RECENT DEVELOPMENTS IN AUSTRALIAN STAMP DUTY

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1. MORTGAGES TO SECURE NON-DEBT OBLIGATIONS

1.1 Basic Principle

Subject to specific exceptions discussed later, with a secured transaction, a security document will only be dutiable if it comes within the definition of a "mortgage". That definition in all jurisdictions has the following elements.

Security (by way of mortgage or charge) for:

(A) the payment of money advanced or lent; or

(B) for the repayment of money to be thereafter lent, advanced or "paid".

Limb (A) requires an advance or loan while limb (B) covers not just a loan or an advance but also money "paid", but it must be the "repayment" of money paid.

Therefore, the following types of securities would not be within this basic definition of a mortgage:

- A mortgage securing original obligations to make payments under, say, a building or a purchase contract (since while there is money to be "paid" which is the subject of the security, it is not the "repayment" of money paid).
- A mortgage which secures the performance of obligations under a covenant, such as the obligation of a company to re-purchase certain redeemable preference shares in the event of a failure to redeem those shares: ***Handevel v CS (Vic)*** (1985) 16 ATR 1044.
- A mortgage securing the obligations of a lessee to pay rent under a lease.

In ***Ansett Transport Industries (Operations) Pty Ltd v CS (Vic)*** (1980) 10 ATR 845 at 848-9, Tadgell J of the Victorian Supreme Court made the following comments concerning this concept of "repayment" of "moneys paid":

> "The expression ['repayment'] naturally comprehends a right given with a view to securing to the grantee repayment of money outlaid by him in circumstances giving rise to a repayment against the payee. Such a security might be granted

> by the payee in whose favour the grantee made the outlay, in which case the grantee would have the choice of enforcing the security or of simply suing the payee for the debt.
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> Equally, such a security might be granted by a party other than the payee of the outlay, and it would be irrelevant whether the outlay were made in circumstances in which the grantor could be sued for debt or not; so long as proper consideration had been given for it, the security would be enforceable against the grantor as a security for the repayment to the grantee of his outlay, to whomsoever the outlay had been made.
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> An instrument of mortgage providing security 'for the repayment of money to be thereafter ... paid' ... also presupposes, of course, that the money to be paid will be paid in circumstances giving rise to a right of repayment against the payee ... As a prerequisite to enforcing a security of that kind the grantee must be able to point to a payment which constitutes a debt which the mortgage is intended to secure."

The ***Ansett*** case thus also accepted that the word "paid" means paid so as to constitute a debt, following a number of English earlier cases including ***Wroughton v Turtle*** and ***Lord Suffield v IRC***; see also ***Handevel's*** case.

1.2 Places where Basic Principle Applies

In essence, the South Australian and Victorian legislation does not have any specific provisions which would override the operation of the basic principles set out at 1.1 above. Of course, there is no loan security duty in the ACT. Other places have provisions which override the basic principle to some extent or with some types of securities, as discussed below. These are illustrated in Table 1 at the end of this paper, and are discussed at 1.5-1.8 below.

1.3 Securities over Bill Facilities

(a) At the 1986 Banking Law Association of Australia Annual Conference, Tony Fitzgerald QC and I gave a paper on "Stamp Duty on Securities for Bill Facilities". In that paper, we concluded that, even where the same party both accepts and discounts bills under a bill facility arrangement, the better view is that this does not constitute a "loan" or an "advance".

This same conclusion has been reached in a very recent decision of Ormiston J of the Victorian Supreme Court, ***Brick and Pipe Industries v Occidental Life Nominees Pty Ltd*** (1990) 3 ACSR 649.

That case principally involved disputes about the Goldberg group and ss68A and 230 of the "old" Companies Code. The judge examined in detail the stamp duty and related authorities on the question whether a bill discounting transaction was a loan, where the bank or financier not only accepts the bills but also discounts them itself, and concluded that such a transaction was not a loan.

The main issue was whether the bill arrangement involving the Goldberg group was a "loan" for the purposes of s230 of the Companies Code. Ormiston J held that it was not a loan, even though, in his words, there were provisions in the particular facility agreement "which appear to sit uncomfortably with the conventional view that a bill facility, or at least that kind of facility in which there are three parties, does not involve a lending of moneys".

He concluded at 703 as follows:

> "This process of discounting bills ... both in economic and practical terms ... is different from lending moneys. In particular, in contrast to a loan whereby moneys are paid by the lender who obtains in return only a right to seek repayment of the moneys upon demand or on a fixed date, together with interest, under a bill facility the banker or financier discounting the bill obtains an asset in the form of a negotiable bill which provides in practical terms a hedge against liquidity pressures in that that asset may be sold on the bill market if necessary. Although a sum must be provided by the bank or financier it thus receives in return a negotiable bill."

Again, he commented at 704 in relation to the rollover procedure as follows:

> "Finally one cannot ignore the procedure laid down by the facility agreement for the rolling-over of the bills. Each bill was to be paid out at the end of each accommodation period and new bills were to be drawn and discounted. If the facility was not a sham, a new liability was thereby to be created upon the accepting and discounting of bills subsequently drawn pursuant to the terms of the facility. The liability would arise not by virtue of any lending of moneys, but by virtue of the existence of the obligation imposed pursuant to the terms of each of the new bills as qualified by the terms of the facility agreement.
>
> For these reasons I have concluded ... that the liability imposed on the company cannot properly be characterised as an obligation to repay a 'loan' within the meaning of s230. I should add that no authority cited to me supported the view that the word 'loan' should be read as applying to some wider concept for the advancing of moneys so as to comprehend the obligations imposed under the bill facility as I have analysed it."

(b) Victorian Practice Note 25 states that an unlimited security which secures obligations under a bill facility does not need to be upstamped as and when a bill is drawn accepted and/or discounted, but that a duty liability arises upon default under the bill when the acceptor pays out on the bill out of its own funds.

(c) The difficult question then remains, whether there can be a dutiable "loan" or "advance" in a default situation with a bill facility arrangement. It is true that part of the mechanism in a default situation can involve, with some types of bill facility arrangements and some types of default, the provision of funds, or at least the making of book entries consistent with the provision of funds. It is then said that this can represent a loan or advance for stamp duty purposes, hence requiring the security at that time to be stamped.

