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Refocusing on Fundamental Principles of Stamp Duty

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Abstract

This article refocuses on the fundamental principles of Stamp Duty in the context of the rewrite of stamp duty and tax reform. The article traces the course of these changes through the States in Australia and carefully tracks changes to heads of duty such as lease duty, duty on hire of goods, duty on quoted marketable securities, on business assets etc. The article notes an increasing emphasis on dealings in land and the greater role of land rich duty in the tax base. It examines the constitutional validity of land rich duty as well as flagging the validity of anti-avoidance measures that purport to operate outside of the jurisdiction of a State. The article finally reflects on the pursuit of uniformity amonsinpucsinState jurisdictions and expresse
e hope that a narrower tax base, a consequence of tax reform, may well return us to the process of consistency of
plication of duty across jurisdictions.

INTRODUCTION

In recent years there have been many significant changes to stamp duties in Australia. One fundamental transformation has been the change of emphasis from being a tax levied on certain instruments to a tax levied on certain transactions. To some extent this process was accelerated during the rewriting of stamp duty law conducted by some States and Territories in the last decade.[1] The more recent changes have involved the abolition of a number of duties as an indirect result of the introduction by the Commonwealth of the goods and services tax ("GST"). This has involved a significant change in the stamp duty tax base.

In the early stages of the Rewrite process, one of the authors of this article analysed some fundamental principles of stamp duty law and the potential effect of the Rewrite on these principles.[2] This article seeks to re-examine some of these basic issues in the light of the potential changes to the scope and significance of stamp duties and comment on where future issues may lie. What emerges is that the narrowing of the

number of the "review" taxes.[16] Finally, following intense and public political pressure,[17] New South Wales announced the removal of a number of the taxes.[18]

Differences in terminology and application of various taxes make generalisations difficult. However, most jurisdictions have abolished or will abolish mortgage duty (see Table 1 below), duty on leases of real property (see Table 2 below), duty in relation to the hire of goods[19] (see Table 3 below), duty on marketable securities that are not quoted on a recognised stock exchange (see Table 4 below), and duty on the conveyance of business assets other than real property (see Table 5 below). The abolition of various taxes on credit arrangements, bills of exchange, cheques and promissory notes has also been announced.[20]

TABLE 1: CHANGES TO MORTGAGE DUTY

JURISDICTION	CHANGES
NSW	Mortgage duty will be phased out by being reduced by 50% from 1 January 20010 with complete abolition from 1 January 2011: see New South Wales, *Budget Paper No 2 Budget Statement 2006-07*, p 8-17.

TABLE 2: CHANGES TO LEASE DUTY

JURISDICTION	CHANGES
NSW	Lease duty will be abolished from 1 January 2008: New South Wales, *Budget Paper No 2 Budget Statement 2006-07*, p 8-17.
VIC	Abolished from 26 April 2001: *State Taxation Acts (Taxation Reform Implementation) Act 2001* (Vic) ss5 and 15.
QLD	Lease duty abolished from 1 January 2006: see Queensland Government, *State Budget 2005-06 Budget Strategy and Outlook Budget Paper No 2*, p81.
WA	Lease duty was abolished from 1 January 2004.
SA	Lease duty abolished from 1 July 2004: see RevenueSA, *Stamp Duties Circular No 246: State Budget 2004-2005.*
TAS	Tasmania does not impose stamp duty on leases.
ACT	Lease duty will be abolished by 1 July 2009: Australian Capital Territory, *2005-06 Budget Paper No. 3: Overview,* p81.
NT	Duty on the grant or renewal of leases and franchises abolished from 1 July 2006. However, the transfer of rights under a lease or franchise arrangement may be dutiable as a conveyance until the abolition of duty on non-residential conveyances (other than land): Northern Territory, *Fiscal and Economic Outlook 2005-06 Budget Paper No.2*, p64.

TABLE 3: CHANGES TO DUTY IN RELATION TO HIRE OF GOODS

JURISDICTION	CHANGES
NSW	Duty on rental arrangements to be abolished from 1 January 2007: New South Wales, *Budget Paper No 2 Budget Statement 2006-07*, p 8-17.
VIC	Rental business duty to be abolished from 1 January 2007: Victoria, *2005-06 Strategy and Outlook Budget Paper No. 2*, p79.
QLD	Hire of goods duty will be abolished from 1 January 2007: see Queensland Government,

TABLE 4: CHANGES TO DUTY ON UNQUOTED MARKETABLE SECURITIES

JURISDICTION	CHANGES
NSW	To be abolished on 1 January 2009: New South Wales, *Budget Paper No 2 Budget Statement 2006-07*

subject to the existence of a sufficient territorial nexus with the law-making jurisdiction.[28] The operation of this requirement is described in the context of taxation in *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1937) 56 CLR 337 where it is stated (at 375):

It was held by Rich, Dixon and McTiernan JJ that the provision went beyond the powers of the New South Wales legislature.[41] In a separate judgment Starke J agreed with this conclusion.[42] The majority stated that the provision in question:

> assumes to tax the share as property out of the jurisdiction, but does so because of the existence of the company's business within the jurisdiction. In doing so, it adopts a connection which is too remote to entitle its enactment to the description a law 'for the peace, welfare, and good government of New South Wales'.[43]

By analogy it could be argued that land-rich duty provisions may go beyond the capacity of the States and Territories to tax. Indeed, this has been described by Hill as "quite a respectable argument".[44] Before any firmer conclusion could be drawn on the issue it is worth considering three further matters.

