RECENT DEVELOPMENTS — STAMP DUTY

JEFF MANN

Mallesons Stephen Jaques, Solicitors, Brisbane

Although there have over the last 12 months or so been some legislative activities with respect to stamp duties in the states and territories, they are not by and large all that significant.

This paper concentrates on some of the court decisions which have a fundamental impact on the application of the states and territories stamp duty legislation.

This paper will cover six areas:

1. Extra-territorial drive — costly confusion;
2. Partnership interests;
3. Proprietary rights;
4. Equitable interests;
5. Taxpayer's bill of rights;
6. "News from the North."

EXTRA-TERRITORIAL DRIVE — COSTLY CONFUSION

At this conference two years ago, some of the unfortunate consequences and confusions created as a result of each of the states and territories drive to maximise their stamp duty dollars by giving their stamp duty legislation extra territorial operation were highlighted. It was urged that the states and territories should seek tax harmonisation as soon as possible and to join the push for microeconomic reform.

As reported to this conference last year, the Taxation Institute of Australia took up the issue and formulated a submission entitled "Stamp Duties — The Road to Microeconomic Reform" in association with the Australian Society of Certified Practising Accountants, Institute of Chartered Accountants, Australian Merchant Bankers Association, Australian Stock Exchange, Australian Equipment Lessors Association, Australian Finance Conference, Corporate Tax Association and the Law Council of Australia. That submission was put to each of the states and territories. It is significant to note that, to their credit, New South Wales, Victoria, South Australia and Australian Capital Territory have indicated that they wish the Taxation Institute to assist in achieving that harmonisation. There appear now to be some moves amongst many of the states to rewrite their stamp duty legislation at least in part. It would be hoped that, even if stamp duty standardisation cannot be achieved, at least harmonisation will.

The rewrite of the Queensland Act is still in progress. Enquiry elicits nothing of its policy or conceptual base let alone its drafting. It may or may not be the case that whatever legislation the other states adopt could take the lead from Queensland. If that is the case, then one would need to have regard to the present width and conceptual extensions that the Queensland Act has as against other legislation and some of the assessing practices Queensland appears to be experiencing.

PARTNERSHIP INTERESTS

The use of the partnership as a business structure has advantages (such as the distribution of tax losses) and disadvantages (such as unlimited liability) and for some (such as solicitors) is the only way in which a commercial venture can be structured. What should be appreciated is that some of the difficulties consequent upon an analysis of partnership interests can well be said to relate back to the point that the law of partnership "... which largely began as a collection of off-shoots from the law of contract" has "... become a virulent plant in its own right" (see *Lindley and Banks on Partnership* (Sweet and Maxwell, London, 1990) 16th edition, page 1).

Nature of Interest

The nature of the interests held by partners in a partnership has long been the subject of legal analysis (see *Lindley, op cit,* pages 26 *et seq*). But uncertainty remains in many areas and in some situations the nature of what is happening so far as partnership interests as proprietary interests are concerned is so mystical to be difficult (if not impossible) of explanation.

Partnership law has developed over several centuries. Yet it is somewhat of a surprise to find in the 1980s the High Court explaining in *Federal Commissioner of Taxation v Everett* (80 ATC 4076 at 4079) the nature of some of its fundamentals:

> "Although a partner has no title to specific property owned by the partnership, he has a beneficial interest in the partnership assets, indeed in each and every asset of the partnership *(Canny Gabriel Castle Jackson Advertising Pty Ltd & Anor v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321, at 327-328; *Livingston v Commissioner of Stamp Duties (Qld)* (1960) 107 CLR 411, at 453). His share in the partnership consists of a right to a proportion of the surplus after the realization of the assets and payment of the debts and liabilities of the partnership (*Bakewell v DFC of T (SA)* (1937) 58 CLR 743, at 770; *Bolton v FC of T* 13 ATD 378, at 382). Historically the interest of a partner in a partnership has been considered to be an equitable interest because it is a right or interest enforceable in equity and not at law (*Bolton).*"

A partner's interest in the partnership is a chose in action assignable in whole or in part (*Hocking & Ors v Western Australian Bank* (1909) 9 CLR 738, at 743). The better opinion seems to be that, though the interest of a partner is an equitable interest, it may be assigned under section 12 of the *Conveyancing Act*, 1919 (NSW) (as amended), the counterpart of section 25(6) of the *Supreme Court of Judicature Act*, 1873 (UK), now section 136 of the *Law of Property Act*, 1925 (UK). The interest, being a chose in action, falls within the expression "debt or other legal chose in action" because the section, in providing that notice shall be given to a trustee "as a person liable in respect of such debt or other legal chose in action", appears to contemplate the assignment by a beneficiary of an equitable chose in action against a trustee. There would be no point in referring to a trustee if the section made provision only for the assignment by strangers to the trust of debts owing by, and choses against, persons who happen to be trustees. The expression "legal chose in action" may be read as "lawfully assignable chose in action." See generally O R Marshall, *The Assignment of Choses in Action*, pages 162-168 and the cases there cited; Meagher, Gummow & Lehane, *Equity — Doctrines and Remedies*, paragraphs 605-608; *In re Pain, Gustavson v Haviland* (1919) 1 Ch 38, at 44.

But the difficulty with that analysis is that it seems to suggest that there is a two dimensional aspect to the nature of a partner's interest namely, an equitable interest in partnership property and a chose in action (see also *Canny Gabriel Castle Jackson Advertising Pty Limited and Anor v Volume Sales (Finance) Pty Limited* (1974) 131 CLR 321 at 327). If that is right then that analysis presents no difficulty while the partnership is static but is difficult to handle when it is not. In other words although the nature of the interest of a partner in a partnership has for so long been the subject of examination, a number of issues critical for the determination as to whether a revenue law might apply to a relevant transaction dealing with that partner's interest are still uncertain.

