FUNDAMENTAL PRINCIPLES OF STAMP DUTY

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I. BACKGROUND AND SCOPE OF THIS ARTICLE

In the first edition of his work on stamp, death and estate duties published in 1970, Hill J provides some background history to the imposition and development of these taxes.[1] Death and estate duties were abolished in Australia in the late 1970s and early 1980s but stamp duty has remained one of the most important sources of revenue collection for the States and Territories of Australia.[2] On 31 July 1995, an exposure draft of a "Stamp Duty Rewrite" (the "Rewrite") proposal, was jointly published for discussion purposes by the revenue offices of the States of New South Wales, Victoria, South Australia, Tasmania and the Australian Capital Territory. Queensland has now joined in the Rewrite process rather than pursue its own "rewrite" as originally proposed. Western Australia and the Northern Territory have also joined the process on a limited basis.

The Rewrite is considered necessary because:

> ...stamp duty legislation has focused traditionally on commercial instruments and documents. The widening gap between current commercial business practices and this stamp duty tradition demands action both to protect government's revenue bases and reduce compliance costs for taxpayers. These days, decisions are made, agreements formed, proprietary rights acquired and disposed of, in many cases,

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1 DG Hill, Stamp, Death, Estate and Gift Duties, Law Book Co (1st ed, 1970).

2 The NSW Office of State Revenue ("OSR") Report of 1994-1995 discloses that stamp duty collected for the year amounted to $2 624 million. This represented 33.9 per cent of total OSR Revenue of $8 185 million which in turn represented 43.1 per cent of total NSW State Revenue.

without written record. In the 21st century it will be more likely than not that electronic messages will replace paper documentation.[3]

In this article, some of the fundamental principles of stamp duty will be reviewed. The focus will be on some specific issues concerning the main head of duty, ie conveyance or acquisition duty. Before exploring these specific issues however, it may be useful to consider briefly the history of the imposition of stamp duty commencing with its introduction in England as summarised by Hill J:

> Legislation to impose duties upon vellum, parchment and paper was first introduced in England as a temporary measure in 1694 and, as might be expected, became a permanent impost. The duty was finally consolidated in the *Stamp Act* 1891.
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> Stamp duty was not introduced in the colony of New South Wales until 1865 when imposed as from 1st July of that year by the Act 29 Vic No 6. However, prior to that time, the English stamp duty had been a matter of concern in the colony as can be gathered from the Act 20 Vic No 23, passed in 1857, the long title to which indicates that its purpose was to declare that instruments affecting real estate in the colony but executed outside the colony would be admissible in evidence in New South Wales although not stamped.
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> The initial New South Wales Act as extended and amended by subsequent Acts expired on 31st December, 1874. However, the duty was reimposed by the *Stamp Duties Act of* 1880 (44 Vic No 3) and has remained ever since. The Act of 1880 and amendments thereto were consolidated in the *Stamp Duties Act* 1898, No 27, which Act was repealed and replaced by the *Stamp Duties Act*, 1920.[4]

The exposure draft of the Rewrite was released by the participating revenue offices for discussion purposes only as none of the proposals set out in the Rewrite, except where they reflected current government policy, had been approved by any of the relevant governments. A number of submissions have been made on the provisions of the Rewrite pointing out various inconsistencies, anomalies and inadequacies. As a result of these submissions, a further draft is expected to be issued in October 1996.

One final point of introduction to note is that, although for comparison purposes, mention will be made in some cases of similar provisions contained in the legislation of other States and Territories, only the *Stamp Duties Act* 1920 (NSW) ("the Act") as currently drafted will be dealt with in detail. In relation to the Rewrite, again, except in specific cases, the focus of attention will be on the changes intended to be effected to the position in New South Wales and not other States and Territories.

II. INSTRUMENTS LIABLE TO DUTY

Under the present law, conveyances of property of any description are generally liable to ad valorem duty. Agreements to convey property and memoranda of such agreements are liable to the same duty as an actual conveyance of the property and

3 Stamp Duty Rewrite Exposure Draft, New South Wales and Australian Capital Territory.

4 DG Hill, note 1 *supra*.

where the agreement is stamped the actual conveyance is then stamped with nominal duty.[5]

Generally, an offer in writing accepted orally, or by some other act such as the payment of money, will not be an agreement or memorandum of an agreement liable to duty.[6] Similarly, a minute of meeting of directors of a company would not normally be a memorandum of an agreement.[7] However, an offer in writing or a minute of meeting of directors could be a memorandum of an agreement if the parties treat it as such or, for example, if it was a "sham" being in reality a record of a pre-existing oral agreement.[8]

To overcome the problem of transactions being effected (where permitted by law) without the necessity of bringing into existence a dutiable instrument, all States and Territories in Australia have introduced over the last decade what are commonly referred to as 'claytons contract' provisions. These will be discussed later.

