CURRENT DEVELOPMENTS: RECENT CHANGES IN STAMP DUTY LEGISLATION QUEENSLAND

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Bob Sinclair mentioned that New South Wales is perhaps one of the first States in which the value and consideration for goods, livestock etc is to be included in a conveyance or a transfer of a business. Well, next year will mark the 20th anniversary since we have had that in Queensland and it is nice to see that New South Wales is finally catching up with Queensland.

What I really want to do in this paper Mr Chairman is a couple of things. One is to mention some of the amendments over the last twelve months and the other is to highlight some of the trends in stamp duty legislation, at least as we have it in Queensland. From what I hear, it perhaps is true to say that some of these trends are evident in other states in Australia.

It seems to me that, when we talk in terms of "recent changes" with respect to stamp duty legislation, one is really concerned with what has happened over the last few months or so and not so much with amendments last year. But I would like to mention some of the 1986 amendments to the Queensland Act because they provide more examples of current trends in stamp duty legislation, at least as we see them in Queensland. I am aware that some of the amendments were mentioned at the Association's conference last year; there really haven't been many changes of special interest to the banking lawyer.

The Queensland Stamp Act has, over the last twelve months, been amended in a number of important ways, perhaps the most significant of which has been to negate in some circumstances -

> firstly, the tradition of "written offer/oral acceptance - therefore no duty", a tradition which we have all lived with for a long time; and

> secondly, the tradition of "no instrument - therefore no duty" with respect to transactions affecting land.

STAMP ACT AMENDMENT ACT 1986

This Act was concerned with three areas; each provides an example of the current trends I will refer to.

A. Amendments to Public Unit Trust Scheme Documents - Section 61B

In a few words, where there is an amendment to a trust deed for a "public unit trust scheme" (meaning a scheme regulated by an approved deed under Division 6 of Part IV of the Companies Code), it is quite conceivable that the instrument could effect a resettlement. This section relieves that problem but only if you can <u>satisfy</u> the Commissioner (inter alia) that the instrument is made <u>"for the sole purpose of"</u> doing a number of things; whatever that expression means, I am not too sure but it seems to me that intent is somehow wrapped up with the word "purpose". The obvious difficulty is that, if that is right, then whose intent does one have to have regard to in order to satisfy the Commissioner that the various requirements have been met.

The obvious weakness of the new section is that, if you are proceeding from a "private unit trust" (if I may use that expression) over to a "public unit trust scheme" and you have to effect amendments to comply with the Code, then the section doesn't apply and you could be still in the situation of facing a resettlement. It would have been so simple to extend the section to provide that its relieving provisions would extend to those trusts which are "going public".

B. Security Documentation

Apparently there were perceptions in Government of avoidance practices in some lending transactions. So, amendments were made.

Loan Applications and Offers - Section 67A

This new section was inserted to counter (according to the Second Reading speech) an avoidance practice which:

> "... involves the borrower executing an application for a loan which contains all the terms and conditions of the loan with the lender accepting by providing the loan moneys rather than by executing the application which would, if executed, have been a dutiable security document. The lender has no less security but stamp duty is avoided."

Accordingly, under sub-section (2):

> "Where an instrument is executed either within or outside Queensland for the purpose of making an application for a loan or offering to make a loan and:

(a) any of the negotiations in respect of the loan take place in Queensland;

(b) any of the repayments in respect of the loan are proposed or arranged to be made in Queensland;

(c) the loan moneys are obtained for the purpose of being expended or used wholly or in part in Queensland; or

(d) the application or offer is made by or on behalf of a person resident in Queensland or a company incorporated in Queensland,

upon a loan being made pursuant to the application or offer, the instrument, if the application or offer is not accepted in writing, shall be chargeable with duty as if the application or offer were accepted by execution of the instrument at the time at which the loan was made."

A lot of things can be said about this new section:

1. The definition of "loan" is wide and purports to extend to "a transaction (by whatever its terms or form) which in substance effects a loan of money": what does that mean? Does it extend to bill facilities? Probably not.

2. The section purports to have an extra-territorial operation but on many views the connecting factors with Queensland are flimsy; is the section constitutionally valid (and in this regard, what is the true effect of the Australia Acts)? Possibly not.

