CURRENT DEVELOPMENTS
Stamp Duty

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This Paper discusses some significant current developments in stamp duty which have an impact on banking and financing transactions.

SECURITY OVER BILL FACILITIES, AND CONTINGENT OBLIGATIONS - RECENT DEVELOPMENTS

Introduction

In the paper presented by Tony Fitzgerald and me at the 1986 Banking Law Association Conference, we discussed in detail the stamp duty implications of a security over a bill acceptance and/or discounting facility. I thought it might be useful to outline some recent changes which affect this issue; and then to summarise the current practice of the Stamp Duties Office in each jurisdiction about stamping a security over contingent obligations, since this can sometimes have an impact on securities in relation to bill facilities.

Securities over Bill Facilities - Recent Changes

(a) New South Wales amendments: Stamp Duties (Amendment) Act 1987 (June 1987)

The definition of "debenture" in s.83(1) has been amended, and amongst other things, it is now limited to money deposited with or lent to a corporation, and excludes a bill of exchange or promissory note. On the views expressed in our 1986 paper, the reference to a loan to a company would not cover a bill facility arrangement, so that an unsecured bill facility should not be dutiable in New South Wales.

However, in relation to secured bill facilities, amendments have been made which are designed to ensure that duty is payable on them. The upstamping provision for an unlimited security requires upstamping if there is an "advance", which is now defined in s.83(1) to include the provision of funds by way of financial accommodation. Financial accommodation is in turn

defined to include funds provided by means of a bill facility and then a bill facility is defined to mean "an agreement, understanding or arrangement for the provision of funds under which a bill of exchange or promissory note -

(a) is drawn, accepted, indorsed or made; and

(b) is held by, or negotiated or discounted to, the person providing the funds".

There are some limitations to these provisions. First, the definition of "bill facility" requires that the bill is held by or negotiated or discounted to the person providing the funds. It also requires that it is an arrangement "for the provision of funds".

Secondly, and more importantly, one only gets into these extended provisions by coming within the upstamping provision of s.84(3). In the case of a security over a bill facility, it does not even come within the ambit of these provisions unless it is within the definition of "mortgage", since otherwise there is of course no initial, "potential", liability for duty as a loan security. The definition of "mortgage" is still limited in the way discussed in our 1986 paper, to a security for the payment of money advanced or lent or for the repayment of money to be thereafter lent, advanced or paid. In my view, therefore, a true unlimited security over a bill facility should not require upstamping at the time the facility is made available, despite these amendments. I should add that the New South Wales Stamp Duties Office does not necessarily accept this view.

(b) Queensland Amendments

As seems to be often the case in the stamp duties field, Queensland has sought to confront directly the problem in seeking to fit complicated securities over bill facilities into the archaic traditional definitions of "mortgage" in the stamp duties legislation.

With the amendments introduced in Queensland on 26 April, 1988 by the Stamp Act Amendment Act 1988, the definition of "mortgage" has been amended by adding s.65(2), to provide that where a security is given to secure "an obligation on default arising under or in respect of a bill of exchange or promissory note", it shall be deemed to be a security for the payment or repayment of money lent or to be lent, "on the date on which funds are first provided in exchange for the bill or note", and "it shall be deemed that the amount of the loan which it secures is the face value of the bill or note".

Transitional provisions protect transactions entered into prior to the amendments, but variations of facilities will come within the new provisions.

The wording of this provision is wide. However, some limitations should be noted. First, it only applies where the security itself secures "an obligation on default" arising under or in respect of a bill of exchange or promissory note. In some transactions, security might be given, in relation to a bill facility, without securing such an obligation on default. Secondly, the deeming provisions only operate if "funds are provided", and provided "in exchange for the bill or note".

One difficulty with the amendments is that they appear broad enough to impose duty each time a bill is rolled over. It is thought - and hoped - that this is an unattended consequence, and that the Stamp Duties Office will accept that duty should not be payable in that circumstance.

