

# CONVEYANCING SERIES 2021

Mastering the essentials



LEGAL  
PRACTITIONERS'  
LIABILITY  
COMMITTEE



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# Conveyancing tax issues

## Contact information

Phil Nolan | Risk Manager, LPLC

Please contact me with any risk management issues.

T: 03 9672 3800      E: [phil.nolan@lplc.com.au](mailto:phil.nolan@lplc.com.au)

## Website / Social media

[lplc.com.au](http://lplc.com.au)



@LPLC\_AU



@LPLCAU



[Linkedin.com/company/lplc](https://www.linkedin.com/company/lplc)

## Thought

Do you ask your purchaser clients whether they are a trustee and what they intend to do with the property so you can discuss the risks of double duty if nomination occurs after any land development?

## Quote

*"Risk comes from not knowing what you are doing".*

Warren Buffet.

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## Key points

- Develop, use and update a checklist about tax issues.
- Give clients information about relevant taxes.
- **Warn clients of possible double duty consequences of nominating.**

Refer to the LPLC article – [Double Duty and Nominations](#).

- Keep up to date with legislative changes and tax cases.
- Know your limit so you know when to refer the client to an expert for tax advice.

## Introduction

Practitioners should consider which taxes to raise with conveyancing clients including duty and land tax because a client who has tax advice is in a better position to make informed choices and avoid potential pitfalls.

Note Rule 7 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* provides that a practitioner must ensure clients make informed choices.

Sometimes you need to refer the client to an expert to obtain any necessary tax advice. This recommendation is probably best made at the start of a matter.

The two biggest areas of tax claims are:

- **Nomination after land development has occurred.**
- **Failure to give the SRO notice of the acquisition by a trust for land tax purposes.**

Best risk management is to always speak to your purchaser client at the start of a retainer and ask them whether the purchaser is a trustee and what they intend to do with the property so you can discuss the risks of double duty if nomination occurs after any land development.

## Acronyms explained

**CGT:** Capital Gains Tax

**GST:** Goods and Services Tax

## Did you know?

The Federal budget was handed down on 11 May 2021 and the State budget is due on 20 May 2021.

Good risk management includes keeping up with changes to the law. In relation to taxes, this means analysing the Federal and State budgets each year and then identifying the legislative changes to any tax laws.

# CGT

## Overview

**Legislation:** *Income Tax Assessment Act 1997* (Cwlth).

**Commencement:** 20 September 1985.

**Aim:** To collect tax on any net gain on disposal of a CGT asset.

**Imposition:** Payable as part of income tax.

**Exemptions:** Including pre-CGT assets, personal use assets (eg your home), roll-overs.

## CGT claims

CGT claims usually arise because the client believes it was their lawyers' role to raise the possibility of CGT being payable and give the client the opportunity to re-consider the intended course of action, taking into account any CGT consequences.

Most claims relate to the transfer of land between related parties including in family law matters.

### CGT exercise no. 1

#### Background

You are instructed by a couple to do three transfers to remove the husband as a registered proprietor as part of a refinance to be undertaken on advice from their accountant. The properties include:

- principal place
- holiday home available for rent on Airbnb during summer
- investment property used as a retail shop and subject to a lease.

You agree to do the work for a fixed fee of \$900 plus disbursements. The day after you receive instructions you commence drafting your retainer letter.

#### Zoom poll

Which of the following would you include in your retainer letter?

1. Your work is confined to preparing and executing the transfers of land.
2. Your work is confined to preparing and executing the transfers of land and any tax advice is at an additional cost.
3. Your work is confined to preparing and executing the transfers of land and that the clients should seek accounting and financial advice before signing the transfers including advice about any CGT payable.
4. None of the above.

## **CGT exercise no. 2**

### **Background**

You act for a husband and wife in the sale of 386 Blackburn Road, Glen Waverley

The sale is subject to a lease of a granny flat at the rear of the property currently leased to a university student for \$60 a week. The lease expires in 6 months.

The husband is a foreign resident. The wife is an Australian citizen and resident taxpayer. The clients tell you that for a few years they have run a business from home providing IT services.

They tell you they are expecting about \$1,200,000 for the property.

### **Time to chat**

Insert in the chat box one issue you would raise with your clients about CGT in your letter enclosing the sales documents.

### **Your comments:**

# GST

## Overview

GST is not simple but there are some easy steps you can take to help protect you and your clients.

**Main legislation:** *A New Tax System (Goods and Services Tax) Act 1999* (Cwlth).

**Commencement:** 1 July 2000.

**Imposition:** 10 per cent value added tax payable on most goods and services. Registered businesses collect GST and those in the chain of supply are entitled to claim a credit for any GST paid. The end consumer is not entitled to claim a credit.

### Exemptions:

- Entity not registered for GST.
- GST-free supplies:
  - Sale of businesses.
  - Farmland.
- Input taxed supplies:
  - Supply of residential premises (not new).
  - Financial supplies.

## GST claims

Claims usually occur during the sale of commercial or new residential land or the sale of businesses and the following is a list of the three most common causes of claims:

- **Failure to manage the legal issues.** For example, did not check that the supply qualified as a going concern.
- **Simple oversight.** For example, margin scheme 'box' not completed in particulars of sale.
- **Poor engagement management.** For example, a practitioner acted for a client who purchased a property on the margin scheme. When the property was on-sold the practitioner did not discuss with the client whether the margin scheme was to apply to the sale.

**Your comments:**

## GST information

### LPLC GST FAQ's

LPLC has published answers to dozens of the most frequently asked questions regarding GST.

You can find the GST FAQ's here: <https://lplc.com.au/risk-advice/property/gst>.

