Local Tax Club-Melbourne & Geelong

State Taxes – The current landscape

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1. Overview

In this paper we take you through some of the current issues in the state tax landscape and tips and traps for navigating the Regulator landscape. It is not intended to be a comprehensive review of the state tax landscape, nor a deep dive into specific issues. But rather an insight into common issues that are attracting the Regulator's attention, some of the most significant Court decisions to be published and a handful of emerging issues. The topics covered in this paper include:

- payroll tax relevant contractor, employment agent and grouping provisions;
- new and re-emerging/developing land based taxes including vacant residential land tax, primary production exemptions, commercial and industrial property tax and windfall gains tax;
- developments in transfer duty including the impact of the *Oliver Hume*[1] decision for aggregation, treating transactions as part of a single transaction and the "significant interest" threshold for landholder transfer duty and the scope of the exemptions for property passing to beneficiaries from trusts.

Against that landscape, we provide some tips and highlight traps to be aware of when advising clients and representing clients in disputes with the Regulator around these state tax issues, and close with more generic tips and traps for state tax issues more broadly. In that regard, we note that whether the taxpayer selects the VCAT or the Supreme Court to contest a disallowed objection, they will carry the onus of proving their case (as with federal tax disputes). It will be up to the taxpayer to produce the witnesses and documents to do this.

[1] *Oliver Hume Property Funds (Broad Gully Rd) Diamond Creek Pty Ltd v Commissioner of State Revenue* [2024] VSCA 175.

2. Payroll Tax

2.1 Overview

Payroll tax does not only apply to common law employees. It has a vastly extended definition. There are both relevant contractor provisions and employment agency provisions in the payroll tax legislation that mean amounts paid to many contractors are considered “wages” and are subject to payroll tax obligations for engaging entities, even if they are not captured as salaries or wages for other tax or legal purposes. Wages are defined as “wages, remuneration, salary, commission, bonuses or allowances paid or payable to an employee” and including amounts payable under “relevant contracts.” [2]

Both sets of provisions were created to “catch those relationships where the sub-contractor works exclusively or primarily for the one person and where the object of the contract between the parties is to obtain the labour of the sub-contractor”. As such, the types of relationships that were meant to be captured by the relevant contractor provisions are, for all intent and purposes, those arrangements that are identical in substance to the typical employment relationships.

However, the actual ambit of the provisions is much wider.

Recent court authorities have reinforced the breadth of these provisions, confirming that intermediaries and businesses that rely on contractors to carry out their normal business activities increase the risk of having amounts paid to those contractors considered as “wages” for payroll tax purposes. These decisions have challenged previously held common understandings of how the payroll tax provisions apply.

State revenue authorities are increasing their scrutiny of how payroll taxes are applied to contractors on the back of these decisions.

Reviews are currently being conducted across various industries that are heavily reliant on contractors or intermediaries, such as the finance, technology, hospitality and construction industries. Other industries are also under review.

Data matching and data sharing that takes place means that errors and discrepancies are very visible to the state revenue authorities. We have also seen increased audit activity around how payroll tax grouping provisions apply to related entities.

We do recommend close review of existing arrangements to ensure that there are not unexpected or unanticipated payroll tax issues embedded as the landscape has changed significantly over the last few years. And if there are issues identified that consideration be given to how to mitigate those, including revisiting structural and contractual arrangements.

2.2 Relevant contractor provisions

Relevant contractor provisions deem contractors to be employees for payroll tax purposes. Under these provisions, amounts paid or payable by a relevant contractor employer to a relevant contractor are treated as wages in relation to the work or services provided under the contract.

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[2] See eg. *Payroll Tax Act 2007* (Vic) s 13, Division 7.

Relevant contracts include various agreements for services provided by independent contractors – including more specifically contracts under which a designated person in the course of a business carried on the designated person:

(a) supplies services for or in relation to work;
(b) has supplied to the designated person the services of persons for or in relation to the performance of work; or
(c) gives out goods to natural persons for work to be performed in certain circumstances,

unless an exemption applies.

Contracts for this purpose include agreements, arrangements or undertakings, whether formal or informal and whether express or implied.[3]

Exemptions include: services being limited to ancillary services, the service provider providing the services generally to the public, or for limited time frames or having the services conducted by a number of persons.

The breadth of the definition was brought home in the recent decision of *Uber Chief Commissioner of State Revenue v Uber Australia Pty Ltd*[4] which was handed down in August 2025.

Before, addressing the decision it is necessary to give some background to how Uber operates its platform. Essentially, Uber has developed two software applications – the "driver app" (used by drivers) and the "rider app" (used by riders). The apps are platforms which enable drivers and riders to connect, which in turn enables drivers to be available to provide transport to riders. The apps share only limited information about the rider and the driver with the other party up until the time that the ride is accepted. Uber also contracts with drivers and riders separately. Contracts with each provide that Uber does not itself provide transportation services and that Uber acts as collection agent between the rider and driver. Each contract describes Uber's business as being the provision of access to the apps and providing access to lead generation services for a fee. Invoices when issued include the drivers ABN and name, not Ubers.

The Chief Commissioner assessed Uber for approximately $81 million in payroll tax. Uber objected, arguing that its arrangements with drivers did not fall within the statutory concept of 'relevant contracts' and that, even if they did, the amounts remitted to drivers were not 'wages' for the purposes of the Act.

The Federal Court at first instance held that Uber was not liable to payroll tax. The Federal Court found all necessary elements to be met other than the requirement that there be a connection between payments made by Uber and the work done by drivers under the relevant contracts so as to make the payments "for or in relation to the work". On that the Federal Court saw the payment mechanism as important. That is, it is not Uber who pays the driver. The rider does that. Uber is a mere "payment collection agent". By the time Uber accounts to the driver as collection agent the driver has already been paid and the rider has already discharged their obligation to pay. Therefore, the payments made by Uber are not to be taken as wages. To quote directly from paragraphs 180 and 181 of the judgment:

> *There is no element of reciprocity or calibration between the driver and Uber or the rider and Uber with respect to the money paid by the rider. Those elements exist only between the*

[3] See eg. *Payroll Tax Act 2007* (Vic) s 31.
[4] *Chief Commissioner of State Revenue v Uber Australia Pty Ltd* [2025] NSWCA 172.

> *driver and the rider. The payment here is made pursuant to an obligation to account, and no more.*
>
> *What the rider pays the driver is for or in relation to the work done by the driver. What Uber pays the driver is in relation to the payment Uber has received, not in relation to the work itself.*

The Full Federal Court did not agree with that analysis – describing it as an impermissible gloss on the statute. The Full Federal Court held that the phrase 'for or in relation to' is deliberately broad and requires no more than a relationship, whether direct or indirect, between the payment and the work. The words 'in relation to' expand the scope beyond direct remuneration to include payments connected with the work. On this view the Full Federal Court held that payments drivers were related to the work of transporting riders. They were calculated by reference to the driving service (distance, time, etc.), less Uber's service fee. The fact that Uber's obligation arose from its role in collecting fares did not change the character of the payments as being 'in relation to the performance of work'.

The Full Federal Court was also convinced that driving was a service supplied to Uber under the driver contracts, although the driver contracts sought to describe that as a service supplied direct to riders and not to Uber. On this point the Full Federal Court was unconvinced by arguments based on contractual wording, holding that driving was the foundation of Uber's business model, generated Uber's service fee, and engaged Uber's contractual rights to collect fares and deduct fees. The driver contracts conferred a right to be paid for driving and governed performance through obligations relating to safety, conduct and use of the Driver App. Similarly, rating riders after trips was also a service supplied under the driver contracts. Although brief, it was practically mandatory because the Driver App required drivers to rate riders before accepting new trips, and it was regulated by the contracts. The Court rejected Uber's argument that these services were de minimis.

Referrals, however, were different. The Full Federal Court found that referrals were supplied under separate contracts formed when drivers accepted Uber's referral offers, not under the driver contracts.

Uber also argued that the amounts remitted to drivers were not 'paid or payable' by Uber because drivers earned the money from riders, not Uber, and Uber merely acted as a payment collection agent. The Court rejected this argument, relying upon the earlier authorities of *Commissioner of State Revenue v Optical Superstore Pty Ltd*,[5] and T*homas & Naaz*..[6] Those cases held that payments are 'paid or payable' even if the recipient already had a beneficial entitlement to the funds. The statute does not ask whether the payer is the beneficial owner of the funds; it focuses on whether money was provided. The definition of 'paid' in s 3(1) includes 'provided, conferred and assigned', which supports a broad interpretation.[7] Accordingly, Uber's role in collecting fares and remitting them to drivers (after deducting its service fee) constituted 'payment' for the purposes of s 35(1). Those cases, in particular *Optical Superstore,* held that there does not need to be proportionality between the service and benefit obtained.

The judgment comments also on a number of the exceptions to the relevant contractor provisions. Most of those comments are unremarkable. But one worth considering is the interaction between the ancillary exclusion and the additional services provision – and in particular that whether services are bundled together as a holistic offering or put forward as separate options can significantly influence how that exclusion applies.

