STAMP DUTY
INTELLECTUAL PROPERTY ISSUES

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I. INTRODUCTION

The intangible characteristics of intellectual property account for the principal problems presently arising from the application of the stamp duties legislation to instruments or transactions dealing with intellectual property. For present purposes intellectual property shall be taken to include copyright, patents, registered designs, registered trademarks, common law trademarks or goodwill[1] and information.

In very broad terms many of the problems arise from two sources. The first is the need to attribute a territorial location to intellectual property and, if more than one location is identified, the need to apportion the value of the property or the consideration paid for it. The second difficulty is the connection between intellectual property and other (more tangible) forms of property and the need to apportion the value or consideration between them.

Each of these warrants further consideration.

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1 *Federal Commissioner of Taxation v Just Jeans Pty Ltd* (1987) 87 ATC 4373 at 4382-4383; S Ricketson, *The Law of Intellectual Property*, Butterworths (1st ed, 1984) at [25.8]-[25.10].

II. TERRITORIAL LOCATION AND APPORTIONMENT

A. Location

The stamp duties legislation of a particular jurisdiction will expressly or impliedly identify the connecting factors which will render an instrument or transaction dutiable in that jurisdiction. Frequently, one of these is the location *in the jurisdiction concerned* of the property affected by a particular instrument or transaction.

Thus, the *Stamp Duties Act* 1920 (NSW) (the "NSW Act") subjects a "conveyance" to ad valorem duty. According to s 65 of the NSW Act a "conveyance" will only be subject to duty if the property conveyed is located *in* New South Wales. The *Stamp Act* 1921 (WA) (the "WA Act") produces the same result by exempting from conveyance duty a conveyance of any interest in property locally situated *out of* Western Australia. In many other cases the connecting factor is identified by a more general provision which, for example, denies admissibility or legal force in the jurisdiction concerned to an instrument relating to property *in that jurisdiction* or to any thing done or to be done in that jurisdiction unless that instrument has been duly stamped in that jurisdiction.

Because stamp duties legislation often imposes duty according to the location of property, the need often arises to determine whether intellectual property the subject of an instrument or transaction is located "in" or "out of" a jurisdiction.

In relation to this a number of points should be noted.

(i) Multiple Locations

The stamp duties legislation in Australia has not yet developed special rules or deeming provisions for determining the location of intellectual property. Accordingly, the general law applies. The rules as to the situs of property have, in large part, been developed for the purposes of private international law. It is a principle of that body of law that property should have a situs in only one jurisdiction.[2] If this were not the case, when an issue of private international law fell to be determined according to the law of the situs of the property, there could well be an irreconcilable difference on the point under the laws of each situs. For this reason it is submitted that the courts should and would be loath to recognise more than one situs for a single item of property.

Similar problems could arise if the laws of a number of different jurisdictions attributed a different location to the same single item of property. Those difficulties would clearly be compounded where the jurisdictions were combined in a federal system such as Australia. Thus, assume that two jurisdictions each regarded a single item of intellectual property as located in its own jurisdiction. In that case a single instrument or transaction dealing with that intellectual property may well be subject to stamp duty in both jurisdictions, with each jurisdiction ignoring the stamp duty liability in the other. A uniform approach to the

2 PE Nygh, *Conflict of Laws in Australia* (6th ed, 1995) at p 486; *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 at 237, per Lord Lindley; *Toronto General Trusts Corp v The King* [1919] AC 679 at 684; and *Ex parte Coote* (1948) 49 SR(NSW) 179 at 184.

determination of situs of property under the stamp duties legislation of all Australian jurisdictions is required to avoid such outcomes.

The adoption of a uniform approach is not only dictated by considerations of fairness to taxpayers but may also serve the interests of the revenue. As discussed below, in several cases involving a construction of stamp duties legislation, courts in New South Wales and Queensland have felt compelled to adopt an approach which favoured the taxpayer at the cost of the revenue rather than the alternative approach which would have been singularly unfair to the taxpayer.

(ii) Situs of Intellectual Property

The early view that intangible property did not have a territorial situs[3] did not find support,[4] and the rule developed that intangible property was located in that jurisdiction with which it was most definitely associated.[5] Over time various sub-rules developed in relation to particular kinds of intangible property to determine the jurisdiction with which it was most definitely associated. For example, it was recognised that the jurisdiction in which a chose in action would be enforced was the jurisdiction with which it was most definitely associated.[6]

With the notable exception of information, the other forms of intellectual property under consideration are either choses in action or owe their standing as property to choses in action. Patents, registered trademarks, copyright and registered design are choses in action created by Commonwealth statute. Goodwill is a species of property created and protected by the common law action of passing off.[7] As the excursus on goodwill appearing below confirms, goodwill is inextricably associated with a business. The conclusion that goodwill is located in the jurisdiction in which the associated business is conducted is thus hardly surprising.[8] For other species of intellectual property (excluding information) specific rules have not developed and it remains necessary in each case to identify with which jurisdiction a patent, registered trademark, copyright or registered design is most definitely associated.

In general terms it is submitted that those forms of intellectual property which are choses in action created by Commonwealth statute and enforceable throughout Australia are most definitely associated with the jurisdiction comprising the Commonwealth of Australia rather than any particular Australian State or Territory. It should be stressed that this submission does not proceed on the simplistic basis that any chose in action created by Commonwealth statute is necessarily most definitely associated with and located throughout the Commonwealth of Australia. Such an approach was rejected by Sully J of the

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3 *Smelting Company of Australia Ltd v Inland Revenue Commissioners* [1897] 1 QB 175.

4 *Inland Revenue Commissioners v Muller & Co's Margarine Limited,* note 2 *supra* at 236, per Lord Lindley and at 233, per Lord Macnaghten.

5 *McCaughey v Commissioner of Stamp Duties (NSW)* (1945) 46 SR(NSW) 192 at 201, per Jordan CJ at 201, followed in *2 Day FM Australia Pty Ltd v Commissioner of Stamp Duties (NSW)* (1989) 89 ATC 4840.

6 *Fouad Bishara Jabbour v State of Israel* [1954] 1 All ER 145 at 151; PE Nygh, note 2 *supra* at p 486.

7 S Ricketson, note 1 *supra* at [24.4]-[24.5].

8 *Muller's* case, note 4 *supra* at 224, per Lord Macnaghten and at 235, per Lord Lindley.

