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Life cycle of a renewables energy project

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EY

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1 Overview

More than ever, Australia is seeing a move from traditional energy sources such as coal, hydro and gas fired power stations to renewable energy such as solar and wind farms.

Renewable energy projects are proving to be quite unique from a stamp duty perspective and can produce unintended outcomes if not managed carefully. It is also a good example of the lack of harmony between the stamp duty legislation of the different jurisdictions in the modern world, which is something that stamp duty practitioners have had to manage for decades.

The uniqueness stems from a number of factors, including:

- the development process, which sometimes has more similarity with resource exploration than the development of power station;
- the relatively “light” annexation to the land, at least compared to traditional power stations;
- the land tenure itself and the sometimes ongoing relationship with the owners of the land and surrounding land (typically farmers); and
- the funding for the development of the projects themselves and ultimate investment.

This session will explore stamp duty issues arising out of renewable energy projects in that context, including:

- establishing the project vehicle(s) and footprint;
- differing types of land tenure and their various duty treatment across the jurisdictions;
- classification of infrastructure as “fixtures” or “fixed to land”; and
- timing and methods of selldown.

What seems to be apparent from renewable developments is that each has their own unique commercial, legal and land tenure characteristics.

This paper seeks to draw out the more common issues which clients, advisers and revenue offices face when analysing renewable energy developments from a stamp duty perspective rather than attempt to cover all potential possibilities.

For example, the paper assumes that no residential land is owned or leased as part of the project. Such aspects could potentially arise when, for example, a farm house remains on the subject land. In the author’s experience, such residential property is either carved out of the project footprint or already sits on separate adjacent land title. In the event that residential land forms part of the project, a number of other issues would need to be considered, not least of which would be whether it is subject to stamp duty in South Australia at all, and whether residential surcharges apply.

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For ease of reference, the principal legislation which is discussed in the paper are abbreviated as follows:

- *Duties Act 2001* (Qld) ("Qld Act");
- *Duties Act 1997* (NSW) ("NSW Act");
- *Duties Act 1999* (ACT) ("ACT Act")
- *Duties Act 2000* (Vic) ("Vic Act")
- *Duties Act 2001* (Tas) ("Tas Act")
- *Stamp Duties Act 1923* (SA) ("SA Act")
- *Duties Act 2008* (WA) ("WA Act"); and
- *Stamp Duty Act* (NT) ("NT Act").

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2 Taxation of land interests

2.1 Unique attributes

Each jurisdiction imposes stamp duty on dealings in interests in land, in some way shape or form. Other than South Australia (discussed below), certain dealings in commercial property are subject to stamp duty in each jurisdiction as either a form of dutiable property (in the context of transfer or conveyance duty) or a landholding (in the context of landholder duty).

However, it is useful to identify unique attributes in South Australia and Victoria from the outset as they can become important as we walk through the life cycle of a renewable energy project.

2.2 South Australia abolition of duty on commercial property

From 1 July 2018, no duty is payable in South Australia in relation to "qualifying land", being non-primary production and non-residential land. Specifically, section 105A(5) of the SA Act provides that "no liability to duty arises in relation to a conveyance or transfer of property to which this section applies (to the extent to which it provides for the conveyance or transfer of an interest in qualifying land)."

"Qualifying land" is defined as follows (my emphasis):

> *(1)* In this section –
>
> qualifying land means **land** that is being used for any purpose other than –
>
> *(a)* **land** that is taken to be used for residential purposes in accordance with subsection (2)(a), other than land of a classification excluded by the regulations; or
>
> *(b)* **land** that is taken to be used for primary production in accordance with subsection (2)(b), other than land of a classification excluded by the regulations.
>
> *(2)* For the purposes of the definition of qualifying land –
>
> (a) **land** will be taken to be used for residential purposes if –
>
> (i) the Commissioner, after taking into account information provided by the Valuer-General, determines that **it** is being predominantly used for that purpose; or
>
> (ii) the Commissioner, after taking into account information provided by the Valuer-General, determines that although the **land** is not being used for any particular purpose at the relevant time the **land** should be taken to be used for residential purposes due to improvements that are residential in character having been made to the **land**; or

(iii) the Commissioner, after taking into account information provided by the Valuer-General, determines that the **land** is vacant, or vacant with only minor improvements, that the land is within a zone established by a Development Plan under the Development Act 1993 that envisages the use, or potential use, of the **land** as residential, and that the **land** should be taken to be used for residential purposes due to that zoning (subject to the qualification that if the zoning of the land indicates that the **land** could, in a manner consistent with the Development Plan, be used for some other purpose (other than for primary production) then the vacant land will not be taken to be used for residential purposes); and

(b) **land** will be taken to be used for primary production if –

(i) the Commissioner, after taking into account information provided by the Valuer-General, determines that **it** is being predominantly used for primary production purposes; or

(ii) the Commissioner, after taking into account information provided by the Valuer-General, determines that although the **land** is not being used at the relevant time the **land** should be taken to be used for primary production purposes due to a classification that has been assigned to the **land** by the Valuer-General.