The *Stamp Acts* deal with property and instruments or transactions affecting property. Unless a relevant transaction and any instrument which it may entail can clearly identify what property is being affected then the incidence of the *Stamp Act* is difficult to handle. The mystical nature of many of the incidents affecting partnership transactions can compound the mind of any stamp duty lawyer when two different types of property have to be kept in focus.

Now You See It ... Now You Don't?

Take for example the following:

- If a partnership is comprised of A, B & C and C wishes to leave the partnership and assign C's interest to D, what is the difference between that so far as C's partnership interest considered as **property** is concerned and an assignment by C under section 12 of the *Conveyancing Act* 1919 (NSW)?
- If there is a difference, is a new partnership formed between A, B & D where A & B consent to C's assignment?
- If so, does A, B & D acquire all of the assets of A, B & C?
- If not, does D simply acquire that portion of the legal interest in the partnership assets previously held by C?
- If so, (or even if not), does D acquire C's chose in action (which, accordingly to *Everett* (*supra*), "... is a right or interest enforceable in equity ..." (at 4079)?
- If that partnership of A, B & D merges with a partnership of E, F & G, does each of A, B & D and E, F & G acquire an interest in the assets of each other?
- If so (or even if not), do each acquire the choses in action held by each in each partnership?

These questions are difficult to answer and authority is scarce. Transmogrification overcomes a lot of issues in this type of discussion. But for the simple stamp duty lawyer trying to keep a track of property (what property or what interest in property, whose property) so as to determine the effect that stamp duty law might have, the whole thing is a bit of a nightmare. This is not to suggest that there is anything particularly wrong with the conceptual basis of partnership law (whatever that might be), it is simply to state the obvious that a stamp duty lawyer whose attention in the majority of cases must of necessity concentrate on property and proprietary interests will have difficulty in giving advice to clients on the stamp duty implications of what appears to them to be seemingly simple events.

Partnership Interests and Stamp Duty

A good example of that is *Ringthane Pty Ltd v Commissioner of State Taxation (WA)* (93 ATC 4824). R & B were equal partners in a hotel business. R & B entered into a deed of sale under which R purported to buy all interests of B in the partnership. The appellant was claiming the goods, wares and merchandise exemption in Item 2(7) of the Third Schedule of the WA *Stamp Act*. The case is therefore of interest to jurisdictions which have a similar exemption. Seaman J noted (at 4825):

> "The question is whether or not the deed was effective to pass the title to the chattels in use in the business as a discrete item."

Note that later in the judgment (at 4828) what Seaman J appears to be saying is that the deed affects a "specific fractional interest" in those chattels (the exemption is available in such cases: see *Venning v Leckie* 104 ER 267; *Warrington v Furbor* 103 ER 334); and although the deed contemplated the execution of a deed of dissolution subsequently, Seaman J accepted the submission that one effect of the deed of sale was a dissolution of the partnership. His Honour also noted (at 4825) that "... there was no need to sell any of the partnership property to meet the partnership debts." The significance of this observation appears to be found later in the judgment (at 4826): "As at the date of sale the extent of the interest of [B] in the partnership assets had therefore ceased to be indefinite and fluctuating."

The Commissioner contended (at 4825) that there were two issues in the case:

(a) "[F]irstly, whether the deed is properly characterised as an agreement to sell specified assets or whether it is an agreement to sell [B's] share in the partnership to [R] and dissolving the partnership";

(b) "[S]econdly, what is the proper characterisation of the interest agreed to be sold."

As to the first, Seaman J held (at 4826):

> "... the substance of the deed is the same as its form; namely, an endeavour to sell an interest in **particular assets** ..." (emphasis added);

As to the second, Seaman J noted (at 4826) the conflicting arguments of the parties:

> (i) Taxpayer's argument:
>
> "... the partners own between them the whole of the partnership assets and each partner has a proprietary interest in each and every asset which has been described as a beneficial interest. It is not right to regard a partner as merely being entitled to a particular sum of cash ascertained from the balance sheet of the partnership as drawn up at the date of dissolution. During the subsistence of the partnership the extent of the partner's interest in each asset is indefinite and fluctuating, it being proportionate to his share for the time being, in the ultimate surplus if the partnership were to be wound up and its accounts taken";
>
> (ii) Commissioner's argument:
>
> "... the interest of the partner is a chose in action which consists of a right to a proportion of the surplus after the realisation of the assets and payment of the debts and liabilities. The share in the partnership carries with it a beneficial interest in every piece of property which belongs to the partnership while it is partnership property. This beneficial interest has two important characteristics:
>
> (a) it exists only as an incident of the partner's share in the partnership; that is, by virtue of a chose in action;
>
> (b) it is not a right to any definite share of any particular asset."

The appellant relied upon *Canny Gabriel Castle Jackson Advertising Pty Ltd and Anor v Volume Sales (Finance) Pty Ltd* ((1974) 131 CLR 321 at 327 and 328); *Cameron v Murdoch* ((1986) 60 LJR 280 at 293). The Commissioner relied upon *Federal Commissioner of*

Taxation v Everett ((1988) ATC 4076); *United Builders Pty Limited and Anor v Mutual Acceptance Limited* ((1980) 44 CLR 673).

