# STAMP DUTY - AN OPPORTUNITY FOR WORKSHOP DISCUSSION

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## INTRODUCTORY COMMENTS

Welcome to Stamp Duty - An Opportunity for Workshop Discussion. I hope you all realise that the only thing standing between you all and wind surfing on Lake Burly Griffin is the end of this session.

It is probably particularly apt that we have a session on stamp duty here at a conference in Canberra. I do not think there would have been so many finance lawyers in Canberra since the golden days of stamp duty some years ago with everyone flying down in planes and busily signing documents and trying to get out before night fell. Those days have long since gone with the extraterritorial stamp duty legislation. There are still some chinks of course in the armour - New South Wales, for example, it is quite clear that unsecured loan facilities can be signed in Canberra with impunity, there is no ACT loan security duty and debenture duty in New South Wales are limited to documents signed within the State.

But the questions of Canberra still seem to haunt us. One of the most recent developments was the decision of the Federal Court about two weeks ago. Mr Justice Graham Hill who in Davies v. Federal Commission of Taxation - it was a very interesting case and I suggest you all have a look at it - stamp duty played only a small part but there was a deed of assignment and the parties were trying to bring this deed of assignment into evidence and were faced with the contention that it was not stamped. It was clear that the deed of assignment signed some years ago was executed in Canberra and never brought back to New South Wales. His Honour held that s.29 of the New South Wales Stamp Duties Act, the unenforceability provision, you cannot bring a document in civil proceedings unless duly stamped, applied to Federal

Court proceedings - that was an interesting finding in itself - and secondly, he held his long standing view that the document even prior to the extraterritorial amendments in New South Wales, a document that related to New South Wales property or matters was dutiable even though executed and retained outside New South Wales. So that is an interesting decision - interesting in a number of ways - and it shows that the issue of Canberra is not dead.

We are very fortunate today in having two speakers, John Field on my left and Jeff Mann on my right. They are taking four topics of particular specific topics of current interest in the stamp duty field and as this session is a workshop session, to encourage you to feel free to comment and ask questions. If not, they are going to ask you questions.

Jeff Mann:

RECENT DEVELOPMENTS

John and I have been asked to comment on recent developments. What we are going to do is, as Bill Wallace said, to look at four areas. We really are looking to you to chip in and give any comments that you have. We certainly do not want it to be a one-way street. But before doing that what we thought we might do is to have a look at some of the recent developments in some of the States and Territories and mention one or two cases - this all very much in note form simply to alert you to some of the developments. If at any stage you want to leap in the air and ask a question on those developments, then please do so. But really what we are trying to do in the next hour and a quarter is to have a look at four areas. The first one is multi-State securities. John will lead the discussion on that. We will then look at mortgages by deposit and I will look at that area. John will then talk to us or lead a discussion on unwinding financing unit trusts. And then back to me when we will have a look at the developments with respect to the Handevel principle.

Now again with respect to recent developments we have divided that up. I will be looking at Queensland, Western Australia, Northern Territory and the Australian Capital Territory and John will be looking after New South Wales, Victoria, South Australian and Tasmania if there are any developments there - in relation to stamp duty of course!

Queensland

You are all well aware of the 1988 amending Act and certainly we are not going to go over that old ground. The Queensland Act was amended twice since we last met. Firstly, the 1988 No. 2 Act. Going through it there is not a great deal of interest I suppose for banking and finance lawyers except two things which I think are of interest and certainly of importance to people practising in the commercial area. Section 56C is the section which

assesses to conveyance duty on any transfer of shares in the company acting as trustee of a trust; and as we saw last year that has been extended from discretionary trusts to all companies acting as trustee in any capacity.

The difficulty which was highlighted after that amendment - the 1988 amending Act - was that of course you can have a doubling up effect under 56C and 56B - 56B dealing with the acquisition of units. Now what they did in the 1988 No. 2 amending Act was that they put in sub-s.15A and effectively what that does is to try to get away from that doubling up effect but there are still some difficulties. The first thing is that you only get the exemption where the disponee of the shares in the company is also acquiring the units in the unit trust and that is really not a terribly common thing to happen. Often of course the parties may well be related but certainly they would not be identical. The second thing is that you must be able to show that the same amount of duty has been paid or will be paid on the acquisition of the units as would have been payable on the transfer of the shares and no-one has quite worked out what happens if it is not exactly the same.

The other thing which the 1988 No. 2 Act did was to put into legislation the government's budget statement that transfers of principal place of residence from one party to a valid subsisting marriage to the other by way of gift would not be subject to duty.

Secondly, the 1989 amending Act. There are a couple of things there which may be of interest to you. The first thing is that the exemption of mortgages in relation to principal place of residence was increased to 80,000. There was a doubt in relation to that transfer of the principal place of residence between husband and wife by way of gift. What happens, said someone, if the property is subject to a mortgage? Does the assumption of liability under the mortgage mean that you are still back to where start and you have to pay duty in relation to it. Well, the amending Act has taken that point away and clarified it. And the last thing is that we now get interest where we get refunds of duty after a court has made a decision under 24(4)(a).

So really that is legislation wise in Queensland over the last twelve months almost.

### Western Australia

Western Australia was an amending bill which I understand was not passed - it lapsed. That amending bill was to put into place there the proposition that a security on shares in a Western Australian company would deem those shares to be in Western Australia. That is much like the Queensland s.71 except that good old Queensland legislation goes even further and has the same deeming provision in relation to shares in companies acting as trustees of trusts or land owning companies or even units in unit trust schemes.

And the other thing in Western Australia which I also understand the bill lapsed was the taxation reciprocal powers bill and of course we have seen them popping up around Australia over the last twelve months. From what I can see there is legislation like that now in Queensland, Western Australia, New South Wales, Victoria and the Northern Territory. And I am sure you are all aware of what that legislation does.

**Northern Territory**

I think there have been a few things there of interest. Division 8A dealing with land rich companies much like the provisions in Victoria. Division 15 Claytons contracts very much like Division 3A in New South Wales. Loan security duty was increased to 40 cents per $100. There is a new definition of debenture much like that in New South Wales and the definition of mortgage is now an inclusive one.

**Australian Capital Territory**

From what I could see other than the determination with respect to the rate of duty on the surrender and re-grant of a Crown lease, I could not really see that there had been any developments in the Australian Capital Territory of great moment, although Bill Wallace referred me to an amendment to s.47 which appears to extend the time within which transfers or marketable securities, as I understand it, Bill this is only for shares quoted on the stock exchange. It extends the time within which the transfer is to be lodged from 30 days to 3 months.

**Cases**

Cases over the last few months - I really think that the only ones of great interest are as follows. Again these are only going to be by way of note. Commissioner of Stamp Duties v. Pendal Nominees Pty Ltd (20 ATR 368) in the High Court - I am sure you are aware of that. It seems to me that the lesson from that case is do not in any way, shape or form declare a trust unless you are prepared to pay duty on it.

The second one is Zoverton Pty Ltd v. Commissioner of Stamp Duties (judgment of 23 December 1988) and that appears to me to boil down to the point that where the purchase price under a contract is increased and the relevant rates of duty have in the meantime themselves been increased by an amendment to the Act then the new rates only apply to the increase.

Corpers (No 664) Pty Ltd v. NZI Securities Australia Ltd (No. 1458/89) - in that case the borrower sought specific performance of an agreement for a loan which in the end was refused. During the course of the judgment the question of the extent to which an unstamped instrument could be admitted notwithstanding s.29 of the Stamps Act was discussed and Mr Justice Young was of the view that s.29 did not permit the use of an unstamped document for a

collateral purpose but he did draw a distinction between admitting the contents of a document, admitting the fact that a document has come into existence. And he further held that the court could admit evidence of the price for the purchase of property as disclosed in that agreement.

I think that is a rather interesting case to read because it is full of interesting things about ostensible authority and estoppel in the context of letters of offers going out from financial institutions to their clients.

Commissioner of Stamp Duties v. Shortland County Council (20 ATR 417) - I am sure you are aware of that. The New South Wales Court of Appeal dismissed the Commissioner's appeal from the judgment of Mr Justice Enderby that interest was payable on the amount of an assessment refunded to the taxpayer and I have already mentioned the Queensland amendment this year in that regard.