In the context of a renewable energy project, quite often the land on which the project is situated is primary production land. This begs the question as to whether the use of the underlying land (at least in the case of a leasehold interest obtained by the project developer/operator) disqualifies the project's tenure from being classified as qualifying land.[1]

Section 2(4)(a) of the SA Act provides that:

(4) For the purposes of the application of this Act to and in relation to land (whether referred to as land, real property (or property when it is constituted by land) or a land asset under this Act), the following will be taken to be within the concept of land:

(a) an estate or interest in land (including land covered by water);

In the author's view, the "land" subject to a project should constitute the actual interest in land that the project holds, and no other interest in land. In the context of a lease, it is the leasehold interest which should be applied to section 105A, not an underlying pastoral lease or freehold interest.

As long as the project's interest in land is not used for residential purposes or used for primary production within the meaning of section 105A, no duty should arise. One would usually expect that any leasehold rights would not confer a right to use the land for residential purposes or primary production. While that should easily be established for solar farms (or battery storage facilities for that matter) as the facility requires a large uninterrupted and fenced-off perimeter, care should be taken for wind farms, particularly in relation to any agistment rights a farmer may retain.

In the author's experience, section 105A (and its predecessor section 71DC which applied during the time when duty on non-residential land and non-primary production land was being phased out), is

[1] Similar considerations could also arise for a foreign purchaser acquiring "primary production property" in Tasmania to determine whether an additional 0.5% of duty is chargeable under sections 30E or 71A(3) of the Tas Act.

primarily applied by reference to the underlying “Land Use Code” which is determined and used by the Valuer-General.[2]

While paragraphs 105A(2)(a) and (b) require the Commissioner to take into account information provided by the Valuer-General, those paragraphs refer to information in relation to the “land” (refer to the bolded words above). On the premise that the “land” of the project is a leasehold interest with no residential or primary production rights, it would seem that the legislation requires that relevant information provided by the Valuer-General is information regarding the “land” subject to transaction in question (ie the leasehold interest only). In this context, it is difficult to see how the Land Use Codes relating to pastoral leases could be relevant information obtained under section 105A(2) and should not be taken into account in determining the application of section 105A(5) to the property subject to the transaction in question.

For freehold land (or a pastoral lease) which currently has a Land Use Code of primary production, it would seem that it would be useful to seek a change in the Land Use Code under legislation in South Australia. If that is not practicable (at least by the time the relevant transaction is required to be undertaken), the categorisation of the land as “qualifying land” or otherwise is likely to turn on whether it is “predominantly used” for primary production. The concept of “use” and the timing for when “use” changes has been the subject of a number of recent land tax cases, which are likely to provide some guidance in that regard.[3]

In relation to duty charged by reference to a landholding entity under section 100 of the SA Act, it should be noted that there is no longer a threshold value of local land assets under section 98. This makes the classification of qualifying land quite critical to the potential application of those provisions.

2.3 Victorian “dutiable leases”

There have been many papers and discussions of the “lease provisions” of Victoria since their introduction on 21 November 2008 and this paper does not intend to cover all the complex issues arising out of those provisions.[4] Suffice it to say, the lease provisions were inserted in the context of stopping the practice of transacting valuable parcels of land in Victoria by way of long term leases without paying any duty.[5] However, they can have a profound effect on the stamp duty profile of a renewable energy project, which some might say is inequitable and inconsistent with their underlying purpose, not least of which is that duty can be assessed by reference to the unencumbered value of the underlying freehold land[6] (and items fixed to land under the landholder duty provisions)[7]. Such value may have very little bearing on the value of the interest actually transacted.

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[2] Revenue SA Information Circular No. 86.

[3] See for example *Leppington Pastoral Co Pty Ltd v Commissioner of State Revenue* [2017] NSWSC 9.

[4] See for example, Williamson, S Current Victorian Duty Issues and the Growth Areas Infrastructure Contribution delivered at the Property Intensive (Vic) on 12 April 2011.

[5] Explanatory Memorandum to the *Duties Amendment Bill 2008* (Vic).

[6] Section 20(3) of the Vic Act.

[7] Section 73 of the Vic Act.

As is well documented, the lease provisions go well beyond their underlying purpose. That has been recognised by the State Revenue Office through a series of public rulings.[8] This approach has led to the situation where taxpayers must rely on the rulings (or a private ruling) for comfort that a lease does not fall within the ambit of the lease provisions. In the author's experience, the process for obtaining a private ruling is expensive and time consuming, and usually does not fit within the parameters of the transaction timetable.

Even so, the author is aware that the State Revenue Office has determined that the lease provisions can apply to renewable energy projects, when on a plain reading of the rulings, that conclusion might not be readily apparent to a taxpayer.

By way of brief overview on the underlying legislative positon, pursuant to subsection 7(1)(b)(v) of the Vic Act, duty is chargeable on:

> the granting of a lease for which any consideration other than rent reserved is paid or agreed to be paid, either in respect of the lease or in respect of –
>
> (A) the right to purchase the land or a right to a transfer of the land;
> (B) an option to purchase the land or an option for the transfer of the land;
> (C) a right of first refusal in respect of the sale or transfer of the land;
> (D) any other lease, licence, contract, scheme or arrangement by which the lessee, or an associated person of the lessee, obtains any right or interest in the land that is the subject of the lease other than the leasehold estate.

It is beyond the scope of this paper to go into comprehensive detail about the potential application of the lease provisions to renewable energy projects as it will ultimately turn on the precise factual circumstances and particularly the terms of the lease. However, there are some features which do tend to appear in lease arrangements for renewable energy sites worth mentioning, being:

- a relatively small "sign-on" fee (say $10,000);
- the grant of associated rights such as easements for powerlines and access rights;
- rent during the term being calculated (at least in part) by reference to output of electricity; and
- rights and obligations upon the lessee to construct and develop the project.