Supreme Court of New South Wales in *2 Day FM v Commissioner of Stamp Duties*.[9]

In the *2 Day FM* case the Court considered the liability to conveyance duty under the NSW Act of an assignment of a radio broadcasting licence which had been granted by the Commonwealth under Commonwealth legislation. Since the licence permitted broadcasts only within an area inside the State of New South Wales the Court concluded that the benefit of the licence was most definitely associated with the jurisdiction of New South Wales. The fact that the licence had been created under Commonwealth legislation did not alter that conclusion. Accordingly, the instrument assigning the licence was a conveyance of property in New South Wales and liable to conveyance duty under the NSW Act.

It is submitted that intellectual property created by Commonwealth statute should generally be regarded as located throughout the Commonwealth of Australia. This submission has judicial support, at least in relation to registered trademarks. In *Re Usines De Mell and Firmin Boinot's Patent*[10] Fullagar J concluded that a registered trademark was locally situate in Australia and not in any particular State or Territory. The Queensland Court of Appeal in *Carnation Australia Pty Ltd v Commissioner of Stamp Duties (Qld)*[11] concluded that a registered trademark was property out of Queensland for the purposes of s 54(2) of the *Stamp Act* 1894 (Qld) (the "Qld Act") and two members expressly adopted the conclusion of Fullagar J in *Re Usines*.[12]

Notwithstanding the conclusion that intellectual property of various kinds may be located throughout the Commonwealth of Australia, a particular instrument or transaction may be associated with a particular State or Territory if its subject matter is suitably restricted. For example s 152(3) of the *Patents Act* 1952 (Cth) permits the assignment of a patent limited territorially "for a place in or part of Australia". If the subject matter of an assignment were a patent for exploitation in New South Wales, there would be strong grounds for arguing that New South Wales is the jurisdiction with which it is most definitely associated.

The situs would be less easy to determine if the subject matter of an assignment were a patent for exploitation in an area extending beyond the boundaries of a single jurisdiction (eg an area comprising Queensland and New South Wales). In such a case, if the territory in which the patent were capable of exploitation exclusively determined the jurisdiction with which it was most definitely associated, the consequence would be that the patent would be located in both New South Wales and Queensland. Such an outcome would be inconsistent with the proposition that a single item of property should be recognised as having only a single situs. Furthermore, a single instrument or transaction assigning the patent may be liable to conveyance duty in each of the two jurisdictions without any apportionment between the jurisdictions of the value of the patent or the consideration for the patent assignment. As discussed below, the courts have been reluctant to accept such an outcome.

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9 Note 5 *supra*.

10 (1954) 91 CLR 42 at 49.

11 (1993) 93 ATC 4486.

12 *Ibid* at 4493, per Fitzgerald and at 4500, per Davies JA.

The alternative approach to identifying the situs of the patent is to take into account factors other than the territorial area in which the patent licence may be exercised. The decision of the Privy Council in *Toronto General Trusts Corporation v The King*[13] is instructive in this regard. At issue was the situs, at the time of death of the mortgagee, of mortgage debts evidenced by duplicate counterparts located in two different jurisdictions. The normal rule, which determines the situs of a specialty debt by reference to the location of the specialty instrument, led to the conclusion that the debt was located in two Canadian provinces. According to the Court it was "plainly impossible to hold that they were situate in both provinces at once".[14] The Court took into account all the circumstances pertaining to the debt and the mortgage in order to choose between the two provinces. The relevant factors included: the place of residence of the debtor; the place for payment of the debt; the location of the mortgaged property securing repayment; and the fact that the mortgage derived its force and effect from the laws of a particular jurisdiction.

In the case of an assignment of a patent which limits exploitation to two jurisdictions, it is submitted that the following factors would lead to the conclusion that the jurisdiction with which the patent is most definitely associated would be the Commonwealth of Australia and not any particular States or Territories within the Commonwealth. First, the property assigned is a creature of Commonwealth legislation which is enforceable throughout Australia notwithstanding that it may be exploited in only two jurisdictions. Secondly, the assignability of the property and the various incidents attaching to it are determined according to Commonwealth legislation. In other words, where a factor such as the jurisdiction of exploitation does not point unambiguously to a single jurisdiction, these factors would point to a most definite association with the Commonwealth of Australia.

The same approach can be taken to determine the situs of the benefit of a licence to use intellectual property in a particular State or Territory. This would be an issue, for example, in determining the stamp duty implications of an instrument or transaction assigning the benefit of a licence to use a patent in one or more Australian jurisdictions. If the the licence assigned were restricted to a single jurisdiction, the position would be analogous to that considered in the *2 Day FM* case, and the chose in action assigned would have its most definite association with that jurisdiction. However, if the licence extended to a number of jurisdictions, it is submitted for the reasons previously advanced that the area for exercise of the licence could not determine the question. Rather, the chose in action (the benefit of the licence assigned) would have its most definite association with the jurisdiction in which it would be enforced by the assignee. This outcome would reflect the nature of the benefit of what is assigned, a right of action, and would be consistent with the approach taken to determine the situs of a debt.

13 Note 2 *supra*.
14 *Ibid* at 684.

(iii) Situs of Information

Information is distinguished from the other forms of intellectual property in that it is not recognised as property at law.[15] This is so even in the case of confidential information.[16]

This has considerable significance for provisions in stamp duties legislation attaching consequences to instruments or transactions dealing with property. On the face of it such provisions would attach no consequences to instruments or transactions dealing with information. However, that outcome is subject to the reality that, if information is to be exploited commercially, it generally needs to be recorded on or imparted through some tangible medium. As discussed in more detail below, the courts have on occasion been prepared to attribute the value or characteristics of information to that tangible medium, which generally would constitute property for stamp duty purposes.

If the value or characteristics of information may be attributed to property, the problem of determining the situs of the information itself would be avoided. In that case it should be possible to determine the situs of the associated property at any given time. If the value or characteristics of information may not be attributed to property, the question of situs would often be rendered academic in a stamp duty context since information is not property. In those rare cases where the issue may be material, it is submitted that the inherent characteristics of information at large mean it has no situs.

Information in its various forms is of increasing importance to the operation and development of the economy and society as a whole. This gives rise to competing needs. There is a need in a developing democratic society to preserve the free dissemination of and ready access to information. There is also a need to protect those who invest significant sums in the acquisition of information or the development of systems for its efficient compilation, dissemination and exploitation, and to prevent others who have made no such investment from freely capitalising on the results. One limited response to this need has been the extension of the scope of copyright to encompass computer software which is merely a compilation of information. The newly emerging technologies for the broadcasting and dissemination of information and the resulting need to prevent piracy has seen a comprehensive review of the requirement for further expansion in the scope of copyright.[17]

As remedies, such as those available under the Copyright Act, are made available for the protection of various kinds of information, it is suggested that the situs of the chose in action would be likely to be treated by the courts as the situs of the information to which the chose in action relates.

