*Stephen Lendrum**

THE STAMP DUTY ASSESSMENT IN SOUTH AUSTRALIA OF TRANSFERS OF SHARES AND UNITS IN LAND RICH UNLISTED COMPANIES AND UNIT TRUSTS

1 INTRODUCTION AND HISTORICAL PERSPECTIVE

Part IV of the *Stamp Duties Act* 1923 (SA) which came into operation on 24 May 1990, primarily deals with the assessment for duty of transfers of shares in unlisted companies and units in unlisted unit trusts where the major asset of such companies or trusts is real property.

Part IV seeks to correct an anomaly in the South Australian stamp duties legislation which arises where real property is owned by a company or unit trust vehicle. Under general principles, the value of shares in a company or units in a unit trust for duty purposes is the net or unencumbered value. If the assets of the company or the trust are heavily encumbered, the relevant shares or units may have only a small value. Furthermore, in the case of shares a lower rate of ad valorem duty applies than in the case of other property.

Prior to the commencement of Part IV, there were significant stamp duty savings to be made by acquiring real property via the acquisition of a controlling interest in a company or trust which owned that real property. Given the lower share conveyance rate the acquisition of land via the company vehicle was the most attractive form of purchase.

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It is not uncommon in the case of a small proprietary company, formed for the purposes of land speculation or land development, for the company to heavily mortgage its real property. Furthermore, it is not uncommon for a number of shareholder loans to exist. Consequently, the net value of the shares may be quite small. By carefully structuring the sale of the company's shares it was possible, prior to the commencement of Part IV, to reduce the stamp duty payable to a nominal amount. To achieve this it was essential that the parties agreed that the vendor would not cause the company to discharge any of its liabilities prior to settlement. Instead, the purchaser agreed to procure loans for the company at settlement, to enable the company to discharge existing mortgages over its land and to discharge shareholder loans. Consequently, the amount payable by the purchaser for the shares themselves was quite small.

Clearly the stamp duty saving referred to was not sufficient in all cases to encourage purchasers to acquire land in this way.

The acquisition of a freehold interest in land obviously has advantages over the acquisition of shares in a company which has been trading and which may have taxation and other liabilities which are not readily apparent at the time of sale. Whilst the purchaser of shares can be protected to some extent by appropriate warranties and indemnities they must always accept that they are taking some risk.

The philosophy behind Part IV is that where control over real property of substantial value passes from one person to another it should not matter for stamp duty purposes whether the control passes by virtue of a conveyance of the fee simple or by a transfer of shares or units. As control over the real property has passed in each case, normal ad valorem conveyance rates should be applied to the unencumbered value of the real property.

Where the transfer of such control is effected by the sale of shares in a company or units in a unit trust, duty is payable on the instrument of transfer (ie the share transfer form or the unit transfer form) in the same manner as duty was payable prior to the introduction of Part IV. However, what Part IV does is to require that the parties prepare a written statement of the transaction which will attract additional duty at ad valorem conveyance rates. The duty payable on the instrument of transfer will be deducted from the duty payable on the written statement, with the net effect being that the total duty payable will be equivalent to that which would have been payable had an interest in land been conveyed directly.

Part IV is similar to the equivalent interstate legislation which has been passed in all mainland jurisdictions within the last five years. South Australia is the last mainland State to adopt special provisions to deal with what has become known as 'land rich companies and trusts'. The South

Australian legislation is similar to the New South Wales legislation, and to a lesser extent, that of Victoria. However, it is quite clear that our legislators have attempted to take account of some of the mistakes made by their interstate counterparts. In theory, our legislation should be among the best in the country, but only time will tell whether that is the case.

An overriding concern in this context is that the legislation of all jurisdictions is very complex. The experience of the other States shows that any legislation of this kind will be difficult to perfect. It is legislation with an 'anti-avoidance' purpose which must seek to cover a broad range of known, and as yet unknown, devices and it is legislation which must also cope with the complexities of companies and trust.

In the present rescessionary climate land speculation and development is not occurring on a large scale. Consequently, the scope of Part IV has yet to be fully explored in practice. However, given the cyclical nature of the property industry, it will not be long before Part IV comes under close scrutiny by investors and developers seeking to reduce acquisition and disposal costs. As this article will show, there are a number of potential problems with the provisions of Part IV. I am certain that, given the nature of the legislation, lawyers and accountants will stretch its effectiveness to the limit with arguments and devices which were not taken into account when the legislation was drafted.

2 OUTLINE OF LEGISLATION

Before analysing particular aspects of Part IV in detail, it is necessary to provide a general outline of it.

2.1 Operative Provisions

The main operative provision of Part IV is s94. Broadly speaking the section provides that where a person acquires a "majority interest" in a private company or unit trust scheme (or enlarges an existing majority interest), the person must lodge with the Commissioner a written statement summarising the acquisition if the private company or scheme is entitled to real property the unencumbered value of which makes up at least 80% of the unencumbered value of all the property to which the company or scheme is entitled and if the unencumbered value of the real property in South Australia of the company or scheme is not less than $1,000,000. The statement must be lodged within two months of the interest being acquired. The form and contents of the statement are set out in s94(7).

The other operative provision of Part IV is s96. It provides that if a person acquires a "land use entitlement" in a private company or unit trust scheme the person must lodge with the Commissioner a written statement within two

months of the interest being acquired. The form and contents of the statement are set out in s96(3).

Later in this article I will summarize the provisions of Part IV which deal with land use entitlements. However, with the exception of this, I will not deal with the acquisition of land use entitlements unless a reference to such acquisitions is necessary for the sake of completeness.

2.2 **Preliminary Definitions**

An outline of some of the more important definitions is required to give meaning to the operative provisions discussed above.

