GSTD 2021/1EC - Compendium

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Australian Government
Australian Taxation Office

Public advice and guidance compendium – GSTD 2021/1

Relying on this Compendium

This Compendium of comments provides responses to comments received on draft Goods and Services Tax Determination GSTD 2019/D1 *Goods and services tax: development works in the Australian Capital Territory*. It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

Issue number	Issue raised	ATO response
1	**Advice on new issue requested** To avoid future uncertainty, it would be useful if the final Determination addressed the scenario of works done off the land the subject of a long-term lease. Paragraphs 1 and 3 provide that the Determination only applies in relation to works carried out on the land the subject of the long-term lease. Although paragraph 17 refers to works partly on the leased land, it would be useful for the final Determination to address the conduct of works off the land that is the subject of the lease as it is reasonably common with these projects for the developer to perform works both on and off the leased land.	**Changes made** The final Determination has been modified to explain that when associated site works are performed on unleased land which are not retained by the developer, the works will have a measurable economic value and be something that the government would usually or commercially pay money to acquire. For this reason, it is considered that these works are non-monetary consideration for a separate supply of services to the government.
2	**Advice on new issue requested** To avoid future uncertainty, it would be useful if the final Determination addressed the scenario of preparatory infrastructure works – works done off the land to be the subject of a long-term lease. Similarly, at paragraph 6, the draft Determination limits the discussion in respect of preparatory infrastructure works to work on the land that will become the subject of the long-term lease. It would be of great assistance if the final Determination	**Change partly made** See our response to Issue 1 of this Compendium in relation to works done on unleased land. Paragraph 7 of the Determination was inserted to highlight that the arrangements considered in the Determination are different from the arrangements considered in Goods and Services Tax Ruling GSTR 2015/2 *Goods and services tax: development lease arrangements with government agencies*.

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	was extended to works done off the land to be the subject of the long-term lease. Paragraph 7 of the draft Determination indicates that preparatory infrastructure works conducted by the developer on the land that is the subject of the lease represents consideration for the consequent lease. This statement is difficult to understand and seems to conflict with the general thrust of the Determination. The works on the land would seem to be very clearly intended to benefit the developer and that development. This paragraph seems to conflict with Example 1 that follows and the conclusion at paragraph 17 of the draft Determination. This conflict supports our concern around the use of a 'benefit' test.	Paragraphs 48 to 50 have been added to the Explanation section of the final Determination to explain the difference between the final Determination and GSTR 2015/2.
3	**Inadequate representation of the various types of arrangements engaged in** There is concern that the parameters of the example of the typical arrangement (refer to paragraph 9 of the draft Determination) do not adequately consider the various types of arrangements engaged in to develop land in the Australian Capital Territory (ACT). There is a risk of different goods and services tax (GST) outcomes arising under the draft Determination's guidance, even when the result of the arrangement is fundamentally the same. A number of examples are included below: • *Example 1(a) – land is sold to a developer for $400,000 which requires works on an adjacent and separate piece of land. The works include footpaths and street lighting and will ultimately be owned and for the benefit of the ACT. The works cannot be undertaken prior to the development, as they are at risk of being damaged by the construction. As the purchase price of the land is under $500,000 and it is more practicable that the*	**Change partly made** The examples are not fundamentally the same. One involves the grant of a holding lease and the other involves including the obligations in the development agreement. It is appropriate that there are different GST consequences depending on the relevant agreements entered into. Further factual analysis is included in the final Determination differentiating the various types of arrangements which involve associated site work. The Determination now takes the view that associated site works not retained by the developer are non-monetary consideration for the supply of the Crown lease land. Example 2 in the final Determination has been expanded to illustrate the consequences of the different types of associated site work. Part B has been added to the example to illustrate a situation where there are additional works provided that are not part of the building works or associated site work. GSTR 2015/2 provides advice on the GST treatment development lease arrangements where the developer obtains a grant of a short-term or holding lease by the government agency to allow the developer to undertake the development on the land prior to obtaining a long-term lease. Paragraph 6A has been added to GSTR 2015/2 to make it clear that the

