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Dear Commissioner

**Joint submission on the use and effect of State Revenue Office (SRO) website guidance and rulings**

**1. Introduction**

- 1.1 This joint submission has been prepared by Chartered Accountants Australia and New Zealand, the Law Institute of Victoria, the Property Council of Australia, The Tax Institute, Tax and Super Australia and the Urban Development Institute of Australia (**Signatories**).
- 1.2 The Signatories write to express concern and make recommendations about the practice of relying on website guidance to set out how the Commissioner of State Revenue (**Commissioner**) intends to apply Victorian taxation and duties legislation (**Website Guidance**). Examples of substantive Website Guidance issued by the State Revenue Office (**SRO**) include its website pages in respect of the economic entitlement regime,<sup>1</sup> the off-the-plan duty concession,<sup>2</sup> and foreign purchasers of property.<sup>3</sup>
- 1.3 We also express concern about the diminishing use of public rulings and limited use of private rulings.
- 1.4 Below we:
  - (a) outline the benefits and drawbacks of Website Guidance generally;

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<sup>1</sup> See Part 3 of this letter. Refer <<https://www.sro.vic.gov.au/economic-entitlements>>.

<sup>2</sup> Refer <<https://www.sro.vic.gov.au/offtheplan>>.

<sup>3</sup> Refer <<https://www.sro.vic.gov.au/foreignpurchaser>>.

- (b) raise concerns about particular issues which are currently the subject of Website Guidance;
  - (c) raise concerns about the diminishing use of public and limited use of private rulings;<sup>4</sup> and
  - (d) make recommendations as to how the current Website Guidance and private ruling system could be improved.
- 1.5 We would welcome the opportunity to engage further with the SRO and the Department of Treasury and Finance on these issues.

## 2. Merits of Website Guidance

- 2.1 The SRO's Website Guidance has a role to play in providing taxpayers with clarity on the operation and administration of state revenue law. It generally makes the Victorian duties and taxation regime more accessible, and provides efficient and clear guidance to taxpayers to complement the underlying legislation and the Commissioner's public rulings. Website Guidance also allows the Commissioner to respond quickly to provide direct guidance to taxpayers where necessary, for example in the context of recent COVID-19 initiatives.
- 2.2 However, for the reasons outlined below, Website Guidance must be used with caution. In particular, it should not be used as a substitute for legislation or SRO rulings (e.g. by seeking to clarify or override ambiguous provisions), or as a means to address poorly drafted legislation.
- 2.3 The legal uncertainty attaching to 'soft law' such as Website Guidance is well established.<sup>5</sup> Informal commentary on the proposed interpretation of legislation is not law and has no substantive legal effect.<sup>6</sup> A regulator's policy may be taken into account as a relevant consideration when assessing the application of a statutory test or the exercise of a statutory discretion, but is nonetheless not binding on a court or tribunal.<sup>7</sup> In such circumstances, a court or tribunal would be obliged to apply the words of the statute itself, not the regulator's interpretation or stated policy in respect of that statute.<sup>8</sup>
- 2.4 However, guidance from agencies such as the SRO may sometimes give the appearance of itself having legislative force and often is applied in practice as if it were law. This can create the illusion of legal certainty where no such certainty in fact exists. Members of the public and taxation professionals may be encouraged to rely on such commentary, despite the fact that there is no strong legal foundation for that reliance, and there are very limited protections if the guidance is subsequently departed from (either by the Commissioner or by a court or tribunal). This leads to the risk that a taxpayer may rely on Website Guidance in organising their affairs, and then may be faced with a subsequent contradictory decision by the Commissioner, a court or tribunal (with the taxpayer's reliance on Website Guidance being no substantial defence).
- 2.5 Website Guidance is particularly susceptible to these critiques compared to other forms of 'soft law' (such as public rulings) given:
- (a) there is usually no formal consultation or engagement process before Website Guidance is posted online. This means that the benefits of public scrutiny of the adopted position are lost. Courts and tribunals may also give less weight to policies which have not been subject to industry consultation;<sup>9</sup>
  - (b) in recent times it has been used to clarify legislative intent that is not evident from legislation itself (the economic entitlement legislation being a prime example – refer section 3 below); and

<sup>4</sup> As set out in public ruling GEN-009v3.

