STAMP AMENDMENT BILL 2006

Second Reading

Resumed from 22 November.

HON GEORGE CASH (North Metropolitan) [5.44 pm]: The opposition is prepared to support the Stamp Amendment Bill 2006, which will amend section 73D of the Stamp Act. The reason for this amendment is two recent court cases. The first was heard in the High Court of Australia and the second was heard in the State Administrative Tribunal and questioned the effect of unit trusts creating a beneficial interest in certain land. The amendment contained in the bill seeks to clarify the operations of the private trust provisions to ensure that when a unit holder has units, he is taken to have an interest in the underlying land and chattels held by the trustee of the trust, despite any of the terms that might be contained in the trust to the contrary.

The High Court decision was heard in September 2005 and it dealt with CPT Custodian Pty Ltd, which previously traded under the name of Sandhurst Nominees Victoria Ltd. That company was the appellant and the Victorian Commissioner of State Revenue was the respondent. This case involved the Victorian Land Tax Act 1958. Although tonight we are dealing with the Western Australian Stamp Act, the question of underlying interest in land with regard to unit holders is basically the same. Some of the questions that were raised in the original High Court case were the status of the holder of issued units in these trusts, as an owner of the land for the purposes of the Victorian Land Tax Act 1958, and whether holders of issued units in a trust, which itself holds issued units in a further trust whereby the trustee is the registered proprietor of land, is an owner of the land according to the definition of "owner of land" as stated in the Land Tax Act 1958. Another question was whether the holder of only some of the issued units of a unit trust stands in a different position from the beneficiary owning all the units in the trust. A further question was raised regarding the ruling in the case of Saunders v Vautier as to whether there was an opportunity for beneficial interests to confer on their holding by instructing the trustee to disband the trust and transfer whatever entitlement they had to them. That Victorian case was heard by five High Court judges: Chief Justice Gleeson, and Justices McHugh, Gummow, Callinan and Heydon. The general circumstance of this case is that it involved appeals from a decision of the Victorian Court of Appeal. Originally, the issue was heard in the Supreme Court of Victoria by Mr Justice Nettle. He made certain determinations that were referred to the Victorian Court of Appeal, and in the end the matter was referred to the High Court of Australia. Cross-appeals were contained within the particular case. The various appeals were heard together, with appearances by the same counsel for the particular parties. The appeals were brought as a result of the decisions and orders made by the Victorian Court of Appeal, which had heard all six appeals and cross-appeals. The Victorian Court of Appeal in Victoria was made up of Justices Phillips, Buchanan and Eames, who delivered the reasons that the High Court was required to consider.

The litigation generally concerned the application of the taxing provisions of the Victorian Land Tax Act 1958 to parcels of land on which stood a number of rather large shopping centres. The shopping centres were known as the Glen Shopping Centre at Glen Waverley, the Keilor Downs Plaza at Keilor Downs, the Cranbourne Park Shopping Centre at Cranbourne and the Mildura Centre Plaza at Mildura, all of which stood on land of which the registered proprietors were in fact trustees under trust deeds constituting what were identified to be unit trusts. The High Court noted the considerations of the Court of Appeal. The High Court noted that in the Court of Appeal counsel for the taxpayers had correctly submitted that rather than approach the issues by looking broadly at the characteristics of the unit trusts, it was necessary to begin with the terms of the relevant trust deeds and the rights, powers and restrictions provided for in those trust deeds. That was one of the important points of the case. It was not the case that beneficial interests automatically flowed just because there was a unit trust. The question was what was actually contained in the trusts, as that was critical to the decision of whether it could be said that there was an underlying interest in that land. In the Victorian case, much of the question revolved around the definition of "owner" and who constituted an owner as such. The High Court ultimately found that if someone had been found to be an owner within the definition of section 3 of the Victorian Land Tax Act, that person, having jumped that first hurdle, would be able to deal with the relationship in respect of sections 51 and 52 of that act. However, the first question that had to be resolved was whether someone could be classed as an owner under that act. The High Court in its decision decided that the various appeals should be dismissed with costs, and the appeals are set out in detail in the High Court case. That decision of the High Court caused a fair bit of consternation among tax lawyers and accountants who were dealing in unit trusts at the time.