Part IV defines "private company" to include all unlisted companies whether public or proprietary.[1] The terms "private scheme" andr "scheme" are defined to mean a unit trust scheme that is not the subject of a deed approved for the purposes of the prescribed interest provisions in Division 6 of Part IV of the *Companies Act Cth (1981)* and Companies Codes of the Australian States and Territories. The definition contains an anti-avoidance provision which provides that a unit trust scheme which is the subject of a deed approved for the purposes of the prescribed interest provisions will be included within the terms "private scheme" or "scheme" if no units have been issued to the public or only a limited number of persons are beneficially entitled to units under the scheme.[2]

An "interest" is defined to be an interest (other than a land use entitlement) in a private company or scheme which would entitle the holder of the interest to participate in a distribution of the property of the company or scheme on a winding up.[3]

A "majority interest" is defined to mean an interest (other than a land use entitlement) in a private company or scheme which would entitle the holder of the interest, or that person together with any related person, to participate in the distribution of property of the company or scheme on a winding up to an extent greater than 50 per cent of the value of the property distributable to all the holders of interests in the company or scheme.[4]

A "land use entitlement" is defined as an interest in a private company or scheme which gives the holder of the interest an entitlement to the exclusive possession of real property in South Australia.[5]

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1 *Stamp Duties Act* 1923 (SA) s91(1).
2 As above.
3 As above.
4 As above.
5 As above.

Other relevant definitions will be dealt with elsewhere in this article.

2.3 Exclusions

The following acquisitions of interests in a private company or scheme are excluded from the ambit of Part IV:

(a) Section 93 excludes a wide range of acquisitions including, inter alia, an acquisition by a receiver, liquidator or executor,[6] an acquisition under a will,[7] an acquisition on dissolution of marriage,[8] an acquisition which is deemed not to be a voluntarily disposition inter vivos by virtue of s71(5)[9] and an acquisition by a beneficiary of a trust where the trustee's original acquisition was the subject of a statement under Part IV.[10]

(b) Section 98 excludes certain financial arrangements from the application of Part IV. It seeks to deal with the situation where a majority interest or a land use entitlement in a private company or scheme is acquired by a person for the purpose of securing financial accommodation provided by that person.

Where a majority interest is acquired in these circumstances a statement must still be lodged under s94 or s96. However, the statement will not be chargeable with duty provided that, within the period of five years after the acquisition,[11] the relevant interest or land use entitlement is reacquired by the person from whom it was acquired or, in the case of an acquisition on account of a mortgagee exercising a power of sale, the interest or land use entitlement is conveyed by the mortgagee to a third person in exercise of that power of sale.[12]

Before leaving s98 it is appropriate to refer here to a curious aspect of this section. The exclusion relating to certain financial arrangements described above is contained in sub-sections (1) and (2) of s98. Sub-section (3) then goes on to say that ss94 and 96 (ie the operative provisions of Part IV) do not apply "to the reacquisition by a person of an interest in a private company or scheme, or the reacquisition of a land use entitlement". By its terms, s98(3) is not limited by the terms of ss98(1) and (2). The effect of s98(3) is that if a person transfers an interest or land use entitlement and subsequently reacquires the same

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6 Section 93(1)(a).
7 Section 93(1)(b)(iv).
8 Section 93(1)(c).
9 Section 93(1)(e).
10 Section 93(2).
11 The Commissioner has a discretion to extend this period under s98(2).
12 Sections 98(1) and (2).

interest, then that reacquisition will not be caught by s94 or s96 notwithstanding that the original transfer and subsequent reacquisition are not effected for finance and security purposes of the kind referred to in ss98(1) and (2). It is not clear why the broad exclusion contained in s98(3) should exist.

(c) Another exclusion to which reference should be made is that relating to pro rata allotments of shares or units. Section 94(2) provides that an acquisition by virtue of a pro rata allotment does not trigger the obligation to lodge a statement provided the allotment does not have the effect of varying the rights of shareholders or unitholders.

2.4 Obligation to Lodge Statement

I have already said that, pursuant to s94 and s96, a person acquiring a defined interest or a land use entitlement in a private company or scheme is obliged to lodge a statement with the Commissioner in respect of the acquisition. In the case of an acquisition of an interest or a land use entitlement in a private company, an additional obligation to lodge a statement relating to the acquisition is placed upon the company itself. This obligation, contained in s105a, applies where "by a relevant acquisition, a person acquires a majority interest", or "a person acquires a land use entitlement", in a private company.

Two comments must be made in respect of s105a. The first is that it may be difficult for a company to monitor acquisitions which may require it to lodge a statement under this section. Secondly, the scope of the section is not clear in the context of acquisitions of majority interests. Where a relevant acquisition is, by itself, an acquisition of a majority interest the company clearly has an obligation to lodge a statement. But it is not clear if this obligation arises if the relevant acquisition, when aggregated with earlier acquisitions, results in a person acquiring a majority interest. If an earlier acquisition may be taken into account the company would appear to be liable to lodge a statement even though the earlier acquisition may have occurred more than two years before. If that is the case the company will be required to lodge a statement even though the person acquiring the majority interest will not be so obliged under s94.

Curiously, s105a does not appear to require the company to lodge a statement where it is aware that a person already having a majority interest has acquired a further interest. The significance of these comments with respect to s105a will become more apparent after s94(1)(a) has been considered in more detail below.

2.5 Assessment of Duty

The assessment of duty on a statement lodged under s94 is dealt with by s95. Section 95 provides that the statement will be deemed to be a conveyance operating as a voluntary disposition inter vivos of property.

Where there have been no "prior acquisitions"[13] of interests in the private company or scheme, the value of the relevant property is deemed to be the amount calculated by multiplying the unencumbered value of all real property in South Australia to which the private company or scheme is entitled at the date of the relevant acquisition, by the percentage of the interest acquired by the relevant acquisition.

Where there have been prior acquisitions the value of the property upon which duty will be assessed is the aggregate of the amounts calculated, in respect of the relevant acquisition and each prior acquisition, by multiplying the unencumbered value of all real property in South Australia to which the private company or scheme is entitled at the date of the relevant acquisition, or the prior acquisition as the case may be, by the percentage of the interest acquired by the relevant acquisition or the prior acquisition as the case may be.[14]

Section 95(2)(a) provides that the duty chargeable will be reduced by the sum of the duty paid under Part IV in respect of a prior acquisition. Such a reduction is obviously necessary given the fact that where there have been prior acquisitions, the value of the property for duty purposes is calculated by aggregating a deemed value of the property acquired by the relevant acquisition and a deemed value of the property acquired by each prior acquisition. However, if the rate of duty imposed by the Act increases between the date of the assessment of duty in respect of a prior acquisition and the date of the assessment of duty in respect of the relevant acquisition under consideration, the reduction allowed by s95(2)(a) would not appear to adequately compensate the acquirer. The Commissioner has a discretion, where there have been prior acquisitions, not to aggregate the deemed value of property acquired by a prior acquisition.[15] The assessment of duty in respect of the acquisition of a land use entitlement is dealt with by s97.