(c) Victoria - ABS Case

In the Victorian Full Court decision in February this year in the Associated Broadcasting Services Limited v. Comptroller of Stamps, the Court considered that the statements in the High Court's decision in the Handevel case did "tend to lessen the authority of the view that it has in the past received judicial support namely, that a debenture must create or acknowledge an existing debt, as distinct from providing security for a future debt". Without deciding the matter, however, the Court thought "there is much to be said in support of" the view that in that case the supplemental loan agreement did not acknowledge or create an existing specific debt so as to constitute it a "debenture". The matter has not been decided, therefore, but it is still open to argue that the concept of a debenture does essentially involve a document acknowledging or creating an existing, specific debt.

Securities over Contingent Obligations - Stamp Duties Offices' Views

The general principle is that where a security for an unlimited amount secures only contingent obligations, such as the obligations of a guarantor, there is no requirement to upstamp the security in respect of advances made, provided that the security secures the guarantor's obligations rather than the borrower's obligations, and that the earliest time at which upstamping can occur is in the event of a default when the liability crystallises. There are arguments in some jurisdictions that, even when the liability crystallises, there is still no obligation to upstamp. The exact position varies from this general principle in some jurisdictions.

I now set out an update on my understanding of the views of the various Stamp Duties Offices on this issue. The effect of the contingency principle on the issue whether a security over a bill facility is dutiable is discussed in our 1986 paper and for completeness I should add that, even where the Stamp Duties Office accepts the contingency argument, in relation to, for

example, a security over a guarantor's obligations, it does not necessarily accept that the argument applies to a security over a bill facility. That is, the issue of whether a secured bill facility is dutiable is not always the same issue that arises with a security over contingent obligations.

New South Wales

The New South Wales Stamp Duties Office accepts the contingency principle and has issued a Revenue Ruling confirming this.

Victoria

The Victorian Stamps Office accepts the contingency principle, but does not consider that it applies to a security over a bill facility.

Queensland

Prior to the recent Queensland amendments, the Queensland Stamp Duties Office generally accepted the contingency principle; the Office also often seemed to be of the view that upstamping was required as soon as there was default such that the guarantee could be called upon. It is not clear whether the recent amendments will change this view.

Western Australia

The Western Australian State Taxation Office does not accept the contingency principles, and the Office points to the words in the upstamping provision of s.83(3) which, unlike other jurisdictions, refer not only to advances but to "indebtedness thereby secured". There is still a good argument that the concept of "indebtedness thereby secured" relates to actual, rather than contingent, indebtedness.

South Australia

The position has not been stated with precision but it is understood that the Stamp Duties Office has on occasions accepted that an unlimited security over contingent obligations can be stamped at the time of enforcement without penalty.

Tasmania

The legislation in Tasmania is somewhat different, because it covers security for payments as well as repayments. There are good arguments that the contingency principle should still apply. However, it appears that usually the Commissioner will not accept the argument.

Northern Territory

I understand that the Commissioner does not generally accept the contingency principle.

Unlimited Security: Companies Code Priority Limitations

An important question that often arises with securities is whether a security, which is otherwise limited in amount, ceases to be an unlimited security for stamp duty purposes, and hence ceases to have the privilege of being able to be upstamped as and when advances are made, simply through the inclusion of a maximum amount which is expressed to be only for Companies Code Schedule 5 priority purposes.

It is submitted that the better view is that this should not, for stamp duty purposes, change the nature of the loan security, from an unlimited to a limited security. Cases such as Lendlease Investments Pty Limited v. Commissioner of Stamp Duties 86 ATC 4427 lend support to this view. The New South Wales Commissioner of Stamp Duties has confirmed in a Revenue Ruling (ST 35) that liability of stamp duty in respect of a company charge will not be assessed upon a statement of maximum prospective liability inserted in the charge for priority purposes in accordance with Schedule 5 of the Companies Code. Generally, this view seems now to be accepted by the various Stamp Duties Offices, but the following divergences should be noted.

Tasmania

We understand that the Commissioner considers that a limit for priorities purposes pursuant to Schedule 5 of the Companies Code does make the security limited for stamp duty purposes.

Northern Territory

We understand that the Commissioner is still currently of the view that a maximum prospective liability limitation for Companies Code purposes can in appropriate cases cause the security to be treated as a limited security for stamp duty purposes.