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[5] *Commissioner of State Revenue (Vic) v The Optical Superstore Pty Ltd* [2019] VSCA 197.
[6] [2023] NSWCA 40.
[7] *Chief Commissioner of State Revenue v Uber Australia Pty Ltd* [2025] NSWCA 172, 380-383.

Thomas and Naaz Pty Ltd v Commissioner of State Revenue[8] is another decision worth commenting upon, being one that has brought about legislative change in a number of states for medical general practitioners.

In *Thomas and Naaz* the applicant operated three medical centres from which various medical practitioners operated. There were written agreements between the medical practitioners and applicant. The main issue was whether the payments from the applicant to the medical practitioners of Medicare benefits were "taxable wages" for payroll tax purposes.

Written agreements between the medical practitioners and applicant included a clause that the medical practitioners shall 'bulk bill' the patients and will pay the applicant 30% plus GST of the total billing. Whilst the contractual position was that the medical practitioners would make Medicare claims and remit 30% of the amount to the applicant, in practice all except for three medical practitioners working in the centres had agreed to have the applicant deal directly with Medicare on their behalf. Medicare paid the bulk billing payment into a bank account in the applicants name – the applicant's administrative staff then attributed the payments to each practitioner for their services and paid 70% of the amounts to the medical practitioner, with the applicant retaining 30% plus GST of the total billings.

For Medicare benefits claimed and collected by the applicant then remitted to medical practitioners the Court held such amounts were taxable wages. Where the medical practitioners processed their own Medicare claims and remitted 30% to the applicant it was accepted by the Respondent that those amounts were not taxable wages. Whilst this was the accepted position in the Court case it is important to note there are deeming provisions in the Payroll Tax Acts across the various states that do mean even these amounts can be captured – that is because the deeming provisions do not require the amount be paid from the putative employer to putative employee. It can be from a third party to the putative employee; from the putative employer to a third party at the direction of the putative employee, or between third parties entirely at the direction of both the putative employer and employee.[9]

At first instance, the conclusion that the relevant contractor provisions applied was reached on the basis that the medical practitioners provided services to the applicant. That was because it was central to the applicant's business that people would attend its centres in order to receive medical treatment and that to that end the applicant provided the premises, employed administrative and receptionist staff and nurses. Further, that the medical practitioner's attendance at the applicant's medical centre in order to provide medical services to patients was an important aspect of the business and was indeed the source of income for paying administrative, reception and nursing staff.[10] This issue was not considered or determined on appeal as it was a question of fact and not law.

The appeal point was whether there needed to be a 'quid pro quo' for wages. The Court was of the view that issue was likewise not a question of law but rather one of fact – but did state that quid pro quo is not required and that wages can include on-payment of amounts to which the payee is already contractually or beneficially entitled.[11] There is an earlier decision of the Victorian Court of Appeal to the same effect.[12]

The larger body of case law considering the relevant contractor provisions goes further. Those cases confirm that:

[8] [2023] NSWCA 40.

[9] See eg. *Payroll Tax Act 2007* (Vic) s 46.

[10] *Thomas and Naaz Pty Ltd v Commissioner of State Revenue* [2023] NSWCA 40, [40]-[43].

[11] *Thomas and Naaz Pty Ltd v Commissioner of State Revenue* [2023] NSWCA 40, [64].

[12] *Commissioner of State Revenue (Vic) v The Optical Superstore Pty Ltd* [2019] VSCA 197.

- the requirement that amounts be paid for or in relation to performance of work requires no more than that services be work-related. That is, a payment made need not be for services provided to the payer to constitute wages – it is sufficient that they are work-related services to someone. For example, services provided by medical practitioners to end patients.
- the term "services" has a broad meaning and can include "an act of helpful activity", "the action of helping or doing work for someone" and an "act of assistance". By way of example, a mortgage broker's commitment to undertake work in a particular way was characterised as the performance of a service to the mortgage aggregator, even though it was also the performance of a service to a client for whom a loan was arranged.[13]
- there need not be proportionality between the services performed and the amounts paid for that amount to constitute wages.
- wages include amounts paid or payable by an intermediary to a service provider where the funds flow through the intermediary entity – even where the service provider is beneficially entitled to those funds at all times. For example, Medicare benefits paid to a medical practice and passed onto medical practitioners.

2.3 Employment agency provisions

The employment agency provisions capture a chain of on-hire arrangements rendering each entity within the chain potentially liable for the payroll tax owing on the services provided by the end service provider.

The most recent decision considering the employment agency provisions is *Integrated Trolley Management Pty Limited V Chief Commissioner of State Revenue.*[14] In that case *Integrated Trolley Management* (**ITM**) provided trolley collection services by engaging independent contractors (service providers) to locate, collect, and return supermarket trolleys to the clients' [Woolworths, ALDI, IGA] stores. The main principles that come out of the case are:

- It is the contract between ITM and its clients [Woolworths/ALDI/IGA] that is the relevant contract – not that between ITM and trolley collectors.
- That it is the terms of the contract, not how the parties interacted in practice, that takes precedence in determining the character of the relationship.
- That the core question to be considered is whether services (trolley collection) of individual subcontractors provided through the agent [ITM] to allow clients [Woolworths, ALDI, IGA] to conduct their business in same or similar way as would do through an employee.
- That it is misleading to give too much weight to indicia from other cases as there are many and different ways in which the concept of "in and for" the client's business have been expressed and can be expressed in different business contexts and that therefore there is risk created in relying on semantic distinctions that may put an impermissible gloss on the statutory language.

Previous cases have established that where there are chain of on hire arrangements there can be more than one putative employer when the employment agency provisions are applied – and in that instance that the State Revenue Authority can seek to recover the payroll tax from each putative employer in that chain of on-hire.

[13] *Loan Market Group Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 390.
[14] [2023] NSWCA 302

2.4 Payroll tax grouping

Payroll tax grouping has important implications for calculating threshold entitlements for payroll tax. For example, where a payroll tax group exists:

- the gross wages of all group members must be added together and a single threshold deduction applies to the group.
- the threshold entitlement is based on the proportion of NSW wages against total Australian wages.
- every member of the group is liable for any unpaid payroll tax of any other group members.

The payroll tax grouping provisions are exceptionally broad in their ambit. Payroll tax groups can arise as a result of there being:

1. Related body corporates

   The entities are corporations which are related to each other by virtue of section 50 of the Corporations Act 2001 (Cth). The definition includes all holding companies and their subsidiaries (direct and indirect) where one entity is a subsidiary of a second entity if the second entity:

   - can control the composition of the first entities board;
   - is in a position to cast or control the casting of more than 50 per cent of votes in the first entity; or
   - holds more than 50 per cent of the share capital in the first entity.

   Entities grouped under this provision cannot be de-grouped.

2. Common employees

   At least one employee of an entity performs any duties for or in connection with a business conducted by another entity or there is an agreement between two entities for the employee of one of them to perform duties in the business conducted by the other entity.

3. Common control and controlling interests

   A person or set of persons (individual, corporation, partnership, trust or other entity type) together have a controlling interest in two or more entities. A controlling interest being where the person or set of persons:

   - is or are the sole owner(s) of a business however constituted;
   - is in a position to cast or control the casting of more than 50 per cent of votes in a corporation, holds more than 50 per cent of the capital in a partnership or is the beneficiary of more than 50 per cent of the interests in a trust (whether as trustee or beneficiary);
   - holds more than 50 per cent of the share capital in a corporation or is entitled to more than 50 per cent of the profits from a partnership;
   - constitute more than 50 per cent of the board or controlling organ of an entity or can control the composition of that controlling organ of an entity; or
   - have authority that mean an entity is under an obligation whether formal or informal to act in accordance with the direction, instructions or wishes of that person or set of persons.

There are also tracing provisions to connect entities of the above classes through interconnections. Further, default beneficiaries of discretionary trusts are taken to have a beneficial interest in more than 50 per cent of the value of interests in the trust. This means that if a discretionary trust is part of a corporate group, it will almost always be part of a payroll tax group. The discretionary trust can be a link between many other entities in the group, causing them to also fall under the payroll tax group.

It is important to note that the term ‘entities’ in the explanation above can also refer to non-employing entities (companies without employees) and dormant entities (companies that are not actively trading). Both types of entities can serve as a link between other entities that are employers.

Where a business is a member of more than one group, all businesses in each group are subsumed into a single payroll tax group.

Fortunately, there is an exception. It is one that is dependent on the Commissioner of State Revenue in the relevant State exercising a discretion in writing and therefore requires there be active engagement with the State Revenue Office. The discretion can broadly be exercised by the Commissioner where satisfied having regard to the nature and degree of ownership and control of the businesses, the nature of the businesses and any other matters the Commissioner considers relevant, that a business carried on by the person, is carried on independently of, and is not connected with the carrying on of, a business carried on by any other member of that group.

It is a highly fact specific enquiry that looks not just to the contractual and formal legal arrangements are in place but to how entities interact in practice.

Those looking to avail themselves of the discretion ought to seek advice early, ensure policies and procedures are implemented to maintain independence and have the records necessary to prove the position down the track if necessary.

For those subject to a current review or audit that involves grouping considerations – invest the time in fully understanding your position and its strengths and weaknesses before putting submissions forward, focus on the facts and speak to specialists as to where you stand and what options you have.