The author has seen the State Revenue Office use these types of features to suggest that a renewable energy lease could fall within the lease provisions. In the author's view, these features alone should not give rise to a dutiable lease when looking at the underlying purpose of the lease provisions.

It is common for a lease for a renewable energy project to be struck on ordinary terms for market rent (at least from the time the project is operational). Low value rental payments can also be payable during the development and construction phase. In addition, it is not usual for any consideration to be paid in respect of:

[8] Revenue Ruling DA.052v2: Lease provisions – general application; Revenue Ruling DA.050 Lease provisions and meaning of rent reserved and DA.053 Lease provisions and meaning of consideration.

- the right to purchase the land or a right to a transfer of the land;
- an option to purchase the land or an option for the transfer of the land;
- a right of first refusal in respect of the sale or transfer of the land; or
- any other lease, licence, contract, scheme or arrangement by which the lessee, or an associated person of the lessee, obtains any right or interest in the land that is the subject of the lease other than the leasehold estate.

It should also be noted that while leases can span a number of years, market rent is payable over that time, and there are make good provisions at the expiry of the lease. That is, the underlying purpose of the tenure is to have exclusive possession of the land for the expected useful life of the project, not to obtain the equivalent of a freehold interest. Lease arrangements do not typically result in the lessee obtaining any economic benefit from the underlying land, but rather, the lessee benefits from only the permitted use, i.e. the business of developing and operating a renewable energy project. Relevantly, the improvements to the land are made merely to allow a developer/operator to fully use and enjoy the premises for the permitted use during the term of the leases, and must be removed at the end of the term.

It is submitted that such leasing arrangements would seem to naturally fall within Example 4 in Revenue Ruling DA.052 which provides that (emphasis added):

> 'Example 4 – Grant of lease for consideration in addition to rent reserved
>
> ABC is the owner of land in the CBD with a market value of $5 million which has been refurbished for use as a pub. ABC has advertised the premises as available for lease and has been inundated with offers. One such offer is from XYZ which has offered **a premium of $100,000 to secure a lease over the property** in addition to the payment of market rent. Having accepted XYZ's offer, ABC grants XYZ a standard commercial lease for a period of seven years with two options for further terms of seven years. Under the lease, XYZ does not obtain any rights or benefits in relation to the underlying land other than the right to use and occupy the land.
>
> Ordinarily, the grant of a lease for consideration other than rent reserved would be dutiable under the lease provisions. However, **consistent with the policy underlying the lease provisions, the grant of the lease in this example will not be chargeable with duty**. Despite consideration being paid, **XYZ has not obtained valuable rights or benefits in relation to the land other than the right to exclusive possession**. When regard is had to the transaction as a whole including the consideration paid relative to the market value of the land, **it is apparent that XYZ has paid the premium to secure the right to use and occupy the premises over the term of the lease. In such circumstances, the Commissioner would regard the premium as a payment for the use of the land**.'

To put it another way, it is difficult to see how such a lease would **not** be analogous to this example, thereby allowing a taxpayer to rely on it to determine that a lease does not fall within the lease provisions, at least in respect of nominal sign-on fees.

Regarding construction obligations, at least in a number of circumstances, arrangements confer a **right** on the lessee to construct, but not an **obligation** to construct. In such circumstances, it is typical for a lessee to accept obligations of **how** to construct (eg safely and using good workmanship), but not to require construction or development itself. Where there is an obligation to construct (say within a period of time so that the land is not locked up and used for land banking purposes), Revenue Ruling DA.053 considers that certain covenants can constitute consideration in some circumstances (emphasis added):

> The provision of non-monetary consideration can include covenants given by a lessee to a lessor (or an associated third party) under the terms of a lease or a separate but connected agreement to the lease. Often these covenants are provided to secure the right to use the land under the lease and will have nil or nominal value. **However, covenants can have a significant value where they require the lessee to undertake substantial works to improve the land and those improvements become the property of the lessor at the end of the lease**. For example, where a lease requires a lessee to fit out the premises or to construct other improvements on the premises such that the improvements will become the property of the lessor at the end of the lease, the value of the improvements may be regarded as consideration.

As stated above, a lessor would not typically acquire the improvements (eg solar or wind infrastructure) at the end of a lease. Indeed, the lease is more likely than not to require them to be removed. It would therefore seem to suggest that such arrangements, at least having regard to the public statements of the Commissioner, would not give rise to a dutiable lease.

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3 "Exploration" phase

3.1 Overview of this stage of development

What seems to have emerged in the renewable energy sector in Australia, is a number of players who seek out the most favourable locations in Australia to develop solar and wind farms, with favourable sunlight and wind aspects in proximity to electricity connection points. This process involves spending some time and effort to carry out technical studies, begin the government approval process and negotiate land use, typically with farmers. In some ways, this activity is not too different from the initial activities of a traditional prospector or mineral explorer, who seek to prove up a resource with the intention of selling an interest in the opportunity to a developer who has the funds (or source of funds) to develop the project itself.

Such opportunities can range from single sites to a portfolio of opportunities, which can traverse multiple Australian jurisdictions. The ultimate goal for such an "explorer" can be to sell down a percentage interest in the project at the opportunity phase, to an entity with the funds and resources to undertake the development and construction.

