

Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2024

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Submission to the Housing, Big Build and Manufacturing Committee: *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2024 ('Bill')*

Introduction

Thank you for the opportunity to make a submission to this review. Master Builders is Queensland's peak industry body for building and construction in Queensland and represents the interests of over 9,500 building and construction related members. Most members are licensed builders or trade contractors regulated under the *Queensland Building and Construction Commission Act 1991* (QBCC Act).

Master Builders is a member of the Department of Public Works' Trust Account Framework Implementation Steering Committee. That Committee was formed to assist the Department in its consideration of the implementation issues with the project trust account framework.

Executive Summary

This submission focuses on amendments to the *Building Industry Fairness (Security of Payment) Act 2017* (BIF Act), raising the following key issues:

- We have concerns that the change purporting to clarify who is a 'subcontractor beneficiary' creates a new set of interpretation complexities while trying to solve an existing problem.
- We believe an unintended consequence is created by using the undefined term 'entitled to be paid' in section 20A and alternative wording with an accepted meaning should be used.
- We do not agree with the proposed amendment requiring payment of GST into the retention trust account with each transfer of retention money.
 - This proposed amendment would require business practice changes contrary to existing ATO Tax Rulings on retention and GST.
 - The proposed amendment would also require the trustee (typically head contractors) to set aside GST amounts for lengthy periods, without the ability to

claim an input tax credit for those amounts until the end of the project due to the operation of Tax Rulings.

- We request that if the amendment is to proceed it not commence unless and until the Government can obtain an ATO Tax Ruling permitting the trustee to claim an input tax credit for the GST amount transferred into the retention trust account at the time of such transfer.
- We generally agree with the remaining proposed amendments provided they result in a reduced administrative burden for trustees.
- We submit the Queensland project trust account framework is fundamentally flawed and the proposed amendments in this Bill will not produce a workable framework, although may simplify some aspects and enable availability of software tools (at an expense to industry). We also submit there are other, better mechanisms to protect payments due and owing.

Clarify who is a ‘subcontractor beneficiary’ of the project trust account

The Bill proposes a simplified framework whereby parties subcontracted to carry out work and/or supply goods / services for which a relevant licence or registration is required will be ‘beneficiaries’ of the project trust account.

Master Builders agrees with the intent to simplify the assessment of which subcontractors/suppliers are ‘beneficiaries’. However, the amendments will create additional complexities and as a result we believe further consideration is required.

This is because the BIF Act creates an offence for paying someone from the project trust account if they are not a subcontractor beneficiary, in addition to an offence for not paying someone from the project trust account if they are a subcontractor beneficiary.

For example, the amendment proposed in the Bill will require a head contractor to set up separate payment arrangements for subcontractors on site who are not required to be licensed or registered, such as soft floor layers, pump operators, and others engaged as subcontractors on a project but not requiring a licence or registration to undertake the work.

Other subcontractors may be in a situation where the subcontractor company is not required to be licensed but the individual operator or worker is, such as scaffolding, cranes, demolition, earthworks, certification etc and we expect this will create confusion for head contractors as to whether the subcontractor entity is required to be paid from the project trust account.

Queensland has arguably the most rigorous licensing framework in Australia, which we support. However, there are many circumstances where industry participants are unsure whether, or which type, of licence is required to carry out particular work. In recent years, we have become aware of an inability of the QBCC to provide advice to industry participants as to whether and which licence is required. This also creates complexities for head contractors in determining which subcontractors must be paid from the project trust account and which must not.

We acknowledge the proposed head of power to prescribe additional types of work and subcontractors may assist in clarifying particular trades over time. However, we believe additional consideration is required before the changes proposed by the Bill are implemented in order to avoid unnecessary administrative costs to head contractors.

Amendment to section 20A of the Act

An amendment is proposed in the Bill to when a trustee may withdraw an amount from a project trust account. The amendment is to s.20A of the Act and replaces reference to the defined phrase 'liable to pay' with the undefined phrase 'entitled to be paid'. This creates uncertainty for industry as to when the head contractor can withdraw funds from the trust account in order to pay its employees, suppliers, business overheads and other costs.

Arguably, 'entitled to be paid' means an amount 'due and payable' to a subcontractor, but it could be argued it means the time when a payment schedule is issued, or when the time period for a schedule has passed, or perhaps even when a claim is made or a legal entitlement to make a claim arises.

