THE TAX INSTITUTE

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By email: Michelle.Owens@finance.wa.gov.au

Dear Michelle,

**Draft Revenue Ruling DA 26.0 Fixed to Land Model – Unintended Consequences**

The Tax Institute thanks you for the opportunity to consult on Draft Ruling DA 26 (**Ruling**). Overall, we think the release of the final Ruling will be of assistance to taxpayers and we are therefore supportive of it.

We do not have significant concerns with the content of the Ruling. However, we do think there are some issues highlighted below that could be addressed in the Ruling so that the Commissioner's position can be made clear. As requested, we have also raised what we consider to be unintended consequences and would be supportive of measures to address them.

## 1. Comments on the Draft Ruling

*Scope of 'fixed to land' inclusion*

We note that the *Stamp Act 1921* (WA), which applies prior to 1 July 2008, also has an extended definition of land which covers items "fixed to the land". This definition was considered by the Court of Appeal in *Epic Energy (Pilbara Pipeline) Pty Ltd v Commissioner of State Revenue* [2011] WASCA 228. Both McClure and Buss JJ found that in order to enliven the specific inclusion the corporation first had to have an interest in the underlying land.

Sub-section 3A(1)(f) of the *Duties Act 2008* (WA) (**Duties Act**) includes anything "fixed to land". There is no use of the definite article "the" in this phrase. We think it would be helpful if the Ruling could clarify whether the slight difference in wording is a basis to distinguish the reasoning in *Epic Energy (Pilbara Pipeline) Pty Ltd v Commissioner of State Revenue* [2011] WASCA 228 outlined above from the meaning of the phrase "fixed to land" in the Duties Act. That is, whether ownership of something "fixed to land", perhaps by Statute, constitutes land for the purposes of sub-section 3A(1)(f) of the Duties Act, and therefore the landholder rules, even if the owner of the fixed item does not have any estate or interest in the physical land to which the item is fixed.

*Valuing land and fixtures*

A somewhat related issue is the proper construction of sections 36, 36A and 149A of the Duties Act.

Sub-section 36(1)(c) gives power to the Commissioner to ignore an estate or interest in the property if it reduces the value of the property and, in the Commissioner's opinion, the reduction was due to a scheme or arrangement with the sole or dominant purpose of reducing the value of the property. This provision is responsive to decisions such as *Commr of State Revenue (Vic) v Bradney Pty Ltd* 96 ATC 5130 and *Commissioner of State Revenue v Pioneer Concrete (Vic) Pty Ltd* [2002] HCA 43 where it was confirmed that in determining the unencumbered value of property for stamp duty purposes, any estate or interest in the property held by a third party that impacts the value of the land needs to be taken into account (unless it is a security interest such as a mortgage or charge). A merely personal contractual right should be ignored as it does not impact the value of the property in exchange.

Assume, for example, that A owns the freehold and grants a lease to B who constructs infrastructure on the land (which is a fixture) but which B has the right to remove. Without more, the freehold would, as a matter of law, include the fixture but should be valued taking into account the lease and the attendant right to remove the fixture unless sub-section 36(1)(c) applies. Thus, an acquisition of A should only be subject to landholder duty on the basis of the freehold ignoring the infrastructure (as this would be the value of the freehold when the lease and removal right is taken into account). On the other hand, an acquisition of B should attract landholder duty by reference to the value of the lease and the infrastructure. This seems an entirely appropriate outcome and consistent with the case law and legislative history outlined above. An alternative view (relying on section 36A, see below) would see the fixture included in the land value of A and B and could lead to double tax. An interpretation leading to double taxation should not be preferred – see Dixon J (as he then was) in *Executor Trustee& Agency Co of South Australia Ltd v Federal Commissioner of Taxation* [1932] HCA 25; (1932) 48 CLR 26 at 44.

The exact purpose of sections 36A and 149A is therefore somewhat elusive. Section 36A provides that in determining the unencumbered value of dutiable property that is land, anything that is part of the land as a fixture is to be taken into account even if the dutiable transaction does not, or purports not to, apply to the fixture as well as the land. Section 149A seeks to achieve a similar outcome for landholder duty purposes. Sub-section 36(5)(e) provides that if section 36A applies the value is to determined having regard to that section. It does not say "exclusively under that section".