3. Land based taxes

3.1 Vacant residential land tax

3.1.1 Overview

Vacant residential land tax (**VRLT**) has been part of the state taxes landscape since 1 January 2018, when it applied to vacant residential land across inner and middle Melbourne councils that was unoccupied for more than six months in a preceding calendar year. However, from 1 January 2025, it applies to all residential land across <u>all</u> of Victoria, based on the use of the land as at midnight, 31 December 2024. Land in alpine resorts (as defined in the *Alpine Resorts Act* 1983) in Victoria is excluded.

From 1 January 2026, VRLT will also apply to unimproved land in metropolitan Melbourne that has been undeveloped for five years or more. Although legislated in the *State Taxation Acts and Other Acts Amendment Act* 2023, the provisions are not yet contained in the *Land Tax Act* 2005, by reason of their start date. Simply finding all the legislation pertaining to VRLT is a challenge.

Subject to two exceptions below, the tax is 1% of the capital improved value (**CIV**) for the first year of liability, increasing to 2% for the second consecutive year of liability and topping out at 3% for the third consecutive year of liability and beyond. For example, land (including a house) with a CIV of $1 million would attract VRLT of $10,000 for the first year it is vacant, $20,000 in the second year and $30,000 for the third year it is vacant and beyond, in addition to land tax. This is in addition to land tax imposed on site value. It appears to be having far reaching ramifications.

One exception to the incremental rate exists for certain land that becomes residential land and which remains unused, unoccupied and unsold after 3 years (see below). In that scenario, VRLT is capped at 1% of the CIV. A second exception relates to VRLT on unimproved residential land – this will also be kept at 1% of the CIV.

An owner of vacant residential land is required to notify the Commissioner of State Revenue in the approved form by 15 January of each year. A failure to do so amounts to a notification default that may attract penalty tax: see Revenue Ruling TAA-008 and TAA.007v5.

3.1.2 Residential land that is vacant

Residential land is land that is capable of being used solely or primarily for residential purposes.[15] It does not include land that is capable of being used solely or primarily as commercial residential premises (as defined in the GST Act), a residential care facility, a supported residential service or a retirement village service (all defined by the *Land Tax Act 2005* (**LTA**)).

The legislation treats residential land as vacant if it has not been used and occupied for a period, whether continuous or aggregated, of greater than six months in the preceding land tax year by the owner of the residential land as their principle place of residence (**PPR**), the owner's permitted occupant as their PPR, or, generally, a natural person under a lease or short-term letting

[15] *Land Tax Act 2005* s 34B(1).

arrangement. A “permitted occupant” is a person other than a tenant who uses and occupies the land with the permission of the owner.

A residence that is being constructed or renovated will be treated as residential land, however it will not be treated as vacant at the end of a land tax year unless the construction/renovation is not completed and more than two years has elapsed since construction, or the renovation commenced (taken to be the date of issue of the building permit), or the Commissioner is satisfied there is an acceptable reason for the delay.

Further, since the 2020 land tax year, residential land includes residential properties that have been uninhabitable and which does not have a residence that is being constructed or renovated. Uninhabitable land will be treated as vacant if it is uninhabitable for 2 years or more, for two years or more, unless the Commissioner is satisfied there is an acceptable reason for the residence not having been made habitable: s 34C(4A).

From 1 January 2026, the definition of “residential land” will also include, broadly, unimproved land in metropolitan Melbourne that is capable of being developed as residential land, unless the Commissioner determines that there is an acceptable reason for the land not yet being used or developed: future ss 34B(2B), 34B(4).

Unimproved land that does not change ownership will be treated as vacant if it has been undeveloped for 5 continuous years or more: future s 34C(2B).[16] Accordingly, unimproved land purchased in the 2020 calendar year will be considered vacant for VRLT purposes if construction does not commence by the end of the 2025 land tax year. In this regard, construction is taken to commence on the date the building permit issues: s 34C(4), LTA. The Commissioner will have a discretion to determine, having regard to guidelines issued by the Treasurer, that a residence is to be constructed and there is an acceptable reason for the construction not having commenced. In that scenario, the land will not be vacant for that year. This measure does not apply to land to be developed for a non-residential use.

3.1.3 Holiday home exemption

The exemption that has attracted the most attention recently is for holiday homes: s 88A, LTA. It is complex in its operation. An exemption from the VRLT applies to a holiday home owned by an individual or a vested beneficiary if:

(a) the owner or vested beneficiary used and occupied the land as a holiday home, or, from 1 January 2025, a relative (as defined in s 3 of the LTA) of the owner/vested beneficiary for at least four weeks (need not be continuous) in the preceding land tax year; and

(b) the owner/vested beneficiary must have used and occupied other land in Australia as a PPR.

In considering whether the land was used and occupied as a holiday home, the Commissioner must have regard to certain criteria (location of the land, distance from the owner’s PPR and the nature and frequency of use).

The expansion of the VRLT to all land in Victoria did not initially permit owners other than individuals or vested beneficiaries of trusts to access the holiday home exemption at all. Amendments made in

[16] The 5 year period will not be broken if the Commissioner considers that the land changes ownership to obtain a VRLT reduction or exemption.

early 2024 now permit a company or trust (other than a trust with a vested beneficiary) to access the holiday home exemption from 1 January 2025 where the following requirements are met:

(a) the company/trust owned the land as at 28 November 2023 (or became the owner after that time pursuant to a contract entered before that time);

(b) the company/trust has owned the land continuously since 28 November 2023;

(c) since 28 November 2023, any transfer of shares, units or beneficial interest is between persons who are "relatives" as defined, or for a discretionary trust, any changes to the "specified beneficiaries" (as defined) is to add or remove a relative of another specified beneficiary;

(d) the "PPR requirement" is met;

(e) in the year preceding the land tax year, the land was used and occupied for a period of at least 4 weeks, whether continuous or aggregate by a "specified person"; and

(f) the Commissioner is satisfied that the land was used and occupied as a genuine holiday home having regard to the location of the land, the distance between the location of the land and the PPR of the owner, vested beneficiary (for a trust with a vested beneficiary), shareholder, unitholder, beneficiary or specified beneficiary etc.

The PPR requirement means that at least 50% of the shares, units or beneficial interest (for a fixed trust) were directly/indirectly owned by one or more natural persons who, in the year preceding the land tax year, used and occupied other land in Australia as their principal place of residence. For a discretionary trust, the PPR requirement will be met if a specified beneficiary who is a natural person or a relative of that person used and occupied other land in Australia as their principal place of residence in the year preceding the land tax year.

A specified person is defined essentially as a natural person referred to in the relevant definition of PPR requirements, or their relative: s 88A(5).

The amendments accordingly now permit owners (such as discretionary trusts) other than individuals or vested beneficiaries to access the holiday home exemption where they owned the land as at 28 November 2023 (and the other requirement above are met). However, owners other than individuals or vested beneficiaries who purchase a holiday home after 28 November 2023 will not be able to access the holiday home exemption. In my opinion, this remains unsatisfactory; many holiday homes are purchased by family trusts for legitimate assets protection and succession reasons.

From 1 January 2026, unimproved land that is contiguous to land to which the holiday home exemption applies may also be exempt from VRLT if it:

- is unimproved land;
- is owned by the same owner as the holiday home land;
- is contiguous with the holiday home land;
- enhanced the holiday home land; and
- is used solely for the private benefit and enjoyment of the person who uses and occupies the holiday home land.

Lastly, from 2025, the holiday home exemption may continue to apply for up to 3 years (or longer if extended by the Commissioner) after the death of the owner or sole shareholder of a company that owns the home passes away: see s 88AB. This is provided that person uses and occupies other land in Australia as their PPR and use and occupy the holiday home for a period of at least 4 weeks (whether continuous or aggregate).

3.1.4 Other exemptions

Foremost, land that is exempt from land tax will be exempt from the VRLT.

An exemption applies to land that is used and occupied as a residence for at least 140 days in the preceding year for the purposes of attending the owner's place of business or employment (provided that place of business or employment is in Victoria) and the owner used and occupied other land in Australia as a PPR in the preceding year.

There are also other exemptions specific to the VRLT: Division 9 or Part 4 of the LTA. Land that is sold and transferred during a year will be exempt from the tax in the following year.[17]

Similarly, land that becomes residential land during a year will be exempt from the VRLT in the following year.[18] Further, where certain conditions are satisfied, land that becomes residential land can be exempt from VRLT for up to 3 years: see ss 88E, 88EA. This is targeting land converted into residential land that remains unused, unoccupied or unsold. For the third year, the Commissioner must be satisfied the owner has made genuine attempts to sell the land at or below the price they expected to receive when construction commenced. If the land remains unused, unoccupied and unsold after 3 years, VRLT will be imposed at 1% of the CIV until it is used, occupied or sold: s 88EB.

Also from 1 January 2026, land contiguous to an owner's PPR may be exempt from VRLT: see s 88F, LTA. The land must be owned by the owner of the PPR land, be contiguous with the PPR land (or separated only by a road or railway or other similar area), enhance the PPR land and be used solely for the private benefit and enjoyment of the person who uses and occupies the PPR land.

