STAMP DUTY REWRITE LAND-RICH PROVISIONS

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I. INTRODUCTION

For the revenue authorities of the participating jurisdictions, the release of the first Exposure Draft of the Stamp Duty Rewrite (the "Rewrite") at the end of July 1995 was a proud moment representing the culmination of 21 months of unprecedented co-operation between them. The apparent purpose of that co-operative effort is to deliver to the residents of Australia and to those who participate in its commercial life a simple, more uniform and fair regime for the imposition and collection of stamp duty, through revenue-neutral reforms.[1]

It was therefore disappointing that, in a number of significant respects, the draft legislation abandoned that purpose, and indeed appeared to embrace notions diametrically opposed to it. This phenomenon was nowhere more evident than in the terms of the new "land-rich" provisions contained in Chapter 2 of the Rewrite. Under the new regime, an acquisition of any percentage interest in certain unlisted companies or trusts entitled to land with a value of at least $1 million would be treated as an acquisition of that percentage of the relevant land and would bear ad valorem duty at conveyance of land rates.

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1 Office of State Revenue Brochure "Stamp Duty and Administration Legislation: The Rewrite - A joint State and Territory project involving New South Wales, Victoria, South Australia, Tasmania and the Australian Capital Territory", issued November 1994.

Those provisions had the potential to add substantially to transaction costs within, and ultimately cause enormous harm to, the superannuation, life insurance and funds management industries, and the commercial property market generally.[2] It was a threat quickly recognised by the business community and their professional advisers and which the revenue authorities removed shortly after the Rewrite's release by announcing that the new provisions in the Rewrite would not proceed in that form.[3] However, as a result of and since that announcement, there has been no draft legislation available for public consideration or comment in this area of stamp duties law.

At the time of writing this article, the second draft of the Rewrite had not been released, and so the analysis in this paper does not directly address its terms. Nonetheless, it is hoped that what is said in this article, particularly in relation to the potential features of a new land-rich regime, does not come too late to assist the revenue authorities to consider further their policy position. Hopefully, this paper will also serve as a checklist against which the land-rich provisions in the second draft of the Rewrite may be readily examined.

The primary focus of this paper is the land-rich regime in the current New South Wales stamps legislation. However, in some instances the position throughout Australia (ie not just in the jurisdictions participating in the rewrite process) is examined. It does not examine in any detail the special regimes in Queensland and Western Australia applicable to private trusts which are not strictly "land-rich" regimes, although passing mention is made. Nor does this paper examine penalty and offence provisions, which in the context of the Rewrite will be dealt with in the new Taxation Administration Act. Reference is made to the "land-rich" provisions of the Rewrite where appropriate, but detailed coverage of them is limited in view of the revenue authorities' announcement.

Before commencing the analysis of current provisions, the policy of the land-rich provisions is examined. In particular, this paper briefly evaluates the proposition, accepted by State governments and State revenue authorities and indeed by commentators,[4] that these provisions are "anti-avoidance" provisions. The paper then examines the features and requirements of those provisions, with a particular focus on what amendments are necessary or desirable on a technical level from the perspective of taxpayers.

II. LAND-RICH PROVISIONS AS A TAX AVOIDANCE MEASURE

New South Wales was the first Australian State to introduce land-rich provisions into its stamps legislation. Those provisions became operative on 10 June 1987. In the Second Reading Speech in the Legislative Council for the

2 N Tabakoff and T Featherstone, "Stamp Duty Changes Throw Trust Sector into Confusion" *Australian Financial Review*, 3 August 1995, p 2.

3 N Tabakoff, "States Drop Draft Land-Rich Changes" *Australian Financial Review*, 23 August 1995, p 41.

4 Butterworths, *Australian Stamp Duties Law* at [14A.04].

amending bill[5] by which the provisions were introduced, the Hon Deirdre Grusovin explained the purpose of the provisions as follows:

> The other major avoidance scheme dealt with in the bill is that involving the transfers of shares or trust units to mask the sale of land. ... Though the provisions in the bill are not simple, because of the need to incorporate certain anti-avoidance mechanisms, the basics of the legislation are straightforward. Briefly, for a transfer to be taxed at conveyance rates the company or unit trust must have more than 80 per cent of its assets as land, the land held in New South Wales must be worth $1 million or more and an interest of more than 50 per cent in the company or unit trust must be acquired.[6]

A more strident attack on that perceived avoidance practice had only a little earlier been made by Mr Robert Debus in a speech he delivered on the Second Reading of the amending bill in the Legislative Assembly:

> Again, this form of tax avoidance was not available to the average taxpayer, and nor was it used by the honest taxpayer. The revenue being lost through this device is difficult to estimate, but since conveyances form the largest single stamp duty tax base it is vital that any erosion be arrested without delay. A rapid response was necessary because so-called tax experts have already been giving seminars on stamp duty pointing openly to the duty savings available through the use of this scheme. The provisions in the bill are not simple, but I make no apology for this because of the need to be one jump ahead of the tax avoiders.[7]

After New South Wales, Western Australia[8] and then Victoria[9] introduced land-rich provisions in 1987. Other States and the Northern Territory followed in subsequent years.[10] In all of those jurisdictions, the government introducing the relevant amending legislation into the Parliament described the land-rich provisions as an anti-avoidance measure. In South Australia, the parliamentary member introducing the bill thought that the purpose of the land-rich provisions was to "counter a blatant tax avoidance scheme".[11]

What then is tax avoidance? Parsons suggests the following meaning:

> There is tax avoidance when the law does not require payment of tax in a set of circumstances though the policy of the law would say that tax should be paid.[12]

On that formulation, a sale and transfer of shares in a company which owns land in preference to a sale and transfer of the land itself would not be characterised as tax avoidance. The clear policy of the *Stamp Duties Act* 1920 (NSW) ("NSW Act") immediately prior to the introduction of the land-rich provisions was to levy duty on a share transfer on a basis more favourable to taxpayers than that on which a transfer of land was charged to duty. The more favourable treatment had two important elements:

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5 *Stamp Duties (Amendment) Act* 1987 (NSW).

6 New South Wales, Legislative Council 1987, Debates, Vol 198, p 13461.

7 New South Wales Legislative Assembly 1987, Debates, Vol 197, p12428.

8 *Stamp Amendment Act* 1987 (WA).

9 *Taxation Acts Amendment Act* 1987 (Vic).

10 *Stamp Act Amendment Act* 1988 (Qld); *Taxation (Administration) Amendment Act (No 2)* 1988 (NT); *Stamp Duties Amendment Act* 1989 (Tas); *Stamp Duties Amendment Act (No 3)* 1990 (SA).

11 South Australia, House of Assembly 1990, Debates, Vol 1, p 692.

12 R Parsons, "Reforming The System: A Lawyer's View", in Australian Tax Research Foundation, *Tax Avoidance and the Economy*, 1983 at 57.

(a) share transfer duty was levied at a lower rate than duty on a conveyance; and

(b) share transfer duty was levied on the value of the shares, which took account of the company's assets and liabilities, whilst conveyance duty was levied on the gross value of land and the value of encumbrances was ignored.

Outside the area of operation of the land-rich provisions, those two differences are still features of the NSW Act.

Another meaning of tax avoidance is the following:

> Tax avoidance involves techniques to minimise tax through legal means which are blatant, artificial and contrived and which have no major object other than obtaining tax benefits.[13]

It must be said that this is a narrow formulation of the concept of "tax avoidance". However, if that formulation is accepted, the activity against which the land-rich provisions are aimed could not be characterised as tax avoidance. It would be a questionable use of language to describe as "blatant, artificial and contrived" the purchase of shares in a company if the purchaser does nothing more than to enter into an agreement for the purchase of shares at the conclusion of arm's length negotiations with a seller. On a view most favourable to taxpayers, and using an analogy drawn from the area of income tax, those circumstances would be an illustration of the choice principle, which stated that s 260 of the *Income Tax Assessment Act* 1936 (Cth) (the general anti-avoidance provision which preceded Part IVA) was not intended "to deny to taxpayers any right of choice between alternatives which the Act itself lays open to them".[14] To choose the course which minimised tax was not "to defeat, evade or avoid a liability imposed on any person by the Act or to prevent the operation of the Act".[15]

It is submitted that the real concern of State governments in introducing the land-rich provisions was to expand their tax bases, regardless of whether the activities at which they were aimed could properly be characterised as tax avoidance. No doubt, the successful elimination of a tax avoidance practice by legislative response will result in increased revenue to the responsible government. However, it does not follow logically that if an expansion of the revenue base is the consequence of a legislative amendment then such legislation must be necessary to counter tax avoidance.

If tax avoidance were the real target, why is it only land in respect of which this regime operates? After all, there are many categories of assets apart from land the transfer of which attracts duty at conveyance of land rates (eg in New South Wales the goodwill of a business, trade debts, a partnership interest), but an acquisition of shares in a company owning such assets does not attract duty at such rates.[16]

The revenue authorities would perhaps have a reasonable argument that the deliberate strategy of having land acquired and held by a company with the

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13 GJ Cooper, RE Krever and RJ Vann, *Income Taxation Commentary and Materials*, Law Book Company Ltd (1989) p 1157.

14 *WP Keighery Pty Ltd v Federal Commissioner of Taxation* (1957) 100 CLR 66 at 92.

15 *Ibid* at 93.

16 The author hastens to add that he does not advocate such an expansion of the duty base.

intention of minimising the duty payable by a subsequent disposition of shares in that company is a form of tax avoidance. However, the land-rich provisions do not depend for their operation on an intention to avoid duty, and even the revenue authorities must concede that those provisions levy duty in circumstances where no such intention exists.

Whatever view is taken as to the meaning of the phrase "tax avoidance", it is clear that the phrase is not apt to describe transactions of the kind sought to be made dutiable under Part 4 of Chapter 2 of the Rewrite. Those provisions, if passed into law, would have levied duty on an acquisition of any percentage interest in certain unlisted companies or trusts entitled to land with a value of at least $1 million as if it were an acquisition of that percentage of the relevant land. There is no equivalent in those provisions to the 80 per cent threshold test under current provisions (see Part III, Section A below), and therefore the Rewrite provisions may apply to a company or unit trust which is not "land-rich".

The revenue authorities claim that the new provisions were designed to counter avoidance practices under existing provisions. That claim is unsustainable, because in relatively few situations would a buyer of a small percentage unitholding in a unit trust have a commercial choice between buying that unitholding and buying an equivalent tenant-in-common interest in the land. That choice is certainly not available to potential investors within the wholesale trust industry. It seems more likely that the purpose of the new provisions was not to counter any known avoidance practices, but to expand significantly the duty net.

If the current land-rich provisions were truly designed to counter tax avoidance, then there could be no quarrel with their existence regardless of how much revenue they raise. Nor does the fact that the provisions are designed to raise new revenue by itself make them inherently illegitimate or worthy of repeal. However, in view of their revenue-raising purpose the success of these provisions should be measured by the revenue they have raised. What information there is on revenue collected under land-rich provisions superficially suggests that they have been unsuccessful in raising substantial revenue.[17] Unfortunately, it is not possible to draw that conclusion, because it is conceivable that many parties, confronted with the choice of buying land or shares in the company which owns it, have opted to buy the land because there is no difference in the amount of stamp duty payable.

