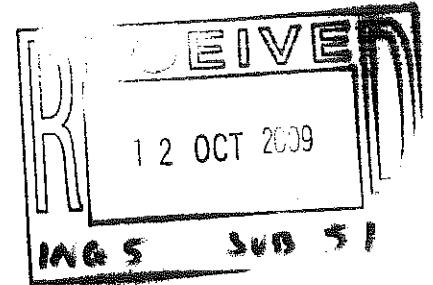




9 October 2009

Mr Sean Coley, Executive Officer
Outer Suburban/Interface Services and Development Committee
Parliament of Victoria
Parliament House, Spring Street
East Melbourne VIC 3002



Dear Mr Coley

Inquiry into the Impact of the State Government's decision to change the Urban Growth Boundary

The Law Institute of Victoria (LIV) is pleased to have this opportunity to make a submission to the *Inquiry into the Impact of the State Government's decision to change the Urban Growth Boundary* (Inquiry) being undertaken by the Victorian Parliament's Outer Suburban/Interface Services and Development Committee.

In addition to considering the change to the Urban Growth Boundary, the Inquiry extends to consideration of the impact of the Government's decision to introduce the growth areas infrastructure contribution (GAIC) for land in designated growth areas. The LIV has, to date, made three submissions to the Growth Areas Authority to raise a range of issues and uncertainties regarding the operation of the GAIC which are adversely affecting vendors, purchasers, mortgagees and practitioners involved in UGB land transactions.

The LIV considers that the issues raised in its submissions are relevant to the terms of reference of the Inquiry, particularly paragraph (d) which requires consideration of the impact of:

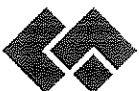
any unintended consequences including the impact on all landholders and purchasers to be impacted'.

The LIV's letters to the Growth Areas Authority are now submitted to the Outer Suburban/Interface Services and Development Committee for consideration as part of the Inquiry. Responses received from the Growth Areas Authority are also attached for context, but they do not form part of the LIV's submission.

If you would like to discuss any of the matters raised in this submission please do not hesitate to contact me or Karen Cheng, LIV Property and Environmental Law Section Lawyer, on ph 9607 0522.

Yours sincerely,

Steven Stevens
Acting President
Law Institute of Victoria





26 May 2009

The Hon. Justin Madden
Minister for Planning
Level 17
8 Nicholson Street
East Melbourne VIC 3002

Mr Peter Seamer
Chief Executive Officer
Growth Areas Authority
Level 6
35 Spring Street
Melbourne VIC 3000

Dear Minister and Mr Seamer

Growth Areas Infrastructure Contribution

On 2 December 2008, the Government announced that a Growth Areas Infrastructure Contribution (GAIC) will apply to land brought into the Urban Growth Boundary (UGB) after 2005. The Law Institute of Victoria (LIV) has identified many issues and uncertainties regarding the operation of the GAIC which are adversely affecting vendors, purchasers, mortgagees and practitioners involved in UGB land transactions. The LIV respectfully submits that these issues must be addressed as a matter of urgency.

Information sheets

The Government has provided information about the GAIC in the Melbourne @ 5 million Growth Areas Infrastructure Contribution Factsheet (Melbourne @ 5 million Factsheet) and the Growth Areas Authority Growth Areas Infrastructure Contribution Information Sheet (GAA Information Sheet).

The GAA Information Sheet specifies that:

1. the GAIC will apply at a rate charge of \$80,000 per hectare to land zoned for development and above 0.4 hectares which was brought into the UGB in 2005; and
2. the GAIC will apply at a rate charge of \$95,000 per hectare to land zoned for development and above 0.4 hectares within Investigation Areas which is subsequently brought into the UGB in 2009.



The GAA Information Sheet further states that once the GAIC legislation is in effect, the GAIC will apply to either the first sale of the land or its subdivision, or the building permit for major building works, whichever occurs first. It is also specified that the land owner at the time of sale or subdivision or the building approval process where there are major building works, will be liable to pay the GAIC.

