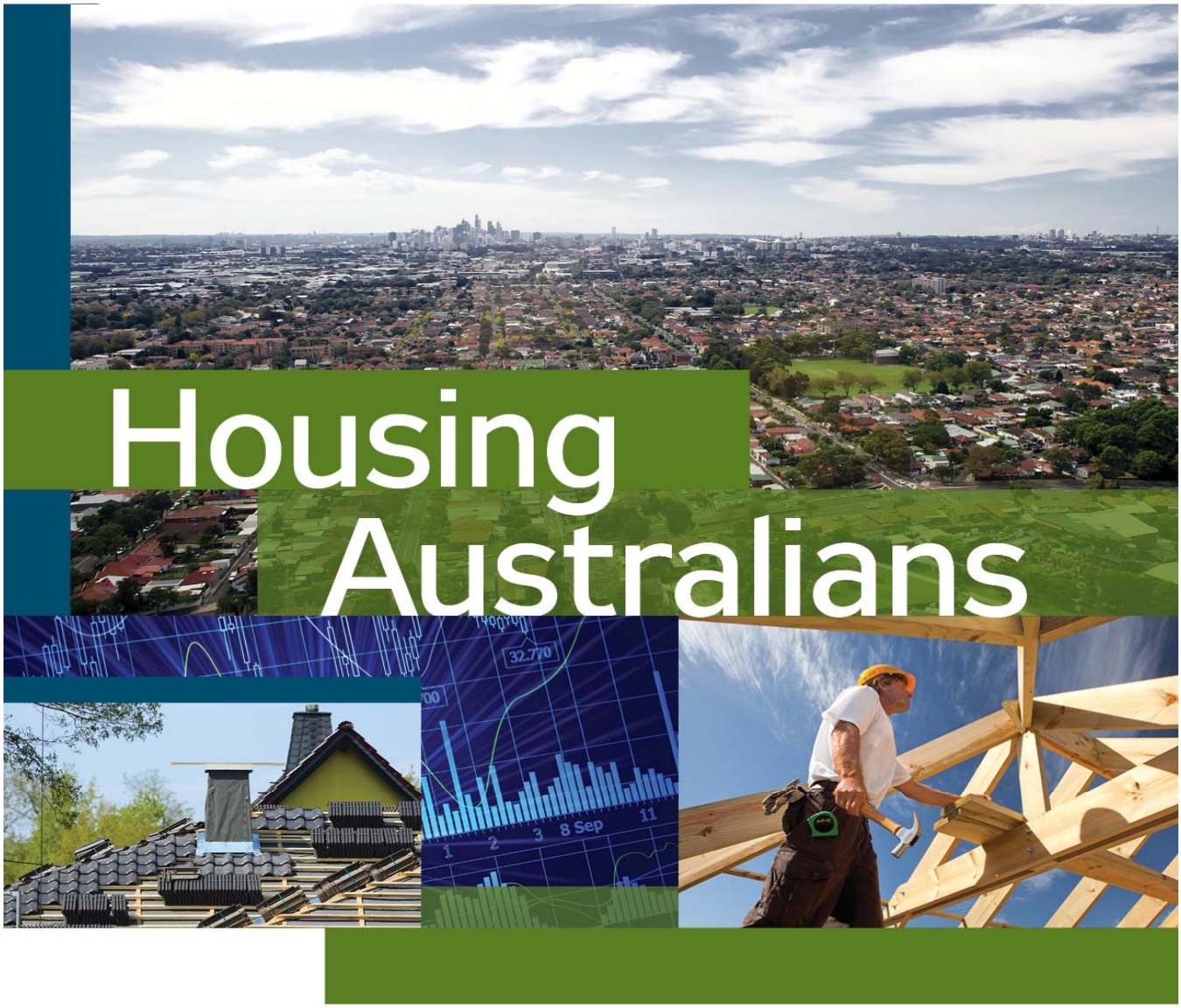
HOUSING INDUSTRY ASSOCIATION



Submission to Treasury

in response to the

Treasury Laws Amendment (Measures No. 9) Bill 2017: TSY/45/248 5 Real property transactions

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1. INTRODUCTION

HIA welcomes the opportunity to provide comments in response to the exposure draft *Treasury Laws Amendment (Measures No. 9) Bill 2017: TSY/45/248 5 Real property transactions*.

