

GST AND INVOLUNTARY SUPPLIES*

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This article examines the application of GST to “involuntary supplies”. It does this by analysing the compulsory acquisition of land and the compulsory acquisition of securities. It is clear that the compulsory acquisition of land under statutory mechanisms generally should not involve taxable supplies as the dispossessed landholder is passive in the process. This highlights a key limitation of the concept of a “supply”. The Commissioner recently has acknowledged this treatment despite expressing a contrary view for more than two years. The GST treatment of the compulsory acquisition of securities is more uncertain. These uncertainties largely arise from whether the limitations of the concept of “supply” also apply in relation to the definition of “financial supply” in the A New Tax System (Goods and Services Tax) Regulations 1999.

1. INTRODUCTION

This article examines the application of the Goods and Services Tax (“GST”) to involuntary supplies. Perhaps more accurately it explores whether the concept of an “involuntary supply” for GST purposes is oxymoronic. It does this by examining compulsory acquisitions in two different contexts:

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- first, the compulsory acquisition of real property interests by a government authority; and
- second, the compulsory acquisition of securities pursuant to Ch 6A of the *Corporations Act 2001* (Cth).

There has been some analysis in the literature of the compulsory acquisition of land.¹ This has revealed some problems of characterisation and some difficult issues concerning the boundaries of the concept of a “supply” under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (“GST Act”). Discussion in this article of the compulsory acquisition of securities reveals some further fundamental matters relating to the construction of the GST Act and how it interacts with the *A New Tax System (Goods and Services Tax) Regulations 1999* (“GST Regulations”).

2. THE COMPULSORY ACQUISITION OF LAND

Subject to any constitutional limitations,² a range of government authorities have the power compulsorily to acquire real property. While such power may flow from an “enabling Act” (in many cases the Act that establishes the authority or entity), both the Commonwealth and the States have regimes that govern the procedures to be followed in the case of compulsory acquisitions of land by government authorities. These legislative regimes vary. However, they generally provide a process whereby notice is given

¹ See G Brysland, “GST and Government” (Paper presented to the 2003 National GST Intensive, Taxation Institute of Australia, Manly 10-11 October 2003); and P Edmundson and P McMahon, “GST and Compulsory Acquisitions” (Sep 2003) *GST News* 1.

² The legislative powers of the Commonwealth are restricted by s 51(xxxi) of the Commonwealth Constitution which requires any legislatively empowered compulsory acquisition to be “on just terms”: see *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 349-350 (per Dixon J). This limitation is a creature of the Commonwealth Constitution and does not place limitations on the States’ powers to acquire property compulsorily. The States’ powers simply flow from principles of parliamentary sovereignty and are without this formal restriction.

of the intention to acquire an interest in land and, upon the publication of that notice, the relevant interest is:

- (a) vested in the acquiring authority; and
- (b) freed and discharged from all other interests and from all trusts, restrictions, dedications, reservations, obligations, mortgages, encumbrances, contracts, licences, charges and rates.³

While the various regimes may provide for an acquisition to be by negotiation (presumably by way of transfer),⁴ where the acquisition is compulsory no transfer is required and the process is one of vesting and extinguishment. The process of vesting and extinguishment gives rise to rights to compensation. However, the validity of these measures is not contingent upon compensation being paid or accepted by the former land holder.⁵

Generally, the regimes provide for the determination of compensation based on the market value of the land or interest acquired.⁶ An offer may then be made to the former land holder and this may be accepted or rejected (with rights of appeal). In circumstances where the adequacy of compensation is disputed there may be a right to an interim payment pending the settlement of the

³ *Lands Acquisition Act 1989* (Cth), s 41(4). This is in the same form in the *Lands Acquisition Act 1994* (ACT), s 33(4) and in functionally similar terms in the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), s 20(1); the *Lands Acquisition Act 1978* (NT), s 46(1); the *Acquisition of Land Act 1967* (Qld), s 12(1); the *Land Acquisition Act 1969* (SA), s 16(2); the *Land Acquisition Act 1993* (Tas), s 19(1); the *Land Acquisition and Compensation Act 1986* (Vic), s 24; and the *Land Administration Act 1997* (WA), s 179.