We submit the phrase 'due and payable' under the subcontract is the far better term to be used as it has an accepted meaning in Queensland case law. Alternatively, 'entitled to be paid' could be defined in the Act to mean 'due and payable' under the contract, and where the phrase is used incongruously with this definition it be changed. Using an undefined and uncertain term will likely lead to disputes and legal fees.

Clarify trust account ledger and other record keeping requirements

Master Builders supports the introduction of a head of power for a guideline to assist trustees in meeting compliance requirements.

Master Builders is concerned at the burden imposed on head contractors by the QBCC in its audit program, and the large volume of records required to be produced. Master Builders understands that QBCC endeavours to audit at least 50% of all project trusts per year. Master Builders supports any amendment that will simplify that process and reduce the administrative burden and cost on head contractors.

Clarify the treatment of GST for retention amounts

The Bill purports to 'clarify' that cash retention amounts are inclusive of GST. Master Builders disagrees that this proposed amendment is a clarification, and submits it is a substantive change of policy approach.

Regard must be had to relevant rulings of the Australian Tax Office (ATO) in considering the impacts of this proposed change. These rulings override attribution rules for retention amounts and make provision for deferring attribution of GST payable and input tax credits for retention amounts. Under the ATO rulings, GST is only payable on receipt (or invoicing) of retention money to the contractor/subcontractor at practical or final completion. The rulings also have the effect that a GST input tax credit is not available until the retention money is paid (with the GST) at the end of the project.

The reason for the ATO making the above rulings is set out in the attached letter from the ATO to Master Builders. The letter includes the following statement:

“Having regard to the delay in receiving or paying retention amounts, the Commissioner is satisfied that this application of the basic attribution rules produce an inappropriate result.”

The Bill has been drafted without regard to the effect of these ATO rulings as the Bill requires the retention trust account trustee (ie the party holding the retention – presently mostly head contractors) to pay the GST amount into the retention trust account with each transfer of retention money. However, under the ATO rulings the trustee (e.g. head contractor) cannot claim an input tax credit at that time (the input tax credit is to be claimed on payment of retention at the end of the project).

In our view, the Bill imposes unnecessary costs on business without commensurate benefit. These additional costs include:

- the need for trustees to implement changes to standard business procedures for managing GST,
- imposing a consequential requirement for trustees (e.g. head contractors) to tie up additional cash in a retention trust beyond the retention amount itself, and for a lengthy period, and
- creating an obligation for a trustee to make a GST payment into a retention trust where the trustee is unable to claim an input tax credit for the GST amount until the end of the project.

While we also agree that subcontractors should not be out of pocket in the event of insolvency, we understand that subcontractors operating on an accruals accounting basis are unlikely to be required to remit GST to the ATO (or could obtain an adjustment) on a retention amount received post-insolvency and exclusive of GST. As the vast majority of head contractors operating retention trust accounts will not become insolvent, and will remit GST at the time of transaction paying a subcontractor, the proposed changes burden the majority for an unknown benefit and we submit a net benefit has not been demonstrated.

As the burden for retention account trustees (largely head contractors at present) is created by the Queensland legislative framework for retention trust accounts, we request if the amendments proposed are to proceed, they do not commence unless and until the Queensland Government has obtained a further ATO Tax Ruling to the effect the trustee of the retention trust account can claim an input tax credit for the GST paid into the retention trust account at the time of payment into the trust account.

Simplify the independent trust account review requirements

We support the expansion of who can audit a trust account. We have received feedback from our members having difficulty finding a suitably qualified auditor willing to undertake the audit required.

Clarify transitional application for Project Trust Account and Retention Trust Account eligibility criteria

We agree that the framework should not apply retrospectively.

General comments on Queensland's project trust account framework

The Queensland legislated project trust account framework does not, and we submit cannot, achieve its intended purpose. We call out project trust accounts separately from retention trust accounts. The latter are considered workable provided there can be a simplification of administrative obligations on the trustee.

There have been at least four head contractor insolvencies involving project trust accounts, and no subcontractors have been paid from a trust account following the insolvency as at the date of this letter.

