Submission No 1

INQUIRY INTO PROPERTY TAX (FIRST HOME BUYER CHOICE) BILL 2022

Name: Ms Joanne Seve

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JOANNE C. SEVE
Solicitor

Hon Tara Moriarty MLC
Committee Chair
Portfolio Committee No. 1 - Premier and Finance
Parliament House
Macquarie Street
Sydney NSW 2000

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Dear Madam Chairwoman,

Portfolio Committee No. 1 - Premier and Finance
Inquiry on the Property Tax (First Home Buyer Choice) Bill 2022

I am a sole practitioner Solicitor and State Taxes Consultant specialised in State Taxes, formerly a partner of Freehill Hollingdale & Page and of PricewaterhouseCoopers and formerly a part-time Judicial Member of the NSW Administrative Decisions Tribunal assigned to the Revenue Division and Appeal Panel.

I write by way of a submission to the Portfolio Committee No. 1 - Premier and Finance ("the Committee") on its Inquiry on the Property Tax (First Home Buyer Choice) Bill 2022 ("the Bill") and raise the following comments and questions on the Bill, for the Committee.

1. **Section 2** - The Bill is expressed to commence on a "*date or dates to be proclaimed*". The reason for this is unstated. It would be helpful if the reason for the uncertainty as to commencement date and the reason why some provisions might commence before others, could be disclosed. This is particularly relevant Clause 2 of Schedule 4 of the Bill which permits applications for the property tax to be made during the "*transitional period*" which is a period "*starting on the commencement of the Act*".

2. **Section 5(1)(c) and 5(1)(e)(i)** – Under these provisions, a person cannot be a "*first home buyer*" if the person or their spouse (as defined) has ever owned residential land in Australia. This may give advantage to someone who (or whose spouse) has owned or still owns residential land outside Australia. Should residential land owned anywhere in the world (and not just in Australia) be included in the exclusion conditions in s5(1)(c) and 5(1)(e)(i)?

3. **Section 6** - The definition of "*land*" in s6 refers to "*a lot*" which is not defined and its intended meaning is unclear. The definition of "*land*" also refers (in s6(b)) to "*a parcel other than a lot if the parcel is owned by the Crown and…".* The expression "*parcel*" is not defined in the Bill. That expression is used in the Land Tax Management Act 1956 ("LTMA") and is not defined in that Act either. It appears from the drafting of s6, that a "*parcel*" only includes land owned by the Crown. This is confusing. It would be helpful if the expressions "*lot*" and "*parcel*" could be defined in the Bill and the definition of "*land*" in s6 clarified.

4. **Section 8** - The definition of "*owner of land*" refers in s 8(1)(f) to "*otherwise - the legal owner of the lot*". As mentioned in 3 above, "*lot*" is not defined in the Bill. Query if the reference to "*the lot*" in s8(1)(f) is intended to be to "*the land*"? Additionally, s 8(1)(d) refers only to "*land leased from the Crown in perpetuity by a person other than the Crown*". Firstly, land may be owned by the Crown and leased by a person who subleases to another person who is not the Crown and query if such a sublessee should also be included as "*an owner of land*" for the purposes of the Bill?

Secondly, "*in perpetuity*" is not defined and that expression should preferably be clarified, especially since the definition of "*land*" in s6 doesn't specify any term of years for a Crown leasehold.

5. **Section 9(3)** defines "*associated utility lot*" and paragraph (c) of that section provides that *"it is not suitable to be used -*

(i) for human occupation, or

(ii) as a residence, office, shop or similar."

The Dictionary defines a "*utility lot*" as "*a lot designed to be used primarily for storage or accommodation of boats, motor vehicles or goods and not for human occupation as a residence, office, shop or similar".*

Most "*lots*" designed to be used primarily for storage or accommodation as described are also likely to be "*suitable to be used*" as an "*office*" or *"similar*" (e.g. a garage may be "*suitable to be used*" as a home office). Should s9(3)(c)(ii) and the definition of "*utility lot*" be amended to remove the reference to "*office*"?

6. **Sections 11** - s11(1)(b) refers to "*land leased from the Crown in perpetuity by a person other than the Crown".* The comments on s8(1)(d) in 4 above apply.

