LOAN SECURITY DUTY

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I. BACKGROUND

Each Australian jurisdiction, other than the Australian Capital Territory and the Northern Territory, imposes ad valorem stamp duty in respect of loan securities. The first question, however, is what is meant by a "loan security". Not all jurisdictions use the term "loan security" but, in each jurisdiction, the general concepts are similar although they vary in the detail in relation to the application of stamp duty.

This article will first deal with some aspects of the stamp duty legislation as it currently exists. It will then explore some of the changes proposed under the Rewrite in which New South Wales, Victoria, South Australia, Tasmania and the Australian Capital Territory are participating.

II. CURRENT POSITION

Generally speaking, each jurisdiction that imposes ad valorem duty on loan securities seeks to impose duty where a lender provides financial accommodation

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to a borrower. Immediately, however, this can be seen to be an over-generalisation as not all financial accommodation attracts ad valorem duty.

It is important also to distinguish between documentation which provides a form of proprietary security, such as a mortgage or charge over assets, and documentation which does not create a proprietary security, in the form of a mortgage or charge but nevertheless is characterised as a "security" for the purposes of the loan security provisions. It is, indeed, one of the quirks of current stamp duty legislation that an instrument that does not itself provide any proprietary security in the form of a mortgage or charge can nevertheless be regarded as a "security" for the purposes of the stamp duty legislation.

In the case of *Jones v Inland Revenue Commissioners,*[1] the word "security" was considered in the context of stamp duty:

> the word "security" as used in these schedules does not mean as in popular language some obligation which is auxiliary to some other obligation, but means any obligation created by any instrument.[2]

The categories of instruments that fall within the "unsecured" loan security head of duty are:

- debentures (excluding Tasmania);
- bonds and covenants;
- an instrument that secures the payment of an amount to be paid by way of annuity or at stated periods (Queensland);
- foreign securities (Victoria);
- any instrument of security of any kind whatsoever (Western Australia); and
- guarantees (Tasmania).

Loan security duty in respect of instruments which do not provide any proprietary security is limited in most jurisdictions to specific kinds of instruments. This means that careful consideration has to be given to whether an instrument falls within the class of dutiable instruments.

The categories of unsecured instruments present a number of opportunities for planning minimisation arrangements. The ease with which a transaction could be arranged to fall outside the enumerated classes was itself sufficient impetus for the change proposed in the project to rewrite the current stamp duties legislation in the majority of States ("the Rewrite"). Unfortunately, on many occasions instruments are executed before any consideration is given to their stamp duty significance. Also, the fact that persons could unwittingly execute instruments subject to ad valorem duty without realising it, was of itself, also an impetus for change. As will be seen under the Rewrite proposal, none of the instruments referred to above will incur any ad valorem duty, which will be restricted to instruments which grant proprietary security over the property.

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1 [1895] 1 QB 484.

2 *Ibid* at 492.

III. MORTGAGES - CURRENT POSITION

Each jurisdiction other than the Australian Capital Territory and the Northern Territory imposes ad valorem duty on mortgages. However, it is not all mortgages that are subject to ad valorem duty. By way of example, the term "mortgage" in Victoria, New South Wales, Tasmania and Queensland is defined by reference to a mortgage that secures the repayment of, in a general sense, financial accommodation. It was for this reason that the High Court in *Handevel v Comptroller of Stamps*[3] determined that a mortgage to secure the purchase price of shares under a put option was not a mortgage for the purposes of the *Stamps Act* 1958 (Vic).

In each jurisdiction (except Queensland and arguably Tasmania), the definition of "mortgage" also includes a "charge". The Tasmanian position is complicated in that there are in Schedule 3 and Schedule 4 to the *Stamp Duties Act* 1931 (Tas), at various stages, interchangeable references to mortgages and charges without there being an explicit definition that a "mortgage" includes a charge. The Tasmanian statute appears to assume that a mortgage will necessarily include a charge. Whether that is correct may one day be determined by a court.

In Western Australia, a charge clearly falls within "an instrument of security of any other kind whatsoever" and is therefore dutiable.

