

Treasury Laws Amendment (2017 Measures No. 9) Bill 2017
 Exposure Draft – 17 November 2017

Issues Register

Issue No.	Issue Description	Bill Clause Number	TAA 1953, Schedule 1 Reference	Impact on Taxpayers/Queries	Possible Solution
1	<p>Recipients are exposed if suppliers fail to issue a notice confirming that a GST amount is payable under the withholding regime. Recipient liable to penalty equal to withholding amount and also remains liable for GST amount as well?</p>	1	16-30	<p>Drafting needs to protect purchasers from vendors who deliberately or inadvertently fail to issue notices or who issue notices with incorrect details, in particular, as draft section 14-250 says purchasers must pay an amount (irrespective of whether a notice is received unless the purchaser reasonably expects the property is not new residential).</p> <p>As currently drafted, a purchaser that in good faith relies on a vendor’s certificate and therefore doesn’t remit the GST withheld amount appears to continue to have the obligation to pay that amount to the ATO where it is subsequently determined that the purchaser should have paid an amount (despite the fact that it would already have paid the GST component to the vendor and therefore no longer has access to the funds). Draft section 16-30 only appears to remove the penalty, not the purchaser’s primary liability.</p>	<p>The provisions should make it clear that a recipient has an absolute liability to pay 1/11th of the price to the Commissioner unless the recipient receives a notice from the supplier stating that the recipient is not required to pay or is required to pay a lesser amount. In the absence of having information which clearly indicates otherwise, recipients should have an absolute entitlement to reasonably rely on a notice received.</p>

2	If a supply is made under the margin scheme, the recipient must still withhold and pay to the ATO 1/11 th of the price.	3	18-85	<p>Significant cash flow impact on developers. They will have to fund the difference until the refund is received. Likely to impact external finance arrangements. Monthly BAS lodgers cannot apply in advance for a refund, so will be forced to fund difference until BAS has been processed and refund has been issued by the ATO.</p> <p>Also, GST may be less than 1/11th of the purchase price for other reasons, eg where an option fee has been paid or where there has been a partition.</p>	<p>To lessen the cash flow impact on residential developers, there should be an option for suppliers to notify recipients of the correct GST liability under the margin scheme, which would then allow the recipient to withhold and pay the correct amount to the ATO.</p> <p>Alternatively, provide a different withholding rate that applies to supplies under the margin scheme or allow the vendor to apply to the Commissioner to vary the withholding rate (similar to section 14-235 of the <i>Taxation Administration Act 1953</i> (Cth) (TAA) for the foreign resident capital gains withholding measure).</p>
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3	Recipient must pay the required amount to the ATO	1	14-250	<p>There are numerous issues here:</p> <ul style="list-style-type: none"> • Recipient withholds but fails to pay the amount to the ATO – how does the supplier recover the amount withheld? • What happens if the vendor and purchaser are not using an electronic conveyancing system? – this will likely lead to disputes, particularly as the vendor only 	<p>The Commissioner should have the ability to issue determinations as to which entity / person(s) are entitled to issue certificates under section 14-255, pay GST withheld amounts under section 14-250 and lodge notifications under section 16-150.</p> <p>Per our discussions with Treasury and the ATO on 10 November 2017, we understand that some of these</p>
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				Is draft section 14-250(4) necessary in circumstances where draft section 14-250(1) only applies to taxable supplies and sections 48-40 and 51-30 of the GST Act already indicate that the supplies specified in section 14-250(4) are treated as though they are not taxable supplies?	
4	Recipient must pay 1/11 th of the price	1 and 20	14-250(7)	Price for GST purposes includes settlement adjustments. Supplier won't generally know these 14 days before settlement. For the same reasons, the purchaser may not know the price 5 days before settlement when they are required to give their notice and therefore is unlikely to comply with section 16-150(2).	Allow supplier notification and recipient payment to be based on consideration as known at the supplier notification date. 'True up' will occur as part of BAS lodgement process.
5	Recipient can determine reduced amount in case of mixed supplies	1	14-250(8)	If supplier gives notification of payment amount equal to 1/11 th of price but recipient determines an incorrect reduced amount based on their view of transaction, who will be penalised? May give rise to disputes between vendors and purchasers where one party considers a reduced amount is payable but the other disagrees	See 1 above. Recipient should have an absolute liability to pay 1/11 th of the price unless the recipient receives a notice from the supplier stating that the recipient is required to pay a lesser amount. Recipient should be able to rely on supplier's notification unless it has information which clearly indicates otherwise
6	Applies to supplies of 'potential residential land'	1	14-250(2)	Is the regime intended to apply to supplies of 'potential residential land' between	Exclude B2B supplies from operation of regime

