STAMP DUTY UPDATE

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WESTPAC BANKING CORPORATION & ANOR V COMMISSIONER OF STAMP DUTIES (QLD)

The Queensland Court of Appeal handed down its decision in this case (92 ATC 4571) on 11 September, 1992 and the High Court rejected an application by the Queensland Commissioner of Stamp Duties for leave to appeal on 5 February, 1993. The analysis adopted by the court raises for consideration the prospect that in Queensland and, possibly also in New South Wales and Western Australia, a much wider range of instruments commonly used in commercial transactions will be assessed to ad valorem conveyance duty.

The case involved an assessment by the Queensland Commissioner of Stamp Duties of ad valorem conveyance duty on various bases upon an agreement between Westpac and the Commonwealth ('the Agreement') for the 'privatisation' of the low interest home loan operations previously conducted by the Defence Service Homes Corporation. In broad terms the Agreement established a framework for the vesting in Westpac by Commonwealth legislation of various assets previously belonging to the Defence Services Homes Corporation (eg receivables and mortgages). In addition under the Agreement the Commonwealth granted to Westpac a so-called 'lending franchise' under which Westpac would have the exclusive right to make loans to eligible defence personnel and receive an interest rate subsidy from the Commonwealth.

In so far as the Agreement made provision for the vesting of assets in Westpac pursuant to Commonwealth legislation, the Queensland Commissioner assessed it as liable to ad valorem conveyance duty under sections 54(1) or 54(4) of the *Stamp Act* 1894 ('the Qld Act'). In so far as the Agreement conferred the lending franchise upon Westpac, the Queensland Commissioner assessed it as liable to ad valorem conveyance duty in reliance upon section 56 of the Qld Act. The Court of Appeal upheld objections to the assessments on both bases and concluded that the Agreement was liable to the 50¢ duty tendered at the time of lodgement of the Agreement for assessment.

It is the assessment under section 56 and the analysis by Pincus JA and Demack J in a joint judgment of the scope of that provision which is relevant for present purposes. That section provides as follows:

> *'Where, upon the sale of any annuity or other right not before in existence, such annuity or other right is not created by actual grant or conveyance, but is only secured by bond, warrant of attorney, covenant, contract, or otherwise, the bond or other instrument, or some one of such instruments if there be more than one, is to be charged with the same duty as an actual grant or conveyance, and is, for the purposes of this Act, to be deemed an instrument of conveyance on sale.'*

Materially identical or similar counterparts of section 56 of the Qld Act are to be found in section 71(1) of the *Stamp Duties Act* 1920 ('the NSW Act') and section 70 of the *Stamp Act* 1921 ('the WA Act').

Prior to the decision of the Court of Appeal section 56 of the Qld Act and its counterparts were distinguished, not only for the obscurity of their drafting, but by the rarity of their practical application (if ever) by the stamp duty authorities in each of the three jurisdictions. The joint judgment noted with some bemusement the dearth of authority (apart from the decision of the High Court in **Commissioner of Stamp Duties (NSW) v Yeend** (1929) 43 CLR 235) concerning the operation of section 56. The absence of case law was doubtlessly attributable to the well settled and wide spread interpretation of the conclusions reached by the High Court in **Yeend's Case** and the absence of reliance upon the provision by the stamp duty authorities in their administration of the stamp duties legislation. The Court of Appeal's conclusions in relation to the principles established in **Yeend's Case** and the operation of section 56 of the Qld Act are significant because of the possibility that section 56 and its counterparts might be relied upon to support assessments of ad valorem conveyance duty upon a host of written agreements used in commercial transactions, including banking and financing transactions, which have hitherto attracted at most nominal fixed duty. The incipient signs are that at least the Queensland Commissioner has concluded that section 56 may have a wider application than previously recognised.

The preconditions to the application of section 56 and its counterparts are as follows:

(a) Right

In the case of sections 56 of the Qld Act and 70 of the WA Act there must be the **sale** of an annuity **or other right** not before in existence. In the case of section 71(1) of the NSW Act, it would suffice if there was a **sale** or a **gift** or other **creation** of such a right.

The ordinary concept of a 'sale' embraces a transaction under which existing property is transferred from one party to another party for consideration (**Litterwoods Mail Order Stores Ltd v IRC** [1963] AC 135). Accordingly, most people would reject any suggestion that the granting of a licence or the entry into a loan agreement or a syndication agreement could possibly be characterised as a 'sale'. However, the legislature clearly intended that section 56 (and its counterparts) would extend beyond the ordinary concept of sale by requiring that the right the subject of the sale should not previously have been in existence. The plain language of the section makes it clear and the Court of Appeal accepted that the section applies to an instrument which creates the rights sold. In this regard the provision is akin to section 160M(6) in the capital gains provisions of the *Income Tax Assessment Act* (1936) considered recently by the High Court in **Hepples v FCT** (92 ATC 4013).

When it is recognised that most of the multitudinous agreements entered into daily in commercial and private transactions either create or provide for the creation of rights not previously in existence the potential width for the application of section 56 becomes apparent. For many years it had been considered by commentators and advisors that the potential width of the section was significantly curtailed by the High Court's decision in **Yeend's Case**. That case concerned, in part, the possible application of section 71(1) of the NSW Act to a Licence Agreement. As it then stood section 71(1) of the NSW Act was effectively identical to section 56. The judgments of the majority of the High Court and of Isaacs J in the minority are somewhat cryptic. However, the accepted wisdom was that the High Court had concluded that section 71(1) of the NSW Act would only apply where the right created was a proprietary right and not a mere personal right. The joint judgment of the Court of Appeal rejects this interpretation of the decision of the High Court in **Yeend's Case** although it is conceded that some of the observations of Isaacs J might support such a conclusion.

The trouble is that Pincus JA and Demack J do not provide any clear guiding principle in substitution for that which they dismantle. Although they deny that **Yeend's Case** is authority that the subject right must be proprietary and not personal, the two judges recognise that section 56 does **not** apply to 'every acquisition of rights under a contract' (at p4581). Rather than articulate a test by which it would be possible to determine whether or not rights created by an instrument are of a kind to which section 56 applies, Pincus JA and Demack J simply proceed to test whether 'within the ordinary meaning of the language of the section' the preconditions to its operation are satisfied by the Agreement under consideration in that case. It is ironic in the extreme that, having bemoaned the absence of any authority providing 'substantial assistance' on the question under consideration by the court, the two judges in their decision should perpetuate that unhelpful state of affairs.

