Piper Alderman

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Application of stamp duty to mineral and petroleum transactions

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Application of Stamp Duty to Mineral and Petroleum Transactions

Alan Jessup [*]

SUMMARY

All States and Territories impose stamp duty either on certain types of transactions of certain types of property or on instruments involving certain types of transactions involving property generally or certain types of property.

Transactions involving mineral and petroleum interests may be subject to stamp duty imposed by the various States and Territories but not always. Unfortunately each State and Territory is different and therefore need to be considered separately.

There appears to be a growing trend of Governments in Australia to see the exploration and mining industry as a cash cow. Therefore there have been a number of recent changes to the stamp duty laws in some States and Territories which tighten and arguably extend the operation of the stamp duty provisions to transactions involving mineral and petroleum interests including in circumstances where the Courts have limited their operation.

The paper examines the basic legal principles of valuation in relation to stamp duty that is imposed on transactions involving mineral and petroleum interests and in particular as to how mineral and petroleum interests are characterised for these purposes. It then goes on to explore the common scenarios when stamp duty and related valuation issues arise including farm-in agreements, royalties, mining information, mining equipment and land rich or landholder duty.

The paper concludes that it is important to analyse the nature of the transaction that is taking place and how the various items of property are characterised to ascertain whether or not the transaction will be subject to stamp duty. Ordinary meanings of words such as "land" do not necessarily have that meaning under the relevant duties legislation. Some things which are not property such as mining information may still affect the value of the property concerned in some jurisdictions. Careful examination of the transaction, the property and the relevant duties legislation is therefore important.

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Application of Stamp Duty to Mineral and Petroleum Transactions

INTRODUCTION

Transactions involving mineral and petroleum interests may be subject to stamp duty imposed by the various States and Territories. Although there are some general principles involved, unfortunately the legislation in each State and Territory is different and therefore the provisions have to be considered separately.

There appears to be a growing trend of Governments in Australia to see the exploration and mining industry as a cash cow. Therefore there have been a number of recent changes to the stamp duty laws in some States and Territories which tighten and arguably extend the operation of the stamp duty provisions to transactions involving mineral and petroleum interests including in circumstances where the Courts have limited their operation.

For example:

In NSW:

- there has been a deferral of the proposed abolition of duty on a statutory licence or permission under a NSW law (which covers mineral and petroleum tenements) from 1 July 2013 indefinitely ([1]); and,
- there are proposed amendments which will add additional types of mineral tenements under the NSW *Mining Act* as interests in land ([2]);
- there are proposed amendments which will cause mining information to be an attribute of the mining tenement ([3]).

In Western Australia, to overcome a recent High Court decision in *TEC Desert Pty Ltd v Commissioner of State Revenue* ([4]), retrospective amendments were made to deem:

- an estate or interest in a mining tenement to be an interest in land; and,
- various types of fixtures to mining tenements to be an interest in land ([5]);

In Queensland, various types of mineral and petroleum interests became subject to stamp duty that were not previously subject to duty operating retrospectively ([6]).

It should be noted that in Victoria and ACT, transactions involving mineral or petroleum interests are not subject to stamp duty because they are not dutiable property ([7]). Hence the discussion below makes no reference

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1 NSW *Duties Act*, 1997, s 33B , inserted by State *Revenue and Other Legislation Amendment (Budget Measures) Act 2013*

2 *State Revenue Legislation Amendment Bill 2013*, Schedule 1 [17] and [20] amendment to the definitions of "mining tenement" and "interests in land" in the Dictionary to the NSW *Duties Act, 1997*

3 NSW *Duties Act, 199*, s 23(2A) proposed to be inserted by the *State Revenue Legislation Amendment Bill 2013*

4 [2010] HCA 49

5 amendment to the definition of ""land" in WA *Duties Act, 200,* s 3 and s 149 inserted by the WA *Duties Amendment Bill 2011*

6 Amendments to Queensland *Duties Act, 2001* inserted by the *Fiscal Repair Amendment Act, 2012*, ss 137 & 167 amended and new Part 17 of Chapter 17 operating retrospectively from 10.30 am on 13 January 2012 inserted

to the duties legislation in relation to transactions involving mineral or petroleum interests in Victoria or the Australian Capital Territory.

CHARGING OF STAMP DUTY

With the exception of South Australia and the Northern Territory, in general terms, stamp duty is imposed on the basis of dutiable transactions of dutiable property rather than on instruments ([8]). In such cases it is important to examine a transaction to determine whether the transaction involved is a dutiable transaction and whether the type of property involved is dutiable property. Just because a mineral or petroleum interest may be property does not necessarily mean that it is dutiable property causing a transaction in relation to that interest to become subject to stamp duty. There may also be deeming provisions to be considered such as a provision deeming a mining or petroleum interest to be an interest in land.

In the Northern Territory, although stamp duty is imposed on dutiable instruments, stamp duty is also imposed on dutiable transactions ([9]). However if you follow through the definitions of "conveyance", in fact stamp duty is imposed on an instrument that effects a dutiable transaction of dutiable property ([10]).

In South Australia stamp duty is imposed on specified instruments ([11]). This covers instruments which are a conveyance or transfer on sale of any property (not otherwise charged), including a contract or agreement for sale ([12]). It should be noted that the word "property" is used rather than "dutiable property". The concept of "dutiable property" in other States and Territories confines the imposition of stamp duty to transactions concerning certain specified types of "property" rather than "property" generally. Therefore South Australia may impose duty on a wider range of transactions than other States and Territories. "Property" is defined in the South Australia legislation to mean real or personal property and includes intellectual property (except know-how and confidential information) and an interest in property ([13]). The exclusion of know-how is important when it comes to mining information which will be discussed later in this paper.

Although there are some differences in terminology, in general terms, the various States' and Territories' duties legislation charges duty on the dutiable value or value or market value of the dutiable property or property transferred ([14]).

In general terms, the dutiable value or value for stamp duty purposes will be the greater of the consideration or the unencumbered value of the dutiable property or property ([15]).

The general practice of the revenue authorities is to accept the consideration as being the dutiable value where the transaction appears to be at arm's length and there is nothing indicated on the face of the agreement to suggest that the consideration is less than the unencumbered value ([16]).

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7 Vic *Duties Act, 2000*, s 10 – Note "interest in land" has a limited meaning which does not include mineral or petroleum interests; ACT *Duties Act, 1999*, s. 10 – Note: land or interest in land is not defined to include mineral or petroleum interests

8 NSW *Duties Act, 1997*, ss.8 – 11; Queensland *Duties Act, 2001,* ss. 8- 10; Tas *Duties Act, 2001,* ss. 7-9; WA *Duties Act 2008,* ss. 10-18.

9 NT *Stamp Duty Act,* s. 5 and Schedule 1.

10 Ibid, definitions of "conveyance" and "dutiable property" in s. 4 .

11 SA *Stamp Duties Act, 1923,* s. 4 and Schedule 2.

12 Ibid, Item 3 of Part I of Schedule 2.

13 Ibid, definition of "property" in s. 2(1).

14 NSW *Duties Act, 1997,* s. 21; Queensland *Duties Act,2001* s. 11(7); A Tas *Duties Act, 2001* s. 18; NT *Stamp Duty Act* s. 4AB(1); WA *Duties Act 2008* s. 27; SA *Stamp Duties Act, 1923, s* 60A(1) and (2).

15 Ibid.

16 For example, in NSW, see public rulings DUT 12 and DUT 33.

This makes sense because in the ordinary case of an arm's-length agreement for the sale of property, there is likely to be no difference between the consideration and the unencumbered value and in fact the consideration for the sale agreement would, in many cases, be the best evidence of the property's value ([17]).

However just because parties are at arm's length does not mean that the consideration will necessarily be accepted. Although a transaction may seemingly be conducted at arm's length between independent and capable commercial entities and individuals, there may be circumstances where there is no evidence of hard bargaining and there may be reasons of policy and convenience for entering into the transaction rather than offering the property on the open market ([18]). The parties may also have colluded or been disinterested in the allocation of the consideration to the transaction ([19]).

CONSIDERATION AS THE DUTIABLE VALUE

There are some common principles as to what exactly constitutes the "consideration" for the purposes of determining the dutiable value of the transaction where the dutiable value is accepted by the relevant Revenue Office as being the consideration for the transaction.

The NSW Office of State Revenue has issued a helpful public ruling which sets out the general legal principles applicable to the meaning of "consideration" in the context of NSW duties legislation ([20]). The principles set out in this ruling have general application to similar provisions in the duties legislation of other States and Territories.

The general principles are:

1. The word "consideration" for stamp duty purposes should be given the wider meaning or operation that belongs to that expression in conveyancing rather than the more precise meaning of the law of simple contracts namely the consideration is the money or value passing which moves the conveyance or transfer ([21]).

2. The criteria in the duties legislation of the consideration "for" the transaction upon which the liability for the duty arises requires you to look to what was received by the Vendors so as to move the transfer to the Purchaser as stipulated in the Agreement ([22]). This may involve more than the promises which the Purchaser made and may include the performance of all of the various stipulations in the Agreement including promises made by someone other than the Purchaser ([23]).

The combined effect of the words "consideration" and "for" requires an enquiry into both the nature of what is said to be dutiable and the nexus between it and the relevant transaction ([24]).

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17 *Chief Commissioner of State Revenue v Dick Smith Electronics* [2005] 221 CLR 496 at [20].

18 *Symex Holdings Ltd v Commissioner of State Revenue* [2007] VSC 159 at [102]

19 *Granby Pty Ltd v Federal; Commissioner of Taxation* [1995] FCA 1217; *Collis v Federal Commissioner of Taxation* (1996) 33 ATR 438; also see *Federal Commissioner of Taxation v AXA Asia Pacific Holdings Ltd* [2010] FCAFC 134 and the summary of the arm's length principles discussed in that case in Alan Jessup *"Managed Investment Schemes"* © 2012 Federation Press at p. 410-411.

20 DUT 33.

21 *Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW)* (1948) 77 CLR 143 per Dixon J (as then was) at [6]; followed in *Chief Commissioner of State Revenue v Dick Smith Electronics* [2005] 221 CLR 496 at [71].

22 *Dick* Smith Ibid at [72].

23 Ibid at [79].

24 *Conder Tower Pty Ltd v Commissioner of State Revenue; Harbour One Tower Pty Ltd v Commissioner of State Revenue; Dock 9 Pty Ltd v Commissioner of State Revenue; The Avenue Stage 1 Pty Ltd v Commissioner of State Revenue; Aquavista Tower Pty Ltd v Commissioner of State Revenue; Yarranova Pty Ltd v Commissioner of State Revenue* [2012] VSC 107 at [6]; *Lend Lease Development Pty Ltd v Commissioner of State Revenue; Lend Lease*

The consideration "for" the dutiable transaction is not limited to amounts paid by the purchaser to the vendor ([25]).

However the enquiry into what was received by the vendor so as to move the transfer to the purchaser is not answered by concluding that every promise in a contract leading to or effecting a transfer will be part of the consideration "for" the dutiable transfer. ([26]). It requires an evaluation of the promises and of their connection with the transfer ([27]).There may be interdependent promises, some, but not all, of which are "consideration for" that part of the composite whole which moved the transfer ([28]).

For example, in a case where part of the agreement for sale of shares in a company involved the company declaring a dividend before completion, it was held that both the dividend and the purchase price formed the consideration that moved the transfer of the shares from the vendor to the purchaser ([29]). This was because the vendor was only willing to sell the shares if all of the promises making up the agreement were kept so that the payment of the dividend was critical to the moving of the shares from the vendor to the purchaser and formed part of the consideration for the transfer. Therefore duty was assessed on the sum of the dividend and the purchase price.

Most of the States and Territories have additional provisions that specify what the consideration for a dutiable transaction is taken to include, such as the value of any encumbrances to which the dutiable transaction is subject, but there are differences so care needs to be exercised ([30]). These provisions need to be considered in association with the above principles.

CONSIDERATION, EXPLORATION EXPENDITURE AND FARM-IN AGREEMENTS

General Principles

As discussed above, the dutiable value may be the consideration received by the vendor so as to move the transfer of the mineral or petroleum interest from the vendor to the purchaser.

With a farm-in agreement, the interest in the mineral or petroleum tenement only is transferred if a certain level of exploration expenditure is undertaken.

The question is whether the exploration expenditure is part of the consideration for the transfer of the mineral or petroleum interest and therefore needs to be taken into account in working out the dutiable value of the mineral or petroleum interest that is transferred.

Arguably in these circumstances the exploration expenditure is not consideration that is received by the farmor from the farmee so as to move the transfer of the interest in the mineral or petroleum tenement from the farmor to the farmee. Rather the exploration expenditure is spent on work undertaken by the farmee on the tenement and is not money received by the farmor for the transfer of the interest in the tenement.

Real Estate Investments Ltd v Commissioner of State Revenue; Lend Lease IMT 2 Pty Ltd v Commissioner of State Revenue [2012] VSC 108 at [12].

