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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 amongst the State jurisdictions and expresses the hope that a narrower tax base, a consequence of tax reform, may well return us to the process of consistency of application 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 stamp duty base will increase the relative emphasis on the imposition of duty on dealings in land. This is likely to refocus attention on matters concerning indirect dealings in land. In particular, there is scope in the future for re-examination of the ability of the States and Territories to tax dealings in land-holding entities that are otherwise unconnected with the taxing jurisdiction. There will also be increased pressure on both general and specific anti-avoidance provisions in order to protect a narrowing tax base.

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[1] This process (the "Rewrite") flowed from the release in 1995 of an exposure draft published for discussion purposes by the revenue offices of a number of States and the Australian Capital Territory.

[2] WDM Cannon, (1996). "Fundamental Principles of Stamp Duty" 19(1) UNSWLJ 1.

Whether or not the pursuit of uniformity will be forgotten in this process remains to be seen. However, it is notable that the greatest steps toward uniformity have been made in relation to duties that are being abolished and there are still fundamental differences between the jurisdictions in relation to the taxation of dealings in land and the anti-avoidance mechanisms that support such taxation.

While some reference will be made to other States and Territories, for the sake of brevity when specific matters are discussed the main focus will be on the position in New South Wales.

THE REWRITE AND SUBSEQUENT CHANGES TO THE TAX BASE

The process of rewriting stamp duties laws undertaken by a number of jurisdictions gathered momentum in the mid-1990s. In 1995 an exposure draft was released by the various revenue offices of New South Wales, Victoria, South Australia, Tasmania and the Australian Capital Territory. This Rewrite exposure draft recognised that traditional stamp duties on instruments may be problematic in the context of the increasing volume of transactions undertaken without paper documentation. The benefits of moving toward a more uniform approach to duties was also apparent, although it was clear from the start that not all jurisdictions were keen to participate in the process.

Following release in 1997 of a second exposure draft of Rewrite Duties legislation in New South Wales, the *Duties Act 1997* (NSW) based on that exposure draft was introduced. Similar (but not identical) Duties Acts were subsequently enacted in the Australian Capital Territory, Victoria and Tasmania.[3]

Queensland also followed with its own version in 2001.[4] Western Australia, South Australia and the Northern Territory did not enact new Duties Acts. Rather, they retained their existing stamp duty legislation, although they introduced a number of amendments, some of which had the aim of achieving consistency across the various jurisdictions.[5]

To some extent the Rewrite process was overtaken by the introduction of GST and the agreement between the Commonwealth and the States and Territories dealing with the narrowing of the stamp duty base by the abolition of duty on a number of dealings. The agreement between the Commonwealth and the States and Territories, in the form of the Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations (the “Intergovernmental Agreement”),[6] provides for the distribution to the States of revenue raised by the Commonwealth from the collection of GST. It also has

[3] *Duties Act 1999* (ACT); *Duties Act 2000* (Vic); *Duties Act 2001* (Tas).

[4] *Duties Act 2001* (Qld).

[5] Amendments made for the purpose of achieving consistency related principally to mortgage duty and hire of goods duty.

[6] The text of the Intergovernmental Agreement can be found in Schedule 2 of the *A New Tax System (Commonwealth-State Financial Arrangements) Act 1999* (Cth). While this Act purports to give effect to the Intergovernmental Agreement (in fact it states that it is the “intention” of the Commonwealth to comply with, and give effect to, it: see section 10), there are significant doubts about its legal enforceability by any party: see generally Saunders, (2000) “Federal Fiscal Reform and the GST” 11 *Public Law Review* 99.

the aim of "the achievement of a new national tax system, including the elimination of a number of existing inefficient taxes which are impeding economic activity".[7]

Under the Intergovernmental Agreement, the States and Territories agreed to abolish stamp duties on quoted marketable securities by 1 July 2001.[8] All jurisdictions have abolished this duty and financial institutions duty (if previously imposed). It was also agreed that the tax, or similar taxes, would not be reintroduced in the future. Obligations in relation to some other heads of stamp duty are more vague. It was agreed that the Ministerial Council, a body formed to oversee the operation of the Intergovernmental Agreement,[9] would:

> by 2005 review the need for retention of stamp duty on non-residential conveyances; leases; mortgages, debentures, bonds and other loan securities; credit arrangements, instalment purchase arrangements and rental arrangements; and on cheques, bills of exchange, promissory notes; and unquoted marketable securities.[10]

