STAMP DUTY

JEFF MANN

Partner
Mallesons Stephen Jaques, Solicitors, Brisbane

No doubt the re-write of the legislation holds and, probably for some months to come, will hold centre stage for stamp duty.

However, things still go on. Legislation is amended, cases are decided, rulings are issued.

This paper highlights some of the developments in those areas. It ends with a question? Is the task of interpreting revenue legislation made any the easier for Commissioners, taxpayers or courts, post statutory and judicial directions about constructions which promote the purpose or object of that legislation? A recent Victorian case illustrates the difficulties.

This paper looks at four areas:

1. Legislation;
2. Cases;
3. Purposive rule of construction;
4. Debits tax.

LEGISLATION

By and large taxpayers and their advisers concern themselves when new revenue legislation is passed with either expansions or contractions of the tax base.

The legislation in each of the States and Territories over the last 12 months or so has seen both those aspects at work.

New South Wales has been the most active as far as concessions are concerned. The State Revenue Legislation (Further Amendment) Act 1995 made the following changes:

- Intergenerational transfers of rural land: section 66H was amended to extend this exemption for property integral to primary production and transferred with the land.
- Definition of loan security: the loan security duty exemptions were extended to instruments connected with options trading as applies to instruments in the money market.

- Exemption from loan security - regional headquarters: loan security duty is not payable by a company that establishes its regional headquarters in New South Wales where a determination under section 82CE of the Income Tax Assessment Act 1936 was made in relation to it before 1 September 1995; the concession expires on 1 July 2000.

- Declarations of trust - mortgages and corporate debt security: section 97AE paragraph (41) of the General Exemptions in the Second Schedule of the Act extend exemption with respect to the transfers of mortgages and corporate debt security to declarations of trust over mortgages and corporate debt security.

Tasmania amended its Stamp Duties Act 1931 by the Revenue Legislation (Miscellaneous Amendments) Act 1995 and introduced in the process two concessions which should be noticed:

- Intergenerational transfers of family farms - a new exemption now reads:

  "A conveyance of real property, whether for consideration or not, and which includes personal property used solely or principally in connection with the business of primary production, if the Commissioner is satisfied that the conveyance:

  (a) relates to land which is used and will continue to be used in the business of primary production; and

  (b) did not arise from any arrangement or scheme devised for the purpose of evading the payment of duty by taking the benefit of this exemption; and

  (c) is from -

    (i) a natural person to a relative of the person or to a trustee of a trust of which all the beneficiaries are relatives of the person at the time of the conveyance and of which the named beneficiaries cannot be varied other than by the addition of a relative; or

    (ii) a company to a trustee of a trust of which all the beneficiaries are relatives of all the shareholders of the company at the time of the conveyance and of which the named beneficiaries cannot be varied other than by the addition of a relative; or

    (iii) a company to a natural person and all the shareholders of the company are relatives of the person; or

    (iv) a trustee of a trust to a person who is a relative of all those beneficiaries of the trust who are natural persons; or

    (v) a trustee of a trust to a trustee of another trust of which all the beneficiaries are relatives at the time of the conveyance of all those beneficiaries of the first-mentioned trust who are natural persons and of which the named beneficiaries cannot be varied other than by the addition of a relative."

Corresponding exemptions apply in relation to transfers of shares in farming companies and landholding entities.

- Refinancing rural loans - item 18 of Part I Schedule 3 reads:

  "Any instrument made before 31 December 1997 for any additional advance secured by or under a loan security, for the balance outstanding under an earlier loan security, if each loan security applies to the same, or substantially the same, land and that land is used for primary production."

Each of the States and Territories legislation has been amended to reflect the reduction in marketable securities duty from 0.6% to 0.3% in relation to transfers of ASX securities (whether listed units or listed shares and rights): see Revenue Laws Amendment Act 1995 (Qld), State Revenue Legislation Amendment Act 1995 (NSW), Stamps (Further Amendment) Act 1995 (Vic), Stamp Duties (Marketable Securities) Amendment Act 1995 (SA), Stamp Amendment (Marketable Securities Duties) Act 1995 (WA), Stamp Duties Amendment Act 1995 (Tas), Stamp Duties (Marketable Securities) Determination No 74 of 1995 (ACT) and Stamp Duty Amendment Act (No 2) 1995, (Taxation Administration) Amendment Act 1995 (NT).

But on the other side of the penny there have been extensions of the tax base. No doubt some would take issue with the proposition that any of the States' tax bases have been extended where anti-avoidance provisions have been inserted. That argument seems to be quite illogical: if one could have done something to avoid duty prior to the amendment of an act, surely it follows that the amendment extends the tax base.

In this area the following can be mentioned:

New South Wales

Contract splitting: the contract splitting provisions are extended to parties who are related to the original parties to a conveyance.

Queensland

Transfers of statutory business licences: new section 54AD where a licenceholder surrenders or relinquishes a licence or agrees not to apply for an extension or renewal of the licence then when the licence or its extension or renewal is issued or given to another a return is required to be filed with the Commissioner which is chargeable with conveyance duty.

Notwithstanding protestations to the contrary that this section extends the tax base,[1] practitioners must be aware of this new transaction section. Its essential elements are:

- it can be interpreted to apply to an acquisition by transfer of a statutory business licence but it is not clear that it is intended to operate other than in circumstances where there is the grant, extension or renewal of a statutory business licence where the former holder surrendered or relinquished or agreed not to apply for an extension or renewal and another licence for the same type of activity is issued;[2]
- the statutory business licence must, itself, be property and not a mere personal right;
- such a statutory business licence must be situated in Queensland;
- that situation is deemed where the licence relates to or is held in connection with a business taken to exist in Queensland under section 54A(10) or Queensland or a part of Queensland;
- apportioning provisions can apply in such cases, but the formula will create difficult valuation issues;

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1 See letters to editors in *Australian Financial Review* 28 November 1995 and *Business Queensland* 27 November 1995.

2 See the then Treasurer's statement in *Weekly Hansard,* 15 November 1995, p 1125; see also letters to editors in *Australian Financial Review* 28 November 1995 and *Business Queensland* 27 November 1995.

- the section is a transaction section requiring a statement to be filed;

- "statutory business licence" is defined as "a licence, permit or authority issued or given under the law of the Commonwealth or Queensland that is required by the law to be held by a person carrying out an activity for gain or reward".

Some of the comments made in Parliament at the time of the passing of this legislation are somewhat instructive and may well have to be reverted to at some time if litigation on these provisions ensues.[3]

The then Treasurer said:[4]

> "The second amendment deals with transfers of statutory licences. Where a statutory licence is transferred, either by itself or as part of a business, stamp duty applies to the transaction. Some examples of statutory licences include radio and television licences, liquor licences, taxi licences and nursing home licences. It has come to our attention that persons may be avoiding duty on transfers of statutory business licences by arranging for the licence to be relinquished and reissued to the acquirer instead of being transferred. It is proposed to overcome such avoidance and provide clear instructions for the apportionment of duty to Queensland where Commonwealth licences are involved. Western Australia recently amended its Stamp Act to address such avoidance techniques. Northern Territory legislation prevents such avoidance and it is understood that other States intend to address this issue as part of a rewrite of their Stamp Acts."

In subsequent debate the then Treasurer made the additional points:[5]

- "If the licence is owned and then surrendered by a group of persons and reissued to another group, comprising some of those same persons, the provision would be construed to apply only to the persons newly acquiring an interest in the licence. A revenue ruling can be issued to confirm this construction."

- "The question was raised as to whether section 54AD could apply if the same person surrendered and later renewed the same licence. The answer is no ..."

- "[section 54AD] is not aimed at catching people who are renewing licences and it is certainly not aimed at catching the issuing of licences."

- "It is to catch those people who use this artifice to not pay stamp duty on the transfer of a licence."

Section 54AD will be limited in its operation by four points:

1. The statutory business licence must fall within the definition in subsection (12): that limits its operation to a licence, permit or authority issued under a law of the Commonwealth or Queensland and not any other State or Territory; further it is only a licence, permit or authority that is "required by the law to be held by a person carrying out an activity for gain or reward" which may exclude, for example, a trade mark since in that case it can be argued that it is the registered holder of the trade mark that can determine whether an activity is carried out and not the law of the Commonwealth which just simply grants the monopoly right;

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3 See section 14B of the 1954.

4 *Weekly Hansard*, 2 November 1995, p 893.

5 See *Weekly Hansard*, 15 November 1995, pp 1124-25.

2. The statutory business licence has itself to be "property": the distinction is drawn between a mere personal right and property;[6] that distinction is hard to define and equally hard to put into practice;[7]

3. The statutory business licence has to be situated in Queensland: most times that will not be an issue; the deeming provisions of subsection (4) however give this section an uncertain operation;

4. The statutory business licence may only apply to the grant, extension or renewal of the statutory business licence where the former holder surrendered or relinquished or agreed not to apply for an extension or renewal and another licence where the same type of activity is issued: the interesting point appears to be the suggestion that new section 54AD does not apply on the straight transfer of a licence. If you read subsection (2) there is certainly the argument that it could apply not only to the grant where there is a prior relinquishing etc of the licence but also to straight assignment. That could well apply in circumstances where section 54A does not apply.

Licence to occupy premises: new section 64D requires the grantor of a right to occupy all or part of a building used as a place of business in relation to which exclusive possession is not obtained (where the failure to obtain that exclusion possession essentially does not adversely affect the grantee's use of the premises) to file a return in relation to which lease duty is payable.

Again, notwithstanding protestations to the contrary (see letters to editors referred to above), this section appears to be an extension of the tax base. Its essentials are:

- it applies to a contract or agreement that is in writing or for which there is a written offer (with the result that verbal agreements are not caught);
- a person needs to acquire a right to occupy all or part of a building in Queensland;
- the occupier will use the premises as a place of business;
- the occupier does not obtain exclusive possession;
- taking into account the period and times of occupation and the right of access to the premises, it is reasonable to conclude that the lack of exclusive possession does not really adversely effect the occupier's enjoyment of the premises as a place of business;
- sub-section (2) then restricts the application of the section so that it does not apply where the arrangement to occupy will be over in a month **or**, if it will extend beyond a month up to one year, the consideration for the right of occupation adjusted for a term of one year is not more than $10,000 **or**, if the right of occupation in to go more than a year, then the consideration is not more than $10,000;
- the obligation is on the **grantor** - not the grantee - to file the statement with the Commissioner;
- that statement is chargeable with duty as if it was a lease, the consideration payable was rental and the term and any conditional term of the right of occupation was a term and conditional term of the lease.

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6 See letter to editor, *Business Queensland*, 27 November 1995.

7 See J G Mann, *Queensland: The New Regime?*, Sixth Annual Australian Stamp Duties Symposium, IBC Conferences, 1993.

Some of the points to note about this new section include:

- a right to occupy vacant land is not caught, but what about the right to occupy part of the forecourt of a shopping centre or a service station?

- the definition of "business" in section 54A(7) is for the purposes of that section, so what is a "place of business" for the purposes of this section?

- what test should one use to determine whether the lack of exclusive possession will make it reasonable to conclude that the occupier's right of enjoyment would be adversely effected?

Again, Parliamentary statements as to the operation of this section may be instructive. The then Treasurer said in relation to this section:[8]

> "The first [amendment] is to tax, as leases, licences of premises in certain circumstances. A lease is distinguishable from a licence because a lease conveys the right to exclusive possession. The amendment will ensure that lease duty cannot be avoided on arrangements which are in substance a lease by, for example, providing that the occupier does not have a right of exclusive possession between the hours of 11.30 pm and midnight. Arrangements involving annual rent of $10,000 or less will be exempt, as will arrangements for less than one month's duration or for occasional use. This will ensure that genuine licences for hire of premises, attendance at ticketed events and occupancy of corporate boxes will not be inadvertently caught."

Subsequent debate centred on one important issue and was raised by the present Treasurer in relation to subsection (7):[9]

> "... should the grantor of the licence be excused if he or she did not know that the grantee was going to carry on a business? There is no allowance in this section to do so, and the grantor would be taxed accordingly."
>
> Mr De Lacy: "I cannot answer that. I imagine that that would be covered by other legislation."

So what are some examples where the section may apply? Will an instrument relating to the installation of an ATM in a shopping centre or a hoarding permitting one to place an awning on the side of a building or an instrument allowing one to use part of premises as storage - will any or all of these be caught?

Section 64D will be limited in its operation by four points:

1. A person has to get a right to occupy: a right to install something and to service it from time to time is arguably not such a right.[10]

2. The right to occupy has to be of all or part of a building in Queensland: that suggests some sort of structure and not, for example, a tiled area outside a shopping centre; this element of the section will see a great deal of debate. The following passage is instructive of the difficulties posed for practitioners in trying to define the concept:

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8 *Weekly Hansard*, 2 November 1995, p 893.

9 *Weekly Hansard*, 15 November 1995, page 1126.

10 See *R v Ditcheat (Inhabitants)* (1829) 9 B & C 176 at 183; *Poowong Shire v Gillen* (1907) VLR 37 at 40.

> "What is a 'building'? Now, the verb 'to build' is often used in a wider sense than the substantive 'building'. Thus, a ship or a barge-builder is said to build a ship or a barge, a coach-builder is said to build a carriage; so, birds are said to build nests; but neither of these when constructed can be called a 'building' .... The imperfection of human language renders it not only difficult, but absolutely impossible, to define the word 'building' with any approach to accuracy. One may say of this or that structure, this or that is not a building; but no general definition can be given; and our lexicographers do not attempt it. Without, therefore, presuming to do what others have failed to do, I may venture to suggest, that, by a 'building' is usually understood a structure of considerable size, and intended to be permanent, or at least to endure for a considerable time. A church, whether constructed of iron or wood, undoubtedly is a building. So, a 'cow-house' or 'stable' has been held to be a building the occupation of which as tenant entitles the party to be registered as a voter .... On the other hand, it is equally clear that a bird-cage is not a building, neither is a wig-box, or a dog-kennel, or a hen-coop - the very value of these things being their portability."[11]

3. The possession which the grantee obtains must not amount to exclusive possession: is this a question of fact? Why is the section framed this way - why does it not refer to the occupier not obtaining a **right** to exclusive possession?[12] So if an occupier does not get the right to exclusive possession but in fact enjoys exclusive possession does the section apply?

