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GST and Development Leases - A Variety of Issues

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Introduction

Development Lease arrangements (**DLAs**) occur in both the private and public sectors. In the public sector the arrangements are mainly associated with infrastructure projects such as roads, rail, transport, health, ports in implementing government policy or statutory objectives with reduced cost and risk. These arrangements are covered by a suite of documents. In the private sector the areas include property development of all kinds.

Generally, the focus of the parties is on 'no risk' (from a liability and compliance perspective) and 'no cost' (from a loss of input tax credits or cash flow).

GST is but one consideration. Other considerations include the return on investment, income tax, stamp duty, and asset protection. In some instances there is tension between the various considerations. For example, GST and stamp duty, as seen in the case of Lend Lease.[1]

This paper draws out some of the issues that arise in different factual scenarios involving DLAs. It is not intended that this paper be an in depth technical analysis of each of the issues.

GSTR 2015/2

GSTR 2015/2[2] was released on 3 June 2015 and applies on and from the date of issue. The Commissioner's previous views in relation to DLAs with government agencies were contained in GSTR 2008/2 which was withdrawn on 11 May 2011 as a result of the decision in *Federal Commissioner of Taxation v Gloxinia Investments Ltd.*[3]

The Ruling explains the GST treatment of particular transactions arising in the context of DLAs entered into between government agencies[4] and private developers. On one view, the Ruling may be said to apply the concepts and views contained in other published rulings including the supply ruling[5] and the non-monetary consideration ruling.[6] On this understanding there is no reason why the principles referred to in the Ruling should not apply where no government agency is involved in the DLA.[7]

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1 [2014] HCA 51.

2 GSTR 2015/2: development lease arrangements and government agencies. The Ruling was previously issued as Draft Ruling GSTR 2014/D5 on 14 November 2014.

3 *(2010)183 FCR 420; 2010 ATC 20-182*. The Commissioner's view on the Court's decision, administrative treatment and any GST refunds is outlined in the relevant Decision Impact Statement (**DIS**) of 21 April 2011.

4 For the purposes of the Ruling *'government agency'* includes both Australian government agencies and government related entities as defined in sec 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999* (**GST Act**) and 995-1(1) of the Income Tax Assessment Act 1997 (**1997 Act**).

5 GSTR 2006/9: Supplies

6 GSTR 2001/6: Non-monetary consideration. Also see, GSTR 2003/12: barter consideration for a supply, GSTR2003/14: barter exchange.

7 This is confirmed by paragraph 5 of GSTR 2015/2 provides a number of the principles are applicable to non-government agency arrangements.

While particular arrangements vary, the Ruling lists the common features of DLAs between a government agency and a developer as the following:

(a) the private developer (developer) undertaking a development on land owned by a government agency in accordance with the terms of a written agreement between the developer and the government agency, and

(b) the government agency supplying the land by way of freehold or grant of a long-term lease to the developer subject to the developer undertaking the development in accordance with the terms of the written agreement. That is, the developer becomes entitled to the transfer of the freehold or grant of a long-term lease when the development is completed.

By reference to these features the Ruling considers:

(a) the principles for identifying and characterising supplies made for consideration,

(b) the extent to which consideration includes non-monetary consideration,

(c) how to determine the value of non-monetary consideration,

(d) when a supplier must attribute[8] GST, and

(e) when a recipient can claim the relevant input tax credit (**ITC**) entitlement.

The Ruling also considers the transitional arrangements following the withdrawal of the previous ruling on this topic, GSTR 2008/2 (which took a very different view of the GST analysis). Where the parties are commercially committed to an arrangement the Commissioner will not disturb the GST treatment if the parties account for GST on the same basis and continue to apply the same basis for the entire life of the arrangement. Alternatively[9], the parties may, within 6 months from the date of release of the Ruling, choose to revise their GST treatment in accordance with the Ruling.

The Ruling does not consider the application of the GST provisions dealing with the grants of land by governments (sections 38-445 and 38-450), payment of Australian taxes, fees and charges (Division 81)[10] or in kind developer contributions required by law in return for the supply of rights by an Australian government agency[11] to develop land (Division 82).

The term *"right to develop land"* is not defined in the GST Act. The Explanatory Memorandum[12] states the term has its common law meaning and includes approval for subdivision, rezoning and permitted subdivision and rezoning. Under Division 82, GST does not apply to the supply made in return for the supply of the right to develop.

Identification and characterisation of supplies for consideration

The identification of the supplies made for consideration is primarily determined by an examination of the specific terms of the particular arrangement in question. However, it is also relevant to consider the

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[8] Division 29 of the GST Act.

[9] Subject to relevant time limits in the *Taxation Administration Act 1953.*

[10] In the property sense see CR 2013/13 developer contributions to NSW Councils and CR 2013/32 property development charges imposed by NSW Councils.

[11] See CR 2013/13 for the practical application.

[12] *Taxation Laws Amendment Bill (No.3) 2012*, paragraph 1.16.

substance of the entirety of the arrangement and whether the arrangement is implemented in accordance with the terms of the agreement or agreements.[13]

The terms of the DLA particularly give rise to a number of actions by the parties including those referred to below. The analysis requires identification of the relevant supplies, the GST characterisation of the supplies, identification of the consideration and nexus between the consideration and supply.

Where one supply is directly made for the other, the nexus question is easy to resolve. It is easy to see how the development works and possible other non-monetary consideration relationship with the transfer of the land.

Non-monetary consideration will be a consideration for a supply if it is "*in connection with*", "*in response to*" or "*for the inducement of*" a supply.[14]

The meaning given to the term "*in connection with*" in *Berry v FC of T* (1953) 89 CLR 653 has been adopted by the Commissioner. The meaning given to the term in *Berry's* case is similar to that which was ascribed by the Court of Appeal in *C of IR v New Zealand Refining Co Ltd* (1997) 18 NZTC 13,187 at 13,193 - 13,194 per Blanchard J. In *Berry*'s case, Kitto J held that "*in connection with*" was a broader test than "*for*" which requires a direct link. At page 659, His Honour commented that consideration will be in connection with a property where:

> "*the receipt of the payment has a substantial relation, in a practical business sense, to that property*".

In determining whether a sufficient nexus exists between the supply and consideration, regard needs to be had to the true character of the transaction. An arrangement between the parties will be characterised not merely by the description that the parties give to the arrangement, but by looking at all the transactions entered into and the circumstances in which the transactions are made.[15]

The test as to whether there is a sufficient nexus is an objective test. The motive of the supplier and the recipient may also be relevant in determining whether the supply was made for consideration, if a reasonable assessment of the evidence supports that motive.[16]

While consideration for a supply may include acts, rights or obligations provided in connection with, in response to, or for the inducement of a supply, it is only if those acts, rights or obligations that have an economic value and independent identity separate from the transaction which will be a separate supply. That is, it must be capable of being valued and be a thing that an acquirer would usually or commercially pay money to acquire. The rights and obligations must be more than merely conditions of a contract defining the commercial arrangement.[17]

Grant of a development lease or licence to the developer to undertake development works on the government land.