⁴ See, eg, *Land Acquisition and Compensation Act 1986* (Vic), s 18. See also *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), s 30 which allows for the curiously-named “compulsory acquisition with consent”.

⁵ See, eg, *Lands Acquisition Act 1989* (Cth), 45. Indeed, this lack of choice is what makes the acquisition compulsory.

⁶ See, eg, *Land Acquisition and Compensation Act 1986* (Vic), s 41(1)(a). The provisions dealing with valuation do not allow for an additional amount to be payable in respect of GST. If any compensation is to be made in respect of GST it would have to be built into the concept of “market value”. For a discussion of this in the context of a market value rental review clause, see *Orti-Tullo v Sadek* [2001] NSWSC 855.

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final amount payable.⁷ Ultimately, it may be that the amount payable is determined by a Court or, alternatively, there may be acceptance of an offer in circumstances that require the execution of a release in favour of the acquiring authority.⁸

While the various jurisdictions' regimes vary and not all possibilities are canvassed, the observer of a compulsory acquisition may note the following:

- a land holder walking away from the land that they formerly occupied;
- a payment being made by an acquirer of that land (either by way of settlement, interim payment or court order); and
- the acquirer enjoying the land exclusively.

3. THE APPLICATION OF GST TO THE COMPULSORY ACQUISITION OF LAND

When there is a compulsory acquisition of land, an important question is whether or not the compulsory acquisition gives rise to a taxable supply. It may be that the land holder is not carrying on an enterprise or is not required to register for GST.⁹ However, assuming these requirements are satisfied, there can only be a taxable supply if there is a "supply for consideration".¹⁰ It is submitted that the

⁷ See, eg, *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), s 48.

⁸ See, eg, *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), s 44.

⁹ See the familiar requirements in s 9-5 of the GST Act. It may also be claimed that an event such as a compulsory acquisition is so far outside the ordinary scope of business activities that it does not satisfy this requirement. Ultimately this will be a question of fact.

¹⁰ GST Act, s 9-5(a).

requirement to pay compensation (and the fact that this flows from the compulsory acquisition) satisfies the requirement for consideration and nexus with any supply that may exist. Therefore, the key matter is whether or not there is a supply.

The term “supply” is defined as “any form of supply whatsoever”.¹¹ Without limitation this includes a number of items listed in s 9-10(2) of the GST Act. The most relevant of these are:

- the “grant, assignment or surrender of real property”;¹²
- the “creation, grant, transfer assignment or surrender of any right”;¹³ and
- the “entry into, or release from an obligation ...”.¹⁴

Discussion below first analyses the concept of “supply” in its general meaning and then addresses the more specific inclusions set out in s 9-10(2).

3.1 The Compulsory Acquisition of Land Does Not Involve a “Supply” in Its General Sense

The starting point is to examine the concept of “supply” generally and then to test whether the context of its use in the legislation demands a particular meaning. A dictionary definition of “supply” suggests that in its ordinary context it means “to furnish or provide”.¹⁵ Support for such an interpretation in the context of similar provisions can be found in case law overseas.¹⁶ The question

¹¹ Ibid s 9-10(1).

¹² Ibid s 9-10(2)(d).

¹³ Ibid s 9-10(2)(e).

¹⁴ Ibid s 9-10(2)(g).

¹⁵ *The Macquarie Dictionary* (3rd ed).

¹⁶ See *Customs and Excise Commissioners v Oliver* [1980] 1 All ER 353, 354 (per Griffiths J).

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then becomes whether this encompasses a situation where something is done to a particular party, such as the extinguishment of the party's rights, where that party takes no steps to facilitate the extinguishment.

