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Stamp Duty: A Reflection on the New Duties Act

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SUMMARY

A new stamp duty regime began in Queensland on 1 March 2002, with the commencement of the Duties Act 2001 (Duties Act). The Duties Act replaced the often controversial 107 year old Stamp Act 1894 (Stamp Act). There was an expectation that it would create greater certainty and fairness relative to the other Australian States and Territories (States). Five months into the new regime, some interesting points have arisen out of the operation of the Duties Act. In particular, the message for the mining and resource sector, Queensland's largest export industry, is that the changes to the law will have a significant impact on that industry, especially for transactions involving joint venture interests. This paper highlights some of the issues relevant to the mining and resource sector and contrasts some of the more significant aspects of the Duties Act with the stamp duty legislation in other Australian States.

OVERVIEW OF THE QUEENSLAND DUTIES ACT

It must be noted that Queensland is not the only State to have recently re-written its stamp duty law. Each of New South Wales, Victoria, Tasmania and the Australian Capital Territory has introduced new stamp duty legislation since 1997. Only South Australia, Western Australia and the Northern Territory are yet to modernise their stamp duty laws.

While an aim of the re-write process was to harmonise stamp duty law throughout all participating States, the reality is that such harmonisation has not been achieved in a number of significant areas

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of stamp duty law. The rates of stamp duty in each State (ranging from a maximum transfer duty rate of 3.75 percent up to 5.5 percent), the type of property liable for stamp duty (for example, trading stock is dutiable in Queensland but not in other States) and the basis upon which stamp duty is payable (for example, transfers of trust interests being dutiable on the net assets of a trust in most States but on gross assets in Queensland) are examples of this. For that reason alone, it is important when advising on transactions involving property in States outside your own jurisdiction, to consider carefully the stamp duty laws in that or those other States. On a positive note the lack of harmonisation continues to provide opportunities to structure a transaction or dealing in a matter which ensures maximum stamp duty efficiencies for that transaction.

In any case in Queensland the law of stamp duty has generally been re-organised and re-written by the new Act. The *Duties Act* uses plain language and modern concepts in an attempt to make it a more comprehensible law. It was not the government's intention to significantly change the taxing regime of stamp duty by the introduction of the new *Duties Act*. As a result, the new *Duties Act* has in fact adopted most of the known stamp duty principles that applied under the *Stamp Act*. Despite this, the new *Duties Act* has brought about some specific changes (intentional or otherwise) to Queensland's stamp duty law that will impact to varying degrees on most transactions.

At its most general level, the *Duties Act* has shifted the focus of stamp duty from instruments to transactions. This has changed one of the fundamental rules of the old regime, namely that an instrument was required before a stamp duty liability could be triggered. While this rule was eroded to some extent under the old regime, it still applied to most dealings. Therefore, if there was no written document for a transaction, there would generally be no stamp duty. This meant that some transactions could be structured in such a way that stamp duty was minimised or avoided altogether.

Except for mortgages and leases, the new *Duties Act* now catches all transactions, whether oral or in writing.[1] As an instrument is no longer required to trigger a stamp duty liability in Queensland, informal arrangements that may not have been caught under the *Stamp Act* will now be caught by the new *Duties Act*. For example, an oral declaration by a person that he or she holds property on trust for another is now subject to stamp duty under the *Duties Act*.

The numerous heads of charge under the *Stamp Act* have been re-organised and re-written into modern, plain-English heads of duty. They are:

[1] *Duties Act* 2001 (Qld), s 8.

(a) transfer duty;[2]
(b) land rich and corporate trustee duty;[3]
(c) lease duty;[4]
(d) mortgage duty;[5]
(e) credit business duty and credit card duty;[6]
(f) hire duty;[7]
(g) insurance duty;[8] and
(h) vehicle registration duty.[9]

The most obvious example of how the *Duties Act* has modernised and simplified its heads of duty is that the new transfer duty head encompasses numerous and often misunderstood heads of charge from the *Stamp Act,* including "conveyance or transfer", "settlement, deed of gift or voluntary conveyance" and "declaration of trust" as well as incorporating the partnership and business sale provisions.

