COMMENT ON STAMP DUTY: DEVELOPMENTS AFFECTING THE RESOURCES INDUSTRIES

By Barry Johnston*

Australian Stamp Duty has consistently aroused a number of unflattering reactions from committees of enquiry, tax task forces, commentators[1] and the business community — bizarre, illogical, inequitable, discriminatory, regressive, among them — indeed, the taxpayer could be forgiven for believing that when former USA President Ronald Reagan spoke of the evil empire, he was referring to Australian stamp duty.

A kaleidoscope of archaic legal concepts, differing rates and conditions between States and differing rulings and interpretations by taxation departments has produced distortions and inequities, sometimes capable of attracting a range of multiple duties on the one transaction both within and outside one jurisdiction, and in some cases having a value in excess of the profit margin on the transaction!

But, in practical terms, the most annoying features for the business community are (i) the difficulties of being able to predict the ultimate tax liability with a degree of accuracy; (ii) the distortions that tax minimisation strategy produce on simple transactions; (iii) the absorption of managerial time and other resources; (iv) the lengthy delays encountered in obtaining an assessment due principally to the processes of requisition and valuation and most importantly, (v) the cost burden, often at the front end of a project and at a time when it can be least afforded and when capable of being better employed to more productive ends. Indeed, in many cases this cost can be a 'deal breaker' unless it can be reduced by sensitive planning or unless exemptions apply or *ex-gratia* refunds are available.

The purpose of this commentary is (i) to consider stamp duty issues relevant to corporate restructuring and (ii) to examine requirements for valuations for stamp duty purposes. This commentary is supplemental to the paper by Peter Allen and the other commentary by Bernie Walrut and should be read in conjunction with those contributions. The comments that follow apply primarily to Western Australia but will have general application to other jurisdictions.

CORPORATE RESTRUCTURING[2]

It often becomes necessary for a corporate group to reorganise its affairs. Reasons include the need (i) to simplify corporate structures; (ii) to improve overall control and efficiency; (iii) to reduce administration

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1 E.W. Wallace 'Stamp Duties — Impact on Interstate and International Transactions' (1987) 61 *ALJ* 786.

2 Extensive commentary on this topic is contained in A.F. Tolhurst, E.W. Wallace and F.P. Zipfinger *Australian Revenue Duties* (Butterworths 1979) paras. 8.666–8.719.

time and expense including accounting, audit and company fees; (iv) to produce a business entity designed to carry out a discreet activity or be suitable for a special purpose, such as public listing; or (v) to produce taxation advantages. Whatever the reason, assets will need to be transferred and companies may need to be merged by amalgamation or be liquidated.

There are many ways of effecting a transfer of property. These include (i) transfer by farm-in; (ii) transfer by way of sale, gift or settlement; (iii) transfer in specie by way of dividend; (iv) reduction of capital by way of distribution of assets in specie; (v) transfer in specie on winding up;(vi) transfer by way of satisfaction of debt; (vii) transfers pursuant to schemes of reconstruction or amalgamation; (viii) transfer of operations but not assets and (ix) transfer by way of conditional surrender of mining titles against fresh applications.

Many of these alternatives may either be inappropriate, involve serious imperfections in the form of adverse taxation and/or stamp duty consequences or involve difficulties of implementation. However, in looking at various methods of reorganising a group structure to achieve the most efficient situation from an operational, financing, investment and taxation point of view, all alternatives need to be considered.

This will involve from a stamp duty perspective intimate knowledge of (i) the group structure; (ii) the true nature of the assets involved; (iii) the situs thereof; (iv) the applicable jurisdictions in cross border operations; (v) territorial nexus; (vi) the corporate objectives to be achieved and (vii) any other factors likely to influence stamp duty liability, such as exemptions or other relief.

Once this information is to hand, proper stamp duty planning can commence. This can be a lengthy, time-consuming and costly exercise involving issues of some complexity. In this process, it also needs to be appreciated that a transaction can be severely hampered by the cost (both in time and money) of (i) identifying the duties which may apply both to the relevant transaction and to the documents relating to that transaction; (ii) undertaking the calculations necessary to determine the amounts of duty payable; (iii) paying a duty which applies on such a remote connection with a jurisdiction that it could not have been originally foreseen; (iv) structuring to minimise the incidence of multiple duties; (v) taking steps necessary to obtain credits for duty paid elsewhere; (vi) paying multiple duties where credits or exemptions are not available; and (vii) complying with time limitations in stamp legislation as well as other legislation such as the Companies Code.

On general principles, a transfer of property made by a company to its creditors or shareholders in the course of a winding up of a company or to a related corporation whether in the course of reconstruction or by means of an inter-company transfer, would, in the absence of express exemption, be a dutiable transfer.

However, Australian stamp duty legislation and/or the practice of taxing authorities provides some measure of relief, in certain circumstances, from the full impact of stamp duties. Principal areas for consideration in reconstruction planning are discussed directly below.

Goods, Wares and Merchandise

Exemptions apply in some jurisdictions in relation to transactions involving chattels. In Western Australia, a full exemption is given in respect of a conveyance or transfer of any estate or interest in goods, wares and merchandise or in any ship or vessel. In other jurisdictions, the exemption is partial only, and (broadly stated) only applies, for example, (i) according to the type of chattel involved; or (ii) to agreements to convey where title does not pass by virtue of the instrument; or (iii) the chattels are not included in a transaction for the transfer of real property. None of the jurisdictions have a uniform approach.[3]

Also, the exemption will be reliant on the relevant item not being categorised as a fixture. Whether a chattel has become a fixture is to be determined having regard to all relevant circumstances. The most important circumstances are the purpose of object of annexation and the mode or degree of annexation. Although both of these considerations are relevant, neither is conclusive. There are instances of chattels which have been securely affixed to premises not being treated as fixtures. There are also instances of chattels becoming fixtures notwithstanding that the party annexing the chattels had no such intention. Other relevant factors may include the ease with which the particular item can be removed, the nature of the item and the intended duration of the annexation.

It is important that the purchase price in respect of chattels be separately apportioned in the relevant contract, as failure to do so may result in the exemption being lost.[4]

Interests Not Regarded As Property

The existence of 'property' is critical to any consideration of duty on conveyances. The term is comprehensive, indicative and descriptive of every possible interest which a party can have.[5] But, judicial authority has established that certain items are not property for stamp duty purposes; namely (i) expectancies; (ii) no competition covenants; (iii) rights of property not yet arisen; and (iv) know-how and confidential information.[6]

Situs of Property

Broadly stated, in determining stamp duty liability, it is necessary to consider the territorial connection ('nexus') for that duty. The primary nexus between the instrument and the taxing jurisdiction is usually that it relates to property situate in that taxing jurisdiction. But, other factors are relevant such as (i) place of negotiations in respect of the instrument; (ii) place of execution of the instrument; (iii) place of any payments under the

3 Stamp Duties Act 1920 (N.S.W.) ss. 43–43B; Stamps Act 1958 (Vic.) ss. 63 and 63A; Stamp Act 1894–1982 (Qld.) ss. 49(2)–(4) and 54; Stamp Act 1921 (W.A.) Sch. 3 Item 2 para. (7); Stamp Duties Act 1923–1982 (S.A.) ss. 31(1), 31a, 66a and Sch. 2, Ex. 14; Stamps Duties Act 1931 (Tas.) ss. 70(4A), 70(4B), 70(6)(a)(i), 70(6)(9)(ii), 70(6A) and Pt. 1 of Sch. 3 Item II; Stamp Duties Act (A.C.T.) s. 19(1)(a); Stamp Duty Ordinance 1978 (N.T.) s. 8(1)–(3).