HIA does not support the Bill. If enacted it would add cost, red tape and further complexity to thousands of building projects each year, including every house, town house or apartment purchased off-the-plan.

According to the Explanatory memorandum, the Bill is a response to the practice of 'corporate phoenixing' by some developers in the construction industry who collect GST at settlement but dissolve or liquidate their business before their next Business Activity Statement (BAS) lodgement is due to avoid remitting the GST.

The Bill purports to solve this problem by requiring that all purchasers of "new residential premises" and "potential residential land" (subdivided residential lots) would be required to withhold GST from the purchase price and pay this amount directly to the ATO on settlement.

The Government's broad policy intent to reduce the non-payment of GST by phoenix operators in the industry is laudable and supported by HIA. Individuals who hide behind the shield of a company without any intention of paying their debts, erode the confidence of consumers and put legitimate and responsible businesses that comply with their obligations at a competitive disadvantage.

Regrettably, this Bill is not a fair or measured response to this problem or the problem of tax avoidance.

The Bill bluntly targets every residential property development rather than dishonest and unscrupulous operators. Such an approach does not "even the playing field". It penalises everyone, including future homeowners.

Requiring, under threat of financial penalty of up to $21,000, that all purchasers of new residential property become the Australian Tax Office's (unpaid) agent on settlement imposes new risks and burdens on ordinary mums and dads. May's Federal Budget papers suggest that most purchasers should experience "minimal impact" from the changes. This overlooks the reality that the Bill adds unnecessary confusion to the conveyance process, particularly for those who are self-represented in the process.

Further, the Bill will have adverse cashflow implications for many small homebuilders undertaking small subdivisions and constructing on a speculative basis. There is no protection or release from liability for vendors if the GST is subsequently not paid or remitted to the ATO after settlement.

In the event the Bill advances, HIA recommends that the following amendments be made to improve the operation, fairness and workability of the legislation. HIA elaborates on these matters in below.

- Providing an exemption for vendors and developers who have an established record of compliance
- Requiring that GST is paid at settlement on the original (contract) purchase price only
- Releasing vendors of their liability once settlement has occurred
- Better clarifying the timing of paying GST after settlement
- Deleting unnecessary vendor and purchaser notice requirements
- Introducing a GST clearance mechanism similar to operation of land tax clearances in NSW.

2. SPECIFIC COMMENTS & RECOMMENDATIONS

2.1 EXEMPTION FOR DEVELOPERS AND VENDORS WITH A GOOD GST COMPLIANCE HISTORY

In the *Combatting Illegal Phoenixing* consultation paper released by Treasury in September 2017, the Government proposed that a different approach to targeting phoenix operators be applied to high-risk entities (HRE) and high-risk phoenix operators (HRPO).

As this a sensible model that enables regulators to target their efforts at unscrupulous operators, HIA is confused why a similar approach is not being adopted in this Bill.

The motivation for the Bill is to prevent the loss of GST revenue due to "phoenix" operators, yet the proposed provisions would apply to all developers selling new residential premises or potentially residential land.

This includes small builders who construct and develop a one-off home on a speculative basis and the many residential developers who have been running compliant and lawful operations for many years. Neither they nor their clients should be subject to the new and onerous obligations imposed under the Bill.

HIA recommends that residential developers and vendors with a good GST compliance history should be exempt.

