STAMP DUTY

Multi-Jurisdictional Security – Jurisdictional Disharmony

Stamp Duty Rulings

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INTRODUCTION

The focus of this paper is to be jurisdictional disharmony in relation to the imposition of stamp duty upon mortgages or charges encumbering property in more than one jurisdiction and the associated issue of so-called "rulings" by Australian stamp duty authorities. The link between these seemingly disparate issues is provided by the stamp duties Rewrite process. The impetus for this consideration is provided by the impending commencement of the Rewrite (incorporated in the Duties Act 1997) in New South Wales on 1 July 1998 and by the astonishing release in May 1998 of a paper entitled "Multi-Jurisdictional Mortgages" sponsored by the stamp duty authorities in Queensland, South Australia, Tasmania, Victoria and Western Australia (Paper).

Multi-Jurisdictional Securities Paper

The stated purpose of the Paper "is to seek comments from industry on the best method of handling mortgages with security in more than one jurisdiction."

The Paper propounds a model for dealing with that issue which differs in significant respects from that adopted in the NSW Duties Act. The stated justification for the different model is that the sponsoring authorities consider that "sufficient anomalies and technical flaws had been revealed in the approach reflected in the NSW Duties Act to justify considering alternatives." The stated principles underlying the promotion of the alternative model include:

- reduced compliance costs;
- resolving valuation issues;
- providing pro rata distribution of revenue;
- accommodating the mortgage package concept;
- addressing the non-imposition of duty on mortgages in jurisdictions (eg Northern Territory and Australian Capital Territory);

- providing for the future stamping of existing mortgages; and
- simplifying administration.

The Critique of the Paper set out below evaluates the extent (if any) to which the alternative model promoted in the Paper better achieves those objectives than the model incorporated in the NSW Duties Act.

Consultation by the stamp duty authorities with industry and the pursuit of the stated objectives are in themselves commendable. What renders them astonishing is the timing.

Rewrite History

The Rewrite project involving the stamp duty authorities in New South Wales, Victoria, South Australia, Tasmania and the Australian Capital Territory was launched in 1994 and the first Exposure Draft legislation was released for public comment in July 1995. The Taxation Institute of Australia (TIA), whose call for micro-economic reform had sparked the process, was responsible for co-ordinating the responses of interested parties. Apart from the responses channelled through the TIA, there were a number of submissions made directly by industry bodies to the participating stamp duty authorities. The response from interested parties was substantial.

As part of the process of reviewing the submissions made representatives of the stamp duty authorities undertook detailed discussions with a number of the parties who had lodged submissions. Furthermore, the Exposure Draft legislation and possible modifications to that legislation were examined at a number of seminars attended by industry participants, stamp duty practitioners and stamp duty authorities. One indicator of the dimensions and difficulty of the consultative process was provided by the failure of the participating stamp duty authorities to release a further draft of the legislation within the anticipated time frame.

Another factor contributing to the extended delay in the release of the next draft was the belated involvement in the process of the stamp duty authorities of Queensland and Western Australia. According to statements at the time those offices had not been given authority by the governments to which they were responsible to participate in the Rewrite process as a whole but only in relation to the provisions imposing duty upon acquisitions or conveyances of dutiable property. To an observer the spectacle which unfolded following the belated involvement of Queensland and Western Australia was akin to that provided by synchronised swimming. A seemingly co-ordinated, calm and harmonious appearance above the surface belied furious and agitated threshing in all directions below the surface.

The sub-surface activities have not been fully illuminated by any statement from the participating authorities. However, from the perspective of a spectator sitting above the surface but reasonably close to the side of the pool, the position appears to be as follows. Representatives of the Queensland stamp duty authority advocated an approach to the conveyance/acquisition provisions which ran counter to the direction in which the Rewrite participants had been heading in response to the substantial submissions made by interested parties in relation to the first Exposure Draft. A divergence of opinion developed as to whether the approach advocated by Queensland should be preferred over an approach advocated by New South Wales.

At a major Stamp Duty Symposium held in November 1996 representatives of the New South Wales stamp duty authority described in some detail the features of the transfer model favoured by it. Those representatives justified their approach on the basis that the model was relatively simple; would modernise the existing provisions in the NSW legislation; would, when measured against the existing NSW provisions, collect appropriate revenue without involving a major expansion of the revenue base; and, in view of the substantial submissions made by interested parties to the first Exposure Draft, would be likely to be acceptable to industry. A representative of the Queensland stamp duty authority described an alternative acquisitions approach which was apparently supported by most of the other Rewrite participants and by Western Australia. The Queensland representative indicated that drafting instructions for the preparation of provisions reflecting the Queensland preferred approach were in the course of preparation and draft legislation would be available for consideration without undue delay. The question of delay and the potential for further delay was said to be of concern to the New South Wales stamp duty authority since the first Exposure Draft had been released some sixteen months previously and the time for the lodgement of public submissions had closed some fourteen months previously. It was clear that the New South Wales stamp duty authority was concerned that protracted delay and a substantial departure in approach coming after intensive consultation and apparently rejecting the views expressed could undermine the credibility of the entire Rewrite process.

Contrary to expectations no draft legislation reflecting the Queensland preferred approach was released for public consideration. In fact it is understood that the drafting of the provisions was never completed. The divergence of approach and controversy seemingly centred solely upon the transfer/acquisition provisions. The rewriting of the many other provisions to be affected by the Rewrite remained stalled whilst the debate raged between the jurisdictions over the transfer/acquisition provisions. This was so notwithstanding that there did not appear to be major divergences in approach between the participating jurisdictions in relation to those other areas and that the views of interested parties had been obtained and analysed some considerable time previously. For present purposes it is worth noting that the provisions relating to the imposition of duty upon mortgages, including mortgages affecting property in more than one jurisdiction, had received extensive analysis by industry bodies and had been the subject of comprehensive submissions. The effective time for consideration and consultation was substantially longer in relation to the provisions affecting mortgages and charges than the other areas covered by the Rewrite. This was attributable to the enactment in New South Wales some years prior to the launch of the Rewrite of model loan security duty provisions which were never proclaimed to commence. Although those provisions never became operative they were scrutinised closely and attracted considerable commentary.

Finally, in September 1997 the NSW stamp duty authorities released a further Exposure Draft legislation dealing with all subject matter encompassed by the Rewrite. At the time of release of the second draft the NSW authorities expressed a hope that the legislation would commence with effect from 1 January 1998 and that the other Rewrite participants would shortly release their legislation for comment. Notwithstanding the relatively brief period available for public comment, the second NSW draft attracted substantial comment. In response to those submissions some significant amendments were made to the second Exposure Draft as reflected in the NSW Duties Bill 1997 which was introduced into the NSW Parliament in November 1997.

It is relevant to note that one of the changes incorporated in the Duties Bill related to a mortgage or charge encumbering property located in New South Wales and one or more other jurisdictions. Under the provisions in the Duties Bill the NSW duty payable upon the mortgage was to be determined on a pro rata basis having regard to the value of the encumbered property located in the various jurisdictions as at the time of execution of the security concerned. This contrasted with the position adopted in the first and second Exposure Drafts which would have required the value of the property located in the various jurisdictions to be established at the time of each advance in the case of mortgages or charges securing a sum which was not limited or certain. It is understood that this change was made in response to strong submissions made by or on behalf of industry.

Although some concerns about the Duties Bill were voiced in the NSW Upper House, the Bill was enacted on 15 December 1997 without alteration. In the meantime, it had become apparent that the other Rewrite jurisdictions would not be in a position to enact Rewrite legislation with effect from 1 January 1998. However, there was an expectation that this would be possible by 1 July 1998. In consequence, the NSW government agreed that the NSW Duties Act should not commence operation until 1 July 1998 in the hope of achieving as much uniformity and consistency of approach as possible across the maximum number of jurisdictions.