### LPLC GST advice service

Have a client-related question about GST? LPLC's dedicated GST advice service can help you find the answer.

Before contacting the GST advice service review the GST FAQ's as your query may be covered in our extensive selection of common GST questions and answers.

LPLC has been providing a GST advice service as a risk management initiative since 1999. The service provides practitioners insured with LPLC with expert advice from Derry Davine for client-related GST queries. The service is intended to cover most queries from practitioners but will not cover complex advice that requires more than 30 minutes of Derry's time.

The GST advice service operates Monday to Friday by contacting Derry Davine in writing at [dc.davine@bigpond.com](mailto:dc.davine@bigpond.com).

### LPLC GST checklist

This checklist contains common GST questions in relation to registration, land transactions, purchaser withholding and more.

You can find the checklist here: <https://lplc.com.au/resources/checklists/gst>.

### Your comments:

## GST cases

### **Cityrose Trading Pty Ltd v Booth v Anor [2013] VSC 504**

- GST special condition void for uncertainty.
- Key takeaway – use the standard LIV GST clause

### **Ashton v Monteleone [2010] NSWSC 258**

- Contract did not deal with mixed supply.
- Key takeaway – if in doubt obtain an ATO ruling before going to court.

### **Aurora Developments Pty Ltd v Commissioner of Taxation [2011] FCA 232**

- Key takeaway – for the going concern exemption to apply the sale must comprise all things necessary for the purchaser to operate the business.

### **Duoedge Pty Ltd v Leong & Anor [2013] VSC 36**

- Vendor not registered for GST but contract provided the supply was GST inclusive. Purchaser argued 1/11<sup>th</sup> of the price not payable.
- Key takeaway – where vendor is not registered the purchaser must pay the price and is not entitled to a deduction of 1/11<sup>th</sup>.

### **Igloo Homes v Sammut Constructions [2004] NSWSC 1213**

- Confusion about GST position in NSW contract but special condition expressly provided plus GST.
- Key takeaway – carefully consider the GST clause when acting in an interstate matter.

### **SeaRoad Logistics v Patricks Stevedores [2014] VSC 170**

- Key takeaway – where no tax invoice received purchaser can withhold GST amount only. See general condition 19.3.

### **A & A Property Developers Pty Ltd v MCCA Asset Management Ltd [2017] VSCA 365**

- 'GST' inserted in particulars of sale in contract instead of 'Plus GST'.
- Key takeaway – attention to detail is crucial to avoid a dispute and potential claim.

## **GST exercise**

### **Background**

You act for two companies selling a house located at 706 Pascoe Vale Road, Glenroy.

The house is leased to a dentist.

The sole director of the two companies informs you that the companies are not registered for GST.

### **Zoom poll**

How would you treat the supply of the premises for GST purposes?

1. No GST as vendor not registered.
2. Input taxed as existing residential premises.
3. Taxable as new residential premises.
4. Taxable as commercial premises.
5. Going concern.

**Your comments:**

# Land tax

## Overview

**Main legislation:** *Land Tax Act 2005* (Vic).

**Commencement:** *Land Tax Act 1877* (Vic).

**Imposition:** A tax on the value of land owned as at 31 December. There are various rates.

**Exemptions:** Including principal place, primary production land, retirement villages.

**Deduction:** Generally, land tax can be claimed as an expense for a rental property for the period your property was rented or available for rent.

## More information

- SRO website

<https://www.sro.vic.gov.au/land-tax>

## LPLC articles

- Land can be taxing

<https://lplc.com.au/resources/lij-article/land-can-be-taxing>

Note in particular our risk management tip in this article when acting for a purchaser, to always obtain a land tax certificate as the purchaser has the benefit of the protection pursuant to s96(4) of the Land Tax Act 2005 (Vic). That is, only the amount in the certificate can constitute a charge on the land.

- More land tax woes

<https://lplc.com.au/resources/lplc-article/more-land-tax-woes>

- Land tax adjustments aren't standard

<https://lplc.com.au/resources/lij-article/land-tax-adjustments-arent-standard>

- Beware of land tax mines when advising your client

<https://lplc.com.au/resources/lplc-article/beware-of-tax-land-mines-when-advising-your-client>

## What's new

The closing date for applications for the [2020 land tax coronavirus relief](#) was 31 March 2021 but late applications will be considered provided they are lodged by **30 September 2021**.

## Missed a payment due to the SRO?

Due to the coronavirus pandemic, the SRO announced that late payment interest would not be applied on outstanding taxation debts during the pandemic.

From **1 October 2021**, any outstanding taxation debts that have not been paid by **30 September 2021** will be subject to late payment interest calculated from the date of the tax default.

### Land tax claims

Practitioners are often pursued by clients who are found to owe unexpected land tax alleging that the practitioner failed to advise.

A common issue we have seen is that practitioners are not told by the client that the purchaser is a trustee, and so don't notify the State Revenue Office (SRO) that the land was acquired by the purchaser in a trustee capacity.

The surcharge land tax rate for trustees operates where the total value of land owned by the trust is \$25,000, subject to several exceptions. This is a much higher rate than the general land tax rate which operates for land of \$250,000 or more.

One of the key things to do to avoid these oversights is to ask the client if they are buying the property in a trustee capacity. This question is in our [Key Risk Checklist: Purchase of land – questions for the purchaser](#).

### Zoom poll

Do you ask your purchaser clients whether the purchaser is acting in a trustee capacity?

1. Yes
2. No

### Failure to adjust land tax at settlement

LPLC has also seen claims where there was a failure to obtain a land tax certificate to identify any land tax owing and a failure to adjust land tax at settlement.

