STAMP DUTY

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HIRING ARRANGEMENT DUTY/BUSINESS RENTAL DUTY – ROADSHOW UPDATE

The author's paper presented to the Banking Law and Practice Conference in 1996 examined the implications for the imposition of hiring arrangement duty or business rental duty of two then recent decisions of the Victorian Supreme Court. The cases were *Roadshow Distributors Pty Ltd v Commissioner of State Revenue (Vic)*[1] and *Taxiway Pty Ltd v Commissioner of State Revenue (Vic)*.[2] That paper noted that the taxpayer in the *Roadshow* case had lodged an appeal. Judgment in the appeal, reported as *Roadshow Distributors Pty Ltd v Commissioner of State Revenue (Vic)*,[3] was handed down by the Victorian Court of Appeal on 14 March 1997. The Victorian State Revenue Office is seeking special leave to appeal to the High Court.

In brief Roadshow had appealed against the imposition of business rental duty under the Victorian stamp duties legislation (the Vic Act) in respect of the consideration (excluding a delivery fee) received by Roadshow from film exhibitors to whom Roadshow granted a licence to screen a film in public and to whom Roadshow delivered a print of the film for exhibition which remained the property of Roadshow. On the basis that the arrangements between Roadshow and exhibitors involved Roadshow granting to exhibitors rights to use goods comprising the print of the film, the Victorian Comptroller of Stamps and Byrne J of the Victorian Supreme Court concluded that Roadshow was engaged in "rental business" as defined in section 131AA of the Vic Act. The counter argument of Roadshow was principally that the granting of rights to use goods was merely incidental to the essential business of Roadshow which comprised the conferral of rights to exhibit in public the cinematograph images comprising the work in which copyright subsisted. In rejecting Roadshow's submission, the Comptroller of Stamps and the Victorian Supreme Court concluded that rental business duty was payable by reference to the whole of the consideration received by Roadshow from an exhibitor apart from a delivery fee which represented a consideration for the provision of a service.

The Victorian Court of Appeal concluded that the activities of Roadshow comprised "rental business". However, the Court of Appeal rejected the imposition of rental business duty by reference to the whole of the consideration received by Roadshow. According to the court, the duty should be imposed by reference to only such proportion of the total consideration as could fairly be

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1 95 ATC 4663.

2 95 ATC 4667.

3 97 ATC 4271.

said to have been received for or in relation to the use of goods (as distinct from the intellectual property rights). On that basis the appeal against the duty assessed was upheld and the Comptroller of Stamps was directed to reconsider the liability of Roadshow to rental business duty.

The judgment of the Appeal Court addresses two principal issues: the characterisation of the arrangements between the parties and the apportionment of consideration. The court's approach to each issue and the implications of the court's conclusions warrant further consideration:

Characterisation of Arrangements

So far as relevant for present purposes the expression "rental business" is defined in section 131AA(1) of the Vic Act to mean "the business of letting, bailing or otherwise giving rights to use goods". It is a precondition to the imposition of a liability for rental business duty and the other obligations imposed under subdivision (13A) of Division 3 of Part 2 of the Vic Act that a person is engaged in Victoria in carrying on "rental business". Thus, a fundamental question in the *Roadshow* case was whether or not Roadshow was engaged in activities or transactions encompassed by the definition of "rental business".

According to the Court of Appeal, Byrne J had approached that fundamental question, with the agreement of the parties, by asking whether Roadshow conducted "**a** rental business". The Court of Appeal took issue with this formulation. According to the Court of Appeal the "true question" was not whether Roadshow conducted "a rental business" or whether "the business of Roadshow was a rental business", rather it was whether Roadshow carried on "rental business" as defined. There can be no doubt that the question posed at that point by the Court of Appeal is correct. However, it is highly questionable whether any difference in outcome should flow from a formulation of the fundamental question as whether Roadshow "conducts **a** rental business" or whether Roadshow "carries on rental business". The Court of Appeal concludes that there is a significant difference in outcome but it is submitted, with respect, that the analysis of the Court of Appeal is erroneous.

Having made the fine semantic distinction, the Court of Appeal elaborates upon the fundamental question as follows: "What the appellant systematically did during the relevant period either was to let, bail or otherwise give rights to use goods, or it was not."

