



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: MM:LJB:Property Law
Direct Line: 9926 0202

21 June 2010

The Hon Eric Roozendaal MP
Treasurer
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Treasurer,

State Revenue Legislation Amendment Bill 2010 (Bill)

I am writing to you at the request of the Law Society's Property Law Committee (Committee).

The Committee has the responsibility of considering and dealing with any matters relating to property law and advising the Council of the Law Society on all issues relevant to that area of practice. The members of the Committee are senior property law practitioners and experts. Many of them advise clients who are parties to land transactions of their rights and obligations under relevant legislation including the *Real Property Act 1900* and the regulations made pursuant to it.

The Committee's comments relate to Schedule 10 only of the Bill, being that part of the Bill which proposes amendments to the *Real Property Act 1900* (Act) and the *Real Property Regulation 2008* (Regulation).

Torrens Assurance Levy

The proposed amendments enable regulations under the Act to require a levy (Torrens assurance levy) to be paid in respect of any dealing, caveat, withdrawal of caveat, application or request lodged under the Act. The levy may comprise a specified amount, an *ad valorem* amount or a specified base amount to which an *ad valorem* amount is added.

The Torrens assurance levy replaces existing arrangements for the funding of the Torrens Assurance Fund (TAF). At present, the Act allows the Minister to direct payments to be made to the TAF from fees paid to the Registrar General for the

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lodgement of any dealing, caveat or withdrawal of caveat. It also permits the fee payable to the Registrar General for lodgement of a dealing, caveat or withdrawal of caveat to be prescribed so as to include the amount to be paid into the TAF.

Under the new arrangement, the levy will be a separate charge to the administrative fees paid under the Act, and will be payable into the Consolidated Fund. The Minister may, after consultation with the Treasurer, direct that payments be made to the TAF from Torrens assurance levies paid to the Registrar General.

In a media release, the Minister for Lands, Tony Kelly, MP, noted in relation to the introduction of the Torrens assurance levy:

“the principle of ad valorem is that it usually is imposed as proportion of a property’s value rather than as a flat fee and is designed to provide greater land document safety.

This principle fits with land registration duties as it is reflective both of the value conferred on the owner and the protection provided by the Torrens Title system in New South Wales where property ownership is guaranteed by the State.”

The Committee disagrees with the proposition that a selective *ad valorem* impost fits with the principles of the Torrens system. For this reason, the Committee opposes the introduction of the Torrens assurance levy.

By introducing this levy, one group of users of the Torrens Title system is singled out to fund, according to government statements, fraud mitigation measures designed to protect the integrity of the Torrens Title system. The TAF is designed to provide *assurance* to all those dealing with Torrens Title, not just parties to those dealings but reassurance to the community generally of the integrity of the system of State-guaranteed property ownership. It is fundamentally inequitable, in the Committee’s view, for one group only of users of the system (i.e. purchasers or other transferees of property valued at over \$500,000) to fund fraud mitigation measures that benefit all users of the system. The notion that transferees of “high value” property should substantially fund the TAF is fundamentally flawed. The Committee notes that a significant proportion of the claims on the TAF are made by mortgagees and there is no suggestion that the contribution to the TAF should be value based for mortgagees.

Fraud mitigation measure

The Committee has considerable difficulty in categorising the introduction of a Torrens assurance levy as having the purpose of funding fraud mitigation.

The Committee notes the Budget Papers indicate the anticipated contribution to revenue from this levy over the forward estimate period of \$420 million.

During the financial years during which the per-dealing fee was \$4.00 and for which information is publicly available (2004- 2005 to 2008- 2009), the average revenue to the TAF is of the order of \$3.15 million per annum. The amount standing to the credit of the TAF at the commencement of the 2008- 2009 financial year was approximately \$18 million. The Committee notes that payments out of the TAF in the last financial year amounted to \$4.78 million and recognises the need to take remedial steps to ensure that there is an adequate balance available to meet anticipated claims.

The Committee is strongly of the view that a measure which is estimated to generate some \$92 million in its first year of operation cannot fairly be categorised as an appropriate response to fraud. An examination of the TAF “Snapshot” annexed to this letter supports this view.

It seems likely to the Committee that the vast bulk that any Torrens assurance levy will ultimately fall into the Consolidated Fund.

Administrative Inefficiency

One result of the introduction of the Torrens assurance levy may be that there will be two separate government agencies assessing the *ad valorem* value of a property transfer.

The Office of State Revenue (OSR) has experienced staff and administrative processes designed to ascertain evidence of purchase price or transfer price for the purpose of calculating *ad valorem* duty.

It has never been part of the function of the Land and Property Management Authority (LPMA) to capture this information as a precursor to the registration of documents. The Committee considers that this is a most unnecessary duplication and increase in red tape.

This may not be the case if the Registrar- General avails himself of the power to enter into an arrangement with the Chief Commissioner of State Revenue, (depending on the terms of that arrangement), as contemplated by section 144A:

‘144A Payment and recovery of fees or levies

(1) The Registrar-General **may** enter into an arrangement with the Chief Commissioner of State Revenue for the administration and enforcement of any provision made by or under this Act for the payment of fees or levies.” (bold emphasis added)

While such an arrangement may assist in overcoming some of the problems outlined below, it will add a further layer of administrative complexity. The Committee would strongly urge the Registrar- General to consult with stakeholders if outsourcing of this function is proposed.