It must be noted that a number of general rules remain unchanged. For instance:

(a) the rate at which transfer duty applies remains at the maximum rate of 3.75 percent[10] compared with 5.5 percent in most other States except most notably Tasmania (4.0 percent) and Western Australia (4.85 percent);

(b) taxpayers are still obliged to lodge documentation evidencing dutiable transactions within 30 days of the document being entered into.[11] This compares unfairly to most other jurisdictions where the time limit is more generous. For example:

  (i) in New South Wales, Victoria, and Tasmania taxpayers have three months to lodge dutiable documentation and pay stamp duty;

  (ii) in the Australian Capital Territory taxpayers have 90 days to lodge documentation and pay stamp duty;

  (iii) in the Northern Territory and South Australia taxpayers have 60 days and two months to lodge documentation and pay stamp duty respectively; and

2 *Duties Act* 2001 (Qld, Ch 2.
3 *Duties Act* 2001 (Qld), Ch 3.
4 *Duties Act* 2001 (Qld), Ch 4.
5 *Duties Act* 2001 (Qld), Ch 5.
6 *Duties Act* 2001 (Qld), Ch 6.
7 *Duties Act* 2001 (Qld), Ch 7.
8 *Duties Act* 2001 (Qld), Ch 8.
9 *Duties Act* 2001 (Qld), Ch 9.
10 *Duties Act* 2001 (Qld), s 3.
11 *Duties Act* 2001 (Qld), s 19.

(iv) in Western Australia taxpayers have three months to lodge documentation and another three months to pay the duty; and

(c) dealings in trusts which are liable for transfer duty (for example, transfers of units in a unit trust) continue to be assessed based on the gross or unencumbered value rather than the net value of the assets of the trust.[12] This can be contrasted with other States such as New South Wales where stamp duty, if payable, is only payable on the value of the net assets of the trust.

TRANSFER DUTY

Transfer duty is by far the most significant head of stamp duty under the new *Duties Act* given it attracts the highest rate of stamp duty (that is 3.75 percent) and is the duty which applies to most of the various commercial and business dealings undertaken whether in the resource or other industries.

Transfer duty departs significantly from the conveyance or transfer approach adopted under the *Stamp Act*. Perhaps the biggest change introduced by the *Duties Act* is the concept of dutiable transaction. As a general rule, dutiable transactions are transactions or events that happen to dutiable property.[13] The most common examples of dutiable transactions are transfers [14] and agreements for the transfer of dutiable property.[15] There are though other types of dutiable transactions, such as the acquisition of new rights.[16]

Fortunately, like most other jurisdictions with new stamp duty laws, the type of property liable for stamp duty is now exhaustively defined.[17] Consequently, if the asset or other interest or valuable right involved in a dutiable transaction does not fit within the definition of "dutiable property", then stamp duty will not be payable on that dutiable transaction.

It is important to note that dutiable property is by definition extended to include an interest in dutiable property.[18] By operation of the *Acts Interpretation Act* 1954[19] (AIA), an interest in relation to

[12] *Duties Act* 2001 (Qld), s 63.
[13] *Duties Act* 2001 (Qld), s 9.
[14] *Duties Act* 2001 (Qld), s 9(1)(a).
[15] *Duties Act* 2001 (Qld), s 9(1)(b).
[16] *Duties Act* 2001 (Qld), s 9(1)(g).
[17] *Duties Act* 2001 (Qld), s 10.
[18] *Duties Act* 2001 (Qld), s 10(2).
[19] *Acts Interpretation Act* 1954 (Qld), s 36.

property includes a legal or equitable estate in that property or a right, power or privilege over that property.

Dutiable property is defined for the purposes of the *Duties Act* to include items normally recognised as property at general law and, in some cases, extends beyond the general law concept of property. The *Duties Act* lists dutiable property as follows:

(a) land in Queensland;
(b) a transferable site area;
(c) a Queensland marketable security;
(d) an existing right;
(e) a Queensland business asset; and
(f) a chattel located in Queensland if, together with any property mentioned in cll 3.5(a) to 3.5 (d), it is the subject of a dutiable transaction.[20]

Of these various classes of dutiable property, land, existing rights and Queensland business assets are perhaps the most relevant to the resource sector. The following considers each of those items of dutiable property as well as the concept of new rights in the context of assets and transactions commonly encountered in the resource industry.

Land

The definition of land in the *Duties Act* is very brief and, subject to some specific exemptions, includes airspace above land and coastal waters.[21] The AIA provides a more comprehensive definition of land which can be read with the *Duties Act* definition:

> "'Land' includes messuages, tenements and hereditaments, corporeal or incorporeal, of any tenure or description, and whatever may be the interest in the land."[22]

For the purpose of this paper exploration permits, mining leases and mining lease applications are considered in the context of whether or not they fall within this broad definition.

