Rep 419 at 423 and 430).

This intermediate class will include madder, clover, teasels – and in Australia, pineapples (see *Stonham on Vendor and Purchaser* at 44 footnote 1). However, in all these cases there is an element of annual or other periodic profit to be immediately derived as the fruit of labour."

Having looked at these principles, Williams J was of the view that (at 4541):

"... growing pines are to be characterised as *fructus naturales*."

With respect to the argument that the contractual treatment of the trees indicate that they are to be regarded as having been severed from the land, Williams J said (at 4542):

"In the present case the intention of the Purchaser (established extrinsically by the agreed facts) is to harvest the trees over a period of time. However, no common intention of the parties is discernible upon the face of the contract."

19. Share Sale Agreement not a "debenture"

Prime Wheat Association Limited v Chief Commissioner of Stamp Duties (NSW) **(97 ATC 5015)**

Facts

A Share Sale Agreement was executed in which the balance price was to be paid by instalments over twenty years. The purchaser was obliged to grant mortgages to secure the balance and a share mortgage and real property mortgage were executed accordingly.

Issue

Did the Share Sale Agreement constitute a "loan security" for the purpose of section 83(1) of the Stamp Duties Act 1920 (NSW)?

Decision

The Court of Appeal answered that question, no.

Reasons

Gleeson CJ delivered a judgment agreed to by the other members of the court except on the issue of the share mortgage and the real property mortgage.

Gleeson CJ noted that the transaction gave rise to financial accommodation but that it did not follow that a loan was involved. Gleeson CJ was of the view that there was no advance of money, there was no forbearance to require payment of money owing and there was no transaction which in substance effected a loan of money. Gleeson CJ said (at 5020):

> "The essence of a loan is an obligation of repayment. Here what was involved on the part of the purchasers was payment, not repayment ..."

Further the Share Sale Agreement was neither a debenture nor a mortgage since it did not fall within the words "accompanied with the deposit of ... documents of title."

Gleeson CJ disagreed with the other members of the court as to whether the share mortgage and real property mortgage fell within the definition of "mortgage" at section 3. Sheppard AJA and Handley JA were of the view that they fell within the definition but because the total amount secured was not expressed, duty was fixed at $5.00.

PART 2 – SHARE BUY BACKS: THE COLES MYER DECISION

Coles Myer Limited v Commissioner of State Revenue (Vic) (unreported judgment dated 30 April 1998) has already been mentioned. A share buy back was held by a majority not to be a transfer.

A difference in focus?

The difference between the approach of the majority and the minority is a question of focus:

- the majority focused on the property in the hands of the transferee so that if the transferee does not have the same or substantially the same right or interest in the property then no transfer takes place: Ormiston JA and Winneke P;

- the minority focused on the property at the time of transfer and not what the transferee can do with the property thereafter: Phillips JA.

The majority was not able to quote any authority in support of their analysis. Phillip JA quoted no authority in support of his analysis. Reference was made by the majority to Canadian and US cases which, with respect, appear to be somewhat equivocal. If stamp duty is still a tax on instruments (admittedly a proposition which one now uses somewhat at one's peril) then surely the focus is simply on the instrument and the property it transfers rather than the extent of the ability of the transferee to use it in the same way as it previously had been done by the transferor. On that basis Phillips JA is correct. Perhaps similar views prompted the Victorian Parliament to expressly exempt share buy backs when it enacted section 31 of the State Taxation (Amendment) Act 1994.

But what if the analysis of Ormiston JA and Winneke P is correct? Does it now mean that every time there is a question as to whether an instrument or a transaction could be subject to conveyance duty that attention has be focused on the ability of the transferee to use the property in the same way as the transferor and if there is in the hands of the transferee any lessening of the capacity to have substantially the same right or interest in the subject matter as did the transferor then no transfer takes place? What then is "... substantially the same right or interest in the subject matter ...?" If A sells land to B and B is the trustee of a trust then is there no transfer on this test? And conversely, what if the transferee ends up with rights larger than the transferor where the transfer is from a trustee to a beneficiary? Is there no transfer?

Remember that:

- In *Allders International Pty Ltd v Commissioner of State Revenue (Vic)* ((1996) 186 CLR 630), McHugh, Gummow and Kirby JJ said (at 676):

  > "For duty to be attracted to the instrument, it is typically unnecessary to show that the latter is capable of specific performance or even that property has passed, whether in law or equity."

- In *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* ((1981-1982) 149 CLR 431) the transfer was held to be a conveyance; see Gibbs CJ at 443; Mason and Stephen JJ at 452; Aickin J at 469; Brennan J at 476; see also *Farm Products Co-operative (Tararua) Co Ltd v IRC* ((1969) 1 ATR 85), *Dixon v Chief Commissioner of Stamp Duties (NSW)* (85 ATC 4718).

- In *Suncoast Milk Pty Ltd v Commissioner of Stamp Duties (Qld)* (94 ATC 4862), created proprietary rights were held within section 54(1).

Purposive rule helps?

The purposive rule of interpretation now reigns supreme: section 33 of Interpretation Act 1987 (NSW); section 14A of Acts Interpretation Act 1954 (Qld); section 35 of Interpretation of Legislation Act 1984 (Vic); section 22 of Acts Interpretation Act 1915 (SA); section 18 of Interpretation Act 1984 (WA); section 11A of Interpretation Act 1967 (ACT); *Commissioner of Stamp Duties (NSW) v Commonwealth Funds Management Ltd and Anor* (95 ATC 4756 at 4759); *State Bank of New South Wales v Commissioner of Stamp Duties (Qld)* (93 ATC 5505). Does it assist in answering these questions? It is difficult to see how it does. Witness the difficulties Byrne J had in the *Lamattina* cases (96 ATC 4474; 96 ATC 4898) in trying to deal with such a rule.