4. The occupier must use the premises as a place of business; is a trade therefore excluded?[13] No doubt any activity carried out for commercial gain is intended to be covered,[14] but it must still be a place of business. All those difficult issues of what is a business and are the premises a place of business will arise.[15]

It is suggested that in each of the above cases the occupier will not use the premises as a "place of business". Certainly in a commercial sense it can be said that part of the business is being conducted in the relevant premises but it is suggested that that is not enough.

This section is likely to cause a lot of dispute.

South Australia

Lease duty: new section 75 allows the Commissioner to assess duty based on current market rent of the rent or other consideration not be ascertained or estimated at the time the lease is lodged.

Western Australia

Business licences: new section 73F in somewhat similar style to Queensland section 54AD for disposal or transfer of a business licence or the relinquishment or agreement not to renew in circumstances where the business licence can be issued to another. Where the section applies the licence is property situated in Western Australia and the transaction is a transaction by which that property is transferred by the licensee and becomes the property of the other person.

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11 *Stevens v Gourley* (1850) 7 CBNS 99 at 112, 113, per Byles J.

12 See Megarry and Wade, *Law of Real Property*, (5th ed Stevens) p 633.

13 See *Cooney v Council of Municipality of Ku-ring-gai* (1963) 114 CLR 582 at 602.

14 See *Re Norris; ex parte Reynolds* (1888) 4 TLR 452.

15 See, for example, *Smith v Anderson* 15 ChD 258.

There are some important differences between Queensland section 45AD and this section:

1. Under section 73F(1) and (3) the licence is deemed to be property situated in the State: under section 54AD(4) and (10) the territorial nexus is wider.

2. Under section 73F(2) the section applies to any transaction by which the licensee either disposes of the business licence or agrees to the business licence being transferred to another or agrees to relinquish that licence or not to apply for its renewal so that it can be issued, granted or given to another: under section 54AD(1) and (2), interpreted so far as the then Treasurer's public statements are concerned, it only applies in the latter circumstance.

3. Under section 73F(3) the business licence to which the transaction relates is deemed to be property situated in Western Australia: under section 54AD(1) the section only applies to a statutory business licence *"... that is property situated in Queensland"*. The problem of when a licence is property continues to be a problem in interpreting the Queensland Act.

4. Under section 73F(4) duty can only be charged to the extent of the value of the business licence so far as it authorises the carrying out of an activity in Western Australia or the portion of the consideration for the transaction which relates to the carrying out of the activity in the State under the authority of the licence: under section 54AD(11) one's attention is focused (as mentioned above) on concepts such as the value of the licence derived from the business undertaking conducted in Queensland or the business undertaking conducted from Queensland or the relationship of the licence to Queensland.

CASES

Not all of the cases decided over the last 12 months will be reviewed in this section.

The cases which may be of particular interest to practitioners and the areas they concern are:

1. Mortgages and contingent obligations: *CitiSecurities Limited v Commissioner of Stamp Duties* (Qld).[16]

2. Debentures and facility letters: *Queensland Cement Limited v Commissioner of Stamp Duties (Qld)*; *National Australia Bank Limited v Commissioner of Stamp Duties (Qld)*.[17]

3. Cases stated: *EIE Ocean BV v Commissioner of Stamp Duties (Qld)*,[18] *Suncoast Milk Pty Ltd v Commissioner of Stamp Duties (Qld)*,[19] *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd*.[20]

4. Goodwill and sections 56F - FO (Qld): *EIE Ocean BV v Commissioner of Stamp Duties (Qld)*,[21] *Federal Commissioner of Taxation v Krakos Investments Pty Ltd*.[22]

5. Intention and rectification: *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd*.[23]

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16 95 ATC 4471.

17 95 ATC 4480.

18 95 ATC 4501.

19 94 ATC 4862.

20 96 ATC 4875.

21 95 ATC 4501.

22 96 ATC 4063.

6. Jurisdiction and Commonwealth places: *Allders International Pty Ltd v Commissioner of State Revenue (Vic).*[24]

7. Contracts to sell and building covenants: *Davis v Commissioner of Stamp Duties (NSW).*[25]

8. Section 54(2) and "goods": *Tynte (1986) Limited v Commissioner of Stamps (SA).*[26]

9. Lease duty and rent: *Commissioner of Stamp Duties (NSW) v Commonwealth Funds Management Limited.*[27]

10. Conveyance duty and section 54A (Qld): *Campbells Hardware & Timber Pty Ltd v Commissioner of Stamp Duties (Qld).*[28]

11. Conveyance duty and principal place of residence: *Deane v Commissioner of Stamp Duties (Qld).*[29]

12. Conveyance duty and section 64A (Victoria): *A & G Lamattina & Sons Pty Ltd v Commissioner of State Revenue (Vic).*[30]

13. Solicitors obligations and revenue legislation: *Bayer v Balkin.*[31]

1. "Mortgage" - Contingent Obligations

CitiSecurities Limited v Commissioner of Stamp Duties (Qld) 95 ATC 4471

Facts. C made financial accommodation available to A. X executed a guarantee in favour of C guaranteeing the repayment of that financial accommodation. X also gave a charge in favour of C securing its liability under the guarantee.

Issues. Was the charge supporting the guarantee dutiable under section 65(3) of the Queensland Act? Was section 68(2) of the Act a charging section?

Decision. The Court of Appeal answered both questions "yes". Section 65(3) of the Act extends to a charge given over property in support of the chargor's guarantee of a third party's obligation to repay a debt and that proposition applied notwithstanding that the obligation to pay under the guarantee is contingent upon default by the third party and subsequent demands. Section 68 when read together with section 4 has the effect of being a charging section.

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[23] 95 ATC 4620.

[24] 95 ATC 4257.

[25] 95 ATC 4245.

[26] 95 ATC 4571.

[27] 95 ATC 5756.

[28] Unreported Qld judgment 22 April 1996.

[29] Unreported Qld judgment.

[30] Unreported Victorian judgment.

[31] 95 ATC 4609.

Comment. The decision came as a great surprise for many practitioners both in Queensland and interstate. For example, on 2 November 1987 the New South Wales Office of State Revenue issued Revenue Ruling NSW SD 70:

> "**Preamble**
>
> Instances arise where funds are advanced by way of loan without security from the borrower, but with a guarantee given to the lender by a third party.
>
> In addition, the third party will give a mortgage to the lender in support of that guarantee. Typically, the mortgage will provide that it is given by the third party in support of the obligations arising under the guarantee. Generally, the mortgage will be an 'unlimited' security (ie it will be framed as an 'all moneys' mortgage).
>
> The question to be answered is whether or not *ad valorem* rates of loan security duty are payable on the mortgage at the time funds are advanced by the lender to the borrower.
>
> **Ruling**
>
> Since the mortgage is an 'unlimited' security the provisions of s 84(3) of the Stamp Duties Act are relevant and *ad valorem* stamp duty is payable by reference to advances made under or secured by the loan security. In the circumstances outlined, the mortgage given by the third party to the lender does not secure any advances made by the lender to the borrower. Rather, it secures the obligations of the guarantor to the lender.
>
> For that reason, the mortgage should be stamped with duty of $5 on execution.
>
> Should the borrower default in its obligations to the lender, so that the latter calls on the guarantor to make good that default, a debtor/creditor relationship is created between the guarantor and the lender and, at that stage, there is a deemed advance by the lender to the guarantor.
>
> It is only when that deemed advance is made that an obligation arises for the payment of loan security at *ad valorem* rates - see s 84(3)."

The Stamp Duties (Amendment) Act 1988 (NSW) then introduced section 84(3B) - (3D) to impose loan security duty on securities over contingent obligations arising under guarantees. Subsequent amendments have the effect that if a loan security is used or is capable of being used to recover sums payable by a guarantor or an indemnifying party or a party to another instrument, duty is payable on the amount of the contingent sum.

In Victoria a similar approach to that in New South Wales Revenue Ruling SD 70 applied. Official Practice Note VIC/25/T/2 read:

> "Practice note VIC/25/T/1 indicated that an unlimited security to secure obligations under a bill facility was liable to stamp duty upon default under the bill.
>
> It has recently been suggested to this Office that as a result of the decision of the High Court in the case of *Handevel Pty Ltd v Comptroller of Stamps* (1984) 157 CLR 177, an advance is not in fact made at the time a demand is made under a guarantee. After due consideration it is accepted that the position adopted by this Office is not correct and, accordingly, the practice note referred to above is substituted by the following:
>
> In the situation where funds are advanced by way of loan without security from the borrower, a guarantee is given by a third party and an unlimited mortgage is given by the third party to the lender to support the obligations arising under the guarantee, the unlimited mortgage will not be liable to *ad valorem* duty either at the date of its execution or at any subsequent time.

Instruments to which this Practice Notes refers should be submitted to the Stamp Duties Office for suitable endorsement and, where relevant, for 'Deed' duty to be paid."

So what happens now in Queensland? Four points must be mentioned:

1. **Amnesty**. The *CitiSecurities* decision was handed down on 28 July 1995. About three weeks later the Commissioner issued a notice that an amnesty would be granted in relation to loans which had been structured in a similar way. The amnesty stated:

> "To give those who executed such securities in the belief they were not taxable an opportunity to now comply with their obligations under the Stamp Act 1894, penalties will not be imposed in the following circumstances:
>
> the advances or loans were made after 1 June 1988 and structured in a similar way to *CitiSecurities* case.
>
> the executed instruments, Form G (if applicable) and duty payable are lodged with the Office of State Revenue by 10 October 1995.
>
> It is not intended to carry out audits on loans or advances made prior to 2 June 1988."

The difficulty for many practitioners however was what was meant by "... structured in a similar way to the *CitiSecurities* case"? And was this not a new assessing practice having a retrospective effect?

2. **Ruling**. To address some of those types of concerns, on 19 December 1995 the Commissioner issued draft Revenue Ruling QLD SD 25:

> "(1) A security mentioned in subsections 68(1) or 68(2) includes a security given by a debtor to a creditor for the debtor's obligation to repay the debt.
>
> (2) A security mentioned in subsection 68(1) or 68(2) also includes a security given by a principal debtor to a surety to secure the principal debtor's obligation to repay to the surety an amount that may be paid by the surety to a creditor of the person: *Ansett Transport Industries (Operations) Pty Ltd v Comptroller of Stamps (Vic)* 80 ATC 4323.
>
> In that case, Ansett gave a security by way of a mortgage to the Commonwealth over certain of Ansett's assets. The security was for all moneys which the Commonwealth was liable to pay or might at any time be liable to pay under guarantees to lenders from whom Ansett intended to borrow money. It was held by the Court that a contingent or prospective payment by a surety is capable of being described as money to be lent, advanced or paid where a security by way of a mortgage has been given for its repayment. The Court rejected the argument that the definition does not cover the case of a mortgage given to a surety to secure repayment to him of a payment which he might make. It is sufficient that the mortgage secured a contingent liability of the surety.
>
> (3) A security given by a surety to a principal creditor to secure the sureties contingent obligation to repay to the principal creditor an amount lent, advanced or paid to another person, or owing on an account current from the other person is a security for the purposes of sub-sections 68(1) and 68(2): *CitiSecurities Limited v Commissioner of Stamp Duties (Qld)* 95 ATC 4471.
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> The case involved a deed of guarantee executed in favour of CitiSecurities to secure lending to an associated company. To secure its liability under the guarantee, the guarantor also executed a fixed and floating charge in favour of CitiSecurities. The Commissioner assessed the charge as a *mortgage* pursuant to section 65(3), and as

the security was for an unlimited amount, assessed the mortgage pursuant to section 68(2) and the First Schedule, to the value of the amount advanced.

The appellant's argument that the charge must secure payment by the person to whom the money was lent advanced or paid was rejected. The Court followed *Ansett* and gave a wide construction to the word 'repayment'. It is not necessary that the security be given by the principal debtor to the principal creditor.

(4) From the *Ansett* and *CitiSecurities* cases it is clear that the test to determine whether a security is dutiable under subsections 68(1) and (2) is whether the grantee of the security, as a prerequisite to enforcing the security can point to a payment which the security instrument was intended to secure. It is immaterial that it secures a contingent liability and that neither the principal debtor nor the principal creditor are parties to the instrument.

Accordingly, a security mentioned in subsection 68(1) or 68(2) includes a security given by a person for the payment or repayment of an amount lent or to be lent, advanced or paid to the person or to anyone else by, or that may become owing on an account current kept by the person or anyone else with, the holder of the security or someone else.

For example, where A lends money to B, C gives a guarantee to A, and D provides a guarantee to C and a mortgage to C to secure the guarantee, the mortgage given by D would be a security within the meaning of subsections 68(1) and (2). (Furthermore, C's guarantee to A may be a security which falls for duty under paragraph (1)(b) of the heading 'Mortgage, Bond, Debenture Covenant' in the First Schedule of the Act.)"

