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## STAMP DUTY UPDATE

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### INTRODUCTION

Although the last twelve months have not seen in any of the States or Territories legislative activity making sweeping changes, there have been some amendments of importance to bankers, financiers and their legal advisers and there have been some cases of particular significance.

This paper will address:

1. Extraterritorial Drive - Costly Confusion: What has happened since last year?
2. State and Territory Roundup: What legislation and cases of significance to those in the banking and finance industry have taken place in the last twelve months?
3. Transfers of Securities, Further Advances and Further Securities: What does the stamp duty position in these areas look like at the moment?
4. Securities Securing Contingencies: What is the present position?

### THE EXTRATERRITORIAL DRIVE - COSTLY CONFUSION

This conference last year saw some of the unfortunate consequences and confusion created as a result of each of the States' and Territories' drive to maximise their stamp duty dollars by giving their stamp duty legislation an extraterritorial intent.

The paper finished with a plea that micro-economic reform by the States and Territories of their stamp duty legislation to achieve tax harmonisation should be implemented as soon as possible since foreign and domestic investment in this country could well depend on such moves.

It is pleasing to be able to report that the matter has not been forgotten since then. The Tax Institute of Australia has just about completed the formulation of a submission entitled '*Stamp Duties - The Road To Microeconomic Reform*' in association with the Australian Society of Certified Practising Accountants, Institute of Chartered Accountants, Australian Merchant Bankers' Association, Australian Stock Exchange, Australian Equipment Lessors' Association, Australian Finance Conference, Corporate Tax Association and the Law Council of Australia. That submission will be put to each of the States and Territories with the objective of establishing a joint working party to resolve the issues.

It is also encouraging to see that the New South Wales Act has been amended to introduce sections 84ED, 84EE and 84EF in an effort to develop consistent legislation in the area of the stamping of loan

securities which secure property in more than one jurisdiction. The amendments will not take effect until a day to be appointed by proclamation, the intention being that the legislation will become effective once the other States and Northern Territory introduce similar legislation.

But although there is then some organised lobbying in train and an obvious commitment to keep the issue in front of government, and some positive steps being taken in some States, one does not get a feeling that State tax harmonisation is going to come easily. Although enquiries do not disclose a rejection of the New South Wales lead in introducing sections 84ED, EE and EF, there does not appear to be widespread enthusiasm to pass similar legislation in the near future. An officer of one of the State's stamp duty office indicated that these amendments 'could benefit some States to the detriment of others'!

And let it be remembered that Queensland is in the throes of totally rewriting its Act. How much will that take the Queensland legislation even more out of kilter with the rest of Australia? Probably a lot. How much effort will be made to harmonise with the rest of Australia? Probably little. Perhaps before bludgeoning the legal profession, the States and Territories could sort out this legislative mess and present something consistent across Australia. After all, with increasing frequency of inter-State transactions, it is the commercial community and the legal profession which end up having to lend their collective minds to up to eight pieces of different legislation and then is blamed for the resultant cost.

## STATE AND TERRITORY ROUNDUP

### Queensland

The rewrite of the Act is still in progress. No drafts have been seen and suggestions to amend the present Act are often met with the statement that the matter will be addressed in this drafting process.

But, although there has been no legislation of any real significance affecting the Act for the last 12 months, there have been some cases worthy of noting.

**Bond Media Limited v Commissioner of Stamp Duties** (92 ATC 4324) established that section 70(4)(a) can only apply where the whole of the property for which the money is secured is located in another State or Territory. The use of the definite article 'the' in the phrase '... in which the property ... is located ...' was held to be significant. The court noted (at 4327) that:

*'If both subsection (1) and subsection (4) applied together in any instance there could be inconsistency in the credit provided for and it would be surprising if the carefully constructed system for calculating credit adopted under subsection (1) were intended to be overridden because subsection (4) also applied.'*

So the appellant had to pay a larger sum of duty in Queensland since the greater credit provided by the sub-section was not available.

**Westpac Banking Corporation v Commissioner of Stamp Duties and Commonwealth of Australia v Commissioner of Stamp Duties** (92 ATC 4571) established:

1. the execution of an agreement which has something to do with a transfer of property does not amount to a conveyance where the vesting of that property happens by force of legislation; although the definition of 'instrument' at the relevant time was wide enough to include a statute of the Commonwealth Parliament, that proposition would not be applied in a particular case unless there were explicit words to do so. Pincus JA and Demack J noted (at 4577):

*'... a critical feature of the case is, in our opinion, that it cannot accurately be said that the vesting in Westpac occurred pursuant to the Commonwealth's promise; the vesting was not a fulfilment of any undertaking of the Commonwealth, conditional or otherwise;'*

2. section 54(4) (which has the effect of subjecting to conveyance duty the memorandum of association of a company which acquires property in Queensland in relation to which there is no instrument charged with such duty), in its reference to 'memorandum of association', will not be read to extend that expression to such things as 'or other founding document'. Pincus JA and Demack J noted that Westpac was incorporated by statute and so had no memorandum of association; and
3. the decision in **Commissioner of Stamp Duties v Yeend** ((1929) 43 CLR 235) is no authority that section 71 of the New South Wales Act and section 56 of the Queensland Act are confined to rights of a proprietary kind.