What about other types of sections?

But if it is right that a share buy back cannot be caught by traditional transfer provisions, would there have been a different result if an acquisition section or a Clayton's contract section had been in question? See for example:

- section 54AC(1):

> "An instrument effecting or evidencing a change in the beneficial ownership of a marketable security or right in respect of shares is chargeable with duty as if it were a transfer of the security or right."

- section 54(4):

> "If a company incorporated in Queensland or a corporation registered in Queensland acquires for a consideration in money or money's worth any property in Queensland and a contract or an agreement for the sale or an instrument of conveyance of the property is not executed or, being executed, is not duly stamped with ad valorem duty, then in the case of a company incorporated or a corporation registered in Queensland, the memorandum of association of such company or the copy memorandum of association registered in Queensland of such property and, for the purposes of instrument of conveyance of such property and, for the purposes of section 4B to have been signed or executed by the company or corporation and shall be chargeable accordingly with ad valorem conveyance duty."

Under section 54(4), all that has to happen is that a Queensland company acquires property. Can there be any room for the sort of analysis that Ormiston JA went through for such a section? Bearing in mind that a share is undoubtedly property, (or as Ormiston JA described "... a fascicle of rights and obligations ..." (page 15)) there must be a serious doubt as to whether the Coles Myer decision could be expected in relation to section 54(4). Even Ormiston JA acknowledged that *Coles-Myer* "... undoubtedly received certain benefits ..." (at page 17).

So far as section 54AC is concerned, as soon as payment was made by Coles Myer to K-Mart why would it not be correct to say that there had been a change in the beneficial ownership of the shares? Ormiston JA would answer this by noting that under section 206PB(2), any further agreement for the on-selling of the shares by the company is void and accordingly "... there was thus nothing beneficially vested in the company as transferee pursuant to this instrument." (page 16) But, to apply the test in the *ISPT* case, surely equity would have intervened if K-Mart or Coles-Myer had reneged?

Further, on the execution of the agreement between Coles Myer and K-Mart to effect the selected buy back, why would not the Commissioner in Queensland at least find comfort in assessing under section 54(1) as a result of the Court of Appeal's decision in *Suncoast Milk Pty Ltd v Commissioner of Stamp Duties* (94 ATC 4862)? After all, the agreement gave rights to Coles Myer even though they were created rights.

The only way out of these arguments is that the substance of a share buy back is one of share cancellation (see Ormiston JA at pages 16 and 19). That may be right but that is not the mechanism the Corporation Law adopts nor, it is suggested with respect that a substance over form argument can support, "... for the substance of the transaction is not in doubt" (see Phillips JA at page 25).

Government responses?

The Western Australian Government on 11 May 1998 announced that the Stamp Act would be amended "... to ensure that stamp duty remains payable on the transfer of shares as part of a company share buy back". There has also been a report in the media on 1 June that ACT will amend its Act also, but, said the report, only to validate past and present assessments, not to impose new obligations.

It is unclear whether other States will follow suit or will adopt the majority's decision in this case. A fax to each of them last week has brought no response; because of the impending election, the Queensland Government is not in a position to make an assessment on this issue.

"Matter or thing" in Victoria?

The other point of interest was whether the transfer document related "to a matter or thing done or to be done in Victoria" within the meaning of section 17(4) of the Stamps Act. Ormiston JA and Winneke P agreed with the analysis of Phillips JA on this issue.

After looking at the decisions in *Ansett Transport Industries (Operations) Pty Ltd v Comptroller of Stamps* ([1983] 2 VR 305 and 308-310) and *ACI Resources Limited v Commissioner of Stamp Duties* (NSW) ((1986) 86 ATR 4810 to 4812), Phillips JA was of the view (at page 26):

> "... the transfer document does relate to a matter or thing done in Victoria because it was part and parcel of the completion which was required in Melbourne by the Buy Back Agreement. Completion involved a number of things including payment of the purchase money and delivery of the executed transfer, with the script. Completion was the 'matter or thing done or to be done' in Victoria and even if the Transfer Deed cannot be said to relate to its own delivery, the Transfer Deed did relate to the other things which were to be done in conjunction with its delivery by way of completion. Put shortly, the Transfer Deed related to the payment of the purchase money and delivery of the script and on that ground I think that his Honour did not err in concluding that section 17(4) applied."

PART 3 – BENEFICIAL OWNERSHIP: A MISLEADING CONCEPT?

It is a familiar drafting technique not only for stamp duty but for other revenues to make exigibility to duty or tax dependent upon the change in the beneficial ownership of some item of property (eg section 54AC, Stamp Act 1894 (Qld); sections 44-44F of Stamp Duties Act (NSW); sections 59 and 64A of Stamps Act 1958 (Vic); sections 49F-56 of Stamp Duties Act 1987 (ACT); sections 83A-83F of Stamp Duty Act (NT); see also for example sections 50J, 50K, 63A, 80A, 80B, 160ZNM, 160ZX of Income Tax Assessment Act).

The Duties Act 1997 (NSW) retains the concept. For example:

- section 8(3) "Declaration of Trust": certain declarations can fall within the definition "... although the beneficial owner of the property ... may not have joined in or assented to the declaration";

- section 11(f) "a relevant interest": beneficial ownership in respect of certain shares comes within the definition.

"Beneficial ownership" is not an unfamiliar concept for lawyers (see "Beneficial Ownership", Robin Speed, *Australian Tax Review*, volume 26, pages 34-50; "Some Thoughts on Beneficial Interests and Beneficial Ownership in Revenue Law", Margaret Stone and Vanessa Lesnie, *UNSW Law Journal*, volume 19, pages 181-192). Most times it is unnecessary to concern oneself about its actual nature and its identifying features.