In the course of the application by the Queensland Commissioner to the High Court for special leave to appeal against the decision of the Court of Appeal the High Court received lengthy argument from counsel for the Commissioner and for Westpac. Needless to say the Commissioner did not argue for the High Court that the majority of the Court of Appeal was incorrect in their interpretation of the decision in **Yeend's Case** since the decision of the Court of Appeal on that point suited the Commissioner. Had leave to appeal been granted by the High Court Westpac would doubtless have argued that Pincus JA and Demack J were incorrect in their interpretation of **Yeend's Case**. Nothing was said by the members of the High Court hearing the special leave application which cast any light as to their views on this point. If the emerging signs of greater reliance by the Queensland Commissioner upon section 56 are substantiated, it is quite possible that the High Court may be called upon in future to clarify whether or not the rights referred to in section 56 are restricted to proprietary rights and, if not, how to discriminate between instruments creating personal rights which are within the scope of section 56 and those which are not. The views expressed by the Court of Appeal in relation to section 56 of the Qld Act do not constitute authority in relation to the interpretation of sections 71(1) of the NSW Act or 70 of the WA Act.

Another possible limitation upon the width of application of section 56 of the Qld Act and section 70 of the WA Act arises from the requirement that there be a 'sale'. For reasons which will be explained this limitation would not apply to section 71(1) of the NSW Act. As already noted the language of section 56 requires a departure from the normal concept of a 'sale' to the extent that the subject matter comprises newly created rights and not existing property. However, there does not seem to be any warrant for ignoring the other requirement of the general law concept of a sale; viz, that there be supporting consideration. Furthermore it is submitted that the consideration concerned must be given in return for the creation of the right and not for its future exercise. This distinction reflects that recognised at law between a premium paid for the grant of a lease and rent payable during the term of the lease. The authorities accept that a premium represents consideration paid by a lessee to the lessor for the vesting in the lessee of the leasehold estate created by the granting of the lease (see, for example, **Frazier v Commissioner of Stamp Duties (NSW)** 85 ATC 4735). In contrast the authorities accept that rent payable under a lease comprises consideration for the exercise of the rights created by the lease rather than the creation of the rights.

The clear thrust of section 56 of the Qld Act and its counterparts is that the instrument creating the right is treated as a conveyance of the right created and subjected to duty as an instrument of conveyance. If, as submitted, it remains a necessary ingredient for the sale of a right not before in existence that there be consideration, the logic of the section dictates that the consideration support the creation of the right rather than its exercise. If this submission is accepted, it would have the practical effect of substantially reducing the number and categories of commercial agreements evidenced in writing which fall within the scope of section 56 of the Qld Act or section 70 of the WA Act. As a generalisation many commercial agreements creating rights provide for consideration in return for the exercise of the rights granted rather than for the creation of the rights. This conclusion would not be applicable to the construction of section 71(1) of the NSW Act since, following the decision in **Yeend's Case**, section 71(1) was amended to extend its operation to cases where rights were created, not only by sale, but also by **gift** or other **creation**. At general law a gift comprises a disposition of property for no consideration or inadequate consideration.

(b) Actual grant or conveyance

Section 56 and its counterparts expressly predicate that the subject right should **not** be created by 'actual grant or conveyance' but should only be 'secured by bond, warrant of attorney, covenant, contract or otherwise'.

The distinction being made is between a fully executed grant or conveyance of a right which is operative upon execution of the instrument, on the one hand, and an executory agreement, on the other. Under the Agreement the Commonwealth expressly 'granted' to Westpac the 'lending franchise'. This formulation was prudent having regard to the decision of the English Divisional Court in **The Mersey Docks and Harbour Board v IRC** ((1897) 1 QB 786) which clearly suggests that the use of the expression 'grant' may be a precondition to characterising an instrument as a grant in this context. Notwithstanding the formulation used in the Agreement, Pincus JA and Demack J in the Court of Appeal concluded that this did not protect the Agreement from the application of section 56. According to the judges the whole of the Agreement (including the grant of the lending franchise) was dependent upon action taken by the Commonwealth Parliament and the mere potential creation of rights conditional or dependent upon parliamentary action did not constitute an 'actual grant or conveyance' for the purposes of section 56. On the other hand the rights concerned were 'secured' by contract in the sense that the Agreement defined the right created and could have been relied upon on enforcement.

The apparent logic underlying the displacement of section 56 and its counterparts in the case of an actual grant or conveyance is that an instrument which actually grants or conveys newly created rights would be liable to ad valorem duty as a 'conveyance' within the ordinary meaning or specially defined meaning of that expression. The assumption that an instrument granting newly created rights would necessarily attract a liability for ad valorem conveyance duty is not well founded. The decision of the High Court in **Yeend's Case** remains clear authority that an instrument vesting newly created rights in a party could not constitute a 'conveyance' for the purposes of the NSW Act (and, in particular, the definition of 'conveyance' in section 65) unless the subject rights were proprietary in nature. This aspect of the High Court's decision attracted no comment in the Queensland Court of Appeal.

It follows that, if a party wishes to avoid the possible application of section 56 or its counterparts and the context and circumstances permit, it would be prudent for the instrument to provide for the subject rights to be 'granted' and for the grant to be unconditional.

(c) Territorial nexus

Some connection needs to exist between a State and an instrument or transaction in order for the legislation of the State to subject the instrument or transaction to a liability for duty. The legislature of a State is free to select any matter or thing as the requisite connecting factor provided that the factor has some relevance to the burden imposed (see the Privy Council in **Johnson v Commissioner of Stamp Duties** [1956] AC 331) and it is a matter of statutory construction to determine which matter or thing has been chosen by the legislature (see Dixon J in **Broken Hill South Ltd v Commissioner of Taxation** (1937) 57 CLR at 375). In some cases the nexus will be expressly identified by the legislation in relation to the particular category of instrument or transaction rendered dutiable. Thus, in the case of the Qld Act, section 54(2) makes it clear that the provision subjecting a contract for sale of property to conveyance duty (section 54(1)) has no application where the property concerned is outside Queensland. Likewise the definition of 'loan security' in section 83(1) of the NSW Act expressly incorporates the relevant territorial factors. However, in many cases the territorial nexus is not so specifically expressed. Section 56 of the Qld Act (and its counterparts) is such a provision.