III. TERRITORIAL LIMITATIONS ON THE STATES' (AND TERRITORIES') LAW-MAKING POWERS

The various States' and Territories' law-making powers are limited to making laws for the peace, welfare and good government of the relevant State or Territory. Courts will, therefore, in construing stamp duty legislation, attempt to construe it as limited in its operation to the particular State or Territory.[9]

The power to make laws for the peace, order and good government of a State does not enable State Parliaments to impose by reference to some act, matter or thing occurring outside the State, a liability upon a person unconnected with the State whether by domicile, residence or otherwise. But it is within the competence of the State legislature to make any fact, circumstance, occurrence or thing in, or connected with the territory, the occasion of the imposition upon any person in the State of a liability to taxation or of any other liability. It is also within the competence of the legislature to base the imposition of liability on no more than the relation of the person to the territory. The relation may consist of presence within the territory, residence, domicile, carrying on business there, or even remoter connections. If a connection exists, it is for the legislature to decide how far it should go in exercise of its power.[10]

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5 Sections 41, 65 and the Second Schedule to the Act.

6 See for example *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.

7 See for example *Vaughton v Brine* (1840) 1 M&G 359.

8 *Chadwick v Clarke* (1845) 135 ER 717 and *Fleetwood Hesketh v Commissioner of Inland Revenue* [1936] 1 KB 351.

9 See for example, *Commissioner for Stamps (Qld) v Wienholt* (1915) 20 CLR 531 at 540 and *Barcelo v Electrolytic Zinc Co of Australasia Limited* (1932) 48 CLR 391 at 427 and 428. In recent years one area where the issue of territorial nexus has been of practical importance is the construction of "land rich" company and trust provisions. See for example Law Book Co, *Stamp Duties, New South Wales and the Australian Capital Territory* at [3.16310] for a discussion of this issue in relation to Division 30 of the Act.

10 See Dixon J in *Broken Hill South Limited. v Commissioner of Taxation* (NSW) (1937) 56 CLR 337 at 375.

These rules apply notwithstanding the passing of the *Australia Act* 1986 (Cth) and comparable legislation in each State[11] whereby the United Kingdom Parliament enacted legislation in the form of the First Schedule to the *Australia Acts (Request) Act* 1985 (NSW). This legislation specifically provides that the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extra-territorial operation.

It seems, however, having regard to recent decisions of the High Court, for example *Union Steamships v King*,[12] that the various Australia Acts may do no more than recognise what has already been achieved in the course of judicial decisions.[13]

IV. POSITION UNDER THE REWRITE

Under the Rewrite, the general territorial nexus adopted for the imposition of duty on an acquisition is property in the State. Clause 8 of the Rewrite provides for an apportionment of duty where the property acquired is only partly in the State. Paragraph (1) of clause 8 applies where there is a single consideration expressed for the acquisition of dutiable property which is situated at least partly in the jurisdiction. It enables duty to be then apportioned pro rata by reference to the dutiable property in the jurisdiction. Paragraph (2) deals with the case where the dutiable property acquired relates to a business undertaking and enables apportionment by reference to that business undertaking.

Some problems have been identified with the provisions of clause 8. For example, paragraph (1) does not seem to apply where the property is wholly out of the jurisdiction but the definition of "dutiable property' might extend to such property. Paragraphs (1) and (2) also appear to overlap in relation to acquisitions of businesses carried on partly within and partly out of the State. In such cases it is not clear which subsection is to apply. It is expected that these problems will be resolved in the next draft of the Rewrite.

V. SUBSTANCE VERSUS FORM - THE DOCTRINE OF FISCAL NULLITY

The mere fact that the parties label their transaction in a particular way will not prevent the Court from going behind the transaction to determine its true nature. In that sense the Court must look for, "the real substance of the transaction instead of forming a judgment upon the mere document or machinery adopted by the parties for the purpose of carrying out the transaction."[14] However the substance of a transaction embodied in a written document is to be found in ascertaining the

11 The Act in each State was entitled *Australia Acts (Request) Act* 1985.
12 (1988) 82 ALR 43 at 48.
13 Law Book Co, note 9 *supra* at [1.400].
14 *Mask v Commissioner of Stamp Duties* (1920) 20SR (NSW) 339 at 345, Cullen CJ.

legal rights and obligations of the parties under it by construing the document as a whole.

This issue arose for consideration by the High Court in *Comptroller of Stamps (Vic) v Ashwick (Vic) (No 4) Pty Limited.*[15] The Court considered whether the doctrine of fiscal nullity or "Ramsay principle" (developed by the courts in England in the context of capital gains tax and income tax in cases such as *WT Ramsay Limited v Inland Revenue Commissioner,*[16] *Inland Revenue Commissioner v Burmah Oil Co Limited*[17] and *Furniss (Inspector of Taxes) v Dawson*[18]) had any application to the imposition of stamp duty on instruments in Australia. Vinelott J in the Chancery Division in England had earlier decided in *Ingram v Inland Revenue Commissioner*[19] that the doctrine did apply to stamp duty with the result that ad valorem duty was imposed on an instrument prima facie liable only to nominal duty, but which was brought into existence as part of a stamp duty avoidance scheme.