The difficulty for practitioners is twofold: firstly, in paragraph (4) what is meant by the words "... which the security instrument was intended to secure", "... neither principal debtor nor the principal creditor are parties to the instrument" and what is meant by the second paragraph?; secondly, to apply what is perceived to be the principles of this ruling may cut across traditional assessing practices in relation to securities securing letters of credit or guarantees issued by banks for performance obligations.

3. **Declaratory Act.** It is now common knowledge that following submissions to the then Treasurer, in December 1995 and January 1996 indications were made that the application of the *CitiSecurities* decision would be made from a date later than June 1988. But at the same time indications were given that a declaratory Act would be passed in the future by Parliament. A new section 68(2A) was proposed:

"Amendment of s68 (Security for future advances, how to be charged)

10. Section 68

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'(2A) To remove any doubt, it is declared that a security mentioned in subsection (1) or (2) includes, and has always included, a security given by:

(a) a debtor to a creditor for the debtor's obligation to repay the debt; and

(b) a surety to a person to secure the surety's contingent obligation to repay to the person an amount lent, advanced or paid to another person, or owing on an account current from the other person; and

(c) a person to a surety to secure the person's obligation to repay to the surety an amount that may be paid by the surety to a creditor of the person; and

(d) a person for the payment or repayment of an amount lent or to be lent, advanced or paid to the person or to anyone else by, or that may become owing on an account current kept by the person or anyone else with, the holder of the security or someone else.'"

There is obviously a correlation between those four paragraphs and the four paragraphs of draft Revenue Ruling SD 25. The uncertain meaning of (c) and (d) and their perceived application together with the fact that, being a declaratory Act, they would have retrospective effect caused a great deal of concern for many. Past assessing practices appear to have been ignored. If the proposition is that these provisions simply reflect current case law then why have a declaratory Act? And if they do not reflect current case law then why are they retrospective?

4. **New government.** Following on representations, the present Treasurer issued a Press Release on 24 April 1996:

"Deputy Premier and Treasurer Joan Sheldon is to finally put to rest the stamp duty issues raised by the *CitiSecurities* case and has signalled a 'change of attitude' by the OSR under the Coalition.

Mrs Sheldon said today that the State Cabinet has cleared the way for the possible reimbursement of tax paid transactions prior to the court decision.

'This significant decision may affect up to 80 companies which have paid tas under a previous penalty amnesty.'

'The Government will now frame legislation, in consultation with the industry, and I hope to have this matter resolved within months.'

The Supreme Court decision in July 1995 in *CitiSecurities v The Commissioner of Stamp Duties* found in favour of the Commissioner on the question of stamp duty on a guarantee providing security for a mortgage, when the guarantee had been acted upon.

The Office of State Revenue (OSR) sought to apply the decision on guarantees, whether or not they had been called upon, going back to 1988 but with a penalty amnesty for taxpayers who paid the tax before the specified date.

Members of the business community and their professional advisers complained that the *CitiSecurities* decision should have only applied from the date that it was made. They maintained that there had been a reinterpretation of the law and of assessing practice in support of that argument.

Businesses had also complained that OSR had not adequately notified them prior to the *CitiSecurities* decision that the Act had been reinterpreted to apply to all guarantee documents, whether or not the guarantees were called upon.

OSR, on the other hand, argued that the decision was justification for the previous actions.

Today Mrs Sheldon said: 'I am concerned to see that, as far as possible, taxpayers have certainty as to their obligations to pay State taxes. The new Coalition State Government believes that retrospective applications of tax law should be avoided at all cost.'

'This means that the Queensland Tax Acts should clearly indicate what these obligations are and that, when an interpretation is required from OSR, a ruling to apply prospectively is to be issued.'

'I would also like to see OSR adopt a more consultative approach in the development of legislation and rulings.'

'In terms of the decision in *CitiSecurities*, OSR will now develop a prospective legislative amendment to put beyond doubt the liability of duty on a security for loans and advances. There will be wide public consultation on the proposal.'

'Further, I will be discussing with members of the business community the extent to which ex gratia arrangements are appropriate and on the required course of action.'

'Once agreement is reached in these issues the legislation will be amended and ex gratia arrangements put into effect having regard to the principle of taxpayer certainty which will apply under the Borbidge-Sheldon Govemment.'

'This decision in *CitiSecurities* signals to the Queensland community a new direction for OSR under the Coalition Govemment.'

'I will be discussing the operations of OSR further with the Acting Executive Director to ensure that these and other improvements are introduced for the benefit of the State and the taxpayer,' Mrs Sheldon said.

Wednesday, April 24, 1996"

The case will therefore probably apply from the date of the judgment, namely, 28 July 1995. Obviously a number of issues have yet to be announced. The proposed legislation will be closely studied.

Further, any change in the law should be prospective and that (c) and (d) of proposed section 68(2A) should not be included until their meaning is clarified and the Commissioner's understanding of where they apply has been thoroughly thrashed out. Otherwise, the govemment may well be criticised for extending the tax base.

But before leaving this area, a few comments can be made on what appears to be the direction which that legislation may take.

As already noted, it is easy to see that proposed section 68(2A) essentially mirrors the paragraphs of draft Revenue Ruling SD 25.

To the extent that section 68(2A)(a) reflects paragraph (1) of that draft ruling, that (b) reflects paragraph (3) and that (c) reflects paragraph (2), probably everybody remains fairly comfortable. It is interesting to note that the Commissioner is of the view that, although *Ansett* concemed the meaning of "mortgage", its principle can be applied wherever "security" appears in the Act.

The difficulty is with proposed section 68(2A)(d) and paragraph (4) of that draft Ruling. Paragraph (4) opens with these words:

> "From the *Ansett* and *CitiSecurities* cases it is clear that the test to determine whether a security is dutiable under sub-sections 68(1) and (2) is whether the grantee of the security ... can point to a payment which the security instrument was intended to secure."

A number of points arise:

1. Did *Ansett* decide that the test to determine whether a security is dutiable under sub-section 68(1) is whether the grantee of the security can point to a payment which the security instrument was intended to secure?

2. Did *CitiSecurities* decide that the test to determine whether a security is dutiable under sub-section 68(2) is whether the grantee of the security can point to a payment which the security instrument was intended to secure?

3. Why focus on intention? And if that is correct then whose intention and how is it to be determined? How far outside the instrument can one roam in search of that intention, (particularly if that instrument is an all moneys mortgage executed years before other instruments): certainly Tadgell J referred to intention (at p 4326) but is this what he meant?

The statement in paragraph (4) it is suggested, was true before both those cases.

What paragraph (4) is saying is that section 68(1) (read in the context of the decision in *Ansett*) and section 68(2) (read in the context of the decision of *CitiSecurities*) can be combined. The example is evidence of that view.

But there are difficulties in doing that. The mortgage given by D may well be an all moneys mortgage given a long time before any other one of the instruments was entered into. Section 68(2) (unlike section 68(1)) only requires an upstamping if there is any further "advance or loan". It may be the case that the loan from A to B is made and then A looks around for some security from C who then looks to D for the indemnity. How does that trigger section 68(2)?

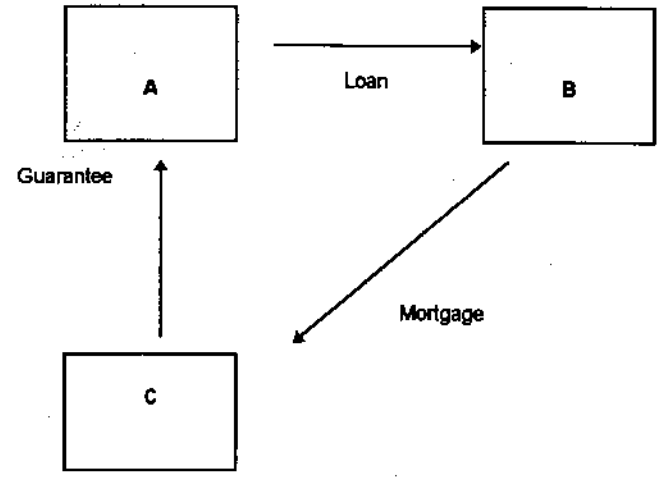
Further, in the example in paragraph (4), the mortgage given by D is at the one time within section 68(1) and section 68(2). How can that be? Surely sub-sections (1) and (2) are mutually exclusive.

By trying to combine *Ansett* and *CitiSecurities* in a way in which paragraph (4) and section 68(2A)(d) tries to do, do you not end up with something which is beyond authority and simply creates confusion for everyone?

Let's look at some of the possibilities.

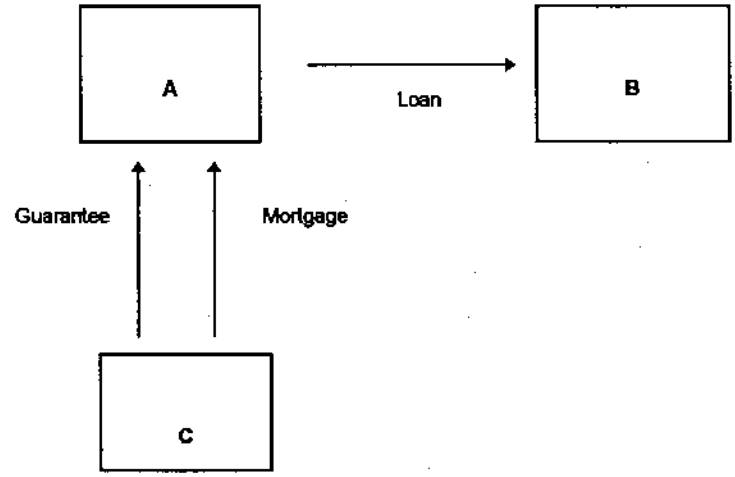
Consider the following structures:

Structure 1



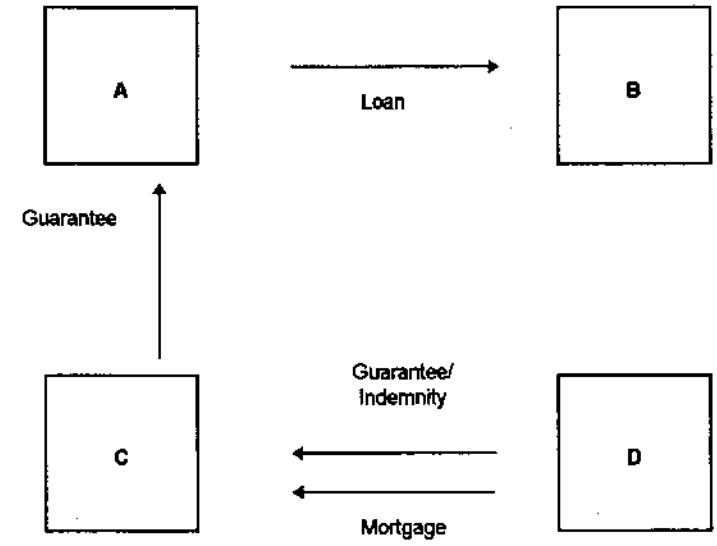
This is essentially what *Ansett* was about.

Structure 2



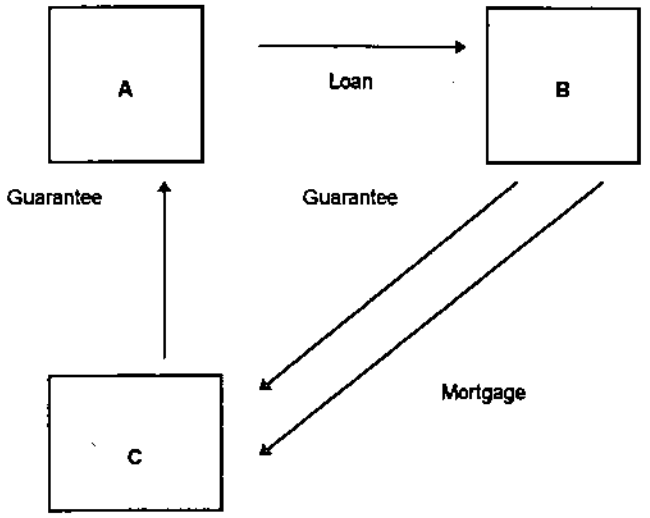
This is essentially what *CitiSecurities* was about.

Structure 3



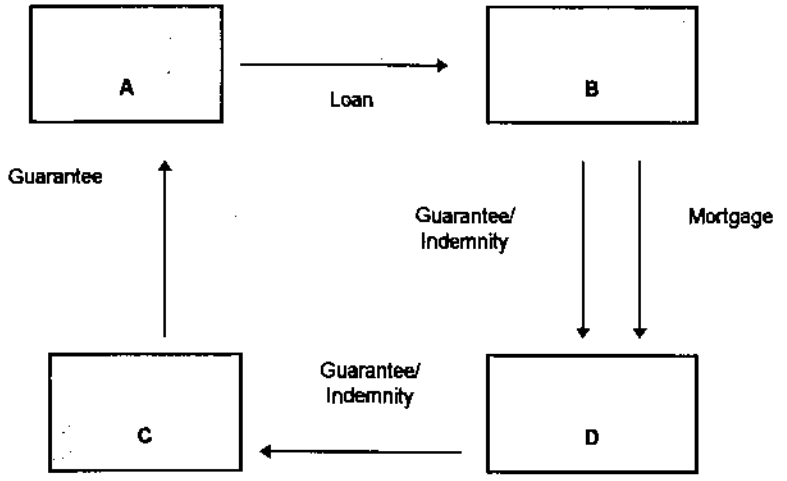
This appears to be what paragraph 4 section 68(2A)(d) is talking about.

Structure 4



This is a variation on structure 3.