The Commissioner's practice under the old regime was to exclude from stamp duty conveyances and transfers of exploration and prospecting permits issued under the *Mineral Resources Act* 1989 on the basis that they were not property despite there being clear authority to suggest that exploration permits have property rights (see *Commonwealth v Western Mining Corporation*[23]). The new *Duties Act* valiantly attempts not to change that practice. As part of that process the *Duties Act* specifically excludes from the definitions of "Land":

[20] *Duties Act* 2001 (Qld), s 10.
[21] *Duties Act* 2001 (Qld), s 6.
[22] *Acts Interpretation Act* 1954 (Qld), s 36.
[23] (1996) 136 ALR 353.

(a) an exploration or prospecting permit under the *Mineral Resources Act* 1989;
(b) an authority to prospect under the *Petroleum Act* 1923; and
(c) an exploration permit under the *Petroleum (Submerged Lands) Act* 1982.

While this is consistent with the old regime, it is out of step with other jurisdictions which assess stamp duty on transfers of exploration licences and permits. For instance:

(a) in New South Wales, stamp duty is payable on exploration licences issued under the *Mining Act* 1992;
(b) in Victoria, stamp duty is payable on exploration licences issued under the *Mineral Resources Development Act* 1990;
(c) in Western Australia, stamp duty is payable on exploration licences issued under the *Mining Act* 1978 ;
(d) in other jurisdictions for example Tasmania, stamp duty is payable on a mineral tenement (for example, an exploration licence) within the meaning of the *Mineral Resources Development Act* 1995.

Mining leases issued under the *Mineral Resources Act*, while not defined to be specifically within the definition of "land", would be land because at the very least mining leases provide a legal interest in land. Mineral development licences which issue under the *Mineral Resources Act* 1989 are more than likely to fall within the definition of land. In any case, even if licences of that nature are not interests in land they are likely to be existing rights (see discussion under the heading "Existing Rights" below).

In Queensland mining lease applications may be transferred in accordance with the provisions of the *Mineral Resources Act* 1989. In other States, for example, New South Wales and Western Australia, it does not seem that mining lease applications can be transferred. Over the years an issue arose in Queensland under the *Stamp Act* as to whether the transfer of a mining lease application was liable for stamp duty as a conveyance or transfer of property. This issue was finally put to rest by the Queensland Court of Appeal in the decision of *Arco Resources Ltd v Commissioner of Stamp Duties*.[24] In that case it was held that a mining lease application was property for the purposes of the *Stamp Act*, but did not confer on the holder an estate or interest in land.

This position is generally well accepted such that, if the mining lease application or, for that matter, a mineral development licence application, stemmed from an exploration permit issued under the

[24] (1996) 1 Qd R 1.

Mineral Resources Act, then that application would not fall within the general definition of land or an interest in land. However, there exists a school of thought that suggests a mining lease application will be an interest in land where the mining lease application stems from a mineral development licence.

Existing Rights

The exhaustive definition of an existing right, to the extent that it is relevant for the resource sector, includes two existing rights:

(a) existing statutory licences other than those required to carry out an activity for gain or reward (which are treated as Queensland business assets); and
(b) rights under a joint venture agreement if the joint venture has dutiable property not solely comprising chattels.[25]

Statutory licence is specifically defined to mean a licence, permit or other authority issued or given under a Queensland or Commonwealth Act.[26] Consistent with the intention not to apply stamp duty to dutiable transactions in relation to exploration permits, the definition specifically excludes exploration and prospecting permits under the *Mineral Resources Act* 1989, authorities to prospect under the *Petroleum Act* 1923 and exploration permits under the *Petroleum (Submerged Lands) Act* 1982.

There are obviously a number of other permits and authorities granted pursuant to State and Commonwealth legislation which would be considered statutory licences. For example, an environmental authority issued under the *Environmental Protection Act* 1994 enabling prospecting, exploring or mining activities to take place on land to which a mining tenement relates fits within the definition of a statutory licence. Therefore transfers of such an authority would be a dutiable transaction in relation to dutiable property even though transfers of the mining tenement itself would not.

It is at least uncertain whether a mining lease application is a statutory licence as the nature and tenure of a mining lease application would not seem to support the proposition that it is a licence, permit or other authority. Stamp duty was payable in Queensland under the old regime on the transfer of a mining lease application and that in itself lends support to the suggestion that it may in fact be considered a statutory licence and therefore dutiable property. At noted above, the position in other States, such as New South Wales and Western Australia, seems to be that mining lease applications are not able to be transferred and consequently transfer duty does not become an issue.

