

# The Tax Summit

## Session 10.2: Contemporary issues with stamp duty

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Written By:

Geoff Mann, CTA  
Deloitte

Alina Fukuyama  
Deloitte

Presented By:

Geoff Mann, CTA  
Deloitte

# Contents

<b>1. Overview .....</b>	<b>3</b>
<b>2. A Short History of State/Territory Stamp Duty .....</b>	<b>4</b>
2.1    Carta, Cook, Colonies and Commonwealth .....	4
2.2    The Stamp Duty Rewrite Project .....	5
<b>3. Transfer Duty.....</b>	<b>7</b>
3.1    General Transfer Duty .....	7
3.2    Foreign Purchaser Surcharges.....	10
<b>4. Shift away from land transfer duty.....</b>	<b>15</b>
4.1    South Australia .....	15
4.2    Australian Capital Territory (ACT) .....	15
4.3    Victoria- Commercial and Industrial Property Tax .....	15
<b>5. Constitutional Challenges .....</b>	<b>17</b>
5.1    Double Tax Agreement non-discrimination- G Global .....	17
5.2    Vanderstock .....	17
<b>6. Exploration of Some Ongoing Problem Areas .....</b>	<b>19</b>
6.1    Land tenure/landholder duty rules .....	19
6.2    Interests in Trusts – Queensland and South Australia .....	30
6.3    Wholesale Unit Trusts.....	31
6.4    Landholder aggregation .....	36
6.5    “Control” provisions.....	37
6.6    Economic entitlements.....	37
6.7    Victorian Conversion duty.....	38
6.8    Sub-sales/double duty .....	38
6.9    Valuations .....	38
6.10    Corporate reconstructions .....	38
6.11    Insurance Duty.....	42

# 1. Overview

This paper examines the history of stamp duty, provides a comparative analysis of the current stamp duty framework across jurisdictions, highlighting variations in dutiable property definitions, rates, exemptions, and foreign purchaser surcharges, and explores targeted reform efforts, constitutional constraints and some ongoing problem areas.

Stamp duty is quite an old form of tax. Stamp duty had been consistently criticised for its economic inefficiency, distortionary impacts on real property transactions and housing and labour mobility, and complexity and compliance costs in multi-jurisdictional transactions. Yet it remains a significant revenue source for State and Territory governments.

The Stamp Duty Rewrite Project initiated in the 1990s aimed to modernise and harmonise duty regimes across jurisdictions. The Project might have achieved some greater consistency of form in legislation but the project ultimately fell short of achieving national uniformity, leaving taxpayers to navigate inconsistent rules and compliance burdens across states and territories. There have also been a range of changes since the Rewrite which have re-opened the gaps in uniformity.

Unless otherwise stated, legislative references are to the following Acts:

- Duties Act 1997 (NSW);
- Duties Act 2000 (VIC);
- Duties Act 2001 (QLD);
- Duties Act 2008 (WA);
- Duties Act 1999 (ACT);
- Duties Act 2001 (TAS);
- Stamp Duties Act 1923 (SA);
- Stamp Duty Act 1978 (NT).

## 2. A Short History of State/Territory Stamp Duty

### 2.1 Carta, Cook, Colonies and Commonwealth

Our timeline begins with *Carta*, that is, the Magna Carta, the big one, in 1215, from which the cry of "no taxation without representation" stems.

The first stamp duty is often credited to Holland in 1624 to finance a war against Spain, although there might be claimants to a slightly earlier start date<sup>1</sup>. The original scheme established a government monopoly over the supply of stamped paper for use in legal documents.

A similar scheme was established in England in 1694 during the reign of William (of Orange) and Mary (perhaps drawing on Dutch heritage), as a temporary tax for four years.

Then, we jump to Lieutenant James Cook and 1770 (he wasn't promoted to Captain until later) for effect only as he didn't really have anything to do with the imposition of taxes in Australia. There were no taxes in Australia (relating to European settlement at least) until later.

Governor Phillip's arrival with the First Fleet in 1788 saw the transportation of convicts to Australia, along with English law, as far as applicable, but this didn't seem to include taxes specifically for the new Colony of New South Wales.

The legislative power over the colony of New South Wales staggered along with some uncertainty, including in respect of taxes for the Colony, which perhaps commenced with taxes on the importation of tobacco and spirits. At one point this uncertainty over the power of local authorities to impose taxes was sought to be resolved by retrospective legislation of the Imperial Parliament to validate the imposition of the taxes.

Over the period 1825-1859, the other 5 Colonies that would become States upon Federation were formed.

By the time of Federation and the formation of the Commonwealth of Australia on 1 January 1901, the Colonies each had their own system of taxation, largely customs and excise but including stamp duty, which had been inherited from England.

Upon Federation, the Commonwealth of Australia Constitution Act 1900 (UK) provided for certain powers, including certain taxing powers, to be exclusive to the Commonwealth (eg customs and excise, Commonwealth places), placed certain restrictions on State taxing powers (eg no tax on property of the Commonwealth) and left both the States and the Commonwealth with the power to impose other taxes (eg income tax).

So, initially, what had been the main area of taxation by the Colonies, ie excise and customs, transferred exclusively to the Commonwealth. That left the States with income and other taxes, such as taxes on real property. We see that overtime there has been an effective reversal of that position, the evolution of the application and interpretation of the Commonwealth Constitution and the political interplay between the Commonwealth and the States and Territories leaving the Commonwealth with practical exclusivity over income tax and the States and Territories having the financial benefit of the largest customs and excise base, being GST.

The current state of play is what is called "vertical fiscal imbalance". This refers to the imbalance between the States and Territories to raise their own taxes as compared to the funds needed for the provision of services falling within their jurisdiction, while providing the Commonwealth with an "excess" from which it can dole money out to the State and Territories, exerting a degree of control in the process.

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<sup>1</sup> Dagnall, H (1997) Creating a Good Impression: three hundred years of the Stamp Office and stamp duties: London. HMSO. At page 100

The States and Territories have then been left with a rag bag of taxes, producing complexity, lack of uniformity and inefficiency, in trying to fund their operations outside of Commonwealth funding. Duty is arguably the most problematic of them all.

Traditionally, stamp duty was a tax on certain instruments; it was not as such a tax on transactions. An unstamped instrument was unavailable to be given in evidence: (eg s272 of the Duties Act 2000 (Vic)). Stamp duty and penalties for late stamping may be enforced by action in debt, there is an obligation to stamp within a particular time frame and a failure to do so involves an offence.

Another consequence of the traditional form of stamp duty was that if the transaction was not one which the law required to be in writing, it might be carried out without an instrument with the result that no stamp duty was payable. Gradually stamp duty has become a duty on transactions, overcoming the problem that there might be no instrument. Provisions aimed at imposing duty in such circumstances are sometimes referred to as "Clayton's contract" provisions (named after a non-alcoholic drink). Other specific anti-avoidance mechanisms have been used as well, such as requiring statements or returns to be provided which are then the dutiable instrument. Now we also have more general anti-avoidance provisions applying to particular areas of duty or taxes generally in some states/territories.

## 2.2 The Stamp Duty Rewrite Project

In 1993, the governments of Victoria, New South Wales, South Australia, Tasmania and the ACT agreed to a joint project to rewrite their respective stamp duty legislation. This project was initiated in response to requests led by the then Taxation Institute of Australia, for various reasons, including:

- the need for greater consistency across jurisdictions (8 sets of legislation)
- differences in construction/format (8 separate administrations)
- the need for better alignment with modern business practices
- to minimise the compliance burden
- to simplify the law.

Draft legislation, intended to replace the stamp duties laws in force at the time, was released in 1995. That led to the enactment of a new Duties Act in four of these jurisdictions. South Australia, originally a participant in the rewrite project, did not proceed with a complete rewrite. Queensland was not involved in this common rewrite process. Instead, it undertook its own separate rewrite project which resulted in the enactment of a new Duties Act in that jurisdiction in 2001. Western Australia and the Northern Territory were not formally involved in the Rewrite process. However, NT did a bit of a re-jig of its legislation in 2007 and WA also rewrote its Act in 2008.

The goal of the Rewrite was to modernise the legislative framework surrounding stamp duty, which had grown outdated, convoluted, and inconsistent across states. The rewrite focused on:

- Consolidating numerous exemptions and concessions
- Clarifying the treatment of modern commercial instruments (e.g., options, leases, digital documents)
- Addressing inconsistencies in the treatment of corporate groups and trusts
- Modernising language and removing obsolete concepts (e.g., physical stamping of documents)

The Rewrite Project achieved significant progress in some jurisdictions including the Duties Act 1997 (NSW) and Victoria's Duties Act 2000 (VIC) and spun off stand alone taxation administration legislation where that wasn't already present. However, the larger goal of national harmonisation of duty laws was never fully realised

as each state and territory continued to legislate and interpret stamp duty differently, leading to significant compliance burdens and legal ambiguity, especially for multi-jurisdictional transactions.

When Australia introduced the Goods and Services Tax (GST) on 1 July 2000, it represented an overhaul of the country's indirect tax system, aimed not only at replacing the federal wholesale sales tax but also at eliminating a number of inefficient state and territory taxes, including several stamp duties. The Commonwealth guaranteed that all GST revenue would be distributed to states, contingent upon their abolition of levies such as the Financial Institutions Duty, bank account debits tax, and stamp duties on marketable securities, credit arrangements, leases, bonds, and promissory notes. Consequently, the Financial Institutions Duty and debits tax were phased out and a suite of smaller stamp duties was also removed. Some areas slated for abolition remain though, eg duty on business assets, including goodwill and intellectual property, in Queensland and Western Australia. Real property-related stamp duties also largely remain, as states depended heavily on the significant revenues these taxes generate.

