STAMP DUTY — INFRASTRUCTURE FINANCING CASE STUDY

Panel Discussion including Questions and Answers

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HYPOTHETICAL CASE STUDY — INFRASTRUCTURE FINANCING

Spaceport Technologies Pty Ltd ("ST"), incorporated and managed in the ACT, is developing a $500 million network of receiving and transmitting stations across Australia for a satellite-based communications system. The main site is to be here on the Gold Coast. (The satellites themselves already exist and are not part of this financing.)

ST already owns most of the land on which the stations will be constructed. In Queensland, however, the station will be constructed on Commonwealth leasehold land; in Victoria it will be constructed on privately-owned leasehold land.

ST enters into a Development Agreement with Blue Sky Constructions Pty Ltd ("BSC"), a Sydney-based company, for the construction of the stations. The Development Agreement is conditional on ST arranging satisfactory project finance.

The financing involves three components:

1. Construction facility

GoldCoast Bank arranges a syndicate to provide a construction finance facility to cover the two-year construction period. The funding will be limited-recourse to the assets of the project. The primary security will be a mortgage by ST over its rights against BSC under the Development Agreement.

ST has claimed that it cannot give a mortgage over its freehold or leasehold interest in the land "because of stamp duty".

The facility takes the form of a bill acceptance and discount facility, which will be negotiated and signed in Queensland.

2. Equipment leasing facility

Paradise Leasing Ltd arranges a lease financing for the $300 million equipment component of the project, which is to come into effect on completion of construction. Much of the equipment will be affixed to the land, although it could be dismantled and removed if need be.

The leasing structure involves:

- an on-sale of the equipment by ST to a United States head-lessor;
- a head lease to a special-purpose Cayman Islands company ("SPC");
- a sub-lease by SPC to SpaceTrack Lease Partnership No. 1 ("Aust Partnership"); and
- a sub-sub-lease by Aust Partnership back to ST.

The sale proceeds will be applied towards repayment of the outstanding balance of the construction facility.

The head-lease and sub-lease both contain a purchase option, so that they will be treated as hire-purchase agreements for Australian purposes. The present value of the sub-lease rents will be fully prepaid, so as not to give rise to withholding tax.

The head lease documents will be negotiated and signed in New York. The sub-lease and sub-sub-lease documents will be negotiated and signed in the ACT.

3. Inflation-indexed bonds

The remainder of the long-term funding for the project takes the form of an issue of 25-year amortising inflation-indexed bonds, which is fully underwritten by Blue Diamond Securities Ltd. The proceeds of the bonds will repay the balance of the construction facility.

The bondholders' recourse, again, will be limited to the project assets. The bonds will be secured by a Security Trust Deed that includes a charge over ST's rights under the equipment lease facility and over the User Agreements which ST plans to enter into with corporate customers. It will be a condition precedent to the issue of the bonds that ST have entered into User Agreements generating a sufficient cash-flow to service the bonds. The Security Trust Deed will be executed in the ACT.

All the financing documentation is to be put in place at the outset, even though no drawdowns under the equipment lease facility or the bond issue will take place until the completion of construction.

ST assembles a panel of experts to advise on the stamp duty implications of the financing.

STAMP DUTY ISSUES

1. Bill Facility Agreement - dutiability in Queensland.

2. Bill Facility security:

   - Mortgage over Development Agreement rights - dutiability in Queensland/NSW.

   - What if a Mortgage over Commonwealth Crown lease?

3. Sale of equipment - fixtures? (All States)

4. Hiring arrangement/rental business/instalment purchase agreement/rental agreement duty - all States.

5. Inflation-Indexed Bonds - dutiability of Underwriting Agreement.

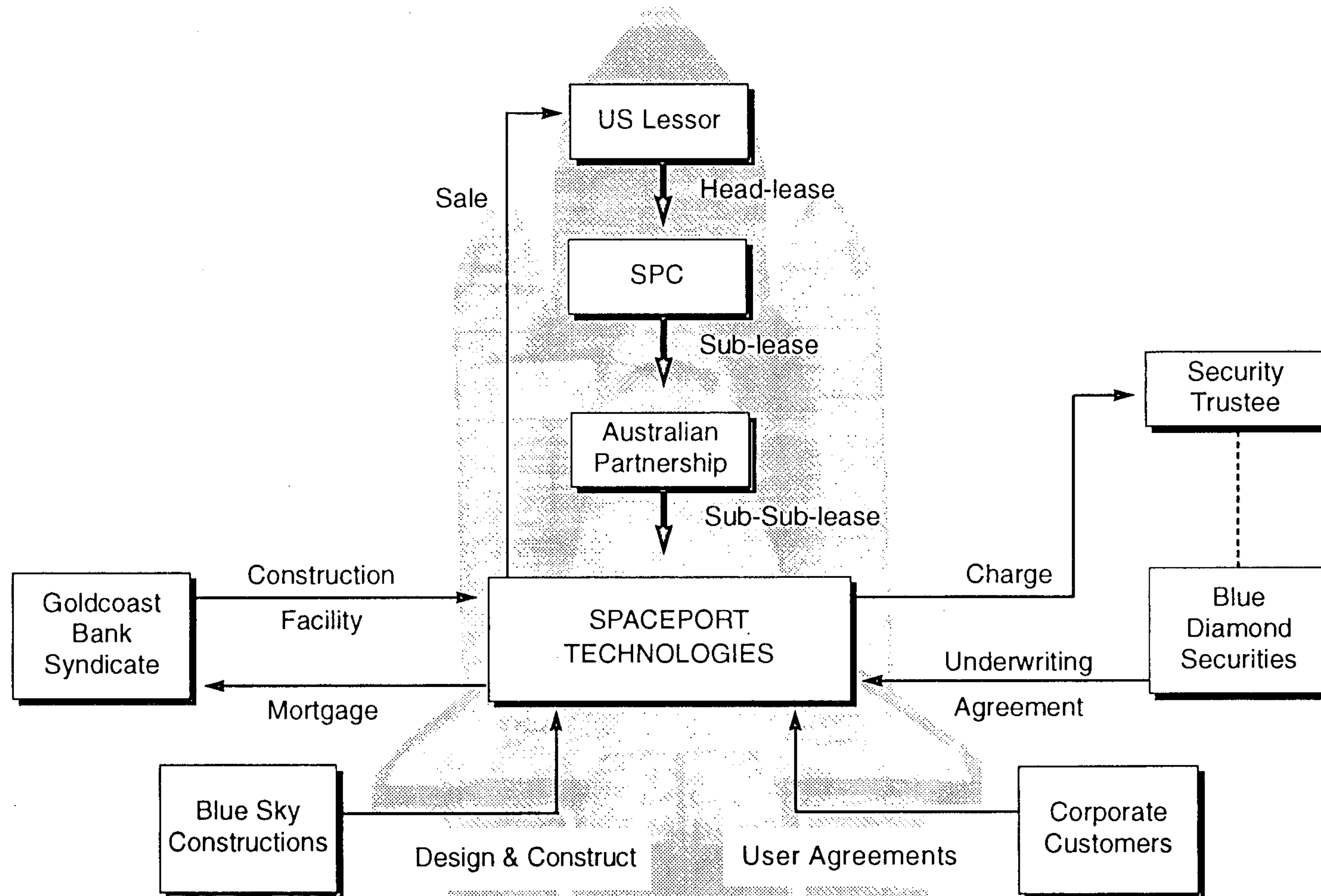
6. Bond Issue security:

   - Charge over equipment lease rights

   - Charge over User Agreements

7. Effect of "stamp duties rewrite" project

Hypothetical Case Study — Infrastructure Financing



TRANSCRIPT

John Field (Chairman)

The format of the Stamp Duty session this year is that we are going to be looking at a case study of an infrastructure financing project and examining the various stamp duty issues that that case study throws up. In examining the case study we are privileged today to have a distinguished panel of speakers to help us answer some of the questions that it does throw up. If I can now turn to the case study. I think we have got a diagram of the case study which Bob might kindly put up on the screen for us — it is also in the handout.

