THE LAW SOCIETY
OF NEW SOUTH WALES

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3 July 2015

Committee Secretary
Standing Committee on Economics
PO Box 6021
Parliament House
Canberra ACT 2600

By email: economics.reps@aph.gov.au

Dear Committee Secretary,

Inquiry into Home Ownership

I write on behalf of the Law Society of NSW members of the Office of State Revenue/Law Society Liaison Committee ("OSR Committee") and the Rural Issues Committee ("RIC") of the Law Society of NSW. The Committees have asked me to provide their submissions, which address two discrete issues relevant to the broad issue of home ownership.

The OSR Committee notes the terms of reference include "opportunities for reform" and its submission addresses the issue of transfer duty bracket creep in NSW. The OSR Committee considers that addressing the issue of transfer duty bracket creep would not only assist average homebuyers but would incentivise turnover, thereby maintaining revenue collected from transfer duty.

The RIC notes the terms of reference include both the "impact of current tax policy at all levels" and "opportunities for reform". In respect of these terms, the submission of the RIC addresses an issue that has arisen in the experience of its members, who are based in rural, regional and remote areas. In the RIC's experience, people (particularly older people) in farming families may be discouraged from formalising arrangements that grant a lifetime right to reside in a property because of capital gains tax obligations, and therefore become vulnerable to losing the right of lifetime residence. The RIC considers that there are public interest reasons, including security of housing for older people, to support the making and formalisation of these arrangements and suggests that the issue be reviewed.

Thank you for the opportunity to provide comments. Any questions may be directed at Vicky Kuek, Principal Policy Lawyer, on victoria.kuek@lawsociety.com.au or 9926 0354.

Yours sincerely,

John F Eades
President

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Transfer duty bracket creep

1. Overview

The OSR Committee submits that the impact of 'bracket creep' needs to be addressed. Transfer duty rates on land transfers have not been changed to cater for the increase in home prices since the current rates (other than the premium rate introduced on 1 June 2004) commenced. This means that the impact of 'bracket creep' has increasingly, over the years, resulted in the 'average home purchaser' paying duty at maximum rates, which was never the intention when the current base thresholds were introduced.

The OSR Committee notes that in NSW, the current transfer duty brackets (other than the top bracket for residential land over $3 million) have been in place for 29 years. In that time, the mean average price of NSW homes has increased exponentially.

The OSR Committee's view is that transfer duty bracket creep should be addressed in NSW by transfer duty rates being decreased so that the applicable rate of transfer duty for dutiable values from $80,000 up to $1 million is 3.5%. This is because the maximum rate of transfer duty intended to apply to average home buyers is 3.5% (see below) and the mean average of house prices in Sydney is reported to now be at $900,000 or $1 million. Similar adjustments to transfer duty thresholds and rates should be undertaken in other States and Territories, to address transfer duty bracket creep.

In doing so, State and Territory Governments would not only be assisting average homebuyers but would be incentivising turnover, thereby maintaining revenue collected from transfer duty.

2. Background

2.1. Legislative intention and current home values

The *Stamp Duties (Further Amendment) Act 1986* (NSW) ("Act") on enactment increased NSW transfer duty rates and introduced the current base thresholds. The Committee notes that in that Bill's Second Reading speech, the following statement was made:

> **The increased rates for conveyances** only affect properties worth more than $300,000 and thus **will not affect the average home purchaser**.[1] [emphasis added]

The OSR Committee considers that this indicates that there was no legislative intention in NSW for average home buyers to pay 4.5% or 5.5% rates of transfer duty.

However, the OSR Committee notes that the latest reports indicate that the mean average price of homes in Sydney is now at $900,000 or $1 million.[2] With the mean average price of NSW homes having increased exponentially over the past three decades since the original base thresholds were introduced, average home buyers are now paying 4.5% or 5.5% transfer duty rates, contrary to the Act's legislative intention abovementioned.

The OSR Committee submits that the 3.5% rate of NSW transfer duty should now apply up to at least $1 million.