The revenue authorities appear to be strongly attached to the notion that acquisitions of interests in companies and trusts entitled to substantial land should bear duty as if there had been an acquisition of land, as is evidenced by the attempt of participating revenue authorities to extend significantly the operation of existing land-rich provisions under the Rewrite. With that background, it is highly unlikely that State governments or revenue authorities would pay serious attention to calls for the abolition of land-rich provisions. Indeed, the suggestion that such provisions be repealed was made in a paper delivered at the 1994 Stamp Duties

17 J Seve, "Land Rich Provisions and Marketable Security Duty", presented at IBC Annual Australian Stamp Duties Symposium 1994, 22 October 1994.

Symposium,[18] eight months before the release of the Rewrite, obviously to no avail.

If it is too much to ask for the repeal of land-rich provisions, then it is at least incumbent on the revenue authorities and the State and Territory governments to produce provisions which are certain in their operation and no more complex than is necessary, and which do not make compliance impossible in practice. As will be seen below, the current land-rich provisions fail to meet those objectives.

III. ANALYSIS OF CURRENT LAND-RICH PROVISIONS

Broadly speaking, an acquisition of shares in a company or of units in a unit trust will attract duty under the land-rich provisions if two requirements are satisfied, namely:

(a) the company or trust is one to which the land-rich provisions apply; and
(b) the acquisition constitutes an acquisition of an interest which is a majority interest, adds on to an existing majority interest or results in the creation of a majority interest.

Each of these basic requirements has a myriad of different elements which vary between jurisdictions. The Rewrite represents a valuable opportunity for the participating governments to harmonise the land-rich provisions and to simplify their operation.

Parts A to E look at the major issues associated with requirement (a). Parts F to L look at the major issues associated with requirement (b).

A. Companies to which Land-rich Provisions Apply

(i) Common Tests

In all Australian States and the Northern Territory, a company will be one to which land-rich provisions apply if:

(a) it is not listed on the Australian Stock Exchange ("ASX") or (in all places except Victoria) on another recognised stock exchange or, if it is so listed, its shares are not "listed" or "listed for quotation" on any such stock exchange;[19]
(b) it is entitled (either by direct ownership or indirectly through certain downstream companies or trusts) to land in the relevant jurisdiction with a value of at least $1 million ($500,000 in the Northern Territory);[20] and

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18 *Ibid.*

19 Definition of "private company", NSW Act, s 99A(1); *Stamps Act* 1958 (Vic) ("Vic Act"), s 75I(1); *Stamp Act* 1894 (Qld) ("Qld Act"), s 56FL(1); *Stamp Duties Act* 1923 (SA) ("SA Act"), definition of "private company" in s 91(1); *Stamp Act* 1921 (WA) ("WA Act"), s 76AI(1) and s 76AP(1); *Stamp Duties Act* 1931 (Tas) ("Tas Act"), s 35(1); *Taxation (Administration) Act* 1978 (NT) ("NT Act"), s 56N(1).

20 Definitions of "private company" and "designated landholder" NSW Act, ss 99A(1) and 99A(3); Vic Act, s 75I(2); Qld Act, s 56FL(2); SA Act, s 94(1)(f); WA Act, s 76AI(2) and 76AP(2); Tas Act, s 35(1)(b); NT Act, ss 56N(2) and 56N(5).

(c) land located anywhere in the world to which it is so entitled has a value equal to 80 per cent (60 per cent in the Northern Territory) or more of the value of all assets (except those expressly excluded) to which the company is so entitled.[21]

As already noted, under the Rewrite as presently drafted there is no counterpart of the 80 per cent threshold. It is understood that an equivalent test will reappear in the second draft of the Rewrite.

Given the obvious desire of the revenue authorities to increase the revenue they raise from land-rich provisions, it would not be surprising if the participating jurisdictions attempt in the next draft of the Rewrite to bring their threshold tests into line with those in the Northern Territory. Such a move would be open to criticism as departing from the object of revenue-neutrality.

In the Australian Capital Territory, there are no land-rich provisions of the kind in other jurisdictions. Rather, the land-rich policy works within the provisions dealing with the transfer of shares in a company incorporated in the Australian Capital Territory. Under the Determination[22] which sets the rate of duty, the higher conveyance rates apply if the company owns or is entitled through downstream companies or trusts to land in the ACT. There are no thresholds corresponding to the $1 million and 80 per cent thresholds described above.

In relation to requirement (a), shares are not strictly "listed for quotation" but rather quoted for trading.[23] Despite the inaccurate language, it is reasonably clear that in New South Wales a company is not excluded from the definition of "private company" simply because it is listed on a recognised stock exchange. It is an additional requirement for exclusion that the shares in the company must be "listed for quotation", which presumably means quoted for trading. The definition of "private company" in the Rewrite addresses this issue, referring in part to a public company "whose shares are not quoted on the market operated by the Australian Stock Exchange or a market recognised by the Australian Stock Exchange".[24]

Under the NSW Act the phrase "recognised stock exchange" is not defined. The Commissioner has sought to fill the legislative void by issuing a public ruling[25] in which he has stated that a recognised stock exchange for the purposes of land-rich provisions is any exchange listed in rule 5.9 of Part 6.4 of the Business Rules of the ASX.

In Victoria, the land-rich provisions are expressed not to apply to a corporation's shares in the capital of which are listed on the ASX. An entity listed on an overseas stock exchange but not on the ASX is therefore subject to the land-rich provisions, a surprising result which is corrected in the Rewrite.[26]

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21 *Ibid.*

22 Stamp Duties (Marketable Securities) Determination (No 74) 1995 (ACT).

23 However, the phrase "listed for quotation" appears in s 1097A of the Corporations Law. See also the definition of "quotation" in s 9 of the Corporations Law.

24 Chapter 2, clause 28(2).

25 Revenue Ruling NSW/SD113.

26 Note 24 *supra*.

(ii) Special Tests in Queensland and Western Australia

To determine whether or not a company is a landholder in Queensland and Western Australia, one must consider tests unique to those States in addition to the tests considered at paragraph A(i) above.

In Queensland, a company will be one to which land-rich provisions apply if it satisfies the 80 per cent and $1 million thresholds on a group consolidation basis (as per A(i) above) or on an unconsolidated basis (ie by reference only to assets owned by that company).[27]

The WA Act provides for separate regimes depending upon whether the company is incorporated in or outside Western Australia. For the purposes of the 80 per cent and $1 million thresholds, the entitlement to the assets of a company incorporated in Western Australia is determined in the same manner as in other jurisdictions (see paragraph A(i) above).[28] A company incorporated outside Western Australia is treated as entitled for the threshold tests to assets owned by it or by any "related corporation".[29] "Related corporation" is defined to mean a related body corporate under the Corporations Law,[30] thus including parent and sister companies. However, for the purpose of calculating the value of Western Australian land on which duty is payable, that company will be treated as entitled only to land owned by it or by downstream companies (ie subsidiaries).[31]

B. Trusts to which Land-rich Provisions Apply

(i) Threshold Tests

The land-rich provisions apply to certain unit trusts in New South Wales, Victoria, South Australia, Tasmania and the Northern Territory, and the threshold tests are the same as for companies.[32] In all those jurisdictions a public unit trust scheme (which may or may not be a listed trust) is excluded from the operation of the provisions.

In New South Wales, "public unit trust scheme" is defined[33] to mean:

(a) a unit trust scheme any of the units of which are listed for quotation on the Australian Stock Exchange or on a prescribed stock exchange; or

(b) a unit trust scheme:
   1. which is the subject of a deed approved under Division 5 of Part 7.12 of the Corporations Law or a corresponding law;
   2. any of the units in which have been offered to the public; and
   3. in respect of which no fewer than 50 persons hold units.

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27 Qld Act, s 56FL(2).

28 WA Act, s 76AI(4).

29 WA Act, s 76AP(4).

30 WA Act, s 76(1).

31 WA Act, s 76AS(4) and (5).

32 Definition of "private unit trust scheme" in NSW Act, s 99A; Vic Act, ss75I(2) and 75N; SA Act, definition of "private scheme" in s 91; Tas Act, ss 33(5) and 35(1); *Stamp Duties and Taxes Act* 1987 (ACT) ("SDTA"), s 44 and definition of "private unit trust scheme" in Stamp Duties (Marketable Securities) Determination (No 74) 1995.

33 NSW Act, s 3(1).

If a comparison can be drawn between public companies and public unit trust schemes, it is not apparent on policy grounds why public companies, the shares of which have been offered to the public and which have at least 50 shareholders, should not be excluded from the operation of land-rich provisions.

In Victoria, a trust is excluded from the land-rich provisions if it is not a "private unit trust scheme".[34] It will not be a private unit trust scheme if it satisfies requirements similar to those under alternative (b) in the New South Wales definition of public unit trust scheme, together with the additional requirement that not fewer than 20 unitholders are beneficially entitled to not more than 75 per cent of the units on issue. In determining beneficial entitlements to units for the purposes of that definition, units held by certain related persons are deemed to be held by one person.[35] The fact that a unit trust is listed on the ASX or another stock exchange and that its units are quoted for trading on such an exchange will not be sufficient in itself to take the trust outside the private unit trust scheme definition.

In South Australia, a unit trust is not excluded from the operation of the land-rich provisions simply by virtue of its units being quoted for trading or "listed" on the ASX or a recognised stock exchange.

In the Australian Capital Territory, duty is levied on a transfer of units in a private unit trust scheme if the units are registered in the ACT or, if there is no Australian register, the manager is incorporated or resident in the ACT. If the trustee or a downstream company or trust owns ACT land, duty at conveyance of land rates is payable.[36] In the Rewrite, the land-rich provisions only apply to a "private unit trust scheme", which is a unit trust scheme not being a "public unit trust scheme".[37] The definition of "public unit trust scheme"[38] is very similar to the definition in s 3 of the NSW Act.

(ii) Special Regime in Queensland and Western Australia

In Queensland and Western Australia, the regime which applies to non-public unit trust schemes is not a "land-rich" regime in the sense considered above, because it does not impose threshold tests such as the 80 per cent and $1 million tests of other States. A detailed consideration of these provisions is beyond the scope of this paper.

In Queensland, a private unit trust scheme the trustee of which owns property of any value (whether or not land) located in Queensland is subject to a special regime under which ad valorem duty at conveyance of land rates may be payable.[39] In Western Australia, a similar special regime applies to a private unit trust scheme the trustee of which owns an estate or interest in land in Western Australia (regardless of its value).[40] In both States, a disposition (broadly defined to include,

34 Vic Act, ss 75N(1) and (3).
35 Vic Act, s 75N(2).
36 Stamp Duties (Marketable Securities) Determination (No 74) 1995 (ACT), paras 9, 10, 14 and 15.
37 Chapter 2, clause 28(3).
38 Chapter 10.
39 Qld Act, s 56B.
40 WA Act, s 73D.

amongst other things, redemptions, allotments and variations of rights) of any units in such a trust will attract duty: there is no "majority interest" threshold as in the land-rich company provisions of those or other States.