25 *Comptroller of Stamps v Buckland* [1959] VR 517.

26 *Conder Tower Pty Ltd v Commissioner of State Revenue; Harbour One Tower Pty Ltd v Commissioner of State Revenue; Dock 9 Pty Ltd v Commissioner of State Revenue; The Avenue Stage 1 Pty Ltd v Commissioner of State Revenue; Aquavista Tower Pty Ltd v Commissioner of State Revenue; Yarranova Pty Ltd v Commissioner of State Revenue* [2012] VSC 10at [12].

27 Ibid

28 Ibid

29 *Chief Commissioner of State Revenue v Dick Smith Electronics* [2005] 221 CLR 496 at [73] to [77].

30 NSW *Duties Act, 1997*; s. 22; Qld *Duties Act, 2001*, s. 12 and 13; s. 21; Tas *Duties Act, 2001*, s. 19; WA *Duties Act 2008*, s. 30.

At best it might be argued that if the farmor retains an interest in the tenement after the exploration expenditure has been undertaken then money's worth has passed from the farmee to the farmor, being the value increase in the tenement, if any, as a result of that exploration expenditure, to move the transfer from the farmor to the farmee of the dutiable property. The difficulty would be working out the value of the moneys worth in this situation.

NSW

In practice the Commissioner appears to accept that the dutiable value of a transfer that takes place only after exploration expenditure is undertaken is nominal.

However even if exploration expenditure could be said to be consideration that moves the transfer of an interest in the mineral or petroleum tenement to the farmee, the Commissioner, based on the decision in *Amoco Minerals Australia Co v Commissioner of State Taxation (WA)* ([31]), under the former duties legislation distinguished the stamp duty position in the following alternative circumstances:

1. the agreement operates to create an immediate right or interest in property in the farmee and that property right is obtained in consideration of a binding obligation to make a payment to or on behalf of the farmor in which case ad valorem duty is payable on the amount of that payment; and,

2. the agreement operates merely to give the farmee an entitlement to obtain a participating interest on payment of stated sums of money to or on behalf of the farmor but is under no binding obligation to do so in which event only nominal duty is payable ([32]).

Generally the position is likely to be that set out in (2) above so there should only be nominal duty payable on the transfer of the interest in the mining tenement in those circumstances.

Queensland

The Commissioner has issued a ruling that makes it clear that transfer duty will not apply to the following:

1. a farm-in agreement where the only consideration for the agreement is an exploration amount ([33]);

2. a transfer under a deferred farm-in agreement with respect to that part of the consideration for the agreement that comprises an exploration amount that has been expended in accordance with the farm-in agreement if the interest being transferred is the interest specified in the farm-in agreement ([34]);

3. a transfer under an upfront farm-in agreement with respect to that part of the consideration for the agreement that comprise an exploration amount that is to be expended in accordance with the agreement if the interest being transferred is the interest specified in the farm-in agreement ([35]).

An "exploration amount" is an amount specified in the farm-in agreement to be expended after the agreement is made on either or both exploration and development of the exploration authority to be carried out after the agreement is made and within the period of time specified in the agreement ([36]).

A deferred farm-in agreement is an agreement which provides the farmee, after expending the exploration amount specified in the agreement, with a right to acquire an interest in the exploration authority ([37]). An up-

31 (1978) 8 ATR 719
32 SD 52
33 DA000.12.1 at para 6
34 Ibid at para 8
35 Ibid at para 11
36 Ibid

front farm-in agreement is an agreement which provides for the immediate transfer of an interest in the exploration authority and, subject to expending the exploration amount by the date specified in the agreement entitles the farmee to retain the interest in the authority ([38]).

An exploration authority for the purposes of this ruling covers the following types of mineral and petroleum interests:

(a) an exploration permit or prospecting permit under the *Mineral Resources Act 1989;*

(b) an authority to prospect under the *Petroleum Act 1923* or the *Petroleum and Gas (Production and Safety) Act 2004*

(c) a geothermal exploration permit under the *Geothermal Energy Act 2010*; and

(d) a GHG exploration permit under the *Greenhouse Gas Storage Act 2009* ([39]).

Tasmania

There are no specific provisions so the position should be the same as discussed in relation to NSW above.

South Australia

There is a concessional rate of duty that will apply to farm-in agreements. Upon application to the Treasurer a concessional rate of duty may be given in circumstances where:

(a) there is a conveyance of an exploration tenement or an interest in an exploration tenement and

(b) the consideration or a part of the consideration for the conveyance consists of an undertaking on the part of the person or persons acquiring an interest in the tenement:

(1) to engage in exploratory or investigatory operations (to be carried on after the date of the undertaking) within that part of the area of the tenement to which the conveyance relates; or

(2) to contribute to the cost of exploratory or investigatory operations (to be carried on after the date of the undertaking) within that part of the area of the tenement to which the conveyance relates ([40]).

If the duty but for the concession would be less than $1,000 then the duty is $1,000. However if the duty but for the concession would be greater than $1,000 then the duty will be an amount calculated in accordance with the following formula:

D = (A-V) + $1,000.

Where:

D is the duty payable;

A is the duty that would otherwise be payable but for the concession; and

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37 Ibid

38 Ibid

39 Ibid

40 SA *Stamp Duties Act, 1923* s.71D(1)

"V" is the value of the undertaking by the transferee referred to in (b) above ([41]) which will be taken to be equal to the costs for which the person or persons acquiring an interest in the tenement by virtue of the conveyance become liable, or for which that person or those persons are reasonably expected to become liable, by virtue of the undertaking (assessed as at the time that the undertaking was given) ([42]).

For the above purposes "exploration tenement" has a specific meaning and is limited to specified types of tenements and any portion of the same ([43]).

Northern Territory

The Northern Territory has a specific provision that deals with farm-in agreements and exploration expenditure.

If

(a) the dutiable property consists of an interest in an exploration mineral title; and

(b) the conveyance of the interest arises out of the operation of a farm-in agreement; and

(c) the exploration work, or the contribution to the cost of exploration work, in respect of which the right to the interest arises under the farm-in agreement has actually been carried out or made,

then for the purpose of assessing the dutiable value of the mineral interest in the exploration mineral title which is the subject of the conveyance:

(d) its unencumbered value will be determined as at the date of the farm-in agreement; and

(e) the consideration will be taken to be the amount by which the consideration given for the interest exceeds the reasonable cost of the exploration work or (where the consideration consists of a contribution to the cost of exploration work) the relevant proportion of that reasonable cost ([44]).

Therefore the duty will only be payable on the amount by which the consideration exceeds the reasonable cost of the exploration work. In most circumstances this will result in only nominal duty being payable on a farm-in agreement.

For the purposes of this provision a mineral exploration title is limited to specified types of mineral titles under the *Mineral Titles Act*. It therefore does not apply to interests granted under the *Petroleum Act* although these interests are exempt from duty in any event ([45]). The general principles discussed at above in this section should therefore apply to these types of interests. The position in relation to these titles should be the same as in NSW discussed above.

A farm in agreement is also defined as a written agreement under which a person is entitled to acquire an interest in (but not full ownership of) a mining tenement by carrying out exploration work, or contributing a proportionate part of the cost of exploration work to be carried out, on the area of that mining tenement after the date of the agreement ([46]).

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41 Ibid s.71D(2)

42 Ibid s. 71D(5)

43 Ibid s. 71D(4)

44 NT *Stamp Duty Act*, s. 4AB(4) and (5).

45 Ibid,, Item 13 of Schedule 2

46 Ibid, definition in s. 4

Western Australia

In Western Australia, there are specific provisions that deal with farm-in agreements. These provisions specifically exclude the exploration amount from forming part of the consideration for the farm-in agreement. The "exploration amount" is the amount to be expended, after the farm-in agreement is made, on exploration or development of the mining tenement carried out after the farm-in agreement is made ([47]).

A farm-in agreement is a dutiable transaction ([48]). The dutiable value for a dutiable transaction that is a farm-in agreement is the consideration for the transaction ([49]) but only nominal duty is chargeable on a farm-in agreement if no consideration is paid, or agreed to be paid, for the agreement ([50]). However "consideration" in this context does not include the exploration amount ([51]).

Further once duty has been paid on the farm-in agreement and the exploration amount under the agreement has been expended there is no duty chargeable on the transfer or the agreement to transfer the interest in the mining tenement under the farm-in agreement ([52]).

However it is important to note that a "farm-in agreement" is a defined term. A farm-in agreement is an agreement between:

(a) an owner of a mining tenement, or a person who holds a right to exploit a mining tenement; and

(b) another person,

to the effect that, after the other person expends the exploration amount specified in the agreement:

(c) that other person will have:

(1) a right to acquire an interest, or an entitlement to an interest, in the mining tenement that is specified in the agreement; or

(2) a right to acquire a right to exploit, or an entitlement to a right to exploit, the mining tenement that is specified in the agreement; and

(d) the mining tenement, or the right to exploit the mining tenement, will be held with the person referred to in paragraph (a) above ([53]).

This is important because in one case it was held that an agreement was not a farm-in agreement if the other person acquires an interest in a mining tenement <u>prior to</u> the exploration amount having been expended by that other person ([54]).

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47 WA *Duties Act 2008*, s. 13(2).

48 Ibid, s. 11(i)(j).

49 Ibid, s. 135(2)

50 Ibid, s. 135(1)

51 Ibid s. 135(3)

52 Ibid, s. 42(15)

53 Ibid, s. 13(1)

54 *Zodiac Resources Pty Ltd v Commissioner of State Revenue* [2013] WASAT 96

ROYALTIES – CONTINGENT CONSIDERATION

General Principles

When there is a dutiable transaction involving a mineral or petroleum interest, the consideration may consist partly or wholly of a royalty to be paid by the purchaser to the vendor of the tenements on the minerals or petroleum recovered in the future from the tenements. This part of the consideration is contingent because it is depending on the quantity of recovery of minerals or petroleum recovered and therefore will not be known as at the date of the agreement.

The question is how is this to be assessed if the dutiable value of the transaction is the consideration.

It is clear that the right to be paid a royalty is a right of property even though the degree of likelihood of a contingency occurring may affect the value of the property ([55]). Therefore the value of that right of property should be taken into account in working out the dutiable value of the transaction.

However there is a common law principle known as the "contingency principle". This principle states that where there is a sum payable on a contingency, namely an event that is yet to happen and may in fact never happen, then duty is to be levied on the maximum sum payable, so long as that amount is quantifiable and regardless of however unlikely it is to become payable and that for the purposes of assessment of stamp duty, the Commissioner is entitled to ignore the contingency and assess the instrument on the total amount referred to in the relevant instrument ([56]). This principle is however subject to the specific provisions of the duties legislation ([57]).

Therefore in a case where a purchaser purchased a number of mining tenements for a consideration, including a royalty to be paid by the purchaser to the vendor of the tenements on gold recovered in the future from the tenements up to a maximum amount of $500,000, duty was assessable on the maximum amount of royalties of $500,000 payable irrespective of the fact that the payment was contingent on a certain amount of gold being recovered which may or may not be recovered ([58]).

Nevertheless the contract may not state a maximum amount on which the Commissioner may be based making it impossible to make an assessment by application of the contingency principle. In such circumstances it would be arguable that the right to receive a royalty is part of the consideration that moves the transfer being moneys worth and therefore the market value of that right should be included in the consideration on which the stamp duty is chargeable.

The position in those States and Territories in relation to circumstances where a royalty is part of the consideration payable is set out below.

NSW

The contingency principle applies in NSW ([59]). In such cases the Chief Commissioner may assess duty by way of estimate when the full dutiable value cannot be immediately ascertained, and to place an interim stamp on the

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55 *In the Estate of McClure* (1947) 48 SR (NSW) 93 at 96; followed in *Commissioner of Stamp Duties v MIM Holdings Ltd* [1999] QCA 390 at [71] and *National Trustees Executors & Agency Company of Australasia Ltd v Federal Commissioner of Taxation* (1954) 91 CLR 540 per Kitto J

56 *Lionore Australia (Avalon) Pty Ltd v Commissioner of State Revenue* [2006] WASAT 250

57 Ibid at [86] citing *Hill 50 Gold Mine NL v Commissioner of State Taxation* (WA) (1993) 93 ATC 4880 per Nicholson J in support

58 *Wild Acre Metals Limited v Commissioner of State Revenue* [2011] WASAT 173

59 DUT 33 at para 22

instrument ([60]). Duty may then be reassessed when the full dutiable value is known ([61]). If there is an overpayment then duty will be refunded ([62]).

However as an alternative the Chief Commissioner may agree an amount with the taxpayer as a final amount ([63]).

Queensland

Where the consideration or any part of the consideration consists of money payable periodically for a definite period (such as a royalty), then if the total amount to be paid can be ascertained, that total amount is taken to the consideration or part of the consideration for the assessment of duty ([64]).

