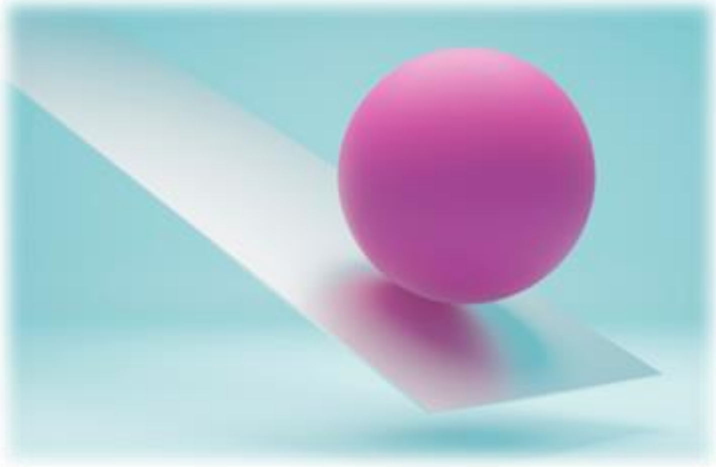
O'DONNELL TAX LAW

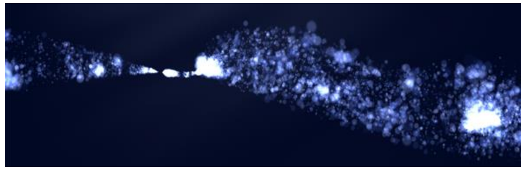
GST in Property Transactions

Legal Practitioners' Liability Committee

26 November 2025

Overview





- GST – basic rules and concepts
- Types of real property - characterisation
- GST withholding regime
- Margin scheme
- Going concern / farming business
- Managing GST obligations in the contract of sale and at settlement

Taxable supplies – the starting point

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GST applies to property transactions if there is a 'taxable supply'.

Taxable supplies – s. 9-5

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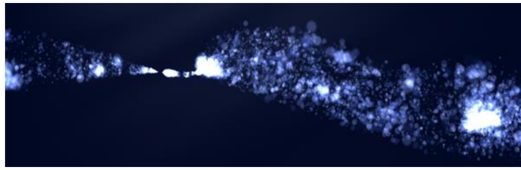

- Consideration (ss. 9-15 and 9-17)
- Supply (s. 9-10) in the course or furtherance of an enterprise (s. 9-20)
- Connected with Australia* (s. 9-25)
- Supplier registered or required to be registered
- Not 'GST-free' or 'input taxed'

*indirect tax zone

A New Tax System (Goods and Services Tax) Act 1999

GST – basic GST rules and concepts

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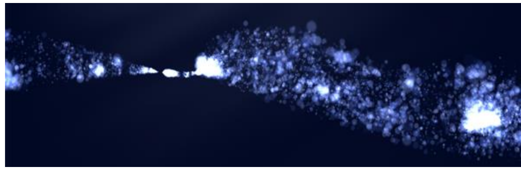

Supply	GST on supply	Input tax credits for acquisitions relating to supply
1 Outside GST net	No	No
2 Taxable	Yes	Yes
3 GST-free	No	Yes
4. Input taxed	No	No*

* Reduced input tax credits or reduced input tax credits available in certain circumsta

GST – capital supplies and GST registration

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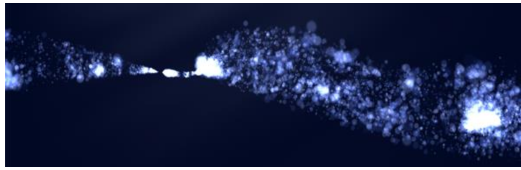
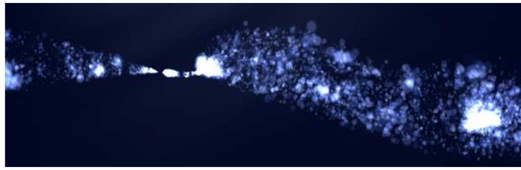


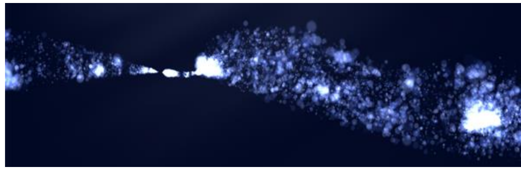
- Entity that is 'carrying on an enterprise' is:
  - **entitled** to be registered – even if 'GST turnover' below 'registration turnover threshold';
  - **required** to be registered if GST turnover meets registration turnover threshold
- Carrying on an enterprise – activity or series of activities
  - in the form of a business
  - in the form of an adventure or concern in the nature of trade
  - leasing, etc