3.2 Securing land tenure early

These activities in themselves should not give rise to material stamp duty implications other than potentially securing land tenure in the form of leases, agreements to lease or options to lease. The initial tenure, and the form it will take on selldown of the opportunity, can be critical, and can have long lingering effects through the life cycle of the project, particularly in Victoria (see discussion above).

3.2.1 Options to grant a lease

The entry into an option to grant a lease can give rise to duty in Queensland,[9] South Australia[10], and Western Australia[11].

However, if only nominal consideration is paid, and the unencumbered value of the option is not higher than the consideration, nominal or nil duty should be payable. If the option fee and unencumbered value of an option for a lease in Queensland is $5,000 or less, no duty is payable.[12]

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[9] Section 9(1)(f) of the Qld Act.
[10] Section 2(5) of the SA Act.
[11] Section 17(1)(b) of the WA Act.
[12] In accordance with Schedule 3 of the Qld Act, duty is only payable if the dutiable value is more than $5,000.

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In New South Wales, while the grant of an option to lease is not itself a dutiable transaction, any monetary consideration payable for the option should be counted as a "premium" on an agreement for lease or lease entered into pursuant to an option.[13]

3.2.2 Grant of lease or agreement for lease

The entry into a lease or agreement for lease can give rise to duty in each jurisdiction. However, the amount on which duty is calculated does vary:

- **Queensland** – the total of any of the following amounts payable for the lease –
    - premiums, fines or other consideration payable for the grant of the lease;
    - consideration paid for, or the value of, any moveable chattels taken over by the lessee from the lessor or outgoing lessee;
    - if, on the leased premises, a business is to be carried on and an amount in excess of what would be the rent if a business was not carried on is charged for the lease – the excess amount.[14]
- **New South Wales** – the amount of any premium payable for the lease or grant of the lease, and any amount payable for an option pursuant to which the lease or agreement for lease is granted.[15]
- **Australian Capital Territory** – for a commercial lease with premium, the amount of the premium.[16]
- **Victoria** – if a dutiable lease, the higher of the consideration (both monetary and non-monetary) for the lease or agreement for lease and the unencumbered value of the underlying freehold land.[17]
- **Tasmania** – for a lease for which a premium of more than $3,000 is paid for or in connection with the grant, transfer or surrender of the lease, the higher of the consideration (if any) for the dutiable transaction (being the amount of a monetary consideration or the value of a non-monetary consideration, or both) and the unencumbered value of the dutiable property.[18]
- **South Australia** – if not qualifying land, for a lease for which any consideration other than the rent reserved may be paid or agreed to be paid, the amount of the other consideration.[19]

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[13] See the definition of "premium" in section 8(3) of the NSW Act. The Northern Territory also has a similar concept in section 4(2) of the NT Act.

[14] Section 11(4) of the Qld Act, noting that duty is not payable on a dutiable transaction with a dutiable value of $5,000 or less.

[15] Section 21(5) of the NSW Act.

[16] Section 20(2) of the ACT Act, noting that duty is not payable on a dutiable transaction of dutiable property used, or that will be used, partly or wholly for a commercial purpose, with a dutiable value of less than $1,500,000 (see *Taxation Administration (Amounts Payable—Duty) Determination 2018 (No 1)*).

[17] Section 20(3) of the Vic Act.

[18] Sections 18 and 53 of the Tas Act.

[19] Section 64 of the SA Act.

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- **Western Australia** – the total of the following amounts–
  - the amount of any consideration for the grant of the lease;
  - any amount paid or payable under the lease as rent that –
    - is in excess of a fair market rent for the leased property; and
    - represents an amount paid or payable for the grant of the lease.[20]
- **Northern Territory –** for a lease for which valuable consideration in addition to, or instead of, rent is given, the amount or value of the consideration.[21]

3.3 Choice of entity to house projects/opportunities before construction

As an "explorer" develops opportunities, the question of the appropriate entity to use can be important from the outset. Stamp duty is not the only consideration in that regard, as commercial, legal and tax implications also need to be considered.

From a stamp duty perspective, the best guide will be the intended future selldown, particularly whether it is likely that the project will be sold in isolation or as part of a portfolio and whether any portfolio is likely to involve multiple jurisdictions. That said, there is sometimes a practical tension between housing potential opportunities in their own vehicle and administrative costs that accompany it, particularly if opportunities are quite speculative and may never be developed.

3.4 Movement of opportunity into selldown vehicle

A taxpayer would generally prefer to effect the least number of transfers as possible to effect selldown, which favours opportunities to be created and developed in the intended selldown vehicle. However, particularly at the earliest stages, that may not be known or is otherwise impractical. Therefore, it is often the case that when an "explorer" is preparing for selldown, there is a need to move property interests and information to the vehicle which is to be sold down.

3.4.1 Land and goods

It is unlikely that a project will consist of valuable land and/or goods at this stage. To the extent that an interest in a lease or agreement for lease is required to be transferred, as long as it is not transferred for valuable consideration, nil or nominal duty should be payable. However, South

[20] Section 28(4) of the WA Act.
[21] Item 4(3) of Schedule 1 of the NT Act.

Australia and Victorian non-dutiable leases aside, if goods are required to be transferred, a transfer of a lease is likely to bring the transfer of goods to duty as well.[22]

In the context of a transfer at this stage of the life cycle, it might be surprising to learn that there is any dutiable event at all, and if there is, it gives rise to a material cost. The practical issue is that such transfers into a selldown vehicle are often delayed until there is a potential or imminent selldown to a developer, and the "explorer" is monetising its previous efforts in developing the project to this point. As such, a material cash payment is likely to arise, even at this early stage. That said, all things being equal, only nominal dutiable value should be attributable to transferring lease/option interests and goods if documented appropriately.