The Commissioner may assess duty on the highest consideration payable under the instrument or transaction if the consideration payable may be increased or decreased depending on a particular thing happening or not happening or may or may not actually become payable depending on a particular thing happening or not happening ([65]).

The Commissioner may assess duty on the minimum amount if the consideration payable is agreed to be a minimum amount, whether or not it depends on a particular thing happening or not happening ([66]).

The Commissioner may assess duty on the maximum amount if the consideration payable is agreed to be a maximum amount, whether or not it depends upon a particular thing happening or not happening or is agreed to be either a minimum or maximum amount, whether or not it depends on a particular thing happening or not happening ([67]).

Tasmania

Tasmania has similar provisions to NSW ([68]).Therefore the contingency principle should apply.

The Commissioner may assess duty by way of estimate when the full dutiable value cannot be immediately ascertained, and to place an interim stamp on the instrument ([69]). Duty may then be reassessed when the full dutiable value is known ([70]). If there is an overpayment then duty will be refunded ([71]).

South Australia

Where the consideration or any part of the consideration consists of money payable periodically for a definite period (such as a royalty), then if the total amount to be paid can be ascertained, that total amount is taken to the consideration or part of the consideration for the assessment of duty ([72]).

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60 NSW *Duties Act, 1997,* s. 49.

61 Ibid

62 Ibid

63 NSW *Taxation Administration Act 1996,* s. 12.

64 Qld *Duties Act, 2001,* s. 12(2).

65 Ibid, s. 502 (1)(a) and (b) and (2)(a).

66 Ibid, s. 502 (1)(c) and (2)(b).

67 Ibid, s. 502 (1)(d) and(e) and (2)(c).

68 Tas *Duties Act, 2001,* ss. 19 and 31.

69 Ibid, s. 31

70 Ibid

71 Ibid

72 SA *Stamp Duties Act, 1923,* s. 66

Northern Territory

If the amount of consideration is dependent on future contingencies, the dutiable value of the property will be assessed on the assumption that the contingencies will operate so as to maximise the consideration to be given for the property i.e. on the maximum consideration possible ([73]).

However, if it is later shown that the consideration actually given is less than the contingent consideration, and there is no further scope for contingent increase, the Commissioner of Territory Revenue may reassess the dutiable value of the property taking into account the amount or value of the consideration actually given ([74]).

Western Australia

The contingency principle applies in Western Australia ([75]). Therefore the dutiable value will be determined by having regard to the highest possible consideration that might be payable, regardless of whether that consideration is paid ([76]).

The Commissioner has power to make a reassessment if the amount of the consideration is not paid ([77]). An application for reassessment of the duty must be made within five years of the day on which the liability for duty on the agreement for the transfer of the dutiable property arose ([78]).

UNENCUMBERED VALUE AS DUTIABLE VALUE

Meaning of Unencumbered

Where the consideration is not used for determining the amount of duty payable on the dutiable transaction or instrument, then, in general terms, duty will be calculated on the basis of the unencumbered value of the property concerned ([79]). The unencumbered value of the property is the value (or in the case of South Australia the market value) of the relevant property without regard to any encumbrance to which the property is subject ([80]).

Unless there is a specific provision dealing with what is meant by "unencumbered", the word "unencumbered" in this context is not used in the loose sense but refers to security interests in, or charges or other liabilities which attach to, the property in question ([81]).

Therefore tipping rights which were retained by the vendor and therefore reduced the value of the land were to be ignored in working out the unencumbered value of the land because tipping rights were not an "encumbrance" ([82]).

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73 NT *Stamp Duty Act*, s. 4AB(2).

74 Ibid, s. 4AB(3)

75 *Lionore Australia (Avalon) Pty Ltd v Commissioner of State Revenue* [2006] WASAT 250 and *Wild Acre Metals Limited v Commissioner of State Revenue* [2011] WASAT 173

76 OSR Fact Sheet on Contingent Consideration

77 WA *Duties Act, 2008*, s. 32.

78 OSR Fact Sheet on Contingent Consideration

79 NSW *Duties Act, 1997*, s. 21; Queensland *Duties Act,2001* s. 11(7); A Tas *Duties Act, 2001* s. 18; NT *Stamp Duty Act* s. 4AB(1); WA *Duties Act 2008* s. 27; SA *Stamp Duties Act, 1923, s* 60A(1) and (2).

80 NSW *Duties Act, 1997*, s. 23; s. Qld *Duties Act, 2001, s.* 14; Tas *Duties Act, 2001*, s. 20; NT *Stamp Duty Act*, s.4A; WA *Duties Act 2008*, s. 36*;* SA *Stamp Duties Act, 1923*, s 60A(1)

81 *Chief Commissioner of Stamp Duties (NSW) v Buckle* [1998] 192 CLR 226 at [44]

82 *Commissioner of State Revenue v Pioneer Concrete (Vic) Pty Ltd* [2002] 209 CLR 651

A lease also is not an encumbrance in this sense ([83]). This led to the specific anti-avoidance provisions being inserted in the various duties legislation to prevent the value of dutiable property being reduced by the grant of long term leases.

In addition, most of the States and Territories have specific provisions that effectively render nugatory any arrangements entered into that reduce the unencumbered value of the property being transferred ([84]) or a general anti-avoidance rule which most likely would operate in a manner to achieve the same result ([85]).

Meaning of Value

General principles

Some duties legislation does not specify the criteria for determining the value of the dutiable property on which the stamp duty is assessed.

However in the context of other legislative provisions, Williams J of the High Court said that where there is no specific provision in the relevant legislation that the value should be ascertained on the basis of a sale in the open market, then the Court should assess the value on what is the true value of the property to the owner of the property. Williams J said that this postulates a hypothetical purchaser, so that, even where there is only one such purchaser, it must be assumed that the vendor would only be willing to part with the property for its real value and that the purchaser would be willing to pay this amount ([86]).

In a subsequent decision, Williams J of the High Court said that this meant that the Court should endeavour to ascertain the price which a willing but not anxious vendor could reasonably expect to obtain and a hypothetical willing but not too anxious purchaser could reasonably expect to have to pay for the property if the vendor and the purchaser had got together and agreed on a price in friendly negotiation ([87]).

In most cases it would appear that the true or real value of the property will be the open market value of the property ([88]).

In any event, the test for determining the market value is similar to the test for determining the "true value" or the "real value" referred to above.

The test used in both cases is based on the consideration of a hypothetical, namely, what is the price that a willing but not anxious purchaser would have to offer to induce a willing but not anxious vendor to sell the property rather than the price which an anxious vendor would obtain upon a forced sale ([89]). This is the price that a hypothetical prudent purchaser would entertain, if he desired to purchase it for the most advantageous purpose for which the property was adapted ([90]).

This test contemplates a prudent purchaser who has informed himself or herself of all of the relevant attributes and advantages that the property enjoyed which means not just being conversant with the property in its existing

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83 *Commissioner of State Revenue v Bradney* (1996) ATC 5130; *Chief Commissioner of State Revenue v Centro (CPL) Limited* [2011] NSWCA 325 at [118].

84 NSW *Duties Act, 1997,* s. 24; Qld *Duties Act, 2001,* s. 14; Tas *Duties Act, 2001,* s. 21; WA *Duties Act 2008,* s. 36*; SA Stamp Duties Act, 1923,* s. 60A(4A); NT *Stamp Duty Act,* s4A(3).

85 NSW *Duties Act, 1997,* Chapter 11A*;* Qld *Duties Act, 2001,* Chapter 11; NT *Stamp Duty Act,* s. 4B*;* WA *Duties Act 2008, Chapter 7.*

86 *Perpetual Trustee Co Ltd v Federal Commissioner of Taxation* (1942) 65 CLR 572

87 *Abrahams v Federal Commissioner of Taxation* (1944) 70 CLR 23

88 *Brisbane Water County Council v Commissioner of Stamp Duties (NSW)* [1979] 1 NSWLR 320 per Waddell J; *Lion Nathan Brewing Investments Pty Ltd v Commissioner for ACT Revenue* [1997] FCA 1153

89 *Spencer v Commonwealth* (1907) 5 CLR 418 at 432 per Griffiths CJ and 441 per Isaacs J.

90 Ibid at 441 per Isaacs J

state but also any profitable uses to which it might be put ([91]). This embodies the concept of the highest and best use of the property ([92]).

This is commonly known as the *Spencer* test after the High Court decision upon which these principles are based and to which the Courts have used in their determinations of market value or property.

Although the *Spencer* test is based on both a hypothetical vendor and a hypothetical purchaser and therefore the market value from either hypothetical party's point of view should be the same, in some cases emphasis has been placed on what would be the best price which the vendor could hope to obtain ([93]).

The question as of "special value" of particular property has often been raised in cases. However in reality this is only part of the *Spencer* test that in attributing the price that would be paid to the hypothetical vendor by the hypothetical purchaser it is to be assumed that the property will be put to its "highest and best use" ([94]).

It may be that a Court in applying the *Spencer* test may not be confined to a valuation exercise but may involve a consideration of other factors ([95]). Therefore in a highly speculative market during boom conditions the hypothetical purchaser may be prepared to pay a premium ([96]).

The *Spencer* test has been applied in stamp duty cases in determining the value of the dutiable property ([97]).

However it should be noted that although the application of these valuation principles are said to be the same for compensation cases as in revenue cases, nevertheless the result in compensation cases may be different from the result in revenue cases in that in the former cases any doubts are resolved in favour of a more liberal estimate whereas in the latter cases they are resolved in favour of a more conservative estimate ([98]).

For income tax purposes, the Commissioner of Taxation takes the view which seems a sensible application of the *Spencer* test that it can be expected that the value of a mineral or petroleum interest disposed of at the grass roots or wildcat exploration stage would be less but the value would be expected to be higher if the interest were disposed of after exploration had indicated that deposits or reserves warranted development and production. The Commissioner of Taxation also takes the view that the discovery of minerals in adjacent permit areas may have the effect of increasing the market value of the interest disposed of even though the interest may or may not subsequently prove to be worth developing ([99]).

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91 *Boland v Yates Property Corporation Pty Limited* [1999] HCA 64 per Callinan J at [267].

92 Ibid at [271]

93 *Abrahams v Federal Commissioner of Taxation* (1944) 70 CLR 23per Williams J at 29; *Brisbane Water County Council v Commissioner of Stamp Duties (NSW* [1979] 1 NSWLR 320 per Waddell J at 324 followed in *Lion Nathan Brewing Investments Pty Ltd v Commissioner for ACT Revenue* [1997] FCA 1153 per Cooper J.

94 *Boland v Yates Property Corporation Pty Limited* [1999] HCA 64 per Callinan J at [274].

95 *Chameleon Mining NL v Murchison Metals Limited* [2010] FCA 1129 at [911]-[912]

96 Ibid at [911]-[915]

97 e.g. *Wayne v Commissioner of Stamp Duties (1969) WN 51*; *Commissioner of State Revenue v Pioneer Concrete (Vic) Pty Ltd* [2002] 209 CLR 651 at [44]; *MIM Holdings Limited v Commissioner of Stamp Duties* [1998] QSC 292 at [43].

98 *Commissioner of Succession Duties (SA) v Executor Trustee and Agency Co of SA Ltd* (1947) 74 CLR 358 per Dixon J (as he then was) at 373-374 followed by Callinan J in *Boland v Yates Property Corporation Pty Limited* [1999] HCA 64 at [356]

99 IT 2378

NSW

NSW has no criteria for determining the value of the dutiable property on which the stamp duty is assessed so the general principles referred to above in this section will apply namely the *Spencer* test will be used to determine the dutiable value of the property concerned ([100]).

After proposed amendments to the NSW *Duties Act, 1997* are enacted ([101]), in the case of a mining tenement that is a mining lease, mineral claim, assessment lease, exploration licence or opal prospecting licence under the *Mining Act 1992*, the unencumbered value of an interest in land arising because of that mining tenement is to be determined having regard to any information about the land ([102]), as if the information were an attribute of the land ([103]). This means that although on general valuation principles, the mining information should be kept separate from the tenement ([104]), that mining information is now considered as an attribute of the land itself.

There is also a provision pursuant to which the Chief Commissioner may require the taxpayer to provide a valuation of property prepared by a "registered valuer" ([105]). This should therefore result in a valuation of dutiable property being carried out in accordance with the general principles of valuation applicable to the relevant type of dutiable property and so give rise to application of the *Spencer* test.

It should be noted that the Chief Commissioner has also issued a public ruling which sets out what he will accept as evidence of value which may include documents other than a formal valuation ([106]).

Queensland

Queensland has no criteria for determining the value of the dutiable property on which the stamp duty is assessed so the general principles referred to above in this section will apply.

As with NSW, Queensland has a similar provision whereby the Commissioner may require the taxpayer to provide a valuation of property prepared by a "registered valuer" ([107]).This should therefore result in a valuation of dutiable property being carried out in accordance with the general principles of valuation applicable to the relevant type of dutiable property.