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	developer undertake the works, the works will form part of the prescribed conditions of the Crown lease. In this example, the development works would not constitute non-monetary consideration for the acquisition of the Crown lease. This result is driven purely by the way in which the development agreements have been engaged in, and through the consideration of the land purchase price. Further, this example illustrates that there are often works being undertaken that are not for the benefit of the developer, but rather are for the benefit of the ACT. • *Example 1(b) – land is sold to a developer for $600,000 and works are required on an adjacent and separate piece of land. The works include footpaths and street lighting, and will ultimately be owned and for the benefit of the ACT. The works cannot be undertaken prior to the development as they are at risk of being damaged by the construction. As the purchase price of the land is over $500,000, the developer is granted a holding lease for both parcels of land, and on completion of the development works, a Crown lease is to be granted.* In this example, the development works would constitute non-monetary consideration for the acquisition of the Crown lease. This is despite the works being exactly the same as those conducted under Example 1(a) of this Compendium and ultimately being for the benefit of the ACT. The draft Determination does not draw a distinction between the types of arrangements described in Examples 1(a) and 1(b) of this Compendium. Although these arrangements are fundamentally the same, applying the current draft Determination would produce different GST outcomes.	principles in that Ruling may apply to development lease arrangements in the ACT.

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	• *Example 2(a) – ACT land is sold to a developer for $500,000. The developer requires subterranean access to an adjacent parcel of land for works (for example, for an underground car park). It is a prescribed condition of the granting of the Crown lease for the subterranean land that the developer must restore the surface of the land to its previous condition.* In applying the draft Determination, these works would not constitute non-monetary consideration for the acquisition of the Crown lease. Further, this example illustrates that there are often works being undertaken that are not for the benefit of the developer, but rather are for the benefit of the ACT. • *Example 2(b) – land is sold to a developer for $500,000. The developer is issued with a holding lease for subterranean works (for example, for an underground car park) that are to be completed on an adjacent parcel of land. It is a condition of the granting of the holding lease that the developer must restore the surface of the land to its previous condition. Once the surface works have been completed, a Crown lease will be issued for the subterranean land.* In applying the draft Determination to this example, the works would constitute non-monetary consideration for the acquisition of the Crown lease. This is despite the works being exactly the same as those conducted under Example 2(a) of this Compendium and ultimately being for the benefit of the ACT. Again, the draft Determination fails to draw a distinction between these two types of arrangements which are fundamentally the same but under the current draft Determination would produce different GST outcomes.	

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4	**New example involving preparatory infrastructure** The draft Determination only includes one example which confirms that building works and associated works are not non-monetary consideration. To avoid confusion for taxpayers, it would be helpful if a second example involving a holding lease and preparatory infrastructure works was included which demonstrates that this is non-monetary consideration.	**No change made** This is beyond the scope of this Determination. These types of examples are considered in GSTR 2015/2. Also, see our response to Issue 3 of this Compendium.
5	**Further explanation of the key elements of a taxable supply in the Ruling section** It has been suggested that further explanation of the key elements of a taxable supply be more explicitly set out in the Determination. The Determination jumps to the issue of consideration without stepping through the other requirements. It was also suggested that a sentence along the following lines be added to the beginning of the Ruling section of the Determination as follows: > The building works are not consideration as nothing was supplied from the developer to the government entity in these circumstances. To the extent that it is a supply it is of negligible value.	**Change partly made** We consider it would be preferable to keep the Ruling section succinct and only refer to consideration. Additional material has been added in the Explanation section to address the nature of the supply – see paragraphs 38 and 39 of the final Determination.
6	**Example not specific enough** The Example in the draft Determination needs to be more specific about what the terms and conditions are and what the developer is required to do. Specifying this makes it clearer that the requirement is just a term or condition of the contract and not a supply. The Example should be aligned with a situation that occurs in the ACT.	**Change made** We have added more specific facts to Example 1 of the final Determination and included references to the requirements under the ACT's affordable home purchase scheme.
7	**Changes to example** Suggest removing the word *effectively* (emphasis added) from paragraph 12 of the draft Determination.	**Change made** The word 'effectively' has been removed – see paragraph 16 of the final Determination.