3.2 Primary production exemption

3.2.1 Overview

The primary production exemptions are not new. They have existed for a long time. But they have come to the fore again, as Melbourne's expansion into broad acres have altered the exemption within which existing use primary production land falls and as land values have continued to rise.

The Commissioner's ability to monitor and assess has also increased, with it now being well known that images such as those available through Google Earth are being used to assess whether land is actually being putting to a primary production use or another use. Against that context, the dollars at stake have resulted in considerable litigation over the last few years.

In Victoria there are four primary production exemptions. Which of those land falls within depends upon its zoning. The four exemptions are for:

- Primary production land outside greater Melbourne (s 65 LTA);
- Primary production land in greater Melbourne but not in the urban zone (s 66 LTA);
- Primary production land in an urban zone in greater Melbourne (s 67 LTA); and
- Land being prepared for use for primary production (s 68 LTA).

[17] *Land Tax Act 2005* s 88C.
[18] *Land Tax Act 2005* s 88D.

Each can apply to a part of the land or a whole parcel of land. Complex issues arise also around how to distinguish the separate parts, or indeed whether they are sufficiently separate, where that issue arises.

For primary production land outside greater Melbourne the sole required is that the land "is used primarily for primary production". The expression "primary production" is defined in s 64 to mean:

(a) cultivation for the purpose of selling the produce of cultivation (whether in a natural, processed or converted state); or

(b) the maintenance of animals or poultry for the purpose of selling them or their natural increase or bodily produce; or

(c) the keeping of bees for the purpose of selling their honey; or

(d) commercial fishing, including the preparation for commercial fishing or the storage or preservation of fish or fishing gear; or

(e) the cultivation or propagation for sale of plants seedlings mushrooms or orchids;

This definition, in and of itself, does not require that a primary production business be carried on (although see s 67 below). However, the primary production activity will have to have a commercial aspect to it – a hobby of cropping or running cattle will not suffice.

For primary production land in greater Melbourne but not in the urban zone, the standard that must be met is the same being that it must be "used primarily for primary production". But it is no longer a self assessment provision – rather it is the Commissioner that must make that determination. As the High Court starkly warned us in the decision of *Addy v Commissioner of Taxation*[19] the test is not the same. Where the Commissioner simply fails to consider the criterion at all it is nonetheless binding on the taxpayer as non-eligible as it means that the Commissioner has not made a determination. But, also as highlighted in that case, the issue can be revisited at the objection phase. When objecting to such an issue it is of absolute importance that the issue is therefore put front and centre in the grounds in a way that it cannot be avoided to ensure that an actual determination is made and that a case is not decided adversely to a taxpayer simply because the issue has not been considered.

For primary production land in an urban zone in greater Melbourne the test becomes much more onerous. Like section 66 LTA, section 67 LTA is a test based on the Commissioner's determination also. But for this land in the urban zone the use must be "solely or primarily for the business of primary production". The introduction of the business element, and the addition of the word solely (although used in combination with primarily) increases the intensity of use required. But those are not the only additional requirements.

Section 67(1)(b) also requires that the owner of the land meets certain requirements in either s 67A (for a natural person), s 67B (for a company), s 67C (for a superannuation trust), s 67D (for a discretionary trust) or s 67E (for a trust other than a discretionary trust or superannuation trust or a unit trust scheme. Those criteria are complex. They broadly require a natural person, or relative, who owns 50% or more of the shares, or who is a specified beneficiary of a discretionary trust or a member of a superannuation trust or a unit holder to be normally engaged in a substantially full-time capacity in the primary production business on the land.

Further, the principal business of the company, discretionary trust or other trust must be the primary production business conducted on the land. It cannot be another business such as land development, or leasing of properties. This again can be problematic for vehicles set up for family businesses that

[19] *Addy v Commissioner of Taxation* [2021] HCA 2021.

have a number of functions, and for land in the transitional phase from primary production to another use, which is not uncommon for recently rezoned urban land due to the increase in land value and proximity to expanding urban areas.

The assessment of use at 31 December of the year prior (being the relevant date) can include consideration of what was happening on the land "shortly before and/or shortly after the date in question", alternately "taking account of events and circumstances 'during a period not overlong and not over short' either side of that point in time": *Rainn Pty Ltd v Commissioner of State Revenue* [2016] VSCA 338 at [17]; *CDPV Pty Ltd v Commissioner of State Revenue* [2017] VSCA 89 at [50]. There is otherwise no hard line test for what that period is. It can depend on the nature of the activities themselves and how long it takes to get to a point where produce can be sold or animals breed. That said, compelling reasons would be required to extend it beyond six months prior and after given the annual nature of land tax.

Other common issues coming up and the subject of litigation (all very fact specific) include:

- Whether cultivation took place/animals kept for the purpose of sale or for another purpose: *CDPV Pty Ltd v Commissioner of State Revenue* [2017] VSCA 89;
- What level of intensity of primary production activity the various standards of "primarily', 'solely or primarily for the business' or other iterations in other States require to be met: *CDPV Pty Ltd; Annat v Commissioner of State Revenue* [2020] VSC 108;
- The types of activity on land that can cause the land to have a purpose other than primary production: *Chief Commissioner of State Revenue v Metricon Qld Pty Ltd* [2017] NSWCA 11; *Annat*; *Godolphin Australia Pty Ltd v Chief Commissioner of State Revenue* [2024] HCA 20;
- Whether what is being done constitutes a "business" or whether it is alternately a hobby or profit making venture;
- For entities established for more than one purpose, whether the principal business of that entity is primary production: *Lotus Oaks Pty Ltd v Commissioner of State Revenue* [2021] VSC 388; *Australian Investment & Development Pty Ltd v Commissioner of State Revenue* [202] VSCA 47; *Lavender Rain Pty Ltd v Commissioner of State Revenue* [2022] VCAT 1264; *Premier Bay Pty Ltd v Commissioner of State Revenue* [2024] VSC 447;
- Whether there is a qualifying person normally engaged in a substantially full time capacity in the business of primary production and especially what that means in the context of less intensive or seasonal primary production activities: *Delma v Commissioner of State Revenue* [2024] VSC 649 (on appeal); *Annat v Commissioner of State Revenue* [2020] VSC 108, *Lotus Oaks*.

Given the plethora of issues, the highly fact specific nature of each, the extent of information available to the Commissioner of State Revenue to cross check, the requirement for active determination from the Commissioner on some of the exemptions and the dollars at stake we expect to continue to see litigation in this space for some time yet.

3.3 Commercial and industrial property tax

3.3.1 Overview

Abolishing stamp duty for commercial and industrial property was recommended in Henry Review and by the Productivity Commission and Grattan Institute. The commercial and industrial property tax (**CIPT**) is a measure designed to achieve that. The rationale behind the shift was that stamp duty when added to the cost of purchasing property discourages business from investing in, expanding and relocating operations – impeding growth. The expected benefits of CIPT are:

- remove barriers against and thereby encourage expansion and relocation
- supporting investment in buildings and infrastructure by business owners
- promoting use of commercial and industrial land.

Whether those objectives will be achieved and to what extent remains to be seen. We remain in early days. The first properties that entered the CIPT regime are starting to go on the market. In August of this year, it was reported that 3-7 Hamilton Street, Mont Albert purchased by its current owners in July 2024 is back on the market and will be sold without the impost of transfer duty due to having entered the CIPT regime.

3.3.2 What is the CIPT and how much is it?

CIPT is an annual charge of 1% of the site (unimproved) value of land with no tax free threshold. It is based on land ownership at 31 December the year prior.

It applies only to properties with a "qualifying use" which is determined by reference to the Australian Valuation Property Classification Code (**AVPCC**) allocated to the property for the latest valuation. The AVPCC codes presently prescribed are:

- 200-299 (commercial): being retail premises, shops, cafes, offices, hotels, motels, medical centres, commercial vacant land;
- 300-399 (industrial): being manufacturing, factories, warehouses, storage facilities, industrial vacant land;
- 400-499 (extractive industries): being mines and quarries; and
- 600-699 (infrastructure and utilities): being waste disposal and recycling facilities.
- Is qualifying student accommodation.

Mixed use properties (that is with one of the above AVPCC codes for part but not all of the property) are in the CIPT regime only if the sole or primary use is the qualifying use, as determined by the Commissioner. Properties yet to get an AVPCC code can apply for a provisional code.

It can be paid either in a single payment or by instalments.

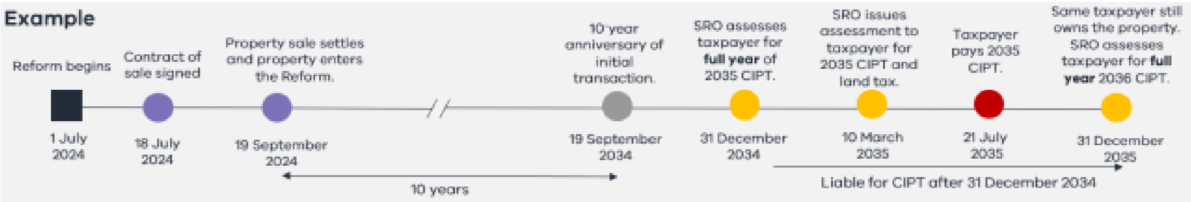
CIPT is in addition to and not in substitution for land tax. But its scope is largely consistent with land tax in that the same exemptions apply, and many of the same limitations such as prohibition on pas through to retail tenants as identified in the *Retail Leases Act 2003* apply.

