AUSTRALIAN STAMP DUTY

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1. INTRODUCTION

In the normal course of their banking activities, bankers and their lawyers would encounter the stamp duty imposed upon security instruments. The recent fashion of providing financial accommodation by means of a subscription for units in a unit trust may also have exposed those parties to the duties imposed upon dealings with units in non-listed unit trusts by the stamp duties legislation in Western Australia ("the WA Act") and Queensland ("the Qld Act") or upon dealings with units in land-rich or land-owning non-listed unit trusts by the stamp duties legislation in New South Wales ("the NSW Act"), Victoria ("the Vic Act"), South Australia ("the SA Act"), Northern Territory ("the NT Act"), Australian Capital Territory ("the ACT Act") and Tasmania ("the Tas Act"). Beyond this territory lies a stamp duty realm which testifies to the truth of the observation by Hunter S Thompson that:

> "when the going gets weird, the weird turn pro".

Notwithstanding the title to this paper (which is to be delivered within forty-five minutes), it would be presumptuous in the extreme to purport to canvass in any meaningful fashion the breadth of the varying duties imposed upon differing instruments and transactions by the stamp duties legislation applicable in each Australian jurisdiction. The scope must be narrowed. A review of past stamp duty papers delivered to the annual conference of this Association reveals that the duty imposed upon security instruments in the various jurisdictions has already been closely examined. Accordingly, this paper will not traverse that ground again. The focus of this paper will be the stamp duty issues arising when a bank effectively converts its debt into equity in a project experiencing significant financial difficulties by acquiring assets. Included is an excursus upon the *situs* of licences and industrial and intellectual property which is relevant to stamp duty considerations affecting both acquisitions and security instruments.

2. CONVERTING DEBT TO EQUITY

One option open to a creditor is to accept from the debtor in whole or partial satisfaction of the debt property which confers upon the creditor a direct interest in the debtor or in the property or business of the debtor. Such an option may well be attractive in circumstances, such as those now prevalent, where asset values have plunged; where the realisation of security would further depress values; and where there is a prospect for a recovery in values. Recent times have seen a number of notorious illustrations.

The effective conversion of debt into equity might be achieved by a number of means. Where the debtor is a company or the trustee of a unit trust, debt could be extinguished by the allotment of shares or units possibly in conjunction with arrangements for the transfer to the creditor of existing shares or units by the existing holders. Alternatively the debtor might sell assets or a business for fair value to the creditor or an entity owned by the creditor and the proceeds of sale would be used to repay debt. Such arrangements involving an acquisition of property give rise to potential liability for stamp duty. That duty would be imposed at a rate higher than the rate imposed upon security instruments and would be imposed upon the creditor exclusively (in most jurisdictions) or jointly with the debtor (in other jurisdictions).

2.1 ACQUISITION OF A BUSINESS OR ASSETS OF A BUSINESS

2.1.1 General

In various contexts **a business** is referred to or treated as though it were a discrete unit. In truth it is a complex relationship involving activity which is usually recurrent and which involves the use of property of one kind or another and the incurring of liabilities or expenditure and which gives rise to revenue and in most cases the intangible property known as goodwill. The Qld Act and the ACT Act require a return to be lodged and impose a liability for *ad valorem* duty by reference to the transaction comprising the acquisition of a "business" (as variously defined in the legislation concerned). The Tas Act imposes a liability for duty upon an instrument comprising an agreement for the sale of the assets of a business. The stamp duties legislation of the other jurisdictions does not attach a liability to the acquisition of a "business" as such but attaches a liability to instruments or, in some cases transactions, by which property within various identified categories is acquired. The categories of dutiable property identified in some cases relate particularly to a business (eg, the goodwill of a business) but in most cases do not (eg, an acquisition of land would generally be dutiable regardless of whether or not the land was used in a business). To the extent that property within those identified categories comprises the asset of a business, the acquisition of the business would necessarily involve the acquisition of that property and may well attract a liability for duty.

If the transaction does not involve the acquisition of a business but merely the acquisition of some of the assets of a business, the business acquisition provisions in the ACT would not apply and those in the Qld Act may not (for reasons discussed later in detail) apply. If the business acquisition provisions of those two jurisdictions would not apply to an acquisition of business assets, it is nonetheless possible that the assets concerned would fall within the categories of dutiable property identified in the ACT Act and the Qld Act and that the acquisition may well attract a liability for duty in the same manner as in the other jurisdictions.

2.1.2 Territorial Factors

The factor which determines whether the business acquisition provisions of the ACT Act or the Qld Act will apply to a business acquisition is the conduct of the business concerned in the Australian Capital Territory or Queensland as the case may be. Thus, if a business conducted wholly outside the Australian Capital Territory were to be acquired, the business acquisition provisions of the ACT Act (ss64A-64E) would have no application. Likewise, if a business conducted wholly outside Queensland were to be acquired, the business acquisition provisions of the Qld Act (s54A) would have no application. In this regard it is noteworthy that s54A(10) of the Qld Act provides that a business shall be deemed to exist in Queensland (and, hence, have the requisite connection to attract the operation of s54A) if its conduct involves, in whole or in part, an offer to supply most kinds of property or to tender services to persons ordinarily resident

in Queensland. In a case where the business is conducted partly in Queensland or partly in the Australian Capital Territory, provision is made by the legislation or administrative arrangement to determine the duty payable by reference to the portion of the business conducted in the jurisdiction concerned (see s54A(11) of the Qld Act and Revenue Circular 11 published by the Commissioner for ACT Revenue on 21 June 1990 in relation to the Stamp Duties and Taxes (Amendment) Act 1990).

In the case of the acquisition of assets of a business, the location within a jurisdiction of an asset acquired would suffice to attract the stamp duties legislation of that jurisdiction to that acquisition if the asset concerned comprised dutiable property for the purposes of that legislation. Thus, if the business assets acquired were located in a number of jurisdictions, the stamp duties consequence in respect of each asset acquired would be considered in the light of the stamp duties legislation of the jurisdiction concerned. In some jurisdictions (eg, South Australia) the stamp duty authority may also lay claim to the duty payable upon an instrument acquiring an asset if the instrument were executed in that jurisdiction and notwithstanding that the asset concerned were located in another jurisdiction. If such a claim were made, this would result in a single asset acquisition attracting a liability for duty in two jurisdictions since there would be a liability for duty also in the jurisdiction in which the asset were located. Accordingly, if an instrument (eg, a contract for sale) provided for the acquisition of an asset located outside South Australia, the instrument should be executed outside that jurisdiction to ensure that, at most, duty would be payable only in the jurisdiction in which the asset were located.

Legal rules have been developed according to which the *situs* of differing categories of property is determined. Tangible property, such as land or plant and equipment, has its *situs* at any particular point of time in that jurisdiction in which it is then located. For a time there was a debate in the courts as to whether any *situs* could be attributed to intangible property such as debts and other *choses in action*, the goodwill of a business, or industrial and intellectual property. That debate was eventually resolved on the basis that intangible property is located in that jurisdiction with which it is most definitely connected. Over time sub-rules have developed as to the jurisdiction with which particular kinds of intangible property should be regarded as most definitely connected. It is submitted that the position relating to intangible assets of the kind typically found in a business is as follows:

Debts

A debt created or evidenced by a deed (known as a specialty debt) is located in the jurisdiction in which the executed counterparts of the deed are located. Where executed counterparts of the deed are located in different jurisdictions, the specialty debt will be considered to have its *situs* in that jurisdiction with which the debt has its most definite connection having regard to all relevant circumstances. In **Toronto General Trusts Corporation v The King** ([1919] AC 679) the Privy Council, confronted with this dilemma in relation to duplicate counterparts of a mortgage, took into account: the place of residence of the debtor; the place of payment of the debt; the location of the mortgaged property securing repayment of the debt; and the fact that the mortgages derived their force and effect from the laws of a particular jurisdiction.