ISPT case

But where exigibility to duty or tax is made not just dependent upon its presence or absence but also on a change, the nature and extent of the concept has to be fathomed. This was the issue in point in *ISPT Pty Ltd as trustee of the ISPT Coles Myer (Forster) Property Trust (No 1) v Chief Commissioner of Stamp Duties*; *ISPT Pty Ltd as trustee of the ISPT Coles Myer (Eastgate) Property Trust (No 1) v Chief Commissioner of Stamp Duties* (98 ATC 4084).

As has already been seen earlier in this paper, in holding that, where the trustee of a unit trust (all of the units of which are held by C) offers in writing to acquire property from C with the offer being orally accepted, there is no change of beneficial ownership for the purposes of section 44A of the Stamp Duties Act 1920 (NSW).

Studdert J applied the test of whether equity would have intervened on behalf of C.

Conversely, where equity will intervene to protect an interest, is there then a change in the beneficial ownership of the relevant property or part of that property? If so, is that the only test of when a change takes place?

Many times we are told that it is dangerous to interpret a provision in a statute by reference to another context in which that expression may be used particularly in other legislation. But what are we to do? There is no definition of "beneficial ownership" in any of the State or Territories stamp duty legislation in which it is used, there is no definition in the Income Tax Assessment Act and there is certainly no definition in the dictionary to the Duties Act 1997. So one is forced to look at all of the cases in which the expression has been used or defined if one is to get an idea of what this expression means. The approach taken by Studdert J in the *ISPT* case is authority for one to do exactly that.

"Beneficial" and "ownership"

Can the answer be found by looking at each of the two words "beneficial" and "ownership"?

So far as "ownership" is concerned, after reviewing Roman and English law, Robin Speed (supra) commented (at page 46):

> "There does not appear to be any satisfactory judicial definition of ownership. The common lawyers, like the Roman lawyers and equity lawyers, wisely refrain from the definition, preferring to proceed from case to case on an hoc basis, concentrating on practical remedies rather than abstract notions. Without a definition of ownership any consideration of beneficial ownership is likely to lead to error; the danger is to concentrate on 'beneficial' when 'owner' remains undefined."

The obscurity of just what is "ownership" in our law is familiar.

What about "beneficial" then?

It is used in a lot of contexts in the law. For example, one comes across "beneficial enjoyment" of property by a successor (see Succession Duty Act 1853 section 21), "beneficial occupation" of an occupier assessable to poor rate under the Statute of Elizabeth (see *Dewsbury Waterworks Board v Penistone* 17 QBD 384), "beneficial occupation of a burial ground" (see *Winstanley v North Manchester* [1910] AC 7), "beneficially entitled" in relation to settled land (see Settled Land Act 1882 section 2(5)); "beneficial interests", "beneficially interested", "beneficial owner", "beneficially owned" are equally common. It is also quite familiar for the expression "beneficial ownership" or "beneficial interest" to be used in place of "equitable ownership" or "equitable interest".

"Beneficial" is, for example, defined in *The Australian Concise Oxford Dictionary* (Oxford University Press, 1987):

> "beneficial (-shal) a. advantageous, (Law) of, or having, the use or benefit of property etc; hence ≡LY"

The most that one gets out of a review of some of the cases where "beneficial ownership" is used is that "beneficial" refers to enjoyment: see *Commissioner of Stamp Duties (Qld) v Livingstone* ([1965] AC 694); *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* ((1981-1982) 149 CLR 431); *Comptroller of Stamps (Vic) v Yellowco Five Pty Ltd* (93 ATC 4025); *ISPT Pty Ltd v Chief Commissioner of Stamp Duties (NSW)* (98 ATC 4084); see also Stone and Lesnie (supra) at page 182.

One is tempted to think in terms of categorising the various interests and rights into:

- legal: ownership, interest and right;
- equitable: ownership, interest and right.

If that is right then is "beneficial ownership" something which can be common to both law and equity so that one can talk in terms of "legal beneficial ownership" or "equitable beneficial ownership"?

To try to categorise the different interests in law or in equity in such a way no doubt is an over simplification and misleading. Its utility would also need to be questioned. The purpose of trying to do something like that however is to try to get a picture in one's mind of just what it is that the cases have thrown up and to try to get to a stage where one has some confidence that one understands what a concept like "beneficial ownership" really means. It is only when that stage has been reached that one can then turn to the relevant legislation to see whether it is likely that that is what the draftsman of the section intended or whether perhaps there is some other special meaning to be applied in the context of that piece of revenue legislation (see for example, the approach of Gummow J in *Hepples v FC of T* 90 ATC 4497 at 4512-4517). Surely if one's taxation is dependent on such a tax trigger, such an exercise is fundamental.

Some examples and theories

It is not intended in this paper to canvass all of the cases and all of the threads of argument which have been advanced in Australia and in England on this question. A number of points can be made:

- can the legal owner of property be described as the "beneficial owner"? The answer would appear to be, yes: *In re Vanderwell's Trusts (No 2)* ((1974) Ch 269 at 291); *Curry v Hamilton* ([1984] 1 NSWLR 687 at 690); Mason J in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* ((1981-1982) 149 CLR 431 at 461); *J Sainsbury Plc v O'Connor* ([1991] 1 WLR 963); *Adele Grace Pty Ltd v Commissioner of Land Tax* ([1977] 2 NSWLR 382);

- can the "beneficial owner" of property be a person acting in a fiduciary capacity? The answer would appear to be, yes: *In re Robert Roulston's Trusts* ((1888) 21 LRI 503);