In the *Ashwick* case a company, CUB, had set up a scheme to provide lessees of hotels with an equity in hotels which they leased. Pursuant to the scheme, redeemable preference shares were issued at a premium to lessees and on redemption the freehold of the hotel was transferred to the stockholder/lessee. It was held that the transfer on redemption fell within exemption (19) under Heading VI of the *Stamps Act* 1958 (Vic). The procedure was devised and implemented in order to achieve a transfer by CUB to the appellant and other similar companies of the hotel properties and with a view to taking advantage of the exemption. The court held that, whether or not the doctrine of fiscal nullity applied in Australia, it had no application to the facts before it: "The duty is charged upon instruments, if they exist and come within any of the categories prescribed by the Act. It is not charged upon transactions."[20] The Court went on to note that:

> Nevertheless, in determining the category to which the instrument is to be assigned, its character is to be ascertained by considering its legal effect at the date of its execution: *WM Cory & Son Limited v Inland Revenue Commissioner* [1965] AC 1088.[21]

With regard to the instrument before the Court there was no difficulty in ascertaining the character of the instrument. It was simply a conveyance of land. The expressed consideration however was in a form which, if accepted, would attract exemption (19). The Court noted that the transfer accurately recorded transaction that had occurred and to which it was intended to give effect. The Court then approached the fiscal nullity issue by asking the question, "Assuming the availability of the *Ramsay* principle, is it possible to treat the instrument simply as a conveyance of land for a consideration of $899,557?"

The Court then answered this question as follows:

> Before an affirmative answer can be given, the transfer must be the end result of a pre-ordained series of transactions or one single composite transaction having no business

15 (1987) 87 ATC 5064.
16 [1982] AC 300
17 [1982] STC 30.
18 [1984] AC 474.
19 [1986] Ch 585.
20 Note 15 *supra* at 5072.
21 *Ibid.*

> purpose other than the avoidance of stamp duty on the transfer. And, as Tadgell J asked in the Full Court, 'What are the "inserted steps" that are properly to be ignored?' It is here that in any event the appellant's case breaks down... To ignore all the steps between payment of moneys by the respondent and the transfer of the hotel to it, as the appellant invited us to do, is to disregard the very situation to which exemption (19) refers, namely a conveyance made to a shareholder in the course of a distribution of assets in consequence of a reduction of capital. Where there is such a conveyance, it is hard to see how the circumstances in which it took place, circumstances which exemption (19) expressly contemplates, may simply be put to one side.[22]

In the writer's experience the Chief Commissioner has only raised the possible application in New South Wales of the fiscal nullity doctrine on one occasion. The facts were similar to those before Vinelott J in *Ingram v Inland Revenue Commissioner*[23] but had not come about as a result of a stamp duty avoidance arrangement. Certain retirement village serviced apartments had been leased to elderly tenants for a 999 year term. The leases provided for the rent for the whole of the term to be prepaid. Duty was paid on the leases at the lease rate on the basis of *Frazier's* case[24] and ruling SD23. Under the relevant retirement village legislation serviced apartments could only be leased, not sold, to residents. Once the rent was prepaid under the leases, the reversion became worthless.

To protect the residents a decision was made to transfer the reversion to a trustee to hold on trust for residents in occupation in eighty years time. The Chief Commissioner was asked to confirm that only nominal stamp duty would be payable on transfer of the reversion which, as already noted, was worthless. At first the Commissioner indicated that the doctrine of fiscal nullity would be applied and full ad valorem duty assessed on the unencumbered value of the property the subject of the 999 year leases, ignoring the fact that all the rent under those leases was prepaid.

He acknowledged later however that only nominal duty would be imposed, subject to seeking legal advice to determine whether the 'nominal valuation' of the reversionary interest did not 'effect an illusory stamp duty result'.

VI. THE POSITION UNDER THE REWRITE

There is currently no general anti-avoidance provision in the NSW Act. The *Stamp Duties and Taxes Act* 1987 (ACT) does contain a definition of "tax avoidance scheme"[25] which is similar to Part IVA of the *Income Tax Assessment Act* 1936 (Cth). The provision is not however a general antiavoidance provision, as is Part IVA. It applies only in specific circumstances, eg exemption from ad valorem duty is available in respect of a transfer to a trustee without change of beneficial ownership but only where "the transfer is not made in connection with a tax avoidance scheme."[26]

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22 *Ibid.*

23 Note 19 *supra.*

24 *Frazier v Commissioner of Stamp Duties* (NSW) (1985) 85 ATC 4735.

25 Section 4(1).

26 *Stamp Duties and Taxes Act* 1987 (ACT), Sch 4, paras (g) and (h).

The Rewrite, in a separate *Taxation Administration Act*, proposes the introduction of a general anti-avoidance provision in similar terms to the ACT provision. This proposal has met with strong disapproval from both the business community and legal and accounting professions. As a consequence, it seems the scope of application of the provision will be limited in a similar manner to the ACT provision.[27]

VII. WHEN DOES LIABILITY FOR DUTY ARISE?

Liability for duty under present legislation normally arises on first execution of an instrument. Section 38(1) of the New South Wales Act provides in this regard:

> Every person primarily liable with respect to any instrument or matter of the nature mentioned in this Act is personally liable to the Crown for the payment of the duty so chargeable on such instrument immediately upon the first execution thereof, and every such person may be sued for the amount of such duty as for a debt due to the Crown.