In a case where the legislature has not expressly identified the territorial nexus it is necessary to determine that which has impliedly been chosen. The stamp duties legislation of many Australian jurisdictions contains a provision which denies admissibility in civil proceedings to an instrument having certain defined connections with the jurisdiction unless it has been stamped in accordance with the law in force in that jurisdiction at a particular time (sections 29(1) NSW; 4A Qld; 30 Vic; 27(1) WA; 22 SA; 121 NT; 13A ACT). In a number of cases concerning the stamp duties legislation of various jurisdictions the courts have recognised that such provisions provide a definition of the general territorial nexus which applies if there is no specific nexus identified (see, for example, the House of Lords in **CIR v Maple & Co (Paris) Ltd** [1908] AC 22 and the NSW Supreme Court in **ACI Resources Ltd v Commissioner of Stamp Duties (NSW)** 86 ATC 4810). Pincus JA and Demack J in the Court of Appeal took the same approach in holding that section 4(2) of the Qld Act and its predecessor section 4A provided the general definition of the territorial operation of the Qld Act. This meant that an instrument would have a relevant connection with Queensland to attract a liability for duty under a provision, such as section 56, if the instrument were executed in Queensland or related to property situated in Queensland or to any matter or thing done or to be done in Queensland.

Although the relevant parts of the Agreement were cast in terms of a franchise conferred by the Commonwealth upon Westpac to make advances to eligible personnel (many of whom would reside in Queensland), such a view of the nature of the Agreement was clearly inadequate. There was nothing the Commonwealth nor Westpac could do to prevent another financial institution making loans on whatever terms they chose to defence personnel qualifying for eligibility under the Defence Service Homes Scheme. However, since Westpac was entitled to an interest rate subsidy from the Commonwealth under the Agreement, it would be very difficult for a financial institution, other than Westpac, to make an advance to eligible personnel at a rate of interest as low as that which Westpac could offer. The Agreement contemplated that during its term Westpac would be the only financial institution entitled to such an interest rate subsidy from the Commonwealth. Thus, in effect, the so-called lending franchise amounted to an exclusive right conferred by the Commonwealth upon Westpac under an Agreement executed outside Queensland and governed by the law of a jurisdiction outside Queensland to receive payment outside Queensland of an interest rate subsidy. Proceeding on this basis Pincus JA and Demack J concluded that the Agreement in so far as it comprised the 'lending franchise' did not in a relevant respect have the requisite nexus with Queensland since it was executed outside Queensland and did not relate to any property situated in Queensland or to any matter or thing done or to be done in Queensland. Those judges rejected the Commissioner's argument that the 'lending franchise' involved the making of loans to residents of Queensland and the taking of security over property in Queensland and, hence, had a sufficient territorial connection.

The Court of Appeal was undoubtedly encouraged to reach that conclusion in respect of territorial nexus by the fact that the consideration payable by Westpac to the Commonwealth for the 'lending franchise' was not, in the view of Pincus JA and Demack J, expressly identified and, in particular, was not in any way dissected or apportioned as between the different Australian jurisdictions in relation to which the lending franchise would operate. The Commissioner's counsel conceded to the court that the Qld Act contained no effective basis for the apportionment of that part of the consideration referable to Queensland and that the basis on which the Commissioner had proceeded in the assessment issued (viz, the contract-splitting provisions of section 53) had no relevance to the problem. Accordingly, counsel for the Commissioner was forced to concede to the Court of Appeal that, if the Commissioner was correct in arguing that there was a relevant territorial connection with Queensland, ad valorem Queensland conveyance duty would be calculated by reference to the full amount of the consideration supporting the lending franchise (assuming it could be identified). This exposed Westpac to the possibility that ad valorem conveyance duty could also be exacted in other jurisdictions (eg Western Australia and New South Wales) by reference to the full amount of the same consideration. In other words, the same transaction would attract full ad valorem duty in a number of jurisdictions without any relief or credit between the jurisdictions.

The Court of Appeal was clearly reluctant to accept this result. It is not asserted that this inequity was solely or principally responsible for the court coming to its conclusion on territorial nexus. However, where a court is faced with a difficult decision in applying a general principle to particular facts and one application appears clearly inequitable, it would be completely consistent with human nature for the court to incline toward the alternative. In this regard it is noteworthy that the NSW Supreme Court in the case of **JV (Crows Nest) Pty Ltd v Commissioner of Stamp Duties (NSW)** (85 ATC 4198 at p4204) expressly acknowledged that the possibility of multiple duty in different jurisdictions applying to a single transaction without effective credit or relief influenced the court's construction of the relevant provisions of the NSW Act. These are subtle illustrations of how the lack of effective harmonisation between the stamp duties legislation of the different Australian jurisdictions may work to the disadvantage of the revenue.

In passing it is of interest to note that in the application to the High Court for leave to appeal, counsel for the Commissioner argued forcefully that section 4(2) of the Qld Act did not define or prescribe the general territorial limits for the operation of the Qld Act. It was submitted to the High Court that the conclusion of Pincus JA and Demack J on that point was erroneous since it denied any continuing effect to the judgment of the High Court in **Commissioner of Stamps v Wienholt** ((1915) 20 CLR 531). On the basis of that judgment, counsel for the Commissioner submitted that the mere physical entry of the Agreement into Queensland was a sufficient connection to subject the Agreement to Queensland duty. Mason CJ asked counsel for Westpac for comment upon that submission and the response was that an instrument brought into Queensland would not be liable for duty unless it satisfied one of the territorial connections identified in the legislation. The High Court did not comment upon the point but it is submitted that the changes made to the Qld Act since the decision in **Wienholt's Case** have rendered the decision clearly distinguishable and that the response by counsel for Westpac is correct. It is to be hoped that the submission made by counsel for the Commissioner merely reflected 'a boots and all' attempt to persuade the High Court that grounds for special leave existed and that it does not reflect the Commissioner's present view of the operation of the Qld Act.

(d) Instrument

Section 56 of the Qld Act and its counterparts only apply where there is a written instrument creating the subject right. This leaves open the possibility that rights could be created and vested in a party by virtue of an agreement concluded by means of a written offer accepted by conduct, such as payment of a sum of money, without attracting the operation of section 56 or its counterparts. The so-called 'Clayton's contract' provisions in the stamp duties legislation in New South Wales, Western Australia and Queensland would not operate in such circumstances so long as the rights created did not vest an interest in property of a kind to which the Clayton's contract provisions apply (eg land or the goodwill of a business). The scope of operation of the Clayton's contract provisions was examined in some detail in my paper delivered to the Banking Law Association conference in 1992.