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8	**Reference to decision in *Commissioner of State Revenue v Lend Lease Development Pty Ltd* [2014] HCA 51** It is recommended that references to the decision in *Commissioner of State Revenue v Lend Lease Development Pty Ltd* [2014] HCA 51 be included in the Determination, in particular the remarks at [76–77] of that decision. These paragraphs indicate that relevant works can be non-monetary consideration, however, this will depend on the nature of the arrangement between the parties.	**Change made** Reference to this decision has been included in footnote 23 of the final Determination.
9	**Reference to the decision in *AP Group Limited v Commissioner of Taxation* [2013] FCAFC 105** It is suggested that the Determination should include a reference to the *AP Group Limited v Commissioner of Taxation* [2013] FCAFC 105 decision, particularly in relation to the discussion about how not everything is a supply and some of the promises are part of the foundation underpinning the relationships and the background to the bargain the parties made.	**Change made** Reference to this decision has been made in paragraph 38 of the final Determination.
10	**Application of a subjective benefit test** In determining whether site works are a supply, the draft Determination proposes a subjective 'benefit' test that considers who will obtain the primary benefit of the associated site works and whether the works enable the effective use and/or proper functioning of the building works. There is ambiguity in the application of this test, specifically in relation to site works that are not clearly for the benefit of the developer, such as street lighting or the construction of footpaths. There are no specific examples in the draft Determination that consider arrangements where site works are not for the benefit of the developer. This is a concern as quite often works are undertaken for the benefit of the ACT, such as footpaths and street lighting, under the terms of prescribed conditions attached to a Crown lease.	**Change made** The benefit test has been removed and replaced with discussion consistent with Goods and Services Tax GSTR 2001/6 *Goods and services tax: non-monetary consideration.* GSTR 2001/6 sets out rules in relation to non-monetary consideration. It provides that for a thing to be treated as a payment for a supply, it must have economic value and independent identity provided as compensation for the making of the supply (see paragraph 81 of GSTR 2001/6). That is, it must be capable of being valued and be a thing that an acquirer would usually or commercially pay money to acquire. Once the Crown lease has been granted, the developer has taken exclusive possession of the land under that lease. While the developer does not have a freehold interest in the land, the nature of a Crown lease in the ACT means that building works done on the leased land result in the developer constructing buildings on its own land. They do not have an independent

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	It is respectfully requested that the Commissioner provide more clarity on this test, specifically with regard to situations where works specified in the Crown lease may be for the benefit of the ACT and not for the Developer. There is a concern that the 'benefit test' is inconsistent with Goods and Services Tax Ruling GSTR 2006/9 *Goods and services tax: supplies*, especially in relation to the 'contractual flow' that exists between the supplier and the recipient for which the supply is made. The concept of contractual flow follows the principle that the recipient of the supply may not necessarily be the party who benefits from the supply. The court in *Customs and Excise Commissioner*s v *Redrow Group plc* [1999] BVC 96 expands on this concept stating that: > Questions such as who benefits from the service or who is the consumer of it are not helpful. The answers are likely to differ according to the interest which various people may have in the transaction. The 'benefit' test as set out in the draft Determination appears to be inconsistent with both the contractual flow concept and established case law, as outlined by the Commissioner in GSTR 2006/9. It is submitted that a more purposive test be considered by the Commissioner, whereby non-monetary consideration arises under a building arrangement (as described in the draft Determination) where works, imposed by prescribed conditions, are undertaken on behalf of the ACT (whether or not on land that is subject of the Crown lease through which the prescribed conditions are imposed). That is, works that but for the prescribed conditions, would have been undertaken by the ACT.	identity to the making of the supply of the leased land. This results in the building works not being considered to be a non-monetary consideration for the supply of the land. However, in relation to associated works **not retained by the developer**, it is considered that the associated site works have an economic value, and are something the government would usually or commercially pay money to acquire. Accordingly, it is considered that these works are non-monetary consideration for the supply of the Crown lease land.
11	**Preferred test for associated site works on leased land** In determining whether associated site works are a supply, the draft Determination purports to adopt a test which considers where 'the works are primarily for the benefit of the developer'	**Change made** See our response to Issue 10 of this Compendium.