This is therefore a contest the result of which depends on the correct analysis of the case by reference to partnership law: On the one hand, the taxpayer concentrating on the nature of the partner's interest in all of the **assets** of the partnership and on the other hand the Commissioner concentrating on the nature of the partner's **chose in action**.

In the end Seaman J (at 4828) found for the taxpayer:

> "In my view in the light of the decision of the Judicial Committee in *Cameron v Murdoch*, consideration of what is assignable in the future and what are the future fruits of a present assignment which arose in the case of *Everett*, and consideration of the position of a mortgagee of partnership assets which arose in the *United Builders'* case, are not determinative of the issue with which I am concerned.
>
> *Cameron v Murdoch* holds, at page 293, that in a case where there was no suggestion at any relevant stage that it was necessary to sell land to pay the partnership debts, a partner could have a fractional equitable interest in land which was partnership property and could acquire a further fractional interest in it through the intestacy of a relative who had previously been in partnership with him although there had been no winding up or taking of accounts in the former or subsisting partnership.
>
> Although the discussions in the authorities in relation to the nature of a partnership interest and the precise application of those authorities to the circumstances of the present case are not entirely free from difficulty, in my opinion if a specific fractional interest in a partnership which is undissolved may be dealt with by the will of a partner in the circumstances which I have described, then such an interest is capable of sale between two partners."

In the result therefore the exemption (*Stamp Act* 1921 (WA), Third Schedule, Item 2(7) "a conveyance or transfer of any estate or interest in any real or personal property locally situated out of Western Australia, or in goods, wares or merchandise, or in any ship or vessel, or part interest or share or property of or in any ship or vessel") was held to apply.

The short point would appear to be that partnership law does not find it necessary to track in this type of circumstance at every moment what is happening to the various proprietary interests. A dispute can be resolved without having to do that. But if it is correct to always analyse a case by reference to the dichotomy between the interests of partners in partnership assets on the one hand and the interests of the partners by reference to the individual choses in action on the other, then the application of any revenue legislation is difficult (compare Part IIIA of the *Income Tax Assessment Act* 1936 as applied to partnership). The application of stamp duty legislation which depends so much upon an analysis of partnership interests by identifying the relevant property involved can be perplexing.

Take for example section 54A of the *Stamp Act* 1894 (Qld). That section is triggered by dealings which go beyond the two planes of proprietary interests dealt with so far since:

(a) it is concerned with **business activities** (see definition of "business" in subsection (7); see also subsection (10)(b));

(b) it is concerned with **business assets** (see the extended definition of "business" in subsection (7); see also subsections (8) and (9));

(c) it is concerned with **partnership interests** (see definition of "business" in subsection (7)).

So far as partnership interests are concerned, it simply does not address the issues as Seaman J did in *Ringthane's* case. It includes in the definition of "business" in subsection (7):

(a) "any interest or any part of an interest held by a partner in a business";

(b) "any interest or any additional interest acquired as a partner in a business."

Remember that these definitions have to be read with subsection (2): You only trigger the obligation to file a return if you "... acquire or agree to acquire a business" so that in the context of the two definitions relating to partnership interests you only have to file a return where either:

(a) you "acquire or agree to acquire" "any interest or any part of an interest held by a partner in a business"; or

(b) you "acquire or agree to acquire" "any interest or any additional interest acquired as a partner in a business."

Now the point to make is that these two limbs could on the face of it both be applicable in many cases, eg the admission of a new partner. But it is suggested that each limb has a different function, the first applying to an *Everett* or section 12 (*Conveyancing Act*) type case and the second to the admission of a partner (or the acquisition of further partnership interests). If this proposition is right then section 54A cannot, at least so far as its application depends on focusing on partnerships is concerned, apply to partnerships dissolutions.

If *Ringthane* (*supra*) had affected chattels only and came up for adjudication in Queensland, the Commissioner would try to apply section 54A.

But there may well be some good arguments against that:

(a) if the above analysis on the operation of subsection (7)(b) and (c) is correct then since there is a dissolution involved, those provisions cannot apply;

(b) the position could be bolstered by effecting a dissolution prior to the execution of the relevant agreement for the sale of goods;

(c) it can hardly be said that the acquiring party is acquiring activities since that party has already been involved in those activities;

(d) the extended definition of "business" in subsection (7) (where it looks to the acquisition of "sufficient ... assets") cannot be said to apply since the acquiring party is acquiring an interest in those assets.

What about the other states?

(a) **New South Wales:** although you may well be able to effect a dissolution of a partnership prior to the execution of the agreement, it is probable that section 44(1)(b) would apply;

(b) **Victoria:** no duty would be payable;

(c) **South Australia:** a similar analysis as that in New South Wales would probably apply under section 71e;

(d) **Western Australia:** query whether section 31B would apply;

(e) **Tasmania:** query whether section 70D would apply;

(f) **Northern Territory:** it is arguable that section 83A and "dutiable property" do not cover such a situation;

(g) **Australian Capital Territory:** query whether section 64A would apply.

When it comes to mergers, *Lindley* (*op cit*) notes (at 447):

> "... where a new partnership is formed, which includes the case of a new partner admitted to an existing firm and the merger of two of (sic) more existing firms, assets which were the separate property of one or more of the partners may become the property of the new, enlarged or merged firm."

