
WITHHOLDING GST FROM PROPERTY TRANSACTIONS

EXPOSURE DRAFT EXPLANATORY MATERIALS

Table of contents

Glossary	1
Chapter 1 Withholding GST from property transactions	4

Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
ABN	Australian Business Number
ATO	Australian Taxation Office
BAS	Business Activity Statement
CCA 1995	<i>Criminal Code Act 1995</i>
Commissioner	The Commissioner of Taxation
GST	Goods and Services Tax
GST Act	<i>A New Tax System (Goods and Services Tax) Act 1999</i>
TAA 1953	<i>Taxation Administration Act 1953</i>

Chapter 1

Withholding GST from property transactions

Outline of chapter

1.1 Schedule 1 to the Bill amends the TAA 1953, ITAA 1997 and the GST Act to require purchasers of new residential premises and new subdivisions of potential residential land to make a payment of 1/11th of the purchase price to the ATO.

Context of amendments

1.2 The Government announced in the 2017-18 Budget that from 1 July 2018 purchasers of new residential premises or new residential subdivisions would remit the GST on the purchase price directly to the ATO as part of the settlement process.

1.3 Currently, GST is included in the purchase price of new residential premises and the developer remits the GST to the ATO in their next BAS. This can be up to three months after settlement.

1.4 The ATO uses a range of strategies to tackle non-compliance with the GST law in the property development industry. The strategies are labour intensive, and costly to undertake and sustain.

1.5 One of the main forms of non-compliance is where developers collect GST on the purchase price of a supply but dissolve their business before their next BAS lodgment to avoid remitting the GST (this is known as ‘phoenixing’).

1.6 In the ATO’s submission to the 2015 Senate Inquiry into ‘Insolvency in the Australian construction industry’, the ATO identified 3,355 individuals controlling over 13,000 entities engaged in this sort of activity in 2015-16. Over \$2 billion in debt has been written off. These insolvent entities have also previously claimed \$1.3 billion in GST credits between 2011 and 2015.

1.7 The ATO’s compliance activities have proven to be inadequate, as the problem usually emerges well after the property transaction has occurred.

1.8 By effectively making purchasers pay GST when consideration for the property is provided, this measure removes the time-lag in GST payment which is the main enabler of current evasion activity in this area.

Summary of new law

1.9 Where an entity makes a taxable supply of new residential premises or a new subdivision of potential residential land, the purchaser will be required to make a payment of 1/11th of the consideration to the ATO directly, prior to or at the time consideration is first provided (other than as a deposit).

1.10 Where an entity makes a taxable supply of new residential premises under the margin scheme, the entity may apply to the ATO for a refund of a portion of the payment.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>Purchasers of new residential premises or new subdivisions of potential residential land must make a payment to the ATO of 1/11th of the price.</p> <p>The entity that makes a taxable supply of new residential premises or a new subdivision of potential residential land must remit the GST to the ATO after lodging their BAS, taking into account any credit available for the payment made by the purchasers (see below).</p>	<p>Where an entity makes a taxable supply of new residential premises or a new subdivision of potential residential land, the entity must remit the GST to the ATO after lodging their BAS.</p>
<p>Suppliers of residential premises or potential residential land must provide an entity that receives the supply with a notification 14 days before making the supply.</p>	<p>No equivalent.</p>
<p>An entity that makes a taxable supply of new residential premises or new subdivisions of potential residential land will be entitled to a credit for the amount of the payment made to the ATO.</p>	<p>No equivalent.</p>

<i>New law</i>	<i>Current law</i>
Where a supply of new residential premises is made under the margin scheme, the supplier may apply to the ATO for a refund of a portion of the amount withheld by the purchaser.	No equivalent.

Detailed explanation of new law

Application of the measure to new residential premises and new subdivisions of potential residential land

1.11 The measure applies to supplies of new residential premises, or new subdivisions of potential residential land. [*Schedule #, item 1, subsection 14-250(2)*]

1.12 The term new residential premises is defined in section 40-75 of the GST Act. Generally, premises will be new residential premises where they have not previously been sold as residential premises, have been created through substantial renovations of a building, or have been built to replace demolished premises on the same land. [*Schedule #, item 1, paragraph 14-250(2)(a)*]

