RECENT DEVELOPMENTS IN AUSTRALIAN STAMP DUTY

JOHN FIELD

Blake Dawson Waldron
Solicitors, Melbourne

DEBENTURES AND LOAN SECURITY DUTY

Thank you Keith and good afternoon ladies and gentlemen.

If Tony Hartnell this morning felt as though he was out on the left wing, I am not sure whether I am on the right wing here or the right half forward flank. But be that as it may, I will do my best to execute a well delivered hand-pass to Bill as we change from topic to topic during the sessions this afternoon. To try and help break it up a little we are planning to alternate the topics and it is my pleasure to begin the afternoon session with a discussion on a few issues arising out of debenture and loan security stamp duty. The reason we thought that we might begin with this particular topic is that there are some traps for the unwary that have emerged from some of the recent decisions in that area.

Bardolph's case (***Bardolph Industries Pty Ltd v Comptroller of Stamps (Vic)*** 91 ATC 2001) as you are no doubt aware is a decision of the Administrative Appeals Tribunal, a recent decision from December last year from Victoria, and even though it is a decision of the AAT rather than of the courts it does have some interesting things to say. You will recall that ***Bardolph's*** case involved two documents. The first was a joint venture agreement involving some loans from one of the joint venturers to the other. It provided for the party that was making the loans, Hargreave Securities Pty Ltd, to be entitled to interest accruing on a daily basis and being capitalised quarterly. And Bardolph Industries Pty Ltd was the company that had to pay that interest.

All went well as far as the documentation was concerned - I am not so sure that it went well as far as the joint venture was concerned - but as far as the documentation was concerned all went well for the first year and then a supplemental agreement was signed which is where the problem started. In the supplemental agreement the parties recited, just in the recitals, not even in the operative provisions of the agreement, that Hargreave Securities had advanced the sum of $6.4m under the original joint venture agreement. The operative words in the recital were that this amount had been "advanced by way of loans inclusive of capitalised interest". The supplemental agreement then went on to set out some of the terms on which these loans were to be repaid and so forth.

The issue that arose in that case was whether this recital amounted to a debenture for Victorian stamp duty purposes. The same sort of issue could arise for loan security duty in other states. The issue turned on the definition of "debenture" in s137N of the Victorian Act which, as those of you who have had to deal with that definition will know, is quite a convoluted one. The definition was introduced in 1982 and it contains two parts. It has an inclusive section followed by a number of specific exclusions. One of the exclusions in particular - and this is the exclusion in question in ***Bardolph's*** case - was introduced into the definition as part of a compromise when the amendment was going through the parliament. It was initiated by the opposition and agreed to by the government for the sake of having the amending legislation passed.

The result of it is anomalous, because the inclusive part of the definition provides (and I am paraphrasing here a bit) that a document can be a debenture if it acknowledges or evidence indebtedness of a corporation in respect of money that is or may be deposited with or lent to the corporation. So that is the inclusive part. And then the relevant exclusion takes away almost everything which has just been included, because it says that a debenture does not include (and I will read this, but for those of you who are not familiar with it, don't expect that you will be able to understand it on a first reading) "a document not being an acknowledgement of indebtedness of a corporation in respect of money that is deposited with or lent to the corporation where that document does not create indebtedness".

So as you will see, and as I can see from the blank faces, it is quite convoluted. The effect of it I think I can summarise by saying that the exclusion takes out from being a debenture any document which simply evidences indebtedness. If the document creates indebtedness then it will be left in. But the definition also takes out any document which acknowledges indebtedness in respect of money that may be deposited or lent in the future. In other words the only acknowledgements it leaves in are acknowledgements in respect of money which is already deposited with or lent to the corporation.

So the issue which emerged then in ***Bardolph's*** case was whether this recital in the supplemental document constituted an acknowledgement of money which was deposited with or lent to the corporation. That raised the further question as to whether the capitalised interest which was referred to in the recital that I mentioned earlier could be regarded as "money lent" to the borrower.

