RECENT DEVELOPMENTS — STAMP DUTY

ASSIGNMENT OF DEBT AND SECURITIES

PETER GREEN

Allen Allen & Hemsley, Solicitors, Sydney

INTRODUCTION

It is common for an original provider of financial accommodation to be replaced by another party before the accommodation is repaid. This outcome may be achieved by a variety of means:

- the selling down or sub-participation by a participant in a lending syndicate;
- an assignment of debt instruments (such as debentures) in a secondary market;
- the sale by a financial institution of a portfolio of receivables as part of a change of business strategy or by way of securitisation.

If the benefit of a debt transferred from one creditor to another is secured, the transaction is likely to involve the benefit of the securities passing along with the benefit of the debt. This may involve a transfer of the title to the securities or a transfer or vesting of only a beneficial interest in the securities.

Under the stamp duties legislation of many Australian jurisdictions a written instrument assigning to or vesting in another party the benefit of an existing debt or the benefit of securities would attract a liability for *ad valorem* conveyance duty unless reliance could be placed upon an applicable exemption or steps could be taken to avoid this consequence. Depending upon the circumstances the assignment of a portfolio of receivables could be assessed by the stamp duty authorities under the business acquisition provisions of the applicable stamp duties legislation.

ASSIGNMENT OF DEBT

1. Is it Property?

In relation to an assignment of the benefit of an existing debt from one party to another, the debt comprises property at general law. As explained by Jordan CJ in the New South Wales Court of Appeal in *In the Estate of Maclure* ((1948) 48 SR (NSW) 93), as between the original borrower and creditor the debt created possesses at the time of creation the characteristics of a purely personal right. However, as between the original creditor and an assignee, the benefit of the existing debt possesses at the time of assignment the characteristics of a proprietary right. This analysis relied upon the judgment of Greene MR in *Re VGM Holdings*

Ltd ((1942) 1 AER 224) and has been followed, for example, by the Western Australian Supreme Court in *Austell Pty Limited v Commissioner of State Taxation (WA)* (89 ATC 4905).

Quite apart from the position at general law, the benefit of a debt would fall within the literal wording of the definition of "property" found in the Stamp Duties legislation of New South Wales ("the NSW Act"). The NSW definition in section 3(1) extends to include any personal property and any debt and any thing in action. However, in *Commissioner of Stamp Duties (NSW) v Yeend* ((1929) 43 CLR 235) the High Court read that definition down such that, where an assignment of property was in issue, the subject matter would only satisfy the definition if it were proprietary in character. This construction remains good authority in relation to the NSW Act notwithstanding the recent observations by the Queensland Court of Appeal in *Westpac Banking Corporation v Commissioner of Stamp Duties (Qld)* (92 ATC 4571) as to the various dicta in *Yeend's* case. (See *JV Crows Nest Pty Ltd v Commissioner of Stamp Duties (NSW)* 85 ATC 4198 at 4204 and *2 Day FM Australia Pty Ltd v Commissioner of Stamp Duties (NSW)* 89 ATC 4840 at page 4844).

2. Is it Dutiable Property?

Although the benefit of a debt assigned may constitute property at general law or within a statutory definition, it does not follow that an instrument assigning the benefit of a debt would be a potentially dutiable conveyance of property under the stamp duties legislation of a particular jurisdiction. Whether or not this would be so would depend upon:

(a) whether or not the stamp duties legislation of that jurisdiction would impose duty upon property of that kind; and

(b) if so, whether or not the benefit of the debt would have a sufficient territorial connection with the jurisdiction to be subject to its operation.

(a) Does legislation apply to property of that kind?

In relation to the first issue, the stamp duties legislation of New South Wales; Western Australia ("the WA Act"); Queensland ("the Qld Act"); Tasmania ("the Tas Act") and South Australia ("the SA Act") imposes a prima facie liability for conveyance duty upon an instrument conveying property of any kind if it has a sufficient territorial connection with the jurisdiction concerned. The legislation in the Northern Territory ("the NT Act"), the Australian Capital Territory ("the ACT Act") and Victoria ("the Vic Act") does not take such an all-embracing approach but applies *ad valorem* conveyance duty selectively upon a conveyance of property of only certain limited kinds. Neither the ACT Act nor the NT Act would extend to a debt. In Victoria the position is more complex.

Victorian Position

The Third Schedule to the Vic Act which identifies various classes of dutiable instrument does not extend to a conveyance of personal property or to a conveyance of a debt. However, Item IV(A) of the Third Schedule extends duty at any effective rate of 0.6% to the transfer of any "marketable security" of any corporation or company that has a register in Victoria or is incorporated in Victoria.