Where a person who is required to do so fails to lodge a statement under either s94 or s96, the Commissioner may make an assessment of the duty which would have been otherwise chargeable on the basis of such

13 A prior acquisition is defined in s91(1) to mean an acquisition by a person or a related person of an interest in the company or scheme at any time during the period of two years immediately preceding the date of the relevant acquisition.

14 Section 95(1).

15 Section 95(3).

information as is available to the Commissioner and such estimates of property values as the Commissioner considers reasonable.[16]

2.6 Commissioner's Charge on Land for Unpaid Duty

Part IV contains a powerful mechanism to enable the Commissioner to recover unpaid duty. Where the Commissioner has made an assessment of duty and the assessment has not been paid, the Commissioner can cause an entry to be made on the original Certificate of Title of any real property to which the private company or scheme is entitled in South Australia. The effect of this entry upon the title is to prohibit the Registrar-General from allowing the registration of a dealing with the relevant land except in accordance with the provisions of Part IV.[17] The unpaid duty is a charge on the real property which will continue until the duty is paid or the entry is cancelled.[18]

If, at the expiration of six months from the date of assessment, the duty remains unpaid, the Commissioner may take action to sell the real property in satisfaction of the duty payable.[19]

2.7 Commencement of Legislation and Relation Back

Before concluding this outline of Part IV it is important to note the commencement date of the Part and to consider whether acquisitions made before the commencement date can be taken into account in applying s94.

Part IV commenced operation on 24 May 1990. Section 93(3) provides that Part IV does not apply where the Commissioner is satisfied that "the acquisition occurred before the commencement of this Part" or "the acquisition arises out of an agreement entered into before the commencement of this Part".

Although it was not entirely clear, it appeared that the effect of this was that an acquisition made prior to 24 May 1990 could not be aggregated with an acquisition on or after 24 May 1990 for the purposes of s94 (or for the purposes of s95). This conclusion is consistent with a ruling made in New South Wales by the New South Wales Commissioner on a similar issue.[20] This conclusion is also consistent with the assumption that the South

16 Section 100(2)(a).

17 Section 101.

18 Section 102.

19 Section 103.

20 Revenue Ruling SD 117, dated 11 November 1988. See also, Tolhurst, Wallace & Zipfinger, *Australian Revenue Duties - Stamp Duties* (Butterworths, Sydney) Vol 1A, pp1490.1-1490.2.

Australian legislation does not operate retrospectively. This interpretation of section 93(3) has been confirmed by the South Australian Commissioner of Stamps for the purposes of s94(1)(a) by a circular issued by the State Taxation Office.[21]

3 INTERPRETATION OF SECTION 94(1)(a)

Section 94(1) provides that a statement must be lodged with the Commissioner upon the "acquisition" of "a majority interest" in "a private company or scheme"[22] which private company or scheme has an entitlement to certain prescribed levels of real property.[23] Parts 3 and 4 of this article will consider in some detail the provisions of s94(1)(a) and s94(1)(b) respectively.

3.1 Analysis of Section 94(1)(a)

Part IV is an anti-avoidance provision. It is seeking to deal with a wide range of possibilities and as a result its provisions are quite complex. It is my opinion that there are significant problems with the interpretation of s94(1)(a). Similar problems of interpretation exist, in my opinion, with the equivalent provisions in the New South Wales and Victorian legislation.

Under s94(1)(a) there are three principal elements involved in determining whether a person has acquired a majority interest in a land rich company or trust which should trigger the assessment of duty.[24] These are:

(a) The person must acquire a "majority interest", that is, an interest which entitles the person, on a winding up of the company or trust, to a distribution of property of the company or trust to an extent greater than 50 per cent of the value of the distributable property.

(b) Interests held by "a related person" are to be aggregated.

(c) Interests acquired within two years of a relevant acquisition are also to be aggregated.

My expectation would have been that the result of the legislation would be to impose duty in both of the following situations:

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21 Circular No 13, dated 15 May 1991.

22 Section 94(1)(a).

23 Section 94(1)(b).

24 The discussion in part 3.1 of this article is confined to those situations where a person first acquires a majority interest. The consequences of a person who has a majority interest acquiring a further interest, which is the subject of s94(1)(a)(iv), are dealt with separately in part 3.5 of this article.

(a) A single acquisition by a person which results in that person having an entitlement to greater than 50 per cent of the distributable property.

(b) An acquisition by a person ("the relevant acquisition") which, when aggregated with other acquisitions by that person on the date of or in the two years preceding the relevant acquisition and aggregated with acquisitions by a related person on the date of or in the two years preceding the relevant acquisition, results in the person, or the person and the related person together, having an entitlement to greater than 50 per cent of the value of the distributable property.

I am not sure that s94 in fact achieves this. The particular approaches taken by South Australia, New South Wales and Victoria differ in this regard. The New South Wales and Victorian approaches are considered briefly below.[25]

Section 94(1)(a) defines the relevant acquisitions which Part IV is concerned with as acquisitions where a person:

(i) acquires a majority interest in a private company or scheme;

(ii) acquires an interest which, together with any other interest acquired during the preceding period of two years, results in the person having a majority interest in a private company or scheme;

(iii) acquires an interest which, together with any other interests acquired during the preceding period of two years, and the interest of a related person acquired during the preceding period of two years, is a majority interest in a private company or scheme; or

(iv) having a majority interest (including an interest which, together with the interest of a related person, is a majority interest) acquires a further interest in a private company or scheme.

A "majority interest" is defined in s95(1) as:

> an interest (other than a land use entitlement) in a private company or scheme which, if the company or scheme were to be wound up -

25 See parts 3.2 and 3.3 of this article.

(a) in the case of an interest acquired by a single acquisition - immediately after that acquisition; or

(b) in the case of an interest acquired by two or more acquisitions - immediately after the later or latest of those acquisitions,

would entitle the person who acquired the interest, or that person together with any related person, to participate (otherwise than as a creditor or other person to whom the company or scheme was liable at the time of the acquisition) in the distribution of property of the company or scheme to an extent greater than 50 per cent of the value of the property distributable to all the holders of interests in the company or scheme.

