



THE LAW SOCIETY
OF NEW SOUTH WALES

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11 March 2021

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

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

Dear Sir/Madam,

Property Tax Proposal

The Law Society of NSW appreciates the opportunity to comment on the Buying in NSW, Building a Future Consultation Paper ("Consultation 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 to date that we have had to further discuss the proposal with Treasury representatives and the Tax Reform Taskforce. We look forward to continuing to work with you on the proposal as it develops further.

The Law Society considers that there is merit in considering a broad-based annual property tax. At this stage, we have outlined some important issues that, in our view, require further clarification before a decision can be made on switching to a property tax. These include whether various exemptions that currently exist for transfer duty will be mirrored in some way for the property tax, and the broader impact that adopting the property tax will have on existing revenue measures.

We acknowledge that views are largely sought on the high-level policy design features as specifically highlighted in the questions raised in the Consultation Paper. Our responses to the questions in the Consultation Paper are set out in the attached table and we make further comments as set out below.

1. Critical core elements of policy design

In our view there are three key areas where further policy development should be undertaken before the initial decision whether to proceed with the property tax is made:

- exemptions;
- 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, and;
- the nature of the hardship scheme.

This contrasts with secondary matters that will require resolution before implementation, but could be dealt with once the initial decision is made.

1.1 Exemptions

Settling issues around the continuation of existing exemptions under the duty and land tax scheme, as well as whether any other exemptions will exist in relation to property tax, is, in our view, an essential task that goes to the threshold decision of whether to proceed with the property tax.

There will be a number of policy decisions that have the potential to act as disincentives for taxpayers to opt into the property tax, including:

- existing duty and land tax exemptions that may not be available in a broad-based property tax regime;
- perceived preferential treatment where some but not all such exemptions are replicated in the property tax (eg for charities); and
- any potential for double taxation (should a particular head of duty be triggered in respect of land already in the property tax regime).

Where an exemption is available, particularly an exemption under the *Duties Act 1997*, the taxpayer is likely to take advantage of it and stay outside the property tax regime. This will impact upon the rate at which properties move to the property tax regime and the associated revenue modelling. This alone makes the question of exemptions a core issue for the threshold decision of whether to proceed with a property tax.

There are also issues of broader policy that in our view make exemptions an issue of core policy design which should be dealt with as part of the initial decision. A number of existing exemptions under the *Duties Act 1997* relate to addressing social issues that arise, and exemptions have been introduced to prevent undue hardship when they occur. Examples include:

- Charitable Exemptions (s 275). The current exemptions in relation to duty and land tax provide significant support for charities, religious organisations and not-for-profit bodies.
- Break-up of Relationship Exemptions (s 68). The current exemption plays a significant role in family law property settlements.
- Intergenerational Rural Land Transfer Exemption (s 274). The current exemption impacts upon succession planning for rural properties.
- Deceased Estates Exemption (s 63). The current provisions seek to minimise government charges at a time of personal loss.

The decision as whether some or all of these “social policy” exemptions will carry over is important. Some might be more easily mirrored in the property tax scheme, such as an exemption for charitable organisations. Others may not be as simple to apply. We also note that part of the rationale for implementing a property tax is that due to its broad base, it should be a more efficient tax. There is an underlying tension between the provision of exemptions, and keeping the revenue base broad, which should be addressed at the initial policy design stage.

In addition to the questions in relation to exemptions being core elements of the policy design, we anticipate that this will be an area where taxpayers and the community more generally will be seeking immediate information should the policy proceed. From the perspective of a smooth transition, we suggest these decisions should be part of the core initial design.

1.2 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

A key question is 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. The Consultation Paper is largely framed in terms of the purchase of direct interests in land only. However, examples of transfer duty imposed under the *Duties Act 1997* in connection with (or calculated by reference to) land include:

- Chapter 2 transfer duty on declarations of trust over land, surrenders of interests in land, leases in respect of which a premium is paid;
- Chapter 3 duty on certain transactions treated as transfers (e.g. put and call options); and
- Chapter 4 landholder duty.

Landholder duty raises interesting questions, such as whether it will apply where the subject properties are in the property tax regime. There may also be a mixture of assets within and outside the property tax regime. Complex questions also arise where the acquisition is less than the whole interest in the landholding entity.

1.3 Hardship scheme

The Consultation Paper refers to the development of a hardship scheme, which we support. We note that if a number of existing exemptions are not carried over to the property tax, there may be considerable pressure for more taxpayers to have access to hardship assistance. The existence of exemptions and the hardship scheme go hand in hand.

