QUEENSLAND STAMP DUTY ASPECTS OF FINANCING TRANSACTIONS

By

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Financing transactions provide a very considerable portion of the revenue base collected by the Stamp Act 1895-1990. Most duty of any consequence flows from acquisitions of various kinds of property *or* from financing transactions. One might have thought that the task of levying these two streams of duty would be approached by two broad categories of transactions duty. However, stamp duty began its evolution as a tax on instruments rather than transactions. It approaches its task through a series of "heads of duty" and statutory provisions which have been added progressively to the original structure. The result bears some comparison with Queensland's Barrier Reef. In each case, evolutionary growth has produced an intricate structure, the detail of which is often difficult to chart, but which offers relatively few clear passages to open water.

The broad shape of the structure relevant to financing transactions may be put briefly. Generally, the Stamp Act seeks duty at the rate of 40 cents per $100 (which is the "mortgage" rate) on the instruments evidencing financing transactions constructed in the traditional form as loans or bill facilities. The financier may also have to pay an additional duty at the rate of 3 cents per $100 (up to a maximum amount of $2,500) under the "credit business" provisions which are the Stamp Act's equivalent of a transactions duty. Equipment leases generally occasion duty at the rate of 43 cents per $100 of amounts payable thereunder, whether on the basis that the instruments of lease are "hiring agreements" or that the financier is subject to the "rental business" regime. More exotic forms of financing such as redeemable preference share funding and property finance using unit trusts require a separate and more detailed analysis. However, insofar as those financing techniques (or for that matter, equipment leasing) involve an acquisition by the financier of some form of property (being shares, units, or equipment), the particular provision dealing with each form of acquisition must be considered.

Secured Loans

Instruments evidencing secured loans will generally fall within the head "Mortgage Bond Debenture Covenant". This may occur for more than one reason. The documentation will ordinarily include a security falling directly within the definition of "mortgage" itself which includes "an instrument creating or agreeing to create a charge over property" in defined circumstances.[1] To the extent to which the documentation secures "the payment or repayment of money" and is executed as a Deed (or under seal), it may concurrently generate a "bond" or "covenant". To the extent to which the documentation includes an acknowledgement of indebtedness by a corporation it may also create a "debenture".

While this paper does not attempt to canvass many of the intricacies of the meaning of the terms mortgage, bond, debenture and covenant, a few points of interest may usefully be made:—

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** Unless otherwise stated, all sections referred to herein are to the Stamp Act 1894-1990.

1. Section 65(1)(3).

(a) An agreement to grant a mortgage is itself treated as a mortgage.[2]. Accordingly, where an initial facility agreement contains an agreement for the granting of a mortgage, that agreement will itself be a mortgage. However, where the granting of security is drafted as a condition precedent only, the facility agreement will not of itself be a mortgage.

(b) There is some debate as to whether a Torrens system mortgage falls within the term "mortgage" used in its classical sense because, in strictness, it is a statutory charge. This debate, however, has little relevance in the present context because instruments creating or agreeing to create charges are ordinarily deemed to be mortgages.[3]

(c) As the term debenture is undefined in the Queensland legislation, it carries its ordinary meaning. That meaning has been said to be incapable of precise definition. However, an instrument will only be a debenture if it is an acknowledgement of an indebtedness that is existing or, to be thereafter made[4] and is issued or executed by a corporation.[5]

(d) It is arguable that a facility agreement can be structured so that considered in isolation, it escapes the traditional mortgage heads. However one should not expect ready acceptance of this view by the Queensland Stamp Duties Office. This matter is discussed further in the context of unsecured loans. However, the addition of a mortgage or an agreement to grant a mortgage will nonetheless bring the security package within the traditional heads through the definition of "mortgage" itself.

The rate of duty applied under the "Mortgage Bond" head to instruments which secure the payment or repayment of money is 40 cents for $100.[6] Where the total amount secured is limited or some maximum amount is specified, duty is simply calculated on that amount, even though it might never be advanced: s. 68(1). Where the security documents contain no such limit, the documents are normally stamped up to the extent of advances made contemporaneously with or prior to the initial stamping of the documents, although it is arguable that the amount of the initial stamping simply involves an election as to the amount for which the security is enforceable.[7] An unlimited security upon which no money is owing can be stamped nominally or for any requested amount. However, to the extent to which "further advances" are made, there are obligations to upstamp to the highest amount further advanced.[8] The amounts secured can ebb and flow within the limits to which the instrument is stamped without attracting further duty. Unlimited securities, therefore, offer at least some opportunity for the deferral of duty as payment of duty can be delayed at least until the June following and possibly to the time at which the amounts are paid off and a Form G is lodged.[9]

The Stamp Duties Office accepts that the insertion in a mortgage or charge of wording giving priority of up to a specified amount for the purpose of the Companies Code will not result in the treatment of the security as a limited security for that priority amount. This approach is now supported by the Tasmanian decision in ***Muirland (No.4) Pty Ltd*** v

2. Ss 66 and 65(3).
3. S. 65(3).
4. *Handevel Pty Ltd* v. *Commissioner of Stamp Duties (Vic.)* (1985) 157 CLR 177.
5. *Broad* v. *Commissioner of Stamp Duties (N.S.W.)* [1980] 2 NSW LR 40.
6. See First Schedule, Stamp Act.
7. Cf *Commercial Banking Company of Sydney* v. *Love* (1974) 133 CLR 459.
8. Section 68(3).
9. Section 68(3).