2.2 THE VENDOR SHOULD BE RELEASED FROM LIABILITY FOR THE GST AT SETTLEMENT

Not only will the withholding measures have adverse cash flow impact on vendors, under the Bill the vendor remains liable for payment of the GST after settlement has occurred.

The express legislative obligation on purchasers to remit the GST still does not give certainty to vendors that any withheld GST has in fact been remitted to the ATO. Once settlement has occurred, vendors will have no control over what happens. Such matters are solely in control of the purchaser and it is simplistic to assume that all purchasers will automatically comply with their obligations and that fraud, mistakes and avoidance will not occur.

The purchaser is, in effect, the ATO's agent at settlement, so the ATO should carry the risk once settlement has occurred. The provisions should be based on the assumption that if settlement occurs, the vendor has rightly advised what GST liability exists and confirmed with the purchaser that the payment must be remitted.

HIA recommends that the Bill be amended to ensure that vendors are released from their GST liability once settlement has occurred and the required funds in favour of the ATO have been accounted for at settlement.

2.3 REMOVE THE REQUIREMENT THAT VENDORS ISSUE A NOTICE TO PURCHASERS IN ADVANCE OF SETTLEMENT

Paragraph 1 of the Bill proposes a new section 14-255 of the *Taxation Administration Act*, by which vendors, under threat of penalty, must issue a notice to purchasers at least 14 days prior to settlement advising whether the purchaser must withhold. If a withholding is required, the notice must include details about the vendor (name and ABN), the amount to be withheld and the date the amount must be paid to the ATO.

This notice requirement will be unworkable in many cases.

It is standard conveyance practice for the contract price to be adjusted on settlement to take into account amounts such as land tax, water rates and council rates. In many cases these adjustments will not be known until much closer to the date of settlement (generally 24 - 48 hours).

Further for new residential premises constructed on a "off-the-plan" basis, construction may be completed, title issued and the property inspected by the purchaser within this 14 day window. It is not uncommon for commercial adjustments to the purchase price to be made subsequent to construction and following inspection by the purchaser.

HIA recommends:

- The notice requirement be deleted
- Alternatively, the 14 day timeframe be deleted.
- Alternatively, the notice should be able to be issued (and GST paid) on the contract price only, before adjustments are applied.

2.4 DUE DATE FOR PAYMENT

Paragraph 1 of the Bill requires that the GST must be paid on or by the day of supply.

Unless the Commissioner issues a determination under subsection 6 setting out the circumstances under which amounts are paid, at face value, many purchasers will be unable to comply with this obligation.

Despite the increase in electronic conveyances, most traditional conveyances still require the exchange of bank cheques. In some cases, it is not possible to bank cheques on the day of settlement. Further, it is unknown what the ATO's specific requirement will be relating to the banking of GST monies.

HIA recommends that the Bill be amended to enable the GST to be paid and remitted to the ATO within a reasonably period after the date of supply.

2.5 DELETE THE REQUIREMENT THAT PURCHASERS MUST ISSUE TWO NOTICES TO THE ATO

In addition to imposing a withholding obligation on purchasers, paragraph 20 of the Bill provides that purchasers must notify the ATO twice:

- Firstly, at least five days prior to the withholding payment (i.e. at least five days prior to settlement).
- Secondly, on the settlement date when the withheld amount is paid.

These measures add unnecessary red tape.

The vendor's BAS statement will already notify the ATO of the transaction and the relevant state revenue and titles and land registry agencies will have details of all the settlements that have taken place. This information could simply be shared with the ATO rather than imposing costly new obligations on purchasers.

In addition, as highlighted in relation to correctly setting the amount payable, the purchaser may not have an accurate calculation of the GST amount.

HIA recommends that the proposed amendment to section 16-150 of the TAA be deleted from the Bill.

2.6 REDUCE THE PROPOSED PENALTIES

A purchaser who fails to pay the GST on the day of settlement faces potential administrative penalties of up to $21,000 under the Bill.

