


NGD/dispute-resolution -

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Notional GST dispute resolution

This document is currently under review to take into account the decision in *Landcom v Commissioner of Taxation* [2022] FCA 510. If you have a particular notional GST matter and would like to discuss dispute options, please contact NotionalGSTDisputeProcess@ato.gov.au

This document outlines:

- the process for a government entity to dispute a position the Commissioner has taken on a notional goods and services tax (GST) matter, and
- summaries of the legal issues and principles which have arisen from notional GST external reviews.

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ATO Dispute Resolution Process for Notional GST Matters

Purpose

This document outlines the process for a government entity to dispute a position the Commissioner has taken on a notional GST matter, given that the legal objection and review rights under the *Taxation Administration Act 1953* are not available in these circumstances.

This ATO dispute resolution process for notional GST matters has been developed in consultation with, and has been endorsed by, the GST Policy and Administration Subcommittee (GPAS) and the GST Administration Sub-Committee (GSTAS).

Context

The ATO's GST administration is governed under the [Intergovernmental Agreement on Federal Financial Arrangements](#) (IGA). This agreement says, at clauses A22 and A23 of Schedule A, that the Commonwealth Treasury is responsible for chairing GSTAS, which monitors the operation and administration of GST. GSTAS has delegated aspects of its role to GPAS.

The Commonwealth is not liable to pay GST under the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).

While the States and Territories are bound by the GST Act, under section 114 of the Constitution, the Commonwealth cannot impose tax on the property of a State, '... nor shall the Commonwealth impose any tax on property of any kind belonging to a State.'

This limitation is reflected in the Acts imposing GST; for example, in [section 5 of the A New Tax System \(Goods and Services Tax Imposition—General\) Act 1999](#).

However, the IGA states at clause A28 of Schedule A that:

... the Commonwealth, States, Territories and local governments and their statutory corporations and authorities will operate as if they were subject to the GST legislation. They will be entitled to register, pay GST or make voluntary or notional payments where necessary and will be entitled to claim input tax credits in the same way as non-government organisations ...

Consistent with this, under Division 177 of the GST Act and the *A New Tax System (GST, Luxury Car Tax and Wine Tax) Direction 2015*, the Commonwealth is notionally liable to pay GST and notionally entitled to input tax credits.

Likewise, the States have enacted laws requiring or allowing payments of notional GST. A State law which provides for payments of notional GST is not a 'taxation law' as defined in section 195-1 of the GST Act. However, for practical reasons of administration, State entities include both notional GST and legal GST in 'GST on sales' in their GST returns.

Territories are not 'States' for the purposes of section 114 of the Constitution. However, land in the Australian Capital Territory is owned by the Commonwealth and certain Australian Capital Territory government entities supply land (usually by way of long-term leases) on behalf of the Commonwealth. While these supplies of land are legally made by the Commonwealth, and the GST on these supplies is notional, the sales revenue from these supplies is retained by the Australian Capital Territory and the relevant Australian Capital Territory government entity reports the supplies for GST purposes.

While the ATO seeks to treat notional GST issues in the same way as legal GST issues, this is not always possible. For example, an ATO decision in relation to notional GST is not able to be reviewed by the Administrative Appeals Tribunal (AAT) or the courts as the decision is not in respect of a legal GST liability.

Table 1 of this document identifies when GST is legal and when GST is notional:

Table 1: Legal and notional GST

| Jurisdiction | Legal GST | Notional GST |
|------------------------------|---|---|
| Commonwealth | <ul style="list-style-type: none"> • None | <ul style="list-style-type: none"> • All GST • All input tax credits |
| States | <ul style="list-style-type: none"> • GST (other than GST on property) • All input tax credits | <ul style="list-style-type: none"> • GST on property |
| Australian Capital Territory | <ul style="list-style-type: none"> • GST (other than GST on real property supplied on behalf of the Commonwealth) • All input tax credits (other than input tax credits on acquisitions made on behalf of the Commonwealth) | <ul style="list-style-type: none"> • GST on real property supplied on behalf of the Commonwealth • Input tax credits on acquisitions made on behalf of the Commonwealth |
| Northern Territory | <ul style="list-style-type: none"> • All GST • All input tax credits | <ul style="list-style-type: none"> • None |

Principles in resolving notional GST disputes

While recognising a taxpayer's rights to disagree with the ATO, there is an expectation that State and Territory government entities will work with the ATO to actively seek to achieve an outcome that maintains the integrity of the GST base and system.