In our experience, it is difficult to qualify for existing hardship schemes. As mentioned in our responses to the Consultation Paper, we would support a more accessible hardship scheme for the property tax, although we note this may have significant implications for the costs associated with the policy.

2. Secondary elements of policy design

There are other areas of policy design which could, in our view, be worked through once a decision is made as to whether to proceed with a property tax. However, we include reference to them here for completeness. Such matters include:

- Whether any change in ownership will trigger an opportunity to opt-in to the property tax, or only a purchase (e.g. transmission applications or lodging a notice of death).
- Principles in relation to the subdivision and aggregation of land (e.g. what happens when land that is subject to the property tax is aggregated with land that is not).
- Whether a surcharge property tax is proposed.
- The notification process for electing to opt-in to the property tax, whether this must be unanimous among co-purchasers, and the timeframe for making the election.

We would be pleased to work with you in considering these issues as appropriate.

3. Implementation – impact on the conveyancing process

From a conveyancing perspective, a critical element of the policy design is the way in which a prospective purchaser would be able to reliably ascertain whether a property has moved across to the property tax scheme. While this could be something that appears in advertising material for the property, a prospective purchaser needs to be able to access this information

from a 'single source of truth'. This information needs to be easily obtained and preferably in real time.

Once contracts are exchanged for the purchase of a property subject to the property tax scheme, 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, particularly if that unpaid property tax creates a statutory charge on the property, like land tax. A mechanism similar to the land tax certificate that may be obtained from Revenue NSW under s 47 of the *Land Tax Management Act 1956* could be considered as a means of providing this information.

The question of whether unpaid property tax creates a charge on the property is a key aspect of the policy design with significant implications for the conveyancing process. The way a property tax charge would be cleared in an electronic conveyance requires urgent consideration, having regard to the system change timelines of Electronic Lodgment Network Operators ("ELNOs") and NSW Land Registry Services. 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).

Depending on the design features of the property tax, it is quite likely that standard conveyancing and other legal documentation will require amendment to make provision for the property tax. For example, changes may be necessary to the 2019 edition of the Contract for Sale and Purchase of Land.¹ Lead times for documentation and system changes should be adequately addressed in the implementation timeline.

Another key design element of the proposal will be the mechanism by which a taxpayer elects to opt-in to pay the property tax and when the taxpayer must make this election. Currently 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. Where a purchaser has elected to opt-in to the property tax, the duty verification processes in the electronic workspace will need to be adjusted to reflect this.

In our view, it is important to ensure an appropriate lead time for systems and documentation changes, particularly having regard to release timeframes for ELNOs and potential system changes at Revenue NSW. Should the Government choose to proceed with the property tax we would be happy to work with you to further discuss these and other impacts upon the conveyancing process.

4. Implementation – draft legislation and timeline

If the Government chooses to proceed with the property tax, significant legislative change will be required. In our view, the implementation timeline must provide adequate time for the development of draft legislation and public consultation on the draft legislation. Apart from the qualitative review of the provisions, this will be important to raise awareness and assist with the education of the property industry, and the community more generally.

Given the significance of the potential changes, communication and education to legal professionals will be an important part of the overall communications strategy, and we would be pleased to work with you in that regard.

¹ Copyright in the Contract is owned jointly by the Law Society of NSW and the Real Estate Institute of NSW.

Thank you for the opportunity to comment. 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.

Yours faithfully,

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

Juliana Warner
President

Encl.

Consultation Paper
BUYING IN NSW, BUILDING A FUTURE
Creating Jobs and Securing our Future

Submission by the Law Society of NSW – March 2021

NO.	QUESTIONS FOR CONSULTATION	COMMENTS
1.	Do you agree that stamp duty is out of date and is a handbrake on the economy? Is there merit in replacing it with a broad-based annual property tax?	<p>The Law Society agrees that stamp duty is out of date, in the sense that the applicable rates and brackets have not been adequately adjusted to reflect increases in property prices since stamp duty's inception.</p> <p>The Law Society considers that there is merit in considering a broad-based annual property tax. At this stage, there are important details that require further clarification, such as whether various exemptions that currently exist for stamp duty will be mirrored in some way for the property tax. The Law Society would also be pleased to review draft legislation should the proposal proceed.</p>
2.	The annual property tax would be based on unimproved land value, much like the way council rates are currently calculated – what do you think of this approach?	<p>We agree that it would be appropriate to base any annual property tax on unimproved land value as this is an established concept within existing state taxation and valuation systems. We also note the argument that using improved land value may be a disincentive to property owners from undertaking renovations or adding value to their property, as referred to on page 17 of the Consultation Paper.</p> <p>We suggest that existing mechanisms to dispute land value determinations may require further resourcing if this approach is adopted.</p> <p>We note that, irrespective of whether improved or unimproved land value is chosen, apartment owners will likely pay much lower levels of the property tax than house owners.</p>

