STAMP DUTY ON SECURITIES FOR BILL FACILITIES

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1. POTENTIAL STAMP DUTY LIABILITY FOR SECURITIES OVER BILL FACILITIES

1.1 Summary of Potential Liability

The potential stamp duty liability for bill facilities and securities over bill facilities, under the "Mortgage" and "Loan Security" heads of duty, can arise in a number of ways. The following summary is based on the provisions that apply in most States and Territories; material differences in the legislation in particular States and Territories are summarised at 8 below.

Mortgage. Under the definition of "mortgage", if a mortgage or charge is given over real or personal property to secure a party's obligations under a bill facility, that mortgage or charge may be dutiable if it is a security by way of mortgage or charge:

- for the payment of any definite and certain sum of money
  - advanced or lent at the time
  - or previously due or owing
  - or foreborne to be paid, being payable, or

- for the repayment of money
  - to be thereafter lent, advanced or paid
  - or which may become due upon an account current
  - together with any sum already advanced or due, or without, as the case may be.

Bond or Covenant. The security given over a bill facility may also be dutiable, whether or not it is a mortgage or charge, if it is executed under seal and is hence a "bond or covenant", and secures either the payment or repayment of money or, in some jurisdictions, a "loan" where a loan includes:

- an advance of money,

- money paid for or on account of or on behalf of or at the request of any person,

- a forebearance to require payment of money owing on any account whatsoever, or

- any transaction (whatever its term or form) which in substance effects a loan of money.

Debenture. A security over a bill facility, whether or not it is a mortgage or charge or executed under seal or under hand, may, if given by a company, be dutiable as a "debenture" if it creates or acknowledges indebtedness.

Bill Facility itself. If the security over the bill facility is dutiable, the bill facility document itself would, even if otherwise dutiable as a loan security, usually be exempt from ad valorem duty as a "collateral security", but if for some reason the security is not dutiable, or there is no security, the bill facility document is potentially dutiable as a "debenture" or (if under seal) as a bond or covenant, under the above principles.

Unlimited Securities. If the amount secured by the security is not limited, only nominal duty is payable at the outset but as and when any "advance" or "loan" is made, there is an obligation to upstamp.

1.2 Summary of Issues in Determining Liability

Therefore, the essential issues, in determining the stamp duty liability of a security over bill facility obligations, are a follows:

- When a party provides accommodation under a bill facility, is it making an "advance" or a "loan"?

- Is the obligation on the party accommodated an obligation "for the repayment of money to be thereafter paid"?

- Is the giving of security in respect of the obligations of the party accommodated, or the entering into of the bill facility document by that party, the creation or acknowledgment of "indebtedness"?

- To what extent does the contingent nature of the parties' obligations under a bill facility affect the liability for duty?

2. NATURE OF SECURED BILL OBLIGATIONS

In order to discuss the stamp duty on securities for bill facilities, it is necessary to describe the obligation of the customer to the bank which is thereby secured (it may of course

be a financier other than a bank that is providing the facility to its customer, but for convenience we will refer in this paper to the financier as a bank). Ordinarily, the obligation will be the subject of express agreement, the form of which will vary from bank to bank. Obviously, for present purposes attention must be concentrated upon the common features of such transactions.

2.1 Bill Acceptance Facility

In broad terms, under a bill facility agreement, a bank agrees to endorse, or more usually accept, bills of exchange drawn by its customer up to a specified maximum limit in return for fees agreed to be paid by the customer. The commercial value and negotiability of the customer's bills will thus be enhanced, because the bank will have become liable upon them at maturity to the holder. Funds can therefore be raised by the customer by the sale of the bills. Normally, the agreement does not require the customer to avail itself of the facility and, with the possible exception of some fees, the customer's liability to the bank will be conditional upon it doing so.

By sub-section 8(1) of the Bills of Exchange Act 1909 (Commonwealth), a bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer. A bill payable to bearer is transferable by delivery, and a bill payable to order is transferable by endorsement and delivery. The transferee of a bill may sue in his own name, and a transferee who takes a bill in good faith and for value acquires a good title despite any defect in the title of the transferor: 4 Halsbury's Laws of England, Volume 4, para. 302.

A bill of exchange drawn by a customer upon a bank and accepted by it for the purpose of enabling funds to be raised by the sale of the bill is often referred to as an "accommodation bill". An "accommodation party" is defined in sub-section 33(1) of the Bills of Exchange Act as "a person who has signed a bill as drawer, acceptor, or endorser, without receiving value therefor, and for the purpose of lending his name to some other person". The Act does not define what is an "accommodation bill" and it may be open to debate whether a bill in respect of which the bank receives fees for its acceptance is technically an accommodation bill (see Oriental Financial Corporation v. Overend, Gurney & Co. [1871] Ch. App. 142 at p. 146), although it was assumed that such a bill is an accommodation bill by the High Court in K.D. Morris & Sons Pty. Ltd. (In Liquidation) v. Bank of Queensland Limited (1980) 146 C.L.R. 165.

Although vis-a-vis a holder in due course it is the acceptor and not the drawer who is primarily liable on a bill of exchange, and, in normal circumstances, the drawer is a quasi-surety for the obligation of the acceptor, as between drawer and acceptor of

an accommodation bill it is the drawer whose position is equated to that of principal debtor and the acceptor who is the surety: see K.D. Morris, supra, at p. 178 per Stephen and Wilson J.J.; Scholefield Goodman & Sons Ltd. v. Zyngier [1984] V.R. 445. 456-457; Rowlatt on Principal and Surety, 4th Ed., Ch. 8 especially pp. 163 and 164, and p. 215.

Obligations similar to those imposed by law in favour of an accommodation party in respect of an accommodation bill are imposed by agreement in favour of the bank under standard bill facility arrangements; in particular, the customer undertakes to take up the bill or provide the bank with funds for the payment of the bill at its maturity and to indemnify the bank against the bank being compelled to pay the bill through the default of the customer in complying with that undertaking.

The payee of a bill drawn by a customer upon a bank and accepted by the bank is likely to be the customer or its order, at least if the bill is to be returned by the bank to the customer for sale by him. It is more common these days for the bank to sell the bill in the money market either as the customer's agent or on its own behalf if named as payee. In either case, for practical reasons the bills will be sold at a discount, that is to say at less than face value. As required by the agreement, the customer's account will be credited with the proceeds of the sale.

The basic obligation of the customer is to pay to the bank the face value of each bill on its maturity date when the bank will pay the holder of the maturing bill. Subject to the limits set by the agreement, there will be provision for "rolling over" the bills so that the customer may draw replacement bills having a face value equal to the face value of the maturing bills which the bank will accept in return for a further fee. The funds obtained by the customer from the discounting of the replacement bills are, in such circumstances, utilized to satisfy, pro tanto, the customer's obligation to pay to the bank the face value of the maturing bills. Because the replacement bills are sold at a discount, the customer must "top-up" with his own funds the amount received for the sale of the replacement bills to the face value of the maturing bills.

The terms of the bill facility would be set out, either in a written agreement between the customer and the bank, or as an offer by letter from the bank to the customer which can be accepted either in writing by the customer or orally or by conduct (e.g. by payment of an establishment fee).

