

Article #1: **Growth Areas Infrastructure Contribution legislation commences operation**

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## Property & development

### Growth Areas Infrastructure Contribution legislation commences operation

After a difficult and lengthy passage through Parliament, the *Growth Areas Infrastructure Contribution* (GAIC) legislation commenced operation on 1 July 2010.

The extended urban growth boundary (UBG) has also now taken effect, following the gazettal of Amendment C68 on 6 August 2010.

The passed GAIC legislation differs from the first proposal introduced to Parliament, which was defeated in February 2010.

The key features of the GAIC legislation are summarised below.

#### Key features

- GAIC liability attaches to land within one of the four identified ‘contribution areas’:
  - Type A Land: Land that was brought into the UGB between 28 November 2005 and 31 December 2006 and in an urban development area on or after 2 December 2008.
  - Type B-1 Land: Land that was included in the investigation areas 1 to 6 brought within a growth area (being Melton-Caroline Springs, Wyndham, Sunbury, Hume-Mitchell-Whittlesea and Casey-Cardinia), a UGB and an Urban Growth Zone (UGZ) on or after 2 December 2008.
  - Type B-2 Land: Land that was included in the investigation area 7, brought within a growth area, the UGB and a UGZ on or after 19 May 2009.
  - Type C Land: Any land that is not Type A, B-1 or B-2 Land, that is brought within a growth area and a UGZ on or after the commencement date of the GAIC legislation (1 July 2010).
- GAIC rates for Type A Land for the 2010-2011 financial year are \$80,000 per hectare;
- GAIC rates for Type B-1, B-2 and C Land for the 2010-2011 financial year are \$95,000 per hectare;
- GAIC rates for subsequent financial years will be indexed annually based on the CPI;
- the events which trigger payment of the GAIC remain the same;

- changes to the legislation now allow developers to defer up to 70 per cent of the GAIC until a statement of compliance is issued in respect of a plan of subdivision (Statement of Compliance) or an application for a building permit for substantial works (Building Permit Application) is lodged. Deferred GAIC payments may also be staged with the approval of the Minister for Planning (Minister); and
- section 32: Vendor’s Statements for all contracts of sale relating to GAIC land must include a new warning notice to purchasers, as well as copies of any GAIC certificates that have been issued by the State Revenue Office (SRO).

#### GAIC Trigger

Payment of the GAIC contribution will continue to be triggered by the same three events as set out in the previous proposal, which are collectively referred to as ‘GAIC Events’.

#### Purchase / Transfer

GAIC is to be paid by the purchaser upon the occurrence of a ‘dutiable’ transaction in respect of the land, such as settlement of the purchase or transfer of the land.

In some circumstances nomination under a contract of sale may be considered a ‘dutiable’ transaction and be subject to GAIC. Ordinarily nomination under a contract of sale does not attract additional duty. However, where a nomination involves additional consideration, land development or an option, the nomination may be treated as a sub-sale and attract additional duty. This is an issue of which developers need to be aware.

#### Statement of Compliance

GAIC is to be paid by the land owner upon the issue of a Statement of Compliance.

If a developer proposes to subdivide land before it becomes the registered owner of that land, special conditions may need to be included in the Contract of Sale, which specify that the developer is to be responsible for the payment of GAIC in these circumstances.

#### Building Permit Application

GAIC is to be paid by the land owner upon the making of a Building Permit Application for substantive building works. Substantive buildings works are considered works with a value greater than \$1 million.

Again, if a developer proposes to undertake substantive works on land before it becomes the registered owner of that land, it is likely that special conditions about GAIC liability will need to be included in the Contract of Sale.

## **Growth Areas Infrastructure Charge legislation commences operation, *continued...***

### **Timing – payment of GAIC**

Land subject to the GAIC will have a notice recorded on the title advising of the potential liability. This notice will only be removed once the GAIC has been paid.

The general rule is that the GAIC payment must be made within three months of the GAIC Event occurring (i.e. three months from settlement). If the GAIC is not paid by the due date, interest will be payable from the due date. The current rate of penalty interest applicable to late payments is 12.80 per cent. The SRO may also impose a late payment penalty.

There are two opportunities for the GAIC payment to be made over time – referred to either as a ‘deferred payment’ or as a ‘staged payment’.

### **Deferred payment**

The GAIC legislation now enables a person to defer up to 70 per cent of the GAIC contribution until a Statement of Compliance has been issued, or a Building Permit Application for substantial works has been lodged.

