



# Draft Goods and Services Tax Determination

## Goods and services tax: development works in the Australian Capital Territory

### **1 Relying on this draft Ruling**

This publication is a draft for public comment. It represents the Commissioner's preliminary view on how a relevant provision could apply.

If this draft Ruling applies to you and you rely on it reasonably and in good faith, you will not have to pay any interest or penalties in respect of the matters covered, if this draft Ruling turns out to be incorrect and you underpay your tax as a result. However, you may still have to pay the correct amount of tax.

### **What this draft Determination is about**

1. This draft Determination<sup>1</sup> provides advice on the goods and services tax (GST) treatment of arrangements between government agencies and private developers (developers) in the context of the development of land in the Australian Capital Territory (ACT). In particular, this Determination considers whether 'building works' and 'associated site works'<sup>2</sup> carried out by developers on land they have acquired under a long-term<sup>3</sup> Crown lease (Crown lease), are non-monetary consideration for the supply of that lease by a government agency<sup>4</sup> (on behalf of the Commonwealth Government).

2. A Crown lease that is automatically renewable is the most extensive interest that can be held in the ACT, with the Commonwealth holding the reversion.<sup>5</sup>

3. The arrangements considered in this Determination (building arrangements) typically have the following features:

- A developer enters into a contract for sale (contract) with a government agency to acquire a Crown lease over land in the ACT for a monetary purchase price.
- On completion of the contract (that is, once the developer has paid the full monetary purchase price to the government agency), a government agency is required to grant the Crown lease to the developer.

<sup>1</sup> All further references to 'this Determination' refer to the Determination as it will read when finalised. Note that this Determination will not take effect until finalised.

<sup>2</sup> See paragraph 3 of this Determination for an explanation of the terms 'building works' and 'associated site works'.

<sup>3</sup> A long-term Crown lease is a lease for at least 50 years. Generally in the ACT a Crown lease is issued for 99 years.

<sup>4</sup> A government agency is an authority of the ACT Government.

<sup>5</sup> Subsection 29(3) of the *Australian Capital Territory (Planning and Land Management Act) 1998*.

- The contract is contingent upon the developer entering into a project delivery agreement (PDA) with a government agency prior to or at the same time of entering into the contract.
- The Crown lease and the PDA provide that the developer must complete building works within a specified time period, for example, within 48 months from the date of the commencement of the Crown lease.
- In relation to works, the PDA typically provides for:
  - the developer to complete building works on land subject to a Crown lease. These building works can include the erection of an approved development on the land (for example, residential buildings) in accordance with plans and specifications the developer prepared and previously submitted to a government agency for approval in writing
  - the developer to undertake associated site works, for example construction of car parking, landscaping, lighting to illuminate all public areas and connecting existing sewers, water supply and stormwater services to the block of land, and
  - other conditions relating to the Crown lease, such as a requirement to provide a proportion of the dwellings as affordable housing.<sup>6</sup>
- The Crown lease may be terminated if completion of the approved development is not done within the agreed timeframe from the commencement of the Crown lease.
- If the Crown lease is terminated before its expiry or not automatically renewed, the developer (as lessee) is entitled to compensation for the value of the improvements on the land (for example, any building works or associated site works on the land).<sup>7</sup>

## **Ruling**

4. Under a building arrangement, the monetary amount a developer pays to a government agency on settlement of the contract to acquire a Crown lease over land in the ACT is consideration for the supply of the Crown lease by the government agency for the purposes of section 9-5 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).<sup>8</sup>

5. However, the building works and the associated site works a developer completes under a building arrangement are not consideration for the supply of the Crown lease by the government agency under section 9-5. While the developer is required to complete these works within a certain time period after acquiring the Crown lease, this stipulated timeframe does not make these works non-monetary consideration for the supply of the Crown lease.

<sup>6</sup> 'Affordable housing' is a defined concept in the ACT. See ACT Government, 2018, *ACT Housing Strategy*, ACT Government, Canberra, page 46.

<sup>7</sup> Section 291 of the *Planning and Development Act 2007* (ACT).