The response of various governments to the "review" of these taxes has not been uniform. The Commonwealth has expressed the view that the States and Territories are obliged to abolish these taxes. It has stated:

> The reason for agreeing to a review of these taxes, rather than setting a firm date for their abolition, reflected uncertainty in 1999 about when GST revenue would be sufficient to fund their abolition. It was understood that if GST revenue proved to be sufficient at the time of the review, the states would abolish these stamp duties.[11]

At a meeting of the Ministerial Council on 23 March 2005, the Commonwealth proposed a timetable for the abolition of the various duties with almost all to be removed by 1 July 2006.[12] On 20 April 2005, all States and Territories except New South Wales and Western Australia made a "counter-offer" which proposed a slower and more flexible abolition of the taxes.[13] The timetable differs for each jurisdiction but involves the removal by 2010-2011 of the taxes reviewed under the Intergovernmental Agreement.[14] The one exception is the limited removal of duty on non-residential conveyances with the maintenance by the States and Territories of duty on the real property component of business sales.[15] Some time after the announcements by other States and Territories, Western Australia agreed to abolish a

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[7] See clause 2(i) of the Intergovernmental Agreement.

[8] See clause 5(vi) of the Intergovernmental Agreement. The States and Territories also agreed to abolish bed taxes and financial institutions duty by 1 July 2001 and debits tax by 1 July 2005.

[9] See clauses 40 and 42 of the Intergovernmental Agreement. Membership of the Ministerial Council comprises the Treasurers of the Commonwealth, States and Territories (or their designated representatives): clause 41 of the Intergovernmental Agreement.

[10] Clause 5(vii) of the Intergovernmental Agreement.

[11] Commonwealth of Australia, *2005-06 Budget Paper No 3: Federal Financial Relations 2005-06*, p 20.

[12] Ibid at 20-21.

[13] New South Wales, *Budget Paper No 2 Budget Statement 2005-06*, p 8-11.

[14] Australian Capital Territory, *2005-06 Budget Paper No. 3: Overview* , p79-81.

[15] The Australian Capital Territory has stated that "[w]ith respect to stamp duty on business conveyances of real property, on both administrative and public policy grounds, all States have stated that they do not support having different treatment of residential and business property": Australian Capital Territory, *2005-06 Budget Paper No. 3: Overview* , p 81. One must also assume that the effect on revenue is a consideration.

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.
VIC	Abolished in Victoria on 1 July 2004: *Duties Act 2000* (Vic) s148A.
QLD	Mortgage duty will be phased out by being reduced by 50% from 1 January 2008 with complete abolition from 1 January 2009: see Queensland Government, *State Budget 2005-06 Budget Strategy and Outlook Budget Paper No 2*, p81.
WA	Mortgage duty will be phased out by being reduced by 50% from 1 July 2006 with complete abolition from 1 July 2008: WA Office of State Revenue, *Circulars 83 & 84*, April 2006.
SA	Mortgage duty is being phased out by 1 July 2009 through a combination of reductions of the tax base and changes to the rate: see RevenueSA, *Stamp Duties Circular No 255: State Budget 2005-2006.*
TAS	Mortgage duty is to be reduced by 50% on 1 July 2006 and abolished completely on 1 July 2007: see Parliament of Tasmania, *Budget Overview 2005-06 Budget Paper No 1*, p119.
ACT	In the ACT duty is only charged on mortgages if it is chargeable under another head of duty (see *Duties Act 1999* (ACT) s174) and on 18 August 2003 the ACT Government formally abandoned its plans to introduce a comprehensive mortgage duty.
NT	The Northern Territory does not impose stamp duty on mortgages.

[16] See Government of Western Australia Media Statement 21 March 2006 (Alan Carpenter MLA and Eric Ripper MLA).

[17] This included television advertisements and full-page newspaper advertisements in which the Commonwealth accused New South Wales of "double taxation": see, for example, Sydney Morning Herald, Friday March 31, 2006, p 6.

[18] New South Wales, *Budget Paper No 2 Budget Statement*, 2006-07, p 8-17.

[19] Including duty in relation to installment purchase arrangements.

