



Law Council  
OF AUSTRALIA

# Improving the integrity of GST on Property Transactions

**The Treasury**

**20 November 2017**

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council is grateful for the assistance of its the Property Law Committee from the Legal Practice Section, the Taxation Law Committee from the Business Law Section and the Law Society of New South Wales.

## Introduction

1. The Law Council of Australia (**Law Council**) welcomes the opportunity to provide a submission to the Treasury's consultation on Improving the Integrity of GST on Property Transactions, including in relation to the Exposure Draft Inserts for Treasury Laws Amendment (2017 Measures No. 9) Bill 2017: TSY/45/248 Real property transactions (**Exposure Draft**) and Exposure Draft Explanatory Materials – Withholding GST from Property Transactions (**Draft Explanatory Materials**).
2. This submission addresses a number of matters which are of importance to the Law Council in the discussion questions identified in the Exposure Draft and Draft Explanatory Materials.
3. The submission comprises the following parts: general comments (primarily from a property law perspective) on the new measures; specific comments on the Exposure Draft including matters which appear not to have been sufficiently addressed in the Exposure Draft; further comments from a specialist taxation law perspective; and an attachment (based on the work of the Law Society of New South Wales) which sets out in more detail the Law Council's views on relevant sections of the Exposure Draft and outstanding issues which should be addressed before the passage of the legislation.

## General comments on the new proposed measure <sup>1</sup>

4. As a general principle, the Law Council has significant concerns in relation to the proposed fundamental changes to the way in which goods and services tax (**GST**) will be payable in relation to a taxable supply of new residential premises and potential residential land.
5. The Law Council understands the policy rationale for the measure is to prevent non-compliance with the GST law through phoenixing, and fully support Government in ensuring the integrity of its taxation system. However, it has real concerns regarding the level of red tape, uncertainty and risks that these changes will impose on the ordinary operation of the conveyancing process and the property industry generally.
6. The Law Council questions if the proposed measures are cost effective for the community, and has doubts about the cost-effectiveness of the measure to the Australian Taxation Office (**ATO**). It appears that the ATO is not vigorously pursuing criminal activity by a very few regular known tax evaders but passing the compliance cost onto the rest of the community. The Law Council believes targeted compliance of the miscreant offenders may be a far more effective measure.
7. Furthermore, the proposal is more difficult, complex and expensive for the community because an amount withheld is not credited to the vendor unless it is actually paid by the purchaser, unlike most withholding regimes such as PAYG. This causes a major complexity and compliance cost.
8. The determinations that both the vendor and purchaser are required to make, without reference to the ATO, and the proposed notice mechanisms represent a shifting of due diligence and risk to the parties. In particular, there is a shift of the

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<sup>1</sup> The Law Council adopts the views directly as outlined in paragraphs 4 to 20 from the Law Society of New South Wales' submission to the Law Council.

onus of the risk of GST non-compliance by the party making the taxable supply (vendor) to the purchaser.

9. In the Law Council's view, this shift is unjustified. The Law Council is concerned that the additional enquiries that a purchaser will need to make, together with the additional administration created for the parties in the transaction are disproportionate to the mischief that the measure is trying to address. More importantly, the drafting of the proposal creates a pattern of inequity for innocent parties. A purchaser becomes legally liable for the withholding even if the vendor/supplier/taxpayer fails to give the required notice. The vendor/supplier/taxpayer fails to gain the tax credit even though the withholding is outside his or her control.
10. The Law Council accepts the possibility of the use of the commissioner's discretion in cases of other party failure is commendable, but an innocent party should not be liable as a matter of law.
11. The Law Council is also concerned that the compliance costs will adversely affect housing affordability.
12. The Law Council is also disappointed that the good work done in the development of a fair process in the recent changes associated with the foreign resident capital gains tax withholding measure (**FRCGW**), in part motivated by a desire not to impede the conveyancing process, does not appear to have been replicated here. We appreciate that conceptually there are significant differences in capital gains tax and GST, but that does not explain why similar procedures and mechanisms could not be adopted for a GST withholding.
13. When the FRCGW measure was first being developed, it initially incorporated concepts of a "reasonable belief" by the purchaser about the foreign nature of the vendor. Fortunately, however, this was then replaced by the clearance certificate for real property transactions, eliminating reasonable belief concepts. The other advantage to the clearance certificate mechanism is that the ATO is notified of the transaction much earlier. The vendor is given the opportunity to clarify its position with the ATO early, sometimes prior to the contract being entered into, allowing the transaction to proceed efficiently.
14. More importantly, the FRCGW measure incorporated 2 measures that are critical to minimising market distortion; namely specific provisions detailing non-interference with the rights of secured parties, and secondly, the capacity for a pre-withholding variation process to be undertaken to allow a 'tailor made' calculation of the withholding to be made before settlement of the sale. This proposal has neither of these.
15. The Law Council is concerned on the effect this measure will have on development lending practices, and the consequential market interference in the construction of new homes. In the absence of a Regulatory Impact Statement, the Law Council expresses concern that if the banks stop lending to builders or developers because of concern that their interests as secured creditors are or could be adversely affected, or increase lending costs to incorporate the new risk, that could affect both housing supply and affordability.
16. The Law Council submits that this measure should be redesigned, with a much greater focus on simplicity of administration between the parties, and an intention to minimise the compliance obligations and risks on both parties.

