

**CURRENT DEVELOPMENTS:
RECENT CHANGES IN STAMP DUTY LEGISLATION
VICTORIA**

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A. INTRODUCTION

There has been a marked increase in recent years in the attention being paid by Governments throughout Australia to stamp duty as a method of generating Government revenue. Whilst this attention has resulted in the introduction of some new heads of stamp duty, most efforts have been concentrated on tightening up existing heads of stamp duty to limit the circumstances in which that duty may be "avoided".

Victoria has been no stranger to this trend. Indeed, it can be said in some instances that the Government, in its zeal to cut off what it perceived as being abuses of weaknesses in the stamp duties legislation, has on occasions sought to rush amending legislation into and through Parliament before the business and legal communities have had an opportunity to comment. This has had the result that the amending legislation, whilst cutting off the perceived abuse, has also had the effect of imposing duty on a range of instruments which it was not intended be chargeable.

Several of these instances are referred to below.

It is pleasing to report, however, that the Stamps Office in Victoria has shown a willingness to take account of the comments and advice of the business community and its legal advisers in framing stamp duty legislation. This was particularly apparent in the case of the Taxation Acts (Amendment) Act 1986, which was amended substantially in its passage through Parliament, largely because of commentary provided through the Law Institute of Victoria.

It is to be hoped that this spirit of co-operation will continue and increase.

In the following discussion, we summarise some of the recent developments in Victorian stamp duty legislation which are most

commonly encountered in banking and finance transactions. They relate to stamp duty on loan securities or debentures (perhaps the head of duty closest to every banking lawyer's heart?), duty on conveyances of property and duty on transfers of marketable securities.

B. STAMP DUTY ON LOAN SECURITIES

(1) Issues of Large-Scale Corporate Debentures

The Taxation Acts (Amendment) Act 1986 (Vic) inserted new section 137MB into the Stamps Act 1958 (Vic) ("the Stamps Act"), allowing the Comptroller, on application, to exempt from duty issues by a corporation of debentures, bonds or covenants to institutional investors where:

- (i) their total face value is not less than \$10,000,000;
- (ii) the issue is made within a six month period;
- (iii) each issue consists of not less than 20 securities; and
- (iv) the face value of each security is not less than \$100,000.

Furthermore, any instrument of trust executed for the sole purpose of securing such securities will also be eligible, on application, for such an exemption from duty. However, both in the case of a debenture, bond or covenant and in the case of an instrument of trust, the exemption will only be available if the relevant instrument is not also a mortgage. Because of the definition of "mortgage" in section 137D, which includes any instrument of trust for the purpose of securing holders of debentures, a literal interpretation would cause the exemption for instruments of trust to be illusory. It seems, however, that the Stamps Office may not apply a literal interpretation in this instance.

To qualify as an institutional investor for this purpose, a person must carry on a business of buying or selling debentures, bonds or covenants or shares or prescribed interests, but may carry on other businesses as well : section 137MB(6)(e).

Victoria appears to be the only jurisdiction in Australia with such an exemption. This exemption, together with the exemption of transfers of corporate debentures from duty (discussed below) is designed to stimulate capital market transactions in Victoria. Although it seems that only a small number of issuers only have sought to take advantage of this exemption to date, we would expect that the exemption will prove to have a significant effect in the longer term in expanding the range of financing products which can be offered in the Australian market.

(2) Secondary Mortgage Market Exemptions

The Stamps (Amendment) Act 1984 (Vic) gave effect to the Victorian Government's previously announced intention to support the establishment of a secondary mortgage market in Victoria by exempting instruments associated with the operation of such a market from ad valorem stamp duty.

Similar steps have also now been taken in several other Australian jurisdictions. A significant secondary mortgage market has arisen as a result.

(3) Proposal Made in 1986 to Overcome the Decision in Handevel's Case

It was held by the High court of Australia in Handevel Pty Ltd v. Comptroller of Stamps (Vic) (1985) 16 ATR 1044 that a mortgage given to secure the obligation of a person to purchase preference shares under a put option was not a security for the "repayment of money to be ... lent, advanced or paid", and so was not chargeable with duty as a mortgage.