1.13 The term potential residential land is defined in section 195-1 of the GST Act, and means land that is permissible to use for residential purposes, but that does not contain any buildings that are residential premises. This includes land that has been zoned for use for residential premises under a law of a State or Territory but that does not contain any current residential premises. Where potential residential land is included in a property subdivision plan, and has not previously been sold as potential residential land in that subdivision plan, the withholding obligation will apply to it. This uses the existing definition of a 'property subdivision plan' which is a plan for the division of real property that is registered (however described) under an Australian law (GST Act section 195-1). [*Schedule #, item 1, paragraph 14-250(2)(b)*]

1.14 The application of the measure to new subdivisions of potential residential land is intended to cover house and land packages, where a purchaser may receive a taxable supply of a vacant block of land which is the subject of a property subdivision plan. [*Schedule #, item 1, paragraph 14-250(2)(b)*]

1.15 To ensure that supplies of new subdivisions of potential residential land between members of a GST group, or participants in a joint venture to the operator of the joint venture are not considered to be the first supply, supplies of that type are specifically excluded from the

measure. This is to ensure that the supply to the end user for consideration is where the withholding obligation arises, and prevents the interposition of certain structures or arrangements to deliberately avoid the withholding obligation arising at that stage. An analogue to this rule is used in the definition of new residential premises, so it is not necessary to exclude supplies of that type from that definition. *[Schedule #, item 1, subsections 14-250(2) and (4)]*

1.16 To avoid any unintended consequences, the Commissioner may, by legislative instrument, determine that the withholding obligation does not apply to certain kinds of supplies of new residential premises or new subdivisions of potential residential land. *[Schedule #, item 1, subsections 14-250(2) and (3)]*

Timing of withholding obligation

1.17 Where a purchaser receives a taxable supply to which the withholding obligation applies, they are required to pay to the Commissioner an amount on or before the day that consideration for the supply (other than consideration provided as a deposit) is first provided. This is not necessarily the same as the day on which the purchaser receives the supply, or acquires a legal or equitable interest in the real property. *[Schedule #, item 1, subsections 14-250(1) and (5)]*

1.18 In the majority of cases, consideration (other than a deposit) is provided on settlement of the property. Where this is the case, the intention is that the purchaser must make a payment to the ATO before or on the day on which settlement occurs and they pay the balance of the consideration. Where consideration under a contract is paid by instalments, the intention is that the purchaser will instead have to make a payment by the end of the day that they make the first instalment payment, as this will be when consideration is first provided. Generally, this outcome aligns with the GST attribution rules, as the tax period in which consideration is first paid is generally when the entity is required to pay the amount to the Commissioner. *[Schedule #, item 1, subsection 14-250(5)]*

1.19 Money that is held as a deposit is generally not considered to be consideration (within the meaning of the GST Act), unless the deposit is forfeited or is applied as consideration for the supply. When an entity provides consideration to another entity as a deposit, the entity does not face a withholding obligation at that time. If that deposit is later forfeited, the intention is not to apply the withholding obligation on the day the deposit is forfeited (even though this will be consideration), as that consideration would have been originally provided as a deposit. Instead, the withholding obligation will apply to the first payment of consideration that is provided other than as a deposit. This is expected to simplify compliance for purchasers. The withholding obligation also applies for the

first payment if it includes both a deposit and any additional amount of consideration. *[Schedule #, item 1, subsection 14-250(5)]*

1.20 To avoid any unintended consequences, the Commissioner may by legislative instrument vary for types of supplies the day by which the payment is to be made to the Commissioner. This may include by varying the number of payments that are to be made to the Commissioner, so that the payments may be made by instalments on multiple different specified days. For example, where consideration is provided in instalments a withholding payment may be made by the end of the day for each instalment. *[Schedule #, item 1, subsections 14-250(5) and (6)]*

1.21 This power to vary the payment day is expected to be only used if small payments are required under a contract over an extended number of years such as the Land Rent Scheme in the Australian Capital Territory. Generally, in other situations payment would need to be made by the end of the day that the first amount of consideration is provided other than as a deposit. *[Schedule #, item 1, subsection 14-250(6)]*

The amount to be paid

1.22 The amount to be paid to the Commissioner will be 1/11th of the price for the supply. The term price means the amount of money paid for the supply, or if the consideration is not expressed as money, the GST inclusive market value of the consideration (GST Act section 9-75). *[Schedule #, item 1, subsection 14-250(7)]*