The GAA Information Sheet provides that the GAIC applies to UGB land transactions entered into on or after 2 December 2008. The Government has indicated that transition arrangements will apply to the sale or subdivision of UGB land between 2 December 2008 and the date the GAIC legislation comes into effect. For transactions during this period, the land owner at the time the legislation comes into effect will be liable to pay the GAIC.

Impact upon UGB land transactions

Apart from the Melbourne @ 5 million Factsheet and the GAA Information Sheet, there is very little information available regarding the GAIC. Efforts have been made by LIV members to obtain clarification from the Growth Areas Authority (GAA) about the GAIC, but the responses provided have not resolved uncertainties or provided any specific guidance on how GAIC issues should be addressed.

The LIV considers that the lack of information about the operation of the GAIC substantially undermines the certainty of both existing and potential UGB land transactions. Examples of transactions which are now problematic include:

1. A UGB landowner entered into a contract in December 2008 for the sale of his farming land with completion due in December 2009. At the time of entering into the contract, neither the vendor landowner nor the purchaser was aware of the GAIC. Therefore, it was not referred to in the contract.
2. An unlisted public company has a loan secured by a mortgage on land in the UGB. The mortgagee is in possession and will sell the property in the immediate future. The mortgagee's valuation did not include provision for the GAIC.
3. A client is contemplating a transfer of shares in a land-rich company. It is unclear whether the GAIC will apply to this transaction.

There has been no clear direction from Government regarding the specific mechanics of how the GAIC will be applied in these types of transactions and a range of other UGB land transactions entered into after 2 December 2008. This presents difficulties for practitioners in providing comprehensive advice to their clients about the GAIC such as whether or not it applies, liability for payment and the impact upon general and special conditions in the contract of sale of land. It also adversely affects vendors and purchasers who have not factored the GAIC into the price of the land and are unsure of how to address the issue of liability. Furthermore, it impacts upon potential vendors and purchasers who are attempting to determine a price for the land but wish to ensure that the significant GAIC liability is factored into the price. Similarly, any valuer appointed by a mortgagee would need to ensure that any GAIC liability is considered in determining the fair market value of land.

The LIV therefore submits that the Government and the GAA must clarify all uncertainties regarding the operation of the GAIC. In particular, the LIV seeks clarification of the following:

1. How will the GAIC be calculated? The Government information sheets do not provide sufficient information regarding calculation.
2. Who will be liable to pay the GAIC? While the LIV appreciates that the Government has provided information regarding this, the LIV requests a comprehensive statement of liability for payment during the transition period and after the transition period.

3. How will the GAIC be collected? The GAA has specified that the GAIC will be payable to the State Revenue Office. However, no other information has been provided.
4. When will the GAIC be collected? It is not clear at what point during a transaction the GAIC will become payable.
5. What is the authority for the GAIC being payable retrospectively from 2 December 2008?
6. Will notices be issued by the GAA regarding the GAIC which require vendor disclosure under s32(2)(e) of the *Sale of Land Act 1962*?

The LIV considers that the lack of clarity regarding the GAIC and its operation is largely due to the limited consultation undertaken by the Government and the GAA. Given the significant practical and financial implications of the GAIC for all persons involved in UGB land transactions, the LIV is of the view that there should have been a comprehensive consultation process and invitation for submissions.

In light of this, the LIV submits that the Government should undertake extensive consultation with all interested parties about the mechanics of the GAIC before the GAIC bill is introduced into Parliament. This is crucial to avoid unintended consequences and operational difficulties concerning the scheme.

The LIV looks forward to receiving your response to the issues raised in this submission. If you would like to discuss any of the matters raised in this submission please do not hesitate to contact me or Karen Cheng, LIV Property and Environmental Law Section Lawyer, on ph 9607 0522.

