PROPERTY COUNCIL of Australia

Australia's property industry
Creating for Generations

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Mr Paul Broderick
Commissioner of State Revenue
Southern Cross Tower, 121 Exhibition St
MELBOURNE VIC 3000

Dear Mr Broderick,

Response to Draft Ruling DA-064 – Meaning of Land Development

Introduction and Context

The Property Council of Australia welcomes the opportunity to respond to draft ruling DA-064 on the meaning of land development as defined in section 3(1) of the *Duties Act 2000* (the Act).

The Property Council is the leading advocate for Australia's property industry — the economy's largest sector and employer.

In Victoria, the property industry contributes $58.8 billion to Gross State Product (13.8 per cent), employs more than 390,000 people and supports more than 471,000 workers in related fields. It pays more than $21 billion in total wages and salaries per year, employs one in four of the state's workers either directly or indirectly, and accounts for 59 per cent or $17.9 billion of Victoria's tax revenue. Approximately 27.9 per cent of wages and salaries paid to Victorian workers are generated by the property sector.

The Victorian Division of the Property Council has more than 500 members. They are architects, urban designers, town planners, builders, investors, and developers. These members conceive of, invest in, design, build and manage the places that matter most — our homes, retirement living communities, shopping centres, office buildings, education, research and health precincts, tourism and hospitality venues.

Since the introduction of Part 4A of Chapter 2 of the Act in 2005, land developers have had to deal with ambiguity and conflicting legal opinion on their planned activity as the definition of 'land development' in the Act departs markedly from what people normally associate with that term.

The major aim of our response is to ensure all land developers of any size have the clarity they need to purchase land and transact confidently within the scope of the Act, without being caught by duties obligations they innocently and/or inadvertently thought did not apply.

In this response, we have provided comment on the overall draft ruling and on each of the six limbs on the definition of 'land development'. We have also provided some suggested further examples to elaborate on these recommendations where we think they add further clarity to the ruling.

As it is important that property purchasers have the certainty that they will not be subjected to double duty, we welcome the opportunity to provide feedback on an updated draft ruling (including on an in-confidence basis) prior to its finalisation.

If you require any further information on our response to this draft ruling, please contact Andrew Lowcock, Senior Policy Advisor at the Property Council of Australia, on 0447 666 902 or ALowcock@propertycouncil.com.au.

Yours sincerely,

Matthew Kandelaars
Interim Executive Director, Victoria
Property Council of Australia

Overarching comments on Draft Ruling DA-064

1. It is our view that duty should only be assessed under these land development provisions when both of these conditions apply:
    a) land has increased in value between the date of entry into a contract of sale and the date that a subsequent purchaser is nominated; and
    b) that the value increase in land occurred only due to the actions of the first or subsequent purchaser, because of what either or both have done or the instructions either or both have made of the vendor and/or the tenant – such actions falling under one or more of the six limbs in the land development definition.

    We note that the preamble of the draft ruling states:

    > *Generally, land development is the process (often involving multiple steps) of changing the state and/or use of land to increase its value or utility.*

    Is it the Commissioner's view that the value of the land is required to have increased solely in order for 'land development' (as defined) to have occurred?

    We also note that the preamble of the draft ruling states:

    > *It is irrelevant who carried out or intended to carry out the process or any part of the process. It does not matter whether the actions are performed in-house or by external professionals.*

    Can the Commissioner clarify this statement such that the process or actions are in accordance with the instructions or actions of the first purchaser or subsequent purchaser?

2. Wherever possible throughout this draft ruling, examples in all the six limbs should include outcomes where land development has not occurred, not just examples where land development has occurred. This might be achieved by maintaining the same example but with slightly altered facts.

Feedback on the draft ruling in the context of each of the six limbs follows:

Limb (a): Preparing a plan of subdivision of the land or taking any steps to have a plan registered under the *Subdivision Act 1988*

1. Some of the initial activities listed in limb (a) as land development activities are very preliminary in nature, do not diverge clearly from the examples of activities not considered land development and, in themselves, are unlikely to have led to an increase in the value of the land.

    For instance, engaging a professional surveyor to undertake a survey of the property is traditionally a preliminary activity; it is not uncommon to get survey work done as part of the purchase of a parcel of land and there is no evidence that that engagement would increase the land value – often it is more an act of due diligence in this scenario.

2. Other examples of preliminary land activity that are inappropriate to classify as land development include:
   - The drawing up of a plan for another party to lodge, which in itself does not lead to a value uplift of the property; or
   - The proposal of a plan or a development, which does not necessarily mean the plan is the best use or will extract value from the land.