2.2 Discounting of Bills

Sometimes, the bank provides the customer with its own funds after acceptance of the bill and may remain the holder of the bill at maturity. A common example would involve the agreement between bank and customer, the customer drawing the bill, acceptance of the bill by the bank, purchase of the bill by the

bank at a discount relative to its face value, and payment of the discounted value of the bill by the bank to the customer. Given a sufficiently short interval of time, it might readily be concluded that the course followed corresponded with an intention at all material times on the part of the bank that, because of its liquidity position and the state of the market, it would itself provide the funds required by its customer. If the bank does not re-sell the bill, but continues to hold it, it may be assumed that there will be no payment, either actual or by book entry, by the bank as acceptor to itself as holder of the bill at maturity, and indeed the bill will then be discharged by operation of law: Bills of Exchange Act, section 66, which is consistent with the general principle that, where the party to pay and the party to receive have become identical, an obligation is discharged: Ford v. Beech [1847] 11 Q.B. 852; 116 E.R. 692; The English Scottish & Australian Bank v. Phillips (1937) 57 C.L.R. 302. The customer nonetheless remains liable to pay the bank the face value of the maturing bill, because the agreement between them so provides.

2.3 Security over Bill Facility

If the bill facility is to be secured, it would be a condition precedent to the bank being obliged to accept bills drawn by the customer that the customer would grant in favour of the bank a mortgage, charge, bill of sale, guarantee or other security, which secures all obligations of the customer to the bank under the bill facility arrangement whether present or future, certain or contingent. The security would often not contain any reference to a specific sum or to the bill facility agreement, and be executed prior to the bill facility agreement being signed or the facility offer being accepted by the customer.

3. LIABILITY OF SECURITY AS A "MORTGAGE"

3.1 Summary of Issues

On an assumption that the security granted is a "mortgage" or "charge" over real or personal property and has sufficient nexus with the relevant jurisdiction, the following issues arise:

- Is it a mortgage or charge for the payment of money advanced or lent?

- Is it a security for the repayment of money to be thereafter lent, advanced or paid?

3.2 Security for the "payment of money advanced or lent"

The mortgage would not be dutiable under the first limb of the definition of "mortgage" (covering a "security by way of mortgage or charge for the payment of any definite and certain sum of money advanced or lent at the time or previously due or owing") unless at the time the mortgage is executed funds have been made available under the bill facility. That is, the wording of this

first limb appears to be limited to past and present (as opposed to future) loans or advances, and (despite a passing reference by Tadgell J. in Ansett v. Comptroller of Stamps (Victoria) [1981] V.R. 35 at 38 to the distinction between the two limbs being "elusive") the authorities seem to accept this: e.g. Handevel Pty. Ltd. v. Comptroller of Stamps (Victoria) (1985) 62 A.L.R. 204. It would only be in the unusual situation where the security is granted at a time when the accommodation has already been provided that this limb is relevant.

It is well established that the sale of a bill of exchange at a discount is not the same in law as borrowing the money, although the practical effect may be the same: see, generally, Re Securitibank Ltd. (No. 2) [1978] 2 N.Z.L.R. 136; K.D. Morris, supra, at pp. 165, 171, 194 ff., and cases cited; Handevel, supra, at pp. 215-216.

The majority decision in Handevel quoted the Privy Council decision in Chow Yoong Hong v. Choong Fah Rubber Manufactory [1962] A.C. 209 that an agreement for discounting bills of exchange is not an agreement "for the repayment of money lent", citing with approval the statement by the Privy Council at p.217 that if in form the transaction "is not a loan, it is not to the point to say that its object was to raise money for one of them or that the parties could have produced the same result more conveniently by borrowing and lending money".

Accordingly, at least where it is a third party which purchases the bills, no loan is made to the customer.

If the bank does purchase the bills from the customer as described in 2.2 above, then whether in such circumstances the payment by the bank to the customer can constitute a loan in the orthodox sense depends upon the agreement between them. The documentation will usually not require the bank to follow the steps in fact taken but will provide for the sale of the bills without restriction as to the identity of the purchaser. If that is not the parties' true agreement, the documentation may be able to be disregarded as a sham (cf. for example, Mullens v. F.C.T. (1976) 135 C.L.R. 290, 316; F.C.T. v. Lau 84 ATC 4929, 4940; and see also provisions such as section 81 of the Stamp Act 1894 as amended (Queensland), which is in terms materially identical to section 261 of the Income Tax Assessment Act but does not have direct equivalents in the stamp duties legislation in other States or Territories). But otherwise the dutiability of the transaction must be determined by the form in which it is cast: see, for example, I.R.C. v. Wesleyan & General Assurance Society [1948] 1 All E.R. 555, 557; Linton and Linton Nominees Pty. Ltd. v. Commissioner of Stamp Duties (1977) 8 A.T.R. 99.

Under the documentation, although the customer receives the money from the bank in such a case where the bank purchases the bill from the customer, it receives it as the purchase price of the bill. That being so, that payment by the bank to the customer does not constitute a loan.

Neither when the purchaser of a customer's bill is a third party nor when the purchaser is the bank is there a loan to the customer of the purchase price, and, in neither case, is the customer's obligation to pay the bank the face value of the maturing bill an obligation to repay a loan made to the customer at the point when the bill was discounted.

Where the bank is the purchaser of the bill, the payment required of the customer by the agreement, although required to be made to the party which originally provided it with the funds, the bank, is not paid to the bank for that reason or in that capacity but rather (as described in 2.1 and 2.2 above) in discharge of obligations of the customer to the bank which arise, under the law (where the bank is an "accommodation party" as described in 2.1 above) or under the agreement, by reference to their respective positions in relation to the bill of exchange at the date when it matures.

Some commentators have interpreted the joint judgment of Stephen and Wilson J.J. in K.D. Morris as authority for the opposite view. We do not consider that this is an accurate interpretation. Their Honours decided only that the customer's liability under a bill facility was a present obligation to pay at a future time, which arose when the first bill was drawn. When the customer availed itself of the facility and had bills outstanding which the bank had accepted, the customer had an obligation "to put the Bank in funds in respect of the Bank's payment of bills on their maturity", this liability being "not a contingent liability but an existing liability, which required the making of a series of payments at particular dates, dictated by the cycle of 180 days fixed by the bills", so that when "the date arrived for it to put the Bank in funds, the liability became a present liability calling for present performance. Otherwise the liability was a present liability but calling for performance only in the future" (54 A.L.J. 424 at 426). They did not suggest that the transaction was a loan.

The judgment of Aickin J. in K.D. Morris (with whom Mason J. concurred) clearly concludes that a bill facility arrangement, where the bank both accepts and discounts, is not a loan. His Honour carefully reviewed the English authorities which likewise so concluded and in particular adopted the reasoning of the Court of Appeal in Inland Revenue Commissioners v. Rowntree & Co. Ltd. [1948] 1 All E.R. 482. In Rowntree, the Court held that a bill facility arrangement, where the financier accepted the customer's bills and then as agent for the customer discounted the bills on the market and remitted the proceeds to the customer, was not a loan or a transaction in the nature of a loan and that the relationship between the customer, the financier and the holders of the bills was not that of borrower and lender. The Court of Appeal further held at p. 486 that "the fact that the letters passing between the parties contemplated a number of transactions of the kind set out therein made the position no different from what it would have been if there had been one isolated

transaction by way of the acceptance of a bill and the discounting of it and handing over of the proceeds".

Irrespective of whether the bank or a third party is the original purchaser of a bill, where the bank is the holder of it at maturity the bill is discharged by operation of law, as noted at 2.2 above. In such a case, the only possible payment by the bank is the initial payment to the customer of the purchase price of the bill and there is no further payment by the bank either to the customer or in satisfaction of a liability for which the customer is primarily responsible.

But, when the bank is not the holder of the bill at maturity, it satisfies a liability to the third party holder for which, as between itself and the bank, the customer is primarily responsible. As has been observed, the bill facility agreement requires the customer to pay the amount of that liability to the bank.