[20] Queensland will abolish credit business duty on 1 January 2006: see Queensland Government, *State Budget 2005-06 Budget Strategy and Outlook Budget Paper No 2*, p81; the ACT will abolish duty on credit arrangements by 1 July 2007: Australian Capital Territory, *2005-06 Budget Paper No. 3: Overview* , p81; New South Wales will abolish duty on credit arrangements on 1 July 2007: 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, *State Budget 2005-06 Budget Strategy and Outlook Budget Paper No 2*, p81.
WA	Hire of goods duty is to be abolished from 1 January 2007: WA Office of State Revenue, *Circular 84*, April 2006.
SA	Rental business duty to be phased out by being reduced by one third on 1 July 2007, one third again on 1 July 2008 and removed completely on 1 July 2009: see RevenueSA, *Stamp Duties Circular No 255: State Budget 2005-2006.*
TAS	Rental business duty was abolished on 1 July 2002: *Revenue Legislation (Miscellaneous Amendments) Act 2002* (Tas) s23.
ACT	Hire of goods duty will be abolished by 1 July 2007: Australian Capital Territory, *2005-06 Budget Paper No. 3: Overview*, p81.
NT	Hire of goods duty will be abolished from 1 July 2007. Northern Territory, *Fiscal and Economic Outlook 2005-06 Budget Paper No.2*, p64.

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*, p 8-17.
VIC	Abolished from July 2002: *Duties Act 2000* (Vic) s7 (3A).
QLD	To be abolished from 1 January 2007: see Queensland Government, *State Budget 2005-06 Budget Strategy and Outlook Budget Paper No 2*, p81.
WA	Duty on unquoted shares was abolished from 1 January 2004.
SA	To be halved by 1 July 2009 with complete abolition on 1 July 2010: see RevenueSA, *Stamp Duties Circular No 255: State Budget 2005-2006.*
TAS	Duty on marketable securities was abolished on 1 July 2002: *Revenue Legislation (Miscellaneous Amendments) Act 2002* (Tas) s5.
ACT	To be abolished by 1 July 2010: Australian Capital Territory, *2005-06 Budget Paper No. 3: Overview*, p81.
NT	Abolished from 1 July 2006. Northern Territory, *Fiscal and Economic Outlook 2005-06 Budget Paper No.2*, p64.

TABLE 5: CHANGES TO DUTY ON SALE OF BUSINESS ASSETS (OTHER THAN REAL PROPERTY)

JURISDICTION	CHANGES
NSW	Duty to be abolished on 1 July 2012: New South Wales, *Budget Paper No 2 Budget Statement 2006-07,* p 8-17.
VIC	Duty not charged on business assets (although attempts have been made to build the value of goodwill into the value of real property).
QLD	Duty to be reduced by 50% on 1 January 2010 and removed completely on 1 January 2011: see Queensland Government, *State Budget 2005-06 Budget Strategy and Outlook Budget Paper No 2*, p81.
WA	Duty on the sale of non-real business property will be abolished from 1 July 2010: WA Office of State Revenue, *Circular 84*, April 2006.
SA	Duty on non-realty conveyances will be reduced by 50% on 1 July 2009 and abolished completely on 1 July 2010: see RevenueSA, *Stamp Duties Circular No 255: State Budget 2005-2006.*
TAS	To be abolished on 1 July 2008: see Rental business duty was abolished on 1 July 2002: see Parliament of Tasmania, *Budget Overview 2005-06 Budget Paper No 1*, p111-112.
ACT	To be abolished by 1 July 2006: Australian Capital Territory, *2005-06 Budget Paper No. 3: Overview*, p81.
NT	To be abolished from 1 July 2009: Northern Territory, *Fiscal and Economic Outlook 2005-06 Budget Paper No.2*, p64.

The abolition of various duties may give rise to some technical questions on the timing of transactions. The removal of duties normally requires transitional measures and many transitional measures in this context are based on whether a transaction was performed (or agreement to perform the transaction was entered into) before a certain date. With the complexity and lack of uniformity in the program for abolition it can be expected that some disputes may arise about when certain transactions are entered into. Experience suggests that, even where a tax has been abolished and no general principle needs to be settled, state revenue authorities may conduct post-abolition audits and even litigate vigorously to claim amounts alleged to be owed for duty that has been abolished.[21]

Notable for its absence from this program of abolition is duty on the transfer or conveyance of real property. The states and territories derive a significant proportion of their taxation revenue from duty on dealings with interests in real property.[22] The program of changes to stamp duty that flow indirectly from the introduction of GST will only increase this proportion. As a result, it is to be expected that as the tax base of stamp duties narrows, duty on land transactions will become increasingly important to the states and territories.