Next, the Queensland case JAW & S Property Management Nominees Pty Ltd v. Commissioner of Stamp Duties (20 ATR 61) - that is a bit hard to summarise in a few words but essentially it boils down to an examination of where you are entitled to get the concession where you transfer property on the appointment of a new trustee. In Queensland there are quite stringent requirements before you get the concession and in this particular case there were transfers of units in unit trusts in Victoria and the Queensland provision amongst other things says that you only get the concession where it has been chargeable with duty where it has been paid. And the court said because it was in Victoria it had been accepted that there was no duty payable and the court came to the conclusion that the Commissioner was required to let the transfer on the appointment of a new trustee to go through without any further duty.

Bill Wallace has directed my attention to a couple of cases - he has already mentioned the one of Davies. The other one to which he has directed my attention is a Western Australian case if my memory is correct, M & W Holdings Pty Ltd and that is a case in which a plaintiff did not get summary judgment on a contract simply because it had not been duly stamped. Apparently it had been produced to the Commissioner, there had been an assessment issued but had not been paid or no other action had been taken on it and no undertaking had been given by the solicitor and as a result the plaintiff was not successful.

Well that is my quick summary of the legislation developments in those States and some of the cases over the last nine months or so. John, over to you.

**John Field:**

## Victoria

Thanks very much Jeff. We have got four States to go in our quick run around the States for legislative changes. First, Victoria. For legislative changes that are of interest to banking and finance lawyers there are really only two. They were both brought about in December last year under the Stamps (Further Amendment) Act 1988. One of them related to an extension of a concession which has been in the Victorian Act for a couple of years relating to debenture duty and that is the exemption under s.137MB for large scale issues of corporate debentures. Previously that exempted unsecured debenture issues or note issues and the amendment last December was purportedly, if one accepts the Treasurer's statement about it, intended to include within the scope of the exemption, secured issues of large scale corporate debentures. The way in which this has been brought about, however, I do not think is successful to achieve that objective because all that has been done in the amendment is to delete certain words. Previously the section referred to "any mortgage, bond or debenture or covenant not being a mortgage" and they have simply taken out the words "not being a mortgage", so that with secured debenture issues the mortgage itself would only be eligible for this new exemption if it also constituted a debenture, bond or covenant, which not all mortgages would.

The second change was one which may have some impact in practice although I doubt that it will come up in many transactions. It relates to the provision in s.137DA for granting of credit or pro rata exemptions from debenture duty or mortgage duty where there are multi-State securities and we will be dealing with that as a broader topic in a few minutes time. But the particular exemption which came in last December was to say that not only is a credit available for duty which is either paid or payable in States other than Victoria, but the credit is now also available where duty would be payable in another State but for a specific exemption there.

## New South Wales

For New South Wales there is some good news and some bad news. The good news comes after a series of increasingly onerous rulings on the dutiability of guarantees during the course of last year in stamp duty rulings Nos. 93 and 112. SD112 you will remember said that where you have got a joint and several guarantee - let us say you had three guarantors providing a joint and several guarantee, that was in fact chargeable four times over - once for the joint guarantee and once for each of the several guarantees. Now, stamp duty on guarantees has been abolished altogether in New South Wales. That change was made by the Stamp Duties Amendment Act 1988, which came into force on 1 January this year. That is the good news.

To turn to the bad news with New South Wales - there are a couple of areas of bad news which Jeff is going to deal with in greater detail in two of his topics later in this session. The first, while we are on the subject of guarantees, related to loan security duty. The Handevel principle that an unlimited loan security which secured simply a contingent obligation under a guarantee was not subject to loan security duty until there was a default under the primary borrowing, has been overturned now with an amendment to s.84. That amendment overturns the specific ruling in SD70 which had previously confirmed the non-dutiability of Handevel type documents.

The second area of loan security duty where there has been some bad news is an amendment to the definition of "loan security", which now specifically includes what effectively are memoranda of deposit - that is, where there is a memorandum setting out the terms which will apply to any deposit of securities if the deposit of securities subsequently takes place. Such a memorandum will now be dutiable as a loan security in New South Wales. There are also some consequential amendments to that in later provisions of s.84, which have been qualified to some extent by a ruling in SD122 which came into effect at the same time as the amending Act. That ruling indicates that the Act will be administered to exclude certain types of government securities and negotiable instruments from the duty on these memoranda of deposit.

Turning to the next area of amendment in New South Wales - we have heard a lot about financing unit trusts in the previous session on recent income tax developments and we will hear a bit more in a few minutes about some of the stamp duty aspects of those trusts. One amendment which came into effect at the beginning of this year in New South Wales was a financing exemption under new s.99K. That is an exemption to the provisions which impose stamp duty at the high conveyance rates on transfers of units in financing unit trusts where the unit trust is basically a land owning trust. There are similar provisions relating to transfers of shares in land-owning companies, as you would be aware.

And finally in New South Wales a new s.84FB was introduced which contains an exemption from loan security duty for loan-backed securities. This is really a complementary provision to the provisions inserted in 1984, and amended in 1986, for mortgage-backed securities. These provisions are intended to enhance the securitisation market and the secondary mortgage market - the sort of things that John Edwards was talking about this morning with the securitisation of credit card receivables and other types of loans.

By way of comparison, the corresponding Victorian provisions, although they refer specifically only to mortgage backed securities, are sufficiently broad that by Governor-in-Council proclamation they can be extended beyond mortgage-backed

securities to securities such as loan-backed securities. This makes them to be equally as broad as the New South Wales provisions.

**South Australia**

South Australia has had two pieces of amending stamp duty legislation in the last twelve months. The first of them dealt mainly with domestic amendments which will not be of particular interest to financing lawyers. The second of them in fact is only a Bill at this stage, namely the Stamp Duties Act Amendment Bill No 2, introduced in March of this year. There is one provision in that Bill which potentially has quite an onerous application and that is proposed new s.17. Its effect will be to cause a document which is executed conditionally to be dutiable from the time of its conditional execution, although there is a provision for a refund of duty if the condition is never fulfilled. This leaves open the question as to how you tell when a condition which may be fulfilled at some time in the future is "never fulfilled".

**Tasmania**

Despite the derogatory comments earlier about Tasmania, I am delighted to report that there have been no amendments in Tasmania in the last twelve months of any significance to banking and finance lawyers.

So that brings us to the end of our roundup of legislative changes around that States, and Jeff has given us a run-down on some of the recent important cases. Let us turn now to the four topics, two of which I will lead the discussion on and two of which Jeff is going to enlighten us about.

**MULTI-STATE SECURITIES**

The first of these relates to multi-State securities which raise all sorts of questions for financing lawyers. It is the sort of thing that we come upon day by day. There are a whole range of factors which can have an effect on the liability for stamp duty of multi-State securities. The types of stamp duty that we are talking about are basically "loan security" duty in New South Wales and the Northern Territory or "mortgage bond debenture and covenant" duty in the other States of Victoria, Queensland, South Australia, Tasmania and Western Australia - although of course in Western Australia we need to be particularly careful because the relevant head of duty there goes beyond simply mortgages and debentures to cover virtually all other forms of securities. Those two categories of stamp duty, mortgage duty and loan security duty - we can really treat for this purpose as being the one category of duty.

## Relevant factors

The sort of factors which can have an impact on the amount of that type of duty which is payable in a financing which includes security taken over assets in various States would include the following factors:

- First, whether the security is a limited or unlimited security - the main point being that if the security is limited then it is likely to be dutiable upon signing whereas if the security is unlimited then generally speaking duty will only be payable as and when advances are made under the security.

- Secondly, the type of financial accommodation which is secured - whether it is cash advances, bill facilities, guarantees etc.

- Thirdly, whether the security includes a statement of maximum prospective liability for the purposes of those provisions in the Companies Code which establish priorities rules - that can have a stamp duty impact in some States.

- Fourthly, the actual location of the secured property - which State the property is in. How that can have an impact is that there are different rates of duty payable in different States. There are different pro rata or credit provisions in the different States. There are different times within which any applicable duty has to be paid in the different States. And importantly if there is no secured property at all at the time the document is executed - eg. if it is either an unsecured facility or if it is secured wholly over future property so that there is no presently existing property, then generally speaking the credit or pro rata provisions will not apply and there is scope for paying considerably more than the standard rate of 0.4 per cent in total.

- Fifthly, the number of different securities involved - eg. if in addition to having a mortgage debenture over all the assets of a company one has a specific mortgage over land in one State, it is important to ensure that the mortgage over land is not treated as the primary security for stamp duty purposes in that State because otherwise the benefit of the pro rata and credit provisions could be lost.

- Finally, the place of incorporation of the company which is granting the security can be relevant, primarily because the practice of the Commissioners for Corporate Affairs or Registrars of Companies in the different jurisdictions as regards granting any necessary extensions of time for making the Companies Code registrations can differ from State to State.