The particular infrastructure financing project that we are talking about today involves a network of receiving and transmitting stations for a satellite-based communications system. These receiving and transmitting stations are located conveniently, from a stamp duty point of view, in each jurisdiction around the country. They are costing some $500,000,000 to produce, and that $500,000,000 cost, of course, needs to be financed.

There are three separate components to the financing that we are going to examine today. The first of them is a construction facility which takes the form of a secured bank bill facility. That is providing the finance through the construction period for these receiving and transmitting stations. The documentation for the other two facilities is being signed up at the outset in our case study, but the actual finance is not being raised under them until the end of the construction period, so that the funding that is provided under them will in fact pay out the construction facility. Those two take-out facilities comprise, firstly, a complex tiered series of leases, and secondly, some inflation-indexed bonds — just to add a bit of spice to the financing cocktail.

Let us now turn to the first of these financing facilities, namely the construction facility, and examine some of the stamp duty issues that it throws up.

We are told in the case study that the construction facility is being negotiated and signed in Queensland — I do not know whether our panel members might give our clients some advice about whether that is an advisable thing to do. It is secured over the rights of our client company, named Spaceport Technologies Pty Ltd ("ST"). ST has entered into a development agreement with Blue Sky Constructions Pty Ltd to construct these receiving and transmitting stations. Part of the security for this bill facility is an assignment by ST of its rights under this development agreement.

The first issue that this throws up is the dutiability or otherwise of the bill facility agreement itself, and I will ask Bob Mitchell if he could lead us through some discussion on that issue.

Bob Mitchell

I suppose the starting point with a bill facility agreement is to look at the general provisions in the Act. In Queensland the relevant head is mortgage, bond, debenture and covenant. I think it is pretty well established general law now that raising funding by way of a bill facility does not involve a loan transaction. You would be aware that in the Queensland Act there is a definition of "financial accommodation" which basically refers to transactions which are of a loan-type character. So considering the possibilities of mortgage, bond, debenture and covenant, we can cross out some of those straight away.

It cannot be a bond or covenant, even if it was executed as a deed, on the basis that it does not secure repayment of any financial accommodation, because the transaction is essentially not one in the nature of a loan. We can cross out debenture, because there is no debtor-creditor relationship. It is possible, I guess, that it could be a mortgage if the facility agreement itself provides for the giving of any mortgage or charge, but otherwise it would not be dutiable as a

mortgage. So under the general provisions, I would conclude that there is no duty implication. But I think it is then necessary to have a look at section 65(2) which deals specifically with bill facility agreements.

The Commissioner has quite a wide and aggressive approach to section 65(2) in Queensland, and it is probably helpful to reflect a little bit on what that provision was actually inserted in the Act to do. It is located in the provisions which deal with what a mortgage is — section 65 — and it is pretty clear from the Explanatory Memorandum and the positioning of that section in the Act that what it is on about is catching mortgages which secure obligations under bill facilities. The Commissioner has taken the view, however, that the security given which is caught by that provision can in fact be the bill facility agreement itself. I think it really tortures the language of the section to say that a security given in support of a bill facility can be the bill facility itself, but that seems to be the approach that is taken. There is a case stated that is going to be heard shortly on that. It has been widely publicised in the local press concerning Queensland Cement Ltd — so you might want to watch out for that case.

My own view is that section 65(2) just cannot apply to attack the bill facility agreement itself. As far as I am concerned, section 65(2) is about duty on mortgages which support obligations under bill facilities, and I think in any event it is clear from the language of the section. It is talking about two documents, one being a bill facility agreement and the other one being a separate document which is given to secure obligations under that bill facility, and that it cannot apply to the bill facility itself. So I say there are no duty implications on the bill facility agreement per se.

Frank Brody

I would endorse those comments. I think, though, what it does highlight is that even though we might all say that as a matter of law it ought not to be dutiable, and hopefully that is the way the case will go, the practical reality is that, until a court does decide that it is not dutiable, that sort of document should not be executed in Queensland.

Bob Mitchell

I think that is prudent advice. I think that until the outcome of the test case is known, it would be putting your client at risk, practical risk. I think one of the issues too that comes out with the Queensland scenario is, as I understand it, case stateds go to the Full Court in the first instance, so you do not actually have a situation where a considered argument can be put before a single judge and all the issues can be aired and tested, and then you have a Full Court that has the benefit of a single judge decision. Here it will come up in one hit, and the three judges just get the one chance to get it right. I think that is a hard issue because you feel that the way the High Court operates with granting special leave, although anybody can appeal, for example, from a single judge decision to the High Court to get special leave, they just do not do it because they insist on intermediate courts having a look at the issue because they get the benefit of the analysis. So I think it is a problem, and the judges in Queensland will have to be particularly astute, I would hope, to come up with the right answer.

John Field

So we are suggesting that Spaceport Technologies should in fact sign the agreement somewhere outside Queensland. I think Queensland is the only State, if I am not mistaken, that would assert that an unsecured bill facility agreement might be dutiable, but of course here we have a secured bill facility agreement. Bob, what do you think about the dutiability of this mortgage over the rights under the development agreement?

Bob Mitchell

This time the document we are examining is the mortgage. Now that is clearly something that is contemplated by section 65(2), and the section is all about catching mortgages which secure obligations under bill facilities. The difficulty I have with this mortgage is that it does not appear on the facts to have any connection with Queensland at the time that it is executed. It is a mortgage over rights under a development agreement. We know that development agreement is conditional. I have assumed that perhaps the mortgage is an all-moneys unlimited mortgage and that the facility agreement would be entered into subsequently. It is difficult to see that there could be any nexus with Queensland. Examining the mortgage on its face, there certainly is not. We are not told where it is executed, but in all likelihood it is executed in the ACT, along with many of these other documents.

I do not think it relates to any property in Queensland. We know that the development agreement itself is conditional, so there may not in fact be any enforceable rights under that agreement. But even if that was not the effect of the condition, the rights, I think, as a matter of law, would be located in Sydney, where Blue Sky Constructions is located, that being the other party to the development agreement. Those rights would normally be enforceable there, so they are rights in New South Wales and not rights in Queensland, so there would be no property in Queensland.

Does it relate to a matter or thing to be done in Queensland? Well, if you execute the mortgage first, it is difficult to see that it does relate to any matter to be done in Queensland.

The issue then becomes, can the Commissioner in Queensland at some stage reconsider the question of nexus, perhaps under section 68(2) which is the upstamping provision for unlimited securities in Queensland? That is a provision which says that, where there is an advance in respect of an unlimited security and that advance takes the document beyond its previously stamped limit, then it is deemed to be a new instrument for the purposes of the Act. The Commissioner would argue that that gives him the ability to retest nexus every time there is a further advance.

I have some problem with that analysis. It seems to me that, when you read sections 68(1) and 68(2) as a code, as it were, for what you do with Queensland securities, you need to have a dutiable security on day-one to be within those upstamping provisions. And because this particular mortgage does not have any connection with Queensland on day-one, the Commissioner therefore has no opportunity to revisit the question of nexus later when bills are actually drawn. So my conclusion is, not dutiable ever.