NO.	QUESTIONS FOR CONSULTATION	COMMENTS
3.	Do you agree that it would be attractive to be able to choose an annual property tax rather than paying a large lump-sum stamp duty on a purchase and, for investors, the current annual land tax?	<p>In our view, the choice aspect of this proposal is only transitory. Once a prospective purchaser decides to opt-in to the property tax scheme, the subsequent purchaser has no choice but to pay the property tax, as there is no means to opt-out. We are not suggesting that there ought to be a means to opt-out, as we understand the rationale of gradually moving most properties across to the property tax regime.</p> <p>Whether or not a prospective purchaser will choose to opt-in to the property tax (where that choice is available) will depend upon their personal/commercial circumstances, the nature of the property, any applicable current exemptions and the expected amount of time they expect to hold the property. In short, it will be attractive for some but may not be the preferred option for others. For example, the cost of borrowing an amount to pay duty (a fixed and quantifiable amount) is relatively low at the moment, in contrast to opting in and paying an annual property tax calculated by reference to an ever-increasing property value. The introduction of a property tax might be better received by individuals and small business in an economy with increasing interest rates rather than the current environment. There will be exceptions, and this may not be the case for larger businesses managing cash flow or that turnover property regularly.</p>
4.	Is an opt-in and gradual approach the best way of ensuring a fair transition to the property tax?	<p>We acknowledge that it needs to be a gradual approach and the opt-in mechanism will achieve this. The transitional aspects of any shift to a broad-based property tax raise difficult questions as to timing and fairness.</p> <p>A gradual approach will also assist in maintaining a revenue stream which is an important aspect of any such transition.</p>

NO.	QUESTIONS FOR CONSULTATION	COMMENTS
5.	Would you delay a home purchase if it meant you could opt-in to the property tax? Should there be a limited window for retrospective opt-in to the property tax, after it commences?	<p>In relation to the second question, we support a limited window for retrospective opt-in to the property tax after it commences. In our view, if the Government decides to proceed with the property tax, the appropriate date from which retrospectivity would operate should be the date of the announcement of that decision. If that approach is adopted, it would be imperative that this is clearly communicated to taxpayers.</p>
6.	Should there be different property tax rates for residential owner-occupied properties, residential investment properties, farmland, and commercial properties?	<p>We note that applying different property tax rates to different categories of purchasers would effectively favour some land uses over others.</p> <p>There is also an argument that differential rates will add to the complexity of the property tax, which is undesirable from a compliance and administration perspective. For example, where a property has mixed uses, which rate will apply? Will concepts of dominant purpose be relevant?</p> <p>Another relevant factor to the consideration of whether differential rates should apply is the future of the various exemptions that currently apply in relation to stamp duty and land tax and whether they will be carried over to the property tax. For example, whether the exemption from stamp duty for intergenerational transfer of land used for primary production will be carried over to the property tax. Without mirrored exemptions, there is also likely to be a disincentive to opt-in to the property tax.</p>
8.	Should price thresholds be used to exclude people buying the most expensive properties from being able to choose the property tax?	<p>We understand the rationale for reducing the initial impact on the revenue stream by having a price threshold above which it will not be possible to opt-in to the property tax for the first phase of implementation. We anticipate that people who can afford to pay purchase prices at the high end of the market are also best placed to afford to pay transfer duty.</p> <p>We are interested to know the price at which the threshold will be set. Ultimately all taxpayers should have the ability to opt-in to the property tax.</p>