This case revives the possible application of section 56 to a large number of instruments. For example, are all franchise agreements subject to conveyance duty? Is any instrument creating a right so subject? Is this section now going to be as mischievous as section 160M(6) of the *Income Tax Assessment Act*? Peter Green will analyse it.

**Rothwells Ltd (in liq) v Connell** (93 ATC 4074) concerned a stay of proceedings on the basis that, since section 27 of the Western Australian Act had not been complied with, a deed was not admissible in Queensland even though stamped in Queensland. Again, Peter Green will look at this case in some detail.

**EIE Ocean BV v Commissioner of Stamp Duties (Qld)** (1993 unreported) is a classic example of how the antiquated appeal provisions in Queensland - the section 24 case stated method of appeal - calls into question the credibility of the Queensland Government's claims to ensure access to justice at a reasonable cost. Essentially what this piece of litigation is about is what the terms of the case stated will look like when the case finally gets before the Court of Appeal. Remember in Queensland, an appeal against an assessment is directly to the Court of Appeal by case stated. At issue in this case was whether the land rich provisions (section 56F-FO) of the Queensland Act applied - a question of the valuation of assets. Since agreement could not be reached as to the terms of the case stated, the appellant commenced an application under the *Judicial Review Act* 1991. The Commissioner made application to dismiss that application but was unsuccessful and an injunction preventing the Commissioner from signing the case stated was granted. So the litigation under the *Judicial Review Act* progresses - and the parties have not even got near the Court of Appeal! In the course of his judgment, Mackenzie J said:

*'... [I]t has not been settled by authority that the Court of Appeal has any jurisdiction to amend the case stated or to send it back for a clarification by the person whose duty it is to state the case. It was accepted that there was no express power to send a case back to the Commissioner (Westpac Banking Corporation v Commissioner of Stamp Duties (Qld) 92 ATC 4571, 4582). However, it was submitted before me that it was clearly recognised by that decision that there might be an inherent power in the court enabling it to bring about or permit an amendment of the case stated. Reference was also made to the dissenting judgment of Brennan J in KLDE Pty Ltd v Commissioner of Stamp Duties (Qld) (1993 155 CLR 288, 304-305). It was also submitted that it was implicit in the judgment of Matthews J in O'Sullivan v Commissioner of Stamp Duties (1984) 1 Qd R 212,215. The fact that this issue remains unresolved is of itself a cogent reason for saying it is inappropriate to stay the application or dismiss it. The result would be, that if it were ultimately held that the Court of Appeal did not have power to send the case back or amend it, that the applicant would be seriously disadvantaged if the case did not raise all necessary issues adequately.'*

One wonders how long it is going to take before the Queensland Government heeds all of the criticism which has been heaped on section 24 over the years. As presently structured, the appeal provisions in Queensland can disadvantage not only taxpayers, but also the Commissioner, as the decision in **Westpac Banking Corporation v Commissioner of Stamp Duties, Commonwealth of Australia v Commissioner of Stamp Duties** (92 ATC 4571) demonstrates.

In another **Westpac** case - **Westpac Banking Corporation v Commissioner of Stamp Duties** (Judgment, 15 January 1993), application has been made under the *Judicial Review Act* in relation to a decision by the Commissioner to make an assessment and a default assessment under section 22A based on section 54A. Again, the Commissioner's application to dismiss was not accepted by the court and that matter proceeds.

Appeals to the Court of Appeal should be replaced with appeals to an AAT or a single judge and the case stated should be replaced with a standard system of pleadings.

The Queensland Office of State Revenue in March of this year began issuing draft rulings. The first batch have been the subject of some discussion and final rulings will be issued shortly. These will cover:

- Revenue Ruling System: Explanation and Status (General-1);
- Late Lodgement Penalty - Conditional Contract (SD-1);
- Lease Duty - Refunds (SD-2);
- Transfers of Shares in a Trustee Company (section 56C) (SD-3);
- Adjudication on Draft Documents - Commissioner's Discretion (SD-4);
- Resettlement - Addition or Deletion of Beneficiaries of a Discretionary Trust (SD-5);
- Principal Place of Residence Concessions - Discretionary Aspects (SD-6);
- Transfer of Vessels (SD-7); and
- Family Law Act - Exemptions (SD-8).

It is understood also that a further ruling will be issued shortly in relation to agreements relating to the transfer of tax losses and also that a ruling will issue shortly in relation to the aggregating provisions of the land rich sections (section 56F-FO). The wording in section 56FN(2) is somewhat obscure: in saying that a person acquires a majority interest if a person acquires a shareholding in the corporation that would entitle the person if the corporation were to be wound up immediately after the shareholding is acquired to participate in a distribution of more than 50% of the value of the property of the company, the question has arisen as to whether one concentrates on the parcel being acquired or the result after that acquisition. The ruling will say that you only look to the parcel being acquired and that the only time that aggregation is to take place under the land rich provisions is under section 56FM(1)(a)(ii). Accordingly, where a company was incorporated in 1989 with X holding 100% of the shares and that company becomes land rich so that Y, in 1990, acquires 50% of the shares, a subsequent acquisition in 1994 by Y of the other 50% would not attract the operation of these provisions.

