Dear Premier

Draft Land Tax (Miscellaneous) Amendment Bill 2019

I write on behalf of the Australian Institute of Conveyancers (SA Division) (AICSA) regarding the draft Land Tax (Miscellaneous) Amendment Bill 2019 (the Bill).

The AICSA is the peak body in South Australia representing the conveyancing profession. The AICSA is committed to building a thriving property market, a strong and productive conveyancing profession and a flourishing South Australian economy. To this end, we consider the proposed land tax reforms will not just stifle but devastate the property market and the state’s economy.

Property ownership, and security of such, underpins the entire fabric of the Australian economy. In what is already a soft property market, the AICSA considers the land tax reform will further subdue the market. The AICSA is disappointed that your government has chosen to continue with the implementation of a policy that will penalise people who have properly structured the ownership of their properties to provide for assets protection, succession planning, and capital gains benefits and as a consequence, limit their land tax liability to a single holding tax position. People who have invested in their retirement so that they can live comfortably and provide for themselves. Furthermore, these investors are faced with both aggregation and significant increases in property values as a result of the Valuer-General’s re-evaluation initiative.

Many conveyancers are small business owners and lessees of commercial property. Our concern is that this measure will restrict the property market and that small businesses will end up bearing the cost of this measure. Additionally, the Trust notification requirements in the Bill are complex and it will be, on many occasions, the conveyancer advising and lodging these forms on behalf of their client. Should the Bill progress, simplification of the Trust provisions are essential to ensure property owners and their conveyancers are able to fulfil their obligations in a straightforward manner without risk of significant financial consequences.

In our letter to you, dated 9 August 2019, the AICSA was clear in our opposition to the implementation of this policy, our position remains unchanged. I make the following points in support of our position and with respect to the land tax reform policy generally:

1. The reduction in the top rate to 2.4% still puts South Australia above all other mainland states and makes statements made by the Treasurer and others about making South Australia more competitive, plainly incorrect.
2. The re-valuation project has already shown increases in site values vastly in excess of Treasury estimates (refer CBRE Report). Our view is that the desired revenue increase being sought by your Government will be accommodated by that process without the need for any review measures and as such that process
should run its course before any other changes are contemplated. The AICSA is aware of commercial properties located in Unley and Hyde Park where capital values have increased by over 100% and it is anticipated the site value will follow suit.

3. The syndicated investment groups referred to in our previous letter, will immediately look to Victoria and NSW for new development opportunities as a result of the uncompetitive nature of the proposed changes. Possibly, unwittingly, the measures will mean aggregation of investment in syndicated unit trusts by investors with their own property holdings. By way of example, an investor in a property trust holding a large Shopping Centre (the Trustee having paid Land Tax at the maximum rate) will then have their own commercial property aggregated and pay significantly more. As a result, the investor will favour an interstate investment, rather than continuing to invest in South Australia.

4. The AICSA regards the statements around making the system fairer as disingenuous to investors in the South Australian economy. We strongly disagree with the examples provided by the Treasurer, which attempt to confuse the general public and are largely incorrect in context. As previously submitted, the measures will in fact target the parties looking to advance their own investment base, mum and dad investors, not the “big end of town”.

Comments on the Draft Land Tax (Miscellaneous) Amendment Bill 2019

Legal Structures

The purpose of most of the structures that these reforms target have nothing to do with land tax, nor avoidance of the same. Generally, people choose to hold land in a Discretionary Trust for a number of purposes, these include:

1. capital gains tax
2. potential to stream rental income among beneficiaries
3. asset protection
4. succession planning

Of significant concern is that by penalising those with property held in Discretionary Trusts, people will no longer be able to structure their assets in such a way that is encouraged by the ATO and essential for asset protection. As a result, people will be more likely to invest in other areas such as interstate land or listed shares.

