

10 IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S238 of 2010

No. S239 of 2010

BETWEEN

BETWEEN

AMERICAN EXPRESS WHOLESALE
CURRENCY SERVICES PTY LTD

AMERICAN EXPRESS INTERNATIONAL
INC

Applicant

Applicant

AND

AND

COMMISSIONER OF TAXATION

COMMISSIONER OF TAXATION

Respondent

Respondent

APPLICANTS' SUBMISSIONS

Part I: Certification for publication

1. These written submissions are in a form suitable for publication on the internet.

Part II: Issues

- 20 2. The first issue is whether what the Full Court described as “the right to present a card as payment for goods or services ...” was a “financial supply” by American Express International Inc¹ (“Amex”) within the meaning of s 40-5 of the *A New Tax System (Goods and Services Tax) Act 1999* (“GST Act”) and Division 40 of the *A New Tax System (Goods and Services Tax) Regulation 1999* (“GST Regulations”). This issue gives rise to the following questions:
- (a) was the Full Court correct in identifying the relevant supply as the “the right to present a card as payment for goods or services and incur a corresponding obligation to pay Amex at a later date”;²
- (b) if not, what was the relevant supply;
- 30 (c) was the relevant supply the “supply of something, or an interest in or under something, that is mentioned in” the table to r 40-5.12, namely “a payment system”;

¹ American Express Wholesale Currency Services Pty Ltd did not enter into the relevant contracts with cardholders or merchants, but was the representative member of the GST Group for part of the period in dispute – cf: s 48-5(1)(c) of the GST Act.

² See also: FC [148], [181].

Filed on behalf of the Applicants

Date of filing: 11 March 2011

Address for Service:
MINTER ELLISON LAWYERS
Aurora Place
88 Phillip Street
SYDNEY NSW 2000

Telephone: (02) 9921 8888
Facsimile: (02) 9921 8123
DX: 117 SYDNEY
Contact: Sarah Woodland
Reference: SCW: 20-5407226

- 10 (d) if not, was the relevant supply a supply “for consideration” of “anything that is recognised at law or in equity as property in any form” (“**property interest**”) in or under a “credit arrangement or a right to credit” within the meaning of r 40-5.09; and
- (e) if so, what was the “consideration”, within the meaning of r 40-5.09(1)(a)(i), for which that property interest was supplied?
3. The second issue – which is probably resolved by the answer to the question in paragraph 2(e) – is whether “late payment fees” and “liquidated damages” (“**default fees**”) paid by cardholders to Amex are “consideration for” a “financial supply”.
- 20 4. The third issue – which only arises if: (a) the relevant supply was not of something that was a payment system; (b) the relevant supply was a supply of a property interest in or under a credit arrangement or right to credit; and (c) the default fees were not “consideration for” a financial supply – is whether the majority erred in permitting the respondent to amend its grounds of appeal.
5. The fourth issue – which only arises if the prior issues are resolved against the applicants and which is also probably resolved by the answer to the question in paragraph 2(e) – is whether the default fees are “revenue from” a “financial supply”.

Part III: Judiciary Act 1903, s 78B

6. The applicants consider that notice is not required pursuant to s 78B of the *Judiciary Act 1903*.

30 **Part IV: Reports of reasons for judgment**

7. The decision of the Full Court of the Federal Court is reported at (2010) 187 FCR 173. The decision of the primary Judge is reported at (2009) 73 ATR 173.

Part V: Relevant facts

8. Amex cardholders use cards to purchase goods or services from certain merchants. The Amex card system is commonly called a “closed loop network system” or “a three party card scheme”.³ Amex pays the merchant for a cardholder’s purchase, less a commission, usually within one to three days.⁴ The cardholder does not incur a debt to the merchant, but instead incurs a debt to Amex.⁵ This system for payment by card operates under two types of written agreement:
- 40 (a) “merchant agreements” between Amex and the relevant merchants;⁶
- (b) “cardholder agreements” between Amex and cardholders.⁷
9. Amex issues two types of card:
- (a) “charge cards”. These do not provide credit to the cardholder, who must pay to Amex the full amount of monthly charges “immediately upon receipt of the

³ See *Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300 at [73].