3.3.3 Entry in and transitional provisions

CIPT applies to transactions of an interest of 50% or more in property where the contract date and settlement date are after 1 July 2024. Where it applies it results in the entire property entering the new tax regime, not just the percentage interest sold.

The approach taken is transitional. On the first sale where a property enters CIPT transfer duty will apply one final time on the first sale post 1 July 2024. There are government back financing options to stagger that over ten years, available to many but not all purchasers. For example, there is a cap on that of property under $30m. There are a number of other eligibility criteria also.

For first purchasers that have had the final duty impost, commercial and industrial property tax will first become payable ten years after the final stamp duty payment – 2034 at the earliest. So by way of example assuming a contract in July 2024 and no subsequent sale or change of nature of the property, the timing would be as follows:



But if the property is sold prior to that ten year period (such as the Mont Albert property above) the CIPT can commence earlier.

The CIPT does not apply to properties primarily used for residential, primary production, community services, sport, heritage or cultural purposes. It also does not apply to transfers that are otherwise exempt such as purchase by charity.

3.3.4 Exit out

If commercial and industrial property is converted to a non-qualifying use (e.g. residential) and the property continues to be used for that use as at the liability date (31 December) for a given tax year, commercial and industrial property tax does not apply for that year. There is an obligation to notify within 10 days of the change of use.

If sold whilst the property has a non-qualifying use stamp duty applies to the sale

There will be a change of use duty that applies to second and subsequent sales post 1 July 2024 where the property is sold as commercial or industrial and then changes to non-qualifying use – calculated based on the transfer duty that would have been payable when the property was transacted, including any relevant concessions, but reduced by 10 per cent for every 31 December that has passed since that transaction, to a maximum of 100 per cent.

There is no refund if it returns to commercial and industrial use

3.4 Windfall gains tax

3.4.1 Overview

From 1 July 2023, a windfall gains tax (**WGT**) of up to 50% of the uplift in value of land applies to land that is subject to rezoning.

We are starting to see some instances of the WGT applying and from that are learning where the contentious elements and aspects are likely to be, and what landowners can do to be prepared and mitigate impacts – from both a structuring and valuations perspective. That noted, it is not an issue confined in its impacts to landowners. It has repercussions for the financing industry also whose security over property can be relegated in priority to charges arising due to WGT.

3.4.2 What is the WGT and how much is it?

WGT is a Victorian state-based tax imposed on the increase in the value of land resulting from rezoning. It is administered by the Commissioner of State Revenue.

The WGT applies to both owner and government initiated rezonings. Rezonings for the purpose of the WGT are amendments of a planning scheme that causes land to be in a different zone from that which it was in immediately beforehand. It does not include rezonings between schedules in the same zone.

WGT applies only if the increase in value of land is greater than $100,000. The relevant value for that purpose is capital improved value of land as defined in the *Valuation of Land Act 1960.* That is the same value as that used for land tax and rates and is currently the value of land plus the house and any other improvements made to the land. That definition was recently amended by the State Taxation Act and Other Acts Amendment Bill 2023 (**Bill**) and will from 1 January 2024 include in capital improved value all items affixed to land regardless of who owns the items and regardless of whether the items are considered fixtures at law.

To avoid taking into account changes in value due to changes in economic conditions, the value of the land pre and post-rezoning is considered at the same date, being the date of the most recent valuation of the land. The relevant valuations are prepared by the Valuer-General (or a delegate) in accordance with the *Valuation of Land Act 1960.*

Landholders have a limited ability to object to a valuation prepared to determine the value of land pre and post-rezoning – however if exercised the objection must be to both valuations not just one and must be lodged within 60 days.

WGT rates vary depending on the amount of the uplift in value. The rates that apply are as follows:

Value uplift	Tax payable
$100,000 to $500,000	62.5% of the uplift above $100,000
$500,000 and over	50% of the total uplift

Grouping and aggregation provisions apply so that the $100,000 threshold applies only once to properties owned by the same owner or group of owners rezoned under the same planning scheme amendment. The provisions group related companies and trusts with their controllers, and where a landowner is a discretionary trust the provisions permit the Commissioner to effectively determine they are related even if no individual has an entitlement to the income or capital of the trust.

3.4.3 Who pays the WGT and when?

The WGT becomes payable by the landholder at the time that the rezoning takes effect.

Generally, rezoning takes effect either at the time that notice of the approval of the amendment is published in the Victorian Government Gazette or at a later date specified in such a notice of approval. This can occur years after the rezoning is first proposed and consultation around the rezoning commences.

Landholders can defer payment of WGT until the earlier of the next dutiable transaction of their land (other than an excluded dutiable transaction) or 30 years from the date of the rezoning. Dutiable transactions include those which trigger landholder duty as well as sales. Excluded dutiable transactions, where deferral arrangements can continue even after the dutiable transaction, include:

- transfers to legal personal representatives of deceased individuals;
- dutiable transactions for no consideration where the transferee elects to assume the WGT liability;
- transfers of land from one charity to another where the charity exemption applies and where both charities use the land exclusively for charitable purposes and where the transferee charity elects to assume the WGT liability.
- acquisitions of economic entitlements (as defined in the *Duties Act 2000*); and
- further acquisitions of interests in landholders for the purpose of the landholder duty provisions in section 78(1)(b) of *the Duties Act 2000*.

Whether to defer payment or not is a choice. Interest does accrue on the deferred liability. Deferral can be for part or the whole of the liability.

The WGT payable also forms a first charge over the land, which is payable in priority to all other encumbrances, including mortgages entered into before a rezoning event occurs. The impact that deferral may have on existing finance and securing finance against the land is therefore a relevant consideration. Prior to choosing to defer payment or recommending the same to clients, lawyers should be reviewing financing documentation to understand what if any disclosure or other obligations are imposed by lenders in respect to WGT liabilities.

For prospective future liabilities it is possible to have both vendor and purchaser share the exposure to possible WGT liabilities via contractual provision in sale of land and option documentation.

However, for WGT liabilities known at the time of entry into a sale or option contract the only way to factor it into a sale of land will be through reflection in sale price. That is because the Bill is amending the *Sale of Land Act 1962* to prohibit the passing on of known WGT and other land tax liabilities under a contract of sale of land. The changes mean that a provision of a contract or the grant of an option to enter into a contract (for WGT only) which provides for adjustments for WGT will be void. Offence provisions with monetary penalties will also apply to vendors who enter into a contract, or grant an option to enter into a contract, which provides for such adjustment. The *Property Law Act 1958* is also to be amended to remove references to the apportionment of land tax between vendor and purchaser in general conditions of sale. The amendments apply only to contracts of sale entered into and options granted on or after 1 January 2024.

3.4.4 Exemptions and transitional provisions

There are some exemptions and transitional provisions. These include:

- some rezoning categories are exempt – for example, rezoning to rural land or public land.
- up to two hectares of land used primarily for residential purposes (including primary production land with a residence) is exempt.
- charities are not required to pay WGT so long as the land is used and occupied by the charity exclusively for charitable purposes for 15 years after the rezoning. Unlike many other charitable exemptions, there is no equivalent exemption for land leased to charities.
- a rezoning that causes the land to be brought within the Growth Infrastructure Contribution (**GAIC**) or the first rezoning of land subject to GAIC that occurs before 1 July 2023 is exempt.
- rezoned land subject to a sale contract, and some options, entered into before 15 May 2021 is not subject to WGT.
- land with a planning scheme amendment that had obtained a tracking number in the amendment tracking system at 15 May 2021 or where significant costs have been incurred by the landowner to support the amendment at 15 May 2021, being the lesser of $100 000 or 1 per cent of the pre-rezoning valuation, are not subject to the WGT.

3.4.5 Interaction with other taxes

The main interaction between stamp duty and WGT is that transactions that are “dutiable transactions” for the purpose of the *Duties Act 2000* are a trigger for deferred WGT liabilities to become immediately payable. This include transactions that trigger landholder duty under the *Duties Act 2000* due to changes in ownership of landholding entities.

How WGT tax interacts with capital gains tax presently remains uncertain. It is possible that windfall gains tax paid does not form part of the cost base of an asset for the purpose of determining a capital gain. There is consultation occurring presently as to whether this ought to be the case – but capital gains tax being a Federal tax and WGT a State based tax there is no assurance of amendment being made to accommodate this mismatch. If WGT does form part of cost base for capital gains tax the element it would most likely fall under is the third element of cost base being “costs of owning the CGT asset you incurred”. The argument against WGT forming part of that element is that the legislation specifically identifies rates and land tax as being included for that purpose – but not WGT.

