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Scott Johnston
Deputy Secretary
Chief Commissioner of State Revenue
GPO Box 4042
Sydney NSW 2001

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Via email: Krystelle.Fitzpatrick@revenue.nsw.gov.au

Dear Mr Johnston,

I thank Revenue NSW for the invitation to provide a submission to the legislative review of *State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022* (the Act). On behalf of our members, the Property Council is able to provide evidence-based analysis of the Act in practice, and demonstrate its broader impact on the property industry, the NSW economy, and the government's housing delivery mandate.

Our members include the nation's major investors, owners, managers, developers, designers and builders of property of all asset classes. They create landmark projects, environments, and communities where people can live, work, shop, and play. The property industry shapes the future of our cities and has a deep long-term interest in seeing them prosper as productive, sustainable, and safe places.

We note the context surrounding this review is considerably different to when the bill was first drafted. Our concerns in 2022 have only been amplified by the backdrop of critical housing supply shortages.

All levels of government have now agreed on a mandate to deliver more homes under the National Housing Accord, with NSW committing to deliver 377,000 new well-located homes by 2029. To reach this target, the property industry will have to develop more homes over the next five years than ever before. Policy settings must be right to relieve the pressure of high costs of construction and interest rate increases which impact development feasibility.

We note the government's commitment to unlocking housing with planning reform focused on diverse, infrastructure-supported homes in urban areas. Improving the efficiency and effectiveness of the planning system is one vital piece of the puzzle, but this must be supported by a holistic look at all policies impacting development to ensure they support our shared goal.

We are concerned that this piece of legislation, in conjunction with other recent changes in the NSW tax regime, has created a punitive operating environment, rather than one that supports housing delivery.

We remain supportive of the Act's intention to improve the integrity of state revenue statutes but are not satisfied that the provisions support this outcome. When the bill was introduced the government, then in opposition, shared these concerns and noted this review would be critical in assessing whether the provisions had met the Act's objectives.

We have observed more complexity and confusion for industry as a result of the introduction of this Act. Fortunately, some of these issues can be amended with drafting changes to better integrate the Act with other legislation and provide clarity to NSW taxpayers.

Pending clarification, industry has been reliant upon non-binding guidance from the Commissioner to comply with these rules, for example, private rulings, website guidance, or discretion issued by assessing officers on a case-by-case basis. As a result, we query if there is increased compliance and an improvement in the integrity of revenue measures, a contradiction to the key policy objective of the Act. This is particularly true for duty on leases.

The Act created a new dutiable transaction, for change in beneficial ownership (Section 8 (1)(b)(ix), a material expansion of the tax base that covered a number of previously non-dutiable transactions, including the grant of an option, lease or security interest. We recommended that these transactions, not intended to be covered, be made explicit in the legislation. Two years later, we continue to encounter types of common commercial transactions which are now impacted by this new provision, which were previously not dutiable and could not be said to be affecting the integrity of the state revenue statutes.

The Act introduced another new dutiable transaction, capturing acknowledgement of trusts (section 8AA). We remain of the view that there was no need for this to be introduced following the High Court's refusal to grant special leave to appeal *Chief Commissioner of State Revenue v Benidorm Pty Ltd* [2020] NSWCA 285 (13 November 2020).

Section 8AA is inconsistent with the changes in beneficial ownership rules that were introduced. This provision should be removed from the Act, on the basis that it applies unnecessary administration and complexity to transaction that was not previously an issue. Revenue NSW has advised that there have only been two transactions assessed under this provision, for a total of $66,005 duty, from 19 May 2022 to 30 September 2024. This is evidence that the provision is unequal to the administrative disruption it creates and that amendment is warranted.

The following submission has been produced under the guidance of the state's leading tax experts and outlines the issues of the Act in its current form, impact on industry and our proposal for amendments.

We urge the NSW Government to consider this submission and recommendations as an opportunity to realise the initial intention of the Act and in doing so, improve industry's ability to improve housing supply in NSW. At this critical time, all legislation that impacts housing delivery should be considered as a lever that can be pulled by government. In doing so, we can incentivise investment in the sector and streamline the pathways to development that are necessary to improve the critical housing shortage being experienced across NSW.

Thank you for the opportunity to provide a submission to this important review. If you have any questions about this submission, please contact NSW Policy Advisor, Nikki Allen at nallen@propertycouncil.com.au or by phone at 0428 663 633.

Yours sincerely,

Katie Stevenson
NSW Executive Director
Property Council of Australia

Imposition of duty on changes in beneficial ownership

Issue

This amendment created a new category of dutiable transaction which is too broad and vague in its scope.