### Warning

Some contracts provide that land tax is adjusted on the basis that it is paid even when it is unpaid, and the purchaser cannot deduct an amount from the settlement proceeds to pay the amount at settlement.

### Zoom poll

Is this condition fair?

1. Yes
2. No

### Warning

Some contracts, usually off-the-plan contracts provide that land tax is adjusted from the day of sale on a lot liability basis for the whole of the land in the development. Warn your purchaser clients about this and if advising pre-contract, seek instructions to revert to an adjustment on a single holding basis in accordance with general condition 23 of the standard LIV form of contract.

# Duty

## Overview

**Main legislation:** *Duty Act 2000* (Vic).

**Commencement:** *Stamp Duties Act 1879* (Vic).

**Imposition:** Levy on dutiable transactions to defray public expenses and making an addition to public revenue.

**Exemptions:** Many, including transfer from trustee to beneficiary.

**Other relevant legislation:** *Taxation Administration Act 1997* (Vic) which contains provisions for the administration and enforcement of taxation laws.

## What's new from the budget?

### Duty information

- SRO website

<https://www.sro.vic.gov.au/>

### LPLC articles

- Double duty and nominations

<https://lplc.com.au/resources/lplc-article/double-duty-and-nominations>

- Nomination woes

<https://lplc.com.au/resources/lplc-article/nomination-woes>

- Trusts and family farm transfers

<https://lplc.com.au/resources/lplc-article/trusts-and-family-farm-transfers>

### LPLC checklist

- Taxes

<https://lplc.com.au/resources/checklists/tax>

## Duty claims

The most common mistake involving duty, is failing to advise purchasers that double duty will be incurred when a nomination occurs after 'land development' usually where a planning application has been made. Often the practitioner is aware the purchaser is proposing to develop the property and is going to lodge a planning permit but fails to give them a warning not to before they nominate.

**Refer to section 32J of the *Duties Act 2000* (Vic) and the definition of land development in section 3 of the *Duties Act*.**

Claims have also arisen where:

- There is a failure to advise a foreigner of higher duty payable.
- Incorrect advice is given about an exemption / concession.
- There is a failure to advise on duty payable on the transfer to beneficiary where there was 'consideration' for the transfer.
- There is a failure to advise on a duty exemption.

## Duty exercise

### Background

You receive instructions post contract from an individual buying a large parcel of land ripe for development in Officer.

The client tells you they intend on nominating a corporate trustee once they have sorted things out with their accountant.

### Zoom poll

When do you advise your purchaser client about any possible double duty issues?

1. In your first letter to the client about their purchase.
2. After you receive details of the nominee.

**Your comments:**

## Know your limits

It is usual in a conveyancing matter to give a client some tax advice. For example, whether GST is payable, providing an estimate of the duty payable or giving an explanation about adjusting land tax.

What is important is to know your limits, so that you know when to refer the client to an appropriate expert.

For example, a lawyer may inform a vendor client that CGT might be payable but recommend that the client speaks with their accountant before entering into a contract of sale for the property. The accountant should know the cost base and would discuss with the client off setting any losses against gains and timing for the sale. It may be that there is a benefit to selling in the current financial year compared to the next or vice versa.

If you attempt to give tax advice on matters outside your expertise, you may not have the systems and precedents to do the matter efficiently or effectively and you are more likely to miss important legal issues and give inadequate or incorrect advice.

Another example of where you might need to refer the client to an expert is about a GST issue. A client who is selling a mixed supply of real estate, part input taxed, part taxable, would usually need advice from a valuer about a fair and reasonable apportionment of the price between the two supplies.

Some tax issues are very complicated sometimes because the law is complicated. For example, the application of the economic entitlement provisions in the Duties Act where a client is entering into a joint venture to develop land. This client would usually benefit from speaking with an expert about the tax issues, such as a barrister who specialises in state taxes.

### More information

#### LPLC article

- It's OK to say no when it's not the right matter for you.

<https://lplc.com.au/resources/lplc-article/not-the-right-matter-for-you>

## Appendices index

### Key Risk Checklist

Taxes

GST

### Article

Taxing times in conveyancing, LJJ Article, May 2019

Double duty and nominations, LJJ Article, December 2020

## Tax issues

This checklist contains the most common taxes and related charges and is not intended to be exhaustive. Ticking a box indicates who is responsible for considering the selected item. Both practitioner and client may be selected. A column has been included for initial comments. It is recommended that a memorandum be sent to the client after the checklist is completed setting out what was agreed. Also refer to the LPLC GST checklist [here](#).

Duty			
Item	Client	Practitioner	Comments
Estimate – <a href="#">transfer duty</a> \$.....	<input type="checkbox"/>	<input type="checkbox"/>	
Exemptions – eg <a href="#">spouse</a>	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Sub-sales</a> / nomination / land development	<input type="checkbox"/>	<input type="checkbox"/>	
Concessions – eg <a href="#">pensioner</a>	<input type="checkbox"/>	<input type="checkbox"/>	
First home owner grant - <a href="#">FHOG</a>	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Principal place</a>	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Landholder</a>	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Farmland</a>	<input type="checkbox"/>	<input type="checkbox"/>	
Growth areas infrastructure contribution - <a href="#">GAIC</a>	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Aggregation</a>	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Congestion levy</a>	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Lease duty</a> – ie right of first refusal	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Self-managed superannuation fund</a> issues	<input type="checkbox"/>	<input type="checkbox"/>	
Request a <a href="#">private ruling</a>	<input type="checkbox"/>	<input type="checkbox"/>	
For more information go to <a href="http://www.sro.vic.gov.au">www.sro.vic.gov.au</a>			

# Key Risk Checklist

## CGT

Item	Client	Practitioner	Comments
Estimate of amount payable \$.....	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Withholding obligation</a>	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Exemptions</a> <ul style="list-style-type: none"> <li>Principal place</li> <li>Pre 20 September 1985 assets</li> <li>Rollover relief</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>	
Long term contracts spanning multiple financial years	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Deceased estate</a> – payment by testator and/or beneficiaries	<input type="checkbox"/>	<input type="checkbox"/>	

For more information go to LPLC CGT withholding obligation [alerts](#) and [Claim free conveyancing practice risk guide](#).