MORTGAGES SECURING PROPERTY IN MORE THAN ONE JURISDICTION, AND MORTGAGES OVER SHARES

Introduction

I now wish to discuss some recent developments in relation to securities over property located in more than one jurisdiction. One area where this is of considerable importance is in relation to a mortgage over shares. While the stamp duties legislation in most jurisdictions has sought to prevent the avoidance of duty on transfers of shares achieved by moving the shares to an out-of-state register, no jurisdiction has sought to prevent the avoidance of loan security or mortgage duty on a security over shares by transferring the place of register of those shares - that is, until the recent Queensland amendments.

Queensland

By the amendments introduced in Queensland as from 26 April 1988 by the Stamp Act Amendment Act 1988, mortgage duty is imposed under new s.71 if property is secured on certain Queensland-related shares or units in unit trusts. This may be a sign of things to come in other jurisdictions.

The provisions are very wide. The section deems a security to be secured on property in Queensland where the property on which it is secured is or includes shares in a Queensland-incorporated company, shares in a company to which s.56C applies, or shares in a corporation to which the new land-owning provisions apply (discussed below), or units in a unit trust scheme within s.56B.

Note that it only applies where there "is secured", by the security, property of the nature described; that is, the provisions seems to require that the security effects an immediate security over that property at the time of execution.

The amendments also set out detailed pro rata provisions where the security is over property both in Queensland and elsewhere in Australia, by means of a credit: see s.70.

New South Wales

The foreign security provision, s.84F, still allows for a credit for duty paid elsewhere in Australia. The section no longer requires that the security be made or issued outside the state, and the territorial base has been changed: it refers to a security where there is property wholly or partly within another state or territory.

Victoria and Western Australia

New pro rata provisions have been introduced into Victoria (s.137DA) and Western Australia (s.84). In an article by Philip Griffin of Mallesons Stephen Jaques in Banking Law Bulletin, Volume 3 No. 5 at pp.69-73, the following observations were made about these provisions:

> "The Victorian and Western Australian provisions are something of a hybrid of the New South Wales and South Australian provisions. However, they go one step further, in that they call for the 'quarantining' of the property in each other jurisdiction for the purposes of calculating the reduction in duty allowable by reference to that interstate property. That is, each other jurisdiction is viewed in isolation.
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> By proceeding on the basis that the mortgage is liable to duty in relation to the whole of the moneys secured, and calculating the credit allowable by reference to the lesser of duty paid elsewhere, or the proportion of the property

situated elsewhere, jurisdiction by jurisdiction, Victoria and Western Australia (as compared to South Australia and Queensland) reap the benefit of lower rates of duty being imposed by the other jurisdictions in relation to property situate in those jurisdictions while maintaining (as compared to New South Wales) a minimum stamp duty recovery calculated at their own rate and in proportion to all property situate within their jurisdiction.

Unfortunately, the drafting of the new provisions leaves something to be desired. The relevant sections are ambiguous and uncertain and, if literally constructed, give rise to presumably unintended consequences.

For example, surely the last part of paragraph (2)(a) of the Western Australian provision should read 'property to which the instrument or those other instruments relate'.

As the sub-section is drafted, where there are two instruments securing the same moneys, one affecting property both in and out of Western Australia, and another affecting property outside Western Australia only, the proportionate reduction in duty will vary according to how much property outside Western Australia is affected by the first-mentioned instrument.

The problem also arises in Victoria and is best demonstrated by an example. Assume that there is mortgaged property worth $5 million in Victoria and mortgaged property worth $15 million in another jurisdiction which imposes the same rate of stamp duty as Victoria, say Queensland.

If one instrument of mortgage relates to the Victorian property only, and another relates to all the other property, the amount of duty initially assessed on the mortgage of Victorian property will not be reduced. However, if one mortgage relates to the Victorian property and $5 million worth of the other property, with the other instrument relating to the remainder of the property, the same proportion 'as the value of the property situated in the other State or Territory bears to the aggregate value of all property to which the instrument relates' is 5/10. Thus, the duty assessed on the mortgage which relates to, inter alia, the Victorian property will be reduced by one half. Similarly, if the mortgage which relates to the Victorian property also relates to $10 million worth of the Queensland property the proportion referred to in paragraph (2)(a) as drafted is 10/15 and the duty payable on the Victorian connected instrument will be reduced by two-thirds.