To date the other Rewrite jurisdictions have not released comprehensive Rewrite legislation for public consideration let alone introduced such legislation into the legislatures of the jurisdictions concerned. Thus, it is clear that no jurisdiction, apart from New South Wales, will have Rewrite legislation operating on 1 July 1998. Furthermore, it is unclear at what time such legislation would become operative in the other jurisdictions (if at all). The release of the Paper on "Multi-Jurisdictional Mortgages" indicates that there are some fundamental issues which are still to be resolved notwithstanding the length and thoroughness of the Rewrite process and the extensive consultation with industry (including the finance industry) which occurred throughout the process. It is in this respect that the paper is astonishing and once again this state of affairs appears to have been attributable to the regrettable failure of the stamp duty authorities in Queensland and Western Australia to have been involved in the Rewrite process from the outset and their belated involvement in selective areas.

Uniformity/Disharmony?

Although its timing is astonishing the Paper provides a wonderful opportunity to obtain uniformity in approach for both Revenue and taxpayers alike which had not appeared possible prior to the publication of the Paper. Even if all of the Rewrite participants (which impose a liability for duty upon mortgages or charges) had adopted a uniform approach, there remained the possibility that Queensland or Western Australia or both would have retained or adopted a position which differed in material respects. As a sponsor of the Paper, each of the stamp duty authorities in Western Australia and Queensland have put on record their willingness to participate in a process having as one of its objectives the ultimate adoption of "the most appropriate and uniform scheme." According to the Paper New South Wales has indicated a willingness to take into account industry responses to the proposals advanced in the Paper with a view to achieving the most appropriate and uniform scheme. It is to be hoped that the sponsors of the Paper will prove equally accommodating if, in responding to the Paper's proposals, industry indicates a clear preference for the NSW model.

From the time of the release of the first Exposure Draft of the Rewrite it was apparent that there would be a lack of harmonisation and a lack of consistency if the approach to the mortgage duty provisions in the first Exposure Draft were to be adopted by the Rewrite participants but not by Queensland and Western Australia. This lack of harmonisation and consistency would have the potential to create significant practical problems in some areas and also the potential that securities would attract ad valorem duty calculated by reference to more than 100% of the sum secured after taking into account the duty payable in each relevant Australian jurisdiction imposing duty upon securities. Upon a number of occasions representatives of the Rewrite participants (which did not include Queensland and Western Australia) expressed the view that, if a uniform approach were to be adopted by the Rewrite participants, there was some prospect that Queensland and Western Australia may adopt similar provisions in the interests of uniformity.

That remained the public stance of the NSW stamp duty authorities when the Duties Act was enacted and when there remained an expectation that, in relation to mortgage duty, the same approach would be adopted by the other Rewrite participants at least. The revelation that the Rewrite participants imposing mortgage duty (apart from New South Wales) have reconsidered the approach adopted by New South Wales and taken consistently throughout the Rewrite process has clearly magnified the potential for practical difficulties and the payment of duty in all relevant jurisdictions by reference to an amount greater than 100% of the sum secured. Even prior to the release of the Paper the NSW stamp duty authority had recognised the potential for significant anomalies and inequities pending the enactment of the anticipated Rewrite legislation in the other jurisdictions. Accordingly, the NSW stamp duty authorities had asked interested parties to identify the potential problems so that consideration could be given to means to eliminate those problems. The introduction into the NSW legislature of the State Revenue Legislation Amendment Bill 1998 makes it plain that such problems are not to be accommodated by a suspension of the commencement of the mortgage duty provisions in the Duties Act 1997.

Rulings

Doubtless the response of the NSW stamp duty authorities to the problems arising from the lack of consistency in legislative approach to the imposition of duty upon mortgages will result in revenue rulings notifying taxpayers as to the means by which such problems may be resolved. There has been no announcement yet by the NSW stamp duty authority as to the approach which would be taken to rectify problems. One possibility is that mortgages would be stamped in accordance with the Duties Act but an ex gratia refund of duty may be made. Another possibility is that the Duties Act would be administered on a concessional basis for a period of time. The approach adopted has particular significance for the finance industry given the extent to which a security which has not been properly stamped at law may be unenforceable.

Apart from the particular considerations raised by the need for rulings in connection with the commencement of the Rewrite regime in New South Wales, a recent judgment in the Federal Court handed down on 31 March 1998 in the case of *Bellinz Pty Ltd v The Commissioner of Taxation* (No VG76 of 1998) focuses attention upon a fundamental danger of reliance upon administrative rulings which are at odds with a technical construction of the revenue legislation.

CRITIQUE OF PAPER

Stated Justification for Alternative Model

At point 6 of the Paper the observation is made that the provisions in the NSW Duties Act relating to multi-jurisdictional mortgages reflected a number of "unanimous decisions" by the Rewrite jurisdictions including:

- the stamping of multi-jurisdictional mortgages on a proportionate basis without recourse to then current crediting provisions;
- exclusion of the value of assets in non-taxing jurisdictions (eg the Northern Territory and Australian Capital Territory) from the calculation of the asset mix;
- the adoption of the mortgage package concept; and
- apportionment of duty according to the asset location mix at the date of **first execution** rather than the time of each advance.

In relation to the last point it is worth noting that the mortgage provisions contained in the first Exposure Draft of the Rewrite (sponsored by all of the Rewrite jurisdictions) and the second Exposure Draft released by New South Wales proceeded on the basis of an apportionment of duty according to the asset mix at the date of each advance. By the time of the introduction of the Duties Bill 1997 into the NSW legislature the relevant provision recognised apportionment of duty according to asset mix at the time of first execution. It is understood from discussions with representatives of the NSW stamp duty authority that this change reflected submissions made by and on behalf of industry that the time of advance approach created substantial problems which would not arise under a time of first execution approach.

At point 6.1 the Paper attributes the adoption of the time of execution approach to two perceived advantages comprising simplicity and the lowest compliance costs for the taxpaying community. At point 6.2 of the Paper it is said that subsequent consideration of the adoption of that approach by revenue offices in other jurisdictions resulted in a recognition that this approach and certain other aspects of the approach adopted in the NSW Duties Act (and had unanimously been endorsed by the various Rewrite jurisdictions) could give rise to a number of anomalies and disadvantages for taxpayers and Revenue alike. Perhaps generously, it is recognised that such anomalies may not have been considered by "respondents to the Duties Act" presumably including the NSW stamp duty authority and the interested parties (including the banking and finance industry) which made submissions in relation to the Duties Act.

The stated disadvantages attaching to the approach adopted in the NSW Duties Act are as follows:

- the perception of simplicity has been put into question by "some large lenders in a number of jurisdictions" in view of the administrative burden of record keeping and recovering documents relating to the date of first execution;

- to the extent that the value of encumbered property in the various jurisdictions alters over time, the distribution of revenue to jurisdictions would cease to reflect "the true position" in relation to the asset mix;
- the possibility of revenue leakage may require anti-avoidance provisions;
- at the time of a further advance new mortgages or charges might be taken which would not comprise part of a mortgage package and in such a case the distribution of duty payable would be affected by the order in which the mortgages were stamped in the various jurisdictions.

Each of the four stated disadvantages is then examined in greater detail. It is noteworthy that, of the four alleged disadvantages, three appear to concern principally the revenue authorities. The fourth of the stated disadvantages, which appears of principal concern to taxpayers, concerns an issue of record keeping. As submitted below, this problem (if it exists) is readily resolved. Thus, although the principal thrust of the Paper is that there are problems associated with the NSW Duties Act for Revenue and taxpayers alike, the principal concerns analysed in the Paper are those affecting the Revenue rather than the taxpaying community. This becomes clearer upon consideration of the more detailed arguments presented in the Paper in relation to each of the four disadvantages.

Whilst the Paper presents the disadvantages attaching to the NSW Duties Act in a self-contained segment of the Paper, the reality is that the disadvantages are not to be considered in isolation. Rather, the perceived disadvantages attaching to the NSW Duties Act should be measured against the advantages/disadvantages of the alternative promoted in the Paper. Thus, any record-keeping problems attaching to a time of execution approach (if they exist) should not be seen as a compelling reason to abandon the time of execution approach if the alternative time of advance approach gives rise to greater problems in record-keeping or otherwise.