The correct way of analysing what happens and what are the stamp duty implications when two partnerships merge, is equally difficult. So far as section 54A (Qld) is concerned it is suggested that even if the business to be conducted by the merged partnership is the same as that previously conducted by each separate partnership, that business is a new business and the merged firm cannot be said therefore to have acquired a business on that test; in other words, a new business is commenced. So far as the proprietary interests are concerned, certainly when partners commit assets to a partnership each of the partners acquires an interest in the others contributed capital but that is simply not covered by section 54A: it does not look to an acquisition meaning one acquired on the creation of an interest in a partnership which conducts a business. Certainly if an agreement is executed by which the two partnerships merge, then the terms of that instrument could well be dutiable as a conveyance or transfer. But without an instrument, it is suggested that the merger of two partnerships simply does not trigger a section like 54A of the Queensland Act.

PROPRIETARY INTERESTS

Some Possible Tests

The operation of stamp duty legislation is commonly dependent upon the identification of property or proprietary rights. Recent developments tend to suggest that the range of proprietary interests is expanding, if only in the minds of revenue authorities. The distinction between non-technical or popular rights, personal rights and proprietary rights is therefore critical. But a search for the essential element or elements which distinguishes one from the other is as much an act of faith as the search for the Holy Grail.

From time to time the nature of proprietary rights are defined by reference to particular elements such as those described in the oft quoted passage of Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth* ([1965] AC 1175 at 1247):

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

But does a right in order to be a proprietary right have to have all of these attributes? What tests can one bring to bear in order to distinguish a proprietary right? Some can be advanced but are not entirely satisfactory:

(a) **Assignability Test**

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

(b) **Enforceability Test**

That enforceability against third parties is enough: see *National Provincial Bank Ltd v Ainsworth (supra)* and *King v David Allen & Sons Billposting Ltd* ([1916] 2 AC 54) which Isaacs J said applied in *Yeend's* case; **but** see Gummow J in *Hepples v Federal Commissioner of Taxation* (90 ATC 4497 at 4515).

(c) **Commercial Characterisation Test**

That rights become proprietary when commerce regards them as such: see *Halwood Corporation Ltd v Chief Commissioner of Stamp Duties (NSW)* (92 ATC 4155); **but** then commerce buys and sells mining information which has been held not to be property: *Pancontinental Mining Ltd v Commissioner of Stamp Duties (Qld)* (88 ATC 4190); cf *Federal Commissioner of Taxation v United Aircraft Corporation* ((1943) 68 CLR 525 at 534) in relation to knowledge.

One extra test appears to be provided by some of the statements made in the High Court case of *Health Insurance Commission v Peverill* (Judgment, 9 March 1994) and draws on what Lord Wilberforce said in *Ainsworth's* case (*supra*).

(d) **Repetitive or Continuing Enjoyment/Exchange or Conversion into Property Test**

In that case the nature of rights to medicare benefits assigned to a pathologist was at issue. As to the nature of those rights, Brennan J (at pages 11-12) said:

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

Although it may be argued that such observations on the meaning of "property" in section 51(xxxi) of the *Commonwealth Constitution* are not applicable to define "property" for the stamp duty legislation, there seem little justification to take that point.

But that test is also not entirely satisfactory — it does not explain why know-how is not property nor why goodwill is.

Although a court's decision is often explained by the essential distinction between non-technical or popular rights, personal rights and proprietary rights, in reality most times all that is in play is a court's perception of what justice dictates. (See "Queensland: A New Regime?", J G Mann, IBC Conference Papers 1993).

Money — Property?

There has long been a question whether money (cash) is property for the purpose of the Act. The passage from the judgment of Brennan J (above) suggests that it is. The High Court also had occasion to consider that recently in *Mutual Pools & Staff Pty Ltd v Commonwealth of Australia* (Judgment 9 March 1994).

Deane and Gaudron JJ said (at page 23):

> "Money is within ordinary concepts of personal property and the acquisition of money is an acquisition of property."

Dawson and Toohey JJ on the other hand said (at 34-35):

> "The nature of money does not lie in its physical characteristics and these may be disregarded. Money is a medium of exchange; it is not an object of exchange. It represents a value or purchasing power in units of account."

Their Honours distinguished the acquisition of value and the acquisition of property and cite (in part) for that proposition Mann, *The Legal Aspect of Money* 5th ed (Clarendon Press, Oxford 1992) page 24. It is interesting to note that that author states (page 8) that "Money is a chattel personal ... both coins and bank notes are chattels in possession, but bank notes are also choses in action ..."

In *Health Insurance Commissioner v Peverill* Dawson J repeated the same proposition (at 19).

So the debate goes on.

Work-In-Progress — Property?

An interesting question is whether work in progress, particularly for professional organisations, is "property" for the purposes of stamp duty legislation. In Queensland, the Office of State Revenue now takes the view that work in progress is "property" for the purpose of the Act. The argument goes this way:

In *Coughlan & Ors v FC of T* (91 ATC 4505) his Honour Hefrey J expressed the view that work-in-progress was:

> "in essence no different from the acquisition of goodwill."

His Honour went on:

> "The effect of a contract for a sale of a business including work in progress would ordinarily be that, by agreeing to receive payment for work in progress, the vendor has bound himself not to get the benefit of the work by completing it and charging the client. To do so would be a derogation from grant and an injunction would probably go to restrain the vendor from so acting: cf *Trego v Hunt* ([1986] AC 7 at 25).
>
> In the same way, the new firm paid money for the right to get access to the work that was in progress in the old firm's office and the right, from 1 July 1979, to complete that work and charge clients for it. Money was paid for goodwill and work in progress, along with other assets, to acquire a structure which could be used to produce income."

A similar view was expressed by his Honour Jenkinson J in *FC of T v Grant & Ors* (91 ATC 4608 at 4615).