GST – capital supplies and GST registration



- Registration turnover threshold:
  - $75k for most taxpayers
  - Met if:
    - ‘current GST turnover’ $75k+ and ‘projected GST turnover’ not below $75k; or
    - ‘projected GST turnover’ $75k+
- Capital assets
  - included in ‘current GST turnover’
  - not included in ‘projected GST turnover’
  - if property is capital asset – consider cancelling registration

Types of real property - characterisation



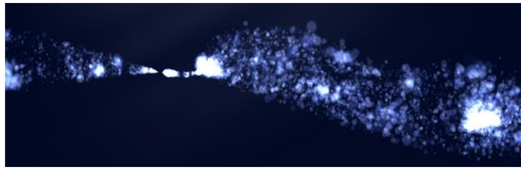
The GST treatment of property transactions (i.e. whether and how GST applies) depends on how the property is classified.

Types of real property - characterisation

- GST applies to supplies of land (without or without improvements) if s. 9-5 elements satisfied → except to the extent that they're input taxed or GST-free
- Residential premises [also GSTR 2003/3DC]
  - S. 195-1 →
    - land or a building
    - occupied as a residence or for residential accommodation / intended and capable of being so occupied
    - regardless of term of occupation

    (includes a floating home)
  - Existing residential – input taxed
    - Residential rent – s. 40-35
    - Sale - s. 40-65
    - Long-term lease – s. 40-70

Types of real property - characterisation

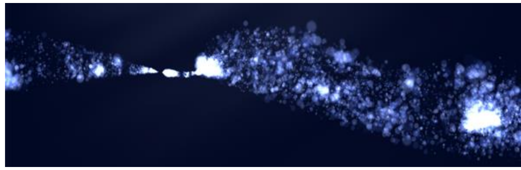


- Sale / Long-term lease of ‘new residential premises’ (**NRP**) and ‘commercial residential premises’ (**CRP**) – taxable because carved out from being input taxed supplies
- NRP → s. 40-75
    - Not previously sold as residential prem (other than CRP) and no previous long-term lease; or
    - Created through ‘substantial renovations’ of a building; or
    - Built / contain a building that’s been built to replace demolished premises on the same land.

  [Notes to s. 40-75(1)]

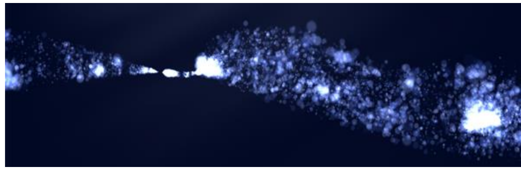
  - <u>**Not**</u> NRP if, for at least 5 years since becoming resi / NRP (as applicable), premises <u>**only**</u> used for making input taxed residential rental supplies.
  - Subdivisions, etc.
  - Includes associated land
  - GSTR 2003/3DC

Types of real property - characterisation



- CRP - s. 195-1
  - Hotel, motel, inn, hostel, boarding house
  - School accommodation
  - Caravan park / camping ground
  - [certain shops and marinas]
  - Anything similar to above
  - Excludes premises used to provide accommodation to students not in connection with an 'educational institution' that is not a 'school'.
- GSTR 2012/6DC
- Long-term commercial accommodation (s. 87-15) → Div 87 concession
- Commercial land / premises (including retail and industrial) – taxable (sale and lease)
- Vacant land (with any characteristics / zoning – taxable (sale and lease)

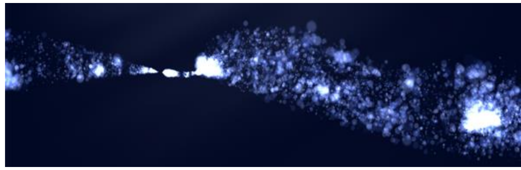
GST withholding regime



When acting for **vendor**, consider whether withholding notice is required if property contains a dwelling or is vacant land.

Vendor is required to give **withholding notice** for sale / long-term lease of ‘residential premises’ or of ‘potential residential land’ [unless exemption applies].