Tasmania

There is a specific provision that specifies that the unencumbered value of dutiable property is the amount for which the property might reasonably have been sold in the open market ([108]) or where a valuation has been provided by a competent valuer, that value which should amount to the same thing ([109]) or in the case of real property applying a method statement to the value under the Valuation of Land Act ([110])

Therefore it is clear that the market value is the method of valuation to be used.

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100 *Molyneux and Vermeesch v Chief Commissioner of State Revenue* [2011] NSWADT 117 at [56].

101 NSW *Duties Act, 199*, s 23(2A) proposed to be inserted by the *State Revenue Legislation Amendment Bill 2013*

102 which is part of the *Spencer* test

103 NSW *Duties Act, 1997,* s 23(2A) to be inserted by the *State Revenue Legislation Amendment Act 2013*

104 *Resource Capital Fund III LP v Federal Commissioner of Taxation* [2013] FCA 363 at [101], [102] and [105]; *Nischu Pty Ltd v Commissioner of State Taxation (WA)* (1990) 21 ATR 391 at 394 and on appeal *Commissioner of State Taxation (WA) v Nischu Pty Ltd* (1991) 4 WAR 437 at 443.

105 NSW *Duties Act, 1997*, s. 305.

106 DUT 12

107 Qld *Duties Act, 2001*, s. 505.

108 Tas *Duties Act, 2001*, s. 20(1).

109 Ibid, s. 247.

110 Ibid, s. 248(2) and (2A).

South Australia

In South Australia value means market value ([111]). Therefore the principles as to what constitutes market value referred to in above in this section will apply.

Northern Territory

The Northern Territory duties legislation lists criteria for determining the unencumbered value of property. In determining this value in relation to land regard is to be had to the following factors:

1. the use of the land that would best enhance its commercial value; and

2. commercial advantages (such as goodwill) that:

    2.1 attach to the location or other aspects of the land; and

    2.2 would affect the price that a reasonable purchaser would be willing to pay for the land; and

3. information about the land that would, if known to a reasonable purchaser, affect the price the purchaser would be willing to pay for the land ([112]).

The following examples are provided of the application of some of these criteria:

(a) the criteria in paragraph (2) above means that the value that accrues to premises because they have been licensed or approved for a particular commercial purpose would be taken into account in valuing the premises;

(b) the criteria in paragraph (3) above means that Information about the results achieved from exploratory or other operations in the area of a mining tenement would be taken into account in valuing the tenement.

These criteria do not appear to go beyond the test of market value referred to above in that market value takes into account:

- the highest and best use of the land ([113]) to which paragraphs (1) and (2) above would appear to fall within ; and.

- that the hypothetical purchaser should be fully acquainted with all relevant information ([114]) to which paragraph (3) appears to fall within.

However there is an additional provision that takes the position further than the *Spencer* test. This provides that in determining the value of property generally (not just land), information relevant to the value of property will, for the purposes of valuation be regarded as "an attribute of the property" and not as a separate form of property to which an independent value can be attributed ([115]).

This will mean that mining information, for example, will be regarded as an attribute of the mining tenement and therefore rather than the cost of reproduction being deducted from the value of the property which is the mining tenement, the value of that mining information would be included.

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111 SA *Stamp Duties Act, 1923,* s. 60A(1).

112 NT *Stamp Duty Act,* S. 4A(2).

113 *Boland v Yates Property Corporation Pty Limited* [1999] HCA 64 per Callinan J at [271]

114 *Commissioner of State Taxation (WA) v Nischu Pty Ltd* (1991) 4 WAR 437 per Wallace J

115 NT *Stamp Duty Act,* s 4A(3).

Western Australia

Western Australia has some specific provisions that set out some additional criteria for determining the unencumbered value of property generally and property that is land in particular.

In determining the unencumbered value of property in applying the ordinary criteria are to apply:

1. it is to be assumed that a hypothetical purchaser would, when negotiating the price of property, have knowledge of all existing information relating to the property; and

2. no account is to be taken of any amount that a hypothetical purchaser would have to expend to reproduce, or otherwise acquire a permanent right of access to and use of, existing information relating to property ([116])

Paragraph (1) goes no further than the *Spencer* test ([117]) and so adds nothing to the requirement of determining the unencumbered value.

However paragraph (2) would appear to add an additional requirement to the *Spencer* test namely in that it requires that in determining the unencumbered value, no allowance is to be made for the costs of reproducing or otherwise acquiring existing information relating to the property which would include the cost of reproduction of mining information which would normally be taken into account in determining the market value of the underlying mining tenement ([118]).

Despite this provision, it is submitted that this is probably insufficient in the case of mining information because the tenement and the mining information are separate things and therefore a valuation of the tenement would be done on a stand-alone basis without reference to the value of the mining information ([119]). Each has separate value. The provision appears to assume that in the case of mining information, the mining information would be attributed to the mining tenement when in fact according to the authorities it is not to be so attributed ([120]). Further there is clear authority that the value of information should not be attributed to other things ([121]).

It would be necessary for an attribution provision similar to the NSW and NT legislation to be inserted so that the mining information is considered an attribute of the tenement thus requiring the value of the mining information that would otherwise be kept separate to form part of the valuation of the tenement.

In determining the unencumbered value of property that is "land" the following additional criteria are to apply

1. if the land is the subject of an agreement to transfer, any improvement made to the land at the expense of the purchaser or transferee before the date liability to duty arises on the agreement is to be taken not to have been made to the land; and

2. if the land is the subject of a transfer, any improvement made to the land at the expense of the transferee before the land is transferred is to be taken not to have been made to the land; and

    2.1 having regard to the use of the land that would best enhance its commercial value; and

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116 WA *Duties Act, 2008*, s 36(4)(b)

117 *Hazel Holdings Pty Ltd v Commissioner of State Revenue* [2013] WASAT 93 at [26]

118 *Resource Capital Fund III LP v Federal Commissioner of Taxation* [2013] FCA 363 at [105] citing *Nischu Pty Ltd v Commissioner of State Taxation (WA)* (1990) 21 ATR 391 at 394 and on appeal *Commissioner of State Taxation (WA) v Nischu Pty Ltd* (1991) 4 WAR 437 at 443at [105].

119 Ibid at [101] and [102].

120 Ibid at [105]; *Commissioner of State Taxation (WA) v Nischu Pty Ltd* (1991) 4 WAR 437.

121 *Federal Commissioner of Taxation v United Aircraft Corporation* (1943) 68 CLR 525

2.2 having regard to commercial advantages (such as goodwill) that attach to the location or other aspects of the land and would affect the price that a reasonable purchaser would be willing to pay for the land ([122]).

As will be seen later in this paper, for stamp duty purposes in WA, "land" includes various types of mineral and petroleum interests as well as things that would be part of the land if the land were an estate in fee simple ([123]).

DUTIABLE VALUE AND MINING INFORMATION

General Principles

When a mineral or petroleum interest is transferred, often there is accompanying mining information. A separate consideration may be provided for the transfer of this mining information for income tax purposes so that the transferee may claim a deduction under the Tax Acts ([124]).

Notwithstanding that there may be separate amounts of consideration expressed in the agreement for the transfer of the mining information and the mining tenement, there is clear law that mining information is not property, as distinct from the documents and things which contain that information ([125]). It is the information itself that is valuable and not the documents and things that contain that information ([126]). For income tax purposes, the value of the documents or things that contain that information is considered by the Commissioner of Taxation to be negligible ([127]).

Further, although the information may be valuable it does not form part of the tenements ([128]).

This means that, in determining the market value of a mining tenement, the mining tenement is to be valued by reference to the hypothetical price that would be agreed between a knowledgeable, willing but not anxious buyer and a knowledgeable, willing but not anxious seller acting at arm's length on a stand-alone basis as if no other asset were offered for sale ([129]).

However in determining the market value of the mining information it is to be assumed that the hypothetical purchaser is the owner of the mining rights and, as such, is able to use the mining information in a manner consistent with the most advantageous purpose for which it is adopted or, its "highest and best use" ([130]). This will be a range extending from a low point of zero for its retention by the hypothetical vendor or, in the alternative, an equivalent nominal amount on its sale to a purchaser not being the owner of the mining rights, to a high point of the cost (time delay cost as well as outlay) to the hypothetical purchaser of re-creating the mining information ([131]).

This means that the hypothetical vendor and purchaser will have regard to the cost of regenerating or acquiring the mining information that would not otherwise be available to the purchaser after the sale. Therefore the

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122 WA *Duties Act, 2008,* s. 36(4).

123 WA *Duties Act, 2008,* definition of "land" in s. 3.

124 *Income Tax Assessment Act, 1997 (***ITAA 97**), s. 40-25(1) or s. 40-730(1).

125 *Resource Capital Fund III LP v Federal Commissioner of Taxation* [2013] FCA 363 at [105] citing in support *Nischu Pty Ltd v Commissioner of State Taxation (WA)* (1990) 21 ATR 391 and on appeal *Commissioner of State Taxation (WA) v Nischu Pty Ltd* (1991) 4 WAR 437

126 *Federal Commissioner of Taxation v United Aircraft Corporation* (1943) 68 CLR 525 per Williams J citing Hawkins J. in *Robb v. Green* (1895) 2 QB at 16 in support

127 TR 98/3 para 8

128 *Resource Capital Fund III LP v Federal Commissioner of Taxation* [2013] FCA 363 at [108] citing *Commissioner of State Taxation (WA) v Nischu Pty Ltd* (1991) 4 WAR 437 in support.

129 Ibid at [101] and [102]

130 Ibid at [102]

131 Ibid at [106]

hypothetical vendor and purchaser will discount the value of the mining tenement by taking into account the cost of replacing the information, costs or losses resulting from consequential delay in development and the risk of unforeseen costs using a discounted cash flow analysis ([132]).

In determining the market value of the mining tenement, therefore, a deduction is to be made for the cost (time delay cost as well as outlay) of re-creating the mining information assumed not to be owned by the owner of the mining tenement and not otherwise available for purchase ([133]).

Absent a particular provision of the duties legislation, this would seem to leave it open to parties to allocate separate considerations to the mining information and the mineral or petroleum tenements being transferred and to argue that duty should only be payable on the proportion of the consideration relevant to the mineral or petroleum tenements. Of course, the Commissioner can always ignore the consideration for the transfer of the mineral or petroleum tenements and assess the duty on the unencumbered value of the mineral or petroleum interest where the unencumbered value is greater than the consideration.

None of the States and Territories duties legislation include "mining information" in the list of "dutiable property". South Australia refers to "property" generally which of course, as stated above, does not include mining information and in any event the definition of "property" in the SA legislation excludes "knowhow" ([134]).

However, as discussed below, NT has and NSW will shortly have specific provisions that have the effect that mining information is an attribute of the mining tenement. This means that the value of mining tenement will include the value of the mining information.

The effect of these specific provisions is that even if on general valuation principles the valuation of the tenement required a deduction to be made for the cost of reproducing the mining information ([135]), that deduction is not to be made because the value of the tenement requires that value to be included.

Therefore in these cases, the separation of the consideration for the mining information and the mining tenement will not work to reduce the stamp duty payable on the transaction.

In WA there is a provision that seems to be intended to ensure that there is no deduction for the cost of reproducing the mining information when valuing the mining tenement. However the provision does not attribute that information to the land. It may be that this may not affect the general valuation principles that would require the mining information not to be treated separately from the mining tenement for the reasons discussed below.

NSW

There are proposed amendments to the NSW *Duties Act, 1997* (which may be passed by the time this paper is delivered) the effect of which is that the unencumbered value of an interest in land arising because of a mining tenement is to be determined having regard to any information about the land, as if the information were an attribute of the land ([136]). This therefore treats mining information, which of itself is not property or dutiable property, as an attribute of the land.

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132 Ibid at [105]

133 Ibid

134 SA *Stamp Duties Act, 1923,* definition of "property" in s 2.

135 Ibid

136 NSW *Duties Act, 1997*, s 23(2A) to be inserted by the *State Revenue Legislation Amendment Act 2013*

A mining tenement for this purpose will be a mining lease, mineral claim, assessment lease, exploration licence or opal prospecting licence under the *Mining Act 1992* ([137]).

However it should be noted that the definition of "mining tenement" does not include interests under either the *Petroleum (Onshore) Act 1991* or the *Petroleum (Offshore) Act 1982*. Therefore this new provision will not apply to interests under either of those Acts.

Northern Territory

The Northern Territory has a specific provision that ensures that information about the results achieved from exploratory or other operations in the area of a mining tenement is taken into account in valuing the tenement and that, for the purposes of valuation, will be regarded as an attribute of the property and not as a separate form of property to which an independent value can be attributed ([138]).

Western Australia

In Western Australia there is a general provision in relation to determining the unencumbered value of any dutiable property which requires a person in applying the ordinary principles of valuation to:

(a) assume that a hypothetical purchaser would, when negotiating the price of property, have knowledge of all existing information relating to the property; and

(b) no account is to be taken of any amount that a hypothetical purchaser would have to expend to reproduce, or otherwise acquire a permanent right of access to and use of, existing information relating to property ([139]).