17. It should also specifically deal with the interests of secured parties.
18. At the very least, the nexus between the notice from the vendor (or more preferably a clearance certificate) and the purchaser's obligation to withhold should be absolute. For example, if the vendor does not issue the required notice to the purchaser in the stipulated timeframe, the purchaser should have no obligation to withhold the GST.
19. Most importantly, purchasers should have complete protection from any liability and penalties or interest, if they have relied on a notice from the vendor, in the absence of collusion or fraud by the purchaser.

## Specific issues with the new proposed measure

20. A number of specific issues with the measure as currently designed are set out below. Additional commentary on most of these issues is also included in our specific comments on the Exposure Draft.
  - a) **Which residential sales require a vendor notice?** Is a vendor notice required for all residential sales, or only for all residential sales that are taxable supplies? From the purchaser's perspective, the property might appear to be new residential premises. The Law Council suggests that further clarification is required.
  - b) **Complex determinations:** While it may seem reasonably clear that a vendor should be issuing a notice regarding payment of GST for a new off the plan residential development, other scenarios will not be as easily determined; for example, where the premises are "new" on the basis they have been substantially renovated. The purchaser should not be put in a position where it is necessary to make further enquiries and complex determinations of tax law to enable the purchaser to discharge a liability to withhold the vendor's GST. The purchaser also faces significantly higher legal and administration costs to address this risk.
  - c) **Zoning enquiries:** The characterisation of land as "potential residential land" appears to require significant enquiry by the purchaser and may not always be straight forward.
  - d) **Clearance certificate:** We suggest that the introduction of a clearance certificate mechanism would operate well for this measure. The new measure as currently drafted creates a real risk that some transactions may be held up due to uncertainty as to the correct position. Further, we suggest that the risks that the measure aims to address will not affect the vast majority of transactions. As such, the measures have the potential to significantly disadvantage and disrupt the majority of transactions in order to prevent the very small minority of transactions at risk from GST avoidance. A clearance mechanism could reduce the disruption by removing the risk from the purchaser.
  - e) **Reliance on statement by vendor by an innocent purchaser:** The Law Council is of the view that a better and fairer outcome would be to provide that a purchaser, acting in good faith, can rely on a statement made by the vendor that the premises are not new premises for the purposes of GST.