<sup>8</sup> All legislative references in this Determination are to the GST Act unless otherwise indicated.

6. The building arrangements considered in this Determination are materially different from arrangements involving the acquisition of a short-term holding lease by a developer in the ACT (preparatory infrastructure arrangements). Under preparatory infrastructure arrangements the government agency grants the developer a short-term holding lease to allow the developer to undertake preparatory infrastructure works on the land. The developer is required to complete preparatory infrastructure works (for example, roadworks, car parking, footpaths, landscaping, and sewer, water, telecommunication, lighting, gas and electrical services) in order to be issued with a Certificate of Practical Completion and be subsequently granted a consequent lease by a government agency (usually a Crown lease).

7. In these circumstances the preparatory infrastructure works are non-monetary consideration for the supply of the consequent lease by the government agency.<sup>9</sup> These preparatory infrastructure arrangements also involve a monetary sum being paid by the developer on settlement of a contract. The nature of these arrangements is so interrelated that they are considered a single transaction for the sale of land. This means that the monetary sum paid under the contract and the value of the works required to be done in order to be granted the consequent lease, together form the consideration provided by the developer for the supply of the land.

8. The following example sets out a typical arrangement and sequence of events for a building arrangement in the ACT, including requirements for affordable housing allocations, and site works.

***Example – apartment development project***

9. *Borage Builders wants to acquire land in the ACT so that it can build apartments to ultimately sell to third parties. It enters into the following arrangements:*

- *a contract with a government agency to acquire a 99-year Crown lease over land in the ACT for \$5 million. This monetary amount is the market value of the Crown lease at the time*
- *a PDA with a government agency (entered into at the same time as the contract)*
- *under the PDA, a timeframe is set within which the following works need to be completed*
  - *building works to construct apartments on the land*
  - *associated site works*
    - *stormwater drains and sewer lines*
    - *facilities to enable electrical and telephone cables to be installed, and*
    - *a heavy-duty concrete driveway*

<sup>9</sup> Arrangements involving such preparatory infrastructure works are similar to the development lease arrangements dealt with by Goods and Services Tax Ruling GSTR 2015/2: *Goods and services tax: development lease arrangements with government agencies*. Accordingly, the GST outcomes outlined in that Ruling are consistent with the GST outcomes for arrangements involving preparatory infrastructure works.

- *the contract and the PDA require the building works to be completed within four years from the commencement date of the Crown lease*
- *the Crown lease may be terminated if the works are not completed within this timeframe, and*
- *Borage Builders is also required to make 10% of the apartments available as affordable housing for low to moderate income earners.*

10. *The developer's purchase price for the Crown lease takes the permitted uses and conditions into account. Once Borage Builders pays the full purchase price of \$5 million to the government agency, the contract is complete. The government agency then grants the Crown lease to Borage Builders.*

#### *Building works*

11. *The building works are completed after settlement of the contract and the grant of the Crown lease. The construction costs were \$100 million.*

12. *The building works (although they are fixtures) are effectively owned by Borage Builders for the duration of the lease. Only Borage Builders is able to sell or lease the dwellings built on the land. Any increase in value from construction of the dwellings increases the value of the Crown lease that is already held by Borage Builders. It has minimal if any impact on the value of the reversion held by the Crown.*

13. *The government agency does not obtain anything of value from the construction of dwellings on land the subject of the Crown lease. The land, with or without a dwelling, continues to attract a nominal rental of five cents per annum.*

14. *Borage Builders are not required to complete the building works to be granted the Crown lease. It constructs the apartments on what is effectively its own land, and for its own benefit, as it is the only entity able to sell them. The legislative requirement in the ACT for the government to pay lessees compensation for improvements on Crown-leased land, if the lease is terminated or not renewed, further demonstrates that the building works are for the benefit of the developer.*

15. *The building works are not non-monetary consideration for the government agency's supply of the Crown lease.*