Mr President will be aware that the Australian government through the Australian Taxation Office has what is known as the National Tax Liaison Group. Interested parties are able to put forward to that group propositions on and seek answers to questions relevant to taxing matters. On 12 December 2005, a few months after the High Court made its decision in the CPT Custodian Pty Ltd case, the National Tax Liaison Group met. At that meeting on 12 December 2005, the Australian Taxation Office was asked whether it would address questions arising from the recent High Court decision in CPT Custodian Pty Ltd v Commissioner of State Revenue;

Commissioner of State Revenue v Karingal 2 Holdings Pty Ltd [2005] HCA 53 delivered on 28 September 2005. The underlying questions that were part of the main question were: does the tax office believe the CPT case has changed the meaning of "presently entitled" for unit trusts; if it does, will it promise not to change practice retrospectively; will it continue to assume that unit holders of unit trusts are always presently entitled to the income of those trusts; and does it accept that resettlements of unit trusts can be made without capital gains tax consequences or are CGT consequences limited to just a valuation of income of the trust? The Australian Taxation Office's response at the meeting of the National Tax Liaison Group was as follows -

> The High Court in CPT Custodian made a number of comments which may have an impact on the circumstances in which a beneficiary would be regarded as having an interest in property of a trust, including on the concepts of:
>
> - present entitlement;
> - absolute entitlement;
> - vested and indefeasible interest.

The Australian Taxation Office reply went on to refer to the meaning of fixed entitlement, which it is not necessary to discuss for the purpose of this particular bill. It then stated -

> The High Court decision in CPT Custodian concerned whether the sole unit holder in unit trusts was the 'owner' of land in the trusts for Victorian land tax purposes. In the course of that decision, the High Court discussed Charles v. Federal Commissioner of Taxation (1954) 90 CLR 598 in relation to the possible view, not that the particular trust deed gave unit holders a proprietary interest in all the property for the time being subject to the trust, but that all unit trusts do so. The Court in CPT Custodian emphasises that Charles referred to 'a unit under the trust deed before us'.

"Before us" meaning before the court -

> On this understanding, Charles is not a general statement of a proprietary interest inherent in any unit trust regardless of its terms.

The response in the minutes of the National Tax Liaison Group's meeting went on to say -

> It is in the light of those submissions that the Tax Office would be able to decide, if CPT Custodian does impact on laws under the administration of the Commissioner of Taxation, whether and how it is considered appropriate that any particular issue be addressed in the form of a Public Ruling.

Interestingly enough, that was in December 2005, just a few months after the High Court decision. I also notice that at the sixth states' taxation conference held in Hobart on 27 July 2006 - under the auspices of the national division of the Taxation Institute of Australia - a paper entitled "Dealing with State Taxes" was written and presented by Ian V. Gzell. He raised the recent indemnity question with respect to CPT Custodian Pty Ltd v Commissioner of State Revenue. The citation for that case is 2005, 79 ALJR at 1724. He listed the facts of the case as follows -

> The Victorian Commissioner of State Revenue assessed land tax against the unit holders in a number of unit trusts that held shopping centres. The taxpayers held 100% of the units in some trusts and less than 100% in others. A curiosity of the case is that the Commissioner chose to assess the unit holders rather than the legal owner of the lands, the trustees.

Further on in the paper that was presented by Mr Gzell, he stated -

> The High Court rejected as dogma the proposition that where ownership is vested in a trustee, equitable ownership must necessarily be vested in someone else, because it is an essential attribute of a trust that it confers upon individuals a complex of beneficial legal relations that may be called ownership. The Court approved what Griffith CJ had said in *Glenn v Federal Commissioner of Land Tax:* . . .

That particular case was an old case; in fact the citation is 1915, volume 20, CLR at 497, in which Griffith CJ said -

> "The respondent's argument is based on the assumption that whenever the legal estate in land is vested in a trustee there must be some person other than the trustee entitled to it in equity for an estate of freehold in possession, so that the only question to be answered is who is the owner of that equitable estate. In my opinion, there is a prior inquiry, namely, whether there is any such person. If there is not, the trustee is entitled to the whole estate in possession, both legal and equitable."

Mr Gzell went on to discuss the issues raised in Charles v Federal Commissioner of Taxation that I mentioned earlier. He recognised that the court had distinguished the decision in that particular case.