Some things that we are not planning to cover in this session are:

. First, bill facilities and how they are treated in a multi-State security context. I think that the subject of bill facilities has been more than adequately covered already in a number of recent seminars.

. Secondly, the Handevel situation I am not going to cover because Jeff is.

. And thirdly the citus rules for how one determines the location of particular types of assets are not going to be covered because we would run out of time. I think that is a subject for a session all of its own on some future occasion.

So let us assume that we have a transaction with property which could be located in any or all of the different States or Territories; let us assume that it is an unlimited security so that we do not have to pay duty up-front; and let us assume that it does include a statement of the maximum prospective liability for Companies Code purposes.

If we turn now to Figure 1 (attached at the end of this paper), we can see the position in different States. The problems to be tackled with multi-State securities are really three. The first is - and these are probably fairly trite but it is worth re-stating them - the first is to avoid paying more duty than is legally required across all the States. The second is to avoid stamping one's documents out of time in any of the States. And the third is to avoid making any necessary Companies Code registrations out of time.

And just having a look at the chart in Figure 1, you should note in the first column the lower rates of duty in three of the States, namely Western Australia, South Australia and Tasmania. Depending on what States your property is located in, you may be able to take advantage of those lower rates.

**Maximum prospective liability clauses**

In the second column, we look at the position regarding clauses specifying a maximum prospective liability. A statement of maximum prospective liability is usually inserted purely for Companies Code purposes and is usually expressed to be purely for Companies Code purposes. There has been a question for some time as to whether the stamp duty authorities would treat that as causing the security to be limited for stamp duty purposes. I think almost all of the commentators on this subject, including the three of us at this table, take the view that it would be quite wrong to say that that does create a limited security for stamp duty purposes. And most of the States have now come into line on that as you will see from Figure 1. I would caution you, however, to exercise care in at least two of the jurisdictions,

namely South Australia and the Northern Territory, where contrary assessments have issued as recently as this year in the case of the Northern Territory. And the authorities are not always adopting a consistent approach there.

**Jeff Mann:**

And the same for Queensland as well.

**John Field:**

Is that true Jeff? Our experience has been that in some cases it may be necessary to make representations to the stamp duties office in Queensland but that the representations have generally been successful.

In New South Wales the position on maximum prospective liability clauses has been clarified by the issue of ruling SD35 which confirms that the New South Wales authorities accept that such a clause will not create a limited security. Victoria does not at the moment have a system of formal rulings comparable with the New South Wales system of rulings. I understand that the Victorian stamps office does have a similar system in contemplation and I think there is at lease a draft ruling in existence at the moment which is comparable to SD35.

Turning to the third column in Figure 1, relating to the time for payment of duty, I would draw your attention here to the fact that in three jurisdictions in particular there is a shorter period than in the others. Queensland has a period of one month and New South Wales two months. In the Northern Territory the position is slightly more complicated than is set out in the chart, but in most cases there will be a maximum of 60 days in the Northern Territory before penalties start to accrue. This factor suggests, if you have to stamp a security document in a range of States, that you treat those jurisdictions early in the sequence.

Interestingly in New South Wales there is another relevant ruling here which is SD94 which suggests that the Commissioner will give a 100 per cent remission of any penalty for late stamping if it can be shown that the delay has been caused by having to stamp the relevant document interstate.

**Pro rata and credit provisions**

If we move now to Figure 2 (attached at the end of this paper), we can look at the pro rata and credit provisions, which are perhaps the element which can have the greatest impact on the amount of duty that is payable and give the greatest scope in some cases for minimising duty.

Taking Victoria first, the position changed a year or so ago. The current position under s.137DA is that one simply gets a credit in Victoria for the lower of either the pro rata amount at

the Victorian rate of 0.4 per cent (being the pro rata mount of duty that is referable to the proportion of the secured property located in other States where ad valorem duty is payable - so that, eg. if there are assets located in the ACT where no ad valorem duty is payable, no credit is allowed for that) - it is the lower of either that or the actual amount of duty which is paid or payable in those other States. When I say "paid or payable" that is a slight misdescription because the position in Victoria if you try to stamp your document there before you have stamped it in one of the lower-rate States is that you will provisionally be allowed a credit for duty on the pro rata basis - in other words you will get the benefit of the full 0.4 per cent credit if you stamp in Victoria first. What then happens is that you are issued with a default assessment in Victoria for the amount that you have been given a credit for, and you have a period of three months to demonstrate to the Victorian Comptroller that you have in fact paid the applicable duty in the other States. And the key here is that when you do demonstrate within the three month period that you have paid the right amount of duty in, say, South Australia, even though the amount of duty you have paid there is at a lower rate than the 0.4 per cent, the default assessment is extinguished and you have effectively had the benefit of a credit for the full 0.4 per cent. So that is a factor which suggests in favour of stamping in Victoria at least before you stamp in the lower-rate States.

One other interesting point to note in relation to Victoria is that when these amendments went through last year, the Law Institute was successful in having a provision inserted which is unique among the States, and which says that if your security is secured wholly on property outside Victoria, provided you are able to state to the Victorian Comptroller that there is no intention to bring Victorian property into the ambit of the security document, then even if you sign the document in Victoria it is subject to nominal duty of $10.

There is a similar provision in New South Wales whereby the document will not be dutiable at all in New South Wales if it is secured wholly on property outside New South Wales, but to achieve that result you have to sign the document outside New South Wales. So if all the parties happen to be located in Sydney and they want to sign in Sydney, that particular exemption will not be available; whereas conversely if all the parties are in Melbourne the exemption would be available if people signed there.

The other aspects of the New South Wales provisions can be stated very simply and they are that you are allowed a credit for duty that is paid or payable in other States. What that means is that New South Wales can be a very useful backstop as the last State in the sequence of States to stamp in, because it means if inadvertently you have paid more stamp duty in some other State than you think you should have, you will still get a credit for the duty that you have actually paid in the other States when you come to stamp in New South Wales.

Queensland is similar to Victoria in that you get a credit for the lesser of the pro rata amount or the duty paid or payable elsewhere, although it is in fact duty paid or payable elsewhere. So the point that I mentioned in relation to Victoria of being able to get some benefit there by stamping there before you stamp in a lower-rate State is not available in Queensland. You actually have to show in Queensland what amount of duty will be payable in the other States and you can get a credit for that. You do not, however, in Queensland have to go back within the next three months to show you have actually paid that duty.

Western Australia is similar to Queensland except that you do have to go back within three months and show that you have actually paid the duty in other States.

South Australia is different yet again. It is the only State which still legislates strictly on a pro rata basis. So you will get a benefit in South Australia only for duty at the South Australian rate - you will not get the benefit of it at the higher 0.4 per cent rate.

Tasmania has no legislative provisions for either a credit or a pro rata basis but as a matter of administrative practice they do allow a concession on a pro rata basis. Interestingly when we spoke to the authorities there this week the reason that they gave for adopting that practice was that they thought it was the same as is currently in force in Victoria!

In the Northern Territory, which is the final jurisdiction, there is no credit or pro rata provision in the legislation - to that extent it is the same as Tasmania. The one thing that there is in the legislation is a provision that says that if your security document actually limits the amount which is secured against Northern Territory property then duty will be paid only up to that amount. Of course you need to be careful in such a case about the ability of the person granting the security to shift assets into the Northern Territory so as to put the assets beyond the scope of your security. And the other point about the Northern Territory exemption is that it is only available if the document is signed outside the Northern Territory. If you sign it in the Northern Territory then wherever the secured property is located you are going to be up for loan security duty on the full amount.

So those are the credit and pro rata provisions. The only point I would mention on Companies Code registration which can have an effect on the timing is that, against the background that it can take quite a long time to stamp the documents in all the States if you have got property located there, in Victoria and New South Wales the Corporate Affairs Commissioners are very reluctant to give any more than two extensions of 30 days each. So that gives you effectively 90 days after you have provisionally registered in order to get your stamping completed, which you would think would be ample time but quite often it is not. So if your

chargor is incorporated in Victoria or New South Wales, that is a point to watch.

**Conclusion**

To sum up and perhaps to draw some of those threads together regarding the sequence of stamping documents around the States. Subject to the timing constraints of the Companies Code registration and also to the general time limits for stamping documents under the stamp duties legislation which we saw in Figure 1, it is usually going to be preferable to stamp documents in Victoria first if there are other assets located in lower-rate States. With the Northern Territory it is preferable to make sure you execute the document outside the Territory and that you do put in a limit for the amount that is secured against Northern Territory property. And it can be a useful precaution to stamp in New South Wales last.