16. *The supply from the government agency to Borage Builders was the Crown lease of land. The monetary consideration for that supply was the contract price of \$5 million. Borage Builders does not make a supply of the \$100 million worth of building works to the government agency. The government agency does not make a creditable acquisition of the \$100 million worth of building works constructed on the land.*

#### *Associated site works on the leased land*

17. *The requirement to undertake the associated site works does not provide the government with anything of economic value. Even if these works are performed on, or partly on, unleased land, the associated site works are primarily for the benefit of Borage Builders in that they enable the effective use and/or proper functioning of the building works.*

*Leasing obligations*

18. *The requirement to provide a percentage of apartments for affordable housing is merely a restriction on the type of the development undertaken, in the same way that a government agency can impose height limitations on the building or requirements for external finishes. Such limitations on the leasehold do not demonstrate that something is provided to the lessor. Meeting this condition does not result in the works creating the affordable housing being provided as non-monetary consideration for the grant of the Crown lease.*

**Date of effect**

19. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

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**Commissioner of Taxation**13 December 2019

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## Appendix 1 – Explanation

**❶** *This Appendix is provided as information to help you understand how the Commissioner’s preliminary view has been reached. It does not form part of the proposed binding public ruling.*

20. The issue of whether building works and associated site works undertaken by a developer on land in the ACT is non-monetary consideration<sup>10</sup> for the supply of the Crown lease granted by a government agency is relevant for determining whether:

- the developer makes a taxable supply of those works to the government agency under section 9-5, and
- the government agency makes a creditable acquisition of those works under section 11-5.

21. Consideration, for a supply or acquisition, means any consideration<sup>11</sup> in connection with the supply or acquisition.<sup>12</sup> Consideration for a supply is something the supplier receives for making the supply. Non-monetary consideration, such as the provision of works, can constitute consideration for GST purposes.<sup>13</sup> The issue is whether the building works and the associated site works are for or ‘in connection with’ the supply of the Crown lease by the government agency. This is determined by considering whether there is sufficient nexus between the supply and the payment.

22. However, a supply needs to be established before a question of nexus becomes relevant. There is no need to consider if the requisite nexus exists if there is no supply of works made by the developer to the government agency.

23. When analysing an arrangement, we must examine the terms of the agreements between the parties and the surrounding facts and circumstances to identify what is being supplied. Not every promise or obligation to do something under a contract is a supply. Some things are just the terms of the arrangement on which the respective parties have reached agreement.<sup>14</sup>

<sup>10</sup> By providing non-monetary consideration for a supply, a developer is in turn making a supply. Where this happens, the developer needs to determine the GST consequences of the supply they make. The GST treatment of non-monetary consideration is set out in Goods and Services Tax Ruling GSTR 2001/6 *Goods and services tax: non-monetary consideration*. It will also be relevant for calculating the margin on a taxable supply of real property a developer makes if it sells the apartments to third parties under the margin scheme in Division 75. The potential application of Division 75 to any future supplies by the developer to third parties is beyond the scope of this Determination.

<sup>11</sup> Within the meaning given by sections 9-15 and 9-17.

<sup>12</sup> See section 195-1.

<sup>13</sup> See GSTR 2001/6.

<sup>14</sup> See *A.P. Group Ltd and Commissioner of Taxation* [2012] AATA 617.

**Is there a supply of works?**

24. A ‘supply’ is defined as being any form of supply whatsoever, including a supply of goods, a supply of services, and the entry into an obligation to do anything.<sup>15</sup>

GSTR 2006/9<sup>16</sup> sets out 10 propositions for characterising and analysing supplies.

Proposition 5 in that Ruling states that an entity makes a supply whenever it provides something of value to another entity.<sup>17</sup> This is consistent with the ordinary meaning of ‘supply’, being to furnish or provide.<sup>18</sup> GSTR 2006/9 also explains that because the GST is intended to be broad-based, a supply may manifest itself in many various ways. However, the scheme of the GST Act is not so broad as to include an entity making a supply to itself or a supply without the supplier providing something.<sup>19</sup>

25. The essential character of what is supplied by grant of a lease over land is that the lessee has the legal right to exclusive possession of the land for the relevant term.<sup>20</sup> This does not prevent the owner of the freehold interest in the land imposing conditions regarding permitted use that will apply for the term of the lease.<sup>21</sup>

26. This means that it is not always the case that an obligation to complete building works and associated site works within a specified timeframe under a Crown lease is a supply by a developer. Rather, an obligation imposed upon a lessee can be a condition under which the supply of land by way of the lease is made.