7. **Section 12** - s12(1) provides that "*A transferee may make an application to subject transferred land to property tax*". Section 11(1) provides that "*In this Act - transferee means a person who will be the owner of land as a result of a transfer…".* "*Transfer*" is defined in the Dictionary to include "*an agreement for sale or transfer*". However, "*transferred land*" is not defined in the Bill and being expressed in the past tense, it suggests that an application for the property tax can only be made when land has been transferred (i.e. an agreement for sale or transfer has been completed). However, **s16(2)(a)** provides that an application "*must be made - for an agreement for sale or transfer – before the transfer of the land*". The expression "*transferred land*" should preferably be defined to include land that is agreed to be the subject of a transfer.

8. **Section 14(1)** defines an "*eligible transfer*" and paragraph (d) of that section provides that *"it is not for the transfer of -*

(i) business premises, or

(ii) a business, or

(iii) land used for primary production within the meaning of the Land Tax Management Act 1956, section 10AA, or

(iv) a holiday home".

It is unclear from whose perspective the sub-paragraphs in paragraph (d) is to be tested.

For example, if a vendor uses a property for one of the purposes described in paragraph (d) but the first home buyer intends not to, does that mean that paragraph (d) does not apply?

Additionally, it seems inequitable for "*land used for primary production*" to be excluded by subsection (iii). Why is a first home buyer of a home that is on primary production land excluded from eligibility for "choice" of the property tax?

It also doesn't follow why a "*holiday home*" needs to be excluded in subparagraph (iv) when there is a principal place of residence requirement in s15 of the Bill.

Subparagraphs (iii) and (iv) of s14(1)(d) should perhaps be deleted and subparagraphs (i) and (ii) of s14(1)(d) should preferably be clarified to refer to the intended purpose of use by the eligible transferee.

9. **Section 18** - s18(1)(d) of the Bill provides for relief from "*the duty chargeable on the transfer*" where an application for the property tax is approved. Since "*transfer*" is defined in the Dictionary to include an agreement for sale or transfer, s18(1)(d) should give relief from both the *ad valorem* transfer duty chargeable on an agreement for sale or transfer and the $10 duty chargeable on the transfer made in conformity with the agreement (under s 18(2) of the Duties Act 1997 (the "Duties Act")). However, as this is a significant provision (i.e. relief from stamp duty) it would be preferable if, like in other provisions of the Bill (such as in s16 and s17), s18(1)(d) and s18(2) expressly referred to an agreement for sale or transfer, in addition to a transfer.

"Duty" is defined in the Dictionary as "*duty under the Duties Act 1997, Chapter 2*". This makes it clear that if enacted, the Bill will not give any relief from surcharge purchaser duty imposed under Chapter 2A of the Duties Act. For example, it is possible that a "*permanent resident*" who is an "*eligible first home buyer*" (as defined in s 13(2) of the Bill), may not satisfy the "*residence requirement*" (as defined in s104ZKA(4) of Chapter 2A of the Duties Act) of having "*used and occupied the property as his or her principal place of residence for a continuous period of at least 200 days within the first 12 months after the liability date*" and be liable to surcharge purchaser duty at the rate of 8%. This is just being noted, without further comment.

10. **Section 37(1)(a)** provides that "*the relevant rate of interest for a period*" is "*the rate for the period specified by the Chief Commissioner by notice in the Gazette*". Section 37(1)(b) provides that "*if no rate is specified*", a rate referable to the NSW Treasury Corporation 10 year bond yield applies. By s37(1)(a) referring to a rate "*specified by the Chief Commissioner*" without prescribing any boundaries for such a rate, the Chief Commissioner will be given an unfettered discretion as to interest rates. Such a discretion should preferably be prescribed by reference to the rates referred to in s38(1)(b) or some other measure. It is submitted that s37(1)(a) should be amended to be limited in this or some other relevant way.

11. **Section 20** creates property tax liability on a financial year basis which is different to land tax which is assessed on a calendar year basis. Furthermore, land tax liability is calculated on the basis of a three-year average of land values whereas the property tax land value base will not involve any three-year average. Query if it would be more administratively cost effective for the property tax liability and property tax land value tax base be aligned with the existing land tax?