The approach taken in this Critique is to consider the advantages or disadvantages of the model provided by the NSW Duties Act, not in isolation, but relative to the advantages/disadvantages of the approach preferred by the Paper.

Record-Keeping – Valuation Proposals

In essence one problem with the NSW model is said to be that several "larger lenders" have indicated that it may be difficult to establish the value of the encumbered assets in the various jurisdictions at the time of execution since the taxpayer may not have retained records for the relevant period or, where the borrower is under different ownership, the taxpayer may not have access to those records. It is also said that the experience of the Victorian Stamp Duties Office is that taxpayers complain that it incurs greater costs to obtain the value of the encumbered assets at the time of execution than to obtain the same information in relation to current asset values at the time of a particular advance.

The alternative promoted in the Paper would require additional advances, increasing indebtedness above that amount in relation to which duty had been paid, to be stamped as if the securities for the advance were new securities executed on the date of advance. The duty payable in respect of such an advance upon the pro rata basis in the various jurisdictions would be determined by reference to the value of the assets located in the various jurisdictions as at the time of the advance. The Paper proposes that a valuation of assets as at the time of the advance need not necessarily be undertaken solely for the purposes of determining the stamp duty. Accordingly, the Paper canvasses a number of possible alternative "referable points" which might provide the basis for the apportionment as alternatives to a valuation obtained by the borrower. The possibilities include: a statement by the lender; an ASC return; the most recent balance sheet produced by the borrower which would either be audited or certified as accurate; insurance risk or any other method approved by all stamp duty authorities. In any given situation the "referable point" to be adopted for the purposes of apportioning stamp duty would be that which provides the most recent information as at the time of the advance concerned.

Submission

Given the submissions made to the NSW stamp duty authority which led to the belated adoption in that jurisdiction of the time of execution approach, it would seem that not all large lenders consider that record-keeping would be a significant problem.

As discussed in more detail below, the stamp duties legislation in the various jurisdictions has in the past not expressly and directly addressed the question as to when the value of assets required determination in relation to securities securing an uncertain and unlimited sum. There has been no Australian authority directly in point but the decision of the Victorian Full Court in the case of *Coles Myer Ltd v Comptroller of Stamps (Vic)* (87 ATC 4498) provides strong support for the time of execution approach currently adopted by the stamp duty authorities in New South Wales and Victoria.

Furthermore, the Irish case of *O'Sullivan v Loughnan* ((1927) IR 493) provides considerable persuasive authority for the proposition that a security, which had no relevant nexus with a jurisdiction at the time of its execution, would not be liable to duty in that jurisdiction at the time of a subsequent advance. This would be so notwithstanding that the security affects property in the jurisdiction concerned as at the time of the subsequent advance (eg as a result of an acquisition of property in that jurisdiction). Thus, according to this case, if a mortgage affected property in New South Wales and Western Australia at the time of execution it would not be liable to duty in Queensland at the time of a subsequent advance even if property in Queensland were affected by the mortgage as at the time of the subsequent advance. *O'Sullivan v Loughnan* was referred to by the Queensland Court of Appeal in *Citisecurities Ltd v Commissioner of Stamp Duties (Qld)* (95 ATC 4471 at 4473). What is relevant for present purposes and what was relevant for the Queensland Court of Appeal is that the Irish stamp duty legislation under consideration in the *O'Sullivan* case was materially identical with the current Queensland provisions for the upstamping of securities which secure an uncertain and unlimited sum.

It may be the case that in practice difficulties could have been experienced in retaining or obtaining access to the value of assets at the time of first execution under a stamp duty regime in different jurisdictions where the need to preserve that information is not clearly established and where there is inconsistency between the jurisdictions. If the stamp duties legislation in all jurisdictions were expressly to provide for the determination of the pro rata duty by reference to the value of assets at the time of execution, greater emphasis may well be placed by the parties upon preserving or obtaining access to that information. In any event it is submitted that the problem is readily overcome by a simple practical expedient.

It is submitted that it would be possible for the cover page of every mortgage to have stamped upon it or printed upon it a small panel showing as at the time of first execution of the mortgage the value of encumbered assets in existence in the various jurisdictions. This should preserve for posterity the record of the value of the assets to be used at the time of subsequent advances. In the unlikely event that both the mortgagor and mortgagee were to lose their executed counterpart of the mortgage, it would be possible to obtain the information by searching the mortgage at the relevant Titles Office if the mortgage had been registered. It would also be possible for similar information to be recorded on the face of any collateral mortgage securing the same moneys. This would address the problem arising in the event of a discharge of one or more securities prior to repayment of the whole of the moneys secured.

In presenting the disadvantage of the NSW model, the Paper suggests that the choice is between determining the value of the assets in the various jurisdictions by reference to an historical factor (ie the position as at the time of first execution of the mortgage) on the one hand, and determining by reference to the appropriate current factor (of the kind canvassed in the Paper) the basis for pro rata stamping at the time of a particular advance. However, it is submitted that this is not the appropriate comparison as the following example illustrates.

Assume the following:

- The customer of a bank has a revolving credit facility or come and go facility which involves repeated advances which may from time to time increase the level of indebtedness above that amount in relation to which duty had previously been paid.

- Repayment of the facility is secured by a mortgage over property in a number of Australian jurisdictions including Queensland.

- The value and location of the mortgaged property varies from time to time which may or may not coincide with advances under the facility.

- There is a default under the facility and the bank seeks to enforce its mortgage.

- Between the time of the last advance which increased the level of indebtedness above that amount in relation to which duty had been paid and the time of default, the value of the mortgaged property located in Queensland increased substantially as a result of the sale of assets in another jurisdiction and the purchase of assets in Queensland.

- The mortgage is stamped at the time of each advance which increases the indebtedness above the amount in respect of which duty has been paid and, as proposed in the Paper, the proportionate amount payable in each jurisdiction in which mortgaged property is located is determined by reference to the appropriate factors at the time of each such advance.

- The bank seeks to enforce its security in Queensland and the amount to be recovered through that enforcement substantially exceeds the value of Queensland property by reference to which duty had previously been paid in Queensland. This situation arises as a result of the increase in the value of the Queensland mortgaged property between the time of the last stampable advance and the time of default.

- The mortgagor or a liquidator of the mortgagor seeks to resist the bank's reliance upon the security by reference to all available arguments including an alleged inadequacy in the stamping of the mortgage in Queensland.

In order to establish that the mortgage upon which the bank is relying had been properly stamped in Queensland and, hence, was fully enforceable in Queensland, the bank would need to demonstrate the proportionate values (or other appropriate factor relied upon) not only in relation to the most recent stampable advance but also in relation to every prior advance which attracted a liability to stamp duty. If record-keeping is a problem for the model adopted by the NSW Duties Act, that problem would be compounded many times over by the model proposed by the Paper. Furthermore, it would not be possible to overcome that problem as readily as in the case of the first execution approach (see above).

Experience indicates that the problems caused by the need to revisit the issue of the location and value of assets in relation to each and every stampable past advance under the time of advance approach also confronts mortgagors even where there is no default by the mortgagor. From time to time it becomes apparent that a particular multi-jurisdictional security for an unlimited and uncertain sum has not been properly stamped. This may be discovered by the mortgagor itself, often as a result of a change of responsible personnel, or by external parties in the course of due diligence or compliance scrutiny. The difficulties associated with rectifying the erroneous stamping under a time of advance approach are generally enormous. It is usually extremely difficult for the mortgagor to retrieve information concerning the location and value of the encumbered assets at the time of each stampable advance. It is then necessary to undertake lengthy and difficult negotiations with the stamp duty authorities in the jurisdictions concerned as to the basis upon which the security is to be stamped in relation to past advances where precise information concerning the location and value of assets cannot be retrieved.