- f) **Adjusted price or price specified on contract?** There is real difficulty in undertaking the appropriate calculation. Under existing GST rulings e.g. GSTD 2006/3, the appropriate amount for the purposes of GST calculation is the adjusted price. However, using the adjusted price will be problematic for specification in the vendor and purchaser notices (other than the notice on settlement), as the adjusted price is usually not known until 3-4 days before, or even sometimes the morning of settlement. The adjusted price will usually vary on a day by day basis, creating practical problems if settlement is delayed from the original settlement date. In addition, post settlement adjustments to the purchase price are not uncommon. It is not clear how the new rules will deal with such adjustments.
- g) **Payment on the date of settlement:** Payment at settlement may be possible when the settlement occurs electronically using PEXA. However, as at 1 July 2018, the majority of settlements will still occur in the paper environment and the transition to electronic conveyancing will occur much later than that date in some States and Territories. In the QACT for example, there are no current plans to join the PEXA system. In the paper environment, a requirement for payment to be made to the ATO on or before the date of settlement is completely impractical. It is essential that a period for payment after settlement is specified in the legislation. There is added difficulty in small and remote jurisdictions where the ATO does not maintain independent offices – in the case of the Northern Territory, the ATO only has two locations, in shared facilities with Centrelink/Medicare. Payment to such offices will need to be able to be achieved by a letter drop system so the purchaser's representative can deposit the funds immediately, without having to wait with other users of the centres.
- h) **Heavy reliance on penalty mechanisms:** The heavy reliance on penalty mechanisms, particularly as applicable to the purchaser, who may be unsophisticated and unaware of the consequences, is not appropriate and disproportionate to the mischief the measure is aiming to address.
- i) **Refund timeframe:** Does the vendor lose the ability to claim a refund if the vendor does not comply with the 14-day timeframe? This needs clarification. More generally there are a number of strict timeframes in the proposal that the different parties need to meet which creates confusion and complexity.
- j) **Transitional provisions:** The transitional provisions are unduly complex. It may be simpler to provide for the measure to apply to contracts entered into after 1 July 2018. An appropriate lead time will also be needed for changes to standard contracts for the sale of land in the States and Territories.
- k) **Transitional provisions:** Where the parties entered into a pre-1 July 2018 contract, the vendor appears to be excused from the notice requirement, but a purchaser may need to withhold GST for certain existing contracts under item 24 of the Exposure Draft. The obligations to provide a notice and to withhold should run together.
- l) **Developers:** Developers should be able to include the vendor notice in the contract, if the vendor notice is retained. Developers with an excellent compliance history should be exempted. This could be achieved through a clearance certificate system.
- m) **Limited funds available on settlement:** Where a vendor's mortgagee is owed in excess of 90% of the settlement proceeds, there will be insufficient funds available at settlement to satisfy the withholding obligation. This needs to be addressed and consideration given to a variation mechanism. More generally, complexities and

hardship may also arise where non-cash consideration is involved (e.g. the purchaser may not have access to sufficient cash reserves to make the payment).

- n) **House and land packages:** The Law Council are not sure how house and land packages will be treated under the measure. Sometimes separate companies are used for the sale of the land and the building of the dwelling. It is the understanding that GST is normally paid on each progress payment as there are separate supplies of each stage of construction. The Draft Explanatory Materials seem to assume that there will either be one entity or that there will be a grouping of the 2 companies for tax purposes even though there may be quite different underlying ownership structures and the 2 companies might be quite at arms-length in terms of underlying ownership and management control other than combining just for marketing purposes.
- o) **Interaction with FRCGTW – i.e. multiple withholding obligations:** It is not clear what the withholding provisions will be if the vendor of new residential premises is a foreign resident. Does this mean that 22.5% withholding must be made by a purchaser and where will the money come from? Which measure takes precedence, in the case of a conflict?

## Business Law Section – Taxation Law Committee Perspective

- 21. Submissions in relation to the Exposure Draft and Draft Explanatory Materials of the Taxation Law Committee of the Business Law Section of the Law Council are set out below.

### Application of withholding rules - sales of premises/land

- 22. Proposed section 14-250(2) states that the withholding rules apply to "...a supply of...new residential premises or potential residential land". The broad nature of the term "supply" means that the proposed rules could potentially apply to leases or licences of the subject property which appears to be contrary to the policy which is solely aimed at purchases of residential property.
- 23. In order to avoid any uncertainty, the Committee recommends that the proposed section 14-250(2) is amended to change the term "supply" to "supply by way of sale or long-term lease".

### Application of withholding rules - entity that pays at settlement might not be the recipient

- 24. It will be common for settlement payments to be made by entities other than the recipient of the supply, for example if the recipient has borrowed funds from a bank and it is the bank who is paying the supplier at settlement.
- 25. While the recipient is liable to withhold GST, but the actual payment is made by a third party, there is a risk that the third party may not withhold the GST, which will cause the recipient to contravene proposed section 14-250(1), but also have flow

on effects to for the supplier (for example not being eligible to claim a credit or refund).

26. The Taxation Law Committee considers that there should be obligations under the rules placed upon entities that make the actual payment to the vendor at settlement (i.e. not necessarily the recipient) or at least further requirements upon the recipient to notify the actual payers of the withholding obligation.
27. In addition, the ATO's systems should be able to identify where payments have come from third parties, but still be able to match these to the correct supplier to ensure there is no delay when it comes to issuing a credit or refund to a supplier.