## Land tax

Item	Client	Practitioner	Comments
<a href="#">Principal place exemption</a>	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Dual principal place exemption</a>	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Trust rate</a> – lodge form 8 notice	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Foreign owner</a> rate (absentee owner)	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Vacant residential land</a>	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Special land tax</a> – a one off payment where an exemption ceases to apply	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">Other exemptions</a> – eg retirement villages	<input type="checkbox"/>	<input type="checkbox"/>	

## Administrative matters

Item	Client	Practitioner	Comments
<a href="#">ABN application</a>	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">TFN application</a>	<input type="checkbox"/>	<input type="checkbox"/>	

# Key Risk Checklist

<a href="#">Lost superannuation</a>	<input type="checkbox"/>	<input type="checkbox"/>	
<b>Lodging fees</b>			
<b>Item</b>	<b>Client</b>	<b>Practitioner</b>	<b>Comments</b>
<a href="#">Lodging fee</a> Estimate \$.....	<input type="checkbox"/>	<input type="checkbox"/>	
For more information go to: <a href="https://www.land.vic.gov.au/land-registration/fees-guides-and-forms">https://www.land.vic.gov.au/land-registration/fees-guides-and-forms</a>  Note - Land Registry lodging fees are subject to annual increases by the Victorian government from 1 July each year.			
<b>Subdivisions</b>			
<b>Item</b>	<b>Client</b>	<b>Practitioner</b>	<b>Comments</b>
Public open space	<input type="checkbox"/>	<input type="checkbox"/>	
Planning / development levy	<input type="checkbox"/>	<input type="checkbox"/>	
<b>Other charges and issues to consider</b>			
<b>Item</b>	<b>Client</b>	<b>Practitioner</b>	<b>Comments</b>
Local council rates	<input type="checkbox"/>	<input type="checkbox"/>	
Local council cladding rectification agreement	<input type="checkbox"/>	<input type="checkbox"/>	
Water rates	<input type="checkbox"/>	<input type="checkbox"/>	
Owners corporation	<input type="checkbox"/>	<input type="checkbox"/>	
Estate agents commission / fees	<input type="checkbox"/>	<input type="checkbox"/>	
Fire services property levy	<input type="checkbox"/>	<input type="checkbox"/>	
Insurance	<input type="checkbox"/>	<input type="checkbox"/>	
<a href="#">First home loan deposit scheme</a>	<input type="checkbox"/>	<input type="checkbox"/>	

<b>Completed by</b>	
Title	Date
Signature	
Title	Date
Signature	

## GST

GST is not simple but there are some easy steps you can take to help protect you and your clients.

References to divisions and sections can be found in [A New Tax System \(Goods and Services Tax\) Act 1999 \(Cwlth\)](#).

**GST alert – for settlements from 1 July 2018, purchaser to collect and pay GST to the ATO for some properties. See ‘Purchaser withholding’ on page 4 below.**

### Input taxed supplies

#### ☐ Is the supply wholly input taxed?

No GST payable where the supply is input taxed. The recipient of an input taxed supply is not entitled to an input tax credit.

Existing residential premises are input taxed.

Supplies which are not input taxed include:

- new residential premises – see [ATO information](#)
- vacant land - see s.9-5 and [ATO information](#)
- commercial real estate
- commercial residential premises - see Division 87 and [GSTR 2012/6](#) and [ATO information](#).  
See s.40-5 to s.40-130 and [GSTR 2012/5](#).

### Registration

#### ☐ Is a party registered for GST?

You can check a parties' GST status by searching on the Australian Business Register (ABN lookup) for the entities current details. You can search by name, ACN and/or ABN. Go to <http://abr.business.gov.au/>

If a party is a trustee you need to determine the GST status of the trust not the trustee.

#### ☐ Is a party required to be registered?

**Must register where turnover is \$75,000 or more.**

Turnover consists of current GST turnover and projected GST turnover and includes turnover from all activities and sources.

Sometimes the sale of an asset, such as land, may be considered the sale of trading stock where for example, the property was purchased for development and resale. The proceeds will be considered turnover and not capital. See [GSTR 2001/7](#) about the meaning of turnover.

## Land transactions

Do any of the following special rules apply?

### ☐ **Going concern**

The supply of all things necessary for the continued operation of an enterprise carried on until the day of supply. The supplier and recipient must be registered for GST purposes and agree in writing that the supply is of a going concern.

Where there is a nomination, the nominee and the supplier need to agree in writing that the supply is of a going concern.

If before settlement a tenant vacates the ATO considers that an entity's letting enterprise continues when premises that have been let become vacant and the landlord immediately commences and maintains a marketing campaign to re-let the property on reasonable commercial terms.

For the sale of tenanted commercial premises pursuant to the standard contract of sale of real estate in Victoria:

- refer to general condition 13 relating to GST
- the contract must contain the words 'going concern' and 'subject to lease' in the relevant boxes in the particulars of sale
- see s. 38-325, s.135-5, s.135-10 and GSTR 2002/5.

### ☐ **Margin scheme**

On the margin scheme GST is calculated on the difference between the value of the land when acquired and the sale price on a subsequent sale.