1.23 This is distinct from the amount of GST payable on the taxable supply, which may be less than 1/11th if the supply is made under the margin scheme. Having a fixed amount of 1/11th of the purchase price simplifies compliance for the purchasers, by not having to inquire about the amount of GST payable on the supply of the property. *[Schedule #, item 1, subsection 14-250(7)]*

1.24 In some cases, a transaction may consist of multiple different types of supplies under a single agreement. It is also possible that a single contract may be for a composite supply which includes a taxable supply to which the withholding obligation applies. Where the contract is expressed as a single amount that covers all taxable supplies, it may not be possible to determine at the time consideration is provided the proportion of the consideration to which the withholding obligation applies. *[Schedule #, item 1, subsection 14-250(8)]*

1.25 This is unlikely to be common for supplies of real property. However, where this is the case, the purchaser must withhold from the whole of the price. Where it is possible to ascertain the amount that is attributable to the supply to which the withholding obligation applies, the

purchaser only has to withhold 1/11th of that reduced amount. [*Schedule #, item 1, subsection 14-250(8)*]

1.26 This rule creates the appropriate incentive for an entity to assign a proportion of the price to the supply to which the withholding obligation applies, as they will have a larger amount withheld and suffer a cash-flow disadvantage if they do not. [*Schedule #, item 1, subsection 14-250(8)*]

Example 1.1 — Withholding at settlement

On 3 December 2018, Rick enters into a contract for the purchase of a new apartment with MortimerHomeCo for \$700,000.

The contract of sale included the required notice providing relevant details to enable Rick to withhold and remit the correct amount of GST payable to the ATO at settlement.

Settlement occurs on 6 June 2019. Rick's conveyancer advises Rick that he will be required to make a payment to the ATO on or before 6 June 2019. Rick's conveyancer makes a payment as his agent to the ATO at settlement of \$63,636 (being the GST component of the purchase).

Because Rick has paid \$63,636 to the ATO, he does not have to provide this amount to MortimerHomeCo, even though the contract price states that the consideration includes the \$63,636.

MortimerHomeCo receives a credit for this amount in their June BAS, and does not then have to make a payment of the amount when paying their net amount for the period.

Example 1.2 — Withholding at settlement using the PEXA platform as agent for the purchaser

Assume the same facts as in Example 1.1 but using an online conveyancing portal.

PEXA is an online conveyancing portal used for completing property settlements. PEXA's portal enables payments to be made directly through it so all parties have complete assurance and visibility of the relevant transaction details.

Each party inputs the required details to PEXA's portal to enable the transaction to be completed. In preparation for the settlement, Rick and MortimerHomeCo input the relevant account information, payment amounts and property information (as a shared line item so that each party has visibility of the account detail) for the payment of the GST.

Rick authorises PEXA to give 1/11th of the purchase price to the ATO. Once Rick transfers the whole of the consideration to PEXA, they then

pay the ATO directly on the day of settlement through the PEXA financial settlement process.

Rick later pays MortimerHomeCo the balance of the purchase price directly to MortimerHomeCo through the PEXA financial settlement process.

MortimerHomeCo receives a credit for this amount in their June BAS, and does not have to make a payment of the amount when paying their net amount for the tax period.

Example 1.3 — Contract by instalments and deposit

Craig enters into a contract for a large home and land package with JeanConstructionCo, a developer, for \$10 million on 24 July 2019.

The parties agreed to pay a 10 per cent deposit on exchange of contracts, and then two equal instalments of \$4.5 million each. The first instalment is due on 24 July 2020, and the second is due on 1 January 2021.

Craig is required to make a payment to the ATO of \$909,090 on the first instalment on 24 July 2020. Craig notifies the ATO five days before the payment is due, and then pays this amount on 24 July 2020. He then pays the balance of the first instalment payment to JeanConstructionCo.

Because Craig has paid the amount directly to the ATO, he is discharged of any obligation to pay the balance of the first instalment to JeanConstructionCo at the time the first payment is made.

Craig then pays the full second instalment of \$4.5 million on 1 January 2021.