Under clause 12 of Chapter 2 of the Rewrite dutiable property is taken to be acquired and a liability to pay duty in relation to an acquisition of dutiable property by a person is created:

> (a) on the date of first execution of a written agreement for the acquisition of the dutiable property by the person, or
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> (b) on the date of first execution of a written instrument by which the dutiable property is acquired by the person, or
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> (c) when the dutiable property is acquiared by the person —
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> whichever first occurs.

VIII. INEFFECTIVE DOCUMENTS

Can liability to duty arise even though a document is not effective? In *Commissioner of Stamp Duties (Qld) v Hopkins*,[28] the High Court concluded that in the case of a settlement of property, execution by the trustee prior to execution by the settlor, or the vesting of property was "first execution" for the purposes of the *Stamp Act* 1895 (Qld). Dixon J commented that the theory of the Act is that liability to stamping may be determined when a document is prepared and before it is executed.

Section 26 of the NSW Act provides that an instrument is deemed to be first executed the first time that it is signed and sealed, or signed (as the case may be) by any party thereto. The section goes on to provide that if an instrument is ineffective because the necessary parties failed to execute it, any stamp duty paid may be refunded.

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27 For a discussion of the scope of application of the ACT provision see Law Book Co, note 9 *supra* at [13.350].

28 (1945) 71 CLR 351.

If all documents bearing a signature are liable to duty at the date of first execution, then provision needs to be made for a refund of duty if the transaction to which the instrument relates does not proceed for any reason.

The Act currently provides for a refund of duty only if certain prerequisites are met. Section 35C of the Act, for example, provides for a refund at the discretion of the Chief Commissioner. But no refund may be made under s 35C if the Chief Commissioner is satisfied that the payment of the amount was made in accordance with an interpretation of the Act commonly applied by the Chief Commissioner at the time the payment was made. Section 26 of the Act provides for a refund of duty "if an instrument is ineffective because of a failure of the necessary parties to execute it." Section 41(7) of the Act provides for a refund of duty if an "agreement" is rescinded or annulled but duty other than ad valorem duty to which the agreement is liable is to be deducted.. No refund is, therefore, available, for example, for any penalty duty payable (at least in the Chief Commissioner's view).

Finally, a refund of duty may be required to be made, subject perhaps to s 35C(2), where the duty has been paid under a mistake of law or fact following the decisions in *David Securities Pty Limited v Commonwealth Bank of Australia*[29] and *Commissioner of State Revenue (Vic) v Royal Insurance Aust Limited.*[30]

Is it correct to say that *Hopkin's* case is authority for the proposition that an instrument once executed is liable to duty even though ineffective? The courts have answered this question in the negative.

In *Re Rushcutters Court Pty Limited and the Companies Act*[31] it was held that a contract was not liable to stamp duty at the time it was entered into as it was void by operation of s 227(1) of the *Companies Act*. As it was void it was not a document stampable pursuant to s 41 of the Act and could therefore be admitted in evidence although not stamped. The Court held that s 41 of the Act applies only to an agreement which has some operation on property in New South Wales.

Similarly, in *Kern Konstruction (Townsville) Pty Limited v Commissioner of Stamp Duties*,[32] it was held that an instrument not in registrable form under the *Real Property Act* 1861 (Qld), and as such ineffective, was not liable to duty. Douglas J (Campbell & Williams JJ concurring) summarised the matter as follows:

> The memorandum, therefore, as things stand cannot be registered... If it cannot be registered it cannot accomplish whatever it was meant to do, whether that was to be a sale, a gift, a declaration of trust, or something else. It simply is a nullity. Such a document cannot be taxed (*Kent v Commissioner of Stamps* (1927) St RQ 398 at 408). That seems to me to be an end of the matter.[33]

In neither of these cases however did the Court consider the decision of the High Court in *Hopkin's* case.

In *Bell Resources Holdings Pty Limited v Commissioner for ACT Revenue Collections*[34] the ACT Supreme Court did consider whether the decision in

29 (1992) 175 CLR 353.
30 (1994) 94 ATC 4960.
31 (1978) 78 ATC 4411.
32 (1981) 81 ATC 4147.
33 *Ibid* at 4150.
34 (1990) 90 ATC 4327.

Hopkin's case required a finding that a transfer of shares, apparently regularly executed, but which was ineffective because of a failure to comply with the Articles of Association of the company, was liable to ACT duty. Jenkinson J acknowledged that his conclusion that duty was not payable on the transfer seemed to be in conflict with *Hopkin's* case. But he confined the decision in that case to the particular legislation before the High Court:

> In my opinion a document will not answer the description "transfer of a marketable security" until it has been executed by the transferor. Unlike the legislation under consideration in *Commissioner of Stamp Duties (Qld) v Hopkins* (1945) 71 CLR 351, to which counsel for both parties referred the Court, this stamp duty legislation evinces no general intention that an instrument on which duty is imposed is to be stamped before execution. Unless constrained by some legislative indication that the words "transfer of a marketable security" are to be understood as denoting, or as comprehending, a document which is intended to be made into such a transfer by execution, I would understand those words in their ordinary meaning, as describing a document executed by or on behalf of the person named therein as transferor. And I find in this legislation no such a constraint. Section 56 is concerned only with times for compliance with the requirements of the legislation and cannot in my opinion be taken to imply a definition of the word "transfer" at odds with what I think to be its natural meaning in the Schedule.[35]

Neaves and von Doussa JJ reached the same conclusion "on a proper construction of the relevant legislation". Von Doussa J noted:

> The transfer document the subject of these proceedings of itself would not, unless validly executed by the transferor, produce any legal effect whatever in relation to the marketable securities with which it purported to deal, and for that reason would not be within the description.[36]

It might be said of the decision of the High Court in *Hopkin's* case however, that the instrument before the court was held to be dutiable as at date of first execution by the trustee and prior to execution by the settlor or vesting of the trust property because on first execution it did become operative as an instrument of settlement having regard to the surrounding circumstances.