The decision in ***Bardolph's*** case itself was relatively easy for the Tribunal to reach and it was able to skirt these questions to a large extent, because the recital itself made use of the word "loans", in that it said that the $6.4m in question was advanced "by way of loans inclusive of capitalised interest". So the Tribunal held that the parties themselves had acknowledged that the capitalised interest in that case did amount to a loan and hence there was an acknowledgement of indebtedness that came within the definition, and was not carved out by the exclusion, and therefore that the document was a debenture.

So one of the lessons I think that we can learn from that case is that we need to be very careful in drafting documents - if we did not know that already - but even in regard to recitals, we need to be very careful that we do not fall into the stamp duty trap.

The second question which emerges is whether capitalised interest can constitute an advance. There is actually a published stamp duty ruling in New South Wales on this very point. That ruling is SD160, which in effect said that capitalised interest in the context of the New South Wales provisions will not be regarded as amounting to an advance unless it comes within one of two quite limited situations. First, if the parties agree that the interest obligation when it is capitalised will be discharged by way of a book entry which the parties expressly contemplate to be an advance, as in ***Bardolph's*** case, then that would be regarded as being an advance. Secondly, if the document providing for the capitalised interest actually provides for the lender to make an advance to discharge the interest obligation, then that too would be an advance. But in the absence of either of those two situations the mere capitalising of interest may well not amount to an advance, and that of course has wider implications than just under ***Bardolph's*** case because of the up-stamping obligations which in most of the states apply to unlimited securities at the time an advance is made.

There is one further question in relation to capitalised interest which is perhaps worth touching on briefly and that is whether, in order to constitute an acknowledgement of indebtedness, there has to be a reference to the specific amount of the indebtedness in question. And, as I have mentioned, in the relevant clause in ***Bardolph's*** case the total amount of the indebtedness, $6.4m, was specifically referred to.

In the 1987 case of ***Associated Broadcasting Services*** (***Comptroller of Stamps (Vic) v Associated Broadcasting Services Ltd*** 87 ATC 4401) this question also arose and at first instance Mr Justice Tadgell in the Victorian Supreme Court held that it was not necessary for the particular dollar amount to be mentioned for there to be an acknowledgement of indebtedness amounting to a debenture, if, having regard to all the circumstances, you could identify what the amount was. Even if the amount was not expressed, you could still have a debenture. On appeal the Full Court cast some doubt on this. Although the court did not need to decide the point in order to reach its decision on the appeal, it suggested that the way may be open to argue in the future that a document which does not specify the particular amount cannot amount to an acknowledgement of indebtedness.

That is all I wanted to say on this particular topic. I'll handball here to Bill who I think will be talking to us about some issues of mortgages securing some non-debt obligations.

SECURITISATION

We thought we should deal with securitisation as a topic because it is something which has been in vogue to quite some extent over the last two to three years in Australia. Some of the financial organisations and a number of the State governments have been undertaking quite strenuous efforts to develop the secondary mortgage market and securitisation market in this country and a number of stamp duty concessions have been introduced in an attempt to help bolster the market.

You will see from the diagram (Figure 1) an example of a very simple securitisation structure. I do not think any of the securitisation structures that have been put in place in this country would in fact be as simple as this, but the example is intended for illustrative purposes only.

We have got a special purpose vehicle (SPV) in the centre of the diagram which could be a company or perhaps a trust. And that company would be raising funds in the market through the issue of notes, and using the proceeds that it raises in that way to make loans to mortgagors or borrowers. The security for those loans would be mortgages which are given back by the borrowers to SPV, which would then give a mortgage of those mortgages to a trustee for the note holders as security for the notes that it originally raised.

The example that we are looking at is one involving mortgages at the bottom level - retail mortgages - but the illustration could work just as well if we were looking at SPV leasing motor cars to retail customers with the matching asset being the leasing receivables, or alternatively SPV could be providing credit under credit cards with the matching asset being the credit card receivables. Both those categories of asset have been securitised widely in the United States in particular, and the securitisation marketers in this country have certainly been talking for a number of years about developing that market in this country. To date it has not developed, but I think there are reasons to believe that as the depth of the investors in this particular type of market in Australia increases, we are likely to see the range of products broadening from mortgages to such things as leasing receivables, credit card receivables and so forth.

