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Abstract

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INTRODUCTION

This article deals with a deceptively complex question - when, for the purposes of the Australian goods and services tax ('GST'), does a 'trust' make an acquisition?[1] As is explored below, this question is of practical significance, particularly in relation to the acquisition of services. The issue also reveals conceptual tensions between the law of trusts and the GST regime. There are few satisfactory principles to guide taxpayers and advisors when seeking to answer the question and it is the aim of this article to develop some guiding principles. When developing these principles it is hoped to provide an approach to the interpretation of the GST regime that appropriately takes account of trust law and minimises the conceptual dissonance between trust law and the GST treatment of trusts.

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[1] The article does not deal with the specifics of trusts registered as managed investment schemes, testamentary trusts, superannuation trusts or bare trusts. However, it may be that many of the principles discussed apply to these types of trust.

AN OVERVIEW OF THE GST TREATMENT OF TRUSTS

The GST regime typically applies to 'entities'.[2] The term 'entity' is defined in s 184-1(1)(g) to include 'a trust'. The deeming of a trust to be an entity creates a fiction that is familiar to tax lawyers in other contexts[3] and gives rise to what are described in understatement in Jacobs' Law of Trusts as 'novel questions of construction'.[4]

The entity that is the 'trust' for GST purposes is actually the trustee, although this interpretation perhaps relies upon legislative context more than clear statement. Subsection 184-1(2) states:

> The trustee of a trust or of a superannuation fund is taken to be an entity consisting of the person who is the trustee, or the persons who are the trustees at any given time.

This in itself does not determine who is the 'trust' contemplated in s 184-1(1). However, s 184-1(3) states:

> A legal person can have a number of different capacities in which the person does things. In each of those capacities, the person is taken to be a different entity.

This creates the potential for the trustee to act for GST purposes in both a personal capacity and in its capacity as trustee and for each of these roles to amount to a different entity. The example accompanying s 184-1(3)[5] supports such an interpretation:

> In addition to his or her personal capacity, an individual may be:
>
> - sole trustee of one or more trusts; and
> - one of a number of trustees of a further trust.
>
> In his or personal capacity, he or she is one entity. As trustee of each trust he or she is a different entity. The trustees of the further trust are a different entity again, of which the individual is a member.

This allows the possibility of supplies, acquisitions and importations by the 'trust' and separate supplies, acquisitions and importations by the trustee personally. It also allows for the possibility of taxable supplies and creditable acquisitions between

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2 Actually many of the key provisions apply to 'you' (eg, s 9-5 and s 11-5) which is defined in s 195-1 to include entities generally. Unless stated otherwise all references are to the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (the 'GST Act').

3 See, for example, *Income Tax Assessment Act 1997* (Cth) s 960-100.

4 J D Heydon and M J Leeming, *Jacobs' Law of Trusts* (7th ed, 2006) [2102].

5 The example forms part of the GST Act but is not an operative provision: s 4-1 and s 4-10. Therefore it assists in interpretation but does not have legislative application.

trustee and trust.[6] This apparent legislative intention is confirmed in the *A New Tax System (Goods and Services Tax) Regulations 1999* (the 'GST Regulations') which contemplate reduced credits for trustee services.[7]

WHY MAY IT BE IMPORTANT TO DETERMINE WHETHER AN ACQUISITION IS BY A TRUST OR BY A TRUSTEE PERSONALLY?

At the most basic level it is important to determine whether an acquisition is by a trust or trustee as a matter of compliance. Disregarding creditable importations, it is only the party who acquires something who is entitled to an input tax credit.[8] If a party claims an input tax credit when not entitled this will lead to either payment of less tax than is required or claiming a greater refund than is properly available. This may cause liability for the general interest charge and penalties (to either trustee or trust) without corresponding compensation to the party who underclaimed a refund or overpaid tax.

Whether an acquisition is made by a trustee or a trust will also affect the ability to undertake some potential planning measures involving trusts that make input taxed financial supplies. The general rule is that an entity is only entitled to claim input tax credits on an acquisition to the extent to which the acquisition is for a creditable purpose.[9] Generally an acquisition is not for a creditable purpose to the extent to which it relates to the making of supplies that would be input taxed.[10] However, reduced input tax credits (of 75 per cent) may be claimed in respect of some acquisitions that relate to the making of input taxed financial supplies.[11] Only certain acquisitions may qualify the acquirer for such reduced input tax credits and these are set out in Division 70 of the GST Regulations.