4 *North Shore Gas Co. Ltd. v. CSD (N.S.W.)* (1940) 63 CLR 52.

5 *Jones v. Skinner* (1835) 5 LJ Ch (NS) 87.

6 Refer authorities cited in Tolhurst *et al.* above n. 2 para. 6.38.

instrument; (iv) place of expenditure or use of moneys; and (v) the existence of any matter or thing done or to be done in the jurisdiction that relates to the instrument, *etc.*[7] Provisions also exist deeming territorial nexus with a jurisdiction which create a need to go beyond the face of a transaction in ascertaining liability to duty.[8]

Clearly, when looking at the scope for relief from stamp duty liability, consideration will need to be given to the possibility of relocating property from one jurisdiction to some other jurisdiction in which stamp duty liability does not extend to such property. For example, the situs rules have established that a specialty debt is situate where the instrument is situate.[9] Thus, if the specialty instrument is removed from a taxing jurisdiction and relocated in a more favourable jurisdiction, the duty involved can be minimised or avoided.

Transfer of Mortgages, Corporate Debt Securities, Releases of Debts and Disclaimers

Generally speaking, Australian stamp duty legislation or the practice of taxing authorities is to exempt or impose only nominal duty on this category of transaction.[10] However, it may be desirable, out of an abundance of caution (at least in Western Australia), that a release of debts be carefully documented to avoid any implication of gift.[11]

Liquidation Exemptions

Liquidation (sometimes called 'winding up') is a process by which a company is prepared for dissolution. A company can be wound up in one of two ways; namely (i) by the court on application by creditors, shareholders, certain past shareholders, the National Companies and Securities Commission or an official manager. Winding up by the court is called a 'compulsory winding up'; or (ii) voluntarily by special resolution of shareholders, without showing cause to any court. In the latter case, if a declaration of solvency is made, the winding up is called a 'members' voluntary winding up' and, in the absence of such declaration, the winding up is called a 'creditors voluntary winding up'.

Most Australian stamp duty legislation contains provisions or definitions which would make, in the absence of specific exemption,[12] the vesting of a company's assets in a liquidator pursuant to section 374 of the

7 M.R. James 'An Examination of the Factors Attracting a Liability to Stamp Duty in Interstate and International Transactions', paper presented at The 1989 Stamp Duty Conference, Perth.

8 Qld. ss 4 and 71. Also W.A. s. 84A if the Stamp Amendment Bill 1988 (W.A.) is revived and enacted.

9 *CSD v. Hope* [1891] AC 476

10 See Tolhurst *et al.* above n. 2 paras. 12.138–12.139k.

11 *CS (Vic.) v. Rylaw Pty. Ltd.* (1981) 12 ATR 1981; *Token House Enterprises Pty. Ltd. v. CSD (Qld.)* (1985) 16 ATR 967.

12 N.S.W. nil unless s. 73(2A) can be argued to apply; Vic. Sch. 3 VI, Ex. (25); Qld. nil; W.A. s. 73AA(1)(f); S.A. nil unless s. 71(5)(d) can be argued to apply; Tas. Sch. 2 Item 13(a) and Sch. 2 Item 28; N.T. nil; A.C.T. 4(1).

13 W.A. ss. 73AA(1)(f), 75(2a) and (3); Tas. Item 7(c) and (d); Part 1, Sch. 2; Vic. ss. 56B(2) and 72(2); S.A. s. 71(5)(b).

Companies Code a dutiable conveyance. Also, transfers by way of realisation of assets by a liquidator and distribution of property to be made in specie would, on general principles, be dutiable conveyances. Exemption is available in some jurisdictions.[13] A distribution of cash will not be dutiable as a conveyance.

In Specie Distribution

When the liquidation involves a distribution of assets 'in specie', this involves a distribution of the assets in their own form and not any substitute or equivalent thereof.

In Western Australia, the practice of the Stamp Office is that, upon a distribution in specie on liquidation, stamp duty is assessable on the basis that the shareholders are the persons beneficially entitled to the assets of the company to the extent of their shareholding. Any transfer of company assets distributed to a shareholder solely in satisfaction of his holdings, in proportion to the other shareholders, is assessed under section 73AA(1)(f) and section 75(3)(f) of the Western Australian Act as a transfer where no beneficial interest passes and therefore attracts only nominal duty. But, if the shareholder assumes any company liabilities as part of the arrangement to acquire assets or if the shareholder acquires the asset in consideration of any debt due to him, those liabilities are viewed as a 'consideration' and transfer duty at the full rate is assessed under section 66 of the Western Australian Act to the extent of the liabilities assumed or satisfied. Furthermore, if any shareholder receives a distribution of assets in excess of his proportionate shareholding in all of the assets of the company, transfer duty at the full rate is charged on that excess as a gift or settlement. The practice of the Western Australian Stamp Office is supported by and is in accordance with good judicial authority.[14]

To enable directors to make a declaration of solvency for the purposes of implementing a distribution of assets in specie under a members voluntary winding up and in order to achieve stamp duty savings applicable thereto it will often be necessary to extinguish liabilities prior to liquidation. Usually, the means of doing so are limited and can only be achieved by (i) release, discharge and forgiveness of debt; (ii) capitalisation of debt by issue of further shares; and (iii) transfer of assets in satisfaction of debt. The first two methods are cost effective from a stamp duty viewpoint but, the consequences of adopting the third approach will be nothing short of disastrous and should be avoided at all costs.

A measure of relief is also given in other jurisdictions.[15] It is unlikely that the minister in taxing jurisdictions would consent under section 83(3)(f) of the Companies Code to a transfer of incorporation for the purpose of obtaining in specie distribution stamp duty relief. But, it is something to be kept in mind, from a long-term planning viewpoint.

14 *Miller and Maund Pty. Ltd. v. CSD* (1959) Tas. SR 96; *CS (Vic.) v. Rylaw Pty Ltd.* (1981) 12 ATR 1981; and *Archibald Howie Pty. Ltd. v. CSD (N.S.W.)* (1948) 77 CLR 143.