				developers, prior to the supply to the consumer?	
7	Supplier required to provide written notice to recipient at least 14 days 'before making the supply'	1	14-255(1)	<p>No time of supply rules in GST Act, just a ruling for standard land contracts. Recipient must pay ATO on or before date any of the consideration is first provided. If the consideration is payable in instalments, when is the supplier required to provide the written notice to the recipient? When is the supply made?</p> <p>If there are multiple recipients or a nominee, who does the supplier notify?</p> <p>What about settlement adjustments?</p> <p>What about urgent settlements? What will occur in the situation where 14 days' notice cannot be satisfied – eg where there is an on-sale with 14 days of the original settlement? Similarly – what if the purchaser cannot provide 5 days' notice to the ATO?</p>	Require the supplier to provide written notice to the recipient at least 14 days before any of the consideration is first payable or to be provided. This will line up the supplier notice requirement with the recipient's payment obligation. Allow the notice to be included in the contract for sale.
8	Supplier entitled to BAS credit for GST amount paid by recipient, but only once GST amount has been remitted by recipient to ATO	3	18-60	<p>When the supplier lodges their BAAS, how will they know whether the GST amount has been paid by the recipient?</p> <p>How will the credit be recorded on BAS? New box? Adjustments Box? Manual addition?</p>	Under the ATO's proposed payment mechanism, both the supplier and the recipient are to receive an "instant" electronic receipt for the amount paid by the recipient.

9	GST Groups	3	18-60	If the supplier is a member of a GST group, should the credit be claimed by the representative member of the GST group or the supplier?	The credit should be claimed by the representative member if the supplier is a member of a GST group.
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10	Commissioner's refund request review power	3	18-85(4)	In circumstances where Commissioner is satisfied that paragraphs (1)(a) and (b) apply, why is there an additional requirement for the Commissioner to be satisfied that payment of the refund is "fair and reasonable"? If the Commissioner is satisfied that the margin scheme applies or there was an error, and is satisfied as to the likely accuracy of the information (s 18-85(4)(d)), the refund should be paid. What is s 18-85(4)(b) is intended to achieve?	
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11	Liability to account to vendor	1.157 EM	16-20	EM at paragraph 1.157 says that under section 16-20 TAA, the paying entity is discharged under the tax law from liability to pay an amount to the vendor. A specific subsection dealing with this like section 16-20(2) that was inserted to coincide with the non-resident CGT withholding rules under Subdivision 14-D in 2016 would be preferred (given the similarity between Subdivisions 14-D and 14-E).	Insert new section 16-20(3) based upon section 16-20(2)
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12	Timing of payment	1	14-250(5)	The ATO should confirm, as with the non-resident CGT withholding rules, that it “will allow a short period after settlement to receive payment before imposing general interest charges and initiating recovery action”	
13	Transitional rules – sunset date of 1 July 2020 for contracts entered into prior to 1 July 2018	24		<p>Why a sunset period of only 2 years? What about existing contracts executed prior to the release of the Exposure Draft where consideration will not first be provided until on or after 1 July 2020? How will the recipient reconcile their contractual obligation to pay the full price to the supplier with their statutory obligation to withhold and pay the ATO?</p> <p>Under clause 24(b), it appears that if a contract is entered into before 1 July 2018 and the consideration (other than a deposit) is provided on or after 1 July 2020, the notification requirements (in respect of the vendor) in draft section 14-255 do not apply. What does this mean for the corresponding purchasers? Are they still required to withhold an amount under draft section 14-250(1) without the benefit of the vendor’s notice?</p>	Extend the sunset period or provide a protection to the recipient similar to the protection provided under clause 25 in respect of PDAs
14	Transitional rules - PDAs	25		Provisions don't work – no 'distribution' of GST if property held by one party. They keep their own money as opposed to paying for development services provided	<p>Possible solutions:</p> <ol style="list-style-type: none"> 1. Exclude PDA arrangements from the measure;

				by the other party. Language doesn't help when parties trying to avoid forming a tax law partnership. Also very broad to say contractual liability is discharged	<ol style="list-style-type: none"> 2. Include a clearance certificate for PDA arrangements 3. Allow the credit to be applied to the Developer
15	Deposit	1	14-250(5)	The section refers to "(other than consideration provided as a deposit)". Is this intended to reference deposits under Division 99 of the GST Act? The ATO adopts a strict view of a deposit, for example, any deposit of more than 10% would normally trigger the vendor's GST liability on the full GST amount. How is this scenario to be dealt with under the Exposure Draft? The purchaser will not have the funds to pay the GST withheld amount at the same time as the deposit. The vendor will need to remit the GST at this time, but will not receive the credit until settlement.	The withholding regime should not apply where the vendor's GST liability is triggered by the deposit. The vendor could be required to provide a notice to the purchaser and the ATO at this time to ensure compliance.
16	Reasonable belief defences	1 / 2	14-255(5) / 16-30(2)	These sections only apply where the entity reasonably believes the premises not to be new residential premises. These defences are too narrow. Section 14-250(1) applies to a taxable supply to which section 14-250(2) applies. There are legitimate reasons why the premises could be new residential premises, but not taxable. For example, if the vendor is not required to be registered for GST or the property is sold as a GST-free going concern.	Sections 14-255(5) and 16-30(2) should refer to a reasonable belief that the sale is not a taxable supply.

17	General exemption for developers at low risk of engaging in phoenixing activities.			The taxpayers being targeted by these provisions are a small percentage of developers. The draft rules will result in significant compliance costs and cash flow implications for developers that are not engaged in phoenix activity.	Specific exemption for taxpayers with a good compliance history.
18	Change in zoning of the property			If land was initially zoned non-residential as at the time of entering into the contract, but at settlement the zoning had changed to allow some form of residential development would the withholding apply? Some situations where this could apply – farmland zoning changing to residential; industrial zoning changing to mixed use.	