<sup>5</sup> See Greg Weeks, 'The Use and Enforcement of Soft Law by Australian Public Authorities' (2014) 42(1) *Federal Law Review* 181.

<sup>6</sup> The only minor exception to this general proposition is if the proceeding is being heard by VCAT and a certificate has been issued which complies with s 57 *Victorian Civil and Administrative Tribunal Act 1998* (Vic). Such certificates are very rarely used. See Justice Stuart Morris, 'Tribunals and Policy' (VCAT) [2006] Vic JSchol 6 at 6.

<sup>7</sup> See Justice Stuart Morris, 'Tribunals and Policy' (VCAT) [2006] Vic JSchol 6 at 2; *Drake v Minister for Immigration and Ethnic Affairs* (1987) 24 ALR 577 at 589-91. See further, *Conder Tower Pty Ltd v Commissioner of State Revenue* [2012] VSC 107 at [42]-[43] where Pagone J emphasised the Commissioner's obligation to apply the legislation as drafted and not solely exercise his discretion in the circumstances listed in a public ruling.

<sup>8</sup> See *VL Investments Pty Ltd v Commissioner of State Revenue* [2006] VSC 215 at [45], where Hollingworth J stated 'the revenue ruling has no binding legal effect. It represents no more than a statement of the Commissioner's policy.' The Signatories could not locate any cases which considered the legal effect of Website Guidance.

<sup>9</sup> *Federal Commission of Taxation v Swift* (1989) 18 ALD 679 at 691-692 (French J).

- (c) there is no clear historical record of Website Guidance at a particular time, meaning that it can be difficult for members of the public to prove what the Website Guidance said at the time they relied on it. Members of the public should not have to rely on informal and imperfect methods such as printing web pages to PDF to prove that they acted in accordance with the Commissioner's stated interpretation of the law at a particular time.

2.6 As far as we are aware, the SRO does not have a published policy which outlines the circumstances in which the Commissioner would depart from its Website Guidance, and what concessions (if any) would be provided to taxpayers in the event that such a departure occurs (for example, a waiver of penalties or interest).

2.7 The effect of the above is that:

- (a) while Website Guidance provides a quick and easy way of communicating internal policy to the public, it can sometimes create considerable uncertainty for taxpayers and their advisors; and
- (b) Website Guidance is sometimes being used in an attempt to address deficiencies in tax legislation, where such deficiencies can only be properly addressed by legislative amendment.

### 3. Examples of the SRO's Website Guidance

3.1 The issues associated with over-reliance on Website Guidance are exemplified by the Website Guidance associated with:

- (a) the economic entitlements regime in Part 4B of Chapter 2 of the *Duties Act 2000* (Vic) (**Duties Act**);
- (b) amendments to trust deeds; and
- (c) the foreign purchaser additional duty (**FPAD**).

#### ***Economic entitlements***

3.2 The concept of an 'economic entitlement' in section 32XC of the Duties Act is defined very broadly. An economic entitlement includes an 'arrangement' in relation to land with an unencumbered value of more than \$1,000,000 which entitles a person directly or through another person to:

- (a) participate in the income, rents or profits derived from the relevant land;
- (b) participate in the capital growth of the relevant land;
- (c) participate in the proceeds of sale of the relevant land;
- (d) receive any amount determined by reference to (a), (b) or (c); or
- (e) acquire any entitlement described in (a), (b) (c) or (d).

3.3 A person can acquire an economic entitlement 'by any means'.<sup>10</sup>

3.4 Despite the fact that the apparent intention of the economic entitlement scheme is to impose duty on quasi-ownership rights, the above definition of economic entitlement captures an incredibly broad range of arrangements. Where a person acquires an entitlement to financial reward calculated by reference to the proceeds, income, profits, rents or capital growth of land, such as real estate agents, architects and fund managers who work on commissions tied to such items, they will generally be captured by the economic entitlements regime based on a plain reading of the Duties Act. It was clearly not the intention of the regime to capture such a wide range of activity.<sup>11</sup>

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<sup>10</sup> Duties Act s 32XC(3).