3. The effect of this section is to deem the application or offer to be executed as an instrument when the loan is made and not before; surely, therefore, you look at the document as to what it is when the loan is made assuming it to be therefore executed; may it be therefore that it only attracts nominal duty under the "Agreement Under Hand" head of charge, could it (because of the section) be assessed to conveyance duty or some other head of charge and not just as a loan document? Probably yes.

Caveats - Section 66A

This new section was put in essentially to complement section 67A.

In the Second Reading speech, it was said:

"Another area where the possibility for stamp duty avoidance has been identified relates to the use of caveats under the Real Property Act. There is the possibility that such caveats may assist in duty avoidance or evasion, particularly in respect of mortgage duty, and it is proposed that the avenue for avoidance be closed."

Accordingly, a caveat claiming an estate or interest pursuant to mortgages or deposit of title deeds is chargeable with duty of the same amount as chargeable on a mortgage or charge for a similar sum of money.

Definition of "Mortgage" - Section 65(3) and Section 66

These amendments were made (according to the Second Reading speech):

> "... to ensure that a charge and an agreement for the deposit of title deeds are both dutiable as a mortgage, further to certain doubts being expressed in these regards."

C. "Prescribed Short Term Debenture" - Section 68B

Prior to this amendment, debentures which were at call (or for a fixed period and then at call) couldn't qualify for the exemption under this section even though their effective terms may not exceed six months. Accordingly, where duty has been paid in respect of a debenture the term of which was not definite or certain, then the duty can be refunded where the actual realised term of the debenture does not exceed six months and the Commissioner is satisfied that it is a genuine short term debenture. Again, we have this concept of the Commissioner being satisfied about things.

In Summary

1. Under section 61B and section 68B: the Commissioner has to be satisfied about something.

2. Under section 67A: the transaction is the focal point and not the instruments used.

STAMP ACT AMENDMENT ACT 1987

The trends I mentioned find further examples in this Act. I will come back to that aspect in a moment - for now, I should mention some of the amendments generally.

This Act was assented to on the 10th April this year. Perhaps the most interesting amendment is the insertion of new section 54AB, to which I will come to in a short moment.

Concessions

These can be shortly dealt with -

(a) there is now a total exemption from conveyance duty for first homes valued at $60,000 or less;

(b) an exemption from agreement duty has been granted for consignment notes when in a standard form;

(c) there is an exemption for policies of insurance covering the physical loss or damage to goods in transit;

(d) there is an extension of the exemption period during which brokers may hold stock in their own account free of duty from 2 to 10 days;

(e) there is an expansion of the current exemption from credit duty for promissory notes discounted on the short term money market.

The interesting amendments, I suppose, are those directed towards perceived avoidance practices.

"Clayton's Contracts" - Section 54AB

A new section 54AB has been introduced. This new section applies to:

(a) a transaction (other than a section 54A transaction) which results in a person obtaining an estate or interest in any real property in Queensland or any land in Queensland held under a lease from the Crown or any livestock or moveable chattels acquired in the same transaction whereby he acquired that estate or interest in real property or leasehold estate;

(b) a transaction which results in a person obtaining a tenancy or occupancy of land, tenements or hereditaments in Queensland in respect of which there is a written offer.

Where this section applies and the transaction is not effected by an instrument chargeable under either paragraph (4) of the "Conveyance or Transfer" Head of Charge or under the "Lease or Agreement for Lease" Head of Charge in the First Schedule, then a party to the transaction is required, where he would have been liable to pay duty had the transaction been effected by an instrument chargeable with duty and had the instrument been executed, to prepare and lodge with the Commissioner a statement in the prescribed form much in the same way as section 54A applies presently.

In introducing the amendment it was said that the measure is:

> "... to counter the possibility for duty avoidance practices ... For example, in respect of conveyance duty, in the case of an armslength transaction, where property is already held pursuant to a trust, the current beneficial owner might make a written offer (not executed by the other party) that on the payment of certain monies he will instruct the trustee to hold the land in trust for that other person."