The instrument before the court in *Hopkin's* case, it will be recalled, was an instrument of settlement. The instrument was only liable to duty if it was an instrument, "whereby property is settled or agreed to be settled." Although not executed by the settlor until some time after execution by the trustee, the Court seemed to assume that the instrument was prepared on instruction from the settlor to document a previously expressed intention to settle the relevant assets.

Rich J concluded that when the instrument was executed by the trustee, it became a settlement within the meaning of the Queensland Stamp Act as then in force. This occurred by the execution of the instrument itself and apart from anything having been done to implement it, because it was a voluntary instrument by which a definite and certain principal sum of money and a definite and certain amount of stock were agreed to be settled.

Dixon J first noted that the theory of the *Queensland Stamp Act* is that liability to stamping may be determined when a document is prepared and before it is executed. He then went on to say that, although it is true that trusts cannot come

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35 *Ibid* at 4330.

36 *Ibid* at 4338.

into operation until the trustee obtains title to and control of the trust property, the vesting of the trust property in the trustee may be regarded as a condition of the operation of the settlement, rather than as an essential characteristic of the 'settling' of the property. When the settlor executed the instrument, he confirmed and authenticated his intention to create the trusts amounting to a settlement and, because the property had then been vested in the trustee, the settlement was operative.

IX. INSTRUMENTS VALIDLY EXECUTED BUT BY MISTAKE

If ineffective documents are not liable to duty, the question of a refund of duty will not arise. What is the position however where parties execute an instrument in circumstances of mutual mistake so that the instrument does not reflect the common intention of the parties? Should the instrument be liable to duty as executed or treated as liable to no duty? Further, if the instrument is capable of rectification should it be liable to duty only as rectified? Finally, if stamped by mistake before being so rectified will a refund of duty be available once an order for rectification has been made?

In *BTR Nylex Limited v Comptroller of Stamps*[37] it was held that a transfer of shares executed as a consequence of a mutual mistake by the parties to it, who had intended that the shares referred to in the transfer be redeemed rather than transferred, was ineffective and thus not liable to stamp duty. A similar argument was advanced in *Extra Nominees Pty Limited v Comptroller of Stamps (Vic)*,[38] a case involving a transfer of real property to one of a number of joint venture parties for whom the property was held on trust at the time of transfer. It was held in that case however that even if the decision in *BTR Nylex* had application to a transfer of real property, it did not apply as the facts did not reveal that the transfers before the court were executed by mistake.

In *Nichols Cabramatta Wholesale Stationery Supplies Pty Limited v Commissioner of Stamp Duties*,[39] Sully J in the Supreme Court of New South Wales expressed the view that a deed should be stamped in the form in which it was at the time of first execution. This was because duty was payable immediately upon first execution and a refund was available if the instrument failed in its intended operation. A refund would therefore be available where proper cause is shown, ie where the court makes an order for rectification. However, the question did not arise in that case as the deed was not sufficiently different from what the parties intended so that the remedy of rectification was not available in any event.

If an instrument is unstamped when it comes before the court where an order for rectification is being sought, it seems clear, notwithstanding the comments of Sully

37 Unreported, Supreme Court of Victoria, Teague J, 16 February 1990.
38 (1990) 90 ATC 2021 at 2028.
39 (1993) 93 ATC 4647.

J in the *Nichols Cabramatta* case, that following the making of the order, the instrument would be liable to duty as rectified.[40]

In *Commissioner of Stamp Duties (NSW) v Carlenka Pty Limited,*[41] McClelland AJA, in the NSW Court of Appeal set out the circumstances when the court will consider granting an order for rectification. In particular His Honour dealt with the question of whether the parties' mistaken view of the liability to stamp duty of the instrument is relevant. His Honour summarised the law as follows:

> In general, the remedy of rectification of an instrument is available where it is established by clear and convincing proof that at the time of execution of the instrument the relevant party or parties as the case may be had an actual intention (if more than one party, a common intention) as to the effect which the instrument would have which was inconsistent with the effect which the instrument as executed did have in some clearly identified way. In this context 'effect' means the legal and factual operation of the instrument according to its true construction, but does not include legal or factual consequences of the operation of the instrument of a more remote, or collateral, kind (eg its liability to stamp duty).[42]

Will a refund of duty be available where an instrument is stamped according to its terms and subsequent rectification results in a lesser liability? Sully J in *Nicholas Cabramatta* suggests the answer is yes. So too Mason CJ in the *Royal Insurance* case.[43] His Honour noted that s 111 of the Victorian Stamps Act (which conferred a discretionary power on the Commissioner to refund duty overpaid) required the Commissioner to refund duty overpaid where, as a matter of general law, the taxpayer was entitled to a refund. All that is required is that the payment is made under a mistake as to the liability to pay. His Honour even suggested that the absence of any legitimate basis for retention of the money by the Commissioner might itself ground a claim for unjust enrichment without the need to show any causative mistake on the part of the taxpayer.