The majority in Handevel noted that the word "advanced" in the definition of mortgage bears a wide meaning, citing Armco (Australia) Pty. Ltd. v. F.C.T. (1948) 76 C.L.R. 584 at 621, and that it may extend to transactions which are not comprehended by the word "lent". In Armco, Dixon J. had said that "In the wide sense properly belonging to the word 'advance'", an American parent, which put its subsidiary in funds by advancing moneys both by way of loan and by supplying goods and allowing the remission of the moneys representing the price to stand over, could be said to be making an "advance". In Burnes v. Trade Credit Limited (1981) 34 A.L.R. 459 at 461, the Privy Council stated that "While the meaning of the word 'advance' may be shaded somewhat by the context, it normally means the furnishing of money for some specified purpose. The furnishing need not necessarily be by way of loan".

In our view, even accepting that the word "advance" can have a broader meaning than "loan", the above analysis of the respective obligations of the parties under bill facility arrangements indicates that in no sense can one party be said to be making an advance to another party. The authorities referred to above, in holding that a bill facility arrangement where the same party is both acceptor and discounter is not a loan, clearly indicate that one cannot simply treat different types of commercial transactions which result in the provision of funds from one party to another as being in substance and effect the same. The analysis in those cases indicates that the nature of the obligations with bill facility arrangements is totally different from the nature of the obligations between a borrower and lender, even where the same end result occurs. In our view this distinction applies equally to bill facility arrangements on the one hand, and arrangements where one party advances funds to another on the other - even giving "advance" a broader meaning than "loan".

Thus, in a passage quoted with approval by Aickin J. in K.D. Morris, the Court of Appeal in Rowntree at p. 486 vigorously rejected the argument that "if you look at this transaction as a whole, if you regard it as a tripartite arrangement, its object was to raise money in the money market, the money was in fact raised, it was made available for the use of the company by the discount house, and, therefore, the discount house is to be regarded as the lender in a commercial sense, and for the purposes of this taxing Act there is a borrowing of money wherever A make available for B money for B's use on the terms that B will pay an equivalent sum to A at some future date", concluding that it was "difficult, if not impossible, to appreciate how there can be borrowed money unless the legal relationship of lender and borrower exists between A and B. After all, the words 'borrow' and 'lend' are not words of narrow legal meaning. They represent a transaction well known to business people which has taken its place in the law as a result of commercial transactions among the merchants of this country".

To take the contrary view, and to suggest that a bill facility arrangement does involve the making of an advance, gives such a broad meaning to "advance" as to make it a meaningless concept. Even if this contrary view to our view is taken, so that a very broad meaning is given to the word "advance", it is then necessary to conclude that if the bank has to pay out on the bill before it has been put in funds by the customer, it may be making an advance by making a payment on the customer's behalf. In the normal course of events under an acceptance facility there will be no "advance", even in that sense - the customer is required to deposit the face value of the bill before the bank pays out on it, so the bank will actually meet the bill using the customer's funds. It follows that even if, contrary to our view, a very wide meaning is given to the word "advance" so that the concept encompasses a bill facility, no advance will be made unless and until the customer fails to lodge funds to meet a bill - and only at that time will any question of a liability to upstamp arise.

In our view, our approach and conclusion is supported by an analysis of the facts and findings in Handevel. The majority of the High Court (Mason, Wilson, Deane, and Dawson J.J., Gibbs C.J. dissenting), held that no stamp duty was payable under the Victorian "Mortgage" head of duty in respect of a mortgage securing the commitment of the taxpayer company to purchase redeemable preference shares of its associated company from the shareholders, that commitment being contingent on the associated company defaulting in redemption or payment of dividends.

In the case, public company investors subscribed for cumulative redeemable preference shares in a shopping centre company ("Mildura Park") of $1 each with a premium of $9,999. The articles of Mildura Park provided for the payment of dividends according to a formula and that each share would be redeemed on a specified future date for $10,000 and any unpaid amounts of dividend.

Each shareholder entered into a separate share issue agreement with Mildura Park and the taxpayer and the shares were issued on the same day that the trust deed and the mortgage, the two documents the subject of this case, were executed. By the standard share issue agreement read in conjunction with the trust deed, the taxpayer company agreed with each shareholder that if Mildura Park failed to pay dividends or to redeem the shares and notice was given to the trustee or if by a change in the law the rebate allowable on dividends was removed and in relation to certain shares notice was given by the shareholder, the taxpayer would purchase the shares for a price equal to the amount payable on redemption.

By the trust deed between the taxpayer, Mildura Park and the trustee acting as trustee for the shareholders, the taxpayer undertook to the trustee to purchase the preference shares from the shareholders in the events already mentioned.

By way of security for the taxpayer's obligations under the share issue agreements and the trust deed, the taxpayer by the instrument of mortgage mortgaged in favour of the trustee specified registered land in Victoria to secure payment of the aggregate amount of moneys payable by it to the preference shareholders on account of the purchase price of the shares in the event of the taxpayer's failure to perform its obligations under the trust deed and share issue agreement.

The Comptroller had assessed ad valorem Victorian mortgage duty on the trust deed and the instrument of mortgage. Murphy J. at first instance in the Supreme Court of Victoria held that the two instruments were given by the taxpayer as security for its due performance of a contingent purchase of preference shares and were not "mortgages" or "debentures" within the Victorian definitions. The Full Court of the Victorian Supreme Court held that the instruments were "debentures" and upheld the Comptroller's assessment, and did not consider the alternative argument that they were also "mortgages".

The majority of the High Court analysed the nature of the security, concluding at p. 214 that the security given by the taxpayer "is for the performance of its undertaking to purchase, not for the performance of Mildura Park's obligation to redeem the shares under the articles"; and at p. 215 that the mortgage was security for performance of the taxpayer's "undertaking to purchase, that is, for the discharge of its contingent obligation to pay the purchase price of the shares"; so that "By no stretch of legal imagination can money subscribed for the issue of redeemable preference shares be described accurately as money lent or money advanced, even in a case in which there is an obligation, rather than an option, to redeem the shares on or before the date stipulated for redemption. The moneys are paid by the shareholder for the issue of the shares and on the issue of the shares he becomes a member of the company entitled to the rights which attach to the shares".

The majority in Handevel noted at p. 215 that the authorities suggest that the concept of mortgage "contemplates the giving of security for (1) the payment of past or present loans and debts; (2) the repayment of future loans and debts; and (3) the repayment of money which may later become due upon an account current". Their judgment suggests that in this area of the law, subject to the context of any particular statute, the payment by creditor to debtor which is spoken of is that "which results in a debt"; that is to say, as we understand what is meant, directly gives rise to an obligation to repay. If that is not so, then it may be that the payment of the purchase price of a bill by a bank to its customer "results in a debt" from the customer to the bank if it is still the holder of the bill at maturity, but the overall tenor of the judgment at pp. 214-216 is such as to suggest a basic dichotomy for stamp duty purposes (subject to particular legislation) between an obligation "for the payment of an original amount" and an obligation to make a repayment, and that it is only where the obligation is to make a repayment that it is to be characterised as an obligation to pay an amount which may not be "lent" or "advanced" but which may be "paid".

Therefore, where the obligation is one for the payment of an original amount (not an obligation to make a repayment), in our view it is only if the payment is in the nature of a "loan" or "advance" that it is dutiable, so that neither a bill acceptance nor a bill acceptance and discounting facility should be dutiable under this first limb of the definition of mortgage.

3.3 Security for the "repayment of money to be thereafter lent, advanced or paid"

On the basis of our conclusion in 3.2 above, in our view a mortgage or charge over a bill facility is not a security for the payment of money to be lent or advanced or for the repayment of money to be lent or advanced. The question remains, is it a security for the "repayment of money to be thereafter paid" under this second limb of the definition of "mortgage"?