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15 *Federal Commissioner of Taxation v United Aircraft Corporation Limited* (1943) 68 CLR 525; *Federal Commissioner of Taxation v Sheritt Gordon Mines Ltd* (1977) 137 CLR 612; *Pancontinental Mining Ltd v Commissioner of Stamp Duties (Qld)* (1988) 88 ATC 190.

16 *Smith Kline & French Laboratories (Aust) Ltd v Secretary of Department of Community Services and Health* (1990) 22 FCR 73 at 119-121, per Gummow J; and RP Meagher, WMC Gummow and JRF Lehane, *Equity Doctrines and Remedies*, Butterworths (3rd ed, 1992) at [4117].

17 Copyright Convergence Group (Australia), *Highways to Change: copyright in the new communications environment*, August 1994.

B. Statutory Construction and Apportionment

(i) Statutory Construction

Stamp duties legislation often attaches significance to the question of whether particular property is "in" or "out of" a jurisdiction. Whilst a particular item of intellectual property may be located in the Commonwealth of Australia, that same item may also be regarded as property "in" or "out of" a particular Australian State or Territory. The resolution of this issue involves an exercise in statutory construction which is influenced by the presence or absence of provisions in the legislation for the apportionment of the value of or consideration referable to the intellectual property concerned.

Stamp duties legislation generally requires the duty payable upon an instrument or transaction affecting property to be calculated by reference to the greater of the value of the property or the consideration paid for it. If a single item of property located in the jurisdiction comprising the Commonwealth of Australia may also be characterised as property "in" an Australian State or Territory for the purposes of the stamp duties legislation, the next question concerns the basis for the calculation of the duty.

One possibility is that the duty in the State or Territory should be calculated by reference to the whole of the value of the property or the consideration referable to it. One or more other jurisdictions might also take this approach, leading to double (or more) duty. The alternative would be to assess the duty in the particular State or Territory by reference to an appropriate proportion of the value or consideration.

This approach would produce a more equitable outcome than the former but could only be adopted if expressly or impliedly permitted by the legislation. The approach taken by the Queensland Court of Appeal in *Carnation Australia Pty Ltd v Commissioner of Stamp Duties (Qld)*[18] demonstrates the extent to which the presence or absence of provisions for apportionment influence the threshold question of whether the property is in the jurisdiction at all.

In that case the Court was required to determine whether registered trademarks were exempted from duty as "property outside Queensland" under s 54(2) of the Qld Act. Each member of the Court concluded that s 54(2) displaced the application of s 54(1) in so far as a sale agreement related to the trademarks on the basis that the trademarks comprised "property outside Queensland". Fitzgerald P began by noting the decision of Fullagar J in *Re Usines*[19] that a registered trademark is locally situate in Australia but not in any particular State or Territory. This conclusion then raised the question as to whether property so situated should be regarded as property "outside Queensland" under s 54(2). Although he found the matter far from clear Fitzgerald P was compelled to the conclusion that it should by the apparent inequity of the opposite conclusion. The result of the opposite conclusion could be that full ad valorem duty would be paid in Queensland in respect of property located throughout the whole of Australia without any account being taken of the liability to duty in the other parts of

18 Note 11 *supra.*

19 Note 10 *supra.*

Australia where the property was also situated. Pincus and Davies JJA adopted the same reasoning. Since, the section predicated that an agreement for sale would be wholly dutiable or not dutiable at all, the court was confronted with the choice between exacting duty "on the whole of the property included in a single sale, where only a small part of the property is in Queensland" and exacting no duty.

Each member of the Court accepted that this all-or-nothing dilemma did not arise in the case of s 54A. Section 54A contains sub-sections providing for an apportionment of the value of and consideration referable to the assets used in a business conducted in Queensland for the purpose of computing the duty payable upon a form S(a). Fitzgerald P and Pincus JA concluded that the trademarks were assets within s 54A and that, apart from certain technical difficulties in the case before them, an appropriate amount of duty could be levied in respect of the trademarks. Given the technical difficulties, the Court did not assess any duty under s 54A. However, a clear sign was given to the Commissioner that he might validly assess duty in respect of trademarks in an appropriate case.

Although the sale agreement expressly allocated consideration to the registered trademarks, understandably there was no express allocation of consideration to the use of the trademarks in the Queensland business. In assessing duty the Queensland Commissioner apportioned the consideration referable to the trademarks used in Queensland in the same ratio as the sale agreement had apportioned the goodwill referable to the Queensland business. This practical approach (which the court was informed was common practice in Queensland) was not disputed by the purchaser. Pincus JA noted that in many situations (including the situation before the court) there could be "much room for argument about the mode of apportionment" required by s 54A. However, since the apportionment was not disputed there was no need to discuss the validity of the agreed basis. Neither of the other two judges commented on this point.

A similar issue confronted the Supreme Court of New South Wales in *JV Crows Nest Pty Ltd v Commissioner of Stamp Duties (NSW).*[20] Lusher J found that the reference in that definition to property "in" New South Wales should be construed as a reference to property *wholly within* New South Wales. One of the expressed bases for this conclusion was the difficulty of apportionment which would arise if the contrary view were to be taken. The authority of this conclusion in relation to the construction of the NSW Act has been weakened to some extent by obiter dicta of Sully J in the *2 Day FM* case,[21] in which Sully J doubted Justice Lusher's conclusion. Sully J did not, however, venture any reasons for his observation nor any solution to the apportionment problem.

The absence of apportionment provisions also clearly influenced the views of the Queensland Court of Appeal in the case of *Westpac Banking Corporation v Commissioner of Stamp Duties (Qld).*[22] The case concerned the liability to duty under the Qld Act of an agreement between Westpac Banking Corporation and the Commonwealth of Australia concerning the entitlement of Westpac to make

20 (1985) 85 ATC 4198.
21 Note 5 *supra*.
22 (1992) 92 ATC 4571.

advances to eligible defence personnel, including persons resident in Queensland. Pincus JA and Demack J concluded that the agreement, in so far as it was a lending franchise, did not have the requisite nexus with Queensland since it was executed outside the State and did not relate to property situated in Queensland or to any thing done in Queensland.[23] They rejected the Commissioner's argument that the "lending franchise" involved the making of loans to residents of Queensland and the taking of security over property in Queensland and, hence, had a sufficient territorial connection.