[1] NSW Government, 1986, *Parliamentary debates: Legislative Assembly: official Hansard*, at 7372 available at: http://www.parliament.nsw.gov.au/prod/parlment/hanstrans.nsf/V3ByKey/LA19861201/$file/483LA047.pdf (accessed 11 June 2015).

[2] See ABC TV 7pm news report 13 June 2015 at 8:13: http://iview.abc.net.au/programs/abc-news-nsw/NC1501H141S00 and "Median asking price for Sydney houses tops 1 million", Sydney Morning Herald, 12 November 2014, a available at: http://www.smh.com.au/business/property/median-asking-price-for-sydney-houses-tops-1-million-20141112-11l0pm.html (accessed 11 June 2015).

2.2. Effect of higher transfer duty on housing market

The OSR Committee's view is that in addition to the inequity of NSW not addressing transfer duty bracket creep for almost three decades, the effect of the misaligned transfer tax brackets has had the effect of inflating property prices, through buyers seeking to recover the cost of transfer duty when they become vendors selling the property that they have purchased so as not to suffer a loss.

Further, the OSR Committee considers that high rates of transfer duty can be an impediment to turnover, and therefore addressing transfer duty bracket creep need not necessarily lead to a loss of transfer duty revenue.

The OSR Committee notes the views of Dr Andrew Leigh (now Shadow Assistant Treasurer) and Mr Ian Davidoff in their paper of September 2013[3] (the "paper"). In this paper, Dr Leigh and Mr Davidoff analysed the effect of increases in transfer duty on housing turnover, and considered housing sales data in Australia over a 13 year period from 1993 – 2006.[4]

The paper concludes that a 10% increase in transfer duty lowers turnover by 3% in the first year and that over a 3 year period, a 10% transfer duty increase lowers housing turnover by 6%.[5] It should follow that the inverse is also the case, namely, that where transfer duty is decreased, turnover increases.

The OSR Committee notes that last financial year, NSW was almost $1 billion ($938 million) above Budget in transfer duty "due to strong growth in residential property transfers".[6] The latest NSW 2014-15 Half-Yearly Review states that residential transfer duty is expected to increase again above the original Budget, by 12% in 2014-15, principally due to higher house prices.[7]

However, the OSR Committee considers that strong growth in residential property transfers is not necessarily inconsistent with high transfer duty rates operating as a disincentive since, according to the paper; growth in NSW should have been stronger had the transfer duty rates been lower.

There is in fact empirical evidence that with transfer duty being a transaction tax, a reduction in the rates incentivises turnover, which produces transfer duty revenue to the State. A most recent experience of this is in the ACT where Transfer (Conveyance) Duty rates were decreased[8] at the commencement of 2013-14 and yet, the ACT still recorded an increase in its transfer duty revenue collected in that financial year ($226,520 million)[9] compared to the financial year before ($225,653 million).[10]

The latest ACT Budget delivered on 2 June 2015 showed that apart from the estimate for the current financial year (yet to be confirmed at the end of this month by actual ACT

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[3] Andrew Leigh and Ian Davidoff, "How do stamp duties affect the housing market?" (2013) *Economic Record* 89, 396–410, available at http://andrewleigh.org/pdf/StampDuty.pdf (accessed 10 June 2015).

[4] Note 5 at 397.

[5] Note 5 at 406.

[6] See NSW Government, *Budget Paper 2 NSW 2014-15*, Chapter 6, at 6-11.

[7] See NSW Government, *Half-Yearly Review 2014-15,* 18 December 2014 at 13, available at: http://203.3.221.13/__data/assets/pdf_file/0017/125306/2014-15_Half-Yearly_Review_final.pdf (accessed 11 June 2015).

[8] See table on p 96: http://apps.treasury.act.gov.au/__data/assets/pdf_file/0005/455981/3.3-Taxation-Reform.pdf (accessed 11 June 2015).

[9] In 2013-14, the ACT Transfer (Conveyance) Duty revenue was $226,520 million - see p63 http://apps.treasury.act.gov.au/__data/assets/pdf_file/0007/684529/2014-15-Budget-Review-Web-Version.pdf (accessed 11 June 2015).