Paragraph (a) does not go further than what determining the market value of the mining tenement involves ([140]).

Paragraph (b) seems to be intended to ensure that even though the valuation methodology of mining tenements would require a deduction for the cost of reproducing the mining information ([141]), this principle will be disregarded.

However it is to be noted that paragraph (b) does not attribute the information to the property concerned. It is clear from the authorities that information such as mining information is not attributable to any particular property other than perhaps the document in which the information is recorded which in any event is negligible ([142]). Therefore this provision may not have the effect no doubt intended by the Legislature. There would need to be a provision similar to that proposed in NSW and that which exists in NT that deems the mining information to be an attribute of the mining tenement.

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137 Ibid, definition of "mining tenement" in the Dictionary to be inserted

138 NT *Stamp Duty Act*,. 4A(2)(c), and example 2 at the end of the provision and s. 4A(3).

139 WA *Duties Act, 2008*, s. 36(4).

140 *Commissioner of State Taxation (WA) v Nischu Pty Ltd* (1991) 4 WAR 437 per Wallace J

141 *Resource Capital Fund III LP v Federal Commissioner of Taxation* [2013] FCA 363 at [105]

142 *Federal Commissioner of Taxation v United Aircraft Corporation* (1943) 68 CLR 525

DUTIABLE VALUE AND MINING EQUIPMENT

General Principles

When a mineral or petroleum interest is transferred, often there is accompanying mining equipment. A separate consideration at written down value may be provided for the transfer of this mining equipment for income tax purposes ([143]).

However a transfer of the mining equipment will only be subject to duty if it is property that is subject to stamp duty under the relevant duties legislation.

A transfer of an interest in land is subject to stamp duty in all States and Territories ([144]) other than Victoria ([145]). At common law, "land" includes everything above and below its surface and therefore prima facie includes any structure erected on it and objects permanently attached to the structure including mining equipment ([146]). Prima facie fixtures to the land are part of the land and become part of the property of the owner of the land ([147]).

The generally accepted principle as to whether or not something is a fixture and therefore part of the land or not is conveniently stated as follows:

> "If a chattel is actually fixed to land to any extent, by any means other than its own weight, then prima facie it is a fixture; and the burden of proof is upon anyone who asserts that it is not; if it is not otherwise fixed but is kept in position by its own weight, then prima facie it is not a fixture; and the burden of proof is on anyone who asserts that it is. The test of whether a chattel, which has been to some extent fixed to land, is a fixture is whether it has been fixed with the intention that it shall remain in position permanently or for an indefinite or substantial period, or whether it has been fixed with the intent that it shall remain in position only for some temporary purpose. In the former case, it is a fixture, whether it has been fixed for the better enjoyment of the land or building, or fixed merely to steady the thing itself, for the better use or enjoyment of the thing fixed. If it is proved to have been fixed merely for a temporary purpose it is not a fixture. The intention of the person fixing it must be gathered from the purpose for which and the time during which user in the fixed position is contemplated. If a thing has been securely fixed, and in particular if it has been so fixed that it cannot be detached without substantial injury.to the thing itself or to that to which it is attached, this supplies strong but not necessarily conclusive evidence that a permanent fixing was intended" ([148]).

The question of whether goods have become fixtures depends on the circumstances of each case but mainly on two circumstances indicating intention i.e. the degree of annexation and the object of annexation ([149]).

The following matters may be taken into account in determining the degree of annexation ([150]):

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143 Division 40 of the ITAA 97

144 NSW *Duties Act, 1997,* s. 11(1)(a) & (i); Qld *Duties Act, 2001,* s. 10(1)(a) & (2); ACT *Duties Act, 1999,* s. 10(1)(a); Tas *Duties Act, 2001,* s. 9(1)(a) & (l); SA *Stamp Duties Act, 1923,* Item 3 Schedule 2 read with definition of "property" in s. 2; NT *Stamp Duty Act,* Item 1 Schedule 1 read with definition of "dutiable property" in s. 4; WA *Duties Act, 2008*, s. 15(a) read with the definition of "land" in s. 3.

145 Victoria limits dutiable property to specified estates or interest in land rather than interests in land generally: Vic *Duties Act, 2000*, s 10(1)(a).

146 *Agripower Australia Ltd v J & D Rigging Pty Ltd* [2013] QSC 164 at [53]-[54].

147 *Lees & Leech Pty Ltd v Federal Commissioner of Taxation* [1997] FCA 404

148 *Australian Provincial Assurance Co Ltd v Coroneo* (1938) 38 SR (NSW) 700 at 712 per Jordan CJ

149 *McDonald's Australia Ltd v Chief Commissioner of State Revenue* [2005] NSWSC 6 at [85] citing *Holland v Hodgson* (1872) LR 7 CP 328 per Blackburn J at 334; *National Australia Bank Ltd v Blacker* [2000] FCA 1458 at[10]

- whether removal would cause damage to the land or buildings to which the item is attached ([151]);.
- the mode and structure of annexation ([152]);
- whether removal would destroy or damage the attached item of property ([153]);
- ([154]).

The following matters may be taken into account in determining the object of the annexation ([155]):

- whether the attachment was for the better enjoyment of the property generally or for the better enjoyment of the land and/or buildings to which it was attached ([156]);
- the nature of the property the subject of affixation ([157]);
- whether the item was to be in position either permanently or temporarily ([158]);.
- the function to be served by the annexation of the item ([159]).

However "[t]here is no single test that will answer the question in all cases" ([160]).

Therefore it is not always easy to determine whether an item is a fixture or a chattel even applying this test. For example in one case a power plant was held to be a fixture ([161]) but in another case it was held not to be a fixture ([162]). The differences turned on the specific facts. In the former case, the equipment was held otherwise than by its own weight ([163]) whereas in the latter the equipment had a limited life, was transportable and only had a slight attachment to the ground ([164]).

Notwithstanding that mining equipment may be a fixture to the mineral or petroleum tenement, at common law, a mineral or petroleum tenement is not an interest in land and therefore fixtures to such a tenement are also not an interest in land ([165]).

Therefore in order for mining equipment that is a fixture on a mineral or petroleum tenement to be subject to duty, then it will need to be dutiable property either because of some deeming provision making the tenement to which it is a fixture "land" or an "interest in land" of deeming the fixture itself to be an "interest in land" or a separate form of dutiable property. Some of the States and Territories do have such deeming provisions as detailed below.

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150 *Blacker* Ibid at [14

151 Ibid citing in support*: Hellawell v Eastwood* (1851) 6 Ex 295 at 312; [1855] EngR 819; 155 ER 554 at 561; *Adams v Medhurst & Sons Pty Ltd* (1929) 24 Tas LR 48 at 49; *Spyer v Phillipson* [1931] 2 Ch 183 at 209-210

152 Ibid citing in support*: Leigh v Taylor* [1902] AC 157 at 162; Teaff v Hewitt 1 Ohio St., 511 referred to by Griffith C.J. in *Reid v Smith*, (1905) 3 CLR 656 at 667; Boyd v *Shorrock* (1867) LR 5 Eq 72 at 78.

153 Ibid citing in support: *Litz v National Australia Bank Ltd* (1986) Queensland Conv R 54-229 at 57,549

154 Ibid citing in support: *Metal Manufactures Ltd v Federal Commissioner of Taxation* (1999) 43 ATR 375 at 411

155 Ibid at [13]

156 Ibid citing in support: see *Hobson v Gorringe* [1897] 1 Ch 782 at 190; *Leigh v Taylor* [1902] AC 157 at 158; *Reid v Smith*, (1905) 3 CLR 656 at 680-1; *Litz v National Australia Bank Ltd* (1986) Queensland Conv R 54-229 at 57,549 at 57,550.

157 Ibid citing in support: *Metal Manufactures Ltd v Federal Commissioner of Taxation* (1999) 43 ATR 375 at 411.

158 Ibid citing in support*: Australian Provincial Assurance Co Ltd v Coroneo* (1938) 38 SR (NSW) 700 at 712-3

159 Ibid citing the example *in Attorney-General Cth) v R.T. Co Pty Ltd (No. 2)* (1957) 97 CLR 146 at 156-7 where printing presses were secured to a concrete foundation by nuts and bolts in order to keep the printing presses steady when in operation

160 *McDonald's Australia Ltd v Chief Commissioner of State Revenue* [2005] NSWSC 6 at [88]

161 *Origin Energy Power Limited v Commissioner of State Revenue* [2007] WASAT 302

162 *Eon Metals NL v Commissioner of State Taxation (WA)* (1991) 22 ATR 601.

163 *Origin Energy Power Limited v Commissioner of State Revenue* [2007] WASAT 302at [124]

164 *Eon Metals NL v Commissioner of State Taxation (WA)* (1991) 22 ATR 601at 611

165 *TEC Desert Pty Ltd v Commissioner of State Revenue* [2010] HCA 49 at [28]-[36]

However if mining equipment is not a fixture but instead is a chattel then there may be an issue as to whether it is subject to duty in any event as some form of dutiable property.

NSW

Mining equipment which is a fixture

NSW includes mining equipment that is a fixture to certain types of mineral tenements as dutiable property. It does this by providing that:

1. the holder of a mining lease or mineral claim under the *Mining Act, 1992* is taken to hold an interest in land ([166]); and,

2. fixtures to such a mining lease or mineral claim are to be treated as if the mining lease or mineral claim were an estate in fee simple in the land ([167]).

At the time of writing this paper, there is Bill before the NSW Parliament which will extend this provision so that an interest in a "mining tenement", as defined, will be an interest in land ([168]). A "mining tenement" will extend what constitutes an interest in land from a mining lease and mineral claim to also include an assessment lease, exploration licence or opal prospecting licence under the *Mining Act 1992* ([169]) It similarly includes fixtures to these types of tenement interests.

Therefore the value of any mining equipment that is a fixture to these types of mineral tenements will be included as part of the dutiable value of the transaction even if there is a separate consideration for the mineral tenement and the mining equipment ([170]).

However currently and even after the proposed amendments, the following types of petroleum interests by express provision do not give rise to an interest in land:

1. a petroleum title within the meaning of the *Petroleum(Onshore) Act 1991*;

2. a licence, permit, lease, access authority or special prospecting authority under the *Petroleum (Offshore) Act 1982* ([171]).

Although these petroleum interests are still dutiable property being a statutory licence or permission under a NSW law ([172]), there is no provision that causes a fixture to such statutory licences to be dutiable property. Therefore mining equipment that is a fixture to one of these types of tenements will not be subject to duty and will not be included in the dutiable value of the tenement unless the fixture can be classified as a chattel for duty purposes.

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166 NSW *Duties Act, 1997,* Clause 4(1) of the Dictionary.

167 Ibid, Clause 4(2) of the Dictionary.

168 *State Revenue Legislation Amendment Bill* 201, Schedule 1 [17] and [20] amendment to the definitions of "mining tenement" and "interests in land" in the Dictionary to the NSW *Duties Act, 1997*

169 Ibid

170 NSW *Duties Act, 1997,* s. 19.

171 Ibid, paragraph 4(2) in the Dictionary.

172 Ibid, s. 11(1)(h).

Mining equipment which is a chattel

Subject to some exceptions ([173]), goods in NSW are dutiable property if those goods are the subject of an arrangement that includes a dutiable transaction over any other dutiable property (other than intellectual property) ([174]).

Mineral and petroleum tenements are a form of statutory licence or permission under a NSW law which is dutiable property ([175]). Therefore if mining equipment is transferred with a mineral or petroleum tenement in NSW, the transfer will impose duty both on the dutiable value of the tenement and the mining equipment.

Queensland

Mining equipment which is a fixture

In Queensland "land" includes a mineral or petroleum interests that are a "resource authority" ([176]). However an exploration permit under the *Petroleum (Submerged Lands) Act 1982* is specifically excluded from being "land" ([177]). A "resource authority" is a defined term and includes a comprehensive list of mineral and petroleum tenements ([178]).

Because each of these resource authorities are "land" for the purposes of the duties legislation, any mining equipment that is a fixture to a resource authority will necessarily be treated as if it was part of the land and therefore the valuation of the resource authority that is transferred will also need to include the value of the mining equipment that is a fixture.

Mining equipment which is a chattel

Chattels are only dutiable property ([179]) if another type of dutiable property is the subject of the same transaction or the transaction of the chattels is aggregated with a dutiable transaction that is not for a chattel ([180]).

"Land" is dutiable property ([181]) and as discussed above "land" includes a "resource authority". Therefore mining equipment which is transferred with the resource authority will be subject to duty.