John Field

In Queensland at least. What about in New South Wales, John? Are you going to issue an assessment on this mortgage?

John Brogan

At the outset, to see whether loan security duty would apply in New South Wales, you would look at the definition of a "loan security" in the loan security division of the Act rather than the definition of "property" at the start, and at the definition of a "mortgage". When you look there you find that a loan security includes a mortgage or debenture executed in New South Wales, or a mortgage that affected property in New South Wales at the time it was executed. Now if the mortgage is going to be executed in Queensland, the first nexus option would be out.

To see whether the mortgage affected property in New South Wales, you would have to see what form the development agreement took. If it was an agreement under hand, which is highly unlikely, the rights under the agreement would be where the debtor resides, and that is the development company in Sydney, and so that would be property in New South Wales and it would attract a

liability to stamp duty. But more than likely it is a deed, and being a deed, the property is where the deed exists at the time the mortgage is executed. And more than likely the deed is going to exist in the Northern Territory or somewhere like that!

John Field

So the client is well advised that it might be possible to avoid a New South Wales nexus with this mortgage?

John Brogan

To be on the safe side, yes. If it was a loan security by virtue of that nexus, then as Bob said, the assessment is another thing. It would probably be assessed at $5, because I do not think you could say that funds had been advanced.

Bob Mitchell

Which raises an issue for Queensland because let us just say that the Commissioner is right in his approach to section 68(2) and that he can in fact revisit the question of nexus later on when bills are actually drawn, by which stage it is clear that funds are being used to construct a satellite installation in Queensland, so there may be a matter or thing to be done which provides a nexus at that subsequent stage. Well the Commissioner is only going to give you a credit where there is secured property in more than one jurisdiction, such as rights in Sydney. He is only going to give you a credit if duty is paid in that other State. If nominal or no duty is payable elsewhere, then Queensland will profit from that.

Frank Brody

I think one other aspect you would consider would be perhaps executing your mortgage in the ACT or the Northern Territory, and drafting it in a way so that it came into existence before the development agreement came into existence, and argue that you do not have any nexus with any relevant taxable jurisdiction. You could also, as has been discussed, execute the development agreement as a deed, treat it as a specialty, and have it again in a favourable jurisdiction.

In the context of upstamping, whether you need to retest nexus, I think this is a live issue because as I understand it with the rewrite, I think it is going to be on the basis of retesting whenever there is an advance. I tend to take the view that, as a matter of law, even though the practice may differ from place to place, at the moment the correct view is that nexus is tested for all time at the time of execution.

I think the authority for that is the *GJ Coles* case in Victoria, where there was a mortgage which had been in existence for a long period of time and the pro rata provisions came into play as from a particular date. There were further advances made under this mortgage, which had been granted prior to the commencement date of the pro rata provisions, and it was held that that particular mortgage did not get the benefit of the pro rata provisions in respect of the further advances.

The taxpayer argued that at the time there is a further advance the Act says there is deemed to be a new and separate instrument. And the court, and in particular Mr Justice Tadgell, took the view that those words did not in fact mean that there was a new and separate instrument. All it did was to provide a mechanism for payment of the duty, and to start the time ticking again in terms of payment without a penalty.

In looking at those provisions there have been two sets of provisions in relation to that upstamping issue. One talks about, I think, "for the purposes of stamp duty" and one just simply says "there

shall be deemed to be a new and separate instrument". The court analysed both of those, which are dotted around Australia, and I think came to the view that it did not really matter which particular format was used.

I think it is going to be interesting to see what the rewrite comes out with because the practice in some jurisdictions may be enshrined, so it becomes a question of testing nexus as and when advances are made or whether maybe the legal position, as I think it probably is, is going to be overturned.

John Field

If that is adopted then it is going to make life even harder for people administering Australia-wide securities, if the upstamping has to be done on a basis of reassessing the pro-rata mix, the asset mix at the time of each future advance.

Let us move to one other element of this construction facility which is that the banks under the construction facility, the GoldCoast Bank and its fellow syndicate members, have said that they would really like to have a mortgage over the land itself on which these tracking stations will be located, but they have been told that they cannot have one "because of stamp duty", whatever that might mean. We have got a variety of different types of land involved here. Some of it is freehold land, and you can well imagine a mortgage over that — it is going to be pretty hard for that to be not subject to stamp duty. But some of it, I think the land located in Queensland, we are told in the case study is in fact located on Commonwealth Crown land. What do you think about that, Frank? Is that going to facilitate the giving of a mortgage without incurring stamp duty?

Frank Brody

I think the accepted wisdom up until now has been that a mortgage or indeed any dealing with property in a Commonwealth place is outside the reach of the State authorities. I think there have been many legal opinions to support that proposition. However, we have all been told that we are now wrong, because the Supreme Court of Victoria on 26 April handed down a decision in the case of *Alders International Pty Ltd v Commissioner of State Revenue*. Mr Justice Harper was the judge in that particular case, and the issue arose whether or not a lease given to Alders, a duty free store, was subject to *ad valorem* duty where that lease was of space out at Tullamarine Airport.

John Field

Presumably making it not such a duty free store!

Frank Brody

Exactly! The history behind this is that there were a number of cases back in the early 1970s in the High Court involving Commonwealth places, and people committed various offences on airports — there was a workers compensation claim, I think, that arose out of an accident on a Commonwealth place. The effect of the High Court decisions was that a State law, even of general application, stopped at the boundary fence of the Commonwealth property and therefore there was a vacuum in relation to that State legislation. As a result of those cases, the Commonwealth *Application of Laws Act* was passed (a very short Act). What it purported to do was to apply the State law as Federal law in the Commonwealth place. But it specifically excluded the application of a tax. I think everybody has taken the view that taxes just simply cannot be imposed by the State through this application of laws arrangement.

And indeed the counsel representing the Commonwealth in this case, Mr Rose QC, he had put an argument many years ago that these things were in fact dutiable, and that the Commonwealth

place argument did not apply. His particular point was thrown out by the court, but nevertheless the Supreme Court decided that the stamp duty law of general application did apply and did affect this particular lease.

I think the wisdom had been that if it was open to the Commonwealth to impose a similar law, ie a stamp duty on a lease of Commonwealth property, then that was exclusive power and the States could not trespass upon it. What the judge has done here is to essentially say that the States can impose a tax.

As I understand it, this particular decision is being appealed. The appeal papers have been lodged with the Full Court of the Supreme Court. And I gather, through the grapevine, that one of the Attorneys-General is going to be encouraged to make an application to have the matter removed to the High Court. When it gets to the High Court could be many months down the track and then it could be another twelve months or so before a decision it handed down — so in the meantime, no doubt, the revenue authorities will be a little bit buoyed up with this particular decision.

John Field

We will await with interest the outcome of the appeal in whatever forum it is heard.

John Brogan

I just might mention a recent land tax case, as it goes to the question of the Crown. It was the case of *Galliball* where the issue was under the *Land Tax Management Act* whether the lessee of Crown land was liable to land tax. The so-called Crown land in the case was land owned by the Darling Harbour Authority and its enabling legislation referred to it as a body representing the Crown. The Supreme Court held in that case, in a decision which narrowed considerably the meaning of the Crown in revenue statutes, that representing the Crown did not mean that the authority was the Crown and that it was therefore not Crown land. And the court also referred to business undertaken on the land, rents from the land, profits of the business undertaking and so forth. So it is an area that is getting considerably narrower when we talk about the Crown.