The notional GST dispute resolution process applies to the extent that the government entity disputes the ATO position in respect of a notional GST issue. The notional GST dispute resolution process does not apply to the extent that a dispute relates to a legal GST liability as the dispute can be resolved through normal objection, AAT review and court processes.

Given that the effective administration of notional GST relies on the co-operation of the States and Territories and their government entities, the following principles have been endorsed by GSTAS, and GSTAS considers they should apply in respect of notional GST generally and in relation to disputes:

- The objective of the tax reforms which introduced GST was to create a system for the benefit of States and Territories, which also created an incentive to ensure the effective and efficient operation of the GST system.
- The IGA is a political agreement and relies on all jurisdictions, and their entities, working cooperatively and within the spirit of the IGA to deliver on agreed and expected outcomes. The IGA provides for notional GST to be paid to ensure competitive neutrality between government entities and other taxpayers.
- The ATO administers notional GST consistently with legal GST where possible. This is done with the agreement and support of the States and Territories and for their benefit.
- Government entities are expected to apply the agreements made by GPAS and GSTAS. This includes the December 2015 GSTAS agreement that the

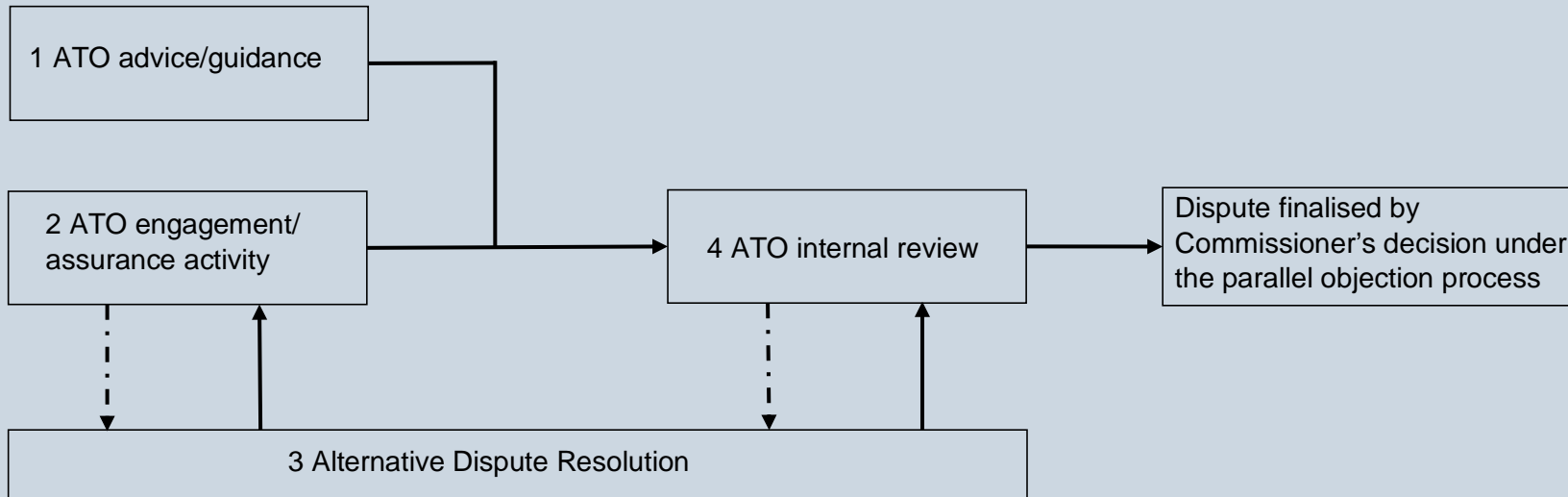
principles from the Finkelstein evaluation¹ are to be applied by all government entities and are to be applied by external reviewers in any future cases.