27. In the building arrangements covered by this Determination, the obligation to undertake works only arises after the Crown lease has been granted to the developer. Further, the obligation is that the works be completed within a specified timeframe after acquiring the Crown lease.

28. Once the Crown lease has been granted, the developer has taken exclusive possession of the land under that lease. While the developer does not have a freehold interest in the land, the nature of a Crown lease in the ACT means that effectively the developer is constructing buildings on its own land. The developer is the entity that obtains the benefit of the buildings that are required to be constructed on the land within a specified timeframe after the Crown lease is granted. The developer, as lessee, is the only entity able to lease or sell the buildings it constructs on the land.

29. As such, undertaking the building works and the associated site works is for the developer’s own benefit and the works are not a supply to the government agency.

30. This is the case even where the associated site works are performed on, or partly on, unleased land where the works are primarily for the benefit of the developer. For example, where they enable the effective use and/or proper functioning of the building works, such as where driveways are built partly on unleased land.

31. Performing the works is not the provision of something of value to the government agency, because the developer, as the lessee, is the entity that derives value from the

<sup>15</sup> See section 9-10.

<sup>16</sup> Goods and Services Tax Ruling GSTR 2006/9 *Goods and services tax: supplies*. This Ruling examines the meaning of supply for the purposes of the GST Act.

<sup>17</sup> See paragraphs 71 to 91 of GSTR 2006/9.

<sup>18</sup> See *Commissioner of Taxation v MBI Properties Pty Ltd* [2014] HCA 49 at [34].

<sup>19</sup> See paragraph 17 of GSTR 2006/9.

<sup>20</sup> *Radaich v Smith* [1959] HCA 45.

<sup>21</sup> *Australian Postal Corporation v Ace Property Holdings Pty Ltd* [2009] QSC 199 at [77].

buildings and associated site works to be constructed on the land after the Crown lease is granted.<sup>22</sup>

32. The incorporation of ‘building and development provisions’ into ACT Crown leases, together with statutory restrictions upon the transfer or assignment of the Crown lease until these building and development provisions are satisfied<sup>23</sup> are standard obligations in Crown leases in the ACT.<sup>24</sup> It is generally accepted that these mechanisms are intended to operate together as a deterrent to land speculation in the ACT.<sup>25</sup>

33. Further, the building and development provisions reflect standard conditions or restrictions imposed by the ACT Government in relation to how a developer is to use the land under the supply of the Crown lease for the developer’s own benefit. The fact that complying with the building and development assists the ACT Government in meeting its policy objectives, does not mean that the developer has made a supply of building works to the government agency. The obligations reflect the overall terms under which the ACT Government grants Crown leases and compliance with the obligations do not give rise to a supply.<sup>26</sup>

34. Accordingly, the building works and associated site works are not non-monetary consideration for the supply of the Crown lease by the government agency.

### **Affordable housing**

35. Requirements in a PDA for a developer to make a number of the dwellings erected on Crown-leased land available as affordable housing is considered to be in the nature of a restriction on the development and use of the land that is properly characterised as a condition of the PDA, which does not involve the provision to the government agency of something which has measurable economic value.

36. Accordingly, the building works involved in constructing the affordable housing are not non-monetary consideration for the supply of the Crown lease by the government agency.

### **Preparatory infrastructure arrangements**

37. In preparatory infrastructure arrangements, the developer provides something of economic value to the government agency. Otherwise, the ACT Government would need to do, or arrange and pay for these works itself. The legal documents, including the short-term holding lease, entered into between the developer and the government agency require the developer complete the works before the Certificate of Practical Completion issues and the consequent lease can be granted by the government agency.<sup>27</sup>

<sup>22</sup> This is consistent with *Commissioner of Taxation v MBI Properties Pty Ltd* [2014] HCA 49 at [34]. This is also supported by the developer’s entitlement to be compensated for improvements on the land under section 291 of the *Planning and Development Act 2007* (ACT) which illustrates that only the developer as lessee of the land benefits from the works if the lease was to be terminated.