- can an equitable owner be a "beneficial owner"? The answer is, yes, at least in some contexts: *J Sainsbury PLC v O'Connor* ([1991] 1 WLR 963); but, no in others: see *Brooklands Selanger Holdings Ltd v IRC* ([1970] 2 All ER 76 at 91);

- does legal ownership always carry with it "beneficial ownership"? The answer would appear to be no: *Brown v Heffer* ((1967) 116 CLR 344 and 349); *CAC v Australian Softwood Forest Pty Ltd* ([1978] 1 NSWLR 150 at 159); for example, where equity will order specific performance of an unconditional contract of sale; see also Brennan J, in *DKLR* (supra) at 473; *McWilliams v McWilliams Wines Pty Ltd* ((1964) 114 CLR 656); *Parway Estates Ltd v IRC* ((1958) 45 TC 135); *KLDE Pty Ltd v Commissioner of Stamp Duties (Qld)* ((1983) 155 CLR 288) *Aust-Wide Management Ltd v Chief Commissioner of Stamp Duties (NSW)* (92 ATC 4740 at 4746);

- if "beneficial ownership" can be held by someone who is not the legal owner because equity will intervene, does it always apply where equity will intervene? The answer would appear to be, no: *Legione v Hateley* ((1983) 152 CLR 406 at 446); *The Commissioner of Stamp Duties (Qld) v Livingstone* ([1965] AC 694); *Jessica Holdings Pty Ltd v Anglican Property Trust (Sydney)* ([1992] 27 NSWLR 140 at 144-152); cf. *Chief Commissioner of Stamp Duties (NSW) v Buckle* (98 ATC 4097 at 4103);

- is it possible for property to lack any "beneficial owner"? The answer is probably, yes: see *Wood Preservation Limited v Prior* (supra at 376): "... for example property which is still being administered by an executor which will go eventually to the residuary legatee"; and Ormiston JA in *Coles Myer v Commissioner of State Revenue (Vic)* (unreported 30 April 1998, page 16); McDonald J at first instance, contra (97 ATC 4110 at 4118); but see Nourse LJ in *J Sainsbury Plc v O'Connor* ([1991] 1 WLR 963) and Walsh J in *Brian Hatch Timber Co (Sales) Pty Ltd v FCT* ((1971) 2 ATR 295);

- is it possible for property to have two "beneficial owners"? The answer is probably, yes: *Tokyo City Pty Ltd v Commissioner of State Taxation (WA)* (98 ATC 4036). That case concerned the meaning of "beneficially entitled" in the WA Stamp Act "landrich provisions". It is then interesting to contemplate together the concepts of "beneficially entitled" and "beneficial ownership". Is there any difference? Does it really mean that we can have "beneficial ownership" being held by a vendor and a purchaser at the same time? If the question in this case was whether there had been a change of "beneficial ownership", would Scott J have found that there had been a change on the execution of the conditional contract? Or is this simply a matter that as between vendor and purchaser, the purchaser is the "beneficial owner"; but as against all other parties, the vendor is the "beneficial owner"?

- if "beneficial ownership" can describe both a legal owner and an equitable owner, then does "beneficial ownership" mean anything other than that it refers to a person having the best right to deal with the property as one's own? The answer is probably, no: see *Baytrust Holdings Limited v IRC* ([1971] 3 All ER 76 at 95-96): see *Wood Preservation Limited v Prior* ([1969] 1 All ER 364 at 368); *Dalgety Downs Pastoral Co Pty Ltd v FC of T* ((1962) 86 CLR 335 at 241).

Obviously, the context in which "beneficial ownership" is used will be all important.

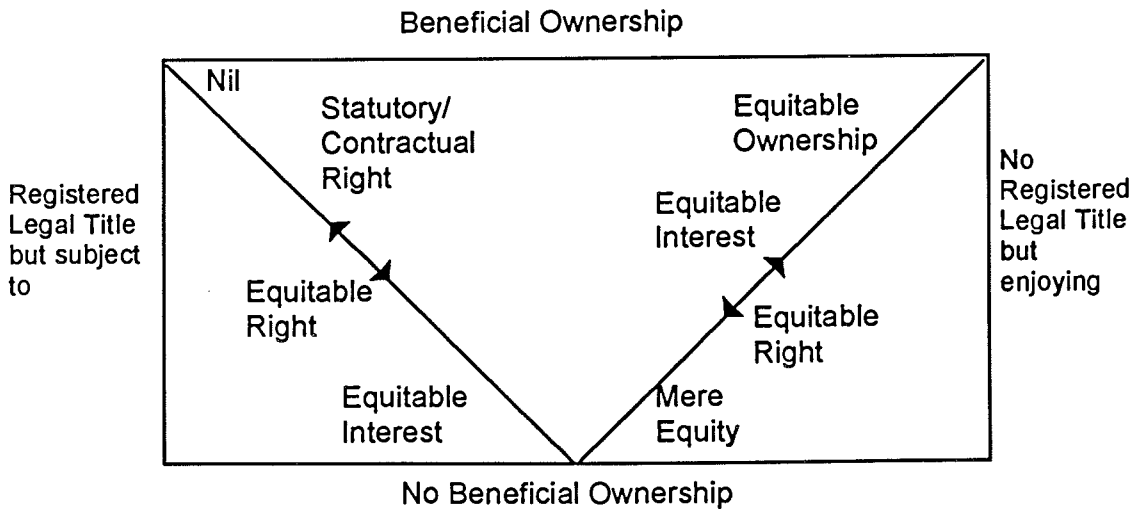
Others have pondered the question of the nature of "beneficial ownership" in trying to fathom just exactly what it is. For example:

- beneficial ownership is a legal or equitable interest but something more: Stone and Lesnie (supra page 183);

- beneficial ownership should not be equated with equitable ownership: Speed (supra page 46);

- beneficial ownership may be 100% of all beneficial interests: Speed (supra page 50).