The Court of Appeal was undoubtedly encouraged to find there was no territorial nexus by the fact that the consideration for the lending franchise was not expressly identified or apportioned as between the different Australian jurisdictions in which the lending franchise would operate. The Commissioner's counsel conceded that the Qld Act contained no effective basis for apportionment and that the basis on which the Commissioner had proceeded in the assessment issued (*viz* the contract-splitting provisions of s 53) had no relevance to the problem. Accordingly, counsel for the Commissioner was forced to concede that, if there was a relevant territorial connection with Queensland, ad valorem conveyance duty would be calculated by reference to the full amount of the consideration supporting the lending franchise. This exposed Westpac to the possibility that ad valorem conveyance duty could also be exacted in other jurisdictions by reference to the full amount of the same consideration. In other words, the same transaction would attract full ad valorem conveyance duty in a number of jurisdictions without any relief or credit between the jurisdictions. The Court of Appeal was clearly reluctant to accept this result.

The implications of the absence of apportionment provisions appear to have been appreciated by the stamp duty authorities participating in the project involving a rewriting of the stamp duties legislation in the majority of Australian jurisdictions (the "Rewrite"). On 31 July 1995 an Exposure Draft of the Rewrite was released for public comment by the stamp duty authorities of all Australian jurisdictions other than Queensland, Western Australia and the Northern Territory. Since that time the stamp duty authorities in Queensland and Western Australia have formally joined the process insofar as the Rewrite deals with the acquisition of dutiable property.

(ii) Apportionment and the Rewrite

Chapter 2 of the Rewrite provides for the imposition of duty upon an acquisition of "dutiable property". As examined in more detail below, "dutiable property" has been defined in Clause 5 of Chapter 2 (except in Victoria) to include certain forms of intellectual property or rights to use intellectual property. The duty is calculated by reference to the greater of:

- the consideration for the acquisition of the dutiable property; or
- the unencumbered market value of the dutiable property.

Clause 8 of Chapter 2 addresses the case where a single consideration is expressed for the acquisition of dutiable property which is partly situated in the

23 *Ibid* at 4583.

participating jurisdiction concerned. In that situation clause 8(1) provides that duty is to be assessed on the value of the assigned property which is situated in the participating jurisdiction. No guidance is provided in clause 8 nor in any other provision in the Rewrite as to how a taxpayer might identify what part of an item of intellectual property should be treated as situated in a particular State or Territory. It is submitted that the legal and commercial reality is that no particular part of an item of intellectual property relating to the Commonwealth of Australia or a larger territory could be identified as being situated in any of the jurisdictions participating in the Rewrite.

It is important to note that clause 8(1) requires a two-step process. First, it is necessary to identify which part of the dutiable property is situated in the jurisdiction concerned. Only if it is possible to do so is it then necessary to calculate what portion of the value of the dutiable property relates to the part identified by the first step. It is then possible to assess the duty payable.

If the stamp duty authorities in the participating jurisdictions (other than Victoria) persist with the view that ad valorem duty should be paid in a particular jurisdiction in respect of an acquisition of intellectual property relating to a territory greater than that jurisdiction, it would be essential for the legislation to set out a clear and practicable basis for apportioning the dutiable value of the property between the jurisdictions. In the absence of such provision, there would be the likelihood of disputes between taxpayers and the stamp duties authorities, and differences in the approach to apportionment taken by taxpayers and the stamp duties authorities in the various jurisdictions.

The selected basis for apportionment should not be arbitrary in order to reduce the likelihood that duty would be assessed by reference to more than one hundred percent of the value of the property. It is possible that a jurisdiction which seeks to impose ad valorem duty upon an acquisition of intellectual property may take an approach other than that reflected in Chapter 2 of the Rewrite. Any such lack of uniformity may well result in the imposition of duty across all Australian jurisdictions by reference to an amount greater than one hundred percent of the value of the item of intellectual property.

Clause 8 of Chapter 2 also deals with the case where a single consideration is expressed for the acquisition of dutiable property which is related to a business undertaking only partly conducted in the jurisdiction concerned. In that case it is provided that duty is to be assessed on the value of that part of the dutiable property as relates to the business conducted in the jurisdiction. The same problems of identifying the actual basis upon which apportionment should occur arise as in relation to an acquisition of dutiable property where no business is involved.

III. THE CONNECTION BETWEEN INTELLECTUAL PROPERTY AND OTHER FORMS OF PROPERTY

As previously observed, information must frequently be recorded on or in some tangible medium. The commercial exploitation and dissemination of information frequently involves the use of some tangible medium. Although information is not property the associated medium is likely to be property. From a stamp duty perspective the issue arises in a number of circumstances as to the extent to which the value or characteristics of the information should be attributed to the associated property. Three examples are found in the operation of the so-called "land-rich" provisions, conveyance duty provisions and hiring arrangement or rental business provisions.

A. Land-Rich Provisions

These provisions subject certain acquisitions of shares in a private company or units in a private unit trust to duty at the rate applicable to a conveyance of land rather than the lower rate generally applicable to shares or units. The provisions only apply where the company or trust is entitled to land such that the value of the land constitutes a specified proportion (generally 80 per cent) of the value of all property to which the company or trust is entitled (other than specified excluded assets). In one form or another these provisions are to be found in the stamp duties legislation of all Australian jurisdictions other than the Australian Capital Territory and, in relation to units in private unit trusts, Western Australia and Queensland.

(i) Association Between Information and Other Property

The ratio calculation to be undertaken for the purposes of the land-rich provisions focuses attention upon the extent to which the value of the assets of a private company or private unit trust should be attributed to the land or other property to which that entity is entitled. This issue was considered by the Supreme Court of Western Australia in the case of *Nischu Pty Ltd v Commissioner of State Taxation (WA)*.[24]

That case concerned the application of land-rich provisions to an acquisition of shares in a company which held certain mining tenements and which had obtained valuable information from exploration upon those tenements. The Commissioner argued that the value of the mining information should be attributed to the mining tenements which constituted land for the purposes of the land-rich provisions. Such an attribution would have subjected the share acquisition to the land-rich provisions in the WA Act since the ratio of the value of land to the value of all property would have exceeded the requisite 80 per cent level.