In South Australia, the *Stamp Duties Act* 1923 (SA) has an entirely different definition of "mortgage" as:

> an instrument creating, acknowledging, evidencing or recording a legal or equitable interest in, or charge over, real or personal property by way of security for a liability; or
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> an instrument creating, acknowledging, evidencing or recording a liability in respect of which an instrument of title is or is to be pledged or deposited by way of security,
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> and includes an instrument that would, assuming the fulfilment of the condition to which the instrument is subject, fall into one of the above categories. [4]

The definition of "mortgage" in the South Australian Act is not limited to financial accommodation arrangements. It is extremely broad and clearly includes a charge. The width of its operation is ameliorated by s 79(5) of the *Stamp Duties Act* 1923 (SA), by which the Commissioner is given a discretion to allow a mortgage which secures a contingent liability to be stamped only when the contingency becomes an actual liability.

IV. MORTGAGES - REWRITE

The proposed Rewrite arrangements will to an extent simplify the issues discussed above. A positive aspect of the Rewrite is that there will be no ad valorem duty paid on loan securities that are unsecured as referred to above. In other words, duty will not be payable on debentures, bonds and covenants. Duty is

3 (1985) 157 CLR 177.

4 *Stamp Duties Act* 1923 (SA), s 76.

to be restricted to loan securities which are in the nature of a mortgage or charge. The Rewrite proposals, to a large extent, adopt the present arrangements under the New South Wales stamp duty legislation.

An instrument will be a loan security if it is:

> a mortgage;
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> that at any time at which it becomes liable to duty (or further duty) affects property in the jurisdiction, or
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> that (not being a floating charge) does not affect property in the jurisdiction at the date of first execution but affects land in the jurisdiction at any time within twelve months after that date; or
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> an instrument that, on the deposit of documents of title over property in the jurisdiction or instruments creating the charge on property in the jurisdiction, becomes a mortgage or evidences the terms of the mortgage (but such an instrument is not a loan security if it is executed by a person for the purpose of conducting the person's money market trading operations).[5]

The definition of "loan security" thus refers to a "mortgage". The definition of "mortgage" is contained in the Dictionary attached to the Rewrite draft. Unfortunately, the definition is inclusive, listing seven separate categories of instrument. The seven categories adopt the current definition or terms which themselves are difficult to understand and to apply.

The question will inevitably arise whether the definition of "mortgage" truly is an exhaustive definition, notwithstanding the use of the word "includes". One would have hoped that, as part of the Rewrite, the opportunity would have been taken to state exclusively what is to be taxed and to do so in plain English.

The definitional provisions relating to "loan security" are circular. Clause 2(1)(a)(i) when taken with clause 5 highlights the circular nature of the terms. Under clause 2(1)(a)(i) an instrument is a loan security if it is a mortgage, that at any time at which it becomes liable to duty , or further duty affects property in the jurisdiction. Under clause 5, mortgages do not become liable to duty. Loan securities become liable to duty. However, an instrument cannot be a loan security unless it is liable to duty, but an instrument has to be a loan security under clause 5 before it can become liable to duty. It is hoped that the circular nature of the definition will be rectified.

V. LIMITED AND UNLIMITED SECURITIES

Under current stamp duty legislation the difference between a limited security and an unlimited security is extremely important. It is clear that a limited security is stampable at the outset with ad valorem duty calculated by reference to the limit. The duty is payable at the outset even though the total financial accommodation made available under the facility and to be secured by the security is not fully drawn down. A recent restatement of that principle is contained in the Victorian

5 Clause 2(1) of Chapter 6 of the Rewrite.

decision of *Ansett Transport Industries (Operations) Pty Ltd v Comptroller of Stamps*.[6]

It is also clear that ad valorem duty is calculated on an unlimited security only in respect of the highest amount outstanding under the mortgage from time to time. Accordingly, where a borrower does not draw down the full amount provided under a loan facility, duty is payable only on the amount drawn down.