When one reads all the cases and articles, the picture that one starts to form in one's mind is something like the following chart.



In this chart "beneficial ownership" is a equated with the better right of a person against someone else to deal with property as one's own (see *Dalgety Downs Pastoral Co Pty Ltd v FC of T* (1962) 86 CLR 335; *FC of T v Casuarina Pty Ltd* (1971) 1276 CLR 62) and would find favour with Nourse LJ in *J Sainsbury Plc v O'Connor* ([1991] 1 WLR 963 at 978):

> "It means ownership for your own benefit as opposed to ownership as trustee for another. It exists either where there is no division of legal and beneficial ownership or where legal ownership is vested in one person and beneficial ownership, or which is the same thing, the equitable interest in the property in another."

(See also Plowman J in *Baytrust Holdings Ltd v IRC* [1971] 3 All ER 76 at 95-96; Stone and Lesnie, supra at page 182). This is surely the case of a sole beneficiary of a trust or of the purchaser under an incomplete, unconditional contract of sale where the sale price has been paid. It is probably not the case where a purchaser has not yet paid under a conditional contract for purchase and it is certainly not the case in relation to a residuary legatee under an unadministered estate or the equitable mortgagee of an estate in fee simple.

But the fallacy in trying to formulate some overall logically based consistent view of the law is that our law is only part referable to established principle or precedent and the other part is ad hocery. That follows from the simple necessity that facts will always be diverse and judges have to fill in the gaps while at the same time clothing themselves with the authority of precedent. There is nothing wrong with that; that is how the common law works and must work.

But the concept cannot be allowed to go unquestioned.

A number of questions arise:

- is "beneficial ownership" property?
- how do you trace it?
- how do you test a change?
- how do you value it?
- why use it in revenue legislation?
- what other approaches are available?

Is it property?

Like "beneficial ownership", trying to fathom the depths and indicia of what is "property" is an interesting but tiresome exercise.

One has to distinguish:

- Popular or non-technical rights, such as the right to work (see *Hepples v Federal Commissioner of Taxation* 90 ATC 4497 at 4512);
- Personal rights, such as a right of action in tort for damages (see *Hepples* case, supra, at 4514; *Commissioner of Stamp Duties (NSW) v Yeend* (1929) 43 CLR 235 at 242, 245; or the right of a deserted wife: *National Provincial Bank Limited v Ainsworth* [1965] AC 1175);
- Proprietary rights, see *McCaughey v Commissioner of Stamp Duties* ((1945) 46 SR (NSW) 192 at 201) where Jordan CJ said: "The word 'property' is used in different senses. It may denote either objects of proprietary rights, such as pieces of land, domesticated animals and machines; or the proprietary rights themselves."

No one test has ever been found adequate. *National Provincial Bank Ltd v Ainsworth* ([1965] AC 1175 at 1247) is often quoted:

> "Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability".

But at least four tests can be discerned:

- Assignability Test

  That assignability is essential: *National Provincial Bank Ltd v Ainsworth* ([1965] AC 1175 at 1247); but see Mason J in *The Queen v Toohey, ex parte Meneling Station Pty Ltd* ((1982) 158 CLR 327 at 342) and remember that in *Commissioner of Stamp Duties v Yeend* ((1929) 43 CLR 235), Issacs J said (at 245): "Assignability is a consequence, not a test"; note that the requirement in *Austell Pty Ltd v Commissioner of State Taxation (WA)* (89 ATC 4905 at 4914) for a consent to the transfer to be obtained was not "... an obstacle to the licence and the rights conferred by it being proprietary in nature ..."; and there is no suggestion in Isaacs J's judgment in *Yeend* (supra) that the requirement of consent to any assignment was the reason why the right there was personal but on the other hand see *Chatterton v Maclean* ([1951] 1 All ER 761 at 765-6).

- Enforceability Test

  That enforceability against third parties is enough: see *National Provincial Bank Ltd v Ainsworth* (supra) and *King v David Allen & Sons Billposting Ltd* ([1916] 2 AC 54) which Isaacs J said applied in *Yeend's* case; but see Gummow J in *Hepples v Federal Commissioner of Taxation* (90 ATC 4497 at 4545).

- Commercial Characterisation Test

  That rights become proprietary when commerce regards them as such: see *Halwood Corporation Ltd v Chief Commissioner of Stamp Duties (NSW)* (92 ATC 4155); but then commerce buys and sells mining information which has been held not to be property: *Pancontinental Mining Ltd v Commissioner of Stamp Duties (Qld)* (88 ATC 4190); cf. *Federal Commissioner of Taxation v United Aircraft Corporation* ((1943) 68 CLR 525 at 543) in relation to knowledge.

- Repetitive or Continuing Enjoyment/Exchange or Conversion into Property Test

  In the Hight Court case of *Health Insurance Commission v Peverill* ((1993-1994) 179 CLR 226 at 243-244) the nature of rights to Medicare benefits assigned to a pathologist was at issue. As to the nature of those benefits, Brennan J said:

  > "The right so conferred on assignee practitioners is not property: not only because the right is not assignable (though that is indicative of the incapacity of a third party to assume the right) but, more fundamentally, because a right to receive a benefit to be paid by a statutory authority in discharge of a statutory duty is not susceptible of any form of repetitive or continuing enjoyment and cannot be exchanged for or converted into any kind of property. On analysis, such a right is susceptible of enjoyment only at the moment when the duty to pay is discharged. It does not have any degree of permanence or stability. That is not a right of a proprietary nature, though the money received when the Medicare benefit is paid answers that description."