## 3. Transfer Duty

### 3.1 General Transfer Duty

Table 1 below contains a summary of the current state of transfer duty in each jurisdiction, noting that the type of property subject to duty differs across jurisdictions and the rates vary. Foreign purchaser surcharges are dealt with later.

Table 1: General Transfer Duty Summary

State / Territory	Dutiable property <sup>1</sup>	Top rate of duty
<b>VIC (note introduction of CIPT from 1 July 2024)</b>	Freehold interests in land, certain leasehold interests, economic entitlements, items fixed to land and goods (excludes registered motor vehicles and trading stock).	6.5%
<b>NSW<sup>2</sup></b>	Interests in non-residential land, goods (excludes registered motor vehicles and trading stock) and resource tenements (other than exploration tenements).	5.5%
	Interests in residential land and goods	7% <sup>3</sup>
<b>SA</b>	Interests in residential or primary production land.	5.5%
<b>WA</b>	Interests in land, items fixed to land, chattels, resource tenements, fixed infrastructure rights, derivative mining rights and business assets (including goodwill and intellectual property but not trading stock, trade debts and licensed motor vehicles). Includes rights in relation to dutiable property.	5.15% <sup>4</sup>
<b>QLD</b>	Interests in land, chattels, resource tenements and business assets (including goodwill, intellectual property, trading stock and trade debts). Includes rights in relation to dutiable property.	5.75%
<b>TAS</b>	Interests in land, goods (other than registered motor vehicles and trading stock) and resource tenements (other than exploration tenements).	4.5%
<b>ACT</b>	Interests in land and goods (commercial land but excludes registered motor vehicles). Interests in non-commercial land (residential/rural).	5% <sup>7</sup>
		4.54%
<b>NT</b>	Interests in land, chattels, goods (other than trading stock and trade debts) and resource tenements.	5.95%

**Footnotes**

<sup>1</sup>Goods and intellectual property are not dutiable unless under the same arrangement as another form of dutiable property in that jurisdiction. In addition, if only transferred with a lease, the value of the goods are potentially disregarded in NSW and Tas.

<sup>2</sup>From 16 January 2023 (including contracts signed between 11 November 2022 and 15 January 2023) eligible first home buyers who purchased a property up to \$1.5m were given the option to pay an annual property tax instead of transfer duty upfront when purchasing their home. The tax rate for owner occupiers is \$400 plus 0.3% of the property's unimproved land value. The tax rate for investors is \$1,500 plus 1.1% of the property's unimproved land value. The option was removed for contracts (and transfers not made pursuant to a contract) signed after 30 June 2023.

<sup>3</sup>A premium rate of 7% applies to transfers of residential land with a dutiable value exceeding \$3,721,000.

<sup>4</sup>Different lower thresholds apply to places of residence, rental homes and land on which a residence is constructed within five years from the date the liability to duty arose.

<sup>7</sup>A rate of 5% for commercial land value over \$2,000,000 applies while there is a nil rate for commercial land value up to \$2 million.

## 3.2 Foreign Purchaser Surcharges

Originally introduced to cool overheated property markets and increase housing affordability for locals, foreign purchaser surcharges seem to be now a permanent and growing component of many state tax systems. These apply to foreign individuals, companies, and trusts. Over the years there have been significant increases in surcharge rates. Some jurisdictions now provide for exemptions from the foreign purchaser duty surcharges where there is the requisite contribution to the state/territory economy, provision of additional housing stock for sale or for build to rent (BTR) projects. However, the treatment of foreign purchasers and the operation of these rules and exemptions varies across jurisdictions. Table 2 summarises the position.

There are also foreign owner land tax surcharges imposed in some jurisdictions (subject to some exemptions, including for BTR projects) but it is beyond the scope of this paper to explore that topic further.

**Table 2: Foreign Purchaser Additional Duty on Residential Land<sup>1</sup>**

<b>State/Territory</b>	<b>Additional Duty Rate</b>	<b>Residential Land</b>	<b>Foreign Corporations<sup>2</sup></b>	<b>Foreign Trusts<sup>3</sup></b>	<b>Special Rules<sup>4</sup></b>
VIC <sup>2</sup>	8%	<p>Land capable of being used solely or primarily for residential purposes.</p> <p>and on which person intends to construct residential premises.</p> <p>Excludes commercial residential premises (GST definition), a residential care facility, a supported residential service or a retirement village (as defined).</p>	<p>Corporation not incorporated in Australia; or</p> <p>More than 50% foreign control. (votes, potential shares and shares).</p> <p>Foreign interests aggregated.</p>	<p>More than 50% of the capital of the trust (substantial interest) held by foreign person(s);</p> <p>Foreign interests aggregated.</p>	<p>Foreign owners are required to notify change in intention (ie a foreign purchaser must advise in writing, within 14 days of forming the intention to convert property into residential property).</p>
NSW	9%	<p>One or more “dwellings”.</p> <p>Substantially vacant land zoned residential.</p> <p>Not primary production land.</p> <p>Excludes Hotel, Motel, Inn, Hostel, Boarding House, certain PBSA, Aged care and other care facilities, certain other short term commercial accommodation. (refer ruling G011)</p>	<p>Applies FIRB definition.</p> <p>“Substantial interest” of 20% or “aggregate substantial interest” of 40% for two or more foreigners.</p> <p>Holdings of less than 5% not aggregated if the corporation or trust has its primary listing on a stock exchange in Australia. Refer Ruling G009 at 26</p>	<p>“Substantial interest” of 20% of the income or property of the trust or “aggregated substantial interest” of 40% for two or more foreigners.</p> <p>Holdings of less than 5% not aggregated if the corporation or trust has its primary listing on a stock exchange in Australia. Refer Ruling G009 at 26.</p>	

State/Territory	Additional Duty Rate	Residential Land	Foreign Corporations <sup>2</sup>	Foreign Trusts <sup>3</sup>	Special Rules <sup>4</sup>
WA	7%	<p>Land capable of being, or intended to be, used solely or dominantly for residential purposes.</p> <p>Land that is vacant or substantially vacant and zoned solely for residential purposes.</p> <p>Any estate or interest in land as described above.</p> <p>Excludes land intended for aged care, commercial residential premises (GST definition) or a retirement village.</p>	<p>Corporation not incorporated in Australia; or</p> <p>Corporation where foreign persons have a controlling interest (ie 50% or more shares or voting rights or potential voting power held by foreign person(s) or their associates).</p>	<p>One or more foreign persons, with associates, hold beneficial interests in at least 50% of the income or property of the trust.</p>	
QLD	8%	<p>Land that is, or will be, solely or primarily used for residential purposes.</p> <p>Land on which residential development is being, or will be, undertaken</p> <p>Excludes certain types of commercial residential premises, eg hotels, motels and dormitory style student accommodation. Aged care, retirement villages, manufactured home parks and other student accommodation might be excluded but are considered on a case-by-case basis.</p>	<p>Corporation not incorporated in Australia; or</p> <p>One or more persons or related persons of foreign persons have 50% or more foreign control (votes, potential votes and shares).</p>	<p>50% or more of the trust interests in the trust are foreign interests.</p> <p>Foreign interests aggregated.</p>	<p>Three-year reassessment provision if acquirer becomes foreign controlled.</p>

State/Territory	Additional Duty Rate	Residential Land	Foreign Corporations <sup>2</sup>	Foreign Trusts <sup>3</sup>	Special Rules <sup>4</sup>
SA	7%	<p>Land used predominantly for residential purposes.</p> <p>Land not used for any particular purpose, but which should be taken to be used for residential purposes due to improvements that are residential in character.</p> <p>Vacant land zoned for residential use.</p> <p>Excludes Land used for commercial purposes (hotels, motels, serviced apartments and short-term unit accommodation), retirement village and aged care residential</p>	<p>Corporation not incorporated in Australia; or</p> <p>50% or more shares or voting rights held by foreign person(s).</p>	<p>50% or more of capital of the trust property held by one or more foreign persons.</p>	<p>One year reassessment provision if acquirer ceases to be a foreign person.</p> <p>Three-year reassessment provisions if acquirer becomes a foreign person.</p>
TAS	<p>Residential: 8%</p> <p>Primary production: 1.5%</p>	<p><u>Residential property:</u></p> <p>Land used solely or primarily for residential purposes.</p> <p>Land that is vacant and will be used solely or primarily for residential purposes.</p> <p>Land that includes a building intended to be refurbished and used solely or primarily for residential purposes.</p> <p>Land on which persons intend to construct a building to be used solely or primarily for residential purposes.</p>	<p>Corporation not Incorporated in Australia; or</p> <p>Corporation where foreign persons have a significant interest (ie 50% or more shares or voting rights or potential voting rights held by foreign persons (in aggregate)).</p>	<p>50% or more beneficial interest In trust estate by one or more foreign persons (taking their interests in aggregate).</p>	<p>Three year reassessment provision if acquirer becomes a foreign person.</p>

State/Territory	Additional Duty Rate	Residential Land	Foreign Corporations <sup>2</sup>	Foreign Trusts <sup>3</sup>	Special Rules <sup>4</sup>
TAS (continued)		<p>Land development for the purposes of constructing a building used solely or primarily for residential purposes.</p> <p>Excludes land on which a building is being lawfully used solely or primarily for commercial residential purposes, including residential care and retirement village.</p> <p><u>Primary production:</u></p> <p>Land used solely or primarily for primary production purposes.</p> <p>Land that a person intends to develop so the land is capable of being used solely or primarily for primary production purposes.</p>			

**Footnotes**

<sup>1</sup>The additional duty applies to any dutiable transaction where a foreign purchaser acquires land, and is in addition to the normal transfer duty rate. The additional duty also applies for relevant acquisitions by foreigners in landholders for landholder duty purposes.