Their Honours used the analogy:

> "It was like purchasing an orchard on which there are trees growing with fruit not yet harvested."

In view of the above when considering work-in-progress consideration needs to be given whether such work-in-progress is property.

The case of *Halwood Corporation Ltd v Chief Commissioner of Stamp Duties (NSW)* (92 ATC 4155) concerned a matter described in the deed as "transferable floor space."

The question in the case was — should that item be considered "property" for the purposes of the New South Wales *Stamp Act*?

The appellants in that case submitted, inter alia, that "transferable floor space" was not a proprietary right, that it was merely an expectation that a proprietary right might come into existence in the future and as such fell outside the concept of property.

The court took the opportunity to canvass rather thoroughly a long line of cases dealing over the years with this topic.

At one stage Loveday J commented (at 4158), inter alia, that "... the word 'property' is used in the Act in the sense of 'proprium'; something of one's own; some property in which the settlor has a distinct interest, vested or contingent."

A further important comment made by the same justice was to the effect that "... new proprietary rights are created by legislation. *Courts also recognise proprietary rights that are 'created' by commerce*. An illustration is trade marks. Courts of equity protected and established a property in trade marks before they were recognised by statute."

Loveday J also quoted from the case of *National Provincial Bank Ltd v Ainsworth* ([1965] AC 1175, at 1247, 1248), wherein Lord Wilberforce said, inter alia: "Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability."

This statement has been applied in Australia; see *The Queen v Toohey and Anor ex parte Meneling Station Pty Ltd & Ors* ((1982) 158 CLR 327 at 342).

It is therefore considered that as no definition exists in the Queensland *Stamp Act* for the term property, its meaning must be derived solely from judicial pronunciations found in various authorities.

In view of the above cases it is considered work-in-progress is property and as such is to be included in the declaration forms S(a).

It is suggested however that this analysis overlooks a number of things:

(a) If "Courts also recognise proprietary rights that are created by commerce", then why did the court in *Pancontinental Mining Limited v Commissioner of Stamp Duties* (*supra*) hold that mining information was not property or why is know-how not property?

(b) If the correct analysis of the High Court's decision in *Commissioner of Stamp Duties (NSW) v Yeend* (*supra*) is that stamp duty was not payable because only a personal right was created, surely that was a classic case of commerce creating a right; someone paid money for it and it was assignable;

(c) In *Henderson v Federal Commissioner of Taxation* ((1970) 119 CLR 612 at 636-637) Windeyer J said:

> "But when a professional man is, according to the terms of his engagement, not to be paid until his task is completed, I do not think he can be said to have earned anything by that task until then. A lawyer retained to write an opinion or draw a deed cannot ordinarily say that he

> has earned any income by his work until he has produced the result of it. Similarly, with an auditor employed to give a certificate, an architect to prepare plans, an accountant to produce a balance sheet. A half-written legal opinion, a deed drawn in part only, plans unfinished and still on the drawing board, an incomplete balance sheet, are not like goods in course of manufacture. When completed they are not valuable because of their physical properties, but for the information they convey or the legal effect they produce." (See also Barwick CJ on appeal at 659.)

Relying on those statements Wilson J in the New Zealand case of *Robertson v Brent and Haggitt* ((1972) NZLR 406 at 408) said:

> "The result is that a share of a valuation of work in progress at the time of a partner's retirement is not an asset and cannot by any stretching of language be considered as included in a reference to 'capital' ..."

That passage was endorsed by Jackson CJ in re *Honniball* ((1976) WAR 83 at 89-90).

The result of some pending litigation on this issue will make interesting reading.

Goodwill — Valuation and Situs

Goodwill is property for the purposes of the *Stamp Act*: see *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* ([1901] AC 217 at 223); *Hepples v Federal Commissioner of Taxation* (22 ATR 465 at 485). But the nature and incidence of goodwill — can it only be associated with an ongoing business, does it die when a business goes into loss only to be resurrected when that business starts to make a profit, can it be associated with persons names or places quite distinct from a business, can one, from a practical point of view, really distinguish between such things as site goodwill, personal goodwill, business goodwill, how do you value them — is difficult to discern.

But these are problems which have to be confronted when the *Stamp Acts* are at work. A substantial amount of attention is now being given to the nature of goodwill particularly with the respect to professional practices. For example:

(a) **South Australia**: Late last year circular number 87 addressed (amongst other things) goodwill and particularly notes a distinction between business, site and personal goodwill; that "personal goodwill cannot be conveyed except when the person's services are contractually bound for a period of time", that goodwill "... is paid for the super efficiency of a going concern"; "... in the case of a service oriented industry (generally in law, accountancy, medical or other similar professions) the major proportion of the excess [of the value of the going concern over the net assets value of the enterprise] could be due to personal goodwill."

(b) **New South Wales**: In conjunction with the ASCPA, ICA, Law Society of New South Wales, Taxation Institute of Australia and the SBP and Small Business Combined Association together with committees of each, the Office of State Revenue has issued a 91 page paper "Goodwill Perspective."

(c) **Queensland**: Over the last year or so discussions have been held with the ASCPA and ICA and also with the Queensland Law Society resulting in the Office of State Revenue issuing statements on the manner in which goodwill will be valued in practices carried on those professions, namely by the capitalisation of future maintainable profits after taking into account a notional salary for partners.