The case, however, was not decided on that basis. Brennan J who gave the leading judgment, (and with whom Toohey and McHugh JJ agreed) noted that the overpayments of duty by Royal fell into different categories. Some were paid by mistake. The Comptroller must be taken to have known at all material times that the statutory liability had been repealed and that she had no entitlement to retain these payments. His Honour therefore concluded that it would be unjust for the Comptroller to retain the amounts; they were recoverable under the general law of restitution.

Another category of overpayments was amounts due and owing when made but deemed not to have been due and owing by later retrospective legislation. His Honour held that there was no mistake affecting the payment of this latter amount. When paid "the Comptroller was entitled - indeed she was bound - to retain it."[44] What then was the effect of the retrospective amendment providing that the amounts were not payable?

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40 RP Meagher, WMC Gummow, JRF Lehane, *Equity: Doctrines and Remedies*, Butterworths (3rd ed, 1992) at [2602].

41 (1995) 95 ATC 4620 at 4633.

42 *Ibid* at 293-4.

43 Note 28 *supra*.

44 *Ibid* at 26.

His Honour held that if the amendment to the law is to be effective retrospectively, the rights and liabilities of the Commissioner and those who overpaid money must be so altered as to place them in the same position as they would have been in had the legislation not imposed the stamp duty abolished by the amendment during the period of retrospective operation of the amendment. That being the case the taxpayer's right to a refund was in His Honour's view, purely statutory, arising as a consequence of the passing of the amending legislation. There was no occasion to invoke notions of common law restitution in order to discover a cause of action entitling Royal to a refund.

What would the result have been in NSW in relation to the third category of overpayments? Would the taxpayer's right to a refund be limited by the provisions of s 35C of the NSW Act? Subsection (7) provides a taxpayer may not bring proceedings against the Chief Commissioner to require the exercise of discretion to refund duty as provided by the section. Further, subsection (2) prohibits the Chief Commissioner from making a refund if an assessment of duty is made in accordance with "the interpretation of the Act in respect of instruments of that kind commonly applied by the Chief Commissioner at the time the payment was made."

In *Royal Insurance* Brennan J noted that the legislative amendment itself created an entitlement to a refund for which the Chief Commissioner could normally be sued, and went on to conclude that s 111(1) of the Victorian Act was clearly intended to prescribe the means by which the Commissioner's liability to make a refund should be discharged. A similar conclusion could presumably be expected in relation to s 35C.

In relation to the first two categories of overpayments therefore, a NSW taxpayer would be entitled to recover duty overpaid based on a common law right of restitution, subject perhaps to s 35C(2). However, in relation to the third category of overpayments, where nomistake would be involved, the taxpayer would be at the mercy of the Commissioner's discretion.[45]

What then is the answer to our original question, ie is a refund available where an instrument is stamped according to its terms but subsequent rectification results in a lesser liability? It is clear that rectification is not available on the basis of a mistaken view as to the instrument's liability to duty.

But can it be said that rectification, if it is to be effective retrospectively, results in the payment of duty having been made by mistake, so that the right of recovery based in restitution exists independently of s 35C? Brennan J appeared to reject this argument in relation to the operation of retrospective legislation in *Royal Insurance*, although this conclusion did not ultimately affect the outcome of the case.

Although not entirely clear it would seem that the argument should also be rejected in relation to a rectification order having retrospective operation. The taxpayer would, therefore, have a right to a refund, but the Chief Commissioner's

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45 Section 35C may however be an exhaustive and exclusive code for the making of refunds in all circumstances. See for example *Chippendale Printing Co Pty Ltd v Federal Commissioner of Taxation* (1996) 96 ATC 4175, and *Common Equity Housing Ltd v Commissioner of State Revenue (Vic)* (1996) 96 ATC 4598.

liability to make the refund would be governed by the terms of s 35C, with the taxpayer again left to the mercy of the Chief Commissioner's discretion.[46]

X. CONDITIONAL AGREEMENTS

Another category of instruments where difficulties arise in determining the liability to duty are instruments executed and delivered in escrow or which are subject to a condition precedent or condition subsequent. Examples of common conditional agreements are those requiring Foreign Investment Review Board approval, heads of agreement which are intended by the parties to be binding, but which provide for a further formal agreement to be entered into, and agreements subject to zoning or development approval.