The grant of the lease or licence is a supply of land (real property). Where the agreement provides for rent to be paid by the developer, the rent is consideration for the continued supply of the land. In the absence of express terms or evidence to the contrary, a lump sum payment and/or non-monetary

[13] See GSTR 2006/9 which contains the various principles adopted by the Commissioner for the purposes of identification of supplies. See Propositions 6 and 11.

[14] Section 9-15(1), Paragraph 67 of GSTR 2001/6.

[15] Paragraph 71 of GSTR 2001/6; Marac Finance Ltd v. Virtue (1981) 1 NZLR 586.

[16] Paragraph 72 of GSTR 2001/6.

[17] Paragraphs 80-81, 83, 86-89 of GSTR 2001/6.

consideration by the developer to the agency on the grant is also consideration for a supply[18] (being the grant of the lease itself).

The developer undertakes works on the land owned by the agency and transferred to developer

The developer makes a supply of development services to the agency. The supply of the freehold land or a long term lease of the land by the agency to the developer is consideration for the developer's supply of the development services. There will be sufficient nexus between the supply of the development services and supply of the land if the arrangement makes the supply of the land subject to or conditional on the developer completing specified development works.

If under the arrangement the agency grants a call option which, when exercised, entitles the developer to the land, the grant of the call option is consideration for the supply of the development services if the grant of the call option is subject to or conditional on the developer completing the development works.

Where a call option is granted by the agency to the developer on the entry into the development lease arrangement (or soon thereafter) and the developer's right to exercise the option is subject to or conditional on completion of the development works, the works are in connection with the exercise of the option and the works supplied by the developer form part of the consideration for the transfer of the land when the option is exercised by the developer.[19] On the other side of the transaction, the transfer of the land by the agency is consideration for the developer's supply of the development services.

Developer undertakes works on land owned by the agency that is not transferred to or retained by the developer

Where the developer undertakes works (for example, roads, bridges, parks, transport hubs) on the agency's land that is not transferred to or retained by the developer, the developer makes a supply of development services to the agency. The additional works is non-monetary consideration for the supply of the land provided by the agency and there will be a sufficient nexus between the two if:

(a) the terms of the arrangement make the supply of the land subject to or conditional on the completion of the developer's additional works; and

(b) Division 82 does not apply. That is where the development services is deemed not to be consideration by the developer in return for a supply by the Australian government agency (or other entity) of a right to develop land.

Where there is a grant of a call option by the agency which is subject to or conditional on the completion of the additional works, the grant is consideration for the developer's supply of development services if Division 82 does not apply.

Value of non-monetary consideration

Where the consideration for a supply is non-monetary consideration, the GST inclusive market value of that consideration is used to work out the price and value of that supply.[20]

Where the parties are dealing with each other at arm's length, the Commissioner considers that the things exchanged between the parties are of equal GST inclusive market value (see GSTR 2001/6). Therefore, the parties may agree to use a reasonable valuation method to determine the GST-inclusive market

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[18] The question of GST and premiums may arise. In relation to premiums stamp duty should also need to be considered. Issues of whether a payment is a premium or a payment of rent are discussed in *Frazier v. CSD (*1986) 17 ATR 64.

[19] Section 9-17(1)(a) provides that if a right or option to acquire is granted, then the consideration for the supply of the thing on the exercise of the right or option is limited to any additional consideration provided either for the supply or in connection with the exercise of the right or option.

[20] Section 9-75 and See GSTR 2001/6 for the Commissioners views in relation to non- monetary consideration.

value[21] for the supplies made by each to the other and it is not necessary for the parties to obtain a formal valuation.

Under GSTR 2015/2 a reasonable method can include the full costing of development works undertaken by the developer as part of a competitive tender process which takes into account the full cost of construction (including builder margins) for determining the GST-inclusive market value of the supply of the development services. In the alternative, it also provides a reasonable basis for calculating the price for the supply of land (or grant of a call option) by the agency for the supply by the developer of the development works.

Where the land is supplied in exchange for both monetary consideration and the developer's development services, the GST inclusive market value of the land needs to be apportioned[22] by deducting the amount of the payment from the value of the land supplied. [23]

To determine the consideration for the agency's supply of the land, the amount of the payment is added to the GST inclusive market value of the development services supplied by the developer.[24]

Agency attribution of GST

The parties in relation to a DLA will generally be on an accruals basis for GST. Any GST payable is attributable to the tax period in which any of the consideration (monetary or non-monetary) is received or an invoice is issued, whichever is the earlier. Attribution of an input tax credit entitlement is attributable in the tax period in which any consideration is received or an invoice is issued, whichever is the earlier and the agency holds a tax invoice.

The non-monetary consideration being the developer's development services for the supply of the land by the agency is not provided in part (or in full) until the conditions specified in the DLA are satisfied and the developer is entitled to the supply of the land or the grant of a call option. Usually this will be on practical completion of the development.

Paragraph 92 of GSTR 2015/2 provides that in practical terms, the agency's GST liability for the supply of the land (or grant of the call option) is not attributable until the specified development is completed (or a specified stage of the development is completed) unless an invoice has been issued in an earlier tax period or a monetary payment has been received for the land (or call option) in an earlier tax period.

The government agency does not obtain the benefit from the progressive fixation of the works on the government agency's land, that is the agency does not acquire anything before practical completion.[25]

The benefit the agency receives is the completion of the development and any specific additional works. It is the completion of the development and specified additional works which is the relevant supply which satisfies the agency's policy objectives and/or statutory obligations.[26]

Based on the above analysis, the agency does not receive (either in full or in part) any of the non-monetary consideration being the development services until the specified conditions of the development, for example, practical completion - are satisfied.[27]

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[21] A change in the market value of the works after the parties have agreed a reasonable basis does not give rise to an adjustment event under Division 19. This is to be compared to a variation in the scope of the works.

[22] Paragraphs 132 to 134 of GSTR 2001/6.

[23] Paragraph 82 of GSTR 2015/2.

[24] Paragraph 83 of GSTR 2015/2.

[25] Paragraph 134 of GSTR 2015/2.

[26] Paragraph 135 of GSTR 2015/

[27] Paragraph 136 of GSTR 2015/2.

Developer attribution of GST

On the developers side, in circumstances where no non-monetary consideration has been provided or an invoice issued to the developer in an earlier tax period, the developer's GST liability for its taxable supply of development services is attributable to the tax period in which the agency supplies the freehold land or long-term leasehold interest (or the call option is granted).

In some cases the developer may be a charity that is registered for the GST concession. The GST concession allows the entity to elect to report GST on a cash basis. In relation to a supplier on a cash basis, GST is attributable on receipt of any part of the consideration (but only to that extent) or when an invoice is issued. To enable symmetry between the GST liability and credit so no net effect arises, both parties should report on the same basis.

Invoices

The issue of a document by the developer to the government agency on entry into a DLA or at any time afterwards, notifying the agency of an obligation to supply the land at a future date (subject to the development works being completed), is an invoice for GST purposes.[28]

Attribution of an input tax credit entitlement is attributable in the tax period in which any consideration is received or an invoice is issued, whichever is the earlier and the developer holds a tax invoice.

On the developer's supply of the services, if no monetary or non-monetary consideration for the developer's supply has been received by the developer in an earlier tax period, the developer's GST liability for its taxable supply of development services is attributable to the tax period in which the invoice is issued. Correspondingly, the agency is entitled to an input tax credit for its acquisition of the development services in the same tax period if it holds a tax invoice.