Sitting suspended from 6.00 pm to 7.30 pm

Hon GEORGE CASH: Before the break I was indicating that of the cases that are referred to by the government as requiring this amendment, one in particular - that is, the High Court case - was the subject of discussion at the meeting of the national division of the Taxation Institute of Australia in Hobart on 27 July 2006. In particular, a paper was presented on this subject by Ian V. Gzell, who is a member of the institute. Before the break I was indicating that the High Court had in fact distinguished the decision made in Charles v Federal Commission of Taxation for the reasons that are set out in the High Court's decision. However, I should also indicate that the court approved the decision of Nettle J at first instance that the entitlements of the unit holders in those terms - that is, the terms of the trust deed - did not make them owners for land tax purposes. Of course, the whole argument surrounding this case was what in fact constituted an owner as defined under the Victorian Land Tax Act. I mentioned earlier that the High Court considered the decision in Saunders v Vautier and said that it did not apply to constitute the single unit holder as the owner of the trust fund. The High Court accepted the modern formulation of that particular rule.

Having said that in respect of the High Court case, the Commissioner of State Revenue in Western Australia obviously took note of the High Court decision and of the decision that was made by the State Administrative Tribunal in May this year in Commonwealth Managed Investments Ltd v Commissioner of State Revenue. Commonwealth Managed Investments Ltd was the applicant and the Commissioner of State Revenue the respondent in this case. The State Administrative Tribunal made it clear that the decision that it made in this case followed the decision made by the High Court in the earlier case of CPT Custodian Pty Ltd v Commissioner of State Revenue in Victoria. In the Western Australian case, again the question of the nature of the interest of unit holders was considered, as was the question of how a beneficial interest in land in Western Australia was to be determined and the approach to be taken in assessing the nature of the particular interest. In this case, the Commissioner of State Revenue decided that notwithstanding there were no executed documents upon which duty could be levied, the commissioner would use his powers under the Taxation Administration Act 2003 to create a memorandum for the transaction and use that memorandum to assess the applicant for duty. The Commissioner of State Revenue gave evidence that he considered the disposition of the units in the Commonwealth Property Investment Fund were caught for stamp duty purposes by section 73D of the Stamp Act 1921, as the Stamp Act stood at the date of the transaction in question. I say that because in the meantime there have been amendments to the Stamp Act. The applicants argued that section 73D of the act had no application because of the ownership of a unit in the CPIF trust and said that it did not amount to beneficial interest in land in Western Australia. The bottom line was that the State Administrative Tribunal considered the submissions of both parties and agreed with the applicants' contentions and ordered that the assessments be set aside. I do not know that there is a great need to go into the various submissions made by the applicants, but submissions were made on five separate grounds. The second submission interests the opposition because it addresses the nature of the Commonwealth Property Investment Fund's trust property. The decision addresses the nature of the trust and states -

> the rights of the trustee/responsible entity of CPIF, as a unit holder in the Sub Trusts, did not answer the statutory description of an 'interest, including any beneficial interest, in' land or chattels in Western Australia within the meaning of s 73D of the Act;

They pleaded in the alternative that, if they were wrong, and a contrary decision was made to the applicants' submissions, the dispositions were chargeable with duty under section 73D of the act and, in particular, section 73D(5) should apply such that only nominal duty should be chargeable in respect of each disposition on the basis that no dispositions significantly affected any right or rights pertaining to any unit in CPIF.

The State Administrative Tribunal followed the decision of the High Court and the State Administrative Tribunal Judge John Chaney, the presiding officer on this matter, states in paragraph 55 of his decision that -

> In my view, given the terms of the CPIF trust deed, the terms of the subtrust deeds, and in particular the express limitations on the rights conferred on unit holders under both the CPIF trust deed and the subtrust deeds, it is not possible to identify a beneficial interest to the "necessary quality of definable extent" . . .

He referred to the case of Gartside and CPT Custodian - the old High Court case that I mentioned - which would constitute a beneficial interest in land within Western Australia for the purposes of section 73D of the Stamp Act.

The conclusion drawn by Judge John Chaney was that section 73D of the Stamp Act had no application to the dispositions, the subject of these assessments that were before the tribunal, and the particular assessments should be set aside. It is because of the decisions in both CPT Custodian and Commonwealth Managed Investments Ltd that the government brings this amendment before the house.

As I indicated, in those two cases the High Court and State Administrative Tribunal were saying that one of the first things to do was to look at the characteristics of the trustee to determine what is intended in the trust deed, and their determination was made according to that. The government is saying that notwithstanding the decisions in the High Court and State Administrative Tribunal cases, it intends that the amendment in this bill to section 73D of the Stamp Act will ensure that a unit holder is taken to have an interest in the underlying land and chattels held by the trustee of the trust, despite any terms of a trust deed to the contrary. In that regard it clarifies the particular issue.