It is submitted that such a formulation omits a critical component of the statutory definition of "rental business". According to the definition "rental business" means "the **business of** letting, bailing or otherwise giving rights to use goods". The Court of Appeal has omitted from its fundamental formulation any reference to business and posed the question as to whether Roadshow "systematically" let, bailed or otherwise gave rights to use goods. There is no justification provided by the court for substituting the test of "business" which is expressly imposed by the definition with the alternative test of "systematic" activity. There is an abundance of authority as to the attributes of a business and the systematic conduct of activities is merely one attribute (and by no means a principal attribute) of a range of possible attributes. It is submitted that the definition of "rental business" necessarily requires an answer to the question as to whether or not the activities of Roadshow in conferring rights to use goods comprise "the business of" giving such rights. The answer to that question necessarily involves a characterisation of the kind which was rejected by the court.

In the course of its argument Roadshow relied upon observations by McPherson J in the case of *Cyclone Scaffolding Pty Ltd v Commissioner of Stamp Duties (Qld)*:[4]

> "The word 'business' used in a context such as this ordinarily refers not to a particular activity but to a series of activities all of which, when taken together, go to make up a single occupation or trade, to which some general description can be or is applied. In the present case that activity can fairly be described as the business of hiring out scaffolding. The process or activity of carting to and delivering the scaffolding on site, of insuring it, and of cleaning or

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4 84 ATC 4812 at p 4818.

> repairing it on its return, are simply incidents of the appellant's business of hiring out scaffolding. They all form part of that single business, and are not capable of being regarded as separate or independent businesses carried on by the appellants ..."

The Court of Appeal was unable to see that the observations by McPherson J assisted Roadshow. It is submitted that the failure of the court to appreciate the relevance of the observations stems from its own failure to take sufficient account of the requirement in the definition of "rental business" that the activities comprise "the business" of letting, bailing or otherwise giving rights to use goods.

The fundamental point made by Roadshow was that it was appropriate to characterise the business conducted by Roadshow in terms of the definition of "rental business" as a business of granting rights to exploit intellectual property and not the business of conferring rights to use goods. It is submitted that the Court of Appeal misstates the proposition advanced by Roadshow in the following passage:

> "It may be accepted that the appellant, **in business,** granted rights to use or exploit work that was the subject of copyright, not being rights to use goods. These rights, however, did not negate or qualify any rights given by the appellant that were fairly comprehended within the definition of 'rental business'."[5]

It is submitted that it is misstating the Roadshow proposition to say that Roadshow granted rights to use or exploit work the subject of copyright "in business". The Roadshow proposition was that such activities constituted the very business and not activities conducted in the course of some other general unspecified business. As soon as it is accepted that Roadshow's activities were properly characterised in that fashion, there is no room (contrary to the assertion by the court) to conclude that the granting of rights to use goods could fall within the definition of "rental business". The one qualification to that assertion would arise where the facts supported the view that Roadshow was engaged in two discrete businesses: one involving the granting of copyright sub-licences and the other involving conferring rights to use goods. Such an unlikely outcome does not appear to have been entertained either by the Victorian Comptroller or by the Court of Appeal.

Taking the analysis of the Court of Appeal at face value, any party engaged in Victoria in activities which systematically involve the conferring of rights to use goods would be engaged in "rental business" notwithstanding that the rights to use goods may be entirely incidental or ancillary to any objective assessment of the essential nature of the arrangements. Such an approach has the potential to expand significantly the range of activities, and parties conducting those activities, encompassed within the scope of the rental business duty provisions in the Vic Act. As explained in the earlier paper, this outcome is of considerable significance for banks as both consumers and providers of intellectual property and information technology. Furthermore, the provisions in the stamp duties legislation of other jurisdictions (apart from the Australian Capital Territory) imposing a duty corresponding substantially with Victorian rental business duty involve the same fundamental issue of characterisation. If the same approach to the question were to be taken by the stamp duty authorities in those other jurisdictions (from a practical perspective) or the courts (in the event of an appeal), the impact of the decision could well be profound.

The impact is diminished to some extent, but by no means completely, by the second principal conclusion of the court that duty should be levied by reference to only a proportion of the consideration paid under the relevant arrangements. However, there is presently some uncertainty as to the validity of the court's conclusion on apportionment as the Victorian Comptroller seeks leave to appeal to the High Court on that issue.

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5 97 ATC 4274.

Apportionment of Consideration

The conclusion that Roadshow was conducting "rental business" in Victoria meant that Roadshow was obliged to become a registered person; to lodge statements with the Victorian Comptroller; and to pay duty to the Victorian Comptroller. According to section 131AC(1) of the Vic Act a registered person is required to specify in the statement the total amount received during the preceding month "in respect of rental business for or in relation to the use of goods (other than books)". It is important to note the compound requirement that the amount be received both in respect of rental business and, also, in relation to the use of goods. The requirement that the amounts be received, not just in respect of rental business, but also in respect of the use of goods is reinforced by section 131AC(2) of the Vic Act.