On the agency's supply of the land, the issue of a document on the entry into a DLA or at any time afterwards, notifying the developer of its obligation to deliver the development services, will potentially be an invoice for GST purposes. Unless monetary or non-monetary consideration has been received by the agency in an earlier tax period, the agency's GST liability for the taxable supply of the land is attributable to the tax period in which the invoice is issued. In turn, subject to the requirement to hold a tax invoice, the developer is entitled to an input tax credit for its acquisition of land in the same tax period as the issuance of the invoice by the agency.

The practical outcome for the parties if, exchanging tax invoices on the entry into the arrangement, is that their respective GST liabilities and corresponding input tax entitlements are attributable to the same tax period.[29]

The Development Agreement or Development Lease is not an invoice in cases where the DLA does not notify the developer of a presently existing obligation to the developer to undertake the particular development works. For example the works may be contingent or conditional on the developer or other party obtaining relevant development approvals. In these circumstances, the agreement does not notify the developer of an obligation to *"pay a specific amount".*[30]

Timing

The GST Act does not specify the time when the market value of non-monetary consideration is to be ascertained. The Commissioner considers[31] that the time must be reasonable in the circumstances of the particular transaction. Depending on the circumstances, it may be:

[28] See paragraphs 105, 137 to 142 of GSTR 2015/2 and paragraph 12 of GSTR 2000/34.

[29] Paragraph 141 of GSTR 2015/2.

[30] See paragraphs 29 to 31 of GSTR 2000/34.

[31] Paragraph 160 of GSTR 2001/6.

(a) when parties enter into a binding agreement;

(b) when economic risk is transferred; or

(c) when recipient assumes effective control.

A taxpayer needs to be able to demonstrate that these times, or another time at which you value the consideration, is reasonable in your particular circumstances. [32]

The process of valuing non-monetary consideration can be done before or after the appropriate time as long as it reflects the GST inclusive market value at the time when it should be determined. For example, if you value non-monetary consideration for the purposes of entering into an agreement and that value reasonably reflects the value as at the time the agreement is made, you can use it to work out the value of your supply. However, it is not reasonable to use this value if you enter the agreement on the basis that the market value has changed from a value established before you entered the agreement.[33]

Money and Land Funding

For the purposes of providing social housing two government entities provide funding to a large charitable organisation. The funding comprises:

(a) Land Funding provided by one government entity (**Gov A**); and

(b) Money Funding provided by another government entity (**Gov B**).

The government entity that owns the land (Gov A) provides a Development Lease to the charity on the condition of the construction of the housing to specific specifications. The consideration for the Lease is payment of rent (if demanded). Upon satisfactory completion of the construction of the housing, the charity is entitled to a transfer of the land from the relevant government entity. The value of the land is $1.3 million (GST exclusive). Gov A is undertaking the demolition and removal of the existing house located on the land. All parties return on an accrual basis. The Money Funding is provided over a period of time by reference to milestones.

In relation to the Development Lease:

(a) Gov A is supplying the premises by way of lease and liable for GST on any consideration for the supply;

(b) The charity is the recipient of the supply;

(c) The consideration provided by the charity is the rent (if demanded).

In relation to the Money Funding:

(a) the charity is supplying obligations. The consideration for the obligations supply is the Money Funding provided by Gov B. Division 156 can apply to the funding payments as they are tied to certain milestones before payment is made. There is a progressive and periodic supply of services and consideration for those services so that GST need only be remitted on the funding amounts as they are paid.

(b) the supply of the funding by Gov B is not a supply.

In relation to the Land Funding:

(a) the supply of the Land Funding by Gov A is a taxable supply to the charity;

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[32] Paragraph 161 GSTR 2001/6.

[33] Para 162 GSTR 2001/6.

(b) the consideration for the land supply is the non-monetary consideration of the development services by the charity;

(c) Paragraph 92 of GSTR 2015/2 provides that unless an invoice is issued in an earlier tax period or part consideration has been received for the land in an earlier tax period, Gov A's GST liability on the taxable supply of the land occurs in the tax period in which the charity satisfies the conditions which entitles the charity to the supply of the land. In this case, this event was tied to the issue of a certificate of completion;

(d) the supply of the development works by the charity is a taxable supply for the land;

(e) the consideration for the supply of the development works is the non-monetary consideration of the Land Funding;

(f) where there is no earlier invoice issued by the charity or part consideration provided for the development, the non-monetary consideration being the land is provided in full and the GST liability arises when the land is transferred;

(g) where the parties to a DLA are dealing with each other at arm's length, the Commissioner considers (unless there is evidence to the contrary) that the supply exchange between the parties are of equal GST inclusive market value[34];

(h) the GST clause in the agreement contained offset provisions between the parties. The taxable supplies and non-monetary consideration of Gov A and the charity should occur in the same tax period. In other words, the GST liability and the reciprocal entitlement to a credit should arise in the same tax period which should result in no GST payable by either party in relation to the transactions;

(i) the agreement to offset the GST liabilities between the parties does not relieve the parties from reporting relevant taxable supplies (and paying the relevant GST, although claiming the ITC to wholly offset any actual liability).[35]

(j) In relation to attribution, the parties should seek to agree on the timing at which they will exchange tax invoices. As noted above the correct timing is for practical completion - when the developer can call for the transfer of the Land as "Land Funding". GSTR 2015/2 relevantly states at paragraph 92 that each cross-supply:

> *…is attributable to the tax period in which the development satisfies the requirements of the development lease arrangement and the developer is entitled to the supply.*

(k) the parties should exchange tax invoices at settlement for the Land Funding.

As a variant, there are cases where the government entity provides cash funding, land funding and also undertakes a percentage of the improvements. On completion of the development under the lease, the government entity will transfer the land (and its interest in the improvements undertaken by it by way of Land Funding). There are four separate transactions for GST being, the funding, the development lease, the development and the transfer of the land.

In relation to the development services paragraphs 125-127 of GSTR 2015/2 provide:

> *125. The developer makes a supply of development services to the government agency, under the terms of a development lease arrangement, regardless of whether or not legal title in the works ever passes to the government agency.*

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[34] Paragraph 19 GSTR 2001/6.

[35] Depending on whether or not the margin scheme is applied under Division 75.

126. Even if the express terms of a development lease arrangement provide that ownership of the physical works undertaken on the government agency's land rests with the developer, having regard to the broad meaning of supply in section 9-10, the developer still makes a supply of development services to the government agency.

127. In all cases, through the developer performing its contractual obligations under the development lease arrangement and completing the required works allows the government to fulfil its policy and statutory objectives.

In accordance with GSTR 2015/2, assuming the parties were dealing at arm's length, either the cost of works or a market value of the property should apply:

70. For example, the full costing of the development works, undertaken by the developer as part of a competitive tender process, which takes into account the full cost of construction (including builder margins), provides a reasonable basis for determining the GST-inclusive market value of the supply of development services by the developer. It also provides a reasonable basis for calculating the price of the government agency’s related supply of land (or grant of a call option).

