

9 February 2018

Your ref GST Property reforms

Our ref WD Property

Mr Jonno Colman
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Government, Law Assurance & Not for Profit Branch
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By email: Jonno.Colman@ato.gov.au

Dear Mr Colman

Treasury Laws Amendment (2018 Measures No.1) Bill 2018 - amendments to GST on Property Transactions – draft online forms and final form of Bill

Thank you for the opportunity to provide comments on the draft online forms proposed to be introduced as part of the amendments to collecting GST on property transactions as announced in the 2017 Budget.

Queensland Law Society (QLS) appreciates being consulted on this important part of the legislative reform process.

QLS also refers to its previous submission of 20 November 2017, responding to an exposure draft of the Bill. QLS notes that the final Bill was introduced on 7 February 2018 to the House of Representatives.

QLS is the peak professional body for the State's legal practitioners. We represent and promote nearly 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide.

This response has been compiled with the assistance of the Property and Development Law Committee who have substantial expertise in this area.

Draft online forms

These comments relate to the version of the following forms circulated to our Chief Executive Officer on 31 January 2018:

- GST on Property Transactions – GST withholding notification online form
- GST on Property Transactions – Settlement advice notification online form

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We have been asked to provide comments by 9 February 2018.

In the time allowed, the Committee has reviewed the forms and provide the following comments:

1. The two forms are both long and detailed. Practitioners who practice in the project conveyancing field generally use sophisticated software which eliminates the need for multiple entries of the same data, saves time, avoids errors and generally streamlines the conveyancing process. The ATO data entry system appears to require separate data entry for each matter (on two separate occasions). There will be a significant amount of time and cost involved in entering the data requested. This applies whether the data is entered by the seller or buyer or the legal firm representing them as it is very common for a legal firm to represent multiple buyers in a project due to referrals from the marketing agent. Is all of the information requested in the form required? Are there other ways the capture of the required information can be streamlined?
2. Some of the information required will already be held by the ATO or other Commonwealth agencies. Can the online system be configured so that those details are pre-populated when the buyer (via their solicitor in Queensland) enters a particular piece of information, for example, the ABN?
3. In a similar way, in relation to the "Settlement advice notification online form", is there a way to link this second form to the first, so that when completing the second form, the solicitor / conveyancer can enter the Lodgement reference number (or similar details) so that the second form pre-populates with the repeated information?
4. Both forms require the postal address of the "contact". Is this really necessary? If the address is the solicitor (or conveyancer), then the email and telephone contact details will be the most useful contact information. If the proposed contact is the buyer, then postal address for a new development is unlikely to have been issued by the local authority.

Other matters

As you are aware the measures are intended to affect the contractual obligations of buyers and sellers, in particular with regard to their obligations at settlement. Under most property contracts entered into in Queensland, a failure to comply strictly with those obligations can result in termination of the contract and a substantial damages claim (and forfeiture of a deposit up to 20% of the purchase price in the case of default by the buyer).

New section 16-30(3) in Schedule 1

QLS notes that the newly introduced section 16-30(3) contemplates that a buyer may provide a bank cheque for the GST withholding amount (for the correct amount and payable to the Commissioner) to the seller at settlement. However it is not clear whether a seller could require the buyer under the terms of the contract to pay the GST withholding amount to it on settlement or if it is merely intended to cover a situation in which a buyer voluntarily elects to hand the cheque to the seller's lawyer on an undertaking to pay.

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If the former, it seems unreasonable for a buyer to be liable for a penalty if the seller fails to pay.

If the latter, the section does not address the concerns raised in our previous submission regarding the risk to the seller of a buyer returning its bank cheque to the issuing bank and cancelling it.

In any event, a clear statement is required as to whether a seller may contractually require the buyer to deliver a cheque for the withholding amount to the seller on settlement.

Furthermore, as there is no obligation on the buyer to prove to the seller that it has the withholding amount, QLS is concerned that in a number of instances buyers who are only able to raise sufficient finance to settle the purchase, will settle and not pay the withholding amount, leaving the seller out of pocket. Whilst this can be addressed contractually (by requiring the buyer to provide evidence that it has funds for the withholding amount at settlement), we have commented in our previous submission on the inadequacy of the grandfathering provisions in the Bill.

Definition issues raised in submission of 20 November 2017

The issues raised in our previous submission in relation to the application of the Act have only partially been addressed.

The expression 'potential residential land ... that is included in a [registered subdivision plan]' remains in the Bill. As previously noted the meaning of this is unclear.

A registered lot is created from a base parcel. The base parcel is a lot in a registered plan. Almost all land is "included in a registered plan". Roads and tidal waters would be the main exceptions. This interpretation would therefore render the words after 'potential residential land' meaningless.

It would appear to follow that the correct interpretation of this expression is it only applies to a lot *which is defined* on a plan which is registered at the time the contract is entered into and would not apply to the sale of a proposed lot (that is, intended to be identified on a plan to be registered at some future time). This seems contrary to your intention. The QLS is particularly concerned about the potential for disputes between sellers and buyers about whether the withholding obligation actually arises due to the lack of clarity in the drafting.

Conclusion

In summary, the QLS remains concerned about:

- Uncertainty about transactions to which the measures apply;
- Uncertainty about whether a buyer can be required to pay the withholding amount to the seller;
- A likelihood of disputes between buyers and sellers as to their obligations leading to significant financial loss for breaching contractual obligations;
- Risk to sellers of buyers failing to account;
- Insufficiency of the grandfathering provision;
- Added administrative burden and resultant cost due to multiple data entry and lack of functionality of the ATO online portal.

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If you have any queries regarding the contents of this letter, please do not hesitate to contact our Acting Principal Policy Solicitor, Wendy Devine by phone on (07) 3842 5896 or by email to w.devine@qls.com.au.

Yours faithfully



Ken Taylor
President