In all cases the Queensland duty will remain constant if the instrument affecting only Queensland property is stamped in Queensland as the primary security with the other instrument being stamped collaterally to it.

> Further examples relate to the Western Australian legislation. Sub-section (4)(a) refers to an instrument being stamped under sub-s.(2). No stamping ever occurs under sub-s.(2). Also the draftsman seems to have had some unusual views of when the words 'paid' and 'payable' should and should not have been used.
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> A rather dramatic consequence of the Western Australian legislation arises under sub-s.(4)(d)(iii). This sub-section provides that if evidence of the duty intended to be paid in another State having been paid is not produced within three months of the initial assessment, the instrument is 'available only for the amount in respect of which duty has been paid under paragraph (a)'. The only duty which will ever be paid pursuant to paragraph (4)(a) is an amount of duty calculated as if duty had been paid in other jurisdictions. Sub-paragraph (iii) quite literally provides that even if further Western Australian duty is paid, the mortgage will not be available to be enforced in relation to those extra amounts of duty paid."

Timing of Stamping

These complicated pro rata provisions make it important to determine in which order an instrument should be executed and then lodged for stamping.

It would seem that the lesser of two evils would be to stamp in jurisdictions other than Victoria and Western Australia first and run the risk of penalty duty for late lodgement rather than expose an instrument to the far harsher sanctions in Western Australia (s.84(4)(d)).

A further difficulty arises if credit for duty paid elsewhere is to be sought in New South Wales. Credit is allowed in New South Wales to the extent of "duty paid or payable under the law" or another state or territory. The problem is that, until a mortgage is re-submitted in Victoria or Western Australia, it is not possible to finally determine how much duty is payable under the law of those States, as there always remains the possibility that it will not be re-submitted in time.

Collateral Securities - Victorian and Western Australia

Under Victoria s.137I and Western Australia s.87, the distinction between "primary" and "collateral" securities has been abandoned. No security is considered as "primary"; rather, all securities for the same moneys are regarded as collateral, on to the other. Again, I am indebted to Philip Griffin for the following analysis of these provisions.

Under the Victorian provision, if an instrument is "duly stamped", the duty chargeable in respect of another instrument securing the same monies is reduced by the amount of Australian

duty paid on the duly stamped instrument, and the duty chargeable in respect of another instrument which is security for part of the same moneys will be likewise reduced, but only by a proportional amount.

Victorian s.137D(4) has the effect that an instrument must bear some Victorian duty or at least be stamped not liable to duty before it will be "duly stamped". Care must be taken where one instrument affects nothing but property outside Victoria, but within Australia, and is stamped there, and a second instrument securing the same monies but affecting property in Victoria is executed. Unless the first instrument is "duly stamped" within the definition in s.137D(4), a duty reduction will not be available under s.137I.

The Western Australian provisions are similar, but the duty chargeable on a second instrument will only be reduced by the amount of Western Australian duty, as opposed to any Australian duty, imposed on the first instrument.

The position in Western Australia and Victoria is complicated by the provisions discussed above. Those provisions also appear to relate to "collateral" securities, in that sub-s.(2) of Victoria s.137DA and Western Australia s.84 refers to "any other instrument that secures the same money".

This gives rise to an implication that sub-s. (2) of the sections requires an aggregation of instruments securing the same moneys for the purposes of pro-rating. That is, the duty payable on a first instrument should be reduced by the same proportion as the Western Australian or Victorian (as the case may be) property affected by all the instruments bears to the totality of the property affected by all those instruments, or the interstate duty paid on all those instruments, whichever is the lesser.

The second and subsequent instruments would be chargeable in precisely the same manner, and with the same amount of duty as the first instrument, but an equal and offsetting credit would be available under ss.87 or 137I. On this view, the legislation requires a security "package" for the same moneys to be viewed as a whole. This also appears to give rise to an equitable result.