If a person elects to defer 70 per cent of the GAIC contribution, the election to defer must be made in writing to the SRO before the day on which the contribution is payable (that is, within three months of the relevant GAIC Event occurring). The deferral election needs to be made on the prescribed form available from the SRO.

The remaining 30 per cent of the GAIC contribution must be paid to the SRO within three months of the relevant GAIC Event.

The deferred GAIC liability will be a charge on the property. The charge will remain on the property until the entire GAIC amount has been paid. Interest is payable on deferred GAIC and will be calculated in accordance with the 10-year bond rate.

### **Staged payment**

The GAIC legislation now also permits a person who has deferred the payment of the GAIC in respect of a dutiable transaction (usually settlement of a Contract of Sale), to apply to the Minister for the approval of the staged payment of the deferred contribution, if one of the following GAIC Events is to occur on all or part of the land in the future:

- the issue of a Statement of Compliance; or
- the making of a Building Permit Application for substantial works.

A staged payment approval application must be lodged with the Growth Areas Authority or the SRO before the day on which the contribution is payable (that is, within three months of the relevant GAIC Event occurring).

A staged payment approval is subject to a number of conditions, including:

- that the GAIC is to be paid to the SRO in stages;
- that each payment stage must relate to a specified subdivision of the land in the case of a plan of subdivision; and
- that each payment must be paid by a specified due date with a final date for payment of the entire GAIC amount.

If the staged payment approval relates to a plan of subdivision, any stage that is not approved under the original approval requires further approval by the Minister. Additionally, any changes to payment dates or amounts requires approval by the Minister.

Strict adherence to any conditions specified in the staged payment approval is required. If there is a failure to comply with any condition of the approval (including a failure to make a staged payment by the due date), the whole amount of the GAIC and the interest payable will become immediately payable as if the approval had never been granted.

Like deferred GAIC liability, staged payments will be a charge on the land. The charge will only be removed when the GAIC, including any interest payable, is paid in full. Again, interest is payable in accordance with the 10-year bond rate.

### **Excluded events**

There are a number of ‘excluded events’ defined in the GAIC legislation, where GAIC is not payable in certain circumstances

The most relevant excluded event for developers applies to dutiable transactions (i.e. completion or settlement of a contract of sale), where the contract relating to that transaction was entered into before the ‘relevant day’. The relevant days for each type of land are:

- Type A Land and Type B-1 Land - 2 December 2008 (being the first announcement day);
- Type B-2 Land: 19 May 2009 (being the second announcement day); and
- Type C Land: The day on which the land became Type C Land.

An application for a Certificate of No GAIC Liability (Certificate) must be obtained from the SRO. This Certificate confirms that a party is not liable to pay GAIC in respect of a GAIC Event. As GAIC is ordinarily payable upon completion of a contract of sale, the Certificate should be obtained prior to settlement wherever possible.

Importantly, excluded events do not permanently extinguish the GAIC in respect of the relevant land. A liability for GAIC may arise upon a subsequent GAIC Event.

### **Settlement timing**

Having regard to the increased paperwork surrounding the GAIC, particularly if a developer intends to defer payment or seek a Certificate, developers should consider appropriate settlement timeframes so that the parties and their financiers may prepare properly.

## New disclosure statement for landlords of retail premises in Victoria to apply from 1 January 2011

The Victorian, New South Wales and Queensland governments are collaborating to standardise retail tenancy disclosure requirements. Landlords of retail premises in these states will be required to provide tenants with a new form of disclosure statement. The Victorian Department of Innovation, Industry and Regional Development expects that the *Retail Lease Regulations* 2003 will be amended to bring the new disclosure statement into operation from 1 January 2011.

The harmonised disclosure statement results from work undertaken by the National Retail Tenancy Working Group under the direction of the Federal Small Business Ministerial Council. The working group expects the harmonised disclosure statement to reduce the regulatory burden on landlords, particularly landlords operating across state borders. The form of the disclosure statement is also intended to help tenants make informed decisions about their leases by bringing together the best disclosure requirements from around Australia.

The new disclosure statement is similar to the present Victorian disclosure statement but differs in several respects. A Victorian landlord of retail premises will be required to disclose current legal proceedings in relation to the lawful use of the premises or building/centre (clause 27.1). The term 'lawful use' is not defined.