Professional services in the nature of legal, accounting, taxation and audit services generally do not give rise to entitlement to reduced input tax credits. However, as mentioned above, trustee services may give rise to reduced credits. This opens the possibility of the trustee acquiring such professional services and claiming full input

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6 While recognising the fiction involved, the label 'trust' is used to describe the trustee in its capacity as trustee and the label 'trustee' is used to describe the trustee acting in its personal capacity.

7 See, for example, regulation 70-5.02 Item 29. Implicitly such reduced credits are available to the trust and not the trustee and it is also implicit that for credits to arise the trustee services are taxable: see s 70-15(1).

8 Sections 7-1(2), 11-5 and 11-10.

9 Section 11-5(a).

10 Section 11-15(2)(a).

11 See generally Division 70 of the GST Act.

tax credits (as the services relate to the taxable provision of trustee services), and the trustee building the cost of these services into the consideration for the trustee services. The result may be a greater entitlement to input tax credits in the hands of the trust than if the professional services were acquired by the trust directly. This is sometimes referred to as 'bundling' as the non-creditable professional services are 'bundled' into the partly-creditable trustee services.[12] It is not the aim of this article to determine whether bundling can be achieved legitimately. Whether this is possible will depend upon the construction of the scope of the regulations under which certain trustee services may give rise to reduced credit acquisitions[13] and also the general anti-avoidance rule.[14] However, the possibility of bundling depends upon relevant acquisitions being made by the trustee and not the trust. Therefore, any rules which determine who makes the relevant acquisition are crucial to bundling structures.

WHEN IS AN ACQUISITION BY A TRUST?

Under the general law a trust cannot contract to acquire something because a trust is not a juridical person. However, the trustee of a trust may contract to acquire something. In some circumstances what is acquired will benefit the beneficiaries or objects of the trust and in others it will benefit the trustee personally. In many cases there will be benefit both to the trustee and the beneficiaries or objects. The overlap between the interests of the trustee and the beneficiaries may arise simply because the trustee has personal obligations in relation to the trust. For instance, the taking of legal or taxation advice by the trustee in relation to trust assets may benefit the beneficiaries by preventing the erosion of the trust fund and may also be of personal benefit to the trustee as the trustee may be personally liable for any tax payable.[15] This highlights two significant matters: first that a simple analysis based solely on who benefits from the acquisition is unlikely to be sufficient, and second, that the question analysed in this article is at its most acute in the context of acquisition of services,[16] in particular those services that are susceptible to bundling.

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12 The possibility of bundling has been widely acknowledged since the implementation of the GST in 2000. For a typical description see the discussion in Rowe, 'GST treatment of trusts: a path through the chaos' (2003) 15(5) *Australian Superannuation Law Bulletin* 70.

13 See Items 23, 29 and 31 of regulation 70-5.02(2) of the GST Regulations.

14 See Division 165 of the GST Act.

15 The trustee may have a right of indemnity in relation to such tax; however, it may be that the trustee cannot exercise this right.

16 Who acquires interests that are more clearly proprietary in nature should probably just be determined by whether or not the property once acquired forms part of the trust fund (in which case the acquisition is by the trust).

As the question is whether the trustee acquires something in its personal capacity or another capacity, it may be analogous to the determination of when a party acts 'personally' and when the party acts as an agent.[17] However, as is explored below, there are differences between agency and trust that may limit the usefulness of the analogy.

Trust law does not deal with the question of whether or not an acquisition is made by a trust or a trustee because of the nature of a trust. For this reason the GST regime, which treats trusts as separate entities, will be in tension with trust law. However, while trust law doesn't answer the question completely, it is submitted that it is preferable to find an interpretation of the GST legislation that works with principles of trust law rather than against them.[18] The discussion below starts with a couple of propositions and then wrestles with the matter more generally.

Proposition One: all unauthorised acquisitions are by the trustee and not the trust

The first proposition is that where a dealing is 'unauthorised' from a trust law perspective, for GST purposes the acquisition is by the trustee and not the trust. This is not intended to be an exhaustive test for when an acquisition is by a trustee, but merely a statement of one set of circumstances where the acquisition should be seen as by the trustee personally.

