Dear Treasurer,

Land Tax (Miscellaneous) Amendment Bill 2019

1. I refer to the current consultation in relation to the draft Land Tax (Miscellaneous) Amendment Bill 2019 (“the Bill”).

2. The Bill proposes a number of changes to the Land Tax Act 1936 (SA) (“the Act”) with significant implications for the current land tax system in South Australia, in particular with respect to aggregation. In addition, the Bill seeks to introduce a number of amendments with respect to land held in trust.

3. The Society has particular concerns with respect to the amendments to the Act regarding land held on trust, these are detailed below. Furthermore, the Society notes the Bill creates liabilities and obligations which were never envisaged at the time legitimate structures were established or when common property was purchased.

4. The Society outlines its concerns and suggestions for improvement, as informed by its Property Committee, for your consideration below.

Aggregation

5. The Society notes the Bill seeks to introduce a simplified version of the New South Wales/Victorian approach to aggregation.

6. The proposed amendments with respect to aggregation target legitimate structures people have established over the years to plan for their tax obligations to the Australian Government; to protect assets; and for the purposes of estate planning and family succession in business. The proposed new measures will create liabilities and obligations which were never envisaged at the time these structures were put in place.

7. There are no exemptions to the “new” liability contained in the Bill, in favour of such structures established prior to the date on which the proposed legislation will come into effect (see for example, the Federal Government’s introduction of Capital Gains Tax liability, which continues to exempt an assessment on a capital gain on the sale of an asset acquired by the Vendor prior to September 1985 when this measure was introduced). Furthermore, the proposed introduction of
aggregation as a basis for assessment of land tax will also affect structures legitimately established for purposes unrelated to land tax liability.

**Terminology**

8. As noted above, a number of provisions contained in the Bill have been adopted from interstate legislation (i.e. Victoria and New South Wales). Consequently, this has resulted in various terminology and concepts used throughout the Bill, which are not consistent with those which already operate and apply in this State (pursuant to revenue measures such as the *Stamp Duties Act 1923* and the *Payroll Tax Act 2009*). Ideally, the proposed terminology, definitions and concepts should reflect those already part of South Australian revenue law and practice.

**Land held on trust**

**Notice of beneficiary**

9. The Society notes that a trustee of land will be liable pursuant to the proposed section 11 for assessment to pay land tax on the whole of a landholding. The proposed amendments, however, envisage a procedure whereby the trustee of a fixed trust (proposed section 12), a unit trust (proposed section 13) and a discretionary trust (proposed section 13A) will be able to avoid this liability by giving to the Commissioner of State Taxation (“the Commissioner”) a written notice in which the beneficial owners of that land are identified. In this case, the beneficial owners rather than the trustee will be assessed to pay the tax on that land (or where applicable, to the extent of their interest in the Land).

10. The Society notes the following key concerns with respect to the proposed measure above:

10.1 The Notice will be in a form and contain the information determined by the Commissioner (see proposed Sections 12(2), 13(2) and 13A(5)-(6)). No information has been made available about the manner in which the information is to be given for this purpose, and consequently, it does not appear to form part of the current consultation process. The omission of this information is of concern to the Society, and it is suggested consultation with respect to this issue occur prior to the enactment of the proposed Bill. The provision of this information is vital, so as to allow stakeholders to consider the requirements and procedures relevant to this very important aspect of the proposed legislation.

10.2 The Society notes that in all cases, the trustee can withdraw the notification of beneficial owners. However, once withdrawn, a notice cannot again be given to the Commissioner. This will work to exclude notification of changes at any time in the future to the class of beneficiaries and unit holders, which will deprive the trustee and the beneficiaries/unit holders from the opportunity to organise liability for land tax in the same manner that other tax payers will be able to do so.