John Field

Let us turn our attention now from the construction facility to the second of the three components of this infrastructure financing, namely the lease facility, which is shown on the top centre part of the diagram. What we have got there is an agreement being entered into now that, upon practical completion of the project, there will be a sale from Spaceport Technologies to a lessor based in the United States of the equipment component of these tracking and receiving stations. And then the US lessor also is now entering into documentation — it is effectively a hire purchase agreement, being a lease with a purchase option — to a special purpose company located in the Cayman Islands. So at that head-lease level we have got two offshore parties, which might be relevant. Then the Cayman Islands company is entering into a sub-lease, again with a purchase option, so we have again got another hire purchase agreement to an Australian partnership of banks or other equity investors. So at that level we have got a hire purchase from an offshore company to an Australian entity. And the rentals under that sub-lease, primarily because of withholding tax rather than stamp duty, we are told in the case study, have been or will be pre-paid in full at the commencement of the actual lease term. And then finally in this tier of leases we have got what you might call a true lease, with no purchase option, from the Australian partnership back to Spaceport Technologies.

Now that sale and tiered lease-back arrangement raises a host of stamp duty issues. I thought we might focus first on the stamp duty issues to do with the actual agreement for the sale of the equipment from Spaceport Technologies up to the US lessor. We know that this equipment is in due course going to be located in all States, and I wonder if Bob might again start off and lead us through the Queensland position.

Bob Mitchell

I guess the first thing to consider is whether any property actually exists yet. It may be an agreement to sell property that will come into existence in the future, in which case that has a bearing on the nexus question, because an agreement for sale for future property will not relate to property anywhere at the time that it is executed. So that possibility for nexus is not there.

This one we know is going to be negotiated in New York and executed in New York so there is no Queensland connection there. And presumably if all the essential aspects of the transactions, such as giving delivery, taking possession, the payments, if all that was structured offshore, there just simply would not be a nexus with Queensland.

If there was a nexus with Queensland then the thing to look at is whether a goods, wares, merchandise type exemption would be available, and that is assuming that there are goods in existence. There is one such exemption in section 54(2) which exempts agreements which relate solely to goods, so there is an issue there. If there are fixtures blended in with it, then it is an all or nothing situation. You could lose your exemption potentially. And there is no exemption for a conveyance of goods in Queensland, so you would need to have a look at the drafting of the agreement. They are the issues for Queensland.

John Field

What about in New South Wales, John? There is a goods, wares and merchandise exemption there also, if we need that. Maybe the future property issue gets us out of trouble there as well.

John Brogan

The way the scenario is drafted, I am not going to assume that it is future property! And I will tell you why, because this is extremely difficult when you throw in the phrase that the sub-lease rents are fully pre-paid further on down in that structure. One wonders just what obligations that creates under the whole structure. But going back to the on-sale by Spaceport Technologies of so-called property that does not exist, well fair enough, I can understand the argument there. But if that property exists, the question is (and we really need more information) does the equipment constitute a fixture, is it part of the land, and the usual ramifications of transfer of property there? Presumably it will not be fixed.

If it is not fixed to the land and it is property in existence, well what is ST selling to the US people? Is it selling an interest under a hire purchase agreement? If it is, well that is dutiable in New South Wales on the basis of the difference between the value of the goods and the amount outstanding. And so it goes on. There is a whole range of stamp duty issues in that first line there.

John Field

I think I would have to have an argument with you if you are asserting that you could assess the sale agreement, however. I think certainly the intention is that it would be an agreement to sell just the equipment. Maybe you get an issue as to whether the equipment, when it is constructed in due course, is going to constitute fixtures, and maybe the goods, wares and merchandise exemption may not be applicable. But perhaps the short answer is, if you think that there is a risk that it is dutiable, we ought to be advising the client that it should be staying out of the New South Wales jurisdiction with this sale agreement. And I think we are told that the sale agreement itself is signed, not only outside New South Wales, but outside the country, and there is certainly no equipment or anything else that is located in New South Wales at the moment. Maybe this is another reason why, if the sale agreement were thought in some way to involve an assignment of rights under the development agreement, not that on its face it would be doing that, but maybe that is yet another reason why we should make sure that the development agreement is signed outside

New South Wales and signed as a deed so that it does not constitute property in New South Wales.

John Brogan

That is true, John. The relevance of the goods, wares and merchandise exemption in New South Wales is if goods, wares and merchandise are sold with "other property" and in this case the reason I mention that interest under the hire purchase agreement is that that interest is "other property". Again, it boils down to where the property is, where the goods, wares and merchandise are, are they in existence or are they not? So it would be well and truly good advice to steer clear of the New South Wales Office of State Revenue I feel.

John Field

Do we have an issue with, in Queensland, section 56 or in New South Wales section 71, which you will recall are the sections which effectively deem there to be a conveyance and hence stamp duty at conveyance rates where there is a creation or a sale of rights not previously in existence? That is a bit of a trap for the unwary as we know.

Bob Mitchell

Well certainly in Queensland section 56 has gone through something of a renaissance. It really has come back to life. It sat there dormant in the Act for a very long time and in the *Westpac* case in 1992 it was applied for the first time in ages. The court held that it could apply in that context to a franchise agreement, but on the facts of that particular case there was no nexus with Queensland. I cannot see how it could apply on these facts. I mean this is an agreement for the sale of future property. Nothing has been paid for the creation of any right. My understanding of the agreement is that when the property comes into existence it is momentarily acquired by the vendor and then the ownership passes to the purchaser upon the property coming into existence. So I just do not see that there is any consideration for a sale of any rights. The consideration is for the sale of the property.

John Field

I agree with that. But it is an issue that needs to be thought about in any transaction like this.

John Brogan

The equivalent in New South Wales is section 71, sale of a right not before in existence. Quite simply all that needs to be done in the instrumentation to overcome that possibility in New South Wales is to include in the documentation the word "grant" because if that word is in it, section 71 is ineffectual, and I am saying that in respect of any interests that might be being on-sold under an existing agreement that ST has been involved in.

Frank Brody

For Victoria the issue is probably not as broad because our conveyance head of duty does not apply generally to personal property, although it might at some stage in the near future. We do not know. But I think the first aspect would be to say that the way this particular transaction appears to be structured is that there would not be any agreement to sell existing property at the moment, so even if you had a fixture involved, you would not be potentially within the real property head of duty. So let us assume for a moment that there was nexus, the issue arises would the agreement to sell be assessed for *ad valorem* duty? The general principle in Victoria is one that we are all

familiar with, the concept of transfers of land in registrable form under the *Transfer of Land Act* or conveyances under general law, but there is old authority to suggest that the duty is leviable on the ultimate conveying document. And indeed I did have a discussion with someone at the State Revenue Office in Victoria some months ago where there was an issue about whether or not a particular contract just to sell freehold was going to be dutiable where there was not going to be an actual instrument of transfer in registrable form. And he said to me that he would assess it. So, there may be a legal issue as to whether that is right or not, but there is old and ancient authority to give him some support about that. So if it turns out that the items are fixtures and we otherwise have nexus, then in Victoria you would probably want to consider doing a written offer accepted by conduct rather than having a fully blown written agreement.

Bob Mitchell

I would just add that for Queensland if any of the items were fixtures then probably the way to go would be to structure it as an instalment purchase agreement which is under section 32A of the Queensland Act, and that can apply to fixtures which are capable of being severed. The effect of that is that the duty under an instalment purchase agreement, and this is again assuming that there was a nexus with Queensland, would be calculated at the rate of .43% rather than the normal conveyance rates of up to 3.75%. So by six or more instalments over six months you could quarantine your duty problem.

John Field

Can we turn our attention now from the sale leg to the tier of hire purchases and leases, and perhaps look first at the New South Wales position. John, am I right in thinking that the two hire purchases are going to be exempt from duty in New South Wales, and is the lease without the purchase option going to be in a different position?