Structure 5



This is another possibility.

Now what also has to be remembered are all the permutations and combinations which one can then build upon so far as each of these structures are concerned by thinking in terms of different securities (all moneys and specific securities) executed at different times.

If in structure 3 the facts are that the mortgage is an all moneys mortgage which has been in place for some years and then a guarantee/indemnity is executed between D and C followed by the giving of the guarantee from C to A, can it be argued really that the giving of the guarantee from C to A requires an upstamping of the mortgage from B to C?

Some other questions now arise:

1. Given *Ansett* and given *CitiSecurities* was it ever necessary for any of the States to legislate as New South Wales and other States have done?[32]

2. Given *Ansett* and given *CitiSecurities* is there any necessity for a section to be inserted in the re-write of the legislation and if so should it be as the present proposed clause 14 in chapter 6?

3. Given *Ansett* and given *CitiSecurities* will Queensland persist with something along the lines of section 68(2A)(d)?

4. If so, what confusion is going to be created and what is going to be achieved if the rest of Australia does not have such a provision? And is there not a risk of being accused of extending the tax base in addition?

Surely it is a better option if Queensland follows the re-write.

One cannot leave this area without noting the terms of Victorian Ruling SD 060:

> "Where funds are advanced by way of loan without security from the borrower, and a guarantee is given by a third party and an unlimited mortgage is given by the third party to the lender to support the obligations arising under the guarantee, the mortgage falls within the ambit of section 137F(2) of the Act and is therefore liable to mortgage duty.
>
> The SRO will require compliance with the legislation for all advances and further advances made on or after 1 November 1995.
>
> This ruling is in addition to Revenue Ruling SD 047 and SD 048 dealing with the application of mortgage legislation on various scenarios involving a performance guarantee, letter of credit facility or bill facility arrangement. Practice Note VIC/25/T/2 issued by the former Stamp Duties Office is now withdrawn.
>
> Please note that rulings do not have the force of law. Each decision made by the State Revenue Office is made on the merits of each individual case having regard to any relevant ruling. All rulings must be read subject to Revenue Ruling GEN 01."

2. "Debentures" - Facility Letters

Queensland Cement Limited v Commissioner of Stamp Duties (Qld)
National Australia Bank Limited v Commissioner of Stamp Duties (Qld)
95 ATC 4480

Facts. The bank wrote to Q offering unsecured financial accommodation. Q wrote to the bank accepting the facilities. Q could but was not obliged to avail itself of the facilities. The Commissioner assessed the correspondence to duty on the basis that it constituted a "Debenture" within the "Mortgage, Bond, Debenture and Covenant" head of charge.

Issue. Could the letters be said to be a "Debenture" when they secured financial accommodation which was only payable at the option of Q?

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32 See New South Wales sections 64(3B)-(3D) and SD 147; South Australia section 79, Western Australia section 89 and Circular 43; Tasmania section 75B.

Decision. The Court of Appeal answered that question "no". The decision in *Knights Deep Limited v Inland Revenue Commissioner*[33] applied. The court distinguished the contingency principle;[34] the decision in *Knights Deep*[35] is not inconsistent with that principle. Since therefore the letters did not create or acknowledge a debt from Q to the bank, there was no "Debenture".

Comment. The decision is clearly correct. How can it be said that an instrument is a security for the payment of anything unless there is by its terms an unconditional commitment to pay? I promise to pay something subject to a contingency is quite different from a commitment to pay if I decide to commit myself to pay. Other arguments were advanced as to why the relevant letters lacked the essential criteria to be a "Debenture". Subsequent litigation must await elucidation of that concept: the relevance of conditions unfulfilled at the time of execution of the document, the fact that advances will be made after the date of its execution and the nature of the "commercial men and lawyers" test[36] will need to be confronted. The Commissioner appears presently to be of the view that a "Debenture" is constituted by any instrument executed by a company which acknowledges or creates a debt even though relevant advances are made after its date of execution. But that simply cannot be right. Note the classic passage in *Handevel*:[37]

> "Any discussion of the nature of a debenture must begin with the statement that English judges of great authority have confessed that the term defies accurate definition (*British India Steam Navigation Company v I R Commrs* (1881) 7 QBD 165 at pp 172-173; *Lemon v Austin Friars Investment Trust* (1926) Ch 1 at p 17; *Knightsbridge Estates Trust Ltd v Byrne* (1940) AC 613 at pp 621-622). However, it has been generally agreed that two characteristics of a debenture are, first, that it is issued by a company and, secondly, that it acknowledges or creates a debt - see *British India Steam Navigation Company; Edmonds v Blaina Furnaces Company* (1887) 36 ChD 215; *Levy v Abercorris Slate and Slab Co* (1887) 37 ChD 260 at p 264; *Topham v Greenside Glazed Fire-Brick Company* (1888) 37 ChD 281 at p 292; *Broad v Commr of Stamp Duties* (1980) 2 NSWLR 40 at pp 48-52. The debt may be secured on the assets of the company but security in this sense is not an essential characteristic of a debenture (*Blaina Furnaces* at p 219). In *Burns Philp Trustee Co Ltd v Commr of Stamp Duties* (NSW) 83 ATC 4477 Hunt J stated (at p 4479) that, in order to constitute a debenture the debt which is acknowledged or created must be an existing, not a future debt. His Honour's view is supported by authority (*Lemmon v Austin Friars Investment Trust; R v Findlater* (1939) 1 KB 594 at p 599). However, the statement needs to be qualified to allow for a document which makes provision for the repayment of a loan to be made thereafter. 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 Commrs v Henry Ansbacher & Co* (1963) AC 191 at p 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 Estates Trust* at pp 620, 629)."

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33 (1900) 1 QB 217.

34 *Independent Television Authority and Associated - Rediffusion Limited v Inland Revenue Commissioners* (1961) AC 427.

35 Supra.

36 See *Handevel Pty Ltd v Comptroller of Stamp Duties (Vic)* 85 ATC 4706 at 4716, *Commissioner of Stamp Duties (Qld) v Westpac Banking Corporation* 93 ATC 4335 at 4339.

37 Supra at 4,715-4,716.

The following points in that passage emerge:

1. the instrument must be issued by a company;

2. it must acknowledge or create a debt;

3. a charge on assets is not required;

4. the debt must be an existing and not a future debt: "However, the statement needs to be qualified to allow for a document which makes provision for the repayment of a loan to be made thereafter."

5. not every document creating or acknowledging a debt is a Debenture ("commercial men and lawyers test") so that "negotiable instruments, deeds of covenant and any other documents in which a company agrees to pay a sum of money ... the promise in writing by a company to purchase shares at a future debt ... a specific mortgage of land to secure a future obligation to purchase property ..." is not a Debenture.

No revenue ruling has been issued on this concept. This view of the Commissioner's current practice is based on public statements by Commissioner's representatives and statements and correspondence to taxpayers. The judgment of the High Court in *Handevel*[38] makes it quite clear that the concept appears impossible of precise definition. It is as elusive as the nature of a "settlement" or the difference between income or capital. It is probably best understood as a mercantile term used in relation to a shortform instrument issued by a company acknowledging or creating a debt much in the nature of a negotiable instrument but without being negotiable.

Again however the Commissioner faces the problem of taxpayer concerns as to where the Commissioner will apply this concept. A ruling is urgently required to put the taxpaying community on notice of what the Commissioner thinks in law is a "Debenture" and where the Commissioner thinks it therefore applies. Accusations of inconsistencies with past assessing practices and an extension of the tax base may again arise.

The decision in this case encourages the reader to re-examine some of the principles with respect to contingencies and conditions.

In *Independent Television Authority & Associated-Rediffusion Limited v Inland Revenue Commissioners*[39] Lord Radcliffe (with whom Lords Tucker and Morris of Borth-y-Gest agreed)[40] distinguished two principles:

> "... if the recording of an enforceable promise for the payment of money under seal or in a written instrument constitutes a 'security' for the payment of that money under the Stamp Act, such a document is [not] the less a security for that purpose because the promise is contingent or conditional or dependant for its enforceability upon the performance of some parallel engagement by the promisee": "ITA No 1";
>
> "... there is at least no better reason for adopting a different principle when there are found clauses which merely vary the amount to be paid according to specified contingencies. Nor does it matter for this purpose whether the effect of such a clause is to make it possible for the sum to be increased or to be diminished": "ITA No 2".

Now there can be disagreements as to what is meant in this context by "contingency" and "condition"; and in particular whether there is any difference between the concepts in the context

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38 Supra.

39 (1961) AC 427.

40 At 442-443.

of instruments for stamp duty purposes. If a purchaser is committed to buy subject to receiving the approval of another, is that something with which the "contingency principle" concerns itself or is that something to do with "conditional contracts"? If a purchaser promises to buy if that purchaser decides to buy then does the "contingency principle" apply?

The decision in *Queensland Cement Limited*[41] requires one to give a bit of thought to some of these issues.

Consider then the following:

Instrument		Security or not
I promise to pay ...		
A	... if you promise to lend	security - ITA No 1
B	if you promise to lend loans of up to $100	security for $100 - ITA No 2
C	... conditional on A's approval to this loan agreement	security - *Moffat v Collector of Imports* (1896) 12 VLR 164; *Wm Cory & Sons v IRC* (1965) AC 1088 at 1108; *Brion v Commissioner of Stamps (SA)* 90 ATC 4696
D	... if you demand $100 under this performance guarantee	security but not, for example, a debenture
E	... if I request you to lend $100	not a security - *Queensland Cement Limited* (supra)

In this area one can distinguish between contingencies (when sometimes one will be talking about ITA No 1 or ITA No 2), conditions (when sometimes one will be talking about conditions precedent or conditions subsequent) and options (when sometimes one will be talking about conditional contracts or irrevocable offers).

Examples A and B are straightforward. It is suggested that ITA No 1 and ITA No 2 apply respectively.

Example C is likely to be the viewed as a security subject to a condition subsequent. But it is still a security for the payment of a relevant sum.

Example D certainly would be said to be a security for the relevant amount; but the point is that there is nothing in ITA No 1 or ITA No 2 or (it is suggested) any other principle which has the effect of permitting the Commissioner at the time of the execution of the relevant instrument to proceed as if the demand had been made and to then determine, for example, that the relevant instrument can be said to secure a debt and therefore be assessable as a "debenture". To do so would on a parity of reasoning enable the Commissioner to assume that the grantee of an option had decided to exercise the option and to proceed as if there was a contract capable of assessment to conveyance duty.

Example E is what happened in the *Queensland Cement Limited* case. That is exactly the same type of situation as that in which the grantee of an option commits to buy if a decision to buy is

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41 Supra.

made. Neither ITA No 1 nor ITA No 2 applies: is what you have in those circumstances a condition precedent? Or to put it another way:[42]

> "... the debenture cannot be said to be a security for anything which is only payable at the option of the obligors".

Equally,

> "... the [option] cannot be said to be a [contract] for anything which is only [to be sold] at the option of the [optionee]?"

The practical significance of applying this analysis to other circumstances - certainly in Queensland - is yet to be fully realised.

3. Cases Stated - Stated Facts or Agreed Facts?

EIE Ocean BV v Commissioner of Stamp Duties (Qld) 95 ATC 4501; Suncoast Milk Pty Ltd v Commissioner of Stamp Duties (Qld) 94 ATC 4862; Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd 96 ATC 4075

Pending the re-write of the Stamp Act and the overhaul of the appeal provisions in Queensland's revenue legislation which is well overdue, decisions of the Commissioner and assessments can in general, be reviewed either by application under the Judicial Review Act 1991 or pursuant to sections 23D and 24 of the Stamp Act. Essentially, where there is no contest of fact then assessments will end up being reviewed by the Court of Appeal by way of case stated. A case stated is a statement by the Commissioner to the court of facts (with relevant documents) with the Court of Appeal then being asked a series of questions. It is obviously vital therefore that a disgruntled taxpayer vet carefully the terms of that case. Revenue Ruling SD 12 states:

> "As a matter of convention, the Commissioner first forwards a draft case to the appellant for comment. Mostly agreement is reached as to contents and the case is signed and delivered."

What happens however where agreement cannot be reached? Does it matter? Cannot the Court of Appeal amend it? Is the Court of Appeal bound by its terms? In *EIE Ocean BV v Commissioner of Stamp Duties (Qld)* Mackenzie J said:[43]

> "The problem ... is that it has not been settled by authority that the Court of Appeal has any jurisdiction to amend the case stated or to send it back for clarification by the person whose duty it is to state the case. It was accepted that there was no express power to send a case back to the Commissioner (*Westpac Banking Corporation & Anor v Commissioner of Stamp Duties (Qld)* 92 ATC 4571, 4582). However it was submitted before me that it was clearly recognised by that decision that there might be an inherent power in the Court enabling it to bring about or permit an amendment of the case stated. Reference was also made to the dissenting judgment of Brennan J in *KLDE Pty Ltd (in liq) v Commissioner of Stamp Duties (Qld)* (84 ATC 4793, 4802; (1984) 155 CLR 288, 304-305). It was also submitted that it was implicit in the judgment of Matthews J in *O'Sullivan & Ors v Commissioner of Stamp Duties (Qld)* (83 ATC 4684, 4687; (1984) 1 QdR 212, 215).
>
> The fact that this issue remains unresolved is of itself a cogent reason for saying that it is inappropriate to stay the application or dismiss it. The result would be, if it were ultimately

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42 As Collins LJ said in *Knights Deep Limited v Inland Revenue Commissioners* (1901) QB 217 at 222 which was accepted by the Court of Appeal in *Queensland Cement Limited*.

43 93 ATC 4280 at 4284.