AN INCREASING EMPHASIS ON DEALINGS IN LAND

If, as is expected, dealings in land will resume a greater relative significance in stamp duties, it is appropriate to contemplate the challenges that this might cause. Simple transfers of freehold interests are relatively easy to tax as systems of title by registration can act as powerful mechanisms to aid the collection of tax. However, a range of measures has grown in order to support the collection of tax on dealings in land. Perhaps most notable is "land rich duty" which applies to some dealings in land-holding entities. Other mechanisms include enactment of specific anti-avoidance provisions (some of which are discussed below) and, in some jurisdictions, general anti-avoidance rules. It is likely that these measures will be placed under pressure in order to prevent erosion of the States' and Territories' narrowing tax base.

The remainder of this article discusses some fundamental issues that may arise in the future in relation to land rich duty and anti-avoidance measures that support the collection of duty on dealings in land. It is not intended to be a comprehensive analysis of the detail of the provisions, but a more general discussion of the structure of stamp duties and some broad issues that may become important.

STATE AND TERRITORY LAW-MAKING POWERS: QUESTIONS ABOUT THE VALIDITY OF LAND RICH DUTY

Each State and Territory has broad law-making powers. These powers are expressed in various formulae such as the power to make laws for the “peace, welfare, and good government”,[23] the “peace, order, and good Government”[24] or simply laws “in and for”[25] the relevant jurisdiction. These words all describe the plenary powers of the various legislatures and are not read as general words of limitation.[26] The power allows the States and Territories to make law that has extra-territorial operation[27]

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[21] For an example of this, see the case of *ANZ Banking Group Ltd v Chief Commissioner of State Revenue*, [2005] NSWSC 960, which deals with liability to financial institutions duty in New South Wales.

[22] In New South Wales for the financial year 2005-06 it is expected that transfer duty will account for 22 per cent of total tax revenue: New South Wales, *Budget Statement 2005-06*, 3-11. It would be expected that the vast majority of this transfer duty arises from dealings in land.

[23] See the *Constitution Act 1902* (NSW), s5.

[24] See the *Constitution Act 1889* (WA), s2.

[25] See the *Constitution Act 1975* (Vic), s16.

[26] *Mobil Oil Australia Pty Limited v Victoria* (2002) 211 CLR 1 at 33. In *Union Steamship Company of Australia Pty Limited v King* (1988) 166 CLR 1 at 9, the High Court notes that the first two formulations are "indistinguishable". In *Mobil Oil Australia Pty Limited v Victoria* (2002) 211 CLR 1 at 54, Kirby J stated that nothing turns on the difference between any of the formulations.

[27] See the *Australia Act 1986* (Cth), s2(1) and *Australia Act 1986* (U.K.), s2(1), although it is questionable whether in this respect these acts did any more than reflect the position at common law: see the

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):

> The power to make laws for the peace, order and good government of a State does not enable the State Parliament 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 concerned therein 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 in presence within the territory, residence, domicile, carrying on business there, or even remoter connections.

When applying the limitation in the context of taxation it is important to recognise that not only must there be some form of territorial nexus, but the matter that forms the basis of this nexus must be relevant to the imposition of the tax.[29] Questions of degree may be relevant in finding a sufficient nexus but, once a sufficient nexus is found, the legislature is not limited in its powers to an exercise of power that is proportionate to the degree of such nexus.[30]

The refocus of stamp duties on dealings involving real property invites a few comments on these principles. Clearly, if a State or Territory imposes duty on the transfer or conveyance of land in that State or Territory, there will be sufficient territorial nexus.[31] This will be the case regardless of the place of residence of the vendor or purchaser. However, in relation to less direct dealings involving land the matter is far from clear. The most serious constitutional difficulties arise in the context of “land-rich duty” such as that imposed under Chapter 4A of the *Duties Act 1997* (NSW).