The views of the Queensland Court of Appeal as to the interpretation of **Yeend's Case** and the nature of the 'right' within the scope of section 56 are at least authoritative in relation to the construction of section 56 of the Qld Act. The potentially greater scope for the operation of section 56 recognised raises the possibility that an instrument which falls within a category rendered specifically liable to duty other than ad valorem conveyance duty (eg a charge or an insurance policy) may also satisfy the preconditions for the operation of section 56. This possibility existed prior to the decision of the Court of Appeal but the settled view as to the interpretation of **Yeend's Case** and the paucity of practical application of section 56 prior to the decision of the Court of Appeal meant that the issue did not effectively arise. It is submitted that in such a case the dutiability of the instrument should be determined under the specific provision rather than under the more general provision of section 56. Such an approach would reflect the clear intention of the legislature which is, after all, the objective of statutory construction. Furthermore this approach would not, of course, have any relevance if the instrument satisfying the pre-condition to the operation of section 56 were not otherwise subjected to a particular duty other than conveyance duty.

It is only a relatively short time ago that the Queensland legislature removed from the Qld Act the catch-all provisions which subjected agreements and deeds not otherwise charged with duty to a fixed nominal duty. It would be perverse if the new life possibly breathed into section 56 by the observations of Pincus JA and Demack J in the Court of Appeal were to render section 56 applicable to a wide range of commercial instruments not hitherto dutiable and expose them to a liability, not for fixed nominal duty, but ad valorem conveyance duty.

DULY STAMPED - ADMISSIBILITY AND ENFORCEABILITY

It is of paramount importance to a financier who has provided accommodation that the powers conferred by any applicable agreement or security be capable of exercise in the event of default. In this section of the paper consideration is given to provisions in the stamp duties legislation of Australian jurisdictions which affect the enforceability or exercise of such rights. This issue has been the subject of recent cases in several jurisdictions which emphasise the importance to a party seeking to rely upon an instrument of ensuring that it is properly stamped in accordance with all applicable legislation.

General sanction

Historically the stamp duties legislation of England and the early stamp duties legislation in the Australian jurisdictions provided that the only consequence of the failure to stamp an instrument liable to duty was that the instrument could not be given in evidence and, in consequence, was deprived of the force of law for most purposes (see **Cobar Corporation Ltd v Attorney-General for NSW** (1909) 9 CLR 378). Although as time passed additional sanctions were incorporated into the stamp duties legislation (eg the right of the stamp duty authority to recover duty as a debt; the imposition of fines and the commission of criminal offences), the traditional sanction was retained, albeit with certain differences from jurisdiction to jurisdiction. Thus, by virtue of section 29(1) of the NSW Act, the consequence of a failure to stamp an instrument chargeable with duty is that, other than in criminal proceedings, the instrument may not 'be pleaded or given in evidence or admitted to be good, useful or available in law or equity for any purpose whatsoever'. A provision to like effect is contained in the legislation of Queensland (section 4A) and the Northern Territory (section 121). The corresponding provision in Victoria (section 30), Western Australia (section 27(1)) and South Australia (section 22) differs from the NSW model in that the denial that the instrument is good, useful or available in law or equity is **not** expressed to be 'for any purpose whatsoever'. This distinction and its significance received consideration by Moynihan J in **Rothwells Ltd v Connell** (93 ATC 4074) and is discussed below.

NSW

The forerunner of section 29(1) of the NSW Act was section 15 of the *Stamp Duties Act* 1898 of NSW. That forerunner denied that an unstamped instrument would, other than in criminal proceedings, be admissible in evidence or available or effectual for any purpose whatsoever in law or equity. The legal consequences of this formulation were considered by the High Court in **Dent v Moore** ((1919) 26 CLR 316). According to the High Court the first limb of the sanction was plain enough and prevented an unstamped instrument liable for duty from being admitted into evidence in any legal proceedings. As to the second limb of the sanction denying that such an instrument would be available or effectual for any purpose whatsoever in law or in equity, the High Court concluded that it rendered the instrument a nullity except for criminal proceedings and for the purpose of being stamped. This consequence attended the instrument until it had been stamped at which time it would operate according to its tenor with effect from the earlier time of its execution. Although the terms in which the successor provision, (section 29(1) of the NSW Act), is cast differ from the formulation of its predecessor, the NSW Court of Appeal in **Ash Street Properties Pty Ltd & Ors v Pollnow & Ors** (87 ATC 4609) concluded that section 29(1) had the same effect as recognised by the High Court in **Dent v Moore** notwithstanding the difference in drafting. Thus, according to the Court of Appeal, an unstamped instrument liable to duty under the NSW Act would not be admissible in any legal proceedings, other than criminal proceedings. The instrument would be a legal nullity unless and until stamped in accordance with the law in force at the time of first execution of the instrument whereupon it would be retrospectively validated with effect from its execution.

WA, SA and Vic

The formulation of the sanction contained in the legislation of Victoria, Western Australia and South Australia differs from the New South Wales sanction in that the prohibition on documents being admitted to be good, useful or available in law or equity does not go on to add 'for any purpose whatsoever'. As a matter of legislative history the additional words had been added to sanctions of the kind under consideration in response to the decision of the House of Lords in **Matheson v Ross** ((1849) 9 ER 1101). In that case the House of Lords concluded that an unstamped document was admissible in evidence for the purpose of proving, not the matter giving rise to the liability for stamp duty, but some collateral matter which was of no stamp duty significance. In **Dent v Moore** the High Court found it unnecessary to determine whether the addition of the words 'for any purpose whatsoever' to the sanction as previously drafted would overcome the collateral purpose exception recognised in **Matheson v Ross** (see 26 CLR at p334). However, in a judgment of the Full Court of Western Australia in **Acclaim Holdings Pty Ltd v Vlado Pty Ltd** ((1989) 1 WAR 128) Kennedy J appears to recognise that the effect of the addition of the words was to overcome the collateral purpose exception recognised in **Matheson v Ross** in referring to English authorities which came to that conclusion. Furthermore, in **Rothwells Ltd v Connell** Moynihan J concludes (at p4076) that the collateral purpose exception recognised in **Matheson v Ross** was overcome under the legislation of those jurisdictions which inserted additional words but was not overcome in those jurisdictions (eg Western Australia) which had not added the words.