In section 3(1) of the Vic Act the expression "marketable security" is defined to mean (so far as here relevant) "any debenture stock bond note or other security of any corporation, whether constituting a charge on the assets of the corporation or not". The word "security" used in the definition would include an instrument creating a debt obligation even though it did not confer any rights of recourse to assets or remedies rendering discharge of that obligation more secure (see *Handevel Pty Ltd v Comptroller of Stamps (Vic)* 85 ATC 4706 and the authorities reviewed by the High Court at pages 4716-4717]. Although the definition of "marketable security" incorporates debt instruments of various kinds of "**any**" corporation, the head of duty in the Third Schedule only applies where the corporation has a register in, or was incorporated in, Victoria.

The potential operation of Item IVA of the Third Schedule is substantially, but not wholly, restricted by Exemption (3) to that head of duty. The exemption applies to any transfer of "marketable securities" which are **not** shares in the capital of a corporation or rights of a beneficiary in a unit trust **provided that** the transfer is supported by consideration in money or moneys worth of not less than the unencumbered value of the marketable securities transferred. Thus, so long as an assignment of debt arising under a debt instrument of a corporation having a register in, or incorporated in, Victoria is supported by consideration equal in value to the unencumbered value of the debt, the instrument of assignment would be exempt from duty. However such an instrument of assignment not supported by such consideration would attract duty at the rate of 0.6%.

Item IVA of the Third Schedule would have application only where there were an instrument of assignment. As will be discussed in more detail later, it is possible that debt may be effectively transferred without the use of an instrument of assignment. For example, it may be the case that the debt is transferable by delivery of the instrument giving rise to the debt. In such a case account needs to be taken of the provisions of section 59 of the Vic Act and those dealing with the assignment of "foreign securities" (sections 137D, 137K and 137L and Item XXII of the Third Schedule).

Section 59 Vic Act

Section 59(1) of the Vic Act applies to every person who disposes of any "marketable securities" (the definition of which includes debt instruments as noted above) where no dutiable instrument of transfer was executed or no stamp duty paid upon the acquisition by that person. The section also specifically applies to the acquisition of debentures or other marketable securities payable to bearer which were acquired by delivery and without the execution of any instrument. A person to whom the section applies is required to furnish a return to the Victorian Comptroller of Stamps of the relevant dispositions or acquisitions and (expressed as a separate obligation) to pay stamp duty equal to the duty which would have been payable upon an instrument of transfer executed in respect of the disposition or acquisition. From the preceding discussion concerning Item IV(A) of the Third Schedule it should be noted that:

- the hypothetical instrument of transfer would only be potentially liable to duty if the debt instrument were issued by a corporation having register in, or incorporated in, Victoria.

- the hypothetical instrument of transfer would be exempt from duty if supported by valuable consideration equal to the unencumbered value of the debt.

To the extent that there would be **no** duty payable upon the instrument of transfer had one been executed, there would equally be **no** duty payable under section 59. However, technically the conclusion that no duty would be payable would not, of itself, displace the obligation to lodge a return with the Victorian Comptroller. By virtue of section 59(5) of the Vic Act it is an offence for a person to fail to comply with **any** of the provisions of section 59. In practice it may well be the case that the Victorian Comptroller would not require a statement to be furnished under section 59 in circumstances where no duty would be payable in respect of the return.

Foreign Securities

Item XXII of the Third Schedule to the Vic Act imposes *ad valorem* mortgage duty at an effective rate of 0.4% upon "every foreign security". The expression "foreign security" is defined in section 137D(1) to mean (so far as here relevant):

> "every security for money by or on behalf of any foreign colonial state, government, municipal body, corporation or company (except a bill of exchange or promissory note) —

- which is made or issued in Victoria; or
- upon which any interest is payable in Victoria or
- which is assigned, transferred or in any manner negotiated in Victoria."

It is submitted that the reference to a "foreign" corporation or company is a reference to a corporation or company incorporated outside Victoria.

It is clear that the duty imposed upon such an instrument by Item XXII applies to the issue or creation of the foreign security. However, one of the particular peculiarities of the definition of the expression "foreign security" is that the characterisation of a debt instrument as a foreign security attracting a liability for duty may depend upon matters occurring at an indefinite time after the creation of the debt instrument. Thus, seemingly the assignment, transfer or negotiation in Victoria **at any time** of a security issued by a foreign corporation would result in the security becoming a "foreign security" as defined.

The possibility that an instrument not falling within a dutiable category at the time of its execution or other creation might subsequently do so is not unique to the case under consideration. The definition of "loan security" in section 83(1) of the NSW Act includes a mortgage (other than a floating charge) which did not affect property in New South Wales at the time of its execution but which affects land in New South Wales within 12 months of execution.