A dealing might be 'unauthorised' from a trust law perspective because it is in breach of a trustee's duties. It may also be 'unauthorised' in the sense that the trustee has incurred an expense in circumstances where the trustee has no right of indemnity from the trust property. While there is overlap between these two matters they are not co-extensive.[19] It is submitted that the better proxy rule for GST purposes is whether or not the trustee in making an acquisition can properly draw upon trust property to fund a particular acquisition.[20] This proxy rule has a number of practical and conceptual advantages. Most important it allows the GST regime to draw appropriately upon principles of trust law. In the absence of case law on the

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17 See the discussion in GSTR 2000/37 at paras 48-54.

18 See *Commissioner of Inland Revenue v Chester Trustee Services Limited* [2002] NZCA 258, [37] where in the context of a trustee's liability, Baragwanath J justified a particular interpretation of the NZ GST legislation partly on the basis that it strayed least from trust law principles.

19 It may not be the case that a breach of duty automatically denies a trustee's right of indemnity. However, where the breach of duty involves the trustee drawing on the trust fund in relation to a matter that is outside the trustee's powers the indemnity should not operate. See *Nolan v Collie* (2003) 7 VR 287, 305-6.

20 This includes not only indemnity by way of reimbursement but also by way of exoneration.

interpretation of this aspect of the GST treatment of trusts the approach provides at least some existing case law as a starting point. This is important as the test is essentially one of nexus. It is easy to state that where a trustee performs an act that is totally unrelated to the affairs of the trust the trustee is not acting in its capacity as trustee for GST purposes. However, like most tests of nexus, it becomes difficult to state a complete test that is workable in practice. Certainty is only likely to evolve as a body of case law develops and the reliance upon existing principles of trust law would give the GST jurisprudence a head start. It is also justifiable as a proxy rule as in both applications the aim of the rule is to draw a line between what is a personal dealing and what is a trust dealing.

While the Commissioner's analysis tends to emphasise the trust deed as the source of a trustee's right of indemnity,[21] the right can also arise in the absence of specific terms under principles of equity generally and also by statute. For example, the *Trustee Act 1925* (NSW) provides that a trustee 'may reimburse himself or herself, or pay or discharge out of the trust property all expenses incurred in or about execution of the trustee's trusts or powers'.[22] The High Court has stated that the right arises in relation to all liabilities incurred by a trustee in the administration of the trust.[23]

Whether an expense is properly incurred in the administration of a trust depends upon the power that is exercised.[24] There is case law that suggests that in matters of day-to-day management, the trustee's indemnity will survive as long as the trustee exercises 'the same care as an ordinary, prudent person of business will exercise in the conduct of that business were it his or her own'.[25] Even if a liability is not 'properly' incurred the trustee may still be entitled to indemnity if acting in good faith and there is benefit to the trust estate.[26] The effect of this is that if a trust deed grants a power to carry on business, the trustee will be entitled to indemnity for a very broad range of expenses that relate to the trust business or are of benefit to the trust estate. Quite clearly this would include taking legal or tax advice in relation to the trust fund. It has also been held to include the cost of employing an accountant in relation to the affairs of a business carried on by a trustee.[27]

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21 GSTR 2004/1 para 670.

22 Subsection 59(4).

23 See Octavo Investments Pty Ltd v Knight (1979) 144 CLR 360, 371.

24 See *Nolan v Collie* (2003) 7 VR 287, 306.

25 Ibid.

26 Ibid.

27 *Re Bennett* [1896] 1 Ch 778.

The nexus required is a broad one and, in day-to-day matters, the test should only rule out expenses that are fairly clearly personal to the trustee or have no real connection with the trust fund or activities carried on under trust.

The proposition that an acquisition is by a trustee personally when it involves an expense that cannot be recouped by the trustee needs some small qualification. A trustee's right of indemnity may be limited where the trustee owes money to the trust. In this case the right cannot be exercised without the debt being satisfied.[28] It may also be the case that a trustee's right of indemnity can be limited or excluded by provision in a trust deed. There is case law that both supports and rejects this possibility.[29] State legislation may also affect the matter.[30] It is submitted that when considering the question of whether an acquisition is made by the trustee for GST purposes, both of these matters should be ignored when determining the scope of the trustee's right of indemnity. Who makes an acquisition for GST purposes should not depend upon the changeable matter of whether or not a trustee owes money.[31] It also should not depend upon any express exclusion of the right of indemnity as, if this is possible, statutory differences may lead to different GST results in different states arising from the same set of facts.