John Brogan

Well, you are quite right. Hire purchase is just simply excluded from the hiring arrangement regime. So there is not a problem there with New South Wales.

John Field

What about the sub-sub-lease without the purchase option. That is going to throw up the question of hiring arrangement duty, is it not?

John Brogan

Yes, the lease from the Australian partnership. You do have a hiring arrangement issue there. Again, if the goods are fixed to the land that is another issue, and then there is a question of whether it is a lease of property in New South Wales. The reason I raise that is that, unlike Queensland where there is a difference between 3.75% on the one hand and .43% on the other, in New South Wales lease duty is 5.5% and hiring arrangement duty is 1.5% — so there is a huge difference as to whether it is a lease of property or whether it is a hire of goods.

John Field

Although at least even though the 1.5% applies to the hiring arrangements of goods, there is the $10,000 cap in New South Wales which is going to ameliorate the position to some extent.

John Brogan

That is true, too John.

John Field

We are told that this Australian lease, from the Australian partnership to Spaceport Technologies, is signed up in Canberra, but of course it is going to be of equipment that is going to be used in all jurisdictions. Is that going to give us a sufficient New South Wales nexus?

John Brogan

Well the nexus simply is if the arrangement is entered into in New South Wales or the goods are supplied or to be supplied or to be delivered here, or to be used here. Now the point to bear in mind about New South Wales hiring arrangement duty is that the duty is assessed on amounts received by the owner of goods for the right to use the goods. The goods do not have to actually be used. In fact the definition of a "hiring arrangement" is that it includes any arrangement under which goods are or may be used. So it does not necessarily depend on this sub-sub-lease resulting in the goods actually having been used, to attract a liability in New South Wales.

Frank Brody

There may be an issue though as to whether or not the goods have to be in existence at the time the documentation is entered into, and there would be an argument I think that could be put that you do not have a hiring arrangement unless the goods are in existence at the time. But that may only get you part of the way in the sense that the particular document that you execute before the goods are in existence may not be a hiring arrangement. But then when the goods do come into existence and you do give the lessee the right to use the goods, there would be an issue perhaps as to whether or not you are then compelled to bring into existence an original instrument at that stage because it may be that you are then giving a right to use goods. I think that is a difficult issue.

Bob Mitchell

And the dutiability then may be determined on issues such as where the Australian partnership is resident, whether the Australian partnership is actually carrying on business, or perhaps if this is the only transaction that the partnership enters into, that might fall short of constituting a business.

Frank Brody

I think in the context of New South Wales again if the lessor is resident outside New South Wales the test is a little bit more restricted in that I think the documentation has to be either executed there or the goods delivered there.

John Brogan

That is for a document Frank, is it?

Frank Brody

That is in connection with the hiring arrangement.

John Brogan

The thing is, if there is no document, the hiring arrangement duty otherwise operates by way of return on money received month by month.

Frank Brody

In that situation, you pay the same duty that you would have paid if there had been the document.

John Brogan

Yes, but the point is that if the liability attaches to money received or the right to use goods month by month, and one possible nexus is delivery of goods in New South Wales, then it follows that money received this month could be in regard to the right to use goods in two months time.

Frank Brody

I think perhaps the moral is that the partnership would be a special purpose partnership that you would structure so that it was not resident in New South Wales and would not have a track record of being approved, would not be on the return system.

John Field

Well what about Victoria, Frank? Have we got some different issues there?

Frank Brody

There are some different issues. In Victoria there is no duty on hire purchase agreements, so the first two layers are OK. The question about the sub-sub-lease raises the issue of rental business duty and that for a start depends upon whether or not the lessor, that is the Australian partnership, is in the business of renting out goods and it would be usual to structure it so that you do not have that scenario in existence. One-off transactions by and large I think would be regarded as not sufficient to carry on business, although there may be the odd transaction where the contrary view might be adopted; but by and large if you structure it so that it is a one-off transaction it ought not to be rental business and therefore there ought not to be any duty payable. If you do get caught and you are subject to rental business duty then it is extremely important that the transaction be structured as a special rental agreement so that you get the benefit of the ceiling of $4,000 rather than paying 1.5% on all the money that happens to be received; but if it is a one-off transaction there ought not to be an issue in relation to registration or payment of duty.

John Field

In Queensland, however, the position is not quite so straightforward, I think, Bob.

Bob Mitchell

No, in Queensland there is a smorgasbord of provisions that you need to consider.

If we are talking about fixtures anywhere, I guess there is the general lease provision that could potentially apply, although I think it probably would not.

Certainly there is section 32A which deals with instalment purchase agreements (the concept of "instalment purchase agreement" is defined to include expressly hire purchase agreements). So, in the Queensland context you would need to consider both the first two legs of the transaction.

There is also a rental business duty in Queensland. If a person carries on a rental business in Queensland then they need to register and lodge returns with the Commissioner each month.

There is also a separate head for a hiring agreement. Any instrument would need to be considered in the light of those provisions as well.

So there are a number of thinks to look at there.

In resolving this particular problem, I thought again it turned on nexus. If there are no goods in Queensland at the time these transactions are entered into, then that basis for nexus is not there. In terms of rental business, it is a question of whether, as a question of fact, a rental business is carried on. As Frank was explaining in relation to the position in Victoria, you need, firstly, a business, and secondly, you need one that is carried on in Queensland. So the question would be, how do you characterise the business? If the essence of the business is granting the right to use goods then you look to the place where those rights are granted to establish the situs for the business, which may be somewhere outside Queensland.

In relation to the second leg, which is the sub-lease from SPC to the Australian partnership, I thought there was a particular issue in relation to the prepayment of that lease. Under the definition of purchase price, which is the basis for the calculation of duty under section 32A, you exclude from purchase price any amount that is paid to the hirer prior to or contemporaneously with the execution of the hire purchase agreement. Since this whole thing is prepaid, theoretically at least, if that is paid prior to execution, there would not be any purchase price left to impose any duty on; and when you turn to the schedule, if you have got an instalment purchase agreement where the purchase price is less than $20 then the duty is nil.

That exists, I guess, more as a theoretical scenario than as a real-life one because I think logistically it would probably be very difficult to be actually in a position to do the calculation to prepay prior to the goods coming into being.

John Field

As to the cashflow, there probably would not be sufficient cash available to make the prepayment until the end of the construction period, but maybe that gives some incentive to look at structuring so that the documents for the leasing do not have to be signed until the end of the construction period, so that the prepayment could be contemporaneous.

Bob Mitchell

Yes.

Going down to the bottom leg, where this time there is no purchase option so that it is purely rental business duty under section 35B or hiring agreement duty that need to be considered, the Commissioner takes a very wide view as to what constitutes the carrying on of business in Queensland. I think that he would probably take the view that if any of the goods were in fact physically located in Queensland then at least part of your business is there and therefore you would need to be registered and lodging returns. Now I think that is a very questionable proposition on the Commissioner's behalf. I think you need to characterise what the essence of the business is. If the essence of the business is the granting of the right to use, you look to the place where that occurs rather than where physically the goods might be.

John Field

That is to say, the place where the lease document is signed?

Bob Mitchell

Correct. And there is some support for that under the statute too, because rental business is defined to be the business of granting the right to use goods. So by extrapolation you would expect the situs of the business to be where that antecedent activity occurs.