A matter which must be disposed of first is whether acquisitions made before the commencement of Part IV can be taken into account in applying s94. I have already stated that it would appear from s93(3) that an acquisition made prior to 24 May 1990 cannot be aggregated with an acquisition on or after 24 May 1990 for the purposes of s94.

Having disposed of that issue we must now turn to issues of greater difficulty. We must consider whether s94(1)(a) achieves what I have suggested it should be seeking to achieve. This is best considered by reference to examples.

Example 1

A acquires a 30% interest in a private company on 31 December 1990.

A acquires a 30% interest on 30 June 1992.

(a) The acquisition in 1990 is not an acquisition of a "majority interest".

(b) However, the acquisition in June 1992 is caught by s94(1)(a)(ii).

(c) Query whether the acquisition in 1992 is also caught by s94(1)(a)(i)? I suggest it is not. If it was caught by that sub-section then sub-sections (a)(ii) and (a)(iii) would be superfluous. Furthermore, sub-section (a)(i) would then aggregate acquisitions which were more than two years apart and that would appear to conflict with the terms of s94(1)(a) viewed as a whole.

Example 2

A acquires 30% on 29 June 1990.

A acquires 30% on 30 June 1992.

(a) As at 30 June 1992 A has a "majority interest".

(b) However the acquisitions are of interests which individually do not give A a "majority interest" and are more than two years apart. Therefore, neither acquisition appears to be covered by s94(1)(a).

Examples 1 and 2 show that s94(1)(a)(i) should be confined to a single acquisition which gives A a "majority interest". I suggest that one cannot take into account, under sub-section (a)(i), existing interests held by A or by any persons related to A, acquired more than two years before. For the purposes of s94(1)(a)(i) the question is whether the relevant acquisition "alone" (to use the language of the equivalent Victorian legislation[26] gives the person a majority interest.

Example 3

A acquires 30% on 31 December 1990 from Vendor 1.

A acquires 30% on 31 December 1990 from Vendor 2.

(a) This example causes some difficulty. A has not acquired a "majority interest" by any **one** of these acquisitions. Accordingly, it could be argued that s94(1)(a)(i) does not apply.

(b) Section 94(1)(a)(ii) cannot apply as the acquisitions occur on the same date - one does not precede the other.[27]

(c) The difficulty arises because the legislation fails to refer in sub-sections (a)(ii) and (a)(iii) to acquisitions "on the same date" as well as during the preceding period of two years.

(d) It may be that a court would regard two or more acquisitions by A on the same date as being one acquisition for the purposes of s94(1) particularly

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26 *Stamps Act* (Vic) 1958 s75J(a)(i).

27 That is certainly so if the transfers bear the same date and the settlements of both acquisitions occur simultaneously, particularly where both derive from the same contract. However, even if the settlements occur at different times they may still be deemed to have occurred at the same time by virtue of s91(4) which deems an acquisition to have occurred "on the date on which the transfer is executed".

where they arise out of one transaction. In other words, such acquisitions may be aggregated and s94(1)(a)(i) may apply. However, this is by no means clear and the uncertainty could have been avoided by better drafting.

Example 4

A acquires 30% on 31 December 1990.

B acquires 30% on 31 December 1990 (where **B** is related to **A**).

(a) I do not believe that the acquisition by **A** is caught by s94(1)(a)(i). If it was then s94(1)(a)(iii) would be superfluous and s94(1) would have a wider application than that which I believe it is intended to have.

(b) For the reasons previously given, the acquisition by **A** is not caught by s94(1)(a)(iii) as the acquisitions occur at the same time. It cannot be said that **B**'s acquisition occurred "during the preceding period of two years".

(c) It may be argued that by virtue of the definition of "majority interest" it is necessary to aggregate **B**'s acquisition with **A**'s acquisition and consequently to catch these acquisitions under s94(1)(a)(i). I suggest that both a literal and logical interpretation of the definition of "majority interest" and of s94(1)(a)(i) cannot lead to this conclusion.

Example 5

B acquires 30% on 31 December 1990.

A acquires 30% on 30 June 1992 (where **A** and **B** are related).

An obligation to lodge a statement clearly arises when **A** acquires its 30% interest in June 1992. This is covered by s94(1)(a)(iii).

The preceding examples show that significant problems may arise in applying s94(1)(a) to particular fact situations.

3.2 New South Wales Comparison

To assist our understanding of s94(1)(a) of the South Australian legislation it is useful to consider the equivalent provisions in the New South Wales and Victorian legislation. I will first consider the New South Wales legislation.

The relevant sections of the *Stamp Duties Act* 1920 (NSW) for consideration here are ss99E, 99A and 99F. Pursuant to s99E(1) a person must lodge a statement if the person:

(a) acquires a majority interest;

(b) acquires an interest which results in the person having a majority interest;

(c) acquires an interest which, together with the interest of a related person, is a majority interest; or

(d) having a majority interest (including an interest which, together with the interest of a related person, is a majority interest) acquires a further interest.

Section 99A defines "prior acquisition" to be the acquisition by a person or a related person "*on* or at any time during the period of three years before the date of a relevant acquisition" (but not earlier than certain nominated dates) (my emphasis). The use of the word "on" in this definition is an important difference from the South Australian legislation.

The definition of "prior acquisition" is important to the application of s99F. Section 99F provides that a statement lodged under s99E is chargeable with duty on amounts determined by a formula similar to that contained in s95(1) of the South Australian legislation. Section 99F(1)(a) provides that where there have been no prior acquisitions the value of the relevant property acquired is deemed to be the amount calculated by multiplying the unencumbered value of all land in New South Wales to which the private company or scheme is entitled at the date of the relevant acquisition by the percentage of the interest acquired by the relevant acquisition. Section 99F(1)(b) provides that where there have been prior acquisitions the value of the property upon which duty will be assessed is the aggregate of the amounts calculated, in respect of the relevant acquisition and each prior acquisition, by multiplying the unencumbered value of all land in New South Wales to which the private company or scheme is entitled at the date of the relevant acquisition or the prior acquisition as the case may be, by the percentage of the interest acquired by the relevant acquisition or the prior acquisition as the case may be.

