AUSTRALIA

Energy Overview

Australia is a significant producer of many valuable natural resources including:

- Coal
- Iron ore
- Natural gas, including liquified natural gas (LNG)
- Uranium
- Critical minerals and rare earths

Australia exports more than three quarters of its coal and natural gas.

Australia's own energy production is currently weighted towards fossil fuels (eg coal and LNG). In 2023, 39.4% of Australia's total electricity generation was comprised of renewable energy, with the balance provided by fossil fuels.

Recently, Australia has set increasingly ambitious climate goals with an intention to reduce carbon emissions and become a renewable energy export superpower in the future. Australia aims to cut greenhouse gas emissions by 43% from 2005 levels by 2030 and reach net zero emissions by 2050. This goal followed the ambitious pledges made by other countries with similarly advanced economies.

The International Energy Association forecasts that Australia's renewable energy capacity will expand by 85% by 2027 due to ambitious targets, increased clean energy funding at both Federal and State levels and new projects in the renewable energy space. The Australian Government is also aiming to reach 82% renewable energy in the national electricity mix by 2030.

In November 2023, the Australian Government expanded the Capacity Investment Scheme. This scheme encourages investment in energy projects by incentivising States and Territories to provide a favourable environment for investment in renewables, and to agree to underwrite successful energy projects.

The Australian Government has also implemented a Renewable Energy Target Scheme. The scheme incentivises investment in renewable electricity generation by providing Large Scale Generation Certificates in respect of power stations (such as wind and solar farms) for eligible renewable electricity they produce. These certificates can be sold to companies wishing to demonstrate their renewable energy use.

Recent announcements by the Australian Government designed to incentivise investment in green energy projects and the production of critical minerals as a contribution to the clean energy supply chain are summarised below.

The above demonstrates that there is expected to be significant investment in energy projects in the Australian market, particularly as part of the transition to renewable energy.

Tax Overview

Australia levies a Federal income tax on the world-wide taxable income of Australian residents, including on net capital gains. This tax also applies to non-residents earning income from sources in Australia and capital gains from the sale of certain Australian assets, including real property, resource interests and business assets.

In determining taxable income, a taxpayer's assessable income is reduced by allowable deductions. In some instances, there is also an opportunity to carry forward tax losses from prior years (ie where allowable deductions exceed assessable income) indefinitely to offset against future assessable income (depending on the type of entity and satisfaction of loss carry forward tests).

Australia also imposes a series of other taxes, including a goods and services tax (VAT equivalent) and withholding taxes on payments (including interest, dividends and royalties) made by Australian residents to non-residents, subject to any limitations outlined in Australia's double tax agreements. Australia also has employment related taxes and withholdings, including the Fringe Benefit Tax levied on an employer in respect of non-cash benefits provided to employees, and the superannuation guarantee.

In addition, Australia's States and Territories also impose taxes including payroll tax, land tax and stamp duty. These taxes have varying liabilities and thresholds depending on the relevant State or Territory. Local Governments can also impose council rates on land located in their municipality.

Australia's taxation of companies involves an imputation system. Under this system, the payment of income tax gives rise to credits in the company's "franking" account which can subsequently be attached to dividends paid by the company to shareholders. Australian shareholders can generally claim an offset in respect of the franking credits against their own income tax liabilities. Non-resident shareholders are not entitled to an offset but dividends to such shareholders will not be subject to Australian dividend withholding tax to the extent that the dividends are "franked" (ie paid out of taxed profits).

The Australian income tax system is self-assessed. Each taxpayer must lodge an income tax return. In respect of corporate taxpayers, the Commissioner of Taxation is generally deemed to have issued an assessment in respect of the income tax payable disclosed in the return. Other types of entities, such as trusts and partnerships, may be afforded tax flow-through treatment (but must still lodge a return).

Taxation of Energy Projects

Although Australia is heavily invested in the green energy transition and the drive to net zero emissions, unlike some other jurisdictions, Australia has not typically implemented specific taxation rules (eg tax incentives) that apply to energy projects. However, there are some important tax issues that should be considered.

Structure - Australian energy projects can be undertaken through a variety of structures, including companies, trusts and partnerships. The choice of structure will depend on numerous factors, including whether there are non-resident investors. A company will be taxed on a stand-alone basis, unless it is part of a tax consolidated group in which case the head company of that group and all of its wholly-owned subsidiaries will be treated as single taxpayer. A trust or partnership may generally be expected to result in the net income being subject to tax in the hands of the beneficiaries or partners respectively.

Tax losses - Energy projects, including renewable energy projects, are capital intensive, particularly in the development phase. As a result, many energy projects will experience tax losses in their infancy, which may be able to be carried forward indefinitely to offset against future income. A corporation can carry forward their tax losses if they have maintained the same majority ownership and control since the loss or if it satisfies business continuity tests. There are different and often more complex rules impacting the carry forward and use of tax losses incurred by a trust. A partnership gives each partner a proportionate share of the loss and may then allow individual partners to offset against their income.

Financing - The high capital requirements of energy projects will also necessarily give rise to funding considerations (ie debt and/or equity). Generally, interest incurred on debt may be tax deductible whereas returns on equity would not be. However, the Australian thin capitalisation rules, debt deduction creation rules and transfer pricing rules must be considered in detail to determine whether any such deductions may be denied (even in part).