71. Similarly, a professional valuation of the land (including the development works) provided by the government agency to the developer, with appropriate adjustments made for any monetary consideration also provided for the land by the developer, would also be a reasonable basis for the parties to determine and agree upon the GST-inclusive market value of the development services supplied by the developer. It would also provide a reasonable basis for calculating the price of the government agency’s related supply of land (or grant of a call option).

Set off

In large infrastructure projects, due to cash flow considerations or a possible mismatch of attribution and claiming credits, the parties agree to approach the Commissioner and request that the development services recipients (land supplier) credit from the taxable supply of the development works by the developer be applied against the developer's GST liability in the relevant tax period.

The contractual arrangement between the parties is reflected in an appropriately drafted GST clause. The matters covered in the clause may vary from case to case but generally include:

(a) Unless otherwise stated, all amounts referred to are GST exclusive.

(b) If GST is payable, it is an additional amount payable by the Recipient at the same time and in the same manner as the other consideration (subject to a valid tax invoice being received prior to the date of payment) required under the Deed. The recipient is not obliged to pay the additional amount until a valid tax invoice is received.

(c) Where an adjustment event occurs, be it an increasing adjustment or decreasing adjustment, the Supplier will provide a refund or credit to, or be entitled to receive the amount of the variation. Except where the Recipient is required to issue an adjustment note, the Supplier will issue a valid adjustment note. No additional amount is payable unless and until a valid adjustment note is received.

(d) No amount is payable to the extent that the GST to which the amount relates has ceased to be payable by or refundable to the Supplier under the GST law.

(e) Recording the acquirer's intention that the government entity not bear any net costs (including funding costs arising from timing differences) in respect of GST payable on any taxable supply to which the consideration relates.

(f) The parties will use their reasonable endeavours to obtain and implement an agreement by the Commissioner to offset in the parties running balance accounts, the developer's liability to pay GST and the government entities credit entitlement. Any set off by the Commissioner will satisfy the obligation of the government entity to pay the developer an amount in respect of GST (GST on the development works).

(g) The timing of the delivery of the Developers tax invoice is tied to payment.

(h) The government entity is not obliged to make a payment until it has (acting reasonably) received the benefit of a credit in offset against a GST or other tax liability credited to the entity's running balance account. On being refunded to the entity or a combination.

(i) If the government entity is denied a credit the developer must reimburse the entity for any relevant GST it has to pay in excess of its credit and indemnifies an amount equal to any penalty or interest resulting from claiming the credit.

(j) The government entity will cooperate with the developer to enable discussions with the Commissioner in relation to the reasons for the denial of the credit and it will take reasonable steps, as reasonably directed by the developer to dispute the denial. The developer indemnifies the entity for its costs incurred in disputing any denial.

(k) If the entity's entitlement to a credit is increased the government entity will pay the developer an amount equal to the increase.

(l) The entity must take all reasonable steps to ensure it receives the benefit of the credit as quickly as possible including claiming the credit, lodging its Business Activity Statement (BAS), forwarding any correspondence from the Commissioner to the developer and promptly informing the developer of any delays or related issues in respect to the credit.

(m) The specific GST provisions continue in force if the agreement is terminated (subject to the 4 year rule).

The offset request to the Commissioner may include comments as to the following:

(a) Sufficient detail as to the arrangement, supplier, GST liability, recipient and credit entitlement.

(b) If there are progressive and periodic supplies made by the developer during the Design and Construction phase, the GST on each payment would become attributable by the parties in the tax period in which payment is made or invoiced.

(c) To facilitate the offset request, the parties agree and request the Commissioner's agreement for the total GST payable in respect of monthly payments yet to be invoiced will be invoiced in a lump sum and become attributable on issue of the tax invoice by the developer so that GST is attributable under the general attribution rules contained in Division 29 of the GST Act. Consequentially, the credit entitlement of the government entity will accrue on receipt of the tax invoice issued by the developer.

(d) For authority some advisors have referred to the process set out in PSLA 2011/21- Offsetting of refunds and credits against tax debts.[36]

(e) Attach a notification from the government entity requesting that its credit be applied against the GST liability of the developer by transferring the amount of the credit to the developer's integrated client account.

Novation and GST

There does not appear to be one concise ATO statement in relation to GST and novation's.

A novation involves the creation or substitution of a new agreement[37] between the original parties to the agreement and a third party. The third party is substituted for the original party. A novation is not an

[36] *Practice Statement Law Administration PS LA 2011/21 Offsetting of refunds and credits against taxation and other debts*

assignment because the obligations under the old agreement disappear when the agreement is terminated. Apart from a novation effected by statute, all parties must agree to a novation in order to give enforceable rights or obligations to the third party. An assignment of a chose in action by contrast, does not require the participation of all the original parties.[38]

The Private Rulings concerning "GST and Novation" appear to be specific to hire purchase arrangements and the transfer of loan liabilities. For example, Private Ruling Authorisation Number 46985 considers the GST implications of a novation to transfer loan liabilities from one entity to another. The ruling concerns a novation agreement between associated entities for GST purposes where:

(a) entity A had previously entered into loan arrangements with entity B; and

(b) entity A then transfers its loan liabilities to entity C under a novation agreement.

In this instance, the Commissioner takes the view that entity C has not made a taxable supply in entering into the novation agreement. Rather, this aspect of the agreement is more appropriately characterised as a financial supply under Division 40 of the GST Regulations. This Ruling indicates that entity C would have made a taxable supply in entering the novation agreement had the agreement related to something other than loan liabilities/ a financial supply.

In *Re Taxpayer v Federal Commissioner of Taxation*[39], the matter involved the sale of a business from one company (**Rivalco**) to another (**the taxpayer**). The arrangement also included the novation of Rivalco's rights and obligations under agreements with local councils to the taxpayer. The novation arrangements were not disputed. However, the Tribunal noted the following:

(a) under the terms of the sale agreement, the taxpayer agreed to accept the novation of the Material Contracts on the condition that Rivalco pay a subsidy amount of $Y.

(b) the sale agreement transferred plant and equipment valued at $X.

(c) the taxpayer paid an amount in respect of GST to Rivalco.

(d) the taxpayer included the amounts of $X and Y in its income tax return for FYE 2007 but lodged an objection to the assessment. [16-17]

(e) the payment of $Y was characterised as income in the hands of the taxpayer. [36]

While the GST component was not contested, the matter illustrates a case where the taxpayer paid GST under a sale agreement and novation arrangement.

GSTR 2000/16W[40] previously touched on the implications following a change of parties to an agreement. The ruling provided:

(a) One or more parties to an agreement may change on or after the relevant date. A party may assign its rights and obligations under the agreement to another person or entity or this can occur due to the operation of law. [84]

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[37] See GSTR 2000/16 and GSTR 2004/4. Novation involves the creation of new rights and obligations in a new contract, rather than the assignment (i.e. transfer) of existing rights: *Olsson v Dyson* (1969) 120 CLR 365 at 388-389 per Windeyer J; *Commissioner of Taxation (Cth) v Arnold & Others* (No 2) (2015) 324 ALR 59 at [105]. In a novation, the obligations of both parties under the old contract are discharged: *ALH Group Property Holdings Pty Limited v Chief Commissioner of State Revenue* [2012] HCA 6 at [37] per French CJ, Crennan, Kiefel and Bell JJ. Note that "liabilities" cannot be assigned

[38] Paragraph 14 GSTR 2004/4 Goods & Services Tax: Assignment of payment streams including under a typical securitisation arrangement.