With regard to deeds delivered in escrow, when the conditions of escrow are satisfied, the instrument immediately becomes operative, taking effect as between the parties to it as from its delivery in escrow, although that retrospective operation may not carry with it intermediate income. In *Ansett Transport Industries (Operations) Pty Limited v Comptroller of Stamps (Vic) No 3*,[47] a deed was delivered in Victoria in escrow conditional upon execution by the Commonwealth. Tadgell J in the Victorian Supreme Court held that the time when the deed first had some legal effect was when it was delivered in escrow. The fact that when it was executed in Victoria its operation was conditional did not affect its liability to duty once its delivery had become unconditional. This was so because as between the parties to it, it achieved on execution by the Commonwealth the status of an effective deed as at the time of original delivery. His Honour did not need to consider the liability to duty if the condition had not been fulfilled. As liability under the NSW Stamp Act arises upon first execution irrespective of the conditional delivery, then it should logically follow that the question of fulfilment of the condition is irrelevant to the liability for duty.

If the escrow condition is the execution by another party to the deed, and that party fails to execute it, then in NSW a refund of duty would be available pursuant to s 26 of the Act. If, however, the escrow condition is the happening of some other event, the ability to obtain a refund of duty is more problematic. As noted above, s 35C provides only a limited right to a refund at the discretion of the Commissioner. Section 41(7) provides for a refund only if an agreement is rescinded or annulled, and a taxpayer's entitlement to sue at common law for a refund only arises where the payment has been made by mistake (unless Chief Justice Mason's approach, discussed above, is adopted).

The fact that a contract for the sale or conveyance of a property is expressed to be conditional does not prevent the contract being liable to stamp duty. Ordinarily such a contract would still satisfy the description of an agreement for the sale of conveyance or property. The Chief Commissioner confirms this view in ruling SD99. However, he does not in the ruling distinguish between a condition

46 See also Deane J in *University of Wollongong v Metwally* (1984) 158 CLR 447 at 478.
47 (1984) 84 ATC 4103.

precedent and a condition subsequent. There is an obvious difference between a condition which is precedent to the formation or existence of a contract and a condition which is subsequent to formation but precedent to the obligation of a party to perform his part of the contract.[48]

It is arguable that where the condition is a true condition precedent, the instrument will not satisfy the statutory description as an agreement for the sale or conveyance of property until the condition is fulfilled.

Instruments commonly described as "heads of agreement", which are intended by the parties to be binding, but which contemplate that a formal agreement for the sale or conveyance of property will subsequently be entered into by the parties, will likewise, arguably, not be liable to ad valorem duty as an agreement for the sale or conveyance of property. Although they are binding agreements, they may more properly be described as "agreements to enter into an agreement for the sale or conveyance of property." To ensure that a heads of agreement is not so liable it needs, however, to be carefully drafted and, as a practical matter, it will normally be prudent to have the agreement stamped wtihin time to anticipate the possibility that the Commissioner will consider it liable to ad valorem duty. In this way, a penalty for late payment of duty may be avoided.

XI. THE POSITION UNDER THE REWRITE

The Stamp Duties Rewrite as initially drafted contemplates that liability to duty will arise where there is an 'acquisition' of dutiable property ie an acquisition that results in dutiable property being transferred to, vested in or accruing to a person. This parallels the present provisions of s 65 of the Act which define "conveyance" by reference to whether New South Wales property is transferred to, vested in or accrues to any person.

There is an exclusive definition of "dutiable property" in the Rewrite[49] and this definition includes land and an interest in land in the jurisdiction, transferable floor space or air space, shares or stock, units in unit trust schemes, assets of business undertakings, rights to use trade names or industrial designs, patents, copyright, things in action, personal property etc.

It is clear under the Rewrite that an unconditional agreement for sale of dutiable property such as land which is specifically enforceable, will cause an interest in that land to vest in or accrue to a purchaser. Unconditional contracts for the sale of land would therefore become dutiable by reference to the dutiable value of the interest under the contract. The same however will not necessarily be true where the contract is not specifically enforceable, or where it isconditional.

A conditional contract of sale would not ordinarily create in the purchaser an interest in the land until the condition is fulfilled. In most cases it would create no more than a right in the purchaser to require the vendor to secure performance of

48 See *Perri v Coolangatta Investments Pty Limited* (1982) 149 CLR 537.

49 Chapter 2, clause 5.

the condition.[50] However, when a conditional contract becomes unconditional, an interest in dutiable property (being itself "dutiable property") will be created. That situation will normally arise in circumstances where no new written instrument is brought into existence. In that case it is not clear whether the purchaser is required to bring into existence a further instrument and pay duty on that instrument or is simply required to upstamp the original contract. Alternatively it may be intended that duty be paid on the conditional contract when first executed. In that case the various problems discussed above in relation to refunds of duty will arise. The Rewrite provisions currently contemplate that specific refund provisions will be set out for each head of duty. The Rewrite *Taxation Administration Act* then deals with the mechanics for obtaining a refund. Presumably further clarification of these issues can be expected in subsequent drafts of the Rewrite proposals.

XII. TO WHAT EXTENT DOES STAMP DUTY REMAIN A TAX ON INSTRUMENTS?

As noted above, as well as requiring duty to be paid on instruments, all States and Territories have introduced legislation requiring stamp duty to be paid where there is a change of beneficial ownership of property although the provisions apply to different items of property in different jurisdictions.