The Queensland framework does not address consequences of late payment by principals (e.g. Government and developers). A 2023 survey of Master Builders members carrying out Government and Government-funded building contracts identified late payments were a common occurrence. Over 65 per cent of responses stated they were not always paid on time.

The Report of the Building Industry Fairness Reforms Implementation and Evaluation Panel pursuant to section 200A of the *Building Industry Fairness (Security of Payment) Act 2017* (BIF Report) noted there were repeated calls for increased protection for head contractors when principals paid late.

The BIF Report also identified:

“The few subcontractors being paid via PBAs the Panel heard from confirmed that nothing had changed in terms of payment times, but also that they had never had issues with late payment from the head contractor that was now paying them via a PBA.”

This is supported in the findings of the QBCC audits of project trust accounts. We understand that the majority have now be audited and that the findings have been that subcontractors and suppliers are being paid. The only shortcomings identified were in the administrative requirements (noting industry is still waiting, now 2 years, for compliant software solutions to become generally available). We submit any current arguments for greater protections ignore the enhanced protections already offered in Queensland.

Further we argue that there are a number of existing protections that are being insufficiently utilised to ensure appropriate payment outcomes. These include:

- building contractors in Queensland are subject to licensing requirements to the effect they must pay all debts to subcontractors and suppliers to remain licensed,
- disciplinary and offence provisions in the QBCC Act addressing avoidance of contractual obligations causing significant financial loss,
- rapid adjudication framework,
- subcontractors' charges framework,
- requirement for supporting statements,
- maximum contractual payment timeframes, and
- legislative requirement to pay an amount scheduled (or claimed if no schedule) with accompanying offences.

We assert that if further, additional protections are considered necessary for subcontractor payments in circumstances of head contractor insolvency, that these must be enacted at a federal

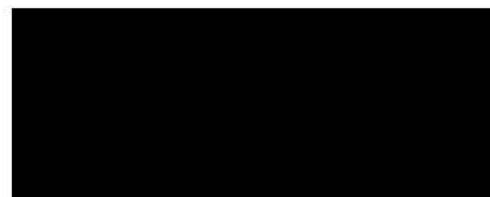
level to avoid inconsistency with Australian insolvency laws. For example, subcontractors could be placed higher in the order of creditor priority, or a federal fund could be established (similar to the Fair Entitlements Guarantee) for up to 2 progress payments per subcontractor providing the amounts are verified as due and payable by an adjudicator.

Conclusion

In summary, project trust accounts impose an enormous financial and administrative burden on head contractors for no demonstrated benefit. The amendments proposed by the Bill do not change this position.

Even if software providers are able to produce a compliant product, there will continue to be a large cost to head contractors to purchase software, implement required changes and carry out audits. Notwithstanding any software tools that may become available, head contractors will continue to bear legal responsibilities as trustee of project trust accounts which cannot be met by implementation of software tools alone. The complex administrative burden on head contractors will continue despite the provisions in this Bill.

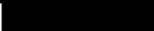
Master Builders is strongly of the view Queensland should not continue to roll out the application of project trust accounts as planned in 2025.



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**Endorsed by Paul Bidwell
Chief Executive Officer
Master Builders Queensland**

Contact email: 
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Attachment: ATO letter to Master Builders dated 17 June 2009



Queensland Master Builders Association Industrial
Organisation of Employers
Attention: Mr J R Poultney
417 Wickham Terrace
SPRING HILL QLD 4000

Our reference: [REDACTED]
Receipt Number:
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E-Mail: GSTmail@ato.gov.au

17 June 2009



Dear Sir/Madam,

Goods and services tax (GST): bank guarantees and retention monies

You wrote to us on 12 March 2009 asking:

1. Should GST be included in an unconditional bank guarantee that is provided by a contractor to an owner under a building contract as security for performance of the contract?
2. Should GST be included in a retention amount that is withheld by an owner from a payment to the contractor under a building contract as security for performance of the contract?

We also refer to the subsequent correspondence and telephone conversation between Mr Jeffrey Poultney and Cecilia Vun of this office.

You provided us with the following information:

You (Queensland Master Builders Association Industrial Organisation of Employers) wish to apply for a private ruling in relation to the GST treatment of security provided by a contractor to an owner for the performance of a contract in the form of unconditional bank guarantees and cash retention amounts.

