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REAL ESTATE INSTITUTE
OF NEW SOUTH WALES

Submission

Review of Revenue Ruling No. LT 22 Version 2
Land Used for Primary Purposes
Section 10AA – *Land Tax Management Act* 1956 (NSW)

To:
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1. INTRODUCTION

This Submission prepared by The Real Estate Institute of New South Wales (**Institute**) is in response to the Office of State Revenue's release on 5 February 2014 of the draft "Revenue Ruling No. LT 22 Version 2 – Land Used for Primary Purposes", prepared by the Chief Commissioner of State Revenue, Mr Tony Newbury (**Draft Ruling**).

The Institute is the largest professional association of real estate agents and other property professionals in New South Wales. The Institute seeks to promote the interests of its members and the property sector on property-related issues. In doing so, the Institute has a substantial role in the formation of regulatory policy in New South Wales.

2. REVIEW OF THE DRAFT RULING

The Draft Ruling sets out the Chief Commissioner's interpretation of section 10AA of the *Land Tax Management Act* 1956 (NSW), which exempts land that is used for the dominant purpose of primary production.

The Institute has reviewed the Draft Ruling and is primarily concerned with the meaning of "*dominant use*". Accordingly, the Institute makes the following comments for consideration:

Paragraphs 14 and 18 of the Draft Ruling

Paragraph 14 relies on a Tribunal Appeal Panel decision. However, the Institute is of the opinion that both paragraphs 14 and 18 should have regard to the following decision of the Court of Appeal of Western Australia, which relates to an exemption from Western Australian Council rates for land **used** exclusively for charitable purposes (emphasis added):

> *Shire of Derbywest Kimberley v Yungngora Association Inc* [2007] WASCA 233 (6 November 2007) - Extract from Newnes AJA with whom Buss JA and Miller JA agreed (emphasis added):
>
> > "*61. **The focus of the exemption under the Act is upon the use of the land in question**. In determining the purpose or purposes for which land is used, **the focus must be on what is done on the land**, not on what use is made, or is going to be made, of what is done on or derived from the land: see Moon v London County Council [1931] AC 151; Nunawading Shire v Adult Deaf & Dumb Society of Victoria [1921] HCA 6; (1921) 29 CLR 98.*"

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Paragraphs 16 and 17 of the Draft Ruling

The Institute is of the view that paragraphs 16 and 17 should have regard to the majority in the High Court decision of *Newcastle City Council v Royal Newcastle Hospital* [1957] HCA 15; (1957) 96 CLR 493 (21 March 1957) (**HC Newcastle Case**) where Taylor J (in the majority) held (emphasis added):

> "*11. The word "used" is, of course, a word of wide import and its meaning in any particular case will depend to a great extent upon the context in which it is employed. The uses to which property of any description may be put are manifold and what will constitute "use" will depend to a great extent upon the purpose for which it has been acquired or created. Land, it may be said, is no exception and s.132 itself shows plainly enough that the "use" of land will vary with the purpose for which it has been acquired and to which it has been devoted. It may be used for a public cemetery, for a common, for a public reserve, in connexion with a church or school and so on. Each of the forms of user referred to in the section relate to use by the owner and some of them, no doubt, contemplate a use which is synonymous with actual physical occupation and enjoyment. Others contemplate a use in a less direct form. But* ***where an exemption is prescribed by reference to use for a purpose or purposes it is sufficient, in my opinion, if it be shown that the land in question has been wholly devoted to that purpose even though, the fulfilment of the purpose does not require the immediate physical use of every part of the land****. In my opinion where a hospital acuires or sets apart, for a project which may properly be described as a purpose of a public hospital, a tract of land which it considers is the minimum requirement for its contemplated project and thereupon proceeds to carry out that project it, thereby, uses the whole of the land. How its purposes shall be fulfilled is, within reason, for it to decide and, as I have already said, it is nothing to the point to say that it has employed in the project more land than may, upon the views of others, be thought to have been necessary, or that in fact, it has derived no benefit or advantage therefrom in the fulfilment of its purposes.*" (at p515)

Note that the above was cited by the majority (Gibbs ACJ and Stephen J with whom Murphy J agreed) in *Ryde Municipal Council v Macquarie University* [1978] HCA 58; (1978) 139 CLR 633 (19 December 1978).

Paragraphs 20 and 24 of the Draft Ruling

The Institute considers that the requirement in paragraph 20 that "*preparation for primary production has been* ***largely completed***" is inconsistent with the HC Newcastle Case. Further, the Institute would like to see a change to paragraph 24 so that it has regard to the HC Newcastle Case.

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Paragraph 22 of the Draft Ruling

The Institute is of the opinion that the words in parenthesis (being, "*see relevant factors identified in paragraph 18*") should have regard to the decision by the Court of Appeal of Western Australia in *Shire of Derbywest Kimberley v Yungngora Association Inc* [2007] WASCA 233 (6 November 2007), as summarised above with respect to paragraphs 14 and 18 of the Draft Ruling.

Paragraphs 25 and 26 of the Draft Ruling

The Institute would like paragraphs 25 and 26 amended so that they each have regard to the decision in *Quito Pty Ltd and Commissioner of State Revenue* [2014] WASAT 8 (17 January 2014).

3. CONCLUSION

The Institute requests that the Chief Commissioner specifically include in the Draft Ruling the decisions set out in this Submission, which are predominantly decisions of the High Court and Courts of Appeal. The reason for that is because none of the cases in New South Wales that have considered the interpretation of "*dominant use*" have been tried and tested by the High Court. Despite that fact, the Draft Ruling has relied on the decision in *Leda Manorstead v Chief Commissioner* [2010] NSWSC 867 (16 August 2010) and has cited that case in paragraphs 13, 16, 17, 19, 23 and 55 of the Draft Ruling. It is a first instance decision of the Supreme Court of New South Wales and the Institute is of the view that the Draft Ruling should refer to more Courts with higher authority to support the interpretation of section 10AA of the *Land Tax Management Act* 1956 (NSW). In any event, with respect to the paragraphs of the Draft Ruling referred to in this Submission, the Institute would like to see the Draft Ruling incorporate decisions from a higher authority in order to determine the meaning of "*dominant use*".

Thank you for the opportunity to provide this Submission and the Institute would welcome the opportunity to discuss it further.

Yours faithfully

Tim McKibbin

Chief Executive Officer