### **Calculation of GST amount to be withheld**

28. The amount of GST to be withheld by recipients and paid to the ATO is calculated as "1/11 of the price for the supply" (refer proposed section 14-250(7)).
29. Due to the nature of property transactions, the final price for the supply of a property may not be known until the time of settlement. This would apply where for example there are settlement adjustments made in respect of the property. For GST purposes, settlement adjustments are taken into account in calculating the consideration for a supply on which GST is calculated (refer to GST determination GSTD 2006/3).
30. Suppliers are required to notify recipients of the amount that recipients are required to withhold at least 14 days before settlement date (per proposed section 14-255(1)). This means that it will be impractical for the withheld GST to be based on the final consideration for the sale of the property.
31. Given the price for the supply of the property can potentially change between the time of exchange of contracts and settlement, the withheld GST must be calculated based on the price at a specified period of time. As such, the Committee recommends that proposed section 14-250(7) should be amended so that the withheld GST notified by the supplier is based on the headline, unadjusted [contract price] for the sale of the property.
32. However, the issue still remains regarding how the withheld GST will be adjusted to take into account any adjustment to the price that occurs up until settlement. It would be administratively costly for both suppliers and the ATO if adjustments were required for all transactions where there were adjustments to the price.

### **Notification requirements by suppliers – application to a wider range of supplies**

33. Pursuant to the proposed section 14-255(1), a supplier must not make "a taxable supply of residential premises or potential residential land..." unless it meets certain notification requirements.
34. This notification requirement will apply not only to "new" residential premises but to all taxable supplies of residential premises. That is, it will apply more widely to suppliers who are not affected by the proposed withholding rules of taxable residential premises. As explained at paragraph 1.29 of the Draft Explanatory Materials, this is a deliberate inclusion by the legislature.

35. In the Taxation Law Committee's view, the notification requirements should only apply in respect of suppliers who are affected by the proposed withholding rules (i.e. new or potential residential premises). This is especially given that there are penalties applicable where suppliers fail to satisfy the notification requirements. The potentially wide-ranging notification requirements are buried within the proposed withholding rules within the TAA and there will undoubtedly be suppliers who unintentionally contravene these requirements.
36. The Committee recommends that proposed section 14-255 is amended to apply to taxable supplies of new residential premises or potential residential land, in line with the withholding requirements for recipients at proposed section 14-250(2).

### **Notification by suppliers - the practical effect of non-compliance by supplier**

37. The opening words of the proposed section 14-255(1) regarding notification requirements for suppliers begins with:

*You must not make a taxable supply of residential premises or of potential residential land to another entity unless...*

38. Based on the above, the supplier must notify a recipient in the proper manner and with the required information in for it to make the taxable supply. Putting aside the imposition of penalties on suppliers (under proposed section 14-255(2) and (4)) there is uncertainty regarding what the practical effect of non-compliance with the notification requirements are. For example, if the supplier does not notify or notifies after the required 14 days, what effect will this have on the actual supply of the property. It is difficult to envisage that contravention of this notification requirement will have any force to delay or cancel settlement.
39. The Taxation Law Committee recommends that the Draft Explanatory Materials are amended to provide an explanation regarding the practical effect (if any) on settlements, if a supplier does not adhere to the notification requirements.

### **Credits to suppliers – contingent upon payment received from recipients**

40. In order for a supplier to receive a credit in its BAS relating to the GST withheld by the recipient, one of the requirements is that another entity has paid the withheld amount to the ATO (refer to the proposed section 18-60(1)(d)).
41. Further, a supplier's refund from the ATO is also dependent upon the recipient having paid the GST withheld to the ATO (refer to proposed section 18-85(1)(a)).
42. This places the supplier in an uncertain position as it will have almost no control over whether the recipient actually pays the withheld GST amount to the ATO. There may be instances where the supplier has correctly notified a recipient of the amount to be withheld (per proposed section 14-255(1)), the recipient withholds the GST from the settlement payment to the supplier but does not remit the withheld GST to the ATO (either on time or at all). In this instance, the supplier would not be entitled to a credit or a refund because the payment has not been received and the requirements of both proposed sections 18-60(1)(d) and 18-85(1)(a) are not met.

43. The Taxation Law Committee requests an explanation of what relief will be afforded to compliant suppliers in circumstances where recipients fail to pay withheld GST to the ATO. This explanation is better placed in the Explanatory Materials.
44. Further, if the recipient does pay the withheld GST to the ATO by the required date, the ATO's systems will need to be able to match this payment against the GST liability for the supplier in a timely manner in order for suppliers not to incur any additional costs. The Taxation Law Committee requests that Treasury provides assurance or an explanation of the ATO's systems that would be able to support this.