In Handevel the majority of the High Court held that the security in that case could not be for the "repayment" of money to be paid. The only amount to be paid, the purchase price of the shares, was to be paid by the taxpayer and then only if one of the contingencies should occur, so that security was given for the payment of an original amount, not for the repayment of an amount previously paid. The Court accepted previous decisions which held that the word "paid" must be "restricted to a payment which results in a debt", as noted in 3.2 above.

It is important here to consider, in the light of Handevel, the relevance to bill facilities of the decision of Tadgell J. in Ansett Transport Industries (Operations) Pty. Ltd. v. Comptroller of Stamps (Vic) [1981] V.R. 35 particularly as the Ansett decision has been considered by a number of commentators to lead to the conclusion, even after Handevel, that a mortgage over a bill facility is dutiable (for example, "Corporate Finance and

Stamp Duty Implications", a paper given by F.N. Brody, Solicitor to the Victorian Comptroller of Stamps, at the Recent Developments in Stamp Duties Seminar, Centre for Commercial Law and Applied Legal Research, 25 March 1986, Melbourne).

In Ansett, the taxpayer, the borrower, borrowed money from the lenders on condition that the Commonwealth Government, the guarantor, guarantee the repayment of that loan and payment of interest. The document in question was a mortgage by the borrower given to the guarantor over property owned by the borrower in which the borrower undertook to the guarantor to make due payment to the lender of principal and interest in respect of the loan to be guaranteed. In the event of the guarantor being obliged to make payment under the guarantee or if the borrower made default under the mortgage, the guarantor could recoup itself by dealing with the mortgaged property. The mortgage contained no requirement that the borrower should make any payment to the guarantor either by way of indemnity or otherwise, and only the rights given to the guarantor by way of enforcing its security were recoupment by way of dealing with the mortgaged property. At the time the mortgage was executed, neither the loan agreement nor the guarantee had been executed and the loan had not been made.

The Court held that the mortgage was a security by way of mortgage for the "repayment of money to be thereafter paid".

Of considerable potential significance here is the following passage in Handevel at p. 216 in which the correctness of Ansett was apparently accepted:

> "The recent decision of Tadgell J. in Ansett Transport Industries (Operations) Pty. Ltd. v. Comptroller of Stamps (Vic) [1981] V.R. 35 does not support the respondent's argument. There the deed of mortgage which was held to fall within s.137D(1) gave security to the surety for the obligation of the principal debtor to repay to the surety moneys which it was called upon to pay to the principal creditor. The security was therefore given for the repayment of an amount which would be paid by the surety to the principal creditor before repayment to the surety by the principal debtor. Here it is otherwise, for the security is given for the payment of an original amount, the amount which the applicant will be liable to pay by way of purchase price for the shares in the future, if and when the preference shareholder gives notice requiring purchase by the applicant in the event of one of the three contingencies occurring."

The effect of that passage is that, if a bill facility agreement only requires a customer to pay the face value of a bill to the bank after the bank has paid the holder, the obligation of the customer would be, in the relevant sense, an obligation to make repayment to the bank in respect of the bank's satisfaction of a

liability to the holder of the bill for which, as between bank and customer, the customer was primarily responsible.

While it would theoretically be possible to make the obligation of the customer conditional upon the discharge from the bank of its obligation in respect of the bill or the discharge of the bill by operation of law, that is not the ordinary approach, especially as such a course is seen as unduly diminishing the bank's rights against its customer in the event of default. The substantive obligation of the customer to the bank under a bill facility transaction (apart from payment of fees) is a simple obligation to make a money payment at a fixed future time, namely the date of maturity of the bill, irrespective of whether the bank has paid the holder.

Therefore, in our view, a mortgage or charge over a bill facility is not a security for the "repayment of money to be thereafter paid", even taking into account Ansett.

A close reading of Ansett reveals an additional ground for concluding that the security over a bill facility is not a security for the repayment of money to be paid. It is somewhat difficult to express this additional ground with precision, given that the reasoning of Tadgell J. appears to move back and forth between "repayment" and "payment" concepts. The starting point for this additional ground is the following passage of Tadgell J. at p. 39:

> "The expression 'a security ... for the repayment of money ...' has the advantage of being couched in non-technical language ... The expression naturally comprehends a right given with a view to securing to the grantee repayment of moneys outlaid by him in circumstances giving rise to a right of repayment against the payee. Such a security might be granted by the payee in whose favour the grantee made the outlay, in which case the grantee would have the choice of enforcing the security or of simply suing the payee for the debt. Equally, such a security might be granted by a party other than the payee of the outlay, and it would be irrelevant whether the outlay were made in circumstances in which the grantor could be sued for debt or not: so long as proper consideration had been given for it, the security would be enforceable against the grantor as a security for the repayment to the grantee of his outlay, to whomsoever the outlay had been made."

However, Tadgell J. then concluded further at pp. 39 and 40:

> "An instrument of mortgage providing security 'for the repayment of money to be thereafter ... paid' in terms of s.137D of the Stamps Act also presupposes, of course, that the money to be paid will be paid in circumstances giving rise to a right of repayment against the payee ... A right of repayment of the kind which would justify resort to the security might arise pursuant to a contract, express or

> implied, between the grantee of the security and the payee, or it might arise by operation of law ... As a prerequisite to enforcing a security of that kind the grantee must be able to point to a payment which constitutes a debt which the mortgage is intended to secure."

Pausing there, clearly Tadgell J. considered that this limb of the definition of "mortgage" included mortgages which secure the repayment of moneys where the original recipient of the moneys (the payee, i.e. the borrower) is obliged to pay those moneys and it does not matter which party then grants the security for that repayment. He appeared initially, as can be seen from the first extract quoted above, to rely on the fact that the definition covered "... a right given with a view to securing to the grantee repayment of money outlaid by him in circumstances giving rise to a right of repayment against the payee", i.e. securing to the guarantor/mortgagee repayment of money outlaid by him to the lender where there is a right of repayment against the payee. However, he then concluded that there was nothing to suggest that "a payment made by a surety pursuant to a guarantee is to be regarded as a payment which is not made in circumstances giving rise to a right of repayment". It cannot be maintained that, where a surety makes payment under his guarantee, the beneficiary of the guarantee, i.e. the payee, is obliged to repay the moneys paid by the surety.

The only way in which the initial remarks of Tadgell J. and his conclusion regarding the guarantee are consistent is by looking at the original payment by the beneficiary of the guarantee, the lender, to the debtor, the borrower. This payment was made in circumstances where the borrower was obliged to repay the money. When the surety made payment under the guarantee, he was subrogated to the rights of the creditor, the lender, and that payment under the guarantee resulted in the surety being entitled to exercise the rights the lender had to seek repayment against the borrower. These latter rights arose out of the original payment.

If this approach is correct, it follows that the only mortgages which are subject to duty are those which secure the repayment of moneys where the payee of the moneys is obliged to make that repayment or where the payee has the benefit of the rights of repayment which accrue out of the payment made by him and those benefits then accrue for the benefit of the mortgagee.

With a bill transaction, no party is obliged to repay any moneys to the person from whom those moneys were originally received. The payee of the bill, when it is discounted, sells the bill absolutely to the discounter and is only obliged to compensate the discounter in the event that the bill is not paid according to its tenor: s.60(2) of the Bills of Exchange Act. The obligation to compensate is to be contrasted with the obligation to repay, for the former obligation exists independently of whether or not the discounter made any payment to the payee and may not be able to be relied upon: the obligation arises out of

the fact that the bill was endorsed by the payee and results from the operation of the provisions of the Bills of Exchange Act.