Your submission includes:

The Australian Building Industry Contract suite (ABIC) new generation of standard form plain English building jointly published by the Australian Institute of Architects (AIA) and Master Builders Australia (MBA) for use where the Architect is administering a project for an Owner in the commercial or domestic area of the construction industry.

Introduced into the Australian construction industry in 2001, the suite of documents were endorsed by each State MBA, however there has been ongoing divergence of views on the administration of the ABIC contract on how the *GST Act 2000*, should be applied to:

Item 1 - Security provided by the Contractor to the Owner for the performance of a contract in the form of unconditional guarantees (Bank Guarantees), as a percentage (maximum 5%) of the GST inclusive Contract Price.

See: Section of ABIC attached: Introduction Item 4 Contract Price, Section C - Security, Section N-Payment for the Works - N 4.2 or alternatively;

Item 2 - Security withheld from the Contractor by the Owner for the performance of a contract in the form of cash retention as a percentage (maximum 5%) of the GST inclusive Contract Price.

See section of ABIC: Introduction Item 4 Contract Price, Section C - Security, Section N - Payment for the Works.

Item 1 - Security provided in the form of unconditional bank guarantees.

- a) Clause C1.1 of ABIC MW, 2003 requires the Contractor to provide to the Owner security for the performance of the contract by way of unconditional Guarantees, this is normally in the form of a Bank Guarantee. This requirement is addressed in Item 3 of Schedule 1 of the contract.
- b) Clause C3 sets out the Owners requirements for the unconditional guarantee based on a percentage of the contract price, set out in Item 3 of Schedule 1 of the contract.
- c) Contract price is defined in Clause N1 and includes GST per N1.1.

Master Builders has had the opportunity to study the following Taxation Office GST rulings GSTR 2006/1 and GSTR 2006/2, referenced in private ruling ref 5748842, provided to Master Builders Queensland by a member, Mr Michael Johnson.

MBAQ strongly supports this ruling given by the Taxation Office in relation to Bank Guarantees provided as security for performance under a building contract and strongly believes this ruling would apply to the ABIC contracts.

Item 2 - Security provided in the form of Cash Retention.

- a) Clause C1.1 of ABIC MW, 2003 permits the Owner to withhold a cash retention sum to provide security for performance of the Contractors obligations. This matter is subject to the Contractor allowing the Owner to retain an amount from progress payments as addressed in Item 2 of Schedule 1 of the contract.
- b) Clause C2.1 permits the Owner to withhold up to 10% of each progress payment until the value of the cash held equals a percentage of the Contract Price. The 'default' percentage of the Contract Price is 5% as per Item 2 of Schedule 1 of the contract.
- c) Contract Price is defined in Clause N1 and includes GST per N1.1.

Master Builders Queensland has read the following Tax Office GST Rulings GSTR 2000/17 and GSTR 2000/29 and when read in relation to the ABIC conditions set out above, Master Builders Queensland believes that:

- GST is not attributable to cash retention deducted and retained until the tax period in which the moneys retained are actually claimed (GSTR 2000/17 Section 49 & 50).
- The claiming of the cash retention by the Contractor occurs at:
 - i. Practical Completion by way of a Tax Invoice when one half of the cash retention is released with GST payable on the taxable supply
 - ii. Final Completion at the end of the defects liability period when the remaining balance (one half) of the cash retention is released with GST payable on the taxable supply.

At no time under an ABIC contract and during the course of the contract should GST be applied to cash retention as there is no supply and no GST attributable to the cash retention until such time it is claimed by a Contractor at Practical Completion Clause C7 and N10 and N12 at Final Completion using a Tax Invoice (GSTR 2000/29 Section 179-181).

We advise:

1. No, GST should generally not be included in an unconditional bank guarantee that is provided by a contractor to the owner under a building contract as security for performance of the contract.

For further information please see the 'Explanation' section below.

2. Yes, GST should generally be included in a retention amount that is withheld by an owner from a payment to the contractor under a building contract as security for performance of the contract. However, particular attribution rules apply.

For further information please see the 'Explanation' section below.

Explanation:

Note: all reference material used in this ruling is available on the Tax Office website www.ato.gov.au

As you are an industry association seeking advice on the GST implications that would relate to parties entering into your standard Australian Building Industry Contract, we have provided the following general advice to assist you with your queries.