Under current stamp duty law, it is also clear that in determining the amount upon which ad valorem duty is calculated, only the principal sum relating to the financial accommodation is taken into account. Additional ad valorem duty is not required to be paid in respect of interest as it accrues unless the interest is capitalised in the technical sense contemplated by the High Court decision in *Bank of New South Wales v Brown*.[7]

Payments in the nature of interest, fees, insurance premiums, legal expenses, enforcement costs and other incidental amounts which may be secured by a mortgage are not part of the amount upon which duty is currently calculated, unless further advances are made to cover those items. Under the Rewrite, clause 11 provides as follows:

> The amount secured by a loan security means the amount or maximum amount that is or may become payable or repayable, or that is secured, or that is to be ultimately recoverable, by or under the loan security as a consequence of the making of an advance or advances.

This marks a subtle shift away from the position under current legislation. The definition will, if it is not changed, render all incidental amounts discussed above dutiable as they become payable "as a consequence of the making of an advance or advances". Whilst the difference in wording is subtle, it is a major policy move if the Rewrite provisions are not amended.

Arguably, one consequence is that there may never be a limited loan security unless it incorporates an express ceiling on the amount to be recovered. This may be unlikely as financiers would usually want to have the ability to recover all amounts owed by the borrower.

It is thought that the Rewrite was not intended to make any substantive policy change to the way in which limited and unlimited securities are currently dealt with. Nevertheless, not only has the introduction of the phrase "the amount secured by a loan security" meant a significant change, but also the reference in clauses 12 and 13 to a "dollar amount" causes difficulties if the amount secured is in a foreign currency, or indeed, in any currency which happens to use a unit other than a "dollar".

The reference in clauses 12 and 13 to "or otherwise" in respect of amounts specified as secured by the instrument is also a change from the current position. There is no indication as to where one is to have regard in determining whether an amount is "otherwise" specified for the purposes of clause 12 and 13. Under current arrangements, if the mortgage does not express a limit, then reference is not made to any other instrument to divine one.

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6 [1981] VR 35.

7 (1983) 151 CLR 514.

An issue that the Rewrite has not dealt with adequately in the context of "amount secured by a loan security" arises from the decision of the Supreme Court of New South Wales in the case of *Prime Wheat Association Limited v Chief Commissioner of Stamp Duties.*[8] The Rewrite proposal refers to "an advance or advances" in clause 11 in relation to the "amount secured by a loan security". The Dictionary contained in the Rewrite contains an inclusive definition of "advance", which is itself a problem given that the Rewrite is intended to simplify stamp duty provisions.

The definition of "advance" includes a reference to a "loan". In the *Prime Wheat* case, the Court came to the extraordinary conclusion that any deferral of an obligation to pay money, including a deferred purchase price would constitute a loan, such that a mortgage to secure the amount so deferred would be dutiable. The reasoning at first instance has been the subject of substantial criticism, and is currently the subject of an appeal.

In that case, the State of New South Wales agreed to sell to the taxpayer. The consideration for the purchase was $323 million payable by instalments over twenty years. The consideration represented the present value of the shares, $90 million plus interest, together with an additional purchase price of a maximum of $20 million. Under the agreement the taxpayer had to give specified security documents to secure performance of its obligations. The execution and delivery of these documents was a condition precedent to completion, and the title to the shares passed to the purchaser on completion.

One of the recitals to the agreement referred to financial accommodation to be provided by the State to the taxpayer under the agreement. Duty was assessed on the agreement as an agreement for the sale of shares and there was no dispute about that assessment. However, the Chief Commissioner also assessed the agreement as liable to duty as a loan security for a sum of $109 million, being the present value of the purchase price, $90 million, and the additional purchase price, $20 million, less the deposit paid of $1 million.

The taxpayer objected to the assessment of loan security duty. Dunford J referred to the definition of "loan" which appeared in s 83(1) of the *Stamp Duties Act* 1920 (NSW), the terms of which substantially appear in paragraph (a) of the definition of "advance" in the Rewrite. He held that the deferred purchase price arrangements fell within the concept of:

- an advance of money;
- a forbearance to require payment of money owing on any account whatsoever; and
- any transaction (whatever its terms or form) which in substance effects a loan of money.