Where the trustee is a $2 company, the purchaser of the property could then acquire the shares in the trustee company for nominal duty and gain full control over the property without the payment of proper duty.

Sections 31H and 31I - "Darwin Shuffle"

Amendments to these sections have been introduced:

> "... to counter possible further variations to the share transfer duty avoidance scheme known as the 'Darwin Shuffle'."

The scheme has a number of variations but largely it involves transfers of shares in Queensland companies being arranged so that they attract duty in the Northern Territory where a lower share duty rate applies.

To overcome this avoidance Queensland companies were required to pay duty on entries on branch registers in jurisdictions which were not proclaimed. Those jurisdictions imposing duty corresponding to Queensland duty are proclaimed.

Possibilities for further variations to the avoidance scheme have now come to attention.

One involves the transfer being entered on the branch register in a jurisdiction which is proclaimed but with the transaction being arranged so that it is not dutiable in that jurisdiction.

For example, persons wishing to transfer Queensland incorporated company shares could move them to the Darwin branch register and execute the transfer in Darwin and then move the shares to the Perth register for entry. The share transfer would not be dutiable in Queensland or Western Australia because it was not executed in either place and was not at time of execution on a register in either of those jurisdictions. The anti-avoidance branch register provisions would not catch the transfer as the entry is not made on the Darwin register.

The other possible variation would involve a Queensland incorporated company shifting its principal register to a non-proclaimed jurisdiction thereby avoiding our anti-avoidance provisions which apply in respect of branch registers only.

To overcome possibilities for avoidance it is proposed, in addition to the existing provisions, to make dutiable, entries to Queensland company branch and principal registers in proclaimed jurisdictions which are not chargeable with duty in those jurisdictions and entries to principal registers of Queensland companies in non-proclaimed jurisdictions.

At the same time, where duty applies under the anti-avoidance provisions, it is proposed that total duty on the transaction (including in another jurisdiction) not exceed the duty imposed on such transactions under the Queensland Act."

Section 49C - "Non-Genuine Cases"

Amendments have been made to section 49C. For those unfamiliar with that section, it exempts transfers of shares and property from duty on company amalgamations and reconstructions. What one can only do in New South Wales by grace and favour, you can do in Queensland by force of statute.

The amendments were introduced:

> "To counter possible avoidance [and] to tighten the criteria under which the concession applies by:
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> (i) strengthening the association test by defining ownership as to 90 per cent in terms of owning 90 per cent of the shares which carry the right to unlimited participation in the distribution of income and capital and which have voting control (i.e. being in a position to cast 90 per cent or more of the maximum votes at a general meeting) rather than simply in terms of owning 90 per cent of issued share capital, as at present, which would include non-voting and other shares;
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> (ii) extending from three to five years the period in which the transferor and the transferee must remain associated after the transfer;
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> (iii) increasing from 6 per cent to 20 per cent the penalty interest on duty avoided when the concession is abused and, on detection, withdrawn;
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> (iv) providing that where, in allowing the concession, matters the Commissioner was satisfied would not occur, do occur, such is to be notified to the Commissioner within 28 days;
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> (v) in addition to the existing criteria where the reconstruction involves a new holding company being established to take over one or more existing companies, in order to ensure that only genuine reconstructions qualify, providing that each existing company shareholder must receive consideration equal to the value of the shares acquired from him."

We have in those two amending Acts seen some of the inroads into traditional concepts of stamp duty; one can see those inroads or trends developing particularly since the late 70's although of course Queensland has never been slow to look to transactions rather than instruments for duty, e.g. section 54A which came in in 1968 and section 54(4) which goes back many years.

These trends in the Queensland Act include:

1. **Greater emphasis on transactions:** Stamp duty as a tax on instruments is slowly but surely giving way to a stamp duty on transactions; to an extent of course stamp duty as a tax on transactions has in one sense been always true, since instruments are simply in document form what parties have done in a particular dealing; but the trend which I'm talking about is to totally ignore whether there has been anything in writing, to concentrate on the commercial transactions effected between the parties, to require them to reduce some into writing and then, hey presto, it is subjected to duty; examples are sections 35, 42A, 42B, 54A, 54AB, 54(4) - there are many more though.

