Queensland Law Society

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Office of the President

20 November 2017

Your ref GST Property reforms

Our ref WD Property

Manager
Indirect Taxes and Not-for-profit Unit
Individuals and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: GSTProperty@Treasury.gov.au

Dear Manager

Comments on exposure draft of Treasury Laws Amendment (2017 Measures No.9) Bill 2017: TSY/45/248 Real Property Transactions – amendments to GST on Property Transactions

Thank you for the opportunity to comment on the exposure draft of the Treasury Laws Amendment (2017 Measures No.9) Bill 2017: TSY/45/248 Real Property Transactions.

Queensland Law Society appreciates being consulted on this important legislative change.

The Queensland Law Society (QLS) is the peak professional body for the State's legal practitioners. We represent and promote nearly 12,000 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.

Our policy committees and working groups are the engine rooms for the Society's policy and advocacy to government. The Society, in carrying out its central ethos of advocating for good law and good lawyers, endeavours to ensure that its committees and working groups comprise members across a range of professional backgrounds and expertise. In doing so, the Society achieves its objective of proffering views which are truly representative of the legal profession on key issues affecting practitioners in Queensland and the industries in which they practise. This furthers the Society's profile as an honest, independent broker delivering balanced, evidence-based comment on matters which impact not only our members, but also the broader Queensland community.

Consultation timeframe is inadequate

QLS notes that the 2 week timeframe for consultation is extremely short for such a significant amendment to the GST framework. Consequently the response period has not allowed for a comprehensive review of the exposure draft. It is possible that there are issues relating to fundamental legislative principles or unintended drafting consequences which we have not identified.

Summary

QLS is not supportive of the approach adopted in the draft legislation on a number of grounds.

In addition some of the drafting is unclear or impractical and is likely to lead to disputes between sellers, buyers and their lawyers.

Additional Burden and Risk for Practitioners

Firstly, QLS is particularly concerned at the increasing burden being placed on practitioners who are acting in conveyancing transactions. In the last two years, in addition to increased administrative work required by State governments, practitioners have been faced with:

- Reporting requirements regarding the foreign residents capital gains withholding;
- Significant additional data collection and reporting requirements on property transfers to the ATO (via the Office of State Revenue);
- Proposed new reporting and payment requirements for GST.

There are also significant bureaucratic regulatory requirements for practitioners transacting in PEXA which has been mandated in a number of States.

Each of the new regimes has been introduced in an uncoordinated manner and has introduced considerable inefficiencies and red tape into the conveyancing process. The regimes require repeated and multiple data entry (as the ATO requires its own portals to be used and thus prevents the much more efficient production of forms using conveyancing software), where applicable require practitioner's staff to be immediately dispatched to a bank in order to make the required payments and require considerable additional time gathering information from clients in order to fulfil these requirements.

Property conveyancing is an extremely competitive, low margin area of legal practice and is becoming increasingly so due to new technology. The continuous shifting of administrative burden and risk onto practitioners will ultimately result in increased cost to consumers and/or business failure (noting that the majority of legal practices in Queensland are small businesses).

Fundamental alteration of conveyancing process and GST framework

The effect of this proposal is that every buyer of "new residential premises" or certain "potential residential land" must retain and remit 1/11th of the purchase price to the Australian Taxation Office (**ATO**).

This means that at settlement, if an online electronic platform is not used, the buyer will retain a cheque in payment of the GST amount and the seller must rely on the buyer to deliver that cheque to the ATO.

The exposure draft and explanatory materials also indicate that the seller does not obtain a credit for remitting the GST unless the buyer actually pays the GST to the ATO.

QLS considers that this approach is contrary to usual conveyancing practice (whereby the purchaser does not obtain title to the property without paying the full purchase price to the seller) and unnecessarily exposes developers to fraud. There is no requirement (absent a contractual provision) for a buyer to provide evidence that they have sufficient funds to pay the GST withholding following settlement.

Even if the ATO intends adopting a practice of pursuing buyers for the payment, this may take some time and in some cases may not be successful. In the meantime the seller will be required to pay the relevant GST and will therefore be out of pocket.

QLS is aware that comparisons have been drawn with the practice of buyers' solicitors retaining cheques for unpaid rates or land tax and giving undertakings to remit the amount to the relevant authority. In these cases the amounts are usually only one or two thousand dollars, if that. The GST to be withheld is likely to be significantly more. In addition, not all buyers will engage a solicitor. The risk is greatly increased if there is a self-acting buyer.

Further, it is noted comparisons have been drawn with the FRCGT withholding framework. However the withholding obligation only arises in relation to a small proportion of sales whereas this process will affect every sale by a property developer.

