

FOLEY'S | LIST

GROWTH AREAS INFRASTRUCTURE CONTRIBUTION

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GAIC – GROWTH AREAS INFRASTRUCTURE CONTRIBUTION

In a series of decisions both the Tribunal and the Supreme Court have been asked to consider whether a Growth Area Infrastructure Contribution was payable with respect to land in Melton. The decisions revolved around when a GAIC event had occurred – in this case the formation of a contract to purchase land.

1. Update Pty Ltd v Commissioner of State Revenue (Taxation) [2012] VCAT 116 (Senior Member Robert Davis) 3 August 2012

Update made an offer to purchase the land in Melton for \$1.4m in November 2008. The offer was accepted by the Vendor on 1 December 2008. A contract (which was a contract that had previously been prepared for a lower price, and subsequently amended) was signed by Update on 2 December 2008. The Vendor counter-signed the contract on 9 December 2008. The purchase was settled on 16 June 2009, and Update became registered proprietor in August 2009. The Commissioner of State Revenue (CSR) assessment for GAIC liability was issued on 1 December 2010.

As readers will know, a GAIC is a levy imposed on land dealings in designated growth areas to fund the provision of infrastructure. (see Part 9B Planning and Environment Act 1987). A GAIC event triggering the liability to pay the GAIC is defined in s.201RA of the Act and includes the occurrence of a dutiable transaction relating to land (for example the transfer of land). However, if a contract which would lead to the dutiable transaction was entered into before 2 December 2008 (the relevant date), the GAIC is not triggered.



The issue for Update and the CSR therefore was whether a contract for the sale of land was entered into prior to 2 December 2008. If it was, Update avoided the GAIC. If it was not, Update was liable to pay the GAIC.

Update argued that an oral contract had been entered into on 1 December 2008; on the other hand, the CSR put the case that the contract did not come into

existence until 9 December 2008 when the written contract was countersigned by the vendor, thus rendering Update liable to pay.

In the first decision, the Tribunal found that at 1 December 2008, the parties had neither reached finality in arranging all the terms of their bargain; nor were they immediately bound to the performance of the terms of the arrangement [62]. The parties to the contract did not intend the contract to come into being until 9 December 2008 which was the date of the concluded contract [69].

1. Update Pty Ltd v Commissioner of State Revenue [2013] VSC 122 (Davies J) 21 March 2013

Update appealed to the Supreme Court. There, the Court held in essence that the Tribunal had erred in construing s.201RB(d)(iii) to apply only to written contracts for the sale of land entered into prior to 2 December 2008; and had not taken into account all the circumstances bearing on an intention to create contractual relations. That would have required an objective assessment of the state of affairs between the parties and what would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened [26].

In other words, the Tribunal had not adequately analysed the facts and circumstances of the transaction leading to a contract being in place. The matter was remitted to the Tribunal for determination in accordance with the law.

2. Update Pty Ltd v Commissioner of State Revenue (Review and Regulation) Correction [2013] VCAT 1627 (Senior Member Robert Davis) 17 September 2013

Back to the Tribunal. In the third case, the parties agreed that the question to be determined by the Tribunal was whether a contract relating to the transfer of the land was entered into before 2 December 2008. If it was, then the transfer was not a GAIC event and GAIC was not payable.

The Tribunal reconsidered the circumstances surrounding the purchase of the land and again arrived at the conclusion that:

- The objective evidence does not show that the vendor and Update intended that there be a concluded agreement between them on 1 December [41]
- Neither Update nor the vendor through his agent intended to be bound until the contract was signed by at least Update but in all probability the vendor as well [46].
- Update and the vendor did not have a concluded agreement on 1 December 2008. At the earliest, the concluded agreement would have been made on 2 December 2008 but more than likely it was not made until 9 December 2008 [54].

3. Update Pty Ltd v Commissioner of State Revenue [2014] VSC 187 (Sloss J) 5 May 2014

The second appeal to the Supreme Court (and fourth hearing) took place in February 2014. The questions of law on which the appeal was based related to:

- whether the Tribunal in the second VCAT hearing had applied the wrong test when considering whether the vendors and Update had an intention to create contractual relations on 1 December 2008;
- whether the Tribunal was entitled to make certain findings on an analysis of the evidence with respect to the transactions between the parties; and
- whether, taken together, the evidence and facts lead to a conclusion that contractual relations were established on 1 December 2008.

Unfortunately for Update, the Court vindicated the decision of the Tribunal, deciding that the Tribunal had not applied the wrong test with respect to an intention to create contractual relations; that the Tribunal was entitled to find there was no clear evidence that on 1 December 2008 the parties intended to proceed otherwise than by the signing and exchange of written contracts; and that therefore, the Tribunal was not required to find that the vendors and Update intended to create legal relations on 1 December 2008. An appeal to the Court of Appeal has been filed with respect to this decision.

On the subject of GAIC, readers may be aware that a GAIC liable entity can offset part or all of its GAIC liability by providing land or infrastructure works to the State, or a combination of land and works. Hence, "work in kind" agreements can be entered into pursuant to subdivision 2A, Division 2 of Part 9 Planning and Environment Act.

s.201SLB(1) **The Minister may, in accordance with this Subdivision, enter into an agreement with a person for the provision by that person of land or works or a combination of land and works to meet the whole or part of that person's liability or expected liability to pay a growth areas infrastructure contribution (a *work-in-kind agreement*).**

Comprehensive guidelines for GAIC work-in-kind agreements have been published by DTPLI. Go to www.dtpli.vic.gov.au.

Julie is a member of the Victorian Bar. She has for many years practised in land development, planning, local government and associated areas. Julie is an experienced VCAT advocate in its many jurisdictions. In addition to private practice, she has worked within local government and a metropolitan water company. She holds a Bachelor of Laws degree (Melbourne University), a Master of Business (Corporate Governance) (RMIT); and is a certified Mediator. Julie can be contacted through Foley's list on 9225 7777, 0412322111 or julie.r.davis@vicbar.com.au.