For example, a home owner sells their existing home to a developer for \$500,000. The developer then builds five townhouses on the land. The developer can use the margin scheme in the contracts of sale for the five townhouses. Assume each sold for \$600,000 with a land value of \$100,000 each. GST is calculated on \$500,000 (\$600,000 minus \$100,000) and the GST is \$50,000.

The margin scheme cannot be applied in certain circumstances. The most common is where the property was acquired through a taxable supply to which the margin scheme was not applied. See s.75-5(3).

Special rules relating to calculating the cost of acquisition apply in certain circumstances. See s.75-11.

An input tax credit cannot be claimed where the margin scheme applies and the supplier is not obliged by law to provide a tax invoice. See s.75-20 and s.75-30.

See also [ATO information](#), rulings [GSTR 2006/7](#), [GSTR 2006/8](#) and [Determination MSV 2009/1](#).

For the sale on the margin scheme pursuant to the standard contract of sale of real estate in Victoria:

- refer to general condition 13 relating to GST
- seek instructions as to whether the price is 'plus GST' or 'GST inclusive'
- where instructed that the price is 'plus GST' the contract must contain the words 'plus GST' in the relevant box in the particulars of sale

- the contract must contain the words 'margin scheme' in the relevant box in the particulars of sale.

## □ **Farmland**

The sale of farmland is GST-free where a farming business has been carried on for at least five years preceding the supply and the recipient of the supply intends that a farming business be carried on, on the land.

See s.38-475 and 38-480 and [ATO information](#).

For the sale of farmland pursuant to the standard contract of sale of real estate in Victoria:

- refer general condition 13 relating to GST
- the contract must contain the words 'farming business' in the relevant box in the particulars of sale.

## □ **Substantially renovated residential premises**

The sale of substantially renovated residential premises is usually a taxable supply. In summary substantial renovations means all or substantially all, of a building is removed or replaced.

See s.195-1 and [GSTR 2003/3](#).

For the sale of a taxable supply pursuant to the standard contract of sale of real estate in Victoria:

- refer general condition 13 relating to GST
- seek instructions as to whether the price is 'plus GST' or 'GST inclusive'
- where instructed that the price is 'plus GST' the contract must contain the words 'plus GST' in the relevant box in the particulars of sale.

## □ **Mixed supply**

Some supplies are mixed supplies for GST purposes, for example the supply of a dwelling and shop in the same building. This means GST is payable on the supply of the shop but not the supply of the dwelling.

The purchase price must be apportioned between the two components of the sale. The basis of the apportionment should be set out in the contract in a special condition. Apportionment can be on any reasonable commercial basis that does not skew the apportionment towards one component or the other. It can be on the basis of rents or council values or a written appraisal and/or sworn valuation from an estate agent or valuer.

See [GSTR 2001/8](#)

For the sale of a mixed supply pursuant to the standard contract of sale of real estate in Victoria:

- refer general condition 13 relating to GST
- seek instructions as to whether the price is 'plus GST' or 'GST inclusive' in relation to any taxable supply
- where part of the supply is a going concern the contract must contain the words 'going concern' in the relevant box in the particulars of sale
- where part of the supply is farmland the contract must contain the words 'farming business' in the relevant box in the particulars of sale
- your special condition should explain which part of the supply is taxable, input taxed, going concern, farming business as applicable.

## Purchaser withholding

- ☐ **Is the property:**
  - **new residential premises (not substantially renovated or commercial residential) or**
  - **potential residential premises, in a subdivision not previously sold as potential residential premises and does not contain any building that is used for a commercial purpose?**

Before the vendor makes a supply of the property described above, the vendor must give the purchaser a notice stating that payment of GST must be made by the purchaser to the ATO. Penalties apply if the notice is not given.

The purchaser must withhold the GST payable and pay it to the Australian Taxation Office or give the vendor a bank cheque at settlement made payable to the Australian Taxation Office. See sections 14-250, 14-255 and 16-30(3) and schedule 1 of *Taxation Administration Act 1953* (Cwlth).

- ☐ **Is there a special condition in the contract about the purchaser withholding the GST?**

## Other considerations

- ☐ **Are the parties 'associates'?**

The supply to an associate is deemed to be at market value except where the recipient is registered for GST and would be entitled to a full input tax credit.

See Division 72.

- ☐ **Is a party a bare trustee?**

Special rules apply where an entity causes the trustee of real property (held on a bare trust for the entity) to transfer the property to a third party. For example, no GST is payable on a transfer by a retiring bare trustee to a new bare trustee.

See [GSTR 2008/3](#)

## The contract

- ☐ **Is GST properly dealt with in the contract?**

When completing the particulars of sale in the LIV standard contract of sale:

- consider whether 'plus GST' needs to be inserted
- make sure the right boxes are ticked about GST.

## Settlement

- ☐ **Has GST been accounted for on the adjustments?**

See ATO ruling about adjustments: [GSTR 2004/9](#) and [GSTD 2006/3](#)

- ☐ **Is a tax invoice required?**

A tax invoice is required for all taxable supplies. In preparation for settlement make a written request for a tax invoice at least 28 days prior to settlement.

See s.29.70 which gives a supplier 28 days to provide a tax invoice on request.

- ☐ **Does the tax invoice contain all relevant information?**

For example, ABN of supplier and price for the supply.