If no outsourcing arrangement is put in place, Clause 12 A (5) of the Regulation contemplates that the Registrar General is entitled (but not required) to rely on information in the Notice of Sale (NOS) as evidence of purchase price and date of the contract. The Committee has difficulties with this proposal. The NOS has only recently been redesigned and procedures significantly changed as a result of the welcome introduction of an eNOS. It would be unfortunate if the form needed further amendment so soon after its introduction.

The eNOS does not specifically address GST and there is some uncertainty about how the price should be completed. The OSR has well established procedures in place to assess the GST status of the transaction by perusal of the contract. The eNOS is not as transparent.

Another problem with the eNOS is that it is certified by one party only. It can be prepared by the purchaser’s representative without ever being seen by the vendor or vendor’s representative.

The Bill provides in proposed **section 144A (2) and (3) of the Act:**

(2) The regulations may make provision, in connection with any such arrangement or proposed arrangement, for the application of the Taxation Administration Act 1996, or any regulations under that Act, to any fee or levy payable under this Act.

(3) Without limiting the above, the regulations may provide that the Taxation Administration Act 1996 applies in respect of a fee or levy payable under this Act, with or without modifications, as if the fee or levy were a tax and this Act were a taxation law (within the meaning of that Act).

Until regulations are made that deem the Torrens assurance levy to be a tax and the Act to be a taxation law under the TAA, there is a void of objection and appeal rights for taxpayers assessed with the new tax which is inequitable and contrary to public policy. Even if such regulations are made, they will form an incredibly artificial and complex regime.

Exemptions

Many transfers currently exempt from *ad valorem* duty (such as on death or divorce where the matrimonial home is transferred), change of trustees, transfers to certain charities or other prescribed entities, transfers within a corporate group (eligible for corporate reconstruction exemption duty) and others could be stymied if mirror exemptions are not available in respect of the *ad valorem* component of the Torrens assurance levy.

Arguably, to be consistent in the application of policy, the NSW OSR rulings on the transfer duty exemptions would also need to be replicated in respect of the Torrens assurance levy.

Cumbersome and complex regime

The more complex and cumbersome a revenue regime is the greater the risk that transactions will be structured in a way designed to exploit perceived loopholes. Indeed, the very complexity of the system often makes such loopholes easier to locate.

It would be unfortunate if an inefficient, complex and cumbersome regime were introduced for the sole purpose of permitting a government to be able to state that it has not increased State taxes such as stamp duty.

Time for Implementation

The implementation of a Torrens assurance levy introduces a dramatic change to the existing regime.

It is the view of the Committee that despite the inclusion of transitional provisions in clause 18A of the Regulation, purchasers and others need a reasonable period to prepare for the new regime. One example of this need is a purchaser who is borrowing funds for the purchase where the Torrens assurance levy is payable. The net funds available at settlement will almost inevitably be reduced and purchasers will need to be aware of the requirement to have additional funds available. A period of only weeks between introduction of the Bill and its commencement is inappropriate on that ground alone. The administrative difficulties foreshadowed above will exacerbate the problem.

Way forward

The Committee opposes the introduction of the Torrens assurance levy. If, however, the Bill is passed by both houses of Parliament, in its present form, the Committee suggests its input could be of value in the implementation of the Torrens assurance levy in much the same way as the Law Society has assisted in the implementation phase of other imposts, such as the introduction of (and in due course the removal of) the former vendor duty.

The Committee is prepared to provide representatives for urgent discussions with both OSR and LPMA to discuss issues arising from the implementation of the Torrens assurance levy.

As Chair of the Committee, I am happy to meet with you to discuss these concerns, if you wish. Please contact Ms Liza Booth, Executive Member of the Property Law Committee by telephone on 9926 0353 or by email at liza.booth@lawsociety.com.au if you wish to discuss this submission or arrange a meeting.

Yours sincerely,


Mary Macken
President

Torrens Assurance Fund Snapshot

	2009	2008	2007	2006	2005	2004	2003
	\$000	\$000	\$000	\$000	\$000	\$000	\$000
Opening cash balance	18,407	17,554	14,821	11,745	8,825	8,273	9,327
Add:							
Revenue	2,917	3,196	3,167	3,240	3,228	2,017	498
Less:							
Expenditure	(4,780)	(2,343)	(434)	(164)	(308)	(1,465)	(1,552)
Balance at YE	16,544	18,407	17,554	14,821	11,745	8,825	8,273
Per dealing fee	\$4	\$4	\$4	\$4	\$4	\$2	
Contingent Liabilities	13,865 ^a	15,956 ^a					

- a. **Torrens Assurance Fund**
 The Department maintains a special deposit account for claims arising through fraud or departmental error (the Torrens Assurance Fund). Estimates of the potential liability for claims that have been made against the fund, but which are not yet finalised, are identified as contingent liabilities. These liabilities have been estimated on the assumption that all disputed claims will be lost by the Department.
Source: Department of Lands Financials - Department of Lands Annual Report {08/09} pages 75, 82

Additional information

Torrens Assurance Fund

During 2008/09 financial year the Registrar General made several payments in response to claims against the Torrens assurance fund totalling \$4,780m.

This sum includes compensation payments and legal fees of claimant parties.

Source: Appendixes - Department of Lands Annual Report {08/09} page 131