THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: BLC/RNLSL:JBgl030225

3 February 2025

Scott Johnston
Deputy Secretary
Chief Commissioner of State Revenue
Revenue NSW

By email: [redacted]

Dear Chief Commissioner,

***STATE REVENUE AND FINES LEGISLATION AMENDMENT (MISCELLANEOUS) ACT 2022* REVIEW**

Thank you for the opportunity to contribute to the statutory review, of the amendments made by the *State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022* (NSW) (**Amendment Act**), to the provisions of the *Taxation Administration Act 1996* (NSW) (**TAA**) and the *Duties Act 1997* (NSW) (**Duties Act**). The Law Society members of the Revenue NSW/Law Society Liaison Committee and Business Law Committee contributed to this submission.

The statutory review specifically seeks feedback on the amendments in relation to:

- whether the policy objectives of the amendments remain valid, and
- whether the terms of the amendments remain appropriate for securing the policy objectives.[1]

The reforms introduced by the Amendment Act, were described in Parliament as falling into three broad categories, which effectively provides the policy objectives of the Amendment Act:

1. Amendments to **State taxation and grant legislation** to enhance revenue integrity, ensure the equity of exemptions and concessions, address anomalies, respond to court decisions, close tax avoidance loopholes and reduce red tape;

2. Amendments to **State debt legislation** to enhance Revenue NSW's role in delivering an end-to-end payment collection and debt recovery capability for the State; and

3. Amendments to **fines legislation** to improve customer service and strengthen enforcement of overdue fines.[2]

The first policy objective outlined above is the only policy objective relevant for the purposes of the current statutory review. Broadly speaking, we support this first policy objective, and in our view, the objective remains

[1] The terms of this review reflect the provisions in section 128 of the *Taxation Administration Act 1996* (NSW) and section 317 of the *Duties Act 1997* (NSW), which were inserted by the Amendment Act.
[2] New South Wales, *Parliamentary Debates, Second Reading Speech*, Legislative Assembly, 23 March 2022, 8865 (Victor Dominello, Minister for Customer Service and Digital Government), https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322-123267.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au

T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au

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valid. However, we submit that some of the amendments made to the Duties Act and the TAA by the Amendment Act are not appropriate for securing the first policy objective. In our view, a number of the substantial changes made by the Amendment Act go materially further than the stated objectives, and the stated objectives arguably do not correctly describe some of the changes that were implemented. We set out our detailed comments below on whether the policy objectives of the amendments remain valid, whether the terms of the amendments remain appropriate for securing the policy objectives, and some further matters for consideration.

1. Amendments made to the Duties Act

Schedule 1 of the Amendment Act made a number of changes to the Duties Act. Our comments below relate to the more significant changes from our members' experience.

1.1. Imposition of duty on changes in beneficial ownership (sections 8(1)(b)(ix), 8(2A), 8(3) of the Duties Act)

A significant amendment made by the Amendment Act is the imposition of duty on transactions which result in a 'change in beneficial ownership' of dutiable property. The amendments established the meaning of 'beneficial ownership', 'change in beneficial ownership' and 'excluded transaction'. The person liable to duty is the person who obtains the beneficial ownership or whose beneficial ownership is increased.

In our view, the imposition of duties on changes in beneficial ownership does not 'enhance revenue integrity' or 'close tax avoidance loopholes', and should not be described as such. Rather, it is the broadening of the existing revenue base by the inclusion of a new and broad head of liability, which aligns the Duties Act with equivalent Victorian law.[3] The Second Reading Speech[4] specifically refers to 'revenue integrity' and 'to prevent avoidance' as the basis for introducing the change in beneficial ownership provisions, and gives an example about the disposal of a beneficiary's 50% interest in a fixed trust holding land to the other beneficiary without any duty being incurred. However, these provisions have been interpreted and administered broadly by Revenue NSW so as to impose duty on transactions previously not liable to duty, such as the grant of call options, and the grant of leases for non-monetary consideration. Expanding the duty base did not appear to be the stated policy intent, yet in practice this is a significant impact of the amendments. We also note that 'reducing red tape' is one aspect of the first policy objective, which is strongly supported, however in our view the introduction of the change in beneficial ownership provisions has had the overall effect of increasing, not reducing, administrative and tax compliance obligations.