Dunford J held that there was an advance, first, because the transfer of title, without waiting for the actual receipt of the full purchase price, constituted a form of "financial accommodation" and he noted that the definition is inclusive, rather than exhaustive. It is submitted, with respect, that a deferred purchase arrangement should not be seen as a "loan".

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8 (1995) 31 ATR 33.

Dunford J also held that the transfer of title gave rise to a present debt, and the provision for payment of that debt over a number of years constituted a "forbearance to require payment of money owing". Again, it is submitted that this is not correct, in that a forbearance requires that there be an obligation to pay money in the first place. In the circumstances of this case, there was no contractual obligation to pay any money up front, which could then be forborne.

Finally, Dunford J held that the arrangements were in effect a transfer with mortgage back and accordingly the arrangements "in substance effects a loan of money". Again, it is submitted that a purchase price deferred at the outset is not either legally or commercially treated as a loan of money. Funds in the form of a disguised loan have not passed from the vendor to the purchaser.

Since the *Prime Wheat* case is on appeal, and therefore its outcome cannot be predicted with certainty, the Rewrite definition of "advance" should deal explicitly with whether such arrangements are intended to be dutiable. If the present definition becomes law before the *Prime Wheat* appeal is decided, then the clarity and certainty sought by the Rewrite will not eventuate.

Apart from the problems associated with the *Prime Wheat* decision, the definition of "advance" broadens the concept for a number of Rewrite jurisdictions. Firstly, in Victoria, where current legislation does not impose duty on bill facility arrangements, duty will now be levied. This is a change which is not revenue-neutral. Another feature of the Rewrite is that paragraph (c) of the definition of "advance" will also include the provision or obtaining of funds by provision under any other obligation, except an obligation imposed by a lease or a hire of goods. This is so broad as to be meaningless. To the extent that it does have operation, it clearly extends the current concept of "advance" for a number of jurisdictions.

VI. CITISECURITIES DECISION

In the recent decision of *Citisecurities Limited v Commissioner of Stamp Duties (Qld),*[9] the Queensland Court of Appeal considered a particular lending arrangement. The borrower did not provide any security and did not execute any documents which gave rise to any ad valorem duty in any Australian jurisdiction. The obligations of the borrower, however, were supported by guarantees and indemnities given by entities related to the borrower. The guarantees and indemnities were not executed as bonds or covenants and were not otherwise subject to any ad valorem duty in any jurisdiction. The guarantors supported their obligations under the guarantees by the execution of fixed and floating charges.

The Commissioner in Queensland sought to assess the fixed and floating charges with ad valorem duty calculated by reference to the underlying financial accommodation provided by the lenders to the borrower. The Court of Appeal upheld the Commissioner's argument. The judgment is extremely short and it is

9 (1995) 95 ATC 4471.

submitted, with respect, that the views expressed by the Court of Appeal are not correct.

The Court of Appeal appeared to enlist support from the decision of the Supreme Court of Victoria in *Ansett Transport Industries (Operations) Pty Ltd v Comptroller of Stamps*[10] in arguing that the fixed and floating charge given by the guarantors in the *Citisecurities* case was dutiable. An examination of the facts of the *Ansett* case makes it clear that the mortgage was of an entirely different character from that given by the guarantors in the *Citisecurities* case. The mortgage in the *Ansett* case was to secure an obligation by the Commonwealth of Australia, which in turn, had guaranteed the obligations of an underlying borrower to certain lenders.

The Supreme Court of Victoria found that the money secured was in the nature of moneys to be thereafter lent, advanced or paid, in this case with payment thereafter by the Commonwealth. The fact that payment by the Commonwealth under its guarantee was contingent upon default of the underlying borrower did not prevent the conclusion that the limited security granted by Ansett secured the repayment of moneys to be thereafter lent, advanced or paid.

