

CURRENT DEVELOPMENTS:
RECENT CHANGES IN STAMP DUTY LEGISLATION
PROPOSED NSW STAMP DUTY CHANGES

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Actually I cannot speak about the proposed changes to any great degree. It has been the source of a lot of publicity I guess in the papers for quite some time. Those of you who are unfamiliar with this I think the Minister's press release on the 21st of November 1986 probably gives some of us an idea. He has referred to it as anti-social behaviour that people should avoid stamp duty and what he describes as a highly artificial form of verbal contract, a Clayton's contract, together with the Darwin shuffle, and pointed out specifically Bond Corporation where they paid \$430 stamp duty instead of some tens of millions on some hotel purchases. And he also pointed out Elders-IXL, that they transferred more than \$60,000,000 worth of shares using the Darwin shuffle to avoid \$360,000 stamp duty in New South Wales. And I guess the rest of the thrust is the Minister said that as of the 21st of November 1986 a campaign will be waged to protect State revenues from such anti-social attack.

Legislation has been discussed. Discussion papers went to the various industry groups including the Law Society, the ABA, the Finance Conference to name a few and answers were given. The state of the legislation right now is that it should be law by the end of next week. I have not seen the drafts but the drafts were submitted to some of the industry groups including the Law Society - I don't know what information the Law Society gave to members - I know it certainly was not on the Caveat that turned up in my letter box today. I guess we all wait with baited breath as to simply how it will be framed.

I have always found interesting that really the whole Clayton's contract idea was based, perhaps it is being a little bit simplistic, on the old Carlill v. Carbolic Smoke Ball Co. case where we had a written offer that set out all the terms and conditions and then rather than an oral acceptance an acceptance by performance such as in drawing down moneys or whatever. It was so simple I don't know really if there is any case law on enforcement there. It was certainly very simply done but unfortunately time will tell. The Stamp Duties Office anyway

believes that it is going to be a thing of the past as a vehicle for avoidance.

One thing I might highlight in part of the Minister's statement is he did point out that there would be criminal sanctions against people involved in it which of course would point to practitioners. In some of the other talks we heard today the question of professional responsibility was raised, now we are also looking at some sort of criminal responsibility. Perhaps against a practitioner that is party to it, there is going to be in the legislation some form of criminal sanction. I don't know what it is but obviously it is quite dangerous.

A question actually turned up on my desk - what is the stamp duty on a professional indemnity policy issued by the Law Society and the answer is fifteen cents. I don't know why they wanted to know, it is topical.

Our recent amendments which are probably of interest to most of you especially people who have read the April edition of the Banking Law Bulletin. Remember it is in the loan security area. We have not really what is described as deplorable ill begotten legislation the effect of which has to be tempered by practice notes.

What in fact happened for a period of six months there was consultation with a solicitor from the industry at a fairly high level in an attempt to straighten out the loan security provisions. Everything looked fine until the bill hit the house and then I guess something else hit the fan. Because the industry was very upset. I can't really comment on the thought that it is deplorable that legislation has to be administered by practice notes.

I think a recent article in the Australian Law Review has made that quite clear in the realm of Federal taxation area. But really it was a response by the department. The enormity of it didn't hit during the consultation process but it came out during the parliamentary process. It did become law. It was tempered I guess by practice notes and the changes will be law hopefully also at the end of next week.

What was cleaned up in that, was the major problem Australia wide in foreign securities where we attempted under our old law (the existing s.29) to find some matter or thing to be done interstate. You are probably all aware of the various Ansett cases in Victoria where mere registration was the issue. We have gone away from that and provided our own nexus in law in loan securities in looking at property in New South Wales and charging that.

We have also got a set-off for duty paid in other states in the case of ex-NSW collaterals as obviously at times we will have a local prime security for that or vice versa. Hopefully we could

have the ideal situation which will never occur where all securities are in one state. We have changed our definitions considerably. Bond or covenant went out as you are probably aware, so strictly we are charging duty on mortgages and debentures. We have defined "debenture" in the Act which is really a follow-on from Handevel's case in Victoria and hopefully things are more certain. Time will tell on that one.

In moving away from loan securities, in New South Wales, there was always an exemption in agreements for sale, an exemption for goods, wares and merchandise. That provision has been removed, strictly so that in the sale of business area stamp duty is paid on the whole lot. There is power to prescribe. Primary producers are exempt on their goods, wares and merchandise. A strict sale of goods, wares and merchandise only, remains basically exempt except if it is under seal it is \$10. But there are strict anti-avoidance provisions in that also, whereas before the only document that was often seen by the Stamps Office might be an assignment or transfer of lease the law now provides that ad valorem duty can in fact be put on to that and as part of the anti-avoidance measures any person involved in it may be fined. Which once again points to the practitioner. It is similar to other anti-avoidance measures introduced in I think '82 and over the years we have always tried to point to the practitioner. I don't know if we have ever got one - as far as I know we haven't.

One of the other very important issues is objections and appeals. Previously under the New South Wales legislation your only hope was to request the Commissioner to state a case for the opinion of the Supreme Court. I was involved in some research in the early stages and it became quite clear there that it was missing an intermediate step. If an assessor of stamp duty simply made a mistake it would, if it was brought to the attention of someone higher up, be remedied. The legislation, however, provided that you should pay the duty, request the Commissioner to state a case and then when the Commissioner's face came out with egg all over it you got your money back and everything was done. Well that was obviously unsatisfactory.

There is now a provision for lodgment of an objection. I know it is an appeal to Caesar against Caesar's decision but the point is someone is willing to look at it and decide. If your objection is overruled of course well be off to the Supreme Court anyway. The Commissioner is now allowed to extend the time. Previously the Commissioner could not extend the time for lodgment of a request for a stated case which meant that if you were one day late the Commissioner even if he wished to go ahead could not.

The only other tip I might give is something that has come up quite often in the enforceability of documents and admissibility of documents in evidence. If you look at the second schedule of the Act in most cases it tells you who the party primarily liable is. I might suggest that even if your client is not the party primarily liable that you still have a clause in you document pointing out who will pay the stamp duty.

A recent matter I was involved in on the periphery was where the party primarily liable had simply not stamped the document because he did not want it admitted in evidence. The only way that could be admitted in evidence was if the plaintiff's solicitor paid the stamp duty. As there was no provision in that document for payment of stamp duty by anyone it would have meant that the party not primarily liable would have paid the stamp duty which was quite substantial and not be able to recover it from the party primarily liable. So I would suggest don't necessarily rely on the Stamp Duties Act, if you have to pay stamp duty for admissibility you would also like your client to be able to recover that money from the other side.