The Victorian Comptroller had argued and Byrne J had accepted that the whole of the consideration provided to Roadshow by an exhibitor (apart from the delivery fee) was both in respect of a rental business and in respect of the use of goods. The key to that conclusion appears to have been acceptance of the proposition that the use of the goods (ie, the print of the film) was required in order for the exhibitor to obtain access to the intellectual property. In that sense, to the extent that the intellectual property rights were of commercial value, their exploitation was dependent upon the use of goods. Consequently it followed that the whole of the consideration should be subject to rental business duty. This line of argument was rejected by the Court of Appeal.

The court recognised that the intellectual property rights were separate from the tangible property upon which the copyright work was recorded. The court also accepted that the most valuable commercial benefit provided to exhibitors by Roadshow comprised the intellectual property rights rather than the tangible goods. Furthermore, the court inferred that, if a film print were to be destroyed by fire or some other means, it would be replaceable and replaced and that there would not be a destruction of the intellectual property rights granted to the exhibitor. On those bases the court concluded that it was unrealistic to find that all of the receipts by Roadshow in respect of its rental business were relevantly for or in relation to the use of goods. To take that view would constitute an "incomplete view of the commercial reality" which needed to be examined in order to establish for or in relation to what the consideration was paid by the exhibitor. Accordingly, it was necessary for an apportionment of that consideration to be undertaken. The parties had not made any express contractual apportionment of the consideration. The court suggested, without finding, that the cost of the goods would be an important consideration to take into account in making an appropriate apportionment.

It is understood that the basis of the Commissioner's appeal to the High Court, if special leave is granted, would be that there should be no apportionment of consideration since the use of goods was fundamental to, and an essential precondition of, the enjoyment of the valuable copyright.

As a practical matter the author has on past occasions reached agreement with the stamp duty authorities in similar circumstances as to an appropriate basis for apportionment. The basis reached was to take the original cost of the goods concerned and to amortise that cost over the estimated economic life of the goods. It was agreed that the owner of the goods would, at the least, seek to recover that amortised cost over the life of the goods together with an effective interest component representing compensation for the cost of the funds tied up in the goods.

The statutory basis for an apportionment of consideration is not as clear cut under the hiring arrangement provisions in the legislation in New South Wales and the Northern Territory as it is in Victoria and the other jurisdictions. In New South Wales and the Northern Territory a hiring arrangement comprises, so far as here relevant, any arrangement under which goods may be used by a person other than the owner of such goods. Duty is imposed by reference to the amount payable "under the hiring arrangement" (in the case of a non registered person) or payable "in respect of the hiring arrangement" (in the case of a registered person paying by return). Unlike the provisions in the Vic Act there is not an express additional requirement that the amount concerned should relate to the use of the goods. However, it is submitted that the absence of such an express additional requirement is not fatal to the statutory basis for apportionment. Assuming the same situation as that considered in the *Roadshow* case, it would be necessary for the taxpayer to argue that the transaction involved two arrangements: one relating to the use of goods (ie the reel of film)

and the other relating to the conferring of intellectual property rights. If it were accepted that the transaction involved two such arrangements, the single undissected consideration paid by the exhibitor would need to be apportioned in order to determine the amount payable under or in respect of the hiring arrangement and the amount payable under or in respect of the other arrangement. Such an approach to characterising the transaction as involving two arrangements would at least be consistent with the apparent policy underlying the provisions imposing the duty. The apparent policy is that duty should be payable in respect of the use of goods but not otherwise.

Such an approach to characterising the transaction as involving more than one arrangement appears to underlie Revenue Ruling SD53 issued by the New South Wales Commissioner. That Ruling provides guidelines in a variety of circumstances to assist in identifying the amount payable under a hiring arrangement which would attract duty as distinct from amounts which would not attract duty.

The earlier paper relating to this issue concluded that, from a commercial perspective, the preferable outcome would be for the stamp duty authorities to accept that the duty payable would be calculated by reference to the consideration allocated to the use of goods under an arm's-length apportionment rather than leave the outcome to an all or nothing lottery dependent upon the fundamental characterisation.