> held that the Court of Appeal did not have power to send the case back or amend it, that the applicant would be seriously disadvantaged if the case did not raise all necessary issues adequately."

In that case the applicants sought a restraining order against the Commissioner in relation to the draft case stated and that restraining order was granted.

Subsequent to that decision, further discussions took place between the applicant and the Commissioner in an endeavour to get agreement on the terms of the case. But again the matter ended up before Mackenzie J: *EIE Ocean BV v Commissioner of Stamp Duties (Qld).*[44]

Facts. The appellant had been assessed for "land rich" duty under sections 56F-FO of the Queensland Act in relation to the acquisition of shares in a company. The relevant property was the Sanctuary Cove complex. One of the central issues concerned goodwill and its nature. The appellant contended that certain trade marks had an independent value which should be deducted from the value of the land while the Commissioner contended that they inhered in the land and had no existence or value independent of it.

Issue. Are all documents which are alleged to be relevant to the proper resolution of the issues pertaining to duty to be included in the case stated so that the Court of Appeal may have access to them if necessary?

Decision. Mackenzie J answered that question "yes". "That principle has not been applied by the Commissioner, and the proper resolution of the matter is to order that the Commissioner include in the case stated the documents relating to the trademarks".[45]

A similar contest ended up before Derrington J in *Suncoast Milk Pty Ltd v Commissioner of Stamp Duties (Qld).*[46]

Facts. In that case, documents called "contract to lease" and "lease" were entered into between the Queensland Dairy Industry Authority and Suncoast Milk Pty Ltd. What the documents essentially did was to grant rights in a certain locality for the sale of milk. No lease in the strict sense was granted. The Commissioner assessed the contract to lease as a conveyance. Suncoast made application to the court on the terms of the draft case arguing that the Commissioner had wrongly included a number of matters in the case.

Issues. Can a case stated be framed in such a way as to invite the Court of Appeal to find that duty is payable on an instrument upon a basis other than that used by the Commissioner? Can a case stated be framed to invite the Court of Appeal to make a determination of duty upon an instrument other than that to which the appeal relates? Or, upon a deemed instrument when there was no assessment of duty in respect of such an alleged instrument?

Decision. Derrington J answered the first question "yes" but answered the second and third questions "no". But Derrington J dismissed the application for relief on the basis that the issues could be decided by the Court of Appeal.

Is there a conflict then between these two decisions? What are the powers of the Court of Appeal in relation to a case stated? What should a practitioner do if a case stated includes or excludes facts or issues or extends to documents not the subject of the appeal? Should the practitioner make application under the Judicial Review Act 1991 or simply wait for the matter to get before the Court of Appeal? Will it then be too late to do anything about it and will the Court of Appeal find itself constrained to answer the case as presented with no amendment by it or remission

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44 95 ATC 4501.

45 At 4,503. Compare *Re Sharpe* (1944) St R Qd 26 referred to by Mackenzie J at 4502.

46 94 ATC 4862.

back to the Commissioner for amendment? Can a client allege that the practitioner made an unnecessary application to the court if a Judicial Review Application is made or that the practitioner was negligent if no such application is made and the Court of Appeal will not admit, for example, essential facts?

The decision of the High Court in *Commissioner of Stamp Duties (SA) v Telegraph Investment Co Pty Ltd* [47] is then of interest not only for South Australian practitioners.

Facts. The South Australian Commissioner assessed duty in relation to a certain transfer of shares. An objection pursuant to section 24 of the Stamp Duties Act 1923 (SA) was rejected. The appellant appealed to the Supreme Court against that objection pursuant to section 24(3) of that Act. The appellant pursuant to section 24(4) required the Commissioner to state and sign a case. A draft case stated was forwarded by the Commissioner to the appellants and correspondence ensued as to its contents. No agreement was reached and the Commissioner signed the case and filed it in the Supreme Court. The appellants made application to the Supreme Court seeking leave to file affidavits setting out relevant facts. The Full Court of the Supreme Court of South Australia gave the leave sought. The Commissioner appealed.

Issue. Was the Supreme Court bound by the facts stated in the case stated as signed?

Decision. The High Court answered that question "no". Some may say justice required such a decision since South Australia does not have an equivalent of the Judicial Review Act 1991. The High Court distinguished what was said in *Mack v Commissioner of Stamp Duties (NSW)*[48] on the basis that sections 23 and 24 of the Stamp Duties Act 1923 (SA) are materially different to the legislation before the court in that case. The majority in *Telegraph Investment Co* case[49] thought it significant that section 24 of the South Australian Act speaks of a case "setting forth the question" upon which the Commissioner's opinion was required and the "assessment made by him;" and further that the Commissioner could express an opinion whether a document was dutiable whether he had been requested to do so or not. Under sections 22(1) and 22A of the Stamp Act 1894 (Qld) the Commissioner is in much the same position. Does it follow therefore that where the Commissioner in Queensland raises a default assessment the Court of Appeal is not bound by the terms of a case stated signed by the Commissioner? The majority in *Telegraph Investment Co* case[50] however left the point open when an appellant has requested the Commissioner to assess.[51] In that case it appears that the words in section 24(4) of the Stamp Duties Act 1923 (SA) (almost identical to the words in section 24(1B) of the Stamp Act 1894 (Qld) "... upon which the Commissioner's opinion was required ...") are significant. Although it might appear that the decision is limited to default assessment situations, the majority noted that the right to appeal under section 24 of the South Australian Act was not dependent upon subsection (4): "... it is given by subsection (3) independently of the procedure prescribed by subsection (4)".[52] Can a similar analysis apply in Queensland?

Comments. This decision is significant for Queensland practitioners. If it is equally applicable to this State then applications under the Judicial Review Act 1991 may be avoided. Note that in *Telegraph Investment Co* case[53] the appellant had, prior to requiring the Commissioner to state and sign a case, filed a notice of appeal in the Supreme Court.

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47 96 ATC 4075.

48 (1920) 28 CLR 373 at 381.

49 Supra.

50 Supra.

51 At 4080.

52 At 4080.

53 Supra.

The decision of the High Court in favour of the appellants appeared to revolve around five points.

1. Under section 23(1) of the South Australian Act the Commissioner could assess whether asked or not - section 22 and 22A of Queensland Act is to the same effect.

2. Under section 24(4) of South Australian Act the "appellant may require the Commissioner to state and sign a case" - section 24(1B) of Queensland Act is different: "Notice of the appeal **is to require** ...". (Emphasis added)

3. Under section 24(4) of South Australian Act the case is to set forth the question upon which the Commissioner's opinion was required - section 24(1B) of Queensland Act is the same.

4. Under section 24(1) and (3) of South Australia the appeal is to the Supreme Court - section 24(1) of Queensland Act is the same.

5. Under section 24(6) of the South Australian Act the court has power to determine the question submitted and assess the duty - a similar power is in section 24(3) of the Queensland Act.

Does it follow because of the words in section 24(1A) of the Queensland Act (namely "Notice of the appeal is to require ...") that the only method of appealing in Queensland under section 24 is by way of case stated and that the court is bound strictly by the terms of the case and cannot introduce additional facts?

The majority in *Telegraph* appear to be saying[54] that the use of the expression "setting forth the question" means that extrinsic evidence can be introduced by the court on the hearing of the case. It is difficult to see the reasoning to suggest that view but if that is right then it would mean that the Court of Appeal could admit such evidence.

Since the majority[55] noted that the South Australian provision does not in terms require the Commissioner to state the facts (and that provision is the same in Queensland) and since the majority noted that section 24(6) of the South Australian Act empowered the court to determine questions submitted and assess the duty (and that provision is the same as in section 24(3) of the Queensland Act), it would follow that this decision in *Telegraph* would apply to Queensland.

But it is unlikely that appellants will not continue to have recourse to an application under the Judicial Review Act 1991 in cases in which the central issues revolve around complex facts or disputed issues of fact. In practice, it is anticipated that the Court of Appeal would rely on the *Telegraph* case[56] in limited circumstances, such as, seeking leave to file affidavits as in that case.

4. Goodwill - Sections 56F-FO (Qld)

EIE Ocean BV v Commissioner of Stamp Duties (Qld) 95 ATC 4501
Federal Commissioner of Taxation v Krakos Investments Pty Ltd 96 ATC 4063

EIE Ocean BV v Commissioner of Stamp Duties (Qld)[57] has been referred to earlier. Application was made to the court for an order that the Commissioner include in the case stated certain trade mark documents. "A point at issue between the Commissioner and the applicant is whether the trade marks of independent value which can be deducted from the value of the land (as the

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54 At 4080.

55 At 4080.

56 Supra.

57 95 ATC 4501.

applicant contends) or whether (as the Commissioner contends) they inhere in the land and have no existence or value independent of it."[58]

Goodwill is a form of property: *Commissioners of Inland Revenue v Muller & Co's Margarine Limited*.[59] But many aspects of goodwill are unclear and confusing: it has been said that it cannot exist apart from a business; that under the Trade Marks Act trade marks can be assigned with or without the goodwill of the business concerned in the relevant goods and/or services;[60] it has been described colourfully in the past as "cat goodwill" or "dog goodwill" or "rat goodwill" and even "rabbit goodwill";[61] it has been said to be capable of having several situations and sometimes to be personal and sometimes to attach to a site. The New South Wales Office of State Revenue has issued a dissertation on goodwill and its valuation. The Queensland Office of State Revenue has made pronouncements in relation to the valuation of goodwill in legal and accounting practices but otherwise remains silent.

Federal Commissioner of Taxation v Krakos Investments Pty Ltd[62] is a capital gains tax case. But there are some observations in it on goodwill which are worthy of comment.

Facts. K owned and operated a hotel and held a liquor licence. K entered into an agreement for the sale of the hotel business on a leasehold basis for a total consideration of $840,000.00. The parties apportioned the sum as to one-half to plant and equipment and the other half to goodwill. K granted a five year lease of the premises.

Issue. Was the payment said to be for the goodwill of the business in reality a premium for the lease?

Decision. The Full Federal Court answered that question "no".

Comment. The Commissioner of Taxation had contended that goodwill of a licensed hotel of this particular kind adhered to the land and that the goodwill was made available to the purchaser by force of the lease and accordingly the consideration said to be for the goodwill was in fact consideration for that lease. In other words, the consequence was that the consideration was a premium paid as consideration for the lease being granted. The judgment of Hill J (with whom the other members of the court agreed) endeavours "...to crystallise the relevant principles from the ... the authorities."[63] Amongst the points made in that judgment are:

1. Goodwill is a species of intangible property capable of being bought and sold.

2. It is capable of having a local situs.

3. Goodwill may not be difficult to recognise but it is difficult to define at least in an exhaustive way.

4. The variety of elements of which goodwill is composed suggests that those different elements are in fact different species of property or at least different kinds of valuable rights.

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58 Per Mackenzie J at 4502.

59 (1901) AC 217 at 223.

60 See section 106(3) of , 1995.

61 See *Whiteman Smith Motor Co Ltd v Chaplin* (1934) 1 KB 35 at 49; *Mullins v Wessese Motors Ltd* (1947) 2 All ER 727; *Kirby (Inspector Of Texes) v Thorn EMI PLC* (1988) 2 All ER 947; Hill J in *Krakos Investments* case, supra, at 4068.

62 96 ATC 4063.

63 At 4068.

5. The statement made by the *Inland Revenue Commissioners v Muller & Co Margarine Limited*[64] that "The goodwill of the business is one whole and ... must be dealt with as such ... goodwill has no independent existence. It cannot subsist by itself. It must be attached to a business", must be doubted as a universal proposition.

6. Business may have both goodwill attaching to a name and goodwill attaching to premises.

7. There is no reason why each of these aspects of the goodwill of the business could not be dealt with separately.

8. Goodwill may be of different kinds namely site goodwill, personal goodwill, name goodwill and monopoly goodwill; further a distinction can be drawn between "adherent goodwill" and "net adherent goodwill". ("Adherent goodwill" is the totality of the goodwill attached to the site that is the net adherent goodwill together with the site goodwill).

9. Site goodwill is the mere habit of customers resorting to the site.

10. Personal goodwill has no relationship to premises but follows the person to whom it is attached and is incapable of being assigned.

11. Name goodwill is the goodwill attracted to a business by the use of a name.

12. Monopoly goodwill attaches when a monopoly has been conferred upon a trader (eg a patent).

13. The principles relating to the goodwill of a public house are no different from those which relate to other businesses. The goodwill of a public house is like other businesses, in part referrable to locality, in part to the way in which the business is conducted, in part to the personality of the publican and, perhaps, in part to the name of the public house to which some reputation may attach. What makes the situation of a public house unique is a system of licensing applicable to the sale of liquor.

14. Legislative differences between the situation existing in some Australian States and that existing in the nineteenth century England may well require a rethink of the prima facie rule that the whole goodwill of a public house attaches to the premises. Since the owner of premises may sell the premises without the licence, the purchaser cannot use the premises for the sale of alcohol, and accordingly the purchaser does not obtain the goodwill of the business previously carried on the premises merely because the premises were acquired.

15. The goodwill of the business carried on at licensed premises can only be transferred if the licence is transferred with the premises but some part of the goodwill of the business must attach to the licence rather than the premises.

16. Site goodwill normally attaches to the site but in the case of a public house some goodwill attaches to the licence.

17. Name goodwill attaches to the trade name and at least where this involves a trade mark (registered or unregistered) will be property. A mere business name may not be property.

18. Monopoly goodwill attaches to the statutory monopoly rights.

19. To the extent that the goodwill attaches to a species of property it may only be dealt with together with that property. But this is not to say that it is not capable of being dealt with as a separate species of property or as being the subject of a bargain and sale at a price.