The Commissioner's argument was not accepted by the Full Court. The parties to the case had agreed upon a statement of facts which recognised that all of the mining information was embodied in books, papers, reports, analyses, plans, core samples, micro film, records, magnetic data tapes and discs which were chattels and comprised goods, wares and merchandise for the purposes of the WA Act. Each of the members of the Full Court appears to have proceeded on the basis that such chattels comprised property of the landholding company which should be taken into account in computing the threshold ratio and that the value of the

24 (1991) 91 ATC 4371.

information should be attributed to these chattels. Thus Malcolm CJ expressed the following view:

> The land is required to be valued on an unencumbered basis, namely, free of any encumbrances derived from the Joint Venture Agreement ... to the extent that it was accompanied by chattels containing relevant mining information it was proper to assign or apportion a value to that information or, more accurately, to the chattels. While the information as such is not property it has a value. Ownership of the mining tenements does not include a right of access to the information. Ownership or possession of the documents and things which contain the information must be acquired in order to gain permanent access to the information. It follows, in my view, that any relevant value must be reflected in the value of the chattels rather than in the value of the mining tenements.[25]

The same point appears to have been made more succinctly but with less clarity by Wallace J where he says:

> The statute [ie the WA Act] demands that a value be placed on all land to which the company is entitled so as to determine whether that value is 80 per cent or more of the value of all property to which the company is entitled, other than property directed to be excluded by [s 76AI(3)] and the property constituted by the company's records is accepted as an asset in the statement of agreed facts. That property is not excluded by [s 76AI(3)]. It seems to me that in those circumstances, the argument about the information not being property is irrelevant.[26]

Pidgeon J adopted the reasons of the Chief Justice.

It is noteworthy that in *Nischu's* case the parties had agreed that all of the relevant information was embodied in various records and samples which comprised chattels. That agreement ran counter to views expressed on the same matter by judges in a number of earlier cases. In *Pancontinental Mining Ltd v Commissioner of Stamp Duties (Qld)*[27] the Supreme Court of Queensland considered the dutiability of an agreement for the sale of an interest under a mining joint venture including information arising from feasibility studies and exploration work. The Court rejected an argument by the Commissioner that the information was tangible property on the basis that it related to documents and records in the following terms:

> I am not persuaded that the information referred to in clause 2.2(c) is necessarily to be found in those documents. But if some of the information does appear in them, the communication of that information is clearly not for that reason converted into a transfer of property. It would be quite wrong to confuse the information with the physical record: cf. Rolls Royce... The information itself remains intangible.[28]

The reference by the Court to the case of *Inland Revenue Commissioners v Rolls Royce Ltd*[29] was intended to incorporate an observation by Lord Radcliffe that it would be wrong to confuse know-how (which comprises information) with the physical records of that information.[30]

25 *Ibid* at 4378.
26 *Ibid* at 4386.
27 (1988) 88 ATC 4190.
28 *Ibid* at 4193.
29 [1962] 1 WLR 425.
30 *Ibid* at 431.

The agreement between the parties on this issue in the *Nischu* case made it unnecessary for the Court to express a view on the question and undoubtedly made it easier to attribute the value of the information to the chattels.

(ii) Association Between Goodwill and Other Property

The same question as to whether value should be attributed to land or to other property for the purposes of the land-rich provisions also arises where the private company or unit trust conducts a business on land. In that circumstance it may well be necessary to determine the extent to which the value of goodwill of the business and, in particular, "site goodwill" should be attributed to the land or to property other than land (ie goodwill). On various occasions stamp duty authorities have asserted that site goodwill attaches to and is inseverable from land and its value would be attributed to land for the purposes of the land-rich ratio calculation.

It is submitted that such an approach fails to take account of a fundamental characteristic of business goodwill, and is not supported by dicta in a recent decision of the Full Federal Court in *Federal Commissioner of Taxation v Krakos Investments Pty Ltd.*[31] The case concerned the consequences under the capital gains provisions in the *Income Tax Assessment Act* 1936 (Cth) (the "Tax Act") of an agreement for the sale of an hotel business conducted upon premises which were leased by the vendors to the purchasers. The actual question to be resolved was whether an amount designated as consideration for the acquisition of the goodwill of the business should be treated as a premium paid for the grant of the lease, each of which had different consequences under the Tax Act.

Resolution of that issue involved consideration of the nature of goodwill and the extent to which the goodwill of the hotel business (in particular "site goodwill") attached to the lease granted. The principal judgment was delivered by Hill J with whom von Doussa and O'Loughlin JJ concurred. Hill J undertook an extensive review of the principal authorities in Australia and England concerning the nature of goodwill. That review considered the various manifestations of goodwill such as site goodwill, personal goodwill, name goodwill and monopoly goodwill.

After a wide-ranging general review, Hill J summarised the position in a passage which is of significance to the issue under consideration:

> In summary I think it may be said that there are various kinds of goodwill, all of which, with the exception of personal goodwill, attach to property. Site goodwill clearly attaches to the site, although in the case of a public house the conclusion that all aspects of goodwill attach to the site ignores the significance in South Australia of the licence. Name goodwill clearly attaches to the trade name and at least where this involves a trademark (registered or unregistered) this name will be property. A mere business name may not be property. Monopoly goodwill attaches to the statutory monopoly right. Having regard to the disparate nature of these rights which together make up the goodwill of a particular business and which to some extent can be dealt with separately, I do not think that it can be correct today to say that although comprised of separate elements goodwill is to be treated as inseverable. It is, however, correct to say that to the extent that the goodwill attaches to a species of property it may only be dealt with together with that property. But this is not to say

31 (1996) 96 ATC 4063.

> that it is not capable of being dealt with as separate species of property or as being the subject of a bargain and sale at a price.[32]

In the case before him Hill J concluded that the goodwill of the hotel business could properly be treated as an asset separate from the lease of the premises and that a separate consideration could properly be paid for that goodwill without it being treated as consideration for the grant of the lease.

It is submitted that the reasoning and conclusion of the Full Federal Court in this case supports the conclusion that the goodwill of a business conducted upon land should be regarded as a species of property separate from the land and improvements and capable of being the subject of an agreement for sale with a separate value. Furthermore, such an outcome is consistent with general principles.