[25] *Duties Act* 2001 (Qld), s 6.
[26] *Duties Act* 2001 (Qld), s 6.

An existing right is defined to include existing rights under a joint venture with dutiable property. That means that if a joint venture has dutiable property, the transfer of an interest in a joint venture will now be dutiable as one single transaction of dutiable property. This will be the case even though some of the underlying assets of the joint venture are not dutiable property. It follows that on the assignment of an interest in a joint venture, exploration permits and other assets which are not dutiable property will be liable for stamp duty if they form the subject matter of the joint venture which includes other (dutiable) property. While this is inconsistent with the stamping practices under the old regime, it seems to be an intended consequence. In fact the following question and its answer can be found on the Queensland Office of State Revenue website:

> "Q5.5 - What is [the] dutiable value of an existing right that is a joint venture interest, where the joint venture has both dutiable and non dutiable property (eg an exploration permit)? Does the value of the JV interest include the value of the exploration permit?
>
> A – Yes, just as the value of a company's share reflects the value of all the assets of the company, the value of an interest in a joint venture will reflect the value of all the assets of the joint venture."

Despite the comparisons between a shareholder's interest in a company and a joint venturer's interest in a joint venture, the Commissioner neither assesses transfers of joint venture interests at the marketable securities rate (0.6 percent) applicable to share transfers nor assesses duty based on the net asset value of the joint venture interest which is the amount upon which transfer duty on shares is assessed. Instead, stamp duty on transfers and agreements for transfers of joint venture interests are assessed on the full unencumbered value of the property held by the joint venture at the higher rate of transfer duty of 3.75 percent.

It should also be noted that the approach taken for transfers of joint venture interests is inconsistent with the approach taken under the new *Duties Act* for assessing stamp duty on transfers and acquisitions of partnership interests. Stamp duty on those transactions are calculated by reference to the full unencumbered value of the dutiable property and not all property forming the subject matter of the partnership.[27]

In light of these comments it would seem that the better approach would be to treat the contractual rights under a joint venture arrangement as dutiable property but apportion a value to those

[27] *Duties Act* 2001 (Qld), s 46.

rights in the same way as value is attributed to all other assets making up the joint venture. If that approach was adopted the value of non-dutiable property would not attract stamp duty when a joint venture interest is transferred.

Until the matter is finally resolved, assignments of joint venture interests which include Queensland dutiable property will need to be considered carefully because the current intention is for the assignment to be liable for stamp duty based on the gross value of the joint venture assets being assigned. This means that stamp duty would be payable on exploration permits, mining information (see below) and property located in other jurisdictions including, for example, mining tenements included in the joint venture which are located in other States.

While most other jurisdictions apply the same concepts for stamping interests in a partnership, they do not seem to assess stamp duty on assets which are not dutiable property even where they form part of a joint venture and an interest in the joint venture is being transferred. New South Wales applies a similar approach of applying stamp duty only to the dutiable property included in the partnership and applies duty to transfers of joint venture interests only to the extent the joint venture holds dutiable property.

Business Assets

The *Duties Act* overhauled the awkward *Stamp Act* regime dealing with business acquisitions. The provisions under the *Duties Act* take a different approach in that they attempt to capture the transfer of business assets rather than the business itself. However, a sale of trading stock, plant, livestock (which are all items of personal property), intellectual property or business debts is exempt from stamp duty unless the transfer is part of a broader transaction involving other business assets or items of dutiable property.[28] Transfers of these items alone will not be dutiable under the *Duties Act*. Therefore, documents can normally be drafted to specifically transfer title to these items without triggering a stamp duty liability.