15 Vic. s. 72(2); S.A. s. 71(5)(b); Tas. in practice nominal; N.T. Sch. 2, Item 9.

General Corporate Reconstruction Exemptions

In Western Australia, the Commissioner has power under section 75B of the Western Australian Act to exempt from *ad valorem* duty 'wholly or partially' any instrument whereby (i) assets are transferred, (ii) to a company (company A) which is incorporated by way of 'reconstruction' upon the basis of a sale of those assets, (iii) that sale is a sale of assets of a company or of a foreign company (company B) by the liquidator thereof, (iv) the assets are so transferred to company A in accordance with (a) the sale or (b) any contract lodged with the Corporate Affairs Office pursuant to section 113(3) of the Companies Code that relates to any shares in company A that are to be allotted or transferred to the shareholders of company B for the purposes of the reconstruction, and (v) the assets are specified in any such instrument. Section 113(3) of the Companies Code deals with allotments pursuant to written contract for a consideration otherwise than in cash.

The scope of this provision is limited and its meaning is not as clear as would be desirable. Inquiry of the Western Australian Stamp Office has been unhelpful. No guidelines have been issued (unlike other States where *ex gratia* relief is granted where 'public benefit' or 'public involvement' can be demonstrated) nor could any actual cases of exemption be remembered. Thus, there would appear to be some novelty in using the provision and it would be advisable to obtain prior step-by-step approval of the Western Australian Stamp Office to any particular proposal, particularly as the exemption from stamp duty will be solely dependent on the favourable exercise of the Commissioner's discretion. In any event, the key ingredients appear to be (i) a sale by a liquidator, and (ii) a company incorporated by way of 'reconstruction'.

The word 'reconstruction' has no definite legal meaning. It is a commercial and not a legal term, and, even as a commercial term, bears no exact definite meaning. In each case one has to decide whether the transaction is such as that, in the meaning of commercial men, it is one which is comprehended in the term 'reconstruction'.[16]

Reconstruction relief is also available in Queensland, New South Wales and Victoria.

In Queensland, the Commissioner has power under section 49C of the Queensland Act to exempt transfers of shares and property between associated companies. The provisons of this section are complex, detailed and difficult to interpret. This section has been the subject of extensive commentary[17] and critical judicial comment.[18] The topic is too large to be considered in this commentary. But, it should not be overlooked that 'claw-back' provisions exist which require payment of the exempted duty plus interest at 20 percent per annum from the transfer date if the transferor and the transferee cease to be associated (other than by reason of liquidation) within five years of the transfer date. This may make reliance on section 49C too risky.

16 *In re South African Supply and Cold Storage Company* [1904] 2 Ch. 268.
17 See Tolhurst *et al.* above n. 2 para. 8.694.

Both New South Wales and Victoria have adopted different approaches to the detailed legislative framework set out in the Western Australian and Queensland Acts.

In New South Wales, reconstruction relief is available under item (32) in the General Exemptions in the Second Schedule of the New South Wales Act in respect of an instrument 'approved by the Minister (except to such extent (if any) as may be determined by the Minister and in accordance with such conditions (if any) as may be so determined)' by which property is conveyed or agreed to be conveyed by one group company to another group company. General Guidelines for relief are set out in Revenue Rulings SD20 and SD80 published by the New South Wales Department of Finance. Ruling SD80 augments and, in parts, replaces Ruling SD20. Instruments may qualify for an exemption in certain cases set out in those Rulings. If certain circumstances exist, it is not necessary for the Minister to be satisfied that there will be a sufficient 'public benefit' resulting either directly or indirectly from the reconstruction. If those circumstances do not exist, then relief may still be available if public benefit can be shown. The Rulings set out certain criteria for establishing such benefit.

In Victoria, reconstruction relief is available under section 137R of the Victorian Act in respect of an 'instrument of a class that, under guidelines approved for the time being by the Minister, is a class of instrument arising out of a bona fide corporate reconstruction'. No separate guidelines have been established for the purposes of section 137R. It is understood that general guidelines issued by the Victorian Treasurer prior to the introduction of section 137R in respect of *ex gratia* refunds, are treated as being applicable. The Victorian guidelines provide that an *ex gratia* refund of duty will only be granted (i) 'where the reconstruction is at the request of public or semi-government authority', or (ii) if 'the companies have a considerable degree of public involvement and it can be demonstrated that the existing corporate structure of those companies is unsuitable for the future growth of the corporate group'. Also, an exemption would only appear to be available in very 'exceptional circumstances' to private companies. Like Queensland, the guidelines contemplate exempted duty 'claw-back' if a change in ultimate ownership and control occurs within a 12-month period. Once again, reliance on the exemption may be too risky unless directors can be wholly confident that no such change will occur within that period.

In jurisdictions in which no statutory relief from stamp duty is available, the taxpayer can nevertheless still apply to the relevant Government seeking relief from stamp duty.However, in such a case, any relief granted would be by way of *ex gratia* refund of duty paid, as no statutory facility would exist for exemption. Failing availibility of statutory or *ex gratia* relief, the taxpayer will be dependent on the effectiveness of planning measures taken to minimise or avoid duty otherwise payable. Measures reliant on the absence of dutiable instruments have been subject to 'Claytons contracts' legislation.[19] But, some scope still remains for cer-

18 *KLDE Pty. Ltd. v. CSD (Qld.)* (1984) 15 ATR 271.

19 N.S.W. ss. 44–44E; Vic. s. 64A; Qld. ss. 54AB, 54A and 54(4); S.A. s. 71e; W.A. s. 31B.

tain types of transaction to be organised outside those anti-avoidance provisions.

Finally, it should be noted that the capital gains tax legislation provides rollover relief, *i.e.* a deferral of capital gains tax liability in a number of situations.[20] In most cases, capital gains and general income tax considerations will drive reconstruction planning measures. Often, it is extremely difficult, if not impossible, to obtain both an optimum tax position and an optimum stamp duty position; with a cost effective step in one area being traded off to produce a greater benefit in the other area. For example, whilst a distribution in specie may optimise stamp duty savings, this may be undesirable from a capital gains tax viewpoint. As the capital gains tax legislation currently operates, access to rollover provisions would not be available in the case of a distribution in specie.

VALUATION[21]

Over the last year or so there have been a number of factors which have combined to put valuations of resource projects under the spotlight and to focus increasing attention on the quality of valuations and the underlying principles of valuation.

Those factors include (i) ever increasing governmental regulation, (ii) general public interest in the resource sector fuelled by Stock Exchange bull runs, recent headline-grabbing takeover, merger, divestment and reconstruction activity, (iii) demands for accountability by government on its involvement in the market place and (iv) the inevitable litigation which always surrounds these types of activities.

Broadly, the need for valuation of resource projects stems from (i) reporting and disclosure requirements under the Companies Codes and Approved Accounting Standards; (ii) requirements for fair and reasonable expert reports under the Takeover Codes[22] and the ASX Listing Rules;[23] (iii) provisions of the Income Taxation Act,[24] Land Tax and Rating Acts, Stamp Duty Acts and other revenue-raising legislation; (iv) provisions of the Petroleum (Submerged Lands) (Registration Fees) Act 1967 (Cth.); (v) requirements for regular revaluation of institutional resource portfolios to enable fund members to buy and sell units at fair value; and (vi) compulsory acquisition by the Crown.