It is most noteworthy that each of the cases reviewed by Hill J in *Krakos Investments* discussed goodwill in relation to a trade or business. Likewise the discussion by Hill J of each of the four different categories of goodwill proceeds in each case in relation to a trade or business. This connection between goodwill and a trade or business is often overlooked in the course of detailed examination of whether goodwill attaches to the personality of the person by whom a business is carried on or the name under which a business is carried on or the site at which the business is carried on. Nonetheless, this connection is always present even in those cases most frequently relied upon to support the proposition that goodwill, particularly "site goodwill", attaches to land. For example, the case of *Box v Federal Commissioner of Taxation*[33] is frequently relied upon as authority for the proposition that the value of goodwill of the business conducted upon land should attach to the land upon which the business is conducted. However, the following extract from the judgment of the High Court makes clear the overriding connection between that goodwill and the business:

> Some premises have a site goodwill because the site has some particular advantage for carrying on a business as where premises adapted for a shop are situated in a position specially favourable for the business in a busy shopping area or where a licence can be obtained for carrying on a business such as that of a publican upon a suitable site on which it would be otherwise unlawful to carry it on. Other premises may have acquired a site goodwill, as in the case of the retail store, because a profitable business has been carried on there for anumber of years and people have become accustomed to resort to that site to do their business.[34]

Thus, although different cases will focus upon different attributes of goodwill, there is a universal recognition that goodwill is a product of and necessarily associated with a trade or business. This is well established at general law. The decision of the Privy Counsel in the case of *Inland Revenue Commissioners v Muller & Co's Margarine Ltd*[35] is widely regarded as one of the landmark decisions on goodwill. In that case goodwill was described by Lord Macnaghten as:

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32 *Ibid* at 4073.

33 (1952) 10 ATD 71.

34 *Ibid* at 75.

35 Note 2 *supra*.

> The benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom ... it cannot subsist by itself. It must be attached to a business.[36]

Hill J took issue with certain aspects of the description by Lord Macnaghten but not the proposition that goodwill "must be attached to a business". This feature of goodwill was further recognised by the refusal of courts to recognise any assignment of goodwill separate from the business to which it related. Thus, at general law a purported assignment of goodwill without an accompanying assignment of the associated business was held in a number of cases to be contrary to public policy and void.[37] The basis for the general law rule is that, since goodwill is an asset of a particular business, an assignment of that goodwill to some party separated from the business which produced it would be fundamentally misleading and deceptive.[38]

Thus, the general law recognises that goodwill is a product of and attaches to a business. Particular aspects of or kinds of goodwill may be intimately connected with different aspects of that business (eg the name or site of a business or the identity of its owner) but the overriding reality is that the goodwill attaches to the business.

Accordingly, it is submitted that for the purposes of the land-rich provisions, goodwill (including site goodwill) should be recognised as non-land property and the value of that goodwill should not be attributed to land.

B. Conveyance Duty Provisions

As the legislation presently stands in the majority of Australian jurisdictions ad valorem conveyance duty is imposed upon a written conveyance of or agreement for the conveyance of property located in the jurisdiction concerned. To the extent that the subject matter of the conveyance or agreement comprises intellectual property, it is necessary to determine whether it is located in the jurisdiction concerned (as previously discussed) and whether it comprises property for the purposes of the legislation concerned. In general terms all forms of intellectual property, with the exception of information, are property at general law and for the purposes of the stamp duties legislation. In the case of information, a written conveyance or agreement for conveyance would not be subjected to ad valorem conveyance duty even in those jurisdictions imposing duty upon a conveyance or agreement for the conveyance of property of any kind. However, that conclusion may prove misleading if the value or characteristics of the information were to be attributed to property having a location in the jurisdiction concerned. If that associated property is the subject of a written conveyance or agreement for conveyance, the question arises whether ad valorem conveyance duty would be

36 *Ibid* at 223-224.

37 *Warwick Tyre Co Ltd v New Motor & General Rubber Co Ltd* [1910] 1 Ch 248; *Ullman & Co v Cesar Leuba* (1908) 25 RPC 673; *Thorneloe v Hill* [1891-4] All ER 1263; *Bacchus Marsh Concentrated Milk Co Ltd v Joseph Nathan & Co* (1919) 26 CLR 410 and in recent times in Australia by the Federal Court in *Federal Commissioner of Taxation v Just Jeans Pty Ltd*, note 1 *supra*.

38 C Wadlow, *The Law of Passing Off* (1st ed, 1990) at [2.41]-[2.42].

imposed upon the instrument. That question gives rise to a number of considerations.

First, there is a threshold characterisation issue which accounts for the apparent inconsistency between approaches taken by the Supreme Courts of Queensland and Western Australia in the *Pancontinental* case and the *Nischu* case. The *Pancontinental* case concerned the dutiability of an agreement for the sale of an interest under a mining joint venture including information. A significant monetary consideration was expressly allocated to the information. The Queensland Commissioner assessed the sale agreement to ad valorem conveyance duty on the basis that the information was tangible because it was to be found in various documents but the Court rejected this. The Court's rejection stemmed principally from its threshold characterisation of the transaction which emerges from the following extract from the judgment of de Jersey J:

> In my view this agreement was both a contract for the sale of property... [eg mining tenements and plant]... and an agreement for the performance of a service by Isa for the benefit of the appellant, being the disclosure of the confidential information referred to in cl 2.2(c).[39]

In other words, the Court did not characterise the relevant agreement as an agreement for the sale of the information but, rather, an agreement for the performance of the service of imparting the information.

This characterisation strongly influenced the view previously discussed that the mining information did not repose in the various chattels recording it. That view is seemingly inconsistent with the view taken by the Supreme Court of Western Australia in the *Nischu* case where the Court was not required to undertake the same exercise in characterisation and was influenced by an agreement between the parties as to the facts.

The second consideration is that, if the property to which the value of the information is attributed is a chattel, a written conveyance or agreement for conveyance may be exempt from ad valorem conveyance duty. The stamp duties legislation in a number of Australian jurisdictions exempts from conveyance duty a written conveyance or agreement for conveyance of goods, wares or merchandise. Thus, the attribution of the value of information to property which is goods, wares or merchandise would have no stamp duty consequences in such jurisdictions.