Yours faithfully,



Danny Barlow
President
Law Institute of Victoria

cc. Mr Matthew Guy MLC
Shadow Minister for Planning
56 Beetham Parade
Rosanna VIC 3084



5 August 2009

Mr Peter Seamer
Chief Executive Officer
Growth Areas Authority
Level 6
35 Spring Street
Melbourne VIC 3000

Dear Mr Seamer

Growth Areas Infrastructure Contribution (GAIC)

Thank you for your letter of 25 June 2009.

Law Institute of Victoria (LIV) members have considered your responses to the questions set out in the LIV's 26 May 2009 letter. The LIV's further comments are set out below.

1. *How is the GAIC to be calculated?*

Noted.

2. *Who will be liable for the GAIC?*

LIV members are particularly concerned about pre-legislation transactions and the real difficulties which the proposed legislation is having on present conveyancing practice in Victoria.

It appears to be now accepted that there has been no notice of the proposed GAIC sufficient for the purposes of section 32(2)(e) of the *Sale of Land Act 1962* or General Condition 21 of the Contract of Sale of Real Estate provided for by the *Estate Agents (Contracts) Regulations 2008* Form 2.

The Growth Areas Authority letter to landholders of 23 February 2009 is not in the form of a notice and the notice in *The Age* and *Herald Sun*, both of 6 December 2008, was not provided to individual landholders.

Likewise, even where a planning certificate is endorsed with a reference to the GAIC there will be no obligation on the part of a vendor to disclose the certificate, as section 32(2)(c) of the *Sale of Land Act 1962* only requires the vendor to describe the matters set out in section 32(2)(c)(i)-(iv).



It follows that a vendor will not be required to disclose to a purchaser the potential liability for the GAIC in the vendor's statement before contract, and General Condition 21 will not apply to require the vendor to meet the GAIC liability after contract if the legislation comes into force after settlement.

In that case, the purchaser will be responsible for the GAIC even though no allowance for the GAIC may have been made in the purchase price.

However, if an allowance is made in the purchase price on the assumption that the purchaser will pay the GAIC, the purchaser can escape liability if the legislation comes into force before settlement and the contract does not contain a special condition that the purchaser is to pay the GAIC.

Similarly, the purchaser can escape liability if an allowance is made in the purchase price on the assumption that the purchaser will pay the GAIC, the purchaser sells the land to a subsequent purchaser, there is no special condition in the contract as to the payment of the GAIC and the purchase settles before the legislation comes into force. This will also be the case if the legislation does not come into effect at all or is not retrospective in its operation and, again, there is no special condition in the contract as to payment of the GAIC.

The lack of adequate notice and the lack of legislation have meant that the usual conveyancing safeguards are not in place. LIV members are finding that inappropriate procedures are being adopted, inadequate conditions are being drafted, existing contracts are being sought to be terminated and other contracts are being delayed or not entered into at all. Lawyers are finding themselves exposed to potential professional liability claims. There is therefore concern and anger in the profession at the current uncertain position.

Due to these significant difficulties, our members are very strongly of the view that the legislation must be brought on as quickly as possible and that it should have prospective operation only.

3. *How will the GAIC be collected?*

Noted.

4. *When will the GAIC be collected?*

As discussed with your office on 17 June 2009, the LIV foresees certain significant problems in respect of the collection of the GAIC.

A landholder may not have funds to meet the contribution payment until settlement of a contract of sale in which case it would appear far more equitable, practical and appropriate that the payment be made on the occurrence of the last (rather than the first) GAIC event.

The typical situation will be where a contract has been entered into conditional on the registration of a plan of subdivision. The plan will be lodged for registration (and the payment of the GAIC required) often well before the vendor receives the settlement money.

5. *What is the Authority for the GAIC being payable retrospectively from 2 December 2008?*

For the reasons given in 2 above, the LIV is very strongly of the view that the legislation should be brought on as quickly as possible and should have prospective operation only.

6. *Will notices be issued which require vendor disclosure under section 32(2)(e) of the Sale of Land Act 1962?*

At the meeting with your office on 17 June 2009, it was suggested that there might be a process whereby the liability for GAIC would be noted on title and that notation would be removed on the payment of the contribution.