This commentary will examine the requirements for valuations under the Western Australian Act with particular reference to Part IIIBA — imposing duty on change of control of certain land-owning corporations — which has brought the question of the value to be placed on Western Australian resource-based enterprises under even greater scrutiny.

This commentary does not attempt to teach the science or art of valuation. Suffice it to say that in many cases the valuation process calls

20 Income Tax Assessment Act 1936 (Cth.) ss. 160ZZK–160ZZPB and proposed ss. 160ZZMA, 160ZZPC, 160ZZPD, 160ZZPE, 160ZZQ(1A), 160ZWA, 160ZPAB, 160ZZPF.

21 Paper presented at the 1988 AMPLA (W.A.) State Conference.

22 Refer ss. 12G and 38.

23 Refer Listing Rules 2B(3A), 2B(4)(a), 2B(9), 2B(11)(e), 2F(10), 3A(4)(b)(iv) and 3J(3)(c):

24 Refer s. 160ZH(9) of the Capital Gains Tax provision.

on a multi-disciplinary team of experts such as financial analysts, computer modellers, economists, geologists and mining engineers with the end product being the result of consensus team work. Some of the necessary qualifications are stipulated in National Companies and Securities Commission Policy Statement Release No. 102 and ASX Listing Rules 2B(9) and 3J(3)(c).

Valuation Techniques

Broadly speaking there are five traditional methods of valuation, which valuers consider first, irrespective of the nature of the business entity being valued.[25] Namely:

— capitalisation of earnings in the form of P/E multiples and the capitalisation of maintainable profits or maintainable dividends;
— assets-based valuations in the form of current values, going concern book values and notional liquidation values;
— open-market values in the form of stock market capitalisations and market comparables;
— industry yardsticks in the form of turnover multiples and other accepted industry formulae; and
— net present value (NPV) based on the discounted cash flow (DCF) technique.

Valuation methods based on assets statements, or on conventional accounting measurements of earnings have proved inadequate in attempts to value resource projects. The only generally satisfactory tools are those based on cash flow statements. These are generally referred to as discounted cash flow (DCF) techniques.

Other forms of valuation based on comparative sales may be of some application in the valuation of 'broad area' exploration tenements which have no known reserves of ore, but are not generally relevant for the assessment of the market value of more developed tenements, due to difficulties in making meaningful comparisons.

A cash flow is merely a statement of the net income derived from an investment per unit of time after all cash costs have been absorbed. Costs include both operating costs and capital expenditure, but not depreciation. In the pre-production period cash flow is negative as capital is invested. Once production starts, cash flow is gross revenue received minus all cash costs actually incurred.

Before adding the annual cash flows together to obtain a total value of the project the effect of time on the value of money must be consdered. For example, a return of $100 in year 1 may be reinvested at 5 percent per year and appreciate to $128 in year 5. In this sense, a return of $100 in year 1 is equivalent to a return of $128 in year 5, *i.e.* $128 in five years time has a 5 percent present value of $100. Using compound interest tables the

25 M.H. Kyle 'Valuations of Resource-Based Enterprises' (July 1983) Journal of the Securities Institute of Australia; J.K. Sturgess 'Mine Evaluation — Myth and Reality', paper presented at the 1982 Annual Conference of the Australasian Institute of Mining and Metallurgy.

present value of any future cash flow can be calculated once the interest rate or discount rate is known.

The net present value (NPV) of a series of cash flows is the difference between the present value of all the positive cash flows and the present value of all the negative cash flows. A positive NPV indicates that the project adds to the value of the company while a negative NPV indicates that the return on investment is less than the cost of capital.

The rate of discount chosen depends on the going rate of interest on gilt-edged securities, plus a premium for the additional risk involved in the investment being considered.

In the long run every company must earn for its shareholders a return equal to the return they could receive elsewhere with equal risk. This return which must be earned on new investments is the cost of capital and is the appropriate discount rate to be used for valuing investments.

The best approximation of the riskless rate is the long-term government bond rate with the implied real rate of interest being the difference between the bond rate and the then rate of inflation.

An appropriate discounting rate could be selected on the basis of the following general ranges of real rates for mining projects, which incorporate an allowance for risk:

Exploration Projects	—	18–25%
Feasible Projects	—	12–18%
Producing Projects	—	8–12%

No specific reference has been referred to derive the above ranges, which are generally accepted as appropriate discount rates for the valuation of mining properties, and which have been applied to such valuations for a number of years.[26]

Stamp Duty Principles of Valuation

Valuations for stamp duty purposes are intimately linked to the adequacy of the consideration for a transaction. The Stamp Act, with some exceptions, does not provide any criteria by reference to which property is to be valued.

But, it is settled law that for revenue purposes, the object of a valuation of an asset is to determine the 'real', 'actual' or 'true' value of that asset. Generally, this is determined by way of the assessment of the market price or value of the asset although, where the asset has some particular value to a particular party, or has no ready market, other factors will come into play.

The general basis for determining the 'market value' is the same test as is used in assessing compensation on a compulsory purchase or resumption.[27]

While variously expressed, a good, generally applicable, expression of the test is that of Williams J. in *Abraham's* case that:

26 P.L. McCarthy, James Askew Associates Pty. Ltd., Mining and Geo-Technical Consultants.

27 *Abrahams v. FCT* (1944) 70 CLR 23; *Elders Trustee and Executor Co. Ltd. v. FCT* (1951) 96 CLR 563; *McCathie v. FCT* (1944) 69 CLR 1.

> [The Court] should endeavour to ascertain (as in the case of property compulsorily acquired) the price which a willing, but not anxious vendor could reasonably expect to obtain and a hypothetical willing but not too anxious purchaser could resonably expect to have to pay for [the property] . . . if the vendor and purchaser had got together and agreed on a price in friendly negotiations.[28]

It is also stressed, however, that the value of the property is properly assessed by reference to its value to *the seller*. So Williams J. also said in *Abraham's* case:

> Further, in applying the test, it must be remembered that the value to be ascertained is the value to the seller of the property *in its actual condition at the relevant time* . . . with all its existing advantages and *all its possibilities*. [emphasis added][29]

His Honour adopted the approach of the leading English and Commonwealth authorities in that regard.[30] These principles have also been adopted in Income Tax Ruling IT 2378 giving guidance in determining the market value of prospecting or mining rights for income tax and capital gains purposes.

However, these verbal expressions of the valuation tests, fail to bridge a gap which may be seen to exist between the knowledge of a vendor as to the particular potential of the asset and that of the purchaser who (if not informed of that potential and relying only upon his own or general knowledge) would not in normal circumstances be prepared to match the vendor's asking price. That question has never been raised in the resumption cases, for in all such cases the notional vendor has been anxious to place before the court all those factors tending to show some potentiality or particular value of the land to him and, in the case where such potentiality renders the land more valuable to any purchaser, that gap can be bridged.