Non-specialty debts are located in the jurisdiction in which they would be enforced. This is generally said to be the jurisdiction in which the debtor resides. However, this conclusion should be displaced in a case where the debtor resides in a particular jurisdiction and the instrument (if any) creating or evidencing the debt is governed by the law of a different jurisdiction and the parties have submitted to the exclusive jurisdiction of the courts of that different jurisdiction.

Goodwill of a Business

Goodwill is located in the jurisdiction in which the business generating the goodwill is conducted.

Licences

The benefit of a licence to use property or to do something which would otherwise be unlawful, whether created by private contract (eg, a licence to use a trademark) or by statute (eg, a commercial television broadcasting licence), comprises a *chose in action*. Whilst such a *chose in action* would not fall within a category of dutiable property for the purposes of the conveyancing provisions in the stamp duties legislation in certain jurisdictions (eg, Victoria and the Australian Capital Territory), it would in most jurisdictions. In the case of **2 Day FM v Commissioner of Stamp Duties (NSW)** (89 ATC 4840) Sully J of the New South Wales Supreme Court considered the liability to conveyance duty under the NSW Act of an assignment of an existing radio broadcasting licence which had been granted by the Commonwealth to the assignor under Commonwealth legislation. On the basis that the licence assigned permitted broadcasts only within an area inside the State of New South Wales the Court concluded that the benefit of the licence was most intimately connected with the jurisdiction of New South Wales. The fact that the licence assigned had been created under Commonwealth legislation did not alter that conclusion. Accordingly, the instrument assigning the licence was a conveyance of property in New South Wales and liable to conveyance duty under the NSW Act.

The conclusion might be drawn from the **2 Day FM Case** that the jurisdiction with which a licence is most intimately connected is the jurisdiction within which the licence may be exercised. However, it is submitted that this is not necessarily so. The relevant factors in the **2 Day FM Case** were all connected with New South Wales in that the transmitter licensed was located in the State and the broadcast area fell wholly within the State. There will be cases in which the territorial area in which the licence assigned may be exercised will encompass two or more States or Territories. There are, for example, commercial television licences and licence warrants authorising broadcasts from a transmitter located in New South Wales but close to the boundary between that State and the Australian Capital Territory or Queensland where the audience reach of the broadcasts extends into that adjoining jurisdiction. Likewise, in the case of a licence created by private contract (eg, a licence to use a trademark registered under the Commonwealth Trademarks Act 1955) the area for the exercise of the licence may encompass the whole of Australia. In identifying the jurisdiction with which the benefit of such a licence is most definitely connected, there appear to be a number of possibilities:

- It may be said that the benefit of the licence is most definitely connected with each of the jurisdictions in which it may be exercised. A consequence of this approach is that the *chose in action* comprising the benefit of the licence would be attributed a *situs* in more than one jurisdiction. A further consequence would be that an instrument assigning the benefit of the licence could be liable to *ad valorem* conveyance duty under the stamp duties legislation of more than one jurisdiction. These consequences give rise to a number of problems.

- The first problem is that the rules as to the *situs* of property have, in part, been developed for the purposes of the body of law known as private international law or conflict of laws. It is a fundamental principle of that body of law that property should have a *situs* in only one jurisdiction so that the *lex situs* of property (which has a significant role to play in many issues of private international law) might be determined (see, for example *Conflict of Laws in Australia* by P E Nygh

2nd Ed at p602 and **IRC v Muller & Co's Margarine Ltd** [1901] AC 217 per Lord Lindley at p237). If property were to be considered to be located in more than one jurisdiction and the laws of those jurisdictions were not wholly uniform, when an issue of private international law fell to be determined according to the law of the *situs* of the property, there could well be an irreconcilable difference on the point under the laws of each *situs*. For this reason it is submitted that the courts should and would be loath to recognise that a single item of property (ie, the benefit of a statutory or contractual licence) could have more than one *situs*. It may well be the case that the courts of different forums would reach different conclusions as to the *situs* of particular property but that does not contradict the principle that under the laws of a particular jurisdiction a single item of property would have its *situs* in only one jurisdiction.

The second problem concerns the possibility that a single instrument of assignment of a single item of property (ie, a transfer of the benefit of a licence of the kind under consideration) might attract a liability to full *ad valorem* conveyance duty under the stamp duties legislation of more than one jurisdiction without any effective mechanism for apportionment of the value of the property or the consideration supporting the assignment as between the jurisdictions or crediting the duty paid or payable in one jurisdiction against the duty paid or payable in another jurisdiction. This problem could only arise under the stamp duties legislation of a particular jurisdiction if that legislation were construed on the basis that a conveyance of property would be dutiable even if the property conveyed were not located wholly within the jurisdiction concerned.

Section 65 of the NSW Act defines a "conveyance" as an instrument whereby "any property **in** New South Wales" is transferred to or vests in or accrues to any person. In **J V Crows Nest Pty Ltd v Commissioner of Stamp Duties (NSW)** (85 ATC 4198) Lusher J of the New South Wales Supreme Court found that the reference in that definition to property "**in**" New South Wales should be construed as a reference to property wholly within New South Wales. One of the expressed bases for this conclusion was the difficulty of apportionment which would arise if the contrary view were to be taken. The authority of this conclusion in relation to the construction of the NSW Act has been weakened to some extent by gratuitous obiter dicta of Sully J in the later **2 Day FM Case**. After noting the conclusion reached by Lusher J in the earlier case Sully J doubted that he would have reached the same conclusion that an instrument would not have been liable to conveyance duty under the NSW Act unless the property conveyed were located wholly in New South Wales. Sully J did not venture any reasons for his observation nor any solution to the apportionment/multiple liability problem.

Similar issues arise under the stamp duties legislation of other jurisdictions. For example, s54(1) of the Qld Act provides that a contract for the sale of property is to be charged with the same duty as if it were a conveyance of the property. Section 54(2) of the Qld Act denies the application of s54(1) to a contract for the sale of any property (other than any equitable estate or interest in any property) which is "property **outside** Queensland". If the television licence referred to earlier were the subject of a contract for sale and were considered to be located in both New South Wales and Queensland, the question arises under the Qld Act as to whether the subject property should be regarded as property "**outside** Queensland" for the purposes of s54(2) of the Qld Act. It is understood that the Queensland stamp duty authority would not so regard it and would consider that it was entitled to assess *ad valorem* conveyance duty by reference to the whole

of the value of the licence or the consideration under the contract referable to the licence (whichever was the greater).

The same question arises under the WA Act. That Act subjects to conveyance duty a conveyance or agreement for the conveyance of property but exempts from duty "a conveyance or transfer of any estate or interest in any real or personal property locally situated **out of** Western Australia" (see para (7) under item 2 in the Third Schedule to the WA Act).

