



## Things Fixed to Land and Rights relating to Fixed Infrastructure

1. This ruling clarifies the Commissioner's interpretation of things fixed to land and rights relating to fixed infrastructure.

### Background

2. For transfer duty, dutiable property includes land in Western Australia and a right<sup>1</sup> which includes certain rights and licences relating to fixed infrastructure.<sup>2</sup>
3. For determining if an entity is a landholder, a land asset includes land,<sup>3</sup> fixed infrastructure control rights<sup>4</sup> and, in certain circumstances, fixed infrastructure access rights.<sup>5</sup> When calculating landholder duty, a land asset may include a fixed infrastructure statutory licence.<sup>6</sup>

### Things fixed to land

4. Common law fixtures are part of the land to which they are affixed and are land for the purposes of the *Duties Act 2008* (Duties Act).<sup>7</sup>
5. Land includes anything fixed to land<sup>8</sup> (including land the subject of a mining tenement or pastoral lease), whether or not the thing
  - (a) constitutes a fixture at law
  - (b) is owned separately from the land or
  - (c) is notionally severed or considered to be legally separate from the land as a result of the operation of any law of the State or the Commonwealth.<sup>9</sup>
6. A thing is taken to be fixed to land if it has a physical connection to the land or is buried or partly buried under the surface of the land.<sup>10</sup>

#### Example 1

Pipeline Owner Pty Ltd owns an underground pipeline that traverses many pieces of land. For some sections of the pipeline, Pipeline Owner does not have an estate or interest in the land in which the pipeline is buried. The pipeline is land because it is fixed to land, despite Pipeline Owner not having an estate or interest in the land to which it is fixed.

<sup>1</sup> Duties Act s 15.

<sup>2</sup> Duties Act s 16(1)(h)-(j).

<sup>3</sup> *land asset* is defined to include land: Duties Act s 148(1); s 3A(1).

<sup>4</sup> *land asset* is defined to include a fixed infrastructure control right: Duties Act s 148(1).

<sup>5</sup> Subject to Duties Act s 204A, a fixed infrastructure access right is a 'land asset': Duties Act s 148(1).

<sup>6</sup> Duties Act s 204B.

<sup>7</sup> Duties Act s 3A.

<sup>8</sup> The term 'land' in Duties Act s 3A(1)(f) means physical land: Duties Act s 3A(5).

<sup>9</sup> Duties Act s 3A(1)(f).

<sup>10</sup> Duties Act s 3A(3).

7. Land does not include
- (a) a thing fixed to land on a temporary basis for the purpose of being used in construction works
  - (b) a thing fixed to land that is not a common law fixture and is held or used in connection with the business of primary production or
  - (c) a relocatable home in a residential park site, or an addition or structure fixed or attached to the home, that is not a common law fixture.<sup>11</sup>
8. A thing fixed to land is taken not to be land if the thing will be permanently removed from the land and transferred without an interest in the underlying land.<sup>12</sup>

### ***Rights relating to fixed infrastructure***

9. A thing fixed to land<sup>13</sup> is fixed infrastructure.<sup>14</sup>
10. A fixed infrastructure control right ('control right') is a lease, licence or other right that gives the holder the day-to-day control, and the operation or use, of fixed infrastructure.<sup>15</sup>
11. A fixed infrastructure access right ('access right') is a licence or other right that authorises access to or use of any land for a purpose related to the control, operation, use, construction, inspection, testing, maintenance, repair or other purpose associated with fixed infrastructure.<sup>16</sup>
12. A fixed infrastructure statutory licence ('statutory licence') is a licence, permit or authority under a law of Western Australia or the Commonwealth that authorises the ownership, control, operation or use of a thing fixed to land where a person who does not hold a licence is prohibited from doing so.<sup>17</sup>
13. Anything that is land<sup>18</sup> is not a control right, access right or statutory licence.<sup>19</sup>

#### ***Example 2***

Mike and Jan have signed a lease for a unit in a retirement village. The lease gives them the day-to-day control and use of the unit. However, as the lease is land, it is not a control right.

#### ***Example 3***

A water supply authority holds an easement that entitles it to access an area of land to install, access and maintain water infrastructure. As the easement is land, it is not an access right.

<sup>11</sup> Duties Act s 3A(4). *Relocatable home* and *residential park site* are defined in Duties Act s 3.