## **Refunds to suppliers – additional criteria for consideration by Commissioner**

45. After a supplier has applied in writing for a GST refund, the Commissioner must be satisfied that it would be 'fair and reasonable' to refund the amount to the supplier based on a set of criteria set out in proposed section 18-85(4).
46. The list of criteria is extensive given the original policy intent behind the proposed withholding rules. That is, the policy intent behind the proposed withholding rules was to combat the fraudulent behaviour of suppliers who did not remit GST on sales of new residential premises. It was not the intention to introduce more rigorous powers for the Commissioner to investigate and retain refunds or to penalise compliant taxpayers. To this end, there were suggestions of a 'rapid refund' system for suppliers whose GST liabilities were less than the 1/11th amount withheld by recipients at settlement. The idea of the 'rapid refund' scheme was discussed as a way to mitigate the cash-flow costs for suppliers who would have more GST withheld from sale proceeds than their true GST liability. The inclusion of these criteria to be assessed by the Commissioner could give rise to additional delay in suppliers receiving their respective GST refunds.
47. The criteria also provides scope for the Commissioner to conduct further investigation into the circumstances relating to the proposed refund which in our view is unnecessary, unwarranted and unintended effect of the proposed withholding rules. In particular, the Commissioner can have regard to the following criteria in assessing whether a refund is 'fair and reasonable':
  - Proposed section 18-85(4)(a) – "the circumstances that gave rise to the obligation (if any) to make the payment under section 14-250";
  - Proposed section 18-85(4)(b) – "the nature of the applicable matter mentioned in paragraph (1)(b)..." - relating to whether the refund arises due to the margin scheme or because a payment was made in error; and
  - Paragraph 18-85(4)(f) – "whether an approved valuation of the real property (within the meaning of the GST Act) to which the supply relates has been conducted..."
48. The above criteria may require the Commissioner to understand the circumstances behind the requested GST refund in substantial detail which can give rise to delay in payment of the GST refund. Further, the Commissioner may be required to devote a significant amount of resources to verifying every refund against the proposed set of criteria.
49. In the Taxation Law Committee's view, these criteria give the Commissioner an unintended scope to conduct an investigation into refunds and to cause delay in the GST refunds being received. Whilst the proposed withholding rules are aimed at preventing fraudulent behaviour of a minority, it would be unfair for all suppliers who

would be entitled to GST refunds to have to be subjected to additional scrutiny from the Commissioner. This would impose additional cash-flow and compliance costs on compliant taxpayers.

50. Further, the Commissioner already has sufficiently wide powers to investigate proposed GST refunds, which could apply to the proposed withholding. As a result, the proposed additional powers are unnecessary.

### Refunds to suppliers – timing requirement for refund application

51. Under the proposed section 18-85(2) of the ED, the supplier must make a written refund application to the Commissioner "no later than 14 days before the day on which GST is payable on the supply".
52. However, paragraph 1.51 of the Draft Explanatory Materials states that:

*The application must also be lodged at least 14 days before the end of the tax period to which the taxable supply is attributed.*
53. These are contradictory statements regarding the time when the supplier is required to apply to the ATO for the refund. The timing contained in the Draft Explanatory Materials appears to be incorrect, as the timing requirement cannot be met if settlement of a transaction occurs after say the 16th or 17th day of a month.
54. The Taxation Law Committee recommends that the Explanatory Materials are amended to align the timing for the supplier to issue notifications with the timing included in the Exposure Draft.

### Refunds to suppliers – inconsistent use of the term 'recipient'

55. The term "recipient" is used in the proposed section 18-85(1)(a) when referring to a supplier who applies for a refund from the Commissioner. Although the supplier is applying to receive a refund from the Commissioner, the use of the term "recipient" in this context can cause confusion especially where the common GST term "recipient" is used elsewhere in the Exposure Draft – see proposed section 14-250(1).
56. The Taxation Law Committee recommends that a different term is used in proposed section 18-85 to refer to the supplier applying for the GST refund. The term "applicant" could be used, for example.

### Transitional provisions – property development arrangements

57. For existing property development arrangements (**PDA**), the transitional provisions at Item 25 of the ED apply such that where parties to a PDA are required to distribute amounts between the parties, the obligation for a party to be required to pay an amount equal to the GST liability of a supplier is discharged where the proposed withholding rules apply.
58. Whilst this is aimed at ensuring that suppliers do not receive a windfall gain, a question arises regarding whether a statutory provision can override the contractual terms agreed to by the parties.
59. The Committee would like confirmation that the statutory override would be enforceable to contractual arrangements between parties and recommends that the

EM is updated to include further explanation and examples demonstrating the operation of the transitional provisions to PDAs.

