

June 2018 – updated August 2018

## Some purchasers required to withhold GST from 1 July 2018

### Key points

- New GST withholding regime applying to some settlements from 1 July 2018.
- New **notification** obligations on **vendors** of new residential or potential residential land.
- New **notification** and **withholding** obligations on **purchasers** of new residential or potential residential land.
- Penalties apply for both vendor and purchaser if they fail to comply.
- Practitioners will be at risk of claims if they fail to advise clients about their new notification and withholding obligations and fail to take steps to ensure compliance.

From 1 July 2018 purchasers of certain new residential premises and potential residential land will be required to withhold the goods and services tax (GST) and pay it to the Australian Tax Office (ATO).

The new requirements are set out in [subdivision 14-E of Schedule 1 to the Taxation Administration Act 1953 \(Cwlth\)](#) (the schedule) as amended by *Treasury Laws Amendment (2018 Measures No.1) Act 2018* (Cwlth)(amending Act) Schedule 5. The ATO has published [LCR 2018/D1](#), a companion ruling which contains a number of practical examples.

### Which transactions are affected?

The new withholding obligation applies to supplies by way of sale or long-term lease where the contract is entered into:

- on or after 1 July 2018
- before 1 July 2018 where the first consideration (outside of the deposit) is received (usually settlement) on or after 1 July 2020 (see schedule 5, Part 3 of the amending Act).

The supplies must be for:

- new residential premises, that are not:
  - created through substantial renovations or
  - commercial residential premises (e.g. motel – see [GSTR 2012/6](#) for definition)
- potential residential land that is included in a property subdivision plan **at the time of**

**supply** (i.e. settlement), where:

- the land does not contain buildings used for commercial purposes
- the recipient is not registered for GST and does not acquire the land for a creditable purpose, (section 14-250(1) and (2)).

**Potential residential land** as defined in the *A New Tax System (Good and Services Tax) Act 1999* (Cwth) (GST Act) means land that can be used for residential purposes but does not contain any buildings that are residential premises. The most common example is vacant subdivided lots in a residential development.

**Property subdivision plan** as defined in section 195-1 of the GST Act means a plan for the subdivision of real property that is registered (however described) under an Australian law.

For the purposes of this bulletin we will refer to the premises and land affected by the withholding obligations as the **relevant residential premises**, the supplier as the **vendor** and recipient as the **purchaser**.

## What must vendors do?

### Give notice

A vendor of residential premises or potential residential land must give the purchaser written notice before making a supply (i.e. prior to settlement) by sale or long-term lease (section 14-255(1)). There is **no** minimum notice period.

This notification requirement applies to a wider range of property than the withholding obligations, namely all residential premises and potential residential land. However, there are two exceptions and they are:

- supply of commercial residential premises
- supply of potential residential land where the purchaser is registered for GST and acquires the land for a creditable purpose (section 14-255(2)).

The notice must contain the prescribed details in section 14-255(1), including whether the purchaser will be required to make a withholding payment. If they are required to make a withholding payment, the notice must contain:

- the supplier's ABN (note this may not be the vendor under the contract of sale)
- the amount to be withheld
- when the withholding amount will be payable
- the GST-inclusive market value of any non-monetary consideration provided by the purchaser (if applicable).

Importantly, the notification obligations extend to existing residential premises, even where the supplier is not registered or required to be registered for GST (i.e. a sale of an existing premises between two private consumers).

### Penalties for failing to notify

Failure to comply is a strict liability offence (section 14-255(4) and (5)) with a maximum penalty of 100 penalty units (\$21,000) for an individual and 500 penalty units (\$105,000) for a corporation (currently \$210 per penalty unit). The defence of honest and reasonable

mistake of fact is available.

Where the strict liability offence is not prosecuted, there is an administrative penalty with a maximum 100 penalty units. There is no honest and reasonable mistake of fact defence available to a vendor failing to give a notice. However, a vendor will not be liable for the penalty for failing to give the full details required by section 14-255(1)(b) in a notice to the purchaser about withholding GST if, at the time of giving the notice, the vendor reasonably believed the purchaser was not required to withhold the GST (section 14-255(6) and (7)).

### **The vendor is still liable for the GST**

The withholding provisions do not move primary responsibility for GST from the vendor to the purchaser. The vendor remains the party primarily liable for GST and for reporting via its business activity statement (BAS). The adjustment of the vendor's GST liability on the supply will occur in the first BAS return following the making of the supply.