<sup>12</sup> Duties Act s 18A. For more information see [CP DA 46 'Things fixed to land that are removed'](#).

<sup>13</sup> As described in Duties Act s3A(1)(f).

<sup>14</sup> Duties Act s 91A(1).

<sup>15</sup> Duties Act s 91A(1). A fixed infrastructure control right does not include a security interest (as defined in Duties Act s 3) or a fixed infrastructure statutory licence.

<sup>16</sup> Duties Act s 91A(1). Anything that is land because it is a thing fixed to land, or an estate or interest in a thing fixed to land, is not a fixed infrastructure access right: Duties Act ss 91A(2) and 3A(1)(f) – (g).

<sup>17</sup> Duties Act s 91A(1).

<sup>18</sup> As defined in Duties Act s 3A.

<sup>19</sup> Duties Act s 91A(3).

14. Duty applies to transactions and acquisitions involving
- (a) control rights<sup>20</sup> and
  - (b) access rights and statutory licences if the same, or another, transaction or acquisition also involves the fixed infrastructure to which the access right or statutory licence relates, an estate or interest in the fixed infrastructure, or a control right relating to the fixed infrastructure.<sup>21</sup>

#### *Example 4*

Pipeline Owner leases the pipeline in Example 1 to New Pipeline Co. The lease gives New Pipeline Co the day-to-day control, and the operation or use, of the pipeline. The lease does not constitute an estate or interest in the land to which the pipeline is fixed, so the lease is not 'land' as defined in the Duties Act.<sup>22</sup> Duty applies to the grant of the lease as it is the acquisition of new dutiable property being a fixed infrastructure control right.<sup>23</sup> As the lease is not land, the exception to the definition of new dutiable property relating to the grant of new leases does not apply.<sup>24</sup>

## **Ruling**

### ***Determining if a thing is fixed to land***

15. The Duties Act specifies that a thing is fixed to land when it has a physical connection to the land or is buried or partly buried under the land.<sup>25</sup> Otherwise, the term 'fixed to land' is not defined and takes its ordinary meaning.
16. The word 'fixed' means<sup>26</sup>
- made fast or firm; firmly implanted
  - definitely and permanently placed
  - permanently established or
  - definite; not fluctuating or varying.
17. The common law status of a thing as a fixture or a chattel, or any statutory or contractual provision that results in a thing being a chattel, is not relevant to whether the thing is fixed to land.<sup>27</sup>

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<sup>20</sup> For transfer duty, fixed infrastructure control rights are dutiable property, new dutiable property and, in some circumstances, special dutiable property: Duties Act ss 15, 16(1)(a) and 17(1)(b)(iia). They are also land assets for landholder duty: Duties Act s 148.

<sup>21</sup> Duties Act ss 91C, 204A and 204B. This includes where a transaction or acquisition involving an access right or statutory licence forms, evidences, gives effect to or arises from substantially one arrangement with a transaction or acquisition involving the fixed infrastructure, an estate or interest in the fixed infrastructure, or a control right relating to the fixed infrastructure: Duties Act ss 91C, 204A, 204B and 204D.

<sup>22</sup> Duties Act s 3A

<sup>23</sup> Duties Act ss 11(1)(f) and 17(1)(b)(iia)

<sup>24</sup> Duties Act s 17(2)(c)

<sup>25</sup> Duties Act section 3A(3).

<sup>26</sup> *Macquarie Dictionary Online*, 2020, Macquarie Dictionary Publishers, <https://www.macquariedictionary.com.au>

<sup>27</sup> This is not the case when determining whether the exclusions in section 3A(4) of the Duties Act apply.

18. 'Fixed to land' is a broad term that includes a thing that
- (a) is buried or partly buried under the surface of the land regardless of the extent of the physical connection, for example, a pipeline, a conduit or a cable in a conduit, even if it can be easily removed
  - (b) rests on land by its own weight, where it is rendered immovable, for example, by virtue of its weight, the weight or nature of its constituent parts or its configuration<sup>28</sup>
  - (c) has foundations or is bolted to a slab or
  - (d) is physically connected to land through a pipe, cabling or conduit for services such as water, sewerage or electricity.

*Example 5*

A house is bolted to a slab that rests on the ground. The house and slab are fixed to land by virtue of the combined weight and configuration of the constituent parts of the house and slab. The house is also fixed to land through pipes or conduits between the house and the ground for services such as water, sewerage and electricity.