Regrettably, unlike most other States, the *Duties Act* continues to assess stamp duty on the transfer of trading stock when acquired with other business assets as part of an acquisition of a business.[29] Further, the not so uncommon practice of entering into consignment agreements on the sale of business assets has received special attention to ensure that only legitimate consignment arrangements will not attract stamp duty.[30] Also, an arrangement where a business

[28] *Duties Act* 2001 (Qld), s 37.
[29] *Duties Act* 2001 (Qld), s 35.
[30] *Duties Act* 2001 (Qld), s 38.

asset is surrendered so that a similar business asset may be granted is taken to be a transfer from the original owner of the asset to the person who acquires the new business asset.[31]

New Rights

In addition to capturing transfers and agreements to transfer dutiable property, the list of dutiable transactions also extends to include the acquisition of a new right on its creation, grant or issue. New rights are defined to include, for example, land in Queensland, a lease of a business and rights to use existing statutory licences. Also specifically included in that definition is a licence or right to do a thing that is:

(a) prescribed under a regulation; and
(b) is sold or granted by the (Queensland) State, a government entity or a government owned corporation.[32]

The definition of a new right would seem to include the grant of a mining lease under the *Mineral Resources Act* 1989 by the State of Queensland to the applicant of that mining lease. If that is the case it follows that stamp duty is payable on that grant. Previously under the *Stamp Act* the granting of mining leases did not attract conveyance or transfer stamp duty. Despite this, it is unlikely that the stamp duty consequences will be significant. This is because the "dutiable value" of a dutiable transaction (in this case, the acquisition of a new right being a lease of land in Queensland) is assessed on the total of any premiums paid for the grant of that lease or any consideration paid for any movable chattels taken over by the lessee.[33] In most if not all cases a mining lease applicant will not pay the State of Queensland a premium or provide it with other consideration for the granting of that lease.

However, if the new right is not a lease of land then the normal principle applies such that the dutiable value upon which stamp duty is assessed is the greater of the consideration paid and the unencumbered value of the new right.[34]

A case where a significant stamp duty liability might arise is where an exploration permit is granted by the State of Queensland under the *Mineral Resources Act* 1989. This is because an exploration permit could be construed as being a licence or right to do a thing that is granted by the State. If that were to happen an unusual situation would arise where stamp duty based on the value of the exploration permit would be payable upon the granting of that permit but not on

[31] *Duties Act* 2001 (Qld), s 39.
[32] *Duties Act* 2001 (Qld), s 6.
[33] *Duties Act* 2001 (Qld), s 11(4).
[34] *Duties Act* 2001 (Qld), s 11(7).

its transfer (see the discussion above regarding the exclusion of exploration permits from the exhaustive definition of dutiable property). Clearly that is not the intention of the new *Duties Act* and therefore the logical conclusion must be that exploration permits are excluded from the definition of new rights by reason of exploration permits not being "prescribed under a regulation". It remains to be seen though whether this in fact is the case. Obviously a risk arises that other non-land licences granted by the State of Queensland will attract stamp duty upon their grant.

Valuable Rights not Dutiable Property

Mining information has long been held not to be property for stamp duty purposes. The Queensland Full Court decision of *Pancontinental Mining Ltd v Commissioner of Stamp Duties (Qld)*[35] is the founding authority for the proposition that mining information is not property. Since then the decision of *Commissioner of Taxation (WA) v Nischu Pty Ltd*[36] has suggested that while information itself is not property, the value of that information may in fact rest with the chattel containing that information.

The current practice in most, if not all, States is not to apply stamp duty to transfers or disclosures of mining information. If the mining information and the chattel containing that information forms part of a sale of other Queensland business assets then a question arises as to the apportionment of value between the chattel and the mining information, particularly if the current stamp duty practices in Queensland change.

Relevant to the resource sector, the following items of value would appear to be capable of transfer without attracting stamp duty as they seem to fall outside the exhaustive definition of dutiable property:

(a) mining information;
(b) exploration or prospecting permits under the *Mineral Resources Act* 1989;
(c) an authority to prospect under the *Petroleum Act* 1923; and
(d) an exploration permit under the *Petroleum (Submerged Lands) Act* 1982.

This applies unless any of these assets form part of a joint venture which includes other dutiable property and the dutiable transaction involves a transfer of an interest in that joint venture. (See discussion under the heading "Existing Rights" above).

It also remains to be seen whether the transfer of a mining lease application is assessable under the new *Duties Act*.

[35] (1988) 88 ATC 7190.
[36] (1991) 21 ATR 1557.

TRUSTS AND DEALINGS IN TRUST

It is not often that trusts are used as ownership or investment vehicles in the resource sector. Despite this there are some instances where they do arise and the stamp duty position in Queensland remains materially different from most other States.