GST withholding regime

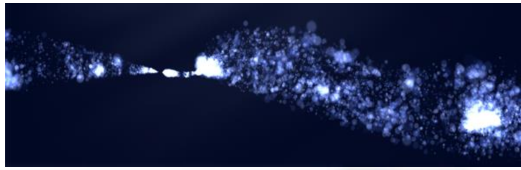


When acting for **purchaser**, consider whether withholding is required if property contains a dwelling or is vacant land.

Purchaser is required to **withhold GST at settlement** for purchase / long-term lease of ‘new residential premises’ or ‘potential residential land’ [unless exemption applies].

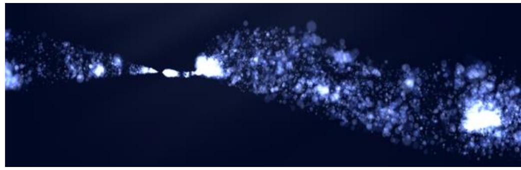
GST withholding regime

- Notification by supplier – written notice required
  - Whether recipient required to pay to Commissioner
  - If so, various additional information (including name and ABN, amount payable, when payment required, etc)
- Written notice not required –
  - Supply of commercial residential premises;
  - Supply of potential residential land to registered recipient acquiring land with creditable purpose
- Strict liability and administrative penalty – exception where supplier holds reasonable belief not required
- Non-compliance does not impact recipient's obligation to pay



GST withholding regime

Taxation Administration Act 1953 – Sch. 1, ss. 14-250 and 14-255



- Recipient pays GST to Commissioner
  - Sale / Long-term lease
    - New residential premises –
      - not created through ‘substantial renovations’; and
      - not ‘commercial residential’; or
    - Potential residential land that -
      - is included in a ‘property subdivision plan’; and
      - does not contain any building in use for a commercial purpose,

      [Commissioner may exclude by legislative instrument].
    - For potential residential land, recipient either –
      - Not registered for GST; or
      - Does not acquire the thing supplied for a creditable purpose.

GST withholding regime

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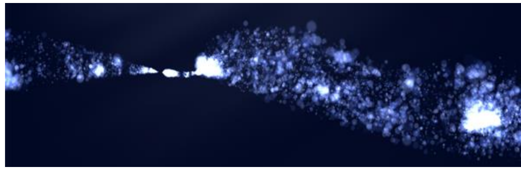
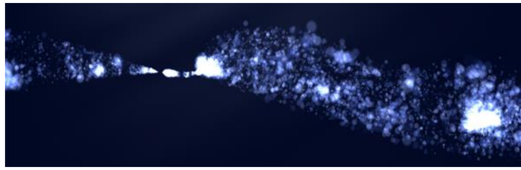
- Usually payable when any consideration other than deposit paid / received
- Fully taxable supplies – $1/11^{th}$ of the contract price
- Margin scheme supplies - 7% of the contract price
- Supplies between associates for < market value consideration - 10% of the GST-exclusive market value of the supply

Margin Scheme



- ❑ Is the margin scheme available? [V]
- ❑ Written agreement requirement satisfied? [V and P]
- ❑ Withholding amount correct [V and P]
- ❑ GST withheld [V]

Margin Scheme



- Div. 75
- Sale of land subject to margin scheme
  - Reduction of GST on a taxable supply by sale of land
  - GST payable = 1/11th of margin
  - Margin
    - = sale consideration – purchase consideration paid by vendor to acquire it (or per valuation)
    - Value added to the property by the vendor
    - **Not** the vendor's profit margin
  - Withholding – 7% of contract price
    - True-up in vendor's BAS

Margin Scheme

- Upside
  - GST savings
  - Less stamp duty
- Downside
  - Not always available
  - Purchaser cannot claim ITCs
- Context
  - Private owners and developers / investors on-selling under margin scheme
  - Change of intention particularly relevant – information and documentation

Margin Scheme

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Conditions

- Sale of freehold or strata title or grant or sale of long-term lease
- Written agreement to apply the margin scheme
  - On or before the making of the supply
  - Commissioner can allow further period
- Must **not** have been acquired by supplier through a supply that was **'ineligible for the margin scheme'**

Margin Scheme

Calculation

- Margin = consideration for the supply – consideration for the acquisition
- GST = 10% of margin

Example

- Sale price $3m
- Acquisition price $2m
- Margin = $3m - $2m = $1m
- GST = 10% of margin = $100,000 (rather than $300,000)
- Therefore, $3.1m including GST

