



THE LAW SOCIETY  
OF NEW SOUTH WALES

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30 July 2021

Tax Reform Task Force  
NSW Treasury  
GPO Box 5469  
Sydney NSW 2001

By email: [TaxReformTaskforce@treasury.nsw.gov.au](mailto:TaxReformTaskforce@treasury.nsw.gov.au)

Dear Sir/Madam,

### **Property Tax – Progress Paper**

The Law Society of NSW appreciates the opportunity to comment on the Buying in NSW, Building a Future Progress Paper (“Paper”). The Law Society members of the Revenue NSW/Law Society Liaison, Business Law and Property Law Committees have contributed to this submission.

We also thank you for the opportunities we have had to discuss the Paper with the Tax Reform Taskforce. We look forward to continuing to work with you on implementation matters, should the decision be made to proceed with the proposal.

As previously stated, the Law Society considers there is merit in considering a broad-based annual property tax. We note that the Paper provides key updates in relation to many areas where we sought further detail in our response to the original consultation paper, but there remains a significant level of detail yet to be determined.

While our understanding of the proposal and policy design has benefitted from the Paper, in our view much of the finer detail will need to be determined via formal public consultation on a draft bill. We support the detailed consultation that has occurred on policy design to date, however in our view that should now be matched by thorough public consultation on draft legislation. This is particularly important given the magnitude of changes to existing revenue legislation and the creation of the new framework for the property tax which will be required to implement the proposed reform.

Consultation on the bill will also support smooth implementation of the legislation and minimise disruption to the NSW property market. Such broad consultation has previously been given before implementation of major changes to tax legislation, with the clearest example being the exposure draft of the Duties Bill which ultimately became the *Duties Act 1997*. We believe that process greatly assisted the smooth introduction of the *Duties Act 1997* for government, taxpayers and advisers.

We note that additional benefits of public consultation on the draft legislation could include:

- ensuring that proposed changes blend smoothly with other regimes which incorporate or reference the property tax;
- identifying potential unintended consequences; and
- identifying potential gaps in the framework, or areas requiring clarification in the legislation.

Even if no public consultation on the draft legislation is possible, we suggest a significant period of lead time should be provided between the passage of the legislation and its commencement, to achieve the following implementation benefits:

- educational benefit to industry and citizens of NSW;
- assisting industry and advisors prepare for the changes, including revising standard documentation, forms, systems and processes;
- assist parties who may be able to utilise the limited retrospective operation of the legislation.

We set out below our comments in relation to matters that require further attention.

### **1. Whether the property tax is intended to replace all duties imposed in connection with land in NSW, or purely purchases of direct interests in land**

This key question is not addressed in the Paper. If the property tax is to apply more widely, and include transactions such as declarations of trust, put and call options and surrenders of interests, many technical questions will arise. The impact of the property tax on landholder duty, in particular, raises some difficult questions including:

- the impact upon landholder duty where the company's assets comprise a mixture of properties within and outside the property tax regime;
- the approach to be taken where the acquisition is less than the whole interest in the landholding entity; and
- the appropriate corporate decision-making processes, particularly if consent is required from minority interest holders to make a decision to opt-in to the property tax.

We would be pleased to work with you in relation to this very technical area.

### **2. Exemptions**

The Paper, at page 39, clarifies that as a broad principle, existing exemptions under the duty and land tax legislation will remain for properties where there has been no election to opt-in to the property tax. The continuation of these exemptions will provide relief and mitigate against potential detrimental impacts of introducing a property tax, particularly in the case of exemptions introduced to prevent undue hardship, such as the exemption under s 68 of the *Duties Act 1997* for family law property settlements.

In terms of any property tax exemptions, at page 39 the Paper states the broad principle that where a duty exemption exists at the time of purchase, and a land tax exemption exists during the period of ownership, the owner will be exempt from property tax during ownership. The example of a charity is provided to illustrate the point. While the Paper outlines some of the main exemptions and provides a useful insight into the broad design principles governing exemptions, we suggest detailed consideration of every current exemption or concession under the respective legislation is needed to avoid unintended consequences for taxpayers and industry, and we look forward to assisting the Government in this regard.

### **3. Surcharge property tax**

We note that the Paper, at pages 24 and 25, introduces the concept of a surcharge property tax, being an additional 0.3% ad valorem rate on aggregate landholdings above \$1.5 million of unimproved land (excluding principal place of residence and farmland).