This matter was, however, addressed to some extent in *Lynall v. IRC*[31], where the House of Lords held that information as to the future business intentions of a company, which if made public would have enhanced the value of the shares of that company, and which was in the possession of the deceased shareholder only by virtue of her also being a director of the company, could not be taken into account in calculating the value of those shares in a hypothetical 'open market' sale. The shares concerned were held in a private company, with restrictions upon transferability, deemed to be sold in the open market for the purposes of the assessment of death duties. The case might, however, be seen as difficult to reconcile with other authorities. It was also decided upon the particular language of English death duties legislation which required the assumption of a notional 'open-market' sale.

It may be unsafe to apply the House of Lords' decision in *Lynall's* case to Australian valuations, where the 'willing buyer and willing seller' concept is wider than the test of 'if sold in the open market'. In Australia it may well be held that the fullest information shall be deemed to be avail-

28 (1944) 70 CLR 23, 29.

29 *Ibid.* 31.

30 *Vyricherla Narayana Gajapatiraju v. Revenue Divisional Officer Vizagapatam* [1939] AC 302 and *Horn v. Sutherland Corporation* [1941] 2 KB 26.

31 [1972] AC 680.

able to both buyer and seller. 'Real value is presumed to be calculated with the knowledge of all relevant data, and on the assumption that the hypothetical buyer and seller each have the same knowledge':[32] I will return to this particular topic later in this commentary.

While the test is expressed to be the same in each case, there may be some difference in the application of the test, in effect, between valuations for the purpose of compulsory purchase or resumption, and those for the assessment of the revenue, so that in the former case the court's objective is to ensure that the person to be compensated is given the full money equivalent of his loss, while in the latter it is to assess (in the words of Dixon J. in *Clifford's* case).

> . . . what money value is plainly contained in the asset so as to afford a proper measure of liability to tax. While this difference cannot change the test of value, it is not without effect upon a court's attitude to the application of the test. In the case of compensation — doubts are resolved in favour of a more liberal estimate, in a revenue case, of a more conservative estimate.[33]

One final matter should be considered. It is accepted that for shares and similar securities for which there is no ready market (due to restrictions on transferability, limited rights or other factors making the securities unattractive as investments), the proper manner of assessing the value of those assets is generally to determine the present value of those shares, being the discounted future revenue likely to be derived by a notional purchaser of those shares, in all the circumstances.

In assessing that revenue, the valuer is entitled to take into account likely increases in profits as a result of (i) better employment of assets and improvements in management, (ii) proper rate of return for securities of like nature, (iii) the extent to which the income of the company is secured by tangible assets, (iv) the entrepreneurial and other qualities of the management, in particular the ability to work together to achieve stated objectives and (v) the speculative nature (if applicable) of the investment. All those factors are taken into account in assessing the appropriate discount rate to be applied to the projected income from the investment (see: *Clifford's* case[34], *McCathies's* case[35], *Abraham's* case[36]).

While primarily a test developed for, and applicable to, shares and similar securities, that test may also be applicable to discrete assets for which there is no ready market. For example, land having income earning potential, but no market by which 'comparative value' can be assessed, may properly be assessed on a net present value basis. Similarly, an interest in a joint venture or partnership which is not readily transferable or for which there is no ready market, may be assessed on the same basis.

For valuation purposes, different methods may accordingly be applicable to mining tenements or interests therein which may be readily transferable, and to the interests of parties in a joint venture (relating to

32 M.S. Adamson *The Valuation of Company Shares and Businesses* (1980) (Law Book Co., 6th ed.), 22.
33 (1947) 74 CLR 358, 373-374.
34 *Ibid.*
35 (1944) 69 CLR 1.
36 (1944) 70 CLR 23.

such tenements) where those parties are subject to limitations upon the right to dispose of their interests.

Stamp Act Provisions Concerning Valuation

The Western Australian Act enables the Commissioner to require to be furnished with a statement in approved form concerning the value of the property or with such other evidence of that value as the Commissioner thinks fit.[37] It is usual for this information to be requested in the case of a transaction under Part IIIBA but not otherwise in the case of other types of transactions between parties acting at arms length. Two types of valuation forms are used (each being inappropriate to resource titles) being Annexures 'A' and 'B' to the booklet entitled *Stamp Duty Information Requirements* issued by the State Taxation Department in July 1988. These forms only provide a guide for the Valuer General and it is not necessary to obtain a valuation from a qualified valuer — unless the requirement for evidence can be interpreted to extend to a requirement for the production of an independent valuation from a duly qualified valuer. If dissatisfied with the statement about the value, the Commissioner may cause a valuation to be undertaken,[38] for which purpose overriding powers of revocation or reconveyance, or fractional interests, shall be disregarded.[39] Also, the Act provides a means of ascertaining the value of an undivided share in any property.[40] Finally, the Act contains provisions which relate to specific types of interests and properties.

The extent of information which the Commissioner will require in valuing a particular transaction will often depend as a matter of practice on the size or importance of the transaction: refer the booklet entitled *Stamp Duty Information Requirements* issued by the State Taxation Department. The Commissioner is unlikely to accept as evidence of value the tombstone epitaph quoted in Frank Aley's article 'All Because It's His':

> He has nine eight foot holes on these nine claims, each and every one of which is in immaculate limestone, untarnished by any suggestion of copper, unaccompanied by the slightest association with iron, unsullied by the remotest relation to gold, silver, lead, tungsten, or bismuth, incomparable in its superb isolation from the contaminating influence of any known metal.

Whilst the Valuer General's Department will provide a ready reference point to the Commissioner for valuation of freehold land, other reference will need to be made in the case of mining tenements.

The whole question of valuation of mining tenements is a minefield (no pun intended). At this stage, neither the State Taxation Department nor the Valuer General's Department have any pre-existing experience in this valuation process. Indeed, in most cases, if not in all cases, mining tenements are valued by mining engineers and not valuers, despite doubts raised by duly qualified valuers as to competency of mining engineers to do so. The valuation process is started by requisition. If

37 Ss. 75A and 76AA (1).
38 S. 75A(2).
39 S. 75A(3).
40 S. 75A(4).

every piece of paper required to be furnished was in fact delivered, the paper writer suspects that the system would become quickly unworkable. One can imagine the consternation of the State Taxation Department upon being confronted by the number of removalists wheeling in filing cabinet after filing cabinet of mining information.

One of the big difficulties for the Valuer General's Department is that they are being asked to value something which cannot be valued with any accuracy. Valuers like to sample evidence and put up a case that they can prove. This is extremely difficult in the case of mining tenements especially in cases where no resource has been established or where the resource requires technology, long term sales contracts, *etc.* to exploit.