Furthermore, a landlord of a retail shopping centre will be required to disclose:

- details of major/anchor tenants (clause 23.1). The term 'major/anchor tenant' is not defined, which potentially gives rise to confusion; and
- whether the landlord assures that the current tenant mix will not be altered by the introduction of a competitor (clause 24.2). This positive assurance is much more unequivocal than Part 4 of the current Victorian disclosure statement, which only requires a landlord to indicate whether the tenancy mix of the centre is likely to change over the term of the lease. The contractual nature of the disclosure may be interpreted to guarantee a tenant exclusive trading rights. Alternatively, the disclosure may be interpreted to be a representation that a tenant relies on to enter into a lease. 'Competitor' is also not defined and this lack of certainty potentially gives rise to disagreement if a Landlord gives such an assurance.

The new concepts and terms mentioned above may become the subject of interpretation by the Victorian Civil and Administrative Tribunal in the future. In the absence of such guidance, landlords are likely to take a cautious approach towards any necessary disclosures and avoid giving unnecessary assurances.

Landlords should contact us well in advance of 1 January 2011 to ensure that their disclosure statements are compliant with the new requirements.

## Planning and Environment – Major Cases List

The Major Cases List of the Victorian Civil and Administrative Tribunal (VCAT) has now been in operation for three months, since 3 May 2010.

### Key features

The Major Cases List operates as a sub-list of VCAT's Planning and Environment List.

The following applications lodged in VCAT on or after 3 May 2010, where the value of the development is \$5 million or more, will automatically be included in the Major Cases List:

- Section 77 Application (appeal against refusal to issue a permit by responsible authority);
- Section 79 Application (appeal against failure to grant a permit by responsible authority);
- Section 80 Application (appeal against conditions on permit); and
- Section 87A Application (cancellation or amendment of permit issued at direction of Tribunal).

The following accelerated timelines apply to Major Cases List proceedings:

- a practice day (directions) hearing will be held within four weeks of the application being lodged;

- a mediation will be held within six weeks of the application being lodged. A mediation will be compulsory unless VCAT is satisfied at the practice day hearing that the proceeding is not likely to settle;
- a hearing will be held within 12 weeks of the application being lodged; and
- a decision or interim decision will be delivered within four weeks after the end of the hearing (that is, within 16 weeks of the application being lodged).

In order to achieve the objective of delivering decisions within 16 weeks, the Tribunal has blocked hearing days in its calendar for exclusive use by applications on the Major Cases List. This has, in turn, limited the availability of hearing dates of proceedings not within the Major Cases List. Our recent experiences indicate that proceedings not within the Major Cases List have a wait of approximately six months for a hearing date.

### What about submitting amended plans?

Importantly, inclusion on the Major Cases List does not restrict an applicant from submitting amended plans during the hearing process. However, the Major Cases Practice Direction provides that any application to amend plans must comply with the Tribunal's usual practices as set out in the *General Procedures Practice Note*. To submit amended plans under the *General Procedures Practice Note*, an applicant must file and serve the amended plans on all parties to the proceeding (including all objectors) at least 20 business days prior to the hearing date. The practical effect of this is that the amended plans must be ready to be served on the parties at the same time as, or very shortly after, the initial practice day hearing.



## Planning and Environment – Major Cases List, *continued...*

If an applicant cannot comply with the requirement of 20 business days' notice without adjourning the allocated hearing date, the Tribunal may remove the proceeding from the Major Cases List. If a matter is removed from the Major Cases List, an applicant will not be allocated a hearing date within a 16-week timeframe.

### Can proceedings within the Major Cases List be adjourned?

Adjournments of proceedings within the Major Cases List will only be granted in exceptional circumstances. The non-availability of legal counsel or expert witnesses will not normally be accepted as the basis for the grant of an adjournment.

If an applicant wishes to adjourn a hearing because it is not ready for the hearing, or for some other reason, the Tribunal may grant the adjournment on the basis that the proceeding will be

removed from the Major Cases List. As noted above, if a matter is removed from the Major Cases List, applicants will not be allocated a hearing date within a 16-week timeframe.

The practical effect of this is that an applicant must be in a position to brief the relevant legal counsel and expert witnesses with all of the relevant application material as soon as a *Decision Notice* has been issued by the responsible authority (if not earlier), to ensure that legal counsel and the expert witnesses have sufficient time to prepare the reports required for the accelerated hearing. Briefing legal counsel and experts early not only ensures availability and preparedness for the accelerated hearing, but can also assist in the early identification of any shortcomings in the application material, which will need to be addressed at the VCAT hearing.

Importantly, the Major Cases List is still a pilot program. VCAT is closely monitoring its implementation and is seeking feedback from stakeholders about its operation. Subject to the feedback received, the Major Cases List may be amended. We will provide further updates which set out these amendments as they arise.

### Contacts

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### Further information

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