Commissioner of Stamp Duties (Tas).[10] Where the lender is in the business of making loans, the transaction may in addition to mortgage duty (at 40 cents per $100) attract credit and rental business duty at 3 cents per $100 (with a cap of $2,500). Until 1984 it was possible to offset the mortgage duty on security documents against duty otherwise payable under the credit provisions. However, that is no longer the case.

Secured Bill Discount Facilities

Bill discount facilities fall into two distinct categories. First, there are facilities in which a bill of exchange is delivered as an adjunct to what is otherwise an ordinary loan. The bill enables the lender to "reliquify" by selling the bill. Secondly, there are bill discount facilities strictly so called which involve no relationship of borrower and lender, and which are commonly structured as tripartite transactions.

Prior to April 26, 1988 secured tripartite bill discount facilities could be established without payment of any material duty. In substance, there was thought to be no obligation to upstamp an unlimited security covering obligations under a true bill discount facility prior to default, because there was no "advance" necessitating upstamping.[11] There was also a secondary argument that a mortgage securing a bill discount facility in the strict sense is not a mortgage because it does not secure the payment or repayment of money "advanced or lent" or otherwise described in the definition of mortgage. In April, 1988, s. 65(2) was inserted which provides that where a security is given wholly or in part to secure an obligation on default arising under or in respect of a bill of exchange or promissory note the security is deemed to be a security for the payment or repayment of money lent or to be lent. The amount of the loan at particular times is deemed to be the total face value of the bills or notes current or outstanding from time to time. These amendments are clearly intended to equate secured bill discount facilities with secured loans so as to levy duty at the 40 cents per $100 rate. Curiously, the drafting omits to expressly deem a "further advance" for the purposes of the upstamping regime (although presumably that is the intention). It is important to note that there must be a "security" and that security must itself secure "an obligation on default" arising under or in respect of a bill of exchange or promissory note. Furthermore, funds must be provided "in exchange" for the bill or note.

Unsecured Loans, Unsecured Bill Discount Facilities and Negative Pledges

Where a loan is unsecured (in the sense that there is no mortgage or charge over property) there will be no "mortgage" for stamp duty purposes. However, duty at the 40 cents per $100 rate may in certain cases be nonetheless applicable if the loan is evidenced by an instrument which is a "bond", "covenant" or "debenture" falling within the heads previously referred to.

The heads "bond" and "covenant" are relatively simply avoided by ensuring the instrument is executed under hand and not as a deed. It is not so simple to ensure that the instrument escapes duty as a "debenture". However, it is thought that an instrument setting up the terms of a facility under which the borrower has no obligation to borrow, and the lender has no obligation to advance funds can avoid the head "debenture" (on the basis that it neither acknowledges an existing debt nor creates a debt). Thus it has in theory been possible to create appropriate evidence of the terms of an unsecured loan facility via a facility agreement without attracting the traditional "mortgage" heads of duty (although one should not expect ready acceptance of that view by the Queensland Stamp Duties Office). The

10. (1989) 20 ATR.
11. Section 68(2).

facility could be drafted so that the borrower had to perform certain conditions precedent before the lender became obliged to make the accommodation available. This approach could be taken a step further by adding a negative pledge under which a borrower covenanted not to charge assets without the consent of the lender. However, in 1985 s. 67A was inserted. The intention of the section was to render an application for a loan or an offer to make a loan dutiable at the 40 cents per $100 rate where there was no other instrument which is so chargeable. In other words, it was a "Clayton's contract" provision applicable to loans. Section 67A has no application where neither party executes anything at all. There must be either a document executed by the potential lender "for the purpose of making the loan" or by the potential borrower "for the purpose of making an application for a loan". Duty is only payable under Section 67A where the application or offer is not itself accepted in writing. That is to say it must be accepted orally or by conduct.

One might have thought that s. 67A left open the kind of facility agreement outlined earlier provided that facility agreement is executed by both parties. However, insofar as that agreement simply sets out in elaborate form the terms of an offer of loan which is in due course accepted by the borrowers conduct (in fulfilling preconditions), it is arguable that s. 67A nonetheless applies. However, the consequence of application of s. 67A may then be contended to be no more than to render the instrument liable to the duty it would have attracted if in writing. If the offer is under hand but does not provide for periodic drawdowns, repayments, or fees, and it has no agreement to grant a mortgage, no duty should be leviable. However, the Stamp Office may take a wider view of the operation of s. 67A.