In the BAS in which the supply is reported, the vendor should receive a withholding credit for the amount withheld by the purchaser. This withholding credit will be set off against the vendor's actual GST liability on the sale of that property to which the withheld amount relates. Any difference between the amount withheld and the vendor's actual GST liability will be either:

- realised as a refund owing to the vendor where its actual GST liability is less than the withheld amount or
- represent an additional payment owing by the vendor on that BAS where its actual GST liability is greater than the withheld amount.

There will almost always be a small discrepancy in the amount withheld against the vendor's actual GST liability due to GST on settlement adjustments not being withheld.

Substantial differences between the withheld amount and the vendor's actual GST liability will most commonly arise for sales where the margin scheme is applied (see below).

### **Vendors can apply for a refund**

The vendor may apply for a refund separate to the BAS process where the withholding and payment were made in error by the purchaser (section 18-85). Application must be made no later than 14 days before the date on which GST on the supply is payable, that is, the next BAS statement after settlement.

## **What must purchasers do?**

### **Give notice to the Commissioner of Taxation**

A purchaser must notify the Commissioner of the amount to be withheld on or before the day of payment of the first consideration other than the deposit, usually settlement (section 16-150(2)). In practice, there will be two ATO forms for the recipient to complete – one to obtain a payment reference number (PRN) and lodgement reference number (LRN) for the withholding, referred to as form 1. The other form is to be lodged at the time of payment confirming the settlement date to the ATO, referred to as form 2. The PRN and LRN are needed for the purchaser to make the withholding payment.

These forms will be completed online. Details about the forms can be found on the ATO website [here](#), although at the time of this publication the forms are unpublished.

## **Make a payment to the Commissioner**

A purchaser must either:

- withhold the required GST amount and pay it to the Commissioner on or before the settlement date (section 14-250(4)) or
- give the vendor a bank cheque payable to the Commissioner for the appropriate withholding amount at settlement (section 16-30(3)).

If the purchaser provides a bank cheque payable to the Commissioner they should keep evidence that the vendor received it and was directed to pay it to the Commissioner.

Where a contract requires part of the consideration, other than the deposit, to be paid before final settlement, the time for payment of the withholding amount is when that interim payment is due. The full withholding payment associated with the transaction is required even where only part payment has been made. There is no statutory period of grace.

Purchasers are not required to be registered for GST to make the withholding payment.

Joint purchasers are treated as receiving a single supply and are jointly liable for the withholding. Either purchaser can make the payment. Multiple purchasers who are tenants in common are each treated as having received a proportionate supply and are liable for the withholding in the same proportion (section 14-250(11)).

Payment to the Commissioner relieves a purchaser from liability to any entity other than the Commissioner to pay or account for that amount (section 16-20).

## **Administrative penalty equal to the GST**

A purchaser who fails to withhold or provide a bank cheque made payable to the Commissioner is liable for an administrative penalty equal to the amount that should have been withheld plus the general interest charge (sections 16-30(1) and 16-80).

## **Lack of vendor notification**

A purchaser is not excused from making a withholding payment where the vendor fails to give the required notice. If this happens the purchaser must make their own assessment whether GST is required to be withheld and paid to the Commissioner. If they assess GST is required to be withheld the purchaser can simply pay the withholding amount direct to the Commissioner.

Where the vendor gives notice indicating the withholding obligation applies but specifies an amount that appears to be inadequate, the purchaser can pay the correct amount to the Commissioner.

## **Base amount for withholding calculation**

The amount to be withheld is generally determined by reference to the GST inclusive contract price, without taking into account settlement adjustments. This is the contract price specified in the particulars of sale in cases where expressed as a GST inclusive sum or the contract price plus GST where expressed as a GST exclusive sum (section 14-250(7)).

Where there is no price stipulated in the contract, or there is any non-monetary consideration provided, the withholding amount is calculated on the 'price' of the supply as defined in the GST Act, which would include both the monetary consideration and the

GST inclusive market value of any non-monetary consideration provided.

### **Withholding amount**

The percentage or fraction to be withheld is:

- where the margin scheme applies to the transaction – generally, seven per cent or some other higher percentage as determined by the Commissioner not exceeding nine per cent (section 14-250(6))
- where vendors and purchasers are associates and there is no consideration or a consideration less than the GST inclusive market value, 10 per cent of the GST exclusive market value (section 14-250(9))
- where the sale is a 'fully taxable supply' (i.e. subject to GST at the full rate), 1/11th of the contract price or 'price' (see above) (section 14-250(6)).