[39] [2010] AATA 819.

[40] GSTR 2000/16W: transitional arrangements - GST free supplies under existing agreements. Withdrawn on 13 May 2013.

(b) If an agreement that satisfies subsection 13(1) of Transition Act continues after the change of parties and the change of parties does not alter the supply or consideration identified, or provide a review opportunity, the mere change of parties, in itself, will not mean section 13 ceases to apply to the agreement. However, if the change of parties creates a new agreement section 13 will no longer apply. [85]

(c) A subrogation or assignment which does not disturb the existing agreement is different to a novation. A novation gives rise to a new agreement. If the new agreement is made on or after the relevant date, section 13 will not apply to the new agreement.

Effectively, the Ruling at paragraph 86 notes that section 13(1) of the Transition Act would not apply to a novation. Presumably, this is on the basis this is a new transaction rather than a variation of an existing agreement protected by the Transition Act.

Novation- Example

In some infrastructure projects, concessions may be granted by local or state government to an operator, for example, a toll road. It is usual for the concession to be documented in the Project Deed or a separate Concession Deed.

In the event the infrastructure assets and operations are sold, it is necessary to obtain the consent of the government entity to the termination or the assignment or existing agreements and entry into the transactions contemplated by the Assignment or Disposal Agreement or other transaction documents including the sale of the assets and the assignment of leases and novation of particular Project Documents. The consents to termination of the existing agreements is on the condition that new documents are executed by the acquirer and will become effective on or before completion of the sale.

The government entity is generally interested in limiting any potential GST or compliance risk in relation to the novation of the concession from one party to the other.

Under the Disposal Agreement, the seller novates its rights and obligations under the Concession Deed to the acquirer.

As a consequence of the novation, the Commissioner will consider the government entity is making a new concession to the acquirer and will be liable for GST on that supply. The consideration received by the entity will be the non-monetary consideration of the new obligations assumed by the acquirer and any other non-monetary consideration provided under the document package.[41]

The supplies by the parties, to each other, will be the creation, grant, transfer, assignment or surrender of rights or entry into or release from obligations to do anything to refrain from an act or to tolerate an act or situation.[42]

The transaction is similar to a barter/contra arrangement where each party receives non-monetary consideration in return for its supply.

From a risk perspective the ATO may seek to recover GST from the government entity as a result of its taxable supply of the concession.

As outlined by the Commissioner in GSTR 2001/6 it is necessary for the entity and the Acquirer to value their supplies and exchange tax invoices.

On the understanding that each party is entitled to a full input tax credit, the effect of the exchange of tax invoices will be that each party has paid GST and claimed a corresponding input tax credit in its BAS for the period in which the transaction is completed or closed.

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[41] This would likely include procuring the surrender of the original concession although that is not emphasised in the relevant edited PBRs. PBR 65183.

[42] See section 9-10(2)(e), (g) and (h) of the GST Act.

Based on the Acquirer's assurance and the Commissioner's general statement[43] that when parties are dealing with each other at arm's length he will accept their non-monetary consideration is equal, subject to finalisation of the form and content of the tax invoices. The GST payable by each party should be able to be offset against a corresponding input tax credit provided valid tax invoices are exchanged in the relevant tax period. This means there is no cash outlay for any party. The entities positions may be mitigated by:

(a) The parties agreeing the valuation methodology and apportionment.

(b) On the day of Completion, the parties exchange tax invoices for the non-monetary consideration pursuant to the agreed valuation methodology and apportionment.

In cases where the Disposal Agreement provides for leases to be transferred to an asset entity and the concession to an operational entity, an apportionment of the value of the consents will be required.

Apart from the method of valuation and apportionment, the wording of the tax invoice needs to considered to ensure that it reflects the relevant supplies. Where there is a consent to the assignment of a lease and the granting of a new concession, one may expect the invoice issued by the government entity to refer to all supplies considered to be non-monetary consideration provided by it to the acquirer under the Transaction documents including the consent to the assignment of the lease.

The Developer's corresponding lease invoice may read something along the lines, *"For all supplies considered to be a non-monetary consideration provided by it to the government entity under the Transaction documents between the acquirer and the government entity including the undertakings and obligations contained in the assignment documents for the lease."*

In relation to the grant of the concession, the government entities tax invoice may say, *"For all supplies considered to be non-monetary consideration provided between the parties including the grant of the concession."* Similarly, the acquirers invoice may refer to *"such supplies including the undertakings and obligations referred to in the Project Deed"* which would include seeking to ensure the acquirer executes the Novation Deed.

In Queensland, consideration should be given to whether the grant of a new concession is a dutiable transaction over a Queensland business asset[44] via section 39 of the *Duties Act 2001 (Qld)*- surrender of Queensland business assets. The effect of the provision is that the surrender is taken to be a transfer of the business asset by the owner to the other person when the similar business asset is granted by a third party.

Margin Scheme

A number of government infrastructure arrangements (with private developers or other government entities), relate to the development of land for residential purposes. An example of an arrangement may be:

(a) A government entity grants a development lease to an Investor over the land until it is transferred to the Investor or a nominee. The development is undertaken by a separate development entity and includes the construction of residential units/premises.

(b) The government entity may grant to the Investor a Call Option to transfer developed parcels of land from the government entity to the Investor or nominee. The exercise of the Call Option is dependent on the developer completing the development works.

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[43] In GSTR 2001/6 the Commissioner accepts that when the parties are dealing with each other at arm's length their non-monetary consideration is equal. The value of the GST non-monetary consideration provided by each party should be equal.

[44] For Queensland duty purposes, *"business asset"* is defined in section 35 of the *Duties Act 2001 (Qld).* The Queensland duty base is broader than those of NSW and Victoria.

(c) Due to the scale of the development, the developed units will be rented out and later sold to third parties when market conditions permit. Generally, there is a delayed supply to the market to ensure the market is not over supplied.

In accordance with the terms of the Development Agreement, the potential supplies to the Investor are conditional on the developer completing the development works in accordance with the terms of the Development Agreement.

If the developed units are rented out for more than 5 years, then they will no longer be new residential premises and the sale will be an input taxed supply. Any denial of input tax credits will add to the cost of the project.

While the residential premises are being leased, it will be an input taxed supply and a portion of the input tax credits in relation to the construction will be denied. If there is a mix of commercial, retail and residential premises and the lease or sale of the non-residential premises will be taxable and the relevant party entitled to input tax credits.

If the residential premises are sold while "new", it will be a taxable supply and a retrospective credit entitlement. If there is a reimbursement arrangement, it may be better for the government entity that the supplies to third parties are new residential premises. The considerations will then focus on when the supply will no longer be the supply of "new residential premises" as defined in section 40-75[45]. Relevantly:

(a) section 40-75(1)(a) provides residential premises are new residential premises if they have not previously been sold as residential premises.

