

18 August 2010



RankineTucker
LAWYERS

Attention: Mr Graeme Jackson

Commissioner of State Taxes
State Administration Centre
200 Victoria Square
Adelaide SA 5000

VIA HAND DELIVERY

Dear Graeme

Stamp Duties (Partnership Interests) Amendment Bill 2010

In my capacity as Chair of the Members in South Australia of the Taxation Committee of the Business Law Section of the Law Council of Australia I thank you for drawing the Committee's attention to the above Bill and inviting our comments.

Attached is a detailed submission relating to the Bill.

We will be grateful of an opportunity to meet with you at your earliest convenience to discuss the submission. The Committee's representatives will be Bernie Walrut, Paul Ingram and myself.

Yours sincerely,

JOHN TUCKER
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Submission on Stamp Duties (Partnership Interests) Amendment Bill 2010

Retrospective Effect - Width

1. Following the decision of the Full Court of the South Australian Supreme Court in *Cyril Henschke Pty Ltd v Commissioner of State Taxation*¹ the Commissioner issued Revenue Ruling SDA001 on 4 December 2009.
2. The Commissioner's Revenue Ruling SDA001 describes the possible retrospective effect in the following terms:

The Government has given approval for retrospective amendments to be made to the Stamp Duties Act 1923, to ensure that stamp duty remains payable in relation to transfers of partnership interests.

*The amendment is potentially required to restore the stamp duty base to what was understood to be the position that existed prior to the decision of the Full Court of the South Australian Supreme Court (in *Cyril Henschke Pty Ltd v Commissioner of State Taxation*).*

The Full Court decision has potentially wide-ranging implications for stamp duty assessments as they relate to transfers of partnership interests. The Stamp Duties Act 1923 will be amended to ensure that all past and current assessments in relation to transfers of partnership interests remain valid.

Instruments lodged for opinion based on the decision in the Henschke case, will be assessed based on a strict interpretation of that case.

3. As will described later in this submission, even if retrospective legislation is justified, the legislation that has been introduced is much broader than suggested in the foregoing and the retrospective effect is consequently much broader. This cannot be justified even if any justification for retrospective legislation is accepted.

Retrospective Effect – Fundamental Proposition

4. The fundamental starting point in a consideration of a proposal that legislation be retrospective is that retrospective legislation is inimical to our system of law and democracy. A few quotes from F Bennion, *Bennion on Statutory Interpretation*, 5th ed provide both an explanation and justification for this view.
5. The fundamental proposition is that the law should be certain:²

It is universally assumed that the law should be certain. As Locke wrote:

To this end it is that men give up all their natural power to the society they enter into, and the community put the legislative power into such hands as they think fit, with this trust, that they shall be governed by declared laws, or else their peace,

¹ [2009] SASC 148.

² F Bennion, *Bennion on Statutory Interpretation*, 5th ed, p 800.

quiet, and property will still be at the same uncertainty as it was in the state of Nature.

Shael Herman remarked that (as Montesquieu has taught us) 'certainty can positively affect the citizenry'. Herman went on to say: 'if private actors know in advance the incidence of state intervention, they can adjust their activities to account for it, thereby avoiding the effect of sporadic legal catastrophes'.

6. The anathema that retrospectivity constitutes is highlighted in the following further quote.³

The essential idea of a legal system is that current law should govern current activities. Elsewhere in this work a particular Act is likened to a floodlight switched on or off,' and the general body of law to the circumambient air. Clumsy though these images are, they show the inappropriateness of retrospective laws. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of law. '... those who have arranged their affairs ... in reliance on a decision which has stood for many years should not find that their plans have been retrospectively upset' ...

Retrospectivity is artificial, deeming a thing to be what it was not. Artificiality and make-believe are generally repugnant to law as the servant of human welfare.

7. As Bennion yet further highlights:⁴

A person cannot rely on ignorance of the law and is required to obey the law. It follows that he or she should be able to trust the law and that it should be predictable. A law that is altered retrospectively cannot be predicted. If the alteration is substantive it is therefore likely to be unjust. It is presumed that Parliament does not intend to act unjustly. From the general principle governing retrospectivity it follows that the penalties imposed for any transgression of the law should not be altered to the detriment of the transgressor after he or she has transgressed. Any such alteration amounts to switching the rules while the event is still in progress, and is obviously unfair.

8. Neither the Minister's speech on the introduction of the Bill nor the Explanation of Clause 3 provides any reason as to why the provisions should operate retrospectively. The Explanation of Clause 3 simply states that:

The section will operate both prospectively and retrospectively.

9. The underlying justification for retrospectivity appears to be that the amendments will ensure that the provisions reflect the Commissioner's current view of how the provisions should operate in the partnership situation. This approach is fundamentally flawed for a number of reasons.
10. Taxpayers order their affairs on the basis of the law as it is stated by Parliament. They take advice from lawyers on that law and the decisions of the

³ F Bennion, *Bennion on Statutory Interpretation*, 5th ed, p 316.

⁴ F Bennion, *Bennion on Statutory Interpretation*, 5th ed, p 807.

courts interpreting that law. Sometimes they may take a different view as to the operation of the law than that of the Commissioner. They are entitled to do that and rely on that advice. If it is subsequently found that such views are correct and prevail over that of the Commissioner's view the clients are entitled to have the benefit of it. If it is found to be wrong then they pay the tax and any relevant interest and penalties. This is the system that has prevailed in this State until very recently and generally prevails in the rest of Australia at both a Federal and State level and most of the common law world.