There is undoubtedly a greater willingness on the part of the Queensland Office of State Revenue to be more open and accountable in its dealings with taxpayers. While the practice of issuing Rulings is welcome, it should, it is suggested, be looked upon only as a first step to introducing a ruling system similar to that now operating in the Australian Tax Office. In particular, private rulings should be binding. It has to be recognised by revenue authorities that taxpayers have rights and that it is ludicrous to allow them to formulate their affairs based on a ruling, public or private, which a revenue authority can simply walk away from. The importance of taxpayers being able to rely upon certainty in the law and certainty in rulings is highlighted for those currently self-assessing, eg under section 13A, and solicitors self-assessing in relation to contracts for the purchase of principal places of residence. Without a ready acceptance by revenue authorities of the rights that taxpayers have, their revenue collection systems are going to lack credibility with the result that, although they will still be able to collect revenue, it will not be in an efficient manner and certainly will not be with the ready co-operation which could otherwise be achieved.

## New South Wales

There have been seven pieces of amending legislation over the last 12 months or so, namely, *Stamp Duties (Amendment) Act 1992 No 33*, *Statute Law (Miscellaneous Provisions) Act 1992*, *State Revenue Legislation (Amendment) Act 1992*, *Statute Law (Miscellaneous Provisions) Act (No 2) 1992 No 57*, the *Mining Act 1992*, *Statute Law (Penalties) Act 1992* and *State Revenue Legislation (Further Amendment) Act 1992 No 86*. Only the first and the last of this legislation is of any particular significance.

The amendments under the first Act of note are:

1. the definition of 'Bill facility' in section 83(1) was amended so that there can now be no argument that the definition does not catch normal arrangements in which there is usually more than one transaction in arranging a bill facility;
2. a new section 84CAB was inserted to enable loan securities transferred to be treated in the same way as if they were new loans in respect of advances made after or in connection with the transfer;
3. section 97AE was amended to ensure that its exemption only applies to the actual instrument of assignment;
4. section 73 was amended to allow the concessional rate of duty for an instrument recording the appointment of new or additional trustees or the retirement of existing trustees to apply to such changes even when not affected by formal documents;
5. section 73(2AE) was inserted to enable the beneficial owner of marketable securities or units in the unit trust scheme to transfer them to a trustee to be held by the trustee on the beneficial owner's behalf and marketable securities held by a manager or a trustee to be transferred to a custodian without incurring any conveyance duty;
6. a new section 73(1)(d) was inserted to ensure that the concession for nominal duty in respect of instruments of appointment in favour of persons as the objects of the power of appointment contained in a conveyance or in a will only applies where ad valorem duty has been paid on the conveyance establishing the trust or power and that property (or property representing the proceeds or reinvestment of that property) is being conveyed so that duty is paid at least once on the trust property or its reinvestment on the transfer to the beneficiary;
7. section 41(7) was amended to provide for the payment of a \$25.00 administration fee on agreements cancelled within two months after signing instead of requiring persons liable to duty to pay the full amount and then to be granted a refund less the \$25.00 fee;
8. new section 41A requires the Chief Commissioner to assess or reassess the liability of an agreement to duty in accordance with any reduction in the consideration between the date of the agreement and conveyance.

The *State Revenue Legislation (Further Amendment) Act*:

1. inserts into the Act but from the date to be appointed by proclamation sections 84EE, ED and EF which are the New South Wales Office of State Revenue's proposal for uniform legislation for the stamping of loan securities which secure property in and out of the jurisdiction. These provisions will be looked at in detail later by Peter Green;
2. section 84CAB is amended to extend the original principle behind this section to all transferred loan securities, no matter which party instigates the transfer; again, this provision will be looked at in more detail later;

3. exemptions have been introduced in the Act under sections 66E, 66F and 74CB(c) in relation to transfers of land between married parties where they intend to build their principal place of residence, certain assignments of rents payable under a lease and the conveyance to one of the parties to a marriage or to a marriage which is dissolved or annulled of matrimonial property pursuant to a public auction which is held in accordance with an instrument registered or approved under a Commonwealth Act or in accordance with an order of the court.

In **Halwood Corporation Limited v Commissioner of Stamp Duties** (92 ATC 4155) transferable floor space (the subject of registration in a council's register) attained the status of a proprietary right. In the course of his judgment, Loveday J said, (at 4160) after referring to Lord Brougham's statement in **Keppel v Bailey** (39 ER 1042 at 1049) to the effect that parties should not be allowed to invent new forms of property, that:

*'Lord Brougham's statement cited above does not mean that the categories of proprietary rights are closed. New proprietary rights are created by legislation. Courts also recognise proprietary rights that are "created" by commerce.'*

And later (at 4161):

*'The reality is that commerce regards transferable floor space as a proprietary right. The courts should do likewise.'*