<sup>2</sup>Different rules apply for corporations, trusts and individuals.

<sup>3</sup>Special rules apply to discretionary trusts.

<sup>4</sup>Exemptions may be available for property developers adding housing stock or operating businesses. A refund, exemption or concession might be available for build-to-rent projects. Please refer to our separate publication on build-to-rent duty and land tax concessions

## 4. Shift away from land transfer duty

### 4.1 South Australia

South Australia now only imposes transfer duty in respect of residential and primary production land.

### 4.2 Australian Capital Territory (ACT)

The ACT embarked on a tax reform initiative in 2012 aimed at phasing out stamp duty on real property transactions over a 20-year period and replacing it with a broad-based land tax in the form of increased general rates. This reform was designed to address the economic inefficiencies of stamp duty, which is widely considered a distortionary tax that impedes property market turnover and labour mobility.

Under the program, stamp duty rates are gradually reduced over time (a 20 year period), while property rates which are charged annually based on the unimproved value of land are incrementally increased.

The economic rationale for the reform is grounded in efficiency and stability. Stamp duties are volatile and heavily influenced by property market cycles, making them an unreliable revenue source. In contrast, annual land-based taxes are more predictable, less distortive, and economically efficient because they do not discourage productive activity or property transactions.

During the transition period, the ACT must maintain both systems, including the balance of reduced stamp duties and rising property rates. Political uncertainty over the two decade horizon poses a risk to the continuity of the reform, particularly as successive governments may be tempted to stall or reverse aspects of the policy.

Apart from Victoria, discussed below, it remains to be seen whether other Australian states will follow suit.

### 4.3 Victoria- Commercial and Industrial Property Tax

Effective from 1 July 2024, Victoria has introduced a regime to replace land transfer duty and landholder duty on certain commercial and industrial property with an annual property tax known as the Commercial and Industrial Property Tax (CIPT)<sup>2</sup>. Residential properties are excluded from the scope of this tax.

The CIPT regime was introduced via the Commercial and Industrial Property Tax Reform Act 2024 (Vic) (the CIPT Act), which included amendments to several other Acts, including the Duties Act 2000 (Vic) (the Duties Act) and the Taxation Administration Act 1997 (Vic).

Commercial and industrial properties will transition into the CIPT reform if there is an eligible dutiable transaction or relevant acquisition, defined in the Act as an entry transaction<sup>3</sup>. The transaction has to happen on or after 1 July 2024; it is made pursuant to an agreement entered into on or after 1 July 2024; and the property has a qualifying use under the Australian Valuation Property Classification Code (AVPCC). Additionally, certain subdivisions and consolidations of titles can also bring properties into the CIPT reform.

<sup>2</sup> Commercial and Industrial Property Tax – State Revenue Office Victoria Website.

<sup>3</sup> Part 2 Division 2 from *Commercial and Industrial Property Tax Reform Act 2024 Vic*

Duty applies to entry transactions, with possible concessions, such as a 50% concession for transfers of eligible commercial and industrial property in regional Victoria. However, not all dutiable transactions qualify as entry transactions.

CIPT applies to eligible properties sold on or after July 2024, with purchasers paying stamp duty once at the time of sale. After a 10-year transition period, an annual tax based on the unimproved land value becomes payable, provided the property maintains a qualifying use under the AVPCC and is not exempt from land tax.

The CIPT will apply on an annual basis, like land tax. The CIPT rate is currently set at 1% of the unimproved value of the land. A reduced rate of 0.5% applies to any build-to-rent land<sup>4</sup>. The unimproved value is set as of 1 January of the year before the relevant tax year, as for land tax.

CIPT will be in addition to land tax and any absentee owner surcharge (which is currently set at 4% on top of general land tax). The rate of CIPT does not differ for absentee owners. Land that is exempt land from land tax is not subject to CIPT.

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<sup>4</sup> Part 3 Division 1 from *Commercial and Industrial Property Tax Reform Act 2024 Vic*

## 5. Constitutional Challenges

### 5.1 Double Tax Agreement non-discrimination- G Global

The case of G Global 120E T2 Pty Ltd as trustee for the G Global 120E AUT v Commissioner of State Revenue raises significant constitutional and international law questions concerning the interaction between state taxation powers, international tax treaties, and federal legislative authority. The High Court has heard the matter but is yet to deliver its judgment.

The case concerns a challenge to the validity of Queensland's foreign land tax surcharge<sup>5</sup>, as applied to a foreign company or a trustee of a foreign trust. The appellant argued that the surcharge contravenes Article 24(4) of the German–Australian Double Taxation Agreement (DTA), which has been incorporated into Australian domestic law via the International Tax Agreements (ITAA)<sup>6</sup>.

Specifically, it was contended that the foreign surcharge imposes a more burdensome tax on an enterprise partly owned by German residents than on comparable Australian-owned enterprises, thereby breaching the non-discrimination provision of the treaty. Article 24(4) provides that a national of the other treaty country shall not be subjected in Australia to any taxation more burdensome on an enterprise partly owned by German residents than on comparable Australian owned enterprises.

The High Court is being asked to determine whether this inconsistency rendered the Queensland surcharge provision invalid under s 109 of the Constitution prior to the enactment of the Treasury Laws Amendment (Foreign Investment) Act 2024 (Cth). That Act inserted s5(3) into the ITAA, which clarified that bilateral tax treaty provisions do not override state or territory tax laws unless expressly stated. The High Court is being asked to determine whether this amendment validly removed any constitutional inconsistency and whether it was itself supported by a Commonwealth head of power. Additionally, the Court is considering whether the retrospective operation of s 5(3) constituted an acquisition of property other than on just terms, in contravention of s51(xxi) of the Constitution.

Previous to the amendment of the ITAA, the NSW State Revenue Office had acknowledged that its surcharge purchaser duty and surcharge land tax provisions were inconsistent with Australia's international tax treaties with several countries. The NSW State Revenue Office identified eight jurisdictions (New Zealand, Finland, Germany, India, Japan, Norway, South Africa, and Switzerland) whose citizens may be entitled to refunds or exemptions when purchasing residential land or property in their own capacity on or after 1 January 2021.

Some States have also taken legislative corrective action (with retrospective effect) to bolster arguments that the surcharges are valid. The effectiveness of those actions might be the subject of challenge as well.

### 5.2 Vanderstock

The High Court's decision in *Vanderstock v State of Victoria* [2023] HCA 30 represents a significant development in Australian constitutional law, particularly regarding the scope of state taxation powers. The plaintiff, *Vanderstock* challenged the State of Victoria's Zero and Low Emission Vehicle Distance-based Charge Act 2021 (Vic) ("ZLEV Charge Act) which imposed a charge on electric and low emission vehicles owners based on the distance they drove. The argument made was that this charge constituted a "duty of excise" under section 90 of the Constitution which holds power reserved exclusively to the Commonwealth to impose.

<sup>5</sup> Section 32(1)(b)(ii) of the Land Tax Act 2010 (Qld)

<sup>6</sup> Section 5(1) of the International Tax Agreements Act 1953 (Cth)

The High Court agreed with the plaintiffs, ruling that the charge was in fact an excise duty and therefore unconstitutional. In doing so, the Court broadened the interpretation of “excise” to include beyond distribution and first retail (which was the previously understood limitation on the meaning of “exercise” in s 90). A duty of excise now encompasses all taxes on goods at any stage of the life cycle including at their use or consumption. This decision has significant implications for state taxation powers, raising legal risks for other state-based charges and highlighting the constitutional limits on how states can raise revenue.

This expansion potentially exposes a wide range of state taxes to a similar challenge, for example:

- Transfer duty on the transfer on goods (or any other dutiable transaction relating to goods).
- Landholder duty on the indirect transfer of goods.
- Insurance duty on insurance related to goods.
- Duty on the sales of livestock (eg, Chapter 10 of Duties Act 2000 (Vic))
- Duty on applications for or transfers of motor vehicle registrations.

However, the Commonwealth, state and territory treasurers agree that a substantial decrease in state and territory revenue bases is not in the interests of the Australian federation. The Commonwealth is working beside states and territories to explore own-sourced revenue options and protect stable revenue bases. States and territories continue to work independently and collaboratively towards ensuring secure, efficient and equitable revenue streams. All treasurers agreed to continue working together to provide security and certainty for revenue to fund schools, hospitals, roads and other services and infrastructure across Australia.

The Commonwealth Treasurer notes the *Franchise Fees Windfall Tax (Collection) Act 1997* was introduced following a previous constitutional challenge to various business franchise fees on tobacco, alcohol, and petroleum products in the states. The Commonwealth windfall tax applied to claims for refunds in respect of those taxes collected prior to the challenge. The Commonwealth has indicated it will consider similar actions if required and take protective action if anyone challenges other taxes on the basis of the decision in *Vanderstock*.