These provisions possess the fundamental characteristics which the business community found objectionable in the "land-rich" provisions in the Rewrite. However, neither Queensland nor Western Australia is currently participating in the Rewrite process except, as announced recently, in relation to the acquisition module (excluding land-rich provisions). The Queensland Government has started a process which should culminate in certain "wholesale trusts" (ie trusts established and managed by financial corporations as investment vehicles for wholesale investors) being removed from the ambit of the special regime. A draft ruling has been issued but not yet finalised.[41] To date, Western Australia has not followed Queensland's lead in this regard. Whilst that ruling is a welcome development, it falls short of bringing Queensland into line with most of the participating jurisdictions in which duty at conveyance of land rates is levied only on an acquisition of units in a private unit trust which satisfies "land-rich" threshold requirements.

C. Entitlement to Assets

In each State and Territory, in order to assess whether a company or trust is land-rich, complex tracing rules require an examination of the assets of companies and trusts downstream. As the following analysis illustrates, those rules are not only complex but to a significant extent uncertain in their operation and difficult (if not sometimes impossible) to comply with in practice, a situation which it is imperative for participating jurisdictions to address in the Rewrite.

(i) Circularity

In New South Wales, in determining whether a private company or private unit trust scheme satisfies the $1 million and 80 per cent thresholds, it is necessary to identify those assets to which it is "entitled". Under s 99A(3), a private company or private unit trust scheme is entitled to an asset if:

(a) it owns the asset; or

(b) that asset is owned by a "landholder" and that company or trust would be entitled to participate in a distribution of the property of that landholder if that landholder and all persons (not being listed companies or public unit trust schemes) interposed between it and the company or trust in a chain of ownership of interests were wound up.

A major difficulty in interpreting s 99A(3) is its inherent circularity. It is expressed to apply only to a private company or a private unit trust scheme. Both "private company" and "private unit trust scheme" are defined by reference to whether they are entitled to land in New South Wales or carry on business wholly or partly in New South Wales. In other words, to determine whether a company or trust is a private company or private unit trust scheme, one must determine

41 Revenue Ruling SD24 (Qld) (Draft).

whether it is entitled to New South Wales land, but it will only be so entitled if it is a private company or private unit trust scheme within the terms of s 99A(3).

This circularity could be reconciled if s 99A(3) is interpreted as applying only to a company or trust which carries on business wholly or partly in New South Wales or which is "entitled" to New South Wales land in the ordinary sense of that word. However, as the authors of *Stamp Duties* point out,[42] the ordinary meaning of that word is far from clear although it presumably connotes absolute ownership of the relevant land or a legal or equitable estate or interest in the land. If that interpretation is correct, then a company or trust would not be "entitled" to land under s 99A(3) if it did not carry on business in New South Wales and did not own any legal or equitable estate or interest in New South Wales land, although it held 100 per cent of the shares in a company which owns New South Wales land.

Such a result would be at odds with the apparent purpose of s 99A(3), which is to establish rules to determine whether a company or trust is a private company or a private unit trust scheme and therefore a "landholder" for the purposes of Division 30. The authors of *Stamp Duties* believe that a court is likely to break the circularity inherent in s 99A(3).[43] On the other hand, there is certainly a reasonable argument that s 99A(3) should be read down so as to apply only to a company or trust which is a "private company" or "private unit trust scheme" as defined apart from the application of that provision. That interpretation is consistent with the canon of statutory construction that the NSW Act must be read down so as not to exceed the legislative power of the New South Wales government to make laws for the peace order and good government of New South Wales.[44] Arguably, the Parliament has intended to limit the application of s 99A(3) to those companies or trusts which have a relevant connection with New South Wales apart from the application of that section.[45] The matter is not capable of easy resolution. The Rewrite provides an opportunity for this uncertainty to be removed.

Even where reasonable arguments in favour of the taxpayer are available, reliance upon them may be disastrous if a court takes a contrary view. At least one judge of the New South Wales Court of Appeal, now a judge of the High Court of Australia, seems to think that the courts have abandoned the principle of statutory construction that in interpreting a taxing statute, any doubt must be resolved in favour of the taxpayer.[46] With respect, such a view is unhelpful because it is conducive to uncertainty in the law. In view of the serious consequences which follow if a taxpayer does not discharge its obligations under the land-rich provisions,[47] it is incumbent on the legislature to ensure that the legislation is unequivocal in its meaning and intended operation.

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42 Law Book Company, *Stamp Duties: NSW/ACT* at [3.16310].

43 *Ibid* at [3.16180].

44 See generally the discussion in Law Book Company, note 42 *supra*.

45 *Ibid* at [3.16310].

46 *Buckle v Commissioner of Stamp Duties (NSW)* (1996) 96 ATC 4098, at 4101. per Kirby P; *Commissioner of Stamp Duties v Commonwealth Funds Management Limited* (1995) 95 ATC 4756 at 4759, per Kirby P.

47 For example, in New South Wales failure to lodge a statement is made an offence by s 99I, and late payment penalties (up to 100 per cent) may apply.

The circularity just discussed is not addressed in the Rewrite. Under the Rewrite, a "private landholder" is a private company which has, or a private unit trust scheme the trustees of which have, real property in the relevant jurisdiction with an unencumbered value of not less than $1 million. Property (including real property) of a "private landholder" includes (amongst other things) property owned by a subsidiary of the private landholder. Under the definition of "subsidiary",[48] only a "private landholder" satisfying certain requirements may be a subsidiary of another "private landholder". Accordingly, if company A owns only shares in company B which owns only shares in company C, and company C owns New South Wales land, each of companies A and B will only be a "private landholder" if clause 30 applies, but that clause is expressed to apply only to a "private landholder".

(ii) Chain of Ownership of Interests

A company or trust will be entitled to an asset owned by a downstream company or trust ("entity") if it would be entitled to participate in a winding-up distribution of property by the downstream entity (assuming a winding-up of that entity and all interposed entities). However, the entitlement to participate in such distribution will only be counted for the purposes of Division 30 (the New South Wales land-rich provisions) if the distribution is made through entities associated in a "chain of ownership of interests in landholders".[49] An "interest" as defined in s99A(1) must be "acquired" in a "landholder" on or after a certain date.[50] The term will not have its defined meaning if such meaning is "inconsistent with the context or subject matter".[51] In the author's view, there is nothing in Division 30 to suggest that the word "interest" does not have its defined meaning in s 99A(3). If the chain of ownership includes a shareholding or a unitholding which is not an "interest", it seems that the tracing under s 99A(3) will not proceed through such holding. Accordingly, if company A owns 100 per cent of the shares in company B which owns 100 per cent of the shares in company C and company C owns land and other assets in New South Wales, company A will not be deemed to be entitled to company C's assets for Division 30 purposes if (for example) company B acquired its shareholding in company C prior to 21 November 1986 (such acquisition being excluded from the definition of "interest").

(iii) Tracing through Listed or Public Entities

In New South Wales, South Australia and the ACT, there is no tracing through downstream listed companies and public unit trust schemes.[52] In Victoria, Queensland, Western Australia, Tasmania and the Northern Territory, tracing is required through any "subsidiary", regardless of whether that subsidiary is a listed

48 Chapter 2, cl 30.
49 NSW Act, s 99A(3).
50 See Section G below.
51 NSW Act, s 99A(1).
52 NSW Act, s 99A(3)(b); SA Act, s 92(1) and definitions of "private company" and "scheme" in s 91(1); Stamp Duties (Marketable Securities) Determination (No 74) 1995 (ACT), para 15.

company or trust.[53] Under the Rewrite, in view of the requirement in clause 30 of Chapter 2 that a "subsidiary" be a "private landholder", there is no tracing through downstream listed companies and public unit trust schemes.

(iv) The Significance of "Control"

The current New South Wales land-rich provisions do not rely on any notion of control of one entity over another to determine whether entitlements of a company to assets may be traced through "downstream" entities. Rather, those provisions require tracing through economic interests in downstream entities, being interests which confer an entitlement to participate in a distribution of an entity's property upon a winding-up. In the context of land-rich provisions, a tracing test based on ownership of economic interests is preferable to one based on control in view of the threshold tests considered at section B above. Those tests focus on the quantum of a company's or trust's entitlement to land and other assets owned by downstream entities, and not on a company's or trust's control of, or ability to control, such assets.

Even though the preferable "economic interests" approach is adopted in New South Wales, a problem arises because under s 99A(3), there is no limit to the number of companies or trusts through which entitlements are traced. Moreover, tracing is required no matter how small the interest in the relevant company or trust. For example, if company A owns one per cent of the shares in company B and company B is a landholder, company A will be entitled to one per cent of company B's assets. The necessity to trace through such small interests can make it impossible in some circumstances for taxpayers to determine whether they have obligations under Division 30, because information regarding the assets of such entities will not be available to them.

To an extent the current land-rich regimes in States other than New South Wales require tracing through downstream companies which are controlled by the target company or trust. The provisions in the Victorian Act are a good example of the approach, and form the basis of the provisions in the Rewrite.

Under the Rewrite, property is treated as property of a private landholder if it is (amongst other things) owned by the private landholder or a subsidiary.[54] "Subsidiary" is defined in terms which mirror the definition of "subsidiary" in s 75I(5) of the Victorian Act.[55]

Under s 75I(5), "subsidiary" means:

(a) a subsidiary corporation within the meaning of section 9 of the Corporations Law;

(b) the trustee of any trust, if the corporation or a subsidiary corporation of the corporation as defined in paragraph (a)

(i) is entitled to a share or interest in the trust, whether vested or contingent; or

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53 Vic Act, s 75I(5); Qld Act, ss 5 and 6FL(6) and definition of "subsidiary" in s 56FA(1); WA Act, ss 76AI(4) and 76AP(4); Tas Act, s 35(3) and definition of "subsidiary" in s 33; NT Act, s 56FN(5).

54 Chapter 2, cl 29(1).

55 Chapter 2, cl 30.

(ii) in the case of a discretionary trust, may benefit from that trust and, at the time of the relevant acquisition, the corporation or subsidiary is entitled to more than 50 per centum of the value of the property held by the trustee as trustee of the trust (being the value determined on the basis of a distribution of the property at that time); or

(c) any other corporation, if the trustee of a trust to which paragraph (b) applies in which the corporation or a subsidiary corporation

(i) is entitled to a share or interest, whether vested or contingent; or
(ii) in the case of a discretionary trust, may benefit from that trust

would be entitled if the other corporation is to be wound up, after the time of the relevant acquisition, to participate (otherwise than as a creditor or other person to whom the other corporation is liable) in a distribution of the property of the other corporation to an extent greater than 50 per centum of the value of the property distributable to all of the holders of shares in the other corporation; or

(d) any other corporation or the trustee of any other trust that would by an application of this sub-section be a subsidiary of a corporation that is a subsidiary of the first-mentioned corporation in this sub-section.