Problem/impact

- The new head of duty represents a significant expansion of the NSW tax base. Imposing a tax on the creation and extinguishment of any interest in dutiable property goes beyond the original scope of transfer duty.
- The scope of the new head of duty is too ambiguous and open to interpretation, such that it is not clear what transactions are intended to be taxed. This problem is exacerbated by the integration of the new drafting with the existing legislation more generally, including for example:
  - the meaning of 'any other transaction' is unclear, particularly with respect to leases which the Commissioner now regards as dutiable even if they are not for a premium;
  - common exemptions have not been updated for this new head of duty, such as changes of trustee where the custodian retains legal title.
- The current excluded transactions list is inadequate and standard commercial agreements/transactions (such as leases, security interests) may still be unintentionally caught. For example:
  - changes of beneficial interests in trusts that hold security interests, i.e. as a result of a change in lenders under a syndicated facility agreement or sale of secured notes;
  - the qualification that excluded transactions must be for 'no consideration' is too narrow, and industry is reliant on Commissioner's guidance to exclude nominal consideration transactions.
- There is multiple ad valorem duty risk if a particular arrangement falls within both the 'change in beneficial ownership' head and another head of duty on entry and completion.
- The scope and purpose of legislation should be clearly articulated, particularly if it is intended to create a new head of tax. The power to determine the scope of a new tax should not be left to the executive's power to make Regulations, or to the Commissioner's public statements.
- Revenue NSW has advised that a total of 2766 transactions have been assessed under the new head of duty from 19 May 2022 to 30 September 2024 with a total of $14,225,135 assessed. This represents $6,322,282 per annum over the 2.25 years period.
- The revenue collected from this new head of duty does not justify the unnecessary administration created for taxpayers and revenue officers, particularly when the new head of duty is slowing entry into transactions.
- 'Collateral purpose' wording in section 8(2A) of the Duties Act introduces a specific anti-avoidance provision within the new head of duty, conflicting with the 'sole or dominant purpose' test in the general anti-avoidance provisions in Part 10A of the Taxation Administration Act 1996.

Recommendations

- Repeal the 'change in beneficial ownership' provisions and consult with industry and tax professionals for the introduction of specific identified dutiable transaction provisions consistent with transfer duty that do not adversely impact the government's housing development objectives, and which directly capture the behavior the Act intends to circumvent

- Ensure all dutiable transaction provisions effectively interface with 'no double duty' provisions.
- Ensure all current exemption and concession provisions in the Duties Act relevantly extend to all dutiable transactions.
- Amend legislation to make clear in the Act what transactions are dutiable.

Imposition of duty on acknowledgement of trust

Issue

This amendment has created a new dutiable transaction, capturing acknowledgement of trusts, creating unnecessary costs and risks for taxpayers.

Problem/impact

- There was no gap in the policy framework or integrity of the Duties Act following the Benidorm decision.
- Risk of full ad valorem duty charged on mere statements in documents which do not amount to an actual transaction.
- The new provision creates a practical minefield and potential traps for the poorly advised – in many contracts and other legal documents involving custodians and trustees, there are statements which refer to capacity or seek to limit trustee liability. We then query, do these then amount to a 'statement' which expressly or implicitly acknowledges the trust? And if the Commissioner accepts that under section 58, a trust can be established for $500 duty without identifying dutiable property, and then land can be purchased by the trustee without there being double duty, why should a subsequent acknowledgement then be subject to ad valorem duty? There should at least be a double duty exception which should cover where $500 was paid under section 58. However, this would still not address the burden created by section 8AA.
- The new provision has created delays and increased costs with documents having to be scoured for acknowledgements of trust in circumstances where there is no 'transaction' or any change in beneficial ownership.
- This provision is further red tape and administrative costs for stamping. As mentioned earlier, the low revenue collected is evidence that the provision is not worth the disruption it creates.

Recommendation

The Property Council recommends this provision be removed from the legislation.

Anti-avoidance provisions

Issue

- Significantly broadened definition of 'scheme' and removal of existing 'artificial, blatant or contrived' requirement under Duties Act;
- Avoidance of tax defined to include postponement or deferral of tax; and
- Introduction of a promoter penalties regime for advisers (imposing personal liability) who market tax avoidance schemes.

Problem/impact

- The new anti-avoidance regime has created further confusion for tax practitioners.
- Introduces uncertainty for legitimate commercial decision making and planning.
- Expanding avoidance to include postponement or deferral of tax may catch ordinary commercial transactions such as put and call options. If the intention is to tax such transactions, then provisions should be included to tax them rather than relying on anti-avoidance regime.
- Expanding 'scheme' to include 'whether implemented or not' will have the effect of restricting discussion and consideration of commercial proposals and discourage thought leadership. The Commissioner has verbally indicated to the Property Council that the reference in section 106H(1)(b) to a scheme, plan or proposal 'whether implemented or not' is intended to apply only in respect of the promoter penalties regime, and steps such as a practice note can be taken to clarify this. However, a practice note will not be relevant to an NCAT or Court interpretation of the Act.

