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The Manager  
GST Property and Government Unit  
Indirect Tax Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Dear Sir/Madam

**Exposure Draft: Tax Laws Amendment (2009 Measures No. 5) Bill 2009: GST and representatives of incapacitated entities**

We refer to the above mentioned Exposure Draft Bill for proposed legislation to amend the GST law to ensure that representatives of incapacitated entities are liable for GST on post-appointment transactions.

Gadens Lawyers acts on behalf of various financial institutions as well as a number of insolvency practitioners. We make the following submissions regarding the Exposure Draft Bill.

**Retrospectivity**

The main operative provisions in the Exposure Draft Bill are intended to apply retrospectively from 1 July 2000. The basis for retrospectivity is that the proposed amendments purportedly give effect to the intention stated in the Explanatory Memorandum to the GST Bill.

First, the statements made at paragraphs 6.272-6.273 of the Explanatory Memorandum to the GST Bill regarding the liability of representatives may not accurately reflect the approach later adopted by the Tax Office (see comments below under the heading "Scope of the representative's responsibility or authority").

In any case, it seems an over simplification to state that the amendments proposed by the Exposure Draft merely give effect the original intention of Parliament. The scope of liability of liquidators and other representatives has been uncertain since the GST commenced and the problem was raised by the judiciary and academics well before the decision in *Deputy Commissioner of Taxation v PM Developments Pty Ltd* [2008] FCA 1886. For example, in 2006 the Supreme Court of Queensland discussed the liability of a liquidator in *Sunnyville Pty Ltd v ADIG (Australia Development and Investment Group) Pty Ltd* [2006] QSC 249. In that decision, Lyon J stated that "the state of the law is unclear and the view of the Deputy Commissioner in relation to the liquidator's liability is uncertain". Her honour commented that the view that a liquidator does not have a personal liability because he or she is an agent of the company "may prevail".

Therefore, the decision in *PM Developments* should have come as no surprise to the Government or insolvency practitioners, and yet no steps were taken to clarify the law despite the observations of Lyon J having been made some three years earlier.

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Insolvency practitioners should be entitled to rely upon the law that is in force at the time of their appointment. By amending the law retrospectively, the Government may cause hardship for insolvency practitioners who correctly interpreted the law.

Importantly, insolvency practitioners who correctly applied the law in the way that was subsequently endorsed by the Federal Court in *PM Developments* may no longer have any access to funds of the incapacitated entity (or right of indemnity) as in some cases they may have since retired from their role as representative of the incapacitated entity (which may have even been wound up). If those practitioners are intended to be protected by the *good faith* provision in section 58-65 of the Exposure Draft then, it is submitted, that this protection should be clearly stated so there is no ambiguity.

### **Scope of the representative's responsibility or authority**

The scope of the potential liability of liquidators has long been a point of contention (along with the question of whether they should be liable at all). In particular, an issue arises where an agreement is made before the representative is appointed but concluded during the representative's appointment.

Paragraphs 6.272-6.273 of the Explanatory Memorandum to the GST Bill suggested that:

“The representative is liable from the date on which he or she becomes entitled to act for you (the principal) until he or she ceases to be so entitled. The representative is liable for GST, entitled to input tax credits and has any adjustments attributable to that period.

During that period the effect of [Division 147] is that the representative rather than the principal is carrying on the enterprise. The representative is not personally liable for GST attributable before he or she becomes entitled to act for the principal.”

The approach taken by the Commissioner of Taxation differed subtly. Interpretative Decision ATO ID 2004/290 stated that the GST on a taxable supply made by an incapacitated entity remains the liability of the incapacitated entity even though the GST is attributed to a tax period after the representative is appointed.

The Exposure Draft introduces the new concept of the representative being liable for GST if the making of the supply to which the GST relates is within the scope of the representative's responsibility or authority for managing the incapacitated entity's affairs. However, in our view this leaves uncertainty in relation to the representative's liability for GST on a supply made under a pre-appointment agreement completed by the representative after his or her appointment. Importantly, the GST law has no 'time of supply' rules and the Commissioner of Taxation has indicated that in most cases the 'supply' happens when the contract is completed (see for example GSTR 2002/5 at paragraph 161).

It is submitted that the proposed amendments should clarify that the representative is not personally liable for GST on a supply made under a pre-appointment agreement even if the contract is completed during the representative's appointment.

Similarly, further clarification may be needed in relation to the representative's liability in circumstances where the GST liability arises under the *Taxation Administration Act* 1953 in respect of a supply made by another entity. Currently, section 58-10(1) of the Exposure Draft may cause a representative to be personally liable for GST payable by a partnership 'entity' in circumstances where the representative may not be funded in relation to that liability.

### Policy in relation to Crown priorities

We have made previous submissions to the Government regarding policy issues relating to Crown priorities for taxes.

It is submitted that the court's finding in *PM Developments* was consistent with the long-standing policy of the Australian Government in relation to tax debts and insolvency. If the representative of an incapacitated entity is personally liable for GST on supplies made on behalf of the incapacitated entity, the Commissioner of Taxation effectively takes priority over the other creditors.

It has been acknowledged by successive Coalition and Labor Governments that the Commissioner of Taxation should not rank ahead of other creditors.

In 1978, the Senate Standing Committee on Constitutional and Legal Affairs delivered a report (known as the "Missen Report") which recommended the total abolition of all Crown priority.

This recommendation of the Missen Report was adopted, in part, by the Fraser Government in 1980 when it introduced the *Taxation Debts (Abolition of Crown Priority) Act 1980*. The Second Reading speech by the then Treasurer, Hon. John Howard MP explained:

"This decision by the Government followed consideration of a report tabled by the Senate Standing Committee on Constitutional and Legal Affairs on the right of the Crown to be repaid debts ahead of other creditors. The Senate Committee had recommended that all Crown priorities in insolvency administrations should be abrogated entirely."

A subsequent report of The Law Reform Commission on General Insolvency Inquiry (known as the "Harmer Report") was commissioned by the then Attorney-General of Australia, Gareth Evans, in 1983 and delivered in 1988. One of the recommendations of the Harmer Report was that the (remaining) priority accorded to the Commissioner of Taxation should be abolished.

In 1993, the Keating Government adopted the recommendations from the Harmer Report and introduced the *Insolvency (Tax priorities) Legislation Amendment Act 1993*. The Hon. Wayne Swan MP (as Federal Member for Lilley) commended the Bill to the House of Representatives and stated:

"It is simply a false economy to put the Commissioner of Taxation ahead of employees and other small businesses in terms of insolvency." (Hansard, Australian House of Representatives, 27 May 1993, 1129).

The assertion that the court's finding in *Deputy Commissioner of Taxation v PM Developments Pty Ltd* is contrary to the underlying policy intention seems, with respect, to be inconsistent with the acceptance by successive Governments recommendations of the Missen and Harmer Reports.

Legislation that operates to give the Commissioner of Taxation priority for unpaid GST is unfair to lenders and borrowers. It is also unfair to the employees of borrowers and their trade creditors (which may include small businesses). More particularly, the proposed amendments will reduce the credit for borrowers and produce unfair results for creditors.

Therefore, it is submitted that the GST law should be amended to remove any priority given to the Commissioner of Taxation in relation to supplies by representatives of incapacitated entities and that such priorities also be removed in relation to sales by mortgagees. We submit that the proposed amendments should ensure that the Commissioner of Taxation ranks equally with other unsecured creditors.

If you have any queries, please contact me on (02) 9931 4738.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Cameron Steele', written in a cursive style.

Cameron Steele  
for **GADENS LAWYERS**