⁴ Affidavit of Horikawa 24.8.2007 at [25] at __AB__.

⁵ See *In Re Charge Card Services Ltd* [1989] 1 Ch 497 per Sir Nicholas Browne-Wilkinson V-C at 509.

⁶ A sample of a “merchant agreement” was Exhibit 3 at __AB__ - __.

⁷ Samples of the “cardholder agreements” were contained in Exhibit MR1 at __AB__ - __ (charge card) and __AB__ - __ (credit card).

10 monthly statement”.⁸ If the cardholder fails to pay by the date of the next
 monthly statement, the cardholder is in default and must pay “liquidated
 damages”.⁹ A typical charge card monthly statement is at AB.¹⁰ In
 addition to ordinary charge cards held by individuals, Amex issues charge
 cards called “Corporate Cards” to employees of businesses under an account
 established in the business name.¹¹ The charge card was originally developed
 by Amex as an alternative to traveller’s cheques. It was designed to provide a
 “convenient mechanism for paying for goods and services around the world
 without the need to carry large amounts of cash”.¹² The corporate charge cards
 “allow employees to charge all their expenses to their Card account ...
 20 eliminating the need to issue cash advances and process individual invoices”,¹³
 and

(b) “credit cards”. The cardholder is entitled under the agreement with Amex to
 defer part of the monthly charges and pay interest on that deferred amount.¹⁴ If
 a cardholder defaults in making the minimum monthly payment by the due
 date, a “late payment fee” is payable, in addition to the interest.¹⁵ The credit
 cards operate in the same manner as credit cards such as Mastercard and Visa
 which are issued by banks.¹⁶

10. The contract between Amex and the cardholder is determinable at will by Amex.¹⁷

30 11. Recovery processes are initiated in the event of default for both charge cards¹⁸ and
 credit cards.¹⁹ In certain circumstances, “liquidated damages” and “late payment fees”
 may be waived.²⁰

12. Charge cardholders and credit cardholders who pay the outstanding amount are
 referred to as “transactors” (they pay the whole monthly statement in full); those credit
 cardholders who elect to pay some amount less than the outstanding balance are
 referred to as “revolvers” (they often only pay the minimum payment and permit the
 amount over that to “revolve” each month).²¹

⁸ See: Cl 6 of the Terms and Conditions at AB; Affidavit of Mr Rayner at [16] – [19] at AB - ____ ;
American Express International Inc v CSR (Vic) (2004) 10 VR 145 at [18].

⁹ See: Cl 14 of the Charge Card Terms and Conditions at AB .

¹⁰ Tab 1 of Exhibit GJP1 to Affidavit of Mr Porter, referred to at [5] at AB .

¹¹ Affidavit of Mr Horikawa 24.8.2007 at [15] – [19] at AB - ____ .

¹² Affidavit of Mr Rayner at [11] at AB . See also: Affidavit of Mr Horikawa 24.8.2007 at [6] at
AB .

¹³ Affidavit of Mr Horikawa 24.8.2007 at [19] at AB .

¹⁴ See: Cl 6 – 9 of the Terms And Conditions at AB - ____ ; Affidavit of Mr Porter at [6] at AB .

¹⁵ See: Cl 29 at AB , Financial Table to Terms and Conditions at AB ; Affidavit of Mr Rayner at
 [22] to [25] at AB - ____ ; [34], [35] at AB . The Terms and Conditions and the Financial Table
 are two separate documents: Affidavit of Mr Horikawa 1.4.2009 at [3] at AB .

¹⁶ Affidavit of Rayner at [12] at AB ; Affidavit of Mr Horikawa at [9] at AB .

¹⁷ See cl 7 of Charge Card Terms and Conditions at AB and cl 11 of Credit Card Terms and Conditions at
AB .

¹⁸ Affidavit of Mr Rayner at [18], [32], [33] at AB , ____ - ____ ; Affidavit of Mr Porter at [7] to [9] at
AB - ____ ; [12] to [14] at AB - ____ .