It requires a stretching of the ordinary meaning of "supply" to conclude that a party whose rights are extinguished has supplied something. It is submitted that the context in which the term is used in the GST Act does not demand such a disturbance of the ordinary meaning of the word. This is particularly the case when evaluating the use of the concept of supply within s 9-5 of the GST Act, the "basic rule" dealing with taxable supplies. This basic rule requires a party to "make the supply" before any such supply is taxable.¹⁷ This matter was raised by Underwood J in *Shaw v Director of Housing and State of Tasmania (No 2)*,¹⁸ a case dealing with the treatment of a judgment creditor, the payment to whom extinguishes any rights of that creditor to pursue the judgment sum. It was held that there was no supply by the creditor in that case as nothing was done by the creditor that could amount to a supply.¹⁹ Further, even if there is a supply, the word "make" in s 9-5 "indicates a legislative intention to impose the tax only on voluntary supplies, not upon those supplies that occur without an act of the releasor".²⁰ As is discussed further below, whether this reasoning is fundamental to the outcome in *Shaw*, or merely provides ancillary support for the conclusion that there is no supply, is a matter that may have consequences elsewhere in the GST regime.

The reasoning in *Shaw* supports the conclusion that the compulsory acquisition of land does not involve a taxable supply by the land holder where the land holder is passive and merely has their interest extinguished. Such a situation can be distinguished clearly

¹⁷ GST Act, s 9-5(a) (emphasis added).

¹⁸ [2001] TASSC 2.

¹⁹ Ibid para 19 (per Underwood J).

²⁰ Ibid.

from a situation where there is a “compelled transfer”.²¹ Interestingly, while such a distinction was acknowledged recently by the Commissioner in a draft ruling,²² comments on the matter did not appear in the final version.²³

When *Shaw* is analysed closely there is no reasoning that compels the conclusion that the ordinary meaning of “supply” should extend to the compulsory acquisition of land under the statutory mechanisms outlined above. Further, other Australian cases that deal with the matter are consistent with the reasoning in *Shaw*.²⁴ Finally, there is nothing in the explanatory materials surrounding the tax that demands the stretching of the concept of supply to include such compulsory acquisitions.²⁵ Without wading deeply into debate on the fundamental nature of the Australian GST, in particular whether it is best seen as a tax on consumption,²⁶ it is difficult to see how the

²¹ See, eg, the facts of *FCT v St Hubert's Island Pty Ltd* (1978) 78 ATC 4104 where the liquidator of a corporation was effectively compelled by statute to sell some land.

²² See GSTR 2003/D2 in which the Commissioner stated that where a lease is terminated under a statutory mechanism “[n]o supply is made by the lessor because the lease is terminated pursuant to the exercise of a statutory right by the lessee, and not by any act of the lessor” (at para 71). A similar conclusion was reached in a New Zealand Departmental Statement dealing with compensation paid to the Maori people for the confiscation of land (see New Zealand Departmental Statement, *Tax Information Bulletin*; Vol 4; No 7; released March 1993).

²³ See GSTR 2003/11, in particular para 57 where it is stated that termination of a lease under a statutory mechanism is “akin to a term implied by statute” and that the GST consequences of such a termination should be the same as the consequences of the termination of a lease under an express term in the lease.

²⁴ See *Interchase Corporation Ltd v ACN 010 087 573 Pty Ltd* [2000] QSC 13, paras 53-55 (per White J); and *Walter Construction Group Ltd v Walker Corporation Ltd* [2001] NSWSC 283, paras 479-481 (per Hunter J).

²⁵ Resort may be had to such extrinsic materials in order to confirm that the meaning of a provision is the ordinary meaning: *Acts Interpretation Act 1901* (Cth), s 15AB.

²⁶ It is noted that the Explanatory Memorandum that accompanied the A New Tax System (Goods and Services Tax) Bill 1998 repeatedly refers to the tax as being a “tax on private consumption in Australia”: (p 5). However, it has been argued forcefully that the tax is not on consumption and “so far as the analysis of individual transactions is concerned, the connection between the GST and domestic consumption is so tenuous that it is meaningless”: G Cooper, “Why GST is Not a

treatment of compulsory acquisitions as taxable is required in order to give effect to a consumption tax.²⁷

3.2 The Compulsory Acquisition of Land Does Not Involve the Taxable “Surrender” of Land

It may be argued that the compulsory acquisition of land involves the “surrender” of real property and that this amounts to a supply pursuant to s 9-10(2)(d) of the GST Act.²⁸ This was the view expressed publicly by the Commissioner for more than two years in Interpretative Decisions ID 2001/445 and ID 2001/446. In those documents it is stated that where an entity’s land is taken by way of compulsory acquisition, this involves “the surrendering of the land by the entity” and therefore a supply. These Interpretative Decisions recently were “overturned” in another decision, ID 2003/1173.²⁹