3. The difference drawn in the draft ruling between a 'professional survey' and an 'informal survey' is not expanded upon and requires examples of what the Commissioner considers to be an informal survey. Rather than cause significant confusion in the industry about professional and informal activities, we recommend excluding any form of surveying from the final version of the ruling.

4. Limb (a) also requires significant clarification on what is considered 'drafting' and 'preparation for drafting' a plan of subdivision, which have also been categorised separately with no further guidance.

5. Additionally, it is too subjective to have the phrase in the draft ruling (in two places) saying *"not limited to"* as this promotes uncertainty.

6. The Commissioner may also want to draw upon Example 1 in its draft ruling on part (b) of the land development definition. That is, would it make a difference if it had been the vendor who had commenced the process to prepare or register a plan prior to the date the contract was signed?

7. It is also not clear what the following means:

   In determining whether land development has occurred under limb (a), the Commissioner will also take any of the following into consideration:

   - *An architect or draftsman has been engaged to prepare building plans based on the land survey.*
   - *A feasibility study has been commissioned to make recommendations on the optimal use and project strategy.*
   - *Professional planning advice has been obtained on navigating the town planning requirements of any proposal.*

   These items of themselves would not result in limb (a) being satisfied and they do not clarify anything. Therefore, it should either be deleted or further clarity be provided regarding what is intended.

8. Examples that could be included in the updated draft ruling in this first limb are whether limb (a) would be triggered in any of the following scenarios:

   a) If a developer, after executing a contract of sale, engages an external planning firm to prepare a draft plan of subdivision for discussion purposes.
   b) If that developer engages that external planning firm but then instructs them not to commence their engagement.
   c) If a developer executes a contract of sale to acquire a site with an existing planning permit, and then engages an external planning firm to reconsider any aspect of the existing permit.

d) If a developer with in-house planning capability instructs its planning department to prepare a plan of subdivision for a site recently under contract.
e) Same as (c) above, but assume the site already has a planning permit and the developer requests its internal planning department to review and redraft the existing permit.
f) A developer post execution of a contract of sale engages an external planning firm to advise on, but not prepare, a plan of subdivision for a site.
g) A developer with in-house planning capability instructs its planning department to advise on, but not prepare, a plan of subdivision for a site recently under contract.

Limb (b): Applying for or obtaining a permit under the *Planning and Environment Act 1987* in relation to the use or the development of the land

1. Given the Commissioner's view that it does not matter who undertakes the land development activity, which we strongly disagree with (as referenced in our overarching comments), we ask that more clarity be provided as to the principles to be adopted in determining what activities fall outside limb (b).

2. The two examples provided which attempt to explain the application of limb (b) do not go far enough to illustrate the differences and contain confusing language which requires further clarification.

   In Example 1, in the context of the sub-sale it appears to imply that land development occurred when the permit was granted, but in the context of FPAD, it implies that the development occurred instead when the permit was applied for. This example must require a consistent definition for when the duty for development applies.

   For Example 2 (which we agree is an activity that should not be defined as land development in any scenario), it is unclear if it would make any difference if the tenant obtained vendor or purchaser consent to erect a sign prior to the tenant applying for the permit.

3. There is obviously a significant difference between Example 1 and Example 2, and there will be a range of scenarios between these two extremes which will require planning permits.

   Additional examples may be helpful to illustrate these principles, or at the very least a more sophisticated second example would be useful to more practically determine if limb (b) has been triggered, such as:

   a) A developer executes a contract of sale with a permit application having been made by the vendor but the permit not issued at the contract execution date, and the permit subsequently issues through no action from the developer.
   b) If the answer to (a) is 'no', what if the permit issues following action, enquiries or lobbying by the developer?
   c) Is limb (b) only triggered if a developer with a site under contract was the applicant for a permit that issues post-contract execution?
   d) A developer post execution of a contract of sale applies for a permit for the use of the land by a third party other than itself (e.g. a utility provider).

e) A developer post execution of a contract of sale applies to extend the expiration date of a planning permit in place at contract date.

Limb (c): Requesting under the *Planning and Environment Act 1987* a planning authority to prepare an amendment to a planning scheme that would affect the land

1. Further elaboration is required for Example 3 to properly define what would be categorised as "engagement" with a municipal council to pursue a planning scheme amendment under this limb. At the very least, any engagement that does not lead to an amendment should not be captured under this limb, and further definition needs to be given to the trigger point where "engagement" is considered to have occurred.