A question similar to that under the NSW Act arises under the NT Act from the definition of "dutiable property" in s4(1) of the Taxation (Administration) Act 1978. That definition encompasses the right to use **in** the Territory a trademark or the subject of a patent, registered design or copyright or information where the use occurs in connection with a business conducted wholly or partly in the Territory. As in New South Wales, the issue arises as to whether the definition would require that the use be restricted to the Territory or would be satisfied where the area of use extended beyond the Territory. It is noteworthy that the definition of "dutiable property" also extends to a statutory licence or permission used in or in connection with a business conducted wholly or partly in the Territory.

By contrast the stamp duties legislation of a jurisdiction such as South Australia does not contain any provisions which expressly suggest that conveyance duty would not apply to an instrument unless the property conveyed were located wholly within South Australia. However, the absence of such a provision does not mean that the SA Act should be construed without regard to territorial restrictions and the consequences of doing so.

The proposition presently being examined is that a single indivisible item of property (ie, the benefit of a licence) may not be located in more than one jurisdiction. It is not the case that identifiable parts of the same item are located in different jurisdictions (eg, where a bridge spans the River Murray which is the boundary between New South Wales and Victoria). In this latter case it may well be possible to value that part of the property in each jurisdiction and to apportion the consideration referable to the assignment of each part. In consequence in that case, written assignment or agreement to assign the whole item of property could attract a liability to duty under the stamp duties legislation of each jurisdiction by reference to the greater of the value of or the consideration supporting the assignment of the part located in the jurisdiction concerned. However, each part would be liable to duty only in the jurisdiction in which it were located. This appears to be the situation addressed by s98A of the Taxation (Administration) Act of the Northern Territory. According to that section where, in the opinion of the Commissioner, "dutiable property" is wholly or partly situated in the Territory or is wholly or partly related to a business undertaking carried on in the Territory, stamp duty is to be assessed in respect of that proportion of the dutiable property situated in the Territory or related to the business undertaking carried on in the Territory.

In the case of a single television licence to broadcast signals with an audience reach in both Queensland and New South Wales, it is submitted that it is not possible to identify a part of the licence located in Queensland and a part located in New South Wales. If the conclusion is reached that the single indivisible licence is located in both Queensland and New South Wales, it follows that the whole of that item of property is located in both jurisdictions. A written assignment of or agreement to assign that licence would attract duty in **both** Queensland **and** New South Wales calculated by reference to the greater

of the value of the licence or the consideration supporting the assignment unless the view were taken that the legislation of both jurisdictions applied only to property wholly within the jurisdiction concerned. There would be no mechanism under the stamp duties legislation of either jurisdiction for the stamp duty authority in each jurisdiction to credit in whole or part the duty paid in the other jurisdiction. It is submitted that a court would strive to avoid such a conclusion as witnessed by the decision of Lusher J in the **J V Crows Nest Case**.

An alternative approach to identifying the location of the licences under consideration does not give rise to the first of the two problems arising from the first approach and may not give rise to the second problem. The alternative approach would deny the proposition that the territorial area in which a licence may be exercised **necessarily** determines the jurisdiction with which the licence is most definitely connected and would require all factors to be taken into account. The decision of the Privy Council in the **Toronto General Trusts Corporation Case** is instructive in this regard. At issue in the case was the *situs* at the death of a mortgagee of the mortgage debts evidenced by duplicate counterparts of the mortgage located in two different jurisdictions at the time of death. The normal rule for determining the *situs* of a specialty debt by reference to the location of the specialty instrument would have led to the conclusion that the specialty debt was located in both of two provinces. According to the court it was "plainly impossible to hold that they were situate in both provinces at once" ([1919] AC at 684). As previously noted, the Court took into account all relevant factors pertaining to the debt and the mortgage in order to choose between the two provinces as the *situs* of the specialty debts.

In the case of a television broadcasting licence authorising broadcasts with an audience reach comprising residents of two jurisdictions, it is submitted that the following factors would lead to the conclusion that the jurisdiction with which the licence is most intimately connected is the Commonwealth of Australia and **not** any one or more States or Territories within the Commonwealth:

- The area of exercise comprises two jurisdictions but the rules of private international law strongly suggest that an indivisible piece of property have only one *situs*.

- The property assigned is a creature of Commonwealth legislation enforceable in the Federal Court throughout the Commonwealth of Australia.

- The assignability of the property and the various incidents attaching to the property are determined according to that Commonwealth legislation.

In response to this submission it may be argued that in the **2 Day FM Case** Sully J rejected an argument which (so far as it is possible to discern from the judgment) appears to have been that, because the radio broadcasting licence was a creature of Commonwealth Statute, the licence assigned necessarily could **not** be regarded as property located "**In**" New South Wales for the purposes of the NSW Act. The submission under consideration does **not** proceed on the basis that an item of property created by Commonwealth statute necessarily has a *situs* other than within a particular State or Territory. In a case such as that before the court in **2 Day FM**, the conclusion may well be reached that an item of property created by Commonwealth statute is most definitely

connected with a particular Australian State or Territory. However, it is equally the case that where other factors do **not** point unambiguously to an intimate connection with one State or Territory, the Commonwealth connections would point to the most intimate connection with the Commonwealth of Australia.

Whilst this conclusion would have the virtue of producing a single *situs* for the indivisible item of property, it would not necessarily avoid the problems of multiple duty discussed previously. This problem would only be avoided on the basis of the submission as to *situs* if the stamp duties legislation of the various jurisdictions were construed on the basis that the conveyance duty provisions could have no application to property the only relevant *situs* of which is the Commonwealth of Australia.

The submission that the location of a licence should not necessarily be determined solely by reference to the area of exercise applies with equal force to a licence created by private contract between two parties. Assume that the registered holder of a trademark licences another party to use the registered mark throughout New South Wales and Queensland and that the licence agreement is (as would often be the case) governed by the law of the Commonwealth of Australia and the parties submit to the jurisdiction of the Federal Court of Australia. It is submitted that consideration of all factors would lead to the conclusion that the licence had its *situs* in a single jurisdiction being the Commonwealth of Australia.

This excursus on the location of a licence is relevant to the conveyance duty provisions of the stamp duties legislation in those jurisdictions where a *chose in action* comprises dutiable property. It is **also** relevant to the loan security duty or mortgage duty provisions in the stamp duties legislation of those jurisdictions which determine the duty payable upon a security encumbering property located in more than one jurisdiction (eg, s137DA of the Vic Act; s84F of the NSW Act; s70 of the Qld Act; s84 of the WA Act; s81B of the SA Act; Item 3(f) of Schedule 4 to the Tas Act and s6(11) of the NT Act). The issues raised require consideration whenever a bank takes security over property comprising or including the benefit of such a licence.

Industrial and Intellectual Property

Information is not property at general law or for the purposes of stamp duties legislation (see **FCT v United Aircraft Corporation** (1943) 68 CLR 525; **FCT v Sherriff Gordon Mines Ltd** (1977) 137 CLR 612; **Pancontinental Mining Ltd v Commissioner of Stamp Duties Qld** 88 ATC 4190).

The definition of "dutiable property" in s4(1) of the Taxation (Administration) Act 1978 includes a right to use in the Northern Territory information or technical knowledge connected with a business conducted wholly or partly in the Territory but does not include the information or knowledge itself. Thus, the definition would have the effect of rendering dutiable under the NT Act an instrument assigning a licence to use information in the Territory but not an instrument assigning the information itself.