**Requirements for trustees to notify Commissioner**

11. The Society notes section 13E requires trustees of land to give to the Commissioner a written notice of their interest. This notice must be given within one (1) month of becoming the trustee of the land. In the context of the administration of a deceased estate, this poses the question of whether an executor becomes Trustee of that land at the moment of the death of the Testator, or at a subsequent time based on registration in the Lands Titles Office of a Transmission Application?
12. Under the general law a named executor becomes Trustee of the land upon the death of the testator. However, the proposed legislation does not address situations where there is a question about the validity of the Will or where there are competing claims to the office of executor.

13. Further, the Bill does not address the situation where a named executor may not be aware of his or her appointment for a few weeks, a Will cannot be located, or, there is an intestacy and the persons entitled to make application remain to take advice or make a decision to so apply. It may take some years to determine the identity of the person entitled to take the position of executor.

14. The Bill prescribes a penalty of up to $10,000.00 (under Section 57 of the Taxation Administration Act) where this notification is not given within one (1) month. The Society considers the legislation on this point must be clarified so as to require the executor to give such notice at a clearly identifiable point in time such as the receipt of a Grant of Probate or Letters of Administration, or lodgement of a Transmission Application.

15. It is noted that the proposed legislation appears to provide a solution to this issue in respect of deceased estates – see the definition of “administration trust” in section 5(1) of the proposed Bill. This appears to be supported by the proposed section 13C which states an “administration trust” is an excluded trust for aggregation purposes. If this is correct, section 13E should exempt the trustee of such a trust from the obligation to lodge written notice, or at least until a later time as suggested above.

16. Furthermore, the proposed section 13E(3) requires a trustee who disposes of any land that is subject to the trust must lodge a written notice with the Commissioner within 1 month after disposing of the land. The Society is informed by practitioners who practice in this area that this requirement will be an additional burden to solicitors and conveyancers and it has been suggested that the Commissioner may already have the ability/capacity to ascertain this information.

Notice of a beneficiary of a discretionary trust

17. The Society notes section 13A(1) provides that a trustee of a discretionary trust to which land is subject must, not later than 30 June 2020, lodge with the Commissioner a written notice advising of the designated beneficiary. The Society suggests this may be unworkable and further time should be permitted, for example, until 31 December 2020 (or 6 months after the legislation begins to operate).

Assessment of land tax where more than one owner of land

18. The Society questions the proposed section 9(7), in particular, why trusts have been excluded in the assessment of joint owners. The Society is unsure as to the purpose or benefit of section 9(7) and considers it likely to create an administrative burden which may result in the introduction of corporate trustees in order to avoid the multiple holding status.

Definition of fixed and unit trusts

19. The Society has some concerns around the definitions of fixed and unit trusts as contained in the Bill, in particular, in relation to the application of the surcharge. This is due to various decisions of the courts where both unit and fixed trusts have been considered discretionary trusts. Clearer drafting with respect to the definition of fixed and unit trusts is required to create greater certainty as to the application of the surcharge.
Assessment of tax against land divided by community or strata plan

20. The Society notes proposed section 10 of the Bill provides the Commissioner with the power to allocate common property used by lot owners to be jointly assessed with a particular lot. This allows common property to be valued, and where an interest in this attaches to the strata or community title of an owner, the value is to be aggregated with that of the owner’s land.

21. This power is new and not something an existing owner would have ever contemplated when they first purchased their unit/property. While it is presumed the proposed measure seeks to increase taxable site values across South Australia to capture non privately-owned areas, the Society questions the legal and practical implications of taxing common property in aggregation with other privately owned property.

22. Furthermore, the proposed section confers broad powers upon the Valuer General and the Commissioner of Taxation without any identified process whereby an owner can object or appeal a decision/judgement (and whether such the process will be timely and cost effective). In the view of the Society, this provision should be reconsidered.

General observation

23. The Society notes that limited liability companies are often established as a vehicle for new ventures. This model is used for a number of reasons, including protection of the assets of the promoters. Under the Bill, where the venture includes the holding of land, the value of such land for assessment purposes will be aggregated with the other land holdings of the promoters and will result in additional imposition of land tax. Such measures appear to be inconsistent with the current environment/policies which aim to encourage entrepreneurs and start-ups on both a state and federal level.

Yours sincerely

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