Under the new *Duties Act* declarations of trust which have been intentionally created are liable for stamp duty based on the dutiable value of the dutiable property forming the subject of the trust.[37]

In Queensland, unlike most other jurisdictions, transfers and other dealings (including allotments and redemptions of trust interests) are liable for duty based on the full unencumbered value of the dutiable property forming the subject of the trust.[38] This can be contrasted with other States where stamp duty is often not paid on redemptions and allotments and only payable on the net asset value of the trust at the marketable securities rate of 0.6 percent.

LAND RICH STAMP DUTY

Land rich stamp duty has become a prominent feature of stamp duty laws throughout all jurisdictions. In some jurisdictions land rich duty applies to dealings in trusts interests. Because of the way Queensland stamp duty law applies to trusts, land rich duty in Queensland only applies to unlisted companies.[39]

The land rich provisions under the new *Duties Act* remain essentially the same as they were under the *Stamp Act*, although the provisions themselves are more legible.

Land rich stamp duty is payable on the unencumbered value of all Queensland land-holdings of a land rich company where a majority interest (that is more than 50 percent) has been acquired and when further interests are acquired after land rich duty has been paid on an acquisition of a majority interest.[40]

Like most other jurisdictions a land rich company is defined in the *Duties Act* to be a company which has land-holdings in Queensland worth more than $1 million and which has total land-holdings representing more than 80 percent of all property in the company.[41] The notable exceptions to the 80 percent rule are the Australian Capital Territory (which has no minimum threshold)[42] and the

[37] *Duties Act* 2001 (Qld), s 11.
[38] *Duties Act* 2001 (Qld), s 63.
[39] *Duties Act* 2001 (Qld), s 165.
[40] *Duties Act* 2001 (Qld), s 158.
[41] *Duties Act* 2001 (Qld), s 165.
[42] *Duties Act* 1999 (ACT), s 79.

Northern Territory (which has a minimum threshold of 60 percent).[43] The Western Australian government recently announced a proposal to reduce the land-holding threshold ratio from 80 percent to 60 percent. If implemented, it is intended that this change would apply from 1 July 2003.[44]

It is important to note that the test to determine whether a company is land rich is based on the property and not the dutiable property of the relevant company.[45]

It follows that the value of exploration permits and other property and valuable rights which do not fit within the exhaustive definition of dutiable property are to be taken into account when testing whether a company is a land rich company. With that in mind the following common law principles which are relevant to the resource sector have emerged:

(a) the decision of *Commissioner of Taxation (WA) v Nischu Pty Ltd*[46] is authority for the ability to include the value of mining information as being property (but not land) of a potential land rich company;
(b) the decision of *Arco Resources Ltd v Commissioner of Stamp Duties*[47] is authority for the proposition that a mining lease application is property, but not an interest in land;
(c) the decision of the *Commonwealth v Western Mining Corporation Ltd*[48] where it was held that an exploration permit conferred under the Commonwealth *Petroleum (Submerged Lands) Act* 1967 was property for the purposes of obtaining compensation; and
(d) the decision of *Commissioner of Stamp Duties (Qld) v MIM Holdings Ltd*[49] (MIM case) is authority for the proposition that a bundle of certain contractual rights in respect of adjoining land not owned by Ernest Henry Mining Pty Ltd (EHM) (of which MIM Holdings Ltd had 51 percent of the shares) which allowed access to the adjoining land and excavation rights, was a separate item of property and could not be taken into account in valuing EHM's land even though the rights enhanced the value of the land. The value of the rights however were included in the value of EHM's property.

[43] *Taxation (Administration) Act* 1978 (NT), s 56N(2).
[44] Draft White Paper, *Streamlining Western Australia's Tax System – Fewer, Fairer and Simpler*, June 2002 at 13.
[45] *Duties Act* 2001 (Qld), s 165.
[46] (1991) 21 ATR 1557.
[47] (1996) 1 Qd R 1.
[48] (1996) 136 ALR 353.
[49] (1999) 99 ATC 5084.

The *Duties Act*, which contains a very wide definition of what constitutes "land-holdings" for a corporation,[50] attempts to modify these common law principles.

The *Duties Act* definition includes not only a corporation's interest in land and anything fixed to that land, but also rights held by a corporation that relate to or affect the use of the land and enhance the value of the land. It is worth setting out the provision in more detail:

> "Section 167 What are a corporation's 'land-holdings'
>
> (1) A corporation's 'land-holdings' means the following –
>
> (a) the corporation's interest in land and anything fixed to the land that may be separately owned from the land, other than –
>
> (i) a security interest; or
>
> (ii) an interest in a trust;
>
> (b) rights held by a corporation that –
>
> (i) relate to, or affect, the use of the corporation's land and other land; and
>
> (ii) enhance the value of the corporation's land."