Clause 24 of the Taxation Acts (Amendment) Bill 1986 proposed the insertion into the Stamps Act of a new section 137D(1A), which was to provide that an arrangement in writing securing the payment to a holder of redeemable preference shares of an amount equal to the aggregate of the amount subscribed for those shares and any premium payable on redemption of those shares is deemed to be a mortgage under which those amounts are advanced or lent.

A copy of the Clause is attached to this Paper as Appendix 1.

Following representations made to the Stamps Office expressing concern at the breadth of this Clause (and in particular of the expression "arrangement in writing", which appears to extend beyond mortgage securities to include, amongst other things, guarantees under hand which would not normally be chargeable with duty), this Clause was deleted from the Bill during its passage through Parliament.

(4) Proposals Made in 1982 to Charge Unlimited Securities on each Advance Made

Much attention has been focused recently in New South Wales on the amendments effected by the Stamp Duties (Further Amendment) Act 1986 (NSW) to the loan security provisions of the stamp Duties Act 1920 (NSW) and, in particular, to the proposal that an unlimited loan security be chargeable with duty on the amount of each advance made under the security, whether or not the total amount outstanding at the time of any advance exceeds the amount to which the security is stamped. As a result, the Commissioner for Stamp Duties in New South Wales has issued a series of Practice Notes, reversing the effect of those amendments, pending the introduction of appropriate reversing legislation in the Autumn 1987 session of Parliament.

It is interesting to note that a similar amendment to the Stamps Act in Victoria was proposed in 1983 by Clause 19(3) of the Stamps (Further Amendment) Bill 1983 (Vic). A copy of the Clause is attached to this Paper as Appendix 2.

That Clause proposed the amendment of section 137F of the Stamps Act to charge an unlimited security with ad valorem duty on each amount lent or advanced. Limited securities, however, were to continue to be chargeable only up to the amount of their limit, irrespective of the amounts which may have been lent or advanced from time to time.

Following representations made by the business and legal communities in Victoria, that Clause was deleted from the Bill during its passage through Parliament.

Officers of the Stamps Office have indicated that there is no current proposal to re-introduce such an amendment in Victoria.

C. STAMP DUTY ON CONVEYANCES

(1) Dispositions of Beneficial Interests in Real Property

The Stamps Act in Victoria, in contrast to the stamp duties legislation in most other Australian jurisdictions, imposes duty at the conveyance rates only on actual conveyances of real property, and not on agreements to convey real property. As a result of this, it has in the past been possible to avoid the need to pay conveyance duty by registering a nominee as proprietor of real property and by dealing in the beneficial title to the property only.

To counter this practice, the Stamps and Business Franchise (Tobacco) (Amendment) Act 1985 (Vic) introduced new s.64A into the Stamps Act. That section imposes, broadly, an obligation to furnish a return to the Comptroller, and to pay stamp duty on the return as if it were a transfer of the subject land, in a number of situations where there is a change in the beneficial ownership of land but no change in the registered proprietor.

A copy of that section is attached to this Paper as Appendix 3.

(2) "Clayton's Contracts"

As noted above, most Australian jurisdictions other than Victoria impose conveyance duty on agreements to convey real property. Most other jurisdictions also impose conveyance duty on conveyances of, or agreements to convey, other forms of property, such as choses in action and, in certain cases, chattels.

In order to avoid that duty, a practice has developed in those other jurisdictions of transferring at least the beneficial title to property without creating a dutiable instrument, by having the transferor execute a written offer to sell (which written offer

ought to be sufficient to satisfy the Statute of Frauds), with the transferee accepting that offer not in writing, but either orally or by acts of performance.

Amending legislation has recently been introduced or proposed to counter this mechanism, at least in part, in New South Wales, Queensland and Western Australia.

In announcing the proposed amendments in New South Wales, the New South Wales Minister for Finance suggested that he had arranged a meeting with his counterpart in Victoria with a view to launching a concerted campaign against this practice.

It is not at all clear, however, whether such a proposal is either necessary or desirable in Victoria. As the Stamps Act (subject to the operation of section 64A as discussed above) charges conveyance duty only on actual conveyances of real property, it is not necessary in Victoria in order to avoid attracting a liability to conveyance stamp duty to enter into agreements by way of oral acceptance of a written offer. Accordingly, it is not clear what operation (if any) such an amendment could have in Victoria, other than, perhaps, in relation to leases.