[3] The alignment of the NSW provisions with equivalent Victorian provisions was acknowledged in the Second Reading Speech, and the Explanatory Note, State Revenue and Fines Legislation Amendment (Miscellaneous) Bill 2022 (NSW), 1, https://www.parliament.nsw.gov.au/bill/files/3950/XN%20State%20Revenue%20and%20Fines%20Legislation%20Amendment%20(Miscellaneous)%20Bill%202022.pdf.

[4] New South Wales, *Parliamentary Debates, Second Reading Speech*, Legislative Assembly, 23 March 2022, 8865 (Victor Dominello, Minister for Customer Service and Digital Government).

We note that the 'change in beneficial ownership' provisions create an additional 'dutiable transaction'. However, many of the existing exemptions in the Duties Act do not apply to any 'dutiable transaction', but only to 'transfers' or 'agreements to transfer', for example the change of trustee concession (section 54), or the corporate reconstructions concession (Chapter 11, Part 1). We suggest that for completeness, and to ensure the equity of exemptions and concessions (consistent with the first policy objective), consideration should be given to introducing a provision that deems a 'transfer' in these exemptions to include a 'change in beneficial ownership'. Alternatively, this clarification could be made in a Revenue Ruling, confirming that Revenue NSW will administer the Duties Act on that basis.

As a practical matter, we are also aware that practitioners are encountering difficulties when seeking an interim assessment from Revenue NSW for a change in beneficial ownership, such as an option transaction, where an element of the consideration is unascertainable.

1.2. Imposition of duty on acknowledgement of trust (section 8AA of the Duties Act)

The Amendment Act extended duties to the acknowledgement of trust over dutiable property by deeming that acknowledgement to be a declaration of trust over dutiable property. This amendment was a 'response to the judgement of the Court of Appeal in *Chief Commissioner of State Revenue v Benidorm Pty Ltd* [2020] NSWCA 285'[5] (***Benidorm***), consistent with the first policy objective. In *Benidorm*, the Court of Appeal held that a declaration of trust that does no more than declare an existing trust was not subject to duty. The Chief Commissioner's application for leave to appeal the decision to the High Court was refused, hence the perceived need for a legislative response. The fact that the decision in *Benidorm* was unanimous, and that the High Court rejected the Chief Commissioner's application for special leave, is relevant, in our view, to the appropriateness of the amendments.

In *Benidorm*, the Court noted that the focus of the Duties Act is now on 'transactions' rather than 'instruments'. The Court held that the relevant Deed, to which the Chief Commissioner argued duty applied, had limited effect and did no more than acknowledge the existing position between the parties following the grant of probate and resealing of the will. Further, there was no suggestion that a mere acknowledgement of trust was intended to avoid payment of duty.

In our view, the Amendment Act signals a shift to widen the revenue base to capture instruments as well as transactions, which we submit is contrary to the original policy intention of the Duties Act. In *Benidorm* at [119], Payne JA observed that:

> On 12 November 1997, in the second reading speech, Mr Debus, the Minister responsible for the Duties Bill in the Lower House said (New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), 12 November 1997 at 1612):
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> "The bill replaces all existing stamp duties with the following duties: transfer duty, including special anti-avoidance provisions; marketable securities duty; lease duty; hire of goods duty; mortgage duty; insurance duty; motor vehicle registration duty; and a limited number of general instrument

[5] Explanatory Note, State Revenue and Fines Legislation Amendment (Miscellaneous) Bill 2022 (NSW), 2.

> duties. In contrast to the current law the new bill is structured in such a manner that each duty head is contained in a discrete chapter. I will now comment on some of the new and special features of the bill. The transfer duty chapter continues to impose duty on dutiable transactions such as agreements, transfers and declarations of trust. ***However, for the first time a list of dutiable property is provided, giving taxpayers and their advisers certainty in regard to property transactions that attract duty***." (Emphasis added.)