NO.	QUESTIONS FOR CONSULTATION	COMMENTS
9.	What arrangements should be made for residential and commercial tenants if their landlord chooses to pay the property tax?	<p>There are some existing legislative provisions which are relevant to consider.</p> <p>For residential tenants, we note that ss 40(1) of the <i>Residential Tenancies Act 2010</i> states:</p> <p>(1) A landlord must pay the following charges for the residential premises—</p> <p>(a) rates, taxes or charges payable under any Act (other than charges payable by the tenant under this Division),...</p> <p>Additionally, ss 40(2) of the <i>Residential Tenancies Act 2010</i> states:</p> <p>(2) This section is a term of every residential tenancy agreement.</p> <p>Based on this existing legislation, it would appear that no arrangements or legislative change is required to prevent a landlord passing on the property tax directly to a residential tenant. However, we anticipate that residential landlords might instead increase the rent to effectively cover all or part of the property tax.</p> <p>For commercial tenants, we expect that this is a matter for commercial negotiation between the landlord and the tenant.</p> <p>For retail tenants, we note the existing disclosure regime under s 12A(1) of the <i>Retail Leases Act 1994</i>, which restricts a landlord from collecting an outgoing if the landlord has not made the necessary disclosure in the mandatory Disclosure Statement provided by the landlord to the tenant. Over time we expect landlords will seek to recover any property tax paid from the tenant and this will again be a matter for negotiation.</p> <p>In relation to retail leases that are on foot when any property tax is introduced, ss 12A(3) of the <i>Retail Leases Act 1994</i> provides an exception to the usual requirement for disclosure where a new tax is introduced. It states:</p>

NO.	QUESTIONS FOR CONSULTATION	COMMENTS
		<p>(3) This section does not apply to an outgoing in the nature of a tax, rate or levy that is imposed by or under an Act after the lessor's disclosure statement is given and that was not an outgoing of the lessor when the lessor's disclosure statement was given.</p> <p>When retail premises are sold, subject to tenancy, if the new owner elects to opt-in, the new owner would very likely seek to pass on the property tax to the tenant, citing ss12A(3) as the basis for doing so.</p> <p>We also note that there is some precedent for specifically limiting the recovery by the landlord of state taxes under s 26 of the <i>Retail Leases Act 1994</i>, which limits the way in which a landlord may recover land tax from the tenant. (However, the specific approach taken in s 26 would appear to have no application in a property tax context. For example, the concept of single holding basis is not relevant to the property tax.)</p> <p>In our view, residential tenants appear to have the benefit of some existing protections. Commercial and retail tenants will likely deal with the question of who bears the property tax as a matter for negotiation between the parties.</p> <p>Another relevant consideration for all leases is that it would be difficult to enforce any legislative prohibition on the passing on of the property tax, particularly where it may effectively be passed on by simply charging a higher rent.</p>
10.	What should happen for people who have chosen the property tax, but then can't afford it?	We support the development of a hardship scheme. In our experience it is often difficult for clients to meet the requirements of existing hardship schemes and it will be important that those taxpayers who genuinely require assistance can access the scheme. The ability to waive interest should be part of the hardship scheme, with clear guidelines as to who may exercise such a discretion and indicative grounds.

NO.	QUESTIONS FOR CONSULTATION	COMMENTS
		<p>Page 21 of Consultation Paper notes that a landowner facing financial difficulty would not be required to sell their principal place of residence to meet property tax liabilities. We support this approach. Similar situations may also arise when the matrimonial home passes to a surviving spouse under survivorship or is gifted under a will. These types of situations should also be included.</p> <p>Page 21 also notes the potential for landowners in hardship to defer liabilities until the property is sold or transferred. This seems an appropriate option under a hardship scheme. We note that the ability to accumulate a property tax debt in cases of financial hardship will also have practical consequences for:</p> <ul style="list-style-type: none"> • the administration of estates; and • family law property settlements. <p>This will be an important area to further explore and we would be happy to work further with you.</p> <p>Please also see our further comments in relation to the potential impact of a property tax charge for unpaid property tax on the conveyancing process.</p>
11.	<p>What is the best way of ensuring that the property tax remains affordable for taxpayers, while generating the same amount of long-run revenue as stamp duty and land tax?</p>	<p>The long-term affordability of property tax is an important aspect of the policy design. The bracket creep that has occurred to date with stamp duty illustrates the issues that can arise when the long-term future growth of a tax is not adequately addressed in the initial policy design.</p> <p>There is merit in implementing a cap, however we defer to other stakeholders and more detailed modelling to explore the most appropriate basis for the cap. Whether the cap should operate annually or less frequently should also be explored.</p> <p>We expect that when taxpayers are deciding whether to opt-in to the property tax scheme, one of the key considerations will be the manner in which the property tax will increase over time. Predictability will be key. We therefore suggest that</p>

NO.	QUESTIONS FOR CONSULTATION	COMMENTS
		any cap or review process should be settled and well communicated in any announcement by the Government that it will proceed with the property tax.
12.	Is there a specific aspect of our proposed reform you would change to help make the proposal better?	We have no specific suggested changes, but we have flagged a number of issues in relation to implementation in our cover letter.