In my view, these mechanisms that occur in an event of default do not lead to an obligation to upstamp the security. The essence of the analysis by Ormiston J in the ***Brick and Pipe*** case is that, unless the transaction is a sham (and there is no halfway house, in his view, between a sham and a genuine transaction), a bill facility transaction is a bill transaction, not a loan or an advance - "once a bill facility always a bill facility". The above extracts from that case show this.

Seeking to impose duty on one mechanism occurring on default, the provision of funds, is in my view asking the upstamping provisions to do more than they are able, or are intended, to do. The upstamping provisions are designed to cover a case where, say, a facility of $1m has been entered into, and at a later time an additional amount, say $2m, is advanced. The security is upstamped to cover that further advance of $2m, bringing the total stamping on the security to $3m.

Here, with a secured bill facility, on day one, when the bill transaction is entered into, the mortgage is effective to secure the obligations of the accommodated party at that time. It is just that for technical reasons there has been no loan or advance and hence there is no duty payable. On the later date of default, it is still that original provision of accommodation to the accommodated party that is secured by the mortgage. A provision of funds caused by the default is not really a further amount of accommodation provided to the accommodated party, but represents the same moneys as have already been provided and which are already secured by the security.

(d) In ***Coles Myer Finance Ltd v FCT*** (1991) 21 ATR 1185, the full Federal Court of Australia rejected submissions that some comments in the High Court's decision in ***K D Morris v Bank of Queensland*** (1980) 146 CLR 165 supported the view that an accommodated party is under a present obligation to pay out a bill immediately upon its acceptance by the accommodation party. They held at 1191-2 as follows:

> "Counsel for the applicant ask us to read these passages as indicative of the view that an accommodated party comes under a present obligation to pay out the bill immediately upon its acceptance by the accommodation party. Counsel for the respondent contest this interpretation of the judgments. They point out, accurately, that the issue dividing the High Court in ***K D Morris*** was whether the company's liability arose by virtue of the facility agreement or the drawing of particular bills. They say that this was an issue remote from that involved in the present case and that their Honours were not concerned to determine whether the obligation created by the acceptance of a bill was a present obligation to pay. They point to Stephen and Wilson JJ's description of the bank as "surety" for the company and rightly say that this is a familiar description of the role of an accommodated party: see Chalmers [MD] on ***Bills of Exchange***, 13th ed, at p196 and ***In re Oriental Commercial Bank; Ex parte European Bank*** (1871) LR Ch App 99.
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> Counsel submit that the accepted rule is that, in the absence of an express agreement to the contrary, a debtor incurs no liability to indemnify a surety until the surety has paid out the debt. They refer to ***Wren v Mahoney*** (1972) 126 CLR 212; [1972] ALR 307 and ***Halsbury's Laws of England***, 4th ed, vol 20, pp172-174. Under these circumstances, say counsel, it would be unreasonable to construe the judgments in ***K D Morris*** as indicating that an accommodated party, who had made no special agreement with the accommodation party,

incurred a present liability to the accommodation party immediately upon the acceptance of the bill. The proper analysis of the position, say counsel for the respondent, is that, at the time of acceptance of each bill, the applicant incurred a contingent liability to indemnify the acceptor bank in the event that the bank was called upon to discharge the bill out of its own funds.

We think that this submission is sound. A surety who has not paid the debt may none the less obtain an order in equity compelling the principal debtor to relieve him or her by paying the debt: see ***Ascherson v Tredegar Dry Dock and Wharf Co Ltd*** [1909] 2 Ch 401. But, according to the traditional view, in the absence of an agreement to the contrary the principal debtor does not become indebted to the surety until the surety has discharged the debt: see ***Re Mitchell, Freelove v Mitchell*** [1913] 1 Ch 201, ***Re Fenton; ex parte Fenton Textile Assoc Ltd*** [1931] 1 Ch 85, ***Rankin v Palmer*** (1912) 16 CLR 285. In ***The Modern Contract of Guarantee*** O'Donovan and Phillips say at p436:

'But a surety's right to ***quia timet*** relief does not constitute an existing debt. Thus a guarantor who has not paid cannot prove in the principal debtor's bankruptcy for his right of indemnity as an ***accrued liability***.' [Original emphasis.]

See also Rowlatt [AT] on ***The Law of Principal and Surety***, 4th ed, at pp136-8.

This traditional view was reaffirmed and applied in ***Wren v Mahoney***: see the judgment of Barwick CJ, with whom Windeyer and Owen JJ agreed, at (CLR) 255-9. After reviewing the relevant authorities the Chief Justice affirmed the proposition 'that the existence of a cause of action before the plaintiff has paid the debt, or part of it, depends upon the fact that the defendant has given his promise to pay the debt himself.' ...

As we have already indicated, the traditional view is both well known and long established. It was reaffirmed in the High Court itself as recently as 1972. We agree that there are passages in ***K D Morris*** which might be read as indicating an opinion that an accommodated party becomes presently liable to an accommodation party immediately upon the acceptance of a bill. But these passages are unclear. When it is realised that any such view would depart from the well understood earlier law, the correct course - as it seems to us - is to decline to construe these passages in this way. We think that we should hold that the applicant incurred no present liability in respect of each of the subject bills until that bill was discharged by the acceptor."

This reasoning in the ***Coles Myer Finance*** case again supports the conclusion that a security over a bill facility is not securing a loan or advance and hence is not within the basic definition of a mortgage for stamp duty purposes.

1.4 Upstamping Obligation, Security over Guarantee

Allied to the limitations within the basic definition of a mortgage discussed at 1.1 above is the fact that with an unlimited security, the upstamping provisions expressly state that there is no obligation to upstamp the security unless and until a "loan" or "advance" is made. The exception is Western Australia which also refers to "indebtedness", as discussed at 1.8 below.

Therefore, where there is a security over the obligations of a guarantor, being contingent obligations unless and until default occurs, even it if could be argued that the security secures the repayment of money to be thereafter paid (see the ***Ansett*** case discussed above), the creation of the security, if unlimited, does not require ***ad valorem*** stamping. That is, there is no loan or advance secured by the mortgage, only the contingent obligations of the guarantor. The upstamping provisions therefore do not apply. Some of the authorities and extracts at 1.3 above concerning securities over bill facilities support this conclusion.