However, sub-s.(2)(a) of each section is defective in this respect. The sub-section refers to property to which the "instrument" rather than to which the "instruments" relate. It is perhaps because of this that the Western Australian Commissioner does not feel constrained by the legislation to examine "packages", and is of the view that he may examine certain securities independently of their collateral securities, notwithstanding that this seems to render redundant the reference in the first part of the sub-section to "any other instrument that secures the same money".

The view taken by the Western Australian Commissioner favours the revenue in circumstances where there is one instrument which affects property in Western Australia only. It seems that the Commissioner will seek to impose duty on that instrument in respect of 100 percent of the monies of the moneys secured, and treat a second instrument affecting property in Western Australia and elsewhere as liable to nominal duty only under s.87.

If, on the other hand, the two instruments were looked at as a package under s.84(2), Western Australian duty of something less than 100 percent of the moneys secured would be payable in relation to the package if duty were paid or payable elsewhere on the second instrument.

The Victorian provisions give rise to the same uncertainty as to the way the "pro-rating" and "collateral" security provisions interact and whether the Comptroller should look at security "packages" rather than single instruments under the "pro-rating" section 137DA.

Collateral Securities - ABS Case

The Full Court in the Victorian Associated Broadcasting Services case, referred to above, did accept the view in the Court below that one must look at the substance of the document to see whether it is collateral. Therefore, in that case, it was held that the supplemental loan agreement was collateral, because it "did not for practical purposes secure a larger advance than was secured by the primary agreement upon which full duty was paid. In fact, the supplemental loan agreement contemplated security of a lesser sum. Both agreements are inextricably mixed, and in my view, having regard to the meaning to be ascribed to security, the supplemental agreement is collateral to the amortising loan agreement". This gives a sensible meaning to the collateral duty provisions.

ABOLITION OF AUSTRALIAN CAPITAL TERRITORY LOAN SECURITIES DUTY - OPPORTUNITIES

In a precedent which has not been followed in other jurisdictions, the ACT last year abolished loan security duty, consequent upon the introduction of ACT financial institutions duty.

Because all states in Australia and the NT now seek to impose duty on an instrument with the necessary territorial connection with the state, even where executed outside the state, this abolition does not throw us back to the "good old days", where a document executed and retained in the ACT would not be liable for duty.

However, the abolition does give some scope for minimisation of duty, as outlined below.

With the New South Wales 1987 amendments, an unsecured loan facility can only be dutiable as a "debenture", since the bond or covenant head of duty has been abolished. A debenture has been clearly defined to be dutiable only if executed in New South Wales. Therefore, an unsecured loan facility, if executed in the ACT, is not liable to ACT or NSW duty, irrespective of the closeness of the connections to NSW.

Another possibility, with a security over shares or other personal or intangible property, is to locate the property the subject of the security in the ACT, and then to execute the document there, to avoid an obligation to pay loan security duty in one of the states or in the Northern Territory. This can particularly apply to a security over shares, where the situs is based on the register upon which the shares are located (subject to the recent Queensland amendments referred to above); or to a charge over intangible personal assets such as leases or other specialty debts where executed under seal; or to a charge over personal property which can be located in the ACT at the time of execution of the security, even if it is to be located in another jurisdiction at a later date.

PROPERTY FINANCING AND TRUST TRANSACTIONS : CURRENT DEVELOPMENTS

Introduction

Four States now have complicated provisions imposing conveyance duty on a transfer of shares in a private company (and, excepting Queensland, of units in a private unit trust) where the principal assets of the company or trust are real estate. These provisions can have an impact on a wide range of financing transactions, even where the main thrust of the financing itself is not property based. The legislation really means that if you are involved in transferring shares in a company or units in a unit trust in the course of a financing, you need to check whether the company or trust happens to own substantial real property assets.