In general terms, land rich duty is imposed on the transfer of shares in an unlisted company that holds land (whether directly or through intermediate entities). It may also be imposed on the transfer of units of a unit trust where land is held on trust. Thresholds may apply in respect of both the extent of the interest held or transferred[32] and the extent of real property held by the company or trustee (in its capacity as trustee of the relevant unit trust).[33] Duty is payable not on the value of the share or unit transferred, but based on a proportion of the unencumbered value of the land holdings

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comments of the High Court in *Union Steamship Company of Australia Pty Limited v King* (1988) 166 CLR 1 at 14.

[28] *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1937) 56 CLR 337 at 375; *Union Steamship Company of Australia Pty Limited v King* (1988) 166 CLR 1 at 14. It may be that this territorial limitation stems from the description of the States’ and Territories’ powers or it may flow from “the federal structure of which each State is a part”: *Mobil Oil Australia Pty Limited v Victoria* (2002) 211 CLR 1 at 34.

[29] *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1937) 56 CLR 337 at 375.

[30] Ibid.

[31] See *Johnson v CSD* [1956] AC 331 at 352.

[32] See, for example, the definition of “significant interests” in the *Duties Act 1997* (NSW) s163D.

[33] See, for example, the definition of “land rich” in the *Duties Act 1997* (NSW) s163B.

of the company or trustee.[34] The tax was introduced as an "anti-avoidance" measure[35] to prevent the minimisation of duty by the sale of land-holding entities rather than the land itself.[36]

Land rich duty is not inherently problematic in relation to territorial nexus. However, there are potential difficulties where a State or Territory seeks to impose duty on the sale of shares in a land-holding company where the company was not incorporated in the taxing jurisdiction and neither transferor nor transferee has a connection with that jurisdiction. The holding of property in a jurisdiction clearly provides sufficient territorial nexus to tax the property holder on a dealing with an interest in that property. However, in the situation contemplated, the person being taxed (the purchaser of shares) does not have any legal or beneficial interest in any real property held by the company in the taxing state.[37] If the shares cannot be said to have a connection with the taxing state,[38] and neither party to the dealing is resident or domiciled in the taxing state,[39] then the connection with the taxing state is remote. While there may be real property held by the company in the taxing jurisdiction, it must be remembered that it is a dealing with the share rather than the real property that is the formal subject matter of taxation.

A starting point for analysis of territorial nexus in this context is the case of *Commissioner of Stamp Duties (NSW) v Millar* (1932) 48 CLR 618. That case dealt with the validity of New South Wales provisions that sought to impose death duty on shares where, at the time of the shareholder's death, the company carried on certain businesses in New South Wales.[40] The court considered whether there was sufficient territorial nexus to support the legislation in circumstances where the testator was domiciled outside New South Wales, the company was incorporated outside New South Wales and the legal situs of the shares was outside New South Wales. The provision sought to tax the full value of the shares and not merely a proportion of the value based on the extent or value of the business carried on in New South Wales.

[34] See, for example, *Duties Act 1997* (NSW) s163S (1).

[35] Although note the comments in Hill, *Duties Legislation*, at [8.0020] that describe the duty as a "so-called 'anti-avoidance' measure" and the statement that "[t]he avoidance which the legislature saw fit to eliminate had been known and accepted for centuries".

[36] Duty might be minimised both by the fact that a lower rate may apply to sale of securities than to land and the fact that duty in relation to the sale of land is based on unencumbered value, yet amounts owed by a company may operate to reduce the dutiable value of the company's shares: see Hill, above n 33 at [8.0020].

[37] *Macaura v Northern Assurance Co* [1925] AC 619; *Commissioner of Stamp Duties (NSW) v Millar* (1932) 48 CLR 618 at 632. This reasoning may not apply in relation to unit trusts as a unit-holder typically will have a proprietary interest in the trust property: *Charles v Federal Commissioner of Taxation* (1954) 90 CLR 598 at 608.

[38] Such a connection might arise if the shares can be said to be property in the state, perhaps due to the location of the share register. A connection might also arise on the basis that the corporation was formed in the relevant state (see *Myer Emporium Ltd v CSD* (1967) 68 SR (NSW) 220), although since the referral to the Commonwealth of power over incorporation, this matter has been complicated a little.

[39] As is pointed out in *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1937) 56 CLR 337 at 375, mere residence or domicile may be sufficient to allow a state to tax any property held by a person, whether that property is within or without the state.

[40] (1932) 48 CLR 618 at 626.