LIV members indicated their approval of such a procedure save only that they preferred that the notation be shown as struck out on payment rather than removed altogether so that those searching the title would be able to see that the contribution had been paid.

The LIV would appreciate the opportunity to discuss with your office a draft Bill and, if you consider appropriate, the LIV would be prepared to do this on a confidential basis.

The LIV looks forward to receiving your response to the issues raised in this submission. If you would like to discuss any of the matters raised in this submission please do not hesitate to contact me or Karen Cheng, LIV Property and Environmental Law Section Lawyer, on ph 9607 0522.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'D. Barlow', written over a horizontal line.

Danny Barlow
President
Law Institute of Victoria

cc. Mr Matthew Guy MLC
Shadow Minister for Planning
56 Beetham Parade
Rosanna VIC 3084



1 October 2009

Mr Paul Byrne
Manager, Economic Policy
Growth Areas Authority
Level 6
35 Spring Street
Melbourne VIC 3000

Dear Mr Byrne

Growth Areas Infrastructure Contribution

On behalf of the Law Institute of Victoria (LIV) Planning and Local Government, Property and State Taxes Committees, I would like to thank you and Mr Ed Small for taking the time to present to LIV members on the Growth Areas Infrastructure Contribution (GAIC). The LIV appreciates the opportunity to consult with the Growth Areas Authority (GAA) about the mechanics of the GAIC, and emphasises that consultation with all interested parties is crucial to avoid unintended consequences and operational difficulties concerning the scheme.

To this end, the LIV considers it appropriate to reiterate some of the queries and issues of concern raised by its members during your presentation.

Pre-existing totally binding sale arrangement

The GAA's May 2009 Information Sheet provides that buyers or sellers of land that had a pre-existing totally binding sale arrangement at:

- 2 December 2008 for land brought within the Urban Growth Boundary (UGB) in 2005 or land in the originally announced investigation areas; or
- 19 May 2009 for land in the additional investigation areas

are not required to pay the contribution on the transaction arising from the totally binding sale arrangement.

The LIV seeks confirmation that this exemption applies to binding options granted on or before those dates, where the option may be exercised by the buyer (or the seller in the case of a put option) after that date.

Also, information from LIV members suggests that it is impossible to ascertain the date when land was actually brought within the UGB or the relevant investigation area. We therefore seek further information regarding where such information may be obtained.



Undevelopable land

The GAA Information Sheets specify that land which is "undevelopable" will not be included in the Urban Growth Zone and therefore will not attract the GAIC. The May 2009 Information Sheet indicates that reasons for land being considered undevelopable include an easement for utilities, or where substantial areas are subject to inundation or protected native vegetation. The LIV requests further information as to which land will be classified as "undevelopable" and how this will be determined.

The LIV also seeks clarification regarding the process for rezoning undevelopable land so that it is not included in the Urban Growth Zone and does not attract the GAIC. The LIV considers that there should be a fast track method for such rezoning, rather than rezoning through councils.

The LIV is also concerned that if part of the land is potentially undevelopable it will be extremely difficult to prepare special conditions for a contract of sale to address the issue of who should pay the GAIC in case the area which the parties think is likely to be undevelopable is later not considered to be undevelopable as a result of the legislation or other factors. It would be extremely difficult to assess the actual amount of the GAIC on the basis of a possible reduction in the area which is subject to the GAIC because part of the land is, for example, subject to inundation.

Land rich companies

The GAA's June 2009 (No. 4) Information Sheet provides that the GAIC provisions will generally apply to "land rich" company transfers. The LIV requests further information regarding how this will operate, and what types of transfers will be exempt.

Subdivision

The LIV has previously raised concerns in its 5 August 2009 submission about when the GAIC will be payable if the triggering event is subdivision of the land. The LIV now queries whether the GAIC should be payable in respect of a plan of subdivision where a statement of compliance is issued but the plan is not subsequently registered by the Registrar of Titles. This could occur if a fundamental obstacle to registration arises which was not anticipated when the statement of compliance was obtained.