One limitation to the provisions should be noted. They operate in relation to an "acquisition" of shares or units where the acquisition results in the acquirer obtaining the specified interest in the land-rich company or trust. If, at the time of the acquisition, the company or trust does not yet own the real property, duty is not payable under the provisions, even though subsequent to the acquisition of shares or units the company or trust purchases the real property and hence comes within the ambit of the provisions. Therefore, the provisions are not such a problem if the transaction is carefully structured from the outset so that the acquisition in the company or trust takes place before the acquisition of real property.

Summary of Provisions

New South Wales Division 30

Under this provision, conveyance duty is payable on a transfer of shares in a private company or a transfer of units in a private unit trust, if the transfer results in the person (together with related persons) holding more than 50 percent in the company or trust, where the company or trust has at least 80 percent of its assets in real estate, of which there is at least $1 million worth of New South Wales real estate. The provisions are "transaction" rather than "document" based.

Note the following features of the New South Wales provisions:

- The relevant type of interest which must be held by the person in the company or trust is an interest which would, upon a liquidation, give an interest to that person in the assets of the trust. It hence, does not cover an interest, e.g. in a trust which is an entitlement only to income.

- The dutiable act is the act of "acquisition" of the interest in the company or trust, where that "acquisition" results in the person obtaining the necessary interest in the company or trust. There are some limitations to the definition of "acquisition".

- The provisions have broad "tracing" provisions, but there are good arguments, based both on an interpretation of the provisions and on constitutional grounds, that the tracing provisions do not allow an indefinite tracing through a series of companies or trusts, and that the path of tracing can be broken by interposing a different type of vehicle. For more details on this aspect, see the detailed analysis in the stamp duties paper presented by David Storr of Mallesons Stephen Jaques at the IIR Conference on Property Financing held in Sydney in November 1987.

- There is no exemption in relation to a transfer by way of security, but there has been at least one instance where the relevant Minister has granted ex gratia relief from duty for such a transfer, which indicates that the intention is not to catch such a transfer.

Victoria: Division 3 Part II Subdivision (7) of the Stamps Act

The provisions have a broadly similar operation to the provisions in New South Wales, except that there is an exemption for acquisitions relating to financing transactions.

Western Australia: Part IIIBA Divisions 1, 2 and 3

The provisions have a broadly similar operation to the New South Wales provisions.

Queensland: Sections 56F-56FO

The very recent Queensland provisions are similar to the New South Wales provisions, except that they apply to corporations but not to trusts. However, amendments also came into operation on 26 April, 1988 which tighten the provisions imposing duty on unit trusts and transfers of shares in trustee companies, in ss.56B-56C (these are discussed further in the paper below).

WRITTEN VERSUS ORAL ARRANGEMENTS : RECENT DEVELOPMENTS

Introduction

There is now stamp duties legislation seeking to impose duty on "Clayton's Contracts" for transfers of property, such as written offer/oral acceptance arrangements, in the following jurisdictions: New South Wales, Queensland, Western Australia and, very recently, South Australia. In Western Australia and Queensland, the provisions do relate to loan transactions as follows.

Western Australia

Section 31B(1)(c) imposes duty on certain loan transactions which are not carried out by completed written documents, and hence include written offers accepted orally and written acceptances of oral offers. In Parliament when the legislation was brought in, it was indicated that the provision was not intended to extend the range or type of transactions on which duty is already imposed. Regulations were then passed to exempt a transaction if the transaction would not have been liable to duty had s.31B not existed. This is meant to be a holding operation until the matter is finally resolved.

Queensland

The Queensland duty on application for loan or offer to make a loan in s.67A was discussed in our 1986 paper. There are severe limitations on those provisions: see Tolhurst, Wallace and Zipfinger, Australian Revenue Duties - Stamp Duties, para [12.31C].

RECENT QUEENSLAND AMENDMENTS : TRUSTS AND TERRITORIAL NEXUS

An interesting microcosm of the tightening of the stamp duty net can be seen in the recent Queensland stamp duty changes that came into effect on 26 April 1988 in the Queensland Stamp Act Amendment Act 1988. I have already discussed in this paper some of the provisions which specifically impact on banking and financing transactions, but many of the other changes, particularly in the field of trusts and territorial nexus, can also have ramifications on banking and financing transactions.