Notification by suppliers of residential premises or potential residential land

1.27 To help purchasers comply with the obligation to withhold, an entity that makes a taxable supply of residential premises or potential residential land is required to notify the other entity in writing of certain matters. *[Schedule #, item 1, subsections 14-255(1)]*

1.28 An entity is required to give this notice to the other entity at least 14 days before making the supply. *[Schedule #, item 1, subsections 14-255(1)]*

1.29 Unlike the withholding obligation, which only applies to new residential premises or new subdivisions of potential residential land, the notification requirement applies to the supply of any residential premises or any potential residential land. However, where the supply does not

require a payment to be made under section 14-250, then the vendor does not need to provide more information, which simplifies compliance for the vendor. Generally, a payment will be required when the supply is of new residential premises or a new subdivision of potential residential land. However, there may be kinds of supplies to which the Commissioner has determined by legislative instrument that a withholding payment does not apply. This places the onus on the supplier to identify if there are determinations in effect that mean that a withholding payment may not be required, and to advise the purchaser of whether they are required to make a payment accordingly. *[Schedule #, item 1, subsection 14-255(1)]*

1.30 Where the supply requires a withholding payment to be made under section 14-250, the following other matters must also be included in the notice to the other entity:

- the name and ABN of the entity that made the supply;
- the amount that the purchaser will be required to pay to the Commissioner;
- when the purchaser is required to pay that amount to the Commissioner;
- where some or all of the consideration is not expressed as an amount of money—the GST inclusive market value of the consideration that will not be expressed as an amount of money;
- such other matters as are specified in the regulations.

[Schedule #, item 1, subsection 14-255(1)]

Offence for failing to notify

1.31 Where a person fails to give the required notice in writing to the purchaser, they have committed an offence. This includes where the entity fails to make one or more of the required representations, if they fail to make any representation, or make false representations. *[Schedule #, item 1, subsections 14-255(1) and (2)]*

1.32 Because this is a strict liability offence, it is not necessary to establish fault in failing to make any or all of the required representations. Strict liability is appropriate in this case because the offence is committed by failing to make the required representations. This approach ensures that it is not necessary to establish any knowledge or intention about why the representations in the notice were not made—the fact of failing to make the representations is sufficient. *[Schedule #, item 1, subsections 14-255(2) and (3)]*

1.33 Because the offence is subject to the CCA 1995, a person will not be subject to the offence if they can show they have made an honest mistake of fact as this is sufficient to satisfy the requirements of the defence (CCA 1995 section 9.2). This would include where a person made an honest and reasonable mistake about whether the property was new residential premises or an existing premises, and failed to give the required notice as a result. For example, a person may have made an honest and reasonable mistake about whether renovations they had undertaken amounted to ‘substantial renovations’ that would make the property a ‘new residential premises’. Multiple instances of similar misstatements would likely indicate that an honest and reasonable mistake has not been made. *[Schedule #, item 1, subsections 14-255(2) and (3)]*

1.34 The maximum penalty for the strict liability offence is 100 penalty units. A penalty unit is currently \$210. The penalty for this offence is to create a strong disincentive for potential phoenix companies to falsely misrepresenting that a property is not ‘new residential premises’ or ‘potential residential land’ to avoid the withholding obligation from applying. The penalty amount is set having regard to the significant sums of money involved in such real property transactions. Without a strong disincentive, phoenix operators may not be discouraged from making such a false representation. *[Schedule #, item 1, subsection 14-255(2)]*

1.35 The offence applies to all entities that supply residential premises, to reduce the compliance burden on purchasers. This means that each time residential premises are supplied as a taxable supply, the vendor must advise the purchaser if the property is new residential premises in relation to which a payment must be made under section 14-250. The representation by a vendor that a residential premises is not new residential premises is important to the operation of the defence of an honest and reasonable mistake of fact about whether the entity was required to make a payment, as it provides a basis for the purchaser to determine whether they are required to make a payment or not. *[Schedule #, item 1, subsection 14-255(1)]*

Administrative penalty for failing to notify

1.36 An administrative penalty may also be applied where a person fails to make the required representation. The elements that are required to establish the administrative penalty are the same as the elements for the criminal penalty. The penalty is 100 penalty units. *[Schedule #, item 1, subsection 14-255(4)]*

1.37 This penalty is subject to the rules in Division 298 of Schedule 1 to the TAA 1953 about the application of administrative penalties. It is also subject to the rule in section 8ZE of the TAA 1953, that prevents an administrative penalty being imposed where a prosecution for the criminal

offence has been instituted, and that where a prosecution is later commenced, that the Commissioner must refund the amount of penalty imposed. [*Schedule #, item 1, subsection 14-255(4)*]