As is seen below, the definition of "subsidiary" in the Corporations Law, which is included within the above definition of "subsidiary", incorporates tests based on control.

(v) "Control" by reference to corporate "subsidiary"

Paragraph (a) of the definition in s 75I(5) applies only to a corporation, and incorporates the Corporations Law definition of "subsidiary". S will be a subsidiary of P if:

- P controls the composition of S's board of directors;
- P is in a position to cast or control the casting of more than half the maximum number of votes that might be cast at a general meeting of S; or
- P holds more than half of S's issued share capital (excluding share capital not conferring rights to participate in a distribution of profits or capital beyond a specified amount).

The first test is satisfied by de jure or formal control, or a legally enforceable power to cast the votes attaching to more than 50 per cent of the voting shares.[56] Section 47 of the Corporations Law provides some examples of circumstances where P is considered to control the composition of S's board, such as where P has power to appoint or remove all or a majority of the directors of S corporation. The second test requires either de jure control or de facto control (ie the ability to determine the outcome of a vote without de jure control).[57] The third test focuses on the quantum of the issued share capital held by the shareholder (ie the extent of its economic interest) and is not expressly reliant on any concept of control.

Neither of the first two tests focuses on the entitlement of the shareholder to participate in a distribution of the company's property upon a winding-up. As a consequence, in Victoria, Queensland, South Australia, Western Australia,

56 *WP Keighery Pty Ltd v Federal Commissioner of Taxation* (1956) 100 CLR 66; *Equiticorp Industries Ltd v ACI International Ltd* (1987) 5 ACLC 237; *Mt Edon Gold Mines Aust Ltd v Burmine Ltd* (1994) 12 ACSR 727.

57 HAJ Ford and RP Austin, *Principles of Corporation Law*, Butterworths (7th ed, 1995) p 863.

Tasmania and the Northern Territory the value of land and other assets to which a company is entitled through its Corporations Law subsidiary for land-rich purposes will not necessarily be commensurate with its economic interest in those assets. For example, company A may have a shareholding in company B which entitles it to 10 per cent of B's property upon a winding-up, and yet B may be A's subsidiary because A is able to control the composition of B's board. A will be deemed entitled to the whole of B's property in determining whether A is a company to which land-rich provisions apply. However, in calculating the duty payable under the land-rich provisions only 10 per cent of the value of land in that relevant jurisdiction owned by company B will be included in the duty base.[58] At first blush this might seem fair, but it is capable of bringing within the land-rich provisions a company with only small economic interests in land. In the above example, if the only land owned by company B is Victorian land with a value of $1 million, company A would be entitled upon a winding-up to land with a value of $100,000 but would nonetheless be a "land-rich" company.

The revenue authorities must decide whether the land-rich provisions in the next draft of the Rewrite will depend for their operation on ownership of economic interests, or on the presence of control. It is clear that the mere ability of company A to control the decisions of company B may make B a subsidiary of A for Corporations Law purposes; but it does not necessarily give A the power to appropriate more of B's property than A's shareholding would represent in an economic sense. In the context of land-rich provisions which require a quantification of a company's entitlement to participate in a winding-up distribution of downstream companies,[59] the more sensible approach is one based on ownership of economic interests. The approach under current land-rich provisions in New South Wales to the above example is to attribute to A an entitlement to 10 per cent of B's assets in order to determine whether A meets the 80 per cent and $1 million thresholds and to calculate duty. In other words, in NSW the land-rich provisions focus on the ownership of economic interests, and not on control. If such a focus is adopted in the Rewrite, the new land-rich provisions should apply only to companies which have substantial economic interests in land. The size of that interest is a matter for the legislature, but it is submitted that a company or unit trust should only be deemed entitled to the assets of a company or unit trust in which it holds an entitlement to more than 50% in value of the property of that company or unit trust upon its winding-up. This would be consistent with paragraph (c) of the "subsidiary" definition in s75I(5) and with the limb of the Corporations Law definition of subsidiary which looks at the economic interest of the parent. Such an approach would overcome the difficulty inherent in the current New South Wales and Victorian models of requiring unlimited tracing through certain downstream companies and trusts.

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58 Vic Act, s 75L(4); Qld Act, s 56FK(4); SA Act, s 92(4), WA Act, ss 76AL(4) and 76AS(4); Tas Act, s 39(3); NT Act, s 56R(4).

59 See, for example, NSW Act, s 99A(4).

(vi) Trust as "subsidiary"

(a) **Trusts other than discretionary trusts:** under paragraph (c)(i) of the definition of subsidiary in s 75I(5) of the Victorian Act, the trustee of a trust is a subsidiary of a company which has any vested or contingent interest in the trust, regardless of the extent of that interest. In addition, it makes no difference whether the trust is public or private. Accordingly, even if a company holds one unit in a listed unit trust in which there are 100 million units on issue, the trustee of that trust will be a subsidiary of the company. However, the company will only be entitled to assets to which that trustee is beneficially entitled.[60] This would exclude assets owned by the trustee in its capacity as trustee. The legislature may have intended to treat the company as entitled to the assets of the trust in which it is a beneficiary, but that result does not follow on a literal reading of the legislation. In any event, it is submitted that, under the Rewrite, a company should be treated as entitled to the assets of a trust only if it has a substantial beneficial interest in that trust.

As an alternative to a test based on substantial economic interests, a company or unit trust could be treated as entitled to the assets of a trust over which it has some measure of control. This immediately gives rise to the problem of how to establish the existence of such control.

The Corporations Law definition of "subsidiary" does not apply to a trust. However, there is a definition of "control" which applies for the purpose of consolidation of accounts of a company and entities it controls, including trusts.[61] In that definition "control" is:

> the capacity of an entity to dominate decision making, directly or indirectly, in relation to the financial and operating policies of another entity so as to enable that other entity to operate with it in pursuing the objectives of the controlling entity.

That test is not appropriate for use in a land-rich context, because it does not focus on the entitlement of an entity to participate in winding-up distributions of another entity.

It is suggested that a trust should be treated as a subsidiary of a company if the company has a substantial beneficial interest in the trust. The size of that beneficial interest is a matter for the legislature, but for reasons canvassed above it is submitted that it should entitle the beneficiary to more than 50 per cent in value of the property of the trust upon its winding-up.

(b) **Discretionary trusts:** Section 75I(5)(b)(ii) of the Victorian Act is an anti-avoidance provision. Under it, a corporation is entitled to assets the subject of a discretionary trust if the corporation or its subsidiary (for

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60 Definition of "entitled" in Vic Act, s 75(1); see also equivalent definitions in Qld Act, s 56FA(1); WA Act, s 76(1); Tas Act, s 33(1); NT Act, s 56C(1).

61 Standard 1017 of the Australian Accounting Standards Board, incorporated into Div 4A of Pt 3.6 of the Corporations Law by s 294B(3).

Corporations Law purposes) is an object under that trust, and would be entitled to more than 50 per cent in value of the trust's assets if a distribution were made. On its face this provision is unclear in its intended operation, because it does not establish a mechanism for determining by objective means how the corporation's entitlement under that trust is to be quantified if the trust property has not been vested. The uncertainty is exacerbated by s 75(7) which provides in part that a person that may benefit from a discretionary trust, or trust property that may comprise a benefit from another discretionary trust, shall be deemed to be entitled to or to comprise that property unless the Comptroller determines otherwise.

It is submitted that the current treatment of discretionary trusts is an unwarranted and complex extension of the anti-avoidance apparatus within the land-rich provisions. It is unduly harsh to a company which is a beneficiary under a discretionary trust to be treated as entitled to the whole or any part of that trust's property if that company has no existing proprietary interest in that property and may never acquire such an interest. A discretionary object has no proprietary interest in the trust assets.[62] If a company has a vested interest as a taker in default under a discretionary trust, that interest will constitute an asset for Division 30 purposes and may be valued like any other asset. It is submitted that these provisions should therefore be deleted in the context of the Rewrite.

D. Entitlement to Land

(i) "Land" defined

Fundamental to the operation of the land-rich provisions is the nature and extent of interests in land which are counted in determining whether an entity is land-rich. Needless to say, this differs from State to State.

In New South Wales, "land" is defined for Division 30 purposes in s 99A(1) in the following terms:

> "land" means any estate or interest in land, whether the land is situated in New South Wales or elsewhere, but does not include the estate or interest of a mortgagee, chargee or other encumbrancee in land.

The definition is very broad, covering all manner of legal and equitable estates or interests in land. The estate of a lessee under a lease is included in the definition unless excluded as the estate of an encumbrancee. The better view is that a lease is not an encumbrance and therefore a lessee is not an encumbrancee.[63] If that were not the case, a valuable leasehold estate held by a company (eg a long-term lease granted for a substantial premium) would not be counted in determining whether that company is a "designated landholder".

In jurisdictions outside New South Wales it is an entitlement to real property which matters. In Victoria, for example, a landholder is a company which is

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62 *In re Beckett's Settlement* [1940] Ch 279.

63 This view was recently upheld by the Victorian Administrative Appeals Tribunal in relation to s 17 of the Vic Act in *Re Bradney Pty Limited v Commissioner of State Revenue (Vic)* (1996) 33 ATR 1087.

entitled to real property in Victoria with a value of at least $1 million and to real property wherever located having a value equal to at least 80 per cent of the value of its total assets (excluding certain assets).

"Real property" is defined in s 75(1) of the Victorian Act in the following terms:

> "Real property" includes any estate or interest in real property.

In Victoria, the interest of a mortgagee, chargee or other encumbrancee is not expressly excluded. However, in Victoria (at least as a practical matter) the interest of a mortgagee or chargee is not treated as real property. Section 750 excludes from the land-rich provisions an acquisition in a corporation relating to property if a conveyance of that property would not be dutiable under Heading VI of the Third Schedule. In practice, the Commissioner does not levy duty under Heading VI on the transfer of a mortgage or charge, which he will assess to nominal duty as a deed not otherwise chargeable.[64] Whilst a leasehold estate is clearly "real property" as defined, s 750 will again operate to exclude such an estate from the operation of the land-rich provisions, because a transfer of a lease is dutiable under Heading IX of the Third Schedule, not under Heading VI.

Under the Rewrite, "real property" is defined in Chapter 10 in the following terms:

> "real property" means land and an interest in land, and includes:
> (a) an interest under a lease or licence, and
> (b) an interest conferred by or under an Act, and
> (c) transferable floor space or air space, and
> (d) an option to purchase property included in this definition.

The term "interest" includes an estate, right or entitlement.

At general law, it is clear that neither a licence[65] nor transferable floor space or air space is an estate or interest in land.[66] It follows that an option to purchase such interest is not an interest in land.[67] These items of property in the definition of "real property" will therefore extend the scope of the current land-rich provisions. It is not clear as a matter of policy why the revenue authorities have found it necessary to extend the scope in this way. The effect of such a change would be to expand the duty net, and it is submitted that this would be contrary to the objectives of the Rewrite.