The balance of authority in Australia favours the view that no distinction should be drawn between confidential information and non-confidential information in relation to the issue of whether it is property (see *Equity Doctrines and Remedies* by Meagher Gummow & Lehane 2nd edition at pp832-833 and the authorities there cited). However, in view of the observations of Gummow J in **Smith Kline & French Laboratories (Aust) Ltd v Secretary of Department of Community Services and Health** ((1990) 22 FCR 73 at

pp119-121), it may be that the Australian courts will eventually come to accept that confidential information does comprise a species of property.

At present and for so long as information is regarded as not being property the question of the location of information for stamp duty purposes does not arise. If it comes to pass that confidential information is accepted by the Australian courts as a species of property on the basis that proprietary remedies are available to protect the confidentiality of the information (see **Smith Kline & French**), it is submitted that the jurisdiction with which the confidential information would be most definitely connected would be that jurisdiction in which the proprietary remedies would be enforceable. It is submitted that it would **not** be the jurisdiction or jurisdictions in which was located the medium on which the information was recorded. For a start the information may not be recorded on any medium. Furthermore, there is a clear distinction between the medium which comprises property owned by some person and the information recorded on the medium. In **Argyll v Argyll** ([1967] 1 Ch 302) Ungoed-Thomas J relied on an unreported decision of **Wyatt v Wilson** in which it was recognised that, where confidential information was recorded in a diary, the property in the diary belonged to a party other than the person entitled to restrain publication of the information recorded.

This distinction between the record and the information recorded underlies the extreme difficulty experienced by the law to date in providing effective protection to persons who develop computer software. The software, as distinct from the medium on which it is recorded, comprises information. To date the principal legal protection extended to persons who create computer software arises from the inclusion of the software amongst the various forms of work protected by the Copyright Act 1968. In consequence, the unauthorised reproduction or publication of the software of the kind encompassed by the Copyright Act is prohibited. Other use of the information not encompassed by the Copyright Act is not protected (see **Dyason v Autodesk Inc** 24 FCR 147).

Copyright, patents, registered trademarks and designs are all the creatures of Commonwealth statutes. It is important to appreciate that the subject of consideration here is the registered trademark or patent or design or the copyright in a work and not the benefit of a licence to use such property (considered at length above). The issue involved in determining the *situs* of such property is the same as that involved in determining the *situs* of the benefit of a licence; viz, identifying the jurisdiction with which such property is most definitely associated. The principal difference in this case is that the territorial area for the exercise of the property rights involved is **not** determined by the licence but by the Commonwealth legislation creating the property and, in each case, extends throughout the whole of the Commonwealth. It is submitted that in each case the jurisdiction with which the property concerned is most intimately connected is the Commonwealth of Australia for the reasons already discussed in relation to licences. There is clear judicial support for this conclusion (see **McCaughey v Commissioner of Stamp Duties (NSW)** (1945) 46 SR 192 at 201; **Re Usines de Melle's Patent** 28 ALJ 225 at 227).

If that submission is accepted and it is concluded that such property has its *situs* in the Commonwealth of Australia and not in any relevant sense in any of the other Australian jurisdictions, that conclusion would not dictate the stamp duty consequences under the NT Act of an instrument assigning a patent, registered design or copyright. Such property is expressly included in the definition of "dutiable property" for the purposes of the NT Act. It is noteworthy that the definition does not include a registered trademark as "dutiable property". It is only a right to use such a trademark in the Territory in connection with a business conducted wholly or partly in the Territory which is encompassed by the definition and not the trademark itself.

The position of an unregistered or (as it is commonly known) "common law trademark" differs from that of a trademark registered under the Trademarks Act 1955. A "common law trademark" comprises nothing more than the rights enjoyed by a party carrying on business to protect by an action for passing off the distinctive name, symbol or get-up in relation to goods or services which come to be associated by the public with that party (ie, part of the goodwill of the business) [see *The Law of Intellectual Property* by S Ricketson at pp532-536 and *The Law of Passing Off* by C Wadlow at p41]. Since a common law trademark is nothing more than an aspect of the goodwill of a business, it has its *situs* in the same location; viz, the place in which the business is conducted. Thus, it is possible that a common law trademark used in connection with a business would have a *situs* which differed from the corresponding registered trademark used in connection with that business.

The New South Wales Commissioner of Stamp Duties has suggested publicly that a registered trademark used in connection with a business conducted principally in New South Wales (eg, the name of a newspaper published and sold principally in New South Wales) would have its *situs* in New South Wales. It is submitted for the reasons already given that the registered trademark concerned would **not** have its *situs* in New South Wales but the common law trademark (being the same mark as that registered under the Trade Marks Act) **would** have it *situs* in New South Wales.

2.1.3 Queensland Business Acquisition Provisions

Every person who acquires or agrees to acquire a business that exists in Queensland is obliged by s54A of the Qld Act, within one month, to deliver to the Commissioner a statement in prescribed form setting out:

- the date of the acquisition or agreement to acquire the business;
- all assets in any manner connected with the business which were acquired or agreed to be acquired;
- the value of the various categories of asset acquired;
- the total consideration for the acquisition including the amount of liabilities assumed; and
- any relationship between the parties to the acquisition.

That statement is charged with duty as if it were a conveyance or transfer of the property to which it relates for a consideration equal to the full unencumbered value of the property. The person acquiring the business and delivering the statement is liable for that duty. To the extent that duty is paid upon an instrument by which one or more of the business assets are acquired (eg, a transfer of land or a contract to purchase land) the amount of such duty is set off against the duty payable upon the s54A statement. If only part of the business acquired exists in Queensland, provision is made for the apportionment of the value of the assets of the Queensland business and of the consideration referrable to those assets so that duty is paid by reference to that portion.

Section 54A contains a number of definitions and deeming provisions which extend the ambit of the section:

- The expression "business" is defined to include any business, profession, calling, vocation or other occupation conducted by a person on his own behalf or in partnership and any interest or part-interest of a partner in a business.

- A business is deemed to be acquired under s54A(9) where property of any kind was being used in a business conducted on real property and there is an acquisition of the real property and the other property (whether by the same or different parties) in circumstances where it is likely that the other property will be used in conducting a business on the real property of the same or substantially the same description as the business previously conducted by the person from whom the other property was acquired. In such a case it is the party who acquires or agrees to acquire the real property who is deemed to acquire the business and, in consequence, required to lodge the s54A statement.

- A business is deemed to be acquired under s54A(7) where there is any transaction by which, although the whole of the assets of a business are not acquired or agreed to be acquired, sufficient of those assets are acquired or agreed to be acquired to enable the acquirer to carry on the business.

There is a noteworthy contrast between the deeming provisions of s54A(9) and those of s54A(7). The requirements of the former section will be satisfied where the other property will be used in conducting a business of the same or substantially the same description as the business conducted by the party from whom the property was acquired. The requirements of s54A(7) will be satisfied **only** where the business assets acquired suffice to enable the acquiring party to carry on **"the business"**. It is submitted that "the business" concerned is the very same business as was conducted by the person from whom the business assets were acquired. It would **not** satisfy the requirements of s54A(7) if the party acquiring the business assets conducted a business of the same description as the business conducted by the party from whom the assets were acquired unless it were the same business.