Again, in a default situation with a security over guarantee obligations, the crystallisation of the contingent liabilities of the guarantor still does not represent a "loan" or an "advance". No upstamping is therefore required. This conclusion is confirmed by New South Wales Revenue Ruling SD 162, which applied to the New South Wales position prior to the introduction of special provisions covering securities over contingent obligations (discussed at 1.5 below), and hence is applicable to those places where no specific provisions concerning security over guarantee obligations exist.

1.5 Exceptions - New South Wales

NEW SOUTH WALES - SECTION 83 DEFINITIONS

"ADVANCE" INCLUDES THE PROVISION OF FUNDS BY WAY OF "FINANCIAL ACCOMMODATION".

"FINANCIAL ACCOMMODATION" INCLUDES FUNDS PROVIDED BY -

(A) A LOAN OR BILL FACILITY; OR

(B) UNDER ANY OTHER OBLIGATION (OTHER THAN LEASING OR HIRING).

However, there still must be the "provision of funds".

The "inclusive" extensions to the definition of mortgage in s83(1) describe types of property and security, not the type of obligations being secured. Further, while the definition of "mortgage" in s3(1) is expressed to be inclusive, on the reasoning in Wallace and Zipfinger, ***Australian Stamp Duties Law***, para [12.41C], a mortgage to be dutiable would need to be within this definition.

MORTGAGE SECURING GUARANTEE - SECTION 84(3C)

- LOAN SECURITY CAPABLE OF BEING USED (DIRECTLY OR THROUGH CHAIN OF RELATIONSHIPS)
- TO RECOVER AMOUNT PAYABLE BY
  - GUARANTOR;
  - INDEMNIFYING PARTY; OR
  - PARTY TO ANOTHER INSTRUMENT (WHETHER OF SAME OR DIFFERENT KIND).

DUTIABLE AS IF CONTINGENT LIABILITY WERE AN ADVANCE,

UNLESS COMMISSIONER SATISFIED THAT "NO CONNECTION BETWEEN THE LOAN SECURITY AND ANY ADVANCE BY ANY PARTY TO THE ARRANGEMENTS".

While this concept is wide, there still must be a "contingent liability".

Further, the provision should only apply where the overall transaction does involve somewhere a loan or advance - this accords with Stamp Duties Office practice.

With an unlimited security, it is technically only dutiable if there are also "advances" made under or secured by the loan security, since advances are to "include" contingent liability.

1.6 Exceptions - Queensland

ELEMENTS OF QUEENSLAND LOAN SECURITY (SCHEDULE 1)

(1) MORTGAGE OR DEBENTURE SECURING PAYMENT OR REPAYMENT OF MONEY.

(2) AN INSTRUMENT (NOT IN (1)) SECURING "THE PAYMENT OR REPAYMENT OF FINANCIAL ACCOMMODATION TO BE PAID OR REPAID BY WAY OF -

(A) AN ANNUITY; OR

(B) A SUM OR SUMS OF MONEYS AT STATED PERIODS.

(3) A BOND OR COVENANT (NOT IN (2)) THAT SECURES THE PAYMENT OR REPAYMENT OF AN AMOUNT OF FINANCIAL ACCOMMODATION.

BY THE DEFINITION IN SECTION 2, "FINANCIAL ACCOMMODATION" INCLUDES:

(A) ADVANCE OR LOAN; OR

(B) A TRANSACTION (WHATEVER ITS TERM OR FORM) WHICH IN SUBSTANCE EFFECTS A LOAN OR IS (AS BETWEEN THE PARTIES) TO BE REGARDED AS BEING IN THE NATURE OF A LOAN.

1.7 Exceptions - Tasmania

TASMANIA - SECTION 75B

FIRST PART

- GUARANTEE "GIVEN AS PART OF A TRANSACTION UNDER WHICH MONEY IS TO BE ADVANCED, PAID OR LENT".

- AND NO MORTGAGE DUTY PAID "ON ANY INSTRUMENT RELATING TO THAT TRANSACTION".

DUTY IS CHARGEABLE ON GUARANTEE "AS IF THE GUARANTEE WERE A MORTGAGE" AND "AS IF THE AMOUNT SECURED REFERRED TO THE MAXIMUM CONTINGENT LIABILITY UNDER THE GUARANTEE".

SECOND PART

- A MORTGAGE FORMS PART OF A TRANSACTION UNDER WHICH MONEY IS TO BE ADVANCED, PAID OR LENT.

- AS PART OF THAT TRANSACTION, A GUARANTEE IS GIVEN (EITHER IN THE SAME OR A SEPARATE INSTRUMENT).

DUTY IS CHARGEABLE ON THAT GUARANTEE UNDER THIS SECTION.

These new Tasmanian provisions do not specify a territorial nexus.

1.8 Exceptions - Western Australia

Western Australia has two significant differences in its provisions, both from the basic concept of a mortgage and from the provisions elsewhere in Australia.

(a) The upstamping provision for mortgages securing unlimited advances covers not only a loan or advance but also "indebtedness". There are a number of authorities suggesting that the word "indebtedness" is appropriate to refer only to an existing and not to a contingent liability or indebtedness: see, for example, ***Webb v Stanton*** (1833) 11 QBD 581, and see also ***Handevel's*** case cited earlier.

This limitation can be significant, particularly in relation to a security over a bill facility arrangement, (given the conclusion in the ***Coles Myer*** case referred to at 1.3 above) and over a guarantee (see 1.4 above).

(b) The mortgage head of duty is not limited to mortgages, debentures, bonds and covenants, but covers certain other specified items, including guarantees, and ends with the words "or instrument of security of any kind whatsoever".

The English cases have given a broad meaning to the concept of "security" for stamp duty purposes, considering that it can cover potentially any instrument creating an obligation to pay. This broad concept has recently been applied in the context of the Western Australian mortgage duty provisions, in ***National Mutual Life Nominees Ltd v CST (WA)*** (Supreme Court of Western Australia, Wallwork J, 8 April 1991). In that case, the court held that the concept of "security" in the Western Australian provisions did cover an arrangement where one party granted to another a licence to carry on a business in return for paying a periodic licence fee. The court considered that "security" does cover an instrument by which an obligation to pay is created, the court feeling bound to follow a number of previous English and Western Australian authorities.

One concession has been made. The Western Australian Stamp Duties Office has accepted as a practical matter that no duty is charged on a third party guarantee which is embodied within an instrument having a principal object of a different nature.