While the conclusions drawn in ID 2001/445 and ID 2001/446 might be justifiable in some circumstances, the Interpretative Decisions do not outline what process of compulsory acquisition is involved (ie whether the acquisition is by some form of compelled transfer or pursuant to a statutory extinguishment of rights). Where a compulsory acquisition takes place by way of extinguishment and vesting it is difficult to see how there has been a “surrender”. It is

Consumption Tax ... and Why it Matters” (Paper presented to the 2003 National GST Intensive, Taxation Institute of Australia, Manly 10-11 October 2003).

²⁷ Note that Professor Cooper not only asserts that the GST is not a tax on consumption but takes the next logical step of stating that it is distracting (or even misleading) to interpret the scope of the GST Act from this assumption: *ibid*. If, as is concluded by Professor Cooper, the GST is better seen as a tax on profits the question arises whether this should affect the characterisation of compulsory acquisitions. Analysis of this matter is left for another day.

²⁸ Alternatively, it may be argued that it is a surrender of rights pursuant to s 9-10(2)(d).

²⁹ See also ID 2003/1172. These decisions state clearly that there is no supply involved. ID 2003/1173 states that an entity “must take some action or do something for a supply of the land to occur”.

even more difficult to conclude that the initial land holder has *made* a surrender of their proprietary or other rights.³⁰

The concept of a “surrender” has a familiar meaning in land law. A “surrender” typically involves the giving up of an estate in land in circumstances where the estate surrendered merges into a greater interest. The simplest example is the surrender of a leasehold interest by agreement between a lessee and a lessor. If context demands that “surrender” is given this legal meaning in s 9-10(2)(d) of the GST Act, it is clear that no surrender is involved in a compulsory acquisition.³¹

A broader concept of surrender might involve the abandonment of a claim or the relinquishment of a right. It is submitted that even if such a broader “ordinary” meaning of the concept is relied upon, the fact that a party must *make* a surrender for there to be a taxable supply means that there should be no such taxable surrender where a person who is passive has property taken from them. This conclusion should not change even if the dispossessed party pursues compensation for the loss that they have suffered. On one hand it is encouraging that the Commissioner has recognised this in ID 2003/1173. On the other hand it is disconcerting that it took more than two years to settle this matter and during this time the Commissioner’s publicly stated view had little basis.

3.3 Settlement Procedures Should Not Involve a Taxable Supply

The various jurisdictions’ legislation contain differing procedures in relation to the finalisation and acceptance of compensation amounts. As a precondition to the payment of compensation, a

³⁰ Even where the extended meaning of supply in s 9-10(2) is relied upon, for a dealing to be taxable the supplier must make the supply (s 9-5(a)).

³¹ The clearest support for this conclusion comes from the fact that a surrender as described requires the consent of both parties.

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number of regimes require the former land holder to execute “documents the authority reasonably requires to be executed”.³² The New South Wales legislation specifically contemplates the execution of a “deed of release and indemnity” in favour of the acquiring authority.³³ In New South Wales a party might receive a form entitled “Acceptance of Offer of Compensation” under which they may be asked to acknowledge receipt of an amount:

... in full satisfaction and discharge of all claims of every nature whatever which I now have or may hereafter have for compensation in connection with the acquisition of my interest in the land described in the Schedule and in consideration of the amount so paid as aforesaid I hereby release Her Majesty the Queen the Government of the said State and the [relevant authority] and quit claim all claims demands actions suits cause and causes of action, or Suit sum or sums of money compensation costs charges and expenses which I not have or at any time hereafter may have, or but for this writing might have against Her said Majesty the Queen the said Government or the said [relevant authority] for or on account of the matters before specified, or for or on account of any other matter or thing caused by or arising out of the same.

The question then arises whether the execution of such a release may give rise to a taxable supply by the releasor. As a reading of Public Ruling GSTR 2001/4 indicates, the difficulty in such a case is not identifying *if* there is a supply³⁴ but rather which is the relevant supply and whether that supply is sufficiently connected with consideration to be treated as taxable.