*Example 6*

A transportable building in a workers' accommodation facility rests on a slab. Sewerage services are provided to the building through pipes connected to the building and the ground. The transportable building is fixed to land.

*Example 7*

Movable plant and equipment in a mining site is bolted to footings while it is in position for operation. The plant and equipment is fixed to land.

*Example 8*

Equipment Lease Co Pty Ltd leases photocopiers to business operators. Photocopiers are placed in business premises and plugged into a power point and a network point to operate. The photocopiers are not fixed to land because they may be unplugged and moved by a person pushing.

*Example 9*

A railway network's track infrastructure has components that include ballast, sleepers held in place by friction with the ballast, rails, and fastenings between the sleepers and rails. Legislation relating to the rail network renders common law fixtures on the rail corridor land as chattels.

Although they are not common law fixtures, the ballast, sleepers, rails and fastenings constitute infrastructure which is immovable by virtue of its configuration and the combined weight of its constituent parts. The track infrastructure is fixed to land.

*Example 10*

Portable toilets, industrial bins and shipping containers are located on a construction site. They rest on the ground by their own weight and without any pipes, conduits or cables connecting them to the ground. The items are not part of a larger configuration of equipment and may be moved with relative ease. The items are not fixed to land.

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<sup>28</sup> *Commissioner of State Revenue v Westnet Rail Holdings No 1 Pty Ltd* [2013] WASCA 110 at [112].

### *Example 11*

A galvanising plant is contained in separate warehouse structures with concrete flooring. Components are either hard wired to circuit boards, bolted to the floor or ceiling, bolted to the floor and supported by posts, bolted to platforms, or attached to the walls. The galvanising plant is fixed to land.

### *Example 12*

A solar power facility consists of solar panels, inverter and transformer unit, cabling, combiner boxes, control room, switchboard, meteorological station, tracker controller and security fence.

Some items are attached to the ground via bolts into foundations. Other items are rammed into the earth or buried in trenches. The remaining items are bolted to these items. The solar power facility is fixed to land.

## ***Fixed infrastructure control rights***

19. A control right is a lease, licence or right that enables the holder to have the day-to-day control, and the operation or use, of fixed infrastructure.
20. The word 'lease' in the definition of a control right refers to an arrangement described or characterised as a lease of fixed infrastructure that does not actually constitute an estate or interest in land.<sup>29</sup>
21. The words 'control', 'operation' and 'use' are not defined in the Duties Act and take their ordinary meanings.<sup>30</sup>
  - (a) 'control' means the act or power of controlling; regulation, domination or command
  - (b) 'operation' means
    - (i) the power of operating; efficacy, influence or virtue
    - (ii) exertion or force or influence; agency
  - (c) 'use' means the power, right or privilege of employing or using something.
22. The term 'the day-to-day control, and the operation or use' is interpreted as a whole, and will depend on all the facts and circumstances with no single element being determinative.
23. Relevant matters in determining if a lease, licence or right enables the holder to have the day-to-day control, and the operation or use, of fixed infrastructure include
  - (a) the type of infrastructure the right relates to
  - (b) the type of business and nature of activities carried on
  - (c) the commercial context in which the right exists, for example, the relationship and/or contractual rights between the holder and grantor of the right
  - (d) the extent of decision making power the right allows
  - (e) the nature and extent of the rights and responsibilities of the right holder
  - (f) the term for which the rights are granted

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<sup>29</sup> And see Example 14

<sup>30</sup> *Macquarie Dictionary Online*, 2020.

- (g) the extent to which the right allows other persons or users to be excluded from the fixed infrastructure and
- (h) whether the right is unique to the holder.

24. The rights relating to the fixed infrastructure do not need to be exclusive or give exclusive possession of the fixed infrastructure.

#### *Example 13*

Mining Co Pty Ltd owns a minerals processing plant and adjoining power station infrastructure. Mining Co and Power Gen Co Pty Ltd are parties to a contract under which Power Gen Co has a licence to operate the power station to generate power for the processing plant.

Under the contract, Power Gen Co is entitled to make decisions about the day-to-day running of the power station without reference to Mining Co. The contract specifies a small range of decisions about the power station that Power Gen Co may not make without the approval of Mining Co. Primarily for safety and efficiency, Power Gen Co has the general power to decide who may enter the power station, but there are some circumstances in which Mining Co may enter the power station without permission from Power Gen Co.