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 Legislature can disregard the legal character of the relation between the assets of the company and the shareholders, and can fasten upon the actual benefit or economic advantage which the shareholder derives from property situated in or operations conducted in the State. But the subject of taxation selected by the present enactment is not this advantage or benefit. The subject is the entire value of the share.[46]

When the subject matter of the tax is framed in this way it suggests a difference between land rich provisions and the death duty analysed in *Millar*.[47] This raises the difficult question of whether the subject matter in this context should be analysed on the basis of the event that attracts the imposition of tax or the method that is used to measure the amount of tax imposed. In form, land rich duty is a tax on the transfer of shares or units. However, arguably the calculation of taxable value makes it in substance a tax on indirect interests in land.

Finally, a number of comments in more recent cases suggest that any territorial nexus requirement will be construed very broadly.[48] While the matter is raised in contexts

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[41] Ibid at 631.
[42] Ibid at 636.
[43] Ibid at 632.
[44] Hill, above n 33 at [8.0030].
[45] (1932) 48 CLR 618 at 629.
[46] (1932) 48 CLR 618 at 632.
[47] Hill, above n 33, characterises the issue as "whether the difference of subject matter suffices to distinguish *Millar*": at [8.0030].
[48] Hill, above n 33 at [8.0030].

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 challenge of a State or Territory's law-making power on this basis.[52] However, it is clear that the difficult question of whether there is a sufficient "real connection" remains.[53]

The validity of land rich duty is not put beyond doubt by *Millar*. It may be that the High Court would hold that the measures are constitutional because the valuation for taxation purposes based on land in the taxing jurisdiction provides a sufficiently "real connection". However, the matter is far from settled and ripe for litigation. In particular, there must be questions about the validity of the provisions where the putative land rich entity has no real interest in land in a particular state but is merely the object of a discretionary trust. In such a situation the entity may be deemed to own the land entirely despite having no real interest in it.[54] This would seem to divorce further the subject matter of land rich duty and the connection with a particular State or Territory.

If it is found that the provisions are not valid in certain contexts, then this raises the possibility of structuring acquisitions in a manner that may avoid land rich duty. In turn, this raises the difficult issue of the scope of an individual jurisdiction's anti-avoidance measures (if any) to apply to activities deliberately undertaken outside the jurisdiction in order to avoid duty.

ANTI AVOIDANCE PROVISIONS IN STAMP DUTY LEGISLATION

As noted by the late Justice Graham Hill in a paper titled "Countering Avoidance of Stamp Duty" presented by His Honour at the Fifth Annual State's Taxation Conference conducted by the Taxation Institute of Australia:[55]

> Of the various state taxes enacted in Australia perhaps the most complicated and the most open to avoidance has been stamp duty. Although payroll tax produces a greater amount of revenue, indeed in the order of more than 40% of State Revenue outside of the GST state allocation, it is a less complicated

[49] *Union Steamship Company of Australia Pty Limited v King* (1988) 166 CLR 1 at 14. Here the High Court was expressing agreement with the decision of Gibbs J in *Pearce v Florenca* (1976) 135 CLR 507 at 518. Elsewhere in Gibbs J's judgment the test is stated in terms that legislation will be valid if it "operates on some circumstance which really appertains to the State": (1976) 135 CLR 507 at 517.
[50] (2002) 211 CLR 1 at 23 per Gleeson CJ, at 34 per Gaudron, Gummow and Hayne JJ, at 59 per Kirby J.
[51] *Lipohar v The Queen* (1999) 200 CLR 485 at 547.
[52] Ibid at 548. See also *Mobil Oil Australia Pty Limited v Victoria* (2002) 211 CLR 1 at 51.
[53] *Mobil Oil Australia Pty Limited v Victoria* (2002) 211 CLR 1 at 34.
[54] See, for example, *Duties Act 1997* (NSW) s163U.
[55] Hilton Hotel, Adelaide on 29 July 2005.

> 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 stamping a return which generally is deemed to be the instrument effecting the transaction.

The second example given by His Honour relates to the purchase of land rich entities discussed above (ie a company or unit trust holding land) rather than the direct purchase of the land. This results in a lower marketable security rate of duty being payable rather than the higher conveyance rate, again prompting the legislatures across Australia to enact "land rich" legislation to require duty to be paid where, at least in most jurisdictions, the land represents a significant proportion of the assets of the entity.