On this basis the proposition may be restated as follows: an acquisition is by the trustee and not the trust if it is outside circumstances in which a trustee would normally be indemnified from trust property for the expense of the acquisition.

Proposition Two: an acquisition is by the trust and not by the trustee where the trustee contracts in a manner that excludes personal liability

When making an acquisition a trustee may contract in a manner that attempts to exclude personal liability. This may be done by agreeing with the contracting party that the trustee's liability on the contract is limited to the trust assets. This is probably as close as the law of trusts comes to contemplating an acquisition by a trust and, it is submitted, provides an appropriate guide for when an acquisition must be by the trust for GST purposes. Again, this is not intended to provide an exhaustive statement of when an acquisition is by a trust, but merely a statement of one circumstance in which the trust should be treated as the acquirer.

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28 See discussion in Heydon and Leeming, above n 5, [2104].

29 In favour, see RWG Management Ltd v Commissioner for Corporate Affairs [1985] VR 385, against, see Kemtron Industries Pty Ltd v Commissioner of Stamp Duties [1984] 1 Qd R 576 and JA Pty Ltd v Jonco Holdings Pty Ltd (2000) 33 ACSR 691.

30 See, eg, *Trusts Act 1973* (Qld) ss 65 and 72, the combined effect of which is to prevent express exclusion of the right of indemnity.

31 There is also the problem here that the limitation of the indemnity may be partial as it is only to the extent of the debt.

The next question is what is required to achieve this limitation of liability. There is case law that suggests that limitation of a trustee's liability is not achieved simply by contracting 'as trustee'.[32] In *Muir v City of Glasgow Bank* it was stated:

> To exonerate [a trustee] it would be necessary to show that upon a proper interpretation of any contract [the trustee] had made, viewed as a whole - in its language, its incidents, and its subject-matter - the intention of the parties to that contract was apparent that [the trustee's] personal liability should be excluded; and that although [the trustee] was a contracting party to the obligation the creditors should look to the trust estate alone.[33]

Therefore, ultimately this will be a matter of fact, but it has been held in an older case that liability was limited by contracting 'as trustee only'.[34] If a contract is formed on this basis and the intention of the parties is to limit the trustee's liability then the GST regime would stray unacceptably from the substance of the dealing if it were to choose the trustee as the acquirer rather than the trust.

WHAT OF CIRCUMSTANCES WHERE NEITHER PROPOSITION ONE NOR PROPOSITION TWO APPLIES?

Neither of the propositions above provides a complete rule. The first can be used to identify when an acquisition must be by the trustee and the second may be used to identify when it must be by the trust. However, there is a large range of dealings that are neither unauthorised nor where the trustee limits its liability. In fact it would be expected that this would constitute the vast majority of dealings by trustees. This section of the paper first discusses some of the Commissioner's comments on separating acquisitions of trustees from those of trusts and then explores a few alternative approaches.

The Commissioner's comments

The Commissioner has made some comments on when in his view an acquisition is by a trust. In GSTR 2004/1 it is stated:

> Acquisitions made by a trustee in the course of administering a trust are normally made in the trustee's capacity as trustee of the trust, and are therefore acquisitions of the trust.[35]

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32 See *Lumsden v Buchanan* (1865) 4 Macq 950, *Muir v City of Glasgow Bank* (1879) LR 4 App Cas 337 and *Re Anderson* (1927) 27 SR (NSW) 296.

33 (1879) LR 4 App Cas 337, 368.

34 *Gordon v Campbell* (1842) 1 Bell App 428.

35 GSTR 2004/1 para 669.

Acquisitions made in the course of administering a trust normally would allow the trustee to access its right of indemnity. Therefore, the Commissioner seems to suggest that in circumstances where the trustee incurs a cost that would typically allow the trustee to be indemnified, this *normally* but does not always amount to an acquisition by the trust.

The ruling continues:

> We acknowledge that, in practice, some entities may have difficulty in characterising the dealings that occur between an entity acting in its corporate capacity and acting on behalf of the trust. Where the entity adds a mark-up for the on-supply of the thing to the trust, this may indicate that the entity is supplying something to the trust in its own corporate capacity, rather than acquiring it on behalf of the trust and seeking recovery through the indemnification clause.[36]

The statement appears to assume that the trustee is a corporation but presumably was intended to be of more general application. It also seems to be intended to be an indicator rather than a firm rule. However, it is submitted that it is not a particularly useful or appropriate indicator.