Following the *Benidorm* decision, Revenue NSW released guidance on acknowledgement of trusts in *Revenue Ruling DUT031v2 - Declaration of trust in agreement for sale* (**Ruling**).[6] The Ruling notes the position in *Benidorm* that 'words merely referring to an existing trust or to an existing trust deed will not amount to a declaration of trust or acknowledgement of trust'.[7] The Ruling then notes the introduction of section 8AA following *Benidorm*, and contains three examples which give rise to duty in addition to the duty charged on the contract for sale of a property. The effect of section 8AA is that there will be ad valorem duty on the declaration of trust or acknowledgement of trust *in addition to* the contract, unless a duty concession applies (section 18(6), section 55 or section 62B of the Duties Act).

We submit that section 8AA, while 'respond[ing] to a court decision', consistent with the first policy objective, also undermines the well-established purpose of the *Duties Act*, which focuses on transactions, not instruments. Section 8AA is not merely a response to *Benidorm*, in that the provision does not simply clarify existing legislation, rather it again widens the duty base by creating a new category of dutiable transactions, potentially exposing a trust to ad valorem transfer duty of rates up to 5.5% of the dutiable value of the trust. It imposes additional duties and risks duplication of duties. In our view, consideration should be given to the repeal of section 8AA.

If section 8AA is to remain, we suggest that it be amended to provide a specific carve out such that the section does not apply to an 'acknowledgement of trust' made by a will or testamentary instrument. The intent of the Amendment Act was not, as we understand it, to potentially levy double duty on a transaction in these circumstances. The duty chargeable under section 63 for deceased estates, where fixed duty of $100 is payable on a transfer made under and in conformity with the trusts contained in the will, is not available for an acknowledgement of trust by a will or testamentary instrument. Instead, under section 8AA, an acknowledgement of trust by will or testamentary instrument can give rise to ad valorem transfer duty under section 8AA. The acknowledgements/declarations we refer to are separate to a 'declaration by an executor of a will' for an appropriation transaction.

We note that a transfer of land and an acknowledgement of trust are separate 'dutiable transactions' under section 8(1). However, where a deceased estate is involved, in our view, section 8AA should not apply to the acknowledgement of trust/declaration transaction. This could be achieved by inserting a definition of acknowledgement of trust in section 8AA which mirrors the approach to the definition of 'declaration of trust' in section 8(3):

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[6] NSW Government, Revenue NSW, *Revenue Ruling DUT031v2 - Declaration of trust in agreement for sale*, online: Revenue Ruling DUT031v2 - Declaration of trust in agreement for sale.
[7] Ibid [16].

> **"declaration of trust"** means any declaration **(other than by a will or testamentary instrument)** that any identified property vested or to be vested in the person making the declaration is or is to be held in trust for the person or persons, or the purpose or purposes, mentioned in the declaration although the beneficial owner of the property, or the person entitled to appoint the property, may not have joined in or assented to the declaration. (Emphasis added.)

Alternatively, we suggest that the 'no double duty' provision under section 18 could also be amended to refer to an 'acknowledgement of trust' the subject of a deceased estate. Section 18 only refers to a 'declaration of trust' at present.

As a practical matter, we understand that some financial institutions are, understandably, requiring some 'declaration' or 'confirmation' from an executor/trustee identifying the particular property that may be held under a trust pursuant to a will. When identifying which property is held in testamentary trusts, taxpayers are entering into 'declarations' which may now be liable to ad valorem transfer duty under section 8AA. We submit this was unlikely to have been part of the policy intent of section 8AA and should be addressed.

1.3. Transfer of certain business property between family members (amendment of section 274 of the Duties Act)

Section 274 of the Duties Act provides an exemption from duty on primary production land transfers between family members. The Amendment Act extended the exemption so that it is available where the transferee is an executor of a deceased estate, trustee of a trust, superannuation fund, or private unit trust scheme or a proprietary limited company, provided that the entity is directed by a family member who maintains control of the transferee entity for at least three years.