There seems to be little doubt that applying these tests, "beneficial ownership" can be argued to be property and certainly property for the purpose of stamp duty legislation. For example, if the sole beneficiary of a trust of land executed an instrument assigning the beneficiary's "beneficial ownership" that would be readily held by a court to be an assignment of property.

But is that because "beneficial ownership" has been (to use the words in *National Provincial Bank* (supra)) "... admitted into the category of property" in its own right or because it cloaks the presence of legal and/or equitable rights and interests? (see Nourse LJ in *J Sainsbury* (supra) at 978). Is "beneficial ownership" just a tag used loosely like "right" or "interest" (sometimes referring to rights or interests recognised in the law and sometimes not) or is it like "goodwill", recognised as property but hard to define conclusively? It may be a description of a result rather than something separately identifiable.

How do you trace it?

Can "beneficial ownership" be traced in the sense that if property is held on trust for the trustee of another trust and so on through a string of trusts, can it be said that the ultimate beneficiary holds in the bottom trust the same "beneficial ownership" as is held by the beneficiary at the top of the string of trusts? According to the decision in *ISPT* (98 ATC 4084) the answer is, yes. But what if there is a company or a discretionary trust interposed in that string of trusts? What then? No doubt the draftsman of legislation would then think in terms of "underlying beneficial ownership"! Bearing in mind that sections such as section 44A is triggered by a change in beneficial ownership, this is no minor academic exercise. Is it possible in other words to have a change in the beneficial ownership of the ultimate beneficiary without a change in the beneficial ownership of the top trust? That question may be relevant to issues of valuation if not to exigibility to duty.

How do you value it?

There does not appear to be anything in the Acts or the cases to suggest that any other test than that which normally applies is appropriate. If the beneficial ownership of a party is held other than pursuant to the holding of a legal interest, then no doubt the market value of that beneficial ownership may well be less.

How do you test a change?

But how do you test a change in beneficial ownership? In the *ISPT* case, Studdert J noted the test in *Corin v Patton* ((1989-90) 169 CLR 540 at 579) namely where equity will not intervene to protect an interest which could immediately be brought to an end. Where equity will not intervene there is no change. So that is one test. But is it the only test? Where beneficial ownership is established by reference to someone holding the legal ownership, then the *Corin v Patton* test is obviously irrelevant. The test of a change in beneficial ownership and the moment that the change takes place will find fruitful debate where equity may intervene.

The test of whether a change has taken place and when it may be said to have taken place will usually depend upon the extent to which legal ownership is so heavily burdened with the intrusion of equity (for example, upon the fulfilment of a condition under a conditional contract of sale: *McWilliams v McWilliams Wines Pty Ltd* (1964) 114 CLR 656; or on its waiver: *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537) that the ghost of beneficial ownership departs the legal owner and thereafter reposes in someone else, subject to the comment made above that, in some circumstances, beneficial ownership (like legal remainders in the 16th century) is held by no one so that it can be regarded as "*in nubibus*" or "*in gremio legis*" (see Megarry and Wade, 5th ed, 1984, *Law of Real Property*, page 1177) a view which would not have found favour with Nourse LJ in *J Sainsbury Plc v O'Connor* ([1991] 1 WLR 963).

Accordingly, in each of the following cases because equity will not intervene, beneficial ownership is not changed:

- where specific performance of a contract will be declined for reasons such as illegality or breach of a fiduciary obligation (see *Pottinger v George* (1967) 116 CLR 328);

- there is unascertained property (see *Colyton Investment Pty Ltd v McSorley* (1962) 107 CLR 177; *Chinn v Hochstrasser* (1979) 1 Ch 447).

Why use "beneficial ownership" in revenue legislation?

Is there wisdom in basing exigibility to duty or tax on such an imprecise concept? Why not define precisely what it is that should give rise to exigibility to duty or tax? Notice that it was not thought necessary to use such an expression in Claytons contract provisions such as section 54AB of the Stamp Act 1894 (Qld) or the Victorian equivalent: see the *Lamattina* case (supra). The irony is that if section 44A in the *ISPT* case had been drafted along the lines of section 54AB of the Queensland Act, there would seem to be little doubt that duty would have been triggered (see *Suncorp Insurance and Finance v Commissioner of Stamp Duties* (97 ATC 4826)). A concept of "acquisition of an interest" is far more narrow and from that reason far more precise than "beneficial ownership" which, as has already been seen above, appears dependent upon an examination of who has the best right against the world to treat the property as their own. (see generally "The Stamp Duty Rewrite Project", J G Mann, *Taxation in Australia (Red Edition)* June 1997, Volume 5, No 5, pages 233-262).

Other approaches available?

But what is the draftsman of a Stamp Act to do? What other approaches to ensuring duty is collected on *ISPT* case type structures are there? Is it also the case that a decision like *ISPT* flies in the face of the principles set out in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* ((1981-1982) 149 CLR 431) particularly the principle that new interests are created on the declaration of a trust in favour of the present owner?

A comparison of four cases is appropriate:

DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW) ((1981-1982) 149 CLR 431)

The documents consisted of a request followed by a declaration of trust and a transfer of the relevant land to DKLR. The High Court held that all of the estate of 29 Macquarie was transferred to DKLR and that new interests were thereafter created upon the transfer becoming effective. This was not a "change of beneficial" or "obtaining an interest" case.

Comptroller of Stamps (Vic) v Yellowco Five Pty Ltd (93 ATC 4025)

The documents were a unit trust and a transfer. M was the sole unit holder of the unit trust and transferred land to the trustee. The court held that new interests were created but there was no change of beneficial ownership; further, the transaction was outside the relevant exemption. This was a "change of beneficial ownership" case.