1. unconditional guarantees

GST is transaction based and whether GST applies to a transaction will generally depend upon whether a taxable supply is made or whether a payment made is treated as consideration for a taxable supply.

Section 9-5 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) provides for taxable supplies:

An entity makes a taxable if:

- (a) the entity makes a supply for consideration
- (b) the supply is made in the course or furtherance of an enterprise that the entity carries on
- (c) the supply is connected with Australia, and
- (d) the entity is registered or required to be registered for GST.

However, the supply is not a taxable supply to the extent that it is GST-free or input taxed.

Where a building contract includes a provision that one form of security for the performance of a contract is by giving unconditional guarantees (bank guarantee) by a contractor to an owner, we need to consider whether a taxable supply will be made in relation to the guarantees.

Division 99 of the GST Act provides the special GST rule for deposits as security. Under section 99-5 of the GST Act, a deposit held as security for the performance of an obligation is not treated as consideration for a supply, unless the deposit is

forfeited because of failure to perform the obligation or is applied as all or part of the consideration for a supply. (This is irrespective of the basic rules of section 9-15 which is about consideration).

Where a bank guarantee under a building contract is a form of security for the performance of the contract we need to determine whether it is a security deposit for the purposes of Division 99 of the GST Act.

The term 'deposit' is not defined in the GST Act. However, judicial decisions have indicated that the term 'deposit' has a particular meaning in a commercial context. It should have the following characteristics:

- be held as a security for the performance of an obligation;
- the contract, conduct and intent of the parties to the contract must be consistent with the payment being a security deposit;
- be at risk of forfeiture upon failure to perform the obligation and
- be a reasonable amount.

Whilst a bank guarantee that a contractor provides to an owner as a security will meet with the above characteristics of a 'deposit', Goods and Services Tax Ruling GSTR 2006/2 Goods and services tax: deposits held as security for the performance of an obligation (GSTR 2006/2) indicates that it is not a security deposit for the purposes of Division 99 of the GST Act. Paragraphs 15 and 16 of GSTR 2006/2 consider that security deposits for GST purposes would flow from recipient to supplier, usually in a purchase contract or a hire contract.

Those paragraphs explain that generally an arrangement may involve a contract for the purchase of real property, goods or services (a purchase contract), where the recipient pays a deposit to secure their obligations under the contract, or an arrangement in which a security deposit may be paid would involve a contract for the hire of goods, where the supplier requires a deposit (or bond) to be paid by the recipient to secure the payment of periodic rental instalments and/or the return of the goods on time and in good condition.

In a building contract, the provision of the bank guarantee by a contractor would not reflect the above types of situation and the bank guarantee provided by a contractor would flow from the supplier to the recipient, and not flow from the recipient to the supplier as is generally the inherent characteristic of a purchase or hire contract. Furthermore, the bank guarantee that a contractor provides is money put up by the bank and not money paid by the recipient of a supply as a deposit. Therefore, bank guarantees in a building contract is generally not considered to be a security deposit for the purposes of Division 99 of the GST Act.

For there to be a taxable supply under the basic rules, we need to consider if there is firstly a supply for GST purposes. The meaning of supply is provided in subsection 9-10(1) of the GST Act as any form of supply whatsoever. Paragraph 9-10(2)(f) of the GST Act includes 'a financial supply' as a form of supply.

Under section 40-5 of the GST Act, financial supplies are input taxed. The term 'financial supplies' is defined in the A New Tax System (Goods and Services Tax) Regulations 1999 (GST Regulations) under Subdivision 40-A.

The table in sub-regulation 40-5.09(3) of the GST Regulations lists the interests which can be financial supplies when they are provided, acquired, or disposed of

provided other requirements of subregulation 40-5.09(1) of the GST Regulations are satisfied. Item 7 in that table lists:

A guarantee, including an indemnity (except a warranty for goods or a contract of insurance or reinsurance)

A performance bond is listed as one of the examples of things included under item 7 as provided under Part 5 of Schedule 7 to the GST Regulations.

Goods and Services Tax Ruling GSTR 2006/1 Goods and services tax: guarantees and indemnities (GSTR 2006/1) explains performance bonds as follows:

47. In a performance bond, a surety is liable for the performance, by a service provider, of the conditions under the service provider's contract with the recipient of the services. The surety's obligation is to make good the service provider's obligation. Performance bonds do not usually cover an obligation of the service provider to make payment, but rather an obligation to perform services, or carry out other work, or meet conditions in a contract. A performance bond may take the form of a guarantee (that is, the surety has a secondary liability), but are commonly indemnities (where the surety takes on a primary liability along with the service provider).