An "existing right" is also dutiable property ([182]). An existing right includes a "statutory licence" ([183]). A "statutory licence" includes a licence, permit or other authority issued or given under a Queensland Act but does not include an exploration permit under the *Petroleum (Submerged Lands) Act 1982* ([184]). The definition is wide

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173 exceptions are goods that are stock-in-trade, materials held for use in manufacture, goods under manufacture, goods held or used in connection with land used for primary production, livestock, a registered motor vehicle (although motor vehicles are subject to duty under other provisions), a ship or vessel,

174 NSW *Duties Act, 1997,* s. 11(1)(j).

175 Ibid, s. 11(1)(h)

176 Qld *Duties Act, 2001,* definition of "land" in the Dictionary.

177 Ibid

178 Qld *Duties Act, 2001,* definition of "resource authority" in the Dictionary

178 Ibid

179 Ibid, s. 10(1)(e).

180 Ibid, s. 29.

181 Ibid, s. 10(1)(a).

182 Ibid, s. 10(1)(c).

183 Ibid definition of "existing right" in the Dictionary.

184 Ibid, definition of "statutory licence" in the Dictionary.

enough to include an exploration authority ([185]). Therefore mining equipment that is transferred with an exploration authority will be subject to duty.

From a valuation point of view, a chattel also includes a licence, permit or other authority that is granted or issued under a law for using a chattel and transferable only with the chattel ([186]).

Tasmania

Mining equipment which is a fixture

In Tasmania, fixtures to a mineral tenement are dutiable property ([187]). Therefore it does not matter whether the mineral tenement is "land" or not and overcomes the problem created by the High Court decision in the *TEC Desert* Case ([188]). A "mineral tenement" is defined to include various types of interests under the *Mineral Resources Development Act, 1995* ([189]).

Therefore any mining equipment that is a fixture to any of these types of tenements will be subject to duty.

Mining equipment which is a chattel

Subject to some exceptions ([190]), goods in Tas are dutiable property if those goods are the subject of an arrangement that includes a dutiable transaction over any other dutiable property ([191]).

A "mineral tenement" is dutiable property ([192]). Therefore if mining equipment which is a chattel is transferred with a mineral tenement, there will be duty on the dutiable value of the mineral tenement and the mining equipment ([193]).

South Australia

Mining equipment which is a fixture

In South Australia, other than for the purposes of the land rich provisions where an "interest in land" is given a wider meaning and does include certain types of mining tenements ([194]), there is no provision which would cause a fixture to a mineral or petroleum tenement that is not land to be separate "property" for stamp duty purposes.

Therefore the general principles referred to above will apply and the mining equipment that is a fixture to anything other than land will not be subject to stamp duty.

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185 Ibid.

186 Qld *Duties Act, 2001,* definition of "chattel" and "chattel authority" in the Dictionary

187 Tas *Duties Act, 2001,* s. 9(1)(c)

188 2010] HCA 49

189 Tas *Duties Act, 200, s. 31*definition of "mineral tenement"

190 the exceptions are goods that are stock-in-trade, materials held for use in manufacture, goods under manufacture, livestock, and a registered motor vehicle that is not exempted from motor tax under the Vehicle and Traffic Act 1999 or the Transport Act 1981;

191 Tas *Duties Act, 2001,* s. 9(1)(j)

192 Ibid, s. 9(1)(b).

193 Ibid, s. 17.

194 SA *Stamp Duties Act, 1923,* s. 91.

Mining equipment which is a chattel

Mining equipment is property. Therefore if the transfer of the mining equipment is effected by an instrument the instrument will be subject to stamp duty ([195]). Also if there is a contract or agreement in writing in relation to the sale of an interest in that mining equipment, because the mining equipment is not only property but goods, wares and merchandise not being goods, wares and merchandise agreed to be sold in the ordinary course of trade by a party whose business is or includes the sale of such goods, wares and merchandise, the contract or agreement in writing will be subject to duty ([196]).

However a transfer of mining equipment that can be effected by delivery without an instrument will not be subject to duty unless it is sold as part of a business situated in SA ([197]).

Northern Territory

Mining equipment which is a fixture

In the Northern Territory "land" includes a "mining tenement", an interest in a mining tenement and a fixture to land including a tenant's fixture or a fixture associated with mining operations conducted, or formerly conducted, on the land ([198]). A "mining tenement" is defined as a statutory licence, lease or authorisation to explore for, recover or exploit resources (such as minerals or geothermal resources) to be found in or under the surface of the earth and includes a mineral title under the *Mineral Titles Act* ([199])

Therefore any mining equipment that is a fixture to any of these types of mining tenements will necessarily be treated as if it was part of the land and therefore the valuation of the mining tenement that is transferred will also need to include the value of the mining equipment that is a fixture.

Mining equipment which is a chattel

Subject to some exceptions ([200]), chattels in NT are dutiable property if those chattels are part of a transaction in which other dutiable property is conveyed, acquired or created or the beneficial ownership is changed ([201]).

Therefore if mining equipment is transferred with a mining tenement within the above meaning, the value of the equipment will be included in the dutiable value of the transaction.

Western Australia

Mining equipment which is a fixture

In Western Australia "land" includes the following:

1. a mining tenement;

2. an estate or interest in a mining tenement;

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195 SA *Stamp Duties Act, 1923,* s. 4 and Schedule 2.

196 Ibid, s. 31(1).

197 Ibid, s. 71E.

198 NT *Stamp Duty Act*, s 3.

199 Ibid

200 the exceptions are goods , wares or merchandise that are stock-in-trade, materials held for use in manufacture, goods under manufacture; livestock, any motor vehicle in respect of which a motor vehicle certificate of registration is or will, in the opinion of the Commissioner, be issued to the conveyee;, cash or money in an account at call, negotiable instruments, and money on deposit with any person

201 NT *Stamp Duty Act*, definition of dutiable property ins.4.

3. anything that:

   3.1 under the authority (whether direct or indirect) of a mining tenement, is fixed to land that is the subject of that mining tenement; and

   3.2 would be part of that land as a fixture if the mining tenement were a freehold estate in the land;

4. a licence under the *Petroleum Pipelines Act 1969* ; and

5. a pipeline, as defined in section 4(1)of the *Petroleum Pipelines Act 1969*, constructed on land under the authority of a licence under that Act ([202]).

A "mining tenement" is:

1. a mining tenement held under the *Mining Act 1978* being a mining tenement within the meaning of that Act or the *Mining Act 1904* namely a prospecting licence, exploration licence, retention licence, mining lease, general purpose lease or a miscellaneous licence granted or acquired under the *Mining Act, 1978* or by virtue of the *Mining Act 1904* and includes the specified piece of land in respect of which the mining tenement is so granted or acquired ([203]);

2. mining tenement or right of occupancy continued in force by section 5 of the *Mining Act 1978* ([204]).

This definition is directed at avoiding the High Court decision in *TEC Desert Pty Ltd v Commissioner of State Revenue* ([205]). Not only will mining equipment that is a fixture to land be caught but mining equipment which is a fixture to any of these sorts of tenements even if they are not land at common law.

Therefore any mining equipment which is a fixture to any of these types of mineral or petroleum tenements will be subject to duty.

Mining equipment which is a chattel

Subject to certain exceptions ([206]), chattels are dutiable property ([207]). However a transaction is not a dutiable transaction if the chattels are the only dutiable property involved in the transaction ([208]). Therefore a transaction involving mining equipment that is not a fixture will only be subject to duty if other dutiable property is involved.

Where the mining equipment is transferred with and as defined above, then the dutiable value of the mining equipment will be included in the dutiable transaction that includes the land and the mining equipment.

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202 WA *Duties Act, 2008,* s. 3

203 Ibid, s.3 with s 8.

204 Ibid.

205 *TEC Desert Pty Ltd v Commissioner of State Revenue* [2010] HCA 49

206 the exceptions are chattels that are stock-in-trade, chattels held for use in manufacture, chattels under manufacture, chattels held or used in connection with the business of primary production, livestock, a vehicle the transfer or grant of a licence for which is chargeable with, or exempt from, vehicle licence duty, a ship or vessel, any other chattel prescribed for the purpose of this definition

207 WA *Duties Act, 2008,* s. 15(c)

208 Ibid, s. 14.

SPLIT COMMODITY AGREEMENTS

General

Sometimes parties enter into what is called a "split commodity agreement". This is an agreement that anticipates that several parties may conduct their own exploration and production activities for different minerals over the same area. In the event that a party finds a particular mineral within the area, then they have the right to apply for a new tenement if a commercially viable deposit is discovered.

This will often involve the tenement holder granting to the rights holder a licence to enter the tenements and explore for the relevant mineral and then if the relevant mineral is located the rights holder has a right to apply for a right to mine and exploit that mineral e.g. X who holds a mineral exploration licence to explore for any type of mineral grants a right to Y to explore for nickel on that tenement and if the nickel is found Y will have the right to apply for a There will usually be various conditions to deal with conflicts and responsibilities of the parties in relation to the tenement.

Such agreements have been held to be enforceable even in circumstances where the agreement was silent on essential matters such as the regulation of the activities as between the tenement holder and the rights holder and there was no provision for the obtaining of appropriate mining titles in the event of a successful find ([209]). Such an agreement if carefully constructed also does not appear to infringe State and Territories mineral and petroleum title legislation that prevents the grant of an interest in a tenement without the consent of the Minister ([210]).

The following general principles apply:

(a) the right granted by the tenement holder to the rights holder to go upon land to prospect for minerals does not confer any estate or interest in land ([211]);

(b) the right granted by the tenement holder to the rights holder to prospect for minerals coupled with a conditional right to earn an interest in the particular mineral discovered does not constitute an interest in the exploration licence ([212]);

(c) the right granted by the tenement holder to the rights holder to earn an interest in any minerals discovered on the land had no bearing on whether the rights holder held any interest in the exploration licence itself ([213]);

(d) although an exploration licence is proprietorial character ([214]) unless the agreement does more than give a personal right to the rights holder to come on to the land to explore for the particular mineral coupled with a conditional right to earn an interest in the minerals if found, no legal or equitable interest is granted in the exploration licence ([215]).

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209 *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd* [2000] WASCA 27

210 Ibid at {98]-[110]

211 Ibid at [102] citing in support: *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 (at 190)

212 Ibid

213 Ibid

214 Ibid at [103] citing in support: *Commonwealth of Australia v WMC Resources Ltd* (1998) 194 CLR 1 at 14 (per Brennan CJ).

215 Ibid

However if the right that is granted is a right to come on to the land to explore for minerals that is coupled with an immediate right (as distinct from a conditional right) to any minerals that are discovered this will constitute the grant of a profit a prendre giving the rights holder an interest in the land ([216]).

Further although there may be a provision in the mining legislation that prohibits transferring or dealing with a legal or equitable interest in or affecting an exploration licence without the consent of the Minister this does not mean that the contract is void, illegal or in effective ([217]). All it may mean is that the tenement holder is in breach of the conditions of the tenement and liable to forfeiture of that interest ([218]). Therefore such a condition does not have the effect of prohibiting a contract purporting to have that effect ([219]). Therefore there may be stamp duty applicable to the agreement even though the performance of the agreement requires such consent ([220]).

Nevertheless it has been held that a provision such as section 64(1)(b) of the WA Mining Act, that imposes a statutory prohibition on dealings or other transactions affecting an interest in an exploration licence without prior ministerial consent during the first year of the term meant that a provision in a contract purporting to transfer such an interest did not transfer a proprietary interest in the tenement but only a personal right and therefore no stamp duty is payable ([221]). It may be that a contract conditional on such consent might be sufficient to constitute a dutiable transaction and be subject to stamp duty ([222]) although it might be refunded if the condition was not met ([223]).

Whether or not stamp duty is applicable will be heavily dependent on the nature of the rights created by the agreement. If the rights are no more than a permission to explore with a conditional right to any minerals which are found then it appears there is no transfer of any interest in the underlying tenement ([224]). On the other hand if the agreement has the effect of transferring an interest in the tenement then there will be duty payable if that constitutes a transfer of an interest in dutiable property ([225]).

The following examples illustrate how differences in wording can make all the difference.

Example 1 ([226])

The rights holder agreed to spend money to explore certain mineral tenements to earn a 100% interest in any base metals found on the tenements. However the tenement holder retained a 100% interest in any precious metals discovered within those same mineral tenements. If there was any area within the mineral tenements where both base metals and precious metals were discovered then the priority of development for mining these metals would be determined by the mineral with the greatest recoverable value.

It was held that this was not sufficient to give the rights holder any proprietary interest in the tenements.

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216 *Mills v. Stokman* 1967) 116 CLR, at 71 (per Barwick CJ with whom Taylor J concurred), 75 (per McTiernan J), 77 (per Kitto J), 79 (per Menzies J); *Re Vice Nizich and Ane Nizich v the Commissioner of Taxation of the Commonwealth of Australia* [1991] FCA 426 at [24] per French J citing in support: *Morgan v Russell and Sons* (1909) 1 KB 357 at 365 (Lord Alverstone C.J.), 366 (Walton J.); *Stratford (HM Inspector of Taxes) v Mole and Lea; Old Silkstone Collieries Ltd v Marsh (HM Inspector of Taxes)* (1941) 24 TC 20 at 32-33 (Lawrence J.)