Where a bill discount facility (in the strict sense) is unsecured, one is effectively back in the position prior to the introduction of ss 67A and 65(2). The "Clayton's" loan provisions have no application because there is no "loan". The secured bill discount facility provisions have no application because there is no "security". Note, however, that the term "security" (as used in s. 65(2)) is wider than the conventional notion of a mortgage or charge, and includes instruments creating liabilities to make periodic payments.[12] For these and other reasons, including the territorial factors considered later in this paper, it has in some circumstances been possible to construct unsecured facilities which attract little in the way of duty. In a practical sense, it has been the taking of security over property which has had as its price the payment of substantial duty. This in turn contributed to the increase in so called "negative pledge" financing under which the borrower covenants that it will not mortgage, charge, pledge, or otherwise deal with assets without the lender's consent and provides other covenants and assurances. Some care nonetheless must be taken (in the case of negative pledge funding) to ensure that the negative pledge and associated facility are not a "bond", "covenant" or "debenture" and that s. 67A is not attracted. A negative pledge lending may of course have its own price in the event that the borrower defaults, because the lending is in substance unsecured. It should also be noted that debt instruments properly characterized as no more than "promissory notes" attract no duty or nominal duty of 10 cents. Unfortunately, where promissory notes are given by a company they are often not readily distinguishable from (and may thus be chargeable with duty as) a debenture. Finally, an unsecured loan which escapes "mortgage" duty may nonetheless fall into the credit and

12. See *Independent Television Authority* v. *Inland Revenue Commission* [1961] AC 427; *Neon Signs Ltd* v. *Commission of Stamp Duties* [1963] WAR 16.

rental business regime where the lender is in the business of making loans thereby attracting duty at the relatively modest rate of 3 cents per $100 with a cap of $2,500.

Territorial Factors

Stamp duty is a State rather than a Federal tax. A number of consequences flow from this including the following:

(a) The legislation has evolved separately in each State, and there are often subtle differences in that legislation;
(b) It is important to determine precisely which documents and transactions each State claims are dutiable, and this leads to an examination of the "territorial nexus" adopted by the Act as a whole and the particular charging provisions;
(c) There is often a potential for "overlap" or "double duty" and in some cases there are relieving provisions which alleviate to some extent against double duty; and
(d) Lastly, in some cases an appropriate choice of jurisdiction may minimize the overall duty payable.

The Queensland Act is administered on the basis that the general territorial nexus is to be found in s. 4(2) of the Act so that an instrument is liable to duty where it is:

(i) executed in Queensland; or
(ii) relates to property situated in Queensland; or
(iii) requires some matter or thing to be done in Queensland.

Since 1988 the legislation has attempted to expand the scope of the second and third of these factors by a tracing regime so that where, for example, an instrument relates to rights, obligations, matters or things "arising from" another instrument relating to property in Queensland, it is also deemed to relate to property in Queensland.[13] These amendments also expanded these factors by deeming certain shares and units to be property situated in Queensland for the purposes of applying the mortgage duty provisions.[14] A simple and relatively inoffensive case involves security taken over shares in a Queensland company. Those shares may be on a foreign register and, therefore, not otherwise regarded as property in Queensland. Unfortunately the provisions go on to refer to shares in trustee companies, land owning corporations, and units in unit trust schemes (falling within ss. 56C, 56F, and 56B respectively) wherein the connection with Queensland may be much more tenuous and less obvious. Thus, for example, a unit trust or trustee company may be deemed to own property in Queensland and thus within s. 56B or 56C where the trust is deemed to relate to property in Queensland because it "relates to" matters or things "arising from" instruments relating to Queensland property,[15] or has an indirect interest via interposed trusts in Queensland property.[16]

Section 67A contains its own internalized set of four territoriality factors, these being:

(a) the occurrence of negotiations in respect of the loan in Queensland;
(b) repayments, proposed or arranged, to be made in Queensland;
(c) loan moneys obtained for the purpose of being expended or used wholly or partly in Queensland; and
(d) the application or offer is made by or on behalf of a Queensland resident or a Queensland company.

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13. See s. 4(5) and (6).
14. Section 71.
15. Section 4(6).
16. Section 4(7).

The credit and rental business duty provisions also import their own internalized set of territorial factors which may vary according to the category of transaction. It is beyond the scope of this paper to examine these in detail, particularly as there has always been some difficulty in determining precisely which elements of that regime supplied the nexus. One problem is that there is a set of "inclusory" provisions (see s. 35B(2)) and a set of "exclusory" provisions (see s. 35B(5)) with little guidance as to transactions falling between the two. Broadly speaking, there are three views as to the relevant nexus which in decreasing order of acceptability are as follows:

(a) The "inclusory" provisions exclusively supply the nexus.
(b) The inclusory provisions provide part of the nexus to which one adds transactions occurring within the State or (possibly) having a Queensland proper law.
(c) Registration or residence of the borrower effectively supplies the nexus so that, for example, a registered person must include amounts within a return regardless of the connection which the particular transaction has with the State unless the transaction is positively excluded.