Upon maturity of the bill, the holder looks to the acceptor for payment and the payment by the acceptor discharges his liability and, at the same time, any rights which the holder may have against any endorser or payee of the bill. Consequently, the payment by the acceptor cannot result in the acceptor being "subrogated" to any rights of repayment which the holder of the bill has, because all rights under the bill cease upon payment by the acceptor. The acceptor has a right under the bill facility agreement for payment of moneys by the accommodated party/ customer but, for the reasons set out above, this right should not be considered a right of "repayment" as contemplated by the definition of "mortgage". Neither the recipient of the moneys paid by the acceptor nor the payee of the bill, who is the recipient of moneys paid by the discounter, are obliged to repay those moneys to their respective payers.

We therefore conclude that with a typical bill facility arrangement, the customer's obligation to the bank is not to make payment of an amount lent or advanced, or repayment of an amount to be lent, advanced or paid, by the bank to the customer so that a mortgage or charge securing the customer's obligations under such a bill facility arrangement would not be dutiable as a mortgage.

4. LIABILITY AS A DEBENTURE

4.1 Characteristics of a "Debenture"

If the security over the bill facility is not a mortgage, there is still a question whether it can constitute a debenture. Also, there is a question whether the bill facility arrangement itself is a debenture. Of course, if there is security over the bill facility which for some reason is dutiable, then usually the bill facility itself even if otherwise dutiable as a loan security would be exempt from ad valorem duty as a collateral security.

In most jurisdictions, a "debenture" is defined to include "debenture stock, bonds, notes and any other securities of a body corporate", whether or not constituting a charge on the assets of the body corporate.

We now set out a series of propositions about the scope of a "debenture" for stamp duty purposes, which propositions we think follow from recent cases in the area, including Handevel, Broad v. Commissioner of Stamp Duties (NSW) [1980] 2 N.S.W.L.R. 40, Burns Philp Trustee Co. Ltd. v. Commissioner of Stamp Duties (NSW) (1983) 83 A.T.C. 4477.

(a) Although the definition quoted above is inclusive rather than exhaustive, to be a debenture the security must be issued by a corporation: Broad, Handevel. This conclusion should apply to

the general concept of a debenture for stamp duty purposes, irrespective of that definition.

(b) The definition makes it clear that the indebtedness to which a debenture relates need not be "secured", in the ordinary sense which connotes the creation of a security interest in property, and the cases indicate that this applies to the general concept of a debenture, irrespective of the definition. Unsecured indebtedness may also be the subject of a debenture.

(c) While the authorities indicate that the ordinary legal meaning (as distinct from any statutory definition) of the term "debenture" is a document which either creates a debt or acknowledges it, not every document which creates or acknowledges a debt is a debenture. In relation to the limitation which must be placed on the concept, the majority in Handevel stated at p. 217 that:

> "On the other hand, not every document creating or acknowledging a debt of a company is a debenture. It has been said that commercial men and lawyers would not use the term when referring to negotiable instruments, deeds of covenant and many other documents in which a company agrees to pay a sum of money (Palmer's Company Law (1982) Vol. 1, p. 531). And it has never been suggested that a promise in writing by a company to purchase shares at a future date amounts to a debenture in the ordinary sense of that term (cf. I.R.C. v. Henry Ansbacher & Co [1963] A.C. 191 at 205). Nor has it ever been suggested that a specific mortgage of land to secure a future obligation to purchase property amounts to a debenture according to its ordinary meaning (Knightsbridge Estate Trust, supra, at pp. 620, 629)."

The context of this quotation suggests that the majority in Handevel accepted those limitations. Thus negotiable instruments, deeds of covenant "and many other documents in which a company agrees to pay a sum of money" would not be a debenture if commercial men and lawyers would not use the term when referring to such types of documents.

The majority in Handevel restricted Knightsbridge Estate Trust Ltd. v. Byrne [1940] A.C. 613 to its own facts, i.e., as holding that the United Kingdom definition of "debenture" included "a specific mortgage of land by a company to secure a loan".

The majority thus concluded that the phrase "any other securities" in the inclusive definition must, despite the dicta in Knightsbridge Estates, be coloured by the preceding words, stating at p. 219 that:

> "This is because the reference to 'any other securities of a corporation' is used to supplement the categories of 'debenture stock, bonds, notes' in the context of what is a debenture. In this context and regardless of its content in other respects, the word 'securities' should not be seen as

> enlarging the scope of the definition of 'debenture' in s.5(1) of the Companies Act to include documents by which a company agrees to purchase property at a future date. Such documents are of a quite different character to the issued debenture stock, bonds and notes of a corporation. They are not documents which acknowledge or create or secure an existing debt. They do not make provision for repayment of a loan to be made in the future."

(d) It was held in Broad that to be a debenture there must be an acknowledgment of an existing debt. In Burns Philp, Hunt J. referred to the definitions of "debenture" collected in Broad and said:

> "They do indeed consistently require the instrument which is claimed to be a debenture to amount to an acknowledgment of an indebtedness. That the indebtedness must be an existing debt is also clear."

His Honour went on to point out, however, that a debt could still be an existing debt even if it was not payable until some time in the future.

The majority in Handevel concluded that to be a debenture the debt which is acknowledged or created must be an existing, not a future debt, but added that the concept of a debenture does cover a document "which makes provision for the repayment of a loan to be made thereafter", and the extracts in (c) above indicate this conclusion. The majority likewise stated that a debenture does not "apply to a promise to buy something in the future", and does not include "an instrument which creates or acknowledges a contingent future debt arising from the contingent obligation to purchase".

4.2 Application of these characteristics to bill facilities

(a) Not regarded commercially as a debenture

From the reasoning set out in 4.1(c) above, there are good arguments that a bill facility is not a document which commercial men and lawyers consider to be in the nature of a debenture. While, therefore, the majority in Handevel did not reach a concluded view on the precise scope of a debenture in this regard, there are strong suggestions from the extracts referred to in 4.1(c) above that a bill facility should not be regarded as a debenture for stamp duty purposes, on this ground.

(b) Future Debt

The difference between a loan facility and a bill facility is that the former makes provision for the repayment of a loan to be made in the future, while the latter makes provision for a payment by way of indemnity to be made in the future. The customer's obligation to indemnify the bank under the terms of a bill facility acknowledges a debt; but the debt will not arise

until a bill is drawn, and will not be payable until the bill is presented: see likewise K.D. Morris. It follows that a bill facility is a document which makes provision for the payment of a debt to arise in the future. However, as noted at 4.1(d) above, in extending this characteristic of a debenture to take in future obligations, the High Court referred only to a document which makes provision for the repayment of a loan to be made in the future. Taking the majority approach in Handevel on this strict reading, then, a bill facility arrangement would not be a debenture, on this ground as well. However, there must be some uncertainty whether the majority were holding that for all purposes the only future debts which could be within the concept of a debenture were future loans.

(c) Customer's option to drawdown

The customer's commitment under a bill facility has two features. First, like the commitment under a loan facility, it will arise only if the customer decides to operate the facility by drawing bills. Secondly, once the facility is utilised the customer has a commitment to pay to the bank the amount which the bank pays out to meet the bills. Although this is often described as a contingent liability, the High Court has pointed out in K.D. Morris that it is not really a contingent obligation at all, but a present liability to make a payment in the future; and the reasoning of the High Court in The National Bank of Australasia Ltd. v. Mason (1975) 133 C.L.R. 191 likewise supports this conclusion.