One type of agreement which springs to mind in this context is that now required as a result of the passing of the 1992 amendment to the *Income Tax Assessment Act* in relation to loss transfers. Is an agreement effecting a transfer of tax losses dutiable as a conveyance of property? It is difficult to comprehend how an accounting concept which is the result of arithmetical calculations, the benefit of which is available to only a limited class of company and which cannot be bought and sold freely in anything like the floor space in **Halwood's** case, can be said to be a proprietary right. How such agreements are treated in other parts of Australia is not altogether clear. In Queensland, it has as recently as yesterday been announced that the Act will be amended to specifically exempt those agreements from any duty and in the meantime a ruling will issue. In Victoria, it is understood that the revenue authority does not consider such agreements to be dutiable. New South Wales, however, was quick off the mark to give certainty in a potentially grey area and issued a ruling on 22 February this year that '... instruments effecting the transfer of tax losses, capital losses and foreign tax credits, executed solely for the purpose of complying with sections 80G(6)(c) and (6A); 160ZP(7)(c) and (7AA); 160AFE(ID)(c) and (IDA) of the *Income Tax Assessment Act* 1936 are exempt from stamp duty'. Query why this ruling uses the word 'solely' - what else could such an instrument do?

**Australia and New Zealand Banking Group Ltd v Comer** (unreported, 13896/92, Judgment March 1993) reminds us again that an inadequately stamped instrument can render enforcement proceedings such as ejectment impossible for a mortgagee.

#### Victoria

The *State Taxation Amendment Act* 1992 is worthy of mention in abolishing duty in respect of debentures issued by finance companies of less than \$10 million.

The *Stamps (Amendment) Bill* 1993 was recently introduced into the Victorian Parliament but apart from extending from three months to three years the period within which a taxpayer can apply for refund of duty subsequent to the expiration of a lease, the Act appears to be only concerned with some exemptions from stamp duty for certain motor vehicles and changes the rate of duty on third party insurance business.

In **Royal Insurance Australia Limited v Comptroller of Stamps (Vic)** (93 ATC 4025), it was held that section 111(1) of the Act obliged the Comptroller to repay overpaid duty without any discretion reserved

to decline to refund it. The *State Taxation Amendment Act 1992* makes amendments designed to overcome this decision.

In **Comptroller of Stamps v Yellowco Five Pty Ltd** (93 ATC 4025), it was held that the words 'to be held' in Exemption (18) in Heading VI of the Third Schedule to the Victorian *Stamps Act* introduced an element of futurity necessitating an enquiry whether, immediately upon the conveyance, the trustee/transferee is seen to hold the land for the future in the capacity only of trustee for the transferor. In this case, that exemption could not apply even though the transferor was the only unitholder in a unit trust since the transfer was to the trustee of a unit trust and further units could be issued to others. Tadgell J said (at 4035):

*'In truth the exemption, as the statute frames it, looks both to a result following the execution of an instrument and to the reason for the result. There is to be not only no difference in the beneficial ownership of the subject property before and after the instrument of transfer takes effect, but an analysis of the reason why no such difference was achieved by the instrument. ... The formula selected appears to me to require the constancy in beneficial ownership to be referable to the particular circumstance that the subject property is "to be held solely as trustee or nominee of the transferor". The requirement involves in this case an examination of the terms on which the transferee took the transfer as trustee, as disclosed by the trust deed.'*

**Ralara Pty Ltd v Comptroller of Stamps (Vic)** (92 ATC 2108) brought into question the exemption under Exemption (10) to heading VI in the Third Schedule to the *Stamps Act 1958* in that property was transferred from the trustee of a trust to the beneficiary. The Comptroller argued that the exemption was not applicable because the transfer was not to a beneficiary in its capacity as beneficiary but in its capacity as purchaser under a contract of sale and that analysis was upheld by the Administrative Appeals Tribunal.

### South Australia

Legislatively, the *Stamp Duties (Rates) Amendment Act 1992* changed some minor rates of duty, the *Statutes Amendment (Expiation of Offences) Act 1992* changes some penalties only, while the *Stamp Duties (Penalties, Reassessment and Securities) Amendment Act 1992* made some important changes.

New section 19 makes it an offence if an instrument is produced to the Commissioner and it does not fully and truly state the facts and circumstances affecting its liability to duty and that instrument is not accompanied by a statement fully and truly stating the missing facts; but note that the offence extends to any person professionally engaged to have the instrument stamped. The only defence appears to be 'to prove that the defendant reasonably relied on information supplied by a party to the instrument', whatever that means.

Section 76 was amended to include a definition of 'liability' (to mean 'a present, future or contingent monetary liability') and 'mortgage' (to mean 'an instrument creating, acknowledging, evidencing or recording a legal or equitable interest in or a charge over real or personal property by way of security for a liability; or an instrument creating, acknowledging, evidencing or recording a liability in respect of which an instrument of title is or is to be pledged or deposited by way of security').

New section 79 deals with mortgages securing future and contingent liabilities and this combined with the amendment to section 76 effectively means that **Handevel** structures are no longer open.

Section 31b has been amended to overcome the decision in **Esanda Finance Corporation Limited v Comptroller of Stamps** (92 ATC 4428) which held that the expression 'rental business' did not extend to payments made by a bailee in consideration of a third party guaranteeing to the bailor the performance of the bailment agreement. The definition of 'rental business' includes 'the business of guaranteeing the obligations of a bailee under a contractual bailment or a bailment plan'.