The practical problem from the Revenue's perspective, in such cases where an instrument becomes a dutiable instrument at some time and upon some occurrence after execution, is to encourage its stamping. In the case of the mortgage encumbering New South Wales land within 12 months of execution, it is deemed by section 84(6A) of the NSW Act to be executed at the time it affects the New South Wales land. This deeming attracts the provision imposing penalties and creating offences if a dutiable instrument is not stamped within certain prescribed periods of execution. In relation to "foreign securities" this role is seemingly played by section 137L of the Vic Act. By that section a penalty is imposed upon every person who in Victoria makes, issues, assigns, transfers, or negotiates, or pays any interest upon any foreign security which is not duly stamped.

It is important to note that no period of grace is given within which the instrument could be stamped without penalty after it first becomes a foreign security. For example, if a security for money, upon which interest would not be payable in Victoria, were to be issued by a foreign company outside Victoria, it would not at the time of issue be a "foreign security" under the Vic Act and there would be no liability for Victorian mortgage duty upon the instrument. However, if some years later the security were to be assigned or negotiated in Victoria, it would thereby become a "foreign security" and the parties to the transaction by which it became such would have committed an offence. This would be so even if they sought to stamp the security with Victorian duty immediately following the transaction which caused it to become a foreign security and rendered it liable to duty. This is an excessively severe consequence. However, there seems little doubt that it is correct and intended in view of the provisions of section 137K of the Vic Act.

According to that section the Victorian Comptroller may allow a "foreign security" to be stamped without penalty and at any time irrespective of when it was executed provided that the Comptroller is satisfied that: the security was not made or issued in Victoria; has not been transferred, assigned or negotiated within Victoria; and that no interest has been paid on the security in Victoria. The logical problem with section 137K is that, unless one of the matters referred to in the section has occurred, the security would **not** be a "foreign security" as defined and there would be no liability to duty as a foreign security nor any possibility of a penalty. In other words section 137K is effectively redundant.

It is understood that at one time the Victorian State Revenue Office held and made public the view that it would only seek to impose mortgage duty under the foreign security provisions upon an instrument otherwise comprising a mortgage, bond, debenture or covenant if it had one of the territorial connections with Victoria identified in the definition. The writer has sighted a letter dated August, 1992 from the then Manager of Stamp Duty Policy at the Victorian State Revenue Office confirming this position. The letter proceeded to deal with the territorial connection arising from the factor that "interest is payable in Victoria". The view was expressed that the question of whether interest was payable in Victoria was to be determined by reference to the instrument of security and the circumstances surrounding it at or about the time of execution of the instrument. The connection would be considered to be satisfied if the surrounding circumstances showed an intention that interest be paid in Victoria even if it were not apparent on the face of the instrument. The connection would **not** be considered to be satisfied if the requisite intention were not present at or about the time of execution but, in fact, interest were subsequently paid in Victoria.

This attitude on the part of the State Revenue Office reduces to some extent the practical problems with the foreign security provisions. However, the major difficulty remains that assignment or negotiation of a security issued by a foreign company would expose it to a liability for duty in Victoria and the parties to the transaction to the commission of an offence which they could not technically avoid. It is submitted that the provisions should be removed from the Vic Act. Since the insertion in the Vic Act of the extended nexus provisions, currently reflected in section 17(4), there has been no legitimate need for sections 137L and 137K. Furthermore it is difficult from a policy perspective to see the justification for a set of special provisions applicable according to the historical accident of where the issuing corporation or company was incorporated. It is far preferable to have the legislation clear rather than rely upon some administrative concession particularly where that concession does not address all of the difficulties.

(b) Territorial connection

It was earlier noted that the stamp duties legislation of a particular jurisdiction would have no application to an assignment of a debt (assuming that the debt comprised potentially dutiable property) unless there were a sufficient territorial connection between the debt and the jurisdiction concerned. The preceding discussion concerning the Victorian duty payable upon a foreign security or the transfer of a marketable security identified the territorial connections relevant there. In general under the stamp duties legislation of the applicable jurisdictions it would be the location of the debt assigned in that jurisdiction which would provide the necessary territorial connection.

There was a debate in the courts as to whether any *situs* could be attributed to intangible property such as debts and other *choses in action*. That debate was eventually resolved on the basis that intangible property is located in that jurisdiction with which it is most definitely connected. Over time sub-rules have developed as to the jurisdiction with which particular kinds of intangible property should be regarded as most definitely connect.

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

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

Although it has been submitted that it is the location of a debt in a particular jurisdiction which is the sole factor determining which stamp duties legislation would determine the dutiability of a written assignment of debt, it is understood that the South Australian stamp duty authority would not endorse this view. It is understood on the basis of past experiences with and utterances by representatives of the South Australian State Taxation Office (by no means wholly consistent) that execution in South Australia of a written assignment of a debt located outside South Australia may be considered by the South Australian Taxation Office to be liable to South Australian duty. If so, care should be taken to execute the instrument outside South Australia lest there be a liability to duty there as well as in the jurisdiction in which the debt were located with no relief in either jurisdiction against double duty.