[10] In 2012-13, the ACT Transfer (Conveyance) Duty revenue was $225,653 million - see p 64 http://apps.treasury.act.gov.au/__data/assets/pdf_file/0012/455979/3.1-Revenue-and-Forward-Estimates.pdf

Conveyance revenue collected), the actual ACT Conveyance Duty revenue from 2013-14 through to 2017-18 has been or is budgeted to be in excess of the ACT Conveyance Duty revenue collected in 2012-13. This is notwithstanding the ACT transfer duty rate cuts. Attached at "A" are figures below extracted from ACT Budget Papers.[11]

The OSR Committee notes that another two jurisdictions namely, Western Australia and the Northern Territory have previously reduced their respective maximum rates of transfer duty. Their overall transfer duty revenue collections in the year of that reduction have respectively increased. Attached at "B" is a schedule of this data.

Finally, the OSR Committee notes that in the full financial year that NSW imposed vendor duty (that is, 2004-2005), NSW lost over $1 billion transfer duty revenue. In the full financial year that vendor duty was abolished in NSW (that is, 2006-2007), transfer duty revenue increased by over $1 billion. The OSR Committee considers that this provides further support for the contention that lower rates of transfer duty will incentivise turnover, and will not result in lower revenue collections. The schedule attached at "C" below provides data on vendor and transfer duty and the revenue collected in 2004-2005 and 2006-2007 financial years.

3. OSR Committee's submissions

Given the above, the OSR Committee reiterates its submissions that:

1. Transfer duty bracket creep should be addressed;
2. In NSW, transfer duty rates should be decreased so that 3.5% is the applicable rate for values from $80,000 up to $1 million; and
3. Similar adjustments to transfer duty thresholds and rates should be undertaken in other States and Territories.

In taking these steps, State and Territory Governments would not only be assisting average homebuyers but would be incentivising turnover, thereby maintaining transfer duty revenue collections.

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[11] See p 226: http://apps.treasury.act.gov.au/__data/assets/pdf_file/0011/601031/Budget-Paper-3-Budget-Outlook.pdf (accessed 11 June 2015).
See p 63: http://apps.treasury.act.gov.au/__data/assets/pdf_file/0007/684529/2014-15-Budget-Review-Web-Version.pdf (accessed 11 June 2015).
See p 32: http://apps.treasury.act.gov.au/__data/assets/pdf_file/0004/733765/BP3-Chapter-2-Fiscal-Strategy.pdf(accessed 11 June 2015).

ATTACHMENT A

ACT Conveyance duty revenues

- 2012-13 - $225,653,000;
- 2013-14 - $226,520,000 (**$867,000** more than 2012-13 when ACT Conveyance rates were higher);
- 2014-15 - $222,854,000 ($2,799,000 less than 2012-13);
- 2015-16 - $230,588,000 (**$4,935,000** more than 2012-13 when ACT Conveyance rates were higher);
- 2016-17 - $241,569,000 (**$15,916,000** more than 2012-13 when ACT Conveyance rates were higher);
- 2017-18 - $249,324,000 (**$23,671,000** more than 2012-13 when ACT Conveyance rates were higher).

ATTACHMENT B

In WA:

- in 2003-04 the maximum rate of Conveyancing or Transfer duty was **6.3%;**
- in 2004-05 the maximum rate of Conveyancing or Transfer duty was **reduced to 6%** (from 1 July to 28 October 2004) and **5.4%** (from 29 October 2004);
- in 2005-06 the maximum rate of Conveyancing or Transfer duty remained at the **reduced rate of 5.4%**.

The maximum rate of Conveyancing or Transfer duty was **lower** in 2004-05 as compared to the maximum rate in 2003-04. Notwithstanding this, the WA State revenue collected from Transfer Duty on Conveyancing and Transfers in 2004-05 was in fact **greater** than in 2003-04.