It is submitted that the only resemblance between the *Ansett* and *Citisecurities* cases is that the obligation which was secured in *Citisecurities* was a contingent one. The Court of Appeal did not, with respect, analyse correctly what it was that the mortgage given in *Citisecurities* secured. The mortgage did not secure the repayment of the underlying debt owed by the borrower or any money to be paid thereafter by the lenders. The mortgage secured the obligations of the mortgagor as guarantor to make an original payment under the guarantee.

If the guarantee had been executed as a bond or covenant, then it is submitted that, so long as it had a relevant nexus, it would secure the repayment of the underlying debt and would be dutiable. However, this was not the case. The mortgage secured the obligation of the mortgagor, as guarantor, to make an original payment under the guarantee. In keeping with the views expressed by the High Court of Australia in *Handevel's* case,[11] a mortgage to secure an original obligation to pay money does not secure moneys advanced, lent or paid or to be thereafter advanced, lent or paid.

Notwithstanding the views expressed above, clearly the law as expressed in *Citisecurities* will apply in Queensland, unless and until it is overruled by legislation or judicial decision. In Victoria, no statutory provision presently deals with the factual scenario outlined in the *Citisecurities* case. However, the Commissioner in Victoria has now issued a public Revenue Ruling indicating that he proposes to follow the decision in *Citisecurities* prospectively. Again, it is submitted with respect that the Commissioner ought not do so as it is highly doubtful that the decision is correct.

Under the Rewrite, however, the matter will finally be put to rest legislatively. Provisions will be inserted to ensure that the mortgage securing the guarantors obligation will be dutiable with ad valorem duty if there is underlying

10 [1981] VR 35.

11 Note 3 *supra.*

indebtedness. Whilst it is more satisfactory that Parliament, rather than the courts, should decree that arrangements utilising guarantees are not acceptable, the introduction of such a provision does constitute a policy shift in Victoria and an expansion of the tax base through the Rewrite process.

VII. NEXUS

Apart from New South Wales, which deals with nexus in the definition of "loan security" in its current legislation, the nexus provisions applying in other jurisdictions are difficult and confusing.

As a general principal a loan security has a nexus with a particular jurisdiction if it is executed in that jurisdiction, it relates to property in that jurisdiction or it relates to things done or to be done in that jurisdiction. In New South Wales, duty is imposed on debentures executed in New South Wales. In the case of mortgages, New South Wales imposes duty only where it relates to property in the jurisdiction at the time of execution or, in the case of a charge (other than a floating charge) it relates to land in New South Wales within a period of twelve months after execution and to certain arrangements relating to deposit of title.

Queensland, on the other hand, has through s 4 of the *Stamp Act* 1894 (Qld) adopted a position that an instrument which itself had no nexus with Queensland would nevertheless have nexus with Queensland if it related to another transaction or instrument which had a nexus with Queensland. Section 70(3) of that Act also deems a nexus to exist if the funds are to be used in Queensland. Western Australia also introduced provisions in ss 88 and 88A of the *Stamp Act* 1921 (WA) which impose a nexus once an instrument which did not originally have nexus with the State subsequently is related to property in Western Australia or matters or events happening in Western Australia.

Accordingly, the potential for more than one nexus is clearly evident. Under the Rewrite, given that loan security duty will only apply to mortgages, the nexus tests have been simplified so that the test is whether the mortgage affects property in a particular jurisdiction. If it does not do so at the time at which it becomes liable to duty, the mortgage will not have a nexus with that jurisdiction. This is clearly a desirable result and makes the nexus tests more certain.

The Rewrite proposal also introduces a concept of "package of securities". This concept is referred to in clause 19(1) and means either a single loan security or two or more instruments at least one of which is a loan security, by or under which the same advances are secured. Clause 19(5) further provides that instruments in the package of securities that are executed within a period of fourteen days are taken to have been first executed on the day on which the last of the instruments was executed. By operation of clause 19(6), the pro rata calculation is effected on a package basis. Clearly, this will have beneficial effects as each Rewrite jurisdiction will then be applying the same multi-jurisdictional principles to the stamping.