<sup>23</sup> See section 298 of the *Planning and Development Act 2007* (ACT).

<sup>24</sup> See: <https://www.planning.act.gov.au/leasing-and-titles>.

<sup>25</sup> See *Commissioner for ACT Revenue v Araghi and Dorsett* [2013] ACTSC 43 at [36].

<sup>26</sup> Consistent with *A.P. Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [49].

<sup>27</sup> Under section 298 of the *Planning and Development Act 2007* (ACT), a lease containing a ‘building and development provision’ (that is, a provision requiring the lessee to carry out stated works on the land comprised in the lease or on unleased territory land) cannot generally be transferred unless the lessee has a certificate of compliance under section 296 of that Act (that is, until they have fully complied with the building



Accordingly, the works are a supply by the developer to the government agency. The works also have the relevant nexus to the consideration provided by the government agency, being the grant of the consequent lease. The works are considered to be what moves the grant of the consequent lease to the developer, and they are non-monetary consideration for the supply of the consequent lease by the government agency.<sup>28</sup>

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and development provision and the ACT Planning and Land Authority has issued them a certificate of compliance).

<sup>28</sup> For real property transactions, 'consideration' has the relevant nexus where it is anything that 'moves' the transfer of the land. See paragraph 38 of Goods and Services Tax Ruling GSTR 2009/1 *Goods and services tax: general law partnerships and the margin scheme* which references to *Archibald Howie Pty Ltd v Commissioner of Stamp Duties* (NSW) [1948] HCA 28.

## Appendix 2 – Alternative views

**❶** *This Appendix sets out alternative views and explains why they are not supported by the Commissioner. It does not form part of the proposed binding public ruling.*

38. It has been argued that building works and associated site works are non-monetary consideration for the grant of a Crown lease in the building arrangements dealt with in this Determination.

### Condition subsequent

39. In particular, it has been argued that because the developer is required to complete the building works and associated site works under the Crown lease and the PDA within a specified time, the works are non-monetary consideration for the grant of the Crown lease. Under this argument, it does not matter that the developer undertakes the works after the grant of the Crown lease, because the definition of consideration in section 9-15 includes 'any act ... in response to ... a supply of anything' and thus encompasses conditions subsequent.

40. We do not agree with this view. For the reasons outlined in this Determination, we consider the works are not a supply to the government agency and so cannot be consideration for the supply of the Crown lease.

### GSTR 2015/2

41. It has also been argued that the Commissioner's position in GSTR 2015/2 should apply to these arrangements such that the building works and associated site works are considered non-monetary consideration for the supply of the Crown lease.

42. The arrangements in GSTR 2015/2 deal with development works undertaken by developers on land held by the government agency, and the works are completed by the developer under a short-term lease or license in order to acquire the land or a long-term lease over the land from the government agency. Those circumstances are materially different from the building arrangements dealt with in this Determination, which involve the developer completing works on land that the developer has already acquired a Crown lease over.

### Gloxinia

43. The facts in *Commissioner of Taxation v Gloxinia Investments (Trustee) (Gloxinia)*<sup>29</sup> have been argued to be consistent with the building arrangements in this Determination. Further, because the residential building works in *Gloxinia* were completed after the 'residential lease' (a long-term lease) was granted by the Woollahra Municipal Council (the Council), *Gloxinia* supports the argument that building works and associated site works are a supply.

44. However, the Court in *Gloxinia* was considering a later step in the development being the grant of strata title leases. The Court held in *Gloxinia* that there was a supply by the Council of long-term strata title leases of residential premises for the purposes of section 40-75 following the lodgment of a strata leasehold plan.

<sup>29</sup> [2010] FCAFC 46.