As a preliminary issue, the Paper is silent on the following two matters which require clarification:

- whether the ad valorem rate is applied to the total value of the landholding or only the value of the landholding that exceeds \$1.5 million; and
- whether it is all aggregate landholdings, or only those properties subject to the property tax.

More broadly, we are concerned that the introduction of surcharge property tax adds a significant level of complexity to the administration of a property tax for Revenue NSW and taxpayers.

For example, in a conveyancing transaction, the introduction of surcharge property tax means that the parties will need to distinguish the amount of property tax payable by the vendor on the subject property being sold, from the amount of property tax payable by the vendor due to its total landholdings. Property tax would likely be adjusted on a single holding basis, that is, the amount of property tax referable to the property being sold. This approach is something that could be addressed legislatively or may need to be addressed in the terms of the contract between the parties.

A further level of complexity would be added if unpaid property tax becomes a charge on the land. Such a charge would need to be cleared on or before settlement of a conveyancing transaction. Where a vendor is liable for surcharge property tax, we expect that prior to settlement, Revenue NSW would need to determine and document the amount it will accept to clear the charge, similar to that which is required for land tax where a vendor has multiple land holdings with amounts owing for land tax. No such determination of an amount to clear would be required in the absence of a surcharge property tax.

If surcharge property tax is part of the final tax design, we support the exclusion of a taxpayer's principal place of residence or farmland from the calculation of surcharge property tax.

As a minor matter, we suggest that it may be confusing to use the term "surcharge property tax", given "surcharge" is used to describe the additional transfer duty and land tax payable by a foreign person. We suggest a different term may be less confusing for taxpayers and industry, such as "supplementary", "aggregate" or "cumulative" etc.

### **4. Hardship**

The Paper notes the work that has been done to date to develop a hardship scheme and we support including this as a priority for further policy design. We support a recommendation made by the Working Group to review the hardship scheme after an initial 12 months and then at select intervals thereafter. It will be important that ongoing review occur well into the future to ensure that the hardship scheme is continuing to operate as intended.

The hardship scheme outlined at page 51 appears to be heavily centred on the ability to defer the payment of property tax where the Chief Commissioner determines this is appropriate in the circumstances. We note that the amount of accrued property tax would

then be payable “out of the property proceeds the next time the property is sold.” This would suggest that if a property is transferred but not “sold”, such as on the distribution of an estate, the deferred property tax would not be payable. We would welcome further clarification on this and other transfers which do not involve a sale.

We note that payment of the deferred tax is capped up to a maximum of 75% of the market value of the property. There may be situations where there are competing priorities for the sale proceeds between deferred property tax and, for example, a mortgage. Clarification of these competing priorities is required, particularly if unpaid property tax will be secured by a charge on the land.

## **5. Opt-in process and timing**

Another key design element of the proposal is the mechanism by which a taxpayer elects to opt-in to the property tax and when the taxpayer must make this election. We regard this as one of the key areas that our members will need to know if the property tax is implemented. In our view it will be important that adequate time is provided for a taxpayer to obtain appropriate legal and financial advice before making an election.

For transfer duty, even though the duty is not payable until three months after first execution, the transfer duty effectively needs to be paid on or before settlement of the transaction. This is due to s 301 of the *Duties Act 1997*, which provides that a transfer will only be registrable at NSW Land Registry Services if transfer duty has been paid, or the transfer has been recognised as exempt from duty. Clarification as to whether a similar provision would operate in relation to a property tax would be welcome.

Questions also arise as to whether an opportunity to opt-in to the property tax is triggered by a purchase, or by any change in ownership, such as a transmission application transferring property of a deceased estate, transfer of a part interest, or the severance of a joint tenancy. Again, clarification would be welcome. We expect that this issue will be addressed in the legislation.

## **6. Unimproved land value**

A purchaser needs to know the unimproved land value (“ULV”) of a property to inform the decision whether to opt-in to the property tax. As the Paper notes at page 33, this information is available on the NSW Government Valuer General webpage. However, where a property is being purchased “off the plan”, the ULV will not be known at the time the contract is entered into, and most likely will not be known until well after the settlement of the purchase has occurred.