In any event, at least in the case of New South Wales, South Australia and Western Australia, a corporate reconstruction exemption may be available as there is no post association requirement in those jurisdictions.[23]

3.4.2 Managing freehold interests

If freehold land is acquired, the acquisition would ordinarily be subject to transfer duty calculated by reference to the higher of the GST-inclusive consideration paid (including assumed liabilities) and the unencumbered value of the land in every jurisdiction. While this is one of the more simplistic and "routine" applications of stamp duty, there are a number of aspects which should nonetheless be considered.

It is important to appreciate that transfer duty can apply as soon as an agreement is signed, with lodgement periods starting to run from that time. If there is a long settlement period (e.g. due to expected delays in obtaining the relevant government approvals), duty could become payable before settlement.[24] If a taxpayer wishes to avoid late payment penalties and interest, it would be necessary to pay duty, and if the contract does not settle, seek a refund. This can pose a cash flow issue, particularly if cash funding is not provided until settlement/selldown. In such circumstances, taxpayers should consider whether the entry into a put and call option would be a more appropriate document to facilitate the land acquisition, with the exercise managed against timing of selldown.[25] This is something that should be identified early on in the negotiation with a landowner, as it can be often difficult to change documentation if the land purchase is close to being agreed.

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[22] Although note the exception in Tasmania under section 24 of the Tas Act provided that it does not constitute a fixture separately chargeable as dutiable property under section 9(1)(c) of the Tas Act. Section 26 of the NSW Act would also seem to apply in a way similar to Tasmania. However, in the author's experience, as a matter of practice, the Chief Commissioner does not generally disregard the value of goods.

[23] Note though that in the event that the controlling entity ceases to hold more than 50% of the securities or voting control of a member of a transaction group within 3 years of the transaction, section 264(4) of the WA Act requires the Commissioner to be notified. That said, unless there is an anti-avoidance purpose, the exemption should not be revoked under section 265 of the WA Act. See Commissioner's Practice DA21.1 for guidance on what the Commissioner takes into account.

[24] For example, sections 12(2), 16 and 17 of the NSW Act together provide for a 3 month lodgement and payment period from the date of first execution of an agreement to transfer.

[25] Although this strategy is not necessarily effective in every jurisdiction. See for example, section 45 of the WA Act and section 56BC of the NT Act. While duty can become payable on the grant of a call option in Queensland, Western Australia, South Australia and Northern Territory, the dutiable value should be calculated by reference to the value of the option, not the underlying land interest.

Additional issues would need to be considered if the desired landholding vehicle is not established and in the ultimate ownership structure at the time a contract is required to be signed. In the event that the ultimate landholder is different from the named purchaser in the contract, a double duty impost on acquisition can arise. While most jurisdictions have exemptions or exclusions from such double duty,[26] the risk management strategies can differ markedly, with some jurisdictions (most notably Queensland), offering very limited flexibility in this regard.[27] It can be difficult for a purchaser group to change its mind on the most desirable landholding vehicle after signing an agreement, and so pre-planning is critical in this regard.[28]

3.4.3 Intangible business assets

Queensland, Northern Territory and Western Australia continue to impose duty on dealings in certain business-related non-land property. Therefore, while focus certainly needs to be placed on dealings in interests in land and goods, care must also be taken with other categories of property, particularly in those jurisdictions.

Taking Queensland as an example,[29] in the context of an opportunity, "dutiable property" includes a "Queensland business asset" which includes the following categories of property:[30]

- goodwill;
- a statutory business licence for carrying on a business;
- a right to use a statutory business licence used for carrying on a business;
- the business name for carrying on a business;
- a right under a franchise arrangement used for carrying on a business;
- a debt of a business if the debtor resides in Queensland;
- a supply right of a business;
- intellectual property used for carrying on a business; and
- personal property in Queensland of a business.

Western Australia and Northern Territory have a similarly broad scope of what constitutes dutiable property.[31] Each jurisdiction, however, requires that it is an asset of a "business" or a "business undertaking". Arguably, the provisions in each of these jurisdictions require a business to actually

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[26] For example, exemptions for companies yet to be incorporated and in some jurisdictions, apparent purchaser concessions.
[27] The double duty concession in section 22(3) of the Qld Act and the pre-incorporation exemption in section 116 of the Qld Act both require the ultimate purchaser to be capable of identification on or before entry into the agreement to transfer.
[28] While all jurisdictions have exemptions for transfers within a corporate group, the scope of the exemption can be quite limited, particularly in Queensland and Northern Territory.
[29] Western Australia and Northern Territory have similar concepts.
[30] Section 35 of the Qld Act. Other intangible rights can also be taken to be dutiable property as "existing rights".
[31] See in particular the definitions of "right" and "Western Australian business asset" in sections 16 and 79 of the WA Act and the definition of "dutiable property" in section 4 of the NT Act.

exist and for that business to be carried on before the categories of business assets can be taken to be dutiable property.

Courts have held that the existence of a business is a question of fact and degree and there is no one indicator to determine whether a business is being carried on[32]. Street CJ, Roper CJ and Herron J in *Hyde v Sullivan (1956) 56 SR (NSW) 113* described the concept of carrying on a business as follows at 119:

> "Speaking generally, the phrase 'to carry on a business' means to conduct some form of commercial enterprise, systematically and regularly, with a view to profit, and implicit in this idea are the features of continuity and system".