Deductions - With respect to expenditure incurred in relation to energy projects generally, the tax treatment will depend on the nature of that expenditure. For example, the cost of acquiring land would not be tax deductible but periodic expenditure in relation to accessing land (eg rent or licence fees) may be deductible. Expenditure incurred in relation to certain capital assets such as plant and equipment may qualify as deductible over the effective life of those assets.

Withholding tax - For non-resident investors in Australian energy projects, receipt of any interest, dividends or royalties will be subject to Australian withholding tax. The withholding tax rate is generally 30% for dividends, except where a franked dividend is paid to a non-resident and no withholding tax applies, 10% for interest and 30% for royalties. A lower withholding tax rate may apply in accordance with Australia's double tax agreements or if another exemption applies.

If the project vehicle is a unit trust, payments to non-resident investors can be subject to withholding tax of either 30% or the top marginal tax rate (with different rates applicable to payments comprised of interest, dividends or royalties).

Certain trusts that qualify as "managed investment trusts" may result in a concessional withholding rate of 15% if the investor is a resident in an information exchange country.

R&D tax incentive - A general tax incentive exists to encourage research and development in Australia. Companies engaged in eligible projects and incurring R&D expenditure may be entitled to a refundable tax offset (ie subject to certain limits based on the aggregated turnover of the entity and any connected or affiliated entities). There are also non-refundable R&D tax offsets that may be used to reduce the tax liability of a company. Other types of entities would not be eligible for the incentive.

Companies in the renewable energy space who have developed new products, processes, materials or technology may be eligible for tax offsets under this scheme.

Specific regimes

PRRT - More specifically, a 40% Petroleum Resource Rent Tax (PRRT) is imposed on profits generated from selling "marketable petrol commodities" above a specified rate of return. This is assessed on the extracted value of offshore petroleum less costs involved in exploration and extraction. The Australian Government has proposed changes to this regime. These include capping deductible expenditure which can be used to offset assessable PRRT income for LNG producers.

Royalties - States and Territories also collect royalties on the extraction of onshore petroleum and other resources like coal and iron ore. The royalties rate varies between jurisdictions.

Other Tax Issues To Be Considered

The Australian Government released the 2024-25 Federal Budget on 14 May 2024. In support of Australia's commitments to the transition to net zero emissions, the Budget included announcements to introduce the following:

Critical Minerals Production Tax Incentive - this incentive is intended to support downstream refining and processing of Australia's 31 critical minerals to improve supply chain resilience. The types of minerals expected to fall within the scope of these measures include lithium, cobalt, nickel and rare earths. This incentive will be provided at 10% of relevant processing and refining costs.

Hydrogen Production Tax Incentive - the incentive will apply to producers of renewable hydrogen to support the growth of a competitive hydrogen industry and decarbonisation. The incentive will be provided at a rate of $2 per kilogram of renewable hydrogen that is produced.

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It is proposed that these production tax incentives will apply from the 2027-28 tax year to the 2040-41 tax year. The details of these measures, including eligibility, are yet to be released.

Although not a tax issue, it is also worth noting that the Australian Government has announced a proposal to fast-track investment approvals for foreign investors with the Foreign Investment Review Board (FIRB). This would mean that repeat foreign investors from recognised countries would receive accelerated approvals through a passport or concierge style system.

A business which co-invests alongside governments or in national priority projects (which includes green energy) would be given high priority assistance in navigating approval processes under this regime.

Relevant Experience

Corrs (Taxand Australia) has advised on the tax aspects of significant energy projects in Australia, including:

- ACE Energy (Acciona, Cobra, Endeavour Energy and Capella), on its bid to develop the transmission network for the Central West Orana Renewable Energy Zone in New South Wales, set to become the first REZ in Australia.
- Mineral Resources Limited (ASX: MIN) on its acquisition from Alita Resources Ltd of Tawana Resources Ltd (Tawana) and Lithco No 2 Pty Ltd (Lithco) which own the Bald Hill Lithium mine in Western Australia.
- Powin, LLC, the global energy storage platform provider, on its entry into the Australian market and the development of the battery energy storage system (BESS) as part of the delivery of the Waratah Super Battery in New South Wales which will have a power capacity of at least 700 MW.
- Albemarle Corporation (NYSE: ALB), one of the world's leading global developers, manufacturers and marketers of highly-engineered specialty chemicals, on the acquisition of Liontown Resources Limited, an ASX-listed emerging battery minerals exploration and development company with two major lithium deposits in Western Australia. The larger of Liontown's two deposits, Kathleen Valley, is one of the largest and highest-grade hard rock lithium deposits in the world.
- AGL Energy on the sale of its 50% participating interest in the Macarthur Wind Farm to AMP Capital. The wind farm is located in south west Victoria and the largest of its kind in the southern hemisphere, generating 420 MW.
- Energy Development Limited on its acquisition of the Wonthaggi Wind Farm located in south east Victoria with generating capacity of 12 MW.
- YTL Power on its disposal of its interest in ElectraNet which operates the high voltage electricity transmission system throughout South Australia under a 200-year exclusive lease granted by the State government.
- Hancock Energy (PB) Pty Ltd (Hancock), part of the Hancock Prospecting group (one of Australia's largest iron-ore mining companies), on its competitive off-market takeover bid for Warrego Energy Limited (Warrego) (ASX:WGO). Warrego is focused on the development of an onshore gas project in Western Australia.
- A syndicate of lenders on Australian tax issues associated with the project financing of the Bald Hills Wind Farm in Gippsland, Victoria.

Corrs also has a market leading specialist Energy & Natural Resources practice.

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