Proposed alternative approach – statutory charge

QLS believes a much fairer and more efficient approach would be for the legislation to provide:

- the seller notifies the ATO prior to settlement that a series of withholdings are intended to be made by buyers (in such a way that multiple sales may be notified at once, for example in an Excel spreadsheet containing details of buyers, lot numbers, price and amount withheld);
- the ATO issues payment reference numbers to the seller which may be passed on to the buyers;
- the buyer provides the reference number with the payment (no further notification requirement);
- the seller is entitled to a credit for the amount withheld (in the event of a dispute, the seller would need to prove that the payment was retained by the buyer);
- the Commissioner receives the benefit of a statutory charge over the property until the payment is received by the ATO.

Impracticality of Seller Notice Requirement

Regardless of whether the suggested approach is adopted, the requirement for the seller to give notice to the buyer of the withholding obligation at least 14 days prior to settlement cannot be complied with unless the normal settlement timeframe is extended (typically

Queensland legislation permits a seller to require settlement 14 days after the buyer is given notice of titles issuing). This is because, unlike the FRCGWT, the amount of the withholding is calculated based on the adjusted purchase price rather than the contract price. Adjustments would typically not be calculated until after the first body corporate meeting is held and the levies are struck, usually around 7 days after issue of the title.

Any forced delay in the usual settlement period would have considerable cost implications for developers (in terms of additional interest payments) which is ultimately likely to be passed on to buyers.

Therefore the notice requirement should be reduced to 7 days or the withholding amount should be based on the contract price (the latter solution would appear to the QLS to be preferable as it will enable the withholding obligation to be notified at the time the contract is entered into).

Drafting clarification required – transactions to which the withholding obligations apply

There are several issues with the drafting of proposed section 14-250(2) which result in uncertainty as to its application (and in fact seem to contradict the stated aims of the legislation).

Potential residential land"

The definition of "potential residential land" is not appropriate, at least in the context of Queensland Planning legislation, which will lead to the withholding requirement extending far wider than intended. The term means "land that is permissible to use for residential purposes, but that does not contain any buildings that are residential premises."

Very few uses are "prohibited" under Queensland planning laws, which would mean that potentially any land is "permissible for residential use" subject to obtaining the necessary approval.

As an example, the majority of the Brisbane Central Brisbane District is zoned "Principal Centre Zone". Within this zone, a multiple dwelling complex is 'code assessable' if it is proposed to contain no more than the number of storeys and building height specified in the relevant neighbourhood plan. A near new commercial building, as it does not contain any residential premises, would therefore fall within the definition of "potential residential land" in Queensland. Clearly this is not intended.

Not previously been sold

Proposed section 14-250(2)(b)(ii) also refers to land that "has not previously been sold as potential residential land ...".

It is unclear whether land is first "sold" when settlement occurs or if it is first sold when a contract is entered into, even if that contract is terminated prior to completion (whether because a buyer exercises "cooling off rights", a condition such as a "subject to finance clause" is not satisfied or the buyer defaults).

This drafting needs to be reconsidered.

"property subdivision plan"

The withholding obligation applies to:

> "(b) *potential residential land that:
>
> (i) is included in a *property subdivision plan ...."

The concept of "property subdivision plan" is defined as:

> "a plan:
>
> (a) for the division of *real property; and
>
> (b) that is registered (however described) under an *Australian law."

The Explanatory Materials say it is intended to apply to "a new subdivision of potential residential land".

However the definition refers to a plan that is registered not a plan that is proposed to be registered.

This wording has two possible interpretations:

- It only applies to the sale of a residential lot after the plan has registered (ie excludes an off the plan sale) which is the opposite of what we understand is intended; or
- It applies to all potential residential land (existing lots and proposed lots because even proposed lots are part of a larger parcel which is identified in a registered survey plan) which would make paragraph (i) redundant.

Proposed alternative approach - simplify to apply only to "off the plan" apartment and land subdivisions

QLS believes that the objective of the legislation could be largely achieved by requiring the withholding to apply to all "off the plan" sales of residential apartments or land intended for residential use where a taxable supply is being made. An "off the plan" sale would generally be the sale of a proposed lot intended to be used or developed for residential purposes. A "proposed lot" is "a lot intended to come into existence upon registration of a Subdivision Plan".

If the framework is amended to remove grey areas like "substantially refurbished" houses and "never previously been sold", the objectives of this legislation will still largely be achieved with a simpler framework

Margin scheme

This proposed process will create a significant and burdensome cash flow issue for developers.

QLS believes there should be an ability to obtain a variation notice similar to the FRCGT system, whereby the developer can satisfy the ATO that their liability will be (for example) no

more than "x%" of the purchase price. The ATO can then issue a variation certificate which can be used to advise the buyers of the rate of withholding for a specified development.

Transitional period

The transitional period proposed is not long enough for many developments. There are contracts already in place which will not settle until well after 2020. A longer period must be allowed which takes account of a typical development application, construction and sale process for larger developments (which is likely to be 4 – 5 years).

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

Yours faithfully

Christopher Coyne
Vice President