However, a mere intention to carry on a business is not enough. Brennan J in *Inglis v. FC of T* 80 ATC 4001 at 4004-4005 said that:

> 'The carrying on of a business is not a matter merely of intention. It is a matter of activity. ... At the end of the day, the extent of activity determines whether the business is being carried on. That is a question of fact and degree.'

If it can be demonstrated that the "explorer" has been engaged in activities **preparatory** to its intended future business (eg as manager or joint developer for future projects), having regard to the judicial authority, such provisional or preliminary activities may not constitute a business.[33]

3.4.4 No customers

Even if a business is taken to be carried on, such that intangible property is taken to be dutiable property, each of Queensland, Western Australia and Northern Territory calculate the dutiable value of such property by reference to the percentage of customers located in that jurisdiction. If the "explorer" can demonstrate that it has yet to have a customer, the result under the formula could be that no value should be apportioned to the intangible business assets.[34]

3.4.5 Information

At this stage of a potential opportunity, an "explorer" typically has gone to some effort and expense to gather material and reports which support the proposition that the project site is suitable and favourable for the development of the project. Such information could be in the form of:

- engineering, environmental and weather reports;
- correspondence with potential customers and suppliers in relation to the future development of the project;

[32] *Evans v Federal Commissioner of Taxation* 89 ATC 4540.

[33] *Goodman Fielder Wattie Ltd v Federal Commissioner of Taxation* (1991) 101 ALR 329; Softwood Pulp and Paper Ltd v Commissioner of Taxation 76 ATC 4431.

[34] Continuing to take Queensland as an example, such an argument would only seem to lie in the context of an apportionment under section 27 of the Qld Act (where the head office is located outside Queensland).

- modelling, project summaries and draft business plans;
- correspondence with relevant government departments;
- draft legal documentation; and
- internal working papers.

In accordance with *JV (Crows Nest) Pty Ltd v Commissioner of Stamp Duties (NSW) 85 ATC 4198, Pancontinental Mining Ltd v Commr of Stamp Duties (Qld) 88 ATC 4190 and Commissioner of State Taxation (WA) v Nischu Pty Ltd 91 ATC 4371,* information does not constitute dutiable property, and therefore, to the extent that consideration paid is attributable to information, that consideration should not form part of the dutiable value.

While that should be the end of the matter in Queensland, each of Western Australia and the Northern Territory have specific provisions which seek to deem value otherwise attributable to information, to other "related" or "relevant" property.[35] However, if no business asset or business undertaking is taken to be transferred, it would seem that such information would be required to be attributable to land or goods for its value to be counted for duty purposes. The author expects that would not necessarily be the case.

In the event that a dutiable dealing in land is required, one should also have regard to the potential application of the respective aggregation provisions. In Queensland, the specific aggregation provisions in section 37(3) of the Qld Act do not apply to render intangible property to be dutiable property. As it is specifically dealt with under section 37, it is difficult to see how the general aggregation provisions in sections 29 and 30 would apply.[36]

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[35] Section 36(4) of the WA Act and paragraph (e) of the definition of "dutiable property" in section 4, and section 4A, of the NT Act.

[36] Section 81(3) of the WA Act would seem to have similar effect. As long as a lease is of a kind under section 11(2)(b) or 17(2)(c) of the WA Act, general aggregation under section 37 would seem to have no application. In Northern Territory, as long as intangible property does not itself form "dutiable property" as defined under section 4 of the NT Act, it should not be aggregated with a land interest.

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4 Selldown to developer

In the author's experience, the three main issues which influence the stamp duty position for selldown are the type of selldown vehicle used, the land tenure (eg freehold or leasehold), and the timing of selldown as against the timing of construction.

4.1 Type of selldown vehicle

Regarding the choice of selldown vehicle itself, the main vehicles used in the industry are either a company or unit trust. From a stamp duty perspective, the only jurisdictions where the choice makes a practical difference is Queensland and, to a lesser extent, Victoria.[37]

4.1.1 Unlisted companies – landholder duty

As a matter of general principle, landholder duty only applies to a 50% or more acquisition of shares in an unlisted land-holding company.

Unpacking that concept a little further, an acquisition of shares in an unlisted company is only potentially brought to duty if the target is taken to be a "landholder". South Australia aside,[38] a company will be a landholder if it, together with its subsidiaries or linked entities, holds land or land-related interests in the jurisdiction above a certain value threshold. The land thresholds range from $500,000 in the Northern Territory and Tasmania to $2,000,000 in Queensland, New South Wales and Western Australia.

Even then, an acquisition of an interest in a landholder is only generally brought to duty if the acquisition, together with any related party interest or related acquisition, amounts to an acquisition of 50% or more of the landholder, or, an interest which is already 50% or more, increases. That said, Victoria and the Northern Territory extend those acquisitions which are brought to duty to an acquisition of "control"[39] and in the case of Victoria, to also include an acquisition of certain "economic entitlements".[40] These rules therefore allow many minority interests in such companies to be bought and sold to unrelated parties without giving rise to a duty impost.