The Queensland legislation once afforded relief against double duty through a relatively simple apportionment process. For example, in the case of a secured loan, once the proportion of the value of the property in Queensland was determined, mortgage rate duty was payable on that portion alone. Where the loan was secured wholly on property outside Queensland duty was nominal. The duty actually paid interstate was irrelevant to this process. Since 1988, however, the process has become more complex. Relief is permitted only where the Commissioner is satisfied that ad valorem duty has been or will be paid under a corresponding interstate provision. Even then, the credit allowed in Queensland is the lesser of the interstate duty and the Queensland duty calculated on a value proportioned basis where the security is split between Queensland and another State.[17] Where the property is shares or units a separate and distinct relief provision gives the Commissioner a very wide discretion as to the amount of relief if any.[18] Presumably this greater discretion was thought appropriate because the prospect of double duty in such cases is even greater where other states may concurrently regard the shares or units as being entirely within their domain. In substance a credit may be allowed if the Queensland duty and the interstate duty exceed the duty which would have been payable if the security was wholly over Queensland property.

The Commissioner, it appears, accepts that an instrument executed out of Queensland, securing funds applied out of Queensland and charged only on property outside Queensland is not liable to Queensland duty by reason only that it is brought into Queensland for registration at the Corporate Affairs Commission. However, the instrument should not itself oblige the registration as that would appear to positively tempt fate by attracting the reasoning in *ACI Resources Ltd* v *Commissioner of Stamp Duties (NSW)*[19] In that case an obligation in a Deed of Charge over Queensland property to register in New South Wales was held to be the required "thing done or to be done" under s.29 of the New South Wales Stamp Duties Act 1920 and, therefore, liable for duty. The Queensland legislation does not contain any specific provision dealing with after acquired property to which a charge attaches, whether for the purpose of the nexus provisions or the apportionment regime. As would have been observed, the incorporation of companies in Queensland plays an important role in certain of the tests. It is perhaps interesting to speculate as to the method by which the States

17. Section 70(1).
18. Section 71.
19. (1986) 86 ATC 4810.

would have attempted to carve up the stamp duty cake if the Federal Corporations legislation had been upheld and the notion of companies incorporated in particular States were to have passed into history.

Secured Guarantee Transactions

Secured guarantee transactions are probably best approached by considering a financing transaction which has no connection or nexus with Queensland other than the fact that security is to be given over land or other property in Queensland owned by a guarantor of the principal facility or transaction. A mortgage securing moneys payable under a guarantee will probably fall within the definition of "mortgage". In *Ansett Transport Industries (Operations) Pty Ltd* v *Commissioner of Stamp Duties*[20] a mortgage was given to secure the obligations of a surety. Tadgell J. held that the expression "repayment" extended to the repayment of amounts by a surety. In situations of this type, if the guarantee and securities are drafted as unlimited securities securing only the obligations of the guarantor to amounts in the event of default and without securing the amounts funded under the facility, the documentation can be stamped on execution as an unlimited security. The subsequent provision of funds under the principal facility is thought not to trigger an obligation to upstamp as there is no "further advance" on the security.[21] Insofar as the principal facility has a connection with Queensland that facility must itself contend with the various heads and provision discussed earlier including ss. 67A and 65(2).

Security by Way of Deposit

Securities by way of deposit are likewise best approached by considering a financing transaction having no nexus with Queensland other than the circumstance that a security by way of deposit is to be given over property in Queensland. Mortgage by deposit of share certificates has historically been a relatively common form of security over shares. Mortgages of Torrens title land by deposit of Certificate of Title are specifically recognized by the Queensland Real Property Act.[22] In each case, the act of deposit results in an equitable mortgage. It is thus possible to effect the actual creation of securities of this kind without any instrument. That is not the end of the matter because the definition of mortgage includes an agreement, contract or bond accompanied with a deposit of title deeds for making a mortgage of any lands estate or property, and any power or letter of attorney given upon the occasion of or relating to the deposit of any title deeds.[23] However, if the deposit can be appropriately distanced from such matters it does not of itself occasion duty. In other States the deposit of share scrip or title deed is often accompanied by the delivery of transfers "executed in blank". Queensland has two provisions directed specifically against the use of such techniques.[24]

Transfers by Way of Security

Transfers by way of security are a form of mortgage somewhat at the other end of the security spectrum. In such cases, the lender goes so far as to obtain an actual transfer of the property subject to the borrower's rights to redeem which are commonly set out in a deed of defeasance. The rights of the borrower are effectively such that it retains equity in the property. Generally speaking, conveyances by way of security of any property are dutied as

20. [1981] VR 35.
21. Cf 65(3).
22. Section 30 of 1877.
23. See s. 65(1)(a) and (d).
24. Cf ss 53(5), 31A and 53A.