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	in that they 'enable the effective use and/or proper functioning of the building works' (paragraph 17 of the draft Determination). This seems to be a very difficult subjective test to apply. The example provided of a driveway would seem to be an example of something that is **only** for the benefit of the developer. There are a range of 'associated site works' that are not so clearly for the benefit of only or even primarily the developer, for example, footpaths and street lighting. Given this ambiguity, a more objective test would be preferable. For example, treating works required to be undertaken by a developer as consideration for the purchase of the land only where the works are required to be undertaken on behalf of the ACT, or at the developer's cost, on land that is not the land the subject of a long-term Crown lease. This test would not depend on whether the works were to be performed prior to the issue of a long-term Crown lease in respect of the land. The effect of such a test would not result in a different treatment of developments based on whether they were required under a Crown lease, PDA or holding lease and deed of agreement. It would not require the decision maker to consider which party received the benefit from the development. Rather, it would only require applying an objective test as to the location of the works. This approach is consistent with the GST legislation and provides for consistency between GST and duties legislation. For example, this objective location is consistent with a developer's entitlement to be compensated for improvements **on the land** under section 291 of the *Planning and Development Act 2007* (ACT). Additionally, in GSTR 2006/9, focus is directed to the 'contractual flow' that exists between parties as opposed to an assessment of which party benefits. In Example 5 of GSTR 2006/9, it states:	

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	A's supply of services is made to B. Although C may benefit from these services, it is B who contracts for the supply of these services and is the recipient of the supply. Similarly, the case of *Wilson & Horton Ltd v Commissioner of Inland Revenue* [1996] 1 NZLR 26 also supports a test which does not require an assessment of party benefits. In interpreting the relevant GST provisions, Richardson J stated at page 27 '[t]he statutory focus under s 11(2)(e) was on the contractual supply of services, not on non-contractual benefits.' GSTR 2001/6 also notes that things provided or made available by a recipient to a supplier for use in making the supply will not necessarily form consideration (at paragraph 90). Rather, '*[t]hey are … conditions of the contract that go to defining the supply made …'* (at paragraph 92 of GSTR 2001/6). The draft Determination indicates that associated site works do not form non-monetary consideration where they are conditions of the contract.	
12	**Advice on new issue requested** To avoid future uncertainty, it would be useful if the final Determination addressed the following scenario: Reference is made at paragraph 44 of the draft Determination to long-term strata title leases in *Commissioner of Taxation v Gloxinia Investments (Trustee)* [2010] FCAFC 46 (*Gloxinia*). For completeness, it would be useful if the final Determination addressed the unitisation of title on completion of development.	**No change made** The transaction involving the sale of the individual strata title units is beyond the scope of this Determination. The relevant transaction to consider in this Determination is the grant of the long-term Crown lease and the relevant building and associated works completed in relation to this lease. However, we do not consider that the building works are non-monetary consideration for the supply of the individual units. The building work was required to be completed prior to the strata titling. The strata titling is merely a mechanism to enable individual units to be sold. There is not a sufficient nexus between the building and associated works performed and the granting of the strata title. The reference to the decision in *Gloxinia* has been removed from the final Determination.