I mentioned that a number of States have introduced some stamp duty incentives to help encourage the development of the secondary mortgage market. The current Queensland provisions are I think the oldest of those that are still in force and they are clearly the most restrictive of the existing provisions in that they apply only to secondary mortgage market instruments where the underlying security is comprised of first mortgages of real estate. And there is no provision in the Queensland legislation for any of these broader types of securitisation instruments that I have been mentioning.

The New South Wales and Victorian provisions seem to be pretty much the model which the market is encouraging other States to introduce and I thought it might be worth looking briefly at the provisions in those two States.

As far as New South Wales is concerned, their provisions are formulated slightly differently from the Victorian ones, but the ultimate effect of them I think is not very much different. The New South Wales provisions, which can be found in s84FA and also s84FB of the New South Wales Act, provide a number of exemptions in relation to what are defined as "mortgage-backed securities". They exempt the issue of those securities, transfers of those securities or dealings in them, and also mortgages of assets by a corporation where the mortgage effectively is securing or relating to mortgage-backed securities. Looking again at the diagram, and starting from the bottom, the first instrument which is potentially dutiable will be the retail mortgages. Under all the stamp duty provisions no attempt has been made to exempt from stamp duty the retail mortgages. The exemptions are looking to apply at the next level up where we have got the notes themselves which are potentially loan securities or debentures, and even more clearly of course we have got the mortgage that is given in favour of the trustee for the note holders - that more clearly could be dutiable, but for any applicable exemptions.

So, in the New South Wales provisions s84FA deals with mortgage-backed securities. Section 84FB is a little bit broader in some ways but it is also narrower in some ways. It deals with what are defined as "loan-backed securities". That concept is directed essentially to securitisation of government and semi-government loans, which are not secured by mortgages. But importantly as part of this s84FB exemption for loan-backed securities there is the ability to prescribe other assets within the definition of "pool of assets". And so there is the ability by regulation to broaden the range of assets to things such as leasing or credit card receivables. And I think that is the mechanism that would need to be used in New South Wales to achieve that result.

In Victoria the flexibility is even broader than that. The Victorian exemptions come up under ss137NA and 137NB, and they use the defined expression "mortgage-backed security" which despite its name does not necessarily need to relate to mortgages at all. A number of securitisation schemes have made use of the Victorian exemptions, including the government sponsored housing scheme in Victoria, called the "home opportunity loans scheme", involving the issue of Victorian Housing Bonds. Then there is the corresponding Western Australian scheme, called the "Keystart loans scheme" involving the issue of Keystart Bonds. Both those schemes, and potentially other state schemes, can be funded under the umbrella scheme involving the issue of "National Housing Bonds". All of those bonds have been exempted making use of the regulation-making power contained in ss137NA and 137NB, enabling the definition of "mortgage-backed security" to include any other prescribed instrument and to cover any other prescribed assets. Specific regulations have been prescribed in those cases to ensure that some of the documents in those transactions which arguably may not have come within the specific provisions of the legislation are nonetheless covered by the exemptions.

The flexibility in the Victorian provisions is in fact such, on a literal reading of the sections, that the Governor in Council could prescribe any document at all as being exempt from stamp duty. It need have no relation whatsoever to mortgage-backed securities or the secondary mortgage market or anything else. It could be any other instrument. And there is an interesting question I think as to how that would be interpreted if an attempt were ever made to use that provision to attempt, by regulation, to exempt from stamp duty documents that did in fact bear no relation to that part of the Stamps Act which contains the secondary mortgage market provisions. But to date no such attempt has been made by the Governor in Council or the government and so it is still a moot point. But I would leave you with the thought that the Victorian legislation does have the potential to cover almost anything.

