

To: Office of State Revenue, Western Australia

Re: Revenue Ruling DA 26.0 – Things fixed to land

22 June 2020

Introduction

AMEC appreciates the opportunity to be consulted on the Office of State Revenue's Ruling DA 26.0, regarding "Things fixed to land". The opportunity to consult on the Ruling is important as our Industry is both directly and indirectly impacted by changes relating to the Commissioner's interpretation of things fixed to land and rights relating to fixed infrastructure.

About AMEC

The Association of Mining and Exploration Companies (AMEC) is a national industry body representing over 275 mining and mineral exploration companies across Australia, the majority of which have project interests in Western Australia.

The mining and exploration industry make a critical contribution to the Western Australian economy, employing around 125,000 people in 2018/19. These companies collectively paid over \$6B in royalties and generated more than \$107B in mineral exports.

Comments regarding the Revenue Ruling

General

Following the introduction of a fixed to land model into the *Duties Act 2008*, Industry acknowledges the progress that has been made to address certain transactions being unintentionally adversely impacted by the fixed to land model. AMEC is supportive of policy that reduces ambiguity, to minimise uncertainty and streamline processes to encourage investment in the resources sector, which will have flow-on effects to increasing the benefits experienced by communities. Whilst we are pleased this document is not over-prescriptive, industry is concerned with the negative consequences the Ruling's proposal that something can be considered fixed to land by the virtue of its weight alone will have, and the element of uncertainty the draft Ruling introduces to proposed transactions and adjustments of current arrangements involving fixed infrastructure.

Additionally, we believe further clarity about how the Ruling will be applied should be provided, to ensure the application will not result in undue negative impacts for our industry.

Determining if a thing is fixed to land

The Ruling appears to go well beyond the remit of the Act, incorrectly defining any item fixed to land by its own weight only (gravity), as fixed to land. We recommend OSR consults with the Victorian State Revenue Office¹ regarding their historical attempt to introduce the consideration of an object

¹ <https://www.sro.vic.gov.au/land-holdings>

being fixed to land based on its weight alone. This concept was rejected in line with the definition used by other jurisdictions, where for something to be considered fixed to land, it requires a fixture (such as bolts or screws) to physically attach it to land. Industry does not support the proposed inclusion of considering an item fixed to land by gravity alone.

We note that throughout this Ruling, there is a lot of reference to concrete foundations. We recommend the Ruling utilises more general phrasing about the material of the foundation, so as not to create the impression that something is required to be affixed to a concrete foundation only, in order to be classified as fixed to land.

AMEC recommends adding “; or” to the end of the first three dot points in paragraph 16, to ensure the definition of ‘fixed’ is not misinterpreted.

Uncertainty and valuations

Industry is concerned there will be distorted outcomes in a transfer duty, following the new rules encased in Division 7, Chapter 2 of the *Duties Act 2008* (fixed infrastructure rights provisions) and the landholder duty provisions in Chapter 3 (New Rules). In a transfer duty context, the Commissioner adopts the higher of consideration or unencumbered value when imposing duty on dutiable transactions. Depending on how the consideration is structured, the Commissioner may impose a duty on a much higher deemed “unencumbered value”, which does not accurately represent the consideration. However in a landholder duty context, the Commissioner is not bound by the price paid for the shares of an entity, as the duty liability is imposed on a “look through” basis which considers the underlying unencumbered value of the tenements, plant and equipment on a hypothetical third-party purchaser basis. As such, the cumulative value of tenements and infrastructure may be significantly higher than the price paid for the shares.

In mining, where fixed infrastructure rights are triggered in respect of access, service or usage arrangements in place of infrastructure, the nature of the arrangements can make it difficult to adequately separate the value of the fixed infrastructure rights element of the transaction from other elements for which consideration is provided by an acquirer. The duty liability on the transaction may be disproportionate to the value of the transaction in the absence of valuation directions to assessors. Tensions arising from distorted outcomes have the potential to impede commercial mining activity.

