

GSTD 2021/1 - Goods and services tax: development works in the Australian Capital Territory

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Status: **legally binding**

Goods and Services Tax Determination

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

❶ Relying on this Determination

This publication (excluding appendix) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Determination applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Determination. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Determination.

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What this Determination is about

1. This Determination 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' carried out by developers on land they have acquired under a long-term¹ Crown lease (Crown lease) and 'associated site works'² are non-monetary consideration for the supply of that lease by a government agency.³

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.⁴

¹ 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.

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

³ A government agency is an authority of the ACT Government.

⁴ Subsection 29(3) of the *Australian Capital Territory (Planning and Land Management Act) 1988*.

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

- A developer enters into what is described as a contract for sale (contract) with a government agency for the grant, at completion of the contract, of 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), the government agency is required to grant the Crown lease to the developer.⁵
- The Crown lease is granted on terms satisfactory to the Planning and Land Authority. There is no short-term holding lease granted under the arrangement.⁶
- The contract is usually contingent upon the developer entering into a project delivery agreement or deed (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 an approved development (building works and associated site works) within a specified time period, for example, within 48 months from the date of the commencement of the Crown lease.
- Under the approved development, the developer is required to complete
 - building works 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 writing⁷, and
 - associated site works that can fall into any of the following three categories
 - works on the Crown lease land, for example, a driveway inside the boundary of the Crown lease land
 - works that automatically belong to a government agency where they are constructed on unleased land, for example, the part of the driveway across the footpath (verge), and
 - works on the Crown lease land that are transferred to a government agency or at its direction to a third party⁸, for example, a stormwater drain over which an easement in favour of the government is created.
- There may be other conditions contained in the Crown lease and the PDA, such as a requirement for the developer to sell a proportion of the dwellings as affordable housing.⁹

⁵ The Planning and Land Authority has power under section 237 of the *Planning and Development Act 2007* (ACT) to grant leases. It can delegate this power under subsection 20(2) of this Act.

⁶ Arrangements involving short-term holding leases are discussed in paragraphs 48 to 50 of this Determination.

⁷ The building works are not transferred from the developer to the government entity.

⁸ For example, an entity that is licensed to provide a utility service – see Part 3 of the *Utilities Act 2000* (ACT).

⁹ 'Affordable housing' is a defined concept in the ACT. Affordable housing is housing that is appropriate for the needs of a range of very low-to-moderate income households, and priced (whether mortgage or rent) so these households are able to meet their other essential basic living costs. See ACT Government, 2018, *ACT Housing Strategy*, ACT Government, Canberra, page 46.

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- The developer does not receive a specific monetary sum from the government agency for any building works or associated site works.
 - The Crown lease may be terminated if the approved development is not completed 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 Crown lease land (for example, any building works or associated site works on the Crown lease land).¹⁰
4. This Determination does not consider the application of:
- Division 81 of the *A New Tax System (Goods and Services Tax) Act 1999*¹¹ (payment of taxes, fees and charges), or
 - Division 82 (supplies of works in return for a supply by a government entity of the right to develop land).¹² The supply of a right to develop land includes, for example, approval by a government agency for such things as developments (that are not exempt from the approval process), subdivision and rezoning of land.

Ruling

5. Under a building arrangement, the monetary amount a developer pays to a government agency on completion 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.

6. However, the building works a developer completes under a building arrangement (in accordance with the terms of the PDA and the Crown lease) are not consideration for the supply of the Crown lease by the government agency under section 9-5.

7. The building works are **not** non-monetary consideration for the supply of the Crown lease land because the building works provide no measurable economic value to the government agency.¹³ The building works are of value to the developer as they can either retain the land, subdivide the land and sell the individual lots or sell the Crown lease land in its entirety to another entity.¹⁴

8. While the developer is required to complete these building 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.

9. As explained in paragraph 3 of this Determination, the developer may also be required to undertake associated site works which fall into three categories.

¹⁰ Section 291 of the *Planning and Development Act 2007* (ACT).

¹¹ All legislative references in this Determination are to the *A New Tax System (Goods and Services Tax) Act 1999* unless otherwise indicated.