The decision of the Victorian Court of Appeal goes a substantial way to achieving that outcome, assuming that it is not overturned by the High Court if special leave is granted. On any view, it is submitted that it would be preferable for such an outcome to be put beyond doubt (particularly in New South Wales and the Northern Territory) by legislative provisions incorporated in the long-promised stamp duties rewrite.

FINANCIAL INSTITUTIONS DUTY – REVIEW OR ABOLITION

The author's paper presented to the 1996 Conference referred to a comprehensive review of Financial Institutions Duty (FID) being undertaken by the FID authorities in all relevant jurisdictions and peak industry bodies including the Australian Bankers Association. The review proceeded and reform proposals were developed during the course of 1996 in relation to four key areas. It was anticipated that recommendations for legislative amendments would be taken to the governments of the participating jurisdictions during the first half of this calendar year. Those expectations were confounded on 7 March 1997.

A Communique was released on that date by the Leaders' Forum (involving all State and Territory Premiers) announcing that:

- FID (applicable in all Australian jurisdictions other than Queensland) would be abolished;
- the scope of the existing Debits Tax (BAD) would be expanded to encompass all withdrawals from all accounts of financial institutions and the tax would be imposed at a nationally uniform rate which is likely to be ten cents per one hundred dollars with a maximum tax of $2,000 on any single withdrawal;
- it may be necessary for the abolition of FID and the expansion of BAD to occur gradually over an extended period;
- the proposals were subject to the participation of Queensland upon an acceptable basis.

There have been no further public announcements concerning the proposal. However, on the basis of observations by representatives of New South Wales Treasury and by the FID authorities in several jurisdictions, it is understood that:

- Queensland wishes to preserve in some way or another the commercial benefit which accrues to it in attracting business through not imposing FID;

- Queensland Treasury has failed to meet a number of anticipated dates for a decision and the matter is now likely to remain unresolved for the next 1½ to 2 months;

- even if the requirements of Queensland can be accommodated, the process of phasing out FID and expanding the scope of BAD is unlikely to commence until July 1988 and even that timetable is uncomfortably tight;

- the transition period where FID is phased out and BAD is expanded is likely to last until 2000;

- since participants in short term dealings will require some concession, it is quite possible that the short term dealing regime under the FID legislation (including the payment of short term dealers duty by reference to short term liabilities) would be retained;

- it is most unlikely that the proposals for the reform of FID developed as part of the comprehensive review would be implemented if the proposal for the abolition of FID proceeded notwithstanding the relatively long period for which FID would continue to be imposed.

If the Communique proposal proceeds, many of the issues which had emerged as significant in relation to FID would remain relevant since, in common with FID, the expanded BAD will be a tax imposed in respect of entries made to accounts maintained by financial institutions. If the same significant systemic problems plaguing FID are to be avoided, many of the proposals developed during the comprehensive review of FID would need to be taken into account.

BANK MERGERS

Introduction

The reference to a bank "merger" is a general description of an outcome which may result from a number of differing processes and commercial circumstances. At one end of the commercial spectrum, mergers have been undertaken to give effect to a form of corporate reconstruction. An example is provided by the integration of the savings bank operations conducted by a number of the long-standing banking groups with their trading bank operations which occurred during the early 1990's. At the other end of the spectrum lie the takeover by one corporation, conducting a banking business, of another corporation conducting a banking business. Falling between these poles have been transactions where a corporation conducting a banking business has acquired the whole or part of that business, or of the assets of that business, from another corporation conducting a banking business without an acquisition of equity in the latter.

The integration of savings and trading banks was facilitated by and effected pursuant to Commonwealth legislation styled the Bank Integration Act 1991. That legislation was cast in the form of umbrella legislation establishing a regime under which a number of banks specified in a Schedule could effect integration.

The mergers accompanying or succeeding corporate takeovers have also been facilitated by legislation enacted in various jurisdictions. That legislation has generally been specific to a particular transaction and has been enacted by State or Territory legislatures in those jurisdictions in which assets were located or depositors resided (eg Westpac and Bank of Melbourne (Challenge Bank) Act 1996 (Vic)). Seemingly in response to a number of commercial transactions which foreshadowed mergers, the New South Wales Parliament recently enacted the Bank Mergers Act 1996 (BMA) (assented to on 4 December 1996). The BMA takes the form of general umbrella legislation which contemplates that the specifics of particular mergers or integrations will be governed by special purpose regulations. It is understood that the adoption of similar umbrella legislation is under consideration by the governments of other jurisdictions since this would obviate the need for repeated special enactments.