In addition to these responses by the state and territory legislatures aimed at requiring duty to be paid on transactions as well as instruments and, in circumstances which might otherwise be regarded as falling outside the stamp duty net, specific anti avoidance provisions had been introduced from time to time to counter other avoidance techniques. Examples of such techniques are transactions designed to reduce the value of dutiable property the subject of a dutiable transaction. Subsection (1) of section 24 of the *Duties Act 1997* (NSW) provides in relation to such transactions that in determining the dutiable value of dutiable property for purposes of Chapter 2 of that Act:

> any interest, agreement or arrangement (other than an encumbrance) granted or made in respect of the dutiable property that has the effect of reducing the dutiable value is to be disregarded, subject to subsection (2).

Subsection (2) provides that an interest, agreement or arrangement referred to in subsection (1) is not to be disregarded if the Chief Commissioner is satisfied (having regard to various matters set out in subsection (3)) that it was not granted or made as a part of an arrangement or scheme with a collateral purpose of reducing the duty otherwise payable on the dutiable transaction.

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 interest or option holder (assuming the option is specifically enforceable) would constitute interests in land, the existence of the option, lease or life interest would not be said to be made "in respect of the dutiable property" being the reversion, remainder interest or property the subject of the option. However, as the section and similar predecessor sections were introduced to specifically cover these types of arrangements, it seems that the section would operate in these cases unless the Commissioner is satisfied in terms of subsections (2) and (3).[56]

Another specific anti-avoidance provision inserted in Duties legislation is designed to counter splitting of transactions to prevent advantage being taken of lower rates of duty applying to transactions having lower values or to reduce the transaction value below the threshold for imposition of duty.[57] Similar provisions exist allowing aggregation of acquisitions of interests in land rich entities, not only by related entities but, for example in New South Wales, also by persons who acquire interests under transactions that:

> together form, evidence, give effect to or arise from what is substantially one arrangement between the acquirers…[58]

Despite the expansion of the scope of application of stamp duty legislation to require duty to be paid on transactions as well as instruments and, despite specific amendments being introduced to counter perceived avoidance of duty, taxpayers continue to find ways of structuring transactions so that they fall outside the legislative provisions.[59]

This prompted Justice Hill to suggest that the Offices of State Revenue should urge the Courts in Australia to reconsider whether the doctrine of "fiscal nullity" can be applied to require duty to be paid in relation to "artificially structured" transactions which would otherwise fall outside the legislative provisions.

The doctrine of fiscal nullity was originally formulated by the courts in England in relation to determining the tax consequences of transactions perceived to have been structured in a particular way solely for the purposed of reducing or deferring a tax liability which would otherwise have arisen. The doctrine (more recently described by the courts as a broad "purposive" interpretation of tax legislation, giving effect to the intention of Parliament) requires a court to ignore steps interposed in a transaction where:

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[56] Section 24 of the Duties Act 1997 (NSW) and similar previous sections were inserted to overcome the decision in *Commissioner of State Revenue v Bradney* (1996) 34 ATR 233; 96 ATC 5130 a case which involved the sale of a reversion.

[57] See for example section 25 of the *Duties Act 1997* (NSW). Originally predecessor sections allowed only aggregation of different interests in a single item of dutiable property. The section now allows aggregation of dutiable transactions relating to separate items of dutiable property.

[58] Section 163F of the *Duties Act 1997* (NSW).

[59] See for example *ISPT Nominees Pty Ltdv Chief Commissioner of State Revenue (NSW)* (2003) 53 ATR 527; 2003 ATC 4697.

(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 doctrine is limited to the court disregarding a transaction, or part of a transaction, rather than being able to reconstruct a transaction. Accordingly, in the context of any particular arrangement, even if a step, or steps, in the transaction are disregarded, a liability to duty will only arise if the steps which are not disregarded give rise to a liability to duty.[65]

Queensland has long followed a different path, having in its earlier legislation a general anti avoidance provision originally modelled on section 260 of the *Income Tax Assessment Act 1936* (Cth) (the "Tax Act") and in the *Duties Act 2001* (Qld) measures modelled on the provisions of Part IVA of the Tax Act. Victoria and the Australian Capital Territory have now also adopted their own versions of anti avoidance provisions generally modelled on Part IVA of the Tax Act. The Victorian legislature has in fact adopted two similar sets of provisions applying separately to the land rich provisions of the *Duties Act 2000* (Vic) and the other provisions of that Act. Western Australia on the other hand has adopted similar provisions but they apply only to the land rich provisions of the *Stamp Act 1921* (WA).