2. TRANSFER OF SECURITIES AND LOAN SELL-DOWNS

2.1 Transfer of Securities

In a sense, the transfer of mortgage involves a legal "sleight of hand" which has a number of stamp duty advantages.

The usual structure of a transfer of mortgage is as set out in Table 2 at the end of this paper. As a result of the transfer by the existing mortgagee to the new mortgagee of its rights under the mortgage, automatically by that transfer the mortgage changes from one securing moneys advanced by the existing mortgagee to one securing moneys advanced by the new mortgagee. That is, the transfer has the effect of automatically securing, not the moneys owing to the first mortgagee, but rather the moneys owing to the new mortgagee.

Otherwise, if this were not the case, the transfer of the mortgage does not make much sense. There is no point in a mortgagee having security rights over a property unless there is an underlying debt relating to that mortgage.

Can it be said that a new security taken by the new mortgagee is exempt from ***ad valorem*** duty as a collateral security? That is, can that new security secure the "same moneys" as are secured by the existing transferred mortgage?

The answer should be "yes". Once the security has been transferred, it does secure the moneys owed to the new mortgagee. It has been transformed, it has changed its nature. The answer would have been "no" prior to transfer.

As Tadgell J said in ***Comptroller of Stamps v Associated Broadcasting Services*** in 1987, the expression "'security for the same moneys' do not mean the same cash ... rather, in my view, the words refer to a security for the same right of payment or repayment of moneys that are secured by a primary instrument of security".

New South Wales has recently ruled that the new security is exempt from ***ad valorem*** duty and is collateral: Revenue Ruling SD167, 9 April 1991.

Throughout Australia, the transfer of a mortgage is exempt from duty - subject, in Victoria, with a transfer of a mortgage over marketable securities (not involving shares or units), to the requirement that it be for full consideration. In Victoria, note also the foreign security provision, referred to at 3.8 below.

In ***Wale's*** case in 1879, it was held that where a former mortgagee was paid out by a new mortgagee who made a further advance, the deed between the former mortgagee, the mortgagor and the new mortgagee was, as regards the amount of the old mortgage paid out, a "transfer of mortgage". The deed conveyed the mortgaged property to the new mortgagee, released the mortgagor's equity of redemption under the old mortgage, and created a new proviso for redemption.

2.2 Transfer of Loan Itself

With the transfer of a mortgage over Torrens Title land, the Torrens Title legislation itself provides that the transfer of the mortgage is effective to transfer the loan itself.

With other types of transfers of securities, or with the transfer of unsecured indebtedness, the transfer of the obligations of the borrower under the loan agreement, from the old lender to the new lender, can have stamp duty consequences.

The first issue is whether it is necessary to create a written instrument to effect the transfer of those obligations. If it is, there is obviously the potential for conveyance duty to be imposed, in those jurisdictions which impose conveyance duty on a transfer of personal intangible property.

If it is necessary to effect a separate written transfer of the loan, the next question is, does the exemption for a transfer of a corporate debt security apply. That essentially covers "any debenture, debenture stock, bond or note or other security of a corporation ... whether constituting a charge on the assets of the corporation".

The New South Wales Office of State Revenue seems to argue that a loan facility agreement is not a "debenture", and since the reference to "any other security" should be read ***ejusdem generis*** with the earlier words, it would not be a corporate debt security.

However, there have been cases holding that a loan or facility agreement is a debenture, and some meaning must be given to "any other security".

There should be many cases when the transfer of the loan obligations is within the corporate debt security exemption, which is an exemption that now exists in all States. Of course, the transfer of corporate debt security exemption only applies to the transfer of corporate indebtedness.

2.3 Loan Sell-Downs

If there is only a straightforward transfer of all or part of a security or loan, there should be no particular problems with a loan sell-down. The principles concerning the transfer of a mortgage, discussed at 2.1 and 2.2 above, should apply.

Problems can arise with arrangements such as a security trust deed, where one bank holds the security on behalf of other lenders.

It is not sufficient to describe the relationship as one of agent, since at general law, one party holding property for or on behalf of another must of necessity be holding as trustee for the other party. Again, courts are not usually swayed by the view that a "nominee" is something different from a trustee.

This raises a potential problem in those jurisdictions which impose conveyance duty on a declaration of trust over personal intangible property, since the security and the loan arrangement in respect of which the declaration of trust is made would be a chose in action.

There are a number of approaches which may be available to overcome these potential difficulties:

(a) It may be possible to break the territorial connection, by signing the declaration outside the dutiable State and ensuring that the property rights the subject of the declaration are also located outside that State. Thus, a simple contract debt is located where the debtor resides, while a debt created by a deed is a specialty debt, located where the deed is.

(b) In some cases, an oral declaration may be possible. In most cases, this potential declaration of trust duty is still a document based duty.

(c) In some cases, it may not be necessary to expressly state that the security or loan arrangements are being held on behalf of the other lenders. A constructive trust would attach in many circumstances in any event.

(d) In some cases, ***ad valorem*** conveyance duty is not payable on a declaration, unless there is in existence, at the time the declaration is made, ascertainable property which is subject to the declaration. Note, however, the extension in some cases to property "to be vested", and the decision of the High Court in the ***DKLR*** case concerning what intention or expectation is necessary to come within the concept of property "to be vested".

New South Wales has an additional provision which imposes only nominal duty on "any instrument declaring that any property not identified therein and to be vested" shall be held in trust.

(e) It is still necessary to calculate the value of a property the subject of a trust. If the declaration is made at an early time, there may be no valuable property yet subject to that trust upon which duty could be payable.

2.4 Substitution of New Lender

A certificate or like document substituting a new lender should not be within the ordinary concept of a "debenture" for stamp duty purposes. it would normally provide the assumption of a commitment obligation by the incoming financier. By executing the substitution certificate, there should be no acknowledgement of indebtedness to render it potentially liable as a debenture. A number of authorities suggest that, in order to be a debenture, there must be present indebtedness (see the discussion in ***Handevel's*** case), and this seems to be a view accepted by, for example, the New South Wales Office of State Revenue.

Only after the certificate has been executed can the borrower usually seek financial accommodation from the incoming financier. Only upon the borrower issuing a notice requiring financial accommodation from the incoming financier can there be said to be an "indebtedness". Again, loan security duty is still basically only payable when a written document has been entered into (but note the unusual loan provisions in Queensland s67A).