This is excessive given that in most cases the purchasers will receive little to no benefit from holding onto moneys that should have been paid to the Tax Commissioner. The purchaser is a home buyer who in the normal course of events will have few dealings with the ATO and be unaware of the legal implications of non-payment of the GST or of directing their legal advisors in making necessary payments. The penalty amount is excessive and in falling to the purchaser, is misplaced and has no relevance to the concept of preventing withholding by phoenixing companies.

The Bill also provides that failure to issue the vendor's notice is a strict liability offence with potential penalties of up to $21,000. This is also excessive and should be reviewed.

HIA recommends that the penalties set out in the Bill be reviewed.

2.7 THE WITHHOLDING OBLIGATION IS CONFUSING FOR MARGIN SCHEME SALES

The Bill requires that the purchaser will be required to withhold and remit 1/11th of the purchase price to the ATO.

This is likely to confuse the operation of the margin scheme for those residential developers and vendors who intend to apply it.

The application of the margin scheme is an important issue and may be an important factor in determining the purchase price for the property. Currently under the GST Act a taxpayer must choose to apply the margin scheme at or before making the supply of real property. By imposing a withholding obligation based on 1/11th of the purchase price, this election may now be unclear.

Whilst section 18-85 provides for a refund mechanism for suppliers who account on quarterly tax periods and make sales under the margin scheme, developers who report GST monthly will not be able to use the refund mechanism and are solely reliant on credits via their BAS statement. This will exacerbate cash flow issues for property developers.

2.8 ALTERNATIVE APPROACH

An alternative mechanism for collecting the GST from new residential property and land transactions could involve the GST being payable on the initial purchase price with this amount operating as a statutory charge on the land in favour of the ATO. This reflects the treatment of land tax in NSW.

This ensures that the ATO will eventually be paid most if not all of the GST. Any additional GST payable on contract price adjustments could be dealt with within the normal BAS return process.

Using this approach would require the purchaser's solicitor to apply for a GST certificate as part of the usual conveyancing ,searches and enquiries. The ATO then issue the certificate (free of charge) showing the amount payable on the land.

The purchaser, or their solicitor, serves it on the vendor's solicitor with the requirement that it be cleared at or by settlement, ordinarily as part of the purchase price being directed to payment of the debt at completion. If paid at settlement then an electronic receipt for the amount or production of a cheque in favour of the ATO on the certificate would be deemed to be a clearance.

The purchaser would therefore do a final search on the day of settlement to confirm it had not changed etc. the purchaser is "incentivised" to ensure payment as the GST debt attaches to the land.

This approach would remove the need for multiple notices to the ATO and between the parties.

Good GST payers with a proven history of compliance or those vendors with large land holdings could be cleared without prepayment as the ATO has the security of a charge over the whole of their subdivision or development.

3. CONCLUSION

HIA's primary submission is that the Bill should not proceed.

The Bill, as drafted, is not a fair, sensible or measured response to the problem of phoenixing and non-payment of GST by some recalcitrant operators in the residential development industry.

In addition to requiring that purchasers collect and remit GST at every new residential land or property settlement, if enacted, the Bill would generate tens of thousands of additional red tape each year.

In the event the Bill advances, HIA recommends that a number of amendments must be made to improve its operation and better balance the different policy objectives. These include:

- Better clarifying the timing of paying GST after settlement
- Providing a release for vendors once settlement has occurred
- Deleting unnecessary vendor and purchaser notice requirements
- Empting vendors and developers who have an established record of compliance

The Bill does not offer sufficient details in relation to how the ATO will manage the remittance of these payments, how the ATO will participate in the conveyancing process or how purchasers will manage these payments. Given the short lead time until 1 July 2018 and the expectation that the changes will apply to many transactions already entered into, it is critical that the ATO commence industry consultation. This process should involve the development of guidance material to ensure the administrative burden on both vendors and purchasers, should these changes proceed in this form, is not excessive.