### Should vendors include a special condition in the sale contract?

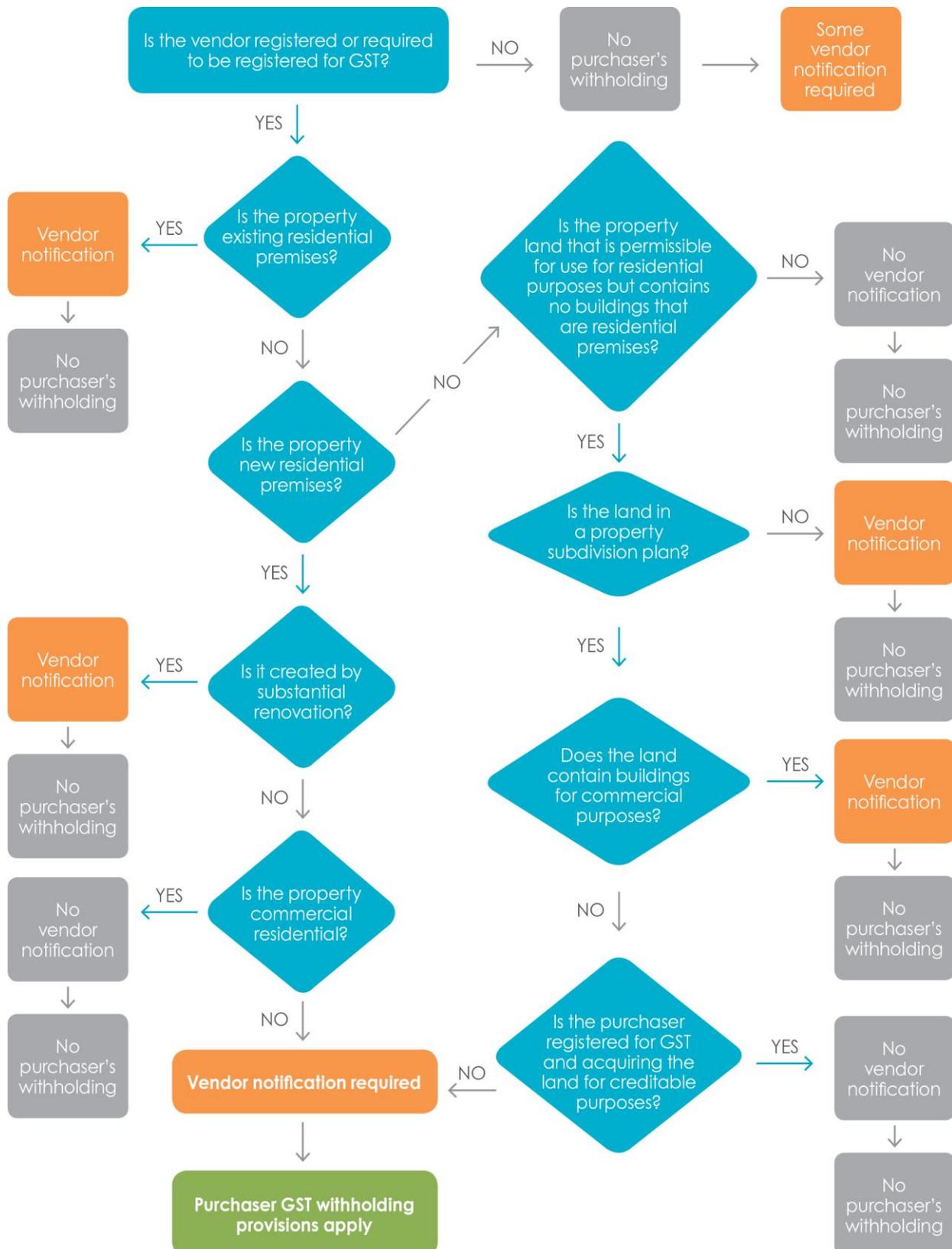
The new notice and withholding obligations are statutory obligations and must be complied with regardless of whether there is permission in the contract to do so.

However, for clarity and certainty the vendor and purchaser may wish to include a special condition in the contract regulating GST withholding issues as between themselves.