The first difficulty with the test is that it presumes an 'on-supply' by the trustee to the trust. This presumption in fact answers the question that is posed. There can be no 'on-supply' to the trust if the trust made the initial acquisition. Even ignoring this, the test leaves the difficult matter of determining when an 'on-supply' occurs between trustee and trust. It is not clear if this is meant to involve some form of sale from trustee to trust[37] or if it merely means application of the thing by the trustee for the benefit of the trust.

The second problem with the test lies in the notion that trustees may, instead of seeking indemnity for a cost, acquire something and supply it to the trust at a profit. This amounts to the trustee incurring a cost and then drawing from the trust fund an amount greater than that cost. In all but some unusual cases this would be a fundamental breach of trust.[38] This might be acceptable where the 'mark-up' is specifically authorised in the trust deed,[39] although it is difficult to see how there is any real difference between such a clause and an indemnity for costs combined with provision for remuneration based on costs incurred. Any trustee who tries to sell

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36 GSTR 2004/1 para 672.

37 A problem arises here because there normally cannot be a contract for the on-supply as it is between the trustee in one capacity and the trustee in another capacity. The general rule is that one cannot contract with oneself.

38 It is fundamental that a trustee cannot profit from their position and must avoid conflict between personal interest and duty as trustee.

39 Or, perhaps, with the assent of all beneficiaries where all are *sui juris*.

their property to the trust at a profit (at least without the sanction of the court) is on very dangerous ground as it would be very difficult to avoid the conclusion that this involves a conflict of interest.[40]

It may be that the Commissioner has suggested this approach because it might assist in the analogous task of determining whether a person acquires something as agent or on their own account: on-supply at a mark-up tends to suggest acquisition as principal rather than as agent. It may also be that the Commissioner has a preference for this approach as it minimises the number of acquisitions by the trustee personally and there is a perception that this may reduce the risk of manipulation of input tax credit recovery rates by trusts through the process of bundling. The fact that the Commissioner's discussion is not in the context of GST and trusts generally but in the context of interpretation of the reduced input tax credit provisions tends to suggest that the Commissioner is conscious of the interaction between matters of who makes the acquisition and the potential scope of the reduced credit provisions. However, neither of these matters justifies the rule proposed. The test also fails to take sufficient account of the law of trusts and in doing so renders itself of limited use.

Some other possibilities

If the Commissioner's approach is not preferred, there are some other possibilities. These include but are not limited to:

- treating all 'authorised' acquisitions as acquisitions by the trust;
- treating all acquisitions as by the trustee; and
- allowing the trustee to choose (or allowing the trustee to choose subject to some limitations);

These possible approaches are explored below.

Possibility One: Treating all 'authorised' acquisitions as acquisitions by the trust

This is a relatively simple approach. Essentially it equates the concept of a trustee's 'capacity' pursuant to s 184-1(3) with the trust law concept of activities 'in or about' the exercise of the powers of the trust. The main advantage of the approach is that, like Proposition One above, it borrows from existing case law on trusts. Finding a proxy rule in the general law gives the GST law a head start in the development of doctrine. It is also consistent with and in fact subsumes the two propositions outlined above.

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40 See, eg, *Re White* (1910) 10 SR (NSW) 295. However, note that such a sale is voidable and not necessarily void (*Re White* at 298).

The main feature of this approach is its breadth. As explored above, while there must be some connection between the incurring of the expense and the trust powers, in the context of ordinary day-to-day dealings the test is a broad one. On this basis, the taking of accounting, tax or legal advice in relation to the affairs of the trust would quite clearly involve acquisitions by the trust, even where these acquisitions benefit the trustee by allowing the trustee to perform its personal obligations.

While the approach borrows a proxy test from the law of trusts, it is probably the method that gives the fullest effect to the fiction of the trust as a separate entity. In this respect it strays the farthest from the general law concept of the trust as relationship rather than entity. Despite this it is a viable approach and it is perfectly possible that a court would take the view that it appropriately gives effect to the apparent legislative intention in Division 184.

Possibility Two: Treating all acquisitions as acquisitions by the trustee

As a matter of contract any acquisition is by the trustee and not the trust. Therefore, it is arguable that this should also be the treatment for GST purposes. The main advantage of this approach is that it is most consistent with general law concepts. However, the approach gives only limited effect to the apparent statutory intention that the trust be treated as a separate entity for GST purposes. Importantly it does not *ignore* the notion of the trust as a separate entity. It is possible to adopt the approach that the trustee personally makes such acquisitions and then there is a second supply between trustee and trust. However, it leaves the trust for GST purposes in the position that it only makes acquisitions from the trustee and not from third parties. The effect is that the trust as an entity is in a position that is very different from other GST entities and it is submitted that ultimately this interpretation is difficult to justify on this basis.