- The ATO and government entities are expected to use public resources in an efficient, effective, economical and ethical manner. At all times, the ATO and government entities are expected to act in a timely manner, avoid unnecessary disputes, work cooperatively to resolve disputes and be model litigants, and avoid unnecessary costs. Government entities at all levels must report and pay tax liabilities on time.
- In the event of disputes relating to notional GST, the ATO and government entities are to act in a fair and honest manner that is consistent with the IGA and that ensures the integrity of the GST base. Government entities should consider their relevant State and Territory Treasury's directions as well as guidelines issued by the ATO regarding the interpretation of legislation and principles on notional GST.
- To have an effective notional GST system, the process for managing disputes with government entities needs to be clear. Government entities should advise their relevant State and Territory Treasury prior to lodging a request with the ATO for internal review of a notional GST issue so that they are aware early and can confirm if their entity is following these principles.

¹ The relevant principles from the Finkelstein evaluation are:

- a human intervention is an improvement if it enhances the value and/or usefulness of the land, for any potential occupier of that land, compared to its natural state, and
- where land consisting of multiple titles is supplied, this may be a single supply or multiple supplies depending on the facts. If it is a single supply, the entire land will have an improvement if any of the titles has an improvement.

Dispute resolution process – notional GST



Further explanation

Alternative Dispute Resolution (ADR)

- The parties may agree to engage in ADR, but neither party can be required to do so

ADR Options include

- In-House Facilitation/Mediation
- Conciliation
- External Review (ATO will agree subject to the relevant criteria being met)

External Review

- The government entity must notify a representative of their Treasury that they intend to request an external review
- The relevant Treasury representative must acknowledge and consider whether they endorse the request for external review
- The government entity must provide acknowledgement and endorsement from their Treasury's representative to the ATO before the ATO will consider the merits of the request. This must be provided to the ATO before an ATO Internal Review decision is made because an ATO Internal Review decision finalises the dispute
- The ATO may seek the views of GPAS/GSTAS

Government entities and Notional GST Dispute Resolution



1. ATO advice/guidance

A government entity may seek advice or guidance from the ATO on the application of the GST law to their notional GST circumstances.

In line with standard practice, the ATO will not generally engage in alternative dispute resolution on the application of the GST law prior to providing that advice/guidance.

2. ATO engagement/assurance activity

Differing views on facts and/or the interpretation or application of taxation law in respect of notional GST may arise at any stage during an ATO engagement/assurance activity. The differing views may relate to questions of fact, questions of law, questions about valuation or a combination of these questions.

The ATO and the government entity should work together to understand and clearly identify the differing views, the nature of the differing views and to resolve disputes as early and as quickly as possible.

As part of the engagement/assurance process and in consultation with the government entity, consideration will be given to [alternative dispute resolution](#). At all stages, negotiation and settlement will be considered where appropriate.

3. Alternative dispute resolution (ADR)

There are different forms of ADR which may be used if both the ATO and the government entity agree. The type of ADR used will be informed by the nature of the dispute. Forms of ADR which the parties may agree to use include:

- In-house facilitation/mediation – An ADR practitioner helps the parties identify disputed issues, develop options, consider alternatives and attempt to reach an agreement. Facilitators/mediators do not normally give advice on the disputed issue.
- Conciliation – The parties negotiate with the assistance of an ADR practitioner (conciliator). The conciliator helps the parties identify the issues in dispute, develop options, consider alternatives and attempt to reach an agreement. The conciliator often has qualifications in the area of the dispute. Unlike in facilitative processes, a conciliator may give expert advice to the parties on possible options for resolving the dispute and actively encourage the participants to reach an agreement.
- [External review](#) – An independent external reviewer, who usually has substantial experience in tax law, provides an opinion about the issues in dispute, or an aspect of the dispute.