3. MULTI-STATE SECURITIES

3.1 Ideal Situation

In an ideal world, where a number of securities are executed which grant security over property located in a number of separate jurisdictions, the following should govern the way in which duty is imposed on the transaction:

(a) Duty should be paid only once on the total amount secured, based pro rata on the location of the underlying property the subject of the security.

(b) If one place does not impose duty on the transaction or the security is exempt there, "credit" should be given for this from the total amount otherwise payable under (a) above.

(c) Where several securities are taken, ***ad valorem*** duty should be only payable once on the total amount secured, irrespective of where the securities are executed and which is described as primary or collateral.

(d) Events after execution should not change the duty position, unless and until further advances are made which are not covered by the amount in respect of which total duty has been paid. If further advances are so made, then again duty should be paid once only on the total of those further advances, calculated pro rata on the location of the underlying property as in (a) above, as at the date of execution of the original securities.

The rest of this part 3 will concentrate on the extent to which there is divergence from the above principles. These divergences are illustrated in Table 3 at the end of this paper.

3.2 Collateral Securities

(a) Each jurisdiction covers the situation where multiple securities are executed which each secure the "same moneys". Each jurisdiction except Western Australia, Victoria and New South Wales distinguishes between a "primary" and "collateral" security. The jurisdictions making this distinction provide that where a "primary" security is stamped with ***ad valorem*** duty, an instrument of security which is characterised as "collateral" to this "primary" security, and which secures the "same moneys", is assessable with either nominal or nil duty.

(b) In New South Wales, Victoria and Western Australia, the distinction between primary and collateral securities is not present. Rather, the provisions in these jurisdictions allow a credit on an instrument of security for the duty paid on another instrument which is security wholly or partly for the same moneys. In effect, these provisions operate by way of credit offset.

In New South Wales and Victoria, the provisions allow a credit for the duty previously paid on an instrument which has been stamped in another jurisdiction.

In Western Australia, the provision allows a credit only in respect of duty previously paid in Western Australia. Where multiple securities are involved, some only of which are dutiable in Western Australia, it is necessary to have recourse to the foreign credit provision in order to obtain relief.

(c) The order of execution of securities will not be determinative of which security will be the primary security: ***Commercial Banking Co of Sydney Ltd v Love*** (1974) 133 CLR 459. The proper test to apply is to determine which of the securities is auxiliary or perhaps accessory and which is primary. The choice will be made having regard to the commercial nature of the transaction, matters of enforcement and rights of enjoyment and the security rights which are conferred.

Value of the property secured and the importance of the security having regard to the particular circumstances in which the security is conferred will all be relevant matters: see ***Stardawn Investments Pty Ltd v CS (Vic)*** (1983) 15 ATR 180.

(d) New South Wales s84B refers to a loan security "or other instrument of security for money". Provided that one has been stamped in NSW or elsewhere in Australia and they are security "wholly or partly for the same money", there is a credit for the duty paid in NSW or elsewhere. A recent amendment expands the provision to allow a credit where duty is payable but not yet paid in NSW or elsewhere.

Again in NSW, the foreign security provision has been brought into line with most other places, by requiring duty to be paid in NSW having regard to the value of assets located in NSW, compared to the total value of all assets secured by the loan security.

(e) South Australia and Tasmania have the traditional provisions, recognising the distinction between a primary and a collateral security. There can be problems where the Stamp Duties Office in one of these places argues about which is primary and which is collateral, since where the security which has been stamped elsewhere as a primary security is not accepted as such, there would often not be the exemption from duty for a collateral security.

(f) The decision of the Full Court of the Supreme Court of Western Australia, in ***Pennant Holdings Limited v CST*** 90 ATC 4594, has clarified the interpretation of Western Australia s84. The case concerned two securities for the same moneys - one a guarantee executed in Western Australia and the other a mortgage over New South Wales property which was not liable to duty in Western Australia.

The question arose whether any reduction was available in respect of the duty otherwise payable on the guarantee (ie full duty under item 13), given that duty had been paid in New South Wales on the mortgage. The court held that a full credit was available pursuant to s84(2). The court took the view that the reference in s84(2)(a) to "the instrument" was a reference to both the instrument liable to Western Australian duty (ie, the guarantee) and to "any other instrument that secures the same money" (ie, in this instance, the New South Wales mortgage).

Accordingly, since there was, under s84(1), money to be repaid under an instrument of security (ie, the guarantee) which was secured in part on property out of Western Australia (ie due to the New South Wales mortgage), a credit was available under s84(2).

(g) The decision in the ***Associated Broadcasting*** case emphasises that the "same moneys" must be the same only from a practical point of view. Thus, there, a supplemental agreement converting the original amortising term loan facility of $8,000,000 to a revolving credit facility for $4,000,000 was held to secure the same moneys.

(h) There is a deficiency in New South Wales s84B, in that it does not properly apply to debenture trust deeds where an undertaking has been given pursuant to s84D. Where the s84D undertaking procedure is adopted, the instruments are deemed to be duly stamped but there is no stamp duty paid on the actual instrument as required by s84B. The solution would be to insert a provision along the lines of Victoria s137I(2).

3.3 Availability of Security

Some of the provisions, particularly those concerning the stamping of unlimited security provisions, provide that the security shall only be "available" or enforceable for such an amount only as the ***ad valorem*** duty denoted thereon extends to cover. In my view, these provisions should only apply where duty which otherwise is properly payable has not been paid. That is, if duty is not payable on the security, for example because the instrument is exempt or is just not dutiable (eg, for territorial reasons), these "availability" provisions are not intended to impose a fresh liability for duty on a document that is otherwise not dutiable. A number of the authorities discussing the concept of unlimited securities, both English and Australian, support this conclusion.

3.4 Events after Execution

(a) The "come and go" principle still applies for unlimited securities. That is, once stamp duty has been paid to secure particular maximum amount of advances, upstamping is not needed unless and until the amount at any one time outstanding exceeds that maximum amount. It does not matter that advances have been repaid and redrawn at different times, or that the total of all advances made exceeds that maximum amount.

If properly documented, a limited security should reap the same benefits. In particular, the provisions do not require additional stamp duty to be paid on further advances made after repayment of part of the loan, unless and until the total amount outstanding at any time exceeds the limit.

With a limited security, where the borrower does repay part of the loan and then redraws further amounts, this principle does require that the redraw is part of the original arrangement or is a true variation of the original arrangement, and is not a fresh loan security.