A time of execution approach admittedly requires information to be retrieved concerning the location and value of assets at the time of execution of the security. However, the scale of the difficulties is likely to be much smaller than those under a time of advance approach.

Understandably, the Paper which is the work of stamp duty authorities focuses upon the issue which is of prime concern to such authorities; viz that appropriate duty is paid at the time of advances and the amount of duty payable at that time may be quantified. Presumably it is for this reason that the Paper presents the comparison between the New South Wales model and the model advanced by the Paper as a choice between a model which requires the parties to look backwards (ie to the time of first execution) and a model which requires the parties to deal only with the current situation (ie at the time of an advance requiring stamping). However, the paramount importance to banks of ensuring that its security is enforceable at the time of default (which is after all the only reason for taking security) means that the comparison constructed by the Paper is not soundly based. The importance to a mortgagee of establishing enforceability in the event of a challenge at the time of default makes it inescapable that the model preferred by the Paper would also involve looking back and, in all likelihood, looking back to numerous points of time rather than a single point of time.

Logically the suggested concession concerning the means for establishing value should not be peculiar to the time of advance model. Although the time of execution model requires the apportionment to be undertaken only once, it would still be advantageous to have flexibility as to the means for establishing value at that one time.

Whether in relation to a time of advance model or a time of execution model, the proposed means for establishing value should have legislative backing and not depend upon an administrative ruling or practice. As previously noted, it is important for a mortgagee to be able to establish that a mortgage has been stamped as required by law if its enforceability is challenged upon default. Whilst a stamp duty authority may in practice consider that the various possibilities discussed in the Paper provide evidence of value, a court may well think otherwise in the absence of a clear statutory basis.

Finally, the proposals relating to valuation do not address the other problem inherent in the Paper's model; viz determining the location of encumbered assets. This may be difficult where the assets comprise intangible assets or where the assets are highly mobile or where the assets are turned over rapidly. At point 9.3.2 the Paper recognises the need for some agreement to be reached on the apportionment of intangible assets as between the jurisdictions but that will by no means overcome many of the practical problems.

Revenue Distribution

The need to make a choice between a time of execution approach or a time of advance approach arises from the stark reality that the property encumbered by a mortgage or charge may change in location and relative value over time. There is nothing surprising in this. That reality must have been apparent to the Rewrite participants at the time of the unanimous adoption by the Rewrite participants of the first execution approach (to which the Paper refers). Seemingly with the benefit of further reflection the Rewrite participants (apart from NSW) now regard the outcome produced by that reality as "inequitable"; "commercially unrealistic" and "far removed from the reality of how the principle should operate." A clue to the reason for this change of heart on the part of the Rewrite participants is provided by the following paragraph advanced in the Paper as an example of the inequity of the time of execution approach (point 6.2.2):

> "It would not be unreasonable to assume that most venture capital would be raised by large corporations situated in NSW and Vic, initially upon assets located in those States. This money may be used to fund major infrastructure and mining projects in other States of Australia, *particularly in Qld and WA* where growth in these projects is being experienced. At some point in time in the future, when these projects become viable, assets from these projects may in turn be offered to secure further advances."

On the basis of the time of execution approach, in the example given duty would continue at all times to be paid only in NSW and Victoria.

In addition the Paper notes that there is no "realistic data" to support any proposition that revenue would even out between the jurisdictions over time if the first execution approach were to be adopted.

Submission

A number of points may be made in response:

- Whilst there may not be objective data to support the proposition that revenue would even out between the jurisdictions over time, there is equally no data to support the proposition that revenue would not even out between the jurisdictions over time. The example from the Paper quoted above is based upon an assumption which is said by the Paper to be "not unreasonable". Experience suggests that the assumption made and the example provided are not generally valid. Experience suggests that the majority of infrastructure and mining projects are financed upon a basis which is legally or effectively limited recourse by a special purpose vehicle providing the security over the assets of the project. During the construction phase there may be additional support provided by equity contributions or guarantees from related companies secured by mortgages over assets located where fate dictates. Experience does not support the proposition that the securities for such projects are concentrated in New South Wales or Victoria.

- It is important to note that the model advanced by the Paper relates to securities which do not secure a certain or limited sum (eg an all-moneys mortgage or charge). The Paper recognises that a mortgage or charge which secures a limited or certain sum attracts a liability to duty at the time of execution only. Accordingly, the duty payable upon a pro rata basis in the various jurisdictions in respect of a security for a certain or limited sum would be determined by the value and location of assets at the time of first execution only.

  In section 10 the Paper addresses the case where a security is subject to "an upper prospective or capping limit" which may be included for corporate or other reasons not related to a definition of the amount available for advance. The Paper proposes that where prospective limits are clearly identified as such in the mortgage or otherwise material is furnished at the time of stamping to demonstrate that the limit is included for "purposes other than to describe the actual sum intended to be advanced", duty would not be assessed by reference to that limit. In such a case the mortgage would be stamped on the same basis as an unlimited mortgage. This proposal reflects the position taken in practice and recognised in rulings in various jurisdictions and should be adopted irrespective of whether a time of execution or time of advance approach is taken. Except in the situation described, the Paper recognises that stamping of a security securing a limited or certain sum would be stamped only at the time of execution and only by reference to the asset mix at that time.

  The fact that a security secures a certain or limited sum does not preclude changes in the location and relative value of assets between the time at which the mortgage is first executed and the time at which it is discharged. Such a security may well remain current for an extended period of time covering many years. Furthermore, in the case of such a security, the certain or limited sum may not be drawn down at the outset but may be drawn down progressively and the progressive draw downs of the certain or limited sum could occur in conjunction with or following a change in the location or relative value of assets. This outcome is not rejected in the Paper as "inequitable" or "commercially unrealistic" where the security secures a certain or limited sum even though the outcome is effectively identical to that arising in the case of a security which does not secure a certain or limited sum.

- In the writer's experience the practical difficulties, cost and inconvenience associated with the need to up-stamp securities in multiple jurisdictions has encouraged mortgagors and mortgagees to include a limit in the security. The result is that the security need only be stamped once and by reference to factors established at the outset. The benefits attaching to the simplicity of this outcome are considered to outweigh the disadvantage that duty is paid by reference to the limit at the outset even though an amount equal to the limit may not be fully drawn for some considerable period after execution or at all. The tendency to adopt such an approach and to include a limit in a security is likely to increase as financiers increasingly rely upon computer systems to manage a portfolio of mortgages. It is not necessary to be a computer programmer to appreciate that it is immeasurably easier to develop a computer system which needs to accommodate a once only stamping than to accommodate up-stamping in a number of jurisdictions where the proportionate amount of duty payable in the various jurisdictions cannot be calculated in advance.

The first execution approach taken in the NSW Duties Act does not remove the need to up-stamp a security which secures neither a certain nor a limited sum. However, the jurisdictions in which the securities would require to be stamped and the ratio in which duty would be payable in those identified jurisdictions would be established at the outset. From an administrative and computer programming viewpoint it is far easier to accommodate those requirements than the requirements imposed by the point of advance approach. The proposals in the Paper previously discussed which may avoid the need to obtain formal valuations of property in the various jurisdictions at the time of advance would eliminate one of the problems attaching to the time of advance approach. However, the administration and management of the mortgage remains significantly more complex from the viewpoint of the financier where it is not possible to predict in advance in which jurisdictions duty would need to be paid at the time of subsequent advances nor the quantum of the duty payable in the various jurisdictions. Furthermore, under the model proposed in the Paper it would also be necessary to determine the location of the encumbered assets at the time of each advance requiring upstamping. This is often a problem where the assets concerned are mobile or are stock in trade which turn over rapidly.

- The Paper recognises that the time of execution approach was justified on the grounds of simplicity and the proposition that revenue would even out between the jurisdictions over time. Whilst the Paper decries the second justification on the basis that there is no objective data, the Paper does not detract from the first justification; ie simplicity. The virtue of simplicity should not be under rated.