(b) Section 40-75(2) provides residential premises are not new residential premises if, for the period of at least 5 years since the premises first became residential premises, they have only been used for making supplies that are input taxed because of section 40-35(1)(a).[46]

Therefore, two questions arise:

1. will the exercise of the Call Option by the Investor or a nominee attract the operation of 40-75(1) and the premises will no longer be new residential premises when sold to a third party; and

2. if the premises are rented out for a period in excess of 5 years, they will no longer be new residential premises and the supply to the third party will be input taxed. As a consequence, the Investor will not be entitled to credits and the government entity will be liable for reimbursements of the lost credits.

The answer to the first question focuses on the 2012 *Gloxinia*[47] *"wholesale supply"* amendments and the introduction of section 40-75(2B)[48].

The section provides the 'wholesale supply' of residential premises is disregarded as a sale or supply for the purposes of the premises being previously sold as residential premises[49]. In the present example, the supply by the Investor to the nominee will be disregarded if:

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45 A copy of section 40-75 is set out in Annexure1.

46 The provision of GST free residential rents by a charity will never satisfy this test.

47 *Commissioner of Taxation v. Gloxinia Investments atf Gloxinia Unit Trust* [2011] FCAFC 46. In *Gloxinia* the Federal Court decided that where residential premises had been developed under a development lease the wholesale supply of the freehold with the newly constructed premises meant that the premises were thereafter no longer "new" (and despite the economic reality of the transaction). Also see the ATO Decision Impact Statement for *Gloxinia*. In the DIS, the ATO take the view that the value of the development works is included in the value of the land supplied to the Developer despite this not being a matter specifically dealt with in *Gloxinia*. That position reverses the view taken in the withdraw GSTR 2008/2.

48 An extract of the Explanatory Memorandum to *Tax Laws Amendment (2011 Measures No. 9) Act 2012* is set out in Annexure 2.

(a) the land from which the residential premises were created had earlier been supplied to the Nominee or one or more of its associates (the Investor);

(b) the arrangements (including an agreement) was made by the entity (the supplier of the earlier supply) and the Investor (the recipient of the earlier supply); and

(c) under the arrangement, the wholesale supply was conditional on specified building works being undertaken by the recipient of the earlier supply (Investor) or by one or more associates of the recipient.

In relation to the last condition, as the Developer is undertaking the specified development works it is necessary to identify if it is an associate of the Investor, being the recipient of the earlier supply. In the present example, the Investor is the party that becomes entitled to the developed premises.

To determine whether the third condition is satisfied, it is necessary to examine the transaction documentation in light of the overall arrangement.

However, if the Investor and Developer are associates, the third condition will be satisfied and the whole supply disregarded. If the Developer and Investor are not associates, then the wholesale supply will trigger section 40-75(1)(a) and the latter sale of the residential premises will be an input tax supply. The consequence will be that the Investor will not be entitled to credits and if a reimbursement arrangement is in place, a liability to reimburse for the lost credits will arise.

[49] Section 40-75(1)(a).

5 year rule

Where the Investor's acquisition is related to the sale of new residential premises it will be entitled to credits in relation to the construction. When the sale of the land from the government entity to the Investor is not a wholesale supply, any supply of the premises by the Investor to third parties will be input taxed.

Where the acquisitions are related to the lease of the residential premises, the Investor will not have a fully creditable purpose in relation to the construction costs assuming the Investor is not a charitable body utilising section 38-250. However, there may be a partial creditable purpose or dual application to the extent that the investor concurrently markets the units for sale.[50]

Section 40-75(2) provides residential premises are not new if for a period of at least 5 years the premises have only been used for making input taxed supplies because of section 40-35(1)(a). The Commissioner considers that the five years must be for a continuous period.[51]

Stamp Duty implications on consideration for GST

The decision of the High Court in *Commissioner of State Revenue v Lend Lease Development Pty Ltd*[52] considered the concept of *"consideration"* for Victorian transfer duty purposes.[53]

The *Lend Lease* decision dealt with a large transaction which the High Court found to be "single, integrated and indivisible". The consideration was treated as being what was required to move the transaction. The documents in that case were all interrelated to a significant degree, including being conditional upon each other.

In *Lend Lease* the default under one document was a default under all the documents and the damages on default were determined by reference to all the documents.

The question before the High Court was, did the consideration for the transfers of land, include the value of non-monetary consideration?

Duty was assessed on the basis the consideration included construction works carried out on adjacent land under the Licence Agreement. In relation to the works the parties had agreed a market value for GST purposes.

In Lend Lease the development works were carried out after the title had been transferred to Lend Lease and the works were not value received by Vic Urban for the land. The value of the development works was not included in the assessment or the agreement as part of the agreed consideration for GST.

The High Court referred to its earlier decision in *Dick Smith Electronics*[54] for the appropriate test to apply when determining the consideration *"for"* the transfer of dutiable property. In *Dick Smith* the High Court found that the statutory criterion of consideration *"for"* the transaction "*looks to what was received by the Vendors so as to move the transfers to the purchaser as to stipulated in the Agreement*".[55]

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[50] See *Re GXCX v. Federal Commissioner of Taxation* (2009) 73 ATR 380 and GSTR 2009/4i relation to dual purpose.

[51] See paragraphs 89 to 93 of GSTR 2003/3.

[52] [2014] HCA 51.

[53] For a full discussion on Lend Lease see, *Lend Lease and "consideration" - relationship between GST and stamp duty*, Adrian Check and Jennee Chan , ATax Conference, 21-22 April 2015.

[54] *Chief Commissioner of State Revenue v Dick Smith Electronics Holdings Pty Ltd* (2005) 213 CLR 230.

[55] *Dick Smith* at [72]; *Archibald Howie* followed.

In a stamp duty context, the focus is on what a vendor receives, rather than on what the purchaser gives up.

In light of Lend Lease the question of identification of consideration in the context of a *"supply for consideration"* and *"consideration for a dutiable transaction"* requires examination, from the suppliers perspective of what is provided to move the supply or transaction.

Paragraph 122 of GSTR 2015/2 provides that for real property transactions, "consideration" may be regarded as anything the "moves" the conveyance or transfer.

It should be noted that the dutiable value of a dutiable transaction is generally calculated on the *"consideration for the dutiable transaction"* or the unencumbered value of the dutiable property if there is no consideration for the transaction, the consideration can't be ascertained when the liability for duty arises or the unencumbered value is greater than the consideration.

By way of example, section 14(4) of the *Duties Act 2001 (Qld*)[56] provides that if before the dutiable transaction, improvements are made to land at the transferees expense, the unencumbered value of the land is determined as if the improvements had not been made. [57] For stamp duty this provision provides the unencumbered value is the unimproved value of the land.

Should there be a sale of the freehold title of the developed land to a Developer, the issue of unencumbered value does not necessarily arise in the case of non-monetary consideration due to the operation of section 14(4). However, this section does not feed into the "consideration for the dutiable transaction" limb of dutiable value in section 11(7)(a) of the *Duties Act 2001 (Qld)*. The decision in Lend Lease needs to be considered in this context as the decision considered the concept of “consideration” for transfer duty purposes includes cash payments and the value of the non-monetary consideration made in relation to a development.

If the tenure granted is a lease, any benefit under section 14(4) will not be available and it will be necessary to determine if the development works can be classified as "a premium, fine or other consideration for the grant of a lease"[58] under section 11(4) of the Duties Act . In this context it may be possible to argue that the lessor never received the benefit of the development services.