12. **Sections 24** is complex and the comments on Schedule 2 below tie in with this.

13. **Section 28(2)(b)** refers to "*a change in the value of the land*". It is understood that this is intended to refer to "*a change in the land value of the land*", using the expression defined in the Dictionary "*land value*" as distinct from "value" which would normally mean "market value" which is a very different "value" to "*land value*" (as defined).

14. **Section 38(1)(b)** provides that property tax is a "*first charge*" on the land. Where land tax is also payable in respect to the land, s47 of the LTMA also provides that the land tax is a "*first charge*" on the land although, there is no charge under s 47 of the LTMA on land that is subject to property tax unless the land tax liability arose before the land became subject to the property tax - proposed new s 73(3) of the LTMA (Schedule 5, 5.3 of the Bill). However, query which liability is to be discharged first when both land tax and property tax are a "*first charge*" on the land? There should preferably be a provision addressing this.

15. **Section 38(5)** provides that the "*Chief Commissioner must waive payment of that part of the charge that is more than 75% of the dutiable value of the land if the charge is only a charge on that land and no other land*". "*Dutiable value*" is defined in the Dictionary by reference to the Duties Act which in turn defines "*dutiable value*" in s21 by reference to a "*dutiable transaction*" so that it appears that s38(5) can only apply where there is a dutiable transaction, such as a transfer or an agreement to transfer. Query if this is intended or, if liability for property tax and interest thereon above 75% of the unencumbered value of land is intended to be waived where the charge on the land reaches 75% of the unencumbered value of the land?

16. **Sections 43(b)(i), 44(b)(i) and 44(c)(i)** provide that "*duty is chargeable on the transaction*" however, this creates potential uncertainty as to whether such provisions are intended to override exemptions or concessions that might apply under the Duties Act (such as on a transfer from an apparent to a real purchaser, under s55 of the Duties Act). Perhaps these sections should be deleted (and the Duties Act simply apply) or, it should be made clear in these sections that they are subject to concessions or exemptions from duty that may apply under the Duties Act or otherwise.

17. **Section 45** provides that if land that is subject to property tax is transferred to a "*related person*" (as defined in the Duties Act) that is not an "*included owner*", the land will only cease to be subject to the property tax if "*the duty that would be chargeable under the transaction is less than the general rate chargeable under the Duties Act, section 32*". Firstly, the "*duty chargeable*" is an amount and it is not a rate. Secondly, duty is not chargeable "*under*" a transaction but is chargeable on or in respect to it. It appears that what is intended is to refer to is "*the duty that would be chargeable on the transfer is less than duty chargeable at the general rate chargeable under the Duties Act, section 32*" (words underlined, substituted and added). It is noted that the policy of this provision appears to be that if a transfer of land to a "*related person*" that is not an "*included owner*", is eligible to an exemption or concession from duty under the Duties Act or otherwise, the land will continue to be subject to the property tax, notwithstanding such a transfer (and no duty will be payable). It is noted that a similar policy applies under **s46** on a transfer of land to a (former) spouse on death of the other spouse or, break up of marriage or de facto relationship.

18. **Section 47(3)(b)(ii)** provides that if no land value is recorded in the Register of Land Values and no method is prescribed by regulations, a land value for the land is to be determined by the Chief Commissioner using *"a method the Chief Commissioner considers appropriate*". This gives the Chief Commissioner a very broad discretion. It is submitted that such discretion should be prescribed, for example, by adding before the word "*appropriate*", words such as "*fair, reasonable and*". Additionally, it would give greater certainty if **s47(4)(a)** were to be amended to require the Chief Commissioner to ask the Valuer-General to determine a land value, by changing the word "*may*" to "*must*" in that subsection (in line with the Valuer-General's obligation under s47(4)(b) of the Bill).

19. **Section 48 (2)** provides that "*each lot resulting from the subdivision is subject to property tax in the same proportion as the subdivided lot was subject to property tax*". This appears to be intended to apply only if there is no "*land value*" recorded for the subdivided lots as at the 1 July preceding a particular financial year because once land is subdivided, separate land valuations are usually determined and entered in the NSW VG's Register of Land Values in respect to each lot, unless they are jointly treated as a "*parcel*". This should preferably be clarified in the Bill.