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13	**Distinction with the *Gloxinia* case** Paragraphs 43 to 45 of the draft Determination try to make a distinction between *Gloxinia*. In *Gloxinia*, the developer was granted a 99-year strata lot lease which was converted to strata units once the apartment development was completed, with the strata unit leases being for the balance of the 99-year lease term. The draft Determination states that in the context of *Gloxinia*, the 99-year strata lot lease was in effect the development lease (albeit for 99 years and not a short-term). Therefore, it makes sense that the building works and associated works were completed prior to the strata leases being granted, implying those works were non-monetary consideration for the strata leases. Again, it is hard to see a reason for the distinction with the arrangements in the ACT once the unit lease conversion is taken into account. It is understood that the conversion of a long-term Crown lease into multiple unit leases happens automatically when a strata plan is registered in the ACT. Therefore, it is an open question whether this conversion does or does not involve any supply and is merely a conversion of title and hence the building works and associated works are not consideration for the unit leases. As such, this should be clearly addressed in the final Determination to avoid creating uncertainty.	**No change made** See our response to Issue 12 of this Compendium. We consider that it is beyond the scope of this Determination to consider in detail the transaction involving the sale of the individual strata title units.
14	**Distinction with GSTR 2015/2** GSTR 2015/2 is dealt with in paragraphs 41 and 42 of the draft Determination. It is stated that the point of distinction is that the development lease arrangements dealt with in GSTR 2015/2 require a short-term development lease during which the building works and associated site works are completed. It is only after those works are completed that a long-term lease (or freehold title) is provided to the developer or an associate over the completed development.	**Change partly made** See our response to Issue 12 of this Compendium. Paragraphs 48 to 50 of the final Determination have been added to explain the distinction between this Determination and GSTR 2015/2. We consider that it is beyond the scope of this Determination to consider in detail the transaction involving the sale of the individual strata title units.

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	However, this ignores the fact that in the ACT developers that complete a residential development project will convert their long-term Crown lease (which may cover the whole of the project or one stage) into 'unit leases' which cover each apartment and the common areas. What is ultimately sold to third-party purchasers is the unit leases, not the initial long-term Crown lease. Of course, the conversion to unit leases cannot occur until the building works and associated works are completed. So, in applying GSTR 2015/2, it would be appropriate to treat the building works and associated works as non-monetary consideration for the unit leases. Once the unit lease conversion is taken into account (which is standard in the typical residential development process and is not mentioned in the draft Determination), there is no distinction between the ACT projects and GSTR 2015/2.	
15	**Inconsistencies with prior ATO guidance on preparatory infrastructure works** There is no requirement contained in paragraph 6 of the draft Determination that preparatory infrastructure works be retained by the ACT for the conduct of the works to constitute non-monetary for the long-term lease. This differs from the view previously expressed in an ATO Minute. Parties might have relied upon the ATO Minute in entering into arrangements or even in completing arrangements. In light of this, paragraph 19 of the draft Determination could be extended to cover taxpayers who have acted upon previous ATO guidance, including guidance that was not provided by way of binding private or public rulings or settlement of a dispute.	**Change partly made** The date of effect has been changed as a result of the change of view in relation to associated site work not retained by the developer. The final Determination applies both before and after its date of issue, however there are some exceptions: • Previous private ruling – the Determination does not apply where a previous private ruling applies to an entity undertaking development works in relation to the development and the entity relies on the private ruling and continues to rely on the private ruling in respect of all aspects of the development arrangement. • Previous reliance on GSTD 2019/D1 – we will not seek to disturb any assessment issued in reliance on GSTD 2019/D1 if both parties apply the view in GSTD 2019/D1 to all aspects of the development arrangement for the entire period of the arrangement. We expect that in such a case there would be an agreement in writing by both parties to apply this view.