mortgages and not as transfers.[25] However, specific provision has been made to ensure that the transfer is not a prelude to a transfer of the borrower's equity in the property. Where the property is land, ad valorem conveyance duty is charged up front and refunded when the land is reconveyed.[26] In the case of other property, mortgage duty is paid up front, and conveyance duty is payable when the transferee or any subsequent assignee obtains ownership free of the equity of redemption.[27]

Leasing and Hiring Equipment

Agreements for leasing and hiring equipment fall within the specific Head of Duty dealing with Hiring Agreements. Where the agreement is for a definite period and the total amount payable can be calculated, this Head imposes duty at the rate of 43 cents per $100 of such amount. However, this duty is not payable where the owner receiving these amounts is registered under the credit and rental business provisions. These provisions[28] are a specific regime directed to a range of financing transactions including rental business transactions. A person carrying on (or deemed to be carrying on) rental business in Queensland is required to be registered[29] and must then disclose a monthly statement specifying monthly receipts from the rental business. Duty at the rate of 43 cents per $100 is then imposed on that amount. Furthermore, a person resident or domiciled in Queensland who transacts any rental business with an unregistered lessor must prepare and lodge a memorandum with similar effect.[30]

As noted earlier, the territorial nexus adopted by these provisions is far from clear. However, assuming that the inclusory provisions in s. 35B(2) provide the nexus, the relevant factors (for rental business) are:

(a) Right to use the goods is granted in Queensland;
(b) Negotiation in respect of the transaction were undertaken in Queensland;
(c) The goods are delivered in Queensland.

If the intermediate view outlined earlier were adopted one must add:

(d) The occurrence of the transaction within Queensland; and
(e) Queensland proper law.

Establishment of a leasing facility may require the transfer of title in equipment to the lessor as in the case of a sale and leaseback. This raises the prospect of conveyance duty on the sale or transfer if some care is not taken. A contract for the sale of property solely comprising goods, livestock, wares or merchandise is exempted from conveyance duty.[31] However, this exemption does not apply to an actual instrument of transfer of the goods. Nor does it apply where the goods have become fixtures. Where a guarantee of obligations under the lease is required, there is a prospect that it may attract duty at mortgage rates. There is a particular risk factor here because even if the guarantee is executed under hand, it is likely to secure periodic payments. However, if executed as an "all moneys" and unlimited guarantee (in advance of the lease), nominal duty may be contended for.

Tax Based Financing — Leverage Leasing

There are generally four key parties to a leveraged lease, namely a lessor (commonly a partnership of financial institutions), the lessee, a lender to the lessor, and a manager.

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25. See First Schedule, Stamp Act, Queensland.
26. Section 56D.
27. Section 56E.
28. See ss 35-35H.
29. Section 35B.
30. Section 35E.
31. Section 54(2).

Commonly, the lessor partnership acts through a nominee company in borrowing, acquiring the equipment, and granting a lease. Typically, the lessor partnership provides say 20% of the cost of the assets from its own funds and gears or leverages its investment by borrowing the remaining 80 %of such costs from a lender on a non-recourse basis. The lease itself, assuming it is a lease of equipment, is analyzed in a similar manner as more conventional leases though regard is had to the wider document package of which it forms part. It is relatively common to find that the equipment which is proposed for a leveraged lease is affixed to land. It follows that an agreement for sale of that equipment to the lessor (or its nominee) is prima facie subject to ad valorem conveyance duty, unless it can be appropriately severed. Documentation relating to the appointment of a nominee company may be dutiable as a "declaration of trust" if it declares that the nominee holds the assets upon trust for the lessor partnership. Where the lender takes a mortgage over the lessor's rights under the lease, the equipment or both, application of mortgage duty needs to be considered. Some nice questions arise concerning the situs of the mortgaged rights. Insofar as the security involves a mortgage of the equipment itself, that equipment will have a situs where the equipment is located. If the security is limited to the lessor's rights under the lease, the chose in action can be located where the documentation is retained if the lease is executed under seal.

Tax Based Financing — Redeemable Preference Shares

The allotment of shares for cash, including redeemable preference shares, ordinarily attracts no stamp duty as there is no longer any duty directed to share certificates or share allotments. The process, in any event, is usually effected without any written instrument. However, this is subject to important exceptions where the company is a "land owning corporation" or a trustee company. Where the shares are allotted in consideration of property other than cash, (shares, for example) it may attract ad valorem duty.[32]