3. Is there an Applicable Exemption?

The conclusion that a debt comprises property located in a jurisdiction which imposes *ad valorem* conveyance duty upon an instrument conveying property of any kind does not necessarily mean that a written assignment of that debt would attract such duty. There may be a relevant exemption or concession in the applicable legislation which would protect such an instrument from that duty. The stamp duties legislation of the various jurisdictions provide a variety of concessions which may protect against duty in the jurisdiction concerned. Regrettably the concessions are not uniform across the jurisdictions.

(a) Corporate debt securities

An exemption from conveyance duty is provided for an assignment of a "corporate debt security" under the NSW Act (exemption (41) Second Schedule); the Qld Act (exemption (12) First Schedule); the WA Act (exemption 2(9) Third Schedule); the SA Act (exemption 2 Second Schedule); and the Tas Act (exemption 36(b) Third Schedule). In general the exemption would apply to an instrument assigning any debenture, debenture stock, bond, note or other security of a corporation or a company (whether constituting a charge on assets or not).

A number of observations might usefully be made about the width of this exemption:

- Where rights are created or evidenced by an instrument or document of title, there is often a tension in discussing an assignment of the rights between the assignment of the intangible right, on the one hand, and the transfer of the instrument concerned, on the other hand. In some cases the two will be inextricably linked. Thus, for example, an effective legal assignment of the *chose in action* created and evidenced by a bearer bond would involve delivery of the bond. In contrast an effective legal assignment of a debt arising under an evidenced by a loan agreement may be achieved without involving the loan agreement.

  The suggestion has been made that the corporate debt security exemption applies only to an assignment where the subject matter of the assignment is the instrument creating or evidencing the debt (eg the debenture or bond) rather than the intangible rights created or evidenced. In many situations the distinction would be irrelevant since the assignment could accommodate both the intangible right and the tangible instrument. However, there are situations (eg where indebtedness is evidenced by a master global note) in which the distinction could be important. It is submitted that the inclusion of "debenture stock" in the definition as well as "debentures" provides an indication that the eligible subject matter should not be restricted to the tangible instrument creating or evidencing the intangible right. According to the legal dictionaries and commentaries on company law, stock (such as debenture stock) represents rights enforceable by the holder against a corporation capable of being assigned as a whole or divided into fractional parts in a way not possible with shares or debentures. In certain jurisdictions (Queensland and Western Australia) the corporate debt security exemption is dependent upon the subject matter falling within the definition referred to earlier and also comprising a marketable security. If anything, this added element suggests in modern times a construction which would include a dealing with the intangible rights within the scope of the exemption. In modem securities markets with computerised trading techniques there has been a marked movement away from paper and the need to relate the subject matter of trading to particular documents of title or instruments.

- The corporate debt security exemption in paragraph (41) of the Exemptions in the Second Schedule to the NSW Act extends to the transfer of the whole or part of a corporate debt security or "any **interest** in a corporate debt security". A similar extension to an "interest in" a corporate debt security which is a marketable security is made in the exemption in the WA Act. The exemptions in the legislation of the other relevant jurisdictions refer to transfers of **the** corporate debt security and do not expressly extend to a transfer of an interest, such as a beneficial interest, in a corporate debt security.

  There is a clear distinction at general law between a transfer of a particular piece of property and a transfer of only an equitable interest in that property. In the former case the transfer would vest in the transferee all of the proprietary rights to the property enforceable against third parties. For that reason the transferee would be recognised as the owner of the property. In the latter case the transfer would vest in the transferee proprietary rights enforceable primarily against the transferor and, in some limited circumstances only, enforceable against third parties without the intervention of the legal owner. The restricted nature of the proprietary rights conferred upon the transferee by comparison with those remaining vested in the holder of the legal title mean that the transferee would not be recognised at law as the owner of the property.

  This general distinction was recognised in a stamp duty context and analysed in some detail in the judgment of Hope JA in the New South Wales Court of Appeal in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* (80 ATC 4279 at pages 4884-4286). The following extract from his judgment illustrates the point:

  > "An unconditional legal estate in fee simple is the largest estate which a person may hold in land. Subject to qualifications arising under the general law, and to the manifold restrictions now imposed by or under statutes, the person seised of land for an estate in fee simple has full and direct rights to possession and use of the land and its profits, as well as full rights of disposition. An equitable estate in land, even where its owner is absolutely entitled and the trustee is a bare trustee, is significantly different."