It is thus usually up to the customer to decide whether or not he will use the facility. The bill facility documents cannot therefore be described as an instrument creating or acknowledging an indebtedness. This argument is supported by an English case, Knights Deep, Ltd. v. Inland Revenue Commissioners [1908] I Q.B. 217. In Knights Deep, a company issued a series of debentures for 100 pounds each, redeemable at par by annual drawings on and after a specified future date. Each debenture contained a stipulation that the company might, at any time after an earlier specified future date, on giving six months' notice, redeem the debenture at 103 pounds, which sum at the expiration of that notice period, would become payable as if it were the amount of the principal moneys thereby secured. It was held at p. 221 that "the money secured by the debenture" was 100 pounds, not 103 pounds, "because the obligors need never, except at their own pleasure, exercise the option, and if they do not the holder would only get one hundred pounds, and not one hundred and three pounds" and at p. 222 that "the debenture cannot be said to be a security for anything which is only payable at the option of the obligors".

This case in our view is not authority for the general proposition that there can be no security in respect of what is merely a contingent obligation to pay. The critical factor was the nature of the contingency, which rendered the obligation voluntary. Since the two terms are mutually incompatible - one

cannot sensibly speak of a voluntary obligation, there was no obligation secured. Put differently, there was not a contingent obligation; there was no obligation at all until it was voluntarily assumed by the "debtor". Such a proposition is familiar enough in contract law, where a sufficiently broad discretion concerning performance is said to render a promise illusory and void of contractual effect: cf. Placer Development Limited v. The Commonwealth of Australia (1969) 121 C.L.R. 353.

4.3 Contingent Obligations

It is necessary to fit the conclusions at 4.2 above, and in particular the concept of the customer's option to drawdown discussed at 4.2(c), into the "contingency principle". Pursuant to that principle, it has been held that a "security" for stamp duty purposes includes an instrument containing an enforceable promise for the payment of money, even though the promise is contingent or conditional or interdependent with the performance of an obligation by the promisee: Independent Television Authority v. I.R.C. [1961] A.C. 427, at p. 442 per Lord Radcliffe; I.R.C. v. Henry Ansbacher & Co. [1963] A.C. 191; Neon Signs (Aust) Ltd. v. Commissioner of Stamp Duties (W.A.) [1963] W.A.R. 167; Kenworthy Homes (1971) Pty. Ltd. v. Commissioner of Stamp Duties (W.A.) (1975) 5 A.T.R. 311; Handevel, supra, at p. 217.

Generally, this contingency principle has only been applied where there is an existing promise or obligation, but its performance is contingent or conditional on some circumstance. Before moneys can be said to be payable upon the happening of a contingency, there must be an existing obligation out of which the ultimate liability will grow: Mason's case, K.D. Morris. On the basis of the above, therefore, the fact that a customer is free to decide whether or not to utilise the bill facility, should be sufficient to ensure that the bill facility arrangement is not a debenture, even taking into account the contingency principle, and even if the reasons in 4.2(a) or (b) above for the bill facility arrangement not being a debenture were not thought to be applicable.

This leaves the question whether this conclusion has been affected by the recent decision of Lee J. of the New South Wales Supreme Court in Glenepping v. Commissioner of Stamp Duties (NSW) (1985) 17 A.T.R. 160. In that case, by a deed of agreement, a lender agreed to advance to the borrower $350,000, and to secure that loan the borrower in that deed of agreement granted to the lender a charge over certain property the borrower owned, which property included its rights under a deed of covenant executed earlier that day between the borrower and the guarantor. This deed of agreement was assessed for ad valorem NSW loan security duty and this assessment was not disputed.

The instrument the subject of this case was the earlier-executed deed of covenant referred to. In that deed of covenant between the borrower and a person referred to as the "Guarantor", the

guarantor, who had requested the borrower to borrow the loan funds from the lender, covenanted with the borrower to pay to the borrower on demand (made by the borrower at any time after demand was made by the lender upon the borrower for the payment or repayment of the loan moneys by the borrower to the lender) an amount equal to the amount of the loan moneys so demanded, and the borrower covenanted with the guarantor to reimburse the guarantor for any payment which the guarantor made to the borrower under that provision together with interest at a specified rate.

In this earlier-executed deed of covenant the subject of the case, there was an independent covenant by the party described as the guarantor to pay to the company (which was the borrower under the deed of agreement with the lender) an amount equal to the amount of the principal loan; that is, there was a separate, independent obligation to make a payment. It was common ground between the parties that the deed of covenant was to be treated as a "covenant" for the purposes of the definition of "loan security". Lee J. also stated at p. 163 that "The parties are agreed that the transaction contemplated" by the relevant paragraphs in the deed of covenant "is a loan within section 82A(1) of the Act"; it might be thought to be arguable whether the independent obligations to make the payments contained in the deed of covenant could truly be considered to be a loan, but given the fact that Lee J. for the purposes of his judgment assumed them to be, the case is not a relevant authority on the meaning of a "loan" for stamp duty purposes.

Lee J. held that the deed of covenant was a covenant "for securing a loan ... to be made" under section 83(2) of the NSW Act. In his view, this conclusion was not changed by the fact that there were a number of contingencies: whether there would be a loan or not depended on whether the loan agreement would be executed, on whether demand would later be made under the agreement, and on whether payments would be made in accordance of the demand; and the amount of the loan was also contingent.

Lee J. referred in this context to Ansett, commenting at p. 165 that:

> "Tadgell J. held that the expression in the Victorian mortgage provisions: 'a security for the repayment of money to be lent, advanced or paid' (cf. s.84(2) of the NSW Act) covered the case of a mortgage given to a surety to secure repayment to it of a payment which it might but well might not have to make to the guarantor's creditor pursuant to a guarantee. His Honour arrived at that conclusion after considering the English authorities. In my view, there is no reason why, for stamp duty purposes, the expression 'loan to be made' used in s.83(2) should not be taken merely to be a reference to a future loan without any regard to whether that loan will or will not necessarily come into existence."

Whether the decision of Lee J. is correct or not really depends on whether he erred in his view of the effect of the material document, which he plainly thought did impose a contingent future obligation. The cases which he discussed, particularly the English authorities concerning the contingency principle, were concerned with such obligations. The effect of the cases which he discussed is probably sufficiently contained in the following passage which he quoted from Canning (Lord v. Raper (1852) 1 E & B 164: "A security for contingent future payments is as much within the words and meaning of the statute as a security for certain future payments". The passage of Lee J.'s judgment which causes difficulty, at least if separated from the context of that view of the document under consideration, is the following, at p. 164:

> "But the expression 'loan ... to be made' in subsec. (2), in my opinion, is not to be construed as implying that a loan must necessarily be made - it merely refers to a loan which is evidenced as a loan transaction by the instrument under consideration, but which is not a present loan but a future loan. There is, in my view (subject always to an expression of contrary intention), a general principle applicable to stamp duty law which renders an instrument made dutiable under the Act, subject to duty even though the particular transaction evidenced by the instrument may not itself become a completed transaction."

In our view, Lee J. could not have had in mind an instrument providing for a loan under which either the lender or borrower had an option whether the loan would be made or accepted as the case may be. If his Honour did so, his views are in our opinion unsustainable, both because of the scope of the contingency principle cases we have set out above, and because the statutory expression "loan ... to be made" plainly does not encompass a loan which may or may not be made. Further, our conclusion that the typical bill facility arrangement is not a debenture is based on decisions including Handevel on the meaning and concept of a "debenture", and this cannot be affected by the interpretation of a provision referring to an instrument securing a "loan to be made".