Accordingly, we would submit that sections 36A and 149A seek merely to confirm that anything that is part of land as a fixture cannot be ignored in valuing the land. That does not preclude, however, taking into account the entitlement that someone other than the land owner has in the land/fixture (subject, of course, to sub-section 36(1)(c) of the Duties Act).

We think it would be helpful if these interpretational issues could be clarified in the Ruling – perhaps with some examples. For completeness, we note that similar outcomes should arise for mining tenements to the extent sections 36A and 149A apply to them.

*Leasing rules*

There are a number of provisions in the Duties Act which provide that a lease is only dutiable if there is consideration for its grant, surrender, assignment etc and that any duty can only be levied on such consideration ("the leasing rules").

We think it would be helpful if the Ruling could clarify whether a lease of something that is fixed to land (without any lease of the underlying land) would be within the ambit of the leasing rules. See also the comment below on fixed infrastructure control rights and leases - maybe these issues interrelate.

Similarly, and although not strictly relevant to the fixed to land issues, would a sub-lease of a mining tenement be subject to the leasing rules? (in *TEC Desert Pty Ltd v Commissioner of State Revenue* [2010] HCA 49 the High Court found that a WA mining lease is a creature of statute and not a lease for common law purposes).

We also think it would be helpful if the Ruling could clarify the outcome on the transfer or assignment of a lease inclusive of tenant's fixtures for nil consideration (perhaps by way of example).

*Miscellaneous comments*

- In paragraph 3, footnote 3 refers to section 3A(1)(f). Query if the reference should be to section 3A(1).

- Paragraph 5, footnote 8 states that the reference in section 3A(1)(f) to "land" means *physical land*. We assume this means land in the sense of tangible land (i.e. dirt), rather than intangible rights over land for example a lease. If this understanding is correct, it would be useful if this is clarified in the Ruling.

- In the discussion of fixed infrastructure control rights (**FICRs**) in paragraph 19 and following, can clarification be provided on what meaning that the word "lease" has in the definition of FICR. If a lease is an interest in land then under section 91A(3) a lease cannot be a FICR. However, the word "lease" appears in the definition of FICR, but not in the definitions of a fixed infrastructure access right or a fixed infrastructure statutory licence. There must be a reason for this difference. This point may also be relevant to paragraph 13.

- If fixed infrastructure is purchased with the intention of permanent removal within 90 days, we think it would be helpful to clarify the stamp duty treatment of an access right granted solely to allow the removal of the fixed infrastructure. This is relevant to the discussion in both paragraphs 8 and 24 and following.

**2. Unintended Consequences**

Following on from our comments above concerning valuation issues and fixed infrastructure, it seems there may be unintended consequences so far as fixed infrastructure access and control rights are concerned. To the extent these rights relate to a fixture on land but are merely contractual, they are unlikely to affect the value of the land – *Pioneer Concrete*. However, these rights will also constitute land of the rights holder for landholder duty purposes – per sections 149 and 204A. As a result, there is the possibility of double duty outcomes as outlined above. A possible solution would be to provide that such rights should be taken into account in valuing the land even as if they conferred an estate or interest in the underlying land.

We also note that securitised licence structures used in public private partnerships **(PPPs**) will now have many stamp duty touch points meaning these won't be so attractive to use in WA. This may be counter-productive if the Government would like to consider the use of such PPPs in the future to facilitate social infrastructure.

Finally, we note that onshore petroleum titles are exempt from duty and previously the chattels/infrastructure did not attract duty as they are not a fixture (*Tec Desert* by analogy). Now the infrastructure would seem to be caught but not the titles – was this intended? If it was, we note that it will invariably lead to difficult valuation issues trying to split between the titles and the infrastructure.

If you have any comments please contact Nick Heggart, CTA, Greenwoods & Herbert Smith Freehills on 08 9211 7593 or Johanne Thomas, CTA, Deloitte on 08 9429 2222.

Kind regards,

**Bill Keays, CTA**
Chair, WA State Council