Suncorp Insurance and Finance v Commissioner of Stamp Duties (97 ATC 4826)

The documents were unit trusts in which Suncorp was the ultimate unit holder; a payment was made by Suncorp to itself to subject relevant lands to the terms of the trust structure. The court held that there were new interests created but the relevant section did not apply where there was a lessening of interests. This was an "obtaining of an interest" case.

ISPT Pty Ltd v Chief Commissioner of Stamp Duties (NSW) (98 ATC 4084)

The relevant documents were a unit trust together with a written offer/oral acceptance transaction. C was the unit holder in the unit trust and entered into the written offer/oral acceptance transaction in relation to land that it held. The court held that a new interest was created but there was no change of beneficial ownership because equity would not intervene. This was a "change of beneficial ownership" case.

It is interesting to contemplate what the results of each of these cases may have been when each is judged against the principles applicable in the others. For example:

- DKLR: "change of beneficial ownership" section would not have rendered the transaction to duty (because equity would not have intervened?) but an "obtaining of interest" section would have (M obtained new interest?) (see however Stone and Lesnie (supra) at page 185);
- Yellowco: an "obtaining of an interest" section would have applied (because M obtained a new interest?);
- Suncorp: a "change of beneficial ownership" section would have applied (because equity would have intervened?);
- ISPT: an "obtaining of an interest" section would have applied (because ISPT obtained a new interest?).

	Documents	**New Interests?**	**Change in Beneficial Ownership**	**Obtained an interest**	**Result**
DKLR	Request → D/T → M/Tfr	Yes	N/A	N/A	Duty on D/T
Yellowco	Unit Trust & M/Tfr	Yes	No	N/A	Duty – outside exemption
Suncorp	Trusts – Acquisition	Yes	N/A	No	No duty – outside section
ISPT	Unit Trust & W/O – O/A	Yes	No	N/A	No duty – outside section

So, what does one deduce from this? You can say that:

- new equitable interests are created on a transfer of property to a transferee holding for the transferor;
- but that effects no change in beneficial ownership;
- nor may it be within an "obtaining of an interest" section.

How then should exigibility to duty proceed? Probably by:

- ensuring the test is not "beneficial ownership"; its "now you see it, now you don't" attribute makes it an inadequate test of exigibility;
- ensuring the test is "obtaining an interest" but draft it along the lines of the Queensland answer to *Suncorp* (supra);

"54AB(1) This section applies to:

(a) a transaction or acquisition, other than an acquisition of a business where the acquirer of the business is obliged to make up a statement under section 54A, which results in a person obtaining an estate or interest in any real property in Queensland or any land in Queensland held under a lease from the Crown or any livestock or moveable chattels acquired in the same transaction or acquisition whereby the person acquired that estate or interest in real property or leasehold estate;

...

(c) a transaction that:

(i) involves a person who has an estate or interest in property of a kind mentioned in paragraph (a); and

(ii) results in a trust restriction being imposed on, or removed from, the person in relation to the property.

...

(1AB) For subsection (1)(c), a trust restriction is imposed on a person in relation to property in which the person has an estate or interest if:

(a) the person's estate or interest is held otherwise than as trustee and the person starts to hold the estate or interest as trustee; or

(b) the person's estate or interest is held as trustee of a trust and the person starts to hold the estate or interest as trustee of another trust.

(1AC) For subsection (1)(c), a trust restriction is removed from a person in relation to property in which the person has an estate or interest if the person's estate or interest is held as trustee of a trust and the person stops holding the estate or interest as trustee of the trust."

"Beneficial ownership" is most times used to mean no more than the ability of someone (A) to enjoy something to the exclusion of someone else (B). Since A's ability to do so will usually be because A has at the same time some right (legal or equitable) to enjoy it, "beneficial ownership" may take on the usual attributes of property. But if A's ability is only that of directing what happens to something, then that stage is not reached. "Beneficial ownership" is an imprecise concept of dubious meaning usually cloaking legal or equitable interest(s) bestowing rights of enjoyment on their holder(s). It should never be used in revenue legislation.

PART 4 – RULINGS: ARE THEY NOT BINDING?

The scene is a familiar one. A transaction is being put together. What are the stamp duty implications? Perhaps it is a question as to whether a "change of beneficial ownership" section will be triggered! So the parties instruct their lawyers to seek a ruling of the relevant Office of State Revenue. Although there are in some of the Acts provisions enabling parties to obtain a statutory private binding ruling from the relevant Commissioner (eg section 49C(7) or section 56FC of the Stamp Act 1894 (Qld)) and although there are some rulings acknowledging that application can in some cases be made to obtain a ruling on a certain document before it is executed (eg Queensland SD 4), by and large the decision to seek and to thereafter rely on a private non-binding ruling from the Commissioner is fraught with some anxiety. Will the Commissioner change his mind? What happens to the parties if he does?

Estoppel available?

Essentially, there are two issues:

- can a Commissioner be estopped from assessing otherwise than in accordance with a private ruling;
- if the Commissioner does, can the Commissioner be liable for damages for doing so?