It may be the case that the value or characteristics of information are attributed to property *other than chattels* in which case this exemption would be of no application. An example would arise in the case of a written conveyance or agreement for conveyance of computer software. As previously noted copyright may subsist in computer software so that the unauthorised reproduction or publication of computer software is prohibited. Not every written conveyance or agreement for conveyance of computer software would inevitably incorporate an assignment of the copyright in the software. In many cases it would incorporate a copyright licence rather than an assignment of copyright. However, in a case where there was an assignment of the copyright, it is likely that the value of the

39 Note 27 *supra* at 4192.

copyright would reflect the value of the underlying information. Whether or not that value would attract a liability to ad valorem conveyance duty would depend upon whether or not the copyright had a territorial location in the jurisdiction according to the principles previously discussed.

C. Hiring Arrangement Duty/Rental Business Duty

In all Australian jurisdictions, other than the Australian Capital Territory, the stamp duties legislation imposes ad valorem duty on certain arrangements whereby a person pays to use goods owned by another. The duty is variously called "hiring arrangement duty" or "rental business duty".

There are many such commercial arrangements. Under some, the use of the goods is the essence of the arrangement. A casual hiring of a motor vehicle from a car rental company or a finance lease of plant and equipment provide but two of many examples in this category. In contrast there are arrangements where the use of goods is merely incidental or ancillary to the essence of the arrangement. An example in this category is where one party confers intellectual property rights upon another person and access to the intellectual property is obtained through the use of physical medium (eg tape or disk) which remains the property of the first party. In such a case the provider of the service or intellectual property rights may retain ownership of the equipment, rather than sell it to the consumer, because the equipment provides effective technical protection against piracy, or the cost of the equipment would be disproportionate to the value of the service or rights provided, or because legislation regulating the arrangements requires it.

From a legal perspective arrangements of this kind are generally characterised as involving a provision of services or dealings with intangible property. However, two recent decisions in the Supreme Court of Victoria focus attention upon the extent to which such arrangements might involve a use of goods by a person other than the owner of such goods. The cases are *Roadshow Distributors Pty Limited v Commissioner of State Revenue (Vic)*[40] and *Taxiway Pty Limited v Commissioner of State Revenue (Vic).*[41]

(i) The Roadshow Case

Roadshow entered into distribution agreements with head distributors which conferred upon Roadshow intellectual property rights in respect of films. The rights generally entitled Roadshow to exhibit the artistic work for reward in certain locations. Roadshow in turn entered into simple form agreements with exhibitors expressed in terms of a grant of a licence to screen a film in public. Roadshow would provide the distributor with a print of the film for exhibition. The exhibitor was obliged to pay a fee for the rights granted and a delivery charge in respect of each film.

Roadshow made the following arguments. The true subject of the agreement between it and the exhibitors was the intellectual property and that the arrangement should not be characterised as a leasing or giving of rights to goods

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40 (1995) 95 ATC 4663.
41 (1995) 95 ATC 4667.

(viz the celluloid film). From a commercial point of view the dominant aspect of its business was to derive profit, not from the celluloid upon which the film was recorded, but from the images and sound track on the film. The celluloid film was simply a vehicle for achieving this predominant commercial objective and its value was insignificant in comparison to the artistic work.

The Victorian Commissioner of State Revenue argued in response thatthe celluloid film should not be seen as an insignificant aspect of Roadshow's commercial activity. The cost to Roadshow for the prints of films represented a significant proportion of the gross revenue which Roadshow earned from the films distributed to exhibitors. The true nature of the business of Roadshow was the granting of rights to use goods (the prints of the film) with the attendant right to the copyright.

Byrne J characterised the business of Roadshow as one of letting or bailing the celluloid films to exhibitors and giving to exhibitors the right to use those films including the right to use the images and sound track on the films. According to Byrne J this comprised a rental business. It followed that, with the exception of the delivery fee, the whole of the consideration received by Roadshow was receipts in respect of rental business attracting rental business duty.

It appears from the judgment that the principal factor leading to this conclusion was that the intellectual property rights vested in Roadshow and conferred upon the exhibitors could not be exploited except through the use of the celluloid film. Accordingly, the intellectual property rights were of no value from the perspective of Roadshow or the exhibitor without the celluloid film.

An appeal has been lodged against the decision of Byrne J.

(ii) The Taxiway Case

Taxiway was the owner of a number of licenced taxis. Taxiway entered into agreements entitled "Driver Leasing Agreements" with licenced taxi drivers pursuant to which Taxiway leased the vehicle to the driver. In return the driver agreed to pay to Taxiway, as rent for the leasing of the taxi *and* the taxi licences a percentage of the gross revenue received by the driver. The rent was expressly apportioned as to 20 per cent for the rental of the taxi and 80 per cent for rental of the licence. The issue before the Court was whether Taxiway conducted a rental business and whether rental business duty was payable on 100 per cent of the rent or only the 20 per cent of that amount which had been expressly apportioned to the use of the taxi (as distinct from the taxi licence).

Byrne J concluded that the proper characterisation of the business of Taxiway was that it granted to drivers the rights to use licenced vehicles. Accordingly, it was a rental business. Furthermore, since Byrne J characterised the subject matter of the agreement as licenced taxis as a composite whole, the Court considered that 100 per cent of the rent was referable to the use of the licenced taxis and attracted hiring arrangement duty.

The factor which appears to have been most significant in the *Taxiway* case was that it would be commercially and practically impossible to use the taxi vehicle without the taxi licence. In other words the taxi had no practical value without the taxi licence associated. Accordingly, it was not realistic to sever the taxi licence from the taxi for the purposes of characterising the business carried on by Taxiway or the nature of the consideration received by Taxiway. The judgments in the *Taxiway* and *Roadshow* cases were handed down by the same judge on the same day. It is hardly surprising that the reasoning is similar in each case.

In the course of the judgment in the *Taxiway* case Byrne J acknowledged that "in the appropriate case" an arrangement involving the use of goods which was purely an incidental adjunct to the true business would not be characterised as rental business. He referred to the decision in *ANI Corporation Ltd v Commissioner of State Taxation (WA)*[42] in which it was accepted that the business of hiring plant and equipment could not be transformed into that of a retailer of petrol or other goods simply because such items were sold as a by-product of the rental activity.

In both cases the major factor influencing the decision was that the rights to use property other than goods (ie copyright or taxi licences) could not in practice be exploited without the use of goods (ie the celluloid film or the taxi vehicle). This conclusion would equally be reached in many of the circumstances in which the fundamental issue of characterisation arises.

The two decisions have significant implications for dealings with intellectual property comprising information and copyright given the extent to which commercial exploitation of each involves the use of goods. To the extent that the stamp duties legislation in a number of other Australian jurisdictions is materially similar to the Victorian provisions, the possibility is raised that the same approach would in future be adopted by the stamp duty authorities in those other jurisdictions. The issues raised are not affected by the Rewrite which (in all jurisdictions other than the Australian Capital Territory) would continue to impose a liability for duty in respect of payments made for the use of goods by a person other than the owner.