New South Wales has a complication, in that s84(2A) states that where the amount is limited to a definite sum, yet total advances are made which exceed that limit even though the amount outstanding does not at any time exceed that definite and certain sum, duty is payable on the difference between the duty payable if the security were executed in respect of the total amount of the advances and the duty already paid.

However, s84(3A) provides that nothing in s84 or the Second Schedule "Loan Security" heading requires the payment of duty in respect of an advance, if the amount payable or repayable under or secured by the loan security following the advance does not exceed the maximum amount secured by the loan security. There is an exception but this does not apply to s84(2A).

New South Wales Revenue Ruling SD56 confirms the above principles, namely that this "come and go" approach does apply even to limited securities.

(b) Conceptual problems arise with an unlimited security where further advances are made after the security is executed and the proportionate allocation of assets secured by the security from State to State has changed. This could apply, for example, with a charge of present and future book debts.

The basic principle remains true that:

- Loan security duty is still a duty on instruments.
- Therefore, the liability for duty must be determined on the basis of the facts and circumstances existing as at the date of execution.

There are exceptions to this:

1. Unlimited securities where further advances at a later date are dutiable - deemed to be made pursuant to a new instrument executed on the date of the further advance.

2. The New South Wales definition of mortgage covers a mortgage (which is not a floating charge) not affecting property in NSW at the time of execution, but affecting land in NSW at any time within the next 12 months.

3. Queensland imposes duty on certain loan arrangements not committed to writing in s67A.

The problem where further advances are made and the assets secured have shifted arises from exception 1, namely the deeming of further advances under an unlimited security to be made pursuant to a new instrument. This problem could create a practical nightmare. In three places, namely NSW, Victoria and the NT, the provisions which deem the further advance to be made pursuant to a new and separate security executed on the date of the advance state that this deeming is only for the purpose of the general provision which sets time limits on stamping after execution. The case of ***Coles v Comptroller of Stamps*** 17 ATR 243 in the Victorian Supreme Court confirms that this deeming provision and the notional new instrument do not affect other provisions in the Act, and in particular the pro rata provisions.

Therefore, in those places, pro rata upstamping on a further advance should be based on the location of assets at the time of execution of the original security.

The provisions in Queensland, SA and Tasmania are not limited to deeming for the purposes of the time limit provisions, but in some cases refer to "for the purposes of stamp duty". However, the better view still is that the location of assets at the time of execution of the original charge should be applied.

Western Australia is the odd one out, as the deeming provision states that it applies without prejudice to any other provisions of the Act. It is difficult really to understand what this means, but on one reading it possibly could require the upstamping to be calculated pro rata on the location of the assets at the time of the further advance, not at the time of the original execution of the security.

3.5 Unit Trust and Share Securities

(a) If a unit trust has the standard provision that a unitholder does not have an ownership interest in any particular of the assets of the trust, there are good arguments that the situs of the unit is the place of the register on which it is registered.

In Queensland, s71(1) provides that a security shall be deemed to be security on property in Queensland where the property on which it is secured is or includes units in a unit trust scheme within the meaning of s56B. There are pro rata provisions to limit the amount of duty payable to the proportion of trust assets located in Queensland.

This Queensland provision can present a real problem, with a security over units in a unit trust where duty has been paid elsewhere based on the location of the register on which the units are registered. However, the Queensland provision does give a discretion to the Commissioner to waive this duty, where the Commissioner is satisfied that ***ad valorem*** duty has been paid in another state or territory, having regard to the whole of the money lent or advanced or to be lent or advanced.

(b) In New South Wales, Western Australia and Queensland, a security over shares in a company incorporated in that particular State is dutiable as if it were security over property located in that State, even where the shares are located on a register outside the State.

3.6 Pro Rata - Credit for Exemptions Elsewhere

Problems can arise with some of the pro rata and collateral security provisions, where credit is given from duty to the extent to which duty has been paid elsewhere. A security may be exempt from duty in a particular place, for example, by the exemptions for certain debenture issues in New South Wales s84EC and Victoria ss137M(5) and 137MB; or may not be liable for duty, as in the ACT. In WA, this problem has been overcome by allowing regulations to declare that certain instruments are exempt in another state or territory and so allowing a reduction in the duty payable. These New South Wales and Victorian provisions have been so exempted.

Apart from Western Australia, in those places where credit for a security over property in several places is given in respect of duty paid elsewhere (rather than the traditional pro rata provisions), additional duty is then paid in those places because of the exemption from duty elsewhere. This is unfair.

3.7 Northern Territory

Northern Territory remains a problem. There is no pro rata provision, but rather it is provided that where there is a loan security issued or made elsewhere in Australia and secured on property in the NT and outside NT, there can be a partial stamping where the loan security expresses that only a part of the total amount is secured on property in the NT. Therefore, a security involving Northern Territory property needs the following:

(a) the security should contain a provision "capping" the amount secured or recoverable in relation to the value of the Northern Territory property; and

(b) the security should have a provision allowing for this cap amount to increase (in line with the increase in value of the Northern Territory property) at the option of the mortgagee/chargee. Any increase in the cap amount would be dutiable.

In the NT, the provision in relation to collateral securities where the primary security is not chargeable with NT duty is somewhat unclear.

3.8 Victoria - "Foreign Security"

Note the trap in the definition of "foreign security" in s137D(1) of the Victorian Act, which covers a security for money by or on behalf of any company, except a bill of exchange or promissory note which is made or issued in Victoria, or upon which any interest is payable in Victoria, or which is assigned, transferred, or in any manner negotiated in Victoria.

This is a very broad, unusual provision and means that it is important that a security potentially within the provision is not transferred within Victoria.

4. ABOLITION OF SHARE TRANSFER DUTY

The New South Wales Premier has announced that New South Wales stamp duty on transfers through the Stock Exchange of shares in listed companies of shares will be abolished, half (on buying transactions) on 1 November 1991 and the balance (on selling transactions) by 1 March 1993.

This move followed calls for abolition from Henry Bosch and others, and a submission from the Australian Stock Exchange, pointing out the gradual abolition of similar duties elsewhere in the world.

These provisions operate in respect of transactions by a broker or dealer on the Stock Exchange and only cover companies recognised or listed on the Stock Exchange.