Recommendations

- The Commissioner has undertaken to issue appropriate Practice Notes/Rulings to clarify intended approach to administration of the new regime (covering both the general anti-avoidance and promoter penalties regime). Any relevant publications should explain the application in the context of each tax to be covered. An amnesty from interest and penalties should apply until such time as the relevant guidance is published.
- In relation to arrangements intended to defer tax, we submit that it is appropriate for tax to be deferred until such time as a transaction is certain. This otherwise places strain on industry as it may not be able to access funding until the satisfaction of conditions precedent, or creates unnecessary administrative complexity and cost in having to lodge and pay tax and then seek a refund when conditions precedent are not satisfied.
- In relation to 'whether implemented or not' wording, we recommend these words be removed from the definition of 'scheme' in section 106H(1)(b) and instead include a definition of 'tax avoidance scheme' in section 106J which incorporates the 'whether implemented or not' concept. In this way, the concept will apply only to the promoter penalty regime and not definition of scheme for avoidance purposes.
- Ensure that if tax is charged under Part 10A due to deferral, ensure no multiple taxation of the same transaction and clarify that amount to be recovered is limited to interest charges and any applicable penalties.
- In section 106M, retain existing wording in section 284I of Duties Act relating to 'innocent participants' to reflect actual knowledge rather than new 'could reasonably be expected to have known' test.

Other issues

The Act in context of this review exists as part of the NSW tax regime and the matrix of legislation that governs dutiable transactions. Our concerns and recommendations above are further exacerbated by the issues of other pieces of legislation. Below we have highlighted these concerns for Revenue NSW's review, either as part of, or separate to the statutory review of *State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022*.

Corporate reconstructions and consolidation - Section 273B of the Duties Act

Issue

The introduction of the 10 per cent concession (as opposed to the full exemption) has led to corporate groups choosing not to restructure and retain inefficient structures.

Problem/Impact

- The imposition of a 10 per cent concessional duty for each transaction is, in our experience, not viable and results in the restructure not proceeding.
- The failure to effectively amend the legislation to permit transfers to or from custodians is causing inequitable outcomes. It is quite common for large property groups to have custodians in their structure. Limiting the use of custodians in this context to registered managed investment schemes results in an inability for property groups to restructure their arrangements effectively. Such restructures are often necessary to fund development in the property sector.
- The provisions do not adequately accommodate common foreign entities within corporate groups, such as limited liability companies and limited partnerships.

Recommendation

- Return to a full exemption from duty for corporate restructures, or in the event that the 10 per cent is retained, introduction of a '30-day rule' similar to that introduced by the Victorian Government.
- Amend the corporate reconstruction provisions such that a custodian is not limited to a registered managed investment scheme and is treated in the same way as if they were a trustee of the relevant unit trust.
- Ensure that the provisions extend to any entity that forms part of a corporate group. For example, a limited liability company or partnership should be acceptable (whether that be as transferor, transferee or a linking entity in the group) if all of the members are members of the corporate group. For many years the corporate reconstruction provisions were practically applied in this way.

Build-to-rent land tax concession and surcharge duty issues

Issue

Land tax: Delays in the grant of land tax concession until development application approval.

Surcharge stamp duty: Imposition of surcharge duty on sales of competed build-to-rent (BTR) developments.

Impact

Land tax: The imposition of the full rate of land tax on project land, even for one year, adversely affects the internal rate of return on BTR projects to the extent that they may no longer be economically feasible. The policy intent is that BTR projects are (subject to the Chief Commissioner of State Revenue being satisfied criteria will be met) subject to a concessional rate of land tax from the commencement of the project. However, notwithstanding all relevant information being provided to prove the BTR project, the Commissioner's practice is to not grant the concession until development approval (allowing for a BTR development) is provided. This delay drives unnecessary cost.

Surcharge stamp duty: The imposition of surcharge stamp duty on sales of completed BTR developments directly affects the valuation of BTR assets, and the consequence is that lower end valuations affect overall feasibility. The carrying and sale value is effectively decreased by 8 per cent (the amount of surcharge duty).

Currently, almost all the capital to fund the development and ownership of BTR is foreign capital (Australian Superannuation Funds are disincentivised from investing in BTR, despite many investing in BTR/Multi-family overseas), and so it is likely that any future purchaser will be foreign.

Whilst an exemption is available for the initial acquisition of BTR land for development, as BTR is classified as residential land, it is subject to surcharge duty.

<u>Solution</u>

Land tax: The Commissioner should change assessing practices and guidelines to immediately grant BTR concessional status upon being provided sufficient information to form a view that a BTR project will be undertaken. There should be no delay pending the grant of development approval.

If ultimately a BTR project does not proceed, there are appropriate provisions to allow the Chief Commissioner to claw-back any benefit, so there is no risk to the revenue.

Surcharge stamp duty: The solution is to recognise that BTR is a commercial investment grade asset, and it should not be treated as residential land. Instead, given the extensive commercial operation and provision of services, it should be treated on the same basis as purpose-built student accommodation or a hotel, or any other commercial land asset, and should not be subject to surcharge stamp duty.

If BTR is treated as commercial residential land and not subject to surcharge duty, then this also solves any issues in relation to the availability of developer exemption. This characterisation would not result in any change to the provisions relating to land tax concessions.

In addition to BTR, other forms of commercially operated institutional investment grade residential projects such as retirement villages and l and lease (manufactured home estate) assets should also be treated as commercial residential land and not subject to surcharge duty.