123. Performance bonds may also be known as 'bank guarantees' or 'insurance bonds'. These terms indicate the nature of the entity providing the assurance, and generally refer to unconditional performance bonds.

126. In commercial practice, performance bonds are given for the quality, timeliness, or some other measure of supplies being made to an entity. In this case, the recipient has contracted for the service provider to make a supply to the recipient. The surety guarantees the quality or timeliness of the completed work.

Hence, the bank guarantee referred to in a building contract which would generally be considered to be a performance bond is a form of indemnity for GST purposes as noted above.

Paragraph 70 of GSTR 2006/1 states that an indemnity, for the purposes of Item 7, is an arrangement involving three parties. In an indemnity, the surety (for example, a financial institution holding the guarantee) takes primary responsibility for an obligation arising in relation to a third party (for example, a contractor). That is, the creditor (for example, an owner in a building contract) may recover directly from the surety, regardless of whether the principal (that is the contractor) defaults.

GSTR 2006/1 summarises the effect of payment made under performance bonds as follows:

128. Whether the surety pays an amount or makes a supply, the payment or supply is not consideration for the release from an obligation for the same reasons discussed in paragraph 76.

129. If the surety makes a cash payment, the payment is not a supply.

Paragraphs 74 to 76 of GST 2006/1 then explain the GST consequences of a payment under a guarantee or indemnity which should apply to a performance bond (or a bank guarantee in this case) in the following:

74. If the surety is called upon to make a payment to an owner, the payment is made as a result of the exercise of the owner's rights under the indemnity.

75. Where the surety pays money, this is not consideration for the release of the surety from an obligation under paragraph 9-10(2)(g) of the GST Act, nor is it consideration for the surrender of the creditor's rights under paragraph 9-10(2)(e). Rather, the payment discharges (or partly discharges) the surety's obligations under the contract. Accordingly, there is no supply to the surety by the owner in consideration of the payment by the surety.

76. The payment of money on the exercise of a right is also not a supply by the surety because of subsection 9-10(4) of the GST Act.

Given the above explanation, as there is no 'supply' made for GST purposes in relation to a payment made under bank guarantees provided by one entity to another as security for the performance of a contract, there cannot be a financial supply.

GST liabilities arise from taxable supplies as provided for under section 9-40 of the GST Act. In the same token, if there is no supply made in return for a payment, a taxable supply also cannot exist and accordingly, there will be no GST liability on the transaction.

Therefore, it follows that GST should generally not be included in the unconditional bank guarantee that is provided by a contractor to an owner under a building contract as security for performance of the contract.

2. Cash retention amounts

For the purposes of this ruling it is assumed that:

- all relevant entities are registered for GST and accounts on a non-cash basis
- all relevant supplies are taxable supplies, and
- all relevant acquisitions are creditable acquisitions.

The basic attribution rules are set out in Division 29 of the GST Act. If an entity accounts for GST on a non-cash basis, under the basic rule in subsection 29-5(1) all of the GST payable by the entity on a taxable supply is attributable to the earlier of the tax period in which:

- any of the consideration is received for the supply, or
- an invoice is issued relating to the supply.

This means that the entity may have to account for GST payable on a supply before actually receiving payment for the supply.

Similarly, under subsection 29-10(1) of the GST Act, if an entity accounts for GST on a non-cash basis, the entity will attribute all of the input tax credit for a creditable acquisition to the earlier of the tax periods in which:

- the entity provides any of the consideration for the acquisition, or
- an invoice is issued relating to the acquisition.

This means that the entity may be entitled to input tax credits before actually paying for the acquisition.

However, under the same Division the Commissioner may also make a written determination to specify a different tax period to that which would otherwise apply, if

satisfied that the application of the basic attribution rules and any relevant special rules under the GST Act would produce an inappropriate result.