The Commonwealth is also working co-operatively with the States and Territories on Federal EV road user charge.

## 6. Exploration of Some Ongoing Problem Areas

### 6.1 Land tenure/landholder duty rules

States and Territories have gradually broadened the definition of "land" for transfer duty purposes to include not only transfers of freehold real property but also:

- items fixed to land, regardless of whether those items are fixtures under the general law or whether they are able to be owned separately to the land
- Leases and sub-leases
- Easements, licenses, and options to acquire land
- Mining and exploration rights and rights to use infrastructure.

It is important to note that this differs from landholder duty purposes, where the extension of this concept applies across all the jurisdictions. The term is broader than the common law fixtures<sup>7</sup>. However, Victoria may allow for exemptions depending on the nature of the fixture and the circumstances of the transaction<sup>8</sup>

<sup>7</sup> Section 10(3) Vic; section 3A(1)(f) WA; section 80A(1) ACT; section 9(A)(1) Tas; section 4 definition of "land" NT; division 2(7) SA

<sup>8</sup> Section 57FA Vic

Table 3: Leases- Duty applied at transfer duty rates

State / Territory	Dutiable Transactions		
	Grant	Transfer	Surrender
VIC	<p>Yes, only if a lease for which any consideration (monetary or non-monetary) other than rent received is paid or agreed to be paid in respect of the lease or in respect of:</p> <ul style="list-style-type: none"> <li>a) A right to purchase the land or a right to a transfer of the land;</li> <li>b) an option to purchase the land or an option for the transfer of the land;</li> <li>c) a right of first refusal in respect of the sale or transfer of the land;</li> <li>d) any other lease, licence, contract, scheme or arrangement by which the lessee, transferee or assignee, or an associated person of the lessee, transferee or assignee, obtains any right or interest in the land that is the subject of the lease other than the leasehold estate.</li> </ul>	<p>Yes, only if a lease for which any consideration (monetary or non-monetary) is paid or agreed to be paid in respect of the lease or in respect of:</p>	<p>Yes, only if a lease of the type described under "Grant" or "Transfer" columns</p>
NSW	<p>The amount of duty payable is calculated by reference to the greater of the consideration and the unencumbered value of the land the subject of the lease.</p> <p>Yes, Duty applies on the grant of a lease for monetary and non-monetary consideration<sup>3</sup></p> <p>*grant of a lease for no consideration is not dutiable</p>	<p>Yes, Duty applies on the transfer of a lease in NSW</p>	<p>Yes, Duty applies on the surrender of lease in NSW</p>

State / Territory	Dutiable Transactions		
	Grant	Transfer	Surrender
SA	Yes, Duty applies on granting a lease of residential and primary production land if consideration is paid or agreed to be paid, other than rent reserved, for the lease.	Yes, Duty applies on transfers of leases of residential and primary production land.	Yes, Duty applies on the surrender of a lease of residential and primary production land if consideration is paid or agreed to be paid, other than rent reserved, for the lease.
WA	<p>Yes, for leases including a diversification lease, but not including a pastoral lease - if consideration is paid or agreed to be paid for the grant of the lease.</p> <p>For pastoral leases – if grant of the lease is subject to a payment of a sale price</p>	<p>Yes, only if consideration is paid or agreed to be paid for the transfer.</p>	<p>Yes, for leases other than a pastoral lease or diversification lease, if consideration is paid, or agreed to be paid, by the lessor for the surrender of the lease.</p> <p>For pastoral or diversification lease – if the surrender is made as part of agreement, arrangement or understanding that the new lease is to be granted to another person, and there is, or will be consideration for the surrender of the old lease and in the case where the new lease is a pastoral lease, the grant of the lease is not subject to the payment of a sale price, or in the case where the new lease is a diversification lease, there is not, and will not be, any consideration for the grant of the new lease.</p>

State / Territory	Dutiable Transactions		
	Grant	Transfer	Surrender
QLD	Yes, Duty <sup>3</sup> applies on an acquisition of new right, on its creation, grant or issue.	Yes, Duty <sup>3</sup> applies on the transfer of a lease.	Duty <sup>3</sup> applies on the surrender of dutiable property that is land in Queensland or a transferable site area. Except if: <ul style="list-style-type: none"> <li>there is no premium, fine or other consideration paid or payable for the surrender.</li> </ul> there is a premium, fine or other consideration paid or payable by the lessor.
TAS	Yes, Duty applies on a grant of an interest in land	Yes, Duty applies on the transfer of lease.  Duties only apply on the lease of land if a premium of more than \$3,000 is paid for or in connection with the grant, transfer or surrender of the lease	Yes, Duty applies on the surrender of an interest in land
ACT	Yes, only if in respect of Crown lease, declared land sublease and a commercial lease with premium <sup>4</sup> , where a premium is more than the amount determined by the commissioner.	Yes, Duty applies on the transfer of a Crown lease, a declared land sublease and a commercial lease with premium <sup>4</sup> .	N/A
NT	Duty is chargeable on the grant of a lease if, in addition to or instead of rent payable, valuable consideration is given for the lease or for the option under which the lease is granted. (except exempt leases under Schedule 2)	The transfer of a lease is considered a dutiable transaction	Surrender is dutiable as conveyance of dutiable property If the surrender: <ul style="list-style-type: none"> <li>results in an increase in the interest in the property</li> <li>removes a restriction to the property.</li> </ul> enables someone to convey the property to a third party.

**Footnotes**

<sup>1</sup>Excludes a Crown Lease, which are dutiable in the usual course as a transfer of land.

<sup>2</sup>Lease duty on rents (not being premiums) has been abolished in all States and Territories. Foreign surcharges may also apply to premiums on leases of residential land – see table for “Foreign Purchaser Duty”.

<sup>3</sup>There is a general dutiable value threshold of \$5,000 before duty is imposed. In addition, duty is not imposed on a surrender to the extent that consideration is provided by the lessor.

<sup>4</sup>Refer revenue circular DAA015.1

Table 4: Options

State / Territory <sup>1</sup>	Grant of call option	Grant of put/call option	Transfer or nominate call option	Transfer or nominate put/call option	Credit for duty on grant of option	Credit for duty on transfer of option	Put/call option is deemed land holding of landholder
<b>VIC (freehold land)</b>	Not dutiable	Not dutiable	Sub-sale provisions- Dutiable if additional consideration or land development on consideration /value of land (and goods)	Sub-sale provisions- Dutiable if additional consideration or land development on consideration /value of land (and goods)	N/A	No	Yes
<b>NSW (land)</b>	Dutiable by reference to option fee and other consideration	Dutiable by reference to option fee and other consideration	Dutiable by reference to consideration/value of option	If for consideration, dutiable by reference to consideration/value of land (and goods) <sup>2</sup>	No	Yes	Yes
<b>SA (dutiable land)</b>	Dutiable by reference to option fee and other consideration	Dutiable by reference to option fee and other consideration	Dutiable by reference to consideration/value of option	Dutiable by reference to consideration/value of option	No	No	Yes, including call option, but only by reference to the value of the option
<b>WA (dutiable property)</b>	Dutiable by reference to option fee and other consideration	Dutiable by reference to consideration/value of land	Dutiable by reference to consideration/value of option	Dutiable by reference to consideration/value of dutiable property	Yes, if option fee applied as consideration under contract	Yes for put/call	No

State / Territory <sup>1</sup>	Grant of call option	Grant of put/call option	Transfer or nominate call option	Transfer or nominate put/call option	Credit for duty on grant of option	Credit for duty on transfer of option	Put/call option is deemed land holding of landholder
QLD <b>(dutable property)</b>	Dutiable by reference to option fee and other consideration <sup>1</sup>	Dutiable by reference to option fee and other consideration <sup>1</sup>	Dutiable by reference to consideration/value of option <sup>1</sup>	Dutiable by reference to consideration/value of option <sup>1</sup>	Yes, if option fee applied as consideration under contract	No	No
TAS <b>(land)</b>	Not dutiable	Not dutiable	Dutiable by reference to consideration/value of option for land	Sub-sale provisions- Dutiable if additional consideration by reference to consideration/value of land (and goods)	N/A	No	No
ACT <b>(land)</b>	Not dutiable	Not dutiable	Dutiable by reference to consideration/value of option for land	Dutiable by reference to consideration/value of option for land	N/A	No	No
NT <b>(land)</b>	Dutiable by reference to option fee and other consideration	Dutiable by reference to consideration/value of land (and goods)	Dutiable by reference to consideration/value of option	Dutiable by reference to consideration/value of land (and goods)	Yes	No	No
<b>Footnotes</b>	<p><sup>1</sup> There is a general dutiable value threshold of \$5,000 before duty is imposed.</p> <p><sup>2</sup> It is possible for the transfer (or deemed transfer) of a put/call option to be dutiable both as a transfer of the option and as a transfer of the land</p>						

For landholder duty purposes, the extension of the definition of “land” to items fixed to land applies across all the jurisdictions, although the result can differ depending on the overall real property tenure situation. The defined term is broader than common law fixtures. Table 5 below shows the landholder duty transfer rates, noting that foreign purchaser surcharges can also apply.