Senior officers at the Victorian Stamps Office have indicated that there is no current proposal to introduce such an amendment in Victoria.

(3) Contract Splitting

The Taxation Acts (Amendment) Act 1986 (Vic) inserted a replacement section 68 into the Stamps Act, providing that the Comptroller, in calculating the amount of duty payable on a conveyance, may aggregate several instruments of conveyance of real property, where, broadly, those instruments arise from a single agreement to convey real property, or together form, or arise from, substantially one transaction or series of transactions.

This provision is designed to overcome the well-known practice of reducing the amount of stamp duty payable on a conveyance by splitting the conveyance into a number of separate conveyances (to take advantage of the sliding scale of conveyance rates of duty).

A copy of the Section is attached to this Paper as Appendix 4.

An earlier unsuccessful attempt had been made in 1985 to introduce similar amendment into the Stamps Act.

Similar provisions have now been included in the stamp duties legislation in most Australian jurisdictions.

D. TRANSFERS OF MARKETABLE SECURITIES

(1) Transfers of Corporate Debentures

In conjunction with the amendments noted in Item B.(1) above, the Taxation Acts (Amendment) Act 1986 (Vic) has inserted a new exemption 3(b) from duty on transfers of marketable securities. All transfers of marketable securities are now exempted from duty, other than transfers of shares in a corporation or of rights or interests (however described) of a beneficiary under a unit trust scheme.

The insertion of this new exemption is designed to stimulate capital market transactions in Victoria, and it seems reasonable to expect that it will indeed have this effect.

It should be noted, however, that the new exemption renders redundant many of the other, pre-existing exemptions from duty on transfers of marketable securities.

(2) Proposal in 1986 to Charge Transfers of Shares in Corporations holding Real Estate at Conveyance Rates

Clause 12 of the Taxation Acts (Amendment) Bill 1986 (Vic) proposed the insertion into the Stamps Act of a new section 59B, which would have charged transfers of marketable securities of corporations owning real property at the conveyance rate of duty (payable on the full unencumbered value of the real property vested in the corporation), if:

- (i) upon that transfer, the transferee were to become "entitled" to more than 50% of the shares of the corporation; and
- (ii) on the date of the transfer, the unencumbered value of the real property vested in the corporation was equal to 80% or more of the value of the gross tangible assets of the corporation.

This proposed amendment was intended to strike at the increasingly common practice of holding land in special purpose companies, the shares in which can be transferred instead of the land.

A copy of the Clause is attached to this Paper as Appendix 5.

After the Bill was introduced into Parliament, representations were made to the Stamps Office, expressing concern at the breadth of operation of this Clause and at the circumstances in which it would apply. Following those representations, the Clause was removed from the Bill and was not enacted.

Senior officers at the Stamps Office have indicated it is unlikely that any further attempt will be made in the coming

Session of Parliament to introduce such an amendment. It seems, however, that this practice is one of substantial concern to the Victorian Comptroller and her counterparts in other jurisdictions, and could be one which becomes the subject of uniform legislation in all Australian jurisdictions.

In this context, it is interesting to note that similar proposed amendments have already been announced in Western Australia. The Minister for Budget Management in that State, by press release issued on 13th January, 1987, indicated that amending legislation would be introduced with effect from that date.

It seems from the press release that the Western Australian legislation is likely to overcome some of the deficiencies of the withdrawn Clause 12 of the Victorian Bill (for example, it seems that the Western Australian measures will not apply to transfers of shares in listed public companies). The Minister's statement, however, is unclear in many other respects, and is a prime example of the unsatisfactory practice of "legislation by press release", which leads to uncertainty in the business community and makes it impossible for lawyers - even banking lawyers - to advise what the liability of an instrument to duty will be.

Appendix 1

Mortgage to include certain securities.

24. After section 137D(1) of the Principal Act insert -

"(1A) For the purposes of sub-section (1), an arrangement in writing relating to redeemable preference shares under which payment to a holder of the shares of an amount equal to the amount subscribed in respect of the issue of the shares, or the sum of that amount and the amount of any premium payable on redemption of those shares, is secured (whether or not payment of any other amount is also secured) shall be deemed to be a mortgage under which amounts to which the arrangement applies are advanced or lent."

