The Law Society
of New South Wales

170 Phillip Street, Sydney NSW 2000
Australia; DX 362 Sydney
Tel (02) 9926 0333 Fax (02) 9231 5809
ACN 000 000 699 ABN 98 696 304 966
www.lawsociety.com.au

Our Ref: JC:lb:1293298
Direct Line: 9926 0202

11 June 2009

Mr Anthony Johnston
Commissioner of State Revenue
Office of State Revenue
Lang Centre, Cnr. Hunter & Marsden Streets
PARRAMATTA NSW 2150

Dear Anthony,

State Revenue Legislation Further Amendment Bill 2009

I am writing to you at the request of the Law Society members of the Law Society / Office of State Revenue Liaison Committee (Committee).

The Committee welcomes the opportunity to review and comment upon the exposure draft of the *State Revenue Legislation Further Amendment Bill 2009* (Bill). The Committee's comments on the new Chapter 4A of the *Duties Act 1997* (*Act*) inserted by the Bill are set out below.

General Comments

Although the Committee appreciates its inclusion in the review process, there is a general view amongst its representatives that the time within which they are required to provide comment is manifestly insufficient to enable them to consider the Bill thoroughly and in a manner which is likely to provide proper assistance to the Office of State Revenue (OSR).

Part 1 Preliminary

Section 146(3) Meaning of "landholder"

The introduction of land rich duty on the acquisition of a significant interest in a listed landholder as defined in new section 146(3) will not be well received by the business community. It is a significant extension to the duty base as it has stood for over 20 years and will create uncertainty and additional cost in the context of takeovers, schemes of arrangement and mergers.

The Committee suggests that it may be worthwhile increasing the threshold provided in section 146 (1) above $2,00,000 to say $3,000,000 given the removal of the 60% land rich test or at least introduce indexation to the threshold as is done under *the Land Tax Management Act 1956* so that the scope of the taxing provision does not expand over time.

Section 147 What are the "land holdings" of a landholder?

The current definition of "landholding" in section 163C (1) of the *Act* excludes a "profit a prendre". The List of Changes to the Bill does not mention the removal of this exclusion. Is the removal of the exclusion for a profit a prendre from the landholding definition in section 147 intended? It appears to be in contrast with comments concerning the importance of the mining industry in NSW regional areas made in the Treasurer's Mini – Budget Speech 2008-09.

Proposed section 147 should also include carve-outs from the definition of landholding which reflect the terms of current section 163C (1) of the *Act*. That is, a landholding should not include as a landholding of a unit trust scheme an interest in land not held by the trustees of that scheme, and should not include as a landholding of a company an interest in land which is not a beneficial interest

Part 2 Charging of Duty on acquisitions of interest in landholders

Section 150 What are "interests" and "significant interest" in landhholders?

The current definition of "interest" and "significant interest" in section 163D of the *Act* exclude an interest:

(a) in a unit trust scheme acquired before 10 June 1987, or
(b) in a private company acquired before 21 November 1986, or
(c) acquired at a time when the landholder did not hold land in NSW.

The List of Changes to the Bill states that the Bill:

6. Quarantines interests acquired when the entity did not own land in NSW for 12 months
7. Removes the quarantining of interests before the initial announcement of land rich duty

The Bill will remove the current complete exclusion of interests acquired when the entity did not own land in NSW from the aggregation provisions (although, it will retain the exemption for such interests under section 163 (g)). This is a shift in policy and involves an effective expansion of the tax base for subsequent acquisitions (where the 12 month quarantine is not applicable). No policy reason has been expressed for this proposed shift.

The exclusion of interests acquired before the initial announcement of land rich duty that has been in place for over 20 years (since 21 November 1986 for unlisted companies and since 10 June 1987 for private unit trusts). Bringing such interests into aggregation with later acquired interests of the holder or, associated persons of the holder, will represent a major shift in policy and involve an effective expansion of the tax base for subsequent acquisitions. No policy reason has been expressed for this proposed shift.

The removal of previous exclusions has been replaced with a 12 month quarantine period after the landholder first holds the land which with the proposed section 160 means that the 12 month quarantine commences from exchange of contracts. Given the vagaries of conditions to contracts and the differing length of completion of contracts it would reduce compliance costs that the 12 month period (if the previous exclusions are not reinstated) commence from completion and not exchange of contracts. This would then be consistent with the definition of acquisition in proposed sub-section 151 (3) which is the completion of the issue, allotment or transfer of a unit or share.