Particularly in the context of renewable energy projects, it also means that any selldown before construction commences will have a nil or materially reduced duty impost compared to a project in an advanced state of construction. This is because all the jurisdictions other than New South Wales, Australian Capital Territory and Western Australia extend the definition of landholdings (or equivalent) to items "fixed to land".[41] Taking the view that "fixed to land" merely needs some form of physical

[37] Duty can arise in Victoria on the acquisition of a 20% or more interest in a unit trust (see section 79(2)(a) of the Vic Act).

[38] Note that from 1 July 2018, there is no threshold in South Australia for non-qualifying land.

[39] See section 82 of the Vic Act and section 56P(3) of the NT Act.

[40] See section 81 of the Vic Act.

[41] Although note that items fixed to land subject to a certain mining tenements are taken to be landholdings (see section 4 of the Dictionary in the NSW Act and section 149 of the WA Act) and in the case of Victorian non-dutiable leases, an exemption should be available under section 89D of the Vic Act.

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affixation to the land, most, if not all, of the physical (or at least valuable) components of a renewable energy project would be expected to be landholdings.

As for New South Wales, Australian Capital Territory and Western Australia, it is arguable that at least some of the infrastructure does not comprise "fixtures" or otherwise constitute an interest in land.[42] Such an argument might be particularly available if the infrastructure is held on leased land. There is also a question regarding the extent to which tenant's fixtures are relevant for calculating the dutiable value of the landholdings generally.[43]

If such an argument is successful, in particular circumstances, the difference in duty impost could be the difference between nil (in the case that it can be demonstrated that the landholder threshold value is not met) and very material duty costs (particularly given that New South Wales and Western Australia also impose duty on the value of goods if the landholder threshold is met).

4.1.2 Unlisted unit trusts

Unlisted unit trusts are treated in a similar way to unlisted companies in New South Wales, Australian Capital Territory, Northern Territory, South Australia,[44] Tasmania and Western Australia. Victoria also has similar treatment, with the exception that a 20% or more acquisition (rather than 50%) in an unlisted unit trust (which is not a wholesale unit trust) can be subject to duty.

However, Queensland has fundamentally different rules for unlisted unit trusts compared to a company. In Queensland, any acquisition of an interest in an unlisted unit trust is potentially subject to duty. In addition, an acquisition or surrender of an interest in a unit trust is subject to duty merely if it directly or indirectly holds "dutiable property", which, as can be seen above, is a much broader category of property than land-related interests. A unit trust over a project in Queensland would leave very little scope to apportion value to items which are not dutiable.

Another aspect is that the trust provisions take account of not only the goods already held, but also contracted goods. For that reason, if the selldown vehicle has entered into a contract for the shipment and delivery of valuable components of the infrastructure (even though title in such goods has not yet passed), if the goods are located in Queensland at the time of selldown, their value would also form part of the dutiable value.

The main exception to these broad provisions are unit trusts which are essentially public in nature and meet clearly defined criteria.[45] Such unit trusts are treated in a similar (but not the same) way as unlisted companies.[46]

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[42] See for example *Power Rental Op Co Australia, LLC v Forge Group Power Pty Ltd (in liq) (receivers and managers appointed)* [2017] NSWCA 8.

[43] As to the application of tenant's fixtures generally to landholder duty, see McMahon, P, *Legal Nature of a Tenant's Interest in its Fixtures* (2016) 90 ALJ 370.

[44] The removal of section 71(4) of the SA Act from 1 July 2018 would suggest that an acquisition of a unit of a unit trust can no longer be brought to duty outside the landholder provisions.

[45] Section 49(2) of the Qld Act provides that the trust provisions do not apply to a trust acquisition or a trust surrender of a trust interest in a public unit trust other than a majority acquisition in a land holding trust.

[46] Section 80 of the Qld Act provides for the way in which an acquisition of a land holding trust is brought to duty, while an acquisitions of a listed unit trust is dealt with under the landholder duty chapter.

4.1.3 Partnerships, listed vehicles and discretionary trusts

Partnerships, listed companies, listed unit trusts and discretionary trusts have different rules again. These vehicles, at least having regard to the current state of the industry, would generally not be preferred by a developer at this stage of the life cycle.

4.1.4 Leasehold v Freehold

Much of this paper has concentrated on the various treatment of leasehold interests. It is true that the footprint of many renewable energy projects are leasehold interests. The reasons are likely to be more commercial than tax driven. For example, a renewable energy developer, as a matter of security of tenure, generally doesn't need a freehold interest to develop and operate a renewable energy project. Additionally, one could be forgiven for assuming that a leasehold interest will naturally give rise to a lower duty outcome.

However, somewhat perversely, given the right factual circumstances, a freehold interest might give rise to a more favourable outcome for a taxpayer.

New South Wales land value threshold

In contrast to the other jurisdictions, for freehold land, New South Wales uses a registered land value (being the site value or unimproved value) threshold to determine whether an entity is a landholder.[47] If a parcel of land has a registered land value, and its registered land value is less than $2m, the entity is not a landholder, regardless of the improvements on the land.

Given that many renewable energy projects are on land which are quite rural, with relatively low land value, it is certainly possible that a freehold interest in land could be below the threshold. If that is the case, any divestment of the entity would not give rise to landholder duty regardless of the improved infrastructure on the land.

Victorian leases

Having regard to the discussion above regarding Victorian dutiable leases, if the commercial negotiations between the developer and the landowner ultimately require significant upfront payments to be made to the landowner (which would effectively render a lease to fall within the leases provisions, with all the stamp duty implications which flow from that), a developer may wish to negotiate to buy the underlying land. In so doing, the developer might then wish to enter into lease arrangements with the selldown vehicle which do not fall within the Victorian lease provisions. Such freehold land (being subject to the renewable energy lease) could then conceivably be sold to a passive investor.