Section 99E, which determines whether a statement must be lodged or not, does not incorporate any reference to prior acquisitions. Accordingly, if A acquired a 30% interest in a private company in 1990 and a further 30% in 1994 then A would appear to be required to lodge a statement in 1994. If my analysis of s94(1)(a) of the South Australian legislation is correct no statement would be required in South Australia in these circumstances.

Query whether, in the example given in the preceding paragraph, A has a liability to pay duty in New South Wales? Section 99F(1)(b) cannot apply as there have been no "prior acquisitions". However, s99F(1)(a) would appear to catch the 1994 acquisition unless that sub-section is interpreted to relate only to situations where the relevant acquisition itself is an acquisition of a "majority interest". It would seem to me that, although s99F(1)(a) may be somewhat ambiguous, it would apply to catch the acquisition in 1994 in our example and so duty should be assessed on the 30% interest acquired on that date. This result is quite contrary to what I would have expected and appears to be contrary to the philosophy of the New South Wales legislation.

It may be that in practice the interpretation placed upon s99F(1)(a) will not result in an assessment of the 1994 acquisition. However, I am not aware of the New South Wales practice in this regard. I note that the commentary on these provisions contained in Tolhurst, Wallace and Zipfinger suggests that in practice the 1994 acquisition would not be dutiable in New South Wales.[28]

3.3 Victorian Comparison

The relevant sections of the *Stamps Act* 1958 (Vic) for consideration are ss75G, 75J and 75K. Section 75G provides that if by a "relevant acquisition" a person acquires a "majority interest" or a "further interest" the person must lodge a statement. Section 75K provides definitions of "interest", "majority interest" and "further interest". The definitions of "interest" and "majority interest" are similar to those contained in the South Australian legislation. Unlike the South Australian and New South Wales legislation the Victorian legislation expressly defines the meaning of "further interest". The effect of this definition is that a person acquires a further interest in a private company if the person (and any related person) has a majority interest in a private company which majority interest required the person to lodge a statement under s75G and the person subsequently acquires a further interest in the private company.

Section 75J(1) defines what a "relevant acquisition" is for the purposes of s75G. An acquisition by a person is a relevant acquisition:

> (a) if the acquisition -
>
> (i) is an acquisition or an interest that alone constitutes a majority interest in the corporation; or

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28 Tolhurst, Wallace & Zipfinger, *Australian Revenue Duties - Stamp Duties* Vol 1A, p1500.5.

(ii) together with acquisitions by the person of interests in the corporation during the 12 months immediately preceding the day on which the acquisition occurs, constitutes a majority interest in the corporation; or

(b) if by the acquisition a person who has a majority interest in the corporation (and in acquiring that majority interest the person became subject to s75G) acquires a further interest in the corporation.

I suggest that the drafting of the Victorian legislation is the best of the three jurisdictions being compared. It clearly states that an acquisition of an interest in a private company is caught by the land rich provisions of the legislation in three situations. First, if the acquisition "alone" (that is, in itself) constitutes a majority interest. Secondly, if the acquisition constitutes a majority interest when the acquisition is aggregated with other acquisitions made by the same person or related persons within the preceding 12 months. Thirdly, if a further interest is acquired after the person has acquired a majority interest in respect of which a statement was, or should have been, lodged.

The Victorian legislation is not without some ambiguity. Neither s75G nor s75J refer to related persons. It is s75K which, in defining "interest" "majority interest" and "further interest", seeks to aggregate the interests of related persons. It is unclear to me whether s75K permits the aggregation of the interest of a related person where that interest was acquired more than 12 months prior to the relevant acquisition. It appears to me that the date of the acquisition by the related person may be irrelevant.

I also note that the time limitation in s75J(1)(a)(ii) aggregates acquisitions during the 12 months "preceding" the date of the relevant acquisition and not acquisitions "on or preceding" that date. This would appear to be a deficiency similar to that contained in the South Australian legislation, in that it would appear to prevent the aggregation of another interest by the same person or a related person on the very same date as the relevant acquisition. However, in the Victorian context this may not be a concern. I have already stated, in the South Australian context,[29] that more than one acquisition by the relevant person on the same day may be treated as one acquisition. Furthermore, in the context of related persons, it appears to me that in the Victorian context there is no time limit which applies to the acquisitions of such persons and, accordingly, the acquisition by a related person on the same day would be aggregated.

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29 See Example 3 in part 3.1 of this article.

3.4 **Related Persons**

As discussed above,[30] s94(1)(a) of the South Australian legislation seeks to aggregate the interests of related persons so as to prevent Part IV being avoided by interests being divided between parties who are associated and capable of acting in concert. I have already stated that it may not be possible to aggregate the interests of related persons in circumstances where one would have expected that such aggregation would be required. I do not intend to elaborate upon this further.

Section 91(2) prescribes certain relationships where persons will be deemed to be related persons for the purposes of Part IV. The majority of these relationships are straight forward and I do not intend to discuss them in detail. However, a few comments with respect to the definitions contained in s91(2) are appropriate.

First, s92(2)(b) provides that "private companies" are related persons if they are related corporations within the meaning of the Companies (South Australia) Code. It is apparent from this definition that there is to be no attempt to treat a public company and a private company as being related persons. In other words, a company can only be related to a private company for the purposes of Part IV if that first company is also a private company.

Secondly, s91(2)(c) provides that trustees are related persons if any person is a beneficiary common to the trusts of which they are trustees. Tolhurst, Wallace and Zipfinger[31] point out that, in the context of the New South Wales legislation, this definition gives rise to a serious anomaly. Where a person is a unitholder in two otherwise unrelated public trusts the two trustees will be deemed to be related persons. Therefore, if the two trusts acquire interests in the same land rich company which, when aggregated, constitute a majority interest then an obligation to lodge a statement will arise. The fact that s91(2)(c) catches public unit trusts in this situation is obviously unintended. However, the anomaly referred to in the New South Wales context clearly also exists under the South Australian legislation.

Thirdly, it is clear from a reading of ss94 and 91(2) that the interests of persons will only be aggregated if those persons are related at the time of the relevant acquisition which is the subject of s94(1)(a). A s94 statement will not be required if **A** and **B** become related persons for the purposes of Part IV after the date of the relevant acquisition.[32]

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30 See part 3.1 of this article.