(ii) Entitlement to Land Under Contract for Sale

An interesting question arises whether for land-rich purposes a company is entitled to land as the seller or purchaser under an uncompleted contract for the sale of land. If so, a further issue arises as to the value of the land to which it is entitled. It is instructive to examine first the position with respect to Torrens Title land independently of the land-rich provisions.

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64 Official Practice Note Vic/23/T/1.

65 *Cowell v Rosehill Racecourse Company Ltd* (1936) 56 CLR 605.

66 *Depsun Pty Ltd v Tallore Holdings Pty Ltd* (1990) 5 BPR 11314

67 Cf *George Wimpey & Co Ltd v Inland Revenue Commissioners* [1975] 2 All ER 45 in which the House of Lords held that an option to purchase land was a proprietary interest in land.

A buyer under a specifically enforceable contract for the sale and purchase of land has a beneficial interest in that land,[68] the extent of which is measured by the amount of the purchase moneys paid.[69] The seller is the legal owner of the land if it is the registered proprietor,[70] and also has an equitable lien over the land until the purchase price is paid.[71] The seller does not have unencumbered beneficial ownership because the existence of the contract renders the seller unable to dispose of its land to any person other than the buyer; the seller under an uncompleted contract is a trustee *sub modo* of the property.[72] The seller is "in progress towards" trusteeship, and the incidents of trusteeship exist only if and so far as a court of equity would in all the circumstances grant specific performance of the contract.[73] The buyer becomes the beneficial owner of the land when it is able to obtain an order for specific performance of the contract,[74] at which time the seller becomes a constructive trustee of the land for the buyer.[75] At the time the purchase price is paid in full and before an instrument of transfer is executed in favour of the buyer, the seller will be a bare trustee of the legal title for the buyer.[76]

The land-rich provisions depart significantly from this position. In New South Wales, as a result of the decision of Smart J in *Mertune Pty Ltd v Chief Commissioner of Stamp Duties (NSW),*[77] a company which is the purchaser of land under an uncompleted contract for sale is "entitled" to the entire estate in the contract land for the purposes of Division 30, and not to some lesser interest. The value of that estate is not the amount of the deposit paid as under general law, but the unencumbered value of the freehold estate (this will be the contract price where the seller and buyer have entered into an arm's length bargain).

Justice Smart's decision was made on the wording of the Act before s 99J[78] was introduced, and he thought that as at the date of the acquisition in question "the Commissioner's case was not, perhaps, quite as strong as it subsequently became".[79] However, he nonetheless held in favour of the Commissioner having regard to the "scheme of the Act" and "the purpose of Div 30, including the mischief at which it was aimed".[80]

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68 *Bunny Industries Ltd v FSW Enterprises Pty Ltd* [1982] Qd R 712.

69 *Ibid.*

70 *KLDE Pty Ltd v Commissioner of Stamp Duties* (1984) 155 CLR 288.

71 *Haque v Haque [No 2]* (1965) 114 CLR 98 at 124, per Kitto J.

72 *Lysaght v Edwards* [1876] 2 Ch D 499; *Barry v Heider* (1914) 19 CLR 197.

73 *Lysaght v Edwards, ibid.*

74 *KLDE Pty Ltd v Commissioner of Stamp Duties,* note 70 *supra.*

75 *Chang v Registrar of Titles* (1976) 137 CLR 177.

76 *Bunny Industries Ltd v FSW Enterprises Pty Ltd,* note 68 *supra.*

77 (1994) 94 ATC 4458.

78 Section 99J provides that if an agreement for the sale or conveyance of land to a person which causes that person or any other person to become a landholder or designated landholder or to become entitled to land is rescinded, annulled or otherwise terminated (except by completion) then any requirement to lodge a statement under Division 30 ceases, and the Commissioner must assess or reassess duty as if no entitlement to land had been created by the agreement.

79 Note 77 *supra* at 4464.

80 *Ibid* at 4466.

The decision in Mertune has been criticised,[81] in the author's view not without reason. It is difficult to see how the conclusion is justified on the basis of a purposive approach to Division 30. Ostensibly, the purpose of Division 30 is not defeated if the buyer under an uncompleted contract is treated as being entitled to land with a lesser value than the full contract price if, as a matter of legal and valuation principle, that is the case. In the author's view, that position is not inconsistent with s 99J, because that section would still have a field of operation if a buyer's entitlement to land under an uncompleted contract, measured by the amount of the deposit paid, is sufficient to make the buyer (or an upstream company or unit trust) land-rich. Despite this, the decision was not the subject of an appeal and accordingly represents the current law.

Buoyed by the decision in *Mertune*, the Commissioner has gone even further by claiming he is entitled to treat both the seller and the buyer as entitled to the entirety of the land the subject of an uncompleted contract for sale. This counterintuitive conclusion is not supported by any particular provision of the Act. Furthermore, it would appear to be inconsistent with the conclusion in *Mertune*, because it is illogical to assert that the scheme of the Act, in the absence of an express provision, is to treat both the buyer and the seller under an uncompleted contract as entitled to the land for Division 30 purposes.

The relevance of *Mertune* outside New South Wales is varied. In Victoria, Western Australia, Tasmania and the Northern Territory the land-rich provisions contain no specific provision dealing with the status of an uncompleted contract for sale.

In Queensland, s 56FL(5) provides that for the purposes of calculating the value of all land to which a corporation is entitled or the value of all property to which it is entitled for the purposes of s 56FL(2), any contracts or agreements for the sale of land of the corporation or of a subsidiary shall be treated as though they had not been made. That provision says nothing about whether a purchaser of land under an uncompleted contract for purchase is entitled to that land. The Qld Act contains an equivalent of NSW s 99J[82] and therefore there is sufficient similarity between the Qld Act and the NSW Act to make it impossible to ignore *Mertune* in the Queensland context. However, it seems that the Queensland Commissioner does not treat a corporation as beneficially entitled to land of which it is the buyer under a conditional contract.[83]

In South Australia, s 92(7)(b) provides that a private company or scheme does not own property beneficially by virtue only of being a purchaser under an uncompleted contract of sale. Accordingly, the *Mertune* principle is displaced by statute in South Australia.

In the Australian Capital Territory, the case has no relevance. The question is whether a buyer under an uncompleted contract "holds" land within the meaning of the relevant Determination. It is understood that the practice of the ACT

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81 G Best, "Stamp Duty: When is a Company 'Land Rich'", (1994) 5 *Journal of Banking and Finance Law and Practice* 285.

82 Qld Act, s 56FK(11).

83 Law Book Company, note 42 *supra* at [4990].

revenue authorities is to treat the seller as holding land until the contract is completed.

Under the current draft of the Rewrite, the seller and the buyer under an uncompleted contract for the sale of property are taken to be separately entitled to the whole of the property.[84] If such a contract causes the buyer to become a private landholder or entitled to land but is rescinded, annulled or otherwise terminated (except by completion), the existence of that contract must be ignored for land-rich purposes. An alternative approach would be to treat either the seller or the buyer (but not both) as entitled to the full land value. If the buyer is treated as so entitled, it would still be appropriate to include a refund provision similar to s 99J. If the Commissioner is concerned about treating only one party as entitled to the land because of the avoidance opportunities it may offer, it is submitted this could be appropriately dealt with by a provision empowering the Commissioner to ignore the existence of an uncompleted contract if in his reasonable opinion the contract has been entered into for the purpose of defeating the operation of the land-rich provisions.

E. Assets Excluded from Land-rich Calculation

(i) Specific Exclusions

In each participating jurisdiction except the ACT, in determining whether a company or trust satisfies the 80 per cent threshold, certain assets must be excluded from the denominator of the calculation. There is a fair degree of consistency as to the assets excluded, although certainly not uniformity.

In New South Wales, the excluded assets are cash, money on deposit with a bank, negotiable instruments, corporate debt securities, loans repayable on demand or within 12 months of the date of the loan, loans to related persons of and certain persons associated with the landholder, land use entitlements and assets that the landholder is unable to satisfy the Commissioner were not obtained to reduce for Division 30 purposes the ratio of the unencumbered value of the land to the unencumbered value of total assets.[85] Similar exclusions apply in the other States and the Northern Territory.[86] In each of those jurisdictions there is an exclusion which enables the Commissioner to ignore assets which he is not satisfied were acquired for a purpose other than diluting the ratio of land to total assets. In some jurisdictions, the Commissioner may exclude any asset, in others only those assets which are prescribed.

In South Australia, the assets (cash, short term loans etc) will not be excluded if it is shown to the Commissioner's satisfaction that the acquisition of, or dealing with, the relevant property was not for the purpose of defeating the object of the land-rich provisions.[87] It is submitted that the South Australian formulation or a variant of it should be incorporated in the Rewrite. Assets of any kind would be

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84 Chapter 2, clause 29(4).

85 NSW Act, definition of "designated landholder" in s 99A(1).

86 Vic Act, s 75I(4); Qld Act, s 56FL(4); SA Act, s 94(5); WA Act, ss 76AI(3) and 76AP(3); Tas Act, s 35(2); NT Act, s 56N(4).

87 SA Act, s 94(5).

excluded if the Commissioner is satisfied they were obtained for the purpose of defeating the land-rich provisions, but would not automatically be excluded. Such formulation would narrow the operation of land-rich provisions because non-land assets currently excluded from the land-rich calculation would be included, with the result that the ratio of land to total assets will be reduced. However, this is a fair result, because the person who acquires a shareholding in a company acquires an economic interest in all of its assets.

(ii) Shares and Units

In determining whether a private company or private unit trust scheme (the "relevant entity") is land-rich, there is a question whether shares or units through which an entitlement to land can be traced are included in calculating the value of the relevant entity's assets. There may be in effect a double counting of the value of land and other assets owned by a company the shares of which are owned by the relevant entity, or owned by the trustee of a unit trust in which the relevant entity holds units.

Division 30 of the NSW Act imposes duty on certain acquisitions of interests in a designated landholder. To be a designated landholder, a company or trust must satisfy the 80 per cent and $1 million requirements discussed above. In determining whether those requirements are satisfied, it is necessary to look at:

(a) all assets owned by the company or trust; and
(b) all assets to which the company or trust is entitled under s 99A(3),

except those assets expressly excluded by the "designated landholder" definition. Shares and units are not so excluded. Accordingly, it would appear that the value of shares or units owned by a relevant entity are counted in the land-rich calculations, along with the value of land and other assets to which that downstream company or trust is entitled and which are reflected in the value of its shares or units.

The terms of s 99A(3) as originally enacted treated a company as entitled to land owned by it or by certain downstream entities. It did not create an entitlement to assets other than land for Division 30 purposes. The definition of "designated landholder" required an examination of the land to which that company was so entitled and of "all its assets" to determine whether the 80 per cent threshold was satisfied. Shares owned by the company in another company were not excluded. Although this "double counting" may have seemed contrary to the legislative intention, it is conceivable that the opposite is true. The legislature may have deliberately allowed the value of such shares to be counted because the company was not deemed to be entitled to non-land assets owned by downstream companies in which it had an interest. Treating the company as entitled to land owned by downstream companies without treating non-land assets in the same way could have led to a company being treated as a designated landholder, whether or not it held an economic interest in substantial non-land assets through downstream entities.