The only other State which has to date made significant progress in introducing secondary mortgage market exemptions is Western Australia. No legislation has been introduced there as yet, but in November 1990 the stamp duty authorities circulated quite a detailed paper to participants in the secondary mortgage market industry seeking comments on their proposals which they indicated would be based substantially on the Victorian provisions, but with a number of protections or safeguards introduced which I believe are designed to limit some of the breadth of the regulation making power that appears in the Victorian provisions. I think they are planning to introduce some further limitations in the legislation itself so that the exemptions do not facilitate the avoidance of duty on transactions which do not relate directly to securitisation.

I would hope, however, that the restrictions which the Western Australian government introduces in this legislation when the legislation comes forward are not so severe as to render the exemptions effectively unworkable for the products that are being developed in the market.

So it is an exciting time in the securitisation area and I think we are likely to see substantial growth in it over the next few years, as well as substantially greater use of these stamp duty exemptions. It would certainly assist the development of this market if exemptions along the lines of those in Victoria and New South Wales were introduced in some of the other States as well.

With that I will hand over to Bill to enlighten us further on sell-downs and loan transfers.

CORPORATE RECONSTRUCTIONS

I am not sure if we are Tom and Jerry or Zig and Zag alternating like this. In any event, I think we have finished the pairings of topics which really go together and we are into a number of topics now which we wanted to mention this afternoon because of their topicality. But they are really individual topics and we plan to have rather briefer discussions on them than we have on the topics to date. As Keith mentioned, corporate reconstructions, or more particularly the exemptions from stamp duty that might otherwise be assessed on a corporate reconstruction, and the guidelines as to how those exemptions will be applied, is what this particular topic is about.

There are two States, namely New South Wales and Victoria, which for a number of years now have had the ability by means of either regulations or specific provisions in the legislation, to exempt documents created in the course of a corporate reconstruction from the duty that would otherwise apply to them. In both those States, the guidelines have changed in the last few months.

The way in which the guidelines have changed differs drastically between those two States. Looking first at the New South Wales guidelines, they relate to general exemption 32 in the second schedule to the Stamp Duties Act, which allows the Treasurer to approve an exemption for an instrument where a group of companies is reconstructed. The guidelines as to how that exemption would apply used to be contained in Revenue Ruling SD80, but they have been superseded from 1 January 1991 by new guidelines set out in Revenue Ruling SD158. In fact in the case of New South Wales the new guidelines do not differ very much from the old ones, but they do differ in a couple of material respects.

Before we get to the differences, just to refresh your recollection of the nature of the guidelines and how the exemption can be applied - there were basically two different categories into which a corporate exemption could fall in order for it to be eligible for the exemption. First, there could be a liquidation and an in specie distribution of property from a subsidiary to its parent. And secondly, there could be a transfer of New South Wales assets from a branch of an overseas company to a new subsidiary of the overseas company at the time when the branch is being closed. In either of these categories, there was an overriding requirement that for the exemption to apply it was necessary to demonstrate a net benefit to the State of New South Wales.

There are some other tests as well which I will not run through at the moment, but the two relevant factors where the new guidelines do differ materially from the previous guidelines are these. First, in determining whether or not there is a net benefit for the State of New South Wales there has to be taken into account the cost to New South Wales of the reduction in the Commonwealth Government's financial assistance grant to New South Wales - the reduction that would result from the exemption being given. Previously that was not specified in the guidelines and I think the view was taken that the indirect cost of the reduction in the Commonwealth financial assistance grant was not a relevant factor that could be taken into account in determining whether there was a net benefit for New South Wales. But now it expressly is to be taken into account and so it is going to be more difficult for companies to demonstrate that the net benefit test has been met. So that is one difference.

The other difference is that the guidelines in New South Wales now specifically provide that no exemption is to be given if the New South Wales Treasurer considers that a principal purpose of the corporate reconstruction is the avoidance of tax, in some other jurisdiction than New South Wales or at a Commonwealth level. So if the reconstruction is being done with a view to avoiding any liability to tax then the New South Wales exemption will not apply.