Possibility Three: Allowing the trustee to choose (or allowing the trustee to choose subject to limitations)

A further possibility is allowing a trustee some choice in whether or not the acquisition is by the trustee or the trust.

As a policy matter it is submitted that there is merit in allowing choice in how an acquisition is to be structured for GST purposes. This is not to suggest that this choice is to be exercised after the transaction has been entered into according to what is best for the parties. However, subject to the general anti-avoidance rules in Division 165, there is no reason why a trustee should not be able to choose to make an acquisition personally or choose to make the acquisition on behalf of the trust.

While this theoretically opens the possibility of bundling acquisitions into 'trustee services' it is submitted that this is not a valid argument against the approach. As outlined above, whether bundling is possible depends upon the general anti-avoidance provisions and the correct construction of the concept of trustee services in the reduced credit acquisition provisions. The arguments in relation to the availability of reduced credits are only relevant in the context of trusts that make input taxed supplies. They should not influence the more general analysis of the GST treatment of acquisitions by trusts. When this matter is properly disregarded it should be seen that adopting a 'choice' approach does not give rise to any inherent abuse.

If the approach is adopted the next matter is formulating the rule that is used to determine how the choice has been exercised. For example, it may be that where a trustee contracts for the acquisition of services in its name 'as trustee' this should be treated as an acquisition by the trust for GST purposes, even if in the circumstances this has no effect on the rights of the parties at general law. As a more general alternative the matter might be determined based on the trustee's intention. It is submitted that this more general rule is preferable. This approach is consistent with the two propositions outlined above as it might be said that the trustee *does not* intend to acquire something for the trust if it is a matter that does not relate to the affairs of the trust and *does* intend to acquire something for the trust if it has taken steps to limit its liability. The approach is also justifiable on the basis that other entities can choose the structure of their dealings. An acquisition involving a trust may concern three entities for GST purposes: the supplier, the trustee and the trust. Subject to anti-avoidance rules the GST regime does not prevent choice of transaction structure in other tri-partite arrangements (for example, those involving principal, agent and third-party supplier). Therefore it seems appropriate that the trustee and trust (through the trustee) should have some choice in relation to who makes the acquisition and it is submitted that this is a more appropriate approach than either of the first two options discussed above.

Of course, if the 'choice' approach is adopted this may leave some difficult questions of fact. In particular, there may be difficulty in imputing a trustee's intention where the trustee has not turned its mind to the matter and is silent on who is intended to make an acquisition. In this case the issue should be settled by looking at the facts as a whole and, considering the scope of the trust powers, what is acquired and where benefit of the acquisition most clearly lies, imputing the trustee's intention. It can be argued that the starting presumption should be that an acquisition is by the trust (based largely on the matters raised in discussion of Possibility One above). It can also be argued that the starting presumption should be acquisition by the trustee as this reflects most accurately the contractual and general law position. This is a difficult matter but it is submitted that the starting presumption should be that an authorised acquisition is made by the trust but it is open to the trustee to rebut this.

CONCLUDING COMMENTS

In deeming a trust to be an entity the GST regime places itself in tension with the general law. This tension causes difficulties of interpretation, as rules must be developed to facilitate the operation of the GST based on assumptions that do not hold in trust law. The particular area of difficulty explored in this article is determining when an acquisition is made by a trustee and when it is made by a trust, although it is by no means the only difficulty caused by the inclusion of trusts in the definition of entity. It has been argued that the most appropriate approach is to develop rules that are as consistent as possible with underlying general legal principles, bearing in mind the fairly clear intention of the legislature in the GST Act. The Commissioner has expressed some views on the matter but they are not persuasive simply because they do not take sufficient account of fundamental principles of trust law.

One way in which the GST regime can draw upon the general law is to adopt appropriate trust law concepts as proxy rules. It is submitted that trust law provides workable proxy rules for some circumstances in which a trustee must be treated as making an acquisition and when a trust must be treated as making an acquisition. Where neither of these rules applies it is submitted that it is appropriate to allow the trustee to determine how the transaction should be structured for GST purposes.