Section 152 Acquisition statements

Section 152 (3) (b) will require that the unencumbered value of **the property of the landholder** (emphasis added) as at the date of the relevant acquisition be included in the acquisition statement required to be lodged under the Chapter. This will mean that not only the unencumbered value of land but also, of non-land assets of the landholder and of linked entities of the landholder (multiplied by the relevant proportional entitlements (section 158(4)) where applicable) will need to be ascertained and included in the acquisition statement. This could be costly, time consuming and will be a form of red-tape. It will be difficult to explain to clients why it is necessary to value non – land property when there is no longer a 60% test.

Appendix B – Revenue Measures of the NSW 2008-09 Mini – Budget included the following statement:

"The change to a "landholder" model will **eliminate the need for complex valuations and calculations regarding the proportion of assets represented by land**" (emphasis added).

Section 152(3) (b) of the Bill is inconsistent with this statement in the Mini- Budget.

It appears that the purpose of section 152(3)(b) will be to enable a relevant proportional credit for marketable securities duty under section 155(5) of the Bill. At the least, this provision should not need to apply where no credit for marketable securities duty is intended to be claimed, for example - where the acquisition is an exempt acquisition (section 155(7)) or, where no marketable securities duty was paid or payable (such duty having been abolished for quoted marketable securities in all States and Territories since 1 July 2001 and having been abolished for unquoted marketable securities in most States and Territories) or, where marketable securities duty was paid but was insignificant and no credit is sought. It should be unnecessary to provide the unencumbered value of **all** the property of the landholder in these circumstances.

Given the low $2 million threshold, the fact that goods will also be taxed and the fact that marketable securities duty will soon be abolished, it is submitted that the balance lies in favour of simply providing a full credit for marketable securities duty which, in any event, is the Committee's understanding of the Commissioner's practice. Maintaining a requirement to value non – land property is just not worth the compliance costs in comparison with the potential revenue foregone.

Section 152 (6) and (7)

This is a case where protecting the revenue must surely be balanced with the compliance burden placed on the taxpayer. The breadth of the test for extending the "Statement Period" is going to require significant due diligence every time there is an acquisition, or a change in ownership of the acquiring entity, to obtain facts and information to determine whether such an arrangement exists or existed. The test should be limited, as it was previously to options or rights to acquire interests to reduce the compliance burden.

New section 152(7) is unclear in its intended operation. The Committee suggests that the OSR, in a public ruling or on its website, provide examples of the circumstances in which a relevant acquisition will be related to an earlier acquisition as contemplated by this provision.

Section 155 How duty is charged on relevant acquisitions – private landholders

As referred to in point 4 of the List of Changes to the Bill, section 155 (1) will impose landholder duty on the acquisition of land **and goods** (excluding certain goods). This will significantly broaden the base of NSW land-rich duty to impose duty not only in respect to NSW land but NSW land **and goods**. In addition, it will bring NSW into disunity with the majority of the other jurisdictions that use the "landholder model" since, only one jurisdiction (Western Australia) currently imposes landholder duty on land **and goods** whereas the ACT and the Northern Territory which also adopt the landholder model, do not.

Appendix B – Revenue Measures of the NSW 2008-09 Mini – Budget also included the following:

"**Changing to a "landholder" model will also provide increased tax harmonisation between New South Wales and the other jurisdictions that use the "landholder" model** and provide for a more robust revenue base in future" (bold emphasis added).

Section 155(1) of the Bill is inconsistent with this statement in the Mini - Budget.

A policy shift to include duty on the value of goods under landholder duty in NSW is also inconsistent with simplification of Chapter 4A.

It is also noted that under the 1 January 2009 Intergovernmental Agreement (IGA), all States and Territories agreed to abolish stamp duty levied on the value of non-real non-residential conveyances before 1 July 2013 (Clauses B2(g) and B3 of Schedule B (Taxation Reform) of the IGA). A policy shift to include duty on the value of goods under landholder duty in NSW would appear to be required to be removed by 1 July 2013, under the IGA.