The Commissioner has made a number of determinations under subsection 29-25(1) of the GST Act, including the *A New Tax System (Goods and Services Tax) Act 1999 (Particular Attribution Rules for retention Payments) Determination (No. 1) 2000* (PAR 2000/1 – retention payments). This determination is attached as Schedule 6 to the Goods and Services Tax Ruling GSTR 2000/29 '*attributing GST payable, input tax credits and adjustments and particular attribution rules made under section 29-25*' (GSTR 2000/29).

The particular attribution rule for GST payable on retention amounts is explained in a number of Tax Office reference materials, including:

- Paragraphs 99 to 103 and 172 to 189 of GSTR 2000/29
- PAR 2000/1- retention payments
- Paragraphs 49 and 50 of Goods and Services Tax Ruling GSTR 2000/17 which discusses '*tax invoices*' (GSTR 2000/17)
- Property and Construction Industry Partnership - Issues Register - Section 02 - Building Contracts
- Goods and Services Tax Ruling GSTR 2000/35 '*Division 156-supplies and acquisitions made on a progressive or periodic basis*' (GSTR 2000/35)

Provisions for retention amounts are generally very common in building and construction contracts between the builder/contractor and developer/proprietor and also between the builder/contractor and its subcontractors.

The recipient withholds a retention amount from the total amount payable in order to provide the recipient with some protection that the builder/contractor or subcontractor will satisfactorily perform its obligations under the contract.

The retention amounts may be significant, with some contracts allowing the recipient to withhold as much as 10 per cent of payments pending full and satisfactory performance of the contract or until the end of the defects liability period. Recipients may retain these retention amounts for lengthy periods.

Having regard to the delay in receiving or paying retention amounts, the Commissioner is satisfied that this application of the basic attribution rules produce an inappropriate result.

Clauses 3(3) and 3(4) of PAR 2000/1 – retention payments are extracted for ease of reference:

(3) The GST payable on the retention amount is attributable as follows:

- (a) If, in a tax period, all of the retention amount is received, the GST payable on the retention amount is attributable to that tax period but only to the extent that it has not been previously attributed to an earlier tax period as a result of the issue of an invoice for the retention amount; or
- (b) If, in a tax period, part of the retention amount is received, the GST payable on the retention amount is attributable to that tax period, but only to the extent that:
 - (i) the retention amount is received in that tax period; and

- (ii) the GST payable on the retention amount has not been previously attributed to an earlier tax period as a result of the issue of an invoice for the retention amount; or
 - (c) if, in a tax period, none of the retention amount is received, none of the GST payable on the retention amount is attributable to that tax period.
- (4) However, if an invoice for the retention amount is issued in a tax period, GST payable on the retention amount is attributable to that tax period, but:
- (a) only to the extent of the amount of the invoice issued in that tax period; and
 - (b) only to the extent that the GST on the retention amount has not been previously attributed to an earlier tax period because part of the retention amount was received in an earlier tax period.

In the situation where a building contract includes a provision that the contractor must provide security for its performance of the contract by allowing the owner to withhold cash retention until satisfactory completion of the contract or until the end of the defects liability period, then it will generally mean that:

- Where a contractor makes a taxable supply of this kind, the contractor must attribute (account for) the GST payable on the retention amount to the tax period in which the contractor receives part or all of the retained amount, but only to the extent that the retention amount is actually received in that tax period.
- Where the contractor issues an invoice or document for the retention amount the contractor must attribute the GST payable on the retention amount to the tax period in which the invoice or document is issued, but only to the extent that the retention amount is included in the invoice or document. The invoice referred to must be issued after satisfactory performance of the contract or following the expiry of the defects liability period. That is, any invoice or document issued prior to this date is not relevant in determining when to attribute GST.

Clauses 4(3) and 4(4) of PAR 2000/1 – retention payments are extracted for ease of reference:

- (3) The input tax credit on the retention amount to which you are entitled for a creditable acquisition is attributable to:
- (a) if, in a tax period, you provide all of the retention amount for a creditable acquisition, the input tax credit for the retention amount is attributable to that tax period but only to the extent that it has not been previously attributed to an earlier tax period as a result of the issue of an invoice for the retention amount; or
 - (b) if, in a tax period, you provide part of the retention amount, the input tax credit for the retention amount is attributable to that tax period, but only to the extent that:
 - (i) you provided the retention amount in that tax period; and

- (ii) the input tax credit on the retention amount has not been previously attributed to an earlier tax period as a result of the issue of an invoice for the retention amount; or
 - (c) If, in a tax period, you did not provide any of the retention amount, none of the input tax credit on the retention amount is attributable to that tax period.
- (4) However, if an invoice for the retention amount is issued in a tax period, the input tax credit on the retention amount is attributable to that tax period, but:
- (a) only to the extent of the amount of the invoice issued in that period; and
 - (b) only to the extent that the input tax credit on the retention amount has not been previously attributed to an earlier tax period because you provided part of the retention amount in an earlier tax period.