## More information

- ☐ **A lot of information is available about GST on the LPLC website** [www.lplc.com.au](http://www.lplc.com.au)
- ☐ **ATO information:**
  - o <https://www.ato.gov.au/Business/GST/In-detail/Your-industry/Property/Property-contract-and-tax-invoice---GST-questions/>
  - o [Common GST problems and property](#)
- ☐ **Find the answer in the** [LPLC GST FAQs](#) . If the answer is not there please email Derry Davine from the [LPLC GST hotline](#) - [dc.davine@bigpond.com](mailto:dc.davine@bigpond.com)

# Taxing times in conveyancing

ALL CONVEYANCING PRACTITIONERS NEED TO HAVE A BASIC UNDERSTANDING OF TAX ISSUES TO AT LEAST ALERT CLIENTS THERE MAY BE A PROBLEM AND SEND THEM OFF FOR MORE EXPERT ADVICE. **BY HEATHER HIBBERD AND PHILLIP NOLAN**

All practitioners practising in conveyancing need to understand the tax implications of buying and selling property. Excluding tax advice from your retainer may not be sufficient to avoid all liability as a court may find that the practitioner should have drawn any relevant tax issues to the client's attention.<sup>1</sup> Some understanding of the tax issues is needed if only to refer clients to other tax experts.

LPLC's tax checklist<sup>2</sup> identifies many issues that need to be considered in conveyancing transactions to help practitioners and clients to agree on who will deal with those issues.

## Land tax

The most frequent land tax issues practitioners need to remember and build into their checklists and systems are set out below.

### Is the client buying as trustee of a trust?

Land owned by a trustee on behalf of a trust, subject to certain exclusions,<sup>3</sup> is subject to land tax, once the aggregate Victorian land holding reaches \$25,000 instead of the general threshold of \$250,000. The tax payable is at a higher surcharge land tax rate than the general land tax rate.<sup>4</sup>

### Claims

Claims have arisen where practitioners didn't realise that the client was buying the property as trustee on behalf of a trust. The practitioners did not submit the land tax trust form 8, resulting in the wrong land tax being paid. The mistakes were usually discovered during a State Revenue Office audit and penalties and interest were incurred.

### Risk management

Ask the client at the start of the transaction if they are buying on

behalf of a trust and tell them that higher land tax will be incurred unless an exclusion applies.<sup>5</sup> Confirm the client's instructions in writing.

Are there land tax implications if buying more than one property from the same vendor?

Land tax is usually adjusted at settlement based on the value of the property, that is, on a single holding basis, as though the land described in the particulars of sale is the only land owned by the vendor. It may be advantageous for some purchasers to buy multiple properties from one vendor under separate contracts rather than in one contract.

Similarly, it may be advantageous for a vendor with multiple land holdings to do adjustments on a proportionate basis.

While practitioners are not necessarily required to do the various calculations, they should understand the issue and raise it with clients in appropriate circumstances.

You should:

- Add land tax certificates to the checklist of certificates you obtain for purchasers.
- Know what land is exempt from land tax. The most common exemptions are principal place of residence property, primary production land, land owned or used by charities and rooming houses. A range of other land tax exemptions is set out on the SRO website.<sup>6</sup>
- Have a basic understanding of these exemptions.

### Why is it important to obtain a land tax certificate?

Practitioners acting for purchasers should always obtain a land tax certificate, first, to check the amounts payable and second, because the purchaser can rely on the amounts in the certificate if liabilities

arise in the future from tax default by the vendor, or errors in the SRO records. This protection is set out in s 96 of the *Land Tax Act 2005* (Vic) and

#### SNAPSHOT

- There are often tax consequences when buying or selling real estate and conveyancing practitioners need to understand what those tax issues may be.
- Land tax, duty and GST consequences of a conveyancing transaction can affect the way the client decides to structure their purchase or sale.
- Practitioners need to make appropriate inquiries and give timely advice about potential tax issues to help clients make the right decisions.

TAX TIME

only applies if the bona fide purchaser for value obtains the certificate. The protection does not apply if the purchaser relies on a certificate provided by the vendor.

## **Duty**

Claims involving duty have increased significantly in the past few years. The most common mistakes involve not understanding when nominations will result in a sub-sale and incur a second amount of duty. The other major issue is failing to advise foreign residents about increased duty they have to pay.

When do nominations incur double duty?

Section 32J of the *Duties Act 2000* (Vic) sets out the basis on which duty will be payable on transfers. While somewhat difficult to follow, it essentially says that double duty will be payable when a vendor agrees to transfer land to an original purchaser and then to a subsequent purchaser, often through nomination, in two circumstances:

- The original purchaser “undertook or participated in land development” before the new purchaser was nominated.
  - The subsequent purchaser pays or is liable to pay more consideration than the original purchaser.
- “Land development” is defined broadly and includes:
- preparing a plan of subdivision or taking steps to have it registered
  - applying for or obtaining a planning permit
  - applying for or obtaining a building permit or approval
  - doing anything on the land for which a building permit or approval would be required
  - requesting an amendment to a planning scheme that would affect the land
  - developing or changing the land in any way which would increase its value.

## **Claims 2**

Claims commonly arise when the law firm knows its purchaser client is about to, or has, lodged a planning application before a related company or entity is nominated as purchaser, but fails to warn the client of the double duty exposure.

## **Risk management 2**

Include advice in your precedent letter to purchaser clients about the risks of

double duty when nominating if any land development, including lodging planning applications, has occurred.

When do foreign purchasers pay additional duty?

There is additional duty payable for foreign natural persons, foreign corporations and trustees of a foreign trust. Foreign entities are defined on the SRO website.<sup>7</sup> The definitions practitioners sometimes don’t know are: a foreign corporation is any corporation incorporated outside Australia or if incorporated in Australia the controlling interest is held by a foreign natural person, foreign corporation or foreign trust. A foreign trust is a trust where a substantial interest is held by foreign natural person, foreign corporation or another foreign trust.