<sup>11</sup> Refer Explanatory Memorandum, *Duties Amendment (Landholder) Bill 2021* (Vic), 14.

- 3.5 The broad range of third-party service providers potentially captured by the economic entitlements regime are only notionally excluded from the scheme by reason of the economic entitlement guidelines published by the SRO on its website (**EE Guidelines**). The EE Guidelines provide that *'ordinary fees for service such as real estate agent fees – even when calculated on a commission basis – are not considered to be an economic entitlement'*. The legislative underpinning for this statement is unclear given that, on a plain reading, section 32XC(1)(b)(iv) captures such fees.
- 3.6 Similarly, section 32XE(2) deems certain arrangements as resulting in the acquisition of 100% beneficial ownership of the underlying land. The main example of this is where the arrangement does not specify the percentage economic entitlement conferred on a person. This section has the capacity to generate a substantial duty liability in respect of relatively minor dealings with respect to land.
- 3.7 The wide-ranging effects of section 32XE(2) are somewhat tempered by section 32XE(3), which gives the Commissioner the discretion to determine a taxpayer's duty liability by reference to a lower percentage economic entitlement interest if the Commissioner considers it appropriate in the circumstances. The EE Guidelines provide that the Commissioner would *always* exercise this discretion where the actual percentage economic entitlement is disclosed to the Commissioner. As set out in section 2 above however, the Commissioner is not bound by this statement. Taxpayers therefore still have the potential to be exposed to a considerable duty liability, with little in the way of protection beyond a non-binding statement on the SRO's website.
- 3.8 As the above examples illustrate, there is a chasm between the economic entitlements regime set out in the Duties Act and the approach of the Commissioner as set out in the EE Guidelines. While guidance to ameliorate the effect of poorly drafted legislation is welcome, we submit that Website Guidance alone is not the appropriate means of achieving this outcome.
- 3.9 The release of the EE Guidelines may have been an appropriate stop-gap measure when the new economic entitlement duty regime was hastily introduced in mid-2019 to manage the outcome in the Supreme Court decision in *BPG Caulfield Village Pty Ltd v Commissioner of State Revenue* [2016] VSC 172.<sup>12</sup> However, more than two years have since passed. Taxpayers should not be required to choose between relying on the EE Guidelines (knowing that they do not reflect the plain terms of the legislation and offer only minimal protection) and complying with the legislation in circumstances where they know the Commissioner does not expect them to do so.
- 3.10 To address the gap between the legislation and practice, as noted at section 5 below, we recommend that a post-implementation review of the economic entitlement duty regime is urgently undertaken by the SRO and the Department of Treasury and Finance. In our view it is inevitable that administrative law issues of the type raised above will be raised in VCAT or the Supreme Court as part of a dispute on the operation of the legislation. Attention to this matter now would therefore help avoid such an outcome.

#### **Amendments to trust deeds**

- 3.11 At general law, amendments to a trust deed can, in extreme circumstances, result in one trust ending and a new trust being created in its place. Duty consequences (as well as income tax consequences) can result if a new trust is so created.
- 3.12 The dutiable transactions that are most relevant in the context of trust deed amendments are:
- (a) declarations of trust (section 7(1)(b)(i) Duties Act); and
  - (b) changes of beneficial ownership, which can include dutiable property becoming subject to a trust or ceasing to be subject to a trust (section 7(4) Duties Act).
- 3.13 Amendments to the trust deeds of family trusts are an extremely common occurrence. In those circumstances, it is particularly important that taxpayers and advisors be given clear guidance on the SRO's views as to when an amendment to a trust deed will trigger a dutiable transaction.
- 3.14 The Commissioner has not issued a public ruling in this area. Rather, the SRO's guidance on the issue consists of some very limited Website Guidance that is generally cast in vague terms. Examples include:

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<sup>12</sup> *State Taxation Acts Amendment Act 2019* (Vic).