*Note – GST withholding regime discussed above

GST-free going concern

‘Of course it’s a GST-free supply of a going concern’

Section 38-325

- For consideration
- Recipient registered or required to be registered
- Written agreement
- Supplier supplies all things necessary for continued operation of an enterprise
- Supplier carries on enterprise until day of supply

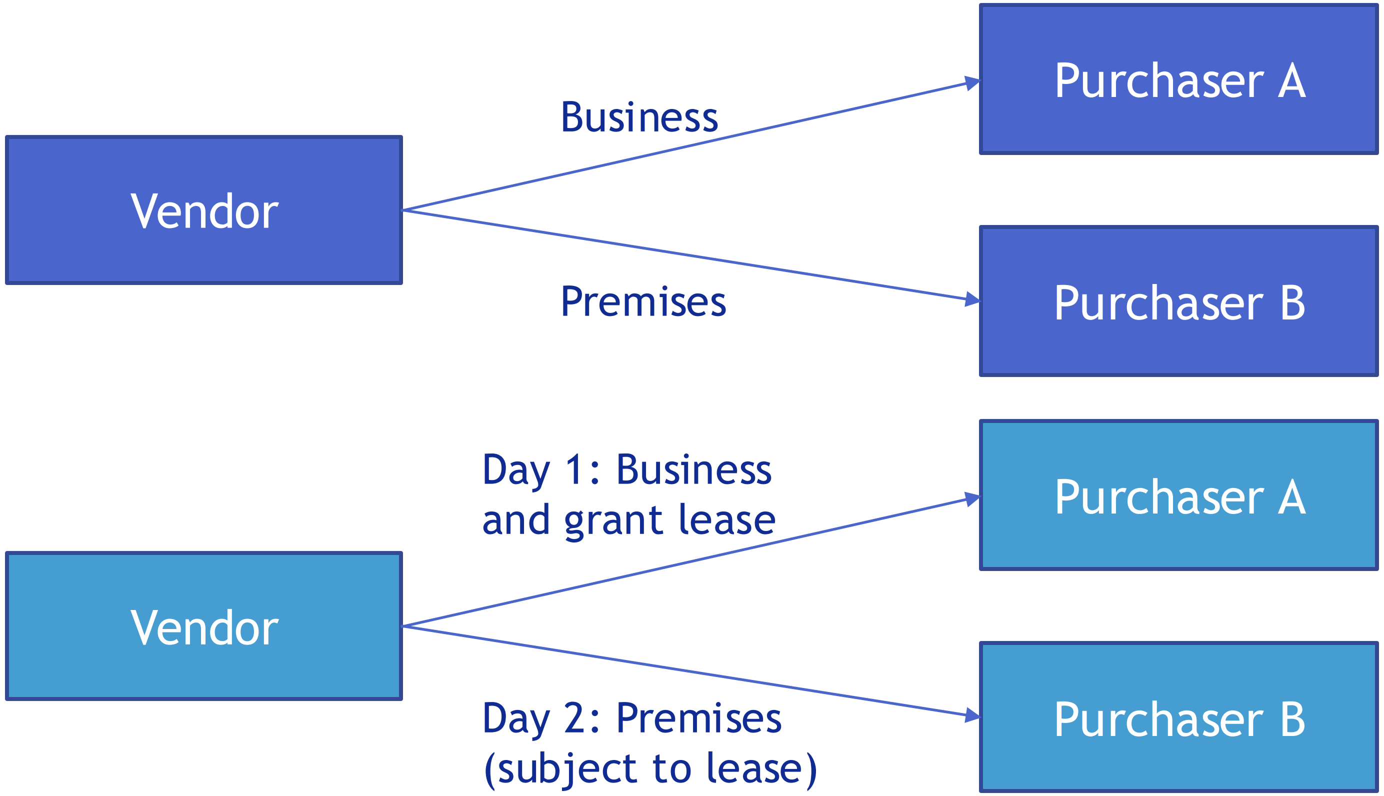
GST-free going concern

Going concern requirements and impacts are often glossed-over

- Div 135 adjustment events
- Appropriate documentation
- Cutover / timing
- Supplies – what, from whom, when?
- Why bother? Safer to treat as taxable supply?
- GSTR 2002/5