One interesting proposition is whether the decision in *Carnations* case can have any application to goodwill. It will be remembered that the Court of Appeal in Queensland in *Carnation Australia Pty Ltd v The Commissioner of Stamp Duties* held that, since trade marks owe their existence to the *Trade Marks Act*, they could not be said to have a situs only in a particular state but is spread throughout the Commonwealth and as a result was property outside Queensland for the purposes of section 54(2) of the Queensland Act. If goodwill is associated with a business wherever that business is conducted ("commercial goodwill" or "personal goodwill": see "Goodwill Perspective" (*supra*) page 6) then, recalling what had Lord Robertson said in *Muller's* case (*supra*) (that goodwill is "... locally situate within the geographical limits which comprehend the seat of the trade, and the trade ...") why wouldn't the same result pertain for an Australia wide business? That argument probably will most times founder on the principle stated in such cases as *Geraghty v Minter* ((1979) 142 CLR 177 at 193):

> "Goodwill of a partnership business is an inseverable whole unless, of course, it consists in fact of a series of separate goodwills, each applicable to distinct areas in which the one business operates or to distinct business activities which the one business entity carries on."

The New South Wales "Goodwill Perspective" states (at 28):

> "... goodwill of a business exists in New South Wales if this state is the part of the trade, or forms part of the overall trade or, to put it another way, if there is an attraction among people here to do business with it (ie there are customers here)."

The paper then refers to apportionment of the total consideration for goodwill or of its overall value by reference to the turnover basis. So far as Queensland is concerned, the point is academic since apportionment can be effected under sections 54A(10) and (11).

EQUITABLE INTERESTS

Previous cases remind us of the importance of keeping an eye on equitable interests for the purposes of assessing duty. Two recent cases are worthy of mention.

Mount Newman Mining Co Pty Limited v Commissioner of State Taxation (WA) (94 ATC 4141) raises for consideration the difference between the **cancellation** of contractual rights between vendor and purchaser on the one hand and the **purchase** by a vendor of a purchaser's interest pursuant to their contract on the other.

The taxpayer and the taypayer's employee agreed in writing for the taxpayer to sell and the employee to purchase a residential property. The price was payable over 15 years with settlement postponed until the final instalment was paid. The employee was entitled to immediate possession of the property. Clause 15 of that contract entitled the employee to notify the taxpayer in writing that the employee required the taxpayer to repurchase "the property." In due course the employee did in fact give such notice to the taxpayer. The Commissioner assessed the notice as a conveyance of property. Although the court held that the Commissioner had erred in determining the correct unencumbered value, the court agreed with the Commissioner that the latter was chargeable with *ad valorem* conveyance duty. Kennedy J was of a view that what was sold by the employee to the taxpayer was the equitable interest in the land to the value of the payments up to that point in time made by the employee to the taxpayer and found no difficulty in so holding notwithstanding the fact that "... following the sale, the equitable interest [of the employee] will merge in the vendor's interest ..." (at 4145). Pidgeon J distinguished *ex parte Miller and Grey* ((1892) 18 VLR 31) [in which a vendor and purchaser, following a transfer of relevant land, agreed to a cancellation of the contract with the vendor retaining all money paid and the purchaser re-transferring the land] on the grounds that:

> "The present case is not the case of parties, having entered into an agreement, subsequently deciding that they did not wish to proceed with it. Here the right to the purchasers to act as they did was a condition of the original contract and this fact was referred to by the learned Commissioner. There was not a return of moneys already paid, but the payment of a greater sum as determined by the

> original contract. It is clear that a purchaser of property in these circumstances, prior to his receiving a transfer, has a limited interest in the property."

The case is arguably not limited to investments containing a right in the purchaser to require the vendor to repurchase.

Commissioner for ACT Revenue v Perpetual Trustee Company (Canberra) Limited (94 ATC 4001) is an example of where the application of the principle of the non-merger of legal and equitable interests could have a different stamp duty consequence than that contended by a revenue authority. CPC held the leasehold of realty as the trustee of the T & G Trust, a unit trust. At the relevant time CPC was also the trustee of the Empire Trust, a discretionary trust, and in that capacity required all of the units in the T & G Trust. As trustee of the Empire Trust it resolved to remove itself as trustee of the T & G Trust and appointed the taxpayer in its place. The Commissioner assessed duty on the deed of appointment as if it were an agreement for the transfer of a Crown lease pursuant to section 17(1)(b) of the *Stamp Duties and Taxes Act* 1987 (ACT). The Commissioner was of the view that the legal and beneficial interests held by CPC had merged with the result that the legal interest was transferred by the deed of appointment from CPC to the taxpayer. Higgins J was of the view that there was no merger of the legal and beneficial interests:

> "In my view, the issue is, in the present case, resolved by reference to the fact that CPC held the units in question as a trustee for the beneficiaries of the [Empire Trust], a discretionary trust. That is a different capacity than that in which CPC held title to the Crown Lease in question. That was as trustee of the [T&G] Trust. On acquiring all the units in the [T&G], CPC held the property of that trust in trust for the beneficiaries of the [Empire Trust] and on the terms thereof. That, however, does not unite the legal and beneficial ownership of the lease in the same person in the same sole capacity. As trustee, CPC held the legal estate subject to and for the benefit of the beneficiaries of the Empire Trust. As beneficiary of the Empire Trust, CPC held a beneficial interest therein as trustee of the Empire Trust." [Note that the report at 94 ATC 4001 has been the subject of a clarifying memorandum (inter alia) in relation to the references to the names of the relevant trusts.]