But even with those two new constraints the New South Wales exemptions are certainly still practicable ones, I think, and ones which I am sure will be used frequently in corporate reconstructions involving companies or assets in that State.

This position is to be contrasted, however, with the new position in Victoria. There were new guidelines released in Victoria on 23 January 1991 and in short they have done away with the availability of a corporate reconstruction exemption for most practical purposes. And the reason I say that is that the new constraints that apply in Victoria are I think three-fold. First, the exemption can only apply where the ultimate holding company in the corporate group which is being reconstructed is a listed public company. So if you are not a listed public company then the exemption is out. Secondly, the amount of duty for which the exemption is available is a maximum of $50,000 duty, so that if your corporate reconstruction - bearing in mind the relatively high rates of duty in Victoria - would involve you in more than $50,000 duty, then your maximum exemption is going to be pegged at the $50,000 level. But thirdly and most importantly of all, the major constraint that has been introduced in Victoria is that the exemption can only be applied for after the reconstruction has commenced.

Now there are not many, if any, companies that would be prepared to embark on a corporate reconstruction that might involve substantial amounts of duty on the off-chance of knowing once they have set the reconstruction in train that they may, if they can meet the tests and catch the Treasurer on a good day, get an exemption. And why this constraint has been introduced is really anyone's guess, except to suppose that it is intended to limit severely the amount of duty for which an exemption is granted, in an attempt to help balance the Victorian Budget! I think such an intention would be misconceived, however, because the fact is that if the exemptions are not available, the duty is not going to be paid. The reconstructions will simply not be implemented. And I think that is unfortunate for the State of Victoria because right now we need all the increased efficiency that we can get.

STAMP DUTY ISSUES ARISING UNDER THE CORPORATIONS LAW

I do not know whether there are any New Zealanders who have been foolhardy enough to come to this session rather than the competing one across the corridor, but if there are, you will no doubt be thankful grant that this country is free of at least some of the difficulties that we have been running through this afternoon.

The Corporations Law is obviously very new in Australia and everyone in law firms who has been working on it since January has been discovering various anomalies in the day to day working of it and in the procedures that apply to it. And there are just a couple that I wanted to mention today because they relate to stamp duty, in particular as it applies to financing transactions.

The first of these is in fact a positive rather than a negative, you will be pleased to hear. Because the Corporations Law has abolished the concept of a company having to register documents in its state of incorporation, it is now much easier to avoid debentures and loan securities from relating to any particular State. Previously if you had, for example, a Victorian incorporated company that gave a debenture or gave a charge even over property located outside the State, it would have to register that document under the old Companies Code in Victoria. That could cause the document to relate to something to be done in Victoria if there was an express obligation on the face of the document to perform that registration.

Now that the Corporations Law allows companies to register documents in any jurisdiction it is possible to still include an express requirement that the company giving the charge should register it under the Corporations Law. You may not need to include that sort of covenant, I would have thought, because it is the law anyway. But nonetheless, a number of firms do include a covenant to that effect. And that can now be done clearly without requiring the document to relate to any particular jurisdiction.

Some firms I know also go so far in their clauses as to expressly negative the fact that the document relates to anything to be done in the chargor company's State of incorporation. In other words, paragraph A will say that the chargor shall register this document under the Corporations Law. Paragraph B will then say that nothing in this deed requires anything to be done by the chargor in its State of incorporation. It seems to me that that again is going further than one needs to. It does not do any harm to say that but some lenders may be concerned that adding the second limb to that clause in some way detracts from the company's obligation to register. We have had a number of non-Australian lenders ask how those two clauses sit together, and there is an obvious explanation for it when one understands how the Corporations Law works. But, as I say, I don't think the clause does any harm, but likewise I don't think it is necessary.

So it is easier to avoid getting tripped up by having a loan security relate to something to be done in a place of incorporation and that is obviously a plus.

