HERBERT SMITH FREEHILLS

APPEAL CONFIRMS WIND FARM ASSETS ARE CHATTELS, NOT FIXTURES

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Legal Briefings – By **Hugh Paynter, Andrew White and Leah Serafim**

Victorian statute imposes a Fire Services Levy, which requires the calculation of the capital improved value of leviable land.

The Supreme Court of Victoria (Court of Appeal) unanimously dismissed an appeal by the Valuer-General Victoria against the decision of Richards J in the Supreme Court of Victoria that the above-ground wind farm assets of the Ararat Wind Farm were chattels and therefore excluded from the land valuation.

SNAPSHOT

- Wind farm operators occupying land under leases from property owners will be impacted by the decision. Other operators, such as solar farms, will also likely be affected.
- The decision will likely have wider prospective application, including for wind and solar farms. For example, the decision may have tax implications for the treatment of wind farm, and similar, equipment as fixtures or chattels both in Victoria and in other States.
- For practical purposes, following the appeal there was no change to the decision of Richards J in the Supreme Court of Victoria in 2020.

WHAT NEXT?

- In the first instance, Fire Services Levies based on the value of the equipment put on the land by lessee operators will likely be too high. Valuations should be reviewed to consider whether objection is warranted.
- Other tax and levy assessment notices may also rely on valuations that are affected by the Ararat Wind Farm case.
- Operators should be aware of time limits for lodging objections and contact their advisers for assistance.

DETAIL

CASE HISTORY

In December 2020 the judgment of Richards J was delivered in favour of the Ararat Wind Farm (**AWF**), represented by Herbert Smith Freehills, in the matter of ***AWF Prop Co 2 Pty Ltd v Ararat Rural City Council*** **[2020] VSC 853**.

The Valuer-General Victoria (**VGV**) sought and was granted leave to appeal the decision to the Supreme Court of Victoria (Court of Appeal).

On 1 October 2021 the unanimous judgment of McLeish and Emerton JJA and Delaney AJA was delivered in favour of AWF, represented by Herbert Smith Freehills, in the matter of ***Valuer-General Victoria v AWF Prop Co 2 Pty Ltd & Ors*** **[2021] VSCA 274**.

BACKGROUND

The AWF operates a wind farm facility on leased agricultural land in Ararat, Victoria. The AWF consists of 75 wind turbines across two council municipalities: 70 turbines are located in the Ararat Rural City Council (**ARCC**) municipality and the remaining 5 are in the Northern Grampians Shire Council municipality.

The wind farm assets located on the leased land and owned by the AWF include:

- the wind turbines and towers, including the wind turbine foundations;
- a substation;
- a multi-purpose management and administration building;
- a storage shed;

- wind monitoring (anemometer) masts;
- access roads and fences;
- a carpark;
- underground electrical cabling and communication cabling; and
- power lines, including communication lines.

With the exception of the wind turbine foundations, underground cabling and roads, the AWF assets are designed to be demountable and can be removed without disturbing the land.

The leases with each land owner expressly provide that, during the lease term, the AWF may remove assets including the turbines and towers. Similarly, the leases provide that the AWF must remove most of the assets from the land when the leases end or the wind farm ceases to operate.

Victorian statute imposes a Fire Services Levy (**FSL**) on the owner of leviable land under the *Fire Services Property Levy Act 2012* (Vic). Under section 19 of that Act, the land owner is required to pay the FSL each year.

The FSL is calculated based on the capital improved value (**CIV**) of the leviable land as defined in the *Valuation of Land Act 1960* (Vic), being the amount for which the land would be sold for if it was held for an estate in fee simple 'unencumbered by any lease'. In calculating the CIV, chattels are excluded from the valuation.

In 2018, the ARCC issued a single rate notice to the AWF for the FSL, based on a supplementary valuation by Mr Paul Newman which specified that the CIV was $470.4m for the land comprising the wind farm.

The AWF's principal ground of objection was that the returned CIV of $470.4m was too high and that, properly assessed, the CIV apportioned to the subject land within the ARCC municipality is no more than $10.15m. The objection was disallowed.

The AWF (through AWF Prop Co 2 Pty Ltd (as trustee) and AWF Pty Ltd) applied to the Victorian Civil and Administrative Tribunal to review Mr Newman's decision, under s 22 of the *Valuation of Land Act 1960* (Vic) (**VLA**). The case was then uplifted to the Supreme Court of Victoria for the trial and the decision of Richards J appealed to the Supreme Court of Victoria (Court of Appeal).

LEGAL ISSUES

The matter was a test case for determining how the capital improved value of leased land was to be valued. The AWF successfully defended all grounds of appeal by the VGV, including that:

- the above-ground wind farm are chattels, not fixtures or 'improvements' to the land, at common law;
- even if the AWF assets are not chattels at common law, section 154A of the *Property Law Act 1958* (Vic) applies to treat the assets as chattels for the purposes of calculating the CIV; and
- the VGV argument that AWF had an 'equitable interest' in the land resulting from its interests in the wind farm assets (which relied on the NSW Supreme Court decision of *SPIC Pacific Hydro Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWSC 395) was dismissed.

The Court of Appeal confirmed the primary judge's conclusions that:

- In determining the capital improved value, it is necessary to first identify the land in question by reference to title, rather than first looking at occupancy.
- The land is to be valued as separate occupancies.
- In determining how the occupancies were to be valued, the Court found that the highest and best use of the land was the lease of the land to a wind farm operator.
- Further, the term 'unencumbered by any lease' in section 2(1) of the VLA does not mean it should be assumed that the property is 'not leased'. Rather, 'unencumbered by any lease' was held to mean that the fee simple estate is not encumbered in practical terms by a lease that diminishes the value of the estate.
- The roads, foundations, fences, carpark and underground cabling could at law be treated as fixtures, while the above-ground AWF Assets were capable of separately being treated as chattels.

For further detail on the legal issues raised at the first instance decision please refer to our articles here and here.

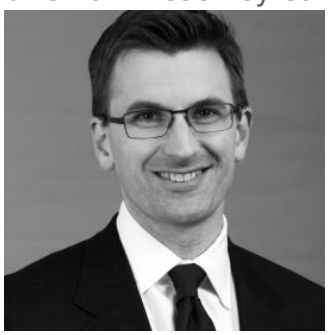
PRACTICAL IMPLICATIONS

The Valuer-General Victoria has decided not to appeal the Court of Appeal decision. The consequence is that the CIV valuation within the ARCC municipality of $14 million, as determined in the Supreme Court, still stands. It replaces the $470.4 million valuation originally applied by the ARCC.

This article was written by Hugh Paynter, Andrew White and Leah Serafim

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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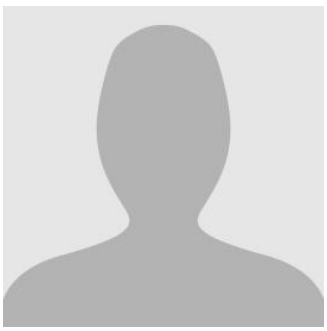

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