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[64] 901 ATC 217 at 224.

In that case Hill J found the presence of monopoly goodwill, personal goodwill, name goodwill and site goodwill.

The lesson in these two cases is that practitioners must be alive to the different types of goodwill and to what each attaches. This examination can be vital in revenue cases and can be determinative whether duty under sections 56F-FO (Qld) or section 54A (Qld) applies. This discussion is most relevant when Draft Revenue Ruling SD 20 (Qld) is examined.

5. Intention and Rectification

Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd 95 ATC 4620

The liability of an instrument is determined by reference to its substance rather than the form it takes or the description which the parties give it: *Inland Revenue Commissioners v Duke of Westminster*;[65] *City of Brisbane v Commissioner of Stamp Duties*;[66] *McAlary v Commissioner of Stamp Duties*;[67] *Eastern National Omnibus Company Limited v Inland Revenue Commissioner*;[68] *Fleetwood - Hesketh v Inland Revenue Commissioner*;[69] *Oughtred v Inland Revenue Commissioner*;[70] *Limmer Asphalt Paving Co v Inland Revenue Commissioner*.[71]

But does that mean that the intentions of the parties are irrelevant? What is meant by "intention" in this context? Can the parties do nothing if an instrument ends up being dutiable when they did not intend it to be? *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd*[72] looks at some of these issues.

Facts. The trustee of a discretionary trust invoked the power conferred on it by the trust deed to appoint a company as a beneficiary. By inadvertence the company became a capital beneficiary as well as an income beneficiary. Conveyance duty was assessed. The trustee brought proceedings to rectify the deed.

Issue. Could the deed be rectified?

Decision. The New South Wales Court of Appeal answered this question "yes". Mahoney AP noted that:[73]

> "... the principle upon which rectification is granted involves two things: that the party (in the case of a unilateral transaction) or the parties (in the case of a transaction between parties) had at all relevant times an intention which was to be given effect by the document to be rectified; and that that document does not give effect to that transaction."

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65 (1936) AC 1.

66 (1923) QSR 54-58.

67 (1917) 17 SR(NSW) 552.

68 (1901) 1 KB 161.

69 (1936) 1 KB 35.

70 (1968) AC 206.

71 LR 7 Ex Ch 211.

72 (1995) ATC 4620.

73 At 4622.

But it was important, said his Honour, to define clearly what was meant by "intention": although its meaning must be determined in a particular case by reference to its purpose and context

> "... ordinarily ... - and in the context of rectification - it refers to what was subjectively seen to be brought about and the consequences of it. It refers to that which is subjectively foreseen and intended to be effected by the document ... it does not include that which was foreseen as likely or certain to occur but not wished for and 'the risk of which he runs possibly with regret'. Similarly it does not include consequences which the parties did not have in their mind when the deed was executed even if, had they thought of them, they would have intended them. In some cases, what may in this sense be intended may be merely the execution of a document containing a particular provision. They may not have adverted to the consequences of such a provision except generally. In such a case, they cannot be said to have intended that the document produce or not produce those consequences and, if having adverted to them the consequences are not wished, that is not sufficient to warrant rectification ..."[74]

In this case rectification was appropriate because the intention was not to include the company as a capital beneficiary.

Sheller JA took up a similar point:[75]

> "Essential to relief by rectification or reform of a document ... is mistaken expression of the true agreement. The plaintiff must prove that there was disconformity between the intention and the written instrument and that the intention continued to the time of execution of the instrument. The plaintiff must displace the hypothesis, arising from the execution of the written instrument, that it expressed the true intention. Proof sufficient to displace this hypothesis may be easy or difficult or impossible. Such proof may be more difficult in some circumstances impossible, if the words of the instrument are purposely used or indicate that the parties or party no longer intended to give effect to the whole of the antecedent intention. Careless copying is one thing. Omission of some words of limitation necessary to achieve the intention another. Mistake as to legal effect of the words used another. The proved intention of the parties or party may be equivocal or too general or not sufficiently exact or precise to found relief. But if the claimant convinces the Court that the instrument does not conform with the intention of the parties or of the party which made it and the intention is clear and precise and can be achieved by the language of an order for rectification, relief should be available."

McLelland AJA spoke of the "effect" of an instrument:[76]

> "In general, the remedy of rectification of an instrument is available where it is established by clear and convincing proof that at the time of execution of the instrument the relevant party or parties as the case may be had an actual intention (if more than one party, a common intention) as to the effect which the instrument would have which was inconsistent with the effect which the instrument as executed did have in some clearly identified way. In this context 'effect' means the legal and factual operation of the instrument according to its true construction, but does not include legal or factual consequences of the operation of the instrument of the more remote, or collateral, kind (eg its liability to stamp duty)."

In this context practitioners need to remember that under section 75(5) relief from unintended duty consequences may be available particularly under sub-section (5)(c).

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74 At 4623.

75 At 4629.

76 At 4633.

Compare *Nichols Cabramatta Wholesale Stationery Supplies Pty Ltd v Commissioner of Stamp Duties (NSW)*[77] in which *non est factum* was rejected: the fact that an instrument had an adverse stamp duty consequence did not make it "radically different" from what the parties had intended. "It has done precisely what was intended and none the less so because it has done other things as well".[78]

However the fact that an instrument ends up being dutiable when it was not "intended" may be irrelevant.

6. Jurisdiction - Commonwealth Places

Allders International Pty Ltd v Commissioner of State Revenue (Vic) 95 ATC 4257

Section 4 of the Stamp Act 1894 (Qld) in general sets the territorial operations of the Act. An instrument will be subject to duty if it is executed in Queensland or, if executed out of Queensland, it relates to property or to any matter or thing done or to be done in Queensland.

Some parts of Australia are owned by the Commonwealth and some of them are in Queensland. What are the stamp duty implications? *Allders International Pty Ltd v Commissioner of State Revenue (Vic)*[79] looks at those issues.

Facts. A leased part of the land at Tullamarine Airport from the Commonwealth.

Issue. Was the lease subject to duty under the Stamps Act 1958 (Vic)?

Decision. The Victorian Supreme Court answered that question "yes".

Comment. The short point was whether the Stamps Act 1958 (Vic) was invalid in so far as it is a law with respect to a place acquired by the Commonwealth for public purposes. The place the subject of the lease remained a Commonwealth place. In other words is "... a law of the Parliament of Victoria imposing stamp duty on an instrument of lease of land encompassing part of the airport ... a law with respect to the airport?"[80] If so then it would conflict with express Commonwealth power and would be invalid. Harper J said:[81]

> "The test is whether the law in question has 'such a direct and substantial connection' with the place that it is 'in point of character' a law with respect to that place: *Worthing's* case at 111 per Kitto J."

In the end Harper J was of the view that it was with the instrument that duty had the direct and substantial connection and not with the land. Accordingly there was no conflict and the lease was properly assessed.

Similar arguments have been dismissed by the Commissioner in Queensland in relation to the Brisbane Airport but the case has gone on appeal to the High Court.

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77 93 ATC 4647.

78 At 4653.

79 95 ATC 4257.

80 At 4260.

81 At 4260.

7. Contracts to Sell - Building Covenants

Davis v Commissioner of Stamp Duties (NSW) 95 ATC 4245

It is not uncommon for an owner of land to enter into a contract for the sale of that land and as part of the transaction agrees with the purchaser to erect a building on the land after conveyance. There appears to be some tendency recently for the Commissioner in Queensland to endeavour to aggregate the consideration payable under the land contract with the consideration payable under the building contract. *Davis v Commissioner of Stamp Duties (NSW)*[82] addresses that type of situation.

Facts. N owned land. N entered into an agreement with H to build houses on nominated sites and to lease then to H. N later entered into a contract to sell the relevant land to D. Simultaneously N and D executed a deed whereby N agreed to arrange the building of a house on the land and N agreed to assign its rights with H to D. No building work commenced prior to settlement of the contract to sell the land. The Commissioner placed reliance on the "package deal" nature of the arrangement between N and D.

Issue. For the purposes of the Stamp Duties Act 1920 (NSW) was the contract of sale and the deed one transaction such that duty was payable on the total consideration?

Decision. The New South Wales Supreme Court answered that question "no".

Comments. The judgment of Spender AJ reaffirms the decision in *Bambro (No 2) Pty Ltd v Commissioner of Stamp Duties.*[83] In that case it was said:[84]

> "... if the whole building is to be completed before conveyance, then the dutiable 'matter', in the form of an agreement for the sale or conveyance of property, which is contained in the instrument is constituted by an agreement for the sale or conveyance of the land with the building upon it; and consideration and unencumbered value for the purpose of assessing ad valorem duty are to be assessed accordingly. The opposite result is reached, where, under the agreement, erection of the building is to be commenced only after conveyance of the land. Here what is dutiable is an agreement for the sale or conveyance of the land alone, and ad valorem duty is to be assessed by reference to the purchase price of the land alone or its unencumbered value."

New South Wales sections 41(2) and 41(3A) are not quite the same as Queensland sections 54(1) and 53. But nothing in this case detracts from the view held in this State for a long time that the principle in *Bambro* [85] applies.

It should be noted that under section 53(2) aggregation can only take place where the relevant instruments are each subject to ad valorem duty.

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82 95 ATC 4245.

83 (1980) WN (NSW) 1142.

84 At 1147.

85 Supra.

8. Section 54(2) - "Goods"

Tynte (1986) Limited v Commissioner of Stamps (SA) 95 ATC 4571

Section 54(2) directs that sub-section (1) (which has the effect of subjecting to duty executory agreements of conveyance) is not to apply, inter alia, to an agreement "... which is solely comprised of any goods livestock wares or merchandise". So what is "goods" for the purpose of this exemption? *Tynte (1986) Limited v Commissioner of Stamps (SA)*[86] is relevant.

Facts. An instrument was executed for the sale of grapevines and grape crop. At the same time an instrument was executed for the sale of the land on which the vines and crops were situated. The Commissioner assessed duty on both and aggregated the considerations.

Issue. When the instruments were read together did they set out "separately the consideration payable for stock, implements and other chattels" for the purposes of section 31A(b) of the Stamp Duties Act 1923 (SA)?

Decision. The South Australian Supreme Court answered that question "no".

Comment. The appellant argued that the grape contract related only to "stock". Perry J came to the view that the vines and grapes were neither "stock" in its extended meaning nor "chattels". His Honour said:[87]

> "All of the crops described above fall within the class of fructus industriales, 'being fruits produced by the annual labour of man in sowing and reaping, planting and gathering': see *Benjamin on Sale* (8th edition, Sweet & Maxwell) at 175".

Fructus industriales are chattels whereas fructus naturales are part of the land. After referring to *Warren v Nut Farms of Australia*[88] (where it was held that pecan, black walnut and chestnut trees remaining in the soil were fructus naturales) and *Saunders (Inspector of Taxes) v Pilcher*[89] (where it was held that fruit trees did not come within the designation of fructus industriales) Perry J held that:[90]

> "... grapevines should for this purpose be treated in the same way as nut or fruit trees. It follows that they fall within the classification of fructus naturales. They are, therefore, part of the land and are neither stock nor chattels."

Further, grapes still on the vine were to be treated in a similar way.[91]

Although the decision could equally apply to "goods" in other jurisdictions it is a little hard to understand why grapevines having been produced "... by the labour and expense of the occupier of lands"[92] they were not fructus industriales. In *Kimberley Pastoral Co Limited v Commissioner of Stamp Duties (Qld)*[93] Sheahan J held that an interest in growing crop is a chattel interest and

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86 95 ATC 4571.

87 At 4574.

88 (1981) WA 134.

89 (1949) 2 ALL ER 1097.

90 At 4574.

91 At 4575.

92 See *Benjamin on Sale* at 175.

93 Unreported, No 12 of 1982.

came within the exemption although it is not entirely clear whether this view is supported by D M Campbell J.

9. Lease Duty - "Rent"

Commissioner of Stamp Duties (NSW) v Commonwealth Funds Management Limited 95 ATC 4756

The lease head of charge imposes duty by reference to the "total rental payable". What sums should one take into account in determining "rent"?

Commissioner of Stamp Duties (NSW) v Commonwealth Funds Management Limited[94] is relevant to this issue.

Facts. An agreement for lease of land was entered into between the respondent and the Sydney Cove Redevelopment Authority. The Authority did not own the land but covenanted that it would obtain title to it. In the meantime the Authority gave possession of the land to the respondents who were to carry out construction works, demolishing existing buildings and erecting a new building. The construction works were to be carried out during a construction period. During the construction period the respondent was to pay an "occupation fee" per year. The lease provided for the payment of rent of a certain sum each year and also provided for the payment of additional sums by way of rent, in general, being a proportion of the net income derived by the respondents from the building they were to construct. The deed was stamped as a lease on the basis that the total rent payable was the aggregate of the occupation fees together with the sums payable each year by way of rent and the additional sums.

Issue. Was there any difference in meaning between "rent" and "rent reserved"?

Decision. The New South Wales Court of Appeal answered that question "No".

Comment. The appeal centred on the meaning of the words "rent reserved" in section 78D of the Stamp Duties Act 1920 (NSW). There are some similarities between that section and section 64B of the Stamp Act 1894 (Qld). The case is authority that, at least so far as the New South Wales Act is concerned, no distinction is to be drawn between the expression "rent" and "rent reserved". Brownie AJA (with whom the other members of the court agreed) said:

> "... rent is a contractual obligation to pay for the use of the land";[95]
>
> "As long as what is created is a lease, with an obligation to pay rent, the use of the word 'reserved' is not essential, and it adds nothing significant, except an air of familiarity."[96]

Sections 62 - 64C and the "lease" head of charge in the schedule to the Stamp Act 1894 (Qld) refer to "rent" (although in section 64(1) there is reference to penal rent being "... thereby reserved or agreed to be reserved..."). On the authority of this case the Commissioner would be entitled to assess lease duty on all sums payable "... for the use of the land".