It can be argued that an exploration or prospecting title (as opposed to a production title) has little or no value and, although this may not be acceptable to the Commissioner, the uncertainty as to value of an exploration title should enable the dutiable value to be kept reasonably low. In the boom days, of course, the Department had some feel for the going rate. Any old rubbish had a value as feed stock for prospectus purpose. In many cases, the Commissioner attempts a rule of thumb approach that market value equals initial acquisition costs plus subsequent expenditures on exploration and title maintenance. This approach to valuation must be absolute nonsense, but the Commissioner is happy in some case to accept such a figure because the more work that is done, the more worthless a property becomes. At present such prospects seem to be valued under the following non-scientific parameters; (i) according to the eye of the beholder; (ii) whatever the traffic will bear; (iii) the right address (location, not geology); and (iv) the existing business climate.

This uncertainty of valuation is implicit in the guidelines prepared by the Mineral Industry Consultants Association for the valuation of vendor interest to meet Stock Exchange listing requirements for mining companies.[41]

Mining Information — The Debate

In determining values, the Commissioner has taken the position that mining information (i) cannot be separated from the mining tenement itself; and (ii) should be considered as land; unless the taxpayer can show that the mining information has a marketable value in isolation from the mining tenement and can be sold without the mining tenement, for the attributed value. This view has its supporters.

> For myself I have great difficulty in understanding how information regarding a property can be treated as if it were a separate asset and the property itself valued without taking into account that information. It is true that the property might be conveyed without the information being imparted. But surely in valuing the underlying property one is entitled to take into account the information. If an analogy helps to make the matter more clear consider the value of certain land. The owner, or even a thrid party, may have information regarding the land as for example rezoning or a proposal to redevelop neighbour-

41 For a useful discussion on the difficulties of valuation see R.D. Butler 'The Valuation of Mining and Petroleum Exploration Tenements' (which has a copy of the MICA Guidelines attached) and Commentaries by N.J. MacPherson and S.R. Lacher [1984] *AMPLA Yearbook* 400.

ing property which information will affect the value. A person might buy or sell that land in ignorance of that information. In those circumstances we would tend to say that because that person lacked the information the price paid was an under or overvalue. We would not say that they paid the true value for the land and should have paid a separate sum for the information about it.[42]

Before tackling this proposition it will be necessary to pause for a moment to consider the nature of 'property' which is of course, central to any consideration of duty on conveyances. There is no definition in the Stamp Act. But 'it is well-known that the word "property" is the most comprehensive of all the terms that can be used, in as much as it is indicative and descriptive of every possible interest which the party can have'.[43]

It appears to be well settled that the ordinary meaning of the word 'property' does not encompass information. There is plenty of support of that view in the authorities. In the *Pan Continental* case[44] de Jersey J. held that the agreement for sale of interests under a joint venture agreement and for the furnishing of confidential information was both a contract for the sale of property (*i.e.* mining tenements, *etc.*) within the meaning of the relevant head of duty, and an agreement for the performance of a service by the vendor for the benefit of the taxpayer, being the disclosure of the confidential information referred to in the clause allocating the purchase price between the various items comprising the interest sold. The agreement was chargeable with *ad valorem* duty in respect of the former matter, but nominal duty only in respect of the latter.

Against that background it is now appropriate to return to the issue of whether or not information has a value apart from the mining tenement itself, so as to reduce the dutiable value. At the outset, it should be appreciated that this issue is not as clear-cut as the Commissioner and his adherents would have us believe. Indeed, the issue is finely balanced. The task of this paper will be to present counter-balancing arguments in favour of a contrary view. However, ultimately the matter will need to be determined by the courts.

Arguably, the test expressed by the Commissioner, approaches the question from the wrong end. The first question to be asked must always be 'What is the value of the mining tenement?', and to determine that question one must always look at a notional transaction of sale and purchase involving our hypothetical purchaser.

Imagine a situation where the mining information was unavailable, for example as a result of destruction of technical records by fire. In this situation, the mining tenement would remain entirely unaffected. It would still be in existence, capable of being dealt with and capable of exploitation in exactly the same manner. Prospectively, it would still yield the same profit. However, the value of the mining tenement to the hypothetical purchaser would plummet in the absence of the mining information. That value would not be restored until the lost mining infor-

42 G. Young 'Taxation of Intellectual Property Rights', paper presented at the Law Society of Western Australia Seminar 21–23 June 1988.

43 *Jones v. Skinner* (1835) 5 LJ Ch. (NS) 87, 90 *per* Lord Langdale M.R., cited with approval in *CSD (Qld.) v. Donaldson* (1927) 39 CLR 539.

44 *Pan Continental Mining Ltd. v. CSD (Qld.)* 88 ATC 4190.

mation had been replaced, at great expense by repeating all work done to enable mine planning, metallurgical assessment, feasibility and project financing, *etc.* Also, anticipated profits from exploitation of the mining tenement would be necessarily deferred by the time taken to repeat the work.

A similar situaton may be envisaged in which a purchaser negotiates to buy the mining tenement on the basis on an expert report as to its value (based upon the availability of the mining information) in circumstances in which that expert has access to all the mining information but is contractually bound not to disclose it. The purchaser pays for the mining tenement the expert-determined value. However, the purchaser has omitted to make express provision for the transfer to it of the mining information and the wily vendor declines to deliver it. In that situation, the mining tenement would be worth considerably less and the purchaser must negotiate for the acquisition, separately, of that mining information. While perhaps an unlikely scenario, it is illustrative of the difference between the mining information and the mining tenement.

In both cases the land itself is not in any way affected. In principle, there seems to be no reason why it is not possible to have a mining tenement valued separately from the mining information relating to the mining tenement. The *Pan Continental* case, appears to support this view. The Commissioner and its adherents cite no authority in support of their contentions. Indeed, Mr. G. Young appears to go even further than the Commissioner in denying a value for mining information even if it has a marketable value in isolation from the mining tenement. This taxpayer is by no means persuaded that if there is no market for mining information apart from the mining tenement it necessarily follows that the value of the mining information merges into the value of the mining tenement.

It may be important to determine what mining information should be regarded as available to the hypothetical purchaser, so that his notional purchase will be made with the knowledge which the hypothetical purchaser would be deemed to have had. But, to the extent that the mining information is reduced to writing it may in its hard copy form be relevant not so much as to the enlightenment of the purchaser, but rather as to its usefulness to him as the new owner of the mining tenement. In other words, the written word is necessary before holes in the ground or claimed reserves are meaningful.

This reasoning does not appear to conflict with any of the valuation cases, which in the case of resumption valuations appear to turn upon uses clearly authorised by law and knowledge which is in the public domain. While 'special' uses have been alleged by applicants they involve no element of the application of confidential information. In other words, the potential is latent in the land not because of the skill, use or knowledge of the vendor. To treat the problem differently, is to tax perceived profits which will only be derived from future effort. By way of analogy, it is akin to valuing vacant industrial land as if it already had an operating factory located on the land. Thus, whilst it is appropriate to have regard to the mining information to determine the value of the mining tenement, (*i.e.* that it is worth more than 'moose pasture'), it is submitted that this evaluation process cannot ignore the discrete nature of the mining information itself and treat it as land.