Matrix – Securities v Inland Revenue Commissioner ([1994] 1 ALL ER 679) is support for the proposition that the Commissioner can in appropriate cases be estopped. In the course of his judgment, Lord Browne-Wilkinson stated (at 791):

> "It is the statutory function of the Revenue to collect the taxes which Parliament has legislated are to be payable. The tax liability which any given transaction attracts can only be determined by the courts after the transaction has been carried through but the financial liability of many transactions depend on its tax repercussions. Therefore taxpayers frequently need to know the tax consequence of a transaction before carrying it through. To meet this need, the Revenue are prepared in certain circumstances to give advance assurances as to the tax repercussions of a transaction so that the parties can proceed with comfort. The practice is of the greatest benefit to the taxpayers and it would not be in the public interest to discontinue it.
>
> It is now established that, in certain circumstances, it is an abuse of power for the Revenue to seek to extract tax contrary to an advance clearance given by the Revenue. In such circumstances, the taxpayers can by way of judicial review apply for an order preventing the Revenue from seeking to enforce the tax legislation in a sense contrary to the assurance given. But the courts can only restrain the Revenue from carrying out their duties to enforce taxation obligations imposed by legislation when assurances given by the Revenue make it unfair to contend for a different tax consequence, as a result of which unfairness the exercise of their statutory powers by the Revenue would constitute an abuse of powers".

It should also be recalled that in *Robertson v Minister of Pensions* ([1949] 1 KB 227), Lord Denning (at 231) said:

> "The Crown cannot escape by saying that estoppels do not bind the Crown for that doctrine has long been exposed".

Further, in *Atkinson v FC of T* (95 ATC 4770), the court held that an injunction could apply in relevant proceedings against the Commissioner for a breach of representation.

The decision in *AGC Investments Limited v FC of T* (91 ATC 4180) is certainly not authority to the contrary when one looks at the decision in detail. In that case Hill J isolated the elements of an estoppel as follows:

- a representation of existing and future facts being made by the Commissioner to the taxpayer;
- the taxpayer being induced to act in a particular way because of the representation;
- the taxpayer being liable to suffer such a determent from the Commissioner departing from the representation as to make it unconscionable to permit the Commissioner to do so.

While in that case it was held by Hill J that it would not be unconscionable or unconscientious for the Commissioner to depart from previous conduct in the case before him, it is suggested that in other circumstances the Commissioner's conduct could be unconscionable or unconscientious and estoppel would apply. In the course of his judgment, Hill J said (at 4195):

> "It is difficult to see what detriment the applicant is said to have sustained, particularly when its assets have been increased by the tax properly exigible which it has not had to outlay. Why is it either unconscionable or unconscientious for the Commissioner having assessed upon a wrong basis, to depart from that course and assess on a correct basis? To me, the question is unanswerable, other than to say it is not.
>
> The last question merely reflects the reasons why there is no room for the doctrine of estoppel operating to preclude the Commissioner of Taxation from pursuing his statutory duty to assess tax in accordance with the law."

The decision in *FC of T v Wade* ((1951) 84 CLR 105) is similarly irrelevant to the present discussion in that the plaintiff had sought to plead estoppel by conduct because the Commissioner had sought to correct a previous erroneous assessment.

OSR liable in damages?

Where however the assessment issues contrary to the previous advice of the Commissioner, *Unilan Holdings Pty Ltd v Kerin* ((1992) ATPR ¶41-169), *L. Shaddock and Associates Pty Ltd v Parramatta City Council* ((1981-1982) 150 CLR 225) and *Mutual Life and Citizen's Assurance Co Ltd v Evatt* ((1968) 122 CLR 556 at 571) (followed in *Tilly v Toowoomba City Council* (1996) 69 LGRA 399) appeared to be clear authority that damages are payable by the Commissioner for breach of the duty of care where it knows the taxpayers will rely on the answers provided by the Commissioner: (See also *Woodlands v Permanent Trustee Co; Bass v Permanent Trustee Co; Conca v Permanent Trustee Co* (1996) ATPR ¶41-509, *Meadow Gem Pty Ltd v ANZ Executors and Trustee Co Ltd* (1994) ATPR ¶46-130, *Reed International Books Australia Pty Ltd (Trading as Butterworths) v King & Prior Pty Ltd* (1993) 11 ACLC 923, *Northern Territory of Australia v Mengel* (1995) 129 ALR 1).

Freedom of Information legislation helpful?

It may be possible in some cases with some provisions of Freedom of Information legislation in some of the states to be helpful.

For example, section 8 of the Freedom of Information Act 1982 (Vic) requires "an agency" to make available to the public, copies of documents used by the agency:

> "(a) in making decisions or recommendations, or in providing advice to persons outside the agency, with respect to rights, privileges or benefits, or to obligations, penalties or other detriments, to or for which persons are or may be entitled, eligible or subject, being –
>
> (i) documents containing interpretations or particulars of Acts or schemes administered by the agency, not being particulars contained in another Act; or
>
> (ii) manuals, rules of procedure, statements of policy, records of decisions, letters of advice to persons outside the agency, or similar documents containing rules, policies, guidelines, practices or precedents; and
>
> (b) in enforcing Acts or schemes administered by the agency where a member of the public might be directly affected by that enforcement, being documents containing information on the procedures to be employed or the objectives to be pursued in the enforcement of the Acts or schemes."

Section 9 then provides:

> "Where under section 8 any agency is required to make available a document containing rule, policy, guideline or practice relating to a function of the agency and the agency falls –
>
> (a) to make the document available; or
>
> (b) to include the document in a statement required to be published under section 8 –
>
> before the time at which the person did or omitted to do any act or thing relevant to the performance of that function in relation to him (whether or not the time allowed for publication of a statement in respect of the document had expired) that person shall not be subject to any detriment by reason only of the application of that rule, policy, guideline or practice, where the knowledge of that rule, policy, guideline or practice he could have avoided the detriment lawfully."

Legislation in the other states and territories which can be compared with these provisions are Freedom Information Act 1992 (Qld), Freedom of Information Act 1992 (WA), Freedom of Information Act 1991 (SA), Freedom of Information Act 1989 (ACT), Freedom of Information Act 1989 (NSW). But this legislation is not in the same terms as the Victorian legislation.

It may be possible in some cases for a taxpayer to avail themselves of the protection in section 9.