The Rewrite then also provides that where a further package of securities, referred to as "the second package", is executed to secure wholly or partly the

same advances as under the first package of securities, the duty payable on the instrument in the second package is to be reduced by the amount of duty paid on the first package of securities where the second package is security for the whole of the sums advanced; and on a proportional basis where the second package is security for part of the same advances.

The difficulty with this provision as drafted is that the reference to "duty" paid on the first package of securities does not appear to encompass duty paid in all jurisdictions. Unless it does, odd results will occur where the proportion of assets changes from time to time as between the jurisdictions.

VIII. PRO RATA ARRANGEMENTS

Under current arrangements, where a security is not some form of mortgage or charge, it is usually possible to ensure that there is no nexus with any taxable jurisdiction when such instruments are executed. However, this is not easy to do for mortgages and charges if part of the mortgaged or charged property consists of real estate which therefore cannot be moved from a taxable jurisdiction into a non-taxable jurisdiction.

For many years, the potential existed in each jurisdiction for multiple duty to be incurred. It was possible, for example, for a charge of all the assets and undertaking of a company to be fully dutiable in several jurisdictions at the one time. The company might, for example, own real estate in each Australian jurisdiction. The fact that property was owned in a particular jurisdiction would be sufficient nexus to ensure that duty was payable in each of those jurisdictions.

To avoid multiple duty, a practice arose whereby multiple charges would be taken. Each charge would be restricted to assets in a particular jurisdiction. This procedure was cumbersome and costly for the parties and also caused difficulties in the enforcement of securities.

The jurisdictions that imposed loan security duty recognised that this was an unfair situation and adopted a policy whereby the duty was to be pro-rated between each jurisdiction with which the security had nexus. Whilst this was an admirable policy, the legislation introduced to implement the policy was far from uniform and filled with distortions.

In Queensland, Western Australia and Victoria, the approach ultimately taken in each State was that duty would be calculated as if the only jurisdiction having nexus was that particular State. The ratio of assets held outside that State to the total assets secured was used to calculate the proportion of duty referable to assets outside the State. The duty prima facie payable in that State was then reduced by the lesser of either the duty paid in the other jurisdiction or the proportion of duty referable to other States.

This procedure had the unfortunate result that, where there was an exemption from duty in one jurisdiction, there would be a windfall gain to the other jurisdiction as the credit to be allowed was the lesser of the tests outlined above. The lesser in this situation meant zero duty and therefore full duty was taken in the other jurisdiction. This could be quite inequitable, particularly if the proportion of

assets contained in the dutiable jurisdiction was minimal when compared to the total assets which were the subject of the security.

The form of pro rata arrangements adopted in Queensland, Western Australia and Victoria ultimately led to the case of *Pennant Holdings Ltd v Commissioner of State Taxation.*[12] The issue was whether a package of securities was to be considered as a whole for the application of the pro rata provisions, or whether it was permissible for the Commissioner only to consider those securities that in fact had a nexus with Western Australia. Fortunately for the taxpayer, the Supreme Court of Western Australia held that the package of securities approach was correct.

New South Wales, South Australia and Tasmania, on the other hand, have adopted a different approach which is simply to apply the proportion of assets in that relevant jurisdiction to the total assets dealt with by the security and apply that fraction to determine the pro rata amount of duty payable in that jurisdiction. This arrangement is fairer from the taxpayer's perspective in that there is no windfall gain to a jurisdiction simply because there may not be a liability to duty in another jurisdiction.

Another difficulty with the pro rata arrangements is what happens after the securities are put in place and further securities are taken, in some instances many years after the original security arrangements are executed. This could occur for a number of reasons. One example would be that the borrowing group subsequently acquires real estate and the lenders insist on a real property mortgage in registrable form. Another common instance is where a group of companies takes over another company that has substantial assets. It is usual that the lenders to the borrowing group will ensure that, where a wholly-owned subsidiary is acquired, it will guarantee the borrowing group's liabilities and will support those guarantees with fixed and floating charges over all assets (together with such other instruments in registrable form as may be required by the lenders).