11. An aspect of this was recently emphasised by Allsop J in a taxation matter in *Commissioner of Taxation v Indoeroopilly Children Services(Qld) Pty Ltd* [2007] FCAFC 16 in the following terms:

6 Considered decisions of a court declaring the meaning of a statute are not to be ignored by the executive as inter partes rulings binding only in the earlier lis. As Mahoney J (as his Honour then was) said in P & C Cantarella v Egg Marketing Board [1973] 2 NSWLR 366 at 383:

'The duty of the executive branch of government is to ascertain the law and obey it. If there is any difficulty in ascertaining what the law is, as applicable to the particular case, it is open to the executive to approach the court, or afford the citizen the opportunity of approaching the court, to clarify the matter. Where the matter is before the court it is the duty of the executive to assist the court to arrive at the proper and just result.'

12. Add to that, the limited explanation justifying retrospectivity in the circular, that this is a new controversy and that the justification for it is wrong, means that there is no reasonable justification to be found for retrospectivity.
13. The effect of a release in the situation involved in the *Cyril Henschke Pty Ltd v Commissioner of State Taxation*⁵ matter has been debated since at least 1899, if not much earlier.⁶ So the controversy predates the current consolidation of the laws relating to Stamp Duties in South Australia found in the *Stamp Duties Act 1923*. That Act has been amended in excess of ninety times since it effected a consolidation of the laws relating to Stamp Duties in this State, but at no time since, it appears, was the executive concerned to seek to ensure its recent and now current view, if it indeed that has been its view,⁷ prevailed by approaching Parliament to do so.
14. Some of the Commissioner's current views are expressed in the Commissioner's Circular 191 *Conveyances and Transactions Involving Partnership Interests* issued in August 1999. This Circular replaced Circular 165 (issued in March 1998) which in turn replaced Circular 86. The original Circular 86 was issued in October 1993 after much discussion. Because the issues were not straightforward there had been doubt and various persons had taken different views on the operation of the relevant provisions, thus causing the Commissioner to issue the Circular. The introduction to Circular 86 highlights that the position had not indeed been fixed and that practices and views had changed over time:

⁵ [2009] SASC 148.

⁶ See *Garnett v Commissioners of Inland Revenue* (1899) 81 LT 633.

⁷ For the reason discussed below in paragraphs 17 and 18.

Until some years ago the practice of the Stamp Duties Office had been to assess conveyances of partnership interests on a "net assets" basis. The practice in some other jurisdictions was to assess on a "gross assets" basis.

Subsequently it was considered appropriate to change to a gross basis and a number of assessments were made on that basis. However, representations were made to the Commissioner by various groups as to the appropriateness of the use of a gross basis.

15. Circular 86 introduced a number of changes in treatment. One is the treatment of real estate in partnerships. It was replaced by Circular 165 which itself states:

Circular No. 86 was issued by this Office in October 1993 and outlined the methods used when assessing stamp duty payable on conveyances of interests in partnerships.

This Circular restates those methodologies and seeks to clarify situations which were not covered by Circular No. 86.

It was in turn replaced by Circular 191 which itself states:

Circular 165 was issued by this Office in March 1998 and clarified the methods used when assessing stamp duty payable on conveyances of interests in partnerships, as outlined in the previous Circular 86.

This circular restates those methodologies and seeks to clarify situations with respect to partnerships that own real property in South Australia.

16. A review of these circulars alone highlights that there were differences in treatment over the period of the circulars. Legal Practitioners who have been practising prior to the issue of the circulars also recall that there were changes in practices up to the issue of each of the circulars over and above those highlighted by the circulars.
17. The foregoing is further accentuated by the fact that Circular 191 confirms that if a partner retires from a partnership and receives nothing more than the partner's capital account and there is no goodwill, then there is no duty consequence. So simply stated a partner retiring and being paid out the partner's capital entitlement involves no duty consequence as confirmed by the Full Court of the South Australian Supreme Court in *Cyril Henschke Pty Ltd v Commissioner of State Taxation*.⁸ The relevant example from the Circular is as follows:

Some Examples

The following examples, while not exhaustive, illustrate the principles involved. All examples will relate to the following hypothetical partnership. The statement of affairs of a partnership just prior to the change in partnership interest is as follows:

A, B, C & Co

⁸ [2009] SASC 148.

Assets	\$ 35	
Liabilities	\$(10)	
Net Assets		\$ <u>25</u>
Partnership Funds		
Capital A	\$ 5	
Capital B	\$ 10	
Capital C	\$ 10	
Total Funds		\$ <u>25</u>

The profits (capital and income) of A, B, C & Co are shared by A, B and C in the ratio 1:2:2...

3 Retirement of a Capital Partner

B retires by taking \$10 from the partnership interest.

Scenario 1 — The partnership has no goodwill.

Since the interests of A and C (the remaining partners in the partnership fund before/after retirement of B) remain the same, the amount on which duty will be levied is zero. However, a statement pursuant to Section 71E(3) is required to be lodged.