Unit Trust Schemes

Section 56B imposes ad valorem duty (calculated by reference to the gross value of trust assets) on a variety of dealings in units in unit trusts, subject to an exception favouring "public unit trusts". The amendments tighten the definition of "public unit trust" by excluding trusts where no units have been issued to the public or which have not achieved or do not maintain defined "spread requirements". The Commission may relax these requirements where satisfied that units will be issued to the public to an appropriate extent within 12 months. Section 56B has also bee strengthened insofar as it deals with tiers of trusts.

Companies involving Trusts

Section 56C has for some time imposed ad valorem duty on certain transactions involving shares in trustees of discretionary trusts. These provisions have been replaced by provisions extending to shares in companies acting as trustee of any trust which carries on business in Queensland or owns property located in Queensland (and to companies having an interest in the shares of such a trustee). The trustee is deemed to hold property in Queensland where it holds indirect interests in interposed trusts which have such holdings. Provision is made for apportioning out property located outside the State, and for a determination by the Commissioner that duty is not payable under s.56C where the share transaction "was not made in contemplation" of certain dealings with beneficial interests in the trust. However, this relieving provision does not appear to extend to the transfer of shares in the trustee of a unit trust concurrently with transfers of units (which transactions may therefore be exposed to double duty).

The legislation seeks to trace through transactions and instruments so that, if with a whole series of transactions, companies or trusts, at the end of the chain there is a Queensland connection, duty can be imposed on the transactions and instruments in the chain. For example, new s.4(6) reads as follows:

> "For the purposes of this section, a trust, an instrument or a transaction is deemed to relate to property in Queensland where it relates to rights, obligations, matters or things arising from an instrument or transaction which relates to property in Queensland, and in determining whether the second mentioned instrument or transaction relates to property in Queensland the second mentioned instrument or transaction shall be deemed to relate to property in Queensland where it would, if it were the first mentioned instrument or transaction, be deemed to relate to property in Queensland under this sub section."

This is applied to the imposition of duty in new s.56C on the transfers of shares in trustee companies. Where an unlisted non-

approved company is a trustee of a trust and in that capacity carries on business in Queensland or owns property located in Queensland, or a company has an interest in shares in a company of that nature it is a company to which s.56C applies. For the purposes of determining whether a company owns shares in a trustee company, tracing through subsidiaries within the meaning of the Companies (Queensland) Code is permitted. A trust is deemed to own property in Queensland if, under s.4(6), it "relates to" that property through a chain of instruments or transactions.

Transfers of shares in such companies are liable to duty, calculated as if there were a conveyance of the underlying property in Queensland. The duty is payable notwithstanding that the trustee company has a bare legal interest in underlying property. The only duty concession arises where the Commissioner is satisfied that the disposition of the share was not made in the contemplation of the disponor disposing, or the disponee acquiring, directly or indirectly, for himself or any person, any benefit in relation to property held on trust.

In addition, the amendments give rise to no less than 32 separate circumstances where liability to duty is affected by the Commissioner being satisfied as to something, making a determination, or otherwise doing something within his discretion. For example, duty on shares in trustee companies may only be waived if the Commissioner is satisfied that the transaction was not made in contemplation of the disposal or acquisition, directly or indirectly, for any person, of any benefit in relation to the property held in trust.

Aside from the propriety of granting such broad and general discretions, questions arise whether the Queensland Parliament has power to impose tax on things so remotely connected with Queensland. The draftsman seems to have been aware of such problems, as in some cases there are parallel provisions, one set fairly clearly within power, the second set imposing liability upon remoter connections with Queensland.

Nexus

The nexus provisions have been expanded to:

(a) provide that where there is an interest relating to a trust (whatever its origin) which relates to property or things to be done in Queensland, the trust is deemed to be connected with Queensland in a number of defined ways (s.4(4));

(b) deem transactions and instruments to be connected to other instruments or transactions which in turn are relevantly connected (s.4(5));

(c) deem a trust to relate to property in Queensland where that trust is indirectly interested by interposed trust in property in Queensland (s.4(7));

(d) deem to be secured on property in Queensland, for the mortgage head of duty, shares in all Queensland companies, shares to which s.56C applies, shares to which the land-owning provision applies, and units in a unit trust scheme under s.56B (see s.7).