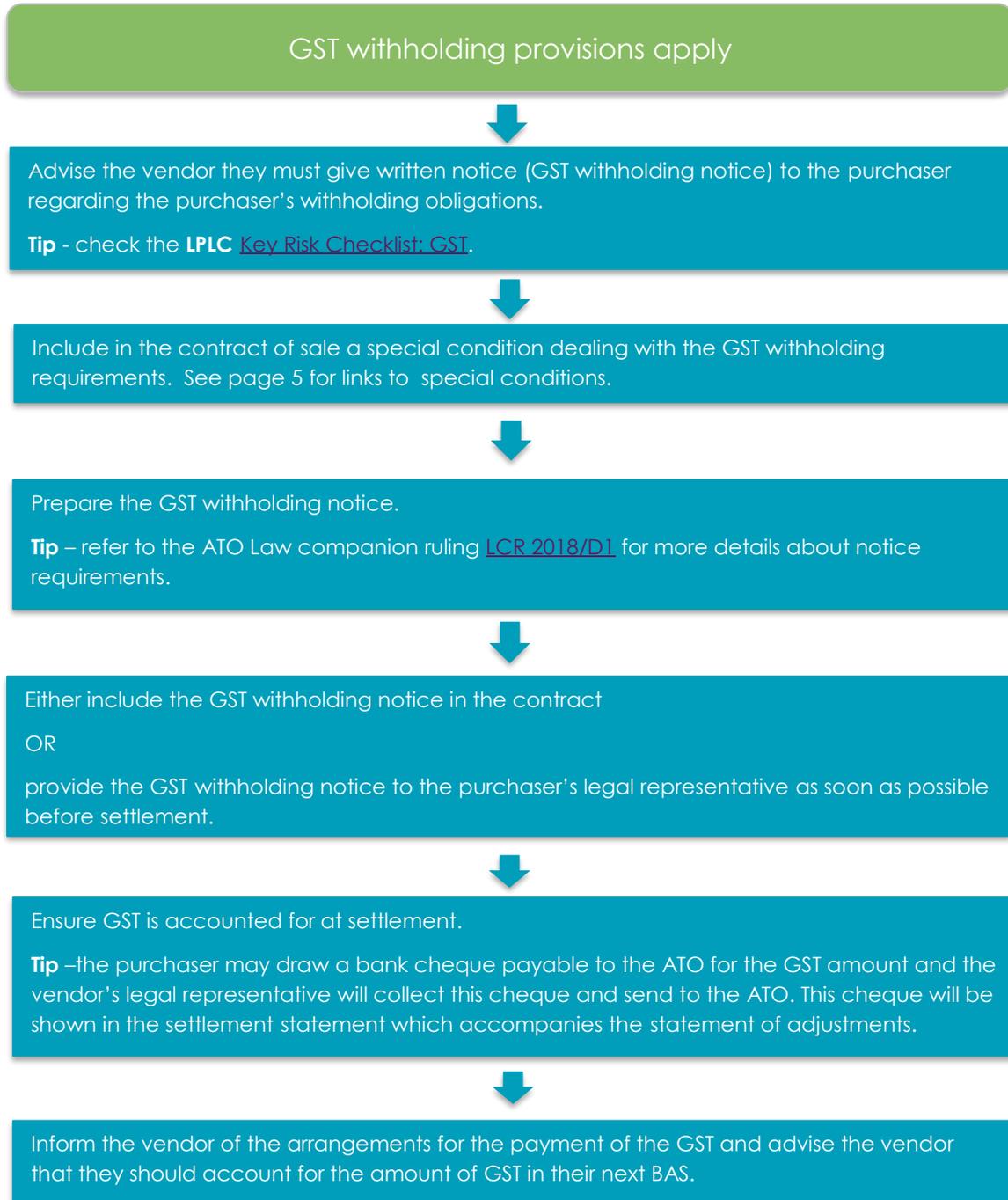
Special conditions are available:

- from the Law Institute of Victoria via [elawforms](#) and [lawsoft](#) or in hard copy from the LIV book shop
- on the LPLC website [here](#) drafted by Derry Davine, consultant lawyer to LPLC.

## Flow chart one. Do GST withholding provisions apply?



## Flow chart two. GST withholding provisions apply – steps when acting for a vendor



## Flow chart three. GST withholding provisions apply – steps when acting for a purchaser