Before a decision is made in an ATO engagement/assurance activity or in an internal review, the ATO and the government entity may agree to ADR. Neither party can require the other party to engage in ADR.

External review

The ATO will only agree to consider an external review if certain conditions are met.

For external review to be considered, the government entity will be required demonstrate that the issue involves an interpretation of the GST law that has not previously been considered by a Court or external review. The ATO will not provide external review where

the only issue is the application of settled law to particular facts. A summary of the legal issues and principles from prior external reviews will be made available by the ATO to all stakeholders to facilitate this process.

The government entity must [notify their Treasury representative](#) if they intend to make a request for external review. To progress the dispute, the government entity must obtain acknowledgement and endorsement of the request from their Treasury representative and this acknowledgement and endorsement must be provided to the ATO before the ATO will consider the request. This must be provided to the ATO before an ATO Internal Review decision is made because an ATO Internal Review decision finalises the dispute. Engagements between government entities and Treasuries will be facilitated by GPAS members. This notification process will ensure greater visibility by State and Territory Treasuries of the disputes underway in their jurisdiction and allow GPAS and GSTAS representatives a greater ability to ensure agreed principles are applied by their agencies.

The ATO may seek agreement or advice from the government entity's GPAS/GSTAS representative, GPAS collectively or GSTAS collectively before agreeing to engage in an external review. The ATO may do this, for example, if they consider the request for external review is not consistent with the spirit and intent of the IGA, previous agreements of GPAS/GSTAS or directions issued by the government entity's Treasury. Where the ATO seeks agreement or advice from GPAS collectively or GSTAS collectively, the ATO will do so on a basis which does not identify the government entity.

Where the government entity's Treasury representative has endorsed a request for external review, but the ATO considers that the issue involves an interpretation of the GST law that has previously been considered by a Court or external review, the ATO will consult with the government entity's Treasury representative and their GPAS/GSTAS representative before a decision is made. The ATO will request that the government entity authorise their Treasury representative and their GPAS/GSTAS representative for the purposes of discussing the matter with them.

If the request for external review raises issues of policy, state and territory Treasury representatives may raise these issues through their respective GPAS representative for GPAS/GSTAS consideration through existing processes for raising potential policy issues with GPAS/GSTAS. Likewise, the ATO may also refer the policy issue to GPAS/GSTAS for their consideration.

Where the ATO does not agree to provide external review, the ATO will provide reasons to the government entity.

Where a dispute is to proceed to external review, the ATO, the government entity and the external reviewer must proceed on a basis that is consistent with:

- the IGA
- the principles that GSTAS has agreed all government entities are to follow
- previous court decisions on the interpretation of the GST law
- the ATO view on an interpretation of the GST law in relation to non-notional GST issues, and
- the interpretation of the GST law adopted in previous external review processes (including court decisions where applicable).

The outcome of an external review in relation to a question of interpretation of the GST Act will be implemented in the following way:

- The ATO will not be bound. However, the ATO will give serious consideration to the reviewer's opinion.

- If the ATO agrees with the reviewer's opinion, the ATO will apply that view to all taxpayers and will update public or private guidance where appropriate.
- If the ATO disagrees with the reviewer's opinion, the ATO will maintain its existing view but will [refer the matter to GPAS/GSTAS](#).

The ATO will also consider a [communication to impacted stakeholders regarding an external review opinion](#) as outlined below.

Treasury representative notification, acknowledgement and endorsement

The government entity must provide sufficient detail to their Treasury representative regarding the dispute, including the:

- amount in dispute
- tax periods to which the dispute relates, and
- legal, factual and/or valuation matters in dispute.

GPAS/GSTAS consideration

Where an external review opinion is not adopted by the ATO, the matter will be referred to GPAS/GSTAS for them to consider the following alternative options:

- Decide whether the dispute highlights a policy gap in the law or the IGA. Where necessary, the matter may be referred to the Council on Federal Financial Relations for consideration.
- Park the issue awaiting a non-State entity to litigate the issue.