18. On the basis of that example the Bill is not retrospectively reinstating the Commissioner's practice but reversing it.
19. The foregoing clearly demonstrates that there has been no fixed view since 1993 let alone 1923 as to the appropriate treatment of dealings in partnership interests such as to justify retrospective legislation that seeks to impose a view that at most, in limited respects, has been the practice of the Commissioner since 1999.
20. Further parts of Circular 191 adopts the same view as adopted by the Full Court of the South Australian Supreme Court in *Cyril Henschke Pty Ltd v Commissioner of State Taxation*⁹ whilst other parts appear to adopt a view that is inconsistent. They appear to be the views now being espoused by the Commissioner as inconsistent and correct. Clearly, the Circular does not cover all aspects of partnership dealings, it does not reflect a shared view notwithstanding the level of consultation that preceded it. It has not always been applied consistently. The foregoing highlights that the views expressed in the Circular are confused and inconsistent.

Retrospective Effect & Reassessments – How Far

21. The provisions are expressed to be retrospective but without limit. On one view it would therefore appear that they are retrospective to at least 1923, on the consolidation of the then Stamp Duties laws in the *Stamp Duties Act 1923*. It is possible that they are retrospective to some time prior to that but it is unclear how that will work without a close scrutiny of the various Acts consolidated in 1923.
22. Section 1 of the Transitional Provisions permit the Commissioner to re-assess duty with respect to any instrument or transaction created or entered into before the commencement of the proposed Act.

⁹ [2009] SASC 148.

23. Section 47 of the *Taxation Administration Act 1996* provides for no time limitation on the right to recover taxes in this State. Section 16 of the *Stamp Duties Act 1923* provides for the duty to be payable by reference to the rates in force at a time the document is to be stamped.¹⁰ The rates have changed very significantly since the introduction of stamp duties in South Australia.
24. The penalty regime has also changed significantly in the period from 1923 to now. Section 2 of the Transitional Provisions provides that there is to be no penalty. The *Taxation Administration Act 1996* distinguishes between penalty and interest. Division 1 of Part 5 provides for interest where there is a tax default and Division 1 of Part 6 for penalty tax. The reference to a penalty in the Transitional Provisions appears to be limited to the penalty tax under Division 2 of Part 5.¹¹
25. There appear to be a number of situations that require consideration. There are those situations where there has been no assessment and there are those situations where there has been an assessment.

Retrospective Effect & Reassessments – No Assessment

26. The lack of an assessment may have occurred for a number of reasons. One is a tax default, another is a different view of the law, another is the use of an adhesive stamp, where permitted at the time and last is on the Commissioner's view of a Revnet assessment.
27. In each of these situations there appears to be no bar to the Commissioner applying the retrospective provisions notwithstanding the then view of the law. This can apply to an agreement under hand stamped with an adhesive stamp, one that has been regarded as exempt since the abolition of agreement duty or a RevNet assessment. These situations simply have no time limits or the Commissioner's power to assess them no matter what the view that prevailed at the relevant time.
28. In these situations the Commissioner will be entitled to apply the full force of the interest and penalty regimes applicable. Section 1 of the Transitional provisions in Schedule 1 has no application, it applies to reassessment situations only, these are not assessment situations that require a reassessment.
29. As to which penalties and interest regimes are applicable may not itself be without its difficulties. Is an agreement with an adhesive stamp from 1974 to suffer the penalty regime of the *Taxation Administration Act 1996* or the then section 20 of the *Stamp Duties Act 1923*?

Retrospective Effect –Assessment

30. It would appear, that even where there is an existing assessment, of any description, that section 1(1) of Schedule 1 of the Bill permits a reassessment whether the assessment is a compromise assessment¹² or an assessment that

¹⁰ So which is the relevant time in this situation?

¹¹ Is it intended to also apply to the penalty regime that used to exist in section 20 of the *Stamp Duties Act 1923*, at least at the time of the 13 July 1995 consolidation?

¹² A compromise assessment may only be re-opened by agreement or where there has been a deliberate failure to disclose material information.

was made more than five years ago.¹³ The wording of the provision has no limitation¹⁴ and accordingly there is nothing to suggest that it is to be read subject to the limits contained in Part 3 of the *Taxation Administration Act 1996*.

31. On this basis a taxpayer who entered into a document in 1974 in a form that was not then dutiable, submitted it to the Commissioner at the time and had it assessed at that time, may have the document reassessed under these provisions, possibly at the current rates notwithstanding much lower stamp duty rates at the time.¹⁵ In addition the taxpayer can be assessed for interest on that duty from then to now under a regime that does not prescribe for interest rates prior to 1996.
32. It has been informally suggested in discussions that the limitations in the *Taxation Administration Act 1996* are to prevail to prevent a reassessment more than five years after an original assessment or where there is a compromise assessment. It is difficult to see how that view may be adopted.
33. Section 3 of the *Stamp Duties Act 1923* requires that the *Stamp Duties Act 1923* be read with *Taxation Administration Act 1996*. The effect appears to be that the *Taxation Administration Act 1996* is read into the *Stamp Duties Act 1923*. The process is described in *GE Capital Finance Pty Ltd v Commissioner of Taxation*¹⁶ as follows:

40 In view of the respondent's submissions, it is necessary to consider the effect of s 4(1). By the operation of s 4(1), the Agreements Act incorporates the Assessment Act subject to s 4(2). However, each Act retains its own identity and the imposition of the relevant tax is still imposed by and at the rates declared by the Income Tax (Dividends, Interest and Royalties Withholding Tax) Act 1974 (Cth) and the Income Tax Rates Act 1986 (Cth) by reference to the Assessment Act. The incorporation has the consequence, as a matter of a drafting technique, of incorporating the text of the Assessment Act into the Agreements Act. As Lockhart J said in Amalgamated Television Services Pty Ltd v Australian Broadcasting Tribunal (1984) 1 FCR 409 at 413:

It is not uncommon to find in an Act a provision that an earlier Act is incorporated and shall be read as one with the later Act. The effect of such a provision is to transpose the earlier into the later Act or to write every provision of the earlier Act into the later Act as if they had been actually printed into it. It is a rule of construction of statutes; but it cannot be used in effect to amend the provisions of the earlier Act which is to be read as one with the later Act. Sometimes an Act provides that it is incorporated and shall be read as one with an earlier Act. The effect is the same namely, to transpose the later into the earlier Act. See generally the Canada Southern Railway Co. v The International Bridge Co (1883) 8 AC 723 at 727, per Lord Selborne; Osborne v The Commonwealth [1911] HCA 19; (1911) 12 CLR 321 at 342-343, per Barton J Perpetual Trustee Co (Ltd) v Wittscheibe (1940) 40 SR (NSW) 501 at 510, per Jordan CJ; Cadbury-Fry-Pascall Pty Ltd v Federal Commissioner of Taxation [1944] HCA 31; (1944) 70 CLR 362 at 388,

¹³ Section 10(4) contains a five year limitation other than where there is a deliberate tax default.

¹⁴ Apart from section 1(2)(b).

¹⁵ See doubt above

¹⁶ [2007] FCA 558.

per *Williams J*, and the cases there cited; *Tasman Timber Ltd v Minister for Industry and Commerce* (1983) 46 ALR 149.

41 For the purposes of this case, it is unnecessary to go any further into the issues mentioned by Sheller JA in *Director of Public Prosecutions (NSW) v Alderman* (1998) 45 NSWLR 526 at 532-533 and the question of whether the incorporation may effect an amendment to the earlier Act.

42 Undoubtedly, the drafting technique of incorporation by reference may require necessary adjustments or modifications to be made in the incorporated provisions. In *Cadbury-Fry-Pascall Pty Ltd v Commissioner of Taxation* [1944] HCA 31; (1944) 70 CLR 362 at 388 *Williams J* said:

The tax is imposed by the Tax Act, which prescribes the rates of taxation. This Act incorporates the Assessment Act and provides that the two Acts are to be read together. My own view, to which I adhere, as to the effect of such a section, is stated in Perpetual Trustee Co (Ltd) v Wittscheibe as follows:

"In re Woods' Estate; Ex parte Her Majesty's Commissioners of Works & Buildings the Court of Appeal held that if a subsequent Act bring into itself by reference some of the clauses of a former Act, the legal effect of that is to write those sections into the new Act just as if they had been actually printed into it. It has also been held that where two Acts are to be read together the Court must construe every part of each of them as if it had been contained in one Act, unless there is some manifest discrepancy making it necessary to hold that the latter Act has to some extent modified something found in the earlier Act: see Hart v Hudson Bros Ltd; Phillips v Parnaby, and Williams v Tooth & Co Ltd." (Footnotes omitted).

34. So the *Stamp Duties Act 1923* will include both the Transitional provisions plus Part 3 of the *Taxation Administration Act 1996*. There are no provisions directing how one deals with conflicts between the provisions in that situation.¹⁷ The Transitional Provisions are much more specific and later in time, so it would appear that faced with construing the *Stamp Duties Act 1923* as a whole these later provisions are to prevail unbridled, there is no other guidance. On that basis there are no limits on reassessment apart from that in section 1(2)(b) of Schedule 1.
35. It is completely inappropriate for legislation to be proposed which the community could not, if properly informed, reasonably be expected to support and which will compromise the Executive through it failing or deciding not to administer according to its terms.

Section 71AB

36. The section uses the concept of an "asset". The *Stamp Duties Act 1923* has generally used the concept of property. The concept of an asset has been

¹⁷ A provision dealing with such inconsistencies, in a like provision, is to be found in section 4(2) of the *International Tax Agreement Act 1953* (Cth).

introduced into a number of parts of the Act¹⁸ but its use creates further issues, rather than resolving them.

37. The possibility that an asset is a concept that is wider than property is highlighted in the definition in section 91(1) where an asset is defined to include property. The Accounting Standards define assets in a manner that raises many issues, if that is what is intended in this situation. The relevant heads of charge are concerned with property; this is mixing and confusing concepts. The provisions should be limited to property. This is also consistent with the conveyancing provisions and agreement for sale provisions, both of which refer to property.