It also appears from observations made by Wallace and Kennedy JJ in the **Acclaim Holdings Case** and by Anderson J of the Western Australian Supreme Court in **Osborne Cold Stores WA Pty Ltd v Novacastrian Nominees Pty Ltd & Ors** (91 ATC 4595) that the Western Australian formulation of the sanction renders an unstamped instrument which is liable to duty a nullity unless and until stamped. At first blush this conclusion may seem to be at odds with the apparent recognition by Kennedy J in the **Acclaim Holdings Case** and Moynihan J in **Rothwells Ltd v Connell** that the Western Australian formulation does not overcome the collateral purpose exception recognised in **Matheson v Ross**. It is submitted that there is no necessary inconsistency if the limited nature of the nullifying effect of the sanction is recognised. It will be recalled that in **Dent v Moore** the High Court concluded that the instrument concerned was a nullity 'except for criminal proceedings and, of course, for the purpose of being stamped' (26 CLR at pp324-325). A possible reconciliation of the two stances referred to above would be to say that, by virtue of section 27(1) of the WA Act, an unstamped instrument liable to duty would be a nullity except for criminal proceedings; except for civil proceedings for the purpose of proving a collateral matter; and except for the purpose of stamping.

Notwithstanding the clear suggestions from the judges of the Western Australian Supreme Court in the **Acclaim Holdings Case** and the **Osborne Cold Stores Case** that section 27(1) of the WA Act has nullifying effect beyond the courts (of the kind described in **Dent v Moore**), the matter is not free from doubt. In the case of **In Re Dehy Fodders (Australia) Pty Ltd** ((1973) 4 SASR 538) the South Australian Supreme Court considered the operation of section 22 of the *Stamp Act* 1923 ('the SA Act') which is effectively identical with section 27(1) of the WA Act and section 30 of the *Stamps Act* 1958 ('the Vic Act'). According to Bray CJ (at p544) and Walters J (at p556) section 22 of the SA Act dealt **only** with the admissibility or availability of the inadequately stamped instrument in evidence and not with the effectiveness or validity of the instrument. A similar sentiment was expressed somewhat cryptically in relation to section 27(1) of the WA Act by Barwick CJ in the case of **Commercial Banking Co of Sydney Ltd v Love** ((1975) 133 CLR 459 at p469). In that case Stephen J (at p476) recognised the uncertainty of the meaning of the concept of 'availability' but did not venture a view. Jacobs J (at p481) endorsed the conclusion of Bray CJ and Walters J in the **Dehy Fodders Case** in relation to the 'similarly worded' South Australian legislation but did not make it entirely clear whether he agreed with the view as to the operation of section 22 of the SA Act and, by inference, section 27(1) of the WA Act.

The Western Australian Supreme Court in the **Acclaim Holdings Case** and the **Osborne Cold Stores Case** made no reference to the observations of the South Australian Supreme Court in the **Dehy Fodders Case** nor to the views expressed by the High Court in **Love's Case**. By the same token neither the South Australian Supreme Court nor the members of the High Court made any reference to the earlier decision of the High Court in **Dent v Moore** concerning the operation of a very similar sanction in the legislation in New South Wales. It is difficult to see that the variation between the drafting of the provision considered by the court in **Dent v Moore** and by the courts in **Dehy Fodders Case** and **Love's Case** would account for the significant difference in the operation of the provisions. The effect of the sanction in the NSW Act described in **Dent v Moore** has received clear reaffirmation by the New South Wales Court of Appeal in the **Ash Street Properties v Pollnow Case** so that there is no doubt that section 29(1) has a nullifying effect on an inadequately stamped instrument beyond the realm of legal proceedings. It is submitted that the effect of the corresponding sanction in the Vic Act, the WA Act and the SA Act is not so clear cut. Given the dicta in the South Australian Supreme Court in the **Dehy Fodders Case** and the fact that the observations in the Western Australian Supreme Court in the two recent cases lack any authority in South Australia, it would seem strongly arguable that section 22 of the SA Act would only deny admissibility to an inadequately stamped instrument and would not otherwise legally nullify it. It is submitted that the question of the effect of section 27(1) of the WA Act remains and needs to be clarified. The same observation would apply in relation to section 30 of the Vic Act.

If the extent and effect of the sanctions contained in sections 30 of the Vic Act or 27(1) of the WA Act or 22 of the SA Act receive fresh consideration, some account should be taken of the significance of section 32(4) of the Vic Act, section 31(4) of the WA Act and section 23(4) of the SA Act which are all in similar terms. By way of example section 32(4) of the Vic Act provides that, if an instrument were stamped under the Vic Act with a 'duly stamped' stamp, the instrument would be 'admissible in evidence **and available for all purposes**' notwithstanding an outstanding objection to duty.

The operation of section 32(4) and its interaction with section 30 of the Vic Act was considered by the Victorian Supreme Court in **Backstop Nominees Pty Ltd v Goscor Pty Ltd** (89 ATC 495) (discussed in more detail below). According to the court (at pp4961-4962) the operation of section 32(4) was to displace or overturn the nullifying effect of section 30. What is significant is that section 32(4), in overturning the nullifying effect of section 30, treats an instrument as 'admissible in evidence and **available for all purposes**'. The strong inference arising from the clear function of section 32(4) is that an instrument otherwise caught by section 30 would not be admissible in evidence nor available for all purposes. The actual terms used by section 30 are that an inadequately stamped instrument would not 'be pleaded or given in evidence or admitted to be good, useful or **available in law or equity**'. In construing the words 'available in law or equity' in section 30 in the light of section 32(4), it is reasonable to suggest that those words mean 'available for all purposes in law or equity'. If this is accepted then, the nullifying effect of section 30 would **not** operate simply in relation to legal proceedings but would also operate to produce a general legal nullity. Thus, the result would be the same as produced by section 29(1) of the NSW Act as recognised in **Dent v Moore** and the **Ash Street Properties v Pollnow Case**. The same reasoning would apply with equal force to the interaction of sections 27(1) and 31(4) of the WA Act and sections 22 and 23(4) of the SA Act.