That is all I propose to say about multi-State stamping but no doubt the Chairman will allow questions and I would certainly be glad of comment that anyone has.

**Jeff Mann:**

MORTGAGES BY DEPOSIT

What I am now going to look at is mortgages by deposit and ladies and gentlemen you will be getting copies of a paper or proceedings in due course together with these various overheads that we have got. Now actually when I thought I would do mortgages by deposit I thought gee that is easy and then I started to sit down and try and work out the various ways in which that can come about. Perhaps if we can have the first page of the next slide. (See annexure "Mortgages by Deposit: At a Glance" and notes thereto). I dreamed up I think ten different possibilities and yesterday I thought about a couple of others and what I am trying to do in that schedule is to give the various examples - and I will go through that in a minute - and try and summarise what appears to me to be the situation in each of the States and Territories. I profess a competency in stamp duty in Queensland but I am a bit thin in the other States so I would be delighted to have your input. The first example which I thought about was that we may well have a situation where we are going to have a written off oral acceptance in relation to the lending agreement. And of course I could not find any problems in any of the States except Queensland on that and you are all aware of 67A.

As I go through each one of these one by one, please feel free to have a look at your own State and if you disagree with the summary, let us hear from you.

The second one, an agreement accompanied with deposit of title deeds; I actually worked out that perhaps you could have four

different circumstances. You can have an agreement and then you could just have the deposit which happened to be made contemporaneously. You could have an agreement to deposit. You could have an agreement which records the deposit. And you could have one of those extraordinary memorandums where people sort of swan around and say "well, I don't know whether I'll ever give you a mortgage. But if I do this is the terms which it might just be on." And then they whistle for five minutes and hey presto - five minutes later it actually happens. Now what I am talking about in 2 and 3 is a case where there is a lending agreement which records the terms of the loan and the borrowing, but it also just simply records the fact that the title deeds have been deposited. Now the reason that I put that one in, (No 2 is accompanied with the deposit, No 3 is unaccompanied with the deposit which might take place either before or after the agreement), is because when I started researching and having a look at these ostensibly easy situations, I found that really the whole things becomes a bag of worms. And I have (as John and Bill well know over the last few days) made a number of amendments to this wretched schedule and I think it has been a bit hard for them to keep up with my changes.

Row 2 has been "problem"/"no problem" three or four times in the last four or five days. The point that I am making is that there were some old cases Meek v. Bayliss (1862 31 L.J. Ch. 448), Pyle v. Partridge (1846 15 L.J. Ex. 129), Attenborough v. The Commissioners (1855 11 Ex. 461) and they are really based on - it is a bit hard to summarise in a few words, but essentially it seems to be this. Take Queensland - Queensland s.65 is almost the same as s.86(1) of the 1891 Act. Now prior to that Act there were these cases of Meek v. Bayliss etc. Meek v. Bayliss was a case in which there was executed an agreement where A said that he owed B money and they recorded the fact that there had been a deposit of title deeds at the same time. The court said that was not a mortgage within the equivalent of s.65 because it is just a record of something being done. Along comes then s.86(2) and that is the section which roughly says that an equitable mortgage relating to title deeds is going to be subject to duty. Sergeant 4th edition - one has to go back to the old edition - says that that would now knock out Meek v. Bayliss. When you look at s.65(1) of the Queensland Act there is nothing in it about equitable mortgages equivalent to the provisions of s.86(2). You therefore come to the conclusion that it seems to me that Meek v. Bayliss would still apply in Queensland.

Now for those of you of course who have got out your pocket copy of the Queensland Act - and don't we all have a copy of one - and it is the same in the other States where I have said "no problem", there is a provision which says a contract or an agreement for the deposit of title deeds to make a mortgage. And those words "for the making of a mortgage", it is a bit difficult to see whether it relates back to agreement or to the deposit of title deeds. But based on Meek v. Bayliss you can say that they relate back to an agreement for the making of a mortgage. In

Queensland however there is a bit of a problem because if you follow that argument through then why did they amend the Act a couple of years ago to specifically catch things like an agreement for the deposit of title deeds etc.

What all that amounts to is that I am really saying therefore that in each of those States where I have said "no problem", I do not believe that there is a mortgage where you simply have a lending and the document records the contemporaneous deposit of title deeds or the title deeds are actually deposited some other time. But I am saying there is a problem for South Australia because it seems to me that South Australia has included in its definition of mortgage, the equivalent of s.86(2) of the old English 1891 Act. And I think that that is the only State for which there is a problem.

**John Field:**

Could I chip in on that Jeff, simply to say that I am not sure that the various Comptrollers or Commissioners would share your view on the interpretation whether "for making a mortgage" relates back to the agreement or whether it relates to the depositing of the title deeds or to the whole thing. I think a lot of the Commissioners would take the view that if the deposit is for the purpose of making a mortgage then that is enough to make the document dutiable.

**Jeff Mann:**

Two days ago or one day ago I actually said for Queensland, New South Wales, Victoria and the others that there was a problem. But after having looked at Meek v. Bayliss and Harris v. Birch (1842 9 M & W 591) and these old cases I came down on the side of saying that there was no problem. But there we are, we have got two views on that. But it seems to me John, would you say that certainly in South Australia there is a problem?

**John Field:**

I think so.

**Jeff Mann:**

Well moving on then to No 4 - deposit of title deed and the power of attorney. I said that there is no problem for any State except Queensland and I think there is a problem for Queensland because 65(1)(d) specifically says that it includes any power or letter of attorney given upon the occasion of or relating to the deposit of any title deeds or instruments constituting of being evidence of title to any property whatsoever. So I think that there is a problem for Queensland.

No. 5 Caveat - I did not think there was any problem if you just put in a caveat in any State except Queensland again because in

Queensland under s.66A we say a caveat under the Real Property Act pursuant to (a) a mortgage, (b) an instrument of a kind referred to in 65(3) (don't worry about that!), or, and these are beaut words, an arrangement whereby title deeds are deposited to secure the payment or repayment of a sum of money etc. shall be chargeable with duty the same amount as is chargeable on a mortgagor charged to secure the payment or repayment of the same sum of money as is secured by the mortgage or the instrument or pursuant to the arrangement unless the Commissioner is satisfied that ad valorem duty is going to be paid somewhere on a document or in the case of an arrangement of the kind referred to in (c) on some other instrument pursuant to that arrangement. It is extraordinary to ponder what the draftsman of that piece of legislation thought was an arrangement. But I have come to the conclusion that I think that you only have arrangements where you have obviously specific dealings between parties etc. But you can ponder the length and breadth of that concept for some time.

Memorandum accompanied with deposit of title deeds - 6 and 7 - that is really the sort that I mentioned before where people sit around and they say I don't know whether they will ever lend to you and I don't know whether I'll ever borrow from you but if I ever did perhaps I might deposit my title deeds with you and if I ever did this would be the terms of it. I did not think there was a problem - neither accompanying the deposit deeds nor not accompanying the deposit deeds except for New South Wales. John do you think there is a problem there?

**John Field:**

I would not have thought so generally. I think in New South Wales there is, though.

**Jeff Mann:**

Yes indeed, because I think that new loan security point particularly picks that one up. It is interesting of course to ponder if there is a problem under 6 and 7, why is there not a problem under 2 and 3. But it is interesting to work from the basis that assuming there is no problem under 2 and 3 (on the sort of arguments that I have mentioned before), why would there not be a problem because of loan security (e). And I think that you can get a bit of an argument there that the wording is different.

Can we have the second page of that slide please. These were three other circumstances - the last one is obvious but the other two - No 8 deposit of title deeds - just simply depositing them with an executed transfer in blank. I did not think there was a problem

No 9 - I did not think there was a problem there but I have highlighted there No 9 Queensland, note 7, and really why I am highlighting that is because we have a couple of funny sections

in Queensland which effectively say - we have a lot of them but these two are interesting - any instrument of conveyance which is executed when you do not have the name of the transferee shown therein is void for all purposes in law and in equity. Breskvar v. Wall in the High Court said that did not apply in relation to real property office land. And then 53A that effectively says that you can still do that, in other words a transfer of scrip where the transferee is not shown, where any transfer of stock or market securities deposited with the relative scrip certificate with any banking company or financial institution carrying on business in Queensland by way of security for a combination extended by the company etc. then that can get the benefit of - you can take one of those transfers in blank. But there are limitations obviously on that - it talks in terms of banking companies doing business in Queensland etc. and I have actually seen a case where the fact that the transferee, the financial institution did not carry on business in Queensland caused a rather monumental problem.