As the contract enables Power Gen Co to have the day-to-day control, and the operation or use, of the power station infrastructure, the rights under the contract constitute a control right.

#### *Example 14*

Railway Co Pty Ltd operates the railway network described in Example 9 under contractual arrangements that include a long term lease of the track infrastructure, but not the land on which it is situated. The arrangements include the right to use the track infrastructure to the exclusion of other freight operators. Due to the nature of the track infrastructure, Railway Co has limited ability to exclude the general public from accessing the infrastructure but has the exclusive right to operate rail freight services on the infrastructure.

Railway Co has rights that enable it to have the day-to-day control and the operation of the track infrastructure. The rights under the contractual arrangements constitute a control right.

#### *Example 15*

Amelia, a florist, enters into an agreement for the short term use of a defined open area in a shopping centre. The agreement grants Amelia a licence to conduct her florist business in the area. Amelia sets up trestle tables for holding stock and preparing orders. The nature of the agreement and the area means she has limited ability to control the passage of people into the space, and is unable to lock the space or safely store stock when she is not present. She has no significant responsibility for maintenance or upkeep of that area of the shopping centre infrastructure.

Although the agreement permits Amelia to use the space, the nature of the space and her rights and obligations under the agreement do not enable her to have the day-to-day control of the licenced area. The rights under the agreement do not constitute a control right.

#### *Example 16*

Toll Road Co Pty Ltd enters into a public private partnership ('PPP') for the design, construction, maintenance and operation of a new toll road. Among the suite of rights granted to Toll Road Co at the time of entering into the PPP is the right to control and operate the toll road once it is constructed.

Although the grant of a new infrastructure control right is a dutiable transaction,<sup>31</sup> the grant of the right to control and operate a toll road that has not been constructed is not a dutiable transaction as the fixed infrastructure is not in existence.

After the toll road is constructed and operational, New Road Co Pty Ltd acquires 100 per cent of the shares in Toll Road Co. Toll Road Co's right to control and operate the toll road is a control right that will be included in Toll Road Co's land assets when determining if Toll Road Co is a landholder and calculating duty on the acquisition.

### **Fixed infrastructure access rights**

25. An access right authorises access to or use of land for a purpose related to the control, operation, use, construction, inspection, testing, maintenance or repair of fixed infrastructure or of things used in conjunction with fixed infrastructure, or any other purpose associated with fixed infrastructure.
26. A direct or indirect acquisition of an access right will only attract duty when the fixed infrastructure to which the access right relates, an estate or interest in the fixed infrastructure, or a control right relating to fixed infrastructure is also acquired.<sup>32</sup>

#### *Example 17*

For the railway network in Example 14, Railway Co holds a licence to use the land in the defined railway corridor. It may use the land for purposes associated with operating and maintaining the track infrastructure. The licence is an access right.

Railway Co grants Maintenance Co Pty Ltd a licence to access the railway corridor land to provide ongoing maintenance services for the track infrastructure. Although this licence is an access right, the grant of the licence is not a dutiable transaction because there is no related transaction for the track infrastructure or a control right relating to the track infrastructure.<sup>33</sup>

Railway Co enters into an agreement to transfer the access rights, along with the control rights referred to in Example 14, to Train Track Co Pty Ltd. The agreement to transfer the access rights is a dutiable transaction because the transaction includes the control right.<sup>34</sup>

#### *Example 18*

In relation to the power station in Example 13, Power Gen Co also holds a contractual licence over an area of land adjacent to the power station owned by Mining Co. The licence authorises Power Gen Co to use the area of land for accessing the power station so it can carry out the power station operations.

Although the power station is not located on the licenced area of land, the licence is an access right because the land is used to access the power station to carry out the power station operations.

Electricity Co Pty Ltd acquires 100 per cent of the shares in Power Gen Co. The value of the access right is taken into account in determining the entitlement of Power Gen Co to land assets for landholder duty purposes<sup>35</sup> because Power Gen Co's assets include the control right relating to the power station infrastructure.

<sup>31</sup> Duties Act ss 11(1)(f) and 17(1)(b)(iia).

<sup>32</sup> Duties Act ss 91C(1)-(4) and 204A.