In GSTR 2001/4 the Commissioner states that the settlement of a claim may give rise to GST consequences where the consideration

³² See, eg, the *Land Acquisition Act 1993* (Tas), s 45(d) and the *Lands Acquisition Act 1989* (Cth), s 87(1)(d)(ii).

³³ *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), s 44(2).

³⁴ It does not require a stretching of the meaning of the words “surrender of a right” or “release from an obligation” to conclude that the execution of such a deed of release involves the making of a supply.

for the settlement relates to an “earlier supply”,³⁵ a “current supply”,³⁶ or a “discontinuance supply”.³⁷ An “earlier supply” is involved “where the subject of the dispute is an earlier transaction in which a supply was made involving the parties”.³⁸ In the case of a compulsory acquisition of land a compensation amount will not relate to an earlier underlying supply simply because no earlier supply is involved.

If the terms of a deed of release require a releasor to perform some further act, then to the extent to which any consideration is provided for this further act (or the promise to perform the act) there may be a taxable “current supply”. While the existence of a taxable “current supply” will depend upon the terms of any deed of release, the form of release applicable in New South Wales does not give rise to any obligations that extend beyond the discharge of claims. In this case there should not be a taxable “current supply”.

Finally, while the surrenders flowing from the execution of a release involve the making of a supply, such “discontinuance supplies” may only be taxable if they are made for consideration.³⁹ In the case of a compulsory acquisition, an amount paid by an acquiring authority will be purely compensatory in nature and the Commissioner suggests that such consideration will not be sufficiently connected with a discontinuance supply to make it taxable.⁴⁰

In GSTR 2001/4 the Commissioner states:

We consider that a payment made under a settlement deed may have a nexus with a discontinuance supply only if there is overwhelming

³⁵ See GSTR 2001/4, paras 45-47.

³⁶ Ibid paras 48-49.

³⁷ Ibid paras 50-55.

³⁸ Ibid para 46.

³⁹ Ibid para 55.

⁴⁰ Ibid para 106.

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evidence that the claim which is the subject of the dispute is so lacking in substance that the payment could only have been made for the discontinuance supply.⁴¹

A payment by an acquiring authority clearly is compensatory in nature and it would be highly irregular if a government authority made such a payment where a dispute over land lacked substance. As a result no taxable discontinuance supply should arise.

In conclusion, the compulsory acquisition of land by a government authority should not give rise to a taxable supply. This is because the dispossessed party does not perform sufficient acts for it to be concluded that they have made a supply. While any release that may be given as part of the process needs to be considered individually, an appropriately drafted release that deals only with the compulsory acquisition should not involve a taxable supply.

4. THE COMPULSORY ACQUISITION OF SECURITIES

Discussion above reveals an important limitation of the concept of a taxable supply under the GST Act: that there must be some form of positive act in order for there to be a supply. By examining another form of involuntary disposition, the compulsory acquisition of shares, it is hoped to shed some light on whether this limitation arises elsewhere in the GST regime.

Chapter 6A of the *Corporations Act 2001* (Cth) provides for the compulsory acquisition of securities in a range of circumstances. This may be following a takeover bid⁴² or in some circumstances where a person holds 90% of the relevant class of securities.⁴³ The relevant regimes provide both definition of the circumstances in which there may be a compulsory acquisition and the procedures to

⁴¹ Ibid para 109.

⁴² See generally Pt 6A.1 of the *Corporations Act*.

⁴³ See generally Pt 6A.2 of the *Corporations Act*.

be followed to complete a compulsory acquisition.⁴⁴ The regime provides for the payment of compensation to the holders of securities that are acquired compulsorily.⁴⁵ Section 666B provides a statutory procedure for the completion of a compulsory acquisition in the following terms:

(1) Under this section, the person acquiring the securities must:

(a) give the company that issued the securities a copy of the compulsory acquisition notice under section 661B or 664C together with *a transfer of the securities*:

(i) signed as transferor by someone appointed by the person acquiring the securities; and

(ii) signed as transferee by the person acquiring the securities; and

(b) pay, issue or transfer the consideration for the transfer to the company that issued the securities.

The person appointed under subparagraph (a)(i) has authority to sign the transfer on behalf of the holder of the securities.