3.4.6 Impacts for property transactions and structuring

Impacted landholders ought to be aware of their objection rights and prepared to exercise that right if necessary. There is a strict 60 day time limit. No ability to extend. But there is also prior warning that the WGT is going to arise as the trigger point is gazettal with many steps prior. Seeking independent valuations is therefore an option well worth considering in case the Valuer General’s valuations do come in overly high or with a margin that does not reflect the real impacts – noting that the assessment is immediately before and after and that in reality land values go up not only a rezoning but also prior due to the anticipation and potential.

From a structuring perspective, the WGT is impacting how some landholders choose to structure their land ownership. Considering the grouping and aggregation measures, it would be appropriate to review ownership structures through which landholdings are held.

For example, discretionary trusts, in particular, are an ownership structure not only more likely to be grouped under the WGT provisions than for various other taxes, but also to be grouped widely given the discretion the Commissioner has to group them with beneficiaries even if those beneficiaries have no entitlement to income or capital.

From another angle corporate restructuring events that trigger landholder duty can otherwise bring forward the timeline for payment of a WGT liability otherwise deferred - it may therefore be desired to not have land held within corporate groups where the intention is long term deferral of payment.

Similarly, for long term holdings succession planning considerations come into play to ensure there are sufficient funds available to pay the liability when it becomes due if deferred and if the triggering event for payment is the passage of 30 years rather than a sale.

For some holders such as developers it could be advantageous to defer payment until the time of the next dutiable transaction, enabling them to fund payment of that liability from the project that gave rise to it. For others up front payment is likely more desirable to avoid interest charges. Lawyers ought to be discussing these options with clients.

The feasibility of existing projects should be reassessed with consideration to the combination of the WGT, capital gains tax and other state-based taxes (especially for foreign owners) can result in tax on such arrangements nearing 100 per cent of the increase in value when combined.

Financiers ought to be reviewing their contractual terms for security and leveraging ratios to have comfort that their lending terms remain appropriate.

4. Transfer duty

4.1 Landholder duty – *Oliver Hume*

The decision of the Victorian Court of Appeal in *Oliver Hume Property Funds (Broad Gully Rd) Diamond Creek Pty Ltd v Commissioner of State Revenue* [2024] VSCA 175 (**Oliver Hume**) is the latest important decision to consider landholder duty in Victoria.

4.1.1 Overview

The landholder provisions are anti-avoidance provisions in the Duties Act 2000 (Vic) (**DA**). Their genesis, the former land rich provisions, sought to ensure that duty would not be avoided through synthetic transfers; that is, by transferring shares or units in entities that held dutiable land in Victoria, rather than the land itself. A 'landholder'[20] is a company or a certain type of trust that owns land in Victoria with an unencumbered value of $1 million or more.

Generally, duty at conveyancing rates is imposed on 'relevant acquisitions',[21] essentially being transfers of 50% or more of the shares in a landholder that is a private company or 20% in a landholder that is a private unit trust scheme. These thresholds are described as a "significant interests" and may be reached either by a single acquirer or by aggregating the interest of one person/entity with other persons or entities.

The Commissioner was successful in *Oliver Hume*, which confirms that landholder duty can apply to equity and capital raisings and other transactions involving multiple investors. However, beyond this caution, a good argument exists that the decision in *Oliver Hume* should largely be confined to its facts; different facts could conceivably produce a different outcome.

4.1.2 Facts

Oliver Hume Property Funds (the **Applicant**) is a member of the Oliver Hume Property Funds Group (**OHPFG**), which is part of the wider Oliver Hume Group of companies. OHPFG provides fund management vehicles with the objective of generating returns for investors from property development activities.

The Applicant was established as a special purpose vehicle to undertake a residential property development project in Diamond Creek, a suburb in the north-east of Melbourne. The Applicant purchased a property in 2011. In 2014, it circulated an Information Memorandum that sought to raise $1.8 million through the issue of 1.8 million shares to fund the development of the property. A condition of the Information Memorandum was that the target of 1.8 million shares be achieved by 26 June 2014. The offer was marketed and promoted to potential investors on Oliver Hume's website and through agency channels.

Ultimately, the target was achieved (after being oversubscribed) and the Applicant issued 1.8 million shares to 18 investors on 2 July 2014. The investors, mostly self-managed superannuation funds, were unrelated to each other. The details of individual applications remained confidential.

[20] *Duties Act 2000* s 71.
[21] *Duties Act 2000* ss 78, 79.

The Commissioner issued a Notice of Assessment to the Applicant in the sum of $151,235, together with a penalty of $7,561.75 and interest. This was on the basis that:

- the acquisition of the shares by the 18 investors constituted a 'relevant acquisition' of a 99.99% interest in the Applicant for the purposes of section 78(1)(a)(ii)(C) of the DA; and
- the unencumbered value of the land in Diamond Creek was $2.75 million.

4.1.3 The decision

Relevantly, section 78 DA defines a 'relevant acquisition' as follows:

> (1) For the purposes of this Part, a person makes a ***relevant acquisition*** if—
>
> (a) the person acquires an interest in a landholder—
>
> (i) that is of itself a significant interest in the landholder; or
>
> (ii) that amounts to a significant interest in the landholder when aggregated with other interests in the landholder acquired by all or any of the following—
>
> (A) the person; or
>
> (B) an associated person; or
>
> (C) any other person in an associated transaction; or

Central to the decision was whether the investors acquired their interest in the Applicant via an 'associated transaction' which is defined in subsection 3(1) DA to mean:

> ***associated transaction***, in relation to the acquisition of an interest in a landholder by a person, means an acquisition of an interest in the landholder by another person in circumstances in which—
>
> (a) those persons are acting in concert; or
>
> (b) the acquisitions form, evidence, give effect to or arise from substantially one arrangement, one transaction or one series of transactions.

Victorian Civil and Administrative Tribunal (VCAT)

At first instance, VCAT (Vice President Macnamara) upheld the Commissioner's assessment by concluding there was a unity of purpose as between the shareholders and the Applicant. Upon acceptance, the shareholders became bound by the statutory contract constituted by the constitution and the rules prescribed by the *Corporations Act 2001* (Cth).

In VCAT, one of the Applicant's arguments was that the Commissioner had departed from his public ruling in DA-057 which provides guidance on the meaning of an 'associated transaction'. In the ruling, the Commissioner states that he will not regard acquisitions of interests by independent members of the public as an associated transaction if they were made in response to a genuine public offer under a product disclosure statement or prospectus lodged with the Australian Securities and Investments Commission (**ASIC**). VCAT noted that there was no provision for the Commissioner to make this concession and that the matter before him did not involve an offer to the public under a product disclosure statement or prospectus lodged with ASIC.

The Applicant sought leave to appeal VCAT's decision directly to the Victorian Court of Appeal (by reason of a Vice President having heard the matter in VCAT). An application for leave to appeal state taxation decisions from VCAT to the Supreme Court (or the Court of Appeal where applicable) is restricted to a question of law only.

The Victorian Court of Appeal

The Court of Appeal granted the Applicant leave to appeal, however, it dismissed the appeal.

The Court adopted the concept of 'oneness', from previous cases and the relevant Explanatory Memorandum, and considered whether there was some connection or interdependence by which the persons acquired their interests essentially as 'one arrangement'. The focus was not on the individuals concerned but on the relationship between the acquisitions and the singular 'arrangement', 'transaction' or 'series of transactions'.

The Court identified various interconnecting factors that supplied the necessary 'oneness' for the purposes of paragraph (b) of the definition of 'associated transaction'. The first was a finding that the acquisitions were interconnected in that no individual acquisition could go ahead at all unless the total of $1.8 million was raised. Despite the fact that acquirers were unrelated and may not have had any communication with each other, the Court concluded that the acquisitions could not be described as independent of each other.

The second factor was the entry, by each acquirer, into the statutory contract constituted by the constitution. Although not determinative, the Court found that the content was highly relevant. This was because the terms of the constitution provided that acquirers together had an interest in an entity which was to undertake a development via an entrenched management structure.

Lastly, the Court noted that the effect of the acquisitions of the shares on the same day and in the same way was to alter the shareholding in the Applicant landholder from being an Oliver Hume entity to an entity owned 99.9% by a group of private investors.

4.1.4 Significance

The Court has confirmed that a wide meaning will be given to an 'associated transaction' for the purpose of the landholder provisions. Where acquisitions in a landholding vehicle are interdependent, a heightened risk exists that the acquisitions will be grouped, even if they are unrelated to each other. This will increase the prospect of landholder duty being payable, in addition to the duty payable on the property itself.

However, as noted by the Court, no finding was made whether any one of the three interconnecting factors above would, considered on their own, be sufficient to amount to an 'associated transaction'. This leaves open the argument that differently structured arrangements ought not to be predisposed to the same outcome as in Oliver Hume.

Separately, one solution, where possible, may be for acquisitions of a similar type to occur before the landholding vehicle acquires the property, that is, before it becomes a 'landholder' for the purposes of DA. However, significant care is required and advice should be sought before taking that approach in any particular factual scenario. Also, there are anti-avoidance provisions to be considered.

Although the Court made no comment about the Commissioner's ruling in DA-057, the comments made by VCAT act as a reminder that private rulings issued by the State Revenue Office, while useful guidance, cannot and do not supplant the terms of the law.

Although the Court's decision concerns the Victorian landholder provisions, the *Oliver Hume* decision may be relevant to other states and territories that have similar provisions.