## Attachment A

### EXPOSURE DRAFT Treasury Laws Amendment (2017 Measures No. 9) Bill 2017:

#### TSY/45/248 Real property transactions

#### Schedule #—Payment of GST on taxable supplies of certain real property

Part/ Item/ Section	Heading	Comments
Part 1 <sup>2</sup>	<b>Main amendments</b> <b><i>Taxation Administration Act 1953</i></b>	
Item 1	<b>Subdivision 14-E—GST payable on taxable supplies of certain real property</b>	
14-250	<b>Recipients of certain taxable supplies of real property must pay amounts to Commissioner</b>	<ul style="list-style-type: none"> <li>• In subsections 14-250(1) and (2) where “supply” rather than “taxable supply” is specified, is this intended to mean “taxable supply” each time?</li> <li>• “potential residential land” is a concept that will require significant enquiry.</li> <li>• Subsection 14-250(2)(b): Query the meaning of “potential residential land”. Does this include land which is zoned for mixed use? Will this be clarified via a ruling issued pursuant to subsection 14-250(3)?</li> <li>• Provision also needs to be made for contracts where the zoning of the land changes while the contract is on foot.</li> <li>• Subsection 14-250(2)(b) may also operate more widely than intended; e.g. the purchase of a subdivided parcel on which a commercial office is located, where the land is zoned for residential use.</li> <li>• Options and “on-sales” (supply of rights rather than a real property interest) are not addressed in the draft legislation.</li> <li>• Subsection 14-250(4)(b)(ii) refers to “interest, unit or lease”. We suggest “interest” may be sufficient. Presumably the measure does not apply to leases. Clarification is required.</li> </ul>

<sup>2</sup>The Law Council adopts the views directly as outlined in the Table – Attachment A from the Law Society of New South Wales’ submission to the Law Council.

Part/ Item/ Section	Heading	Comments
		<ul style="list-style-type: none"> <li>• Subsection 14-250(5) refers to paying the amount “on or before”. Payment before settlement is very unlikely to occur. The FRCGW measure provides a “grace” period by administrative arrangement, but there should be a specified period after settlement for payment provided for the new measure in the legislation. While payment on settlement works for electronic conveyancing, paper settlements will still dominate for some time, particularly in the States/Territories where PEXA is not yet available and is years away from becoming the mandatory mode for settlement.</li> <li>• Payment should be due within 21 days of completion, to match BAS payment timing.</li> <li>• Subsection 14-250(7) refers to “<sup>1</sup>/<sub>11</sub> of the *price for the supply”. We understand that under the GST Law and GSTD 2006/3, the price means the adjusted settlement price. This is not usually known until 3-4 days prior to settlement and will vary on a daily basis if the first attempt to settle is unsuccessful and settlement is postponed to a later date. If the adjusted price must be used, this is problematic for the vendor notification to purchaser 14 days prior to settlement, as well as the purchaser notification to the ATO five days prior to settlement.</li> <li>• If the GST rate increases from 10%, we note that “<sup>1</sup>/<sub>11</sub>” will change.</li> <li>• Subsection 14-250(8)(b) refers to “practicable” but for whom? We envisage that this subclause will generate disputes.</li> </ul>
14-255	<b>Notification by suppliers of residential premises etc.</b>	<ul style="list-style-type: none"> <li>• Why not utilise a clearance certificate as provided in relation to the FRCGW measure? The burden and risk should be on the vendor and the ATO should be involved earlier in the process.</li> <li>• Please clarify if the notice to be issued by the vendor applies in relation to all residential premises or all residential premises where it is also a taxable supply. There is inconsistency between subsection 14-255(1) and para 1.29 of the Draft Explanatory Materials.</li> </ul>