(2) If the person acquiring the securities complies with subsection (1), the company that issued the securities must:

(a) register the person as the holder of the securities; and

(b) hold the consideration received under subsection (1) in trust for the person who held the securities immediately before registration; and

⁴⁴ See generally Pt 6A.3 of the *Corporations Act*.

⁴⁵ See also s 1350, where an attempt is made to safeguard the constitutional validity of any measure in the *Corporations Act* providing for compulsory acquisition by inserting a general power to claim reasonable compensation. This supplements any rights under Ch 6A. Of course, a provision such as s 1350 is particularly pertinent following the referral by the States to the Commonwealth of power in relation to incorporation.

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(c) give written notice to the person referred to in paragraph (b) as soon as practicable that the consideration has been received and is being held by the company pending their instructions as to how it is to be dealt with.

(3) If the consideration held under subsection (2) consists of, or includes, money, that money must be paid into a bank account opened and maintained for that purpose only”.⁴⁶

This process is very different from those under the various provisions dealing with the compulsory acquisition of land by government authorities. It is not a process of extinguishment and vesting, but rather one of compulsory transfer. The most unique aspect of the process is that a transfer takes place without any action by the transferor.

5. THE APPLICATION OF GST TO THE COMPULSORY ACQUISITION OF SECURITIES

Subject to the requirements in reg 40-5.09, the provision, acquisition or disposal of an interest in or under a security is a financial supply⁴⁷ and therefore input taxed.⁴⁸ Therefore, in many circumstances, both the transferor and transferee of a share will be treated as making an input taxed supply. The question is whether this is also the case in relation to the procedures under s 666B of the *Corporations Act*. This matter raises both important conceptual issues and practical issues.

While transfers of securities pursuant to s 666B will not be taxable supplies, if it can be argued that the dealing is outside the scope of GST, this opens the possibility of claiming input tax credits in respect of the costs of acquisitions relating to the dealings (both

⁴⁶ Emphasis added.

⁴⁷ See reg 40-5.09(3) item 10 of the GST Regulations.

⁴⁸ GST Act, s 40-5(1).

from the perspective of the transferor and the transferee).⁴⁹ The fact that recently there has been significant litigation in relation to such acquisitions suggests that these costs may be considerable.⁵⁰ Experts' reports may be required as part of the process⁵¹ and the matter is particularly acute for acquirers under the process as they may be forced to bear the costs of the holder of the security that is acquired.⁵²

5.1 Does Regulation 40-5.09 Require a Positive Act?

The application of GST to acquisitions under s 666B raises some difficult conceptual matters. First, if it is accepted that there is no *taxable* supply where there is not a positive act by the putative supplier, does this limitation also apply in relation to financial supplies? This raises the difficult relationship between supplies and financial supplies.

The concept of a "supply", as defined in the GST Act, includes a financial supply.⁵³ However, what is a "financial supply" is defined in the GST Regulations.⁵⁴ If it is concluded that the concept of a supply in the GST Act brings with it an inherent limitation, this calls into question the validity of provisions in the GST Regulations that purport to stretch beyond this limitation. This possibility of

⁴⁹ If the dealing is input taxed, while neither party will be required to remit GST, the combined effect of s 11-5 and 11-15 of the GST Act may operate to deny full input tax credits in respect of anything acquired in relation to the making of the input taxed supply. There is the possibility of receiving a 75% credit if the relevant acquisition is a "reduced credit acquisition": GST Act, s 70-5.

⁵⁰ See, eg, *Pauls Ltd v Dwyer* (2001) 19 ACLC 959; *Kelly-Springfield Australia Pty Ltd v Green & Ors* [2002] NSWSC 53; *Capricorn Investments Pty Ltd v Catto & Ors* [2002] VSC 105.

⁵¹ See Pt 6A.4 of the *Corporations Act*.

⁵² Section 664F(4) of the *Corporations Act*. As an aside, where one party must "bear the costs" of another party, careless characterisation may give rise to the situation where neither party is entitled to a credit: GST Act, s 11-5.

⁵³ GST Act, s 9-10(2)(f).

⁵⁴ See generally Sub-div 40-A of the GST Regulations.