In New South Wales, for example, the provisions of Division 3A apply to transactions which result in a change of beneficial ownership of land in New South Wales, a lease of land in New South Wales, the New South Wales goodwill of a business carried on in New South Wales, shares in a New South Wales company or in another company where the shares are on a register in New South Wales, chattels where they are sold with other property, an interest in a partnership where it owns any of the above items of property and, from 1 January 1991, certain units in unit trusts.[51] Division 3A does not apply to other items of property such as debts. Certain transactions are also excluded, eg the issue and redemption of units in a unit trust scheme, the surrender of a lease and the release or termination of an option.

The legislation in each State and Territory generally requires a statement to be made where a change of beneficial ownership occurs and duty to be paid on that statement as if it were an instrument effecting the transaction. Thus in form the duty payable remains a duty imposed on an instrument, although in substance it is the transaction which is subjected to duty.

50 See for example *Brown v Heffer* (1967) 116 CLR 344.

51 Section 44(1) of the Act.

XIII. PENALTIES FOR FAILURE TO STAMP INSTRUMENTS OR PAY DUTY

The history of various sanctions imposed by the legislature for non-stamping is set out by Hill J in the first edition of his work on stamp, death and estate duties as follows:

> The sanction for non-stamping of a dutiable instrument lay not in the personal liability for payment of the duty, but in the non-availability of the instrument to be given in evidence... Gradually the sanction came to be extended to include a personal liability for the payment of the duty ... and more recently in New South Wales for the payment of the fine for late stamping... In addition to the imposition of a personal liability for duty, the protection of the revenue was secured in certain cases by the imposition of an obligation to bring instruments into existence and then to stamp them... The next logical step was to provide, as much for the convenience of the taxpayer as for the protection of the revenue, for the dispensing with the obligation to bring the instrument into existence and for the lodging with the Commissioner of periodical returns giving details of the dutiable transaction and accompanied by the payment of the duty...
>
> The Territory legislation has carried this process almost to its logical conclusion. The Acts have differentiated between taxes and duties: taxes payable on returns relate to transactions and displace the obligation to stamp an instrument, stamp duty properly so called is a duty on instruments and is levied by the *Australian Capital Territory Stamp Duty Act*. The sanction for non-payment of the duty lies, however, not in the invalidity of the instrument, as would traditionally have been the case (indeed the Act is silent on this point), but in the personal liability to pay the duty. [52]

Although originally the stamp duty legislation in the Australian Capital Territory did not provide for invalidity of an instrument for failure to stamp, this sanction was introduced into the Territory legislation in 1990 and applies to instruments executed on or after 25 June 1990.[53]

The sanction of invalidity has been used by purchasers of property, who have entered into an otherwise validly binding contract, as a defence to an action for specific performance. It became common for purchasers, who were personally liable to pay the duty, to neglect to do so. Vendors, who in New South Wales had no personal liability to pay, could only enforce the contract if they voluntarily paid the duty and then sought to recover the amount from the purchaser. If the purchaser was unable to pay, the vendor remained out of pocket. As a consequence, the Act was amended in New South Wales[54] to allow an instrument to be tendered as evidence on behalf of a party who is not primarily liable to duty if the court is satisfied that the party will inform the Chief Commissioner of who is primarily liable to duty and will lodge the instrument with the Chief Commissioner. The amendment does not apply however to loan securities which are insufficiently stamped.

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52 Note 1 *supra* at viii-ix.

53 *Stamp Duties and Taxes Act* 1987 (ACT), s 13A.

54 Section 29(4) of the Act, inserted by the *Stamp Duties (Miscellaneous Amendments) Act* No 95 1990 (NSW), s 3 and Sch 1(9).

XIV. THE POSITION UNDER THE REWRITE

The legislative scheme proposed to be adopted in relation to the Rewrite, as already noted, follows to some extent the scheme of the ACT and Northern Territory legislation. It is proposed that there will be a "*Duties Act*" setting out the circumstances when duty will be payable and a separate *Taxation Administration Act* dealing with the making of assessments, lodgement of returns, objections, appeals, refund of duty, penalties etc.

The proposed Rewrite *Taxation Administration Act* scheme of penalties adopts the dual scheme presently contained in the Act, ie unenforceability and a monetary penalty. The monetary penalty provisions however follow the scheme of penalties in the *Income Tax Assessment Act* 1936 (Cth) with a late lodgement/payment component and a penalty (based on culpability) component.

XV. CONCLUSION

In an attempt to cope with changing commercial business practices, the States and Territories have in the past grafted "claytons contract" provisions onto legislation the principal focus of which is to impose duty on commercial instruments . The Rewrite reverses this emphasis. As with the claytons contract provisions presently in the Act, the form of the duty payable on acquisitions will generally remain a duty imposed on an instrument. Duty will be required to be paid however whenever a relevant transaction of acquisition is entered into which results in property, being transferred to, vested in or accruing to a person.

In many respects, as presently drafted, the provisions of the Rewrite will have broader application than the provisions of the Act. At least some of the anomalies in the Act will, however, be removed and, to the extent that even a limited degree of legislative uniformity in the participating States and Territories is achieved (one of the expressed aims of the Rewrite), the Rewrite might be considered long overdue and will be a worthwhile exercise.