This impacts the purchase transaction in two significant ways. Firstly, the purchaser is unable to make an informed choice whether to opt-in to the property tax or pay transfer duty. The amount of transfer duty will be known, but there is no reliable basis upon which to predict what the property tax might be. Secondly, if the purchaser does elect to pay property tax, there is a question as to when the property tax would be payable. Presumably, purchasers will generally be liable for property tax from the date of settlement, but it will be very rare for the ULV to be known at that stage as the relevant plan would be newly registered and the Valuer General yet to undertake the valuation.

Under s 49A of the *Duties Act 1997*, in off the plan transactions involving the purchase of a residence to be used as the purchaser’s principal place of residence, payment of transfer duty can be deferred until 12 months after the date of the agreement or on settlement, whichever first occurs. However, this type of deferral would not solve the issue as, again, at

settlement, the ULV will not yet be known, and such deferral may create a situation where a lump sum or catch up payment is required once the value is known.

The issue of unknown ULV will also be problematic if unpaid property tax is to form a charge on the land being subdivided. We note that s 47(2) *Land Tax Management Act 1956* gives the Chief Commissioner the power to release land from a charge on payment of an estimate of land tax. We suggest it would be useful, particularly for new developments, to reproduce such a provision for the property tax.

We suggest this situation requires further analysis, and would be pleased to be involved in future consultation on this issue.

## 7. Tenant protections

We understand that some commercial leases are being drafted now which make provision for the payment of property tax by the tenant, in the event a property tax is implemented. The Paper proposes (at page 48) that in certain circumstances, a cap on the payment of property tax to the amount of land tax that would have been payable will apply. However, the commentary further notes that the cap will not apply if the parties proceed to renegotiate the lease to provide for the payment of property tax by the tenant. This is appropriate in our view, as the intent of the parties, as evidenced by the lease terms, should govern the situation.

Based on the commentary, by extension, it appears that the cap will not apply to leases being entered into now which expressly contemplate payment of property tax by the tenant, should the property be subsequently opted-in to the property tax; however, clarification on this point would be welcome. If this is the intent, legislative provisions in relation to such a cap should specify that the cap will not apply where the lease terms contemplate payment of the property tax by the tenant, even if the lease was executed prior to the commencement of the property tax regime.

Currently s 26 of the *Retail Leases Act 1994* limits the ability of a landlord to recover land tax from a tenant:

### 26 Limit on recovery of land tax

- (1) A provision of a retail shop lease which requires the lessee to pay money to the lessor in respect of outgoings attributable to land tax payable by the lessor is taken to include provision that the liability of the lessee is not to exceed the amount of that liability had the amount of land tax payable by the lessor been assessed on the basis that—
  - (a) the land concerned was the only land owned by the lessor, and
  - (b) the land concerned was not subject to a special trust (within the meaning of the [Land Tax Management Act 1956](#)), and
  - (c) the lessor was not a company classified under section 29 of that Act as a non-concessional company.

Given the new proposal to include a surcharge property tax, consideration could be given to introducing similar provisions to limit the recovery of property tax from a retail tenant into the *Retail Leases Act 1994*. Such a provision would seem to be in keeping with the existing policy objectives of the *Retail Leases Act 1994*.

## 8. Foreign investors

We note the commentary at page 41 which indicates that a foreign person who acquires a property that is already subject to property tax will be required to pay the property tax, surcharge transfer duty and surcharge land tax. In terms of implementation, this is an

important education point as it is an exception to the general case that a taxpayer either pays property tax, or transfer duty and land tax where applicable.

We also note that foreign persons will not be able to opt-in to the property tax for a residential property. Again, this will be an important education point to ensure that foreign persons and their advisers are aware of the position, particularly as the election will likely be made after the contact for the purchase of land has been formed.

With an ongoing property tax, there will be persons who change their foreign status over time (e.g. a foreign person becoming an Australian citizen or a permanent resident who does/does not meet the 200 day residency requirement.) Mechanisms and the obligations to notify any change in status should also be addressed.

## **9. Other issues**

There are a number of other technical or practical issues that need to be determined, including:

- The rules that will operate when aggregating parcels of land where some, but not all, parcels are subject to the property tax. Clarification regarding subdivision of land will also be required.
- The rules about the period within which notification of change of use must be made to Revenue NSW, and the process for notification, will be required. There will also need to be guidance about determining the effective date of change of use as this will not always be straightforward.
- Further clarification as to the operation of the tax where land is used for dual purposes (for example, partly residential and partly commercial). In this regard, it may not be practical for the Valuer General to try and apportion the use, given the myriad of permutations that can occur.