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repugnancy is an inherent danger in defining in delegated legislation a concept as fundamental as “financial supply”.⁵⁵

The definition of a financial supply also seems to suggest that a “supply” is required,⁵⁶ adding an element of circularity to the issue. Question, then, whether reg 40-5.09 should be read to include the limitation that there is no financial supply unless something is done by the supplier. There are arguments both for and against such a proposition.

One argument against reading a limitation into reg 40-5.09 is that while some form of act is required for there to be a *taxable supply*, this limitation does not derive from the concept of a *supply* as defined in s 9-10 but rather the fact that s 9-5 requires a person to “make the supply”.⁵⁷ In *Shaw*, Underwood J refers to the word “make” in s 9-5 and appears to use this to assist in the characterisation of the word supply in s 9-10.⁵⁸ The reasoning in that case appears to be that the passivity of the party leads to the conclusion that there is no supply (and therefore no taxable supply). It does not appear to state that there is a supply but that supply is not taxable because a party did not make the supply. It is submitted that the better view is that the limitation arises in the concept of “supply” itself, and not only in the context of determining what is a taxable supply.

Another argument against reading a limitation into reg 40-5.09 is that the provision (when read with reg 40-5.06) specifically contemplates that an acquirer can be treated as making a financial supply. This may be used to distinguish the cases (both in Australia

⁵⁵ This issue has long been recognised: see P McMahon and A MacIntyre, *GST and the Financial Markets* (2001) 3.

⁵⁶ This is not explicit, but reg 40-5.09(1) refers variously to the “supplier” of a financial supply and the “supply of the interest”. See also the discussion in McMahon and MacIntyre, above n 55, 40.

⁵⁷ GST Act, s 9-5(a) (emphasis added).

⁵⁸ [2001] TASSC 2, para 19.

and overseas) that consider limitations on the concept of supply. These cases do not contemplate the statutory fiction of an acquirer as a supplier. Perhaps it is open to the Courts to take a different view of the meaning of the word “supply” in the unique context of reg 40-5.09.

Conversely, it may be argued that reg 40-5.09 does require some form of positive act by a putative supplier simply on the basis that the scheme set up by the legislation brings with it an overriding limitation that the tax does not attach to involuntary dealings and it would be perverse if subordinate legislation purported to have this effect. This argument gains some support from an examination of the structure of the legislative scheme. Section 5-5 describes the relationship between supplies that are taxable and those that are “exempt”⁵⁹ because of the operation of provisions in Ch 3 of the GST Act. It is stated that the “exemptions” in Ch 3 (which include provisions that operate to classify supplies as input taxed) “exempt from the GST what would otherwise be taxable”. This suggests that one should first establish that a supply potentially is taxable under s 9-5 and then, as a second step, consider whether it is a financial supply. If this approach is accepted s 9-5 acts as an initial “filter” and any limitation in s 9-5 effectively will operate in relation to the “exemptions”.

It may also be argued that, regardless of any limitation inherent in the concepts of “supply” and “taxable supply”, the concepts of “provision”, “acquisition” or “disposal” relied upon in reg 40-9.05 themselves require some form of positive act. For example, it might be argued that there must be a positive act for there to be a disposal as defined in reg 40-5.04. A problem with this argument is that the concept of a “disposal” specifically includes a “transfer”⁶⁰ and s 666B of the *Corporations Act* clearly provides for the “transfer” of

⁵⁹ Care must be taken with the use of the word “exempt” in this context. In many jurisdictions the term “exempt” is used as the equivalent of “input taxed”.

⁶⁰ Regulation 40-5.04.

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the relevant securities. Whether the concept of “transfer” in reg 40-5.03 extends to the type of transfer contemplated in s 666B is another matter. A starting point for the consideration of this issue might be the stamp duty cases dealing with the definition of “transfer”. These cases generally refer to the passing of pre-existing property from one party to another.⁶¹ A transfer under s 666B appears to fall within this concept. This leaves it open to conclude that there is a transfer regardless of the fact that the transferor is not involved in the process.