The definition of a Unit Trust and a Fixed Trust in the Bill is unclear and must be amended so that the existence of any discretion will not turn a Unit Trust or a Fixed Trust into a deemed Discretionary Trust for the purposes of land tax. Adrian Cartland, Lawyer, has provided the following insight:

“A modern Unit Trust deed(s) can be quite complex and the way the legislation is drafted will likely force them into the category of a Discretionary Trust, and hence the surcharge. A Unit Trust might have fixed beneficiaries (unit holders) but discretion to distribute between Class A and Class B unit holders. Or a Unit Trust might have unit holders who subscribe to Capital and Income units and there is discretion to characterize money received as capital or income. Or maybe just the ability to add a new unit holder or amend the deed (say, when there is a change in circumstances or laws). These things have been found in NSW and Victoria to make the trusts discretionary (i.e. non-fixed).”

This situation is of serious concern and must be addressed as part of the consultation process.

Nominations – Discretionary Trusts

Whilst our preference is to see the Marshall Government abandon this reform, should it continue, the provisions regarding Discretionary Trusts must be amended insofar as it is not just existing (grandfathered) Discretionary Trusts that can make nominations of beneficiaries, but new ones as well. By allowing such a change taxpayers will be able to maintain asset protection and structuring provided for under federal tax law and the State Government would realise an increase in land tax income.

Nominations with respect to Discretionary Trusts pose further concerns that must be addressed and rectified. The Bill provides no mechanism to deal with a Discretionary Trust that may change as a result of a marriage breakdown. In 2017, there were 49,032 divorces granted in Australia, an increase of 2,428 (5.0%) from the 46,604 divorces granted in 2016. Given Discretionary Trusts are a structure used by families for the purposes set out above, it is essential that rules are in place to deal with marriage breakdowns, including the ability to amend a nomination in the case of a court order. Additionally, the AICSA would consider that in circumstances where a nomination has been withdrawn a further nomination can be made, notwithstanding the reason for withdrawal.

Nominations – Unit Trusts

Nominations relating to Unit Trusts or Fixed Trusts are also problematic.

Nominations as provided in the Bill, appear to cover all unit holders (as they change from time to time). New unit holders will need to be aware of any existing nomination in force under section 13 as this nomination could expose the unit holder to beneficiary assessments in subsequent years. Provisions like this will make it impossible to deal with property held in a Unit Trust in a commercial manner without it having significant negative impact on other unit holders.

Timing of provisions

These reforms penalise structuring decisions that have been made in accordance with clear legislation over decades. Of great disappointment is the treatment of Discretionary Trusts with the provision grandfathered from the introduction date of the Bill into Parliament. This is simply unfair and unwarranted. Furthermore, the nomination date of 30 June 2020 is unreasonable. Many people affected by the reforms are mum and dad investors, migrants who have worked hard and invested in property, providing affordable housing to hundreds of South Australians. These people are less sophisticated in their legal and political understanding and must be provided for and supported so they are not further disadvantaged by unjust timeframes. The AICSA recommends the Bill should be amended so that it will only effect land purchased after the date of Royal Assent or a later date.

Conclusion

South Australia currently has the highest land tax rate in the country. While the AICSA welcomes the proposed lowering of the land tax rate; the proposal to aggregate is simply neither appropriate nor sustainable land tax reform. The lack of clarity in drafting and the potential immediate start of the provisions, means that it is difficult for South Australians and investors to be certain of how to structure purchases – an uncertainty that has been seen in the further softening of the housing and construction markets since the announcement of this reform.

The AICSA calls on the Marshall Government to rethink the controversial land tax reform and to look at all land tax options, including a flat land tax rate, before imposing a penalty on mum and dad investors, property investors and ultimately all South Australians. We see this as an opportunity for the government to be innovative and to show leadership in taxation initiatives.

I would welcome the opportunity to meet with you to discuss the enclosed concerns.

Yours sincerely

Rebecca Hayes
Chief Executive

cc. Hon. Rob Lucas MLC – treasurer@sa.gov.au
Courtney Morcombe – Courtney.morcombe@sa.gov.au
Paul Armanas – paul.armanas@sa.gov.au
Julian Robertson - julian.robertson@sa.gov.au
Sarah Taylor - Sarah.taylor@sa.gov.au