The distinction between the value of mining tenements and the value of other assets in relation to the sale of a joint venture interest has some judiciary recognition, for stamp duty purposes. In *Peko-Wallsend Operations Ltd. v. Commissioner of State Taxation (W.A.)*[45] Wallace J. said: 'Without the sales contracts the iron ore deposits and total infrastructure would be of minor value. The goodwill of Robe's business assignment to the appellant is reflected in the long term sales contract'. However, as the question of apportionment was not in issue the observations were strictly *obiter*.

Finally, it should be noted that Australian Accounting Standards AAS21 (Accounting for Acquisition of Assets) and AAS19 (Accounting for Interests in Joint Venture) require that assets be recorded individually rather than in aggregate and that the venturer's share in each of the individual assets explored in the joint venture be brought to account by the venturers.

Part IIIBA of the W.A. Act — Duty on Change on Control of Certain Land-Owning Corporations

In summary, the operation of Part IIIBA is as follows:

(i) if a person or related persons acquire shares in a company giving to them the right to receive more than 50 percent in value of the assets of that company upon a liquidation (or having attained such holding, increases that holding);

(ii) that company is not a public listed company;

(iii) that company is beneficially entitled to land (including mining tenements and fixtures) in Western Australia having an unencumbered value exceeding $1,000,000;

(iv) the value of all land (wherever situated) to which the company is beneficially entitled is 80 percent or more of the value of all property owned by the company, other than certain property (primarily short term or inter-company debt) deemed to be owned by the company only for the purpose of avoiding the operation of these provisons;

(v) then the transfer of shares in that company is liable to duty as if that transfer was the transfer of the same proportionate part of the unencumbered value of the land owned by that company.

Thus a taxpayer will need to establish in any situation to which Part IIIBA may apply that more than 20 percent of the value of all property owned by the company consists of non-land property. In the case of a resource based enterprise, the relevant property comprises in many cases an interest in a joint venture. In such a case, the typical joint venture agreement would describe that interest as an undivided interest as tenants in common in property such as (i) the joint venture; (ii) mining tenements the subject of the joint venture; (iii) all improvements on and upon the mining tenements; (iv) all fixtures, facilities, machinery, equipment and

45 88 ATC 4001.

supplies and any other property or rights of any description whether real or personal or acquired, contained or held in respect of the joint venture; (v) all rights to mine and produce minerals under the joint venture; (vi) all surveys, maps, mosaics, photographs, electromagnetic tapes, radiometric traces, drawings, memoranda, cores, samples, drill logs, engineering studies, design work, geological, geophysical and other test data, maps and reports, sample and assay reports, notes and any other date concerning, relating to or derived from the mining tenements; (vii) the benefit of all contracts entered into by the joint venture with respect to the exploration, mining or exploitation of the mining tenements; and (viii) all minerals produced or extracted on and from the mining tenements; subject always to the burden of the expenses, costs and liabilities of the joint venture in proportion to the percentage interest held.

The valuation problems under Part IIIBA are considerable. In a typical case such as above (i) the only valuation available to a taxpayer generally relates to its joint venture interests as a whole; (ii) the joint venture interests will have been valued on a net present value based on the discounted cash flow technique and (iii) it will not nor will it purport to be a valuation of the mining tenements owned by the joint venture or the interest of the taxpayer in those tenements nor of any other individual item of property comprising the joint venture interest.

Having reached a determination of value on a project basis, the valuer needs to literally turn himself inside out to break up his estimate of the present value of perceived profits into components required by lawyers for stamp duty purposes. For example, the value of (i) moveable plant and equipment; (ii) gold in circuit; (iii) inventories such as carbon, lime, cyanide, *etc.*; (iv) motor vehicles; (v) tools and materials; (vi) mining and technical information, *etc.* and (vii) the value of management on the basis that the value of tenements for stamp duty purposes can be reduced by the difference between the actual cost of management and the accepted cost of average management for the type of project in question.

There is a further problem. Even if the Commissioner can be persuaded that the relevant mining information has a marketable value in isolation from the mining tenement the question then arises whether or not that property and its value can be taken into account in calculating the value of non-land property for the purposes of Part IIIBA.

As mentioned above, it is now well settled that information is not property for stamp duty purposes. This being the case it thus follows that the information and its value cannot be used by the taxpayer to build up the required 20 percent level of non-land property. There are contextual difficulties of construction and interpretation to give the use of the term 'property' in Part IIIBA a different meaning to that applicable to the rest of the Act. But, does it make a difference if the information is converted to tangible objects? Can it become 'goods wares and merchandise' in its tangible form? In the *Pan Continental* case de Jersey J. made reference to a submission by counsel that the information in question was not intangible because it 'relates to documents identified as feasibility studies and analyses, budgets and forecasts' *etc.* The Court concluded that the information was not necessarily to be found in those documents but if some of the information did appear in them the communication of that information is clearly not for that reason converted into a transfer for property and that 'it would be quite wrong to confuse the information with the physical record. The information itself remains intangible'.[46] See also: *Rolls Royce Ltd. v. IRC.*[47] However, neither of these cases seem to deny absolutely the possibility of (i) a sale of the hard copy records as opposed to the information contained therein or (ii) information having a value apart from its subject matter. Indeed, the cases positively affirm the possibility.

Part IIIBA of the Stamp Act is a most unfortunate piece of legislation. I have previously remarked that the legislation is not good law because (i) its interpretation is unclear and application uncertain; (ii) it is conducive to disputation with the Commissioner; (iii) the adjudication process is time-consuming, expensive and not conducive to the efficiency of ordinary commercial transactions; (iv) the extraterritorial provisions will be difficult if not impossible to police; (v) it encourages tax avoidance rather than observance; and (vi) it impacts unfairly on the rights of third parties.[48]

The discipline of writing this commentary has reinforced those views and has, in particular, given a greater appreciation of the absurdity of equating real estate with mining tenements in the valuation process; and the inequities of assessing stamp duty on the value of property not the subject of the transaction in question and in circumstances where there can be very wide divergence of opinion as to the value of that property, due in large part to the subjective element involved in the assessment of the risks associated with technical factors and markets.

Indeed, there have been a number of judicial utterances recognising that all valuations can only be a matter of opinion and the product of intelligent guesswork.[49]

Perhaps, Phillips expressed the underlying principle of valuation more accurately when he said:

> To arrive at an objective valuation, experts peer at and interpret facts, hypotheses and projections for the future rather like seers divining the future from the bowels of a dead dog.[50]

An Eye to Litigation

Everyone who goes through the valuation process knows that every expert witness has his own set of conjectures, of more or less weight according to his experience and personal sagacity. Accordingly, it is stressed that the methodology adopted in the valuation report is crucial to

46 88 ATC 4190, 4193.

47 [1962] 1 All ER 801.