IV. STAMP DUTIES REWRITE

Under the stamp duties legislation of all jurisdictions, other than the Northern Territory, dealings with intellectual property and documents recording those dealings often do not attract a liability to ad valorem stamp duty. Depending upon the jurisdiction, there are two principal reasons for this. First, the stamp duties legislation of a particular jurisdiction may simply not extend to dealings with intellectual property of any kind (eg Victoria and the ACT) or to dealings with intellectual property of certain kinds (eg information or knowhow in all relevant jurisdictions). Secondly, the stamp duties legislation of a jurisdiction may require that the subject matter of the dealing be situated in a relevant sense within the jurisdiction concerned, or may presuppose that there is an appropriate basis for apportioning consideration between jurisdictions where property is located in more than one jurisdiction.

42 (1990) 90 ATC 4714.

For either or both of these reasons it would generally be the case that, at most, nominal duty not exceeding $10 would be payable upon documents recording dealings with intellectual property. This state of affairs would be substantially altered if legislation along the lines of the Rewrite were to be enacted.

A. Summary of Amendments Relating to Dealings with Intellectual Property

In brief, in all of the participating jurisdictions apart from Victoria the proposed amendments address both of the above impediments to the imposition of ad valorem duty upon dealings with intellectual property. The result is that a liability to ad valorem conveyance duty would be imposed upon an assignment of various categories of intellectual property (whether written or unwritten) under the stamp duties legislation of the participating jurisdictions excluding Victoria. In this regard the result would be similar to that produced by the existing provisions in the Northern Territory. It is also possible, but by no means inevitable, that the granting of a licence to use intellectual property would also attract ad valorem conveyance duty under the stamp duties legislation of the participating jurisdictions excluding Victoria. Whether or not conveyance duty would be payable in respect of a licence would principally depend upon whether consideration was paid for the grant of the licence (as distinct from the exercise of the rights conferred by the licence) and the value of the rights granted. Apart from the liability for stamp duty arising as a result of these changes, it is also likely that the assessment of the duty payable will require difficult valuations of intellectual property to be undertaken more frequently than at present.

(i) Dutiable Transaction - Acquisition of Dutiable Property

The proposed provisions[43] would require ad valorem conveyance duty to be paid in respect of an "acquisition" of "dutiable property" whether or not the acquisition was evidenced in writing.

An acquisition occurs whenever dutiable property is transferred to (eg by way of assignment) or vests in or accrues to (eg by way of licence) any person.

"Dutiable property" is relevantly defined in all participating jurisdictions, other than Victoria, to include:[44]

- a patent, a registered design or a copyright (but not a trademark);
- the right to use in the jurisdiction concerned a business name or trading name or a trademark or an industrial design used in connection with a business undertaking;
- a right to use in the jurisdiction concerned any thing, system or process used in connection with a business undertaking which is the subject of a patent, a registered design or copyright and the right to use any adaptation or modification of such a thing, system or process;

43 Sections 1(1) and 3(1) of Chapter 2 of the Rewrite.

44 Section 5 of Chapter 2 of the Rewrite.

- a statutory licence or permission granted by the jurisdiction concerned or by the Commonwealth which is used in a business or in connection with a business;
- an option to purchase any of the above property or an interest in any such property.

Clearly an assignment of any of such categories of property would involve an acquisition of dutiable property. Equally, the grant of a licence to use certain categories of intellectual property would involve the acquisition of dutiable property as defined above.

(ii) Basis for Calculation of Duty

Although the provisions in the Rewrite are incomplete in this respect, it appears that conveyance duty is to be calculated by reference to the greater of the consideration paid or the unencumbered market value of the dutiable property. The rates of duty are not set out and will presumably correspond with the existing rates of ad valorem conveyance duty.

In the case of an assignment of dutiable property, the purchase price of the assignment will be the consideration for the acquisition of the dutiable property. The matter is not so straightforward in the case of the grant of a licence of dutiable property. The law recognises a distinction between the consideration paid for the grant of a licence to use property (eg a premium) and consideration paid for the exercise of the rights conferred during the term of the licence (eg licence fees or royalties). Generally, a licence agreement would provide for licence fees or royalties or other consideration to be paid during the term of the licence for the exercise of the rights conferred. However, it is not nearly as common for consideration to be paid for the grant of the licence.

In the absence of consideration for the grant of the licence, the question will arise as to whether the benefit of the licence has value. According to general principles, if the licence fee or royalty or other consideration payable for the exercise of the rights conferred by the licence comprised an arm's length market consideration, it should be concluded that the benefit of the licence granted would not have inherent value. However, if the licence fees or royalties or other consideration comprised an amount less than an arm's length market consideration, the benefit of the rights granted by the licence would have inherent value and ad valorem conveyance duty could be assessed by reference to that value. In practice the stamp duty authority would be likely to accept that the benefit of a licence would not have value attracting ad valorem conveyance duty if the parties to the licence agreement appeared to be acting at arm's length and did not expressly provide consideration for the grant of the licence (as distinct from the exercise of rights under the licence). However, if the parties to the licence appeared to be related or otherwise not dealing at arm's length, the stamp duty authority would be likely to require a valuation to be undertaken of the rights conferred by the licence in order to consider the imposition of ad valorem conveyance duty on the licence.

(iii) Apportionment of Consideration

As previously noted, the provisions address the situation where a single undivided consideration is expressed for the acquisition of dutiable property which is only partly situated in one of the participating jurisdictions. Somewhat simplistically the provision requires duty to be assessed on the value of that part of the dutiable property situated in the jurisdiction concerned. No guidance is provided as to the practical basis upon which the value of the dutiable property is to be apportioned between multiple jurisdictions.

(iv) Licences

Representatives of the participating jurisdictions have publicly indicated that the grant of a licence to use intellectual property is not intended to be subject to the duty imposed upon an acquisition of intellectual property, subject to one proviso. The proviso arises in a case where party A surrenders an existing right to use intellectual property and a new right is granted to party B in order to avoid the duty otherwise payable if there had been an assignment of that right from A to B.

V. CONCLUSION

The proposed provisions will do little to resolve the current problems experienced in the application of stamp duties legislation to instruments or transactions dealing with intellectual property.