¹² In general, in these types of arrangements, the obligations on the developer are specified in the relevant contractual documents. The developer is not granted a separate right to develop by the planning authority. However, if in the circumstances of a particular case, the developer is granted a right to develop land which is consideration for a charge or obligation which is separate to the 'building arrangements' setting out the supply of the sale of the land, then the application of Division 81 and 82 may need to be considered.

¹³ For further information, see paragraphs 47, 48 and 81 of Goods and Services Tax Ruling GSTR 2001/6 *Goods and services tax: non-monetary consideration*.

¹⁴ Any restriction on sale of the Crown lease comes to an end once the building works and associated site works are finalised.

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10. If ownership of the completed associated site works is retained by the developer, they are **not** non-monetary consideration for the supply of the Crown lease land by the government agency. This is because the associated site works retained by the developer provide no measurable economic value to the government agency.

11. While building works and associated site works retained by the developer may assist in fulfilling a government agency's objectives of developing areas of land, they do not provide the government agency with anything other than assurance that the land is developed in compliance with the relevant government approved plans and the development complies with relevant laws (for example, environmental or health and safety laws).

12. Completed associated site works that automatically belong to a government agency or are transferred to a government agency, or a third party nominated by the government agency¹⁵ (whether on unleased land or the Crown lease land), are non-monetary consideration for the supply of the Crown lease land. This is the case provided Division 81 and Division 82 do not apply.

13. The PDA may also impose certain obligations on a developer, for example, the requirement to construct a certain number of dwellings that the developer will sell as affordable housing.¹⁶ This type of obligation is considered to be in the nature of a restriction on the development and does not involve the provision to the government agency of something which has measurable economic value. 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.¹⁷

14. The following examples set out a typical building arrangements in the ACT.

Example 1 – apartment development project

15. *Borage Builders, a developer, 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 be granted a 99-year Crown lease over land in the ACT for \$5 million paid at completion of the contract.*
- *The 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, and the government agency then grants the Crown lease to Borage Builders, the contract is complete.*
- *A PDA with a government agency (entered into at the same time as the contract).*
- *The Crown lease and PDA provide that Borage Builders must complete works (an approved development) within four years from the commencement of the Crown lease. The approved development consists of*
 - *building works to construct 100 apartments on the land*

¹⁵ For example, an entity that is licensed to provide a utility service – see Part 3 of the *Utilities Act 2007* (ACT).

¹⁶ These dwellings are generally sold for a lower price than the other dwellings in the development. Also see footnote 9 of this Determination.

¹⁷ For further information, see paragraph 81 of GSTR 2001/6.

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- *associated site works*
 - *stormwater service on the Crown lease land connecting to the tie point at the stormwater main that will be retained by Borage Builders*
 - *stormwater main on the Crown lease land that will be transferred to a utility provider and subject to an easement to the ACT government which allows the utility provider to access the stormwater main for maintenance and replacement purposes*
 - *sewerage and water connections on the Crown lease land for the apartment building*
 - *a heavy-duty concrete driveway – this will be constructed partly on the Crown lease land and partly on unleased land, and*
 - *construction of various footpaths and street lighting on unleased land.*
- *Borage Builders pays a security deposit which is an estimate of the cost of the associated site works to be retained by the government agency. The security deposit is returned to Borage Builders on completion of these works.*
- *The Crown lease may be terminated if the approved development is not completed within the four-year timeframe.*
- *Borage Builders is also required to make 10% of the apartments available for sale as affordable housing for low-to-moderate income earners identified by the ACT Government (affordable housing arrangement). Under the affordable housing arrangement, the ACT Government sets a maximum price for these apartments. The ACT Government then requires the developer to provide the identified buyer with the first right of refusal to purchase the property.*
- *The approved development was constructed after completion of the contract and the grant of the Crown lease. The construction costs were \$100 million.*

Building works

16. *Borage Builders completes the building works in accordance with the building arrangements entered into. The building works undertaken (although they are fixtures) are owned by Borage Builders for the duration of the Crown lease. Only Borage Builders is able to sell or lease the apartments (dwellings) built on the Crown lease land.*

17. *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.*¹⁸

¹⁸ This is because the rent remains at a nominal rent of 5 cents per annum. The rent may be increased to a nominal rent (5 cents per annum) for each apartment if they are strata-titled. The Crown (ACT) can only obtain the economic value of the building works if it can terminate the Crown lease. There are limited grounds for terminating a Crown lease. In most cases, compensation to the lessee for the value of improvements would have to be paid at the time of termination.