31 Tolhurst, Wallace & Zipfinger, *Australian Revenue Duties - Stamp Duties* Vol 1A, p1500.4.

32 As above.

Finally, it is noted that in some jurisdictions[33] it is provided that persons will be deemed to be related if they acquire interests in a corporation by virtue of acquisitions that together form or arise from substantially one transaction or one series of transactions. In other words, an organised or concerted plan which is part of one transaction or series of transactions will still be caught even though the persons are not otherwise related under the legislation. Such a "catch-all" provision is not contained in the South Australian legislation.

3.5 Creeping Acquisitions

I have already pointed out that s94(1)(a) provides that interests acquired during a period of two years can be aggregated to determine if a person has acquired a majority interest.[34] From the preceding discussion it is apparent that where a person acquires two interests which separately do not give the person a "majority interest" the person will not be required to lodge a statement under s94 if the separate interests were acquired more than two years apart.[35] By virtue of this a person who accumulates interests in a private company or scheme gradually may not be obliged to lodge a statement when an acquisition finally pushes the person over the "majority interest" threshold.

However, it is important to note that s94(1)(a) appears to provide such a person with a "once only" relief from the effects of Part IV. Once a person has a majority interest, no matter how long it took the person to acquire that majority interest, the acquisition of a further interest by the person will trigger the requirement to lodge a statement under s94.[36] In other words, s94(1)(a) does not provide that a person can avoid Part IV by acquiring small interests in a private company or scheme every two years. Once a majority interest has been obtained all future acquisitions will be caught.

In this regard, the structure and effect of the South Australian legislation is similar to that of New South Wales. It appears to me that ss99E, 99A and 99F of the *Stamp Duties Act* 1920 (NSW) have the same effect in this context.

An important question to be asked here is whether this result, which appears to flow in South Australia and New South Wales, is intended to be accidental. The answer to this is not clear.

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33 Victoria, Western Australia and Queensland.

34 See part 3.1 of this article.

35 See Example 2 in part 3.1 of this article.

36 S94(1)(a)(iv).

Consider the following example:

A acquires a 30% interest in a private company in 1990, followed by a further 25% in 1994 and a further 10% in 1998.

The **1994** acquisition is not caught by the South Australian legislation. On the basis of the analysis provided in part 3.1 of this article, it would appear that a statement is not required in these circumstances under s94(1)(a).

The New South Wales position is unclear. As I have pointed out in part 3.2 of this article a statement must be lodged under s99E of the *Stamp Duties Act* (1920) NSW upon the acquisition of the 1994 interest. As I have also indicated, it appears to me that this interest could be assessed under s99F of the *Stamp Duties Act* 1920 (NSW). However, given the philosophy of this legislation that is an odd result.

In Victoria the 1994 acquisition would not be caught. When one considers the provisions of ss75G, 75J and 75K of the *Stamps Act* 1958 (Vic)[37] it is clear that the 1994 acquisition is not a "relevant acquisition" for the purposes of s75J and consequently no statement is required to be lodged.

In respect of the 1994 acquisition the results under the South Australian and Victorian legislation are consistent and are the results which I would have expected given the philosophy of the legislation.

What then is the effect of the **1988** acquisition? As indicated in the foregoing discussion this acquisition would appear to be caught under the South Australian legislation by s94(1)(a)(iv). Again, this acquisition would also appear to be caught in New South Wales under s99E(d) and assessable under s99F.

However, the 1988 acquisition is not caught by the Victorian legislation. Under s75G of the *Stamps Act* 1958 (Vic) a statement must be lodged only if a "majority interest" or a "further interest" is acquired by a "relevant acquisition". When one considers the definitions of "relevant acquisition" in s75J and of "majority interest" and "further interest" in s75K it is clear that, where a person already has a majority interest, the acquisition of a further interest will only be assessable if the person was required to lodge a statement upon the acquisition of the interest which gave that person a majority interest. In the present example **A** would not be required to lodge a statement in Victoria upon the acquisition of the 25% interest in 1994. Consequently, the 10% interest acquired in 1988 would not be assessable.

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37 See part 3.3 of this article.

The above example shows that there appears to be scope for significant differences in the application of the legislation of the three jurisdictions discussed. Each uses different language, with the South Australian legislation being different to both of the other two jurisdictions but being more similar to that of New South Wales. The result is, in my opinion, a confusing one.[38]

Only the Victorian legislation accords with what I would have expected the legislation to seek to achieve. It provides that once you acquire a "majority interest" which is caught by the legislation then all future acquisitions will also be caught. However, acquisitions above the 50% level may be exempt provided the preceding acquisition of a majority interest was not caught by the legislation.

It is crucial to note that the Victorian legislation contains a definition of "further interest" whereas the South Australian and New South Wales legislation does not. After analysing the definition of "further interest" in the Victorian legislation, and commenting that similar definitions are contained in the Western Australian and Queensland legislation, Tolhurst, Wallace and Zipfinger make the following observation:[39]

> The effect of this formulation of "further interest" is that a person will only be taxed on incremental acquisitions of interest in land-owning entities over 50 per cent if, in acquiring the original interest to an extent greater than 50 per cent, the person became subject to the new provisions and was taxed as on an acquisition of a "majority interest" under the relevant provisions.

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38 My comments with respect to s94(1)(a)(iv) must be viewed in the light of my comments made in part 2.7 of this article. If A acquired a 50% interest in a private company prior to 24 May 1990 and acquires a further 40% on 31 December 1990 A would not appear to be caught by s94(1)(a). The interest acquired prior to 24 May 1990 can be ignored due to s93(3). The December 1990 acquisition is not caught by ss94(1)(a)(i)-(iii) as it is not the acquisition of a majority interest. Section 94(1)(a)(iv) does not catch the acquisition as A did not have an existing majority interest.
Query the result here if A's interest prior to 24 May 1990 was 51%. If an interest acquired prior to 24 May 1990 can be ignored completely for the purposes of s94(1)(a)(iv) the result will be the same. However, if such an interest can be taken into account in determining if a majority interest exists for the purposes of s94(1)(a)(iv) then the December 1990 acquisition will be caught by that section. It is not clear from the wording of s94(1)(a)(iv) and s93(3) which interpretation is the correct one.