For this abolition to be effective, it will really be necessary for other States likewise to abolish duty on transactions through the Stock Exchange, especially as some shares can be traded by NSW dealers and brokers even where the company is not closely connected with New South Wales.

Then, the move to abolish this duty might well flow on to the duty on the transfer of marketable securities generally, subject to the economic constraints on State revenue. In fact, in response to the New South Wales move, the Victorian Treasurer called for "co-operation from all States and the Federal government to consider the removal of stamp duty on share transactions in Australia".

TABLE 1

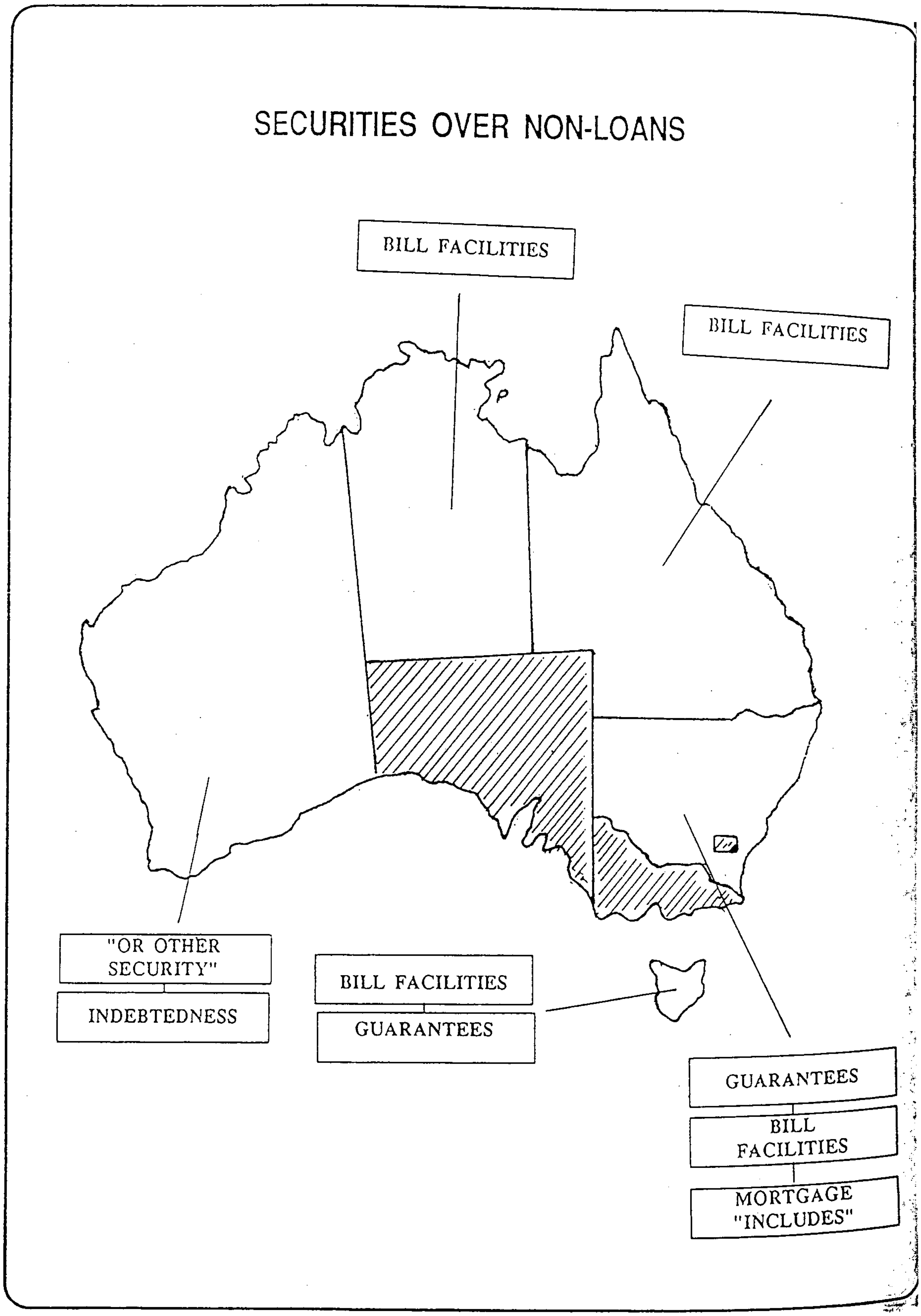

SECURITIES OVER NON-LOANS
BILL FACILITIES
BILL FACILITIES
"OR OTHER SECURITY"
INDEBTEDNESS
BILL FACILITIES
GUARANTEES
GUARANTEES
BILL FACILITIES
MORTGAGE "INCLUDES"