The opposition recognises that the amendment will return the state to the position that it believes it was in prior to the decision in those two cases. In that regard we do not have any objection to the particular amendment before the house.

One of the arguments the government uses for bringing this amendment forward is that to not do so would cause an impost on revenue to the state. Given the huge amounts of revenue that are collected by the government through stamp duty, land tax and other general property taxes, that provides the opportunity for the opposition to consider whether it should agree to the amendment because, obviously, not agreeing to it would deny the government certain revenue. However, we recognise the position of the Commissioner of State Revenue in believing that section 73D of the Stamp Act catches unit holders, and that unit holders have a beneficial interest. We agree that clarification is needed by way of this amendment. The amendment is very clear in its detail. As the single amendment contained within clause 4 of the bill is the only change to the Stamp Act by way of amendment to section 73D, the opposition sees no need go into committee to discuss the matter any further. The opposition supports the bill.

HON MURRAY CRIDDLE (Agricultural) [7.40 pm]: I feel duty bound to make a few comments because I have received a most useful briefing from staff. Hon George Cash has provided great detail. I wish to confirm my understanding of the act and the bill. The amendment clarifies the law concerning unit trusts. Regardless of the terms of the trust deed, duty will now be payable. The bill removes some uncertainty in the application of the law, which could otherwise allow for duty to be avoided due to the terms of a trust. I understand that the amendment will be retrospective to 27 June.

Hon Ljiljanna Ravlich: Correct.

Hon MURRAY CRIDDLE: It is interesting that we have retrospectivity. However, that is the case. I understand that there will not be a great deal of money involved as conveyance duty is between two and 5.4 per cent. As such, there will not be a huge impact. Bearing in mind the huge amount of money the government is collecting these days - the minister would know all about that - the real issue is on what the money is spent. Obviously, that is one of the issues the government will deal with. The National Party supports the bill on the understanding that it clarifies the situation. I look forward to the passage of the bill.

HON PAUL LLEWELLYN (South West) [7.42 pm]: The Greens (WA) support the Stamp Amendment Bill 2006. It is a fair process to expose the line of ownership of people who own unit trusts and the underlying land ownership that is implied. I understand that section 73D was inserted into the Stamp Act in 1982 to ensure that stamp duty could not be avoided by transferring property indirectly through the use of unit trust schemes. A loophole in the legislation has subsequently been discovered. It is right that we should close the loophole and that we should not in any way encourage these types of tax avoidance arrangements in Western Australian law.

Effectively, the bill does not represent a change in policy. It strengthens the concept that there should be a clear relationship between ownership of a unit trust by a unit holder and the underlying value, which in this case is land. As that is an important part of the state's revenue base, we support the bill. I thank Hon George Cash for giving some fantastic background to the amendment.

HON LJILJANNA RAVLICH (East Metropolitan - Minister for Education and Training) [7.45 pm]: I thank honourable members for their contributions to the debate on the Stamp Amendment Bill 2006, especially Hon George Cash, who took us through the history of how this issue arose and the need to rectify the situation. These amendments are necessary to protect the state's revenue base by ensuring that duty is payable on changes in the ownership of these trusts and the high-value properties they control. I understand that if this loophole were not closed the state would forgo tens of millions of dollars of revenue. These amendments do not have any direct financial implications apart from the possible loss of revenue that would result if the loopholes were not closed. This is not a particularly large bill; it consists of only four clauses. The substantive amendment to the principal act is made at clause 4, which amends section 73D, by inserting new subsections (1b) and (1c). There is also a minor consequential amendment to section 73D(6). Hon Murray Criddle is correct in stating that the provisions are retrospective. On the question of whether the government should have gone down this path, given that it already collects plenty of revenue, no matter much revenue the government collects, as soon as revenue is allocated to any priority of government such as health, education or law and order, there remains ongoing demand for more expenditure. Even though this bill does not deal with a huge amount of money, any forgone

revenue means there is less to spend on services and utilities. Closing the loophole in section 73D is also necessary in the interests of fairness and of ensuring that every person is treated equally at law. I do not intend to give another precis of how we arrived at the necessity for this bill because Hon George Cash has already done that very well. I thank members for their support of the second reading and foreshadow that I will be seeking leave to proceed forthwith to the third reading.

Question put and passed.

Bill read a second time.

Leave granted to proceed forthwith to third reading.

Third Reading

Bill read a third time, on motion by **Hon Ljiljanna Ravlich (Minister for Education and Training)** and passed.