Section 71AB(1)

38. Section 71AB is expressed to apply to any instrument that “effects, acknowledges, evidences or records” certain enumerated events in connection with a partnership. Whilst that expression has been used elsewhere in the *Stamp Duties Act 1923*¹⁹ to deem any such instrument affecting or effecting certain interests to be a conveyance operating as a voluntary disposition inter vivos it appears inappropriate in the context of partnerships.²⁰ Under current provisions of the *Stamp Duties Act 1923* for an instrument to be liable for duty it needs to be a contract or agreement within section 31 or a conveyance of an interest within Division 6 of the *Stamp Duties Act 1923* and the relevant heads of charge. If there was no such instrument then there was no duty consequence unless section 71E applies.
39. Whilst the expression “effects, acknowledges, evidences or records” is now used elsewhere in the *Stamp Duties Act 1923* and accepted, with some reservations, to make it apply retrospectively to a class of instruments that were simply never liable in any circumstances is wrong.
40. Section 71AB(a) applies to a “transfer, divesting, dilution, satisfaction, realisation or extinguishment” of the relevant interest. Once again it is plainly wrong that the provisions should apply retrospectively to instruments that were simply never liable in any circumstances under the law, as it stood, to duty. This is notwithstanding the Commissioner’s current view, which, it is submitted, has never been as broad as those words.
41. Further, the lack of consistency in the use of the collations throughout the *Stamp Duties Act 1923* creates considerable uncertainty and inconsistencies. A couple of examples are to be found in sections 3A and 71(3)(a). In section 3A(1) the expression is “creates, transfers, redeems, renounces, surrenders, cancels or extinguishes.” This therefore does not apply to a divesting or dilution. In section 71(3)(a) there is “transfer, declaration of trust, creation, surrender, renunciation, redemption, cancellation or extinguishment.” Again, dilution is not covered. The cost, uncertainty and confusion created by these various different collations for the community can only be deplored. They fail one of the fundamental tenet of a good tax namely simplicity.
42. Further, the difference in these expressions raises concerns about the inter-relationship between section 3A(1) and section 71AB where there is included

¹⁸ See section 3C and Part 4.

¹⁹ See section 71(3)(a) as an example.

²⁰ Unless one is now to suggest that every partnership arrangement involves some form of trust arrangement.

divesting, dilution, satisfaction or realisation. This is only an example of the inter-relationship problems that permeate the *Stamp Duties Act 1923* and which are further aggravated by the approach that has been adopted repeatedly of recent years.

43. Section 71AB once again uses the concept of “transfer” as distinct from conveyance. In this respect it continues to create a level of confusion because of the difference in scope of the two concepts. The *Stamp Duties Act 1923* is now riddled with various concepts, and in particular with the concept of conveyance sometimes, but not always, embracing a transfer.²¹
44. Whilst it appears that the word dilution in section 71AB(1) is intended to catch a reduction in the interests of a partner in a partnership²² it appears it may have a much broader impact because the subsection is concerned about the dilution of the interest in the assets of the partnership. On the basis that a partner’s interest is a right or entitlement to share in the surplus of the partnership assets on a realisation of those assets then a borrowing followed by an imprudent investment by the partnership will lead to a diminution in the interests of the partners. They will each receive on a winding up a lesser sum because of the borrowing transaction though as between them there is no change in their interests *inter se*. The word is too broad in this context.
45. The provisions would apply where partners draw down, pro rata to their contribution of it (or entitlement to it), capital contributed by them. This is contrary to the position with a unit trust where pro rata distributions of capital are expressly exempt.²³
46. It also appears possible that if the partners collectively sell an asset of the partnership the provisions are triggered. In this situation there is a transfer of the interest of the persons²⁴ in the asset of a partnership that is held collectively. Whilst such a transfer, if within the scope of the *Stamp Duties Act 1923*, will be liable to normal conveyance duty under section 60²⁵ and the head of charge conveyance on sale, section 71AB(5) will prescribe a different method for determining the liability for duty or impose an additional liability. This raises the question whether this is a situation to which *Speyer Bros v IRC*²⁶ applies or one to which section 14 and *Commissioner of Stamp Duties (NSW) v Pental Nominees Pty Ltd*²⁷ apply? Where the asset that is sold is not

²¹ One does not need to go far to demonstrate the mixing of these concepts throughout the Act and the absolute confusion it creates. Section 2(1) defines transfer. Section 2(3) expands the meaning of transfer. Section 3A(1) relates to a transfer but does not include a conveyance. Section 60 defines conveyance to include a transfer. Section 71(3)(a) deems certain transfers to be conveyances operating as voluntary dispositions *inter vivos*. The head of charge for conveyances on sale is for both conveyances or transfers whilst the conveyances operating as a voluntary disposition head of charge is limited to a conveyance. General exemption 15 refers solely to a transfer, general exemptions 19, 20, 21 and 23(1) refer to both conveyances and transfer.

²² E.g. a reduction from say a 20% interest to a 25% interest.

²³ Section 71(5)(ia).

²⁴ Partners.

²⁵ Where the asset is one, the sale of which attracts the operation of the *Stamp Duties Act 1923*.

²⁶ [1908] AC 92. The principle is that where an instrument is liable to stamp duty under more than one head, the revenue is only entitled to one but may choose the higher. The view that is adopted appears to be misconceived. In this situation there are not two applicable heads of charge, section 71(3)(a) is very specific.

²⁷ [1989] HCA 19; (1989) 167 CLR 1

one that attracts ad valorem duty, say the sale of goods in the ordinary course of business, then duty will be imposed in accordance with these provisions. This is patently inappropriate. Many other like situations can arise under these provisions as currently drafted. They require considerable clarification, both of the interests within their scope and in their drafting.