  A model which prefers simplicity over complexity confers a number of substantial advantages. It reduces the cost to the community of borrowers and lenders of complying with the legislation. As previously noted, even in those jurisdictions where the party liable for the duty is only the mortgagor, the mortgagee nonetheless has a substantial interest in ensuring that the securities are properly stamped. A company carrying on the business of a bank or financier has a keen interest in simplicity since it would generally have a large number of securities to manage. As the size of the portfolio increases so does the importance of simplicity. Even though the mortgagor (by contrast with the mortgagee) may only have a single financing to manage at any given time, the direct costs of stamping are passed on to the mortgagor by the mortgagee and so are the indirect costs through the interest rate and various fees charged to the mortgagor. The more complex the system, the higher those costs will be. The simpler the system the less likelihood there is of fines and penalties being incurred for late or incorrect stamping. Experience suggests that the late stamping and incorrect stamping of securities has been and remains a problem. The simpler the system, the less likely it is that a financier's securities could validly be challenged at the time of default on the grounds of incorrect stamping.

  The time of execution approach adopted by NSW is clearly more simple than the approach advocated in the Paper. If this is not already apparent, clear evidence is provided by the range of additional measures which the time of advance model introduces in order to address the complexities attaching to the time of advance model. As discussed later, these features of the model preferred by the Paper are said to be "advantages" of that model. It is submitted that this is a misleading description since the need for those features only arises if the time of advance model is adopted and they are unnecessary if the time of execution model is adopted. Rather than being described as being "advantages" of the time of advance model, they would more accurately be described as "palliative measures".

Changes to Property Mix after First Advance

The Paper (at point 6.2.3) asserts that "uniform adoption of first execution regime produces anomalies." The Paper proceeds to provide two Scenarios to illustrate the anomalies.

Scenario No 1

The first Scenario sets out to illustrate two anomalies. The first anomaly is that which has already been discussed at length; viz that under the time of execution approach the jurisdictions in which duty would be payable in the event of a need to upstamp are determined at the time of first execution. The representation of this outcome as an "anomaly" clearly proceeds on the basis that the consequences would not even out over time amongst the jurisdictions. As previously discussed, there is no objective evidence one way or the other in relation to that proposition and the assumption that was made in the Paper to suggest that it would not even out is not valid. The outcome illustrated is clearly a consequence of the time of execution approach but it begs the very question under consideration to describe it as an "anomaly".

The second "anomaly" supposedly illustrated by the first Scenario addresses the case where a security encumbering property in NSW and Victoria is executed and subsequently specific securities are taken over property in Queensland and in Western Australia prior to a subsequent advance. Since the collateral securities would not form part of the package of securities (presumably because the specific mortgages over property in Queensland and WA were executed more than 28 days later than the original mortgage), the duty payable upon the original mortgage would be reduced after allowing a credit for the duty paid on the collateral mortgages in Queensland and Western Australia. According to the Paper this outcome depends upon the mortgages over the Queensland and Western Australian property being stamped prior to the original mortgage. It is said that this credit would only be available if the mortgages had been presented for stamping in Queensland and Western Australia respectively prior to the upstamping of the original mortgage in New South Wales. It is said to be anomalous that the duty outcome would depend on where "the security instruments are first produced." It is said that this anomaly is attributable to the time of first execution approach.

In relation to this second "anomaly" there are a number of points to be made:

- The significance of the presentation of the mortgages for stamping in Queensland and Western Australia first seems to derive from the provisions in section 118 of the NSW Duties Act allowing a credit in respect of the duty upon a collateral security which has been "paid" as distinct from "paid or payable". This problem will be overcome upon enactment of the State Revenue Legislation Amendment Bill 1998 which has been introduced into the NSW Parliament. One of the amendments to the NSW Duties Act to be made by that Bill includes allowing a credit in respect of a collateral security where duty under a corresponding Act (eg the stamp duties legislation in Queensland or Western Australia) is paid or payable upon a security. This amendment would eliminate the significance of the order in which securities are presented for stamping.
- Even if such an amendment were not to be made, the anomaly would not arise from the time of execution approach (as claimed in the Paper) but, rather, from the 28 day period defining a package of securities. The consequences of limiting a package of securities to those executed within a 28 days period of each other (as adopted in the NSW Duties Act) are examined later in the Paper. Whilst those consequences might be considered to be anomalous, it is inappropriate to treat them as an outcome of the first execution model and as a basis for advocating a time of advance model.

Scenario No 2

The second Scenario provided to illustrate anomalies attributable to the time of execution approach proceeds on the basis that this approach has been uniformly adopted. The Scenario involves "single jurisdictional mortgages" over property in NSW, Queensland, Victoria and WA which are said to "comprise a mortgage package". At the time of initial draw down each of the single jurisdictional mortgages is on foot and is stamped in each of the relevant jurisdiction. Prior to a subsequent draw down, the mortgage over the property in WA is discharged. It is said that no duty would be payable in Western Australia at the time of subsequent drawdown in view of the discharge of the mortgage over the property in that State but that the duty payable in each of the other jurisdictions would be calculated according to the proportion of the encumbered assets located in that jurisdictions as at the time of execution. It is said that a deeming provision may overcome the resulting minimisation of duty. However, concern is expressed that there would be "no incentive to comply" with such a deeming provision because the lender would have no interest in ensuring the stamping of a mortgage in a jurisdiction where no encumbered assets were located.

Submission

A number of things may be said about the Scenario:

- Presumably the Scenario proceeds on the basis that the package of security provisions had been enacted in each of the jurisdictions concerned including Western Australia. It is submitted that, if the relevant provisions reflected those currently appearing in section 217 of the NSW Duties Act, the better legal view is that there **would** be a legal liability for the payment of duty in Western Australia at the time of the subsequent advance notwithstanding that the mortgage over Western Australian property had in the meantime been discharged. If there is any doubt concerning the matter a relatively simple alteration to the provisions would eliminate that doubt. It is submitted that this is a far preferable outcome of abandoning the simplicity and certainty otherwise attaching to the first execution model.

- It is cynical in the extreme and undoubtedly offensive to suggest (as the Paper does) that taxpayers and, in particular lenders, would simply ignore a legal liability to pay duty in Western Australia because "there is no incentive to comply". Considerable experience over many years suggests that borrowers and lenders alike will comply with their legal obligations for no reason other than a willingness to comply with the law. If that is not sufficient, the prospect of considerable fines or penalties for late payment and the commission of a statutory offence would provide ample "incentive to comply".

- That same experience suggests that the greatest contributor to non-compliance with stamp duties law, incentive or no incentive, is the complexity and impracticality of the legislation with which the hapless taxpayer is forced to comply. If the legislation is simplified, compliance is enhanced. If the legislation is complicated in its terms or operation compliance is diminished.

- There probably is a miniscule proportion of the taxpaying community which would blatantly ignore a legal obligation simply because there was not a sufficient "incentive" to comply. The question is whether the interests of the vast majority of taxpayers should be prejudiced (through the rejection of a more simple and practicable model) because of a concern on the part of some stamp duty authorities over the behaviour of that miniscule element. The NSW Duties Act has adopted a balance which would not prejudice the interests of the vast majority because of such a concern. The recurrent theme underlying the discussion in the Paper is that the stamp duty authorities in the other jurisdictions are contemplating a different balance. This is borne out by the assertion in the Paper that, if the NSW approach were to be adopted, there would need to be complicating anti-avoidance provisions (see points 6.2 and 9.17.1 of the Paper).

> The NSW Duties Act does not contain such provisions. During the Rewrite process the question of the need for a general anti-avoidance provision was raised. In the light of submissions made the incorporation of such a provision was rejected by the Rewrite participants although it was made plain that the issue would be revisited if experience with the new provisions indicated that such a provision was necessary. The principal basis for the rejection of the provision was a cost-benefit analysis which indicated that the potential benefit of the provision would be outweighed by: the general uncertainty attaching to numerous unexceptional transactions; the administrative burden for the Revenue in issuing rulings in relation to numerous prospective transactions; and the complexity of analysis for both the Revenue and taxpayers in determining whether such a provision could apply with multiple jurisdictions involved.