There are various exemptions that may apply but in general the extra duty payable by a foreign purchaser of residential property is 7 per cent. Giving residential property to a foreign party also incurs the extra duty.

While not strictly duty, foreign buyers may also be caught by the vacant residential land tax.<sup>8</sup>

## **Claims 3**

Clients often allege after the transaction that they were not advised there would be extra duty, and had they been advised they would have restructured the purchase so that it was not made by a foreign party. This can happen where the purchasers are a husband and wife, but only one is a foreign person or the purchaser is a family trust and one of the beneficiaries is a foreign person, which creates a foreign trust.

Often the firm is unaware the party is a foreign purchaser, so the advice is not given.

## **Risk management 3**

Become familiar with the definition of foreign purchaser. Ask clients at the start of the matter, particularly if you are giving precontractual advice, if they are foreign purchasers and advise them of the extra duty.

When are transfers of property between beneficiaries and trusts not exempt?

There are exemptions from duty for transfers to and from a trustee. These exemptions are set out in Chapter 2 Part 5 of the *Duties Act*.<sup>9</sup> They relate to specific types of trusts and beneficiaries and all criteria in the sections must be complied

with for the exemption to apply. This is not an area where a general understanding of principle is enough. If you are going to advise on these transactions, you need to read the legislation and any reliable commentary, including the SRO website,<sup>10</sup> as well as the terms of any trust deeds carefully.

## **Claims 4**

The common claim scenario involves trust property that is subdivided and developed and then one or more titles transferred to various beneficiaries. The beneficiaries are often also trustees of the trusts. The exemptions do not apply for various reasons, including the way the trust deeds are written; the amount transferred does not match the unit holders’ interest; the transfer is made in satisfaction of a debt owed to the beneficiary; or the beneficiary pays out or takes over the existing mortgage. The clients allege, had they been properly advised, they would have restructured their arrangements. The practitioner usually makes the mistake of generalising about the arrangements instead of looking closely at the detail of the transaction.

## **Risk management 4**

The law in this area is complex and if you do not have a detailed knowledge of the legislation and its application you should refer clients to a suitably qualified tax barrister, solicitor or accountant. You should make it clear in your retainer that you are not advising on this aspect and the importance of obtaining advice.

## **GST**

The application of GST legislation and rules is not always simple. LPLC’s GST checklist<sup>11</sup> is a useful tool for everyone practising in conveyancing. It is designed to take practitioners through the main issues to consider and provide them with links to the relevant reference material. We cannot deal with all GST issues in this article, but below are some that appear regularly in the claims or via the LPLC GST Hotline.

## **Who fills in the ‘plus GST’ box?**

Filling in the “plus GST” box might seem like a simple administrative task, but it underpins whether practitioners are dealing with GST with their vendor clients. In some

claims the practitioner or clerk does not even turn their mind to whether GST is payable, often because they don't realise the property is commercial or new residential property. In other cases, the client hasn't decided whether to make the contract plus GST and it is left blank and not revisited.

GST needs to be on the checklist and be considered each and every time.

### What are residential premises?

Residential premises in most cases will be obvious, but there will always be those properties that occupy the fringe of the definition. The definition can be found in s195-1 of the GST Act<sup>12</sup> as land or a building that is occupied, or capable of being occupied, as a residence. For land to meet the definition it must have a building on it that has the physical characteristics of a residence.<sup>13</sup>

If the building is no longer habitable because, for example, the bathrooms are damaged or not working or the kitchen is non-existent, then it will not meet the requirements of being a residence, even if it is in a residential zone. The property needs to be treated as vacant residential land.

Similarly, if the building had previously been a residence but has been turned into an office so that it no longer has the characteristics associated with residential accommodation and is leased for use as an office, it cannot be treated as residential property.

### What are new residential premises?

The sale of new residential premises is a taxable sale if the vendor is registered or required to be registered for GST, and the supply is made in the course or furtherance of an enterprise that the vendor carries out.

The supply by a natural person of their own home is not a taxable supply since it would not be made in the course or furtherance of an enterprise.

The definition of new residential premises appears in s40-75 of the GST Act. The premises will be new if:

- a new residence has been built in place of an old residence or
  - a residence has been substantially renovated
  - the property had not been sold as residential property before, such as when a previously commercial property has been converted to a residence.
- New residential premises cease to be new

if they have been previously sold or rented out for a continuous period of five years.

### When will an isolated transaction for the sale of a property trigger the need for GST registration?

Where a vendor of commercial property or new residential premises is not registered for GST it may appear that GST is not payable. However, there is a further question that needs to be asked. Was the supply done in the course or furtherance of an enterprise? GST ruling GSTR 2001/7<sup>14</sup> at paragraphs 46-47 sets out that where an entity buys a property, such as a suburban shop, and refurbishes it with a view to then selling it for a profit, it is an isolated transaction that constitutes an enterprise. The sale of the property is treated as trading stock rather than the disposal of a capital asset. The sale price is part of the enterprise turnover for the purposes of assessing projected GST turnover and usually will be more than \$75,000, so the vendor will be required to be registered.

The key issue here is what was the vendor's purpose in buying the property in the first place when assessing whether this was an isolated transaction that triggers the requirement to be registered for GST.

### When can the margin scheme be used?

The margin scheme can be applied if the parties agree in writing before settlement to apply it. Where a nomination occurs, the new purchaser should confirm in writing to the vendor the use of the margin scheme. Agreements after settlement must be done with the Commissioner of Taxation's approval (s75-5(1A)).