Table 5: Landholder Duty (@ transfer duty rates unless indicated)

State / Territory	Land holdings value threshold	Acquisition threshold (ie % interest acquired that gives rise to duty)								Duty base	
		COMPANIES			TRUSTS						
		Listed <sup>1</sup>	Private	Listed <sup>1</sup>	Unlisted Widely held <sup>2</sup>	Wholesale Unit <sup>2</sup>	Pooled Public Investment Unit <sup>2</sup>	Private Unit	Land <sup>3</sup> and following “non-land” interests	Goods	
VIC	\$1,000,000 – land (other than fixed assets) \$2,000,000 – fixed to land	90%	50% <sup>4</sup>	90%	90%	50% <sup>4</sup>	No Category	20% <sup>4</sup>	Economic entitlements	X	
NSW	\$2,000,000	90%	50%	90%	90%	50%	No Category	20%	Resource tenements (other than exploration)	✓	
SA <sup>5</sup>	Nil	90% <sup>6</sup>	50% <sup>6</sup>	90% <sup>6</sup>	90% <sup>6</sup>	No Category	No Category	50% <sup>6</sup>	Only includes residential and primary production	X	
WA	\$2,000,000	90%	50%	90%	No Category	No Category	No Category	50%	Fixed infrastructure rights; derivative mining rights; resource tenements	✓	
QLD	\$2,000,000	90%	50%	90%	50% <sup>7</sup>	50% <sup>7</sup>	50% <sup>7</sup>	Nil <sup>7</sup>	Resource tenements	X	

State / Territory	Land holdings value threshold	Acquisition threshold (ie % interest acquired that gives rise to duty)								Duty base
		COMPANIES			TRUSTS					
		Listed <sup>1</sup>	Private	Listed <sup>1</sup>	Unlisted Widely held <sup>2</sup>	Wholesale Unit <sup>2</sup>	Pooled Public Investment Unit <sup>2</sup>	Private Unit	Land <sup>3</sup> and following “non-land” interests	Goods
TAS	\$500,000	90%	50%	90%	90%	No Category	No Category	50%	Resource tenements	✓
ACT	\$2,000,000	N/A	50%	N/A	N/A	No Category	No Category	50%	N/A	X
NT	\$500,000	90% <sup>8</sup>	50% <sup>9</sup>	90% <sup>9</sup>	No Category	No Category	No Category	50% <sup>9</sup>	Resource tenements	X
<b>Footnotes</b>	<p><sup>1</sup>Other than NSW, WA and NT, duty applies at a concessional rate of 10% of the ordinary transfer duty otherwise payable. However, duty will apply at the general rate if the entity has been listed for less than 12 months or been a widely held trust. This concessional rate does not apply to foreign purchaser residential land stamp duty surcharge in all jurisdictions. In NSW, foreign purchaser residential land stamp duty surcharge does not apply to landholder duty for public landholders. Further, in VIC the listing of a company or trust or becoming a widely held trust attracts duty at the concessional rate of duty.</p> <p><sup>2</sup>There are differing stamp duty specific requirements that must be satisfied in order to qualify as a “widely held”, “wholesale” or “pooled public investment trust”.</p> <p><sup>3</sup>Includes things “fixed to land” or items “fixed” or “attached” to land. Note also that an entity can be deemed to hold land and other assets not yet owned, e.g. under an uncompleted contract for sale or options and including where there is an uncompleted contract to acquire interests in other entities.</p> <p><sup>4</sup>Also includes the acquisition of certain economic entitlements and an acquisition of control.</p> <p><sup>5</sup>A separate regime (with no land value or acquisition threshold) applies to certain trusts.</p> <p><sup>6</sup>A proportionate interest includes a reference to voting rights and rights to dividends and distributions of income.</p>									

<sup>7</sup>Duty is imposed independently of the landholder duty regime on trust creations, acquisitions and surrenders where the trust directly or indirectly holds any dutiable property.

<sup>8</sup>The threshold may be 50% for a “merger vesting” of shares or units, and also includes an acquisition of control.

<sup>9</sup>Also includes an acquisition of control.

This extension of the concept of “land” and the types of transactions involving land that are subject to duty is particularly important in the context of general infrastructure and renewable energy projects. These projects involve varying land tenure arrangements over time but might not require the ownership of freehold land. These projects also have a life cycle that might involve changes in direct and/or indirect ownership over time as the development of assets occurs.

## 6.2 Interests in Trusts – Queensland and South Australia

### *Queensland*

In Queensland, only dealings in listed unit trusts are dealt with under the landholder rules<sup>9</sup>. Dealings in other trust interests are not dealt with in the landholder rules but are subject to duty under the transfer duty provisions.

Those provisions impose duty on the creation<sup>10</sup> or termination<sup>11</sup> of a trust of dutiable property, or a trust acquisition or trust surrender<sup>12</sup>.

Unless the trust is a public unit trust, any trust acquisition or trust surrender is dutiable if the trust holds dutiable property in Queensland or has an indirect interest in dutiable property. A trust is taken to hold dutiable property through interests held via other interposed trusts or partnerships<sup>13</sup>. Note that dutiable property is not restricted to interests in land in Queensland and may include Queensland business assets<sup>14</sup> or a significant interest in a landholding corporation<sup>15</sup>.

These provisions generally do not apply to a public unit trust. However, a majority trust acquisition (i.e. 50% or more) in a wholesale unit trust or a pooled public unit trust that holds, or has an indirect interest in, land in Queensland is dutiable<sup>16</sup>.

A public unit trust includes<sup>17</sup>:

- A listed unit trust<sup>18</sup>;
- A widely held unit trust<sup>19</sup>;
- A wholesale unit trust<sup>20</sup>;
- A pooled public unit trust; or
- A declared public unit trust<sup>21</sup>

A trust acquisition that results in a trust ceasing to satisfy requirements of a widely held trust, a wholesale unit trust or a pooled public unit trust is potentially subject to duty<sup>22</sup>.

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<sup>9</sup> Section 165A Qld

<sup>10</sup> Section 53 Qld

<sup>11</sup> Section 54 Qld

<sup>12</sup> Section 56 Qld

<sup>13</sup> Section 58 Qld

<sup>14</sup> Section 35 Qld

<sup>15</sup> Section 498 Qld

<sup>16</sup> Section 49(2) and section 80 Qld

<sup>17</sup> Section 68 Qld

<sup>18</sup> Defined in section 69 Qld.

<sup>19</sup> Defined in section 70 QLD. This requires units to have been offered to the public and there must be at least 50-unit holders

<sup>20</sup> Defined in section 72 Qld. Essentially a wholesale trust must be established by a recognised funds manager solely for the purposes of investments by institutional or professional investors

<sup>21</sup> Section 79 Qld. A declared public unit trust is declared by regulation

<sup>22</sup> Section 70(2) Qld, section 72(3)(b) Qld, section 75(2) Qld

### *South Australia*

South Australia imposes duty on an instrument relating to any of the following transactions:

- a transfer of property to a person who takes as trustee; or
- a declaration of trust; or
- the creation of an interest in property subject to a trust; or
- a transfer of an interest in property subject to a trust; or
- the surrender or renunciation of an interest in property subject to a trust; or
- the redemption, cancellation, or extinguishment of an interest in property subject to a trust.

These provisions do not apply to a unit trust scheme, or financial products as defined<sup>23</sup>.

## 6.3 Wholesale Unit Trusts

As indicated above, the acquisition threshold for “wholesale unit trusts” increases from 0 or 20% to 50% in Victoria, New South Wales and Queensland. Achieving “wholesale unit trust” status can be beneficial as allowing trading in the units in the trust more freely without duty being applicable. The criteria for what is a “wholesale unit trust” and the rules applicable to determining the duty on a dutiable acquisition differ. It is not always easy to determine the status of a trust from the outside and it might be necessary to seek confirmation of the status from the fund manager.

### New South Wales

In New South Wales, wholesale unit trusts that meet the qualifying criteria must be registered with the Chief Commissioner and are subject to a registration application fee of \$10,000. To register a unit trust scheme as a wholesale unit trust, the following conditions must be satisfied<sup>24</sup>:

- The trust is not established for the benefit of a particular investor;
- At least 80% of the units in the scheme are held by qualified investors;
- No qualified investor, either individually or together with associated persons, holds 50% or more of the units in the scheme; and
- Any additional requirements as may be prescribed by the Chief Commissioner by way of gazettal.

Qualified investors include a range of institutional entities, such as large superannuation funds, large deposit funds, listed companies, life insurance companies, and statutory bodies<sup>25</sup>.

A unit trust scheme that does not yet meet these criteria may still be registered, provided it is expected to comply within 12 months of application. Registration is valid for a period of three years where upon expiry, the scheme must reapply to the Chief Commissioner for renewal of its registration. The responsible entity of a registered wholesale unit trust is obligated to notify Revenue NSW within 28 days of becoming aware of any disqualifying event that affects the trust's eligibility for registration<sup>26</sup>.

### Victoria

To qualify for registration as a wholesale unit trust scheme in Victoria, the following criteria must be satisfied<sup>27</sup>:

- The trust is not established or conducted for the benefit of a particular investor;

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<sup>23</sup> Section 71 (14a)

<sup>24</sup> Section 157AC NSW

<sup>25</sup> Refer to Section 157AB NSW for detailed criteria of a ‘qualified investor’

<sup>26</sup> Section 157AG

<sup>27</sup> Section 89S Vic

- The trustee holds (directly or indirectly) an interest in at least three parcels of land, with at least two of those having an unencumbered value of \$10 million or more; or the scheme has at least six-unit holders (not associated persons), each with a minimum subscription of \$3 million;
- At least 70% of the units in the scheme are held by qualified investors<sup>28</sup>;
- No qualified investor (alone or with associated persons) holds 50% or more of the units in the scheme;
- Registration is not sought for the purpose of avoiding or reducing duty otherwise chargeable under this Part.