Significant valuation delays are common, with several high-profile valuation disputes between relevant taxpayers and the Commissioner in recent years. Clarity concerning valuation positions will assist in addressing protracted valuations disputes. A valuation ruling request mechanism for the New Rules will reduce taxpayer uncertainty, disputes, and delays, while increasing compliance.

Industry recommends the Ruling includes wording to reduce uncertainty about the Commissioner’s approach to valuations of fixed infrastructure rights.

Mineral Exploration

Mining and mineral exploration activity are often considered separate activities. Clarification is required about whether mineral exploration activity will be subject to land duties. We recommend mineral exploration should not be considered “land” for the purpose of this Ruling, as mineral exploration fixtures are by nature, temporary. The precedent outlined in 7(a) should apply to mineral

exploration. AMEC recommends amending 7(a) to state “a thing fixed to land on a temporary basis for the purpose of being used for mineral exploration activity”.

Paragraph 18

Similar to paragraph 16, AMEC recommends adding “; or” to the end of 18(a),(b) and (c) to ensure the interpretation of ‘fixed to land’ is not dependent on all of the possible requirements being met.

The scenario represented in 18(b) where an object is considered fixed to land solely based on weight without any fixtures to land required, is a concept our Industry is not familiar with, and does not support. This example should be removed.

Clarification is required for 18(c), as it is not currently clear if an object is bolted to a slab made of any material but concrete, if it will be considered fixed to land or not. For example, would a fixture that is screwed to a slab of another type of material be considered fixed to land?

Derivative Mining Rights

The amendments to the definition of land are significant, representing a departure from traditional notions of the types of assets that are regarded as dutiable land².

Clarification is required about whether under fixed infrastructure rights, Derivative Mining Rights will be considered landholdings.

Ownership

Clarification is required about who will be charged in the event two or more parties own under-lying land and fixtures. The current draft Ruling does not address or mitigate the double-duty potential.

Examples

Example 3

This example is an attempt to provide a situation where Paragraph 18(b) applies, however does not accurately address the claim. A house would need to be affixed to a concrete slab by more than just its weight, not taking into consideration pipes and conduits for water, sewerage and electricity. As other fixtures are required to fix the foundation of the house to the concrete slab, it is not just the virtue of the house’s weight affixing it to land. AMEC recommends removing this example and replacing it with one that more accurately reflects the intention of 18(b), such as a chain and hook example.

Example 9

This example appears to be considered fixed to land because the items are fixed to the ground via bolts into concrete foundations, reflecting 18(c). If this is the case, “they cannot be removed without unbolting them or using a jackhammer to remove the concrete” and “some items require machinery for removal” should be removed. The method of removal does not determine if something is considered fixed to land and could create confusion.

² <https://www.kwm.com/en/au/knowledge/insights/western-australia-expands-its-duty-base-20181218>

Fixed Infrastructure Statutory Licences

Industry would like to see an example of a situation where a Fixed Infrastructure Statutory Licence does not apply, to adequately assess if this will create any negative impacts for the mining and mineral exploration sector.

Railway Lines

Industry questions whether railway lines are considered fixed to land and therefore dutiable, as the draft Ruling does not specify this determination. As railway lines are governed by Fixed Infrastructure legislation, considering them dutiable by this Ruling would create duplication.

Retail

Additionally, we recommend providing an example relevant to the retail industry, as the examples provided are tailored towards heavy infrastructure and buildings, and could possibly have gaps that will cause delays and inconsistencies in application. For example, is a retail fit-out only dutiable when there are bolted wall, floor or ceiling fixtures?

Transitional provisions

Industry requests clarity regarding transitional provisions and how they will be managed.

Further comment

AMEC would welcome the opportunity to meet and provide further consultation on this important matter. If you have any queries regarding this submission, please do not hesitate to contact us.

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