For stamp duty, the amount on which duty is calculated includes the GST amount. If freehold title is transferred, section 14(4) should apply to exclude the non- monetary development works for stamp duty but a GST amount will be payable. Is duty payable on this GST amount?

Paragraph 12 of *DA 011.1.1 - Transfer duty on dutiable transactions subject to GST* provides if an agreement for the transfer or a transfer of dutiable property contains a condition that the transferee will pay the stated consideration plus an amount for the GST payable by the transferor in respect of the transfer, the separate GST component is part of the consideration for the supply because the consideration is determined without any discount for the GST payable on the supply[10]. This is so regardless of the manner in which the separate component is described in the agreement. Consequently, the dutiable value upon which transfer duty is calculated is the greater of the consideration plus the separate GST component or the unencumbered value of the property.

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[56] Annexure 3 contains an Overview of the core definitions/provisions for Queensland duty.

[57] For NSW see section 23 (3) *Duties Act 1997 (NSW). For other jurisdictions the duties legislation should be considered.*

[58] See DA 010.1.1

Annexure 1

40-75 When premises are new residential premises

*(1) *Residential premises are new residential premises if they:*

> *(a) have not previously been sold as residential premises (other than *commercial residential premises) and have not previously been the subject of a *long-term lease; or*
>
> *(b) have been created through *substantial renovations of a building; or*
>
> *(c) have been built, or contain a building that has been built, to replace demolished premises on the same land.*

Paragraphs (b) and (c) have effect subject to paragraph (a).

Note 1: For example, residential premises will be new residential premises if they are created as described in paragraph (b) or (c) to replace earlier premises that had ceased to be new residential premises because of paragraph (a).

Note 2: However, premises that are new residential premises because of paragraph (b) or (c) will cease to be new residential premises once they are sold, or supplied by way of long-term lease, as residential premises (see paragraph (a)).

Note 3: Premises created because of the registration of, for example, a strata title plan, or a plan to subdivide land, may not become new residential premises (see subsection (2AA)).

…

*(2B) A supply (the wholesale supply) of the *residential premises is disregarded as a sale or supply for the purposes of applying paragraph (1)(a) if:*

> *(a) the premises from which the residential premises were created had earlier been supplied to the *recipient of the wholesale supply or one or more of its *associates; and*
>
> *(b) an arrangement (including an agreement) was made by:*
>
> > *(i) the supplier of the earlier supply, or one or more associates of the supplier; and*
> >
> > *(ii) the recipient of the earlier supply, or one or more associates of the recipient; and*
>
> *(c) under the arrangement, the wholesale supply was conditional on:*
>
> > *(i) specified building or renovation work being undertaken by the recipient of the earlier supply, or by one or more associates of the recipient; or*
> >
> > *(ii) circumstances existing as specified in regulations made for the purposes of this subparagraph.*

Note 1: The premises referred to in paragraph (a) could be vacant land.

Note 2: For subparagraph (c)(ii), circumstances may be specified by class (see subsection 13(3) of the Legislative Instruments Act 2003).

Note 3: This subsection does not apply to a supply if certain commercial commitments were in place before 27 January 2011 (see item 12 of Schedule 4 to the Tax Laws Amendment (2011 Measures No. 9) Act 2012).

*(2C) A supply of the *residential premises is disregarded as a sale or supply for the purposes of applying paragraph (1)(a) if it is made because a *property subdivision plan relating to the premises was lodged for registration (however described) by the *recipient of the supply or the recipient's *associate.*

Note: This subsection does not apply to a supply if the plan was lodged for registration before 27 January 2011 (see item 13 of Schedule 4 to the Tax Laws Amendment (2011 Measures No. 9) Act 2012).

Annexure 2

Explanatory Memorandum - Detailed explanation of new law

6.22 These amendments add words and notes to subsection 40-75(1) to clarify that premises that become new residential premises because of substantial renovations or because they have been built to replace demolished premises, cease to be new residential premises once they are sold or supplied by way of long-term lease as residential premises. ***[Schedule 4, item 2, subsection 40-75(1)]***

6.23 These amendments also provide that residential premises are not new residential premises if they are created from residential premises that became the subject of a 'property subdivision plan' and the residential premises were not new residential premises immediately before they became the subject of that plan ***[Schedule 4, item 5, subsection 40-75(2AA)]*** . The term ***property subdivision plan*** has been defined to mean a plan for the division of real property that is registered (however described) under an Australian law. The note to the definition explains that strata title plans and plans to subdivide land are examples of a 'property subdivision plan'. ***[Schedule 4, item 10, definition of 'property subdivision plan' in section 195-1]***

6.24 The intention of new subsection 40-75(2AA) is to clarify that the subdivision of existing residential premises that are not new residential premises does not, by itself, result in the subdivided premises being new residential premises. Subsection 40-75(2AA) will not prevent premises from being treated as new residential premises for the purposes of paragraph 40-75(1)(b) or (c) should they subsequently be substantially renovated or demolished and replaced. The premises referred to in paragraph (2AA)(a) include associated land as well as buildings.

6.25 These amendments also provide that a 'wholesale supply' of residential premises is disregarded in certain circumstances for the purposes of determining whether a subsequent supply of residential premises is a supply of new residential premises. ***[Schedule 4, item 8, subsection 40-75(2B)]***

6.26 The intention of new subsection 40-75(2B) is to ensure that certain sales of newly constructed residential premises by a developer to home buyers and investors will be taxable supplies of new residential premises even though there may have been an earlier 'wholesale supply' of the premises. The earlier supply is disregarded for the purposes of determining whether or not residential premises are new residential premises if the residential premises have been constructed pursuant to a particular arrangement (including an agreement). The particular arrangement being an arrangement between a developer or builder and a land holder, whereby the developer or builder (or an associate of the developer or builder) becomes entitled to the freehold or long-term leasehold title in the premises conditional on specified building or renovation work being undertaken by the developer or builder.

6.27 These amendments are intended to ensure that GST is payable on the full value added to premises by developers and builders.

6.28 The earlier 'wholesale supply' is also a supply of new residential premises. The consideration for the 'wholesale supply' of the residential premises includes the GST-inclusive market value of the specified building or renovation work undertaken on the land by the developer or builder prior to the transfer of the premises to the developer or builder. This is consistent with the Federal Court's approach in *Gloxinia* where it was held that the Council supplied the completed residential premises to the developer, and not just vacant land, when the title to each of the individual residential apartments was granted to the developer upon their completion of the development and construction of the residential premises.

6.29 These amendments also provide for a regulation-making power to allow for future arrangements which may result in similar unintended policy outcomes to be included in and addressed by new subsection 40-75(2B) ***[Schedule 4, item 8, subparagraph 40-75(2B)(c)(ii)]*** . Any proposed regulations would be subject to public consultation in accordance with the Government's tax design policies.