47. Section 71AB(1)(b) provides that the section is triggered if there is a conversion of a relevant interest in an asset into money. There are potentially two different situations where this works considerable injustice. The first is where the partnership buys an asset. In every such situation section 39 of the *Partnership Act 1891* converts the rights of the partners in the purchased asset into a right to receive the payment of the surplus after payment of debts of the partnership, namely the right to receive money or some other benefit. So section 71AB(1)(b) appears to be triggered.
48. The second is where the partnership sells an asset or collects a debt. In each situation the interests of the partners in the assets of the partnership are converted into money or other consideration or benefit. In the case of a partnership conducting a supermarket every sale of its stock in trade²⁸ involves the conversion of the interests of the partners in the assets that are stock in trade into money or a right to receive money from a credit card provider. The right to receive payment from the credit card provider will be consideration or a benefit. On the conversion of that right to receive payment from the credit card provider to actual money section 71AB(1)(b) will again apply because the chose in action will be converted into money or another benefit, this time it is likely to be the right to recover from the partnership's bankers the amount credited.
49. Indeed if taken to its literal legal conclusion each drawing on a partnership bank account that dilutes the partnership's asset of a legal chose in action against the bank has the potential to attract duty. That the dilution of this asset discharges a liability, is not accommodated by the draftsman, there is no concept of net benefit. Duty is levied on the value of the deemed interest in the asset to which it applies. Again it is not an acceptable response to argue that the Executive or the Courts will not apply the literal interpretation of the provisions. Given the extent of the provisions their constitutional base is also a potential issue.
50. Section 71AB(1)(c) introduces yet another new concept into the conveyancing provisions of the *Stamp Duties Act 1923*. The word acquisition is used some 32 times in that Act but apart from its use in an example in Part 3 of Division 6 it is not generally in the conveyancing provisions.²⁹ Its meaning in the Land Rich provisions is the subject of controversy.³⁰ Most conveyances and transfers involve acquisitions. The creation of a new interest clearly involves a conveyance in most situations as discussed in *In Re South Australian Unit Trusts Pty Ltd*³¹ *George Wimpey & Co v IRC*³² *Littlewoods Mail Order Stores*

²⁸ Obviously this also has the potential to render the impost a sales tax or excise and infringe section 90 of the *Constitution*.

²⁹ It occurs in the insurance business provisions, the Land Rich provisions and mortgage head of charge exemptions.

³⁰ See *Affinity Health Ltd v Chief Commissioner of State Revenue* [2005] NSWSC 663.

³¹ [1954] SASR 227.

³² [1974] 2 All ER 602. There is a contrary view, which finds some support in *WM Cory & Son Ltd v IRC* [1965] AC 1088; *CST (WA) v Linton* 1978 8 ATR 526.

*Ltd v IRC*³³ and *Commissioner of Stamp Duties v Henry*.³⁴ Once again why introduce yet further concepts?

51. The provisions also create a like problem to those already described on the acquisition by the partnership of a new asset. In that situation the partnership will acquire an asset and the partners acquire an interest in the asset of the partnership as a partner. If the asset acquired by the partnership is one that is dutiable the double duty problem described above will apply. If it is not one that is dutiable, as goods in the ordinary course of trade, the conversion of one chose in action for another or other conversions of property, these provisions will also be triggered.
52. According to partnership law, partners do not become entitled to their share of the net income of a partnership until the partnership accounts are struck and approved by the partners.³⁵ In this situation a resolution of the partners approving the accounts and consequently the distribution of profit to the partners will necessarily convert the interest of partners in the surplus existing at the time of approval into an entitlement to payment of money for each of the partners entitled to a share of the net income.³⁶ The payment will stand to be made out of the assets of the partnership be they funds in the partnership bank account or by way of set off against the right of the partnership to recover from the partners' drawings made in anticipation of their respective shares of net profit and repayable if their share does not materialise to the extent of the drawings. Section 71AB(4) will treat these resolutions for the distribution of net profit as a conveyance of property operating as a voluntary disposition *inter vivos*. The valuation of the property deemed so conveyed would appear to be the consideration given for it, in the above example the value of the obligation to repay drawings set off against it, or the full amount of the net profit.
53. It cannot be intended that duty be chargeable in the above circumstances. This will retrospectively impose duty on partners who could not reasonably ever have been expected to anticipate such duty. In the future well advised partners will avoid ever creating an instrument to distribute profits whilst others may inadvertently become exposed to such duty. The concept of such a potentially wide reaching provision is critically flawed.
54. The foregoing demonstrates, using the words of others, "this is a great big new tax", not simply the clarification of a situation.

Section 71AB(2)

55. As this subsection is currently drafted it extends the provisions to salaried partners. Whilst a salaried partner, who is a partner, may not have any entitlement to a proportion of the surplus property on a winding up they appear to have an interest, albeit effectively a bare legal interest, in the assets of a partnership. How the subsequent provisions apply in this situation is unclear.

³³ [1961] Ch 597.

³⁴ (1964) 114 CLR 322.

³⁵ *FCT v Everett* [1980] HCA 6; (1980) 143 CLR 440.