A material and specific distinction between an instrument dealing with property of a particular kind and an instrument dealing only with a beneficial interest in that same property is also recognised in particular provisions in the stamp duties legislation apart from the corporate debt security provisions referred to. For example, that very distinction was the subject of considerable analysis and, in part, dictated the outcome of the decision by the Victorian Supreme Court in *TLC Group LP v Comptroller of Stamps (Vic)* (90 ATC 4073). Another illustration is provided by the provisions of section 54(2) of the Qld Act. Section 54(1) of the Qld Act subjects a contract or agreement for the sale of property to the same *ad valorem* duty as a conveyance. Section 54(2) of the Qld Act denies the application of section 54(1) to a contract or agreement for the sale of property outside Queensland or which is solely comprised of goods, livestock, wares or merchandise **except** where the subject matter of the contract or agreement comprises only an equitable estate or interest in such property. The first exemption from conveyance duty recognised in the Second Schedule to the SA Act extends to a conveyance or transfer of a mortgage or **an interest** in a mortgage. The second exemption extends to a conveyance or transfer of any corporate debt security but no express reference is made to any **interest** in a corporate debt security.

It is submitted that, in the absence of an express extension of the exemption to "interests in" a corporate debt security of the kind found in the NSW Act and the WA Act, the exemption would not apply to a conveyance or transfer of an equitable interest in a corporate debt security.

(b) Discount arrangement — NSW

By virtue of section 74CAA of the NSW Act, no duty is to be charged under the NSW Act in respect of a "discount arrangement" made on or after 1 January, 1983 nor upon an instrument made out on or after that date in respect of a discount arrangement. This displacement of duty is expressed to operate notwithstanding any other provision of the NSW Act.

The expression "discount arrangement" is defined in section 74A of the NSW Act to mean (so far as here relevant) the purchase, acquisition, discounting or factoring of a book debt by a person in the course of the conduct of a business of purchasing, acquiring, discounting or factoring book debts where:

(i) The amount payable under the discount arrangement ("accommodation") is paid or payable in New South Wales and:-

- both of the parties to the arrangement are carrying on business in New South Wales; or

- either of those parties is carrying on any business in New South Wales and stamp duty is not payable under the law of another Australian jurisdiction on the discount arrangement or

(ii) The accommodation is payable outside New South Wales and either or both of the parties to the discount arrangement are carrying on any business in New South Wales and stamp duty is not payable under the law of another Australian jurisdiction on the discount arrangement.

The expression "discount arrangement" is defined to **exclude** the purchase, acquisition, discounting or factoring of the following:

(i) Any book debt relating to amounts due to any person in Australia for goods or chattels exported by that person from Australia.

(ii) Any bill of exchange or promissory note at a discount rate not exceeding the prescribed rate per annum or, in the absence of a prescribed rate, 12% per annum. (There is presently no prescribed rate.)

(iii) A "marketable security" which expression includes a corporate debt security.

(iv) Any book debt secured by mortgage over real property in New South Wales if the discounting of the book debt is effected together with a transfer or assignment of the mortgage to the purchaser of the book debt where stamp duty has been paid on the transfer or assignment. This exclusion does not apply if the arrangement would have been a "short term discount arrangement". This would be the case where the debt discounted is payable in full within six months from the date the debt was purchased and the purchaser has elected to treat the arrangement as a short term discount arrangement. In relation to this exclusion it is also noteworthy that, by virtue of section 97AE of the NSW Act, a transfer or assignment of a mortgage made on or after 1 January 1993 is exempt from duty under the NSW Act. Accordingly, there should be no scope for the operation of this exclusion which is dependent, in part, on the payment of stamp duty under the NSW Act on the transfer or assignment of the mortgage.

In light of the exemption from stamp duty applicable to a "discount arrangement" entered into on or after 1 January 1983, the exclusions from the scope of that expression operate in a somewhat contrary fashion. Prior to the exemption being introduced parties would doubtless have been keen to fall within one of the exclusions since this would have displaced the liability for duty otherwise applying to a discount arrangement. However, following the introduction of the exemption from all duty in respect of a "discount arrangement", parties may well be keen to ensure that their transaction **qualified** as a "discount arrangement" and was not within the scope of an exclusion.

(c) Exemption (II) — WA

Exemption (II) in the Third Schedule to the WA Act exempts from *ad valorem* conveyance duty a transfer to a person of the whole or any part of, or an interest in:

- a trade debt;
- cash or money in a call account;
- money on deposit with any person;
- a negotiable instrument.

4. Can Duty be Avoided?

If there would be a liability to duty in a particular jurisdiction in respect of an assignment of a debt, the question may be raised as to the possibility of avoiding that duty.