2. It is also unclear whether it would make any difference in the examples if the vendor had made the request for an amendment prior to entry into a contract with the purchaser, but the amendment is issued after the contract is signed.

3. As anyone can make a request under the Planning and Environment Act to prepare an amendment to a planning scheme, will the Commissioner seek to limit its application of limb (c) to requests made by parties associated with the land contract?

Limb (d): Applying for or obtaining a permit or approval under the *Building Act 1993* in relation to the land

1. Similar to our response to limb (b) earlier in our response, the explanation of what constitutes land development for limb (d) doesn't expand on scenarios where development activity on the land doesn't go ahead as originally planned or the application for the permit or approval is denied.

2. Example 5 also repeats the issue experienced in Example 1 (discussed in our response to limb (b)) where there is a different outcome under the context of sub-sale and FPAD, which should be avoided.

3. The examples do not make it clear what happens if another party (such as an architect) makes the application on behalf of a vendor or purchaser. It must be made clear that architects and other similar parties are not caught by these provisions.

4. Also, Example 6 must more clearly define where land development occurs – to state where building advice and reports lead to an enhancement of the value of the land that this "may constitute" land development is completely unsatisfactory.

5. Other examples relating to limb (d) that the Commissioner may want to include in an updated draft ruling are:
   a) A developer executes a contract of sale with a permit or approval application having been made by the vendor, but the permit or approval is not issued at the contract execution date. If the permit or approval subsequently issues through no action from the developer, is limb (d) triggered?
   b) If the answer to the previous point is 'no', what if the permit or approval issues following action, enquiries or lobbying by the developer?
   c) Is limb (d) only triggered if a developer with a site under contract was the applicant for a permit or approval that issues post-contract execution?

d) What if parties unrelated to the contract of sale apply for or obtain a building permit – for example, a tenant in the property?

Limb (e): Doing anything in relation to the land for which a permit or approval referred to in paragraph (d) would be required

1. Limb (e) would capture a wide range of actions that can be taken outside of an owner or contracted party's ability to influence, such as where a tenant may act without a landlord's knowledge. We ask that this ruling be clearer about instances where any action (or inaction) may and may not be caught in these circumstances.

2. As outlined in our overall comments, land development (as defined) should be limited to actions involving:
   - the first purchaser or subsequent purchaser; or
   - the vendor or tenant under instruction of or knowledge of the first purchaser or subsequent purchaser.

Limb (f): Developing or changing the land in any other way that would lead to the enhancement of its value

1. Given the generality of this limb in trying to capture "any other way" land development may occur that isn't captured in limbs (a) through to (e), we recognise that there will be complexities in how clearly to define the types of activities that may fall in limb (f). As stated in our overarching comments, it is our view that land development activities should be limited to actions involving the first purchaser or subsequent purchaser; or the vendor or tenant under instruction of or knowledge of the first purchaser or subsequent purchaser.

2. In order to provide more certainty (and promote activity), Example 9 in particular can go further in the types of activities that could be classified as 'value preservation' or maintenance type of activities, rather than 'value enhancement' activities.

   To provide an additional example, land that has been purchased that is subsequently found to have a fundamental flaw (or where activities assumed to have occurred prior to sale have not occurred) may require activities to bring the land back to its value at the time of transaction. This type of work should not be categorised as development in these circumstances.

3. Where a tenant in a property is being retained (or attracted) under a long settlement contract requiring material changes that is not part of a scheme to add value, this should also fall outside the provisions of limb (f).

4. Further commentary would also be welcome on the following matters:
   a) Is this sub-paragraph confined to physical changes only to a title under contract?
   b) Must development or change directly lead to the enhancement of value, or is mere indirect enhancement sufficient?
   c) Is 'enhancement' to be considered on a gross or net basis? (e.g. two contemporaneous changes, where one which may increase value and the other may decrease value)
   d) How is 'value' to be assessed? At what time must the value enhancement occur? How certain or definite must the value enhancement be? What if the value

enhancement depends on other things or events occurring, either within or outside the developer's control?

e) If a purchaser under an unsettled land contract makes a submission as part of a PSP Panel process which results in land utilisation different from what was known at the contract execution date (e.g. a school is provided for in the PSP on the title that wasn't provided for originally), is the purchaser considered to be 'developing' or 'changing' the land?

f) Can examples be included of actions / inactions involving tenants or vendors that might constitute land development (or alternatively, not constitute land development)?