*Whether duty applies to the deed of variation depends on whether the variation is a declaration of trust to which duty applies (see s7(4) of the Duties Act 2000), and/or results in a change of beneficial ownership. The amount of duty will depend on whether the trust relates to dutiable or non-dutiable property.*

*Whether a variation to a discretionary trust results in duty can only be determined on a case-by-case basis taking into account all facts and circumstances, the terms of the relevant discretionary trust deed, and the nature and extent of the variations.*

3.15 These types of comments are unhelpful to taxpayers and advisors as they do not provide any real, practical guidance as to the situations in which amendments to a trust deed may result in a dutiable transaction.

3.16 The SRO's Website Guidance also includes the following:

*Generally, the Commissioner considers that a dutiable transaction may arise where a variation to a discretionary trust has the effect of:*

- *Creating beneficial interests in persons in whom those interests did not exist previously.*
- *Changing all the default beneficiaries/takers in default of that discretionary trust.*
- *Significantly changing the interests of beneficiaries between themselves.*

*In these cases, duty at general rates would apply based on the value of the property held by the trust.*

3.17 A very common transaction for a discretionary trust is for one or more default beneficiary/taker in default to be removed, added or otherwise varied. With reference to the Website Guidance, the SRO's view of the duty outcome is unclear other than in the scenario where all of the default beneficiaries/takers in default of the discretionary trust are changed. Providing greater certainty of the SRO view for very common transactions will only assist taxpayers, advisors and the SRO.

3.18 The Australian Taxation Office (**ATO**) has dealt with this issue in Taxation Determination TD 2012/21.<sup>13</sup> That Taxation Determination gives detailed guidance on the situations in which trust deed amendments will result in tax consequences, including many practical examples. Further, Revenue NSW has also released a public ruling dealing with trust deed amendments (DUT 017 'Variations to Trusts'). To assist taxpayers and advisors, the SRO should consider adopting a similar approach.

### **'Foreign' trusts**

3.19 The SRO's approach to Website Guidance on the topic of FPAD and discretionary trusts has also given rise to some concern among taxpayers and advisors.

3.20 FPAD can apply to acquisitions of residential property by the trustee of a 'foreign trust'. A 'foreign trust' is defined to include a trust in which a foreign natural person, a foreign corporation, or a trustee of another foreign trust holds a 'substantial interest' (section 3(1) Duties Act).

3.21 A person has a 'substantial interest' in a trust if they have a beneficial interest of more than 50% of trust capital. For a discretionary trust (e.g. a typical family trust), there is a deeming rule that can deem beneficiaries to have a beneficial interest in trust capital. The deeming rule will apply if a trustee has power or discretion to distribute trust capital to a particular person or member of a class of beneficiaries. Due to the often broad definition of who can be an object of a discretionary trust, this means that such trusts can be sometimes be treated as 'foreign' even where there is no history of distributions (and no intention to distribute) to foreign objects.

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<sup>13</sup> TD 2012/21 entitled 'Income tax: does CGT event E1 or E2 in sections 104-55 or 104-60 of the Income Tax Assessment Act 1997 happen if the terms of a trust are changed pursuant to a valid exercise of a power contained within the trust's constituent document, or varied with the approval of a relevant court?'

- 3.22 Given the sometimes harsh outcomes of this deeming rule, the SRO's Website Guidance previously set out a practical approach to family discretionary trusts that were foreign trusts. In brief, the SRO stated that it would not treat family discretionary trusts as foreign trusts if the foreign beneficiaries had not and were not likely in the future to receive any distributions from the trust. After a few years, the SRO changed its Website Guidance to reflect its position that, from 1 March 2020, it will no longer apply this practical approach. The rationale for this change was that the relevant legislation had been in place for a sufficient period of time such that they '*are better understood by all (or at the very least all advisors on Victorian state taxes)*'.
- 3.23 While expert Victorian tax advisors are familiar with this technical issue, it is clear that the issue is often not understood by many legal practitioners and conveyancers.
- 3.24 As noted by the Legal Practitioner's Liability Committee in an alert released 12 July 2021,<sup>14</sup> legal practitioner liability claims in relation to duty issues have quadrupled since 2014/2015. The main aspects of duty law that have contributed significantly to this spike are sub-sales involving nominations and land development, and more relevantly, FPAD.
- 3.25 This change in Website Guidance provides a striking example of how the Commissioner's position can change without a change in the underlying law and without the safeguards of a formal consultation process that is associated with, for example, a public ruling.