The purpose of amendment was described in the Second Reading Speech as to: 'make the exemption fairer and bring it into line with the structures commonly used by farming families'.[8] We agree, and note that this is consistent with the first policy objective of ensuring the equity of exemptions and concessions.

We suggest that consideration be given to further amending section 274 to capture the policy intent that the exemption is to provide relief for intergenerational transfers of primary production land. We understand from Revenue NSW that the broadening of the terms of the exemption may have caused a misapprehension that the section can be used for a reorganisation or restructuring of a family farm business that does not involve an intergenerational transfer. This misapprehension may be further compounded by the fact that the section is no longer headed 'Intergenerational rural transfers' as it was originally, under the Duties Act. If, as we understand it, the exemption is only intended to be available in the context of an intergenerational transfer, we suggest consideration be given to amending section 274 to clarify the position.

[8] New South Wales, *Parliamentary Debates, Second Reading Speech*, Legislative Assembly, 23 March 2022, 8866 (Victor Dominello, Minister for Customer Service and Digital Government).

1.4. Certain development by Australian-based developers that are foreign persons (amendment of section 104ZJA of the Duties Act)

The Amendment Act introduced an additional category for the refund of surcharge duty for Australian-based developers where the residential land purchased was subsequently wholly or predominantly used for commercial or industrial purposes (section 104ZJA(1)(c)). This amendment may be regarded as addressing an anomaly, consistent with the first policy objective. As stated in the Minister's Second Reading Speech:

> The foreign owner surcharges were not intended to impose additional costs on Australian-based, foreign-owned companies that want to develop land which, for all intents and purposes, is not residential and is clearly intended for commercial or industrial use.[9]

In our view, the policy objective of the amendment remains valid, and the terms of the amendment remain appropriate for securing the policy objectives.

Section 104ZJA was also amended to insert a new subsection (6A), which expanded the reassessment powers of the Chief Commissioner to reassess a surcharge liability after a surcharge purchaser duty concession granted in respect of certain development by Australian-based developers that are foreign persons has been revoked. The Chief Commissioner can now make such a reassessment more than five years after the original assessment. Section 9(3) of the *Taxation Administration Act 1996* (NSW) limits reassessment of a tax liability to five years after the initial assessment unless expressly authorised by another taxation law.

Section 104ZJA(6A) of the Duties Act states:

> For the purposes of the *Taxation Administration Act 1996*, section 9(3)(c), a reassessment under this section is authorised to be made more than 5 years after the initial assessment.

The rationale for the amendment is provided in the Second Reading Speech as follows:

> This five-year limitation on reassessments is problematic in the context of the various surcharge relief provisions about which I have just been speaking. This is because those provisions often require the taxpayer to fulfil certain obligations within 10 years of acquiring the land or meet other conditions imposed by the Chief Commissioner when surcharge relief is granted. For example, the provisions relating to new home development require the Australian-based developer to sell the new homes within 10 years of the developer acquiring the land.
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> If, for example, the Chief Commissioner decided to revoke a surcharge concession seven years after the land was acquired by a developer, the Chief Commissioner's ability to issue reassessments would be significantly constrained because of the five-year limitation on making reassessments.

[9] New South Wales, *Parliamentary Debates, Second Reading Speech*, Legislative Assembly, 23 March 2022, 8867 (Victor Dominello, Minister for Customer Service and Digital Government).

> The proposed amendments will expressly permit reassessments to be made more than five years after an initial assessment when a surcharge concession is revoked. This will encourage taxpayers to adhere to their obligations, thereby supporting the integrity of the provisions.[10]

While we understand the basis for the amendment, the power to make a reassessment for an *indefinite period of time* is not good tax policy as it creates substantial uncertainty for the taxpayer. By comparison, Commonwealth taxes for more complex taxpayers generally have a four-year limitation period on reassessment,[11] with narrow exceptions for serious matters involving fraud or evasion (reassessments on either of those bases can be made at any time).[12]

We suggest that it would be appropriate to have a statutory upper limit on the period of time during which a reassessment can be made, such as 10 years, to align with the timeframe in section 104ZJA(6)(b) of the Duties Act.