In the case of redeemable preference share funding, the shares will invariably be issued for cash by a company acting in its own right (though care should be taken that it is not concurrently a trustee). The allotment or agreement to allot will, therefore, be dutiable only where the company is a land owning corporation. The obligation of the company to redeem the shares may be secured by covenants given by a parent company (or by other means) and this security must in turn be analyzed for its stamp duty consequences. Although the obligation to redeem is in a practical sense treated in the nature of a debt, in strictness it is not a debt obligation. In *Handevel Pty Ltd* v *Commissioner of Stamp Duties (Vic.)*[33] a mortgage was given to secure the contingent obligations of Handevel to purchase redeemable preference shares held by shareholders in a company in the event that the company failed to redeem or pay dividends. The High Court held that the mortgage was not a "mortgage" or a "debenture" in terms of the Victorian legislation because the relevant price was to be paid only if one of the contingencies occurred and there was no amount to be "lent or advanced" for the purpose of the definition of mortgage. *Handevel's case*, therefore founds an argument that there is no "mortgage". Indeed, it founds a more general proposition that an instrument securing non-debt obligations is not a mortgage. However, in Queensland, following recent amendments to the Stamp Act, the security documentation may still attract duty under the head "Mortgage Bond Debenture Covenant".[34]

32. Section 54.
33. (1985) 16 ATR 1044.
34. Stamp Act Amendment Act 1990, First Schedule. The head "Bond Covenant or Instrument" has been removed and its security aspects have been incorporated into the head "Mortgage Bond Debenture Covenant".

The land owning corporation provisions[35] apply where a person acquires a majority interest or builds on a majority interest in an unlisted corporation where that corporation is entitled to land in Queensland with an unencumbered value of not less than $1 million and where the unencumbered value of all land to which the corporation is entitled (whether in Queensland or elsewhere) is 80% or more of the value of all property to which it is entitled. Ad valorem duty is paid on an appropriate proportion of the value of the Queensland land.[36] Almost all categories of "acquisition" are caught including allotments of shares. All acquisitions by persons and related persons within three years before and after an acquisition are potentially aggregated. A corporation is deemed to be entitled to land to the same extent as a subsidiary is entitled to land, and for this purpose, the term subsidiary is given extraordinary width. The test of majority interest focuses upon the entitlements attaching to the acquired shareholding upon an immediate winding up of the company, and asks whether that entitlement is greater than 50% of the value of the property "distributable to shareholders".[37] In the case of a redeemable preference share issue, the percentage of assets flowing to the shareholder upon such a liquidation may not be readily apparent.

Tax Based Financing — Property Financing (Unit Trusts)

In Queensland, the stamp duty problems associated with the establishment and use of unit trusts as tax effective financing vehicles are quite severe. A number of steps in the process have the potential to attract stamp duty including the:

(a) initial acquisition of the site (or an interest in the site) by the unit trust;
(b) allotment of units in the trust to the financier;
(c) redemption or transfer of units by the financier at the end of the project.

The amount of duty payable upon acquisition of a freehold interest in the site by the trustee can be minimized if that acquisition precedes the commencement of construction on the site. Ideally, the site itself should be acquired directly by the unit trust vehicle so that double acquisition costs can be avoided. In some cases the interest acquired by the unit trust is a ground lease, in which case duty is paid under the Head "lease".

Allotments of units in a unit trust generally occasion duty at ad valorem rates calculated by reference to the gross value of the underlying property of the unit trust situated in Queensland.[38] It is, therefore, important to ensure that the allotment of units to the financier occurs before the trust acquires its interest in the real property. Redemption of units in a unit trust likewise occasion duty at ad valorem rates calculated by reference to the gross value of the underlying property of the unit trust situated in Queensland.[39] One course suggested in relation to the take out phase was to so draft the rights attaching to the financier's units that after payment of the guaranteed return they cease to have any value. This drafting was intended to avoid a disposition for the purposes of s. 56B by avoiding any redemption of the units and any valuation, abrogation, or alteration of the rights pertaining to them as those rights were restricted ab initio. The treatment of shares in the corporate trustee also requires careful thought because of the potential for concurrent application of the provisions dealing with shares in trustee companies.[40] Ideally, changes in the beneficial ownership of those

35. Sections 56FA-FO.
36. Section 56FK.
37. Section 56FN.
38. Section 56B.
39. Section 56B.
40. Section 56C.

shares are avoided, although the financier may have secured Board representation through the financing stage.

Convertible Notes

Convertible notes are a hybrid instrument with features placing them somewhere between debt and equity. They commence life essentially as debt, but may be converted into equity upon the exercise of an option or election to convert. Accordingly, the notes are potentially subject to duty at the 40 cents per $100 rate upon allotment where the documentation is a "bond", "debenture", or "covenant". The allotment of shares flowing from exercise of the option to convert will generally not attract duty unless the company is a land owning corporation (or trustee company). The rights of convertible noteholders may be secured by a trust deed in which case the terms of the trust deed itself need to be considered to ascertain whether it attracts duty as a declaration of trust, mortgage, or the like. In *Humes Ltd* v. *Commissioner of Stamp Duties (Vic.)*[41] convertible notes had been issued by Humes to Smorgon at a 10 cent issue price which was repayable and on which interest became payable, and a 90 cents premium which was not repayable and did not carry interest. The convertible note entitled Smorgon's to an ordinary share upon payment of a further $1.70. The certificate issued by Humes was held dutiable as a debenture, the duty to be calculated on the amount of 10 cents (that is, the amount of the relevant indebtedness) and not on the premium of 90 cents.