217 *Abbotts Exploration Pty Ltd and Commissioner of State Revenue* [2013] WASAT 39

218 Ibid

219 Ibid at [98]-[108], [182]

220 *Motor Yacht Marine Holdings Pty Ltd and Commissioner of State Revenue* [2013] WASAT 52

221 *Abbotts Exploration Pty Ltd and Commissioner of State Revenue* [2013] WASAT 39 at [74]-[78]

222 *Motor Yacht Marine Holdings Pty Ltd and Commissioner of State Revenue* [2013] WASAT 52

223 WA *Duties Act*, 2008, ss 99A and 107

224 *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd* [2000] WASCA 27

225 *Abbotts Exploration Pty Ltd and Commissioner of State Revenue* [2013] WASAT 39which distinguished the agreement before the tribunal from the agreement in Ibid

226 Ibid

Example 2 ([227])

In another case the question was whether or not the rights holder had an interest in mineral tenements that were "land" for the purposes of the landholder provisions in a split commodity contract circumstance.

The rights holder (after exercise of an option) acquired from the tenement holder the right to explore for and mine all minerals on specified mining tenements (including applications for mining tenements) ("Mining Interests") held by the tenement holder except for except iron and manganese ("Interest"). There was a provision that the tenement holder would sign all documents necessary to ensure that the rights holder became the registered holder of the "Interest" (note not "Mining Interest") but if any part of the Interest was not a granted tenement or ministerial consent was required to transfer any part of the Interest the tenement holder would hold that part of the Interest on trust for rights holder until such time as the tenement was granted and any necessary ministerial consent was obtained. There was also a provision that the rights holder would be entitled in all respects to be registered as the holder of any mining tenement comprising part of or issued for the Mining Interest and would have the sole and exclusive right in relation to the Mining Interest to explore, prospect for, mine and commercially develop all minerals excluding manganese and iron.

The rights holder argued that the decision in *Anaconda* applied and that all it had was a contractual right and no interest in the tenements. The tribunal rejected this argument. It held that the decision in *Anaconda* turned on the specific wording of the agreement. In this case the wording of the agreement was different. In this case the agreement was not limited to a transfer of the right to carry out mining of a kind authorised by the tenements but also provided that the tenement holder would transfer the tenements to the rights holder.

NSW

A statutory licence or permission under a New South Wales law is dutiable property ([228]) as is an interest in such a statutory licence or permission ([229]). Any mineral or petroleum tenement granted under a NSW law will be a statutory licence or permission under a NSW law. Also discussed above, certain types of mineral tenements constitute an interest in land ([230]) which also is dutiable property ([231]). Also, being interest in land, the rights granted under a split commodity agreement may have to be considered in relation to the landholder stamp duty provisions.

The question then will be whether the grant of the rights under the split commodity agreement constitutes a transfer of any interest in the tenement and therefore is a transfer of dutiable property and subject to stamp duty. This will come down to the particular terms of the agreement.

As discussed above if there is a mere personal right given to the rights holder to come on the tenement to explore for a particular mineral coupled with a conditional right to any minerals if found, this most likely does not constitute the transfer of any interest in the statutory licence and therefore it will not be dutiable property ([232]).

However even if duty is applicable, regard should be had to the discussion in relation to stamp duty on farm-in agreements in NSW above.

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227 *Abbotts Exploration Pty Ltd and Commissioner of State Revenue* [2013] WASAT 39

228 NSW *Duties Act, 1997*, s. 11(1)(h).

229 Ibid, s 11(1)(i).

230 Ibid, Clause 4(1) of the Dictionary.

231 Ibid s 11(1)(a) and (i).

232 *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd* [2000] WASCA 27

Qld

As discussed above in relation to mining equipment, most forms of mineral or petroleum interests will either be and interest in land or an existing right and therefore dutiable property ([233]). Also being interest in land the rights granted under a split commodity agreement may have to be considered in relation to the landholder stamp duty provisions.

The position is the same as discussed above in relation to NSW. Whether duty is applicable will depend upon the construction of the actual terms of the agreement.

Regard should be had to the QLD OSR ruling in relation to farm-in agreements referred to above ([234]).

However it should be noted that if what is taken from the land is gas, petroleum, mineral, gravel, rock, stone, sand, clay, earth or soil taken under a statutory licence or profit a prendre then there is an exemption from duty if the aforesaid is severed or released from the land ([235]).

Tas

A mineral tenement and an interest in a mineral tenement is dutiable property in Tasmania ([236]). The expression "mineral tenement" has a particular meaning as discussed above in relation to mining plant and equipment ([237]). An interest in a mineral tenement is also an interest in land for the purposes of the land rich provisions and therefore a split commodity agreement may be relevant for the land rich provisions ([238]).

The position is the same as discussed above in relation to NSW. Whether duty is applicable will depend upon the construction of the actual terms of the agreement.

It should be noted that any permit, licence, pipeline licence or access authority within the meaning of the *Petroleum (Submerged Lands) Act 1982*, any instrument effecting the transfer of such a licence or authority or any instrument relating to any legal or equitable interest in such a licence or authority is exempt from duty ([239]).

SA

A mineral tenement and an interest in a mineral tenement is "property" and therefore an instrument of conveyance of the same will be subject to duty (although subject to a concessional rate for certain types of exploration licences or a portion thereof to which see the discussion above in relation to farm-in agreements).

The position is the same as discussed above in relation to NSW. Whether duty is applicable will depend upon the construction of the actual terms of the agreement.

NT

In NT dutiable property includes "land' and an "interest in land" ([240]) which in turn includes a "mining tenement" ([241]). A "mining tenement" means a statutory licence, lease or authorisation to explore for, recover or

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233 Qld *Duties Act, 2001*, ss 8, 9 10(1)(a) and (c) and (2) together with the definitions of "land", 'resource authority" and "existing right" in the Dictionary.

234 DA000.12.1

235 Qld *Duties Act, 2001*, s. 150

236 Tas *Duties Act, 2001*, ss 9(1)(b) and (l)

237 Ibid, *s. 31*definition of "mineral tenement"

238 Ibid, s 61(1A)(a)

239 Ibid, s 227(1)(k)

240 NT *Stamp Duty Act*, s.4 definition of "dutiable property"

241 Ibid, s.4 definition of "land"

exploit resources (such as minerals or geothermal resources) to be found in or under the surface of the earth and includes a mineral title under the Mineral Titles Act ([242]).

The position is the same as discussed above in relation to NSW. Whether duty is applicable will depend upon the construction of the actual terms of the agreement.

It should be noted that a transfer under the *Petroleum Act* the *Energy Pipelines Act* , the *Petroleum (Submerged Lands) Act* or the *Petroleum (Prospecting and Mining) Act* (repealed) of a lease, licence, permit or other authority, or any agreement to make such a transfer is exempt from duty ([243]).

Reference should also be made to the farm-in agreement concessions referred to above.

WA

In WA dutiable property includes "land" ([244]). "Land" includes a "mining tenement" and an estate or interest in a mining tenement ([245]). A mining tenement means a mining tenement held under the *Mining Act 1978* being a mining tenement within the meaning of that Act or the Mining Act 1904 and a mining tenement or right of occupancy continued in force by the *Mining Act 1978* section 5 ([246]).

However dutiable property also includes a "right" ([247]). A "right" is widely defined and includes a "right to exploit dutiable property" ([248]). Although there is no authority on the point, arguably the terms of a split commodity contract do involve the transfer of a right to exploit dutiable property being the mining tenement from the tenement holder to the rights holder. Therefore it may be that in WA, unlike the other States and Territories duties legislation, a split commodity contract may be subject to duty being a dutiable transaction of dutiable property namely the right to exploit the mineral tenement. Unfortunately the only case involving a split commodity contract in WA referred to in Example 2 above ([249]), involved the question of the application of the landholder provisions and therefore it was only a question of whether there was an interest in land and the issue of whether the right constituted dutiable property was not relevant.

Regard should be had to the special provisions relating to farm-in agreements discussed above because the terms of the split commodity agreement may satisfy the definition of a "farm-in agreement" ([250]) to obtain the concession that applies to the same ([251]).

LANDHOLDER/LANDRICH DUTY

General

All States and Territories have provisions that subject certain acquisitions of shares in companies or units in unit trusts that own directly or indirectly land or interests in land in that State or Territory either above certain threshold values ([252]) or that are land rich ([253]).

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242 NT *Stamp Duty Act*, s.4 definition of "mining tenement"

243 Ibid, Item 13 Schedule 2

244 WA *Duties Act, 2008* s. 15(a)

245 Ibid, s 3 definition of "land"

246 Ibid, s 3 definition of "mining tenement"

247 Ibid s. 15(b)

248 Ibid s. 16(1)(e)

249 *Abbotts Exploration Pty Ltd and Commissioner of State Revenue* [2013] WASAT 39

250 WA *Duties Act, 2008*, s 13(1)

251 Ibid, s 135

252 NSW *Duties Act, 1997,* Chapter 4; Qld *Duties Act, 2001,* Subdivision 7 of Division 7 and Chapter 3; ACT *Duties Act, 1999,* Chapter 3; *Duties Act, 2000,* Chapter 3 (although it is limited to specified estates in land); NT *Stamp*

Valuation issues will therefore be important if a company or unit trust holds land or an interest in land both from a threshold point of view and for the purposes of working out the duty payable on the relevant acquisition.

However this will only be relevant in relation to companies or unit trusts holding a mineral or petroleum interest if such an interest is "land" or an "interest in land".

As we have seen above, the High Court has held that a mineral or petroleum interest is not an interest in land under the common law ([254]).

Therefore in order for a mineral or petroleum interest to be an interest in land for the purposes of any duties legislation, there needs to be a specific provision in the relevant duties or other legislation that causes the mineral or petroleum interest to be an interest in land ([255]).

NSW

Currently the holder of a mining lease or mineral claim under the *Mining Act, 1992* is taken to hold an interest in land ([256]). This includes fixtures to the lease or claim as if the lease or claim were an estate in fee simple in the land ([257]).

At the time of writing this paper, there is Bill before the NSW Parliament which will extend this provision so that an interest in a "mining tenement", as defined, will be an interest in land ([258]). A "mining tenement" will extend what constitutes an interest in land from a mining lease and mineral claim to also include an assessment lease, exploration licence or opal prospecting licence under the *Mining Act 1992* ([259])

However after the proposed amendments the following types of petroleum interests by express provision do not give rise to an interest in land:

(a) a petroleum title within the meaning of the *Petroleum(Onshore) Act 1991*;

(b) a licence, permit, lease, access authority or special prospecting authority under the *Petroleum (Offshore) Act 1982* ([260]).

This means that a company or trust holding only these types of tenements will not be a landholder and therefore the landholder duty provisions do not apply ([261]).

It should be noted that there is a specific provision that ensures that fixtures to a mining tenement that is an interest in land under these provisions (both before and after the proposed amendment) are considered as part of the land as if the mining tenement was an estate in fee simple ([262]). Therefore the value of mining equipment that is a fixture will need to be taken into account for the purposes of these provisions.

Duty Act, definition of "dutiable property" in s. 56N to 56T; WA *Duties Act 2008*, Parts 4 to 6; SA *Stamp Duties Act, 1923*, Part 4.

253 Part 2 of the Tas *Duties Act, 2001;*

254 *TEC Desert Pty Ltd v Commissioner of State Revenue* [2010] HCA 49

255 Ibid

256 NSW *Duties Act, 1997*, Clause 4(1) of the Dictionary.

257 Ibid, Clause 4(2) of the Dictionary.

258 *State Revenue Legislation Amendment Bill* 201, Schedule 1 [17] and [20] amendment to the definitions of "mining tenement" and "interests in land" in the Dictionary to the NSW *Duties Act, 1997*

259 Ibid

260 Ibid, paragraph 4(2) in the Dictionary.

261 Ibid, s. 147

262 Ibid, paragraph 4(2) in the Dictionary.

NSW imposes duty on a relevant acquisition in a unit trust scheme, a private company or a listed company that has land holdings in NSW with a threshold value of $2,000,000 or more ([263]). Land holdings is defined to be an "interest in land' ([264]) and therefore the above types of mineral interests will be included in the land holdings of the above types of entities for the purposes of determining the unencumbered value of the land holdings of these entities.

A relevant acquisition will be made in the case of a private landholder (unlisted companies and unit trust schemes which are not a public unit trust scheme) if an interest is acquired in that landholder is 50% or more or if already holding 50% or more a further interest is acquired ([265]). Interests of associated persons are aggregated for this purpose ([266]). There are also constructive ownership provisions for land held by the landholder through linked entities and discretionary trusts ([267]).

For the purposes of working out the duty on this relevant acquisition, the relevant proportion of the entity that is acquired is multiplied by the unencumbered value of all land holdings and goods owned by the entity ([268]). If marketable security duty is also payable on the acquisition of the shares or units an adjustment is made for that duty ([269]).