Frank Brody

I endorse the comments that are made there. You just have to think, for example, of a major American corporation that leases goods directly to an Australian business which merely happens to bring the goods here. Suppose that American corporation happens to be leasing similar goods to other people say in the United States. I just cannot see how that corporation is conducting rental business here in Australia merely because the goods happen to be delivered here. I think what sometimes happens with the Commissioner is that the Commissioner looks at the various limbs to determine when duty is payable if you are registered as a person conducting rental business and uses those tests as the test to determine whether you are conducting rental business. But I do not think that is strictly correct. I think the issue of whether you are conducting rental business in a particular place brings a whole host of factors into play, and merely because the goods happen to be delivered in the particular place does not in my view mean that the lessor is conducting rental business there.

Bob Mitchell

And even if you are carrying on a rental business, the question then becomes what you have got to put in your return anyway, and in Queensland that is spelled out in section 35B. You need to have the grant of the right to use the goods in Queensland, negotiation in Queensland, or the delivery of the goods in Queensland, for there to be any amount required to be put in your return, and it may be possible to structure accordingly. On these facts we know that the grant of the right to use the goods takes place elsewhere, and the negotiations take place elsewhere. The only thing that could actually catch you, even if you were required to be registered, would be the delivery of the goods in Queensland, and then it is a question of whether you can structure that in some way to occur outside Queensland.

Question - Michael Newell (Carter Newell Lawyers, Brisbane)

Bob, dealing with unregistered persons, if it was a Queensland person, section 35 (towards the end of it), could you comment on that.

Response - Bob Mitchell

In this context it could only apply to the sub-lease leg. If one of the partners in this Australian partnership happens to be a person who is resident in Queensland who is transacting business with somebody, in this instance SPC, who ought to be registered, then there is an obligation on that person to prepare a note or memorandum of their transaction and then lodge it and pay duty. That could be a live issue if:

a) one of the partners in the Australian partnership happens to be a person who is resident in Queensland; and

b) there was an obligation on SPC in the first place to be registered as carrying on a rental business in Queensland.

I would certainly query, on these facts, whether SPC is such person.

Response - Frank Brody

In Victoria there is also a provision for catching you round the back door if you do not get caught round the front door.

There are a number of exclusions. They do not quite mirror the nexus tests on the situation where somebody is registered, and you end up with some odd results, but if you are domiciled in Victoria you have just got to watch out for, I think, section 131AF of the Act.

John Field

So with the possible exception of the New South Wales hiring arrangement duty on the bottom of those three leases, we look to be reasonably clear, with some careful structuring, of duty in all the States that we have looked at so far. As to the other States, Tasmania we should recall still has hire purchase duty, but if the hire purchase agreements are signed up before there are any goods in existence, the future property argument ought to enable us to escape having any relevant Tasmanian nexus.

I think in Western Australia and South Australia, they are both in the position where even though hire purchase agreement duty has now been abolished, there is no express exemption from rental business duty for hire purchase agreements. So potentially rental business duty still needs to be considered, although I think in Western Australia it is an accepted administrative practice by the State Taxation Office there that, because hire purchase agreements themselves are no longer subject to express duty, the intention was that they also be excluded from rental business duty. I see John Naughton nodding — thank you John.

In South Australia, however, the position is slightly different in that the revenue authority is not as accommodating and I think is stated to have the position under review. Certainly the Commissioner in South Australia does not necessarily accept that you are in the clear from rental business duty with a hire purchase agreement. I think currently he is not actually assessing, pending the culmination of that review. But the review has been ongoing for almost two years now. Frank?

Frank Brody

I think that is right. What he has said is that he is taking advice as to whether there really is a problem — in other words, do you get caught under the rental business head of duty because they do not have an express exclusion for hire purchase agreements. I think if the advice eventually comes back that yes, there is a technical problem, then I think he has basically said, without committing himself, that he would be prepared to get the government to amend the Act. But he is just not satisfied yet that there is the problem.

Bob Mitchell

Perhaps if I could just mention the other potential South Australian nasty in this structure, jumping back a step, is in relation to the on-sale to the US lessor, because the goods, wares and merchandise exemption in South Australia is very limited and under section 31(1) it has to be in the usual course of your business to be selling goods to come within it. So beware, but I guess there is still the future property argument.

John Field

Well that just about covers, I think, the leasing element of the financing. Let us turn now to the third and final component of the financing, which is the issue of inflation-indexed bonds. Now we are told that these bonds are being issued under a security trust deed. We have got an underwriter, Blue Diamond Securities, who is prepared to step up and commit to buy these bonds. And there is security being given under the security trust deed to secure repayment of the bonds and that security takes the form of two things, firstly a charge over Spaceport Technologies' rights under the equipment lease, the one that we have just been looking at, and secondly a charge over the flow of payments that will come under a series of user agreements that Spaceport Technologies is hoping to sign up with corporate customers who will be using this satellite communications system.

So let us look first of all at the underwriting agreement and perhaps even the bonds themselves. Frank, have you got some comments as to whether the underwriting agreement may be subject to duty?

Frank Brody

The underwriting agreement ought not to be subject to any *ad valorem* duty. It would normally be executed as an agreement. You would perhaps sign it in the ACT, and just not have any duty at all in connection with that. So that should be fairly easy to structure.

John Field

Now let us look at the bonds themselves. Bob, have you got some comments on that?

Bob Mitchell

The starting position is that the head in Queensland — mortgage, bond, debenture, covenant — the word "bond" there does not mean a bond of this kind. Bond in that context is referring to a payment obligation under seal. Here what is happening is a bit of paper is being issued by ST to the people who are lending money, and it is question of whether that bit of paper could be a debenture. One case I would like to mention is the *Humes* case which concerned a convertible note certificate, and that was found to be a debenture on the basis of the fine print on the back of the document. The court in that case was prepared to imply a debtor-creditor relationship. Certainly if the certificate led you into the security trust deed in any way, which would presumably contain a covenant to repay or to redeem the bonds in 25 years time, then arguably it could be a debenture, which I guess gives rise to other commercial issues. Do you need to issue bits of paper anyway? The trustee of the security trust deed is going to maintain a register, presumably, of the people who have lent money and their respective interests, and perhaps investors might be content to rely on that. If investors insist on individual certificates, then the issue of debenture needs to be addressed.

The particular Queensland issue that comes out of this is section 70(3), which is a provision that says when an instrument secures repayment of money lent and that money lent is to be applied in Queensland, then the instrument is deemed to relate to a matter or thing to be done in Queensland. Here the whole purpose of issuing the bonds is to get some money to pay off the construction facility. That construction facility was entered into in Queensland. If it contained the payment obligation in Queensland, then that could deem the bonds to relate to a matter or thing to be done in Queensland. So the idea would be to structure the payment obligations under the facility to take place somewhere else, to avoid a problem on this leg.

John Field

And perhaps this also gives another reason to be advising the client to sign the original construction facility outside Queensland.

Frank Brody

Yes. You would probably want to put your security structure in place at the outset, as I think the fact situation contemplates, and maybe set up a security trust deed with a nominal sum in the ACT to start with, before any equipment lease rights have come into existence or any user agreements. So the structure would then be that they would then become after-acquired assets, and with the exception of New South Wales and perhaps some interesting provisions in Western Australia, after-acquired property does not seem to be captured.

In New South Wales it is restricted to land within twelve months in certain circumstances. And in Western Australia there is a curious provision, I think it is section 88 and 88A, which talks about where you do not have an instrument of security but it becomes an instrument of security when assets are acquired in Western Australia. The only trouble with that drafting is that this is an instrument of security at the outset, it just does not have any nexus with Western Australia. It is not a case of it becoming an instrument of security, so it is very difficult to see how the Western Australian provisions really have real effect. I mean, practically, the Commissioner might take you on, but from the legal perspective, it is very difficult to see.