¹⁹ Affidavit of Mr Rayner at [18], [32], [33] at AB , ____ - ____ ; Affidavit of Mr Porter at [7] to [9] at
AB - ____ ; [15] at AB .

²⁰ Affidavit of Mr Porter at [16] – [18] at AB - ____ .

²¹ Affidavit of Mr Horikawa 24.8.2007 at [12] – [14] at AB - ____ ; Affidavit of Mr Rayner at [29], [30] at
AB - ____ .

- 10 13. Amex actively discourages cardholders from failing to make the required payments through a number of measures.²² These include on-line services providing for automatic payment reminders by email and text message, promoting and providing automatic payment plans and using sophisticated risk models to monitor spending patterns.²³ If due payments are not received on time, Amex is deprived of the use of those funds in its business which entails a lost opportunity cost.²⁴ Because Amex will pay a merchant within one to three days of a cardholder's purchase,²⁵ if charge (or credit²⁶) cardholders do not pay Amex the relevant balance in full, Amex incurs the expense of funding an ageing receivable and incurs costs associated with recovery.²⁷ Amex might also need to write off bad debts in part or full.²⁸
- 20 14. The level of the "liquidated damages" was calculated by reference to the historical cost to Amex of pursuing delinquent cardholders and relevant defaults.²⁹
15. Amex uses call centres to collect overdue accounts and to approve or decline specific transactions.³⁰ In respect of its "Credit Operations department", Amex: (a) incurs costs in connection with managing, supporting and maintaining its risk management and mainframe systems; (b) employs 240 people across three countries, including personnel in a credit call centre to manage cardholder relations; and (c) has a dedicated "Risk Management Team" responsible for modelling risk profiles which are used to make decisions in the collections process.³¹
- 30 16. The system is provided to cardholders predominantly so that fees can be earned by Amex from the merchants.³² Amex also earns income by way of annual fees payable by cardholders. The merchant fees earned by Amex are approximately 7 times greater in amount than the card fees.³³ The respondent issued the assessments on the footing that the supplies made by Amex to its merchants were taxable supplies, namely a supply of something being a payment system.³⁴

Part VI: Argument

Overview of Legislative Scheme

17. GST is a consumption tax on certain supplies. The meaning of "supply" is broadly defined in s 9-10 and includes the supply of things which are clearly not property.³⁵ The GST Act contemplates three categories of supplies:

²² Affidavit of Mr Rayner at [37] – [42] at __AB__ - ____. .

²³ Affidavit of Mr Rayner at [39](a) – (c) at __AB__ - ____; [42] at __AB__ . See also affidavit of Mr Horikawa 24.8.2007 at [24] at __AB__ .

²⁴ Affidavit of Mr Rayner at [38] at __AB__ ; affidavit of Mr Horikawa 24.8.2007 at [29] at __AB__ - ____ .

²⁵ Affidavit of Mr Horikawa 24.8.2007 at [25] at __AB__ .

²⁶ Affidavit of Mr Horikawa 24.8.2007 at [32] at __AB__ .

²⁷ Affidavit of Mr Horikawa 24.8.2007 at [25] – [27] at __AB__ - ____ .

²⁸ Affidavit of Mr Horikawa 24.8.2007 at [30] at __AB__ .

²⁹ Affidavit of Mr Horikawa 24.8.2007 at [33] – [39] at __AB__ - ____ .

³⁰ Affidavit of Mr Porter at [2] at __AB__ - ____ .

³¹ Affidavit of Mr Porter at [19] at __AB__ .

³² See Attachment A to Commissioner's Reasons for Objection Decision at __AB__ .

³³ See __AB__ . Annual fees (or "card fees") are approximately 13-14% of merchant fees. Thus, in the 2000 year merchant fees were \$364,738,063 and card fees were \$50,542,603.

³⁴ The respondent's treatment of Amex's supplies to merchants as a supply of an interest in a payment system and as such taxable is in accordance with GSTR 2002/2, Schedule 2, A100 and A104.