Summary

Queensland duty is thus now imposed upon a transaction involving units where the trust relates to something arising under an instrument or transaction, which in turn relates to something arising under a further instrument or transaction and so on, if at the end of the chain (which may be extremely long) there is an instrument or transaction which relates to property in Queensland. Where a transaction involves shares, Queensland duty is imposed if the corporation is the trustee of a trust, not necessarily a unit trust, which, through a similar chain of instruments or transactions, is deemed to relate to property in Queensland. A liability also arises in relation to shares of a company which has an interest in shares of such a trustee company. A company is deemed to have an interest in the shares of a trustee company if, among other things, a subsidiary or a subsidiary of a subsidiary is entitled to the shares. Shares in such corporations are themselves deemed to be property in Queensland.

An extremely thorough examination of all documents relating to trusts should be undertaken before any transaction involving an interest in the trust, or in a trustee company is entered. The costs of exercising "due diligence" are likely to be very high, particularly as valuation of underlying property will be necessary for assessment of duty.

Even greater caution must be exercised by persons who alone or with a related person acquire a majority interest in a corporation which is not listed on any Australian stock exchange, or who take security over such a majority interest. Compliance with the new legislation makes it necessary to identify and value all property which is owned by that corporation or any "subsidiary". "Subsidiaries" for this purpose include subsidiaries under the Companies Code, the trustee of any trust in which the corporation or subsidiary (including a subsidiary which is a subsidiary by virtue of being the trustee of a trust in which the corporation or a subsidiary has any estate or interest) has any estate or interest, and any corporation in which a trustee company which is a subsidiary has a majority interest. Of course, any subsidiary of a subsidiary is also a subsidiary. If this sounds complicated, you should read the legislation.

It is necessary to go through this process, as if the assets of the corporation and all its subsidiaries comprise land in Queensland worth $1 million, and if 80 percent of those assets comprise land wherever situate, Queensland duty will be levied on

the acquisition of or taking of security over the shares and the shares are deemed to be property in Queensland, under the land-owning provisions referred to above. If there is a dutiable acquisition, the person acquiring the shares, the corporation, and each entity defined to be a subsidiary of that corporation and which is entitled to land must lodge a statement. If the person who acquires the shares does not pay duty, each corporation and each subsidiary may be held liable for duty. Again, the crucial question for taxpayers is how far must one go before the test of "due diligence" is satisfied.

Although each of New South Wales, Victoria and Western Australia have introduced similar legislation, none has gone quite so far as Queensland. The provisions are so broad as to be administratively unworkable. There is a very great risk of numerous offences being unwittingly committed. The huge compliance costs generated and the fact that contravention may lead to imposition of severe penalties and transactions being void or unenforceable makes this legislation one of the most onerous and distortionary taxes imposed upon business in recent times.

THE SHAPE OF THINGS TO COME : THE DIRECTION OF STAMP DUTY IN THE BANKING AND FINANCE WORLD

On the one hand, there is an expressed willingness on the part of State governments not to impede the development of financial markets by imposing artificial taxes.

This can be seen in the concessions for the secondary mortgage market, which often can be availed of in a number of banking and financing transactions outside that market. See, for example, the abolition of duty on transfers of mortgages and other securities. Likewise, the Victorian exemption from conveyance duty on transfers of shares in units and landholding companies and trusts, in the case of financing transactions (referred to above), is another example.

On the other hand, there has been a tightening up of the penalty provisions in the stamp duty legislation, on the powers of inspection of documents and papers relating to stamp duty, and a widening of the net to impose liability on directors and officers of taxpaying companies.

For example, see the mirror legislation passed in several jurisdictions, empowering local stamp duty officers to act as investigation and collection agencies for the purposes of the revenue collection of other states.

See also the example of the introduction of personal liability for non-payment of duty in New South Wales on directors and officers of taxpaying companies, and some of the recent Queensland changes, particularly those discussed above.