4.2 Property passing to beneficiaries of discretionary trusts

Exemptions are contained in ss 36, 36A and 36B of the DA in relation to the transfer of dutiable property from the trustee of a fixed trust, discretionary trust or unit trust scheme respectively to a beneficiary. An exemption is also contained in s 41A DA for the transfer of dutiable property transferred from a superannuation fund to a beneficiary of the fund.

It is not the function of this paper to provide a detailed description of each of the exemptions available. However, it is noted that the terms "fixed trust", "discretionary trust", "unit trust scheme" and "superannuation fund" are all defined terms in the DA. Careful regard needs to be given to the deed at hand and the type of trust it answers. Beyond this, the exemptions for trusts broadly require that:

(a) the duty (if any) charged by the DA when the dutiable property was vested in the transferring trust has been paid or the Commissioner is satisfied will be paid;

(b) the beneficiary was a beneficiary at the time the dutiable property was vested in the transferring trust (fixed trust and UTS) or in the case of a discretionary trust, became a beneficiary after that time by reason of falling within a class of specified relations to a beneficiary (such as becoming a spouse, domestic partner, lineal descendant or step child of a beneficiary);

(c) the transfer is either to the beneficiary absolutely or to the beneficiary as trustee of another trust which answers strict criteria; and

(d) the Commissioner is satisfied that the transfer is not part of a sale or other arrangement under which there exists any consideration for the transfer. However, the Commissioner is not to treat a transfer as part of a sale or arrangement if, after the transfer, a beneficiary or a unit holder gives or assumes a mortgage/liability under a mortgage to secure the same or a greater amount as that to which the property was subject if the Commissioner is satisfied that the giving of the mortgage or assumption of liability is not part of a sale/other arrangement: s 36C.

The requirements above should not be seen as conclusive by any means. The elements required for exemption pursuant to s 41A DA (property passing to beneficiaries of superannuation funds) require items (a) and (b) but not (c) and (d) above to be satisfied. In the case of a fixed trust, unit trust scheme and superannuation fund, further rules limit the exemption to the extent of the recipient beneficiary's interest in the trust/fund (and in some instances impose other requirements).

The exemption for transfers from trusts to beneficiaries is a frequently litigated area. In many instances, the timing requirements of the legislation (in terms of the receiving trusts/beneficiaries existing at the time the properties were acquired) is not satisfied: see *Liu v Commissioner of State Revenue* [2016] VCAT 87. In other instances, the taxpayer is unable to lead cogent evidence as to the creation or existence of a trust: see *Kloester v Commissioner of State Revenue* [2016] VCAT 16.

One of the key common requirements is that the transfer is not part of a sale or other arrangement under which there exists any consideration for the transfer. The concept of "consideration" in particular, is widely construed by the Commissioner. It extends to loan accounts that will be discharged or by necessity forgiven by reason of the transfer (likely if the only asset of significance is the property being transferred). The decision of Macnamara DP (as he then was) in *Westella Nominees v Commissioner of State Revenue* [2010] VCAT 1786 and Hollingworth J in *Shop,* *Distributive and Allied Employees Assoc (SDAEA) v Commissioner of State Revenue* [2005] VSC 484 provides guidance about how courts approach this issue.

This exemption has proved to be litigious. The recent VCAT decision in *Baullo v Commissioner of State Revenue* [2023] VCAT 1164 is illustrative of the perils that can await a taxpayer who ignores the subtleties of the “consideration” requirement. In *Baullo*, the trustee of a discretionary trust acquired a property in Pascoe Vale South for about $960,000 (including stamp duty). Part of the purchase price ($157,000) was funded by beneficiaries of the trust and recorded as a loan. Some months later, the trustee transferred the property to the beneficiaries as “an entitlement in equity”. As at 30 June 2018, the accounts of the trust showed an asset of freehold land of $960,000 and a NAB loan of $826,000 and beneficiary loans of $157,000 as liabilities. As at 30 June 2019, the trust’s accounts showed assets of cash ($1.00) and nil liabilities.

Included (somewhat unfortunately) in the evidence before the tribunal was an email from the taxpayer’s solicitor that “… as the land is being transferred to the beneficiaries the loans will be forgiven and not repaid”. A similar statement was in the affidavit of one of the taxpayers.

The Commissioner assessed the beneficiaries to duty of $46,070 on the basis the exemption in s 36A of the *Duties Act* did not apply. The taxpayer was unsuccessful in arguing that the evidence did not establish the forgiveness of any loans. Tang SM found that there were beneficiary loans owing to the beneficiaries and that after the transfer, the trustee was no longer indebted. He found that “there must have been an extinguishment of the loan balance” whether by payment, set off, forgiveness or otherwise. This amounted to consideration, in the form of satisfaction or forgiveness of loans owing by the trust that “moved” the transfer.

The same fate, with similar facts, befell the taxpayer in *Astakhov v Commissioner of State Revenue* [2018] VCAT 1363. In *Astakhov*, Tang SM found that there was consideration in the form of waiver by conduct of loans owing to Mr Astakhov. He also found that Mr Astakhov’s accountant knew that as a consequence of the transfer of the property, the loans owed by the Trust to Mr and Mrs Astakhov would become worthless and would need to be written back to equity. Mr Astakhov’s submission that any forgiveness of the loans occurred after the transfer was rejected.

Careful regard should be given to the SRO’s evidentiary manual as to the documents that will be required (including three years of accounts and a statutory declaration) before the transaction is undertaken. Care should also be taken for trusts that will have a deficiency of assets as a result of the transfer.

5. SRO engagement – tips and traps

5.1 Overview

Contesting a state taxation assessment is not dissimilar to the process for income tax disputes set out in Part IVC of the *Tax Administration Act* 1953 – with some important exceptions. A process of objecting to assessments (or reassessments) and allowing disallowed assessments to be reviewed in the VCAT or appealed directly to the Supreme Court is contained in Division 1 of Part 10 of the *Taxation Administration Act* 1997 (**TAA**). The purpose of the TAA is to administer and enforce Victoria's "taxation laws", essentially its state taxes.[22]

5.2 Objections

Taxpayers who wish to dispute an assessment must generally object to that assessment(s).[23] In addition to assessments, a right to object also extends to a valuations made under s 21(1)(b) of the LTA and decisions of the Commissioner under the *Payroll Tax Act* 2007. In our view, if there is any meaningful doubt about the correctness of the SRO's assessment, the taxpayer should object since they will ultimately lose their rights if they do not. Other than the expense and effort in preparing the objection, there is nothing to be lost – if the objection is disallowed by the SRO, there is no obligation to pursue it further. However, apart from the fact that an objection may be allowed in whole or part, objecting will preserve the taxpayer's review/appeal rights.

The requirements for filing a competent objection are not onerous. At a minimum, the objection must state "fully and in detail" the grounds for the objection and must be in writing.[24] But how it is drafted can have a material bearing on outcome. Prospects of success are materially heightened by objections that consider and put forward a stance on the issues and bring to light factual content that may have been missed or overlooked at first instance (or not provided as relevance was not recognised). The objection is the last opportunity to persuade the Commissioner outside of the Court system. It is the stage of a dispute at which solicitors and barristers are also frequently engaged as the grounds stated in an objection do frequently influence the course of litigation. And because bringing to bear the legalistic and evidence mindset at that stage before actually on the doorsteps of the Court can prevent the need to end up on those doorsteps at all.

In addition to being a competent objection, the need to articulate the grounds carries a secondary consequence. At the hearing, whether it be at VCAT or the Supreme Court, the taxpayer is limited to the grounds of the objection, unless the Tribunal or court otherwise orders.[25] That is again why engaging lawyers at the objection stage is advisable at that stage.

Sometimes, for a variety of reasons, a taxpayer may wish to agitate new arguments after the objection is decided (see below). Leave of the Tribunal or Court will be required to introduce these grounds. From the taxpayer's perspective, this leave will be more readily granted if the Commissioner consents to the additional ground(s) being raised. This is usually best dealt with by writing to the Commissioner, outlining the proposed additional ground(s) at the earliest opportunity and seeking their consent. If there is sufficient time for the Commissioner to deal with these additional ground(s) before the hearing and he is not ambushed, leave is more likely to be granted. However, the

[22] TAA, s 4.
[23] TAA, s 96.
[24] TAA, s 97.
[25] TAA, s 109.

requirement of leave demonstrates the importance of drafting a comprehensive objection in terms of the grounds that it articulates.

An important requirement is that the objection must be filed and received within 60 days after the date of service of the notice of assessment.[26] This is important. However, if the 60-day requirement has been breached, it is still worth trying to object out of time. The Commissioner has a discretion to permit a taxpayer to lodge an objection out of time.[27] However, the process does become more difficult. The taxpayer must explain fully and in detail the circumstances concerning and the for the failure to lodge the objection on time. In this regard, taxpayers should read carefully the Commissioner's ruling in TAA-004v5 (available online). Essentially, regard will be given to the reasons for the delay, whether the taxpayer has an arguable case and any prejudice that may be caused to the Commissioner: see also the decision in *Brown v FCT* [1999] FCA 563. However, unlike the position at federal level, the Commissioner's decision to refuse permission to file out of time is non-reviewable. This is a significant impediment.