First, and probably of least significance overall, the decision in *Millar* was not unanimous. In a joint, dissenting judgment Gavan Duffy CJ and Evatt J found that there was a sufficient territorial nexus to support the legislation.[45] Second, there are some differences between land rich duty and the tax considered in *Millar*. In *Millar*, the legislature sought to impose tax on the full value of the share. However, the various land-rich regimes impose duty based on a value that represents a proportion of the value of land held. In *Millar*, Rich, Dixon and McTiernan JJ stated:

> Let it be assumed that, in so far as the shareholder obtains an actual advantage from the possession by the company of property in New South Wales, that advantage may be taxed by the State. It may be the case that the

att7(sr Tw2322 .1((46(sr .7s x(m).5494rega)49 Tc0.02e m).srl4.7,9(ga)m)-5.9(o)7).srl4x041 (4(s3)0.1- b

well outside tax, and in many instances has been in obiter, it is stated by the High Court:

> The requirement for a relevant connexion between the circumstances on which the legislation operates and the State should be liberally applied and… even a remote and general connexion between the subject-matter of the legislation and the State will suffice.[49]

These comments have been reinforced in the recent High Court case of *Mobil Oil Australia Pty Limited v Victoria.*[50]. Justice Kirby has stated that the High Court in the 20th century "adopted rules of growing ambit" in relation to the States' powers to legislate with extra-territorial effect[51] and that it would be rare to succeed in a

> tax, and because it largely piggy-backs upon the group tax provisions of the income tax law, avoidance is somewhat easier to detect than avoidance in stamp duty…
>
> There is an initial difficulty in defining what is meant by avoidance in the field of stamp duty. Perhaps that is why it has not been uniform throughout Australia for state legislatures to adopt general anti-avoidance provisions. Two examples suffice.
>
> Traditionally, stamp duty has been a tax on instruments and not transactions although this principle has been much eroded over the past fifty years. It is a corollary of the principle that if a transaction could be carried out without an instrument, no duty would be payable. It is a nice point whether it would have been stamp duty avoidance not to document a transaction so that no liability to duty would arise.

His Honour goes on to note that the various state Parliaments thought such an arrangement did involve avoidance when brewery interests worth many millions of dollars were sold in this manner, resulting in amendments to the legislation to ensure that similar transactions were brought to duty notwithstanding that no dutiable instrument is brought into existence.

Notwithstanding the expansion of the ambit of stamp duty legislation to require tax to be paid on some transactions as well as instruments, the tax remained a stamp duty as transactions are generally taxed by the imposition of an obligation to make out and lodge for stamp(i)-6.a46(out stug)8(i)0lsts, tni nfan -8.ci4(pauR -6...4(of , t)-(08 Tc17f)-3.98 i)-auR 3(n)7

Transactions which could potentially reduce the value of land being transferred for example would include: the grant of an option where the option exercise price is low compared to the value of the land; the grant of a long term lease at a premium with less than market value rent payable over the term; and the grant of a life interest. However, it is arguable that in each case as the rights of the lessee, holder of the life

(a) the transaction (and steps making it up) is pre-ordained; and

(b) the interposed steps have no commercial purpose but rather, can be regarded as having been interposed solely for the purpose of minimising tax (which would have been payable if such steps had not been interposed.)

The doctrine of fiscal nullity has been applied to stamp duty cases in both the United Kingdom,[60] and Hong Kong.[61]

In a number of Australian cases, the High Court[62] and the Western Australian Supreme Court[63] have considered whether the doctrine should be applied to the facts before them. Each decided that it should not. In *Ashwick (Vic) (No 4) Pty Limited v Comptroller of Stamps (Vic)*[64] the High Court did not however rule out the possible application of fiscal nullity to Australian stamp duties in the future should an appropriate transaction arise.

However, even if a court applies the doctrine of fiscal nullity, the application of the

right to so tax the transaction (or part of it.) It also suggests that changes to stamp duties have distracted from any significant effort in the pursuit of uniformity between the States and Territories. The narrowing of the tax base has not significantly aided the task as there are still key differences between the jurisdictions in relation to the imposition of duty on dealings involving land.

CONCLUSION

Having regard to the above considerations, it would not be unfair to say that 2005 was a watershed year for stamp duty as a widely based revenue raising mechanism for the States and Territories. The renewed importance of anti-avoidance provisions as a means of expanding and protecting the remaining stamp duty tax base perhaps also heralds in a new era for advisors- an era perhaps marked with the uncertainties that have plagued income tax advisors for the past 25 years.

Following implementation of the program for narrowing the duty base, perhaps there will be a return to the process of trying to achieve some consistency of application of duty legislation across the various jurisdictions at least in relation to those provisions which relate to the taxation of public or widely held entities. As noted above, the States have shown in the past that they have been able to work together to achieve this in relation for example to mortgage duty, hire of goods duty and sale of business duty. If this occurs then the Rewrite process, which gave at least a glimmer of hope of achieving some simplification in the application of duty legislation in Australia, will not have been in vain.