#### **4. Public and private rulings**

##### ***Public Rulings***

- 4.1 The SRO has historically issued numerous public rulings which have provided welcome guidance and certainty to Victorian taxpayers. Benefits of such rulings include increased voluntary compliance and revenue collection. Over the last decade, there has been a decrease in the number of new public rulings and an increase in Website Guidance.
- 4.2 We consider that the reduction in the number of new public rulings has significant implications, particularly given the breadth of operation of recent tax legislation and increased legislative reliance on the exercise of the Commissioner's discretion or an assessment of the Commissioner's state of mind (and the resulting uncertainty such drafting techniques introduce).<sup>15</sup>
- 4.3 As set out in the SRO's *Compliance Strategy 2020-2023*, one of the SRO's key strategic goals is to increase compliance by 'building community confidence in a Victorian taxation system that is widely complied with'.<sup>16</sup> A central aspect of the SRO's strategy is increasing compliance by providing clear and concise communication to enable taxpayers to meet their obligations. We agree that it is in all stakeholders' interest (taxpayers, taxpayer representatives and the government) for this strategy to be pursued.
- 4.4 In that context, we submit that the SRO should prioritise issuing public rulings and decrease its use of Website Guidance for the following reasons:
- (a) as outlined above, Website Guidance has a number of fundamental limitations;
  - (b) the reduction in the issue of new public rulings has, in our opinion, led to increased uncertainty amongst taxpayers and professional advisors;
  - (c) public rulings, unlike Website Guidance, have the benefit of public consultation, which assists in minimising uncertainty and ensuring that all relevant issues are addressed; and
  - (d) continual enabling of front-end compliance, such as through releasing comprehensive public rulings, should increase revenue collection upfront, reduce the need for taxpayers to seek certainty through other means (e.g. by seeking private rulings) and enable the SRO to more efficiently allocate its resources.

<sup>14</sup> Refer <<https://lplc.com.au/news-and-alerts/spike-in-duty-claims-from-conveyancing-transactions>>.

<sup>15</sup> It is noted in a survey of the case law in relation to the exercise of the Commissioner's discretions and state of mind provisions reveals that such provisions create uncertainty, even among courts. Michael Flynn QC, CTA, 'Tackling the Exercise of the Commissioner's Discretionary Power' (Paper presented at the 19th Annual States' Taxation Conference, Brisbane, 25 July 2019) 30.

<sup>16</sup> Victorian State Revenue Office, *Compliance Strategy 2020-2023* (17 August 2021) <<https://www.sro.vic.gov.au/resources/compliance-strategy-2020-2023>>.

- 4.5 The SRO has indicated an unwillingness to issue public rulings on particular topics on the basis that it has not received a significant number of enquiries, private ruling requests or lodgements from taxpayers on such topics. However, in the Signatories' experience, the lack of certainty in relation to the application (and / or administration) of particular tax laws can actually be the cause of reduced engagement with the SRO.
- 4.6 A prime example of this outcome arising is in the context of the economic entitlement regime (as outlined at section 3 above). Some Signatories' experience is that taxpayers in the property and funds management industries are experiencing a great deal of uncertainty as to the application and administration of this regime but are reluctant to engage with the SRO.

### ***Private rulings***

- 4.7 In recent years we have observed that:
- (a) the SRO has increased its tendency to refuse to issue private rulings on the grounds that there is no 'genuine ambiguity in the legislation or a statutory interpretation issue' (a criterion which the Commissioner sets out in *Public Ruling GEN-009v3 'General Information on Private Rulings'*), for example in the context of the change of trustee duty exemption;
  - (b) the SRO has chosen to not issue private rulings in relation to the application of the corporate reconstruction relief regime (following the 2019 legislative changes to that regime); and
  - (c) while the SRO is meeting its target for private ruling turnaround times (>80% within 80 days), there are often significant delays on complex and commercially time-sensitive matters.
- 4.8 From a commercial perspective, this creates significant issues for taxpayers and businesses who require tax certainty. Accordingly, we submit that:
- (a) private rulings should be available in a much wider range of circumstances (including in the areas outlined at paragraph 4.7 above); and
  - (b) with regard to complex and high value matters the SRO should :
    - (i) publish its private ruling turnaround times for such matters; and
    - (ii) dedicate additional resources to allow for private rulings in such matters to be issued in a timely manner.
- 4.9 Given that it is often the case that the SRO will need to review a matter in any event (whether as part of a pre-transaction ruling, a 'complex assessment' or a post transaction lodgement), we expect that an increase in resources dedicated to private rulings would be largely offset by a decrease in resources required to assess transactions once they have occurred.