Similarly, the maximum rate of Conveyancing or Transfer duty was **lower** for the whole of 2005-06 as compared to the maximum rate in 2005-04 when the maximum rates was higher for part of that year. Notwithstanding this, the WA State revenue collected from Transfer Duty on Conveyancing and Transfers in 2005-06 was **greater** than in 2004-05:

- WA Stamp Duty Conveyancing & Transfers 2003-04 - **$1,207,271,000** See p 86 WA Department of Treasury Annual Report 2004-05;
- WA Stamp Duty Conveyancing & Transfers 2004-05 - **$1,218,330,000** See p 86 WA Department of Treasury Annual Report 2004-05;
- WA Stamp Duty Conveyancing & Transfers **2005- 06** - **$1,916,434,000** See p 45 WA Department of Treasury Annual Report 2005-06.

In the NT:

- in 2006-07 the maximum rate of Conveyancing or Transfer duty was **5.4%**;
- in 2007-08 the maximum rate of Conveyancing or Transfer duty was **reduced to 4.95%** (from 6 May 2008);
- in 2008-09 the maximum rate of Conveyancing or Transfer duty **remained reduced at 4.95%**.

Notwithstanding that the maximum rate of Conveyancing or Transfer duty was **lower** for part of 2007-08 compared to 2006-07, the NT revenue collected from Taxes on Property (NB: NT does not have land tax) in 2007-08 was **greater** than in 2006-07.

Similarly, notwithstanding that the maximum rate of Conveyancing or Transfer duty was **lower** for the whole of 2008-09 compared to 2007-08 (where the maximum rate was higher for most of that year), the NT revenue collected from Taxes on Property in 2008-09 was **greater** than in 2007-08:

- NT Taxes on Property 2006-07 - **$86,500,000** See 2006-07 Budget Paper No 2 - Fiscal & Economic Outlook Item 6. Territory Own-Source Revenue p62 - $86.5M - Taxes on Property;
- NT Taxes on Property 2007-08 - **$97,100,000** See 2007-08 Budget Paper No 2 - Fiscal & Economic Outlook Item 8. Territory Own-Source Revenue p 85 - $97.1M - Taxes on Property;
- NT Taxes on Property 2007-08 - **$108,500,000** See 2008-09 Budget Paper No 2 - Fiscal & Economic Outlook Item 6. Territory Own-Source Revenue p 61 - $108.5M - Taxes on Property.

ATTACHMENT C

Information from NSW Treasury Annual Reports
http://www.treasury.nsw.gov.au/Publications_Page/Annual_Reports

Year	Transfer Duty Maximum Rate	Vendor Duty Rate	Revenue Transfer Duty	Revenue Transfer Duty Change	Revenue Vendor Duty	Total	Total Revenue Change
03/04	5.5% or 7% (1 month)	2.25% (1 month)	$3,916M	-	$2M	$3,918M	-
04/05	5.5% or 7%	2.25%	$2,911M	-$1,005M	$371M	$3,282M	-$636M
05/06	5.5% or 7%	2.25% (only for 1 month)	$3,144M	+ $233	$92M	$3,236M	-$46M
06/07	5.5% or 7%	Nil	$4,163M	+ $1,019	$3M	$4,166M	+$930M

Taxation and granny flat arrangements

The RIC's submission relates to home ownership among farming families in rural areas. Specifically, in the RIC's experience, farming families may make arrangements where people, usually elderly parents, are granted a lifetime right to reside in the home of a family member or in a separate dwelling on the property.These arrangements are referred to as a "granny flat arrangement" in this submission, and are discussed in more detail below.

An issue arises in respect of formalising granny flat arrangements in writing as capital gains tax ("CGT") may, as a result, become payable (as a "CGT event D1" might occur). The person who gives the lifetime right to reside in a property may have to pay tax on the value of the amount paid to them,[12] less any incidental costs which may be limited to legal fees incurred to draft an agreement. The RIC has observed that once the tax obligations are explained to family members, particular family members (usually an older person) may choose to forego the protection of their interests by electing not to enter into a formal documented agreement.