When the predecessor to s 167 of the *Duties Act* was introduced into the *Stamp Act* in 2000,[51] the Explanatory Memorandum stated that the intention was to overcome the decision in the MIM case.[52] As a result when determining whether a corporation was a land-holder, the value of rights relating to other land was to be included in the value of the land of the corporation if the rights enhanced the value of the corporation's land. Given the lack of comment in the Explanatory Memorandum to the Duties Bill 2001, we can only assume that s 167 of the *Duties Act* is to apply to rights similar to those considered in the MIM case.[53] Having said that, it will be interesting to see whether the inclusion of rights that relate to or affect the use of and enhance the value of, a corporation's land will be construed to include other rights which are not dutiable property for the purposes of the *Duties Act*. For example, mining information, exploration permits and mining lease applications owned by a corporation and which may affect the use of its land could be relevant. The value of these rights can be significant. If included in the value of a corporation's land-holdings, the value of these rights could have an impact on whether it is land rich or not. The stamp duty consequences for a transfer or other acquisition of shares in that company will of course be significant.

[50] *Duties Act* 2001 (Qld), s 167.
[51] Revenue Laws Amendment Bill 2000, Explanatory Notes, at 7.
[52] *Commissioner of Stamp Duties (Qld) v MIM Holdings Ltd* (1999) 99 ATC 5084.
[53] Ibid.

The type of assets included in the calculation of a corporation's "land-holdings" under the *Duties Act* is wider than in some other States. A number of States limit their relevant definitions to interests in land.[54] Western Australia, South Australia and the Northern Territory however include mining tenements or mining rights in their respective definitions of land for the purpose of determining whether an entity is a land holding entity.[55] In Western Australia, a reference to a mining tenement includes an exploration licence. Therefore, in Western Australia, the value of exploration licences will be added to the value of land to determine whether a corporation is land rich.

Under the *Duties Act* the obligation to lodge a land rich duty statement is on the person who makes the relevant acquisition, and there is no obligation on the land rich company or its subsidiaries to lodge such a statement.[56]

An improvement to the land rich provisions is that there is a new deduction for the land proportion of the marketable securities (share) transfer duty (0.6 percent on the net assets of the company) paid on the transaction to avoid double duty.[57] Also, the extension of the corporate reconstruction exemption to the acquisition of the land rich companies as part of a corporate group restructure has been legislated. [58]

CORPORATE RECONSTRUCTION RELIEF

The *Stamp Act* provided significant stamp duty exemptions for internal corporate group reconstructions. Those provisions continue to apply under the new *Duties Act* and, in fact, have become more generous. They have not though become as generous or flexible as the corporate relief available in other States. All in all the corporate reconstruction exemption has been re-thought, re-organised and re-worded – not just re-written. One section (s 49C of the *Stamp Act*) has been spread over 17 sections of the *Duties Act*.

Under the *Duties Act* a corporate reconstruction is defined as a series of transactions which, viewed as a whole, change the corporate structure to make internal adjustments and which improve the efficiency of a corporate group.[59] The Commissioner must be satisfied of this before granting an exemption.

[54] *Duties Act* 1997 (NSW), s 108(1); *Duties Act* 1999 (ACT), s 80(1); *Duties Act* 2000 (Vic), s 73(1) and *Duties Act* 2001 (Tas), s 61(1).
[55] *Stamp Act* 1921 (WA), s 76(1); Stamp *Duties Act* 1923 (SA), s 91(1) and *Taxation (Administration) Act* 1978 (NT), ss 4 and 56N(2).
[56] *Duties Act* 2001 (Qld), s 177.
[57] *Duties Act* 2001 (Qld), s 187.
[58] *Duties Act* 2001 (Qld), s 409.
[59] *Duties Act* 2001 (Qld), s 398.

Under the new *Duties Act* special purpose constitutions need not be adopted when incorporating the company to access the exemption when interposing a new holding company into a corporate structure.

Also, it is now possible for group companies which have been associated for more than three years to transfer assets among themselves, even where the assets were acquired before the companies became associated.[60] Note also that the test for associated companies is broader under the *Duties Act* than the *Stamp Act*.[61]

One of the other significant changes to the corporate reconstruction exemption relates to the clawback of exemptions and reassessment of duty. The length of time that companies are required to remain associated after an exemption has been allowed has been reduced from five years to three years.[62] This can be contrasted though with other States such as New South Wales and Victoria where the post association requirement is only one year.

