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Mr Cullen Smythe

Commissioner of State Revenue

GPO Box 4042

Sydney NSW 2001

Via email: Cullen.smythe@osr.nsw.gov.au

Cc: Arlene.fernandez@osr.nsw.gov.au

Dear Cullen,

**RE: State Revenue Legislation Further Amendment Bill 2017.**

The Property Council of Australia welcomes the opportunity to make a submission to Revenue NSW on the *State Revenue Legislation Further Amendment Bill 2017.*

We hold serious concerns on the far-reaching implications of this Bill. Notably the proposed s147A represents an extension of the NSW landholder duty and surcharge landholder duty tax base.

Further, the Property Council was given just three business days to provide feedback. As a large industry association, we require more time to collate and provide quality feedback to ensure the Bill is fit-for-purpose.

We request a meeting prior to this Bill being tabled in Parliament for further confidential liaison and consultative discussion on this subject.

Within the constraints mentioned above, the following are some initial comments on the draft Bill:

**S104JA**

The proposed s104JA will deem every trustee of a discretionary trust to be a foreign trustee / foreign person unless the terms of the trust include the provisions contemplated by subsections (1) and (3).

This is an arbitrary change that will result in significant increases in red tape.

The terms of most existing discretionary trusts are unlikely to include the provisions contemplated by s104JA (1) and (3).

If s104JA is introduced in its current form, it will mean that in any case where a trustee of a discretionary trust has acquired (having regard to proposed transitional provision 136(1)) or, proposes to acquire, NSW residential land as trustee of the discretionary trust, even though the

beneficiaries and discretionary objects of the discretionary trust do not include any foreign person, the trust deed will need to be amended to include the provisions contemplated by s104JA (1) and (3) since otherwise, the trustee will be deemed to be a foreign trustee/foreign person and exposed to surcharge purchaser duty.

It is submitted that s104JA is too far reaching and should be narrowed.

Additionally, proposed s104JA (and proposed transitional provision 63 in the Land Tax Management Act 1956 (LTMA)) will introduce a new overall cut-off time limit of 31 December 2018 (different to the current position under Revenue Ruling G 010 which is without such a limit). This may have negative consequences for transactions which occur just before or any time after 31 December 2018 and for land owned by discretionary trusts from the 2019 land tax year. Discretionary trust deeds will need to have been amended by 31 December 2018 as contemplated by s104JA(1) and (3) (and transitional provision 63 in the LTMA) unless foreign persons are intended to be beneficiaries or discretionary objects because otherwise, at least from 1 January 2019, there could be exposure to surcharges even though no foreign persons are actually included as beneficiaries or discretionary objects under the trust.

**S146 and s146A**

The concept of "*threshold value*" was introduced into the NSW landholder duty provisions to bring certainty and to save costs in determining when an entity is a "*landholder*".

It is disappointing that this concept is proposed to be removed from the landholder duty (and now also, surcharge landholder duty) provisions without earlier and more in-depth, confidential consultation.

The Overview to the amendments explains that the amendments will be "*removing inequities in the application of landholder duty, bringing NSW into closer alignment with other jurisdictions and reducing the potential for disputation*". This is difficult to understand because:

- the "*threshold value*" concept applies equally to all potential "*landholder*s";
- alignment with other jurisdictions has not previously been a stated objective of NSW in the context of NSW landholder duty and surcharge landholder duty (which some jurisdictions do not even impose) and it is unusual to express such an objective in respect to just a few NSW Duties Act provisions, especially in respect to "*threshold value*" provisions that were introduced for good reason in NSW;
- the objective of "*reducing the potential for disputation"* must be disputed because the threshold value concept brought certainty in respect to fee simple interests (by reference to NSW VG fixed registered valuations) and removing the concept will involve reverting to opinions as to valuation which are often disputed (as some revenue cases attest).

It is submitted that Schedule 1 [4] and [5] should be removed and that if NSW has issues with the "*threshold value*" concept, those issues should be raised in confidential liaison with professional and industry associations, for consultative discussion and input before legislative amendment, consistent with past practice in this area.

**S147A**

Proposed s147A represents an extension of the NSW landholder duty and surcharge landholder duty tax base.

Once again, the Overview to the amendment explains it as "*removing inequities in the application of landholder duty, bringing NSW into closer alignment with other jurisdictions and reducing the potential for disputation*".

With respect, s147A will introduce inequity by deeming items that are goods at general law, to be land.