The stamp duty legislation generally provides for concessional treatment for instruments that are collateral to other instruments. An instrument is usually regarded as collateral to another instrument if it secures the same moneys as that other instrument. Previously, if an instrument was collateral that usually was the end of the matter. There was no further ad valorem duty payable in respect of that collateral instrument. Those arrangements have now changed and it is unclear in Victoria and Western Australia whether those freshly executed collateral securities require a recalculation of the package of security ratios that originally determined the pro rata division of stamp duty between jurisdictions having a relevant nexus.

Each jurisdiction has specific provisions that deal with collateral securities. However these do not operate uniformly. For example, in Queensland, a collateral instrument is exempt from duty if it is collateral to another loan security that has simply been stamped with ad valorem duty. In the case of New South Wales and Victoria, a collateral instrument is now fully chargeable with ad valorem duty. There is then a credit allowed for any ad valorem duty paid on any other

12 (1990) 3 WAR 396.

instrument that secures the same money and it does not matter whether the duty is paid in that State or in another jurisdiction.

South Australia and Tasmania are similar to Queensland in that there must be a primary security which has been stamped with ad valorem duty that secures the same money as the collateral security. In Western Australia, a collateral security is chargeable with ad valorem duty on the basis of the sum secured but a credit is given for any duty paid in Western Australia.

Whilst the practice varied from jurisdiction to jurisdiction about whether it was necessary to reassess nexus and the proportion of assets in a particular jurisdiction at the time when a further advance was made, the decision of the Supreme Court of Victoria in *Coles Myer Limited v Comptroller of Stamps,*[13] is a strong authoritative decision that nexus with a relevant jurisdiction and calculation of the pro rata arrangements should be effected by considering the circumstances existing at the time of execution of the mortgage instrument and not subsequently when further advances are made.

The Rewrite proposals intend to adopt the contrary position that nexus and pro rata calculations are to be reassessed each time there is a further advance. Clause 19(6) of the Rewrite provides as follows:

> When duty is to be assessed because of an advance or additional advance relating to a package of securities, it is to be assessed at the rate of [$x per $1,000] on the same proportion of the amount of the advance or additional advance as, at the date of the advance or additional advance, the value of the property in this jurisdiction secured by those instruments bears to the value of all property within or outside Australia (including property in this jurisdiction) secured by those instruments.

This provision will create substantial financial and administrative burdens. When a loan facility is put in place initially, one of the conditions precedent to draw-down of funds will usually be that the mortgage is correctly stamped or at least that the financier has been put in possession of all materials necessary to ensure that stamping can be effected quickly and efficiently. This will usually require the mortgagor to give a statutory declaration setting out the location and value of assets.

When a further advance is made, it may be extremely difficult for the financier to obtain a further statutory declaration from the borrower. It may also be impractical to withhold the draw-down of further funds until the statutory declaration or other information is made available to the financier to ensure that stamping in respect of further advances can be made.

It is hoped that the Rewrite jurisdictions will not proceed with this part of the proposal and will revert to the principles enunciated in the *Coles Myer* case.

IX. TRANSFER OF LOAN SECURITIES

New South Wales through s 84CAB of *Stamp Duties Act* 1920 (NSW) has been the only jurisdiction to impose loan security duty in circumstances where existing securities are transferred from one lender to another and a further advance is made.

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13 [1988] VR 208.

Clause 23 of the Rewrite incorporates a similar provision. It is understood that this proposal is to be abandoned, given that New South Wales itself has now removed s 84CAB from its Act.

X. GENERAL COMMENT

The stamp duty law relating to loan securities is presently very complicated, although those borrowers who have access to well-informed advisers are able to understand the impact of loan security duty as between the jurisdictions on financing proposals.

The Rewrite proposal will simplify the stamp duty arrangements relating to loan securities and will make it easier for borrowers to determine whether a liability to duty exists. The Rewrite proposal, however, is subject to technical deficiencies in its drafting which, it is hoped, will be rectified by the time the Rewrite proposals on loan security duty become law.