But does that mean then that every sum payable by a lessee to a lessor pursuant to the terms of the lease is to be "rent" for the purpose of calculating duty? The emphasis in this case is on rent

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[94] 95 ATC 4756.

[95] At 4762 citing Brooking J in *Commissioner of State Revenue (Vic) v Price Brent Services Pty Ltd* 94 ATC 4672 at 4675.

[96] At 4763.

being "... simply part of the consideration for the right to use the property";[97] "... a contractual obligation to pay for the use of the land".[98]

How then are sums payable by a lessee to a lessor by way of contribution to "outgoings of the centre" for example to be treated? Are the sums part of the "total rental payable" for the purposes of assessing duty? There does not appear to be any reason why that would not follow particularly if they are described as "additional rent" or payable "as part of the rent". That appears to be the position in New South Wales (see Revenue Ruling NSW SD 49) where payment for rates and taxes are regarded as "rent" even if not so described. This is obviously another issue on which a ruling should be issued in Queensland.

10. Conveyance Duty - "Business"

Campbells Hardware & Timber Pty Ltd v Commissioner of Stamp Duties (Qld) (Supreme Court, No 400 of 1995, unreported judgment delivered 22 April 1996)

The case is an example of substance over form.

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 a "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 two issues:

1. The meaning of "acquired" in section 54A (Qld);

2. Whether sections 22A(2) and 80(2) authorise the amendment of a form S(a) after it has been lodged and originally assessed.

Decision. Byrne J found for the Commissioner on both issues.

Byrne J said:

> "... 'acquire' and its derivatives [in the expression 'acquired or agreed to be acquired'] import to 'get as ones own'. Merely to take possession of goods is not to 'acquire' them as that word is used in s54A. The evident intent of s54A 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-s(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'."

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97 Per Kirby P at 4758.

98 Per Brooking J in *Commissioner of State Revenue (Vic) v Price Brent Services Pty Ltd* 94 ATC 4672 at 4675, cited by Brownie AJA at 4762.

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.

As to whether the Commissioner was entitled by reference to section 22A(2) and section 80(2) (after having raised an original assessment) to thereafter change "nil" for the value of stock in trade, Byrne J was of the view that he could. The applicant had contended that section 22A(2) did not permit alteration of the form S(a) once it had been assessed to duty. His Honour said:

> "In my opinion, the view that section 22A(2)(a) permits alteration of a form S(a) both before and after assessment better accords with contemporary approaches to statute interpretation. See *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 147 CLR 297; section 14A(1) Acts Interpretation Act 1954 an example."

Comment. The case is authority for the proposition that simply to obtain possession of something is not to "acquire" it for the purpose of section 54A. Where however the effect of the arrangement is that the vendor has no residual right or interest then there will be an acquisition for the purpose of this section. The difficult question is whether something (and if so what) short of what the applicant did in this case would still be held to be an acquisition. For example, would the result have been different if the vendor had retained either a dispositve right in respect of this stock or a power to direct dealings by the purchaser of the goods?

The approach to section 22A(2) and section 80 is indicative of the way in which practitioners must expect courts to react when confronted with "nice" arguments: See also Kirby P in *Commissioner of Stamp Duties (NSW) v Commonwealth Funds Management Limited and Anor.*[99]

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[99] 95 ATC 4756 at 4759.

11. Conveyance Duty - Principal Places of Residence

Deane v Commissioner of Stamp Duties (Qld Supreme Court, unreported, No 519 of 1994)

Issue. The case centres on the meaning of "occupation" in section 55A.

Facts. Essentially the facts were that the appellant while owning a residence in one suburb of Brisbane purchased another proposed residence. For various reasons including renovating the new premises, the appellant did not go into occupation of the new premises.

Decision. Fryberg J said:

> "It seems to me that the Act regards occupation as being occupation by way of residence.
>
> ... It also seems to me that the word 'principal' in the definition allows a wide range of factors to be taken into account, and also implies an objective test in what is the principal place of residence. That is not to say that the intention of the person acquiring the residence is not relevant. ... It seems to me that intention is relevant, but not dominant."

His Honour held that the Commissioner had not erred on this point. His Honour took into account:

> "... evidence regarding the applicant's mail, their usage of electricity, the electoral roll, the time which they spent at [the new house] compared with the time they spent at [the old house], the number of nights slept at each place, all combines to found a proper inference to what was their place of abode or their residence - to put it another way, the place where their home was."

As to the penalty under section 55A(5), Fryberg J found that the Commissioner's officers had erred. Mere failure to notify is not sufficient to justify the imposition of a penalty. "... fault was the consideration of the most importance ...". Next, to the decision of the Commissioner's officers to reduce the penalty under subsection 5(A), Fryberg J noted that that decision was substantially influenced by guidelines then in force which, his Honour noted:

> "... reflect a policy which is so unreasonable that it could not be accepted as a policy which the law would regard as a relevant consideration in the making of a decision on penalty. ... The penalty is not, in my view, imposed as a revenue raising device, but rather as a device to facilitate and encourage compliance with the terms of the legislation. Those guidelines are so far away from adhering to the statutory prescription and purpose that they cannot, in my view, be valid.
>
> ... New guidelines introduced in 1995 were put in evidence before me, but they do not require any opinion from me in the present case. That is better done in the context of a case applying those new guidelines. It would be obvious that some of the comments, which I have made regarding the guidelines which were in force at the time of the present decision, may be applicable to the new guidelines, as well."

12. Conveyance Duty - "Claytons Contracts"

A & G Lamattina & Sons Pty Ltd v Commissioner of State Revenue (Vic) (unreported Judgment, 29 April 1996)

The introduction of "Claytons Contract" provisions will inevitably lead to litigation. This case is an example of some of the difficulties which those provisions throw up.

Facts. Shortly, A was the trustee of two unit trusts, the L unit trust and the R unit trust. Unit holders in each were identical. A, as trustee of the L unit trust, was the registered proprietor of certain land in Victoria. A executed the declaration of trust declaring that the land was thereafter

to be held by A as trustee of the R unit trust. The Commissioner determined that section 64A(3) of the Stamps Act 1958 (Vic) applied. A default assessment issued based on the value of the land and its improvements.

Issues. There were three issues of appeal:

1. whether section 64A(3)(c) is satisfied only where real property is vested in a person otherwise than as trustee;

2. whether the transaction was in any event exempt under Exemption (23) under heading IV in the Third Schedule to the Act;

3. whether the amount of duty payable in the circumstances was to be assessed on the value of the land and improvements.

Decision. Byrne J held:

1. that section 64A applied to the transaction;

2. that the transaction was not exempted under Exemption (23);

3. further argument was invited in relation to the amount of which duty was to be assessed.

As to the first point, Byrne J found himself required:

> "... to identify the purpose or object of the legislation ...",
>
> "... notwithstanding that the words of section 64A may be clear and unambiguous in their ordinary grammatical meaning ...".

To do that his Honour had regard to extrinsic material but his Honour noted the:

> "... difficulty, as is so often the case, lies in determining what is the purpose or object of the legislation. Is it to close the 'loop hole' where a person decides to transfer property to a trust at which he is already a trustee"? [referring to the Treasurer's Explanatory Memorandum].

Is it to impose a duty where beneficial ownership in property passes by a transfer to a trust of which the beneficial owner is trustee? Is it to eradicate a "potentially costly abuse of the Stamps Act provisions to avoid duty on the transfer of property"?

The appellant's argument was that:

> "... the object of section 64A is to ensure that duty is paid where beneficial ownership of property passes without an instrument of transfer and, accordingly, that each of the sub-sections has application only where this occurs".

His Honour examined various aspects of this section and while acknowledging that the appellant's argument was available then turned "... to the extrinsic materials to find the object of the legislation."

His Honour had difficulty extracting the object of or purpose for which the appellant contended and concluded that section 64A(3)(a) applies to cases included the case where A is the trustee of real property.

As to whether the exemption applied his Honour noted that section 64A(3)(d) does not deem the transaction nor the statement to be a conveyance. Further, in response to the argument that since the unit holders of both trusts were the same the conveyance should be viewed in terms of the exemption, his Honour came to the conclusion that:

> "... such a conveyance cannot be so characterised. There are two distinct trusts. The fact that at the time of the transaction the beneficiaries happened to be the same is merely coincidental."

As to the basis upon which duty should be assessed the appellant contended:

> "... on an analysis of the fictional conveyance supposed by paragraph (e), that since the real estate conveyed is the bare legal title vested in A, the supposed instrument would attract no duty since the value of the interest of a bare trustee is nil."

His Honour examined in detail decisions such as *Octavo Investment Pty Ltd v Knight*,[100] *re Enhill Pty Ltd*,[101] *re Suco Gold Pty Ltd (In Liquidation)*,[102] *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties*[103] and statements of Brooking J in *Costa Duppe Properties Pty Ltd v Duppe* [104] and came to the conclusion from them that:

> "... the right of indemnity of the trustee of a trading trust with respect to trust expenses is first a proprietary interest in the trust property and second a transmissible interest."
>
> "... it follows that such an interest is real property within the meaning of section 64A(3)(a) and property which is capable of being conveyed to a trust".

The balance of his Honour's judgment is directed to questions of the valuation of that interest. His Honour identifies the relevant property as:

> "... the property which immediately prior to the transaction was vested in A and which for the purposes of paragraph (e) is supposed to be vested in X and which by the transaction passes to the trust of which A is trustee. Where A is a trustee of a trading trust, the property may include the property which A holds, including any right of indemnity which A has under the trust or at law against the trust property for the payment of trust expenses. I say 'may include' because this will depend upon the property which passes. It may be, for example, that the trustee's right of indemnity does not become an asset of the recipient trust and is therefore not the subject of the suppositious conveyance. Whether it does will depend upon the transaction in question which is, mutatis mutandis to be imported into the supposed conveyance under paragraph (e)."

His Honour was mindful that in the process of characterising the transaction to consider the equitable interest of the unit holders, that the terms of the declaration of trust suggested that perhaps the unit holders had agreed to the transaction so that: "... in some way the equitable interest of those beneficiaries has merged with the legal title the appellant as trustee of ..." the R trust with the result that A had vested in it the legal and equitable title to the land immediately prior to the declaration of trust so that the Commissioner's argument that it is the value of the land on which duty should be assessed would be correct. But if on the other hand the rights of the beneficiaries remained then the focus of attention would be on the bare legal title together with the right of indemnity.

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100 (1979) 144 CLR 360.

101 (1983) 1 VR 561.

102 (1983) 7 ACLR 873.

103 (1984) 1 QDR 576.

104 (1986) VR 90 at 95.

In the end Byrne J called for further argument on these issues.

13. Solicitor's Obligations - Revenue Legislation

Bayer v Balkin 95 ATC 4609

This case addresses the extent of a solicitor's obligation to advise clients of the revenue consequences of transactions.

Facts. The plaintiffs were the trustees of a trust. The defendants were the beneficiaries. The plaintiffs incurred a liability to pay Capital Transfer Tax in respect of the sale of a property in London. The plaintiffs sought an indemnity from the beneficiaries. The defendants claimed that the plaintiffs being solicitors breached their duty of care to ensure that the beneficiaries interests would as far as legally be possible not be reduced by the payment of tax or duties and were obliged to advise the beneficiaries of how that possibility could be avoided or minimised.

Issue. Did the solicitors have such an obligation and had they discharged it?

Decision. The New South Wales Supreme Court answered that question "yes".

Comment. Cohen J said:[105]

> "It may once have been considered that it was the duty of citizens and residents of a country to make their proper contribution to the revenue so as to enable the government to run the country for the benefit of its inhabitants. It now seems to be accepted, with the imposition of high rates of tax upon those who are most able to contribute to that revenue, that there is a duty on persons such as accountants and solicitors to advise their clients how they can avoid, as far as possible, making what the government regards as a proper contribution. That duty to advise has not been contested in these proceedings."

[Note that during debate on the Revenue Laws Amendment Act (No 2) 1995, the then Treasurer said (*Weekly Hansard*, 15 November 1995, p 1123): "... they have an army of lawyers and accountants to find ways of not paying tax. That is legitimate."]

In other words, citizens have the right to avoid and solicitors have the obligation to advise. "As solicitors, their duty was to consider, and if necessary research, the law which provided for steps which would allow avoidance of tax".[106] The obligation on solicitors is the same when they are the trustees of a trust as when they are acting for the trustees of the trust. Further, Cohen J found that there is a duty of care where solicitors are the trustees of the trust to advise beneficiaries in certain circumstances. On the facts of this case although the trustees failed to advise the beneficiaries nothing flowed from it.

An appeal has been lodged from this decision but not yet heard.

The lesson from this case appears to be clear: if you are acting for the trustees of the trust, (or for that matter, any client) you must consider the revenue implications of carrying out instructions and if necessary research what steps could be taken to minimise any relevant tax. If you are acting as the trustee of a trust (no doubt either personally or through a trustee company), the duty remains and the prudent practitioner will ensure that beneficiaries are informed of the revenue consequences of proposed instruments or transactions.

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105 At 4617.