[47] Section 146A(2) of the NSW Act.

4.2 Timing of selldown

As mentioned above, the dutiable value of a selldown vehicle will typically increase as soon as construction commences, and from that point, usually increases at a fast rate. For that reason, at least from a stamp duty perspective, the ideal time to sell down is before the selldown vehicle becomes a landholder. If that can be achieved, and a unit trust is not used in Queensland, no duty should be payable on selldown. This can make a sizeable impact to deal value.

However, a key disadvantage for a prospective buyer is that it is effectively taking on construction risk, which wouldn't be the case for a project which is sold on or shortly after practical completion and commissioning. Conversely, a selldown at that time would potentially give rise to the highest duty cost possible.

Finding a suitable time for selldown between those points (at least from a stamp duty perspective) can be practically difficult to identify and implement. In any case, it won't always be the case that the selldown timetable aligns well with the construction timetable and the progress of the EPC contract and so planning for such time may not be practically possible with any degree of accuracy.

Selling down interests over time can also be difficult to manage. This is because the landholder value would need to be calculated each time an interest is acquired. In addition, if only a minority interest is acquired at a time when the target holds land but is not a landholder, and a 50% or more interest is acquired within 3 years (or as a part of an arrangement made within 3 years), duty could be calculated on the aggregated interest at the higher value of landholdings when the later interest is acquired.[48] This should be contrasted to the position in New South Wales, which looks to the value of landholdings at the time of each acquisition.[49] Moreover, if a selldown in New South Wales can be timed such that a majority interest in the selldown vehicle is acquired at a time when the vehicle does not hold an interest in land in New South Wales, with construction and ultimate selldown of the remainder arising within 12 months, no duty would be payable.[50]

Separately, in Queensland and Western Australia, the landholder status of a company is first tested at the time of entry into an agreement to acquire, and if the company was not a landholder at the time of agreement, again at the time of acquisition. Therefore, at least in those two states, while entering into an agreement to acquire when the target is a landholder should give rise to duty calculated by reference to that value, no further duty should be payable on completion, at which time, the value of landholdings could be significantly higher. Therefore, there can be some taxpayer benefit for a liability to arise earlier than would otherwise be the case, with duty assessed on a lower value.

What these features demonstrate is that there could be very different landholder duty calculations merely dependent on the timing of selldown as against the construction of the infrastructure on the land. While such timing can be practically difficult to manage, it does show that with a bit of planning,

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[48] See for example, section 179(1) of the Qld Act, sections 188 and 189 of the WA Act and section 102 of the SA Act.

[49] Section 155(3) of the NSW Act. See also section 86(3) of the Vic Act, section 56R(3) of the NT Act, section 71(5) of the Tas Act and section 90(2) of the ACT Act.

[50] Section 150(3) of the NSW Act. In Victoria, one would expect the same result without the 12 month restriction by reason of section 78(5) of the Vic Act.

the overall stamp duty impost can differ markedly from project to project and from jurisdiction to jurisdiction.

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5 Investment changes in operations phase

The ongoing income and cash flows generated from the project may be an attractive investment for investors during the operations phase.

An entity sale is likely to be preferred from a legal and logistics perspective just given the sheer amount of documentation involved. In that regard, the same considerations discussed above regarding an entity sale would be equally relevant to a sale or selldown of the project vehicle at this stage.

The additional issue which arises is the extent to which value can be apportioned to non-land and intangible assets for a company which simply has a connection agreement allowing it to supply electricity into the grid. Such issues are currently before the High Court in the context of resource companies in the case of *Placer Dome.*[51] The question may well be resolved upon that decision. Interestingly, reference was made to electricity in the High Court hearing:[52]

> Now, that is the sense in which the Court in Murry was using the word "custom". I think your Honour Justice Gordon pointed this out today, that the Court in Murry was not using "custom" in the historical sense of repeat custom patronage, customer connections, because that is not the nature of business any longer. There is no suggestion in Murry that certain industries are exempt from any application of goodwill, take electricity generation. That is a fungible commodity. But an electricity generating business, a wholesale business, can have goodwill because of its assembled workforce, its efficiencies, its technological capabilities and so on.

It will be interesting to see whether the High Court decision (when its handed down) provides some concrete judicial direction in that regard. If not, one expects that it will be one for continuing debate.

[51] *Commissioner of State Revenue v Placer Dome Inc (Now an amalgamated entity named Barrick Gold Corporation)* [2018] HCA Trans 119.
[52] Ibid at lines 2949 to 2957.

6 Conclusion

This paper has set out just some of the issues which arise for renewable energy projects. As an adviser, it poses fascinating considerations, which vary between each jurisdiction, and the precise set of factual circumstances. Taxpayers tend not to be as enthralled, as navigating the various stamp duty provisions do tend to present unwarranted and disproportionate complexity.

While I am hesitant to call for harmonisation (as one never knows where that may end up), there are some fundamental threshold issues which remain uncertain or at least applied very differently to similar factual circumstances. That uncertainty ultimately leads to decreased deal value, and ultimately investment into the relevant jurisdiction. As state and territory governments are working to shore up their own balance sheets, and given this is an emerging and critical industry, some certainty as to the application of those fundamental principles would certainly be welcome.

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