Well, come on, from any of the States where you disagree with any of that - you have heard from John - he thinks that there is a problem in 2 and 3 in a couple of the States. Do you have any comments?

**Comment - Tom Bostock (Mallesons Stephen Jaques, Melbourne):**

My recollection of 85 - I thought that in Victoria a caveat under the Transfer of Land Act in respect of a mortgage is dutiable as a Mortgage.

**Jeff Mann:**

Yes Tom, I do mention that. I came to the conclusion that if you just have the caveat that talks in terms of if it is pursuant to an unregistered mortgage and I think that that throws up the question whether unregistered mortgage means an actual document. But a well known publication in this area says that it is not too sure whether it means a written instrument or not.

**Bill Wallace:**

I think it is limited to written instruments.

**John Field:**

It perhaps begs the question as to how in the caveat itself you describe your interest. If you say "as mortgagee" then maybe you are going to get assessed.

**Bill Wallace:**

Yes but would that attract assessment if there was no written mortgage behind it?

**Jeff Mann:**

Yes you have to have a written instrument plus caveat or can you just have caveat and the whole thing falls within one of those definitions?

**John Field:**

I think the better view is that the caveat would not be dutiable unless there was also a written mortgage.

**Comment - David Frecker (Blake Dawson Waldron, Sydney):**

I should like to ask about the deposit of title documents accompanied by executed transfers in blank. In the New South Wales definition of "Mortgage", in addition to reference to agreements to give a mortgage by way of deposit of title documents, there is reference to any transfer or conveyance of property comprised in such documents of title and to any defeasance qualifying a transfer or conveyance. I have taken the view, therefore, that an executed transfer in blank might nonetheless be a mortgage under those provisions whether or not it is accompanied by a deposit of title documents. The alternative argument would be that, because the transfer is executed in blank, it is not a legal document at all; but it is an instrument which has been executed and it must have some legal effect.

**Jeff Mann:**

If my memory is correct I think Munroe in his book refers to a case where - I am sure there is a bit of an authority in Munroe that the transfer in blank is not a transfer. [Well what is it then?] It is just simply a thing! Well it is nothing. It is just a piece of writing to be held. But he does refer to a case on that. [But it is an executed document and it should be stamped when it was first executed]. It does not fall within any of those usual concepts of what is a conveyance does it? [It might be a deed?] But is it a transfer, that is really the question. I mentioned that in the notes and came to the conclusion that I thought conveyance there that it was not a mortgage because conveyance in those sections really means your ordinary meaning of conveyance in the principal section of the relevant legislation. But have a look at that Munroe - it is on page 95? - because I had a look at that yesterday!

**John Field:**

UNWINDING FINANCING UNIT TRUSTS

I think we have got two topics to go which will both be abbreviated substantially, because not only are we in the last quarter, we are probably into time-on in the last quarter.

The first of these is unwinding financing unit trusts sometimes known as FUTs. We have heard so far about the income tax aspects of financing unit trusts and about tax ruling IT2512 which was referred to in the last session. Partly as a result of that tax ruling and partly just because the financing periods under some of the earlier financing unit trusts are getting to their end, just through the natural effluxion of time, the question is arising as to what the stamp duty implications are of the unwinding of those unit trusts and the repayment and paying out of the financier. You are probably all well familiar with the structure of FUTs by now but basically the unwinding of the unit trusts involves paying out the banks or the finance unit holders - paying out their units - and that is usually done through a funding of one type or another coming from the sponsor unit holder.

The stamp duty legislation in various States which can be relevant to this, in particular, is the provisions which impose stamp duty at conveyance rates on transfers of units in land owning unit trusts. There are three States which have very similar provisions now, namely Victoria, New South Wales and the Northern Territory. The Victorian and Northern Territory provisions are almost identical and, since their inception, they have included what basically amounts to a financing exemption. Under that exemption, if the change of ownership in the unit trust is to do with the provision of finance or the repayment of the finance then the transfer of units will not attract duty at conveyance rates, although you may still have duty on a transfer of a marketable security at the lower 0.6 per cent rate.

There are two other States, namely Western Australia and Queensland, which also have provisions imposing the higher conveyance rates on ownership changes in land owning trusts, but they are structured rather differently from the Victorian, New South Wales and Northern Territory provisions and neither of them has a financing exemption specifically in the Act. And so one needs to treat those States separately.

With New South Wales its provisions are similar to those in Victoria. As I mentioned earlier in the round-up of recent developments in the States a financing exemption has recently been inserted with effect from the beginning of this year in new s.99K.

Without going into detail as to what those financing exemptions are, there are really three structures for paying out a financier or for unwinding one of these financing unit trusts that I wanted to speak about briefly. Perhaps the most obvious means and the one that is referred to I think in the Income Tax Commissioner's ruling on the subject, is the technique of the units that are held by the finance unit holder actually being sold to the sponsor unit holder pursuant to a put option held by the financier or a call option held by the sponsor unit holder. It is clear, as I said before, that the financing exemption in New

South Wales, Victoria or the Northern Territory would apply so that conveyance duty would not apply to that transfer. Marketable security duty probably would apply.

One point to be careful of in New South Wales, however, is that the financing exemption there is rather more limited than the Victorian or Northern Territory one and if there has been a change in the identity of the sponsor unit holder between the time when the finance unit trust is first put in place and the time when the financier is paid out, then you are at risk of not getting the benefit of that financing exemption.

The Western Australian provision, which has been in force for some time, does not have any comprehensive tracing provisions and so the mechanism which has been adopted in setting up these financing unit trusts so as not to attract the operation of the Western Australian provisions was generally to use what is known as a two-tier trust structure under which the financing trust, the one which actually holds the interest in the land, is not the trust in which the dealings in the units are done. Basically the land owning trust's units are held by another trust and it is that top trust in which the sponsor unit holder and the finance unit holder hold their units and both trusts under that sort of structure are managed and controlled, and have their register of units, outside Western Australia.

That same sort of structure was put in place for numerous property developments in Queensland, but the Queensland amendments introduced last year do have comprehensive tracing provisions and do trace through any number of multiple trusts that might have been put in place and it is very hard I think on a payout of the financier in such a Queensland trust to avoid the application of conveyance rates in Queensland.

So the actual transfer of the units is one mechanism I have mentioned for paying out the finance unit holder. A second and perhaps more common method is that, rather than have the finance unit holder's units transferred to the sponsor unit holder, the finance unit holder's units are simply redeemed by the trustee out of funds that are paid into the trust by the sponsor unit holder, either by way of subscribing for additional units or paying up partly paid units which he may have held previously. That is perhaps the more common structure. And if the finance unit holder is paid out in that way by means of a redemption then for Victoria and New South Wales and I think the Northern Territory not only should the finance exemption be successful in avoiding the payment of duty at conveyance rates, but also the redemption - because it avoids having a transfer - should avoid duty at marketable securities rates. But even that will not be sufficient in Queensland.

There is a third possibility which can be used, generally not at the end of the financing period but rather where an interim structure was put in place before the Tax Commissioner's ruling.

Those interim structures generally involved the financier subscribing for partly paid units but not actually investing the full amount of his financing and many of those structures would have involved various conditions precedent which maybe could not be satisfied or maybe some variation to the structure was needed before the financier would invest the rest of his money, and those variations may have taken the structure outside the grandfathering protection of IT2512. In some of those transactions the interim structure is having to be unwound, but the financier who would have been the unit holder in the trust structure is willing to continue as the financier for the project but just as an ordinary lender rather than on the basis of earning an after-tax yield. Where the same bank is prepared to continue in the transaction after the unwinding of the interim structure, quite often that is done by in fact not dismantling the trust but leaving the trust in place and simply amending the document that describes the guaranteed rate of return that the bank is going to earn and changing it from a guaranteed after tax rate of return into a normal lending rate, namely a pre tax rate something like a margin over bank bills. And so in financial terms that achieves the same thing as unwinding the trust but it can do it in a way which leaves the trust intact and does not involve any change in the ownership of units.

For Western Australia that should be successful even though there is no financing exemption there. In Queensland, however, and I would be interested in Jeff's views on this - he may have some comments - the wording in the Queensland Act is so broad that you can be deemed to dispose of units in a Queensland trust if you have any variation of rights relating to the property of the trust. The comparable Western Australian provision talks about variation of rights relating to the capital of the trust but in Queensland because it talks about varying rights relating to the property of the trust. It seems to me that if you vary the rights to income that the bank is entitled to as a unit holder, that that is a variation of rights relating to the property of the trust and therefore a deemed disposition. And it seems to me that it therefore would still be caught by the Queensland provisions, which I think in Queensland leaves you just with possible constitutional arguments as to the validity of the provisions and in particular the nexus provisions. I personally think that it is constitutionally valid but others who are better constitutional lawyers than I am may have other views on that too.