1.5. First Home Buyers Assistance Scheme residence requirement (section 76(2A) of the Duties Act)

The Amendment Act inserted a clarifying provision, section 76(2A), with respect to the First Home Buyers Assistance Scheme residence requirement. This change granted the Chief Commissioner further discretionary powers to approve an owner's satisfaction of the terms of the scheme. The amendment is in the best interests of first home owners and is consistent with 'ensuring the equity of exemptions and concessions' under the first policy objective.

2. Amendments made to the TAA

Schedule 8 of the Amendment Act made several significant changes to the TAA, particularly in relation to anti-avoidance provisions and penalty tax. The amendments were described in the Second Reading Speech as follows:

> Collectively, these reforms represent one of the most significant enhancements to the integrity of the New South Wales taxation system in its history and make New South Wales a leader in promoting tax compliance.
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> These amendments consist of three core elements:
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> 1. New general provisions relating to tax avoidance schemes;
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> 2. Penalties to deter the promotion of tax avoidance schemes; and
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> 3. New penalty tax provisions.[13]

[10] Ibid.
[11] For example, items 3A and 4 of the table to section 170 of the *Income Tax Assessment Act 1936* (Cth).
[12] For example, item 5 of the table to section 170 of the *Income Tax Assessment Act 1936* (Cth).
[13] New South Wales, *Parliamentary Debates, Second Reading Speech*, Legislative Assembly, 23 March 2022, 8868 (Victor Dominello, Minister for Customer Service and Digital Government).

While we acknowledge the need for robust anti-avoidance provisions, and support the underlying policy objective of such provisions, we have some concerns about of the nature of some of the amendments made, and whether the terms of the amendments remain appropriate for securing the policy objectives.

2.1. Tax avoidance schemes (Part 10A of the TAA)

The Amendment Act brought State tax avoidance legislation under a single umbrella by widening the application of the anti-avoidance provisions, drawn from the Duties Act, to include all taxes administered by the Chief Commissioner. That is, the anti-avoidance provisions in Chapter 11A of the Duties Act were repealed, and replaced with anti-avoidance provisions in the TAA which apply to all revenue laws the subject of the TAA, including duties. Not only did the Amendment Act broaden the reach of the anti-avoidance provisions, but it also made substantive changes to the nature of the provisions.

Former section 284D(1) of the Duties Act (which was repealed by the Amendment Act), required that the tax avoidance scheme be of an 'artificial, blatant or contrived nature':

> A person is liable to pay the amount of duty avoided by the person as a result of a tax avoidance scheme that is of an artificial, blatant or contrived nature.

In contrast, the Amendment Act inserted section 106J(1) of the TAA, which provides:

> A person is liable to pay the amount of tax avoided by the person as a result of a tax avoidance scheme.

Section 106I, inserted by the Amendment Act states:

> **106I Meaning of "avoid"**
>
> In this Part—
>
> (a) a reference to avoiding tax, or payment of tax, includes a reference to postponing payment of tax, and
>
> (b) a reference to avoiding tax liability includes a reference to reducing or postponing tax liability.

These provisions provide a very broad definition of the amount of tax avoided. We also note that section 106F inserts a broad definition of a 'tax avoidance scheme', and section 106G sets out the matters that must be taken into account in determining whether a scheme is a tax avoidance scheme.

Without the limiting factor that the scheme be of an 'artificial, blatant or contrived nature', together with the broad meanings of 'avoid' and 'tax avoidance scheme', the new anti-avoidance provisions have a wide reach, extending what may be construed as a tax avoidance scheme by the Chief Commissioner.

One consequence of the broad meaning of 'avoid' to include 'postponing payment of tax' is the significant uncertainty this has created for taxpayers and their advisors in relation to the use of put and call options, which may not have been intended. It may be difficult for a taxpayer to substantiate that a transaction was

structured as a put and call option for legitimate commercial reasons, rather than for the sole or dominant purpose of enabling a tax liability to be deferred.