45. However, the Court was not considering a situation where building works were undertaken by Gloxinia after the supply of the long-term strata title leases. The building works were already completed by Gloxinia prior to the grant of the long-term strata title leases. Gloxinia was granted a residential lease that contained obligations to undertake works, and when those works were completed Gloxinia was able to apply for long-term strata title leases. Accordingly, despite being a long-term lease, the residential lease was the development lease (in the sense used in GSTR 2015/2) in this specific case.

### **Lend Lease**

46. Lastly, it has been argued that *Commissioner of State Revenue v Lend Lease Development Pty Ltd (Lend Lease)*<sup>30</sup> supports the alternative argument because the works were performed after the land was granted to *Lend Lease* and were considered non-monetary consideration for the land.

47. The *Lend Lease* decision does not directly support the alternative argument because it did not determine that Lend Lease's obligation to VicUrban, to undertake building works on Lend Lease's own land, was non-monetary consideration for the sale of the land. Rather, the consideration in *Lend Lease* was relevantly limited firstly to the monetary payments (effectively VicUrban receiving a profit share of the sale of the completed buildings) that arose after Lend Lease had fulfilled its obligation to build and subsequently sold the relevant buildings, and secondly, to the non-monetary consideration, which was limited to works performed by Lend Lease on VicUrban's land (where VicUrban directly benefited from the works as the owner of that land).

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<sup>30</sup> [2014] HCA 51.

## Appendix 3 – Your comments

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48. You are invited to comment on this draft Determination including the proposed date of effect. Please forward your comments to the contact officer by the due date.

49. A compendium of comments is prepared for the consideration of the relevant Public Advice and Guidance Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments
- be published on ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

**Due date:** 20 March 2020

**Contact officer details have been removed following publication of the final determination.**

## References

### *Previous draft:*

Not previously issued as a draft

### *Related Rulings/Determinations:*

GSTR 2001/6; GSTR 2006/9; GSTR 2009/1;  
GSTR 2015/2; TR 2006/10

### *Legislative references:*

- ANTS(GST)A 1999 9-5
- ANTS(GST)A 1999 9-10
- ANTS(GST)A 1999 9-15
- ANTS(GST)A 1999 9-17
- ANTS(GST)A 1999 11-5
- ANTS(GST)A 1999 40-75
- ANTS(GST)A 1999 Div 75
- ANTS(GST)A 1999 195-1
- Australian Capital Territory (Planning and Land Management Act) 1998 (Cth) 29(3)
- Planning and Development Act 2007 (ACT) 291
- Planning and Development Act 2007 (ACT) 296
- Planning and Development Act 2007 (ACT) 298

### *Cases relied on:*

- A.P. Group Ltd and Commissioner of Taxation [2012] AATA 617; (2012) 87 ATR 692
- A.P. Group Ltd v Commissioner of Taxation [2013] FCAFC 105; (2013) 214

FCR 301; 2013 ATC 20-417; (2013) 92 ATR 629

- Australian Postal Corporation v Ace Property Holdings Pty Ltd [2009] QSC 199
- Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW) [1948] HCA 28; (1948) 77 CLR 143
- Commissioner for ACT Revenue v Araghi and Dorsett [2013] ACTSC 43; 2013 ATC 20-376; (2013) 95 ATR 47; (2013) 7 ACTLR 262
- Commissioner of State Revenue v Lend Lease Development Pty Ltd [2014] HCA 51; (2014) 254 CLR 142; 2014 ATC 20-478; (2014) 93 ATR 247
- Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49; 254 CLR 376; 2014 ATC 20-474; (2014) 92 ATR 241
- Commissioner of Taxation v Gloxinia Investments (Trustee) [2010] FCAFC 46; (2010) 183 FCR 420; 2010 ATC 20-182; (2010) 75 ATR 806
- Radaich v Smith [1959] HCA 45; (1959) 101 CLR 209; 33 ALJR 214; [1959] ALR 1253; 69 WN (NSW) 97

### *Other references:*

- ACT Housing Strategy October 2018
- Lease conditions and responsibilities

### ATO references

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