

APRIL 2018

## PROPERTY INSIGHTS

### NOMINATION UNDER A CONTRACT OF SALE & STAMP DUTY CONSEQUENCES - A TIMELY REMINDER



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PROPERTY

#### In brief:

The definition of 'land development' in the *Duties Act 2000 (Vic)* (the **Act**) makes it easy for a "double duty" event to occur. When a nomination under a contract of sale is made after there has been land development, duty will be assessed twice. It is vitally important therefore to ensure that any nomination under a contract of sale takes place before there has been any 'land development' of the land being purchased.

#### What you need to know:

- ▶ A planning permit or building permit does not need to have been issued in order to satisfy the land development criteria.
- ▶ Simply lodging an application or engaging in preparations to lodge, for example the preparation of formal plans for lodgement, will be enough to be construed as land development for the purpose of section 32J of the Act.
- ▶ If a nomination is made after this has occurred, section 32J of the Act is invoked and two lots of duty will need to be paid.

#### *Duties Act 2000 (Vic)* s32I

Surprisingly and unfortunately, our team all too often finds itself

dealing with requests to nominate a subsequent person/entity to take a transfer of the land purchased after Land Development has occurred post the day of sale. This is even after clear warnings are provided to every purchaser at the beginning of a transaction.

Sections 32I and 32J of the Act provide that:

If...a person (the vendor) enters into a contract (the sale contract) to sell or transfer the property to another person (the first purchaser); and

... (a subsequent purchaser) obtains the right (a transfer right) to have the property or any part of it transferred, on completion of the sale contract (the nomination); and

....after the sale contract is entered into, but before the property or any part of it is transferred, land development occurs in relation to the property or part; then

...Duty on a transfer to which this Division applies is not charged in respect of the transfer from the vendor to the transferee, but is charged separately and distinctly on—

(a) the dutiable value of the sale contract as if it had been completed by the first purchaser; and

(b) the dutiable value of the subsequent transaction by which the final subsequent purchaser obtained the transfer right;



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Section 32J(3) then states that despite subsection (1), duty is not charged under this Division on the dutiable value of a sale contract if...the land development did not occur until after a subsequent transaction (that is, the nomination) occurred.

### What does this mean?

What this means in effect is that where a nomination under a contract of sale is made after there has been Land Development, duty will be assessed twice: First, on the transfer between the vendor and the purchaser (named in the contract) and again on the subsequent transaction between the purchaser and the nominee.

In each case, duty is assessed on the higher of the price in the contract and market value. Hence, the expression often heard, "double duty".

What catches a lot of people out is just how easy it is for this to happen. The reason for this is, broadly speaking, the definition of Land Development.

### What is a Land Development?

The Act provides that:

"land development", in relation to land, means any one or more of the following:

(a) Preparing a plan of subdivision of the land or taking any steps to have the plan registered under the Subdivision Act 1988;

(b) Applying for or obtaining a permit under the Planning and Environment Act 1987 in relation to the use or development of the land;

(c) Requesting under the Planning and Environment Act 1987 a planning authority to prepare an amendment to a planning scheme that would affect the land;

(d) Applying for or obtaining a permit or approval under the Building Act 1993 in relation to the land;

(e) Doing anything in relation to the land for which a permit or approval referred to in paragraph (d) would be required;

(f) Developing or changing the land in any other way that would lead to the enhancement of its value.

### Conclusion

It is vital to take note of the definition of Land Development and ensure that any nomination under a contract of sale takes place before there has been any 'land development'.

All advisers should make it a rule to ask the question, 'Has there been land development or any applications lodged with authorities after the day of sale?' before proceeding to nominate under a contract of sale.

## ARE YOU READY FOR THE NEW GST WITHHOLDING LEGISLATION COMMENCING ON 1 JULY 2018?



By Jen Severn  
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PROPERTY

### In brief:

The winds of change are picking up speed with the commencement date of the GST Withholding legislation rapidly approaching, signalling serious change in the property sector. On 1 July 2018, the Federal Government's GST Withholding regime for the supply of real property comes into force, specifically targeting new residential premises, new residential subdivisions and long term leases.

### What you need to know:

- ▶ The purchaser is responsible for remitting GST on its purchase of new residential subdivided land or new residential premises to the ATO if they are not registered for GST.
- ▶ If the contract of sale is a plus GST sale, the purchaser must remit

1/11th of the contract price to the ATO.

- ▶ If the contract of sale is on the margin scheme, the purchaser must remit 7% of the contract price to the ATO.
- ▶ If the purchaser is registered for GST, the withholding obligations will not apply for the sale.

### What you need to do:

In the lead up to 1 July 2018, there are some important steps you need to take to cater for the legislative change.

- ▶ If you are a vendor, you must provide notice to the purchaser whether or not the withholding obligations will apply.
- ▶ You will need to review all your existing contracts in light of the incoming regime and make appropriate adjustments.
- ▶ Pro forma contracts will need to be updated prior to 1 July 2018 to comply with the new requirements under the GST withholding legislation.

### What is the transition period?

There is a two year transition period applicable to the new legislation. Whether or not the new regime will apply to your development will depend on when settlement is to occur and the supply is made to the purchaser.

### More information

For more information please see our [detailed article on the new legislation](#) or contact the Madgwicks Property team to discuss how the regime will affect your existing and future developments.

#### KEY PEXA DATES

1 MARCH 2018

All survivorship applications, transmission applications and standalone transfers must be lodged electronically.

1 OCTOBER 2018

All combinations of transactions available in PEXA to be lodged electronically e.g. a case comprising a withdrawal of caveat, discharge of mortgage, transfer and mortgage.

1 AUGUST 2019

All transactions to be lodged electronically.