6.30 These amendments further provide that the supply of premises by a government body as a direct result of the lodgment of a property subdivision plan, for example, the grant of strata-lot leases in relation to residential premises, is disregarded for the purposes of determining whether a supply of premises is a supply of new residential premises. ***[Schedule 4, item 8, subsection 40-75(2C)]***

6.31 New subsection 40-75(2C) is intended to deal with the issue of strata titling of a long-term leasehold interest in newly constructed residential premises (which is particularly relevant in those States and Territories where land tenure is held by way of long-term leasehold, for example, the ACT). Specifically the new subsection is intended to ensure that the granting of individual strata lot leases over newly constructed residential premises upon registration of a property subdivision plan is not, by itself, sufficient to cause those premises to cease to be new residential premises and to be input taxed when they are subsequently sold or supplied by way of long-term lease. The supply that this new subsection captures is limited to the supply that a government body makes, for example, the grant of strata lot leases, as a direct result of the lodgment of a strata plan by an entity.

6.32 As noted in paragraph 6.26, the consideration for a 'wholesale supply' of residential premises under an arrangement of a kind described in new subsection 40-75(2B) includes the GST inclusive market value of the development and building works undertaken on the land by the developer or builder prior to the 'wholesale supply' being made. The developer also makes a supply of those development and building works to the land owner. The attribution rules and tax invoice requirements in Division 29 apply in relation to these respective supplies.

Example 6.18

On 1 February 2011, Government X enters into a deed with DeveloperCo for the development and sale of improved land that Government X held at 1 July 2000. The deed between Government X and DeveloperCo provides for the grant of a development lease for a period of three years. DeveloperCo is required to undertake certain development works on the land, including the construction of residential apartments, subject to the terms of the development lease. The deed between Government X and DeveloperCo provides that upon completion of the development works, Government X will transfer freehold title to the land including the development works to DeveloperCo in return for payment of $22 million.

The GST-inclusive market value of the works undertaken on the land by the developer is $220 million.

The value of the land as at 1 July 2000 was $11 million.

On 1 February 2014, the development works are completed and, in accordance with the terms of the deed, Government X transfers freehold title to the premises to DeveloperCo in return for a monetary payment of $22 million from DeveloperCo to Government X.

GST outcomes under the new law - margin scheme is applied

(i) The supply of development services by DeveloperCo and the acquisition of those development services by Government X.

In undertaking the development works on the land, under the terms of the deed and the development lease, DeveloperCo makes a taxable supply of those development works to Government X.

The consideration for the development works undertaken by DeveloperCo is the GST-inclusive market value of the freehold interest in the development transferred to DeveloperCo *less* the $22 million payment that DeveloperCo made in return for that transfer. In this case, it is accepted this amount is equivalent to the GST inclusive market value of the development works undertaken by the developer, that is, $220 million.

On the basis set out above, DeveloperCo's GST liability for its supply of the development works to Government X would be:

$$\$220 / 11 = \$20m.$$

Government X is entitled to an input tax credit for its acquisition of the development works from DeveloperCo, equivalent to the GST payable on the supply of the development works by DeveloperCo, that is, $20 million.

DeveloperCo is entitled to input tax credits on the taxable supplies it acquires to undertake the development works.

(ii) The wholesale supply of the premises to DeveloperCo on 1 February 2014.

The transfer of the freehold title to the premises to DeveloperCo on 1 February 2014 is a wholesale supply to which proposed subsection 40-75(2B) will apply.

This wholesale supply of the premises is a taxable supply.

The consideration for the wholesale supply of the premises is the $22 million paid by the developer plus the GST-inclusive market value ($220 million) of the development works that the developer undertook on the land under the terms of the deed and the development lease.

Therefore the total consideration for Government X's wholesale supply of the premises is $242 million.

Government X's GST liability on its wholesale supply of the premises under the margin scheme is:

```
$242m - $11m / 11 = $21m.
```

(iii) The developer's acquisition of the completed development and subsequent sale of residential premises to home buyers and investors.

The developer will not be entitled to an input tax credit for its acquisition of the completed development from Government X because it was supplied to the developer under the margin scheme (section 75-20).

The developer's sale of the residential apartments constructed under the development lease arrangement will be taxable supplies of new residential premises.

The developer will be liable for GST on its supplies of the residential apartments to home buyers and investors.

Where the margin scheme is applied, the GST liability applicable to the sale of each individual apartment will be equal to:

```
(the sale price of the apartment - the applicable proportion of the $242m
consideration that the developer provided for the entire development) / 11.
```

GST outcomes under the new law - the margin scheme is not applied

The GST outcomes will be the same if the margin scheme is not applied, except that:

> Government X's GST liability on its wholesale supply of the completed premises to DeveloperCo will be calculated on the entire consideration received:
>
> ```
> $242m / 11 = $22m
> ```
>
> DeveloperCo will be entitled to an input tax credit of $22 million for its acquisition of the completed premises from Government X.
>
> DeveloperCo's GST liability on the sale of individual residential apartments to home buyers and investors will be calculated as 1/11 of the entire sale price for each apartment.

Annexure 3

Overview of Qld duty

Under the Duties Act 2001 (Qld) (Act), transfer duty is imposed on *"dutiable transactions",* as relevantly defined in Section 9:

> *9 What is a dutiable transaction*
>
> *(1) Each of the following is a dutiable transaction—*
>
> > *(a) a transfer of dutiable property;*
> >
> > *(b) an agreement for the transfer of dutiable property, whether conditional or not;*
> >
> > *…*
> >
> > *(f) an acquisition of a new right on its creation, grant or issue;*
>
> *…*
>
> *(2) It does not matter whether a dutiable transaction—*
>
> *(a) is effected by an instrument or another way; or*
>
> *(b) involves 1 or more parties.*

A dutiable transaction also includes at para (d) a vesting by statute or Court Order.

"Dutiable property" is then explained in Section.10 as follows:

> *What is dutiable property*
>
> *(1) Each of the following is dutiable property—*
>
> > *(a) land in Queensland;*
> >
> > *(b) a transferable site area;*
> >
> > *(c) an existing right;*
> >
> > *(d) a Queensland business asset;*
> >
> > *(e) a chattel in Queensland.*

While *"land"* includes an estate or interest in land, it does **not** include mere contractual rights.

The duty payable on a dutiable transaction is the *"dutiable value"* as per Section 11 of the Act. Relevantly, that reads:

> *(4) The **dutiable value** of a dutiable transaction that is the acquisition of a new right that is a lease of land in Queensland is the total of any of the following amounts payable for the lease-*
>
> > *(a) premiums, fines or other consideration payable for the grant of the lease;*
> >
> > *(b) consideration paid for, or the value of, any moveable chattels taken over by the lessee from the lessor or outgoing lessee;*

(c) if, on the leased premises, a business is to be carried on and an amount in excess of what would be the rent if a business was not carried on is charged for the lease—the excess amount.

…

*(7) Subject to section 48, the **dutiable value** of another dutiable transaction is:*

(a) the consideration for the dutiable transaction; or

(b) the unencumbered value of the dutiable property or new right the subject of the transaction if—

(i) there is no consideration for the transaction; or

(ii) the consideration can not be ascertained when the liability for transfer duty arises; or

(iii) the unencumbered value is greater than the consideration for the transaction.

Section 11 is subject to Section 14(4):

If, before a dutiable transaction mentioned in section 9(1)(a), (b) or (d) for which the dutiable property is land, improvements are made to the land at the transferee's expense, the unencumbered value of the land must be determined as if the improvements had not been made.