One of the principal reasons, if not **the** principal reason, for the enactment of legislation to facilitate the merger of banks is to transfer the liabilities of one bank (typically the obligations owed to depositors or borrowers entitled to one or more advances of funds) to another bank. Subject to an important qualification, in the absence of legislation such a transfer of liabilities would require novation agreements between the transferor bank, the transferee bank and the creditors to whom the liabilities were owed. In a case where the creditors are numerous, it would be impracticable to secure the requisite novation agreements. The vesting of assets is also simplified where effected by statute although this would generally be achievable without reliance upon statute. It is for these reasons that the disposal of part of a banking business or of the assets of a banking business generally proceeds by way of private agreement without reliance upon statute. Such a case would generally involve only a transfer of assets and no novation of liabilities.

Principle of Universal Succession

The qualification to the proposition that, in the absence of legislation, a legal transfer of liabilities requires a novation agreement derives from the operation of the principle known as "legal succession" or "universal succession". This principle originally derived from Roman law and has been incorporated into English common law. The recognition of the principle and its operation have been discussed at length in the leading cases of *National Bank of Greece & Athens SA v Metliss*[6] and *Adams v National Bank of Greece SA*.[7] In essence the cases concerned the entitlement of the holders of bonds to sue upon a guarantee of the bonds governed by English law where the guarantor was a Greek bank which had under Greek law been dissolved and amalgamated with another Greek bank. According to the House of Lords the amalgamation process had involved the dissolution of the two banks involved in the process and the creation of a new entity being the universal successor to the former banks. The successor entity succeeded to all of the assets and the liabilities of the former banks. Accordingly, the successor entity was capable of being sued by bond holders in respect of the guarantee provided by former bank to which the successor entity had succeeded.

The principle applied by the English courts had formerly been recognised in relation to an heir who took up a succession on death. Such an heir was regarded as liable to the creditors of the deceased for the debts of the deceased. According to Lord Keith of Avonholm:

> "From this aspect he [the heir] represents the deceased. The persona of the deceased is regarded as being continued in the heir ... he is no more to be regarded as a new party introduced into a contract than is an executor or administrator of a dead man's estate in English law."[8]

A cynic might observe that the application of the principle was merely a judicial device to prevent the claims of bond holders against a Greek bank being defeated by the steps taken by the Greek government. Even if such a cynical view were to be entertained, that explanation does not negate or limit the scope of the principle upon which that outcome rested. That outcome flowed from the conclusion that the universal successor represented the legal persona of the former entity which should be regarded as being continued in the successor entity. On that basis the successor entity was both entitled to the assets of and subject to the liabilities of the former bank.

It is also noteworthy for present purposes that the dissolution of the former banks and their amalgamation into a successor entity occurred under Greek law. Since the banks had been created

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6 (1958) AC 509.

7 (1961) AC 255.

8 Metliss (1958) AC at p 530.

by Greek law the English courts recognised the dissolution and amalgamation as a matter of private international law. As Lord Denning noted in *Adams v National Bank of Greece SA*:[9]

> "If the Greek legislature chooses to dissolve or amalgamate its own creatures, the English courts cannot prevent it. They must recognise it as a fact. Just as English law must recognise a dissolution ... also it must recognise an amalgamation."

The principle of universal succession has received recognition in Australian courts.[10] The principle has also been recognised in the BMA. According to section 3(1) of the BMA the object of the Act is to facilitate the merger of two or more banks and to enable regulations to be made for that purpose. Section 3(2) effectively defines a "merger" to include any transaction by which a bank acquires another bank, either by the transfer of the whole or part of the undertaking of the other bank, or by becoming the "successor in law" of the other bank, or by other means. Furthermore, section 4(2)(b) provides that regulations made pursuant to the BMA may make provision for the succession of one bank as the successor in law of another bank and the effect of that succession, including the vesting of assets or liabilities. Section 5(3) of the BMA entitles a regulation to provide that a bank is the successor in law of another bank and is, for all purposes, a continuation of and at the same legal entity as the other bank. Section 7 of the BMA declares the intention of the New South Wales Parliament that a regulation relating to the merger of two or more banks should apply, as far as possible, to land or things situated outside New South Wales (whether in or outside Australia) and transactions and matters entered into or occurring outside New South Wales (whether in or outside Australia).