Section 99A(3) was amended by the *Stamp Duties Amendment Act* 1990 (NSW). References to "land" were replaced by references to "assets". The definition of "designated landholder" was amended so that the reference to "its assets" was

replaced by "assets to which it is entitled". The effect of those amendments is to ensure that a company is deemed to be entitled to all assets, and not just land, owned by downstream companies and trusts. It also deemed a company to be entitled to all assets owned by it. Shares and units were not excluded from the assets which must be counted in determining whether the company is a designated landholder.

Accordingly, on a literal interpretation of the current provisions there is a double counting which makes it less likely that a company will be a designated landholder. To take an example, suppose company A owns 100 per cent of the shares in company B (which has no liabilities) and company B owns $1 million worth of land in New South Wales and no other assets. Company A is entitled to two assets by virtue of s 99A(3): its shareholding in company B and the land owned by company B. Because company B has no liabilities, company A's shareholding in company B will be worth $1 million. The value of land to which company A is entitled ($1 million) will represent 50 per cent of the value of the total assets to which company A is entitled ($2 million, being the aggregate value of the land and shares). Whilst this result may seem contrary to the legislative intention, it is the author's view that there is no justification for a court to read into the "designated landholder" definition an exclusion for any shares owned by the company. As Lord Mersey said in *Thompson v Gould & Co*:[88]

> It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.

The provisions are not denied a field of operation by a literal interpretation,[89] because there will be no benefit to the taxpayer if (for example) such shares are valueless. It is also noted that in order to avoid double counting, the court would be required to read in words which require careful drafting and which do not readily suggest themselves having regard to the other provisions of Division 30. It is not simply a question of reading one word in a statutory provision as if another word was intended to be used.[90] The author endorses the comment made by the authors of *Stamp Duties*[91] that if the legislative intention was not to permit double counting then there should be a further amendment to make this clear.

The position with respect to units is perhaps more difficult. If a company or trust owns units in a unit trust, it may be said to have an equitable proprietary interest in each of the assets of that trust[92] and not a right of property separate and distinct from that interest. Whether a unit is a separate right of property for the purpose of Division 30 is a question of statutory construction. However, having regard to the overall scheme of Division 30, which treats a private unit trust

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88 [1910] AC 409 at 420; see also *Dallikavak v Minister for Immigration and Ethnic Affairs* (1985) 9 FLR 98.

89 See generally DC Pearce and RS Geddes, *Statutory Interpretation in Australia,* Butterworths (3rd ed, 1988) at [2.16] and cases cited therein.

90 Cf *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 81 ATC 4298.

91 Law Book Company, note 42 *supra* at [3.16110].

92 *Charles v Federal Commissioner of Taxation* (1953) 90 CLR 598; *Commissioner of Stamps v Softcorp Holdings Pty Ltd* (1987) 87 ATC 5737; *Costa & Duppe Properties Pty Ltd v Duppe* [1986] VR 90; *Read v Commonwealth* (1988) 167 CLR 57.

scheme as a landholder and units in that scheme as though they were an "interest", and to other provisions of the NSW Act that treat units as a separate right of property,[93] it is at least arguable that a unit in a unit trust owned by a company is an asset to which that company is entitled pursuant to s 99A(3)(a).

F. Dutiable Acquisitions

The second category of issues which arise under land-rich provisions relates to the acquisitions which attract duty. Questions arise as to what events constitute acquisitions, the time at which an acquisition occurs, the relevance, if any, of the period within which successive acquisitions occur and the aggregation of acquisitions by related persons.

(i) Meaning of "Acquisition"

In New South Wales, the concept of "acquisition" is very broadly defined.[94] The definition is as follows:

> 'acquisition' in relation to an interest or land use entitlement in a landholder, includes an acquisition by which a person becomes entitled to an interest or land use entitlement (or an increase in an interest or land use entitlement) by means of:
>
> (a) the purchase, gift, allotment or issue of shares in a company or units in a unit trust scheme;
> (b) the variation, alteration or abrogation of a right attaching to any share or any unit;
> (c) the redemption, surrender or cancellation of any share or unit.

The definition of "acquisition" or "acquire" in other jurisdictions contains similar though not identical wording.[95] In some jurisdictions, the definition itself contains express exclusions, and to that extent differs from the Division 30 definition.

A threshold issue regarding the definition of "acquisition" is whether it is an exclusive or inclusive definition. This is a matter of considerable importance. The definition uses the word "includes" and not "means", so on its face the definition is not intended to be exhaustive. Despite that, there have been occasions where a court has held that the word "includes" has not precluded the relevant definition from being an exhaustive one.[96] Ultimately, the question to consider is whether the legislature in setting out instances of acquisitions in paragraphs (a) to (c) of the definition has intended to expand the ordinary meaning of the term or whether the paragraphs simply provide examples of that meaning.

It seems reasonably clear that the definition of "acquisition" in Division 30 is indeed inclusive. To begin with, it is the only definition in Division 30 which uses the word "includes" rather than "means", suggesting that the legislature intended the term to be read expansively.[97] Furthermore, the ordinary meaning of the word

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93 NSW Act, ss 90-94.

94 NSW Act, s 99A(1).

95 Vic Act, definition of "acquire" in s 7.5(1); Qld Act, definition of "acquire" in s 56FA91); SA Act, definition of "acquisition" in s 91(1); definition of "acquire" in s 76(1); Tas Act, definition of "acquire" in s 33(1); NT Act, definition of "acquire" in s 56C(1).

96 DC Pearce and RS Geddes, note 89 *supra*, at [6.36] to [6.39] inclusive and cases cited therein.

97 *Cohns Industries v Deputy Federal Commissioner of Taxation* (1979) 24 ALR 658 at 660.

"acquire" is "to gain, obtain, or get as one's own".[98] The inclusion of the variation, abrogation or alteration of a right attaching to a share or unit, and the redemption, surrender or cancellation of a share or unit would seem intended to enlarge that ordinary meaning. Finally, the fact that matters could be identified additional to those listed in the definition and falling within the word defined will be taken to indicate that it is not an exhaustive definition.[99] One category of transaction notably omitted from the "acquisition" definition is the transfer of shares or units.

(ii) Excluded Acquisitions

The "acquisition" concept is in each jurisdiction (except the ACT) expressed not to include acquisitions by certain specified means. This is dealt with either in the definition of "acquisition" or in a provision which sets out the categories of excluded acquisitions.

In New South Wales, the acquisitions to which Division 30 does not apply are set out in s 99B(1). It is appropriate to look at that provision in some detail, because the other jurisdictions have similar if not identical exclusions.

An acquisition by a person in the capacity of a receiver or trustee in bankruptcy, a liquidator, or an executor or administrator of the estate of a deceased person is excluded from the operation of Division 30 in NSW by s 99B(1)(a). An identical exclusion applies in South Australia.[100]

In Victoria, Queensland, Western Australia, Tasmania and the Northern Territory, a different mode of expression is used in the equivalent provision. In those jurisdictions, the land-rich provisions do not apply to an acquisition that occurs solely as the result of the appointment of a receiver or trustee in bankruptcy or the appointment of a liquidator.[101] The wording of this exclusion seems to misunderstand the legal effect of the appointment of a receiver or a liquidator, because no property vests in those persons solely by virtue of their appointment.[102] Property however vests in a trustee in bankruptcy upon its appointment in relation to the estate of a bankrupt pursuant to s58 of the *Bankruptcy Act* 1966 (Cth). It is submitted that the wording of the NSW Act is preferable.

In New South Wales an acquisition which occurs solely as a result of the distribution of the estate of a deceased person is excluded from the operation of the land-rich provisions.[103] Jurisdictions other than New South Wales have comparable exclusions.[104]

The category of dutiable acquisitions in New South Wales does not include an acquisition occurring solely as the result of the making of a compromise or

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98 *The Oxford English Dictionary*, Oxford University Press (1978), Vol 1, p 85.

99 DC Pearce and RS Geddes, note 89 *supra* at [6.39] and cases cited therein.

100 SA Act, s 93(1)(a).

101 Definition of "acquire" in Vic Act s 75(1); in Qld Act, s 56FA(1); in WA Act s 76(1); in Tas Act, s 33(1); in NT Act, s 56(1).

102 See in relation to the appointment of a receiver *Australian Mutual Provident Society v Geo Myers & Co Ltd (in liq)* (1931) 47 CLR 65; in relation to the appointment of a liquidator: *United Tool & Die Makers Pty Ltd (in liq) v JV Marine Motors Pty Ltd* (1991) 9 ACLC 314.

103 NSW Act, s 99B(1)(b)(ii).

104 Note 82 *supra*; SA Act, s 93(1)(b).

arrangement under what is now Part 5.1 of Chapter 5 of the Corporations Law which has been approved by the court.[105] There is an equivalent exemption in all other jurisdictions.[106] It is necessary to consider whether the reference to "the court" is to the courts of the relevant jurisdiction only or to any court which has jurisdiction to make an order approving the compromise or arrangement.

As a matter of statutory construction, it seems that the phrase "the court" should be given an ambulatory meaning. Regardless of the meaning of that phrase at the time of the introduction of Division 30, a court will no longer construe Acts in accordance with their natural meaning as at the date of their enactment.[107] Under s 415A of the Corporations Law as it now stands, the Federal Court or the Supreme Court of any Australian State or Territory has jurisdiction to make an order approving a compromise or arrangement under Part 5.1 of Chapter 5 of the Corporations Law. In view of that provision, it seems sensible to read "the court" as meaning "any court which has jurisdiction to make such an order". An equivalent exemption appears in the Rewrite,[108] although it seems that the draftsman of the Rewrite has sought to clarify any uncertainty by using the phrase "a court" in lieu of the phrase "the court".

Section 99B(1)(d) also excludes from duty an acquisition of an interest if the land to which the interest relates could have been acquired by the person under an agreement or conveyance which is not chargeable with ad valorem duty. The current wording of that section requires an examination of the dutiability of an acquisition of the land by the person who acquires the relevant interest, but says nothing about the identity of the person from whom that acquisition is taken to be made. The Commissioner applies the provision on the assumption that an acquisition is from the person who actually owns the land.

The current wording of s 99B(1)(d) was introduced in 1989. The previous provision exempted from duty an acquisition which, "had it been effected by an agreement or conveyance, would not be chargeable with ad valorem duty". The concern about the previous wording, which prompted the amendment, was that it may have been construed as exempting from the operation of Division 30 allotments or issues of units or shares and redemptions of units or cancellation of shares, since such transactions if effected in writing would not be liable to ad valorem duty.[109] However, under the previous provision, it was also clear that Division 30 did not apply if the transfer of shares itself was exempt, such as a transfer of shares by a retiring trustee to a newly appointed trustee when certain requirements are satisfied.[110] As a matter of policy, such a result is sensible and desirable. However, in seeking to close a perceived loophole for allotments and redemptions of shares or units, the legislature departed from that policy, by reimposing ad valorem duty under Division 30 in circumstances where a transfer of shares would be exempt from share transfer duty, or a transfer of units exempt

105 NSW Act, s 99B(1)(b)(i).
106 Note 87 *supra*.
107 DC Pearce and RS Geddes, note 89 *supra*, p 68.
108 Chapter 2, clause 27(2).
109 Law Book Company, note 42 *supra* at [3.16280].
110 NSW Act, 73(2A).

from unit transfer duty. It is strongly submitted that the wording of s 99B(1)(d) should be altered to reinstate an exemption in those circumstances. The perceived loophole could be addressed by limiting the scope of the Division 30 exemption to circumstances in which a transfer of the relevant land by the transferor of the shares or units (assuming it owns the land) to the party acquiring the shares or units would be exempt from ad valorem duty.