5. LIABILITY AS A BOND OR COVENANT

5.1 Nature of a "Bond or Covenant"

It is generally accepted that for stamp duty purposes, a "bond or covenant" requires the instrument to be executed under seal.

In New South Wales, Victoria and the A.C.T., it is only a bond or covenant which secures a "loan" which is dutiable, and the broad definition of "loan" referred to in 1.1 above applies.

In Glenepping, Lee J. applied English authorities and held that a "bond or covenant for securing a loan" covered an instrument which was a primary obligation and was not limited to an

instrument which is a security in the popular sense of collateral security granted to secure a loan transaction. Thus the phrase includes an obligation under seal to repay a loan, that is, the concept covers a loan agreement executed under seal containing covenants. In our view, this conclusion is in accordance with the authorities.

Again, for the reasons set out at 4.3 above, the phrase "the security for a loan to be made" does not cover a loan which may or may not be made.

5.2 Conclusion in relation to Bill Facilities

On the basis of the conclusions in 3 above, in our view a bill facility arrangement, even if executed under seal, will not be a bond or covenant for securing a "loan" even where, as in N.S.W., Victoria and the A.C.T., for this purpose "loan" has an extended meaning (see the definition of "loan" in N.S.W. section 82A(1), incorporated into section 83(2) by reference), which includes "money paid for or on account of or on behalf of or at the request of any person" and "any transaction (whatever its terms or form) which in substance effects a loan of money". In our view, this conclusion is in accord with the cases holding that similar extended definitions in moneylending legislation do not apply to bill acceptance and discounting facilities (e.g., Talcott Factors Limited v. G. Seifeit Pty. Ltd. (1963) 81 W.N. (N.S.W.) 47).

In jurisdictions other than N.S.W., Victoria and the A.C.T., a bond or covenant securing the payment or repayment of money is dutiable. This is a broad phrase but, on the basis of some of the reasoning discussed at 3 and 4 above, there are good arguments that the payments or repayments referred to relates to payments or repayments connected with a debt or indebtedness, as to which see particularly 3.2, 3.3 and 4.2 above. Nonetheless, in these jurisdictions, it is preferable that securities over bill facilities, and bill facilities themselves, are not executed under seal; and the provisions under certain real property legislation, deeming registered instruments to be deeds, should be noted.

6. SECURITY OVER UNLIMITED AMOUNTS

6.1 Summary of provisions

In most jurisdictions, where the "total amount secured or to be ultimately recoverable by or under a loan security is not expressed in the loan security to be limited to a definite and certain sum of money", at most only a nominal amount duty is payable, and then, "where any advance is made in excess of that amount" there is an obligation to upstamp the document with ad valorem duty in respect of that excess.

Where reference is made to a specified sum which is neither a maximum nor a minimum but is variable upwards or downwards in

certain circumstances, duty is to be charged on the specified sum: Ansett at p. 40 and cases there cited.

6.2 Application to Bill Facilities

The upstamping provisions can only potentially be relevant if the security is within the definition of a "loan security". Even if that is the case, in our view there is no obligation to upstamp the document at the time when accommodation is provided under the facility, since on the basis of our reasoning at 3.2 above, the provision of accommodation cannot be considered to be an "advance".

Further, calling upon the indemnity imposed upon the accommodated party, e.g. in the event of default, would usually not represent the making of an "advance". If, with a particular type of facility, it could be concluded that the indemnity obligations which arise in the event of default are an "advance", the obligation to upstamp would only arise if and when default occurred, and penalty duty for late payment would not be payable if payment of the duty then takes place. In some jurisdictions, at the time the further advance is made and the obligation to upstamp arises, this is deemed to be made pursuant to an instrument executed at the time of that further advance - the failure to pay the duty at that stage only makes the instrument not available for enforcement purposes in respect of the amount of the "advance" involved at that time: Home v. Walsh [1978] V.R. 688 at 693.

In some jurisdictions, this obligation to upstamp only arises where there is no limit expressed in the loan security document itself: e.g., see the words quoted at 6.1 above, taken from the N.S.W. legislation. Where that is applicable, then provided that there is no limit expressed in the security document itself, the fact that the parties may have agreed upon a limit in other documentation should not prevent the upstamping provisions from applying. In New South Wales, the Stamp Duties Office does not usually accept this argument and as a matter of practice will often call for production of documents referred to in the loan security which may themselves set out a limit. This practice appears to be based on the view that the upstamping provision in s.84(4) is overridden by the reference in the "Loan Security" head in Schedule 2 to "the maximum amount that is or may become payable or repayable under or that is secured by the loan security". In our view, these words do not override the express provision in the upstamping section which allows upstamping whenever there is no limit expressed in the loan security document itself.

7. CONCLUSIONS

7.1 The typical type of bill facility is not dutiable as a mortgage, even where the same party both accepts and discounts the bills, since no "loan" or "advance" is made (3.2 above) and

there is no obligation for the "repayment of money to be paid" (3.3).

7.2 It can be argued that the conclusion in 7.1 might not apply where the bank both accepts and discounts and is forced to pay out on the bill before it has been put in funds by the customer. This would not be the situation under a typical bill facility, and in any event would only lead to an obligation to pay stamp duty at the time of the customer's failure to lodge funds; and further, the better view is that this gives too broad a meaning to "advance" (3.2). The Ansett decision does not appear adversely to affect this conclusion (3.3).

7.3 A typical bill facility, and security over such a facility, is not a "debenture" for stamp duty purposes (4.2), and this conclusion is not adversely affected by the "contingency" principle (4.3).

7.4 In New South Wales, Victoria and the A.C.T., a bill facility or a security over a bill facility, even if executed under seal, is not dutiable as a "bond or covenant" for stamp duty purposes, since it does not secure a "loan". In other jurisdictions, there are arguments that the conclusion is the same, although the matter cannot be expressed to be beyond doubt (5.2).

7.5 With an unlimited security, there should be no obligation to upstamp the document at the time when the accommodation is provided to the customer, nor if the customer is called upon to meet its indemnity in the event of default (6.2).

7.6 The relevant Stamp Duty offices do not necessarily accept the above conclusions. If the security over the bill facility is not limited to a specified amount or ceiling, and there is no reference in the security document to the bill facility arrangements (which may refer rather to all present, past and future, contingent and certain liabilities and obligations), the document should be able to be stamped with nominal duty.

7.7 As a practical matter, and to fortify the arguments that the bill facilities and securities over bill facilities are not dutiable, it is preferable if the documentation is executed at a time prior to the provision of the accommodation, and if there is no obligation in the documentation upon the customer to drawdown under the facility.

7.8 Loan security duty is imposed only in respect of instruments executed by the parties, i.e. there is no obligation for the parties to bring into existence a document for stamp duty purposes when entering into particular transactions (subject only to the obligation to upstamp an unlimited security when further "loans" or "advances" are made). If the bill facility arrangement, or the security over the bill facility, is evidenced by a written offer to provide the facility or security, accepted orally, there are good arguments that there is no written instrument to which duty can apply (see, however, the recent

Queensland amendments referred to at 8.1 below). See generally in this regard, "Written Offers and Stamp Duty on Agreements" by T.M. Lennox, Australian Tax Review, Vol. 13 at p. 246.

8. MATERIAL DIFFERENCES IN LEGISLATION BETWEEN PARTICULAR STATES AND TERRITORIES

8.1 Queensland

There is no definition of debenture, other than some specific definitions which apply to provisions not relevant to this paper. In our view, this does not adversely affect our conclusion at 7.3 above.