Section 155(7)

Although this Section replicates existing section 163K(7) of the *Act*, in the interests of avoiding red tape and, in order to achieve the object of the Bill of simplifying existing Chapter 4A of the *Act*, it could be submitted that this provision should go further than merely provide that an exempt acquisition is not chargeable with duty and go on to state that an acquisition statement is not required to be lodged under section 152 in respect to an exempt acquisition. A similar comment can be made in relation to section 156 (4).

It is not clear whether an "exempt acquisition" referred to in section 155 (7) and 156 (4) extends to an acquisition that would have been exempt under the former legislation. This should be made clear. The Committee recommends that the words "and not on any other acquisition" be added (after 1 July 2009) in transitional provision (1) (Schedule 1 [3]) to make that provision clearer so that it reads:

> (1) The duty charged by new Chapter 4A is charged on any relevant acquisition in a landholder that is made on or after 1 July 2009 and not on any other acquisition, subject to this clause.

Section 156 How duty is charged on relevant acquisitions – listed landholders

This is the new provision referred to in point 2 of the List of Changes - Imposition of duty on the acquisition of 90 per cent or more of the interests of a widely held trust or a stock exchange listed entity at a concessional rate of 10 per cent of the duty otherwise payable on an acquisition of all the landholdings and goods of a landholder - to apply from 1 October 2009.

This provision will be a new tax in NSW on certain acquisitions of securities in widely held and listed entities in respect to land **and goods**. At a rate of 10% of the duty otherwise payable on land and goods (5.5%), this equates to 0.55% which is similar to the off-market rate of NSW duty on unquoted marketable securities (0.6%) and in excess of the former rate of duty since abolished (on 1 July 2001), on transfers of quoted securities of 0.3%. Differing from to NSW duty on unquoted marketable securities and former duty on quoted securities, this proposed new duty will not be determined by reference to market value or consideration for the securities, but will disregard liabilities of the entity and be applied to the full value of NSW land and goods directly owned or deemed to be owned by the entity. This is not a simple regime.

Part 3 General principles to be applied under this Chapter

Section 158 Constructive ownership of land holdings and other property: linked entities

The Western Australian test for linked listed entities is 90% (consistent with the 90% significant interest), whereas the NSW test will be 50%. The Committee appreciates that a listed entity can only be linked to another listed entity under the proposed Bill, but the Bill will still cast a wider net in respect of listed entities because, a 90% or more interest is required to be acquired in the top – most list entity, but, effectively, only 50% or more is required in downstream listed entities. Is this intended?

In addition, the overall approach in separating out linked entities of listed and unlisted entities is unduly complex. The more simplistic 90% for listed linked entities and 50% for unlisted linked entities is preferable from a compliance perspective.

Section 160 Effect of uncompleted agreements

This section does not include an equivalent to section 163V(2) of the *Act* which relates to agreements for disposal or acquisition of non-land property. This means that there will be no deeming provisions for contracts for sale of goods (or other property) in the new Chapter 4A. Is this the intent of the legislator?

Part 4 Exemptions and Concessions

Section 163 General exemptions: 163 (f), (h) and (i)

Why is the "avoidance" wording required in section 163 (f), in light of the proposal to implement a general anti-avoidance provision? Is "scheme" meant to have a different meaning in this context?

As it is understood that the acquisitions referred to in these sections can never be dutiable (given that they occurred more than 3 (more than 20) years ago and pre 1 July 2009 - transitional provision (1)), the Committee queries the need for these acquisitions to be listed as "exempt". It is noted that as the Bill is drafted, these interests can be aggregated (transitional provision (3)) with subsequent acquisitions which may themselves be dutiable.

Section 163B Exemption for "top hatting" arrangements

The exemption provided in proposed section 163B relates to certain unit trust re-organisations that qualify for tax relief under Sub-Division 124 – Q of the *Income Tax Assessment Act 1997* (Clth) (ITAA). It would seem appropriate that the similar rollover for company interests in Sub-Division 124-G of the ITAA also be subject to the same policy position and be exempt from land holder duty.