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18. *The government agency does not obtain anything of measurable economic value from the construction of dwellings on the Crown lease land. The Crown lease land, with or without a dwelling, continues to attract a nominal rent.*

19. *As the building works do not provide anything of measurable economic value to the government agency, there is nothing that amounts to additional consideration for the supply of the Crown lease.*

20. *Borage Builders does not make a supply of the building works to the government agency. The government agency does not make a creditable acquisition of the building works constructed on the Crown lease land.*

Associated site works – retained by developer

21. *Under the building arrangement, Borage Builders is required to construct on the Crown lease land:*

- *sewerage and water connections for the apartment building*
- *a stormwater service connecting to the tie point at the stormwater main, and*
- *a driveway from the apartments up to the property boundary.*

22. *This work is to be retained by Borage Builders. The associated site works are completed in accordance with the building arrangements entered into. The government agency does **not** obtain anything of measurable economic value from the construction of these associated site works on the Crown lease land.*

23. *As the associated site works do not provide anything of measurable economic value to the government agency, there is nothing that amounts to additional consideration for the supply of the Crown lease.*

24. *Borage Builders does not make a supply of these associated site works to the government agency. The government agency does not make a creditable acquisition of these associated site works constructed on the Crown lease land.*

Associated site works – not retained by the developer

25. *Under the building arrangement, Borage Builders is required to construct various footpaths, street lighting and the part of a driveway for the apartments on land that is not subject to the Crown lease. They are also required to construct a stormwater main that is subject to an easement to the ACT Government on the Crown lease land. The stormwater main becomes the property of the ACT Government.*

26. *The ownership of these works will not be retained by the developer. These associated site works represent something that the government would usually or commercially pay money to acquire and have a measurable economic value.*

27. *These associated site works are non-monetary consideration for the supply of the Crown lease land.¹⁹ The value of the non-monetary consideration is determined in accordance with the principles set out in GSTR 2001/6.²⁰*

¹⁹ For further information, see paragraph 12 of GSTR 2001/6. This is subject to the application of Division 81 and Division 82 if the associated site works are consideration for a right to develop and not the supply of the Crown lease.

²⁰ For further information, see paragraphs 138 to 158 of GSTR 2001/6 which discusses the reasonable valuation of non-monetary consideration.

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Leasing obligations

28. *The affordable housing obligation is merely a restriction on the type of development undertaken, in the similar 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 government agency as consideration for the grant of the lease. Performance of this obligation does not result in the works creating the affordable housing being provided as non-monetary consideration for the grant of the Crown lease.*

Example 2 – apartment development project

29. *Assume the same facts as in Example 1 of this Determination. However, Borage Builders has entered into further arrangements with the government agency to complete additional works on unleased land, being the provision of a car park for the monetary sum of \$900,000. These arrangements are distinct from the works for the approved development and are not consideration for the supply of the Crown lease land. The consideration was agreed to separately, and Borage Builders and the government agency have not entered into an arrangement where they have agreed to reduce the price of the supplies (the supply of the car park and the supply of the Crown lease) that they make to each other for consideration.*

30. *There is no nexus between the supply of the Crown lease and the supply of the additional works on the unleased land. The construction of the car park is **not** non-monetary consideration for the supply of the Crown lease.²¹*

31. *This will be a supply of additional works to the government agency for specific monetary consideration of \$900,000. It will **not** affect the consideration for the supply of the Crown lease.*

Previous private ruling

32. *This Determination does not apply where a previous private ruling applies to an entity undertaking development works and the entity relies on the private ruling and continues to rely on the private ruling in all aspects of the development arrangement.*

Previous reliance on GSTD 2019/D1

33. *The Commissioner will not seek to disturb any assessment issued in reliance on draft Goods and Services Tax Determination GSTD 2019/D1 **Goods and services tax: development works in the Australian Capital Territory** if both parties apply the view in GSTD 2019/D1 to all aspects of the development arrangement for the entire period of the arrangement. The Commissioner expects that in these situations there would be an agreement in writing by both parties to apply this view.*

34. *This 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 this Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10 **Public Rulings**).*

²¹ For further information regarding the situations when entities make mutual supplies for consideration, see paragraphs 125 to 127 of GSTR 2001/6.