### ***Publication of private rulings***

- 4.10 The ATO publishes private rulings in de-identified form on a register maintained on its website. This register promotes transparency, helps improve the quality of ATO private rulings, assists tax compliance and the self-assessment process and ensures large legal and accounting firms do not obtain an unfair advantage over smaller firms.<sup>17</sup>
- 4.11 For these reasons, we recommend that the SRO publishes de-identified private rulings that are accessible in an online database equivalent to that maintained by the ATO.

## **5. Recommendations**

- 5.1 In view of the above, we make the following recommendations:

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<sup>17</sup> Inspector General of Taxation, Review of the Australian Taxation Office's administration of Private Binding Rulings, 3 May 2010.

- (a) Where Website Guidance is proposed to provide substantive guidance which has no clear basis in legislation, it should be:
  - (i) issued in the form of a public ruling (or at least subject to similar consultation processes as public rulings); and
  - (ii) publicly archived when replaced or revised so that the Commissioner's point-in-time position can be accessed by taxpayers.
- (b) If the SRO's official position is that it will 'ordinarily' stand by Website Guidance, then the SRO should release a ruling outlining:
  - (i) the circumstances in which it may depart from its Website Guidance;
  - (ii) its approach in the event that a taxpayer has relied on Website Guidance and the SRO subsequently departs from that position;
  - (iii) its position when a taxpayer and the SRO disagree on the interpretation of Website Guidance; and
  - (iv) what reliance the SRO will allow a taxpayer to place on Website Guidance (including in the context of court or tribunal proceedings).
- (c) The SRO, should recommend to the Treasurer that there be a post-implementation review process for significant changes to Victorian revenue law, in line with the process at the Federal level,<sup>18</sup> so that underlying issues with the substance and administration of the relevant measure or regime can be properly assessed (and addressed as required).
- (d) With regard to the economic entitlement regime specifically:
  - (i) a post-implementation review of the regime, including considering whether various issues raised in the EE Guidelines necessitate legislative amendments should be conducted; and
  - (ii) in the interim, the Commissioner should issue a public ruling which replaces the EE Guidelines.
- (e) With regard to rulings, the SRO should:
  - (i) continue to prioritise issuing public rulings, and decrease its reliance on Website Guidance. This should help mitigate the drawbacks of Website Guidance, increase certainty, enable front-end compliance and increase efficiency in the allocation of resources;
  - (ii) publish a register of de-identified private rulings on its website to help identify high-volume issues and reduce the need for private ruling applications;
  - (iii) provide private rulings in a wider range of circumstances than currently is the case; and
  - (iv) for complex and high value matters:
    - (A) publish its private ruling turnaround times for such matters; and
    - (B) dedicate additional resources to allow for private rulings in such matters to be issued in a timely manner.

5.2 Each of the Signatories would welcome the opportunity to engage further with the SRO and Department of Treasury and Finance in respect of these issues. In the first instance, please contact Julie Abdalla (Tax Counsel, The Tax Institute) on (02) 8223 0058 or by email ([JulieAbdalla@taxinstitute.com.au](mailto:JulieAbdalla@taxinstitute.com.au)) if you require further information or would like to discuss.

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<sup>18</sup> See, e.g., Office of Best Practice Regulation, 'Post-implementation Reviews Guidance Note' (March 2020) <[https://obpr.pmc.gov.au/sites/default/files/2021-06/post-implementation-reviews\\_0.pdf](https://obpr.pmc.gov.au/sites/default/files/2021-06/post-implementation-reviews_0.pdf)>.



Yours sincerely



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