Section 163C Discretion to grant exemption or concession

This provision will allow for partial application of the just and reasonable discretion as noted in point 12 of the List of Changes to the Bill. Representatives from the OSR previously indicated at the last Liaison Committee meeting that they were considering recommending removal of the Chief Commissioner of State Revenue's "not just and reasonable" discretion altogether. While 163C as drafted is preferable to such removal, the following comments might still be made. The Chief Commissioner of State Revenue already has power under section 12 of the *Taxation Administration Act* 1996 (TAA), to make a compromise assessment, with the agreement of the taxpayer, "if it is difficult or impracticable for the Chief Commissioner to determine a person's tax liability under a taxation law without undue delay or expense because of the complexity or uncertainty of the case or for any other reason". Such a compromise assessment (being with the agreement of the taxpayer) is **not** reviewable (section 86(2) (a) of the TAA). These provisions in the TAA should be adequate to address "partial" exemption such that is would be clearer and could be preferable for the "not just and reasonable" discretion to be left as an all or nothing provision that is reviewable. Otherwise, it is difficult to appreciate how the discretion of the Chief Commissioner to "partially exempt" will be properly exercised. Perhaps if examples were given, this could be better understood.

Section 163F (2) Concession for buy-back arrangements

Proposed section 163F (2) corresponds to current section 163ZE. It provides a concession for a widely held trust which ceases to be widely held by reason of certain redemptions by continuing to treat it as a public unit trust for 30 days, provided that no person is beneficially entitled on an associate-inclusive basis to more than 25% of the units for that 30 day period and by the end of that period no person is beneficially entitled to more than 20% of the units on an associate-inclusive basis. This concession operates on the premise that a 30 day period is sufficient for the trustee of the trust to raise capital from new investors which can be used to decrease the interest of the person whose holding of more than 20% causes the trust to be non-widely held. It is submitted that, in the current economic climate and for the foreseeable future, 30 days is an inadequate period within which to find such new capital. The Committee suggests that the 30 day period be replaced with a longer period (say 120 days).

Part 5 Interpretation

Section 281 Corporate reconstructions

Section 281 (d) should be broadened so that the corporate reconstruction exemption can apply where a group company makes a "passive acquisition" in a landholder "from" another member of a group, eg: if the other member has all its shares in the landholder bought back or cancelled thereby increasing the interest of the first group company.

With the proposed extension of section 281 to landholder duty, presumably a new ruling will be issued to replace DUT 026. Will that new ruling be issued by 1 July 2009 and will the Committee be given the opportunity to review a draft before then?

Dictionary

"listed company"

The proposed definition of "listed company" in the Dictionary should be amended to mirror the existing definition of "listed trust" in the Dictionary, that is:

> "***listed company*** means a company ***any of the shares in which*** are quoted on the Australian Stock Exchange or any exchange of the World Federation of Exchanges".

Sometimes listed companies might have a minor class of share which is not quoted although the main class or classes of shares are quoted.

"associated person"

The new Dictionary definition of "associated person" could be amended to clarify that two related bodies corporate each of which holds its interest in a landholder in its capacity as trustee of a trust will be associated persons only if paragraph (d) of that definition applies, assuming that this change is consistent with the policy position.

Paragraph (1) (e) of the definition should be amended to make clear that the investment vehicles are only associated persons if the shares or units of one vehicle are ***stapled to the shares or units of the other vehicle***.

Paragraph 3 currently states:

> (3) A person holds a ***significant interest*** in a managed investment scheme if the person is a member of the scheme and has a beneficial interest in the scheme of more than 20%.

Consistent with other changes proposed by the Bill, the Committee recommends that paragraph 3 of the definition be amended by changing the reference in that paragraph to "50%" rather than 20%:

Conclusion

Thank you once again for the opportunity to comment on the Bill.

The extremely short time allowed for consideration of these complex provisions is plainly inadequate to allow the Committee's state revenue law specialists to consider the potential consequences of such legislation in order to avoid unintended consequences. The Committee members have, however, identified a number of issues with the current draft of the Bill as set out above and would be concerned at the prospect of a proposed commencement date of 1 July 2009 if their recommendations are not adopted.

The Committee considers that a proper period for consideration of these important new provisions, instead of the two business days allowed, would enable its members to review the new provisions in a more considered way and to discuss the likely practical effect, including the potential for unintended consequences. Such a comprehensive review would be likely, in the Committee's view, to result in more carefully drafted and thus more robust legislation.

If you have any queries in relation to this submission, please contact Ms Liza Booth, Executive Member, OSR / Law Society Liaison Committee on (02) 9926 0202 or by email to ljb@lawsocnsw.asn.au .

Yours sincerely,

Joseph Catanzariti
President