The provisions of the BMA in conjunction with the principle of private international law referred to above raise the prospect that a merger or integration of two banks incorporated in New South Wales could be legally effected by a regulation made under the BMA without the need for enabling legislation in any other Australian jurisdiction in which the banks concerned may have assets or liabilities. In other words, if Bank X (incorporated under the laws of New South Wales) were to become the successor in law to Bank Y (also incorporated under the laws of New South Wales) pursuant to a Regulation made under the BMA, the courts of all Australian jurisdictions would recognise the consequences of that process. Thus, Bank X could sue and be sued by a resident of another jurisdiction in respect of a debt or contract governed by the law of another Australian jurisdiction between the resident and Bank Y. This would be so notwithstanding that no enabling legislation had been enacted in that other jurisdiction.

Reserve Bank Policy

Apart from possible business efficiencies, the factor common to the integration of savings banks and trading banks and to mergers resulting from corporate acquisitions is the attitude of the Reserve Bank. For some years the Reserve Bank has pursued a policy of not permitting a corporate group to enjoy more than one banking licence. This policy was the driving force behind the enactment of the Bank Integration Act and the integration of savings banks with trading banks. It is the same policy which leads the Reserve Bank to require the effective relinquishment of the banking licence held by a bank taken over by another bank within a specified period of the takeover. The relinquishment of the banking licence by the company concerned necessarily requires that company to cease the conduct of such banking operations as may not lawfully be conducted without such a licence. Logically, those operations and the attendant assets and liabilities would be taken up by the company retaining a banking licence. It is in this sense that a merger occurs.

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9 (1961) AC 255 at pp 286.

10 See, for example, *L'Abbate v Collins & Davey Motors Pty Ltd* (1982) VR 28 at 32; *State Bank of New South Wales Ltd v Commissioner of Stamp Duties (Qld)* 93 ATC 5005; and *Re Sidex Australia Pty Ltd (Receiver & Manager Appointed)* (1995) 18 ACSR 436.

Stamp Duty

Insofar as the merger of banks involves the acquisition of assets or the creation or assumption of liabilities an issue arises as to the stamp duty consequences. Clearly, if there is an acquisition of property located in a particular jurisdiction effected by a written instrument, a liability to ad valorem conveyance duty would arise in that jurisdiction if the property were of a kind rendered dutiable in that jurisdiction. Depending upon the jurisdiction concerned an acquisition by written instrument of a business conducted in that jurisdiction would also attract a liability to ad valorem conveyance duty in that jurisdiction (eg Queensland, Tasmania and the ACT).

To the extent that existing contractual obligations were to be legally imposed upon a third party by the execution of a novation agreement, in certain jurisdictions that instrument may well attract a liability for ad valorem duty of the kind imposed upon securities such as mortgages or debentures if it "secures" (in the broad sense of that word) the obligation imposed upon that third party. In this regard an instrument may secure an obligation even if it merely creates or imposes the obligation without conferring any right of recourse to property or the benefit of a guarantee.[11] Whether this outcome would occur in a particular jurisdiction would depend upon whether the instrument of security (ie the novation agreement) would have a sufficient territorial connection with that jurisdiction and whether the stamp duties legislation of the jurisdiction would impose such a duty. The legislation in the ACT and the Northern Territory do not impose a liability for duty of such a kind. The legislation in Western Australia imposes a liability for duty upon an instrument of security of any kind.[12] In the remaining Australian jurisdictions, the legislation imposes duty upon instruments of security of limited kinds (eg mortgages; charges; debentures; bonds; covenants; security for recurrent payments).

The precise territorial connection with a particular jurisdiction which must be present before a liability to duty would arise in that jurisdiction differs from jurisdiction to jurisdiction. However, execution of the instrument of security in the jurisdiction concerned and the location of any encumbered property there would provide a sufficient connection in all relevant jurisdictions. With the notable exception of New South Wales, there would also be a sufficient connection with a jurisdiction if the instrument expressly provided for the obligation secured to be discharged in that jurisdiction; for any further financial accommodation to be provided in that jurisdiction; or for the agreement to be governed by the law of that jurisdiction.

It is possible that the transfer of assets and liabilities involved in a merger may be effected in whole or in part without the execution of a dutiable instrument. In the case where the vesting of assets and liabilities occurs pursuant to statute, there would generally not be a requirement for a dutiable instrument to be executed.[13] Furthermore, particularly in a case where one company disposes of banking assets to a related company, the arrangement may be effected by means of a written offer for sale accepted by conduct other than writing (a "claytons contract"). This appears to have been the case in the 1991 acquisition by Westpac of the consumer bank assets and liabilities of Chase AMP.[14] The absence of a dutiable instrument would deny any liability for duty of a kind imposed upon an instrument. However, it would not of itself displace the application of various duties imposed upon specified transactions regardless of the execution or non-execution of an instrument.