39 Tolhurst, Wallace & Zipfinger, *Australian Revenue Duties - Stamp Duties* Vol 1A, p1490.1.

It is submitted that the South Australian legislation has erred in not following the same path as the Victorian legislation in this regard.

4. INTERPRETATION OF SECTION 94(1)(b)

In part 3 of this article I have considered s94(1)(a) which defines the nature of the acquisitions in a private company or scheme with which the legislation is concerned. Section 94(1)(b) provides the definition of what is a "land rich" company or trust. It provides that a statement must be lodged in respect of a s94(1)(a) acquisition if:

> (b) the private company or scheme is, at the time of the acquisition, entitled to real property -
>
> (i) the unencumbered value of which comprises not less than 80 per cent of the unencumbered value of all property to which it is entitled, whether in South Australia or elsewhere (other than property referred to in subsection (5)); and
>
> (ii) the unencumbered value of which, insofar as the real property is situated in South Australia, is not less than $1,000,000.

4.1 80% Threshold

For the purposes of s94(1)(b)(i) there is no restriction upon where the property or real property of the private company or scheme is situated for the purposes of determining whether the 80% threshold is reached.[40]

It is important to note that s94(1)(b) talks in terms of "entitlement" to property. The meaning of "entitlement" is dealt with in s92.[41] The definitions contained in s92 will not be considered in detail here. Importantly, their effect is that a private company or scheme is entitled to property if the company or the trustee as the case may be owns property legally or beneficially, or if the property is owned legally or beneficially by a subsidiary of the company or scheme, or if the property is held under a discretionary trust and the company or scheme (or a subsidiary thereof) is an object of that trust.[42]

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40 In relation to "real property" refer to the definition in s91(1) and in relation to "property" refer to s94(1)(b)(i).

41 In particular, see sub-sections (1) and (2).

42 Section 92(1)(b) and (2).

Section 92 defines the circumstances where a private company or scheme will be deemed to be a subsidiary of another private company or scheme.[43] It is important to note that property owned by a subsidiary will be aggregated with property owned by the subject company or scheme to determine whether the thresholds referred to in s94(1)(b) are reached.

Although some uncertainty exists in other jurisdictions, the South Australian legislation makes it clear that a private company or scheme does not own property beneficially merely because it has an option to purchase or where it is a purchaser under an uncompleted contract of sale.[44]

In determining whether the 80% threshold is reached, s94(1)(b)(i) indicates that the property referred to in s94(5) is not to be taken into account. Section 94(5) provides that certain property cannot be taken into account for the purpose of determining the value of property to which a private company or scheme is entitled. By virtue of this, the ease of showing that real property accounts for at least 80% of the total property to which the company or trust is entitled is increased.

What property cannot be taken into account? Section 94(5) excludes cash, money on deposit with financial institutions, negotiable instruments, loans by the company or trust which are repayable on demand and loans by the company or trust to related persons.[45]

The purpose of s94(5) is to prevent the company from artificially inflating the value of its assets to avoid the application of Part IV. An important proviso to sub-section (5) is that the property referred to need not be excluded "where it is shown to the Commissioner's satisfaction that the acquisition of, or dealing with, the relevant property has not occurred for the purpose of defeating the object of this Part". Given that this proviso requires the Commissioner to consider the purpose of the acquisition of the relevant property, and to make a decision in respect of this, it is difficult to predict how often this proviso will be taken advantage of or the Commissioner's likely attitude to it.

4.2 **$1,000,000 Threshold**

Section 94(1)(b)(ii) provides that the private company or scheme must be entitled at the time of the relevant acquisition to real property in South

43 Section 92(1)(a).

44 Section 92(7).

45 Section 94(5)(c) is somewhat ambiguous. Although it is not clear, the sub-section appears to deal with loans made by the company or trust rather than loans to the company or trust. A consideration of equivalent interstate legislation, particularly the Victorian provisions, supports this interpretation.

Australia which has an unencumbered value of at least $1,000,000. This requirement is relatively straight forward and little comment will be made in respect of it.

However, it is worth noting in the context of both paragraphs (i) and (ii) of s94(1)(b) that Part IV does not clearly indicate how co-ownership of land or other property is to be treated. In other words, if a company or trust is the co-owner of land, or other property, is the total value to be taken into account or only the share to which the company or trust is entitled? Although this is dealt with in some of the other jurisdictions,[46] it is left at large under Part IV. It would appear from the language of Part IV[47] that only the share to which the company or trust is entitled is to be taken into account. However, I suggest that this should have been placed beyond doubt.

4.3 **Definition of "Real Property"**

Section 91(1) defines "real property" broadly to include "any estate or interest in land". The definition expressly includes a mining tenement but excludes the estate or interest of a mortgagee, chargee or other encumbrancee in land or an estate arising by virtue of a warrant, writ or lien.

The definition is certainly broad enough to include a leasehold interest in land. The inclusion of leasehold interests provides scope for problems in view of the difficulties which can arise in valuing leasehold interests. Provided the rental being paid by the lessee, and its contribution to the lessor's outgoings in relation to the land, are in line with current market standards, the lessee's interest in the land should have no value. However, where the lessee is paying less than market value for the property, its leasehold interest will have to be taken into account for the purposes of Part IV.

4.4 **Definition of "Property"**

It must be noted that s94(1)(b) talks of the "property", rather than the "assets", to which a company or trust is entitled. In this regard, the South Australian legislation is similar to the Victorian legislation. On the other hand, the New South Wales legislation uses the concept of "assets". In the debate on Part IV, in its passage through Parliament, the opposition proposed

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46 For example, in Victoria, ss75I(2)(a) and 75I(6) of the *Stamps Act* 1958 (Vic) provide that in determining if the $1,000,000 threshold is reached, the value of the whole of the property is to be taken into account, and not merely the interest of the company or trust, unless the Commission is satisfied that co-ownership was not being used to defeat the object of the legislation.

47 Particularly see ss92(1)(b) and 92(2).

that a definition be inserted in Part IV to provide that "property" include "any asset".[48] This amendment was proposed on the basis that case law suggests that the term "property" is not as broad as the term "assets".

In this regard, consider the decision of the Full Court of the Supreme Court of Queensland in *Pancontinental Mining Limited v Commissioner of Stamp Duties (Qld).*[49] In that case, it was held that "mining information arising from or as a result of feasibility studies and exploration work" was not property for the purposes of the *Stamp Act* 1894 (Qld). The Court held that an agreement to sell such confidential information was an agreement for the performance of a service, that is, a disclosure of that information, rather than an agreement to sell property.