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16	**Inconsistencies with prior ATO guidance on preparatory infrastructure works** It is unclear for which lease the preparatory infrastructure works form consideration. Previous statements from the ATO have been varied and have referred to works being consideration for both holding leases and long-term leases. It would be greatly appreciated if an express statement be included to clarify the ATO's position as to which lease the works represent consideration to avoid potential timing mismatch issues.	**No change made** The final Determination states what was in the draft Determination, that the preparatory infrastructure works are non-monetary consideration for the supply of the consequent lease. An addendum to GSTR 2015/2 clarifies that it can apply to the ACT arrangements, and GSTR 2015/2 already stated that the development works are consideration for the land supplied by way of the long-term lease, and are not consideration for the short-term development or holding lease (see paragraphs 11, 35 and 123 of GSTR 2015/2).
17	**Inconsistency with previous ATO non-binding guidance** The ATO issued prior advice which states that preparatory infrastructure works that are required to be undertaken by the developer, prior to a Crown lease being issued, will be non-monetary consideration to the extent that the works are in the nature of infrastructure to be retained by the ACT. This guidance appears to be contradictory to paragraph 6 of the draft Determination which does not prescribe that preparatory infrastructure works must be retained in order to constitute non-monetary consideration. There is a concern that this guidance has been relied upon for previous arrangements, which now appears to be in contradiction to the guidance provided in the draft Determination. The Commissioner should provide clarification as to whether preparatory infrastructure works are required to be retained in order to constitute non-monetary consideration. In Taxpayer Alert TA 2018/3 *GST implications of certain development lease arrangements*, the Commissioner noted: > Whether development work is required as payment for the supply of the land will turn on the specific terms of each arrangement. An attempt to treat all of the development or building works completed on the land as being payment for the supply of the land, where this is not supported by the	**Change partly made** The final Determination provides new guidance on the three different types of associated site works and the circumstances in which these will be non-monetary consideration for the long term Crown lease. We do not agree with the view that the draft Determination is 'too narrowly prescriptive'. The final Determination deals with a typical arrangement undertaken in the ACT. As is the case with these types of arrangements, there can be many variations in the way in which the agreements are formulated. Each arrangement needs to be considered individually on the basis of relevant facts and circumstances.

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	contractual agreement between the parties, will incorrectly reduce the GST payable on the supply of property. This contradicts the views presented in the draft Determination, which appears to be too narrowly prescriptive, rather than placing an emphasis on the nature of each arrangement's specific terms. As such, it is a concern that this too may give rise to inappropriate or inconsistent GST outcomes.	
18	**Definition of key concepts** The draft Determination deals with the GST treatment of 'building works' and 'associated site works' and their relevant arrangements. These concepts are key because, in general, the ATO will treat preparatory infrastructure works as non-monetary consideration but apply differing GST treatment for associated site works. This is relevant when determining the developer's cost base for the margin scheme purposes (if applicable) or as to whether these works are part of a barter or not. As a suggestion, could the following three concepts be defined upfront in the final Determination to provide greater clarity? • **Associated site works** refers to works that support the building works and which principally (if not exclusively) benefit the developer. Such works will generally be undertaken on land that is leased by the developer, but may also include some work undertaken on land that is not leased by the developer. An example may include the construction of a driveway that is partially on the leased land and partially on the non-leased land. • **Building works** refers to works that are undertaken by a developer on leased land with the intention that the improvements will be leased or sold to third parties on completion. As an example, this may include new	**Change partly made** No change has been made to include specific definitions as we believe that the concepts are clear from the text. An additional description has been added to paragraph 3 of the final Determination to better describe the building arrangements that come within the Determination. In relation to associated site works, paragraph 3 of the final Determination explains the type of works that are considered to be associated site works for the purposes of the Determination. This encompasses the detail included in the definition of preparatory infrastructure works.