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Date of effect

35. This Determination applies both before and after its date of issue.

Commissioner of Taxation

31 March 2021

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Appendix – Explanation

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

Are the building works and associated site works non-monetary consideration for the supply of the land?

36. A payment will be consideration for a supply if the payment is 'in connection with', 'in response to' or 'for the inducement' of a supply.²² There are two elements to the definition of consideration, which are²³:

- the payment by one entity to another, and
- a nexus that must be established between the payment and a supply.

37. This means that in order for the building works or associated site works to be consideration for the supply of the Crown lease land, there must be sufficient nexus between the supply and the consideration.

38. For goods, services or a 'thing' to be non-monetary consideration for a supply, it must have economic value and independent identity provided as compensation for the making of the supply. It must be capable of being valued and be a thing the acquirer would usually or commercially pay money to acquire.²⁴

39. As the meaning of consideration is broad, not all promises and obligations made and agreed between the parties will be non-monetary consideration for a supply. Some things are simply part of the terms of the arrangement on which the respective parties have reached agreement.²⁵ Promises or obligations that have no economic value or independent identity separate from the transaction will not be non-monetary consideration for a supply.²⁶

40. In the context of granting a lease over land, the essential character of what is supplied is the legal right to exclusive possession of the land for the term.²⁷ However, 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.²⁸

41. The incorporation of 'building and development provisions' into ACT Crown leases, together with statutory restrictions on transfer or assignment of the Crown lease until these

²² Section 9-15. See also paragraph 50 of GSTR 2001/6 for further information.

²³ This view is set out in paragraph 51 of GSTR 2001/6. See also *Commissioner of State Revenue v Lend Lease Development Pty Ltd* [2014] HCA 51 at [51] where the High Court explained that identifying the consideration 'for' the transaction requires a search (emphasis added) '... for "what was received by the [vendor] so as to move the transfers to the [purchaser] as stipulated in the Agreement"'. In this case, the Court concluded that the parties' agreements accurately recorded what Lend Lease was providing in return for the transfers – that was, the performance of other promises it had made under the applicable development agreements.

²⁴ For further illustration, see *AP Group Limited v Commissioner of Taxation* [2013] FCAFC 105 (*AP Group*) at [53] and paragraph 81 of GSTR 2000/6.

²⁵ See *AP Group* at [49].

²⁶ See paragraph 80 of GSTR 2001/6.

²⁷ *Willmott Growers Group Inc v Willmott Forests Limited (Receivers and Managers Appointed) (In Liquidation)* [2013] HCA 51 at [63–67] and *Williams v Wreck Bay Aboriginal Community Council* [2019] HCA 4 at [123].

²⁸ See, for example, the circumstances in *Australian Postal Corporation v Ace Property Holdings Pty Ltd* [2009] QSC 199 at [77] where the lease included a clause which provided that the tenant could only use the premises for various listed purposes or for which permission was given.

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building and development provisions are satisfied²⁹, are standard obligations in Crown leases in the ACT.³⁰

42. The building and development provisions reflect standard conditions or restrictions imposed by the ACT Government on how a developer is to use the land. Complying with these provisions may assist the ACT Government in meeting its policy objectives. However, it does not necessarily follow that the developer has made a supply of works to the government agency. These obligations reflect the overall terms under which the ACT Government grants Crown leases. Compliance with the building and development provisions do not give rise to a supply for non-monetary consideration.³¹

43. In relation to the building works considered in this Determination, while the developer does not have a freehold interest in the land, the nature of a Crown lease in the ACT (usually for 99 years, at nominal rent, automatically renewable and compensation payable for the value of improvements if not renewed) results in:

- the developer, as lessee, being the only entity able to lease or dispose of an interest in the buildings it constructs on the Crown lease land
- no increase in the value of the reversion held by the ACT as the rent remains nominal for the duration of the Crown lease and future renewals, and
- the developer or future lessees being entitled to compensation for the building works if the lease is ever terminated.

44. Undertaking the building works on the Crown lease land does not provide the government agency with anything of measurable economic value. For this reason, the construction of building works on the Crown lease land is not the provision of non-monetary consideration for the government agency's supply of the land.

45. The principles in paragraphs 43 and 44 of this Determination also apply to associated site works retained by the developer.