TAXPAYER'S BILL OF RIGHTS

In *Health Insurance Commission v Peverill* (Judgment, 9 March 1994) Dawson J referred to the "familiar definition" of a tax namely: "... a compulsory exaction of money by a public authority for public purposes, enforceable by law, and ... not a payment for services rendered" (see *Lower Maitland Dairy Products Sales Adjustment Committee v Crystal Dairy Limited* ([1933] AC 168 at 175-176); *Matthews v Chicory Marketing Board (Vic)* ((1938) 60 CLR 263 at 276); *Browns Transport Pty Ltd v Kropp* ((1958) 100 CLR 117 at 129) and noted "more recent requirements" that "... a tax is not by way of penalty and that not it is arbitrary" (see *Air Caledonie International v The Commonwealth* ((1988) 165 CLR 462 at 467).

There can be few who take pleasure in paying taxes but governments are not likely to desist their imposition and "Given that the essence of an efficient tax system is central to the very existence of government, it is essential that taxpayers as citizens be assured that their rights under the tax system are inalienable in our system of government" (see *Taxpayer's Bill of Rights*, foreword by President, Mr John Tucker *Taxation in Australia*, July 1993 page 50). Perhaps one can read this statement as "... the essence of an efficient **and creditable** tax system is central to the very existence of government ..." A taxation system which pays no regard at all to taxpayer's rights may well be very efficient but it is not going to be terribly creditable. The result is that taxpayers will hold it and its officers in contempt, regard for tax obligations will increase and revenues will fall. A move towards the enshrinement in law of a taxpayer's bill of rights of the type set out by the Taxation Institute (TIA) in its submission must apply not only at federal but at state and territory level also.

Take for example some of the stamp duty cases reported over the last twelve months or so. One can find in them examples of the sorts of things that the taxpayer's bill of rights would be directed at and that litigation would be unlikely to have happened if such a bill of rights was in place and adhered to.

Right Number 1

The taxpayer should have the right to reasonable certainty under the law in respect of their liability for tax. *Carnation Australia Pty Ltd v The Commissioner of Stamp Duties (Qld)* (93 ATC 4486) can be referred to here. The court in that case savagely criticised the operation of section 54A of the *Stamp Act* 1894 (Qld). The proposition under Rule 1 is that a court would be obliged "... to disallow an assessment where liability is not freely established by the Act."

Right Number 2

The taxpayer shall have the right to a full explanation of the basis of any assessment imposing on them a liability for tax. *Defiance Fine Foods Pty Ltd v Chief Commissioner of Stamp Duties (NSW)* (93 ATC 4588) is a case in point. There a taxpayer sought particulars with respect to the failure by the Chief Commissioner to exercise his discretion under section 43A(2) of the *Stamp Duties Act* 1920 but the Chief Commissioner refused to provide the particulars. Campbell J held that the taxpayer was entitled to the particulars.

Right Number 3

The taxpayer should be entitled to equal treatment under the law and to equal treatment by the [State Revenue Offices]. Taxpayers should also be entitled to fair and courteous [State Revenue Office] treatment.

Right Number 4

The taxpayer should have the right to object and appeal against decisions made by the [State Revenue Office] either in respect of actions taken during the course of examination of their affairs or in respect of any determination of their liability to tax at any time. It is only with the recent introduction of the *Judicial Review Act* in Queensland that penalties have been open to review, a point which (technically it seems) is still not conceded. It can hardly be suggested that a penalty is an "assessment" for section 23D purposes. And does anyone seriously suggest that the case stated method of appeal is in any event a suitable medium to contest it?

Right Number 5

The cost of exercising rights of review shall be reasonable having regard to the resources of the taxpayer concerned. Taxpayers should have the right to have decisions of [State Revenue Offices] reviewed internally by the [State Revenue Office] and to have disputes with the [State Revenue Office] resolved quickly, and with at the least cost to the taxpayer. *EIE Ocean BV v Commissioner of Stamp Duties (Queensland)* (93 ATC 4280) is a report of a hearing by the Supreme Court of Queensland on an application made by an appellant seeking to have included in a proposed case stated facts which the appellant contends are essential to a proper consideration at the ultimate hearing of the matter before the Court of Appeal. Further it should not be necessary for multiple securities for costs under section 24 of the *Stamp Act* 1894 (Qld) to be paid where the same issue arises from the execution of instruments on identical terms. See also *Farmland Pty Ltd v Commissioner of Stamps (SA)* (93 ATC 4167).

Right Number 6

The taxpayer shall have the right to obtain confidential advice from any recognised advisor in respect of their taxation affairs.

Right Number 7

The taxpayer should be entitled at all times to be represented when dealing with the [State Revenue Office] and should be entitled to natural justice in respect of these dealings. One wonders whether the advisability or even the possibility of taking independent advice is mentioned by compliance officers on investigations.

Right Number 8

Taxpayers shall be entitled to exercise their legal and other rights without adverse inferences being made against them. This would obviously extend to taxpayers structuring transactions and/or documents in such a way as to lessen the overall duty bill involved.

Right Number 9

Taxpayers shall have the right to privacy in respect of their taxation affairs.

Right Number 10

Taxpayers shall be entitled to rely on advice provided to them by the [State Revenue Office]. To that end, taxpayers should have the right to be compensated for loss resulting from any actions taken against them by the [State Revenue Office] without lawful authority or cause. There is limited scope in the various pieces of stamp duty legislation entitling taxpayers to obtain binding rulings such as that contained in section 49C(7) of the *Stamp Act* 1894 (Qld). That philosophy should be pursued.

Right Number 11

There should be a taxation ombudsman who should have access to all such resources as are necessary to enable investigation resolution of all matters taxpayers may bring before his/her office. Any government committed to open and accountable government could hardly deny that right.