The LIV is also concerned that in normal conveyancing practice, where a vendor wishes to subdivide its land in order to sell part, the plan of subdivision must necessarily be lodged for registration some considerable time before settlement. Therefore, the vendor will be paying the GAIC before it receives the balance of the purchase price at settlement. This could cause considerable hardship. Similarly, applications for building permits will often be made some considerable time before settlement of a sale.

In cases where a contract of sale is conditional upon registration of a plan of subdivision, the purchaser has the right under the *Sale of Land Act 1962* to rescind the contract if the plan is not registered within 18 months after the day of sale. Alternatively, the contract may itself specify a timeframe of more or less than 18 months within which to procure registration of the plan. It is, therefore, possible that a contract could be cancelled pursuant to these provisions after the GAIC has been paid upon lodgement of the plan.

Furthermore, there is no guarantee that the purchaser will not default under the contract of sale. In this case, if the vendor had to pay the GAIC when lodging a plan of subdivision (or obtaining a building permit), again the vendor would have incurred expense without any prospect of reimbursement from the balance of the proceeds of sale, and the forfeiture of the normal 10% deposit is unlikely to be sufficient compensation for this.

Terms contracts

In respect of terms contracts, the GAA has indicated that the GAIC liability will arise at final settlement. The LIV queries whether this position would be affected by either the vendor or the purchaser exercising rights under the *Sale of Land Act 1962* to call for a transfer and a mortgage back to secure the residue of the price still payable under the contract. The LIV submits that, if such rights are exercised, the GAIC should not be payable until the final payment under the mortgage is made. This is because, if the purchaser exercises its statutory right and the vendor is liable to pay the GAIC, the vendor would be disadvantaged by having to pay the GAIC before having received sufficient monies from the purchaser. Similarly, if the contract or the enactment of the legislation required the purchaser to pay the GAIC, the purchaser would be disadvantaged if it had to pay the GAIC in the event that the vendor exercised its statutory right prior to the date of final settlement specified in the contract.

Development contributions

Part 3B of the *Planning and Environment Act 1987* (PE Act) establishes a regime for a planning scheme to include development contributions for the purpose of levying contributions for the provision of works, services and facilities. Section 46J of the PE Act provides that a development contributions plan may provide for either or both of the imposition of a development infrastructure levy or the imposition of a community infrastructure levy in relation to the land in the area to which the plan applies.

The GAA's Information Sheets provide that all funds raised by the GAIC will be used to provide infrastructure and oversee development in Melbourne's growth areas.

The LIV queries whether the existing development contributions regime is adequate to achieve the outcomes that the government aims to achieve through imposition of the GAIC. If the existing regime is not adequate the LIV seeks the GAA's comments on the interaction and potential overlap between the GAIC and development contributions.

Section 173 agreements

The LIV notes that existing agreements pursuant to s173 of the *Planning and Environment Act 1987* can relate to both state and local infrastructure. The LIV queries whether this might create an overlap where the GAIC is payable. If there is overlap the LIV seeks clarification as to how this will be addressed.

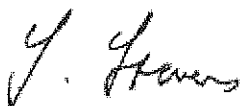
Review of decisions

The Information Sheets do not provide any indication of whether government decisions in respect of the GAIC can be reviewed. The LIV submits that clear legal avenues and procedures for review of decisions need to be established.

The LIV reiterates that it would appreciate the opportunity to discuss with your office a draft Bill and, if you consider appropriate, the LIV would be prepared to do this on a confidential basis.

The LIV looks forward to receiving your response to the issues raised in this letter. If you would like to discuss any of the matters raised in this submission please do not hesitate to contact me or Karen Cheng, LIV Property and Environmental Law Section Lawyer, on ph 9607 0522.

Yours faithfully,



Steven Stevens
Acting President
Law Institute of Victoria