The other point that I wanted to touch on briefly in relation to the Corporations Law relates to some of the procedural aspects of the Form 309 which is the equivalent of the old Form 47 - the document under which a company gives notice of the details of a charge that it has created.

Under the Corporations Law, as I am sure you all know, the Form 309 procedure now includes a document called a "certification of compliance with stamp duty law". And it is not possible to get a complete registration of a charge unless this certification is lodged. Section 265(4)(b) of the Corporations Law says that. There is a policy issue as to whether it is appropriate for the Australian Securities Commission to be policing or attempting to police the State stamp duties laws in this way, particularly when the effect of the requirement is that a lender's security or its priority order could be jeopardised if the requirement has an effect on the timing of registration. The lender's security position in that way can be jeopardised as a result of a stamp duty obligation which is not the lender's obligation at all, it is the borrower's obligation. And I would question whether that is an appropriate thing for the Corporations Law and the ASC to be doing.

But nonetheless, that is the law as it now stands and those of you who are familiar with the Form 309 will be aware that on the back of the Form 309 there is in fact a section called "compliance with stamp duty law" which simply has two boxes - one to be ticked if the document is not yet duly stamped in the relevant jurisdictions and the other to be ticked when it is. Almost invariably at the time when the charge is signed and the Form 309 is signed the document will not by then have been stamped. And so almost invariably it is the "no" box which is going to be ticked at that time. One of the effects of this is that because the "no" box is being ticked it is now almost impossible to have a security registered completely the first time around and it is almost always the case that a security, even where it relates to property in just one State, it is going to have to be provisionally registered first until the stamping can be achieved and then the further certificate of compliance lodged to convert the provisional registration into a final registration. Again, all of that seems a lot of work for no particular purpose.

The next point to note is who can sign these various forms and here we have yet another anomaly because the front of the Form 309 says, as the old Form 47 used to say, that it can be signed by a director, secretary or principal executive officer of the company giving the charge, or by any other interested person. So that an officer of the lending bank could sign it or a solicitor for one of the parties could sign it, and the form could be lodged. When you turn to the back of the Form 309, however, the various certifications that are given there, according to the form, can be signed only by the relevant officers of the company giving the charge. In other words, they cannot be signed by some other interested person.

Likewise when the separate certificate of compliance with stamp duty is signed, that also says that someone who is merely an interested person is not one of the eligible people to sign it - it has to be one of the relevant categories of officers of the company giving the charge itself. But it also says that the person signing this certification of compliance has to be the same person who signed the Form 309. So that if you have got an interested person, in other words not an officer of the company, who signs the Form 309, it is then physically impossible to do that and to comply with the signing requirements called for by the certificate of compliance.