A disqualifying circumstance arises in relation to a registered wholesale unit trust scheme if the scheme no longer meets the criteria for registration; or there is a failure or contravention by the scheme (or its trustee) to comply with a condition of registration. A failure to follow a registration rule won't be considered a disqualifying event if the Commissioner decides that it wouldn't be fair or reasonable to apply the disqualification in that situation.

#### Queensland

A unit trust will be classified as a wholesale unit trust in Queensland if it satisfies all of the following criteria<sup>29</sup>:

- The trust is a unit trust other than a listed unit trust
- Is established and managed by a funds manager;
- Is not established or managed for a particular person; and
- Is operated solely for the investment of funds placed by wholesale investors through the funds manager's services.

These conditions must be met both before and after any acquisition or surrender of units.

There is no registration requirement.

A funds manager<sup>30</sup> is defined as:

- Provides funds management and investment services to wholesale investors<sup>31</sup> as its principal business;
- Manages funds of more than \$500 million (alone or as part of a group);
- Does not provide services solely to particular wholesale investors; and
- Is recognized by other funds managers as a competitor in the wholesale funds management market.

If the criteria for registration as a wholesale unit trust are not met, consideration should be given to whether the trust may instead qualify as a pooled public investment unit trust under the relevant provisions.

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<sup>28</sup> Refer to Section 89P Vic for detailed criteria of a 'qualified investor'

<sup>29</sup> Section 72 Qld

<sup>30</sup> Section 73 Qld

<sup>31</sup> Refer to Section 74 Qld for detailed criteria of a 'wholesale investor'

**Table 6: Wholesale Unit Trust Qualifying Investor**

State / Territory	Qualifying Wholesale Investor
New South Wales <sup>1</sup>	<p>In this division, a qualified investor in a unit trust scheme, means a person who holds units in the scheme:</p> <ul style="list-style-type: none"> <li>a) as trustee of a complying superannuation fund that has no less than 300 members</li> <li>b) as trustee of a complying approved deposit fund that has no less than 300 members</li> <li>c) as trustee of a pooled superannuation trust</li> <li>d) as trustee of a public unit trust scheme</li> <li>e) as trustee of a wholesale unit trust scheme</li> <li>f) as a listed company</li> <li>g) as a life company if the company's holding of the units is an investment of a statutory fund maintained by the company under the Life Insurance Act 1995 of the Commonwealth</li> <li>h) as the Crown, including a statutory body representing the Crown, in right of the Commonwealth, a State or Territory</li> <li>i) as, for or on behalf of an entity established and wholly owned by a government agency of the Commonwealth, a State or Territory and primarily used for the purpose of meeting statutory government liabilities or obligations</li> <li>j) as agent, nominee or custodian for a person or entity referred to in paragraphs (a)–(i) and in accordance with the person's terms of appointment as agent, nominee or custodian</li> <li>k) as custodian or trustee for an investor directed portfolio service if: <ul style="list-style-type: none"> <li>i) the custodian or trustee holds its interest in the unit trust scheme for no less than 300 clients as investors through the service, and</li> <li>ii) none of the clients, individually or together with an associated person, are beneficially entitled to more than 20% of the units held</li> </ul> </li> <li>l) in a way approved by the Chief Commissioner if the Chief Commissioner is satisfied that: <ul style="list-style-type: none"> <li>i) the way the units are held corresponds to paragraphs (a)–(j) under the law of an external Territory or of a foreign country, or</li> <li>ii) the units are held as a wholly owned subsidiary or wholly owned trust of the trustee of a complying superannuation fund that has no less than 300 members</li> </ul> </li> </ul>

State / Territory	Qualifying Wholesale Investor
Victoria <sup>2</sup>	<p>A qualified Investor in a unit trust scheme means a person who holds units in the unit trust scheme in any of the following capacities –</p> <ul style="list-style-type: none"> <li>a) As trustee of a complying superannuation fund that has no less than 300 members;</li> <li>b) As trustee of a complying approved deposit fund that has no less than 300 members;</li> <li>c) As trustee of a pooled superannuation trust;</li> <li>d) As trustee of a public unit trust scheme;</li> <li>e) As trustee of a wholesale unit trust scheme;</li> <li>f) As a listed company;</li> <li>g) As a life company, if its holding of the units in the unit trust scheme is an investment of a statutory fund maintained by it under the Life Insurance Act 1995 of the Commonwealth;</li> <li>h) As the Crown in right of the Commonwealth, a State or a Territory (including any statutory body representing the Crown in right of the Commonwealth, a State or Territory);</li> <li>i) As, for or on behalf of an entity established and wholly owned by a government agency of a State or Territory or the Commonwealth and primarily used for the purpose of meeting statutory government liabilities or obligations;</li> <li>j) As agent, nominee or custodian for a person or entity referred to in any of the preceding paragraphs, in the capacity as such an agent, nominee or custodian and in accordance with the terms of appointment of the agent, nominee or custodian;</li> <li>k) As custodian or trustee for an investor directed portfolio service, within the meaning of the relevant ASIC policy statement, if the custodian or trustee holds its interest in the unit trust scheme of no less than 300 clients as investors through the service, none of whom (individually or together with any associated person) is beneficially entitled to more than 20% of the units held by the custodian or trustee in the unit trust scheme;</li> </ul> <p>In a capacity approved by the Commissioner (being a capacity which corresponds to a capacity referred to in paragraph (a), (b), (c), (d), (e), (f), (g), (i) or (j) above under the law of an external Territory or of a country outside Australia, or the capacity is as a wholly owned subsidiary (within the meaning of the Corporations Act) or wholly owned trust of a person in that capacity.</p>
Queensland <sup>3</sup>	<p>A “wholesale investor” is:</p> <ul style="list-style-type: none"> <li>a. A funds manager (other than the funds manager that established and manages the trust) investing funds for another wholesale unit trust managed by the funds manager; or</li> <li>b. The trustee of another wholesale unit trust investing funds of another wholesale unit trust managed by the trustee; or</li> <li>c. The trustee of a superannuation fund under the Superannuation Industry (Supervision) Act 1993 (Cth) which has more than \$10,000,000 in assets; or</li> </ul> <p>A person who has more than \$10,000,000 invested in wholesale unit trusts.</p>

**Footnotes**

<sup>1</sup>Section 157AB NSW

<sup>2</sup>Section 89S Victoria

<sup>3</sup>Section 74 Qld

## 6.4 Landholder aggregation

Interests of associated persons or related persons can be aggregated when determining whether a relevant acquisition has been made under the landholder provisions or whether a trust satisfies the various definitions of a public unit trust (in particular the spread of ownership requirements)

The concept of associated persons or related persons is particularly broad and can apply to aggregate interests of in circumstances that are not necessarily readily apparent.

As an example, in Victoria, a related person means a person who is related to another person in accordance with any of the following provisions:

- a) natural persons are related persons if one of them is a relative of the other;
- b) companies are related persons if they are related bodies corporate within the meaning of the Corporations Act;
- c) a natural person and a company are related persons if the natural person is a majority shareholder or director of the company or of another company that is a related body corporate of the company within the meaning of the Corporations Act;
- d) a natural person and a trustee are related persons if the natural person is a beneficiary of the trust (not being a public unit trust scheme) of which the trustee is a trustee;
- e) a company and a trustee are related persons if the company, or a majority shareholder or director of the company, is a beneficiary of the trust (not being a public unit trust scheme) of which the trustee is a trustee;
- f) persons are related persons if one of those persons is a related person of a person of whom the other of those persons is a related person (including a person that is a related person of the other of those persons because of one or more other applications of the paragraphs in this definition).

An associated person in Victoria means a person who is associated with another person in accordance with any of the following provisions<sup>32</sup>:

- a. "persons are associated persons if they are related persons,
- b. ...;
- c. Companies are associated persons if: there are minority shareholders common to each company who, if their interests were aggregated, would be majority shareholders in each company; or any major shareholder or relative shareholders in each company
- d. trustees are associated persons if any person is a beneficiary common to the trusts (not including a public unit trust scheme) of which they are trustees;
- e. a company and a trustee are associated persons if the company or a related body corporate of the company is a beneficiary of the trust (not including public unit trust scheme) of which the trustee is a trustee;
- f. ...;
- g. trustees of unit trust schemes are associated persons if the units in each of the unit trust schemes are "stapled", in that they are unable to be traded other than as if they together represented a single security;
- h. a qualified investor and a private company are associated persons if the qualified investor is a majority shareholder in the private company,
- i. a qualified investor and the trustee of a private unit trust scheme are associated persons if the qualified investor holds 20% or more of the units in the private unit trust scheme;
- j. trustees are associated persons if one of the trustees is a beneficiary of the trust (not including a public unit trust scheme) of which the other trustee is a trustee;
- k. persons are associated persons if one of those persons is an associated person of a person of whom the other of those persons is an associated person (including a person that is an associated person of the other of those persons because of one or more other applications of the paragraphs in this definition)."