The stamp duties legislation of all Australian jurisdictions apart from Victoria, the ACT and Queensland contain substantially similar claytons contract provisions. In broad terms, those provisions require a dutiable statement to be made out where "a transaction" results in a change in

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11 For example, see the discussion in *Handevel Pty Ltd v Comptroller of Stamps (Vic)* 85 ATC 4706.

12 For example, see *National Mutual Life Nominees Ltd v Commissioner of State Taxation (WA)* 91 ATC 4309.

13 See, for example, *Westpac Banking Corporation v Commissioner of Stamp Duties (Qld)* 92 ATC 4571 at p 4579.

14 See the judgment of the Queensland Court of Appeal in *Commissioner of Stamp Duties (Qld) v Westpac Banking Corporation* 93 ATC 4335.

the beneficial ownership of a certain specified categories of property and the change is not evidenced by an instrument attracting a liability to specified ad valorem duty. The categories of dutiable property vary as between the jurisdictions but generally include interests in land and fixtures and a business or the goodwill of a business. The categories do not include receivables.

It is a precondition to the operation of the claytons contract provisions that the relevant change in ownership occurs as a result of a "transaction". A change in ownership occurring by virtue of the operation of a statute or regulation would not, it is submitted, have the requisite connection with a "transaction". The meaning of the word "transaction" received substantial judicial consideration in relation to Commonwealth Gift Duty.[15] The meaning would not extend to a vesting of property by operation of, or pursuant to, a statute or regulation.

The provisions in the Queensland legislation which could apply to changes in the ownership of property differ from the claytons contract model in that they do not predicate a "transaction". For example, the operation of section 54A of the Queensland legislation would be attracted to an acquisition of a business conducted in Queensland, or of sufficient of the assets of such a business to enable the same business to be conducted, irrespective of whether the acquisition was effected or evidenced by a written agreement. It is not a precondition that the acquisition result from a transaction. Nor would the operation of the provision be displaced merely because the acquisition (assuming there to be an acquisition) resulted from the operation of a statute. The consequence of the application of section 54A is that a statement must be filed with the Queensland Commissioner and ad valorem conveyance duty paid in respect of the acquisition. It is noteworthy that an acquisition of sufficient of the assets of a business to enable the acquirer to conduct the same business is deemed by section 54A(7) to be an acquisition of a business. It appears from the report of the *Westpac* case referred to above that one of the issues in dispute concerned whether the business assets acquired by Westpac from Chase AMP enabled Westpac to carry on the business previously conducted by Chase AMP. The resolution of the dispute between Westpac and the Queensland Commissioner awaits a hearing before the Queensland Court of Appeal.

It is clearly a precondition to the application of section 54A that there be an "acquisition". Where a merger of banks involves the operation of the principle of universal succession, there is an interesting issue as to whether the process by which the successor bank becomes entitled to the assets of and subject to the liabilities of the merged bank involves an acquisition of a business or business assets for the purposes of section 54A. Such an issue was considered by the Queensland Supreme Court in the case of *State Bank of New South Wales Ltd v Commissioner of Stamp Duties (Qld)*.[16]

That case concerned the operation of New South Wales legislation which constituted the State Bank of New South Wales Limited to be the successor to the entity known as the State Bank of New South Wales. The relevant Act provided that the relevant Minister might make a written order directing that the business undertaking of the State Bank be transferred to the State Bank of New South Wales Ltd and that, upon the commencement of the order, the assets and liabilities of the State Bank would vest in and become the assets and liabilities of the State Bank of New South Wales Ltd. An order was made by the Minister on 8 May 1990 having effect on and from 14 May 1990. According to that order the assets, rights and liabilities of the State Bank were to be transferred to the State Bank of New South Wales Ltd as the universal successor of the State Bank.

At the request of the Queensland Commissioner of Stamp Duties, a Form S(a) was lodged pursuant to section 54A of the Queensland Act on behalf of the State Bank of New South Wales Ltd. That form contained statements to the effect that on 14 May 1990 the State Bank of New South Wales Ltd had acquired or agreed to acquire an interest in a business conducted in New South Wales and elsewhere in Australia and overseas. There was an apportionment of the value of the assets in Queensland set out in the Form. An assessment of duty in respect of the Form S(a) was made on

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15 See, for example, *Grimwade v FCT* (1949) 78 CLR 199.

16 93 ATC 5005.