1.38 Because this is an administrative penalty, the CCA 1995 does not apply to the penalty, so the defence of honest and reasonable mistake of fact does not apply. Accordingly, a defence is inserted that provides that if a person:

- failed to give a notice containing the matters that are required to be included when the premises are ‘new residential premises’; and
- reasonably believed at the time they gave the notice that the premises were not new residential premises;

then they are not liable to the administrative penalty. [*Schedule #, item 1, subsection 14-255(5)*]

Defence for failing to withhold

1.39 Where a purchaser fails to make a withholding payment, they are subject to a strict liability offence for failing to pay the Commissioner the amount as required by Division 14 (subsection 16-25(2) of Schedule 1 to the TAA 1953). Because the offence is subject to the CCA 1995, a person will not be subject to the offence if they can show they have made an honest mistake of fact, satisfying the requirements of the defence (CCA 1995 section 9.2).

1.40 An example of this would be where an entity has made an honest and reasonable mistake of fact that they are required to withhold, because they reasonably believed the property is not new residential premises. This might occur where the entity is given a notice by the vendor indicating that the property is not new residential premises, and there were no other circumstances that made it appear to the entity that the property was new residential premises.

1.41 The administrative penalty in section 16-30 applies to a failure to make a Division 14-E withholding payment. However, the TAA 1953 is amended so that where:

- the amount that was not paid relates to a taxable supply of new residential premises; and
- at the time consideration is first provided (other than consideration provided as a deposit), the entity reasonably believes that the premises are not new residential premises:

the administrative penalty will not apply. *[Schedule #, item 2, subsection 16-30(2)]*

1.42 This ensures that where an entity reasonably believes that a withholding obligation did not apply in relation to the real property because it was not new residential premises they will not be subject to the penalty. An entity may have such a reasonable belief where they have been given a notice under section 14-255 that indicates that the premises are not premises in relation to which a payment must be made, and there are no other circumstances that indicate that the premises are ‘new residential premises’. *[Schedule #, item 2, subsection 16-30(2)]*

Withholding tax credits

1.43 The entity that makes the taxable supply will be entitled to a credit for the amount paid to the Commissioner. The entitlement to a credit arises on the assessment of the entity’s net amount (within the meaning of the GST Act) for the tax period to which the supply has been attributed. *[Schedule #, item 3, subsection 18-60(1)]*

1.44 The availability of a credit to the entity is contingent on the purchaser paying the amount to the Commissioner. A credit does not arise merely because an amount has been withheld from a payment to the vendor. *[Schedule #, item 3, subsection 18-60(1)]*

1.45 The amount of the credit is either the whole of the payment that is made, or where the supply is attributable across more than one tax period (for example, where the entity accounts on a cash-flow basis), the portion of the credit that corresponds to the amount which is attributed to that tax period. *[Schedule #, item 3, subsection 18-60(2)]*

1.46 Where an amount is refunded under section 18-85, the amount of the credit that the entity is entitled to receive is reduced by the amount of the refund that has been given, including by reducing the amount to nil if the whole of the amount has been refunded (section 18-5 of Schedule 1 to the TAA 1953).

1.47 Part IIB of the TAA 1953 (about Running Balance Accounts) sets out how the Commissioner must treat a credit, once it has arisen. These generic rules will apply to credits for amounts withheld under the new withholding regime.

Refunds for amounts where the sale is under the margin scheme, or a payment is made in error

1.48 Because of the withholding requirement, a vendor will no longer have access to the funds for GST. While the entity would ultimately have

to remit this to the ATO once a net amount has been assessed, it has short-term cash-flow impacts for the entity.

1.49 In cases where a sale is made under the margin scheme, the GST payable will be less than the 1/11th required to be withheld. To ensure that the cash-flow impact is minimised, where a sale is made under the margin scheme, the entity that made the supply is able to apply for a refund of the amount of the GST that is anticipated would ultimately be refunded after their BAS for the relevant tax period has been assessed. This amount is the difference between the amount of the payment made and the anticipated GST payable on the supply. *[Schedule #, item 4, subsections 18-85(1) and (3)]*

1.50 Where a purchaser withholds in error, but in purported compliance with the obligation to withhold, (for example, where residential premises are not new residential premises and therefore withholding does not apply), then the vendor may also apply for a refund of the amount of the payment made in error. The amount that may be refunded in this case is the amount that is withheld in error. *[Schedule #, item 4, subsections 18-85(1) and (2)]*