Hill J analyses the differences in the anti avoidance provisions adopted by the different State/Territory legislatures concluding as follows:[66]

> It is obvious that in those jurisdictions without anti-avoidance provisions there will be vulnerability to stamp duty avoidance unless the courts of those jurisdictions adopt the fiscal nullity doctrine and further that that doctrine leaves exposed, when applied, a situation where duty would be payable.
>
> In those jurisdictions with anti-avoidance provisions the question whether those provisions will apply will depend largely upon the circumstances of the particular case. Results may differ from jurisdiction to jurisdiction.

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[60] *Ingram v Inland Revenue Commissioners* [1985] STC 835.
[61] *The Collector of Stamp Revenue v Arrowtown Assets Limited* FACV No 4 of 2003.
[62] *John v FCT* 89 ATC 4101.
[63] *Peko-Wallsend Operations Ltd v Commr of State Taxation (WA)* 89 ATC 4569.
[64] (1987) 87 ATC 5064.
[65] For a more detailed discussion of this aspect see the comments of Hill J in the paper referred to at note 55.
[66] Ibid.

It is likely that specific anti-avoidance measures such as aggregation provisions and mechanisms designed to prevent the manipulation of dutiable value will continue to have a role to play in reinforcing duty on dealings in land. It is also likely that despite such specific provisions there will be perceived need for general anti-avoidance mechanisms. In jurisdictions with a general anti-avoidance rule it is unlikely that fiscal nullity will have a role to play. However, in other jurisdictions the possibility of the acceptance of the doctrine should not be ignored.

HAS THE PURSUIT OF UNIFORMITY BEEN FORGOTTEN?

The dramatic changes to the stamp duty tax base should not be allowed to overshadow the pursuit of a greater degree of uniformity of law between the States and Territories. However, there is still a significant amount of work to be done before there would be a reasonable degree of uniformity. Also, the areas in which perhaps the greatest steps toward uniformity have been made are in relation to heads of duty being abolished (such as mortgage duty). There remains significant dissonance between the various jurisdictions on fundamental matters concerning the imposition of duty on dealings in land and the supporting anti-avoidance mechanisms outlined above.

At present the scope of application of duty legislation to transactions involving dealings in interests in land varies from jurisdiction to jurisdiction. The *Duties Act 1997* (NSW) for example taxes transfers and agreements for sale of interests in dutiable property.[67] The *Duties Act 2000* (Vic) on the other hand taxes as well transactions resulting in a change of beneficial ownership of dutiable property.[68] The *Duties Act 2001* (Qld) brings to duty as well as transfers and agreements for sale of interests in dutiable property, a range of other transactions including a separate list under the heading "creation of new rights".[69] The South Australian and Western Australian Stamp Acts have persisted with the more traditional concept of "conveyances of property" as the principal transaction attracting duty.

The legislative provisions covering the creation termination and dealing with interests in trusts are also different in each jurisdiction.[70] So too provisions dealing with land rich entities, exemptions and other provisions granting relief from full duty (including corporate reconstruction provisions) and provisions dealing with securitisation of landholding interests. Most States and Territories provide full or partial relief from duty for dealings with interests in (and in some cases the establishment and termination) of listed/public/widely held/wholesale, investment vehicles (companies and trusts.) But the provisions are far from uniform.[71] As noted above, even the specific and general anti-avoidance provisions adopted by the various states and territories differ significantly. There is even the possibility that the doctrine of fiscal nullity could be found to apply in some jurisdictions but not others (as they have a general anti-avoidance rule). The consequence of these differences is that the same transaction will be taxed differently depending on the jurisdiction which asserts the

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[67] *Duties Act 1997* (NSW) s8.
[68] See *Duties Act 2000* (Vic) s7(1)(vi).
[69] See *Duties Act 2001* (Qld) s9(1)(g).
[70] For a discussion of some of the different legislative provisions dealing with the creation termination and variation of trusts see the paper presented by W Cannon on this topic at the Fifth Annual State's Taxation conference conducted by the Taxation Institute on 29 July 2005.
[71] For a discussion of some of the differences see the paper presented by Steven Stevens at the Fifth Annual State's Taxation conference conducted by the Taxation Institute on 29 July 2005.

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.