Communication to impacted stakeholders regarding an external review opinion

A copy of the external review opinion will be made available, to the extent possible, to impacted stakeholders including:

- treasuries and GPAS/GSTAS
- other government entities
- ATO staff, and
- advisors.

A summary of the legal issues and principles from the external review will also be provided to these impacted stakeholders. Where potential secrecy limitations prevent a copy of the external review opinion being made available, only the summary will be provided.

The ATO will communicate to impacted stakeholders whether it will:

- clarify or amend the ATO view, or
- where the interpretation of the GST law by the external reviewer has implications for non-notional GST issues, maintain the ATO view until such time as the issue is determined by the Courts.

The ATO will communicate to the broader community where an issue has implications for them.

4. ATO internal review

An ATO internal review is the final stage of the dispute resolution process. Once an internal review decision is made (that is, a decision made by the Commissioner under the parallel process to an objection process), the dispute will be finalised and no further review rights are available.

While notional GST issues cannot legally be resolved by way of an objection, the ATO will provide internal review rights consistent with those for objections. However, internal review rights will not be provided where:

- the ATO and the government entity have entered into a settlement on the issue, or
- an external review has already been undertaken on the issue at the ATO engagement/assurance activity stage.

Government entities can lodge a request for ATO internal review of an assessment, amended assessment or advice/guidance within the timeframes set out for GST in [Decisions you can object to and time limits](#). That is, the request for ATO internal review is to be lodged:

- for assessments – within 4 years and one day from the date the assessment was given to the government entity
- for amended assessment – within the later of
 - 60 days from the date the amended assessment was given to the government entity, or
 - 4 years after the original assessment was given to the government entity
- for advice/guidance - until the time an activity statement is lodged by the government entity that takes into account the matter to which the ruling relates.

The request for internal review must fully state the grounds on which the government entity is seeking internal review.

To ensure that the relevant Treasury representative is aware of disputes relating to notional GST, the government entity is expected to [notify their relevant Treasury representative](#) when the government entity lodges a request for ATO internal review.

As part of the ATO internal review process and in consultation with the government entity, consideration will be given to [alternative dispute resolution](#). At all stages, negotiation and settlement will be considered where appropriate.

The ATO will manage the ATO internal review consistently with [processes set out in Part IVC of the Taxation Administration Act 1953](#) (except that no further external review rights are available).

The ATO internal review officer will determine whether the government entity's internal review is to be allowed, allowed in part or disallowed, including whether previously issued advice/guidance is to be revised. Once the internal review decision is made, the dispute will be finalised in accordance with that decision and no further review rights are available.

External reviews

Notional GST external review opinion – improvements on land (Finkelstein evaluation)

Date: 15 April 2015

The following has been prepared by the ATO as a summary of the legal issue and principles arising from an external review regarding improvements on land for the purposes of Subdivision 38-N and table item 4 of subsection 75-10(3) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).

The external review opinion of Raymond Finkelstein QC was provided on 15 April 2015.

This summary is published for transparency reasons.

While the ATO is not bound by this external review opinion, the ATO has adopted the principles decided in this opinion.

Context

1. The supply of a freehold interest or a long-term lease of land by the Commonwealth, a State or a Territory is GST-free where the land has no improvements when supplied (subsection 38-445(1) of the GST Act).
2. Also, where the margin scheme (Division 75 of the GST Act) applies, and:
 - the supplier of land is the Commonwealth, a State or a Territory which has held the interest, unit or lease since before 1 July 2000, and
 - there were no improvements on the land or premises in question as at 1 July 2000,

the land is valued as at the date on which the supply takes place (table item 4 of subsection 75-10(3) of the GST Act) as if there were no improvements on the land when the supply takes place (subsection 75-10(3A) of the GST Act).