1.51 In either case, the entity that made the supply must apply to the Commissioner in the approved form. The application must also be lodged at least 14 days before the end of the tax period to which the taxable supply is attributed. This restriction is to avoid any administrative complications that may arise because of the proximity in timing of giving a refund and the tax credit arising after assessment of the entity's net amount. Because the entity will receive a credit that may result in a refund after an assessment of their net amount at the end of the tax period, there are minimal disadvantage in waiting for the refund to arise under the BAS. This also has the effect that an entity cannot apply for a refund once they are entitled to a credit, as an entity can only become entitled after the conclusion of the tax period. *[Schedule #, items 3 and 4, subsections 18-60(1), 18-85(1) and (2)]*

1.52 Where an entity is subject to monthly tax periods, the entity is not able to claim a refund on the basis that the margin scheme applied to the supply. This is because an entity that has monthly tax periods will not suffer a large cash-flow disadvantage, because they will receive a credit that may result in a refund at the end of the tax period. However, no such restriction applies to where the refund is sought on the basis that the payment was made in error. *[Schedule #, item 4, subsection 18-85(2), paragraph 18-85(1)(b)]*

1.53 If the entity is entitled to apply for a refund, and the Commissioner is satisfied that:

- the entity has made a withholding payment, or has purportedly made a withholding payment; and
- the margin scheme applies to the sale, or the payment was made in error;

the Commissioner must refund the amount required if it would be fair and reasonable to do so, having regard to particular matters. [*Schedule #, item 4, subsection 18-85(4)*]

1.54 When determining what is fair and reasonable, the Commissioner must have regard to:

- the circumstances that gave rise to the obligation (if any) to make the payment; and
- whether the refund would be because the sale was made under the margin scheme, or the amount was paid in error; and
- the nature and extent of any information provided in the application in the approved form; and
- the likely accuracy of the information; and
- the likelihood that the information is affected by:
 - fraud or evasion; or
 - intentional disregard of a taxation law; or
 - recklessness as to the operation of a taxation law; and
- whether an approved valuation of the real property (within the meaning of the GST Act) to which the supply relates has been conducted; and
- any other matter the Commissioner considers relevant.

[*Schedule #, item 4, subsection 18-85(4)*]

1.55 A person receiving a payment from which an amount is withheld under the amendments, may not claim a refund under section 18-65 from the purchaser where the amount has been withheld in error. [*Schedule #, item 22, sub-paragraph 18-65(1)(a)(ii)*]

Existing machinery provisions

1.56 The definitions of ‘amount required to be withheld’, ‘amount withheld’ and ‘withholding payment’ are amended to ensure that other machinery provisions in Schedule 1 to the TAA 1953 apply correctly. *[Schedule #, items 7, 8, 10 and 11, subsection 995-1(1) the definitions of ‘amount required to be withheld’, ‘amount withheld’ and ‘withholding payment’ (first and second occurring)]*

1.57 Where a withholding payment is made to the Commissioner, the entity that makes the payment is discharged under the tax law from all liability to pay or account for that amount to any entity except the Commissioner, despite any provision of a contract that provides for the whole of the consideration to be paid to the supplier (section 16-20 of Schedule 1 to the TAA 1953).

1.58 Division 16 is specifically amended to ensure that certain machinery provisions apply to the measure correctly, including that:

- an entity that fails to make a withholding payment is required to pay the general interest charge on unpaid amounts (section 16-80 Schedule 1 to the TAA 1953); and
- amounts are to be paid to the Commissioner in the way set out in section 16-85 of Schedule 1 to the TAA 1953; and
- entities are required to notify the Commissioner on or before the day they make a payment (section 16-150 of Schedule 1 to the TAA 1953).

[Schedule #, items 15, 18, and 19 subsections 16-70(3) and 16-150(1)]

1.59 Unlike other types of Division 14 withholding payments, withholders are not required to be registered with the ATO, so the provisions relating to registration are specifically not applied. *[Schedule #, items 16 and 17, paragraphs 16-140(1)(b) and 16-140(2)(b)]*

1.60 Because of the nature of the withholding obligation, an amendment is also made so the entity that is required to make a withholding payment must also notify the Commissioner five days before they intend to make a payment. This ensures that the Commissioner will be aware that a payment is to be made. An entity will have only complied with section 16-150 where it notifies the Commissioner both on the day that they make a payment, and five days before they are required to make a payment. Both notices must be in the approved form and lodged with the Commissioner. *[Schedule #, items 20, subsection 16-150(2)]*