Trust Deeds for Public Debenture Issues

Where a corporation offers debentures to the public, and executes a trust deed in respect of that offer, a special stamping regime is applied. The Trust Deed is charged with duty under the "Mortgagee Bond" head as if it were a debenture.[42] The trustee is obliged to forward to the Commissioner annually (in July) a declaration specifying the amount of debentures subscribed for by the public in Queensland, with duty being payable on that declaration. Where this regime is applicable, the trust deed itself and any debentures issued thereunder are specifically exempted from the potential application of any other head of duty.

Transfers of Mortgages, Refinancing, Security Substitution

Subject to specific exceptions, the conveyance or transfer of a debt or mortgage attracts duty at ad valorem rates under the heading, "Conveyance" at rates of up to $3.75 per $100. Therefore, unless a specific exception can be used with confidence, discretion may dictate a fresh facility (dutied at 40 cents per $100) rather than an assignment of an existing security. Specific exceptions are provided in respect of a transfer of property consisting solely of a mortgage or of an interest in a mortgage secured on land or land and improvements and a connected transfer of property consisting solely of a security which is ancillary or incidental to the mortgage.[43] Such transfers are stamped nominally for $5.00. These provisions give rise to a great deal of uncertainty because firstly it is often unclear whether other securities are ancillary or incidental to the mortgage, and secondly because they are silent in relation to the underlying indebtedness secured by the mortgage. Furthermore, they are not available where the principal security is a floating charge or security over property other than land.

There is also an outright exemption on a conveyance or transfer of a corporate debt security.[44] The term "corporate debt security" is defined at some length in s. 2 to mean any

41. (1989) 20 ATR 860.
42. Section 68A.
43. See paragraphs (1)(a) and (c) of the heading, Conveyance or Transfer, First Schedule, Stamp Act, Queensland.
44. See Exemptions under heading, Conveyance, First Schedule, Stamp Act, Queensland.

marketable security which is a debenture, debenture stock, bond or note or other security of a corporation whether or not constituting a charge on the assets of the corporation. There is some uncertainty as to the scope of this exception and particularly whether the term "marketable security" implies some concept of marketability beyond mere assignability. The only cases dealing with the term are United Kingdom cases which turn on specific wording in the United Kingdom Imperial Act which leads to the conclusion that the security must be of a kind capable of sale on a Stock Exchange. Although these cases do not seem to be strictly relevant they are adopted in statutory annotations to the Act. Arguably the words mean no more than "saleable" or "valuable". In certain circumstances, s. 54AB must also be considered on the assumption that there is a change in the beneficial ownership of underlying securities which grant, inter alia, an interest in land. In limited cases debt sub-participation agreements can be constructed which avoid altogether any conveyance of property, although these should avoid declarations of trust, creation of interests in Queensland property, or security over Queensland property.

It should be noted that the mere substitution of security (there having been no change in the beneficial ownership of the indebtedness) itself attracts no additional duty. A collateral, auxiliary, additional, or substituted security attracts nominal duty if the principal security is stamped with ad valorem mortgage duty. Some complexity arises where the securities have interstate elements and the collateral or substituted documents secure property in Queensland to a greater or lesser proportion than the primary security. As a matter of practice the Stamp Duties Office deals with the security package on a global basis and stamps the principal security accordingly.

Enforcement of Rights and Securities

The Stamp Act provides that an instrument chargeable with stamp duty shall not, except in criminal proceedings be given in evidence, or be available for any purpose whatsoever, unless it is duly stamped.[45] Although the section itself goes on to create an exception available where undertakings as to payment of duty are given in court proceedings by a party or his solicitor, the Courts have generally insisted on undertakings by the solicitor. Fortunately, the Courts have placed something of a "gloss" on this kind of wording, holding that once an instrument has been duly stamped after execution, the stamping has a retrospective operation to the date of its execution.[46] For example, in *Westpac* v. *Mouselli's*,[47] a mortgagor sought to set aside a judgment obtained by a mortgagee on the basis that the mortgages had not been sufficiently upstamped. The Supreme Court of the Northern Territory held that the prohibition on enforceability extended to the exercise of power of sale, but went on to hold that the defect could be cured retrospectively by undertakings as to payment of additional duty. For the same reason, in *Acclaim Holdings Pty Ltd* v. *Vlado Pty Ltd*[48] a judgment by default was set aside by the Supreme Court of Western Australia because the plaintiff's cause of action was based on an agreement which had not been stamped and, therefore, could not be relied upon. In the case of securities for unlimited amounts, the security need not in theory be stamped or upstamped until the holder wishes to take action thereunder *or* until further advances trigger a specific obligation to upstamp.[49] However, the holder of the security cannot look to recover

45. Section 4A.
46. See *Shepherd* v. *Felt & Textiles Limited* (1931) 45CLR 359 applied as to Queensland matters in *Re: Alexander David Douglas,* 20 July 1987 (unreported) Pincus J.
47. (1955) 17 ATR 46.
48. [1989] ATC 5215.
49. Cf s. 68(2)(3).

under it any amount greater than the extent to which it is stamped. The security documentation will invariably require the borrower or other party seeking funds to meet the stamp duty costs. Although this has effect as between the parties, it does not extinguish the statutory obligations of the financier as a party to the documentation to pay the duty. In *Ex Parte M. & W. Holdings Pty Ltd*[50] a party to an unstamped document sought a writ of mandamus to force the other party to pay duty in accordance with its terms. The application was dismissed because it depended on the terms of the unstamped document. In order to proceed the applicant had to pay the duty or undertake to do so.