106 At 4618.

PURPOSIVE RULE OF CONSTRUCTION

A familiar (but now it seems outdated) principle used to tell us that:

> "... it is a general principle of fiscal legislation that to be liable to tax the subject must fall clearly within the words of the charge imposing the tax, otherwise he goes free; and that it is for the Crown to establish that the charge prima facie extends to the subject matter sought to be charged".[107]

Authority for that statement includes *Partington v AG.*[108] *Halsbury* also questions whether "... this strict rule of construction still applies ... in view of the very wide deeming provisions enacted to prevent varying forms of tax avoidance devices". The trend away from the familiar principle has probably been going on judicially for some time.[109] In that case Murphy J said:

> "It has been suggested, in the present case, that insistence on a strictly literal interpretation is basic to the maintenance of a free society. In tax cases, the prevailing trend in Australia is now so absolutely literalistic that it has become a disquieting phenomenon. Because of it, scorn for tax decisions is being expressed constantly, not only be legislators who consider that their Acts are being mocked, but even by those who benefit. In my opinion, strictly literal interpretation of a tax Act is an open invitation to artificial and contrived tax avoidance. Progress towards a free society will not be advanced by attributing to Parliament meanings which no one believes it intended so that income tax becomes optional for the rich while remaining compulsory for most income earners. If strict literalism continues to prevail, the legislature may have no practical alternative but to vest tax officials with more and more discretion. This may well lead to tax laws capable, if unchecked, of great oppression."

In *Statutory Interpretation in Australia* there is this comment:

> "Despite ... general statements that would seem to minimise distinctions between taxing and other legislation, it seems likely that the courts will maintain the view that 'it is for the Crown to show that a taxing statute imposes a charge on a person sought to be taxed': per Scarman LJ in *C & J Clark Ltd v I R Commrs* [1975] 1 WLR 413 at 419."

But the familiar principle is not entirely dead in this country.

On 24 July 1995 Crawford J gave a judgment in *Toyota Finance Australia v Commissioner of Stamp Duties (Tas).*[110] In that case his Honour said:[111]

> "I have come to this conclusion after some hesitation, having derived comfort from general principles which apply to the interpretation of revenue laws, both counsel having accepted that they apply. They include that every charge upon the subject must be imposed by clear and unambiguous language. *Oriental Bank v Wright* (1880) 5 App Cas 842 at 856; *Brunton v Acting Commissioner of Stamp Duties (NSW)* (1913) AC 747 at 760. If there is any doubt about chargeability, the subject and not the Crown must be given the benefit of the doubt (*Attorney-General v Winstanley* (1831) 5 Bligh NS 130 at 150; 5 ER 261 at 268), so that if the construction of the statute is open to two acceptable views, one more favourable to the

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107 *Halsburys Laws of England* (Butterworths, London, 1991) Volume 23 paragraph 25.

108 (1869) LR 4 HL 100 at 122

109 See, eg, *Cooper Brookes (Wooloongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 319, 323; *Federal Commission of Texation v Westraders Pty Ltd* (1979-1980) 144 CLR 55 at 80.

110 95 ATC 4566.

111 At 4570.

> Crown and the other to the subject, then the latter construction should be adopted. *Clifford v Commissioners of Inland Revenue* (1896) 2 QB 187 at 193; *FC of T v McComas* (1923) 31 CLR 479 at 487."

In *Commissioner of Stamp Duties (NSW) v Commonwealth Funds Management Limited and Anor*,[112] the judgment was delivered on 14 November the same year. In that case, Kirby P said:[113]

> "In the event of ambiguity in the meaning to be assigned to the words 'rent reserved', the governing duty of this Court is to give effect to the purpose of Parliament expressed in its language. It is not to approach the construction of the Act in a different, narrow or strict way because it is an Act for the raising of revenue. That approach, apt for a time when taxes were imposed upon unrepresented, or inadequately represented, citizens is not longer apt to legislation enacted by a Parliament elected by, and accountable to, all citizens. Revenue legislation is no longer treated as special. There is neither a presumption in favour of, nor against, the construction urged by the Commissioner. The Court's duty is simply to try to work out what Parliament was getting at when it enacted the provisions in dispute. ... This Court must give effect to Parliament's purpose."

What states and territories have legislatively adopted the purposive rule?

State	Section	Inserted
New South Wales	s 33 of Interpretation Act 1987	1/9/87
Queensland	s 14A of Acts Interpretation Act 1954	1/12/94
Victoria	s 35 of Interpretation of Legislation Act 1984	1/7/84
South Australia	s 22 of Acts Interpretation Act 1915	20/3/86
Western Australia	s 18 of Interpretation Act 1984	1/7/84
Tasmania	-	-
Northern Territory	-	-
ACT	s 11A of Interpretation Act 1967	25/6/82

This is where new section 14A inserted into the Acts Interpretation Act 1954 (Qld) is significant. It provides:

> "(1) In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.
>
> (2) Subsection (1) does not create or extend criminal liability, but applies whether or not the Act's purpose is expressly stated in the Act.
>
> (3) To remove any doubt, it is declared that this section applies to an Act passed after 30 June 1991 despite any presumption or rule of interpretation.
>
> Example - There is judicial authority for a rule of interpretation that taxing legislation is to be interpreted strictly and in a taxpayer's favour (for example, see *Partington v AG* (1869) LR 4 HL 100 at 122). Despite such a possible rule, this section requires a provision

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112 95 ATC 4756.

113 At 4759.

> imposing taxation to be interpreted in a way that best achieves the Act's purpose, whether or not to do so would be in a taxpayer's favour."

See also the approach adopted in the *State Bank of New South Wales v Commissioner of Stamp Duties (Qld).*[114]

The section specifically does away with any "taxpayer's favour". The other states do not appear to do that. Judicial pronouncements in those jurisdictions remain important.

But if courts are now directed by legislation and/or judicial precedent to "... give effect to Parliament's purpose" (see Kirby P above) what is that going to mean practically? Kirby P said that the court's duty is "... simply to work out what Parliament was getting at when it enacted the provision in dispute".

Two recent cases referred to in this paper have seen examples of the adoption of this approach to interpretation:

1. *Campbells Hardware & Timber Pty Ltd v Commissioner of Stamp Duties* (Qld) (above);

2. *A & G Lamattina & Sons Pty Ltd v Commissioner of State Revenue* (Vic) (above).

Surely they are warnings that "nice" arguments may well not last long. The shift from the previous rules and interpretation to the present rules is a bit like the difference between being guilty beyond a reasonable doubt and guilty on the balance of probabilities.

But although founding the taxpayer's case on "nice" arguments may well be fast disappearing, that still does not obviate the difficulties faced by Commissioners or courts in trying to determine just what it was that "... Parliament was getting at when it enacted the provisions in dispute", as Kirby P said in the *Commonwealth Funds Management Limited* case (above).

As already noted within this paper, Byrne J found difficulty in *A & G Lamattina & Sons Pty Ltd v Commissioner of State Revenue (Vic)* (above) in "... determining what is the purpose or object of the legislation".

In *Statutes - Rules and Examples*[115] there is this passage:

> "At common law, the courts ascertained the mischief or purpose of legislation in a variety of ways. Including for example:
>
> - by reading the Act and/or relevant provision see *Maritime Services Board of New South Wales v Posiden Navigation Incorporated* [1982] 1 NSWLR 72; Case 112;
>
> - by reference to partiamentary debates especially the responsible Minister's second reading speech see *Wacando v The Commonwealth* (1981) 148 CLR 1; 37 ALR 317; Case 5;
>
> - by reference to Law Reform Commission reports see *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 50; Case 10; and
>
> - by reference to a preamble see *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436; Case 24.

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114 93 ATC 5005.

115 A I MacAdam & T M Smith, *Statutes - Rules and Examples* (Butterworths, Sydney, 1993) at p 342.

> To complement s 15AA and related provisions, a legislative drafting practice has been introduced in some Australian jurisdictions where objects or purposes sections are formally enacted as part of Acts. The extent of the practice varies between jurisdictions. In most jurisdictions where the practice has been adopted objects or purposes sections are found in some but not all Acts. Whereas Victoria includes a purposes section in every Act."

In *How to Understand an Act of Parliament* [116] the authors raise cautions in relation to purposes sections. For example:[117]

> "The Victorian Parliament has introduced a system of including in an Act a section which professes to set out the purposes sought to be achieved by that Act. Unfortunately, instead of making an interpretation of the Act clearer, it is likely to create new difficulties for the reader and could actually limit the extent to which the purposive basis of interpretation can be adopted in respect of the Act in which it occurs, particularly if the purposes section is expressed in limited terms. If, on the other hand, Parliament chooses to use broad terminology to overcome that difficulty, the result may be such as to give little, if any, assistance to the reader."

The point about this whole issue is that if presumptions (of innocence?) in favour of taxpayers is out, if strict literalist interpretations are out, if the purposive rules are now to be applied, if the evils that Murphy J in *Westraders* are to be avoided, then how of all of this should influence the re-write.

It is suggested that not only will the re-write need to be precise in its terms but explanatory memoranda will need to be detailed for each section with worked examples. It will simply add nothing to the credibility of the re-write if it is thought that uncertainties or flaws or holes in the legislation can be patched up by subsequent rulings and certainly not rulings which have retrospective effect.

DEBITS TAX

In the Debits Tax Administration Act 1982 applied in Queensland by the Debits Tax Act 1990 "*Account*" is defined to mean:

> "An account kept with a bank, being an account to which payments by the bank in respect of cheques drawn on the bank by the account holder, or by anyone or more of the account holders, may be debited ..."

A similar definition appears in the debits tax legislation in the other states and territories.

In *Bank of Queensland Limited v Commissioner of Stamp Duties*[118] the essential issue was whether a "transfer account" came within the definition.

Facts. Bank of Queensland and Bank of Queensland Savings Bank Limited prior to 31 August 1994 carried on business separately. They amalgamated on that date. Prior to amalgamation there was an arrangement in place pursuant to which a customer who had a savings account with the savings bank could draw cheques on an account with the applicant which was called a *"transfer account"*. The customer's funds were kept in the savings account and when a customer's cheque was presented, funds were transferred from the savings account to the transfer account. Dowsett J noted that the transfer was effected after the cheque was honoured, although it was possible that the arrangements between the customer and each bank

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116 D J Gifford and K H Gifford, *How to Understand an Act of Parliament* (Law Book Company, 1991).

117 At 104.

118 96 ATC 4264.

contemplated the transfer occurring first. Since amalgamation, a similar arrangement had been in force although the savings account and the transfer account were now with Bank of Queensland.

Issues. The question was whether the savings account was an account to which payment by the bank in respect of cheques drawn on the bank may be debited.

Decision. Dowsett J held that no liability to debits tax arose on the debiting of that savings account. His Honour looked at the contractual arrangements between a customer and the bank by reference to the various account opening forms. His Honour noted that the form contemplated that the transfer from the savings account to the transfer account would precede payment of the cheque, but noted that the practice was otherwise:[119]

> "A debit is first raised in the transfer account when the cheque is honoured, and the transfer account is then reimbursed from the savings account."

In response to the Commissioner's argument that presentation of a cheque results in a debit to the savings account his Honour noted:[120]

> "This submission overlooks the fact that the definition of 'account' focuses on the authority of the bank to debit the payment to the customer's account, which authority must arise out of the arrangements between the customer and the bank. Although the transfer account receives only passing mention in the documentation to which I have referred, it is nonetheless contemplated in that documentation as part of the arrangements between the customer and the applicant."

The Commissioner also submitted that the definition of account: "... does not require that it be an account against which the cheque is directly debited but rather that it be an account to which payments in respect of cheques may be debited". Accordingly, because the customer had authorised debits in respect of cheques against the savings account, the savings account was the relevant account for debits tax. Dowsett J was of the view, however, that:[121]

> "... the customer authorises the applicant to debit the *amount or value* of each cheque to his or her savings account, but s 3(1)(a) requires that it be *payment* of the cheque which is so debited.
>
> If the proper construction of the arrangements between the applicant and the customer is that funds are to be transferred to the transfer account before the cheque is honoured, then it cannot be the payment of the cheque which is so debited because at that time, there has not yet been a payment. The debit is rather of a transfer in anticipation of such payment. If, on the other hand, the proper construction is that the applicant is to honour the cheque and then recoup the funds from the savings account, then certainly, the debit to the latter account arises as a result of the applicant's payment of the cheque, but it is not a debit of the payment.
>
> ... It might be argued that the applicant pays twice in respect of each cheque: once to the holder of the cheque from the transfer account and once to the transfer account from the savings account. However, when one speaks of a payment by a bank in respect of a cheque drawn on that bank, one is speaking of the bank paying the holder of the cheque. One is not referring to other transactions designed to transfer funds from one account to another to enable that payment to occur or to reimburse the bank for the payment."

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119 At 4266.

120 At 4267.

121 At 4267.

Comment. Although his Honour looked at the contractual arrangements between the customer and the bank, it is quite evident from the judgment that that contractual arrangement was not determinative of the result. His Honour said:[122]

> "It is worth observing that the words, 'in respect of', govern the relationship between payment by the bank and the cheque, not that between such payment and the corresponding debit. Those words do not justify imposition of the tax upon a debit to any account merely because such debit can be seen as being related in some way to payment of the cheque."

In his Honour's view the parliamentary history of the legislation supported his decision:[123]

> "With respect to the Commonwealth Act, the Treasurer said that the tax was attached to debits, 'made to a bank account on which cheques may be drawn', and, 'Debits resulting from cheques drawn on an account will be subject to the tax'."

And later:

> "... it is fairly clear that the Treasurer expected that consequential transactions would be excluded by the impost."

The Queensland Court of Appeal has heard an appeal by the Commissioner against this decision. The outcome of that judgment could have significant implications for the banking industry.

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122 At 4267.

123 At 4267.