Appendix 2

(3) For sub-sections (1) and (2) of section 137F of the Principal Act there shall be substituted the following sub-section:

"137F.(1) A security is to be charged -

- (a) where the total amount secured or to be ultimately recoverable is in any way limited - with the same duty as is payable on a security for that total amount; and

- (b) in any other case - on each amount that is lent, advanced, foreborne to be paid or becomes due upon an account current and is secured by the security -
 - (i) with the same duty as is payable on a security for that amount; or
 - (ii) with the same duty as is payable on a security for the total amount that, immediately after that amount was lent, advanced, foreborne to be paid or became due, is the total of the amounts that have been lent, advanced, foreborne to be paid or have become due under the security, less the total amount of duty that has been paid on the security -

whichever is the greater."

Appendix 3

Statement on transfer to trustee as beneficial owner.

64A.(1) Where -

- (a) real property is vested in a person as trustee; and
- (b) the beneficial interest in the real property is transferred to that person -

that person shall not later than 14 days after the transfer -

- (c) furnish to the Comptroller of Stamps a statement in the prescribed form accompanied by a statutory declaration setting out the prescribed particulars of the transfer; and
- (d) pay to the Comptroller of Stamps as stamp duty on the statement a sum equal to the amount of stamp duty that would have been payable if an instrument for the conveyance of the real property to the person as beneficial owner had been executed.

(2) Where -

- (a) real property is vested in a person; and
- (b) the person enters into an agreement for the disposal of the real property to another person as trustee; and
- (c) before any instrument for the conveyance of the real property to the other person is executed, the first-mentioned person is appointed trustee in place of the other person; and

- (d) if an instrument for the conveyance of the real property to the other person had been executed it would have been dutiable -

the first-mentioned person shall, not later than 14 days after being appointed trustee in place of the other person -

- (e) furnish to the Comptroller of Stamps a statement in the prescribed form accompanied by a statutory declaration setting out the prescribed particulars of the agreement for the disposal of the real property; and
- (f) pay to the Comptroller of Stamps as stamp duty on the statement a sum equal to the amount of stamp duty that would have been payable if an instrument for the conveyance of the real property to the other person had been executed.

(3) Where -

- (a) real property is vested in a person; and
- (b) that person is a trustee of a trust; and
- (c) the real property becomes an asset of the trust -

the person shall, not later than 14 days after the real property becomes an asset of the trust -

- (d) furnish to the Comptroller of Stamps a statement in the prescribed form accompanied by a statutory declaration setting out the prescribed particulars; and
- (e) pay to the Comptroller of Stamps as stamp duty on the statement a sum equal to the amount of stamp duty that would have been payable if the real property had been conveyed by an instrument of conveyance to the person as trustee of the trust by another person.

(4) The payment of the duty on a statement under sub-section (1), (2) or (3) shall be denoted on the statement by an impressed stamp.

Appendix 4

68.(1) Subject to sub-sections (3), (4) and (6), if there are two or more instruments of conveyance of real property -

- (a) that arise from a single agreement (whenever made) to convey real property; or
- (b) that together form, or arise from, substantially one transaction or one series of transactions -

the instruments are chargeable with **ad valorem** duty -

- (c) calculated on the sum of the amounts by reference to which **ad valorem** duty on each of the instruments would, but for this section, have been calculated; and
- (d) apportioned between the instruments as determined by the Comptroller of Stamps.

(2) If a person conveys real property by two or more instruments of conveyance that were, or appear to have been, executed within 12 months of each other to the same person (whether alone or with the same or different persons), it shall be presumed, unless the Comptroller of Stamps is satisfied to the contrary, that the instruments arose from one transaction or one series of transactions.

(3) Sub-section (1) does not apply to two or more instruments of conveyance of real property if -

- (a) where interests in the real property are conveyed by separate instruments to different transferees - the Comptroller of Stamps is satisfied -
 - (i) that there is not an arrangement or understanding between any of those transferees under which the interests are to be used otherwise than separately and independently of each other; and
 - (ii) that the instruments arise from two or more agreements to convey real property made independently of each other; and
 - (iii) none of those transferees entered into any of those agreements conditionally on the making of any other of those agreements; or
- (b) the real property is conveyed in separate parcels by separate instruments.