### Western Australia

The *Stamp Amendment Act* 1992 did not amend the Act in any significant way.

In **Commissioner of State Taxation (WA) v Kitchener Mining NL** (92 ATC 4147), a stay of proceedings was granted against the Commissioner's recovery action for just over \$1 million in spite of section 34C(1) providing that an appeal does not affect the liability to pay duty. This case is of relevance to other States: for example, NSW section 124D, Vic section 33G, Qld section 23D. After referring to the various propositions listed in **Snow v DFC of T** (87 ATC 4093) to which the courts will have regard in determining whether to stay recovery proceedings under the *Income Tax Assessment Act*, Master Adams concluded (at 4152):

*'In my view, these principles are equally applicable to stay applications under the Stamp Act ... I consider that there is no substantial or material difference between section 201 of the Income Tax Assessment Act and section 34C(1) of the Stamp Act'.*

But he noted particularly:

*'I am not persuaded that the allegation as to the invalidity of the assessment is sufficient to displace the application of section 34C. In my view, invalidity in the sense of misapplication of the power to assess is still a challenge to the assessment and falls within the objection and appeal provisions of the Act ... Nor do I consider that it is sufficient for an applicant for a stay to merely show that there is a dispute genuinely based on substantial grounds'.*

In the end after holding that special circumstances had to be shown and finding them in the company's weak financial position, Master Adams granted a stay provided \$250,000 was paid, an undertaking was given not to dispose of assets other than in the ordinary course of business and to prosecute the appeal expeditiously.

**Mt Newman Mining Co Pty Ltd v Commissioner of State Taxation (WA)** (92 ATC 4852) was a case in which a letter, pursuant to the terms of a contract from an employee of the appellant to repurchase the property the subject of that contract, was held to be a conveyance on sale of that property since the employee had obtained a beneficial interest under the contract, even though settlement was not to be effected until the final instalment was paid.

Commissioner Ng said (at 4857):

*'On the facts of the present case [the purchaser] in my view had more than a lien. We have here a valid contract. The parties were clearly contemplating, by the terms of the contract, a transfer of the [purchaser's] beneficial interest with respect to the vendor for consideration. On the authorities cited above, the beneficial interest in the property had passed to them pursuant to the contract of sale. Further, pursuant to the letter, the beneficial interest had passed to the vendor and merged with the legal interest of the vendor'.*

In **Merifield Cooksey Holdings Pty Ltd v Commissioner of State Taxation (WA)** (93 ATC 4153), an agreement containing mutually dependent obligations to redeem units and to convey property came within the exemption in section 73AA(1)(e) of the Act so that the redemption of units in exchange for an in specie distribution of trust property attracted only nominal duty.

**Prime Holdings Pty Ltd v Kanemaru** (92 ATC 4126) raised the question whether an unstamped contract was admissible in an action by a vendor for summary judgment for the forfeiture of the deposit notwithstanding section 27(1) of the Western Australian Act. Murray J found that it was (at 4134):

*'Section 27 in my view does not proceed upon the basis that the instrument in question is to be taken as chargeable with duty if upon its face it would apparently be so chargeable. It looks to*

*whether the instrument is in fact chargeable with duty and in this case upon all the evidence before me, it is clear that the instrument is not chargeable with duty and there is therefore no impediment to it being given in evidence'.*

### Tasmania

The *Stamp Duties Amendment Act 1992* made a number of changes which are more or less administrative in nature. One should, however, note that the contract splitting provisions have been extended to businesses and a request from the Tasmanian Law Society to specifically enact an exemption from conveyance duty for pre-incorporation contracts resulted in new section 70C(3) and (4). In other parts of Australia (such as Queensland), although the practice may well be not to levy double duty in those circumstances, similar legislation would be worthwhile.

**Roussos v Commissioner of Stamp Duties** (92 ATC 4370) recognised that amongst the assets which could be the subject of a business licence agreement was the goodwill attaching to that business. Cox J held that the goodwill did not pass to Roussos under the agreement, merely the right to avail themselves temporarily of the benefits attaching to it. It would seem to follow that the execution of such an agreement in Queensland would be effective to overcome the operation of section 54A (Acquisition of Business) since no business has been acquired, only the right to conduct it and sufficient of the assets to carry on the business have not been acquired since they are only licensed for use. As we shall hear shortly, section 56 may, however, have an impact.

### Northern Territory

There are no legislative changes or cases of any particular significance.

### Australian Capital Territory

There are no legislative changes or cases of any particular significance.

## TRANSFER OF SECURITIES - FURTHER ADVANCES - FURTHER SECURITIES

One thought which will occur to borrowers on the refinancing of loans is whether duty paid on the present security can, in some way, be saved.

There is always a possibility of doing that where the security secures further advances. The borrower may repay a loan and request the mortgagee to transfer the mortgage to another lender or that other lender may buy out the first mortgagee's security and the further advances can then be made.