Whichever model is adopted to deal with the stamping of securities, whether in connection with further advances or otherwise, there will be a clear potential for anomalies to arise. When undertaken as an intellectual exercise, it is often possible to identify a range of anomalies in relation to the operation of any piece of legislation. However, practical realities generally dictate that the actual anomalies which arise are far fewer in number than the potential anomalies identified in theory. In the case of mortgages and charges taken to secure obligations, the practical reality is that the mortgagee wishes to have enforceable security over assets of a value sufficient to cover the indebtedness secured. Those realities significantly constrain the freedom of action which might otherwise create or exploit anomalies. Thus, in the example provided in Scenario No 2 it is unrealistic to expect that the mortgagee would permit the mortgage over the property in Western Australia to be discharged so that the mortgagor could (on one view of the provisions) avoid duty in connection with subsequent advances.

It should be possible for a legislature trying hard enough to enact stamp duties legislation which would eliminate all anomalies and potential for minimisation or avoidance of duty. Having regard to the objectives for the Rewrite identified in the first Exposure Draft, the elimination of such anomalies or possibilities is not the sole or even the principal objective of the project. Those objectives were that the legislation should:

- be simple, fair and equitable;
- reflect modern business practice;
- achieve existing government revenue targets;
- be inexpensive for taxpaying clients to comply with and for Revenue Offices to administer;
- achieve substantial uniformity across participating jurisdictions, unless compelling policy reasons required otherwise; and
- be drafted in contemporary language.

It is submitted that the achievement of those objectives involves a balancing exercise between having extremely complex legislation which would eliminate all possible anomalies and minimisation opportunities, at one extreme, and unrealistically simple legislation which would be easy to comply with but easy to avoid, at the other extreme. There should always be a point between those two extremes where the vast majority of circumstances actually arising in practice would be subjected to an appropriate outcome without an impracticable level of complexity. Beyond that point an attempt to deal with relatively rare anomalies should be rejected on a cost benefit analysis if the result would be to impose upon taxpayers unacceptable complexity. This view is wholly consistent with the objectives underlying the Rewrite. It is also significant to note that in relation to the transfer/acquisition provisions in the Rewrite, New South Wales rejected the approach advocated by Queensland and Western Australia on the basis that the complexity attaching to their proposal was not justified on a cost benefit analysis. Clearly the same philosophical issue has arisen again in relation to the mortgage duty provisions.

Miscellaneous Features of Model

The Paper proposes a number of features which are described at section 9.17.1 as "advantages" of the time of advance model. In reality those features are not "advantages" of that model and only require consideration under the time of advance model to reduce the problems otherwise attaching to that model or, alternatively, are features which would be equally applicable to a time of execution model. The point may be illuminated by the following metaphor.

A family has a small 4 cylinder fuel efficient motor car well suited to its needs for suburban motoring. A used car salesman tries to persuade the family that it should trade the small car in on a large, powerful V-8 model. The salesman proclaims as an "advantage" of the large car that it has a particular injection system which reduces fuel consumption by 30% and has a spare tyre which re-inflates itself when punctured. The fuel injection system would properly be portrayed as an "advantage" in relation to a comparison between the large car with the system and a large car without the system. It would not properly be portrayed as an "advantage" in a comparison between the large car and the small car since the small car would not need the injection system to reduce its fuel consumption to an acceptable level. Nor would the spare tyre be an "advantage" of the large car if the family could purchase a similar tyre for the small car without the need to acquire the large car.

The features concerned include the following matters:

- *Pro Rata Stamping by Reference to Factors other than Value (Points 9.4 and 9.5)*

  As previously discussed the paper proposes that factors, other than a formal valuation, could be taken into account to determine pro rata stamping in connection with further advances. This proposal is a concession to remove the cost and inconvenience of obtaining formal valuations upon a number of occasions in connection with stampable advances. As previously noted, the concession does not eliminate all of the various administrative difficulties for lenders associated with the management of a portfolio of mortgages and the concession does not lend itself to simple systems management techniques. Furthermore, the need for such a concession is significantly reduced if the time of execution approach is adopted.

- *Not Stamping Original Mortgage (Point 9.6)*

  The Paper acknowledges the problems associated with the stamping of original mortgage counterparts in a number of jurisdictions. The Paper suggests that a range of options is available as an alternative to the physical stamping of the original counterpart. For example, it would be possible for duty to be paid by return and the original mortgage to be endorsed. Alternatively, copies or additional counterparts of the executed mortgage might be stamped.

  These proposals are not peculiar to a time of advance approach and would be equally applicable to a time of execution approach since, even under the time of execution approach, it may well be necessary to have an original counterpart of the mortgage stamped in a number of jurisdictions. Furthermore, in the circumstances under consideration where a mortgage secures property in more than one jurisdiction, the payment of duty by return has problems attaching to it from the perspective of the lender. First, in a number of jurisdictions the liability for duty upon a mortgage ordinarily attaches only to the mortgagor and not the mortgagee. However, if the mortgagee elects for the payment of duty by return, the mortgagee is subjected to the direct liability for the duty. This may not generally be a problem in relation to retail lending where a security is taken over a single asset located in a single jurisdiction and the calculation of duty is straight forward. However, where a financing involves the taking of security over assets in a number of jurisdictions, the complexities attaching to the financing and the calculation of the stamp duty correctly payable exposes the lender not only to the direct liability for duty but also to fines and penalties for late or incorrect payment of duty. Experience suggests that lenders are reluctant to assume those risks unless the regime with which the lender must comply is simple.

- *Securities Not Affecting Property (Point 9.9)*

  The stamp duties legislation of Queensland, Western Australia and Tasmania impose ad valorem duty on securities, such as guarantees, which do not themselves encumber property. The Paper proposes that such securities would not be dutiable if mortgages encumbering property located outside the jurisdiction concerned secured the same moneys as such securities. Such a proposal, of course, has nothing to do with the choice between a time of execution approach or a time of advance approach and would simply bring the three jurisdictions concerned into line with the majority of jurisdictions.

- *Rate Differentials On Collateral (Point 9.12)*

  The Paper notes that differentials in the rate of imposition of duty as between the jurisdictions would be ignored in the stamping of collateral securities. As the Paper acknowledges, this proposal is not related to the choice between a time of execution approach or a time of advance approach. Rather, this outcome is a result of the adoption of a pro rata mechanism in lieu of a credit mechanism. Both the time of execution approach and the time of advance approach discussed in the Paper involve an abandonment of a credit mechanism and the adoption of a pro rata stamping.

- *Package of Securities (Points 9.7, 9.10 and 9.11)*

  The Paper proposes a number of measures which relate to the package of mortgage concept which was unanimously adopted by all Rewrite participants and is incorporated in the NSW Duties Act. A number of aspects of the proposals are entirely unrelated to the choice between the time of execution approach or the time of advance approach. However, certain aspects of the proposals relating to the package of mortgage concept are said to render the time of advance approach more complex than it would otherwise be.

  The Paper notes that under the NSW Duties Act securities executed within 28 days of each other can be included as part of a package. The Paper notes that there could be practical difficulties caused where a mortgage was executed after the time of advance but within 28 days of execution of a mortgage securing the same moneys executed prior to the advance. A reference is made to the tight time frame in certain jurisdictions within which a dutiable instrument must be lodged for assessment of duty. If, in order to comply with the tight time frame, mortgages or charges were lodged for assessment shortly after execution, the assessment which would be made may well not take into account the impact of securities executed within 28 days. This possibility may well lead to the need for amended assessments and refunds or other adjustments to duty.

  In order to address this problem the paper proposes that only mortgages executed as at the date of an advance which secure the advance should be included in the mortgage package for the purposes of stamping on a pro rata basis by reference to the advance. Clearly, if a time of advance approach is taken, the problems identified by the Paper will recur with considerably greater frequency than if a time of execution approach is adopted. However, the proposal is not peculiar to a time of advance approach and could be modified to take account of a time of execution approach. According to the modification for the purposes of a time of execution approach, only those securities executed on or before the first advance secured or the first time at which a secured liability arises would form part of the package.