Part/ Item/ Section	Heading	Comments
		<ul style="list-style-type: none"> <li>• Subsection 14-255(1) states that an entity "must not make a taxable supply..." unless the required notice has been issued. The section could be read as implying there is a restriction on the making of a taxable supply, which must not be the case. We suggest that the provision be reworded.</li> <li>• Consideration could be given to requiring a notice only if there is an amount to be withheld. This could be achieved by changing "whether" to "that" in subsection 14-255(1)(a). This would be appropriate if the measure was recast so that the obligation to withhold only applies where a vendor has furnished a notice to withhold, and the purchaser is only obliged to withhold when it receives a notice from the vendor requiring an amount to be withheld.</li> <li>• Does the "amount" in subsection 14-255(1)(b)(ii) need to be an actual dollar amount or could it be specified on the notice, in broad terms such as "1/11 of the price"? There will be significant issues with quantification, especially if the adjusted price is required.</li> <li>• A greater nexus is required between the vendor notice and the purchaser's obligation to withhold. The amount should be as specified in the notice with no requirement for the purchaser to further calculate e.g. market value of "free" goods or services supplied.</li> <li>• Section 14-255 is silent as to what happens between the vendor and purchaser if notice is not given.</li> <li>• Section 14-255 needs to also provide for what should happen if the contract is on foot for less than 14 days. In that case, the notice could be given at the date that the contract is made.</li> <li>• Reference to "reasonably believed" in section 14-255(5), in relation to the vendor, may be problematic without further specification.</li> </ul>
<b>Item 2</b>	<b>At the end of section 16-30 in Schedule 1</b> Add:	

Part/ Item/ Section	Heading	Comments
16-30(2)		<ul style="list-style-type: none"> <li>• Subsection 16-30(2)(a): Is there a missing reference to “potential residential land”?</li> <li>• Subsection 16-30(2)(b): The reference to a reasonable belief that the premises are not to be new premises is strongly opposed. We support including in the measure either a clearance certificate mechanism or making the receipt of a notice to withhold the sole determinant. There must be no need for the purchaser to make further enquiries.</li> </ul>
Item 3	<p><b>At the end of Subdivision 18-A in Schedule 1</b> Add: <b>Entitlement to credit: taxable supply of real property</b></p>	
18-60	<p><b>Credit—payment relating to taxable supply of real property</b></p>	<ul style="list-style-type: none"> <li>• Subsection 18-60(1)(d): We note that the entitlement to a credit is dependent upon the payment by the purchaser of the GST to the ATO and that the withholding itself is insufficient. We note this is the same as with the FRCGW, which creates a significant risk for the vendor. There are fundamental problems for each party if the cheque is retained by the other party.</li> </ul>
Item 4	<p><b>At the end of Subdivision 18-B in Schedule 1 30</b> Add:</p>	
18-85	<p><b>Refund by Commissioner of amount withheld from payment in respect of taxable supply of real property</b></p>	<ul style="list-style-type: none"> <li>• Subsection 18-85(2): Does this mean that after 14 days a refund can never be made? We suggest that is too inflexible.</li> <li>• Subsection 18-85(2): Is the reference to “14 days before <u>the day on which GST is payable on the supply</u>” correct? This would often mean applying for a refund 14 days before settlement. Would the amount to be claimed be known with certainty at this time? Should it be 14 days before the BAS is due?</li> <li>• Subsection 18-85(2): Does the reference to “payable on the supply” mean payable by the purchaser as the withholder or payable by the vendor in its BAS?</li> <li>• Subsection 18-85(4): Determining what is “fair and reasonable” having regard to factors set out in the subsection is a very wide discretion.</li> </ul>

Part/ Item/ Section	Heading	Comments
		<ul style="list-style-type: none"> <li>Section 18-85: We note the absence of a timeframe for payment of any refund.</li> </ul>
<b>Part 2</b>	<b>Other amendments</b>	
	<b><i>Taxation Administration Act 1953</i></b>	
<b>Item 20 16-150</b>	<p><b>At the end of section 16-150 in Schedule 1</b></p> <p>Add:</p>	<ul style="list-style-type: none"> <li>Subsection 16-150(2) is drafted in a way that is not at all straight forward. It appears to mean that notice from the purchaser to the ATO on settlement does not count if the required notice 5 days earlier to the ATO has not also been given.</li> <li>Why does there need to be two notices? What does the ATO do when it gets the 5-day notice? Is there a remittance slip or bar code raised by ATO to assist with payment identification? This should be clarified.</li> <li>Is it 5 business days?</li> <li>The same issues arise as for the vendor notice, for sales that settle in less than 5 days. We query why the purchaser has to notify the ATO at all. Would it not be simpler for the vendor to issue a copy of the vendor notice to both the purchaser and the ATO? The notice requirements could be extended to include the purchaser's name, address and ABN.</li> <li>Why not follow the FRCGW mechanisms here and elsewhere? Parties and their advisors are familiar with it and it represents a better allocation of responsibility and risk. Under this measure, as currently drafted, the ATO only gets involved after settlement for credits or refunds to the vendor. The parties, both the vendor and purchaser, have much more work to do and bear more risk without a clearance certificate mechanism.</li> </ul>
<b>Part 3</b>	<b>Application of amendments</b>	
<b>Item 23.</b>	<b>General rule</b>	<p>The Law Council would prefer a more straight forward approach, such as the amendments to apply in relation to supplies which are made pursuant to a contract for supply entered into on or after 1 July 2018. Clarity and simplicity are important for both</p>