## PROPERTY INSIGHTS

# APPLYING THE ULTIMATE CONSUMER TEST - WHEN IS A LEASE FOR SERVICES A RETAIL PREMISE LEASE?



By Jaclyn Tang  
Lawyer

PROPERTY

## In brief:

The devil is in the detail when it comes to what is considered retail premises and, following the recent Court of Appeal decision in the *CB Cold Storage*<sup>1</sup> case, tenants and landlords alike should be in the know or risk the potential for major unexpected consequences. *CB Cold Storage* further clarified the requirements to determine whether a lease for services is a retail premise lease and confirmed the ultimate consumer test as one of the key indicators when considering whether the services offered are retail in nature.

## What you need to know:

- ▶ When making a determination as to whether a lease for services is a retail premises, the ultimate consumer test continues to be one of the key indicators that should be satisfied.
- ▶ The ultimate consumer test generally considers whether the services provided by the tenant are used by the person to whom they are sold or are the services passed on by the purchaser in an unaltered state to another third person
- ▶ A close examination will also need to be had of:
  - ▶ the service being offered;
  - ▶ whether a fee is paid; and
  - ▶ whether the service is generally available to anyone willing to pay the fee.<sup>2</sup>
- ▶ The ultimate consumer test will be telling but not conclusive in determining whether there is a “retail provision of services” under the lease.

## What is a retail premise?

The *Retail Leases Act 2003* sets out that retail premises are premises that “are used...wholly or predominantly...for the sale or hire of goods by retail or the retail provision of services”.<sup>3</sup> Now, thanks to the Court of Appeal’s recent decision in *CB Cold Storage*, there is increased clarity about when exactly a provision of service will be considered ‘retail’. The decision in *CB Cold Storage* highlights that in determining whether premises are retail premises, one should apply the ultimate consumer test and consider where and how the services are provided.

So, what is the ultimate consumer test? It emerged in the case of *Wellington*<sup>4</sup> where the Court was required to consider whether

the premises from where the patent attorneys conducted their business were ‘retail premises’ even though the attorneys did not see clients in the premises and communicated with clients via fax and phone. The conclusion? The premises were considered retail. The *Wellington* decision shows that the ultimate consumer of the services does not need to be an ordinary member of the public and that one should consider what the service is, where it is provided and whether the service is generally available to anyone willing to pay the fee.<sup>5</sup>

## The decision in *CB Cold Storage*

Whilst VCAT decided that the premises were not retail premises<sup>6</sup>, Justice Croft held that VCAT erred by finding that the customers who used the tenant’s service for a business purpose were not ultimate consumers. In granting the appeal, Justice Croft reasoned that VCAT did not identify precisely the service that is being provided and where it is provided or consumed and the focus must be on the service that is being provided. Further, it does not matter that the ultimate consumer is or is not a business.

The Court of Appeal stated that “the concept of the ‘retail provision of services’ in the *Retail Leases Act* and its predecessor legislation is that it involves close consideration of the service that is offered, whether a fee is paid, where it is a service that is generally available to anyone who is willing to pay the fee and whether the persons who use the service are the ‘ultimate consumer’. On one view, to talk of an ultimate consumer of services may appear strained. Most services that are purchased are not susceptible to being passed on to a third person. This may be contrasted with a sale of goods where the difference between wholesale and retail is easily discernible. Nevertheless, the authorities that apply an ultimate consumer test as one indicia of the retail provision of services are of long standing<sup>7</sup>.”

## Conclusion

As demonstrated in *Wellington* and *CB Cold Storage*, in applying the ultimate consumer test, it is not necessary that members of the public can walk into the premises off the street. If a member of the public can access the service for a fee via telephone or fax, it is sufficiently considered ‘open to public’<sup>8</sup>. However, whether or not there are restrictions on access to the service can be significant. For example, if the service provider had a restriction that access was by invitation only, this may be considered “restrictions on access to the service and who could use it”<sup>9</sup>.

The decision in *CB Cold Storage* shows that it is vital to ascertain whether premises are retail premises (despite the lease stating otherwise) as there are major consequences for landlords and tenants, especially with regard to land tax and maintenance provisions.

<sup>1</sup> IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd [2017] VSCA 178

<sup>2</sup> Fitzroy Dental Pty Ltd v Metropolitan Management Pty Ltd [2013] VSC 344 [16 ] and [34]; CB Cold Storage Pty Ltd v IMCC Group (Australia) Pty Ltd [2017] VSC 23 [23]; IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd [2017] VSCA 178 [23] and [48]

<sup>3</sup> Section 4, Retail Leases Act 2003

<sup>4</sup> Wellington v Norwich Union Life Insurance Society Ltd [1991] 1 VR 333

<sup>5</sup> Fitzroy Dental Pty Ltd v Metropolitan Management Pty Ltd [2013] VSC 344 [16 ] and [34]; CB Cold Storage Pty Ltd v IMCC Group (Australia) Pty Ltd [2017] VSC 23 [23]; IMCC Group (Australia) Pty Ltd v CB Cold Storage Pty Ltd [2017] VSCA 178 [23] and [48]

<sup>6</sup> CB Cold Storage Pty Ltd v IMCC Group (Australia) Pty Ltd [2016] VCAT 1866

<sup>7</sup> IMCC Group Pty Ltd v CB Cold Storage Pty Ltd [2017] VSCA 178 [23]

<sup>8</sup> See Wellington v Norwich Union Life Insurance Society Ltd [1991] 1 VR 333 and Fitzroy Dental Pty Ltd v Metropolitan Management Pty Ltd [2013] VSC 344

<sup>9</sup> IMCC Group Pty Ltd v CB Cold Storage Pty Ltd [2017] VSCA 178 [46]

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