So, for example, suppose that company A is the trustee of a unit trust and owns 100 per cent of the shares in a designated landholder. Company A wishes to retire as trustee of the trust, and company B is to be appointed. Consequent upon the change in trustees, company A transfers its shares in that designated landholder to company B, the transfer instrument being exempt under s 73(2A). As the law currently stands, that transfer would attract ad valorem duty under Division 30 unless the Commissioner is prepared to exercise his discretion under s 99B(2) not to apply that Division. However, as a matter of policy there would appear to be no reason why the legislature would wish to levy ad valorem duty under Division 30 on that transfer, because, if company A owned the land instead of holding shares in the designated landholder, a transfer of the land from company A to company B would have been exempt from ad valorem duty at conveyance of land rates. Under the suggested formulation of the exemption, the transfer would be exempt from any duty under Division 30. Section 99B(1)(d) has its counterparts in all other Australian jurisdictions except Western Australia and the ACT.[111]

In New South Wales an acquisition of an interest in a landholder or of a land use entitlement effected for the purpose of securing financial accommodation is exempt from duty.[112] However, duty will be payable if that interest or entitlement is not reacquired by the person from whom it was acquired, or conveyed to a third person in exercise of a mortgagee's power of sale, within five years after the date of the original acquisition. The reacquisition referred to above will also be exempt from duty. An equivalent exemption has been included in the Rewrite.[113]

(iii) Acquisitions Not Currently Exempt

Division 30 is deficient in terms of what acquisitions it excludes from its operation. Division 30 does not contain exclusions of the kind found in the definition of "acquire" in s 56FA(1) of the *Stamp Act* 1894 (Qld), which excludes, amongst other things, an acquisition:

(a) that is an issue of shares to all the shareholders of a corporation if the proportions in which the shareholders hold the shares after the issue are, as near as practicable, the same as the proportions in which they held the shares before the issue, and the rights among the shareholders are not changed significantly because of the issue of the shares; and

(b) that is an issue of shares to a person who at the time of the issue is the only shareholder of the corporation.

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111 Vic Act, s 750(a); Qld Act, s 56FO(1); SA Act, s 93(1)(d); Tas Act, s 38(5); NT Act, s 56U(a).

112 NSW Act, s 99K.

113 Chapter 2, clause 50.

The Queensland stamps legislation is itself deficient in not excluding redemptions of shares on a pro rata basis or redemptions where there is a sole shareholder.

The New South Wales Commissioner administers the NSW Act on the basis that duty will not be levied under Division 30 in those circumstances.[114] The current draft of the Rewrite does not include such exemptions.

G. Meaning of 'Interest'

Central to the operation of land-rich provisions is the definition of "interest". The definition is similar although not identical throughout the Australian jurisdictions. In New South Wales, the following definition applies:[115]

> "interest" means an interest (other than a land use entitlement) in a landholder, acquired:
>
> (a) in the case of a landholder, being a private company - on or after 21 November 1986; or
>
> (b) in the case of a landholder, being a private unit trust scheme - on or after the date of assent to the *Stamp Duties (Amendment) Act* 1987,
>
> which, if the landholder were to be wound up immediately after the acquisition of the interest, would entitle the person acquiring the interest to participate (otherwise than as a creditor or other person to whom the landholder was liable at the time of the acquisition) in a distribution of the property of the landholder.

There is a corresponding definition in all other Australian jurisdictions,[116] but there are several features of the "interest" definition in Division 30 which make it unique. First, the term "interest" appears in the body of the definition, creating an immediate circularity and uncertainty in meaning. What is clear is that the word "interest" where first used in the body of the definition cannot have its defined meaning. There is a good argument that the term "interest" where used in the body of the "interest" definition in Division 30 is a shorthand which the draftsman has used to refer to shares in a company or units in a unit trust. The Commissioner appears to accept that view, although he has not done so expressly.[117] That view is supported by the scheme of Division 30 as a whole, and in particular by the treatment of both private companies and private unit trust schemes as "landholders". Alternatively, it can be argued that the term "interest" has its ordinary meaning. The difficulty with that view is that it is far from clear what that ordinary meaning would be, at least when used in relation to a company, because a share in a company does not confer any proprietary interest in the assets of the company.[118] That alternative interpretation is perhaps less problematic in the case of a unit in a unit trust scheme, at least in circumstances where the unit confers a proprietary interest in the assets of the trust.

Secondly, the defined term "interest" has a meaning only in relation to a "landholder". The definition requires an examination of the rights attaching to the

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114 Revenue Ruling NSW/SD 156.

115 NSW Act, s 99A(1).

116 Vic Act, s 75K(1); Qld Act, s 56FN(1); SA Act, definition of "interest" in s 91(1); WA Act, ss 76AK and 76AL; Tas Act, definition of "interest" in s 33(1); NT Act, s 56Q.

117 See Revenue Rulings NSW/SD 156 and SD 238.

118 *Commissioner of Stamp Duties v Millar* (1932) 48 CLR 618.

shares or units acquired "immediately after the acquisition of the interest". It is reasonably clear that "the acquisition" referred to is not some hypothetical acquisition, but the actual acquisition by which the shares or units were obtained. It is also notable that the term "acquisition" is defined "in relation to an interest". Accordingly, if a company or unit trust is not a "landholder" as defined at the time that shares or units in it are acquired by a person, those shares or units will not constitute an "interest" as defined. The Commissioner accepts that view.[119] Moreover, the shares or units will not become an interest by virtue solely of the company or unit trust subsequently becoming a "landholder". Effectively, the shares or units will be quarantined for Division 30 purposes. This can lead to curious results. For example, suppose that A and B each acquires 50 per cent of the shares in company X at a time when company X has no assets and has not carried on any business. Clearly, company X is not a "landholder" and therefore the shares acquired by A and B are not "interests". Subsequently, company X acquires land with a value of $2 million in New South Wales, and later still A acquires B's 50 per cent shareholding to take its own shareholding to 100 per cent. The acquisition is not one which attracts liability to duty under Division 30, because A's original 50 per cent shareholding is not an "interest" and the shareholding it acquires from B is not a majority interest.

H. Meaning of "Majority Interest"

As already noted, it is only an acquisition of an interest which is a majority interest, adds on to an existing majority interest or creates a majority interest which attracts a liability to duty under Division 30. The phrase "majority interest" is defined in the following terms in s 99A(1):

> "Majority interest" means an interest (other than a land use entitlement) in a landholder which, if the landholder were to be wound up:
>
> (a) in the case of an interest acquired by a single acquisition - immediately after that acquisition; or
>
> (b) in the case of an interest acquired by two or more acquisitions - immediately after the later or latest of those acquisitions,
>
> would entitle the person who acquired the interest or that person together with any related person to participate (otherwise than as a creditor or other person to whom the landholder was liable at the time of the acquisition) in a distribution of the property of the landholder to an extent greater than 50 per cent of the value of the property distributable to all the holders of interests in the landholder.

Several difficulties are inherent in this definition.

First, the definition requires that the person who acquired the interest or that person together with any related person may participate in a winding-up distribution to the required extent. On its face, that wording can result in unintended consequences in circumstances where there is quarantining as described above, because the definition does not require that the related person be the holder of an "interest" as defined. To illustrate the point, suppose that A acquires 100 per cent of the shares in company X before company X is a "landholder" as defined. Subsequently, company X becomes a landholder. After

119 Revenue Ruling NSW/SD156.

that time, A sells 1 per cent of the total issued share capital to B, which is a related person of A. On a strict reading of the majority interest definition, the acquisition of the 1 per cent shareholding by B is the acquisition of a majority interest, even though A's shareholding is quarantined, because the acquisition by B entitles B and A together to participate in a distribution of 100 per cent of the value of company X's property. Despite that apparently unintended result, it is necessary to look beyond the "majority interest" definition to see whether that interpretation truly reflects the legislative intention. Clearly, it does not. Section 99E(1) requires a person to lodge a statement under Division 30 if that person:

(a) acquires a majority interest;
(b) acquires an interest which results in the person having a majority interest;
(c) acquires an interest which, together with the interest of a related person, is a majority interest; or
(d) having a majority interest (including an interest which, together with the interest of a related person, is a majority interest) acquires a further interest,

in a designated landholder.

This provision unequivocally contemplates that the shareholding of related persons in a private company, or unitholdings of related persons in a private unit trust scheme, will only be aggregated for Division 30 purposes if and to the extent that each holds an "interest" as defined. If that were not the case, paras (c) and (d) of s 99E(1) would be otiose.

The second piece of drafting awkwardness, also a function of the quarantining concept, is the phrase "property distributable to all the holders of interests". In the example just given, but assuming that A and B are not related, the acquisition by B of the one per cent shareholding could be the acquisition of a majority interest, because it is the only holder of an "interest" as defined, and therefore it will be entitled to 100 per cent of the value of property distributable to all holders of "interests" in company X. This is an absurd result and one which in the author's view a court would seek to avoid. In practice, the Commissioner administers the NSW Act on the basis that the phrase "property distributable to all the holders of interests" be read as "property distributable to all holders of shares or units (as the case may be)". The Commissioner has acknowledged in a public ruling[120] that the legislature could not have intended that stamp duty be imposed where a person or persons acquire (in aggregate) a less than 50 per cent entitlement to participate in a winding-up of a landholder.

A further feature of the "majority interest" concept is the period within which acquisitions will be aggregated for the purposes of determining whether a majority interest has been acquired. In New South Wales, there is no time constraint in that regard. However, for the purposes of determining the quantum of the duty payable in New South Wales an acquisition will only be aggregated with a previous acquisition if the previous acquisition is a "prior acquisition" as defined.

The term "prior acquisition" is defined in s 99A(1) in relation to a designated landholder to mean:

120 Revenue Ruling NSW/SD238.

the acquisition by a person or a related person of an interest in the designated landholder

(a) on or at any time during the period of three years before the date of a relevant acquisition by the person of an interest in the designated landholder; but

(b) not earlier than:
   1. in the case of a designated landholder, being a private company - 21 November 1986; or
   2. in the case of a designated landholder, being a private unit trust scheme - the date of assent to the *Stamp Duties (Amendment) Act* 1987.