By recent Queensland amendments coming into operation on 20 March 1986, a new s.67A is inserted whereby, in certain circumstances, an application for a loan or an offering to make a loan becomes liable to duty at ad valorem mortgage rates. The term "loan" is defined to include an advance, money paid for or on account of or on behalf of or at the request of a person, a forebearance to require payment of money owing on any account whatsoever and a transaction (whether its terms or form) which in substance effects a loan of money: s.67A(1).

Where an instrument is executed either within or outside Queensland for the purpose of making an application for a loan or offering to make a loan and the relevant territorial factors are satisfied then, upon a loan being made pursuant to the application or offer, the instrument, if the application or offer is not accepted in writing, is chargeable with duty as if the application or offer were accepted by execution of the instrument at the time at which the loan was made: s.67A(2).

The relevant territorial factors are stated to be negotiations in respect of the loan taking place in Queensland, any of the repayments in respect of the loan being proposed or arranged to be made in Queensland, the loan moneys being obtained for the purpose of being expended or used wholly or in part in Queensland or the application or offer being made by or on behalf of a person resident in Queensland: s.67A(2).

There is also a proviso to the effect that an instrument shall not be chargeable as provided in s.67A(2) if another instrument in respect of the making of the loan is chargeable with ad valorem duty on the amount of the loan under either the Schedule I "Bond Covenant ..." or "Mortgage Bond ..." heads, or in accordance with a corresponding provision of a corresponding Act in another State or Territory of the Commonwealth and duty on that other instrument has or will be paid: proviso to s.67A(2).

Where the Commissioner is satisfied that an instrument chargeable under s.67A is also chargeable with ad valorem duty in another State or Territory and the duty has or will be paid in that other place and the instrument executed for the purpose of making an application for a loan or an offer to make a loan was made by or

on behalf of a person other than a Queensland resident or a company incorporated in Queensland or a foreign company registered under Division 5 of Part XII of the Companies (Queensland) Code, then the Commissioner may stamp the instrument as not being chargeable with duty in Queensland: s.67A(3).

Given the definition of "loan" which applies to this provision as quoted above, we consider that the provision does not apply to bill facilities, for the reasons set out at 3 and 5 above. We have set out the requirements to the provision in some detail, given that it is an important recent development and may be one which is followed in other jurisdictions. These recent amendments also impose duty on agreements to grant a mortgage and securities covering deposit of title deeds but on the reasoning in this paper, again these would not apply to bill facilities.

8.2 New South Wales

There are no material differences in the New South Wales provisions that affect the reasoning and conclusions in this paper, other than those specifically referred to during the course of this paper.

8.3 Victoria

There is an exhaustive definition of "debenture" which has been added to s.137N(1) after the instruments considered in Handevel were executed. There are good arguments that a bill facility, or a security over a bill facility, is not within this definition, in that it is limited to documents "evidencing or acknowledging indebtedness of a corporation in respect of money that is or may be deposited with or lent to the corporation", and there is an exclusion for "a document, not being an acknowledgment of indebtedness of a corporation in respect of money that is deposited or lent to the corporation, that does not create indebtedness". In the paper presented by Mr F.N. Brody, Solicitor to the Victorian Comptroller of Stamps, referred to at 3.3 above, Mr Brody commented in relation to this new definition that "the Stamps Office view is that in the normal form of bill facility arrangement, such arrangement would not be a debenture for the purposes of the Stamps Act 1958. However, there may be instances where a bill facility agreement is drawn in such a way that the definition of debenture could apply".

8.4 Western Australia

The security head is much broader in Western Australia than in other jurisdictions and applies to any "mortgage (legal or equitable), bond, debenture, covenant, bill of sale, guarantee, lien or instrument of security of any kind whatsoever".

Unless the words "instrument of security of any other kind whatsoever" can be read down to be limited to the type of documents referred to in the earlier part of the definition, along similar reasoning adopted by the majority in Handevel in

relation to the definition of "debenture" as discussed at 4.1(c) above, it would appear that bill facility arrangements and securities over bill facilities can be dutiable in Western Australia. It is possible to argue that the head of duty in Western Australia is still limited to obligations which create an indebtedness so that, along the lines of the reasoning referred to in 3.2, 3.3 and 4.2 above, obligations under bill facility arrangements are not in the nature of debt obligations.

The upstamping provision in s.83(3) applies to unlimited securities "when an advance or loan in excess of [the amount in respect of which duty has already been paid] is made or the indebtedness thereby secured is increased". This is broader than the upstamping obligations in other jurisdictions referred to at 6.1 above, in its reference to indebtedness, which could affect the conclusions about bill facilities set out at 7 above.

There is no definition of debenture.

8.5 South Australia

There is no definition of debenture. The upstamping provision in s.79(2) applies where any advance or loan is made, but only relates to "a security by way of mortgage" for the payment or repayment of money to be lent, advanced or paid.

8.6 Tasmania

There is no provision imposing duty on debentures as such and a debenture would hence only be liable if it came within the definition of a mortgage or a bond or covenant.

8.7 A.C.T.

The upstamping provision in s.58M applies either where an advance is made or where the loan security is enforced in relation to an amount greater than that in respect of which duty has been paid.

8.8 N.T.

In the Northern Territory, the loan security duty provisions apply to a "mortgage", a "bond" or a "debenture", and there is no reference to a covenant. "Debenture" is defined along the lines of the definition set out at 4.1 above.

STAMP DUTY ON SECURITIES FOR BILL FACILITIES

Questions and Answers

Question - Peter Fox (Mallesons):

I think Broad's case is a wonderful case. It is a most convenient result from a revenue point of view that one can possible hope to have in this country and so I have absolutely no disagreement with the reasoning of Mr Justice Lee or the substantive decision. Nor do I disagree with the idea that one should not take specific security over a cash deposit.

But I think the papers draw out one of the problems in the area. They do not really cover the fact situation that a bank will be in because there the relevant head of duty for a mortgaged security will be that moneys will become due on an account current and that will happen when the bills fall due, they are not met, the overdraft account will be debited with the result and the mortgaged security will secure that overdraft account. So that for a bank to rely to upon the bill analysis itself may not be a complete answer.

The converse of that is whereas in 1888 most of the banking relationships may well have been revolving around a current account and you may have been able to say who a customer was in a given case, I find it difficult today to see how that is going to be uniformly true where specific facilities are granted by a banker to a person who does not run a current account with that bank and that person will also from time to time make deposits with the bank. I think the practice in Austrlalia that is growing up is also seeking to take account of those cases where the banker in relation to its trust moneys acting as a financier, but there also happen to be deposits made with the bank. But there may not be any current account whatsoever with the bank.

I wonder whether the panel could perhaps comment on the case where a bank makes a specific facility available to a potential borrower who does not have a current account with the bank at all but then secures or then seeks to rely upon a deposit in that case. Should a specific security be taken? And on the other hand it seems to me that once you get to debiting the overdraft on current account, don't you have to stamp the security?

- Bill Wallace (Stephen Jaques Stone James):

Yes, I think that is right, because obviously the whole nature of the obligation being secured has changed. You have the interesting point of course that if the security taken in relation to the deposit is not in the nature of, is not effectively a mortgage or a charge itself, then there is no stamp duty problem and it may lead to support for Richard Yorke's approach of the less security taken in that situation the better.

- Richard Yorke:

In the situation where you haven't got a current account then the relationship is not that of banker and customer. You must be acceptable in the city of London or Brisbane or wherever and as a bank, but in addition, it is absolutely necessary that you are a customer on current account. Otherwise the relationship is not that of banker and customer.

So if you are a bank but do not have a cheque book relationship or if you are not a bank but are providing certain facilities like building societies do in England, then I agree with absolutely every word of the two papers which preceded me. My only disagreement was in certain cases where a banker has superior rights to anything he can get by contract.