In our view, the former approach to tax avoidance under the Duties Act afforded a level of responsible practice in that the Chief Commissioner was required to provide reasons as to why such a scheme was 'artificial, blatant or contrived', with an intention to avoid tax. The current wording places a difficult evidentiary burden on the taxpayer. We suggest that the operation of these provisions is monitored beyond the current statutory review period given the short timeframe after commencement of the provisions.

2.2. Promoter penalty provisions (Part 10A, Division 3 of the TAA)

Separately, the Amendment Act also introduced tax promoter penalty provisions (Part 10A, Division 3 of the TAA), modelled on the Commonwealth provisions, which include substantial penalties of up to 10,090 penalty units for an individual. The intention to deter the promotion of tax avoidance schemes is supported, however we are concerned about the potential for overreach of the provisions.

The breadth of the provisions, in part, arises from the broad definition of 'scheme' in section 106H of the TAA. For instance, the advice to incorporate a company could be considered a 'scheme'. The promoter penalty provisions in NSW are also broader than the Commonwealth equivalent provisions in other ways. For example, under section 106N(2) of the TAA, a person will be a promoter of a tax avoidance scheme if the person 'markets the scheme or otherwise encourages the growth of the scheme, or interest in it'. By contrast, section 290-60 of Schedule 1 of the *Taxation Administration Act 1953* (Cth) requires that, for liability to arise, the promoter (or associate) must have received a *benefit* in respect of the marketing or encouraging of the scheme; and that the promoter must have taken a *substantial role* in marketing or encouraging the uptake of the scheme.

We are concerned that the promoter penalty provisions may capture advisers quite innocently providing services, such as the establishment of companies or trusts. Again, we suggest that the operation of these provisions is monitored beyond the current statutory review.

2.3. Penalty tax (section 27(1) of the TAA)

Section 27(1) was amended to include an additional penalty tax of 50% for taxpayers that are significant global entities (**SGEs**). The penalty tax otherwise remained the same at 25%. This amendment mirrors changes across the Commonwealth tax system in respect of SGEs, those entities being subject to greater tax penalties than other categories of taxpayers. This is consistent with policy views that SGEs, being large entities with substantial resources, should be well positioned to comply with tax laws and correctly manage their tax affairs. This is consistent with enhancements to the integrity of the taxation system.

2.4. Disclosure of information by the Chief Commissioner of State Revenue (sections 83B and 83C of the TAA)

The Amendment Act inserts a list of 'permitted disclosures' of information about a taxpayer in circumstances involving investigations and law enforcement (section 83B) and tax clearance checks (section 83C).

These amended provisions were described by the Minister in the Second Reading Speech as follows:

> The amendments will support law enforcement and investigative activities and ensure that there is no undue delay in providing information for such purposes. They are also consistent with New South Wales privacy law, which provides an exemption from the limits on disclosure of personal information where the disclosure is for law enforcement purposes.

In our view, the policy objective of the amendments remains valid, and the terms of the amendments remain appropriate for securing the policy objectives.

2.5. Electronic service of documents (amendment of section 116 of the TAA)

The Amendment Act expands the methods of approved electronic service under tax law, including an online notification system advising that a taxpayer can access certain documents via a link or portal. This is in keeping with the broad policy objective of the digitisation of customer services.

The important provision for protecting customer interests is section 116(5) of the TAA, which requires the person to opt in (provide 'consent') to any system of online notification for the purpose of the Chief Commissioner serving a document.

For clarity and completeness, we suggest consideration be given to amending the TAA to establish the right for a taxpayer to withdraw at any time their consent for the Chief Commissioner to serve documents electronically via an online notification system, that is, establish a right to opt out and revert to some other form of notification such as by email or post.

Please contact Gabrielle Lea, Senior Policy Lawyer, on (02) 9926 0375 or gabrielle.lea@lawsociety.com.au if you have any questions in relation to this letter.

Yours sincerely,

Jennifer Ball

Jennifer Ball
President