<sup>33</sup> Duties Act s 91C(1)-(4).

<sup>34</sup> Duties Act s 91C(1) and (2).

<sup>35</sup> Duties Act s 204A.



### *Example 19*

Under the lease agreement for the retirement village unit in Example 2, Mike and Jan also acquire the right to use the common areas and communal facilities ('facilities area') in the retirement village in return for agreeing to pay a deferred fee at the conclusion of their lease. They share the right to use the facilities area with other retirement village residents.

The right to use the facilities area is not a control right as Mike and Jan do not have the day-to-day control of the fixed infrastructure.

Although the right grants access to the facilities area in the village and use of the fixed infrastructure in that area, the granting of that access right is not a dutiable transaction.<sup>36</sup> The lease agreement creates an estate or interest in the fixed infrastructure that is the retirement village unit, but this is not the fixed infrastructure to which the access right relates.

### *Example 20*

Lift Repairer Pty Ltd carries on a business of repairing and maintaining lifts. Tall Building Co Pty Ltd enters into a service agreement with Lift Repairer to maintain the lifts in its building. The service agreement permits Lift Repairer to access the building to inspect the lifts and carry out maintenance and repairs for a three-year period.

The building and the lift infrastructure are fixed infrastructure. The service agreement is an access right because it authorises access to the land on which the building is located for purposes related to the inspection, maintenance or repair of fixed infrastructure.

As the service agreement does not include fixed infrastructure, an estate or interest in fixed infrastructure, or a control right, the grant of the service agreement is not a dutiable transaction.

### *Example 21*

Andrew and Beverley own a freehold farming property. A neighbour grants them the right to access an area of the adjoining property to install their own pump and pipes and operate them to draw water from a dam on that property.

Although the right is an access right, the acquisition of the right is not a dutiable transaction because there is no transaction for fixed infrastructure, an estate or interest in fixed infrastructure or a control right.<sup>37</sup>

## ***Fixed infrastructure statutory licences***

27. A statutory licence is a permit or authorisation that is required by law to own, control, operate or use a thing fixed to land.
28. A direct or indirect acquisition of a statutory licence will only attract duty when the fixed infrastructure to which the statutory licence relates, an estate or interest in the fixed infrastructure, or a control right relating to fixed infrastructure is also acquired.<sup>38</sup>

### *Example 22*

Construction Co Pty Ltd is a landholder with assets that include a statutory licence authorising it to construct a gas pipeline that it will own. Prior to construction of the pipeline commencing, New Construction Co Pty Ltd acquires 100 per cent of the shares in Construction Co. As construction has not commenced, the land assets of Construction Co do not include the fixed infrastructure to which

<sup>36</sup> Duties Act s 91C.

<sup>37</sup> Duties Act s 91C.

<sup>38</sup> Duties Act ss 91C(1)-(4) and 204B.



the statutory licence relates. The statutory licence will not be treated as a land asset of Construction Co when calculating landholder duty.

### Example 23

Pipeline Co Pty Ltd owns fixed infrastructure in the form of gas pipeline infrastructure. Pipeline Co also holds access rights for the land on which the pipeline infrastructure is located. The fixed infrastructure is a land asset<sup>39</sup> and the access rights are taken into account when determining Pipeline Co's entitlement to land assets.<sup>40</sup> The land assets of Pipeline Co have a total value of \$2 million or more, which means Pipeline Co is a landholder.

Pipeline Operations Co Pty Ltd is a wholly owned subsidiary and a linked entity<sup>41</sup> of Pipeline Co. Pipeline Operations Co holds a statutory licence to operate the pipeline.

Gas Co Pty Ltd acquires 100 per cent of the shares in Pipeline Co. The statutory licence held by Pipeline Operations Co is treated as a land asset for the purpose of calculating duty on the acquisition because Pipeline Co is entitled to the fixed infrastructure to which the statutory licence relates.<sup>42</sup>

## Ruling history

Revenue Ruling	Issued	Dates of effect	
		From	To
DA 26.0	22 March 2021	22 March 2021	Current

<sup>39</sup> *land asset* includes land: Duties Act s148(1); *land* includes a thing fixed to land: Duties Act s 3A(1)(f).

<sup>40</sup> Duties Act s 204A.

<sup>41</sup> As defined in Duties Act s 156.

<sup>42</sup> Duties Act s 204B.