Mertune's case is authority for the proposition that an acquisition may be a prior acquisition even if, at the time of that acquisition, the relevant company was not a "designated landholder" as defined. The relevant company in that case was a "landholder" at the time of the prior acquisition, and it is not suggested in that case that an acquisition may be a prior acquisition if the company is not a "landholder" at the time of the earlier acquisition. Indeed, an acquisition of a shareholding in a company at the time when it is not a "landholder" is not an "interest" for reasons given above, so that if the company subsequently becomes a "designated landholder" and there is a further acquisition of a shareholding in the company, the earlier acquisition, not being the acquisition of an "interest", is not a "prior acquisition".

In the other Australian jurisdictions, it is only acquisitions within a specified period of time which are aggregated for the purposes of determining whether a majority interest has been acquired. In Victoria, Western Australia and the Northern Territory, that period is one year, in South Australia it is two years, and in Queensland and Tasmania the period is three years.[121] In each of those jurisdictions, there is an anti-avoidance provision in relation to acquisitions which occur upon exercise of "a right to acquire".[122] For example, in Victoria if a person acquires an interest in a corporation and within one year before or after the acquisition the person becomes entitled to a right to acquire a further shareholding in the corporation and that right is exercised, the person is deemed to acquire the further shareholding in the corporation within the period of 12 months after the first acquisition, notwithstanding that the right is exercised after the expiration of the 12 month period.

I. Related Persons

Under Division 30 of the NSW Act, s 99A(8) sets out an exhaustive list of related persons, as follows:

1. natural persons are related persons if they are partners, in a de jure or de facto marriage relationship or in the relationship of parent and child;
2. private companies are related persons if they are related bodies corporate within the meaning of the Corporations Law;

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121 Vic Act s 75J(1)(a); Qld Act s 56FM(1)(a); SA Act s 94(1)(a); WA Act s 76AJ(1)(a) and 76AQ(1)(a); Tas Act s 36(1)(b); NT Act s 56P(1)(a).

122 Vic Act, s 75J(2); Qld Act, s 56FM(2); SA Act, s 84(3), WA Act, ss 76AJ(2) and 76AQ(2); Tas Act, s 36(2); NT Act, s 56P(2).

3. trustees are related persons if any person is a beneficiary common to the trusts of which they are trustees;
4. a natural person and a private company are related if that person is a majority shareholder in, or a director or secretary of, that company or its related body corporate for Corporations Law purposes;
5. a natural person and a trustee are related persons if that person is a beneficiary of a trust of which the trustee is a trustee;
6. a private company and a trustee are related persons if that company, a majority shareholder in or a director or secretary of the company or a related body corporate of that company is a beneficiary of the trust of which that trustee is a trustee.

The definition of related persons in the Rewrite covers all of the categories now covered in the Division 30 definition, but is more extensive in the following ways:

1. natural persons in the relationship of brother and sister are related persons;
2. any companies, and not just private companies, are related persons if they are related bodies corporate within the meaning of the Corporations Law;
3. private companies are related persons if they have a director in common or a common shareholder which holds a majority interest in each.

An interesting aspect of the current concept concerns New South Wales and South Australia, where companies are only related persons for land-rich purposes if they are "private companies". A company with shares which are "listed for quotation" on a recognised stock exchange is not a "private company". Accordingly, extraordinary though the result may seem, a listed company and its unlisted wholly owned subsidiary may each acquire 50 per cent of the issued shares in a company which is a "designated landholder" or 50 per cent of the units in a unit trust scheme which is a "designated landholder" without attracting any duty under Division 30 or its South Australian equivalent. Although that result is surprising, it is not inconsistent with the apparent legislative policy of removing listed entities from the purview of the land-rich provisions. Having regard to the "related persons" definition in the current draft of the Rewrite, it seems that this position may be altered.

It is curious that the result just noted in relation to listed companies does not apply to listed trusts. For Division 30 purposes, trustees are related persons if there is a beneficiary common to the trusts of which they are trustees. This provision is clearly far too broad, and indeed makes compliance with Division 30 impossible in practice for listed trusts. The trustees of a listed unit trust will generally have no means of ascertaining whether a beneficiary under that trust is also a beneficiary under another listed trust. The Commissioner appears to be sympathetic to the difficulty. The author is aware of instances in which the Commissioner has been prepared to exercise his discretion under s 99B(2) not to aggregate the acquisition by the trustee of a listed trust with the acquisition by the trustee of another trust, despite there being a beneficiary in common to those trusts. This is a sensible result, but it should not be necessary to seek an exercise of the Commissioner's discretion to achieve it. It is hoped that the Rewrite will address this problem by appropriate drafting of the "related persons" definition.

J. Time of Acquisition

Crucial to an understanding of whether a liability has arisen under the land-rich provisions is the time at which an acquisition is treated as occurring. In New South Wales, the legislation is silent on the issue. Accordingly, it is necessary to go back to first principles, and in particular to the definition of "interest".

An acquisition is only an acquisition as defined if the thing acquired is an "interest". As we have already seen, the definition of "interest" requires a consideration of the position with respect to winding-up entitlements immediately after the acquisition. If immediately after the possible "acquisition", the acquiring party would not be entitled to participate in a distribution of the property of the landholder upon its winding-up, then the event is not an "acquisition" as defined.

Section 99A(5) provides that the entitlement to participate in a distribution of the property of a private company or private unit trust scheme upon its winding-up is an entitlement to an amount calculated:

(a) as if the winding-up were carried out in accordance with the constituent document of the company or trust and with any law relevant to such winding-up; or

(b) on the assumption that the acquiring party has exercised all powers and discretions to do certain specified things so as to maximise that amount

whichever is the greater. If the amount calculated under paragraph (b) is greater, the Commissioner has a discretion to treat the amount calculated under paragraph (a) as the amount of the entitlement. The Rewrite contains provisions in very similar terms to s 99A(5).

It follows that no interest is acquired at the time that an option to acquire or sell shares is granted, because immediately after the creation of that option the optionee would not be entitled to participate in a distribution of the landholder's property upon its winding-up. Similarly, if parties enter into a conditional contract for the sale and purchase of shares, there will be no acquisition at that time because the purchaser, whilst it may have a beneficial interest in the subject shares, would not be entitled by virtue of that interest to participate in the distribution of the landholder's property on a winding-up. Therefore, there is no acquisition at the time of entering into a conditional contract.

The position with respect to an unconditional contract is more difficult. Assuming that the contract is one in respect of which an order for specific performance could be obtained, the purchaser under that contract would be the beneficial owner of the shares.[123] However, it is unclear whether the purchaser would be entitled to participate in a distribution of the landholder's property upon its winding-up prior to completion. This reduces to a question of what is meant by the word "participate" and whether it requires beneficial participation or merely participation as a registered holder of shares. The Commissioner administers the Act on the basis that the latter view is correct. In Revenue Ruling NSW/SD149, the Commissioner states that Division 30 will be administered on the basis that there is no acquisition of an "interest" until the agreement for the purchase of

123 See *KLDE Pty Ltd (in liq) v Commissioner of Stamp Duties*, note 70 *supra*; see also *Parway Estates Ltd v Inland Revenue Commissioners* (1958) 45 TC 135.

shares or units is completed. He notes that the agreement would be completed by payment of the purchase money by the purchaser, the execution and delivery at the same time of a conveyance (ie a share transfer) by the vendor and the handing over of such deeds (presumably share certificates) as relate wholly to the property conveyed.

In Queensland, the stamps legislation provides that a person is taken to have acquired an interest in a corporation at the time that person enters into an agreement to acquire the interest.[124] If the transfer of shares under such an agreement cannot proceed, the interest is then taken not to have been acquired, in which case the Commissioner must make the necessary reassessments and refunds of duty. No other Australian jurisdiction adopts Queensland's position.

In Victoria, South Australia, Tasmania and the Northern Territory, there is a specific provision dealing with the time at which an acquisition occurs where the acquisition is to be effected or evidenced by a transfer instrument.[125] A typical provision is s 75(8) of the Victorian Act which provides that if the acquisition of an interest in a corporation is, or is to be, evidenced by a transfer of shares, the acquisition is deemed to occur on the date the transfer is made. Accordingly, the time of acquisition is deferred until a written instrument of transfer is executed. The provision will be vitally important in circumstances where the company is not a land-rich entity at the time a contract for the sale of its shares is entered into, but becomes one before completion. The provision is drafted in simple language, but its meaning is not entirely clear. It provides no guidance as to the circumstances in which an acquisition must be considered to be "evidenced" by a transfer of shares. If a written transfer is executed to complete a contract for sale and purchase, it is the contract for sale that will be evidence of the transaction pursuant to which the acquisition occurs. Nonetheless, the use of the phrase "is to be" in s 75(8) strongly suggests that the legislature contemplated that a transfer may be evidence of an acquisition where it is executed pursuant to and by way of completion of a contract for sale. Presumably, an acquisition *is* evidenced by a transfer instrument where that instrument is not preceded by any contract for the sale and purchase of shares, and is the instrument by which the parties intend to carry out their bargain.

It is submitted that, for the sake of greater certainty, the Rewrite should contain provisions governing the time at which an acquisition occurs for the purposes of the land-rich provisions. In this regard, the New South Wales legislature should follow the example of other participating jurisdictions.

K. Land Use Entitlements

The acquisition of a land use entitlement is dutiable ad valorem in New South Wales (Division 30) and South Australia. In New South Wales a land use entitlement is an interest in a landholder which gives the person acquiring the interest an entitlement to the exclusive possession, or substantially exclusive possession, of land in New South Wales other than a "company title" home unit.

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124 Qld Act, s 56FN(1A).

125 Vic Act, s 75(8); SA Act, s 91(4); Tas Act, s 36(3); NT Act, s 56C(8).

A similar definition applies in South Australia, although company title home units are not excluded.

An acquisition of a land use entitlement is an acquisition of dutiable property under Chapter 2, and will attract ad valorem duty in all participating jurisdictions. Under the Rewrite, that concept is defined in terms which reflect the current definition in South Australia.

L. Calculation of Duty

In New South Wales, land-rich duty is levied at conveyance rates based on the unencumbered value of the land. In broad terms, duty is calculated on an amount equal to the value of the land multiplied by the percentage interest acquired.[126]

It is submitted that, as a matter of fairness, the NSW Act should give a credit for duty paid at share transfer rates in New South Wales or elsewhere in Australia. However, at least in practice, a credit is only available under the NSW Act for New South Wales duty at share transfer rates.[127] It is also submitted that a credit should be given for the full amount of duty paid at share transfer rates, and not just on a proportion of that amount as may currently be the case.

IV. CONCLUSION

As is evident from the above analysis, the current land-rich provisions are riddled with drafting inadequacies. The draftsman of the first draft of the Rewrite would appear to have attached little importance to correcting these inadequacies, of which the Commissioner must have been aware for a substantial length of time. Many of the problems are identified in the commentary in *Stamp Duties*,[128] and some of them have been addressed in public rulings issued by the Commissioner. The value of the Rewrite will be seriously diminished if these problems are not ultimately addressed.

126 NSW Act, s 99F(1).
127 NSW Act, s 99F(2).
128 Law Book Company, note 42 *supra* at [3.16090]ff.