24 April 1991 and duty was paid on 7 May 1991. No objection to the assessment of duty under section 54A was lodged with the Commissioner.

Some time later an amendment was made to the State Bank legislation which inserted a new section 11A which provided: "On and from the dissolution of the State Bank, the corporation [ie the State Bank of New South Wales Ltd] is for all purposes a continuation of and the same legal entity as the State Bank."

Following that amendment solicitors for the State Bank of New South Wales Ltd requested the Queensland Commissioner to reconsider the earlier assessment and submitted that the assessment was erroneous in law having regard to certain matters. The Queensland Commissioner responded by rejecting the request for reconsideration and the submissions made.

The State Bank of New South Wales Ltd contended that the refusal of the Queensland Commissioner to reassess the duty was a decision of an administrative character for the purposes of, and reviewable under, the Judicial Review Act. The application for judicial review comprised the proceedings known as *State Bank of New South Wales Ltd v The Commissioner of Stamp Duties (Qld)*.[17]

The Queensland Supreme Court concluded that the decision of the Queensland Commissioner was reviewable and, relevantly for present purposes, proceeded to examine whether the Commissioner had acted under any mistake of fact in concluding that there had been an acquisition of property.[18] The conclusion of the court was that the Queensland Commissioner had not acted under mistake in reaching that conclusion. However, it is clear from the judgment that certain significant matters played an important part in producing that conclusion:

- The State Bank of New South Wales Ltd had lodged a Form S(a), which took the form of a statutory declaration and conceded that two separate entities had been involved in a transfer of assets and that there had been an acquisition of a business.

- The relevant New South Wales legislation and the Ministerial Order consistently referred to the State Bank of New South Wales Ltd acquiring the property of the State Bank by way of "transfer".

- The subsequent amending provision, section 11A, provided that the State Bank of New South Wales Ltd was for all purposes a continuation of and the same legal entity as the State Bank "upon dissolution" of the State Bank. Section 11A said nothing about the vesting of assets. Prior to the operation of section 11A **"upon the dissolution of"** State Bank, there were two parties to the transaction by which property vested in State Bank of New South Wales Ltd.

- State Bank of New South Wales Ltd had not lodged any objection to the assessment raised by the Queensland Commissioner on the basis of the Form S(a).

It may well be the case that a merger of banks pursuant to the BMA and relying upon the principle of universal succession would be distinguishable from the circumstances considered by the court in a number of material respects:

- The banks involved may well refrain from any concession that the process would involve a transfer of assets or an acquisition of a business or business assets.

  Such a concession was made by State Bank of New South Wales Ltd through the lodgement of a Form S(a) and through a failure to object to the assessment raised by the Commissioner.

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17 93 ATC 5005.

18 See p 5013.

- The language used in the BMA and a Regulation pursuant to the BMA may well differ from that considered by the court in that it would recognise from the outset that a bank would be the successor in law of another bank and that the successor becomes the owner of property through the operation of that principle. Unlike the position considered by the court where section 11A was subsequently enacted and operated "on and from the dissolution of the State Bank", the relevant provisions relating to the universal succession under the BMA may well apply and be operative at the time the ownership of property is determined (ie "on the succession day"). The provisions in the Regulation concerning universal succession would form an integrated part of the provisions dealing with the ownership of property. In other words it would not be open to assert that the principle of universal succession operated at a point after ownership of property has altered which is the clear finding of the Supreme Court in the *State Bank of New South Wales* case.

Where the vesting of assets and liabilities in a jurisdiction is effected by or pursuant to a statute enacted by the Parliament of that jurisdiction, the technical analysis of whether a liability for stamp duty arises in that jurisdiction may often be academic. In such a case it is open to the government of the jurisdiction to make it a precondition to the introduction and sponsoring of legislation that a sum be paid on account of or in lieu of the stamp duty otherwise payable. It is submitted that, in considering any such exaction, the government concerned should take into account the extent to which the merger and the vesting of assets and liabilities is forced upon the parties by the dictates of the Reserve Bank presumably acting in the public interest. Furthermore, the operation of the principle of universal succession and its recognition by courts in jurisdictions throughout Australia may well reduce the need for enabling legislation in numerous jurisdictions and consequently reduce the prospect of exactions by State or Territory Governments. Thus, if a merger of banks incorporated under the laws of New South Wales were to be effected pursuant to the BMA and involved one bank becoming the successor in law of the other, the merger should be recognised in all other Australian jurisdictions. This would be so notwithstanding the absence of enabling legislation in those other jurisdictions.