(4) For the purposes of calculating the **ad valorem** duty on two or more instruments of conveyance of real property to which sub-section (1) applies, an instrument shall be disregarded if the transferee under it was not a party to any arrangement or understanding under which interests in the real property were to be used otherwise than separately and independently from each other.

(5) For the purposes of sub-section (3), the Comptroller of Stamps shall be deemed to be satisfied that the circumstances referred to in sub-section (3)(a)(i), (ii) and (iii) apply in respect of an instrument of conveyance if the transferee under that instrument gives to the Comptroller a statutory declaration declaring that those circumstances apply.

(6) If, under sub-section (1), two or more instruments of conveyance of real property are chargeable with ad valorem duty and there is a period of more than 12 months between the dates when the first and last of those instruments becomes so chargeable, sub-section (1) applies so as to make chargeable with ad valorem duty calculated in accordance with sub-section (1) -

- (a) the instruments that become so chargeable within the period of 12 months after the first instrument becomes so chargeable; and
- (b) the instruments that become so chargeable in each succeeding period of 12 months.

(7) The transferee under an instrument of conveyance in respect of which sub-section (1) applies must cause to be disclosed in writing to the Comptroller of Stamps, at or before the time at which the instrument is submitted to the Comptroller for stamping, details known to the transferee of the total consideration given or to be given and the whole of the real property included or to be included in the transaction or series of transactions in connexion with which the instrument is executed.

Penalty: 10 penalty units.

Appendix 5

New section 59B inserted.

12. After section 59A of the Principal Act insert -

Conveyance duty payable on certain transfers.

"59B.(1) If -

- (a) upon the transfer of marketable securities of a corporation (other than a corporation that is listed on the official list of a stock exchange in Australia) the transferee becomes entitled to more than 50 per centum of the shares of the corporation; and
- (b) on the date of the transfer -
 - (i) there was vested in the corporation any real property in Victoria or any estate or interest in real property in Victoria; and
 - (ii) the sum of the unencumbered value of real property (wherever situated) and any estate or interest in real property (wherever situated) vested in the corporation was equal to 80 per centum or more of

the value of the gross assets of the corporation;
and

- (c) the duty payable on the transfer under Heading IVA in the Third Schedule is less than the duty that would be payable if -
 - (i) the transfer were a conveyance or transfer of the real property in Victoria, or estate or interest in real property in Victoria, vested in the corporation; and
 - (ii) the agreement (if any) to transfer the marketable securities were an agreement to sell that real property or estate or interest for a consideration equal to the value, at the date of the agreement, of that property or interest -

duty is payable on the transfer as if it were such a conveyance or transfer.

(2) In determining the value of the gross assets of a corporation for the purposes of sub-section (1), regard shall not be had to particular assets of the corporation if the Comptroller of Stamps is satisfied that the principal or dominant reason why those assets became assets of the corporation was to reduce the ratio of the value of real property, or an estate or interest in real property to, the value of the gross assets of the corporation.

(3) Sub-section (1) does not apply in respect of a transfer of a marketable security that is a share in a service company within the meaning of section 4 of the Transfer of Land Act 1958.

(4) The duty on a transfer of a marketable security to which sub-section (1) applies -

- (a) is payable on the value of the real property to which the transfer applies by reason of sub-section (1) as determined in accordance with subdivision (6) of Division 3 of Part II and Heading VI in the Third Schedule; and
- (b) shall be denoted by an impressed stamp.

(5) For the purposes of sub-section (1), the shares to which a transferee is entitled shall be determined in the same manner as they would be determined for the purposes of the Companies (Acquisition of Shares) (Victoria) Code.

(6) If, on the date of the transfer of a marketable security to which sub-section (1) applies, the marketable security is registered on a register in a State, Territory or country in respect of which a proclamation under section 60G is in force -

- (a) the duty payable under this section in respect of the transfer shall be reduced by the amount of duty paid or payable in respect of the transfer in that State, Territory or country; and
 - (b) if the amount of duty so paid or payable equals or exceeds the duty payable under this section no duty is payable under this section.
- (7) Section 55A(2) does not apply to a transfer of marketable securities to which this section applies.