Although the landholder duty only becomes applicable once the threshold value of land holdings is reached, the calculation of the duty includes unencumbered value of goods as well as land holdings. The only concession is that If the Chief Commissioner is satisfied that the unencumbered value of all goods in NSW of a landholder comprises not less than 90% of the total unencumbered value of all land holdings and goods in NSW of a landholder, the Chief Commissioner may disregard the value of the goods in determining the duty ([270]).

The meaning of "unencumbered value" is discussed earlier in this paper.

A relevant acquisition will be made in a public landholder if an interest is acquired in that landholder is 90% or more or if already holding 90% or more a further interest is acquired ([271]). A public unit holder is a listed company or a unit trust scheme that is either listed or widely held (300 units holder none of which own more than 20%). The duty is worked out the same way as for a private landholder but the actual duty charged is only 10% of the duty that the private landholder would pay ([272]).

It should be noted that although there is an exemption from duty on a transfer of marketable securities in a company (wherever incorporated) whose sole business is either or both of the following activities:

- mining in New South Wales for minerals within the meaning of the *Mining Act 1992* or the *Offshore Minerals Act 1999* , or

- prospecting or mining in New South Wales for petroleum within the meaning of the *Petroleum (Onshore) Act 1991*,

if the consideration for the transfer or agreement is not less than the unencumbered value of the marketable securities ([273]), this exemption only applies to duty under Chapter 2 (general duties) and not Chapter 4

263 NSW *Duties Act, 1997,* Chapter 4

264 Ibid, s. 146 .

265 Ibid, ss. 149 & 150.

266 Ibid

267 Ibid, ss. 158 & 159.

268 Ibid, s.155.

269 Ibid

270 Ibid s. 163G.

271 *TEC Desert Pty Ltd v Commissioner of State Revenue* [2010] HCA 49

272 NSW *Duties Act, 1997,* s. 156.

273 Ibid, s. 66(10).

(landholder duty) of the *Duties Act, 1997*. Therefore a transfer of marketable securities in a company might be exempt from duty under Chapter 2 but still subject to duty under Chapter 4 if the company is a landholder.

Queensland

Trusts as a holding structure are not a good structure to use for holding any dutiable property in Queensland. This is because, unless the trust is a public unit trust, if the trust holds any type of dutiable property (not just land), any acquisition of an interest in the trust will be subject to duty ([274]) on its dutiable value ([275]) to which see the discussion above. In this context it should be noted that dutiable property includes existing rights ([276]) which will include mineral and petroleum interests ([277]) other than an exploration permit under the *Petroleum (Submerged Lands) Act 1982* ([278]).

In relation to public unit trusts (other than listed trusts) an acquisition of 50% or more interest in a wholesale unit trust or pooled public investment unit trust that holds, or has an indirect interest in, land in Queensland will be subject to duty ([279]).Because of the definition of "land" referred to above, this will include such trusts which hold a resource authority.

There is duty imposed on a relevant acquisition in an unlisted company or a relevant acquisition in a listed company or listed trust that has land holdings in Queensland with a threshold value of $2,000,000 or more ([280]).

The definition of "land holdings" includes the entity's interest in "land", and anything fixed to the land that may be separately owned from the land (whether or not the entity has an interest in the thing fixed to the land) ([281]). As discussed above in relation to mining equipment which is a fixture, the definition of "land" includes a "resource authority" which includes the types of mineral and petroleum interests referred to in that section of this paper ([282]). In addition an entity's landholdings also include rights held by the entity that relate to, or affect, the use of the entity's land and other land and enhance the value of the entity's land ([283]).

A relevant acquisition will be made in the case of a private company if an interest is acquired in that private company that is 50% or more or if already holding 50% or more a further interest is acquired ([284]).Interests of related persons are aggregated for this purpose.

A relevant acquisition will be made in a listed company or trust if an interest is acquired in that landholder that is 90% or more or if already holding 90% or more a further interest is acquired ([285]).

For the purposes of working out the duty on a relevant acquisition, the relevant proportion of the entity that is acquired is multiplied by the unencumbered value of all land holdings owned by the entity ([286]).

The meaning of "unencumbered value" is discussed above in the section under that heading.

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274 Qld *Duties Act, 2001,* ss. 9(1)(i), 49 and 55.

275 Ibid, s. 8.

276 Ibid, s. 10(1)(c).

277 Ibid, definition of "existing right" in the Dictionary.

278 Ibid, definition of "statutory licence" Dictionary

279 Ibid, definition of "land-holding trust" in the Dictionary.

280 Ibid, Chapter 3

281 Ibid s 167(1)(a).

282 Ibid, definition of "land" in the Dictionary.

283 Ibid, 167(1)(b).

284 Ibid, Chapter 3.

285 Ibid

286 Ibid, s. 179.

Tasmania

For the purposes of the landholder stamp duty provisions, land holdings will include an interest in a mineral tenement ([287]). A mineral tenement means following types of interests under the *Mineral Resources Development Act, 1995*: a mining lease, an exploration licence, a special exploration licence, a retention licence and a production licence ([288]).

Tasmania imposes stamp duty on relevant acquisitions in a private company or private unit trust scheme ("relevant entity") which has:

(a) land holdings in Tasmania whose unencumbered value is $500 000 or more; and

(b) its land holdings in all places, whether within or outside Australia, comprise 60% or more of the unencumbered value of all its property ([289]).

Therefore the above types of mineral interests will be included in the land holdings of a relevant entity for the purposes of determining the unencumbered value of the land holdings of these entities.

In addition there is a deeming provision that ensure that fixtures are considered as part of the land for the purposes of these provisions even if the fixture is, or purports to be, the subject of an entitlement or interest separate from the ownership of the rest of the land unless the Commissioner is satisfied that it would not be just and reasonable to take the fixture into account in the circumstances ([290]).

Further there is also a deeming provision that means a mere entitlement to or interest in something that is part of land as a fixture where that entitlement or interest is, or purports to be, separate from the ownership of the rest of the land the relevant entity is to be regarded as having an interest in land for the purposes of the land rich provisions to the extent of its entitlement to, or interest in, the fixture ([291]). This overcomes Court decisions that have held that a where a statute vests fixtures in separate ownership to the owner of the land does not vest in the owner of the fixtures an interest in the land ([292]). An example of this principle is the High Court decision in *Asciano Services Pty Ltd v Chief Commissioner of State Revenue* ([293]) which held that a statutory vesting of rail infrastructure in the taxpayer did not give it an interest in the land.

Also to make it clear beyond doubt, anything that under the authority (whether direct or indirect) of a mineral tenement is fixed to land that is the subject of that mineral tenement and would be part of that land as a fixture if the mineral tenement were a freehold estate in the land is to be taken to be part of land as a fixture ([294]).

The other States and Territories which had similar provisions have moved to landholder provisions probably due to the manipulation of the 60% level. For example although certain property is not included for the purposes of working out the 60% level such as cash, a company could say use its cash resources to purchase BHP shares on the day of the acquisition and then resell them the next day to get around the problem.

A relevant acquisition in the private company or private unit trust scheme will be made if an interest is acquired that is 50% or more or if the person already holding 50% or more a further interest is acquired ([295]). Interests with associated persons are aggregated for this purpose ([296]).

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287 Tas *Duties Act, 2001,* s. 61(1A)(a).

288 definition of "mineral tenement" in s. 3 of the Tas *Duties Act, 2001*

289 Ibid, Chapter 2.

290 Ibid, s. 61(5) &(6).

291 Ibid, s. 61(7).

292 *Commissioner of Main Roads v North Shore Gas Co. Ltd* (1967) 120 CLR 118 at 129

293 [2008] HCA 46

294 Tas *Duties Act, 2001*, s. 61(8).

The meaning of "unencumbered value" is discussed above.

South Australia

For the purposes of the stamp duty provisions relating to acquisitions in landholders, an interest in land includes a lease or licence granted under the *Mining Act 1971,* the *Offshore Minerals Act 2000* or the *Petroleum and Geothermal Energy Act 2000* ([297]). Therefor in considering whether or not the threshold for a relevant entity to be a landholder is exceeded the unencumbered value of these types of interest are included in that entity's local land assets.

If a private company, a listed company, a private unit trust scheme or a public unit trust scheme ("relevant entity") will be a land holding entity if the unencumbered value of the underlying interests in land in South Australia of the relevant entity is $1,000,000 or more ([298]). The unencumbered value of the above mineral and petroleum interests are included in the calculation of this threshold because they are interests in land.

If a person or a group (associated persons) acquires a notional interest in the underlying local land assets of a relevant entity that in the case of a private company or private unit trust scheme is 50% or more or in the case of a listed company or a public unit trust scheme is 90% or more or already holding such interests increases the proportionate interest, then they will be subject to duty as if they had acquired a proportionate interest in the underlying local land assets ([299]).

Northern Territory

In the Northern Territory duties legislation "land" includes a "mining tenement", an interest in a mining tenement and a fixture to land including a tenant's fixture or a fixture associated with mining operations conducted, or formerly conducted, on the land ([300]). A "mining tenement" is defined as a statutory licence, lease or authorisation to explore for, recover or exploit resources (such as minerals or geothermal resources) to be found in or under the surface of the earth and includes a mineral title under the *Mineral Titles Act* ([301]).

A company or unit trust scheme will be a "land holding corporation" for the purposes of the land rich provisions if it is entitled to land that has an unencumbered value of at least $500,000 ([302]). This will include the unencumbered value of the mining tenements, interests in mining tenements and fixtures of the type referred to above.

If the land holding corporation is not listed then a person will make a relevant acquisition in the company or trust if they acquire a 50% or more interest in the land holding corporation or already holding such an interest acquires a greater interest ([303]). If the land holding corporation is listed then a person will make a relevant acquisition in the land holding corporation if they acquire a 90% interest save in the case of a merger vesting of shares in which case a 50% interest is all that is required or already holding such an interest acquire more ([304]).

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295 Ibid, s. 64 & 67.

296 Ibid

297 SA *Stamp Duties Act, 1923,* definition of "interest in land" in s. 91

298 Ibid, s 98 read with the definition of "land asset" and "local land asset: in s 92.

299 Ibid, Part 4.

300 NT *Stamp Duty Act,* s 3.

301 Ibid

302 Ibid, s. 56N.

303 Ibid, ss. 56P and 56Q.

304 Ibid

The duty is calculated by multiplying the unencumbered value of the land to which the land holding corporation is entitled by the interest acquired ([305]).

The meaning of "unencumbered value" is discussed in above.

Western Australia

As discussed above in relation to mining equipment which are fixtures in Western Australia, "land" has an extended definition which covers various types of mineral tenements and fixtures to the same as if the underlying tenement was an estate in fee simple.

There is also a deeming provision that that ensures that fixtures are considered as part of the land for the purposes of these provisions even if the fixture is, or purports to be, the subject of an entitlement or interest separate from the ownership of the rest of the land ([306]).

Further if a landholder or other entity has an entitlement to something that is part of land as a fixture and that entitlement is, or purports to be, separate from the ownership of the rest of the land, the landholder or other entity is to be regarded as having an entitlement to land for the purposes of this the landholder provisions to the extent of its entitlement to the fixture ([307]). This means that where the landholder or other entity has a beneficial entitlement to the thing fixed to its estate or interest in the land, it matters not whether the thing fixed is, or purports to be, the subject of ownership separate from its ownership of the estate or interest in the land ([308]).

A corporation or unit trust scheme will be a land holder if it or an entity linked to it is entitled to land in WA with a total value of $2,000,000 or more ([309]). The value of anything that falls within the extended definition of land will be included in this calculation. .

A person will make a relevant acquisition in a land holder which is not listed if they acquire a 50% or more interest in the land holder or already holding such an interest acquire a greater interest ([310]). A person will make a relevant acquisition in a land holder which is listed if they acquire a 90% or more interest in the land holder or already holding such an interest acquire a greater interest ([311]). In both cases there are aggregation provisions for related persons ([312]).

The duty is worked out on the unencumbered value of the land, chattels or land chattels to which the land holder or any linked entity is entitled ([313]).

CONCLUSION

It is therefore important to analyse the nature of the transaction that is taking place and how the various items of property are characterised to ascertain whether or not the transaction will be subject to stamp duty. Ordinary meanings of words such as "land" do not necessarily have that meaning under the relevant duties legislation. Some things which are not property such as mining information may still affect the value of the property concerned in some jurisdictions. Careful examination of the transaction, the property and the relevant duties legislation is therefore very important.

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305 Ibid, s. 56R.

306 Ibid, s 149(2).

307 Ibid, s. 149(3).

308 *Epic Energy (Pilbara Pipeline) Pty Ltd v Commissioner of State Revenue* [2011] WASCA 228 at [255].

309 WA *Duties Act, 2008,* s. 155.

310 Ibid, ss. 160-165.

311 Ibid

312 Ibid, ss. 162-164 & 185.

313 Ibid, s, 186.