It is refreshing to find that the New South Wales Office of State Revenue states in its 1992-3 Annual Report that tax payers have a number of basic rights:

- "to be informed about tax obligations, how they are determined and the means by which they can be discharged;
- to be treated fairly and with impartiality by the tax administrator;
- to courteous and efficient treatment;
- to have access to speedy and fair objections procedures;
- to have consistent treatment by the tax administrator;
- there is certainty in the way tax laws are applied;
- to have reasonable privacy from the tax administrator;
- to have information about the taxpayer treated with absolute respect for its confidentiality and secrecy."

Now that list of rights covers very much the same ground as the Taxation Institute's with the exception of an important one, namely: "to consistent treatment by the tax administrator."

The community and particularly the business community can only work efficiently against a background of reasonable certainty. Legal advisers can only work efficiently against a similar backdrop — after all that is what precedent is all about. The point is that the right to consistent treatment requires:

1. Where an OSR has assessed common standard commercial documentation in a particular way for a number of years, there should be no change to that practice without giving proper advice to the commercial community and their advisers. That can be done by issuing rulings in a timely way.

   Example:

   Interchase Corporation Limited (in liquidation) v Commissioner of Stamp Duties (Qld) (93 ATC 5120) is perhaps an example of this. In that case the short question was whether an instrument indemnifying and guaranteeing a purchaser's obligation under a contract for the purchase of land was a bond or a covenant under "Mortgage, Bond, Debenture and Covenant" head of charge in the First Schedule to the *Stamp Act* 1894 (Qld). The Court of Appeal held that the instrument was not intended to operate as a deed.

2. If it is intended to depart from previous assessing practices based on a recent decision then adequate notice should be given before doing so.

   Example:

   Carnation Australia Pty Ltd v Commission of Stamp Duties (Qld) (*supra*) decided (inter alia) that trade marks cannot be said to be situated in any one particular state or territory of Australia. Is this decision going to be applied by the relevant OSR's? *Westpac Banking Corporation v Commissioner of Stamp Duties (Qld)* (93 ATC 4317) decided (inter alia) that a franchise agreement could be assessed to duty under section 56 of the Queensland Act. Are the OSR's of the various States which have analogous legislation (NSW section 71, WA section 70 and Tasmania Schedule 4A 1(g)) going to apply that decision? What is going to be the attitude to penalties if later on they decide to do so and find documents which fit the bill as a result of compliance activity in the future? It is for that reason that the fundamental right to attack the imposition of a penalty must be acknowledged by every OSR.

In Queensland, the *Legislative Standards Act* 1992 sets out the purposes of the Act to ensure that (inter alia) "Queensland legislation is of the highest standard." Section 4 defines "fundamental legislative principles" as "the principles relating to legislation that underlie a parliamentary democracy based on the rule of law." Subsection (2) states that "the principles include requiring that legislation has sufficient regard to (inter alia) rights and liberties of individuals." Subsection (3) then lists a number of points in determining whether relevant legislation does have sufficient regard to such rights and liberties. Those sentiments are laudable. Those sentiments however require the addition either in that Act or in some other of the principles suggested by the Tax Institute and embraced by the New South Wales Office of State Revenue.

A rewrite of the Queensland Act and the attention now being given by the other states to their legislation gives the perfect opportunity to each of them to adopt these principles legislatively. After all they have nothing to lose by doing so. If they do not then, either intentionally or unintentionally, taxpayers will either ignore or simply be unaware of their obligations with consequential results for state revenue.

"NEWS FROM THE NORTH"

Some recent developments affecting stamp duty in Queensland may be of interest.

Facility Letters — Debentures?

It would appear that the OSR is now of the view that agreements providing facilities whether bills or overdrafts which may or may not be availed of by a customer can still be dutiable as a "Debenture" within the "Mortgage Bond Debenture and Covenant" head of charge in the First Schedule to the Act. It would appear to be irrelevant that at the time of the execution of the relevant agreement there is no subsisting debtor-creditor relationship and even though the agreement only applies in relation to accommodation to be made available subsequent to its execution. One starts to wonder just what the requirement for an instrument to be a debenture namely "... whether commercial men and lawyers would regard it as such" (see *Commissioner of Stamp Duties (Qld) v Westpac Banking Corporation* (93 ATC 4335 at 4339); *Handevel Pty Ltd v Comptroller of Stamps (Vic)* ((1985) 157 CLR 177)) really means.

Partnership Changes — Fresh Duty?

Where A, B & C grant a security which is stamped and thereafter C leaves the partnership and B is admitted and a further new security is granted, then it would appear that the Queensland OSR is of the view that the new security cannot be stamped collateral to the original unless the new security secures only the obligations of the parties to the earlier security and not any obligations of the new partners.

Multiple Debtors — Multiple Duty?

Where A, B & C grant an all moneys mortgage and each is jointly and severally liable for all obligations secured by that mortgage, then if an advance is made to A, B & C of $100,000.00 and some time later $60,000.00 is repaid, then a further advance to A & B pursuant to the original mortgage would not get the benefit of the previous stamping on the basis that the further advance is a separate "current account."

Handevel's Case — Prime Duty?

Securities executed securing contingent obligations in relation to advances made to third parties will be assessed with prime duty notwithstanding any argument based on the decision in *Handevel Pty Ltd v Comptroller of Stamps (Vic)* ((1985) 157 CLR 177).

Transfer of Securities — Credit Available?

Although stamp duty credit on mortgages will now be available to transferees of the interest of the original mortgagee, no ruling has as yet been issued clarifying the situation.