**Jeff Mann:**

Well just on that point on variation of units. What it actually says is that alteration of a right pertaining to the unit with respect to the property of the unit trust scheme. So it ends up I think what John has been saying. I think it is a disposition.

**Jeff Mann:**

RECENT DEVELOPMENTS WITH HANDEVEL'S CASE

The last of the four that we are to look at and we have only got a few minutes. Can we have the last slide thanks. (See annexure "Handevel - Where are We?: At a Glance" and notes thereto). Really the legitimacy for us to look at this is of course the recent change in New South Wales as John mentioned. Again, if you disagree, please let us hear from you. If you leap up and of course you agree you will be paid handsomely later on. I started off by looking at the definition of mortgage in each of the States and came to the conclusion that for Queensland, Victoria, South Australia, and Tasmania that their definitions of mortgage were much the same as was applicable in Handevel. But I thought that New South Wales, Western Australia and the Northern Territory were inclusive definitions. Moving on from that as to where Handevel principle applies, I though it applies certainly in Queensland, Victoria, South Australia, Tasmania, Northern Territory but not now of course in New South Wales and I have said "yes" and "no" to Western Australia on the basis that the upstamping point of course is still probably arguable there.

Relevant rulings - well trying to get relevant rulings in the various States of course in some of the States is pretty hard. I have put question marks beside those States where I have not been able to get what I think is an official answer. I think that in New South Wales we had SD70 and that has now obviously got to be read subject to the amendment that we have heard from John earlier on but I would be interested to hear from anybody as to whether there have been any relevant rulings in Victoria, South Australia, Western Australia etc.

**Comment - Rowan Russell (Mallesons Stephen Jaques, Melbourne):**

We do have a private ruling in Victoria that the contingency principle does still work.

**Jeff Mann:**

Are you aware that other people have got similar private rulings? [I am not aware of anyone who has got a different interpretation].

**John Field:**

I think we have had private rulings also but there is no doubt that is the Comptroller's practice in Victoria to uphold Handevel.

**Jeff Mann:**

What about the other States?

I think Bill in your paper last year you went through this too. You looked at each of the States.

**Bill Wallace:**

Yes. My recollection is that you can still sometimes strike practical problems in South Australia and the Northern Territory again. Not for any particular reason of difference in the legislation as I recall but the practice seems to vary from day to day or hour by hour there.

**Jeff Mann:**

I am right in remembering that you last year said that certainly in the Northern Territory it is not on?

**Bill Wallace:**

I know that the Northern Territory Commissioner had originally ruled that he wound not accept the contingency principle but I understand that now he has on occasions accepted it.

**Jeff Mann:**

Well I would be interested to hear from anybody in those States under that line relevant rulings who can either say positively yes or positively no. We are particularly looking for an elusive Tasmanian too.

**Comment - From the floor:**

I have a comment in relation to New South Wales - in this discussion you have said the Handevel principle does no longer apply in New South Wales. Of course the event that only affects certain contingent obligations and it does not completely abolish the principle of Handevel.

**Jeff Mann:**

Yes, I do mention that in my paper. I think the legislation has got a restriction on it where you can show unless the Commissioner is satisfied that there is no connection between the loan security and any indebtedness of the borrower. Is that what you are talking about? [It is also perhaps in the situation of the application of Handevel in the case of a guarantee - the obligations which may not get caught]. Yes, sure.

**Bill Wallace:**

I would like to thank very much both John Field and Jeff Mann for excellent presentations. It was very creative work particularly in the area of the mortgage by deposit and in the winding up of the financing trusts. It has covering ground which really has not been covered before. And I think when you get their paper, which you will in due course with those tables, you will find it a very useful reference. So could we all thank both our speakers.

FIGURE 1

## MORTGAGE/LOAN SECURITY DUTY

| | Rate | Max. Prospective Liability means limited security? | Time for stamping |
|---|---|---|---|
| VIC | 0.4% | NO | 3 MONTHS |
| NSW | 0.4% | NO | 2 MONTHS |
| QLD | 0.4% | NO | 1 MONTH |
| WA | 0.25% | NO | 3 MONTHS |
| SA | 0.35% | NO? | 2 MONTHS IF EXECUTED IN SA; OTHERWISE 2 MONTHS AFTER RECEIPT IN SA, UP TO MAX. 6 MONTHS |
| TAS | 0.35% | NO | 30 DAYS IF EXECUTED IN TAS; OTHERWISE 60 DAYS AFTER RECEIPT IN TAS. |
| NT | 0.4% | NO? | 30 DAYS IF EXECUTED IN NT; OTHERWISE 30 DAYS AFTER RECEIPT IN NT, UP TO MAX. 60 DAYS |
| ACT | N/A | N/A | N/A |

FIGURE 2

## MORTGAGE/LOAN SECURITY - CREDIT PROVISIONS

(GENERAL SUMMARY ONLY)

| | |
|---|---|
| VIC | - Credit for lesser of (a) pro rata duty referable to assets in other dutiable States, and (b) duty paid or payable (or which but for an exemption would be payable) in other States.<br>- Three months to show duty paid. |
| NSW | - Credit for duty paid or payable in other States. |
| QLD | - Credit for lesser of (a) pro rata duty referable to assets in other dutiable States, and (b) duty paid or payable in other States. |
| WA | - Credit for lesser of (a) pro rata duty referable to assets in other dutiable States, and (b) duty paid or payable in other States.<br>- Three months to show duty paid. |
| SA | - Duty payable on pro rata amount referable to assets in SA. |
| TAS | - No legislative provision.<br>- Administrative practice to assess on pro rata amount referable to assets in Tas. |
| NT | - No credit or pro rata provision.<br>- For securities executed outside NT, where amount secured against NT property is limited, duty payable on that amount. |

## MORTGAGES BY DEPOSIT: AT A GLANCE

| | | QLD. | NSW. | VIC. | SA. | WA. | TAS. | NT. | ACT. |
|---|---|---|---|---|---|---|---|---|---|
| 1. | Written Offer - Oral Acceptance | Problem: S.67A "Mtge" | No Problem | No Problem | No Problem | No Problem | No Problem | No Problem | No Problem |
| 2. | Agreement accompanied with deposit of Title Deeds | No Problem [Note 1] | No Problem [Note 1] | No Problem [Note 1] | Problem:S.76 "Mtge" (d), [Note 12] | No Problem | No Problem [Note 13] | No Problem | No Problem |
| 3. | Agreement unaccompanied with desposit of the Title Deeds | No Problem [Note 1] | No Problem [Note 2] | No Problem [Note 1] | Problem:S.76 "Mtge" (d) [Note 12] | No Problem | No Problem [Note 13] | No Problem | No Problem |
| 4. | Deposit of Title Deeds (or Scrip) and Power of Attorney | Problem:S.65(1) (d) | No Problem | No Problem | No Problem | No Problem | No Problem | No Problem | No Problem |
| 5. | Caveat (over land) only | Problem:S.66A [Note 8] | No Problem [Note 9] | No Problem [Note 10] | No Problem [Note 9] | No Problem | No Problem | No Problem | No Problem |
| 6. | Memorandum accompanied with deposit of Title Deeds | No Problem [Note 11] | Problem:S.83 "Loan Sec." (e) | No Problem | Problem:S.76 "Mtge" (d) | No Problem | No Problem [Note 13] | No Problem | No Problem |
| 7. | Memorandum unaccompanied with deposit of Title Deeds | No Problem | Problem:S.83 "Loan Sec." (e) | No Problem | Problem:S.76 "Mtge" (d) | No Problem | No Problem [Note 13] | No Problem | No Problem |

| | | QLD. | NSW. | VIC. | SA. | WA. | TAS. | NT. | ACT. |
|---|---|---|---|---|---|---|---|---|---|
| 8. | Deposit of Title Deeds and executed Transfer (in blank) (land) | No Problem [Note 3] | No Problem [Note 4] | No Problem [Note 4] | No Problem [Note 5] | No Problem | No Problem | No Problem [Note 6] | No Problem |
| 9. | Deposit of Scrip and executed Transfer (in blank) | No Problem [Note 7] | No Problem [Note 4] | No Problem [Note 4] | No Problem [Note 5] | No Problem | No Problem | No Problem [Note 6] | No Problem |
| 10. | Deposit of Titles Deeds only | No Problem | No Problem | No Problem | No Problem | No Problem | No Problem | No Problem | No Problem |

In the foregoing Schedule, each of the following situations are listed:

1. A written offer to supply credit or an application to obtain credit which is accepted otherwise than in writing.

2. An agreement executed by borrower and lender for the repayment of a lump sum accompanied with the deposit of title deeds by the borrower by way of security; the agreement records the deposit of those deeds.