In a case where some, but not all, of the assets of a business are acquired and the acquiring party conducts a business of the same description as the party disposing of the assets, it is submitted that **goodwill** provides the key to determining whether or not the acquiring party is conducting the very same business or merely a business of the same description. The nature of goodwill has been confused to some extent by the introduction of the Accounting Standard ASRB 1013 (Accounting for Goodwill) which requires that where any premium over fair market value is paid for one or more assets, an additional asset described as goodwill should be regarded as having been acquired for an amount equal to the premium. This is so irrespective of whether or not the property recognised as goodwill at law has been acquired.

Difficulty has been experienced in defining goodwill for the purposes of the law. Perhaps the best and most frequently quoted description of goodwill is to be found in the judgments of the House of Lords in **Inland Revenue Commissioners v Muller & Co's Margarine Ltd** ([1901] AC 217):

> "What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates." (Per Lord Macnaghten at p223).
>
> "Goodwill regarded as property has no meaning except in connection with some trade, business or calling. In that connection I understand the word to include whatever adds value to a business by reason of situation, name and reputation,

> connection, introduction to old customers, and agreed absence from competition, or any of these things, and there may be others which do not occur to me. In this wide sense, goodwill is inseparable from the business to which it adds value and, in my opinion, exists where the business is carried on. Such business may be carried on in one place or country or in several, and if in several, there may be several businesses, each having a goodwill of its own." (Per Lord Lindley at p235).

Without derogating from these descriptions in **Muller's Case** the courts have recognised that different attributes of a particular business may constitute (in the words of Lord Macnaghten) "The attractive force which brings in custom". Recognition of these differences has led to the distinction sometimes made between so-called "local goodwill" and so-called "personal goodwill". This differentiation was most quaintly described by Scrutton LJ in **Whiteman Smith Motor Co v Chapman** ([1934] 2 KB 35 at p42) as follows:

> "A division of the elements of goodwill was referred to during the argument ... as the 'cat, rat and dog' basis. The cat prefers the old home ... though the person who has kept the house leaves. The cat represents that part of the customers who continue to go to the old shop though the old shopkeeper has gone; the probability of their custom may be regarded as an additional value given to the premises by the tenant's trading. The dog represents that part of the customers who follow the person rather than the place; these the tenant may take away with him if he does not go too far. There remains a class of customer who may neither follow the place nor the person, but drift away elsewhere. They are neither a benefit to the landlord nor the tenant, and have been called 'the rat' for no particular reason except to keep the epigram in the animal kingdom."

If a party acquires a large part of the assets of a business being conducted by another but does not acquire the goodwill of that business and the acquirer ventures those assets into a business of the same description as that being conducted by the other party, the question arises as to whether the acquirer is deemed by s54A(7) to have acquired a business. It is submitted that the business conducted by the acquirer would not be the very same business as that conducted by the other party who disposed of the assets if the goodwill were not acquired. As Lord Macnaghten noted in **Muller's Case** goodwill is "the one thing which distinguishes an old-established business from a new business at its start".

If, as submitted, the acquisition or non-acquisition of goodwill may determine the operation of the deeming provisions in s54A(7), it is important to appreciate that it is the goodwill recognised at law as property which is taken into account and **not** the asset recognised under the Accounting Standard. In the circumstances of a creditor effectively converting debt into equity by acquiring assets for a consideration which will be used to retire debt, there is a clear potential for an amount more than fair value to be paid for the assets. If this occurred or if the auditors of the creditor believed it had occurred, it is likely that the accounts of the creditor would in due course disclose the acquisition of goodwill in connection with the transaction. This may encourage the Queensland Commissioner to the view that there had been an acquisition of a business as a matter of fact or by virtue of the deeming provisions of s54A(7). In that event it would be necessary to draw to the Commissioner's attention the fundamental difference between goodwill at law and accounting goodwill. The potential for this kind of problem to arise exists under the stamp duties legislation of other jurisdictions apart from Queensland. It is unfortunate to say the least that the Accounting Standard proceeds on a basis which is at odds with the legal analysis and which can give rise to disputes with stamp duty authorities.

As a practical matter when it comes to the notice of the Queensland Commissioner of Stamp Duties that there has been an acquisition of Queensland assets which appear to relate to a business conducted in Queensland, the Commissioner will issue a requisition or notice requiring the furnishing of information and the lodgment of a statement under s54A. Such a response may well be triggered by the lodgment with the Commissioner for stamping of nothing more than an assignment of a lease or the lodgment of pay-roll tax forms indicating that individuals have ceased to be the employees of one employer and become the employees of another employer. The notice or requisition including the requirement that a s54A statement be lodged may well be issued by the Commissioner in circumstances which do **not** support the conclusion that s54A of the Qld Act applies or where it is at least highly arguable as to whether that Act applies. Any party and, in particular, a bank which prizes its reputation and public image is placed in a difficult position upon receipt of such a request where it seeks to argue that s54A has no application.

The difficulty stems from the form and contents of the prescribed s54A statement. The statement takes the form of a statutory declaration and the prescribed particulars to be included in the statement include declarations acknowledging that there has been the acquisition of a business or an agreement to acquire the business. Once such a statutory declaration is lodged with the Commissioner it makes it extremely difficult, if not impossible, for the declarant to maintain the contention that there has been no acquisition of or agreement to acquire a business for the purposes of s54A. If a party were to lodge a s54A statement in satisfaction of the Commissioner's requirement that this be done but the lodging party continued to dispute the Commissioner's assertion that there had been an acquisition or agreement to acquire a business for the purposes of s54A, the Commissioner would be likely to assess the duty payable upon the statement. Sections 23D and 24 of the Qld Act provide a mechanism whereby the party dissatisfied with that assessment might object to the assessment and, if that procedure were unsuccessful, appeal to the Supreme Court. If the issue in dispute is the factual question as to whether there has been an acquisition of a business or sufficient of the assets of a business to enable the acquiring party to carry on the same business, it would be open to the Commissioner simply to rely upon the statutory declaration which by its very terms acknowledges the position maintained by the Commissioner.

The difficulties facing the party in dispute with the Commissioner in pursuing the rights of appeal under s24 of the Qld Act are compounded by the requirement that the appeal proceed by way of case stated. The case stated mechanism involves the Queensland Commissioner setting out the facts upon which the Queensland Supreme Court is to proceed in hearing the appeal. Where the dispute between the Commissioner and the acquirer of business assets is essentially a factual dispute, there is considerable potential for the rights of the appellant to be prejudiced by the manner in which the case is stated. As a matter of practice, the Commissioner furnishes a draft case stated to the appellant for comment before serving it upon the appellant. There is no statutory obligation upon the Commissioner to do so nor to take into account any of the comments or objections raised by the appellant in respect of the draft.

One course open to the party requested by the Commissioner to lodge the statement would be to engage in correspondence with the Commissioner setting out the reasons why there was no obligation to lodge a statement under s54A. Experience has been that such correspondence may extend over a period of some years. However, if the Commissioner and the other party maintain their respective stance, there will ultimately come a time at which the Commissioner may institute proceedings against the other party on the basis that the other party's failure to lodge the s54A statement constitutes an offence under s54A(4) for which substantial penalties are provided. It would be open to the party being prosecuted to raise as a defence to those proceedings the grounds

upon which that party relies for its stance that s54A has no application. However, it is most unsatisfactory that any person should be placed in a position in which it is forced to conduct what amounts to a stamp duty appeal as a defence to a prosecution for the commission of an offence.