Rothwells v Connell

If an instrument liable to duty in a particular jurisdiction, such as Western Australia, is not duly stamped under the WA Act, it is uncontroversial that the sanction denying admissibility contained in the WA Act would prevent the instrument being admitted in civil proceedings in the courts of that jurisdiction. In the case of **Rothwells Ltd v Connell** the question that arose was whether the Queensland courts should admit in civil legal proceedings a document which had been duly stamped under the Qld Act but which was also liable to duty under the WA Act and had not been duly stamped under the WA Act. Relying upon the full faith and credit provisions in section 118 of the Australian Constitution the Queensland Supreme Court held that the document in question was not admissible and could not be relied upon in the proceedings before the Queensland courts. Just such a result was propounded by Mr G W Fisher in an article published in *Taxation in Australia* (1979-80, Volume 14, pp734-748 at p745) for the slightly different reasons set out in detail in that article.

Section 29(4) NSW

A qualified exception to the traditional sanction provided by sub-section (1) of section 29 of the NSW Act is recognised in sub-section (4) of that section. According to sub-section (4) the provisions of section 29 have no application to an instrument tendered as evidence on behalf of a party (not being a person who is primarily liable to duty in respect of the instrument) if the court is satisfied that such party:

- has notified or will notify the Commissioner of Stamp Duties as to the name of the person primarily liable to duty on the instrument; and

- will lodge the instrument or a copy with the Commissioner in accordance with court approved arrangements.

Under the NSW Act the primary liability for loan security duty is imposed upon the borrower or person bound by the loan security. Accordingly, a financier seeking to tender in court a loan security liable to duty under the NSW Act which had not been duly stamped would be allowed to tender the instrument upon following the procedure prescribed by section 29(4). However, the adoption of that procedure by the financier would not entitle the financier to rely upon the inadequately stamped loan security for any purpose other than in legal proceedings. If the financier simply sought to appoint a receiver or exercise power of sale pursuant to rights created by the loan security without involving a court, it is submitted that the financier could not do so unless and until the instrument had been duly stamped under the NSW Act. As already discussed the courts have recognised that section 29(1) of the NSW Act renders an inadequately stamped instrument both inadmissible in civil proceedings and a legal nullity as between the parties. The overriding operation of section 29(4) is clearly applicable only in respect of legal proceedings and does not restore the legal effect between the parties of the nullified instrument. This restoration would only occur upon the instrument concerned being duly stamped under the NSW Act.

All-moneys security

The stamp duties legislation of each Australian jurisdiction, other than the Australian Capital Territory, provides a regime for the stamping and up-stamping of securities which do not secure a certain sum or a limited sum (eg an all-moneys security). With the exception of the SA Act (following its recent amendment), the legislation provides a sanction for failure to stamp such a security as required (sections 84(4) NSW; 137F(2) Vic; 68(2) Qld; 83(3) WA; 69B(3) NT and Schedule 4 Para 3(e) Tas). The sanction is that the security is only 'available' for such amount as is covered by the duty paid (Vic; Qld; WA; Tas) or 'enforceable as a loan security' for such amount (NT) or 'unenforceable' unless stamped with the requisite duty (NSW).

The interaction under the Northern Territory legislation between the specific provision applying to such a security (section 69B(3)) and the general provision applying to any inadequately stamped instrument (section 121) was considered by the Supreme Court of the Northern Territory in **Westpac Banking Corporation v Mousellis** (86 ATC 4078). According to the court the specific provision (section 69B(3)) applied to determine the status of the securities concerned and not the more general provision. Furthermore, the court concluded that the consequence that an inadequately stamped security was not 'enforceable' beyond a specific amount meant that it could not be enforced by any means including exercise of power of sale. It was **not** the case that the only restriction applied to proceedings in court.

In the **Dehy Fodders Case** and **Love's Case** the South Australian Supreme Court and the High Court respectively concluded that the consequence that an inadequately stamped security would not be 'available' beyond a specified amount meant only that it could not be relied upon in litigation for recovery or set-off in excess of that amount. Subject to one possible qualification, this conclusion would apply to the up-stamping sanctions involving securities securing an uncertain and unlimited sum under the legislation now current in Victoria, Western Australia, Queensland and Tasmania. The only qualification would arise if it became clear that the general sanction applying to any inadequately stamped instrument (eg sections 27(1) of the WA Act or 30 of the Vic Act) had a nullifying effect beyond court proceedings. The basis for this suggestion is that in **Love's Case** and the **Dehy Fodders Case** the view was expressed that there was a symmetry between the operation of the general sanction and the specific sanction applying to a security for an uncertain and unlimited sum. To the extent that the general sanction would only limit the use of an inadequately stamped instrument in court proceedings, so would the specific sanction. Accordingly, if it turned out that the general sanction in the jurisdictions mentioned would nullify an inadequately stamped instrument inter partes and not merely deny its admissibility, it may well also follow that the specific sanction would be considered to render the inadequately stamped all-moneys security unenforceable by any means whatever (as in the Northern Territory).

Given the use of the expression 'unenforceable' in the specific sanction under the NSW Act and also the clear authority that the general sanction has a nullifying effect on an inadequately stamped instrument inter partes, it is submitted that the specific sanction in the NSW Act would prevent enforcement by any means whatever. It is submitted that this view is reinforced by the terms of the specific sanction in section 84(3) of the NSW Act prior to its amendment with effect from 1 January 1987. At that time the specific sanction was expressed in effectively identical terms to that considered by the Supreme Court of the Northern Territory in the **Mousellis Case**. The nature of the changes made to the specific sanction in New South Wales in 1987 do not suggest any intention to change the nature of the restriction imposed upon an inadequately stamped security for an uncertain and unlimited amount.

Meaning of duly stamped

The general sanction applicable to an instrument liable for duty which is not 'duly stamped' (whether or not its effect is limited to court proceedings) places a premium upon ensuring that an instrument is 'duly stamped'. According to the definition in section 3(1) of the NSW Act the expression 'duly stamped' means 'stamped in accordance with this Act and the Regulations'. The objection and appeal procedures contained in Part V of the NSW Act recognise the possibility that the Commissioner may stamp an instrument erroneously. More specifically section 37 of the NSW Act expressly addresses the case in which the Commissioner has stamped an instrument with insufficient duty or otherwise erroneously and specifies the Commissioner's powers in those circumstances. It appears clear from the definition of the expression 'duly stamped' that an instrument stamped erroneously by the Commissioner is not 'duly stamped' for the purposes of the NSW Act and, in particular, section 29(1) of the NSW Act.