(a) No dutiable instrument

To the extent that the liability for duty upon an assignment of debt is imposed upon an instrument effecting the assignment, that liability would be avoided if the assignment were capable of being effected without an instrument. Clearly any consideration of such a possibility needs to take into account not only the stamp duty consequences but also the legal efficacy of the transaction and practical considerations such as the ability to prove the terms of the transaction. The decision in *Carlill v Carbolic Smokeball Company* ((1892) 2 QB 984) raised the possibility of accommodating all of these factors without creating a dutiable instrument. According to that case a written offer to engage in a transaction (eg the purchase of property) which was accepted by conduct, other than writing, would not constitute or form part of a dutiable agreement or memorandum of an agreement. The applicability of this decision in the Australian context has been affirmed by the High Court in *MacRobertson Miller Airline Services v Commissioner of Taxation* ((1975) 50 ALJR 348).

If the act of acceptance of the offer were readily demonstrable, the requirement for clear evidence of the transaction would be satisfied. The terms of the transaction would be evidenced by the written offer. If the act of acceptance comprised the payment of a specified sum of money into a specified account, proof of that acceptance and the provision of valuable consideration (thereby giving rise to a binding agreement) would also be readily demonstrable by reference to banking records.

The provision of valuable consideration by the offeree by way of or in connection with the acceptance of the offer would in many cases attract the assistance of equity such that the offeree would obtain an equitable interest in the property to which the offer related. In the case of a debt, this mechanism would result in equitable ownership of the debt passing to the purchaser. Legal title to the debt would not pass to the purchaser without the execution of a potentially dutiable written instrument. In many circumstances, particularly where the parties to the commercial transaction were related, the vesting in the offeree of the equitable title (without legal title) would suffice. The major disadvantage attaching to equitable ownership of a debt without legal ownership is that the equitable owner could not sue the debtor to recover the debt without the involvement of the legal owner (which assistance could be compelled if necessary). Practical steps can be taken to reduce this disadvantage (eg having the legal owner appoint the beneficial owner irrevocably as its agent to collect and sue upon the debt concerned).

Claytons Contract Provisions

Testament to the opportunity for reduction of stamp duty upon commercial transactions by structuring the transaction by means of a written offer accepted by payment of a sum of money is to be found in the introduction of the so-called "Clayton's" contact provisions in the stamp duties legislation of most jurisdictions. That legislation requires statements or returns to be made out in respect of a transaction which causes a change in the beneficial ownership of an estate or interest in property of certain specified kinds in circumstances where there is no dutiable instrument effecting or evidencing the transaction. The duty payable upon the statement or return is calculated at the same *ad valorem* conveyance rate as would have been applicable if there had been an instrument effecting or recording the transaction. However, the provisions apply only to certain specified categories of property and transaction which differ from jurisdiction to jurisdiction but which in no case covers the field of all commercially valuable property.

The stamp duties legislation in New South Wales, Western Australia, Tasmania, South Australia and Northern Territory contain "Claytons" contract provisions in similar terms. In no case would those provisions apply to a transaction vesting equitable ownership of a debt without a written instrument. The provisions in the Qld Act imposing a liability for duty in respect of transactions effected without a written instrument differ markedly from the "Claytons" contract provisions in the other jurisdictions. With one exception, those provisions would not apply to a transaction by which beneficial ownership of a debt was acquired. The exception arises under section 54(4) of the Qld Act.

Section 54(4) of the Qld Act operates where a company incorporated or registered in Queensland acquires Queensland property for consideration and there is no acquisition agreement or transfer instrument executed or, if such an agreement or instrument is executed, it is not duly stamped with *ad valorem* duty. In such a case the company's memorandum of association or copy memorandum of association registered in Queensland is deemed to be an instrument of conveyance of the Queensland property acquired and to be chargeable with *ad valorem* conveyance duty. It is noteworthy that the provision operates regardless of the nature of the property located in Queensland acquired and would extend to a debt or a beneficial interest in a debt. It is also of interest to note the narrow construction given by the Queensland Court of Appeal to the term "memorandum of association" in section 54(4) and its reasons for doing so in the case of *Westpac Banking Corporation v Commissioner of Stamp Duties (Qld)* (92 ATC 4571).

Westpac was incorporated under the Bank of New South Wales Act 1850, having previously been a joint stock company pursuant to a deed of settlement. When Westpac registered in Queensland under the Companies Act 1931 it did so by registering a copy of the New South Wales Act rather than a document traditionally recognised as a memorandum of association. The court found that Westpac had no memorandum of association or copy registered in Queensland for the purposes of section 54(4).

Counsel for the Commissioner argued that the reference to a memorandum of association in section 54(4) of the Qld Act should be construed as a compendious reference to all constituent documents of any kind. It was clear from the response of members of the bench that this argument was rejected in large part because of the capricious operation of section 54(4) viewed against the fluctuating corporate law requirements for companies doing business in Queensland to register a memorandum of association. In other words, the potential application of section 54(4) to a particular company was very much an historical accident depending upon whether or not the law at the time required a company to register a memorandum of association in Queensland as a precondition to carrying on business there.