  The principal justification given in the Paper for the need to restrict the package of securities in the manner proposed is the relatively short time for the penalty free stamping of mortgages said to be available "in some jurisdictions" (see point 9.7). However, the table attached as Appendix A to the Paper shows that the period is 60 days in 3 jurisdictions; 90 days in 2 jurisdictions; and only 30 days in one jurisdiction (viz Queensland). In fact, with effect from 1 July 1998 the period will increase from 60 days to 90 days in New South Wales. The only jurisdiction with a relatively tight time frame relative to a package period of 28 days is Queensland. Another approach to the solution of the problem may be for Queensland to join with all other jurisdictions in having a more generous penalty free period.

It is consistent with the proposal in the Paper that a collateral security executed after the date of an advance (even within 28 days of an earlier security) would not be taken into account as part of the mortgage package for determining the pro rata stamping referable to the advance. However, according to the Paper the collateral security would be included as part of the mortgage package for the purposes of determining the pro rata stamping in relation to the next subsequent advance (requiring upstamping) after the execution of the collateral security. This proposal effectively means that the duty payable in respect of the collateral security is determined upon a pro rata basis rather than upon a collateral security basis at the time of the subsequent advance.

Under the NSW first execution approach, a collateral security executed in such circumstances would never be taken into account in determining the pro rata stamping of the package of mortgages since the requisite ratios would be determined by reference to the state of affairs applying at the time of first execution of the package. Such a collateral security would be stamped upon a collateral basis consistent with section 218 of the NSW Duties Act. This approach is significantly simpler than the absorption of the collateral security into the package for the purposes of determining pro rata stamping as proposed. The Paper notes that this treatment of collateral securities "has been developed out of a desire to maximise the simplicity of the model." It is submitted that, whilst this proposal might reduce an element of the complexity of the model proposed in the Paper, it clearly does not represent "simplicity" by comparison with the time of execution approach.

- *Prime and Collateral Securities (Point 9.8)*

  The Paper proposes that, if a mortgage package comprises two or more mortgages over property in a single jurisdiction, they may following determination of the pro rata duty, be treated in the same manner as if they were not part of a package (ie as a prime and collateral). Once again this proposal is not necessarily related to the choice between first execution and time of advance approach and is equally applicable to either. Under the approach taken in the NSW Duties Act such mortgages would attract a minimum amount of duty of $10 irrespective of whether they were treated as part of the package or as collateral securities.

- *Transitional Provisions (Points 9.14, 9.15, 9.16 and 10.2)*

  The Paper suggests transitional provisions dealing with the basis upon which mortgages existing at the time of the introduction of new legislation would be handled. In essence, the proposal would ensure that such existing securities would be encompassed only by the new legislation and that the old legislation would cease to have application. This proposal has the undoubted advantage of simplicity irrespective of which approach is taken to pro rata stamping in respect of further advances. In essence, the proposal would be that securities which were duly stamped under the prior legislation would be deemed to be duly stamped under the new legislation. Insofar as a security was not duly stamped under the old legislation, it would be deemed to have been executed at the commencement of the new legislation for the purposes of rectifying the stamping. In effect this would provide an amnesty to the extent of the usual penalty-free stamping period in each jurisdiction. Further advances made under existing mortgages would be subject to duty in accordance with the provisions of the new legislation.

  These proposals could apply equally to a time of execution approach as to a time of advance approach. If the new legislation incorporated a time of execution approach, it would be possible for the existing securities to be deemed to have been first executed at the time of commencement of the new legislation. The Paper also recognises the possibility that existing securities under a time of execution approach could be deemed to be first executed on the date of the next advance following commencement of the new legislation. Finally, the Paper recognises that existing securities could be deemed under the new legislation to encumber property situated in the locations and having the relative values which applied at the time of its actual first execution. The first and second alternatives would require in relation to all existing securities a determination of the location and ratio of values of the encumbered property at the relevant starting point. It would, in all likelihood, be more manageable for a bank with a substantial portfolio of mortgages to undertake that exercise as at the time of the first subsequent advance requiring upstamping. The third alternative would avoid that requirement but may encounter the record-keeping or record access problem previously referred to in the Paper.

It is difficult to assess the relative merits of the alternatives proposed without a close understanding of the logistical difficulties attaching in practice to each of the alternatives. The simplicity on an on-going basis attaching to the transitional proposal suggested in the Paper could be outweighed by the burden attaching to the need to determine in relation to all existing securities the location and value of assets at the three alternative times proposed in the Paper. Alternatively, that simplicity would confer on-going benefits which may warrant those burdens. Once again it would be a matter of applying a cost benefit analysis.

Implications of Dual Regimes

Finally, the Paper notes that there are "double duty and revenue leakage considerations" if all jurisdictions were to adopt a pro rata approach to stamping multiple jurisdiction securities in lieu of crediting provisions, where one or more jurisdictions adopted a time of execution approach and the other jurisdictions adopted a time of advance approach. The Paper presents two Scenarios which demonstrate the truth of that proposition.

The examples illustrate that, depending upon the facts, the total duty payable in all relevant jurisdictions may be computed by reference to an amount exceeding 100% of the sum advanced or may be computed by reference to a sum being less than 100% of the advance. The conclusion expressed in the Paper is that "dual regimes cannot operate in conjunction with pro rata stamping and would require the current crediting provisions to be retained in order not to prejudice either taxpayers or the Revenue." The Scenarios set out at section 10.3 of the Paper serve to demonstrate what has been well established for some considerable time. To the extent that the provisions in all jurisdictions imposing a liability for duty upon mortgages or charges are not uniform, there is the potential for anomalies and inequities both from the perspective of the taxpayer and the Revenue. There are clearly major advantages from all perspectives in uniformity of approach. The Paper serves to reinforce that point.

Conclusion

The stated purpose underlying the release of the Paper is to obtain "comments from industry on the best method of handling mortgages with security in more than one jurisdiction." According to the Paper the NSW stamp duty authority has indicated a willingness to reconsider the approach adopted in the NSW Duties Act in the light of industry responses given a wish to secure the most appropriate and uniform scheme. Thus, if industry overwhelmingly endorses the alternative model favoured in the Paper, there is a prospect of uniform legislation if New South Wales were to amend the Duties Act and adopt the alternative model. The Paper does not indicate how its various sponsors would respond if industry overwhelmingly endorsed the time of execution approach (with some modifications) as currently reflected in the NSW Duties Act. However, it is to be hoped that they would be as accommodating as NSW in the reverse position.

It has been submitted in this Critique that, from the perspective of mortgagees, the time of execution approach is far preferable. It has further been submitted that a number of the concerns about that approach expressed by the sponsors are not warranted and that the claimed "advantages" of the alternative proposal are not actually advantages relative to the time of execution model.

It remains to be seen what view is taken by borrowers and lenders in response to the Paper. One thing is certain. All interested parties should take the opportunity to make their views known. The opportunity to have uniform legislation is far too important to waste.

STAMP DUTY RULINGS

It is an unfortunate fact of a commercial life, where change is the only constant, that legislation has been or is enacted which fails to address particular transactions or situations or which produces anomalies upon application to such situations or transactions. Typically the legislature responsible for the legislation has been slow to rectify the position for a variety of reasons. In an admirable attempt to deal with the resulting problems for taxpayers and Revenue Australian income tax and stamp duty authorities have responded to public pressure and published statements or "rulings" as to the way in which the legislation would be interpreted or applied to given situations or transactions. This response is wholly commendable since it produces greater certainty for all concerned and provides a degree of flexibility in accommodating changing circumstances. However, the rulings response also poses a considerable threat to the taxpaying community if the ruling is not treated as a temporary aid and is allowed to dissipate pressure for legislative change.