GST-free going concern

Single vendor → two purchasers

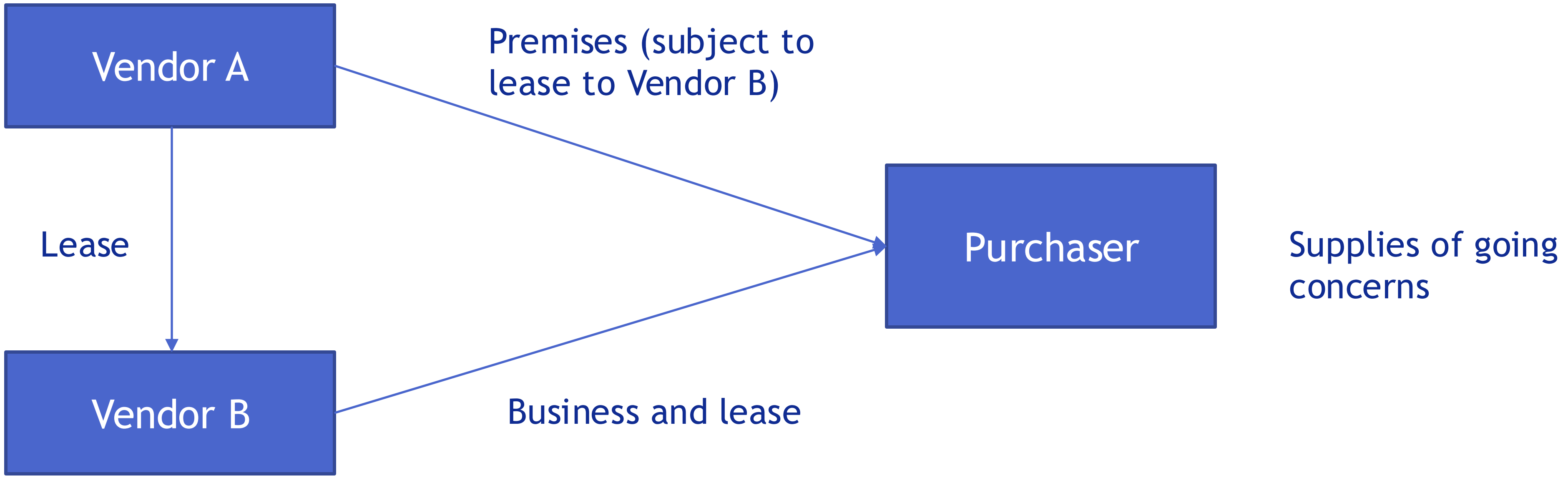


Not supplies of going concerns

Supplies of going concerns

GST-free going concern

Two vendors → single purchaser



GST-free farm land

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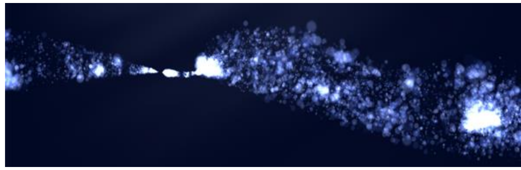
'Farming business'

- Supply of freehold interest in land is GST-free if -
  - Land on which a farming business has been carried on for at least 5 years before the supply; and
  - The recipient intends a farming business be carried on, on the land

Managing GST obligations – contract and settlement

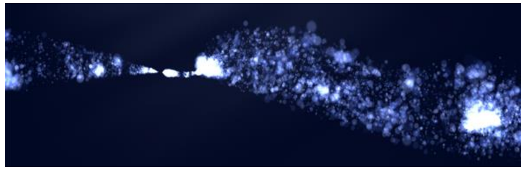


Get it right at the very start

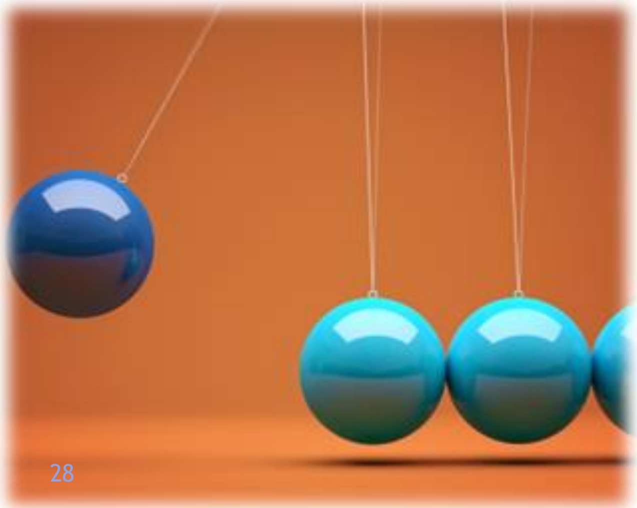
→ when drafting contract,

not just at settlement.