Liquidations

Upon the appoinment of a liquidator to a company the liquidator takes control of the property of the company.[51] However, the property of the company does not vest in the liquidator unless he takes an additional step and seeks a vesting order.[52] Ordinarily no vesting order is made and unlike a sequestration order in bankruptcy, winding up does not effect a transfer of company property, which continues to belong to the company and does not pass to the liquidator.[53] The Titles Office recognizes and will register transfers executed by a liquidator on behalf of a company once a copy of the liquidators appointment is lodged. In the rare case where a vesting order is made, that order is potentially dutiable as a conveyance. The term "conveyance" is defined to include every instrument and every decree or order of a Court whereby property or any estate or interest in property is transferred to or vested in any person.[54] However, the Act does not clearly specify who is liable for payment of the duty so imposed. Sales of property by the liquidator in the course of realizing the assets of the company will attract duty in the ordinary way as conveyances. Transfers of property to shareholders of the company by way of distributions in specie generally attract ad valorem duty under the head "conveyance". Section 49B provides that a conveyance, transfer or assignment otherwise than a sale for full consideration executed by a liquidator in the course of and for the purpose of the winding up of the company shall be taken to be a conveyance on sale for a consideration equal to the value of the property. The importance of s. 49B is probably diminished nowadays because conveyances are now generally dutiable whether or not effected on sale. In the rare case where the recipient of the distribution in specie is an associated company for the purposes of s. 49C, the distribution may attract an exemption under s. 49C(2) although some theoretical doubts have been expressed regarding this. These doubts arise because s. 49C requires a transfer of a beneficial interest in property from one company to another.[55] Payments of cash by a liquidator to creditors or to shareholders do not attract stamp duty.

Receiverships

Receiverships fall into two broad categories. First, the receiver may be appointed out of Court under a debenture or other charge. Secondly, the receiver may be appointed by Court order (as a receiver of a company) independently of the existence of any charge. In neither case does the appointment vest any property in the receiver. An appointment out of court does not ipso facto vest any of the property of the company in the receiver and manager. Nor does it entitle the appointee to have the company's property transferred into the receiver's

50. [1989] ATC 5195.
51. Section 374(1) Companies Code.
52. Section 374(2).
53. J. O'Donovan, McPherson, *The Law of Company Liquidation* 3rd Ed 1987, Law Book Co. Ltd at p.163.
54. Section 49(1).
55. Cf *K.L.D.E. Pty Ltd (In Vol. Liq.)* v. *Commissioner of Stamp Duties* [1984] ATC 4119.

own name. In the case of a court appointment, the legal ownership of the company's property is not disturbed by the appointment itself, although the receiver and manager may later exercise his power to dispose of such property.[56] Where the appointment is made pursuant to a debenture, the stamp duty status of the debenture is of importance, and the failure to stamp that document is a potential source of invalidity of the appointment.[57] The document which effects the actual appointment of a receiver under a debenture alone would attract duty as a power or letter of attorney. Insofar as the receiver obtains an indemnity from the debenture holder, the terms of that indemnity would need to be considered for potential liability under the mortgage head. However, in the normal case this will be a comprehensive indemnity stampable as an unlimited security. Sales of property effected by the receiver in the course of realising the assets of the company will attract duty in the ordinary way as conveyances.

Conclusion

This paper has sought to approach the question of stamp duty by considering a series of different categories of transactions. This kind of analysis is intellectually useful but should never act as a substitute for careful perusal of the particular documentation adopted in each case. The analysis here should suggest that the form which the transaction takes can have a significant impact on the stamp duty payable, and that there are, in certain limited circumstances passages through the stamp duty reef. However, this writer has always had reservations about spending too much energy charting a course through them. As a general observation, there has been something of a tendency to sacrifice the commercial position of the financier from a securities standpoint by adopting approaches which minimize the payment of stamp duty (or indeed other revenues). Negative pledge lending may be seen as a classic case. However, that is a topic for a paper on securities.

56. J. O'Donovan, *Company Receivers & Managers* Law Book Co. Ltd, 1982, at p.50, 304.
57. Cf. *Harris & Lewin Pty Ltd (In Liq.)* v. *Harris & Lewin* (Agents) [1975] ACLC 28 279.