This is contrary to the spirit of the *Intergovernmental Agreement* and *Schedule B Taxation Reform*.

It is submitted that Schedule 1[6] should be removed and that there should be confidential liaison with professional and industry associations, for consultative discussion and input on this subject.

If s147A is, despite our submission, to be retained in the Bill, we strongly submit it should be amended to make it clear that it is limited in its application to owners of a freehold or fee simple interest in land, and should be clarified to exclude other interests in land, such as leasehold interests entered into on arm's length terms. Therefore, the opening words of the section should be amended to read: "*For the purposes of this Chapter, a fee simple estate in land includes anything fixed to the land…".*

In this regard, we strongly submit that the landholder duty provisions should not operate to include, in the land holdings of a corporation or unit trust, more than a nominal value for a lessee's leasehold interest, where that leasehold interest is on ordinary commercial arm's length terms. The fact that, for example, a commercial tenant might spend more than $2 million on the fit out of an office building should not cause that tenant to become a landholder, merely because most of the fit out is in some way attached to the floors and walls of the building, or even if it involves changes to the structure of the building. To the extent that the current practice of Revenue NSW involves the imposition of landholder duty in such circumstances, we submit that this is incorrect in principle and in policy terms.

Further, even in the case of the owner of the freehold or fee simple interest, where that land is leased to a tenant on arm's length terms, the proposed s147A(3) would be unclear in its operation. The subsection would seem to acknowledge the principle that the owner of the freehold should not include in its land holdings the value of items "belonging" to the tenant, and we would agree with that principle. But paragraph (a) fails to take account of the principle of real property law that tenant's fixtures are legally owned by the landlord while attached to the building, even though the tenant has the right to remove them. If the items remain chattels then the tenant legally owns them even if attached to the building. We submit that paragraph (a) should be extended to include a thing where a person other than the owner of the fee simple (or an associate of the owner) has the right to remove the thing (even if they do not "own" the thing). We also submit that paragraph (b) should be removed as it is unclear and potentially too restrictive – if a tenant attaches a table to the floor of the building, is it used in connection with the land, where the owner of the building leases it to the tenant?

**S154**

While the proposed section 154 may reflect the provisions in several other Australian jurisdictions, it would suffer from the same difficulties. In many circumstances it is unfair to impose a liability on the landholder itself, and a charge on its land, where the landholder may not be in a position to ascertain if a landholder duty liability arises. This is particularly the case if there are transactions involving several shareholders or unitholders – the landholder may not know if they are related persons or otherwise aggregated, and may not be in a position to demand or obtain that information. It might not even know there has been a transaction, where a shareholding or unitholding is held through a bare trustee under Part 2A of Chapter 4, and there is a change in the beneficial owner without a change in the registered shareholder or unitholder. Therefore, the responsibility for the liability should remain solely with the acquirer or acquirers. It is also unfair for a subsequent purchaser of, say, 100% of the shares or units in the landholder, who pays full landholder duty on its acquisition, to find there is a charge on the landholdings in respect of historic transactions involving parties who might no longer "be around" to meet their historic liabilities. In this regard it is significant that there is no equivalent of a Section 47 land tax certificate to give the purchaser comfort against the possibility of a charge.

**Transitional Provision 136**

Proposed transitional provision 136 (1) is retrospective legislation and exacerbates the onerous and arbitrary nature above referred to in respect to proposed s 104JA and it is recommended that the provision not be included. It is noted that proposed transitional provision 136 (2) includes reference to terms contemplated by s104JA(1) but doesn't include reference to any equivalent to terms referred to in s104JA(3).

**Transitional Provision 139**

Proposed transitional provision 139 is retrospective legislation which is not supported by principles of "*good taxation*".

There will have been transactions entered into where advice will have been given that landholders are not personally liable to landholder duty and that the land to which the landholder is entitled (or deemed to be entitled) will not be subject to any charge in respect to liabilities of shareholders or unitholders and this transitional provision will operate to retrospectively create such liability and charge (if the shareholder's or unitholder's liability has not been paid). This will also have serious retrospective implications for directors of landholders under s 47B of the NSW TAA. All of this could have potentially adverse implications for NSW's reputation as a State of certainty in taxation, into disrepute. It is submitted that transitional provision 139 should be removed

Please don't hesitate to contact Tim Wheeler, Senior Policy Advisor on 02 9033 1909 or twheeler@propertycouncil.com.au should you wish to discuss this any further.

Sincerely,

Jane Fitzgerald

NSW Executive Director