If you set your structure up in advance and then you issue the bits of paper constituting the bonds subsequently, no doubt you would want to issue those in the ACT, again to avoid nexus. But there may be an issue about whether or not the security structure constitutes a foreign security for Victorian purposes.

I think Victoria is the only jurisdiction that has this concept still of foreign security. It is a bit of a sleeper. The revenue authorities have ebbed and flowed in what they think about it. From the point of view of the previous administration in Victoria, it indicated that if you did not otherwise have a mortgage, bond, debenture, covenant, then it could not be a foreign security. But there is now a different administration, so we go back to the fine print.

A foreign security can be dutiable in Victoria. First of all, what is a foreign security? On one view it is essentially any security given by a corporation incorporated outside Victoria. Now a foreign security becomes dutiable if it is executed in Victoria or if interest is paid in Victoria or it is assigned, negotiated or transferred in Victoria. It may be that the bonds might be assigned or transferred or negotiated in Victoria, which could give you a problem.

The question is, what do you do? Obviously the amount of money involved here is quite substantial. You may want to think about making an application under section 137MB of the Victorian *Stamps Act*. That provides for an exemption from duty where you are raising $10,000,000 or more. You have twenty bits of paper issued, 20 bonds. They can all be issued to the one person — it does not have to be a wide distribution. They have to be issued within a period of six months. In some instances that does not suit commercially, but what the revenue authorities have done is to allow you to have the fiction of calling it series A for six months and then series B for six months, and have it all being fungible so that you can satisfy the six months rule. It has to be issued to people who are players in the wholesale market.

Now if that is done and you get the relief, then that takes you out of the foreign security problem because the particular securities will simply be denoted as exempt.

It may be taking it to the extreme because the chances are that the revenue authorities will not pursue the foreign security issue, but you would not want to be in a fight with somebody and seeking to sue on the document, not having it stamped, and the consequences that flow. And section 137MB is a simple procedure.

John Brogan

Has the section 137MB procedure been used often as what you might call a defensive mechanism against the foreign security risk as far as you know Frank?

Frank Brody

We have done it in our office a couple of times where there have been substantial amounts of money involved. We just rolled up to the revenue authorities. You need a statutory declaration which verifies the various limbs of the section, they give you an opinion in advance, and you go away happy. And the client can be happy with that too, because you hopefully have structured it so that nothing else gets caught, and the foreign security limb is there as a sleeper.

John Brogan

And at least it eliminates that risk altogether.

John Field

Well that just about covers the case study as far as the existing law is concerned. Most of you have probably heard about the stamp duty rewrite project which John Brogan has been involved in from a New South Wales perspective. I think it might be helpful for us all if John could give us a description of what the rewrite process is, how it is going, how far it has got, what the likely timing is etc, and perhaps even some clues as to what we might look for in some aspects of it.

John Brogan

In 1993 several governments approved a joint rewrite project on stamp duty law, and the idea was that it would go out into other areas of revenue later on — payroll tax etc. The five jurisdictions whose governments agreed were New South Wales, South Australia, Victoria, Tasmania and the ACT.

The Western Australian government has been elected on a mandate which makes it very difficult for them to adopt template or model legislation.

We know the story with Queensland — they tend to stick to their guns and carry on with their own rewrite — and that was evidenced in recent days! But I guess the point to be made there is that the whole project is designed to try and get harmonious legislation in terms of policy structures and so forth, but not so much rates. So that was fair enough I guess.

The Northern Territory — I do not know the extent to which they might be sitting there looking at how this is progressing.

Anyway, the point is that it has been divided into about six projects and each project has a sponsor. There is a project on conveyancing duty and marketable securities. There is one on loan security duty, one on rental business and hiring arrangements, and so forth. The sponsors meet every three or four weeks, and they approve the progress being made. The idea is to try and come up with some draft bills in July for public circulation, which try to rewrite the law in a uniform way without fiddling too much in policy issues. So the purpose of the sponsors' meeting is trying to keep under control policy issues that inevitably keep arising, so that each of the five jurisdictions do not have to go back to their respective governments with let us say, alarming policy shifts.

Where we are at the moment is that the draft legislation will be released to the Taxation Institute of Australia in July, and that is because the Taxation Institute of Australia has been appointed as the peak body to co-ordinate consultation with all the interested bodies — Law Society, accounting

bodies etc. Then there will be a consultative period of about 6-8 weeks, and we will try then to redraft it in accordance with the consultative process.

The whole upshot is to try and get legislation in place by 1 January 1996. It is pretty tight and because of that timetable on consultation, I really cannot come here and give an indication of what we might do on say loan security duty, and that is what you are interested in today. But one thing I could do, I guess, is to adopt the theme that you have adopted, and talk to you in a hypothetical sense, and perhaps put to you hypothetically what one might well think could be the outcome if one had been involved in that process!

I put it to you on a hypothetical basis. If I was to be involved in such a project and I was looking at five or six or seven loan security duty regimes, I might well think that the New South Wales regime is pretty well close enough to where we want to be going and I might well think that that is because it reflects stamp duty in its purest sense. Loan security duty really does operate on an instrument basis. In practice, however, it tends to be calculated according to the maximum amount advanced. In between there you have got in New South Wales legislation, at the moment, a portability at the instigation of the lender, and the instigation of duty where there is a refinancing by the borrower.

Now the project might well like to recognise that current regime to endorse also that it is an instrument-based tax. It might also look at the *Prime Wheat* decision. That decision is a recent New South Wales decision which considerably widens the way one looks at debentures, mortgages and so forth, and loan securities — in New South Wales anyway. That case related to security over purchase moneys on an executed agreement as opposed to an executory agreement.

Having looked at all those things, one might then examine the Australia-wide operation of loan security duty and look at an apportionment basis. Looking at an apportionment basis, one might well exclude offshore property, ACT and Northern Territory land and shares, and work out the apportionment basis without those in it.

That is a pretty rough pie chart, but it is designed to indicate the idea of a possible hypothetical situation to the cross-border apportionment problems where you take out Northern Territory shares and Northern Territory land, ACT shares and ACT land, and then you work out your apportionment on the resulting balance.

The significance of the *Prime Wheat* case for anybody involved in this sort of work or this sort of review is that it found that security over purchase moneys (the security was security over shares actually that were part of the agreement), and purchase moneys were a lump sum plus payments in the future according to a tonnage. The judge found that it was liable as a mortgage both as a loan security under the loan security division, and also as a debenture. That has got very wide ramifications if you are in the process of trying to rewrite the legislation and you find suddenly that the legislation you are trying to model has been given a much wider effect than perhaps one thought it had. It also has wide ramifications in the current derivatives market, which is another area — not so much what I am talking about here today but I just mention it. Normally Treasury products are between financial institutions ("FIs"), let us say an interest rate position. The FI on one side stands to win or gain and the one on the other side stands to win or gain, and so being FIs, there is no need secure one another's position.

But the trend recently is for large corporates to be one of the parties with an FI and the FI might well say there is a win or lose situation in the interest rate swap or whatever, I might want some sort of security. Now the *Prime Wheat* case seems to be very important in looking at that sort of commercial situation.

So hypothetically we could go down a track like that. I just illustrate that case to show how critical it is to avoid coming up with large policy issues in the process of trying to rewrite the legislation. I hope that short summary gives you some idea of how the rewrite project is being conducted.

John Field

Well it does indeed. I think it may have come as quite a shock to some people to hear the imminence of the timing on that, if legislation is going to be available for public comment as early as July, with a view to attempting to have it introduced by 1 January 1996. May I ask, without wanting to put you unduly on the spot, how confident the working group is of being able to meet that 1 January target?