Consequential amendments

1.61 A number of terms that are used in the GST Act are inserted into the dictionary in section 995-1 of the ITAA 1997, to ensure that where those terms are used they have the same meaning. *[Schedule #, item 9, subsection 995-1(1) of the ITAA 1997, the definitions of ‘approved valuation’ ‘consideration’, ‘margin scheme’, ‘money’, ‘potential residential land’, ‘price’ and ‘property subdivision plan’]*

1.62 A number of notes are also inserted into the GST Act to direct readers that a withholding obligation applies in relation to those types of supplies. *[Schedule #, items 5 and 6, GST Act, section 33-1, subsection 40-65(2)]*

1.63 An amendment is also made to paragraph 14-215(1)(d) in Schedule 1 to the TAA 1953 so that an entity is required to make a withholding payment under both the foreign resident capital gains withholding measure, and Division 14-E. *[Schedule #, item 13, paragraph 14-215(1)(d)]*

1.64 A consequential amendment is also made to Division 18 of Schedule 1 to the TAA 1953, to ensure that the provisions that relate to credits for income tax do not apply to the measure. *[Schedule #, item 21, subsection 18-10(1)]*

Application and transitional provisions

General transitional rules

1.65 Generally, the withholding obligation and all associated amendments will apply in relation to supplies for which any of the consideration is first provided (other than consideration provided as a deposit) on or after 1 July 2018, whether or not the supply was entered into before, on or after the commencement of the schedule. *[Item 23]*

1.66 The exception to this general rule is where the contract for supply was entered into before 1 July 2018, and consideration for the supply is provided before 1 July 2020, providing a two year transitional period for pre-existing contracts. *[Item 24(a)]*

1.67 Transitional arrangements also apply to the requirement to notify the vendor of whether residential premises are new residential premises. Where a contract is entered into before 1 July 2018, but a supply is made after that day, the supplier will not be required to comply with section 14-255. This rule is not time limited in the same way as the other transitional relief. Therefore, where a contract was entered into before 1 July 2018, a person will not commit an offence by not including

these matters, even if consideration is provided after 1 July 2020. A person seeking to rely on this transitional relief bears an evidential burden in relation to the matter. *[Item 24(b)]*

Example 1.4 — Supply subject to transitional rule

On 11 May 2018, Cindy and Maurice enter into a contract for a new home unit with BaileyHomeCo, a developer, for \$650,000. Settlement occurred when the unit development was completed on 31 May 2020. Since this is within the transitional period, Cindy and Maurice pay the entire purchase price to BaileyHomeCo that will remit the GST to the ATO when their next BAS is due in July 2020.

If settlement occurred on 28 September 2020, the transitional period would not apply and Cindy and Maurice would pay \$59,090 (being the GST component of the purchase) directly to the ATO. Cindy and Maurice would pay \$590,910 directly to BaileyHomeCo as the purchase price.

Existing property development arrangements

1.68 Under certain property development agreements, there may be an agreed distribution or ‘waterfall’ payment arrangement, which provides for how the consideration is to be distributed amongst the parties to the arrangement. Such an arrangement may provide or contemplate that some funds are to be distributed on the basis that a party to the arrangement will use those funds to discharge their GST liability to the Commissioner. However, because of the withholding obligation, it is not necessary to make such a distribution because the purchaser has already withheld GST from the vendor. In that case, if the existing distribution arrangement is in place, the arrangement may provide for the party to whom the distribution would be made to obtain a windfall gain.

1.69 If such an arrangement was entered into before 1 July 2018, the transitional rules provide that a distribution that would result in a windfall gain should not be performed, and that parties to the arrangement are discharged from all liability to pay the GST liability amount to the supplier. *[Item 25]*

1.70 For this transitional rule to apply, the arrangement:

- must be entered into before 1 July 2018, between the entity that makes the taxable supply and one or more other entities, and deal with the distribution between the parties of the consideration for the taxable supply; and

- must provide for the distribution of the GST liability to the supplier, for the payment of the supplier's liability to GST for the taxable supply; and
- were the distribution to occur, must result in the parties not being in the same position as they would be if the withholding amount was not paid.

[Item 25]

1.71 This is intended to preserve the position of all parties to a property development agreement that existed prior to 1 July 2018.