Worked examples of the above issues, where appropriate, would be beneficial to practitioners.

## **10. Assistance for consumers**

The Paper provides an update on the further work that has been done in focusing on the perspective of a potential purchaser and the information required to make a decision whether to opt-in to the property tax. We note the role proposed for Service NSW in supporting this decision. We are comfortable with the Service NSW website hosting some limited information regarding payment of property tax, with links to the Revenue NSW website for further information, following the same approach currently adopted on the Service NSW website for payment of land tax.

However, we have concerns about Service NSW providing “support to customers both through face-to-face service centres and via their call centres” if that would result in Service NSW staff providing information directly to customers. In our view, answering queries and providing information direct to members of the public is a role best handled by Revenue NSW, provided it is appropriately resourced. Additional resources should be provided to Revenue NSW to handle this aspect of the implementation, with all internet information regarding the tax regime being the responsibility of Revenue NSW. In our view, the role of Service NSW should be limited to accepting payments of property tax, and providing information about how to make payments, similar to its existing role for land tax and vehicle registration duty.

## 11. Conveyancing impacts

The Paper, at page 60, envisages that a contract for the sale of land would likely include three basic pieces of information: the property tax status, the ULV for the property and the property tax for the property for the current year. We suggest that of these three, the most important to disclose in the contract are the property tax status and the ULV, as this information should be provided to the purchaser before exchange of contracts. Conveyancing practice in NSW has embraced a system of vendor disclosure for over thirty years under s 52A of the *Conveyancing Act 1919* and the *Conveyancing (Sale of Land) Regulation 2017*. Disclosure of this information fits well into the existing framework, but more detailed considerations will be required. We would be pleased to work with you and the Office of the Registrar General, the agency responsible for this Regulation, as appropriate.

If disclosure of the property tax status is required in the contract for the sale of land, there must be a reliable and easily accessible source of this information. Ideally, practitioners preparing a contract for the sale of land should be able to access this information and print it in a form that can be included in the contract. Importantly, this information must be able to be relied upon by a potential purchaser, in the way a land tax certificate under s 47 of the *Land Tax Management Act 1956* can be relied upon. Similarly, a printout of the ULV from the NSW Valuer General's website should be able to be relied upon when attached to a contract for the sale of land.

We suggest that the appropriate time to consider the status of any property tax payable on the property will be after contracts have been exchanged. The purchaser, through their legal practitioner, will need to be able to establish the current annual amount of property tax payable and whether there is an unpaid property tax debt against the property. Property tax will then be adjusted between the parties, as with the adjustments currently made for payments such as council and water rates.

We note the Paper does not clarify whether unpaid property tax will create a statutory charge on the property, similar to land tax. Administration costs and the impact on the conveyancing process would be significantly reduced if unpaid property tax did not create a charge. However, we acknowledge there may be a preference to adopt that approach, to ensure that unpaid property tax is collected, particularly with the deferral mechanism under the hardship scheme.

If unpaid property tax will be a charge on the land, this introduces several further aspects that will need to be addressed, including:

- The manner in which the purchaser, through their legal practitioner, will be able to establish whether the property is subject to a property tax charge. We expect this should involve provision of a statutory certificate from Revenue NSW which certifies whether or not the land is subject to a property tax charge, following what currently occurs for land tax, under s 47 of the *Land Tax Management Act 1956*.
- The means by which a property tax would be cleared in an electronic conveyance. In our view, where applicable, the electronic workspace should be able to provide real time verification that the amount paid at settlement for outstanding property tax is sufficient to clear any property tax charge on the property. Currently, real time verification is only possible in relation to transfer duty, but it should be available for any property tax (and land tax).

The above two items are examples of system changes that will require an appropriate lead time as they will involve significant changes to documentation and systems at Revenue NSW and Electronic Lodgment Network Operators. Appropriate lead times for such changes must be adequately factored into any proposed commencement date for a property tax.

Thank you for the opportunity to comment. We would be pleased to continue working with you to discuss these and other issues. Any questions in relation to this submission should be directed to Gabrielle Lea, Policy Lawyer on 9926 0375 or email: [gabrielle.lea@lawsociety.com.au](mailto:gabrielle.lea@lawsociety.com.au).

Yours faithfully,

A handwritten signature in black ink, appearing to read 'JW', followed by a horizontal line extending to the right.

Juliana Warner  
**President**