48 B. Johnston 'Stamp Duty Amendments: Part IIIBA — Duty on Change of Control of Certain Land Owning Corporations', paper presented at Taxation Institute of Australia Stamp Duty Seminar, Perth, 19 November, 1987.

49 See *Secretary of State for Foreign Affairs v. Charlesworth Pilling & Co.* [1901] AC 373; *Estate of late Mildred Constance Crane v. CT* (1974) 49 ALJR 1.

50 I.R. Phillips 'Valuation of Interests', paper presented November 1977 A.C.T. Conference organised by the Institute of Chartered Accountants in Australia and the Law Society of New South Wales.

its credibility if it comes under test by challenge in the courts. Thus, in the preparation of the report it is essential that proper and generally accepted principles of valuation are adhered to. In particular, from a lawyer's perspective it is important to ensure that the valuation conforms to the following principles:

(i) Consistency must be maintained in the application of principles and figures, with particular reference to the transfer of calculated figures, or ranges, from one set of calculations to another.

(ii) The report should state all of the assumptions upon which it is based.

(iii) The report should detail all the sources of information used in the valuation (and any other available sources of information not referred to, and the reasons for this).

(iv) The basis of every calculation made in the report should be clearly stated, either in a manner which is in itself comprehensible to a layman or which refers to and imports an accepted and documented method or process of calculation.

(v) To the extent that sales of comparable tenements are used for comparative valuation purposes, the basis upon which the tenements were selected, the bases for comparison, and relevant points of similarity and difference, should be set out.

(vi) An explanation should be given of any differences between values derived using different valuation techniques, and of the reasons for preferring the ultimate valuation, or valuation range, and opted by the valuer.

Finally, with a view to future litigation, it would be prudent to obtain back-up opinion from the taxpayer's auditor that the valuation is fair and reasonable, has been prepared using techniques and assumptions consistent with those generally used in the relevant industry and is in accordance with approved Accounting Standards. This is felt to be most important as the Commissioner is entitled under Part IIIBA to exclude assets from the computation exercise if he is of the opinion that the ownership is solely for the purpose of avoiding the application of the Stamp Act. The taxpayer needs to be conscious of the need to answer any argument that inventive accounting has been involved. The accounting report will be most important in dealing with that question.

Nominal or Unascertainable Amount of Rent

Section 79(5) of the Western Australian Act enables the Commissioner to substitute a 'fair annual rental of the property' on the basis that pursuant to section 79(4) the amount of rent payable in respect of a lease is a 'nominal amount'. The Commissioner has no power to assess the instrument with duty calculated on a market rent, unless the rent is merely 'nominal'. This is a novel provision in Australian stamp duty legislation, although in New South Wales and the Northern Territory provision is made for duty at *ad valorem* conveyance rates to be imposed on the unencumbered value of the lease, if the rent payable is 'nominal'.[51]

51 N.S.W. Sch. 2 Lease Heading Item (3) and (4); N.T. Sch. 1, Item (4) and (5)(b).

Thus, the critical issue in any case is whether the rental reserved by the lease could be regarded as a 'nominal amount'. There is very little authority on the meaning of that expression. Horridge, J. in *Governors of Stepney and Bow Educational Foundation v. Commissioners of Inland Revenue*[52] concluded that the term 'nominal rent' is an amount which is no greater than that sufficient to acknowledge the relationship of lessor and lessee. However, in *Commissioners of Inland Revenue v. Marquess Camden*[53] Lord Dunedin reserved his opinion as to the meaning of 'nominal rent' and did not necessarily agree that the amount of rent paid in that case, which was more than the mere acknowledgement of a lessor-lessee relationship but less than market value, was not 'nominal'.

Thus, on the balance of available authority there must be some element of doubt. The ordinary meaning of 'nominal', according to (i) the *Concise Oxford Dictionary* is — 'virtually nothing, much below actual value of thing'; and (ii) the *Macquarie Dictionary* — 'trifling in comparison with true value'. Clearly, the expression would cover a token amount, such as $1 or a peppercorn rental. But, the critical issue is whether risk of valuation by the Commissioner can be avoided, if the amount taken by itself is substantial, and more than a mere acknowledgement of lessor-lessee relationship.

An example may illustrate the point. Assume a mining title covering a large economically mineable proven resource, with long mine life and significant projected revenues over life of mine. Assume the grant of a sub-lease by the tenement holder to an affiliate for rent equal to all expenditures required to keep the mining title in good standing plus the sum of say $10,000 per annum. Taken in isolation, the amount cannot be said to be 'nominal'. But, it is submitted that to resolve the issue in this way is too risky. This writer prefers on balance (i) the reservations of Lord Dunedin in the *Marquess Camden* case, and (ii) to apply the Dictionary test. In the example, the rent may well be 'nominal' in the sense that the amount is trifling relative to the real value of the lease and recognisable on any objective ground as a mere pittance having regard to that value.

Before leaving this aspect, it should be noted, for the sake of completeness, that section 75A of the Western Australian Act empowers the Commissioner (i) to requisition for information as to the value of property; (ii) to assess duty in accordance with the evidence of value provided; and (iii) where he is not satisfied with the evidence of value so furnished, to cause the property to be valued and charge duty on the basis of that valuation.

This provision raises the question of whether section 75A can be applied to enable the Commissioner to calculate duty on a lease based on a market value, in a situation where section 79(4) is not applicable for the reasons set out above. It is submitted that this course is not open to the Commissioner because (i) section 75A is located within the 'conveyances' provisions of the Western Australian Act and this is a factor to be taken into account to influence the interpretation; (ii) it is not considered that a valuation provision such as section 75A can be used to impose a fresh

52 [1913] 3 KB 570.
53 [1915] AC 241.

obligation to pay duty in respect of an instrument that would otherwise not be liable for duty. For example, an obligation to pay duty in respect of a lease where that obligation would not, by virtue of the 'lease' duty provisons, otherwise apply; and (iii) if the position were otherwise, it would render in some cases other provisions of the Western Australian Act and the basis for imposing duty under those provisions, meaningless.

CONCLUSION

A noted politician once said, 'Life was not meant to be easy'. This certainly holds true in the stamp duty field! And, it's not getting any easier. Amendment, further amendment and new legislation breed with the rapidity of a deadly disease out of control. Complexity and obfuscation seem to grow daily in direct proportion to government appetite for increased revenues. To return to the theme of the introduction to this commentary, the taxpayer is both unable to readily comprehend taxing legislation, or to calculate with any certainty, his liability thereunder. Indeed, regrettably, it has reached the stage where the prudent taxpayer may need, in certain circumstances (such as a corporate reorganisation), to make a transaction subject to a condition that an assessment of stamp duty does not issue beyond a level of estimated exposure, so that he can pull out of the deal without having to pay the assessment, if necessary.[54]

54 In W.A. a refund of duty is available under s. 15A (refund of duty on cancelled instruments) and s. 73B (conveyance agreement subject to unilateral determination).