Under the *Duties Act*, there will not be a re-assessment of duty where the breaking of that association is due to the de-registration of one company or where the association between the companies ceases by reason of the listing of one of the group companies on the stock exchange.[63]

Unfortunately, unlike New South Wales, no exemption is available where shares are transferred in a company whose sole business is mining in Queensland for minerals.

MORTGAGE DUTY

Given the capital intensive nature of resource projects, mortgage duty is often a significant cost to the industry.

The following points should be noted when dealing with financial transactions in the resource industry:

(a) unsecured loans are now no longer liable for stamp duty in Queensland; and
(b) the *Duties Act* seems to include provisions not dissimilar to the New South Wales *Duties Act* enabling stamp duty efficient security arrangements to be used where borrowings take the form of debentures.

[60] *Duties Act* 2001 (Qld), s 406.
[61] *Duties Act* 2001 (Qld), s 400.
[62] *Duties Act* 2001 (Qld), s 412(a)(b).
[63] *Duties Act* 2001 (Qld), s 412(4).

There has been an overhaul of the way Queensland assesses duty on securities where only some and not all of those of the assets being secured are located in Queensland. In the case of advances secured by assets located both inside and outside of Queensland, duty will be assessed on the dutiable proportion of the amount secured only.[64] The dutiable proportion reflects the proportion that the secured property in Queensland bears to all secured property located within Australia as at the date the liability arises. This represents a change from the old regime where stamp duty was payable on the whole of the advance subject to credits for stamp duty actually paid in other jurisdictions.

Finally, mortgages continue to remain liable for mortgage stamp duty only to the extent that they secure loans and other forms of financial accommodation.[65] Mortgage stamp duty has not been extended to cover mortgages to the extent that they secure performance obligations.

ANTI-AVOIDANCE

The *Duties Act* has introduced a more complete general anti-avoidance provision.

The new provisions allow the Commissioner to identify schemes that are artificial, blatant or contrived and designed to reduce liability to duty.[66] These provisions quite fairly do not apply to a reduction in the liability to duty attributable to available concessions or exemptions.[67]

The scheme must also confer a duty benefit on the taxpayer. A duty benefit arises if the amount of duty payable is, or could reasonably be expected to be, less than it would have been apart from the scheme.[68]

For the anti-avoidance provisions to apply, it must be reasonable for the Commissioner to conclude (taking into account various matters) that the taxpayer entered into or carried out the scheme for the sole or dominant purpose of obtaining a duty benefit.[69]

It is thought that the anti-avoidance provisions will enhance the Commissioner's power to strike down, not only blatant and contrived schemes to avoid stamp duty, but also transactions which simply have a more efficient stamp duty result. For instance, the Commissioner is required to take certain factors into account including "the relevant

[64] *Duties Act* 2001 (Qld), s 260(1).
[65] *Duties Act* 2001 (Qld), s 252.
[66] *Duties Act* 2001 (Qld), s 433(1).
[67] *Duties Act* 2001 (Qld), s 433(1)(b).
[68] *Duties Act* 2001 (Qld), ss 433(1)(a), 434.
[69] *Duties Act* 2001 (Qld), s 433(1)(c).

circumstances surrounding the scheme".[70] Not only is this overly general, it is also quite subjective.

Once the Commissioner determines that there is an anti-avoidance scheme which results in a duty benefit, the Commissioner himself determines what he thinks the duty should be. In other words, he has power to reconstruct transactions as he sees fit.[71]

It is worth noting that the re-written New South Wales and Victorian stamp duty laws have chosen not to include a general anti-avoidance provision.

CONCLUSION

There is no doubt that stamp duty is a significant cost to the resource sector given the capital intensive nature of the industry. For that reason alone the new *Duties Act* is a welcome replacement for its predecessor. However, there is a need for further refinement of the legislation to provide more certainty and also to provide a more equitable taxing regime relative to other States. Having said that, however, it must be acknowledged that the rate of transfer duty applicable in Queensland, at 3.75 percent is significantly less than most other States. As a result the most inequitable component of the Queensland stamp duty regime, being the manner in which stamp duty applies to trusts, could almost be overlooked because of that low rate of transfer duty.

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[70] *Duties Act* 2001 (Qld), s 435(1).
[71] *Duties Act* 2001 (Qld), s 436.