There is no provision in the NSW Act which treats an instrument which has been stamped by the Commissioner as 'duly stamped'. Section 124G of the NSW Act, which appears in the objection and appeal provisions, provides that production of any assessment or of any document under the hand of the Chief Commissioner purporting to be a copy of an assessment is to be conclusive evidence of the due making of the assessment and conclusive evidence that the amount and all particulars of the assessment are correct except in proceedings on appeal when it is to be only prima facie evidence. However, it is submitted that this provision does not have the result that an instrument bearing an incorrect stamp affixed by the Commissioner is 'duly stamped' for the purposes of the NSW Act and, in particular, section 29(1) of the NSW Act.

Section 35(1)(b) of the NSW Act requires the Commissioner to assess the duty payable upon an instrument presented to him for that purpose and provides that, 'when the instrument is stamped in accordance with the assessment, it may be stamped with a particular stamp denoting the amount of duty or fine so paid and denoting that it is duly stamped'. As a matter of practice, the stamp affixed by the Commissioner to an instrument which denotes the amount of duty paid does not denote that the instrument is 'duly stamped'. Furthermore, given the definition of the expression 'duly stamped' under the NSW Act, even if the Commissioner's stamp were to denote that an instrument had been 'duly stamped', it is strongly arguable that the instrument would still not be 'duly stamped' for the purpose of the NSW Act if the Commissioner had made an erroneous assessment. There is no provision in the NSW Act which requires that an instrument bearing a 'duly stamped' stamp to be deemed or treated as being 'duly stamped'. Nor is there any counterpart of section 32(4) of the Vic Act which would have the effect of displacing the nullifying effect of section 29(1) if an instrument were stamped with a 'duly stamped' stamp as contemplated in section 35(1) of the NSW Act.

In the **Backstop Nominees Case** the Victorian Supreme Court was required to consider whether or not an instrument assessed and stamped by the Victorian Comptroller was 'duly stamped' for the purposes of specific provisions in the Vic Act. Section 32(3) of the Vic Act was in similar terms to section 35(1)(b) of the NSW Act but the Vic Act contained no definition of the expression 'duly stamped'. Furthermore, section 32(4) of the Vic Act referred to earlier made provision of a kind not found in the NSW Act. According to the court the effect of this provision rendered it unnecessary to decide whether or not an instrument erroneously stamped 'duly stamped' should be regarded as 'duly stamped' for the purposes of section 30 of the Vic Act (the general sanction relating to inadequately stamped instruments). The reason for this was that, even if such an instrument would not be regarded as 'duly stamped' under section 30 the operative effect of section 30, was expressly overridden by section 32(4).

In the absence of a 'duly stamped' stamp upon an instrument stamped in accordance with the assessment of the Victorian Comptroller, the court held that, as between the parties to the instrument, it was open to show that the instrument was not correctly stamped. Accordingly, if it could be shown by a borrower that a security for a fixed or limited sum stamped with Victorian duty in accordance with the Comptroller's assessment but which did not bear a 'duly stamped' stamp had been wrongly stamped, section 30 of the Vic Act would apply to that security until it were correctly stamped. As already discussed, this would at least prevent the security being relied upon by the lender in court proceedings and may possibly result in it being treated as a legal nullity. However, according to the court in such a case it would probably not be open to the Comptroller to claim that the instrument was inadequately stamped.

Electronic stamping NSW

The NSW Office of State Revenue is currently developing a proposal for the 'electronic stamping' of various classes of instruments by professional advisors, such as solicitors and accountants. The present proposals entail the professional advisors being authorised to endorse or stamp instruments within the specified classes (which are likely to include loan securities) and the professional advisors will be required to lodge a return and funds covering the duty with the Commissioner of Stamp Duties by electronic means. The legislative basis for such an arrangement is in large part already contained in the NSW Act. Section 38C authorises the Commissioner of Stamp Duties to approve any applicant to pay duty by return in respect of any class of instruments. Sub-section (8) of section 38C requires an approved person to endorse on any instrument of the class to which the approval relates the words 'Stamp Duty' followed by a serial number. Furthermore, where the instrument concerned is a loan security, the approved person is required to stamp the loan security with the stamp issued to the approved person by the Commissioner.

Sub-section (9) of section 38C results in an instrument endorsed pursuant to section 38C(8) being deemed to be *'duly stamped'* for the purposes of the NSW Act. Doubtless the electronic stamping procedure will also result in the instrument concerned being deemed to be 'duly stamped' for the purposes of the NSW Act. In this respect, such a loan security stamped in this fashion would, as the NSW Act presently stands, obtain an advantage not available to an instrument which is physically lodged with the Commissioner for assessment of duty and stamping by the Commissioner. As previously explained, an instrument stamped by the Commissioner will not be 'duly stamped' for the purposes of the NSW Act and, in particular, the general sanction contained in section 29(1) if it is erroneously stamped. This consequence could not attach to an instrument expressly deemed by the NSW Act to be 'duly stamped'.

It is submitted that it would be somewhat inequitable if an instrument self assessed by some authorised person would escape the nullifying effect of section 29(1) of the NSW Act where the wrong duty is paid but an instrument lodged with and wrongly stamped by the Commissioner would not escape that nullifying effect. Accordingly, it is submitted that the NSW Act should be amended such that an instrument stamped by the Commissioner would be deemed to be 'duly stamped' for the purposes of the NSW Act. This deeming should be made subject to the Commissioner's power to recover additional duty as presently provided by section 37 and to the entitlement of the parties to an instrument to dispute the duty paid through the objection and appeal procedures. In the interests of commercial certainty, the deeming should apply such that the parties to civil court proceedings should not be entitled to dispute the admissibility of an instrument stamped by the Commissioner.

NSW MODEL LOAN SECURITY PROVISIONS

In a novel attempt to stimulate a move towards harmonising the stamp duties legislation in the various Australian jurisdictions applying to mortgages and other securities the NSW legislature enacted a set of model provisions in the *State Revenue Legislation (Further Amendment) Act* 1992 ('the Amendment Act'). The relevant amendments are contained in Part 1 of Schedule 6 to the amending act and principally involve the deletion of section 84B of the NSW Act and the insertion of new sections 84ED, 84EE and 84EF.