This means that the older person may lose their capital with no security of accommodation. Elder financial abuse issues may also arise because the arrangement is not documented or clear for all family members to understand. Further, an older person is vulnerable when family circumstances change, such as a need for family members to move residences, relationship breakdowns and the requirement to sell assets as party of a family law property settlement.

The RIC is of the view that there are public interest reasons to encourage the making and formalisation of granny flat arrangements.

For the purposes of this submission, a granny flat arrangement is an arrangement where a person (usually an elderly parent) resides with another (usually a relative such as a child and his or her spouse and children or a niece or nephew) in their home or in a separate dwelling on land owned by the relative (such as a granny flat).

The parent may contribute to the purchase of a property in the child's name in exchange for a lifetime right to reside in the property. The child may also assist the parent with daily activities or, given the proximity of accommodation, may do so in the future as the parent's mobility or health declines.

1. What are the benefits of a granny flat arrangement?

There are many benefits for families who enter into a granny flat arrangements. The benefits include:

(a) Allowing an older person to remain in their current location, when they are unable to maintain the property alone.

(b) Allowing an older person to live close to a carer who is a family member, as an alternative living in an aged care facility.

(c) Providing a means for an older person to access part of the capital tied up in a residential property, while still retaining a place to live.

(d) Companionship and physical care after an older person has lost his or her partner.

[12] *Taxation Ruling TR2006/14 – Income Tax: capital gains tax: consequences of creating life and remainder interests in property and of later events affecting those interests*, paragraphs [195] and [196].

(e) Having a family home remain in family ownership, even if no longer suitable for the older person.

There are particular benefits for members of farming communities who enter into a granny flat arrangements. The benefits include:

(a) Allowing a farm to be transferred to the next generation or children while parents are still alive, and thereby allowing farming families to continue a productive farming business by transferring the business and its assets to the next generation.

(b) Allowing parents to live on the family farm and in their own home or other dwelling on the farm and allowing an older person to live in close proximity to a child or children who can care for them. This is particularly important in rural and remote areas where access to aged care facilities or support services are limited.

2. The importance of documenting a granny flat arrangement

The RIC is of the view that it is important for family members (particularly older people) to protect their legal interest or right to reside in a property for life through a formal document (through contract, deed or other legal document). In the RIC's view, the types of arrangements that should be documented include:

(a) The accommodation or financial arrangement for the older person if the child sells the property.

(b) The accommodation or financial arrangement for the older person if the child moves elsewhere.

(c) The accommodation or financial arrangement for the older person if the child is made bankrupt.

(d) The accommodation or financial arrangement for the older person if the child's spousal relationship breaks down and there is a family law property settlement.

(e) The older person's rights to participate in any capital gain or loss if the property is sold and the residency rights are ended.

(f) The circumstances in which either party can end the granny flat arrangement and the financial consequences of doing so.

(g) The older person and child's expectations of care services to be provided, in addition to the lifetime right to reside in property.

(h) To clarify what is to happen when the older person vacates the property to enter into a nursing home, and whether any payments are to be made by the children.

3. Granny flat arrangements under tax and social security laws

The RIC has observed inconsistencies in the way granny flat arrangements are treated under social security and tax laws.

Under social security law, a granny flat arrangement is recognised as being similar to ownership of a property. Money given to a child in return for a granny flat arrangement may be excluded from gifting provisions. Further, the granny flat or the lifetime right to reside in a property may be excluded from the asset test for the purpose of assessing the pension entitlements of an older person. This means that an older person is entitled to social security concessions where they enter into a granny flat arrangement with family members[13].

Under the *Social Security Act 1991* (Cth) a granny flat arrangement is referred to as "a right to accommodation for life". It is important that such an arrangement is formally documented to ensure that an older person qualifies for social security concessions.

The RIC is of the view that it is preferable to promote consistency in social security and income tax laws to protect the rights and interests of older people. The current inconsistency in the treatment of granny flat arrangements is confusing and does not encourage older people to protect their legal rights.

[13] Refer to *Guide to Social Security Law, 4.6.4.50 Granny Flats – Features, Rights & Interests, accessed at* http://guides.dss.gov.au/guide-social-security-law *on 10 June 2015.*