20. **Section 49 -** It is usual practice for a purchaser of land in NSW to obtain a certificate under s47 of the LTMA. If enacted, the Bill will make it necessary for purchasers of residential land to prudently also obtain a certificate under s49 of the Bill. Since it will be the same Chief Commissioner administering both the land tax and the property tax, hopefully it won't be necessary for purchasers to have to pay an additional fee. Perhaps the Bill could be amended to state that if certificates under both s47 of the LTMA and s49 of the Bill are sought, the fee to be prescribed under s49(1)(b) shall be just the one fee, determined under s47 of the LTMA?

21. **Section 51** should preferably make it clear from what date a change in use that changes the property tax payable takes effect for the purposes of the property tax.

22. **Section 55 -** It is noted that there is nothing to restrict NSW Parliament from enacting a Bill to repeal section 55 dealing with Bills to increase the property tax.

23. **Schedule 1 Clause 1** – in the list of "*land-related costs*":
- paragraph (d) should perhaps include, in addition to "energy", "*gas, phone and internet*" rates and charges; and
- paragraph (f) should also include "*other taxes whether State or Federal relating to the land*".

24. **Schedule 2 -** Schedule 2 is incredibly complex and it is submitted that it will be difficult for taxpayers and their advisers to understand it and for an NCAT Member or Judge to interpret it on a review under the Taxation Administration Act 1996, without expert assistance. The Bill cannot be said at all to be a model of the principle of "simplicity" for good taxation.

It could be helpful if the Bill included hypothetical examples of calculations of the property tax over a few consecutive years so that s24, s25 and Schedule 2 might be understood or better understood (as the case may be).

An issue that has been drawn to my attention is that it is unclear if the references to "*Gross State Product*" ("*G*") in Schedule 2 are intended to refer to the "real" or the "nominal" Gross State Product and that this should be expressly clarified in the Bill because the rate of change of Gross State Product can be different depending on whether "real" or "nominal" is involved. It has also been pointed out to me that the rate of increase of the fixed amount (initially $400 or $1,500) is likely to be higher than the percentage rate increase and that this could be significant over time.

25. **Schedule 4 -** Clause 3 of Schedule 4 provides that a transfer is not an eligible transfer if a liability for duty on the transfer arose before the date of assent to the Act. However, if duty is not yet payable on an agreement for transfer or a transfer, it appears arbitrary to exclude an otherwise eligible first home buyer from the "choice" of the property tax. Perhaps this should be reviewed.

26. **Schedule 5 Clause 5.2 -** Proposed new s 3AL(7) of the Land Tax Act 1956 refers to "*the value that the land subject to property tax bears to the value of all the land owned by the person*" and proposed new s 3AL(8) refers to "*the value of the land subject to property tax means the value of the proportion…"*. For the same reason as referred to in the comment on **s28(2)(b)** above, it is understood that the references to "*value*" in new s3AL(7) and s3AL(8) are intended to be references to "*land value*" as defined in the Dictionary (to be applied under proposed new s3AL(9)).

27. **Schedule 5 Clause 5.3** - In proposed new s73(1) of the LTMA, query if "*value of the land subject to property tax*" is intended to be "*average value of the land subject to property tax*"? In proposed new s73(2) of the LTMA, query if "*value of the land subject to property tax*" is intended to be "*land value of the land subject to property tax*" (the definition of "*land value*" being applied under proposed new s73(6))?

28. **Schedule 6 Dictionary** - Since the Bill extends to "*exclusive land use entitlements*" (as defined in s7) and since such interests may be acquired by way of allotment or issue (and not just by transfer) query if the definition of:

- "*transfer*" should be amended to also include an allotment of shares and an issue of units and an agreement for an allotment of shares or for an issues of units; and
- "*duty*" should be amended to also include duty under Chapter 3 Part 4?

Closing

Thank you for considering this submission.
I would be willing to give evidence at a hearing of the Inquiry of the Committee.

Joanne C. Seve