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<sup>32</sup> Section 3(1) Victorian definition of associated persons

In addition, interests may be aggregated if interests are acquired under an associated transaction.

In Victoria associated transaction, in relation to the acquisition of an interest in a landholder by a person, means an acquisition of an interest in the landholder by another person in circumstances in which—

- those persons are acting in concert; or
- the acquisitions form, evidence, give effect to or arise from substantially one arrangement, one transaction or one series of transactions.

Note that in other jurisdictions, associated transactions are picked up in definition of “related persons”. How the aggregation applies in relation to related persons and associated transactions can differ between jurisdictions and requires close consideration in relation to any particular transaction. In New South Wales, the associated transaction is required to be under an arrangement between the acquirers, an important distinction.

The case of Oliver Hume Property Funds (Broad Gully Rd) Diamond Creek Pty Ltd v Commissioner of State Revenue [2024] VSCA 175, broadens the scope of what may be considered dutiable under landholder provisions . The applicant, a special purpose vehicle for a property development in Diamond Creek, issued 1.8 million shares to 18 investors in July 2014 after raising the targeted \$1.8 million. Although the investors were unrelated, their acquisitions formed part of a single capital-raising arrangement. The Victorian Court of Appeal upheld the Commissioner’s decision that share acquisitions by these unconnected investors were dutiable as an “associated transaction”. The Court held that the definition of an “associated transaction” focuses on the relationship between the acquisitions and the arrangement, not on the individuals involved. The assessment is based on the objective terms and circumstances surrounding the acquisitions, including any connection or interdependence between them. Therefore, investing in landholding entities may face landholder duty if their acquisitions are part of a coordinated arrangement, as decided in the Oliver Hume case.

## 6.5 “Control” provisions

It should be noted that the landholder rules in Victoria and the Northern Territory contain provisions that apply landholder duty to the acquisition of “control” of certain landholders. These provisions can apply in circumstances where the requisite ownership interest in landholder hasn’t been obtained to trigger landholder duty under the general relevant acquisition rules.

In the case of Tao v Commissioner of State Revenue [2024] VCAT 637, under appeal, it was held that the appointment of a new sole director of a trustee company resulted in acquisition of control of the unit trust which was subject to duty based on an 85% interest in the underlying land (reduced from 100% to reflect the director’s prior economic interest in the land).

Another example of the acquisition of “control” could be where an indirect interest of greater than 50% is acquired in a landholder entity through acquisition of several non-landholding entities.

## 6.6 Economic entitlements

The transfer duty and landholder duty rules in Victoria contain provisions which treat the obtaining of defined “economic entitlements” to be acquisitions of land or acquisitions of interests in a landholder and subject to duty.

These rules are complex. Helpfully, the Victorian State Revenue Office has recently issued several rulings/draft ruling dealing with the transfer duty rules ( see DA-065, DA-066 and draft ruling DA-067).

## 6.7 Victorian Conversion duty

Unique to Victoria, if, under an agreement or an arrangement, a landholder that is a private unit trust scheme, a wholesale unit trust scheme or private company becomes, through whatever means, a public unit trust scheme or a listed company, there is deemed to be a single acquisition of 100% in the public unit trust scheme or listed company. Duty is only charged at the rate of 10% of the duty that would otherwise be chargeable on a transfer of all the land holdings of the landholder in Victoria (calculated on the unencumbered value of the land holdings at the date of the relevant acquisition).

## 6.8 Sub-sales/double duty

An area where unexpected and unnecessary liability can arise is in the scenario of purchaser under a contract for the sale of land deciding that they want the land to be held by another entity going forward. This could involve a nomination of that other entity to be the transferee of the land on completion of the contract. Depending on the jurisdiction and the circumstances, the nomination of the other entity as transferee can result in duty being paid twice on the value of the land.

A transfer to another entity post-completion of the initial purchase could also result in another layer of duty for which no exemption or relief is available.

While the above scenarios might seem to raise obvious duty concerns, a perhaps less obvious issue is where the ownership of a purchaser/transferee entity changes after entering the contracts or being nominated as the transferee. As the purchaser/transferee will be deemed to be the owner of the land the subject of the uncompleted contract, the landholder rules can apply to the changes in ownership, again resulting in another layer of duty.

In Victoria, the impact of CIPT also needs to be taken into account, in particular the transitional rules, to ensure that transfers of land and changes in ownership of entities does not result in duty of more than 100% on the value of the land involved.

## 6.9 Valuations

As duty can be determined by reference to market value and is not limited to the transaction price, particularly in the landholder duty context, there is plenty of scope for disagreement to arise between taxpayers and revenue authorities.

It is recommended that the valuers engaged be properly instructed as to what is required for duty purposes, having regard to the nature of the assets involved, decided cases, relevant provisions of the duties legislation and any revenue authority guidance/requirements. It should also be taken into account that the valuer might be required to appear before a tribunal or court to assist in defending the values adopted.

A valuation report I reviewed recently included a disclaimer that said it was not to be provided to any revenue authority. Another valuer was then required to be engaged.

## 6.10 Corporate reconstructions

All jurisdictions have some form of exemption or concession for transactions involving a transfer of assets between members of a corporate group or other types of corporate reorganisation. However, Corporate reconstruction relief applies inconsistently across jurisdictions. Some states treat relief as a concession, not an exemption, meaning partial duty may still apply. (see Table 6 below). The differing approaches increase

administrative costs and can discourage restructures that would otherwise occur for operating efficiency reasons.

A recent example of the Revenue taking a narrow view of the corporate reconstruction concession, unsuccessfully at this stage, can be found in *Big Ben Holdings Pty Limited c Chief Commissioner of State Revenue [2002] NSWSC 984*.

Table 7: Corporate Reconstruction Relief

State / Territory <sup>1</sup>	Pre-Association Period	Pre-Association Period Exception for New Co	Post-Association Period	Post-Association Period Exception for Public Float <sup>2</sup>	Post-Association Period Exception if transferor / transferee cases to exist	Corporate Consolidation Relief	Top-hatting with Trust	Staple as Corporate Group
VIC	Nil	N/A	Nil	N/A	N/A	Yes	Yes, limited to listed staples (s250I )	Yes, but for listed staples only
NSW	Nil	N/A	Nil	N/A	N/A	Yes	Yes	Yes
SA	Nil	N/A	Nil	N/A	N/A	No	N/A	No
WA	Nil	N/A	3 years <sup>3</sup>	N/A	Yes <sup>8</sup>	Yes	Yes	Yes
QLD <sup>4</sup>	3 years	Yes <sup>5</sup>	3 years	Yes	Yes <sup>9</sup>	Yes	Yes, limited circumstances (s193A)	No
TAS	12 months	Yes <sup>6</sup>	12 months	Yes	Yes	Yes <sup>7</sup>	Yes	Yes
ACT	12 months	Yes <sup>6</sup>	12 months	Yes	Yes	No	No	Yes, but for listed staples only
NT <sup>3</sup>	3 years	Yes <sup>5</sup>	3 years	Yes	Yes <sup>10</sup>	Yes	No	No
	<p><sup>1</sup>In Victoria and NSW, the relief provides for a 90% concession of the duty otherwise payable. Otherwise, it is a complete exemption. In jurisdictions other than Vic and Tas, a pre-determination as to the application of the concessions can be obtained, although it may be possible to apply for a private ruling where the availability of relief is uncertain in Victoria. Some jurisdictions have strict time limits for making an application for the concession/exemption. In addition, while this table highlights the more common requirements and limitations, each jurisdiction has additional criteria which must be met to qualify for relief.</p> <p><sup>2</sup>There are limited other exceptions to the post-association requirement in all jurisdictions, eg liquidation.</p>							

<sup>3</sup>Potentially only a notification requirement. In addition, the post-association requirement is limited to a more than 50% association and not the 90% applicable to the forming of the group.

<sup>4</sup>Corporate reconstruction relief does not generally apply to transactions to/from a trust.

<sup>5</sup>Only if NewCo is the immediate subsidiary of the transferor or an interposed new head company.

<sup>6</sup>The entities must have been members of the same corporate group since incorporation, unless NewCo was acquired as a shelf company.

<sup>7</sup>Although, there are known technical difficulties in how the provisions operate.

<sup>8</sup>The “controlling entity” (ie parent entity of the corporate group for reconstructions, head entity for consolidations) cannot be wound up unless more than 50% of the securities and voting control of the transaction group remains held by the “major holder”.

<sup>9</sup>The exception also applies if less than 5% of the value of the property held, directly or indirectly, by the company that ceases to be a group company is dutiable property.

<sup>10</sup>The exception also applies if the group corporation that ceases to be in the corporate group held no assets (other than cash) immediately prior to the cessation.

## 6.11 Insurance Duty

Insurance duty is a state and territory-based tax applied to insurance premiums where the rate and scope of the duty vary across jurisdictions.

Currently, Australian Capital Territory is the only jurisdiction that has abolished all types of insurance duty. Other jurisdictions such as the Victoria, Western Australia, and Northern Territory have abolished duty on life insurance, except in cases where a life insurance rider may be attached, in which case the rider is treated as a general insurance for duty purposes. The remaining states apply a 5% duty on the first year's life insurance policy premium, excluding South Australia, who imposes a 1.5% duty on the premium. Please refer to Table 4.

General insurance refers to all types of insurance other than life insurance, covering property and risks arising from acts or events occurring wholly or partly within a specific state. In Victoria, Western Australia, and the Northern Territory, life insurance riders are classified as part of general insurance. General insurance duty rates range from 2.5% to 11% and the specifics are listed in Table 5.