The ACT Act does not contain any "Claytons" Contract provisions and nor, subject to one qualification, does the Vic Act. The qualification relates to section 59 of the Vic Act which requires a dutiable statement to be furnished to the Comptroller of Stamps in certain circumstances previously considered.

Memorandum of Assignment

If the offer and acceptance procedure is used to avoid the creation of a dutiable instrument, care should subsequently be taken to avoid the creation of a document which could be characterised as a memorandum of the assignment of the beneficial interest in the debts. Such a memorandum would be as liable to duty as a written instrument of assignment. A document would constitute a memorandum if it recorded all of the material terms of the assignment (see *Horsfall v Hey* (1848) 154 ER 705; *Fleetwood-Hesketh v CIR* (1936) 1 KB 1).

Notice of Assignment

One issue arising in relation to an equitable assignment of a debt concerns the stamp duty consequences of giving notice of the assignment to the debtor. It is not a precondition to an effective equitable assignment that notice be given to the debtor but it may be considered prudent if only for the purchaser to obtain priority over other assignees under the rule in *Dearle v Hall* ((1828) 3 Russ 1). Notice need not be in writing to be effective but it would be preferable to assist in proof of the giving of the notice.

The question arises as to whether such a notice would be an instrument liable to duty on the basis of the principle that an instrument intended by the parties to be part of the machinery to pass property from one to the other is dutiable as a conveyance of that property (see *Fleetwood-Hesketh*). An instrument could be dutiable on this basis in either of two cases:

- if it is, as a matter of law, part of the machinery to pass the property; or
- if the agreement between the parties provides that it is part of the machinery to pass the property.

It is submitted that the first basis would not apply if the notice is given to a debtor of an equitable assignment **which has already occurred**. In that case the notice is not necessary in order to render the assignment effective in equity as between the vendor and the purchaser (see Meagher, Gummnow and Lehane *Equity Doctrines and Remedies* (Third Edition) at paras 609, 686 and 829; *Comptroller of Stamps v Howard Smith* (1986) 54 CLR 614 at 622 per Dixon J; *Ward v Duncombe* [1893] AC 369 at 392; *William Brandl's Sons & Co v Dunlop Rubber Co* [1905] AC 454 at 460 and 462; *Holroyd v Marshall* 10 MLC at 209; 11 ER 999 at 1006). It is important to note that the procedure proposed is that notice would be given after the equitable assignment had operated and that the notice would not itself constitute the equitable assignment. It is submitted that this is an appropriate basis for distinguishing the decisions in *Buck v Robson* ((1878) 3 QBD 686) and *Ronald Motors Pty Ltd v CSD* ((1941) STR Qld 126).

In *Buck v Robson* it was held that a letter from a creditor to his debtor stating that the creditor assigned the debt to a third party and requiring the debtor to hold the debt for the third party was a valid equitable assignment. However, there is nothing said in the case to support the conclusion that notice given by an assignee to a debtor of an equitable assignment which had already occurred was itself an assignment or part of the machinery to pass title. In *Ronald Motors* it was held that an agreement stating "we have this day sold to K one Ford V8 Sedan at or for a price of £251..." was dutiable as a conveyance on sale because, despite the past tense, it was the instrument intended by the parties to operate as an immediate conveyance of the property in the motor car. Again this decision does not bear upon notice of an equitable assignment of a debt where it is clear that the debt has already been assigned.

The second basis for potential dutiability referred to above would not apply unless the agreement arising from the offer and acceptance made provision to the effect the notice would form part of the machinery to pass property from the vendor to the purchaser.

Business Acquisition Provisions

The avoidance of duty upon an equitable assignment of a debt effected without a written instrument is subject to the operation of the business acquisition provisions in the stamp duties legislation of: Queensland, the Australian Capital Territory, Tasmania and South Australia. These provisions were examined in some detail by the writer in a paper presented to the 1992 Banking Law and Practice Conference. If the equitable assignment of debt occurred as part of the disposal of a business, duty would be payable by return in respect of the consideration supporting the assignment if duty had not been paid upon an instrument affecting the assignment.

In recent times there have been a number of sales by banks of portfolios of receivables or operating divisions. The question arising in relation to such transactions is whether or not the portfolio or division comprises a business in itself (in which case the business acquisition provisions could apply) or whether the subject matter simply comprises some of the assets of a larger undivided business (in which case the business acquisition provisions would not apply). For example, would the corporate lending division of a bank's operations comprise a business separate from the retail home loans division of the same bank or would both divisions simply comprise part of a single undivided business of banking? These issues are likely to be examined in detail in an appeal against an assessment of duty by the Queensland Commissioner currently working towards a hearing by the Queensland Court of Appeal.

(b) Change of situs

If a debt is located in a jurisdiction in which a written assignment would attract a liability to *ad valorem* conveyance duty, it may be possible to shift the *situs* of the debt to a jurisdiction (such as the Australian Capital Territory) in which no such liability would arise.