John Brogan

We are very confident about the consultative date in July, but consultation on something this big by its very nature might take longer, and that is the critical part of the project — to get feedback. So that might push the project out to March maybe in terms of the Autumn Session in 1996. But at this stage of the game we are hoping to get it late in the Budget Session this year.

John Field

I hope that on this project we are able to have greater success in getting legislation through all the parliaments than the consumer credit legislation has been able to show to date, in terms of speed anyway! But that has certainly been very helpful John. Thank you for your insight, hypothetically, into the rewrite process.

We have got just a few minutes now available for questions or comments, if anyone has any, either on the case study or of John in relation to his hypothetical comments on the rewrite project.

Question - John Naughton (Mallesons Stephen Jaques, Perth)

John, I think when you were talking about the unsecured bill facility, you mentioned that it would not be dutiable in any other Australian jurisdiction or there would not be a duty question in any Australian jurisdiction other than Queensland. Nexus aside, I think in Western Australia there would be an issue. The Western Australian Commissioner would certainly seek to assess duty on an unsecured bill facility. He would argue that the obligation to put the bank into funds amounted to a covenant to pay, which would make the agreement an instrument of security.

Response - John Field

That is quite right. Thank you for reminding me, John.

Question - Bob Mitchell

Can I just ask, if it was structured so it was executory on both sides, would he still take that view?

Response - John Naughton

The answer to that I think Bob is yes, I think he would.

Comment - Bob Mitchell

We had a matter recently where it was going to be a re-run of the *Handevel* decision in Western Australia and they were taking the view that *Handevel* was not relevant in Western Australia. Just taking the broad view of the fact that you look at the schedule first and you look at the substance of the Act second — we were saying no, you have got to look at the substance of the Act first and the

schedule second, and in the end the matter did not proceed. But he was certainly pushing the issue.

To be fair, I think at single judge level he has got authority on his side. There are a number of single judge decisions now, I think about three or four, and in this particular case that we were going to run, we were going to try and get it up to the Full Court in the first instance. I mean, it is contrary to what I said before, but the reason being that there did not seem to be much point in trying to just argue before another single judge who would feel bound by the other single judges.

Question - Simon Lynch (Arthur Robinson & Hedderwicks, Melbourne)

There was a suggestion earlier, in relation to taking security over the development and construction contract, that if it was executed as a deed and situated in a stamp duty friendly jurisdiction you could avoid or minimise loan security duty. I am just wondering, the concept of specialties, they relate to specialty debts, and not perhaps specialty choses in action. I was wondering what the views are of the panel there on that where it is not a debt, it is just contractual rights, whether you can actually have it in the deed and shift the situs?

Response - Frank Brody

If I can perhaps answer from my perspective. That was an issue that did come up in a live matter some time ago and there was a lot of time spent in analysing it and so on. The view was formed that whilst there may be an element of some doubt, the better view was that it did get the benefit of the same sorts of situs principles as a specialty debt.

Question - Simon Lynch (Arthur Robinson & Hedderwicks, Melbourne)

Is there any authority supporting that?

Response - Frank Brody

There is nothing that says exactly that. It is a question of analysis out of all the preceding cases.

Question - Simon Lynch (Arthur Robinson & Hedderwicks, Melbourne)

If I may ask a second question related to that. I think it has been raised before perhaps by Peter Green, that if you had an agreement under hand, say a development agreement with the Sydney based company, and you had an exclusive submission clause to the courts of the ACT, whether that would be an effective means of ensuring that the situs was in the ACT?

Response - Bob Mitchell

On its face there would have to be a good case to say that it would, because that is where it would be enforced. The issue might be whether that was an enforceable clause, whether you could exclude other jurisdictions from dealing with the matter, particularly if the party to be sued happened to be resident or located in that other jurisdiction. I mean it raises a public policy issue I suppose. But assuming you get over that, I think, with respect to Peter Green, there is a lot of merit to the argument.

Response - Frank Brody

If I can just add a comment to that. It might depend on whether the place of enforcement that one needs look to for situs principles, conflicts of laws principles, is the place where you would actually

bring suit in order to try and get judgment, or whether you might need to be subsequently enforcing that judgment which may give you a different answer.

Response - Bob Mitchell

And you get different issues too where you are resident in a number of jurisdiction, yet the underlying property could only be located in one. And I think the cases to date have said that if you are resident in a number of jurisdictions and you specify that payment is to take place in one of those jurisdiction, then that is where the debt is located. I do not know that the cases have actually dealt with the issue of being resident in a number of jurisdictions, but if payment is not in any of those jurisdictions, what you do then I am not too sure.

Question - David Glynn (Phillips Fox, Adelaide)

Following on from that, I have always had a little bit of concern about the commercial aspects of clients being able to evidence what the transactions are that have taken place and I wondered if the panel could comment about non-original copies of all these documents which are out of the jurisdiction and the dutiability of those in the various States.

Response - Bob Mitchell

I think myself, unless there is something in the Act that says that they are dutiable, then they really ought not to be dutiable. I know that there are some places which talk about copies, and that I think deals with the issue. But personally, if it does not specify that copies are dutiable, I do not see that they can be. I mean the original instrument does the particular job, it is not a question of bringing something else into existence such as a memorandum which is to record and to be the real substance of your transaction. You will have another written instrument that does that job.

I know in South Australia, the Commissioner is fairly keen about shooting down planes that go across South Australian soil!

Comment - Simon Begg (Corrs Chambers Westgarth, Melbourne)

Queensland has probably got the most aggressive provisions in that area. It deems an instrument to be any written document, including any copy of a copy and so forth, whether by mechanical means or otherwise. And then there is another provision, section 15, that says any party who is bound by a document is deemed to have executed it, so there is really quite an aggressive regime in the north.

Comment - Bob Mitchell

But that is a statutory regime, whatever it means.

Question - John Field

Could I ask a question of Bob? We have talked about the stamp duties rewrite project among the five participating States. Is there any insight you can give us as to the Queensland process with their rewrite?

Response - Bob Mitchell

I think Queensland is a non-starter in this collaborative exercise. It takes the view that it had pursued its own agenda and was going down its own path. It was the pioneer, if you like, and then

the others stole the idea from Queensland, but at a point when it was already committed to what it was doing. So it is proceeding down its own, some would say maverick, way. And I do not think you will hear anything this side of the State election which is due before September this year.

There has been a recent announcement that there is going to be a separate *Revenue Administration Act*, so all the administrative-type provisions are going to be pulled out of the *Payroll Tax Act*, *Land Tax Act,* tobacco, betting and all the rest, and centralised in one Act which seems to be a very good move. So you might end up with something like a *Transactions Tax Act* and then a *Transactions Tax Administration Act* as the final product. Certainly there have been public statements by the Treasurer which indicate that the transactions-type approach is under serious consideration in Queensland. And also the possibility of drawing, instead of looking to other States for inspiration, on Federal legislation — perhaps Capital Gains Tax-type principles — in working out whether there is a disposal or a conveyance and that kind of thing. So it is likely to be quite different, I would think.

Comment - John Field

In short, the process of change that was talked about yesterday looks as though it is going to be equally if not more applicable in the stamp duties area as in other areas of legal practice over the next few years.

Well ladies and gentlemen, we are slightly over time. We did start a few minutes late, but I know lunch is waiting. It remains only for me to thank our three panel members today for the time that they have put into their preparation for today and the insights that they have shown us into what really are quite difficult stamp duty issues covering a wide range of possible heads of duty for a project of this sort. So I would ask you to join me in thanking Frank, John and Bob for their efforts today.