

Welcome

# Local Tax Club Geelong

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Novotel Geelong



# Part 6: GST and real property – When things go wrong

**Presenter:**

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# Introduction

- When things go wrong with:
  - contracts
  - land development
- We will look at a series of case examples
- A warning note on language:
  - \$110 including GST ✓
  - \$100 excluding GST ✕
  - \$100 plus GST ✓

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

- Facts

- Sale of uninhabitable residential land
- LIV/REIV standard contract of sale of land
- Relevant box:

The price includes GST (if any) unless the words ‘plus GST’ appear in this box

GST
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- At trial, held price included GST
- On appeal, explained that the default position is that vendor bears the risk of GST but that is reversed by the “plus GST” mechanism
- Held the more likely meaning of “GST” in the box was to engage that mechanism

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

- Facts
  - Residential property with planning permission for a residential development
  - Sale price “\$916,000 GST inclusive” and “plus GST” box struck out
  - Special Condition required the vendor provide the purchaser with a tax invoice
  - Tax invoice issued for \$832,727.27 plus GST of \$83,272.73
  - Purchaser claimed input tax credit after completion – no GST remitted by vendor
  - Commissioner found that the sale was input taxed as the sale of residential premises
- Magistrate ordered \$83,272.73 be refunded to the purchaser
  - Implied term that refund if GST not payable or alternative rectification of the contract
- Supreme Court allowed the vendor’s appeal
  - The contractual terms had a plain meaning – the GST risk lay with the vendor
  - Obligation to give a tax invoice was meaningless if the sale was not a taxable supply

# ***Shimden Pty Ltd v Park Pty Ltd [2022] NSWSC 267***

- Facts
  - Lease of a service station
  - Rent stated in a schedule to lease as \$232,003.20 p.a. (or \$19,333.60/mth) with no mention of GST
  - General gross-up clause in lease
  - The landlord issued monthly invoices for \$17,576 plus GST of \$1,757.60
- On construction of the lease, the rent was \$232,003.20 p.a. plus GST
- No estoppel from the way the invoices were issued

# ***Nerang Subdivision Saga - Background***

- Series of disputes 2020 to 2024
- Proposed residential development of 300ha+ on the Gold Coast with expected revenue of \$2bn
- The Development Deed
  - Clause 17.7
    - **Owner's Return** means the amount payable to the Owner under a Development Lease, excluding rent, outgoings and monies paid by a tenant on account of GST.
    - **Developer's Return** means all of the proceeds of sale of Lots and all other monies received in respect of the Project but excluding the Owner's Return.
  - Clause 15.6
    - ...any payment made by one Party to another...is exclusive of GST and...a Party must pay to the other [Party] an amount equivalent to the GST...

# ***Nerang Subdivision Saga – Background Cont.***

- The Development Lease

- Clauses 5.2, 5.3 and 5.4:
  - ...the Landlord authorises the Tenant to...collect and distribute the proceeds of settlement of Lots.
  - The Tenant will pay the Landlord on the date of settlement of each Lot, an amount equal to 25% of the Gross Sale Proceeds for that Lot.
  - The Tenant is entitled to receive and be paid all the proceeds of sale of Lots and other monies received in respect of the Works and Development for the Stage, after payment of the amounts due to the Landlord under clause 5.3.
- “Gross Sale Proceeds” was defined to mean “...the amount received at settlement from the sale of the Lot comprising the sale price plus or minus any adjustments to it (eg Rates or Charges) pursuant to the contract of sale of the Lot less any GST payable on that amount”



# ***Nerang Subdivision Saga – Opening Skirmishes***

- 2020 – application for declaratory relief
  - Impact of GST on “Owner’s Return”
  - Impact of GST on “Developer’s Return”
  - Whether owner required to register for GST – realisation of capital assets
  - Application refused because hypothetical questions and seeking advisory opinion of the Court
- 2021 – application for a stay of proceedings
  - Two stages had been approved and two Development Leases entered into
  - Dispute as to the terms of the Contract of Sale re GST for the sale of developed lots
  - Dispute resolution clause in Development Leases

# ***Nerang Subdivision Saga – Substantive Proceeding***

- Proceedings issued in 2023 – at this time four Development Leases had been executed
- Issue 1 – was the Owner required to be registered for GST?
  - Enterprise
  - GST turnover threshold
- Issue 2 – Calculation of the Owner's Return
- Issue 3 – Grossing up the Developer's Return for GST
- Issue 4 – Land tax adjustments

# ***Nerang Subdivision Saga – Mopping Up***

- 2023 – Costs
  - Commissioner's costs to be paid by the Owner who was unsuccessful on the GST registration point
  - Commissioner not appearing akin to *amicus curiae*
- September 2024 – Appeal brought by the Developer
  - No appeal by the Owner on the GST registration issue
  - Focus on the finding of the primary judge that the Developer's Return could not be "grossed up" for GST
- Court of Appeal unanimously dismissed the appeal
  - No error by the primary judge

# Thank you

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