The apparent objective underlying the harmonisation of the legislation throughout the Australian jurisdictions is that instruments securing monies should attract total duty at the appropriate rate (ie 0.4% in most jurisdictions) calculated by reference to the sum secured once only regardless of whether the instruments concerned have relevant territorial connections with only one or more than one jurisdiction in Australia. If duty is to be paid in more than one Australian jurisdiction in relation to such securities, the aggregate of the duty paid in each jurisdiction should not exceed the amount resulting from the application of the appropriate rate to the sum secured. The division of the duty between the Australian jurisdictions adopting the uniform provisions should be determined on a common basis in each jurisdiction and would reflect the value of the encumbered property located in the participating jurisdiction concerned as a proportion of the total value of all property located in participating jurisdictions.

The NSW government does not intend to arrange the proclamation and, hence, the commencement of the amendments until there has been a full discussion of the provisions and the agreement of a substantial majority of the Australian jurisdictions to enact such provisions. To the extent that discussion reveals deficiencies in the provisions or that alterations are required by other jurisdictions as a condition of adopting uniform provisions, the model provisions would be amended before proclamation.

The mere enactment in each Australian jurisdiction of the model provisions would not provide complete harmonisation since there are presently substantial differences between the various jurisdictions in relation to a number of the elements fundamental to the security duty provisions which the model provisions build upon but do not modify. For example, there is a substantial variation from one jurisdiction to another in the nature of the instruments subjected to the ad valorem security duty. Thus, at one extreme, the relevant provisions of the WA Act apply to any instrument of security subject to limited exemptions whilst, at the other extreme, the relevant provisions in the NSW Act apply only to a small number of specified securities, The model provisions do not themselves attempt to establish consistency between the nature of the affected instruments. However, unless such a step is taken concurrently with the adoption of the model provisions throughout Australia, the apparent objective referred to above will not be achieved. Likewise, in the case of a security which does not secure a certain sum or a limited sum, the factor which attracts the obligation to up-stamp the security or securities varies from one jurisdiction to another. Thus, under the WA Act an increase by whatever means in the indebtedness secured would attract an obligation to up-stamp whilst under the Vic Act that obligation would only be attracted by an 'advance' (having its general law meaning) and under the NSW Act that obligation would only be attracted by an 'advance' (having its general law meaning and an extended defined meaning).

Considered from the perspective of a jurisdiction participating in the harmonisation arrangements ('Participating State'), the model provisions operate according to whether the property encumbered by the securities is located wholly in or wholly outside the Participating State or partly in and partly outside the Participating State. In summary the model provisions would operate as follows:

- Property encumbered **wholly in** one Participating State - New Section 84ED.

  (a) Collateral Securities:

  Credit for duty paid in **the** Participating State on duly stamped 'loan security' available against duty payable on one or more other 'loan securities' in proportion to the extent to which they secure the same money as the stamped loan security.

  (b) Minimum duty of $10 in **the** Participating State.

- Property encumbered **wholly outside** Participating State - New Section 84EF.

  Fixed duty of $10 in **the** Participating State subject to any applicable exemption.

- Property encumbered by a 'package of securities' **partly in** a Participating State and **partly in another** State whether Participating or non-Participating - New Section 84EE.

  (a) Other loan security provisions are overridden to the extent of any inconsistency.

(b) Duty is paid by reference to that proportion of the sum secured or additional advances secured by the package which the value of property in **the** Participating State bears to the total of that value plus the value of the property in each other Participating State (if any).

(c) Values and the requisite proportion are determined at the time when liability for duty is determined. This would be either at the time of execution of package of securities or at the time of advance depending upon the nature of the moneys secured and circumstances. All securities within a package executed within 14 days of each other are taken to be executed on the date of execution of the last security to be executed.

(d) An advance secured by a package does not attract additional duty if:

  (i) the amount secured following the advance does not exceed the maximum amount previously secured; and

  (ii) appropriate security duty has been paid in each relevant Participating State in respect of that maximum amount.

(e) If all package securities secure the same advance and one package security is appropriately stamped, the duty payable in the Participating State on each other package security is $10.

(f) If duty is paid in a Participating State on one package of securities and a second package of securities secures wholly or partly the same money, a credit is allowed against duty in the Participating State on the second package in proportion to extent to which the same moneys are secured. However, a minimum of $10 fixed duty is payable in the Participating State on each second package security.

The initiative taken by New South Wales is most welcome and should be built upon rather than being snuffed out by destructive criticism. Nonetheless, in a constructive spirit it is submitted that as the model provisions receive further consideration the following points might usefully be taken into account:

- The model provisions predicate that one or more instruments securing the repayment or recovery of monies will encumber property. They would not, for example, provide effective relief from full duty in both Western Australia and Queensland where an unsecured loan agreement was executed in Queensland but was governed by the law of Western Australia and provided for all advances and repayments to be made in Western Australia. Nor would there be any effective relief from multiple duty if a loan agreement were to be executed in Queensland and a guarantee securing repayment of the loan (which comprised the sole security) were executed in Western Australia. Furthermore, if the Participating State were New South Wales, full ad valorem loan security duty would, by virtue of the deletion of section 84B from the NSW Act, be payable on **both** a loan agreement executed in New South Wales which creates a debt and a subsequent acknowledgment of the same indebtedness which was also executed in NSW.

- The provisions require in relation to an all-moneys security that the value of encumbered property in various jurisdictions be established at the time of each advance attracting a liability for duty. Depending upon the number of advances and the nature of the property encumbered, this could impose a time-consuming, expensive and difficult burden. Not only does the process involve an exercise in valuation but, if the property is intangible (eg goodwill or the benefit of a licence), there may well be difficult legal questions of situs to resolve.

- The practical difficulties of arranging for the stamping of securities liable for duty in a number of jurisdictions are often significant given the relatively short period of time within which dutiable instruments must be lodged for assessment or stamping in a number of jurisdictions. Clearly, one-stop stamping where the various stamps of different jurisdictions could, pursuant to some cross delegation, be affixed to an instrument by one stamp duty authority would be ideal. If this utopian mirage never materialises, the problems of multi-jurisdiction stamping will be needlessly exacerbated by the obligation to have instruments stamped with fixed nominal nuisance amounts of $10. The revenue authorities should seriously weigh up the costs to the business community of paying such nominal amounts in multiple jurisdictions against the accretion to revenue.