Part/ Item/ Section	Heading	Comments
		parties to a transaction, as well as their advisors and industry generally.
<b>Item 24.</b>	<b>Existing contracts</b>	<ul style="list-style-type: none"> <li>• This clause is unnecessarily complex.</li> <li>• Transitional provisions – where a contract has been entered into prior to 1 July 2018, the vendor appears to be excused from the notice requirement, but the purchaser still has an obligation to withhold GST for certain existing contracts. Obligations to provide notice and to withhold should run together.</li> </ul>
<b>Item 25.</b>	Existing property development agreements	Please clarify how these provisions are intended to operate.

### Outstanding Issues <sup>3</sup>

No.	Issue	Comments
1.	Clearance certificate and variation mechanisms	The vendor's liability for GST is best determined between the vendor and the ATO. Why not use a clearance certificate mechanism? (A clearance certificate mechanism could also be used to exempt compliant vendors/developers.)
2.	Variation facility	<ul style="list-style-type: none"> <li>• Why is this facility not used?</li> <li>• Where a vendor's mortgagee is owed in excess of 90% of settlement proceeds, there will be insufficient funds available at settlement to enable a purchaser to meet the withholding obligation. In relation to the FRCGW, this issue is solved by a variation notice from the ATO. There should be a variation mechanism available in relation to this measure.</li> </ul>
3.	Definition – residential premises	Is the measure intended to apply to sales of " <u>commercial residential premises</u> "? Conceptually, if the intent is to deal with vendors who make taxable supplies and don't make their GST payments, then arguably commercial residential premises should be caught. If commercial residential premises are not covered across the board, then the issue of newly subdivided commercial residential premises will create additional uncertainty.
4.	Lead time	Ideally several months' notice between the passage of legislation and commencement should be provided to allow industry and their advisors to prepare for the changes; for example, sufficient time to revise the standard sale of land contracts in each jurisdiction.
5.	Treatment of mixed supplies unduly complicated.	<ul style="list-style-type: none"> <li>• What happens if another taxable "thing" is supplied together with the property as a sales incentive; for example: "free" TV or landscaping?</li> <li>• What happens if a non-taxable "thing" is supplied together with the property as a sales incentive; for example: "free" department store gift voucher?</li> <li>• There is potential complexity in relation to a mixed supply of residential and non-residential premises.</li> </ul>
6.	Alternative security?	Should alternatives be available to secure payment of the GST, such as a performance bond?
7.	Will it be possible for developers to agree to pre-pay GST to the ATO prior to settlements taking place?	<ul style="list-style-type: none"> <li>• This might mean an exemption certificate could be produced for an entire development, once GST has been pre-paid; for example, a project development agreement that involves development in nine stages over a 10-year period.</li> <li>• Financiers sometimes establish a separate GST payment facility for developers, so this proposal might be workable given current industry practice.</li> </ul>
8.	"One-off" subdividers, not in	Based on ATO MT2006/1, some subdividers will not be carrying on an enterprise and so will not be entitled to an ABN or required to

<sup>3</sup> The Law Council adopts this view directly from the Law Society of New South Wales' submission to the Law Council.

No.	Issue	Comments
	the furtherance of an enterprise.	be registered for GST. How will this work in relation to the requirement for the vendor notice and the purchaser's obligations? This scenario supports utilisation of a clearance certificate.
9.	Options and on sales	These transactions do not appear to be sufficiently addressed.
10.	Non-conformity between the entity liable for GST and the vendor in the contract and/ or the registered proprietor.	This is already an issue in the FRCGW measure context.
11.	Interplay between FRCGW and GST	For example, what happens when the proceeds from sale are limited, due to a large mortgage liability, and the remaining funds are insufficient to cover both GST and the FRCGW? We suggest that this scenario supports the requirement for a variation mechanism.
12.	If GST is payable by the purchaser, does that mean prices can be advertised on a GST exclusive basis?	Some developers may look to advertise GST exclusive prices after 1 July 2018. This may need to be addressed in the legislation.