The Commissioner must decide the objection and give notice to the objector of his decision and reasons.[28] This is done by issuing a Notice of Decision on Objection (the **objection decision**) which contains the reasons for the decision. There is no time limit for the Commissioner to decide objections. Although historically objections have been turned around in a two to four month timeframe on average, recently it is not uncommon for them to take a year or more. If the objection has not been decided in 90 days, the taxpayer can request the Commissioner in writing to refer the matter to the VCAT or as an appeal directly to the Supreme Court.[29] It is uncommon for this option to be engaged.

If the objection decision is unfavourable, the taxpayer has a choice. The first involves doing nothing. A taxpayer is not obliged to take a disallowed objection decision any further. They will have to pay the duty or tax assessed that was the subject of the objection, as well as any unremitted penalties/interest. The second option is to have the matter referred to the VCAT. The third option is to have the matter referred to the Supreme Court as an appeal (from the disallowed objection). In relation to the second or third options, the Commissioner is limited to the grounds on which the objection was disallowed in his objection decision.

In the case of a referral to VCAT or appeal to the Supreme Court, the taxpayer must make the request in writing to the Commissioner within 60 days after the date of service on the taxpayer of the objection decision. The 60 day requirement cannot be extended. Once the request has been made, the Commissioner is obliged to refer the matter to VCAT/Supreme Court within 60 days (subject to a request for particulars being made). This time limit is frequently exceeded.

One aspect of state tax litigation that differs to federal tax is a request for further and better particulars of the objection that the Commissioner may make within 30 days of receiving the taxpayer's request for referral to VCAT or the Supreme Court.[30] Taxpayers need to be vigilant about such requests and understand that the responses will find their way into the documents before the Tribunal or Supreme Court. If such a request is made, particulars must be given within 30 days after giving the notice. This is because if the particulars are not given within 30 days, the Commissioner must not refer the matter to the VCAT or the Supreme Court. There is no discretion regarding this time frame. In the case of *Vontap*, the taxpayer successfully argued that the "particulars" sought were not in fact particulars and

[26] TAA s 99.
[27] TAA, s 100; This does not apply to an objection to a valuation in s 96(1)(ca), TAA.
[28] TAA s 103.
[29] TAA, : s 106(1)(b).
[30] TAA, s 107.

accordingly did not have to be complied with.[31] However, this is very much the exception rather than the rule.

5.3 VCAT or the Supreme Court?

There are several differences between the VCAT and the Supreme Court. A hearing in the VCAT is a denovo hearing. The role of the Tribunal is to make the correct or preferable decision. That is, the Tribunal stands in the shoes of the Commissioner and makes a fresh decision on the material before it. This is significant because if the subject of the review by VCAT involves the failed exercise of a discretion by the Commissioner, it is far easier to have this reviewed in the Tribunal (as a denovo hearing) than in the Supreme Court, which will be looking for legal error in how the discretion was exercised.[32]

Amendments to the *Duties Act* and the *Land Tax Act* over the years have conferred many discretions on the Commissioner. Further, it is usually the case that reassessments or assessments that follow an investigation will impose a penalty on the taxpayer. In that regard, the *Taxation Administration Act* 1997 was amended in 2025 to allow the Commissioner to impose a penalty of 50% of the unpaid tax if the Commissioner is satisfied that the default was caused wholly or partly by recklessness by the taxpayer, or someone acting on their behalf. Penalties can be imposed at other rates as well (a default 25% for failure to take reasonable care, or 75% for intentional disregard). In our view, contesting penalties will be easier in the VCAT than the Supreme Court, for the reasons above.

The VCAT is guided by but not bound by the rules of evidence and is generally more informal. State tax matters are heard by Tribunal members who are usually experienced solicitors or counsel. Significantly, as a “no cost” jurisdiction, an unsuccessful taxpayer will not have to pay the Commissioner’s costs (and will not be awarded costs if they win).

The Supreme Court is a more formal hearing where the rules of evidence apply more strictly. Costs are generally awarded to the successful party. Starting in the Court will remove the prospect of an appeal from the VCAT to the Court that is a possibility if VCAT is selected. The Court is understandably a less popular choice if the dispute involves the exercise of a discretion or the state of mind of the Commissioner.

In tax litigation (state and federal), it is vital to understand that it is the taxpayer who carries the onus of proof. It is up to the taxpayer to find the witnesses and documents necessary to discharge their onus. However, there is no special burden of proof; the degree or standard of proof is that which applies in an ordinary civil proceeding.[33] This could be some years after the transaction in dispute occurred. They will likely be unsuccessful if they cannot do this. In many cases, the Commissioner will not call his own evidence, since it is the taxpayer who carries the onus. However, the Commissioner’s documents, including letters, interviews and other information obtained will be placed before the VCAT/Supreme Court and tendered into evidence. Cases in which the Commissioner is more likely to call evidence are often valuation disputes that are battles between experts. In any case, expect the Commissioner to brief counsel (if need be Senior Counsel), cross examine the taxpayer’s witnesses and make submissions (written and oral).

With this in mind, our observations are that most objection decisions that are pursued further are referred to the VCAT. This may be because unlike the Supreme Court, an unsuccessful taxpayer in a

[31] *Vontap Pty Ltd v Commissioner of State Revenue* [2005] VSC 322.
[32] See in this regard *Conte Mechanical and Electrical Services Pty Ltd v Commissioner of State Revenue* [2011] VSC 104 and *Mould v Commissioner of State Revenue* [2014] VSC 268.
[33] *FCT v Cassaniti* [2018] FCAFC 212

state tax matter in VCAT will not have to pay the Commissioner's costs. However, taxpayers should be under no illusions about VCAT otherwise being a "no cost" jurisdiction. Although the referral fees are less for VCAT, the substantive costs of preparing and conducting a case in the VCAT are very similar to the Supreme Court. In either venue, orders will be made for evidence to be given by witness statement (or affidavit in the Supreme Court), first by the taxpayer, then by the Commissioner. An outline of legal contentions is typically ordered to be filed on the same day as the evidence. In practice, and especially in fact-heavy cases, this can be a time consuming, expensive process. There may be numerous witnesses who the taxpayer will call and each will have to produce a witness statement/affidavit. The taxpayer and other witnesses should expect to be cross examined by the Commissioner's counsel (unless notified to the contrary).

The Commissioner will be obliged to file the documents in his possession with the Tribunal/Court. These documents will almost certainly end up being tendered as evidence in the proceeding. They will include correspondence between the taxpayer, their solicitor and accountants and the Commissioner. With this in mind, caution should be exercised in corresponding with the Commissioner prior to trial since it will likely end up before the Tribunal/Court.

5.4 The Commissioner and alternate dispute resolution

No orders are typically made for alternate dispute resolution in either the VCAT or Supreme Court. Our experience is that the Commissioner of State Revenue will settle disputes with taxpayers, typically after the taxpayer's evidence has been filed, if he considers (and likely advised) that he will lose. In any other instances, it will be difficult to settle disputes. In our experience, the Commissioner of State Revenue will agree to meet with and listen to the taxpayer (essentially because he has to) but this will likely occur at the initiative of the taxpayer and will frequently go no further than a meeting. That noted there is some prospect for alternative dispute resolution where new materials or evidence have been adduced not considered at an earlier stage, or where the issues in dispute have evolved to include different grounds or reasons to those on the table at first instance.

5.5 Private rulings

The Commissioner of State Revenue does issue private rulings. However, unlike his federal counterpart, he is not required by law to do so and does so to assist taxpayers who are uncertain of their liability to pay tax based on ambiguity in the application of legislation. The Commissioner will not however, provide advice; there must be a contemplated transaction, ideally within a reasonable time frame. Further details are contained in the Commissioner's ruling GEN-009v3 (online). An adverse private ruling cannot be objected to (or referred to VCAT or the Supreme Court). It is the assessment itself that should be contested.

5.6 The Commissioner - not an ordinary litigant…

The Commissioner of State Revenue has many of the same powers of collecting information as his Commonwealth counterpart, including the power to require a taxpayer to provide documents and/or attend compulsory interviews.[34]

[34] TAA, s 73.

Taxpayers should also expect data sharing between state and federal government agencies and regard to social media.

Lastly, as is the case with Commonwealth taxation, state tax assessments are subject to conclusive evidence provisions.[35] The fact that a review in VCAT or appeal in the Supreme Court is pending does not affect the ability of the Commissioner to recover the tax in the meantime.[36] The principles applicable to seeking a stay of execution of a tax judgment at commonwealth level are equally applicable to state tax debts in the state courts.[37]

[35] TAA s 127.

[36] TAA, s 104.

[37] See amongst others, *Snow v DC of T* (1987) 14 FCR 119, *Southgate Investment Funds v DC of T* [2013] FCAFC 10 at [77], *Cywinski v DC of T* [1990] VR 193, *Trade World Enterprise Pty Ltd v C of T* [2006] VSCA 191, *DCT v Songa Offshore Pte Ltd* [2013] FCA 839. Note that the Magistrates' Court has unlimited jurisdiction in relation to the recovery of state tax debts.