The Queensland Commissioner appears to be taking the view that, where a mortgage is transferred, a further mortgage taken from the original mortgagor cannot thereafter be stamped collateral. This approach appears to be based on some sort of proposition that collateral stamping is only available where the **accounts** secured are the same and where a mortgage is transferred, that requirement is absent. It is suggested that that sort of approach is quite untenable.

New South Wales, however, as mentioned earlier, has now taken legislative action in this area. *Act No 33 1992* introduced new section 84CAB. *Act No 86 1992* amended that section.

The section provides:

- (1) *If a loan security is transferred (whether or not at the request or direction of any party) to:*
- (a) *a person who, either in connection with the transfer or at a later time, makes an advance or additional advance under or secured by the loan security; or*

- (b) *a person who is a party to arrangements (referred to in section 84(3C)) relating to such an advance or additional advance,*
- the transferred loan security is taken, for the purpose of determining its liability to duty under this Act, to be a new loan security on which no duty has been paid and is liable to duty in respect of the advance or additional advance accordingly.*
- (2) *The date of first execution of the transferred loan security is taken to be:*
- (a) *in the case of a loan security where the advance or additional advance was made in connection with the transfer - the date of first execution of the transfer; and*
- (b) *in the case of a loan security where the advance or additional advance was made at a later time - the date of the first such advance or additional advance.*
- (3) *If an insufficient amount of duty has been paid on a loan security to which this section applies before it is taken by this section to be a new loan security, the Chief Commissioner is not prevented from recovering at any time the amount with which, in the Chief Commissioner's opinion, the loan security was properly chargeable in respect of duty or fine, or both, from the person primarily liable in respect of the loan security.*
- (4) *This section does not apply to a loan security to which section 84CAA applies.*
- (5) *This Division applies to a loan security to which this section applies in the same way as it applies to any other loan security, except as provided by subsection (6).*
- (6) *Duty paid or payable on a transferred loan security before its transfer is to be disregarded for the purpose of determining, at any time after the transfer, any reduction of duty under section 84B in relation to the transferred loan security or any other instrument referred to in that section.'*

A number of things can be noted in connection with this section:

1. the exemption from duty under section 97AE to a transfer of mortgage is not affected;
2. the transfer need not be at the request or direction of any party, particularly the mortgagor;
3. where this section applies, any duty paid on the loan security is lost;
4. prima facie, even if no advance or additional advance is made under the transferred loan security, any duty paid on it is lost for the purposes of collateral securities under section 84B. However, a draft ruling has been issued on this point and states in paragraph 11:

*'Section 84CAB(6) only applies to:*

*a transferred loan security to which section 84CAB(1) applies; or*

*a loan security which secures the whole or part of the same moneys as a transferred loan security to which section 84CAB(1) applies.'*

All this has potentially serious consequences if later enforcement of the security is proposed. The transferred security is treated as an unstamped security.

The draft ruling is in some respects a little hard to understand but it has attached to it two tables which are intended to illustrate the workings of this new section.

TABLE 'A'. Refinancing of \$100,000 (duty \$341) plus further advance of \$20,000 (duty \$80).

Transaction	Documentation	Duty before 18.5.92	Effect of Amendment 18.5.92	From January 1993
<b>Borrower Refinances</b>	New mortgage with new lender	\$341 + 80 <u>\$421</u>	\$341 + 80 <u>\$421</u>	\$341 + 80 <u>\$421</u>
	Transfers mortgage to new lender and old mortgage varied by new lender	Nil + 80 <u>\$80</u>	\$341 + 80 <u>\$421</u>	\$341 + 80 <u>\$421</u>
	Transfers mortgage to new lender and gives fresh mortgage to new lender	Nil + 80 + 10 <u>\$90</u>	\$341 + 80 + 10 <u>\$431</u>	\$341 + 80 + 10 <u>\$431</u>
<b>Buy-out between mortgagees</b>	Transfer of mortgage. Mortgage varied by new mortgagee	\$80 <u>\$80</u>	\$341 + 80 <u>\$421</u>	\$80 <u>\$80</u>
	Transfer of mortgage. Mortgagor requested to give new mortgage	\$80 + 10 <u>\$90</u>	\$341 + 80 + 10 <u>\$431</u>	\$80 + 10 <u>\$90</u>

TABLE 'B'. Refinancing of \$100,000, repayment of \$40,000, subsequent further advances.

Transaction	Advance	Amount Secured	Duty	Amount to which duty has been paid {S 84(3A)}
<b>Borrower Refinances</b>				
Refinancing	\$100,000	\$100,000	\$341	\$100,000
Repayment	(\$ 40,000)	\$ 60,000	-	\$100,000
Further advance	\$ 20,000	\$ 80,000	Nil	\$100,000
			<u>\$341</u>	
Refinancing	\$100,000	\$100,000	\$341	\$100,000
Repayment	(\$ 40,000)	\$ 60,000	-	\$100,000
Further advance	\$ 70,000	\$130,000	\$120	\$130,000
			<u>\$461</u>	
<b>Buy-out Between Mortgagees</b>				
Buy-out	Nil	\$100,000	Nil	Nil
Repayment	(\$ 40,000)	\$ 60,000	-	Nil
Further advance	\$ 20,000	\$ 80,000	\$ 80	\$ 20,000
			<u>\$ 80</u>	
Buy-out	Nil	\$100,000	Nil	Nil
Repayment	(\$ 40,000)	\$ 60,000	-	Nil
Further advance	\$ 70,000	\$130,000	\$280	\$ 70,000
			<u>\$280</u>	

The ruling emphasises the necessity to have both a transfer of a mortgage and an advance by the transferee at the time of the transfer or later. But note that where a mortgage is purchased and an advance or further advance is made, the intention apparently is that you rule off the ledger and although the transferred security is still duly stamped, you get no credit thereafter.