46. However, the outcome is different if associated site works are retained by, or transferred to, the government agency or a third party nominated by the government agency (whether on unleased land or the Crown lease land). Performing these works involves the provision of something of measurable economic value to the government agency, because the government agency would otherwise have had to pay to have these works constructed.³² There is a sufficient nexus between the works where the arrangement makes the supply of the land conditional on the developer completing the specified works.³³

47. Accordingly, provision of these associated site works will be non-monetary consideration for the supply of the Crown lease land.

Development lease arrangements – GSTR 2015/2

48. 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

²⁹ See section 298 of the *Planning and Development Act 2007* (ACT).

³⁰ See www.planning.act.gov.au/leasing-and-titles.

³¹ Consistent with *AP Group* at [49]. See also paragraphs 15 and 80 of GSTR 2001/6 which indicate that rights and obligations can often be disregarded as payments as they do not have economic value of independent identity separate from the transaction.

³² If the obligation to carry out associated site works arises as consideration for a development approval then Division 81 and Division 82 may be applicable.

³³ For further information, see paragraphs 51 and 80 of GSTR 2001/6.

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the ACT, as considered in Goods and Services Tax Ruling GSTR 2015/2 *Goods and services tax: development lease arrangements with government agencies* (development lease arrangements). Under development lease 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). If the developer did not undertake the preparatory infrastructure works then the ACT Government would need to undertake or arrange and pay for the works itself.

49. Under the arrangements discussed in paragraph 48 of this Determination, the preparatory infrastructure works are non-monetary consideration for the supply of the consequent lease by the government agency. The works have the relevant nexus and are considered to be for the grant of the consequent lease by the government agency. 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.³⁴

50. The preparatory infrastructure arrangements may also involve a monetary sum being paid by the developer on completion of the contract. These arrangements are so interrelated that they are considered a single transaction for the supply 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. Accordingly, the works are a supply by the developer to the government agency.

³⁴ For real property transactions, 'consideration' has the relevant nexus where it is anything that 'moves' the transfer of the land. See comments made by Gleeson CJ and Callinan J in their dissenting judgment in *Chief Commissioner of State Revenue v Dick Smith Electronics Holdings Pty Ltd* [2005] HCA 3 at [22–26] and *Commissioner of State Revenue v Lend Lease Development Pty Ltd* [2014] HCA 51 at [49–62]. For further information, see paragraph 38 of Goods and Services Tax Ruling GSTR 2009/1 *Goods and services tax: general law partnerships and the margin scheme*.

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GSTD 2019/D1

*Related Rulings/Determinations:*GSTR 2001/6; GSTR 2009/1; GSTR 2015/2;
TR 2006/10*Legislative references:*

- ANTS(GST)A 1999 9-5
- ANTS(GST)A 1999 9-15
- ANTS(GST)A 1999 Div 81
- ANTS(GST)A 1999 Div 82
- TAA 1953
- Australian Capital Territory (Planning and Land Management Act) 1988 29(3)
- Planning and Development Act 2007 (ACT) 20(2)
- Planning and Development Act 2007 (ACT) 237
- Planning and Development Act 2007 (ACT) 291
- Planning and Development Act 2007 (ACT) 298
- Utilities Act 2000 (ACT) Pt 3

Cases relied on:

- AP Group Limited v Commissioner of Taxation [2013] FCAFC 105; 214 FCR 301; 2013 ATC 20-417; 92 ATR 629
- Australian Postal Corporation v Ace Property Holdings Pty Ltd [2009] QSC 199
- Chief Commissioner of State Revenue v Dick Smith Electronics Holdings Pty Ltd [2005] HCA 3; 221 CLR 496; 2005 ATC 4052; 213 ALR 230
- Commissioner of State Revenue v Lend Lease Development Pty Ltd [2014] HCA 51; 254 CLR 142; 2014 ATC 20-478; 93 ATR 247
- Williams v Wreck Bay Aboriginal Community Council [2019] HCA 4; 266 CLR 499; 363 ALR 631; [2019] ALMD 1590; 93 ALJR 279
- Willmott Growers Group Inc v Willmott Forests Limited (Receivers and Managers Appointed) (In Liquidation) [2013] HCA 51; 251 CLR 592; 88 ALJR 132; 304 ALR 80

Other references:

- ACT Government, 2018, *ACT Housing Strategy*, ACT Government, Canberra

ATO references

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