3. Same as 2, but unaccompanied with the deposit of title deeds which, however, is effected later.

4. No executed agreement for the payment of that sum of money but a deposit of title deeds by way of security and the execution of the power of attorney by borrower in favour of lender enabling lender to sign transfers of those deeds on default.

5. No executed agreement for the payment of those moneys; a caveat however is lodged over land.

6. A memorandum setting forth the terms upon which any deposit of title deeds is to be regulated (if ever made) accompanied with the deposit of title deeds.

7. Similar memorandum but unaccompanied with deposit of title deeds which are actually deposited later.

8. No agreement for the repayment of the money but accompanied by deposit of title deeds and executed transfer in blank of land.

9. Same but this time the transfer is in blank of shares.

10. Oral agreement between lender and borrower accompanied by deposit of title deeds by borrower by way of security.

It is not suggested that some good deal of debate cannot accompany each one of the relevant statements for each of the particular States and Territory.

The respective Notes shown in the Schedule demonstrate some of the areas of possible debate.

The relevant Acts referred to shortly in that Schedule:

Queensland - Stamp Act, 1894-1989

New South Wales - Stamp Duties Act, 1920

Victoria - Stamps Act, 1958

South Australia - Stamp Duties Act, 1923-1988

Western Australia - Stamp Act, 1921

Tasmania - Stamp Duties Act, 1931

Northern Territory - Taxation (Administration) Act, 1978

Australian Capital Territory - Not Applicable

**Note 1**

Section 65(1) "Mortgage", sub-paragraph (c) uses the expression "Any agreement, contract or bond, accompanied with a deposit of title deeds for the making of a mortgage ...". The questions which arise are:

1. whether the words "... for making a mortgage" relate to "agreement" or "deposit of title deeds". Meek v. Bayliss (1862 31 L.J. Ch. 448) suggests the former; can that still be right if there is now s.66. On balance, it appears so;

2. whether (even if there is a problem under 1) these words mean that, in a temporal sense, the deposit of the title deeds has to be made more or less contemporaneously with the execution of the agreement. The word "accompany" has been variously defined. The Macquarie Dictionary (Macquarie Library Pty Ltd, 1982) defines that to include:

   "1. To go in company with; join in action: to accompany a friend on a walk. 2. To be or exist in company with; thunder accompanies lightning. 3. To put in company with; associate (following by with); he accompanies his speech with gestures".

   It is suggested that the deposit of the title deeds has to be part of the same transaction: it is suggested that what this means is that the deposit has to be contemporaneously made with the execution of the agreement. If there is any time interval between the execution of the agreement and the deposit of the title deeds such that it can be said that the borrower could always have refused to effect the deposit then the definition is not fulfilled. This will always be the case where the lender executes the agreement and/or lends the money before the deposit is effected.

   Similar points arise in other States.

**Note 2**

NSW. Section 83 "Mortgage" (d), NT. Section 4 "Mortgage" (f), include: "any agreement, contract or covenant (being an agreement, contract or covenant relating to documents of title or accompanied with the deposit of any documents of title or

instruments creating a charge on any property) for making a mortgage ...".

The question then is whether the addition of the words "... relating to documents of title" (not found in Qld. s.65(1) "Mortgage" (c)) add anything to the operation of the definition.

It is suggested that the addition of these words does not make any difference for these facts: that an agreement will be one "... relating to documents of title" if the agreement refers to them.

**Note 3**

Qld. Section 65(1) "Mortgage" (c) includes: "... and any instrument by which any property whatsoever is ... rendered liable as a security for the payment or repayment of any sum of money". It is not, however, thought that these words would extend to the execution of a transfer in blank since executing that document without more would not render liable property as a security; the charge is effected by the deposit.

**Note 4**

NSW. Section 83 "Mortgage" (d) includes: "... or any such other security, transfer or conveyance of any estate or interest in real or personal property whatsoever comprised in such documents, or for pledging or charging any such property as a security".

Although the transfer executed in blank may be thought to prima facie come within these words, it is suggested that the s.65 concepts of "conveyance" are intended; on that basis when a transfer executed in blank in these circumstances would not fall within those words.

It is suggested that the same applies to Vic. s.137D "Mortgage" (c).

**Note 5**

SA. Section 76 "Mortgage" (c) includes: "... or any such conveyance or instrument as described above of or concerning any real or personal property comprised in such title deeds, or any estate or interest therein, or for pledging or charging in as a security".

Although the words "as described above" could refer to either (a) or (b), again it is suggested that the s.60 concept is applicable.

**Note 6**

NT. Section 4 "Mortgage" (f) includes: "... or any other security, transfer or conveyance of an estate or interest in real

or personal property comprised in those documents, or for pledging or charging that property as a security".

Again, it is suggested that the section for definition of "conveyance" would apply.

**Note 7**

The same points as made under Note 4 apply.

However, it should be noted that:

1. Section 53(11) provides:

   "No instrument of conveyance or transfer executed on or after the 1st day of November, 1918 of any estate or interest in any property whatsoever shall be valid, either at law or in equity, unless the name of the purchaser or transferee is written therein in ink at the time of the execution therein.

   Any such instrument so made shall be absolutely void in operation, and shall in no case be made available by the insertion of a name or any particulars afterwards.

   Moreover, for any breach of this sub-section a penalty not exceeding $40.00 shall be incurred by each party executing the instrument:

   Provided that this sub-section shall not apply to a transfer or conveyance of any marketable security or right in respect of shares to which sections 31C, 31D, 31E and 31F to this Act apply".

   The possible application of this sub-section should not be overlooked as is evidenced in the High Court decision of Breskvar v. Wall (although that case decided that, so far as the Real Property Act in Queensland is concerned, the sub-section does not apply since the system under those Acts is title by registration and registration of title).

2. Further, s.53A (second paragraph) provides (in part):

   "Where any transfer of stock or marketable security is deposited with the relative script certificate with any banking, company or financial institution carrying on business in Queensland by way of security for a combination extended by such company or institution to any broker or agent or customer in an ordinary course of business and the name of the transferee is not written in such Transfer in ink at the time of the execution thereof by the transferor, such transfer of stock or marketable security shall not be affected by the provisions of sub-section 5 [sic] of section 53 of this Act in so far as such transfer of stock or

marketable security is intended to be held as a security for such accommodation only by such company or institution ought to be dealt with, should occasion arise by any such company or institution in the exercise of the Power of Sale under such security".

No doubt the type of instrument of conveyance or transfer to which sub-section (11) is speaking is one to which the Queensland Act would purport to apply. Further, the restricted nature of the protection provided by s.53A should be noted particularly:

(a) The deposit must be with a banking company or financial institution;

(b) That banking company or financial institution must be carrying on business in Queensland at the time of the deposit;

(c) The deposit must be by way of security for accommodation (whatever that means);

(d) The accommodation must be extended by such banking company or financial institution;

(e) The accommodation must be extended in the ordinary course of business.

**Note 8**

Qld. Section 66A provides:

"A Caveat under the Real Property Act, 1861-1985 or the Real Property Act, 1877-1981 claiming the estate or interest in land pursuant to -

(a) a Mortgage;

(b) an instrument of a kind referred to in section 65(3) or 66; or

(c) an arrangement whereby Title Deeds are deposited to secure the payment or repayment of a sum of money advanced or lent at any time, or previously due and owing or foreborne to be paid, being payable, or for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon the current, together with or without any sum already advanced or due, as the case may be,

shall be chargeable if duty if of the same amount as is chargeable on a Mortgage or Charge to secure the payment or repayment of the same sum of money as is secured by the Mortgage or the instrument or pursuant to the arrangement,

unless the Commissioner is satisfied that ad valorem duty chargeable under the heading 'Mortgage, Bond, Debenture and Covenant' in the first schedule on an amount no less than that sum, has or will be paid:-

(d) in the case of a Mortgage or an instrument of the kind referred to in paragraph (b), on that Mortgage or instrument or some other instrument pursuant to the arrangement in relation to which the Mortgage or instrument was executed; or

(e) in the case of an arrangement of a kind referred to in paragraph (c), on some other instrument pursuant to that arrangement".