Accordingly, on the basis of *Pancontinental Mining* it may be that assets such as confidential information and intellectual property will not be taken into account in determining the 80% threshold. As a result of this, it will be more likely that companies and trusts will fall within the terms of s94(1)(b).

The proposed amendment to include "any asset" within the definition of "property" was not passed. The Government's position was put by the Attorney-General who stated that the Government opposed the amendment on the basis that the reference to property, rather than assets, in Part IV was consistent with the balance of the *Stamp Duties Act* 1923 (SA). If the Act did not assess the transfer of confidential information it was reasonable that the value of such information should not be taken into account for the purposes of Part IV. Furthermore, the Attorney-General stated that[50]

> the inclusion of assets other than property would weaken the operation of the legislation and provide scope for clever professional advisers again to restructure transactions in such a way that high values were attributed to assets that were not property and therefore dilute the value of real property to less than 80 per cent.

4.5 Ownership of Property via Units in a Unit Trust

Some recent decisions dealing with the interest which unitholders of a unit trust have in the property of the unit trust may provide problems in applying s94(1)(b). The problems will arise where the private company or scheme under consideration holds units in a unit trust.

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48 SA, Parl, *Debates* (1990) at 1409.

49 (1988) 88 ATC 4190.

50 SA, Parl, *Debates* (1990) at 1409-1410.

In the decision of the Victorian Supreme Court in *Costa & Duppe Properties Pty Ltd v Duppe*[51] the court held that a unitholder had a proprietary interest in all of the property of the trust for the time being and certainly had a sufficient interest in the trust's land to support a caveat. This decision was referred to with approval in the decision of the Full Court of the South Australian Supreme Court in *Commissioner of Stamps v Softcorp Holdings Pty Ltd*, where the court stated:[52]

> In a conventional unit trust (in the absence of special or unusual powers) the holders of units in the unit trust have an undivided interest in the whole of the trust fund in direct proportion to the number of units held by them.

In the context of s94(1)(b) these principles could lead to the conclusion that a private company or scheme is "land rich" by virtue of the fact that it owns units, exceeding $1,000,000 in value, in a land owning unit trust, even though the private company or scheme does not own or is not otherwise entitled to any real property.

5. LAND USE ENTITLEMENT

Earlier, I indicated that Part IV also requires a statement to be lodged with the Commissioner where a person acquires a "land use entitlement".[53] The obligation to lodge such a statement is imposed by s96 and the assessment of duty is dealt with in s97.

A "land use entitlement" is defined as an interest in a private company or scheme which gives the holder of the interest an entitlement to the exclusive possession of real property in South Australia.[54] Note that there is no concept of the acquisition of a "majority interest" here. All that is required is that a person acquire a land use entitlement.

At first glance it is not entirely clear what types of interests will be caught by the definition of "land use entitlement". Section 91(6) provides that it does not include an entitlement in respect of a dwelling pursuant to a scheme where such entitlement derives from ownership of a share in a private company or a unit in a unit trust scheme, nor does it include an entitlement that arises pursuant to a retirement village scheme.

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51 [1986] VR 90.

52 (1987) 47 SASR 382 at 386. The court went on to say that this may be displaced by contrary provisions in the trust deed.

53 See part 2.1 of this article.

54 Section 91(1).

The most obvious example of what will be covered by the definition of "land use entitlement" will be an entitlement to real property, other than a dwelling, which is conferred by ownership of a share in a private company or a unit in a unit trust scheme. For example, company title schemes for the ownership of commercial properties will fall within the definition. Tolhurst, Wallace and Zipfinger[55] state that the land use entitlement provisions will catch "certain time share arrangements, commercial property title situations (for example, professional chambers, factory unit developments) and artificial schemes which may otherwise have been used to circumvent s99E".[56]

There should be no overlap between ss94 and 96. Section 94 is dealing with the acquisition of a "majority interest" which gives a person control over a private company or trust and the right to more than 50% of its property upon a distribution of the same. The land use entitlement provisions require that a person must gain "an entitlement to the exclusive possession of real property". In other words, s96 is concerned with legal or beneficial entitlement to exclusive possession of real property rather than the entitlement which, from a commercial point of view, the controller of a land owning company has in respect of that land. This latter entitlement is dealt with by s94.

6. CONCLUSION

It is difficult at this early stage to predict what problems will arise in practice with the application of Part IV. In part, that will depend upon the particular facts of individual cases and the Commissioner's attitude to the interpretation of those provisions which are ambiguous or lack clarity.

The foregoing discussion has shown that the new Part IV has a number of inherent problems, some of which may enable persons who were intended to be caught by the legislation to evade it and others which may inadvertently catch persons who are not intended to be caught.

In view of the fact that Part IV has an 'anti-avoidance' purpose, and in view of the fact that it must deal with the complexities of companies and trusts, it is not surprising that the resultant legislation is extremely complex. Only time will tell whether it will give rise to significant numbers of legal challenges and whether it will be effective in achieving its purpose.

However, there is no doubt that since the introduction of the legislation the attitude of those involved with the acquisition of commercial real property

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55 Tolhurst, Wallace & Zipfinger, *Australian Revenue Duties - Stamp Duties* Vol 1A, p1500.10.

56 Section 99E is the equivalent of s94 in the South Australian legislation.

has changed. The prevalence of property developers and investors acquiring and disposing of land by means of company or trust vehicles has greatly diminished.

The acquisition of a freehold interest in land has always had advantages over the indirect acquisition of such land by acquiring control of company or trust vehicles. With the acquisition of a company or trust the acquirer has to face the possibility of attracting taxation and other liabilities which may not be apparent at the time of acquisition. With the added risk of contravening Part IV, there is no doubt that the balance has now shifted in favour of the acquisition of a direct interest in land. If some of the defects of Part IV as presently drafted are shown to be real, and if professional advisers develop ways of structuring transactions to avoid Part IV, the pendulum may swing back to some extent.

However, I have little doubt that Part IV will go a long way towards achieving its purpose of increasing the amount of stamp duty received by the State Government in respect of conveyances, where the underlying property being conveyed is land.