Another alternative open to a party which did not wish to place itself in such an invidious position and did not wish to compromise its chances of succeeding in the dispute by lodging a s54A statement would be to seek from the Queensland Supreme Court a declaration that there had been no acquisition of a business or agreement to acquire a business attracting an obligation to lodge a statement under s54A. Courts have proved reluctant to entertain an application for a declaration in revenue law disputes where the legislation creating the impost provides an objection and appeal mechanism. However, it is submitted that this reluctance should be overcome and the court should entertain the application for the declaration where the statutory rights of objection and appeal following lodgment of the prescribed form of s54A statement is jeopardised in the manner previously described.

This state of affairs is clearly unsatisfactory and it is submitted that, at the very least, an amendment is required to the prescribed form of statement under s54A to remove all references to the acquisition of a business or an agreement to acquire a business. The statement would simply include information of a kind presently required concerning the assets and liabilities (if any) acquired. Given that the information to be furnished includes the value of assets and given the notorious difficulty of establishing with precision the value of assets, it is submitted that it is also inappropriate for the statement to take the form of a statutory declaration.

2.1.4 ACT Business Acquisition Provisions

Section 64A of the Stamp Duties and Taxes Act 1987 provides for the determined amount of tax to be paid on the acquisition of a business conducted wholly or partly in the Territory. Where the business is conducted partly in the Territory, duty is to be paid only on the acquisition of such part of the business as is conducted in the Territory.

The amount of the tax payable is "determined" by the Stamp Duties (Licensed Vehicle Dealers and Acquisition of Businesses) Determination 1990 made by the Minister for Finance and Urban Services under s99(1) of the Taxation (Administration) Act 1987. The Determination provides varying rates of duty applicable to:

- the unencumbered value of such of "**ACT assets**" as comprise an interest in land;
- the higher of the market value of or purchase price for such of the "**ACT assets**" as comprise motor vehicles the registration of which would be taxable under the ACT and
- the higher of the amount of the "**residual consideration**" or the "**net ACT assets**".

"ACT assets" are defined in the Determination to mean assets relating to the conduct of business in the Territory. "Net ACT assets" are defined to mean the difference between the unencumbered value of such of the ACT assets as are not interests in land or motor vehicles less liabilities relating to the conduct of business in the Territory ("ACT liabilities"). "Residual consideration" is defined to mean the amount of consideration attributable to the acquisition of the business conducted in the Territory less the unencumbered value of the ACT assets comprising interests in land or motor vehicles.

It is noteworthy that, in computing the amount of duty payable by reference to the "net ACT assets", the liabilities relating to the conduct of the business in the Territory are subtracted from the unencumbered value of certain of the ACT assets. Quantifying the liabilities which relate to the conduct of the business in the Territory may well give rise to considerable difficulties where the same party carries on a business or commercial activities outside the Territory in the course of which liabilities are incurred. In **Ronpibon Tin NL v FCT** ((1949) 4 AITR 236) the High Court considered the question of the extent to which particular expenditure had been incurred for the purposes of producing income assessable under the Federal income tax legislation. The Court noted that some expenditure is indiscriminate in that it cannot be related to particular objectives or activities whilst other expenditure can be so related. An example of expenditure in the former category would be head office expenditure incurred by a taxpayer carrying on a variety of activities some of which produce assessable income and some of which produce exempt income. The same considerations would apply to liabilities incurred by a party carrying on a business in the Territory and elsewhere. Thus, assume that a company conducts a business Australia-wide from headquarters in leased premises in Sydney utilising a centralised computer held under a finance lease. There would be considerable, and probably insuperable, difficulties in identifying to what extent the liability for the rent of the headquarters or the computer lease related to the Territory business.

It may well be said that liabilities of that kind should not be taken into account as a deduction in computing the duty base since only liabilities being assumed by the purchaser should be taken into account for that purpose. The problem with this view is that any such liabilities assumed by the purchaser would form part of the total consideration provided by the purchaser for the acquisition of the business. As such those liabilities assumed would form part of the "residual consideration". Thus, although such liabilities would be deducted in computing the amount of the "net ACT assets" (see above) they would be added back as part of the "residual consideration". Since paragraph 7(c) of the Determination requires duty to be paid by reference to the **higher of** the "residual consideration" or of the "net ACT assets", the whole exercise of identifying and deducting the ACT liabilities appears as a matter of law to be pointless. It would only make sense if, in practice, the Commissioner for ACT Revenue would not require the ACT liability assumed to be taken into account in computing the residual consideration.

In *Revenue Circular 11* the Commissioner for ACT Revenue blithely asserts that liabilities are to be apportioned in the proportion which Territory assets bear to total business assets. The basis for this assertion is presumably paragraph 8 of the Determination. According to that paragraph the maximum value of the ACT liabilities which "may be included in a return" where the business acquired is conducted from locations within the ACT and within another Australian jurisdiction is to be computed in accordance with a formula

$$\frac{A}{B} \times C$$

where:

A is the unencumbered value of the ACT assets acquired
B is the unencumbered value of the total assets acquired
C is the value of the "total liabilities **acquired**".

The reference to the total liabilities "acquired" confirms the suggestion that only liabilities assumed by the purchaser are intended to be taken into account. Also this formula predicates that the ACT liabilities (ie, the liabilities relating to the conduct of the Territory business) have been identified. Hence, the formula cannot logically be relied upon to determine what liabilities should be regarded as ACT liabilities.

If it is the case that the ACT liabilities assumed by the purchaser and deducted in calculating "net ACT assets" are also excluded from the "residual consideration", there is a fundamental difference between the ACT Act and s54A of the Qld Act on this point. The statement to be lodged under s54A requires that business liabilities assumed by the purchaser be taken into account as part of the consideration attracting a liability to duty. The Queensland position is hardly surprising since the express assumption by a purchaser of a liability otherwise imposed upon a vendor, where the assumption occurs in connection with the acquisition of the property, would properly be characterised as part of the consideration for the acquisition of the property.

The purchaser of a Territory business is required to lodge a return in an approved form within 60 days of the acquisition and to pay the tax payable in respect of the acquisition. A credit against the duty payable upon the return is allowed for any Territory duty paid upon an instrument relating to the acquisition of the business (eg, a transfer of an interest in real estate). Conversely, if duty has been paid upon the return, a credit would be allowed against the duty payable but unpaid on any such instrument.

2.1.5 Asset Acquisition

If assets are acquired from the debtor the resulting liability to stamp duty (if any) under the stamp duties legislation of any Australian jurisdiction will depend upon the following factors:

- the location of the asset acquired;
- whether or not the acquisition is affected by a written instrument;
- the nature of the instrument; and
- the nature of the asset acquired.

These factors are significant for the following various reasons:

Location of Asset

The principal determinant of the stamp duties legislation (if any) applicable to a property acquisition is the location of the property acquired (see point 2.1.2 above).

Written Instrument or Not

Traditionally stamp duty has been imposed upon written instruments rather than transactions. On that footing, if it were possible to effect a transaction upon an acceptable basis without involving a written instrument, any potential liability for stamp duty would be avoided. The common practice of recording or effecting a commercial transaction by written instrument is usually attributable to either or both of the following reasons:

- the written instrument provides clear evidence of the terms of the transaction; and

- according to particular legislation certain transactions may not be effected unless a written instrument is executed (eg, a transfer of the legal title to *choses in action* or Torrens Title land may only be achieved if, amongst other things, an instrument of transfer is executed by the transferor).