When an insurance policy covers properties across multiple jurisdictions, any risk that could arise in more than one jurisdiction or insures lives with principal places of residence in different locations, the duty will be apportioned between the relevant jurisdictions based on the Schedule of Apportionment<sup>33</sup>.

In the context of super fund mergers (where members of a terminating fund become members of a continuing fund in return for the assets of the terminating fund being transferred to the continuing fund), there is a need to deal with the insurance arrangements that apply to the members of the terminating fund and to consider the arrangements that will apply to both old and new members of the continuing fund.

Care must be taken as to the legal form of the arrangements made in respect of the insurance policies. While the transfer of an insurance policy in these circumstances would not be subject to transfer duty, the creation of a new policy or the addition of members to an existing policy could result in insurance duty. The duty relief that might be provided for super fund mergers does not extend to insurance duty. The policy for those concessions for super fund mergers would seem to indicate there should be relief from additional insurance duty arising in these circumstances.

Similarly, amendment of terms of insurance policies for various reasons raise a concern as to whether those changes result in the creation, issue or effecting of a new policy, subject to duty. Where the proposed amendments affect fundamental elements of the policy, it might be argued that the changes give effect to a new policy or contract in respect of which duty will arise. However, it could also be argued that the nature of life policies is such that it is intended that the policy will be required to be amended or varied from time to time, and policies typically provide broad powers to vary policy terms. A detailed review of any proposed changes should be undertaken to determine whether there is a new policy created which gives rise to duty.

Given the variance and scale in general insurance duty rates across jurisdictions, including the gradual abolition of duty on certain business insurance in Victoria, we recommend insureds, as well as insurers, regularly check the basis for calculation of duty on their insurance policies.

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<sup>33</sup> E.g. NSW Ruling DUT 038; Vic Revenue Ruling DA-042

Table 8: Life Insurance

State/ territory	Temporary/term insurance policy	Trauma/disability insurance policy	Group term insurance policy	Other insurance policies
NSW <sup>1</sup>	5% of the first year's premium on the policy	5% of the premium paid to affect the insurance.	5% of the first year's premium on the policy <b>and</b> 5% of premium payable in any succeeding year in respect of each additional life covered by the insurance policy (if any).	<ul style="list-style-type: none"> <li>On the first \$2,000 or part of \$2,000 of the sum insured - \$1.</li> <li>And for every \$200, or part of \$200, more than the first \$2,000 – 20 cents</li> <li>Life Insurance Rider: 5% of the first year's premium on the policy.</li> </ul>
QLD <sup>2</sup>	5% if the first year's premium	Other life insurance: <ul style="list-style-type: none"> <li>if the sum insured is not more than \$2,000 : 0.05% of the sum insured <b>or</b></li> <li>if the sum insured is more than \$2,000 :               <ul style="list-style-type: none"> <li>0.05% of the first \$2,000 <b>and</b></li> <li>0.1% of the balance of the sum insured.</li> </ul> </li> <li>Life insurance rider (attached to a policy of life insurance and provides for an additional capital payment): Class 2 general insurance, 9% of the premium or part of the premium to affect the insurance.</li> </ul>		
TAS <sup>3</sup>	5% if the first year's premium on the policy	<ul style="list-style-type: none"> <li>Mortgage insurance policy : 2% of the premium on the policy.</li> <li>Other:               <ul style="list-style-type: none"> <li>if the sum insured does not exceed \$2 000, 10 cents per \$200, or part, of the sum insured <b>or</b></li> <li>if the sum insured exceeds \$2 000, \$1 plus 20 cents per \$200, or part, of the sum insured that exceeds \$2 000.</li> </ul> </li> <li>Life insurance rider (attached to a policy of life insurance and provides for an additional capital payment): Class 2 general insurance, 9% of the premium or part of the premium to affect the insurance.</li> </ul>		

State/ territory	Other insurance policy
SA <sup>4</sup>	1.5% of the annual premium amount. Life insurance riders attached to a life insurance policy that provide additional insurance are subject to duty as general insurance at a rate of 11% of the premium
WA <sup>5</sup>	N/A (Duty on life insurance was abolished on 1 July 2004, however, you may still need to pay duty where a life insurance rider that provides for an additional benefit or cover is attached to a life insurance policy. The portion of the premium in respect of the policy is taken to be general insurance (whether or not the payment of the benefit under the rider will or may reduce the benefit payable under the life insurance component of the policy or terminate the policy).)
NT <sup>6</sup>	N/A (No duty on life insurance policies issued after 1 July 2015. However, life insurance riders attached to a life insurance policy entered into after this date continue to be subject to duty as general insurance (whether or not the payment of the benefit under the rider will or may reduce the benefit payable under the life insurance component of the policy or terminate the policy).)
VIC <sup>7</sup>	N/A (Duty on life insurance was abolished on 1 July 2014, however you may still need to pay duty where a life insurance rider (additional insurance) is attached to your life insurance policy. This is due to life insurance riders being classified as general insurance.)
ACT <sup>8</sup>	N/A (Insurance duty was abolished in the ACT on 1 July 2016)
<b>Footnotes</b>	<p><sup>1</sup>Chapter 8, Part 2, Section 239-26 NSW Duties Act 1997</p> <p><sup>2</sup>Chapter 8 Qld Duties Act 2001</p> <p><sup>3</sup>Chapter 7, Part 2 TAS Duties Act 2001</p> <p><sup>4</sup>Part 3, Division 3 SA Stamp Duties Act 1923</p> <p><sup>5</sup>Chapter 4 WA Duties Act 2008; The Stamp Amendment (Assessment) Bill 2005 WA.</p> <p><sup>6</sup>Revenue and Other Legislation Amendment Bill 2015 NT</p> <p><sup>7</sup>Insurance– State Revenue Office Victoria Website. Chapter 8 Insurance Vic Duties Act 2000</p> <p><sup>8</sup>Tax Reform– State Revenue Office ACT Website.</p>

Table 9: General Insurance

State / territory	General insurance duty rates
NSW <sup>1</sup>	<p>The amount of duty chargeable on the premium paid:</p> <p><b>Type A</b> : 9% of the amount of the premium.</p> <ul style="list-style-type: none"> <li>• General insurance other than Type B insurance or Type C insurance.</li> </ul> <p><b>Type B</b> : 5% of the amount of the premium.</p> <ul style="list-style-type: none"> <li>• Motor vehicle insurance or</li> <li>• Aviation insurance or</li> <li>• Disability income insurance or</li> <li>• Occupational indemnity insurance or</li> <li>• Hospital and ancillary health benefits insurance.</li> </ul> <p><b>Type C</b>: 2.5% of the amount of the premium.</p> <ul style="list-style-type: none"> <li>• Crop insurance or livestock insurance.</li> <li>• Crop insurance and livestock insurance are exempt from duty under Part 5 and are not types of general insurance if the insurance is affected or renewed on or after 1 January 2018.</li> </ul>
QLD <sup>2</sup>	<p>Insurance duty is imposed on the full premium unless a regulation states that duty is payable only on a part of the premium.</p> <p><b>Class 1</b> : 9% of the premium/part of the premium</p> <ul style="list-style-type: none"> <li>• General insurance other than compulsory third party (CTP) or class 2 general insurance.</li> </ul> <p><b>Class 2</b> : 9% of the premium/part of the premium</p> <ul style="list-style-type: none"> <li>• General insurance for, or relating to professional indemnity, a motor vehicle (other than CTP insurance), a first home mortgage, personal injury relating to aircraft travel or a life insurance rider.</li> </ul> <p><b>CTP (Compulsory Third Party) insurance</b>: 10 cents</p> <p><b>Accident insurance</b>: 5% on the net premium</p>

State / territory	General insurance duty rates
<b>VIC<sup>3</sup></b>	10% of the amount of premium (other than a contract of business insurance)  From 1 July 2024, duty on certain contracts of “business insurance” will be gradually abolished over a 10-year period, reducing by 1% per year. ‘Business insurance’ refers to policies taken out by businesses covering aviation, cyber, directors and officers, employers’ liability, fire and industrial special risks, marine, public and product liability, professional indemnity.
<b>SA<sup>4</sup></b>	11% of the amount of premium.
<b>TAS<sup>5</sup></b>	10% of the amount of premium.
<b>WA<sup>6</sup></b>	10% of the amount of premium.
<b>NT<sup>7</sup></b>	10% of the amount of premium.
<b>ACT<sup>8</sup></b>	N/A (Insurance duty was abolished in the ACT on 1 July 2016)
<b>Footnotes</b>	<p><sup>1</sup>Chapter 8, Part 1, Section 239-26 NSW Duties Act 1997</p> <p><sup>2</sup>Chapter 8 Qld Duties Act 2001</p> <p><sup>3</sup>Insurance— State Revenue Office Victoria Website</p> <p><sup>4</sup>Part 3, Division 3 SA Stamp Duties Act 1923</p> <p><sup>5</sup>Chapter 7, Part 1 TAS Duties Act 2001</p> <p><sup>6</sup>Chpater 4, Part 2 WA Duties Act 2008</p> <p><sup>7</sup>Part 3 Division 6 NT Stamp Duties Act 1978</p> <p><sup>8</sup>Tax Reform— State Revenue Office ACT Website.</p>