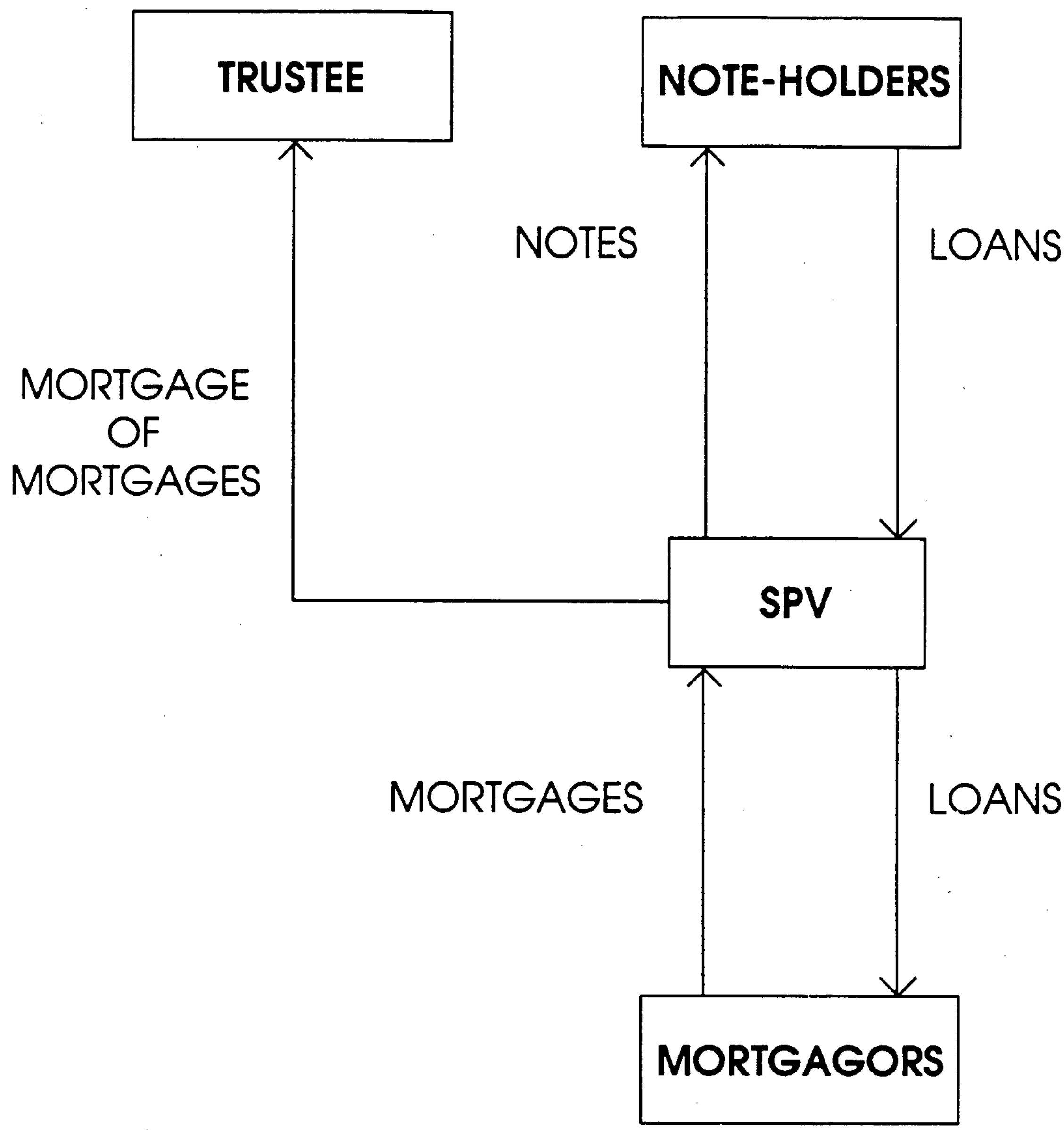
I understand that at least in Victoria the ASC is exercising some flexibility with the certificate of compliance and is accepting them even if they are not signed by the same person as signed the Form 309. I am not sure whether the position is the same in the business offices in other States. But again, it is an anomaly which in practice has been causing difficulties, it should be able to be fixed, and I would hope that it will be.

Finally, one of the consequences of this certification procedure is that it is not possible to achieve a final registration of a security until the stamp duty has been paid in all the relevant States in which the property which is covered by the security happens to be located. As those of you who are involved in this sort of exercise on a regular basis will know, that can be very time consuming indeed if you have got a security over property in all the different States and you have to go round to the stamp duty offices in all the different states.

There has been some suggestion that the ASC Policy Committee has been considering restricting the number of extensions of time that they would give for converting a provisional registration into a final registration. I know that there has been some suggestion to that effect in Queensland, but whether or not the suggestion is well-founded I am not certain. But the suggestion is that consideration is being given to a limit of two extensions. Now if that were to come into place, it would wreak some havoc in practice, I would suggest. I hope that the ASC has the good sense not to introduce any such limit. But if anyone has any further information either on that point or any others, perhaps question time would be a good time to raise it.

SECURITISATION

FIGURE 1



- Position in: - New South Wales
  - Victoria
  - Queensland

- Proposals in Western Australia