The means to provide clear evidence of an acquisition agreement and, in some cases, to satisfy statutory requirements without the execution of a dutiable instrument was recognised by the decision in the case of **Carlill v Carbolic Smoke Ball Co** ([1892] 2 QB 484). In that case it was held that a written offer to sell property accepted by conduct other than writing did **not** constitute a written contract for sale or memorandum of such a contract which would attract a liability for stamp duty under the English stamp duties legislation. This view received Australian confirmation by the High Court in the context of the WA Act in **Macrobertson Miller Airline Service v Commissioner of State Taxation** ((1975) 133 CLR 125). So long as the conduct comprising the act of acceptance (eg, the payment of a stipulated sum of money into a nominated bank account) were clearly demonstrable, there would be clear evidence of the making of the contract (through the written offer accepted by conduct) and of the terms of the contract (by reference to the written offer). If the contract related to the acquisition of land, the written offer would provide a sufficient memorandum of the contract for the purposes of the Statute of Fraud provisions incorporated in the legislation of the various Australian jurisdictions (eg, s54A of the Conveyancing Act 1919 of New South Wales) although not for the purposes of the stamp duties legislation (on the authority of the **Carbolic Smoke Ball Case**). If the contract resulting from acceptance of the offer were satisfied by the payment of the full purchase price then, depending upon the nature of the property, either full ownership would vest in the purchaser or full beneficial ownership (see, for example, the decision of the High Court in **KLDE Pty Ltd v Commissioner of Stamp Duties (Qld)** 84 ATC 4793). If the property acquired were of the kind such that a statute required a written instrument of transfer in order to vest legal title (eg, land or a *chose in action*), the formation of the contract by the payment of a sum in acceptance of the offer would generally vest in the purchaser an equitable interest and the satisfaction of the contract upon payment of the full purchase price would vest unconditional equitable ownership in the purchaser. This vesting of equitable interests and equitable ownership would not be denied by the provisions in conveyancing legislation requiring writing in order to vest interests in property such as land (eg, s23C of the Conveyancing Act 1919 of New South Wales) since those provisions recognise exceptions to the requirement for writing in a case where the vesting occurs by means of an implied or constructive trust. If the property acquired were of a kind such that no written instrument of transfer were required in order to vest legal title (eg, plant and equipment), the satisfaction of the contract upon payment of the full purchase price and delivery of any tangible property would vest legal title to the property in the purchaser.

The avoidance of stamp duty by such means (dubbed by the New South Wales Minister for Finance as "Claytons Contracts") has been countered to some extent by provisions incorporated in the stamp duties legislation of most Australian jurisdictions which create a liability for duty by reference to certain transactions and not by reference to a written instrument. For example Division 3A was inserted in Part III of the NSW Act with effect from 21 November, 1986. The effect of the Division is to require a party to make out a statement which attracts a liability for ad valorem conveyance duty in respect of certain transactions. This obligation arises where a transaction causes or results in a change in the beneficial ownership of an estate or interest in specified kinds of property, which change is not effected or evidenced by an instrument chargeable with *ad valorem* duty under certain specified provisions in the NSW Act, and where such a liability to duty would have arisen had such an instrument been executed. This obligation would **not** arise unless the property involved fell within one of the following categories:

(a) land situated in New South Wales;

(b) goods wares or merchandise situated in New South Wales which is sold or conveyed with other property in New South Wales of the kind to which the provisions apply;

(c) the goodwill in New South Wales of a business carried on in New South Wales;

(d) a lease of land situated in New South Wales;

(e) an interest in a partnership to the extent that the interest relates to partnership property which is of the kind to which the provisions apply (eg, land in New South Wales);

(f) shares or rights to shares of a corporation incorporated in New South Wales or a corporation incorporated outside New South Wales which are registered on a share register kept in New South Wales;

(g) units in a unit trust scheme which are registered on a register kept in New South Wales or on a register kept outside New South Wales (in the latter case if the manager of the unit trust is a company incorporated in New South Wales or a person resident in New South Wales).

An exception to the obligation to make out such a statement is recognised in the case of certain changes in beneficial ownership which occur as a consequence of a limited range of circumstances (eg, the appointment of a receiver or trustee in bankruptcy or a transfer or conveyance by way of security). To the extent to which duty **is** paid on a statement, any instrument effecting or evidencing the transaction to which the statement relates is not chargeable with duty. There are detailed provisions determining the time within which a statement is required to be lodged after the transaction giving rise to the obligations to lodge the statement. A failure to lodge the requisite statements within the required time is rendered an offence as is the aiding or abetting or counselling of a person to enter into a transaction of the kind to which Division 3A applies knowing or believing that the person did not intend to comply with the obligations to lodge a statement and pay duty under Division 3A.

Provisions of the kind contained in Division 3A of Part 111 of the NSW Act have also been included in the WA Act, the SA Act, the Tas Act and the NT Act. The principal difference between the provisions concerns the categories of property in which a change of estate or interest would trigger the provisions. Under the NT Act the categories of property are identical to those under the NSW Act except that they do not extend to units in a unit trust. The categories of property within the scope of the provisions in the SA Act comprise land; a business or the goodwill of a business in South Australia; and a partnership interest. The categories of property within the scope of the provisions in the WA Act comprise goodwill; freehold land or a crown lease or a mining tenement or any improvements to any such realty. In addition, the provisions under the WA Act are triggered by a transaction involving a loan of monies or a lease of land or improvements situated in Western Australia. The categories of property within the scope of the provisions in the Tas Act comprise land; a Crown lease or mining lease; and a business. In addition, the provisions under the Tas Act are triggered by a transaction involving a loan or agreement to lend money in respect of which a guarantee has been given or agreed to be given or property has been pledged or charged or agreed to be pledged or charged or a negative pledge has been given.

Whilst there is a keen similarity in the structure and terms of the "Claytons contract" provisions in the stamp duties legislation of New South Wales, Northern Territory, South Australia, Tasmania and Western Australia, the provisions in the Qld Act are somewhat different. Section 54(4) of the Qld Act operates where a company incorporated or registered in Queensland acquires Queensland property for consideration and there is no acquisition agreement or transfer instrument executed or, if such an agreement or instrument is executed, it is not duly stamped with *ad valorem* duty. In such a case the company's memorandum of association or copy memorandum of association registered in Queensland is deemed to be an instrument of conveyance of the Queensland property acquired and to be chargeable with *ad valorem* conveyance duty. It is noteworthy that the provision operates regardless of the nature of the property located in Queensland acquired. Section 54AB of the Qld Act applies where there is a transaction or acquisition (not caught by s54A) which results in a person obtaining an estate or interest in any Queensland Crown lease or there is a transaction which results in a person obtaining occupancy rights over land in Queensland in respect of which there is a written offer. In such a case if the transaction or acquisition is not effected or evidenced by an instrument chargeable with particular duty specified the parties to the transaction or acquisition are obliged to lodge a statement if a liability to any such duty would have arisen had the transaction or acquisition been effected or evidenced by an instrument. Such a statement is deemed for all purposes of the Qld Act to be an instrument of conveyance or an instrument of lease (as the case may be) and, in consequence, liable to the appropriate duty.

The ACT Act does not contain any such provisions and nor, subject to one qualification, does the Vic Act. The qualification relates to s59 of the Vic Act which requires a dutiable statement to be furnished to the Comptroller of Stamps in certain circumstances where a person disposes of any marketable security or right in respect of shares. That obligation will arise where the marketable securities or rights in respect of shares disposed of had been acquired by the person concerned without the execution of a dutiable instrument of transfer or the payment of stamp duty.