It is possible to change the *situs* of a specialty debt from one jurisdiction to another jurisdiction by transferring all executed counterparts of the deed evidencing the specialty debt. It is also possible to convert a simple contract debt into a specialty debt by executing a deed which sets out the terms of the debt such that it evidences the debt to the exclusion of any other instrument.

ASSIGNMENT OF SECURITIES

1. Assignment of Mortgage

The benefit of a mortgage does not comprise dutiable property for the purposes of the conveyance duty provisions in the ACT Act. Thus, an assignment of mortgage would not be dutiable in the Australian Capital Territory.

An assignment of the benefit of a mortgage securing a debt would potentially attract a liability to *ad valorem* conveyance duty in only the Northern Territory (see Schedule 1 Item 15). In each other jurisdiction there would be a liability to nominal duty or an applicable exemption (NSW Act section 97AE exempt; Qld Act Schedule 1 "Conveyance" Item 1 $5; SA Act Schedule 2 "Conveyance" Exemption 1; Vic Act no duty by administrative concession; WA Act Schedule 2 Item 13(3) $10; Tas Act Schedule 2 Item 27 $20).

In the case of the Northern Territory the duty on an assignment of a mortgage would be calculated by reference to the greater of the consideration supporting the assignment or the unencumbered value. If the mortgage assigned does not create the debt or other obligation secured and the assignment of mortgage is made in connection with an assignment of the debt or liability, it would be possible to apportion the consideration between the debt and the mortgage. A written assignment of the debt would not attract a liability for duty in the Northern Territory unless it comprised a debenture. Accordingly, if the majority of the consideration were to be apportioned to the debt assigned, rather than the mortgage, there would be little or no *ad valorem* duty payable by reference to the consideration. The stamp duty authority could call for a valuation of the mortgage if there was a concern that the value of the mortgage was greater than the consideration allocated. If the valuation established that the value of the mortgage (as distinct from the debt) was greater than the consideration allocated, duty could be assessed by reference to that value. It is an interesting question for an expert in valuation as to whether any significant value attaches to a security for a debt in relation to which no default has occurred nor is reasonably foreseeable.

2. Assignment of other Securities

The benefit of other securities such as guarantees and indemnities comprise a *chose in action*. A written assignment of the benefit of such *choses in action* may well attract a liability to *ad valorem* conveyance duty in those jurisdictions which impose *ad valorem* duty upon a conveyance of property generally (viz all jurisdictions other than Victoria, Northern Territory and the Australian Capital Territory). In New South Wales there has been an active debate with the Office of State Revenue as to whether or not the benefit of such securities given by a company are properly characterised as "corporate debt securities" such that a written assignment would be exempt from duty. The Office of State Revenue was persuaded over time that the benefit of guarantees and indemnities and facility agreements was encompassed within the definition of "corporate debt securities" on the basis that it was an "other security" of a company.

However, around twelve months ago the Office indicated that it was reconsidering its attitude and was likely to recommend to the Government an amendment to the definition of "corporate debt security" which would clearly not include such securities. Representations opposing this course were made by a number of interested parties and the question remains under review by the Office of State Revenue. In the meantime, the NSW Commissioner is assessing duty on the basis that such securities given by a company do comprise corporate debt securities. In those jurisdictions where the corporate debt security concession depends upon the subject matter also comprising a marketable security, it may be more difficult to establish that a written assignment of the benefit of such securities attracted the concession.

To the extent that assignment of the benefit of such securities would attract *ad valorem* duty, the question would arise as to the value of such securities and the consideration to be allocated to the assignment of the securities separately from that allocated to an assignment of the debt or other liability secured. It may well be the case that such securities would have little value.

(a) Section 84 CAB NSW Act

In his paper presented to the 1993 Banking Law and Practice Conference Jeff Mann undertakes a detailed analysis of the stamp duties consequences of a financier, who has taken an assignment of securities, making fresh advances secured by the securities. In particular the provisions of section 84 CAB of the NSW Act are examined and should be borne in mind given the potential severity of the operation of the section. In essence the benefit of all NSW stamp duty paid upon a mortgage or charge may be lost if the security is assigned to a person who subsequently makes any advance secured by that security or who is a party to contingent liability arrangements of the kind referred to in section 84(3C) of the NSW Act.

In addition to the points made by Jeff Mann in his paper it is worth noting that:

(a) Section 84CAB would not be triggered unless there were a transfer of the security. A transfer of a beneficial interest in such a security would not attract the operation of the section.

(b) A transfer of the legal title to a security without any charge in beneficial ownership would attract the operation of the section if the other prerequisites were satisfied.

In concluding I acknowledge the contribution made by my partner Mark Richmond to the section of my paper dealing with Memoranda and Notice of Assignment.