In conclusion, the matter is not clear, but perhaps the better view is that the structure of the legislative scheme and limitations inherent in the concept of supply suggest that some form of positive act is required before a party can be treated as making a financial supply. While this conclusion is tentative, discussion below addresses the consequences that might flow in the context of the compulsory acquisition of securities.

5.2 Complications in the Characterisation of the Compulsory Acquisition of Securities

If it is decided that the making of a financial supply requires some form of positive act, then a few questions remain:

- does this limitation apply to both “acquisition financial supplies” and “ordinary financial supplies”?; and
- is it correct to state that there has been a positive act by the holder of the acquired securities in the taking up of the securities?

In relation to the first of these questions, it is submitted that it would be a curious result if a dealing did not give rise to a financial

⁶¹ See *Commissioner of Taxes (Qld) v Camphin* (1937) 57 CLR 127; and *Coles Myer Ltd v Commissioner of State Revenue* (Vic) 97 ATC 4110.

supply by a party making a provision or disposal (because of the lack of a positive act) but did give rise to a financial supply by the acquirer. Further, if the view is taken that reg 40-5.09 contains an overriding limitation, then this limitation should apply to provisions, acquisitions and disposals.

In relation to the second of these questions, it may be argued that the situation is analogous to that outlined in GSTR 2003/11. That ruling considers the termination of a lease pursuant to consumer credit legislation. The ruling states that this statutory right to terminate “forms part of the framework” of relevant leases “whether or not it is referred to expressly in the lease”.⁶² Further, it is stated that:

the statutory right to terminate early is therefore akin to a term implied by statute. It follows that the GST implication of early termination pursuant to the statutory right are similar to those arising out of early termination in accordance with an express term of the original lease.⁶³

This reasoning replaces a statement in draft ruling GSTR 2003/D2 that in such a situation “no supply is made by the lessor because the lease is terminated pursuant to the exercise of a statutory right by the lessee, and not by any act of the lessor”.⁶⁴ It is submitted that in relation to s 666B the reasoning in GSTR 2003/D2 is more appropriate than that in GSTR 2003/11. It is difficult to characterise the procedures under Ch 6A of the *Corporations Act* as terms inserted into a bargain. The *Corporations Act* contemplates that some sections “have effect as a contract ... between a member and each other member”⁶⁵ but this is limited to the replaceable rules.⁶⁶ On this

⁶² GSTR 2003/11, para 56.

⁶³ Ibid para 57.

⁶⁴ GSTR 2003/D2 (replaced by GSTR 2003/11 on 3 September 2003).

⁶⁵ Section 140.

⁶⁶ See s 141 for a list of such replaceable rules and s 135 for a description of their nature.

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basis it is submitted that the better view is that the taking up of shares subject to the regime in Ch 6A should not be seen as a positive act sufficient to make the compulsory acquisition of those shares a supply.

Again, the conclusion is guarded, but the better view is that a compulsory acquisition of securities pursuant to s 666B of the *Corporations Act* should not give rise to an input taxed financial supply by the transferor. Instead the dealing should be outside the scope of the GST because the transferor does not perform any positive act that results in the transfer of the securities. It is slightly harder to reach the conclusion that the transferee does not make a financial supply, but this is still arguable.

6. CONCLUSION

The consideration of compulsory acquisitions highlights some important potential limitations of the concept of a supply. The position in the context of the compulsory acquisition of land by a government authority is fairly clear and the Commissioner has recently retreated from the long-held position that taxable supplies are made. However, the matter is not as clear in the context of the compulsory acquisition of shares. Both scenarios raise matters that are more fundamental than simple issues of characterisation of dealings.

Analysis of the compulsory acquisition of land reveals an important limitation to the concept of “taxable supply”. That is the supplier must do something that amounts to the making of a supply and the extinguishment of the rights of a passive party should not be treated as taxable. Analysis of the compulsory acquisition of securities reveals the potential for a similar limitation in the context of financial supplies. However, the existence and scope of any such limitation is less certain. In part this uncertainty flows from the structure of the Australian GST regime and, in particular, complexities in the relationship between the GST Act and the GST Regulations. It has long been recognised that the placement in regulations of such an important matter as the definition of financial supply has the potential to cause uncertainty. This article has aimed

to draw to the surface some of these uncertainties and take some small steps towards their resolution.