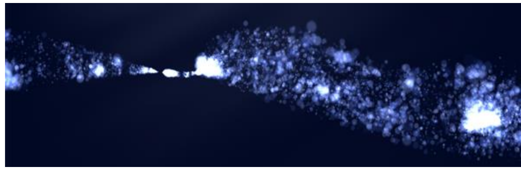
Managing GST obligations – contract and settlement



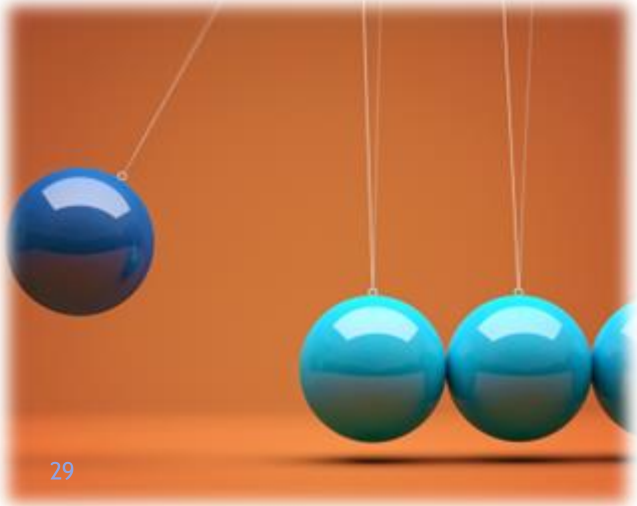
- First consider whether GST applies to the sale / lease
- Writing in the box / ticking the box is not sufficient
- Ensure all parties are on the same page
- ‘Plus GST’… if any
  - ‘The price includes GST (if any) unless the words “plus GST” appear in this box.’
  - GC 13.2 (LIV standard form contract) – ‘The purchaser must pay to the vendor any GST payable by the vendor in respect of a taxable supply made under this contract in addition to the price if the particulars of sale specify that the price is “plus GST”.
- Warranties / special conditions



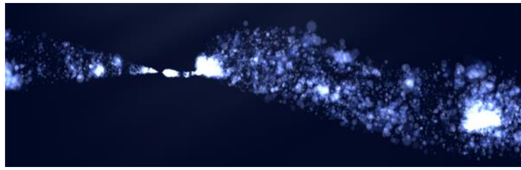
Managing GST obligations – contract and settlement



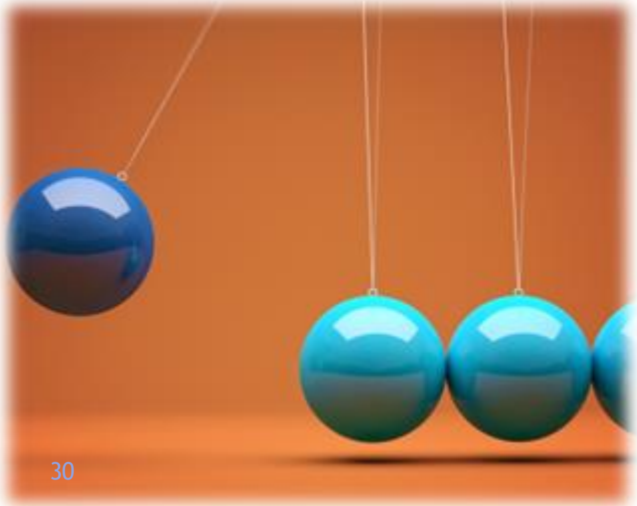
- Supply at settlement
- Long-term considerations
- Apportionment
- Tax invoices
- Deposits
- If in doubt, reach out!



Managing GST obligations



- Going concerns / farming businesses
  - Going concern – if parties agree and other requirements satisfied
  - Farm land – if requirements satisfied
- Margin scheme – preferable to avoid ‘plus GST’ contracts
- GST withholding
  - Prepare at the same time as the contract
  - Crucial to understand why the relevant position is adopted
- Fallback positions



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