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	residential or commercial premises that are constructed on the land. • **Preparatory infrastructure works** refers to works that are wholly undertaken on non-leased land and which benefit a government agency (who otherwise need to bear the cost of those works). Examples may include roadworks, car parking, footpaths, landscaping, sewer, water, telecommunication, lighting gas and electrical services.	
19	**Purported limitation of 'consideration'** The second sentence in paragraph 21 of the draft Determination states '[c]onsideration for a supply is something the supplier receives for making the supply'. This seems to be a limitation on what is 'consideration' not provided for in the GST law. Subsection 9-15(1) of the *A New Tax System (Goods and Services Tax) Act 1999* provides for a broader interpretation of consideration: ***Consideration*** includes: (a) any payment, or any act or forbearance, in connection with a supply of anything; and (b) any payment, or any act or forbearance, in response to or for the inducement of a supply of anything. Paragraph 22 of the draft Determination similarly imposes a requirement that the builder's supply be to the government agency, which is not a requirement for 'consideration' under the GST law. It is respectively submitted that these purported limitations be removed.	**Change made** The Explanation section in the Appendix of the final Determination has been rewritten. The sentences referred to have been deleted.

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20	**Ambiguities in drafting** The following are ambiguities in the draft Determination which cause future uncertainty: • The reference to 'payment' at the end of paragraph 21 seems odd given the discussion is around non-monetary consideration. To avoid any restriction in the form of consideration applicable, it is respectfully submitted that this reference be altered to 'potential consideration'. • Additionally, paragraph 22 seems to confuse which supply is being mentioned. It is unclear whether 'supply' refers to the supply of works by the developer or the supply of land by the ACT. It would be useful to have clarification on this matter.	**Change made** The Explanation section of the final Determination has been rewritten. The sentences referred to in paragraphs 21 and 22 of the draft Determination have been deleted.
21	**Application to the ACT only** The draft Determination is obviously confined to the ACT. However, it is noted that the draft Determination distinguishes between lease arrangements in the ACT and GSTR 2015/2, rather than trying to expand the scope of GSTR 2015/2 to include ACT leases. This may mean that the ATO will accept that building works and associated site works are non-monetary consideration for development lease arrangements outside the ACT. If so, that creates significant risk in new GST planning opportunities and appears to run counter to TA 2018/3.	**No change made** The Determination is confined to land in the ACT. The main reason for this is because in the ACT, the greatest title that can be owned is a 99-year Crown lease. Freehold title is not available. The arrangements in the Determination also involve the full Crown lease being granted to the developer initially rather than a holding lease being granted first and then the full Crown lease when the works have been completed.
22	**Retrospective application** It is noted that the draft Determination is proposed to apply both prospectively and retrospectively from the date of issue. This will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue. This raises a concern, specifically in relation to the reliance it has placed on the Commissioner's guidance through ATO Minutes and private binding rulings issued to counter-parties to	**Change made** The final Determination applies both before and after the date of issue, however there are two exceptions: • Previous private ruling – the Determination does not apply where a previous private ruling applies to an entity undertaking development works in relation to the development and the entity relies on the private ruling and continues to rely on the private ruling in respect of all aspects of the development arrangement.

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	development arrangements. For example, if private binding rulings provided to the developer have been relied upon, the outcomes of these various private binding rulings may be inconsistent with the Commissioner's view as set out in the draft Determination. On this basis, it is requested that paragraph 19 of the draft Determination be amended to reflect the fact that the finalised Determination applies from the date of issue and not retrospectively to ensure that previous and existing arrangements remain undisturbed.	• Previous reliance on GSTD 2019/D1 – we will not seek to disturb any assessment issued in reliance on the draft Determination if both parties apply the view to all aspects of the development arrangement for the entire period of the arrangement. The Commissioner expects that in such case there would be an agreement in writing by both parties to apply this view.
23	**Date of effect** It has been suggested that the view in the final Determination should be applied prospectively if there is a change in view. Concern was raised that if there was a change in view in the final Determination that where a development had already commenced it would be reasonable to continue to apply the previous view to the arrangement. Concern was also raised that taxpayers should be able to be protected if they have been issued with a private ruling prior to the publication of the final Determination.	**Change made** See our response to Issue 22 of this Compendium.