The introduction of this section into New South Wales raises the question of what are the stamp duty implications around Australia of a transfer of a mortgage followed by further advances or the execution of further securities. Is New South Wales alone in this area? In other words:

- (a) How do the States/Territories assess a transfer of mortgage?
- (b) How do the States/Territories assess a collateral security subsequent to a transfer of the mortgage?
- (c) What States/Territories allow a stamp duty credit to be used after a transfer of a mortgage?

There can of course be a myriad of fact situations. In Charts 1-7, a number of those situations are posed and the result for each of the States is suggested.

Essentially, those fact situations are really concerned with a case in which:

A mortgages Blackacre to B in consideration of an advance to A of \$1,000.00;

B transfers its interest in that mortgage to C for \$1,000.00;

C thereafter, takes a collateral mortgage over Whiteacre and makes a further advance of \$1,000.00 to A.

The results around the States and Territories would appear to be as follows:

#### Transfers of Securities

State	Duty	Section/Schedule
Qld	\$5	Schedule, 'Conveyance', item (1)
NSW	No	S 97AE
Vic	No	Administrative practice
SA	No	Schedule, 'Conveyance', Exemption (1)
WA	\$10	Schedule 2, item 13(3)
Tas	\$20	Schedule 2, item 27
NT	Yes	Schedule 1, item 15
ACT	N/A	

It will be seen that each of the States assesses such a transfer to either no duty or nominal duty. Northern Territory, however, looks for ad valorem duty.

#### Further Advances

State	Duty	Section/Schedule
Qld	Yes on \$1,000	S 68(2)
NSW	Yes on \$2,000 if an advance Yes on \$1,000 if no advance	S 84CAB(1) S 84
Vic	Yes on \$1,000	S 137F(2)
SA	Yes on \$1,000	S 79
WA	Yes on \$1,000	S 83(3)
Tas	Yes on \$1,000	Schedule 4, item 3(e)
NT	Yes on \$1,000	S 69B(3)
ACT	N/A	

The effect of section 84CAB(1) in New South Wales can be seen from this chart. Whether C simply buys out B or whether C buys out B by way of refinancing can make a difference.

#### Further Securities

State	Duty	Section/Schedule
Qld	No	Collateral: 'Mortgage' head of charge, item (2)
NSW	No	Collateral: S 84B, Ruling
Vic	No	Collateral: S 137I
SA	No	Collateral: 'Mortgage' head of charge, exemption (1)
WA	No	Collateral: S 87(1)
Tas	No	Collateral: Schedule 3, item 18
NT	No	Collateral: S 69D(1)
ACT	N/A	

Whether the further securities will be stamped as collateral securities is dependent for New South Wales, Victoria, Western Australia and Northern Territory on whether the further securities secure 'the same moneys'. In **Comptroller of Stamps (Vic) v Associated Broadcasting Services Limited; Associated Broadcasting Services Limited v Comptroller of Stamps (Vic)** (87 ATC 4392 at 4407), Tadgell J noted that the words 'security for the same moneys' in section 137I of the Victorian *Stamps Act* 1958 refer: '... to a security with the same right of payment or repayment of moneys that are secured by a primary instrument of security'. That principle appears equally applicable in the types of circumstances being discussed here and in fact New South Wales Revenue Ruling SD167 and Western Australian Revenue Ruling SD11 makes that clear. As already mentioned, it would appear that prima facie the effect of section 84CAB(6) bites even though no advance or additional advance is made but the draft ruling states that that subsection will be held not to apply where subsection(1) does not apply.

This area of stamp duty will be an interesting one to watch in the other States and Territory. The New South Wales lead could well be followed elsewhere.

### SECURITIES SECURING CONTINGENCIES - WHERE ARE WE?

At this conference in 1989, the position around the States and Territories with respect to securities securing continued obligations was summarised in the following schedule:

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

Since then, a number of changes have occurred. Several States have amended their Act specifically to counter these types of structures, but others have not. The position at the moment would appear to be summarised in the following chart:

	QLD	NSW	VIC	SA	WA	TAS	NT	ACT
Same or substantially same def of Mtge as in <b>Handevel</b>	Yes [S 65]	Yes [S 3 & S 83]	Yes [S 137D]	No [New S 76]	Yes [S 81 and Sch 2, 13]	Yes [Sch 4A, 3]	No [S 4]	Nil
<b>Handevel</b> principle applies	Yes(?)	No [S 84(3c)]	Yes	No [S 79]	No [S 89]	No [S 75B]	Yes(?)	N/A
Relevant Rulings	Yes(?)	Yes	Yes(?)	Yes(?)	No	No(?)	No(?)	N/A
Amending Legislation	No	Yes [S 84(3c)]	No	Yes [S 79]	Yes [S 89]	Yes [S 75B]	No	N/A

So far as Queensland is concerned, the Commissioner would appear to accept the proposition that there is no upstamping requirement when demand under the guarantee is made (see NSW SD162, Vic Prac Note VIC/25/T/2) but appears to be now assessing on the basis that a mortgage securing a guarantee which in turn secures the repayment of advances is itself a security for those advances.