To the extent that property to be acquired does not fall within the particular categories within the scope of the "Claytons contract" provisions in the various jurisdictions, it may well still be possible to acquire the property concerned by means of a "Claytons contract" without attracting a liability for stamp duty.

Nature of Instrument

If an instrument is executed to evidence or effect an acquisition of property, that instrument may take one or both of the following forms:

- There may be a written purchase agreement which may or may not provide for the purchase to be completed by some other act such as the delivery of moveable property or execution of a written instrument of transfer.

- There may an instrument of transfer of property completing an antecedent agreement for the acquisition of the property which agreement may have been in writing or may have been parol. In rare cases there may simply have been an instrument of transfer without any antecedent agreement for purchase.

Under the stamp duties legislation of most Australian jurisdictions, both a written agreement for the acquisition of property and an instrument transferring the property would each be liable to ad valorem conveyance duty. The payment of two amounts of *ad valorem* conveyance duty in respect of the same acquisition is avoided by effectively exempting the transfer instrument from *ad valorem* duty if it is made pursuant to a

stamped purchase agreement. Nonetheless, the potential for double duty remains real and could arise, for example, where the purchase agreement provided for a transfer to a named party or that party's nominee and the ultimate transfer were executed in favour of the nominee. However, in normal circumstances, the ad valorem conveyance duty would be paid upon the purchase agreement and nominal duty (if any) would be paid upon the instrument of transfer. This is the regime applicable under the stamp duties legislation of New South Wales, Queensland, Western Australia, Northern Territory, South Australia (in relation to certain kinds of property identified in s31(1) of the SA Act), Tasmania (in the case of certain kinds of property identified in ss25 and 70 of the Tas Act). In the cases and jurisdictions where duty is not paid upon the written purchase agreement, *ad valorem* conveyance duty would be imposed only upon an instrument transferring the property acquired ie, in Victoria and the Australian Capital Territory and in certain cases in South Australia and Tasmania.

The fact that the stamp duties legislation in Victoria and the Australian Capital Territory does not impose a liability for duty upon a written purchase agreement provides the most logical explanation for the absence from that legislation of "Claytons contract" provisions which are primarily designed to ensure that duty is paid where there is an unwritten agreement for acquisition. If no duty is payable in the jurisdiction concerned upon a written purchase agreement, there would be no logical justification for introducing complex provisions which would require the payment of duty upon an acquisition effected without a written instrument.

Nature of Asset

The nature of the asset acquired will determine whether or not the written instrument evidencing or effecting the acquisition is liable to duty and, if so, the rate at which the duty is calculated.

The stamp duties regime providing for the imposition of duty upon an acquisition of a property in the various Australian jurisdictions follows either of two models. According to one model a transfer of or an antecedent agreement to acquire property of any kind whatsoever would *prima facie* be liable to *ad valorem* duty. Exceptions to the imposition of that duty are recognised by specific exemptions which apply to acquisitions or transfers of specific categories of property (eg, a corporate debt security or goods wares or merchandise). Under such a regime (which is applicable in New South Wales, Queensland, Western Australia, South Australia and Tasmania) the nature of the property determines the availability of any exemption.

According to the second model (which applies in Victoria, Australian Capital Territory and Northern Territory), the stamp duties legislation only imposes a liability for duty upon transfers of certain categories of property specifically identified in the legislation. Thus, under legislation following this model, a conveyance of property would not be liable to duty unless the property fell within one of the specified categories (eg, real property). Even within these limited categories of property, there may be specific exemptions recognised in the case of a particular sub-class of the property. Thus, Item IV of the Third Schedule to the Vic Act identifies one of the categories of dutiable property as "marketable securities" but also exempts from duty any transfer of a "marketable security" not being a share in a corporation or a unit in a unit trust scheme. It follows that under legislation following this model the nature of the property transferred determines whether the instrument evidencing or effecting the transfer is *prima facie* liable to duty and whether any exemption might exclude that liability.

It is not feasible within the confines of this paper to identify each category of property subjected to duty or exempted from duty under the stamp duties legislation in each

jurisdiction. As a generalisation it would be fair to say that the principal difference between the scope of the property acquisition or transfer provisions of legislation which follows the first model and that which follows the second model concerns intangible property such as debts and other contractual rights and industrial and intellectual property. The stamp duties legislation which follows the first model would be most likely to impose a liability for conveyance duty upon an instrument transferring or agreeing to acquire such intangible property whereas (with the exception of the NT Act) legislation following the second model would not. Reference has previously been made to the definition of "dutiable property" for the purposes of the NT Act and the inclusion within that definition of various items of industrial and intellectual property.

In relation to tangible property such as land and improvements comprising fixtures, there is no material difference in approach between the two legislative models since such property is identified as one of the dutiable categories under the stamp duties legislation following the second model. In the case of tangible property comprising moveable plant and equipment the liability for duty upon an acquisition agreement in writing or, more rarely, an instrument of transfer may vary substantially according to the jurisdiction concerned and the particular circumstances.

Under the WA Act a written transfer or agreement for the acquisition of goods wares or merchandise (which would include moveable plant and equipment) would be exempt from duty (see exemption 2(7) in the Third Schedule). Under the SA Act a written transfer or agreement for the acquisition of goods wares or merchandise would be liable to *ad valorem* conveyance duty. Under the Qld Act a written agreement to acquire property comprising solely goods wares or merchandise would be exempt from duty (see s54(2)) but a written transfer of goods wares and merchandise would be liable to *ad valorem* duty. Under the NSW Act a written transfer or agreement for the acquisition of goods wares or merchandise would be exempt from duty if the only property acquired by the instrument or as part of a transaction comprised goods wares or merchandise (see ss43 and 43A). To the extent that such property is not restricted to goods wares or merchandise, the resulting liability for *ad valorem* duty would be displaced in the case of goods wares or merchandise comprising stock in trade held or used in connection with the business or in connection with land used for primary production provided an exemption were claimed (see s43B). Under the Vic Act a written transfer of real property would attract a liability to *ad valorem* duty calculated, in part, by reference to chattels (other than stock in trade held or used in connection with the business conducted in relation to the real property) which are sold or transferred by reason of the sale of the real estate or as part of the same transaction. Under the ACT Act a written transfer or agreement for the acquisition of chattels in connection with or as part of the same transaction as the conveyance of a Crown Lease would attract a liability for *ad valorem* duty (see s19(1)). Under the NT Act a written transfer or agreement to acquire chattels would be liable to *ad valorem* duty only if the chattels were acquired as part of a transaction in which other "dutiable property" was conveyed or acquired (see the definitions of "conveyance" and "dutiable property" in the Taxation (Administration) Act and Item 5 of Schedule 1 to the Stamp Duty Act). The liability to duty under the NT Act would be displaced if the chattels comprised goods wares or merchandise that were stock-in-trade, livestock or certain other categories of property (see para (j) under the definition of "dutiable property" in s4(1) of the Taxation (Administration) Act). Under the Tas Act a written transfer of goods wares or merchandise would be liable to *ad valorem* duty (see Item 7(a) of Schedule 2) and an agreement for the acquisition of any moveable chattels as part of the same transaction involving a transfer of real property would attract a liability for *ad valorem* duty (see s70(4A), s69H and Item 6 of Schedule 2).