In the situation where a building contract includes a provision that the contractor must provide security for its performance of the contract by allowing the owner to withhold cash retention until satisfactory completion of the contract or until the end of the defects liability period, then it will generally mean that:

- Where an owner makes a creditable acquisition of this kind, the owner may attribute the input tax credit on the retention amount to the tax period in which the owner provided payment for part or all of the retained amount, but only to the extent that the retention amount is actually paid in that tax period.
- Where the contractor issues an invoice or document for the retention amount in a tax period the owner may attribute the input tax credit on the retention amount to that tax period, but only to the extent that the retention amount is included in the invoice or document.

The basic attribution rules will continue to apply to the GST payable and the input tax credits claimable on the rest of the contracted amounts (the non-retained amounts), that is, when an invoice is issued or when any payment is received for the supply (whichever happens earlier).

Where the supplies or acquisitions are made for a period or on a progressive basis and Division 156 of the GST Act applies, this particular attribution rule will not alter the application of Division 156. If Division 156 applies, the particular attribution rule of subsection 29-25(1) will also apply in respect of any retention amount in respect of each separate supply.

In summary, GST should generally be included in a retention amount that is withheld by an owner from a payment to the contractor under a building contract as security for performance of the contract. However, section 29-25 of the GST Act overrides the basic attribution rules and defers attribution of GST payable and input tax credits to the extent related to the retention amount.

We have attached explanatory notes on the effect, duration of this advice and your review rights. If you wish to discuss this advice please phone Cecilia Vun on [REDACTED] and quote reference number [REDACTED].

Yours faithfully

Shane Reardon
Deputy Commissioner of Taxation

[REDACTED]

(Cecilia Vun) /
Encl.

Explanatory notes

Effect

This advice sets out the Tax Office view about the operation of the GST law that may apply to an entity's circumstances. To the extent that this general view applies to an entity's circumstances, the Commissioner will be bound by that advice.

If an entity wants specific advice dealing with its individual circumstances it should apply for a private ruling using the *Application for GST Private Ruling* form available at www.ato.gov.au or by calling the Tax Agent Information line on 13 72 86.

Duration

You may rely on this advice until it is withdrawn, overridden by a public ruling or there is a change in the legislation affecting the treatment of the subject matter of this advice for GST purposes.

Review rights

You have a right to have this advice informally reviewed under the taxpayers' charter. If you want to do this, you should contact the person handling your case or the Tax Office where the decision was made. The review is normally conducted by a tax officer who was not involved in making the original decision.

You can also contact the Tax Office on the numbers listed at the bottom of these explanatory notes.

This advice cannot, however, be reviewed under the *Taxation Administration Act 1953* (TAA), as it is not a reviewable decision under subsection 110-50(2) of Schedule 1 to the TAA. Also, this advice cannot be reviewed under the *Administrative Decisions (Judicial Review) Act 1977*.

Freedom of information

The *Freedom of Information Act 1982* (FOI Act) gives you a legal right to access certain documents relating to this decision held by the Tax Office.

Requests for access under this Act

- must be in writing
- describe the document you want in enough detail to identify the document
- give an address in Australia for reply
- include the \$30.00 application fee, and
- be posted or delivered to the Tax Office.

The Tax Office may refuse you access to some documents, or portions of documents, that are subject to exemption provisions. There are rights of review should you disagree with this decision.

For further information about access to documents under the FOI Act or to obtain a Freedom of Information request form please refer to the contact numbers listed below.

Contact Numbers

If you need help you can:

- phone 13 28 69 or
- visit our website at www.ato.gov.au

If you do not speak English and need help from the Tax Office, phone the Translating and Interpreting Service on 13 14 50.

People with a hearing or speech impairment with access to appropriate TTY or modem equipment should phone 13 36 77.