In a paper published in 1979 Mr SEK Hulme QC made the following percipient comments about the practice adopted by the Commissioner of Taxation in the issuing of rulings ["Developments In The Taxation of Mining and Petroleum Ventures" *Australian Mining & Petroleum Law Journal*, Vol 2, No 1, at p 100]:

> "Although it always seems reasonable and indeed courteous of the Commissioner to give to taxpayers a benefit which the material suggests the Act was intended to, one really ought not to gloss over the impropriety of acting in this way. The duty of the Commissioner is to administer 'this Act', not ministerial statements: cf section 8. It is as wrong to allow a deduction for which the Act does not provide, as to deny one for which the Act does provide. If the draftsman is seen to have bungled, the remedy is to amend the Act, if necessary retrospectively (where the bungled provision was intended to benefit taxpayers). The remedy is not to ignore the statutory duty (and oath) to administer 'this Act'. It is one thing to have standard procedures by which to seek consistency in application of provisions which are in the Act. It is quite another to have procedures of ignoring the Act.
>
> Quite apart from the fundamental objection that we are intended to be governed by Parliament, not Ministers or Commissioners, one particular evil is that such a provision becomes in practice a means of disapproving a taxpayer's conduct; a kind of poor man's section 260. It enables the Commissioner where he disapproves of what a taxpayer has done, to apply the Act (the terms of which have been left standing for the very reason that because normally not applied, there has been no call for amendment). That leaves the taxpayer concerned at the mercy of the Commissioner's administrative decision. He cannot appeal, because he has been treated in accordance with the Act. His complaint is that he has been treated differently from other taxpayers. But the court cannot ensure that he is treated the same as other taxpayers. All the court can do is to ensure that he is treated in accordance with the Act. The assessments of the other taxpayers, who (to their benefit) were treated otherwise than in accordance with the Act, the court never sees.
>
> It will not do to say that the Commissioner would not act in this way. In the first place, he ought not to have power to act in this way. In the second place, he has acted in this way."

A clear example of the danger foreshadowed by Mr Hulme is provided by the recent decision of the Federal Court in the *Bellinz* case (supra). The case concerned the entitlement to a deduction for depreciation in respect of plant and equipment leased to a taxpayer under a lease which contained an option to purchase. Section 54(1) of the Income Tax Assessment Act 1936 at the time provided such a deduction for the "owner" of plant and equipment. The Commissioner of Taxation argued before the court that the members of a leveraged leasing partnership which had leased plant and equipment under a lease containing an option to purchase were not the owners for the purposes of section 54 and were not entitled to a deduction for depreciation.

The stance taken by the Commissioner of Taxation was inconsistent with the approach taken by the Australian Taxation Office under extremely long-standing administrative rulings and practice. Unlike the stamp duty legislation in the various jurisdictions around Australia, the federal income tax legislation makes provision for the issuing of binding rulings [see Part IVAA of the Taxation

Administration Act 1953 and sections 170BA and 170BB of the Income Tax Assessment Act 1936]. The appellant in the case argued both that the members of the lessee partnership constituted a relevant "owner" for the purposes of section 54 and, in any event, were entitled to be treated in that way by the Commissioner by reason of rulings made by the Commissioner.

At first instance the Federal Court held that the members of the lessee partnership were not a relevant "owner" for the purposes of section 54. The court found that none of the public rulings issued by the Commissioner had dealt with precisely the kind of arrangement under consideration by the court. Furthermore, there were indications in some of the many rulings which had been issued which suggested that the Commissioner would not "necessarily" be bound to treat a lessee as an owner for depreciation purposes. Accordingly, the court rejected the taxpayer's argument that the Commissioner was bound by rulings to treat it as an "owner" and this was so notwithstanding that the rulings stated general principles upon which the taxpayer had relied in seeking the depreciation deduction.

Having reached that conclusion in relation to the rulings, the Federal Court made the following observations about the system of public rulings:

> "The present case suggests that the public rulings to which I have referred may not have served the purpose Parliament envisaged that they would serve. When the binding rulings system was introduced in the Administration Act ... the Minister Assisting the Treasurer stated in the Second Reading Speech for the Bill:
>
>> 'This Bill will provide real benefits for taxpayers by making the system fairer and more certain ... The new system of binding and reviewable rulings will promote certainty for taxpayers, and thereby reduce their risks and opportunity costs. The new system will also be fairer because taxpayers will be able to object to private rulings and have the matter reviewed by an independent Tribunal or Court.'
>
> By making a ruling that states that it is binding 'to the extent it is capable of being a public ruling', or that a particular arrangement is 'likely to be regarded as a hire purchase arrangement', or that tax treatment of a particular arrangement is to be 'generally' as outlined the Commissioner is not providing the certainty that binding public rulings are intended to provide. Further, rulings in such terms obviously have a tendency to mislead, which is antithetical to the system of certainty and fairness intended to be provided to taxpayers by the public ruling system."

It is understood that the taxpayer is appealing to the full Federal Court against the decision.

It is important to note that the *Bellinz* case is not the only situation in which the Commissioner of Taxation has departed from long-standing practices and administrative rulings when it suited the Commissioner. A review of the Tax Cases reveal that there have been a number of other occasions upon which the Commissioner of Taxation has put arguments to the court which were inconsistent with long-standing administrative practices. For example in *Dwight v FCT* (92 ATC 4192 at 4201) Hill J noted that a proposition advanced to the Federal Court on behalf of the Commissioner was "contrary to the Commissioner's practice of at least half a century." Upon occasion the Commissioner of Taxation has threatened taxpayers that he would depart from long-standing administrative practices and apply the strict letter of the law unless the taxpayer abandoned a particular proposal which the Commissioner did not favour. As Mr Hulme succinctly noted, the taxpayer faced with such a situation is forced to comply. Largely because of the generous administrative treatment, any pressure from industry or taxpayers to amend the legislation to reflect the practice adopted by the revenue authority is dissipated. Since the law has not been amended, the taxpayer has no remedy where the Commissioner abandons the administrative practice and treats the taxpayer according to the letter of the law.

By contrast with the position now applying under the income tax legislation, the system of rulings adopted by the stamp duty authorities in the various Australian jurisdictions has no statutory basis. In particular, there is no statutory provision for any ruling issued by a Commissioner of Stamp Duties to be binding. The rulings issued by the stamp duty authorities generally expressly provide that, whilst they may reflect an interpretation of the legislation adopted by the

Commissioner, they cannot supplant the terms of the law and do not operate as an estoppel against the stamp duty officials in relation to the operation of the law [see, for example, Revenue Ruling SD 1 issued by the NSW Commissioner and Revenue Ruling Gen 01 issued by the Victorian Comptroller]. This is an entirely correct qualification which is often overlooked in practice.

The *Bellinz* case and other examples point to the possibility of a revenue collector departing from a ruling or administrative practice. Experience points to the possibility of a revenue collector threatening to do so as a way of pressuring a taxpayer to adopt a particular course of action. Quite apart from these possibilities, rulings pose an additional difficulty in a stamp duty context. The difficulty is that an instrument which is stamped in accordance with a convenient administrative practice or ruling, rather than in accordance with the law, may not be duly stamped and may well be totally ineffective to achieve its intended objective as a matter of law. Furthermore, if the instrument comprises a mortgage or charge, it may well be unenforceable by the holder of the security if stamped in accordance with a convenient administrative practice or ruling rather than the requirements of the law.

The realities of life, including likely delays in securing legislative amendments, often force taxpayers to rely upon stamp duty rulings. The purpose of this paper in pointing to the problems inherent in rulings is not to discourage taxpayers from relying upon them. Rather, it is submitted that the important thing is to treat the ruling as only a temporary measure pending the enactment of legislation which would be retrospective if necessary. The danger for taxpayers arises if the ruling is treated as though it were law and if the pressure, which would otherwise build up in support of legislative amendment, is released in light of the ruling. In most cases the need for a ruling signifies the need for legislative change and both the Revenue and taxpayers should persevere in pressing for such change. This should be borne in mind as the Rewrite process unfolds and apparent anomalies and inequities emerge.