TABLE 2

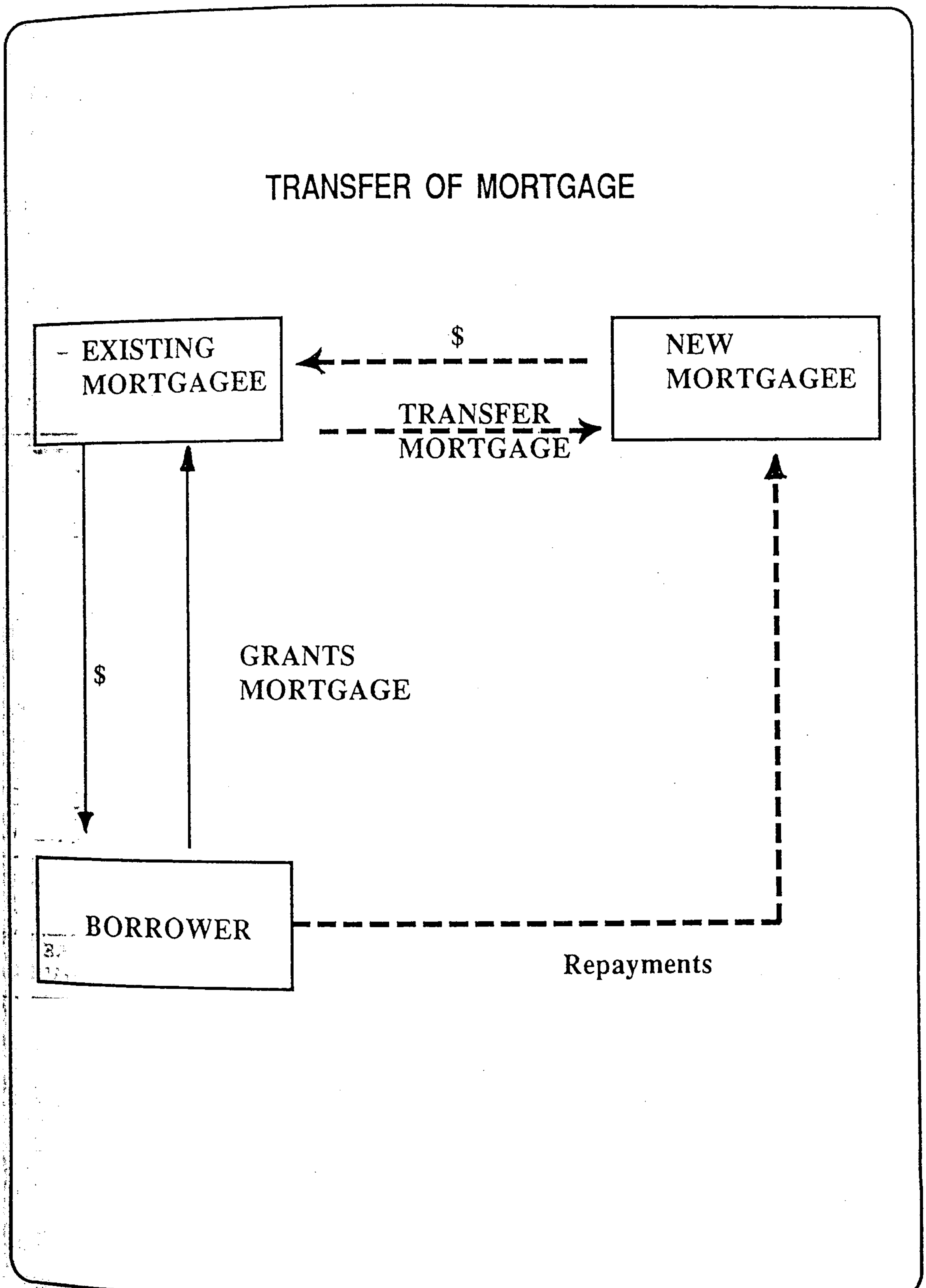
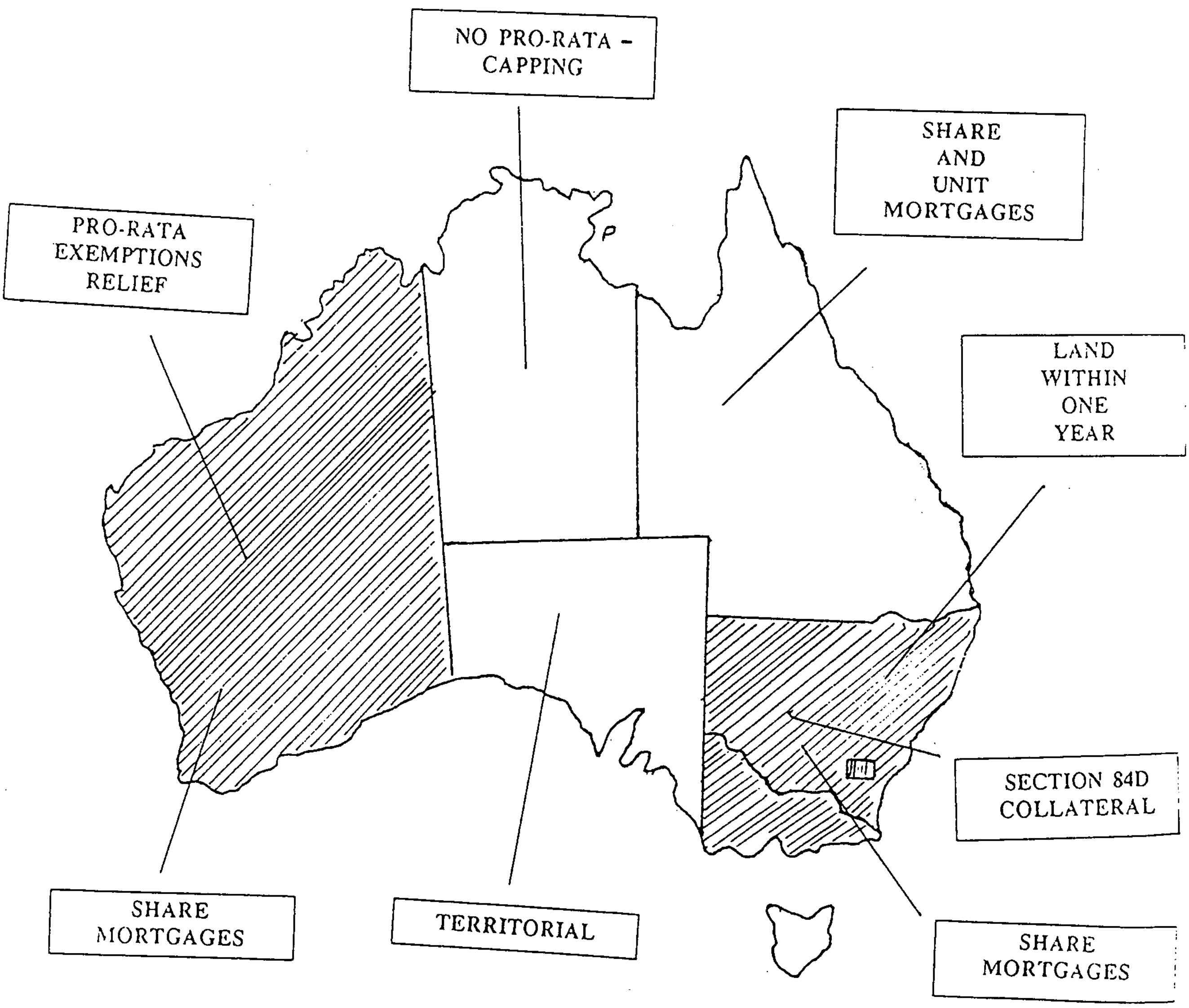

TRANSFER OF MORTGAGE
EXISTING MORTGAGEE
$
NEW MORTGAGEE
TRANSFER MORTGAGE
$
GRANTS MORTGAGE
BORROWER
Repayments

TABLE 3

MULTI-STATE SECURITIES



= NO PRIMARY / COLLATERAL DISTINCTION