Again, this area remains an interesting one to watch, particularly the Queensland Commissioner's present assessing practice and whether that is upheld. Classic analysis would say otherwise.

### Transfer of Securities - Further Advances - Further Securities

#### Chart 1

**Facts:** A mortgages Blackacre to B to secure \$1,000 and further advances.  
B (without any request/direction from A) executes a transfer of the mortgage to C for \$1,000.

**Question:** Duty on the transfer?

State	Duty	Section/Schedule
Qld	\$5	Schedule, 'Conveyance', head of charge, item (1)
NSW	No	S 97AE
Vic	No	Administrative practice
SA	No	Exemption (1) to 'Conveyance' head of charge
WA	\$10	Schedule 2, item 13(3)
Tas	\$20	Schedule 2, item 27
NT	Yes	Schedule 1, item 15
ACT	N/A	

**Chart 2**

**Facts:** Same as Chart 1 but this time A, at C's request, subsequently mortgages Blueacre to C as additional security.

**Question:** Duty on the additional security?

State	Duty	Section/Schedule
Qld	No	Collateral: Schedule, 'Conveyance', head of charge, item (2)
NSW	No	Collateral: S 84B and Ruling
Vic	No	Collateral: S 137I
SA	No	Collateral: 'Mortgage', head of charge, exemption (1)
WA	No	Collateral: S 87(1)
Tas	No	Collateral: Schedule 3, item 18
NT	No	Collateral: S 69D(1)
ACT	N/A	

**Chart 3**

**Facts:** Same as Chart 1 but this time A requests the transfer.

**Question:** Duty on the transfer?

State	Duty	Section/Schedule
Qld	\$5	Schedule, 'Conveyance', head of charge, item (1)
NSW	No	S 97AE
Vic	No	Administrative practice
SA	No	Exemption (1) to 'Conveyance' head of charge
WA	\$10	Schedule 2, item 13(3)
Tas	\$20	Schedule 2, item 27
NT	Yes	Schedule 1, item 15
ACT	N/A	

**Chart 4**

**Facts:** Same as Chart 1 but this time A, at C's request, subsequently mortgages Blueacre to C as additional security.

**Question:** Duty on the additional security?

State	Duty	Section/Schedule
Qld	No	Collateral: Schedule, 'Conveyance', head of charge, item (2)
NSW	No	S 84B and Ruling
Vic	No	Collateral: S 137I
SA	No	Collateral: 'Mortgage', head of charge, exemption (1)
WA	No	Collateral: S 87(1)
Tas	No	Collateral: Schedule 3, item 18
NT	No	Collateral: S 69D(1)
ACT	N/A	

**Chart 5**

**Facts:** Same as Chart 1 but this time A requests the transfer as part of a refinancing arrangement under which C advances a further \$1,000 to A pursuant to the transferred mortgage.

**Question:** Duty on the mortgage in respect of the further advance?

State	Duty	Section/Schedule
Qld	Yes on \$1,000	S 68(2)
NSW	Yes on \$2,000	S 84CAB(1)
Vic	Yes on \$1,000	S 137F(2)
SA	Yes on \$1,000	S 79
WA	Yes on \$1,000	S 83(3)
Tas	Yes on \$1,000	Schedule 4, item 3(e)
NT	Yes on \$1,000	S 69B
ACT	N/A	

**Chart 6**

**Facts:** Same as Chart 5 but this time as additional security A mortgages Whiteacre to C to secure the \$2,000 then owing.

**Question:** Duty on the additional security?

State	Duty	Section/Schedule
Qld	No	Collateral: Schedule, 'Conveyance', head of charge, item (2)
NSW	No	Collateral: S 84B and Ruling
Vic	No	Collateral: S 137I
SA	No	Collateral: 'Mortgage', head of charge, exemption (1)
WA	No	Collateral: S 87(1)
Tas	No	Collateral: Schedule 3, item 18
NT	No	Collateral: S 69D(1)
ACT	N/A	

**Chart 7**

**Facts:** Same as Chart 5 but this time A mortgages Whiteacre to C as additional security for the \$1,000 already advanced and mortgages Greenacre to C to secure the additional \$1,000.

**Question:** Duty on the additional security?

State	Duty	Section/Schedule
Qld	No	Collateral: Schedule, 'Conveyance', head of charge, item (2)
NSW	No	S 84B and Ruling
Vic	No	Collateral: S 137I
SA	No	Collateral: 'Mortgage', head of charge, exemption (1)
WA	No	Collateral: S 87(1)
Tas	No	Collateral: Schedule 3, item 18
NT	No	Collateral: S 69D(1)
ACT	N/A	