For present purposes, it is the terms of (c) which is of interest.

The word "arrangement" has been variously defined. The Macquarie Dictionary defines that to include:

"1. The act of arranging. 2. The state of being arranged. 3. The manner in which things are arranged. 4. A final settlement; adjustment by agreement. 5. Proprietary measure; previous plan, preparation. 6. Something arranged in a particular way; a floral arrangement."

It is suggested that the word connotes any intended dealing between two parties. Accordingly, if the lodgment of a Caveat is an after thought then s.66A will not apply.

Note 9

NSW and SA. There is no equivalent to Qld. s.66A. Section 84CA subjects a Caveat under the Real Property Act 1900: "... in which in a state or interest is claimed under an unregistered mortgage ...". Although the reference to "mortgage" in that expression perhaps would leave one back to looking at s.83 "mortgage", it is suggested that this section only applies where an instrument of mortgage in the usual form is executed.

Note 10

Vic. Section 137DB is similar to the NSW position. Again in that State there is no comparative section in Victoria to that in Queensland.

Note 11

Qld. Section 65(1) "Mortgage" (c) includes: "Any agreement, contract or bond, accompanied with a deposit of title deeds for making a mortgage ... or for pledging or charging the same as security". It is suggested that the sort of memorandum under consideration would not fall within those words since it is a

memorandum only of the terms which will govern any relevant deposit if made. There is no agreement when a mortgage will be granted or a pledge or a charge will be made. After its execution both borrower and lender are under no obligation to do anything else.

Note 12

SA includes "Mortgage" definition (d) which is identical to s.86(2) of the English 1891 Act of which Sergeant (4th Ed.) p.162 says would "... make chargeable with duty documents of the kind referred to in ... Meek v. Bayliss ... which had hitherto escaped liability as not being 'mortgages'".

Note 13

Note that Sch.4A,3(a)(iv) includes "writing accompanying or given in relation to any deposit of title deeds ..."; yet that writing must be "... whereby the property comprised therein is pledged or charged as a security ...".

GENERAL COMMENT

Although it is suggested as the Schedule shows that probably each of the deposits effected in the manner set out in situations 8, 9 and 10 can be effected Australia wide with no problems, there are, as has been seen from the notes, qualifications which can be made on some of those possibilities.

At the end of the day it is suggested that the only true way in which a mortgage by way of deposit can be effected clearly without any problems is by way of a deposit accompanying with no writings at all. Where that is effected or even where there is a deposit accompanied by executed transfers in blank, there are potential problems such as:

(a) How is the lender later to prove the deposit was by way of mortgage?

(b) How is the lender to prove the terms of that mortgage?

(c) Does the lender get a power to sell?

(d) If so, then it is a simple and practical remedy.

(e) Can the lender appoint a receiver?

It is not proposed to discuss those questions here - the law on each is perhaps a paper for another day.

If there is independent evidence of the fact that a mortgage was effected, then its terms no doubt could be proved. There is abundant authority for the proposition that a deposit of title

deeds effects an equitable mortgage and that the power to sell would be granted by a court. Yet it is readily seen that this way of taking a charge is not all that practical. An assessment of the relevant situation however may well be that the lack of an easy method of realising on the security is no great problem where the amount of duty would be high.

## HANDEVEL - WHERE ARE WE?: AT A GLANCE

| | QLD. | NSW. | VIC. | SA. | WA. | TAS. | NT. | ACT. |
|---|---|---|---|---|---|---|---|---|
| Same or substantially same def. of Mtge as in *Handevel* | Yes [S.65] [Note 1] | No [S.3 & S.83] [Note 2] | Yes [S.137D] [Note 1] | Yes [S.76] [Note 1] | No [S.81 and Sch.2,13] [Note 2] | Yes [Sch. 4A,3] [Note 2] | No [S.4] [Note 2] | Nil [Note 6] |
| *Handevel* principle applies | Yes | No [S.84(3c)] [Note 3] | Yes | Yes | Yes & No [Note 7] | Yes | Yes | N/A |
| Relevant Rulings | Yes(?) [Note 4] | Yes [Note 5] | Yes(?) | Yes(?) | No(?) | No(?) | No(?) | N/A |
| Amending Legislation | No | Yes [S.84(3c)] | No | No | No | No | No | N/A |

**GENERAL COMMENT**

The decision in Handevel v. Comptroller of Stamps (Vic.) (85 ATC 4706) (other than with respect to the meaning of "debenture") can be stated as follows:

> A mortgage given as a security for the discharge of a contingent obligation to pay is not a "mortgage" within the meaning of s.137D(1) of the Stamps Act 1958 (Vic.).

The facts of the case are well known and will not be repeated here. Three points in the judgment of the majority in the High Court are worthy of mentioning:

1. The majority found that the security to support the undertaking to purchase the shares fell outside the statutory definition of "mortgage" since there was "... no basis for saying that the instrument of mortgage given by [the company] was 'for the payment of ... money advanced or lent at the time or previously due or owing, or foreborne to be paid, being payable'".

2. It was not necessary in that analysis to look beyond the company's undertaking in categorising the security as a "mortgage" or not; but, even if it was, the majority found on that analysis that the Comptroller's case was not advanced: "By no stretch of legal imagination can money subscribed for the issue of redeemable preference shares be described accurately as money lent or money advanced, even in a case in which there is an obligation, rather than an option, to redeem the shares on or before the date stipulated for redemption".

3. The decision in Ansett Transport Industries (Operations) Pty Ltd v. Comptroller of Stamps ((1981) VR 35) could be distinguished: "There the deed of mortgage which was held to fall within section 137D(1) gave security to the surety for the obligation of the principal debtor to repay to the surety moneys which it was called upon to pay to the principal creditor. The security was therefore given for the repayment of an amount which would be paid by the surety to the principal creditor before repayment to the surety by the principal debtor. Here it is otherwise, for the security is given for the payment of an original amount, the amount which [the company] will be liable to pay by way of purchase price for the shares in the future, if and when the preference shareholder gives notice requiring purchase by [the company] in the event of one of the three contingencies occurring".

The transposition of that principle to the situation of a security given to support a guarantee or indemnity for the payment or repayment of sums owing or to be thereafter owing by a principal debtor was soon made.

Several of the Commissioners have issued rulings which by and large confirm the applicability of the principle: for example; the ruling issued by the New South Wales Commissioner of Stamp Duties on 2nd November, 1987 (SD 70).

However, the Handevel era may well be coming to a close. The New South Wales Stamp Duties (Amendment) Act 1988 introduced new s.84(3B)-(3D): Duty is payable on "the amount of any contingent liability" which arises where the security for an advance to a borrower is or includes a guarantee or indemnity and a loan security is used or is capable of being used (whether directly or through a chain of arrangements) to recover the whole or any part of an amount payable by the guarantor or indemnifying party as a result of any default by the borrower or any party to the arrangements. In that case, the loan security is liable to duty in respect of the contingent liability under the guarantee or indemnity (or where there is more than one guarantee or indemnity, the greatest contingent liability) as if that liability was an advance.

There is provision however for the section not to apply where "... the Chief Commissioner is satisfied that there is no connection between the loan security and any indebtedness of the borrower ...". Immediately one is tempted to ponder:

(a) What is a "connection" - is it something dependent upon an intent, determinable by subjective or objective criteria?

(b) How does one go about satisfying the Commissioner that, whatever "connection" means, in the particular case it is not present?

**Note 1**

The definition is a "means" definition.

**Note 2**

The definition appears to be an inclusive definition but see Wallace & Tolhurst Para 12.41C. For New South Wales, Western Australia and Northern Territory, the Handevel principle could not apply so far as determining whether the security fell within "mortgage" but could apply in relation to unlimited security with respect to "advance".

**Note 3**

Commenced on and from 1st January, 1989.

**Note 4**

So far as Queensland is concerned, although the New South Wales type system of rulings is not followed, the Commissioner has, it is understood, issued rulings similar to Ruling SD70.

**Note 5**

SD70 must now be read subject to s.84(3C).

**Note 6**

Duty was abolished in the Australian Capital Territory on and from 1st September, 1987.

**Note 7**

The terms of Item 13 of the Second Schedule ("Mortgage (Legal or Equitable), Bond, Debenture, Covenant, Bill of Sale, Guarantee, Lien or Instrument of Security of Any Other Kind Whatsoever") would preclude the argument that the security did not come within the head of charge but the argument that upstamping an unlimited security was not necessary when the guarantee was given would be available.