³⁶ Some large firms run profit pools. In other words part of the profits are allocated in proportions other than their fixed entitlements by reference to various criteria. So similar issues may arise in these situations.

Section 71AB(3)

56. This provision appears to extend the provisions to Everett type assignments. In many situations in the past Everett assignments were valued differently from dealings in interests in the partnership itself. Once again the retrospective effect has the potential to disturb past transactions that have been assessed on a different basis.

Section 71AB(4)

57. Section 71AB(4) treats the instrument as a conveyance operating as a voluntary disposition *inter vivos*. Most of these transactions involve the passing of a consideration, so it is unclear why they should be deemed to be a conveyance operating as voluntary disposition *inter vivos*. There are differences in the exemptions under the two heads of charge.
58. Is section 71(5) therefore to apply in these situations?
59. Some of the Commissioner's personnel have taken the view in respect of a like provision in section 71(3)(a) that the Commissioner can then choose between the conveyance on sale head of charge and conveyance operating as a voluntary disposition *inter vivos* head of charge, apparently on the basis of the principle in *Speyer Bros v IRC*.³⁷ If this provision is to remain it should be clear that this provision prevails, as appears to be the intention.

Section 71AB(7)

60. Section 71AB(7)(a) treats land that is a partnership asset as one to be accounted for on its unencumbered market value. For the purposes of the law, if the land is truly a partnership asset then its treatment is very different from land that is not a partnership asset, but used by the partnership.³⁸ In practice this is not that common.
61. This difference in treatment has long had revenue implications and been the source of contention. There has been no justification in the *Stamp Duties Act 1923* for treating one form of partnership asset differently from another. Notwithstanding that, the Commissioner has sought to do so since at least 1993. The only justification is a revenue policy issue of treating land differently in partnership situations to avoid a revenue leakage.
62. Section 71AB(7)(b) refers to the net value of the assets. Is this the value of all assets net of liabilities or the net value of each individual asset (the value of the asset after allowing for any inherent liability or charge on the particular assets)?

This appears to be further confused by section 71AB(8) which attributes a charge to certain non land assets for determining the value of the assets. The provisions must be more clearly expressed as the value of the other assets less the liabilities of the partnership. This may be better addressed by modifying the formula in section 71AB(6) to allow for the deduction of liabilities.

³⁷ [1908] AC 92. The principle is that where an instrument is liable to stamp duty under more than one head, the revenue is only entitled to one but may choose the higher. The view that is adopted appears to be misconceived. In this situation there are not two applicable heads of charge, section 71(3)(a) is very specific about its application to the exclusion of the conveyance on sale provisions.

³⁸ See section 22 of the *Partnership Act 1891*.

These provisions also ignore that many partnerships have ongoing contractual obligations that are significant and not brought to account as liabilities. They also need to be addressed. Will such contractual obligations be allowed to be brought to account as contingent liabilities or are they excluded?³⁹

63. Section 71AB(7)(b) excludes a negative value. This is to deny reality and to in effect penalise those who may otherwise be struggling.
64. Section 71AB(7)(c) provides that the proportionate interest of a partner is represented as the greater of the relative capital contributed and the entitlement to share on a surplus on a winding up. The need to do the computation in each situation will unduly complicate matters. Whether the provision even works, let alone fairly is open to question. The following example highlights the difficulties. A and B started a legal practice contributing \$10,000 each to the capital of the firm. They work hard and take minimal drawings and build up loan accounts from undrawn profits of \$150,000 each after say five years. It is then decided to admit a new equal partner C who is required to contribute \$210,000 by way of capital contribution and \$50,000 by way of loan to the partnership and pays it into the partnership bank account. A bank overdraft facility of \$150,000 is also established for the partnership. The original partners withdraw \$100,000 each from the bank account in reduction of their loan accounts. They are equal partners so on a winding up share equally the surplus assets namely one third each. Yet their relative capital contributions will be 4.35%, 4.35% and 91.3% respectively. Is this what is intended?
65. Both section 71AB(7)(c)(ii) and 71(9) use the expression loan capital. The provisions do not include any definition of what is loan capital. Usually partners have capital accounts, current accounts and loan accounts or some combination of them. The capital accounts are usually fixed, the current accounts usually fluctuate with drawings and annual profit determinations. The loan accounts may change from time to time depending on the need for funds, their availability externally and decisions as to whether it should be capital or a loan. The *Partnership Act 1891* does not appear to have a concept of loan capital. What does it mean?

Section 71AB(9)

66. The proposed section 71AB(9) permits the Commissioner to exclude loan capital unless the Commissioner determines it to be part of a genuine business arrangement. Once again there is no definition of loan capital. Prima facie any loan of money from one person to another, whether the persons are partners or related or in all but quite exceptional circumstances, ought to be considered a genuine arrangement.
67. The reason for the use of the word business is unclear, if the loan is a genuine loan (as opposed to a contribution of capital incorrectly characterised as a loan) then it ought to be treated as such. Neither the proposed provisions nor the Explanatory Memorandum gives any indication of the criteria the Commissioner must apply to be satisfied that a loan is a 'genuine business arrangement'.

³⁹ RevenueSA has sought to disregard contingent liabilities and contingent assets in situations, which have suited it.