The margin scheme can be applied to property that was previously bought on the margin scheme. It can also be applied where the previous purchase was input taxed, non-taxable or GST-free, for example, existing residential property. There are some less common restrictions on the use of the margin scheme that can be found at s75-5 of the GST Act. If GST was paid on the full sale price when buying the property, the margin scheme cannot be applied on the sale.

Developers who buy existing residential premises and then develop them into new residential premises will usually want to sell on the margin scheme and can do so if the sale contract specifies the margin scheme

be used. Developers who buy residential vacant land will want to buy on the margin scheme so they can sell the developed property on the margin scheme. This should be discussed if giving pre-contract advice for the purchase, and the subsequent sale.

### Practical examples

LPLC's GST FAQs<sup>15</sup> has a lot of practical examples on GST issues and further information about GST withholding can be found in LPLC's bulletin, *GST practical examples*.<sup>16</sup> All LPLC checklists can be found at [lplc.com.au](http://lplc.com.au).

### Conclusion

Tax issues in conveyancing transactions are often not simple. Practitioners doing conveyancing need to have a general grasp of the issues, so they can at least warn clients of the potential pitfalls and when they need to get further tax and/or financial advice. It is not enough to just say you don't advise on tax. You need to be at least consciously incompetent in this area. That is, know what you don't know. ■

**Heather Hibberd** is the chief risk manager at LPLC. **Phillip Nolan** is a risk manager at LPLC.

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1. *Snopkowski v Jones (Legal Practice)* [2008] VCAT 1943.
2. <https://lplc.com.au/checklists/key-risk-checklist-tax-issues/>
3. See s46A of the Land Tax Act for a list of exclusions such as a superannuation trust.
4. State Revenue Office website <https://www.sro.vic.gov.au/node/1506>
5. See s46A of the *Land Tax Act 2005* (Vic)
6. <https://www.sro.vic.gov.au/node/1460>
7. <https://www.sro.vic.gov.au/node/1658>
8. The vacant residential land tax applied from 1 January 2018 to homes that were vacant for more than six months in the preceding calendar year in inner and middle Melbourne. Land owners of vacant residential property are required to notify the State Revenue Office by 15 January every year. Failing to notify is a notification default and penalties may apply.
9. [http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/vic/consol\\_act/da200093/](http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/vic/consol_act/da200093/)
10. <https://www.sro.vic.gov.au/node/1478>
11. <https://lplc.com.au/wp-content/uploads/2018/04/Key-Risk-Checklist-GST.pdf>
12. *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act).
13. GSTR 2003/3 para 26, <https://www.ato.gov.au/law/view/document?DocID=GST/GSTR20033/NAT/ATO/00001&PiT=99991231235958>
14. <https://www.ato.gov.au/law/view.htm?DocID=GST/GSTR20017/NAT/ATO/00001>
15. <https://lplc.com.au/risk-management/taxgst/gst-qa-2/>
16. <https://lplc.com.au/bulletins/gst-withholding-practical-examples/>

## Double duty and nominations



Claims involving duty have increased significantly in the last few years. The most common mistake involves not understanding that land development, particularly applying for a planning permit before nominating a new purchaser, will result in a sub-sale and incur a second amount of duty.

Section 32J of the Duties Act 2000 (Vic) sets out the basis on which duty will be payable on transfers. While somewhat difficult to follow, it essentially says that double duty will be payable when a vendor agrees to transfer land to an original purchaser and then to a subsequent purchaser, often through nomination, in two circumstances:

1. The original purchaser undertook or participated in land development' before the new purchaser was nominated.
2. The subsequent purchaser pays or is liable to pay more consideration than the original purchaser.

'Land development' is defined broadly and includes:

- preparing a plan of subdivision or taking steps to have it registered
- applying for or obtaining a planning permit
- applying for or obtaining a building permit or approval
- doing anything on the land for which a building permit or approval would be required
- requesting an amendment to a planning scheme that would affect the land
- developing or changing the land in any way which would increase its value.

### Claims

Claims commonly arise where the law firm knows their purchaser client is about to, or has, lodged a planning application before a related company or entity is nominated as purchaser, but fails to warn the client of the double duty exposure. Sometimes the failure is due to a lack of knowledge about the current law, and sometimes there is a gap between when the planning application is lodged and when the nomination occurs and the practitioner does remember the application was made.

## Risk management

- Best risk management is to always speak to your purchaser client at the start of a retainer and ask them what they intend to do with the property so you can discuss the risks of taking development steps before nominating.
- Include advice in your initial precedent letter to purchaser clients about the risks of double duty when nominating if any land development, including lodging planning applications, has occurred.

### Suggested wording

If you decide to nominate an additional or substitute purchaser there are several issues you need to consider including:

- additional duty may be payable if you undertake any land development **before** you nominate a new purchaser. Land development can include:
  - applying for a planning or building permit
  - preparing or registering a plan of subdivision
  - requesting an amendment to a planning scheme
  - doing any building works that would require a permit
  - developing or changing the land in any way that would enhance its value.
- additional duty may be payable if the nominee gives you money and or some other consideration for the nomination
- you need to comply with any conditions in the contract of sale about nomination.
- a fee may be payable to the vendor for a nomination.
- we will need to prepare nomination document(s) which is outside the current scope of work we have given you.

Please contact us if you wish to discuss any nomination.

- If you are later asked to assist a purchaser client with a planning application, warn them in writing again about double duty if they want to nominate a new purchaser later.
- Likewise, if you are later asked to assist a purchaser client with a nomination, warn them in writing about double duty if any planning applications or other development work has been done.

For more information about extra duty claims, particularly for foreign purchasers and transfers between beneficiaries and trusts, see our articles [Taxing times in conveyancing](#) and [Nomination woes – GST, foreign investment and stamp duty](#).