   But the difficulty is that, unless those particular transactions are defined with clarity and precision, practitioners and businessmen generally are going to have difficulty knowing exactly where their obligations start and finish; the best example of that is section 54A dealing with acquisitions of businesses.

2. **Relevance of intent:** purpose and intent are becoming important; we see this in a number of Queensland concessions -

   on the appointment of a new trustee - "Conveyance or Transfer";

   on amalgamations and reconstructions - section 49C;

   the principal place of residence - section 55A;

   family rural properties - section 55B;

   family businesses - section 55C.

   One of the interesting examples is section 81 (the general anti-avoidance provision like the old section 260 of the Income Tax Assessment Act) - an arrangement (and not simply documents) which has or purports to have the purpose of evading or avoiding the Act is absolutely void. The introduction of this section into the Act in 1959 perhaps can be said to be somewhat symbolic of later directions.

   But the exasperating thing is that we're not told in some cases whose intent is relevant and how that intent is to be manifested; the best example of that is in the tests for exemption on conveyances executed on the appointment or removal of trustees.

3. **Relevance of Commissioner's opinion:** we've seen this again in these amendments last year and this year; the Commissioner has to be satisfied about something. The examples mentioned above apply here also. One of the intriguing sections (introduced in 1981) is section 22A -

the Commissioner is empowered to alter any statement, return or other document so that, in his opinion, it satisfies the requirements of the Act and may assess the duty which in his opinion ought to be charged on that statement, return or other document.

But if we have to live with trying to satisfy the Commissioner about something then, so far as Queensland is concerned, the old case stated method of appeal under section 24 is hardly a proper vehicle for resolving disputes.

4. **Extra-territorial operation:** No doubt it is legitimate for a State to regulate actions affecting it and property within its territory.

But the urge to tax things going on out of the State affecting the State even in a slight way is hazardous in a federal system and is almost at the ridiculous stage. We've seen that under section 67A; it purports to apply where a loan application is deemed to have been executed when the loan is made and the section purports to subject to Queensland duty not just when a loan is made in Queensland but when "any of the negotiations in respect of the loan take place in Queensland"; I've never quite been able to work out where you have someone in Brisbane talking to someone in New South Wales whether they can be said to have been negotiating in Queensland; do you have to have both people in Queensland?

Now we all know the usual tests to apply when we approach a section which appears to have extra-territorial effect. Ignoring for the moment the question as to whether a section has an extra-territorial intent, the question of constitutional validity has up until recently been able to be judged by reasonably clear principles even though the application is often an interesting exercise. But the difficulty is, just what is now the effect of the Australia Acts section 2 which declares that State Parliament's powers include power "... to make laws for the peace, order and good government of that State that have extra-territorial operation." A State Parliament is equated with the Parliament of the United Kingdom. So far as Queensland is concerned, section 4 (the section which is the central charging section and which appears to give extra-territorial operation to the Act) was put into the Act in 1984 before the Australia Acts came into existence; does that latter Act apply to an Act which is already in existence? If not, does it apply in relation to any section passed after its implementation which purports to have an extra-territorial effect? This is a very interesting area and perhaps, Mr Chairman, I can hide in the proposition that I haven't got enough time to talk about it - frankly, I'm not too sure what the answer is. On some of my enquiries of those constitutional lawyers who perhaps should be able to give us the answers straight up, I've received some rather vague replies.

5. **Relevance of Underlying Assets:** I read with interest the report in yesterday's press of proposed amendments for the New South Wales Act to assess duty effectively at higher rates where shares are acquired in a company holding assets in land greater than 80% of its entire assets. The valuation and tracing provisions will be interesting to read. Queensland has already embraced this principle of assessing by reference to the nature of underlying assets; for example -

    1. **Section 56B** - duty on transfers in private unit trusts depends on the nature of the trust property;

    2. **Section 56C** - the same principle when you transfer shares in discretionary trust companies.

And for those students of stamp duty history - and I'm so pleased to see so many here today - for many years Queensland levied a higher rate of duty on a transfer of shares when it represented a transfer of a controlling interest in a company; that provision however went out in 1959.