Legal issues considered

3. For the purposes of these provisions:
 - For the phrase 'land on which there are no improvements', what is an improvement?
 - Can improvements be lost?
 - Does the highest and best use of the land or the intention of the purchaser determine whether something is an improvement?
 - Where the land consists of multiple titles, will each title always be assessed individually to determine if there is an improvement? Alternatively, will there be situations where multiple titles are assessed together so that, if there is an improvement on any of the titles, the land comprising the multiple titles will have improvements?

Principles decided

4. In determining what is an improvement:
 - An improvement to land is a physical alteration or addition which results in an enhancement in the value of the land from the value in its natural state, or an alteration or addition which will improve the usefulness of land for an occupier when compared with its natural state.
 - Where land had improvements, they will cease to be improvements if they have been 'exhausted'. However, simply because improvements cease to affect the land's market value does not mean that the improvements have been 'exhausted' or that the land has the character of 'land with no improvements'.
 - It is not relevant whether a physical alteration or addition contributes to the 'highest and best use' of the land or contributes to the purpose for which a purchaser intends to use the land. For example, if the highest and best use of the land is for residential development, or the purchaser intends to use the land for residential development, it does not matter whether the physical alteration or addition adds value or usefulness for a residential development.
 - An improvement has not been lost simply because of a change in the preferred activity that can be conducted on the land.
5. Where land consisting of multiple titles is supplied:
 - Individual titles will not always be separate supplies.
 - The facts will determine whether the supply of the land is a single supply or multiple supplies. The starting point is the contract which brings about the supply. In most cases, the subject matter of the supply should be identifiable from the terms of the contract.
 - Each supply of land is separately assessed to determine if there are any improvements on the land.
 - If it is a single supply of multiple titles, the land will have an improvement if any of the titles has an improvement.

References

Legislative references:

- GSTA 1999
- GSTA Subdiv 38-N
- GSTA 1999 38-445(1)
- GSTA 1999 Div 75
- GSTA 1999 75-10(3)
- GSTA 1999 75-10(3A)

Notional GST external review opinion – improvements on land (Crennan evaluation)

Date: 24 May 2017

The following has been prepared by the ATO as a summary of the legal issue and principles arising from an external review regarding improvements on land for the purposes of table item 4 of subsection 75-10(3) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).

The external review opinion of Susan Crennan AC QC was provided on 24 May 2017.

This summary is published for transparency reasons.

While the ATO is not bound by this external review opinion, the ATO has adopted the principles decided in this opinion.

Context

1. Table item 4 of subsection 75-10(3) of the GST Act (item 4) provides that the valuation date for a supply of land under the margin scheme is the day of the supply if the supplier of land is the Commonwealth, a State or a Territory which has held the interest, unit or lease since before 1 July 2000, and there were no improvements on the land or premises in question as at 1 July 2000.

Legal issues considered

2. For the purposes of table item 4, where there was an improvement on the land at 1 July 2000, and the land is later subdivided such that the previous improvement would have been on what are now multiple titles for individual sale:

- Has the improvement as at 1 July 2000 lost its character as an improvement if a later individual subdivided title only has a part of that improvement?
- Must the part of the improvement that existed as at 1 July 2000 have value or usefulness for the purpose for which the later subdivided title is to be used?

Principles decided

3. Where there was an improvement on land as at 1 July 2000 and the land is later subdivided such that the previous improvement would have been on what are now multiple titles for individual sale:

- The land is assessed as at 1 July 2000. If there was an improvement on the land as at 1 July 2000 and the improvement, or part of that improvement, was on that part of the land representing the later individual subdivided title, that later individual subdivided title had improvements as at 1 July 2000.
- The improvement as at 1 July 2000 does not lose its character as an improvement as at 1 July 2000 because of later subdivision.
- It is not relevant whether the improvement, or part of that improvement, as at 1 July 2000, has value or usefulness for the later subdivided title either generally or for the purpose for which the later title is to be used.

References

Legislative references:

- GSTA 1999
- GSTA 1999 75-10(3)