Section 71AB(10)

68. Section 71AB(10) continues the Commissioner's denial of reality. It requires that the goodwill of a partnership be included as an asset of the partnership. In many larger professional practices goodwill is not brought to account nor charged on either the admission or retirement of a partner.
69. These partnerships are rarely capable of converting the goodwill into anything. In some smaller partnerships goodwill may still be paid for and it is appropriate in those situations that it be brought to account. It reflects reality. Accountants' theories of valuation, which have found some support in particular circumstances, ought not to be legislated to have effect to deem values where clearly none exist in genuine market circumstances.
70. Notwithstanding the current factual situation the Commissioner continues to insist on an amount being included for goodwill. This unreality should not become reality by law.

Section 71AB – Other Provisions and Exemptions

71. As already highlighted the interaction of section 71AB with other provisions of the *Stamp Duties Act 1923* is unclear. One of particular concern is the lack of apportionment provisions between jurisdictions. In many situations section 3C has application, whether it applies in this situation is unclear. There are a number of large professional partnerships operating across state borders, the formula in section 71AB(6) does not clearly allow for apportionment in this situation, it should
72. Section 71AB(12) provides that the section does not limit the operation of any other section which provides for the imposition of ad valorem duty with respect to the conveyance of property. Is this simply intended to be a statutory expression of *Speyer Bros v IRC*⁴⁰ or is it intended to be something different or more as highlighted above.
73. Nothing preserves the operation of any of the exemptions or relief provisions such as section 71B or 71CC. The operation 71AB appears to in effect ignore the operation of 71B, which is important in the family partnership situation.

Valuation Methodology

74. The provisions of section 71AB adopt a particular characterisation and valuation methodology. There are others that may be more appropriately adopted in particular situations. The Commissioner has accepted various methodologies, as appropriate, in the past, as one would expect. This prevents that.
75. More importantly the prescribed methodology retrospectively declares every other method as incorrect with a duty consequence. It authorises past assessments based on any other method to be set-aside on a reassessment.

⁴⁰ [1908] AC 92. The principle is that where an instrument is liable to stamp duty under more than one head, the revenue is only entitled to one but may choose the higher. The view that is adopted appears to be misconceived. In this situation there are not two applicable heads of charge, section 71(3)(a) is very specific about its application to the exclusion of the conveyance on sale provisions.

Section 91 and Section 95 Amendments - Generally

76. The possibility of these amendments to Part 4 having retrospective effect was never foreshadowed. They seek to overturn the operation of section 22 of the *Partnership Act 1891*, which was not an issue in *Cyril Henschke Pty Ltd v Commissioner of State Taxation*.⁴¹ There is simply no justification for these provisions to apply retrospectively. It was never foreshadowed.
77. The provisions either do not integrate or integrate unfairly with the land rich provisions. A corporate or private unit trust partner will now be deemed retrospectively to hold an interest in land which is an asset of a partnership of which it is a partner. If there have been changes in significant interests in an entity which was a partner in a partnership but not land rich it will now be retrospectively deemed to have held an interest in land and this will raise an issue as to the application of the land rich provisions, after the date on which those provisions come into force.
78. The land rich provisions require the lodgement of a statement within 2 months after a dutiable transaction occurs. If the statement is not lodged within that time an offence is committed. In effect a person will be made liable for a prosecution retrospectively.
79. Non-dutiable transactions that have occurred will be retrospectively made dutiable though the parties to them are unlikely to be appropriately informed of this occurring. Consequently the law will be applied in a discriminatory way and be incapable of fair administration.

Section 91(3b)

80. The proposed section 91(3b) is similar to section 71AB(7)(c) and the comments made above in respect of that provision also apply to section 91(3b).

Section 91(3c)

81. The proposed section 91(3c) is similar to section 71AB(9) and the comments made above in respect of that provision also apply to section 91(3c).

Summary

82. The retrospectivity cannot be justified and the limited grounds put forward for it to be adopted are contradicted by the Commissioner's own Circular.
83. The creation of penal sanctions retrospectively is untenable.
84. Unlimited power to amend past assessments to give effect to untenable retrospective provisions compounds and completes a trilogy that makes a mockery of the rule of law.
85. The substantive provisions of proposed legislation are drawn in the most pervasive possible terms:
- 85.1 deeming partners to have an interest in assets that they do not have at law;

⁴¹ [2009] SASC 148.

- 85.2 deeming dealing with interests to be made by persons who are partners even though they, under the terms upon which they are partners, have no interest in the surplus of partnership assets over liabilities nor possibly beyond a share of the income of the partnership;
 - 85.3 deeming collectively held assets to be the asset of a person and thereby creating a curious concept of a collective member of a partnership and also potentially imposing double duty in any situation where an interest has been assigned in equity but not law, once upon the assignor, once upon the assignee;
 - 85.4 deeming a basis of valuation for duty which is not reflective of market value but which require the Commissioner to apply a formula to create some other, deemed, value which will potentially have no correlation to market value.
86. This is instead of just legislating to impose the Commissioner's losing argument in *Cyril Henschke Pty Ltd v Commissioner of State Taxation*.⁴² or introducing the most onerous regime from among the existing legislation of other states.
87. Clearly the provisions are anti-business, will reflect very badly on any legislature that passes them, compromise those who are to administer them and ought not to be pursued or passed in their present form.

⁴² [2009] SASC 148.

