



THE LAW SOCIETY
OF NEW SOUTH WALES

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18 September 2020

Mr Peter Achterstraat AM
Commissioner for Productivity
NSW Productivity Commission

By email: ProductivityFeedback@treasury.nsw.gov.au

Dear Commissioner,

Continuing the Productivity Conversation – Productivity Commission Green Paper

Thank you for the opportunity to comment on the Continuing the Productivity Conversation – Productivity Commission Green Paper (“Green Paper”). The Law Society members of the Revenue NSW/Law Society Liaison Committee and the Business Law Committee have contributed to this submission. We make a brief comment on the issues discussed in Chapters 5 and 6 and also comment on some of the draft recommendations in Chapters 4 and 8.

Chapter 4 Forward-looking regulation supports competition and innovation

COVID-19 regulatory changes

The Law Society supports draft recommendation 4.1, to extend the operation of temporary COVID-19 regulatory changes for 12 months to evaluate their success, and then to retain any measures where a net public benefit is demonstrated.

This trial period will provide time for proper consultation with stakeholders and consideration of whether there is a case for continuing the new measures beyond the COVID-19 pandemic.

We also support draft recommendation 4.2, but subject to the same 12-month trial period provided in draft recommendation 4.1. This would allow further consultation with stakeholders and time to evaluate whether retaining a particular measure results in a net public benefit. We note that the NSW Government has recently announced plans to introduce new legislation to enable remote witnessing of documents to continue until the end of 2021.¹

By way of illustration of some of the advantages and disadvantages of such regulatory changes, we make the following comments about the impact of some measures in the justice system.

¹ Mark Speakman, Attorney General and Minister for the Prevention of Domestic Violence, Media release: COVID-19: Video Tech Signing of Legal Forms, 15 September 2020, accessed at: <https://www.dcj.nsw.gov.au/news-and-media/media-releases/covid-19-video-tech-signing-of-legal-forms-to-continue>

Remote witnessing

The Law Society would welcome the opportunity to provide further comments in relation to the practical considerations of permitting remote witnessing and attestation of documents on a continuing basis. At this stage, our members have advised that the *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (“the Regulation”) has assisted in promoting access to justice during the COVID-19 pandemic, particularly in rural, regional, and remote areas. However, Law Society members have identified some issues for further consideration.

Some of our members have raised concerns in relation to the potential risk of fraud and duress in permitting electronic witnessing, and a lack of clarity in the Regulation as to what constitutes the original instrument where multiple documents are created.

Court proceedings

The use of video links and teleconferencing during the pandemic has ensured matters have been able to progress despite difficult circumstances. It has increased accessibility and improved efficiencies in many cases.

We support the courts retaining the facility to conduct procedural, directions and interim hearings and other simple processes electronically where there is an emphasis on case management. A decision as to the suitability of a virtual hearing for each case should be made based on the unique circumstances of each individual case. In our view, appeals also generally lend themselves well to the electronic medium.

We acknowledge the cost and time savings to the parties, particularly by reducing the need for parties and their representatives to travel, and reducing the time spent at court waiting for a matter to be called in a heavily booked list. There are also cost savings to the court in reducing the need for judicial officers to travel to regional areas.

However, in our view, video links or teleconferencing are not appropriate for contested hearings in any of the courts. The ability of a judge to see a continual flow of evidence and assess the demeanour of a witness in examination or cross-examination is necessarily compromised in the electronic environment. This is especially so when documents need to be put in front of a witness. The conduct of virtual contested hearings may undermine public perception about the transparency of the legal process and the administration of justice.

We recommend that the use of teleconferencing be limited to appropriate matters where all parties can join the teleconference simultaneously. In matters where this is not possible due to technological limitations, there is a risk that procedural fairness is denied, as any party who is not on the call cannot hear what is being put before the court.

The courts’ ability to continue or extend the use of video links and teleconferencing will also require the courts to invest in reliable technological infrastructure. Ongoing training of judicial officers and court staff will also be necessary – both in the use of technology applications and in best practice on managing a virtual court (for example, training on minimising any perception of unfairness when allocating the order in which parties may speak). Similarly, court users will require guidance on participating in online hearings in the form of practice directions or other protocols.

Chapter 5 *Meet the challenge of reliable, well-priced water and energy* and Chapter 6 *Smarter infrastructure will support jobs and communities.*

We note that the Commonwealth Department of Home Affairs has released a consultation paper on critical infrastructure assets. This consultation will impact on the definition of assets which are of “national interest” under Australia’s Foreign Investments regime. The outcome

of this review will be of interest in respect of any evaluation of NSW's water and infrastructure assets.²

Chapter 8 A better mix of state and local taxes can encourage growth

The Law Society broadly supports part of Draft recommendation 8.1, *Replace inefficient taxes with more efficient ones*. We set out our comments below.

Transfer duty

The Law Society has reservations about replacing transfer duty with a broad-based land tax. As recognised in the Green Paper, there are significant issues to be analysed and worked through in considering such a fundamental shift. The impact of any such changes upon existing and future landowners needs to be carefully considered and balanced. The possible timing and manner of any shift from transfer duty to a broad-based land tax raises difficult questions as to equity and fairness, requiring careful design.

The Law Society is interested in participating in further consultation on any specific proposals for replacing transfer duty with a broad-based land tax, once developed. As the Law Society members interact with a broad range of stakeholders in the community whose interests extend beyond any one business group or industry focus.

Insurance duties

The Law Society supports the abolition of insurance duties for the reasons referred to in the Green Paper. We particularly note the conclusion of the Henry Review cited on page 260 of the Green Paper:

The Henry Review noted not only that a dollar of insurance duty carried a high economic loss to society, but that low-income people are the least able to bear the losses typically insured against (Henry et al., 2009).

Payroll tax

We support continued harmonisation and co-ordination with other jurisdictions in relation to payroll tax. However, we note that even where legislation has been harmonised with other jurisdictions, there are differences in the application of the legislation which compromise the benefits and efficiencies that can be gained from harmonisation.

We note the proposal for the establishment of a new single inter-jurisdictional body to coordinate the adoption of a consistent approach to the administration of the payroll tax system. While we support consistency in administration, we have reservations about the utility of establishing a new body for this purpose.

The Law Society appreciates the opportunity to comment on the Green Paper. Any questions in relation to this submission should be directed to Gabrielle Lea, Policy Lawyer, by phone (02) 9926 0375 or by email to gabrielle.lea@lawsociety.com.au.

Yours sincerely,



Richard Harvey
President

² Commonwealth, Department of Home Affairs, *Protecting Critical Infrastructure and Systems of National Significance*, accessed at <https://www.homeaffairs.gov.au/reports-and-publications/submissions-and-discussion-papers/protecting-critical-infrastructure-systems>