

**Submission  
No 5**

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

**Organisation:** Law Society of New South Wales

**Date Received:** 25 October 2022

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THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: RNLSLC/PLC:JvdPgl251022

25 October 2022

The Director  
Portfolio Committee No. 1 – Premier and Finance  
Parliament House  
Macquarie Street  
Sydney NSW 2000

Via [submission portal](#)

Dear Madam,

### **Inquiry into the Property Tax (First Home Buyer Choice) Bill 2022**

Thank you for inviting us to comment on the Property Tax (First Home Buyer Choice) Bill 2022 ("Bill") as part of the Legislative Council Inquiry. The Law Society members of the Revenue NSW / Law Society Liaison and Property Law Committees have contributed to this submission.

#### **Creation of a charge for unpaid property tax**

A major concern the Law Society has in relation to the Bill is the creation of a charge upon the land for unpaid property tax under clause 38(1):

##### **38 Recovery of unpaid amounts**

- (1) An amount of unpaid property tax is—
  - (a) a charge on the land, and
  - (b) the first charge on the land.

In our view, as a matter of principle, unpaid property tax should not be a charge on the land. Unlike land tax and council rates, which are payable despite a change of ownership (subject to any exemptions), the continuance of property tax depends on, inter alia, the purchaser's choice whether or not to opt-in to the property tax scheme. Whether a subsequent purchaser will choose to pay the property tax, depending also upon whether that particular purchaser is eligible to do so, is unknown, and this represents a fundamental difference between the nature of the schemes. In our view, this makes the creation of a charge for unpaid property tax inappropriate as a means of collecting unpaid property tax.

From a conveyancing and administrative costs perspective, we are also concerned about the need for an additional conveyancing investigation under clause 49 of the Bill, to determine whether a particular property is subject to a property tax charge, and if so, the amount outstanding which needs to be cleared on settlement. In the early stages of the implementation phase, the number of properties subject to the property tax will be small, but as a matter of prudent conveyancing practice, each and every purchaser in NSW will need to

have their solicitor or conveyancer check whether the property being purchased is subject to a charge for unpaid property tax, and if so, arrange for clearance of that charge on or prior to settlement. This will add complexity and expense to the conveyancing process which, in our view, is not proportionate to the revenue to be protected.

We suggest that consideration should be given to other mechanisms for enforcing the collection of unpaid property tax at settlement, for instance mirroring the facility for collecting transfer duty at settlement of an electronic transaction. Another alternative mechanism is that which applies under section 84 of the *Strata Schemes Management Act 2015*, where the new owner and former owner are jointly and severally liable for any unpaid strata levies owing in relation to a strata lot at the time of the change in ownership. Given the significant impact on the conveyancing process, we suggest further examination of alternative means of collecting unpaid property tax is warranted, and should have regard to the number of properties likely to be impacted by the property tax, and the administrative cost of the mechanism chosen to collect any unpaid property tax when that property is sold.

#### Drafting suggestions

If unpaid property tax is to remain a charge upon the land, we make two drafting suggestions for further consideration. We suggest the addition of a further subsection explicitly stating that the proposed section overrides the registered proprietor's indefeasibility of title under section 42 of the *Real Property Act 1900*. For example, section 47(3)(b) of the *Land Tax Management Act 1956*, in the context of unpaid land tax being a first charge upon the land, states:

The provisions of this section have effect despite anything contained in—

.....

(b) section 42 of the *Real Property Act 1900*.

Similarly, section 550(5) of the *Local Government Act 1993*, in relation to a charge created under that Act, states:

The provisions of this section have effect despite anything contained in section 42 of the Real Property Act 1900.

We also suggest that clause 38(1)(a) may be redundant, noting that clause 38(1)(b) establishes the charge.

#### **Relationship between the Bill and the *Duties Act 1997***

We submit that the interplay and interpretation between the Bill and the *Duties Act 1997* ("Duties Act") needs to be abundantly clear, particularly in relation to the charging of the tax itself. The proposed new section 18A of the Duties Act (item 5.1 in Schedule 5 of the Bill) provides that Chapter 2 of the Duties Act is subject to the Property Tax (First Home Buyer Choice) Act 2022 ("Property Tax Act"). It is therefore clear throughout the Bill that where the Property Tax Act provides that duty is not payable, the Property Tax Act will override Chapter 2 of the Duties Act.

However, there are instances where the Bill provides that "duty is chargeable" (see clauses 43(1)(b)(i), 44(1)(b)(i) and 44(1)(c)(i)). Given that the Duties Act is subject to the Property Tax Act, it is unclear whether this is a separate charging provision to the Duties Act. Given there is limited language in the Property Tax Act which describes **how** duty is chargeable, it would seem that the Duties Act is enlivened. However, the Duties Act provides for a number of exemptions. In those instances, the Duties Act uses the words "no duty is chargeable" (see, for example, sections 65 and 68 of the Duties Act).

While the word “duty” is defined to mean “duty under the *Duties Act 1997*, Chapter 2”, the phrase “duty is chargeable” does not provide **how** duty is chargeable. In order to make the drafting clearer, we submit it would be appropriate to either remove the references in the Property Tax Act to “duty is chargeable”, thereby letting the Duties Act do the work as intended (ie charging duty subject to exemptions), or by providing that “duty is chargeable under the Duties Act”, which would also make it clear that duty is chargeable subject to exemptions.

Yours faithfully,

Joanne van der Plaats  
**President**