³⁵ For example, a "supply of services" (s 9-10(2)(b)) and the "provision of advice or information" (s 9-10(2)(c)).

- 10 (1) taxable supplies;
 (2) input taxed supplies;
 (3) GST-free supplies.
18. Liability for GST only arises in respect of taxable supplies. A taxable supply is made if the four matters in s 9-5 are satisfied, the first of which is that the supply is made “for consideration”. Persons registered under the Act, whether or not they make taxable supplies, are entitled to an input tax credit if they acquire something for a creditable purpose: Division 11.
19. While there is no liability for GST on GST-free supplies (s 9-5), a supplier of GST-free supplies is still entitled to input tax credits. A supplier of input taxed supplies is not entitled to an input tax credit to the extent that the relevant acquisition relates to making input taxed supplies: s 11-15(2)(a). In contrast to the law in other jurisdictions which requires a nexus between an acquisition and the making of a taxable or GST-free supply to allow an input tax credit,³⁶ the Australian GST regime reverses this onus and presumes that all acquisitions by registered entities are creditable unless there is a relationship with an input taxed supply. An obvious result of this is that receipts that are unrelated to any supply (such as damages) do not result in the denial of credits.
20. Where a taxpayer makes both taxable (or GST-free) supplies and input taxed supplies, the GST on acquisitions is apportioned by reference to a formula in s 11-30(3), which turns on determining the “extent of creditable purpose”.
- 30 21. Supplies which are input taxed are set out in Division 40 of the GST Act and include a “financial supply”,³⁷ which has the meaning given by the GST Regulations: s 40-5. The relevant structure of Division 40 of the GST Regulations is:
- (a) Regulation 40-5.09 sets out what are “financial supplies”. It includes the “provision, acquisition or disposal³⁸ of an interest” in or under a “debt, credit arrangement or right to credit”.³⁹ Notwithstanding the broad definition of supply, a financial supply must be of a property interest.⁴⁰ The relevant supply must also be one made “for consideration”.⁴¹
- (b) Regulation 40-5.12 sets out what are not “financial supplies”. It includes “the supply of something, or an interest in or under something, that is mentioned in an item in the ... table”, namely – for present purposes – “a payment system”.
- 40 (c) If a supply falls within both r 40-5.09 and r 40-5.12, the supply is not a “financial supply”: r 40-5.08(2).
- (d) Schedules to the Regulations provide examples of what are financial supplies under r 40-5.09 and what are not financial supplies under r 40-5.12. However, in each case, the “description” in the regulation prevails if an “example” is

³⁶ For example, section 3A(1)(a) of the *Goods and Services Tax Act 1985* (NZ) only allows input tax credits where “goods and services are acquired for the principle purpose of making taxable supplies”.

³⁷ In terms of GST theory, it is generally accepted that there are certain kinds of activities where the basic system of output tax on supplies and input tax credits on acquisitions will not lead to taxation on the value added by each supplier in the chain. The most important example is said to be financial transactions of financial institutions: *HP Mercantile Pty Ltd v FCT* (2005) 143 FCR 553 at [16].

³⁸ “Provision”, “disposal” and “acquisition” are defined in rr 40-5.03, 40-4.04 and 40-5.05 respectively.

³⁹ Regulation 40-5.09(3), item 2.

⁴⁰ Regulation 40-5.02.

⁴¹ See r 40-5.09(1)(a)(i).

10 inconsistent with the description: notes to Schedules 7 and 8; s 15AD of the
Acts Interpretation Act 1901.

Overview

22. The system provided by Amex to facilitate the payments by consumers to merchants enables Amex to earn substantial commissions from merchants.⁴² As noted in paragraph 16 above, the respondent issued the assessments on the footing that the supplies made by Amex to its merchants were taxable supplies, being a supply of something being a payment system and, accordingly, there was a GST liability in respect of those fees.⁴³ The majority held that the relevant supply by Amex to cardholders was the “right to present the card as payment for goods or services and incur a corresponding obligation to pay Amex at a later date”⁴⁴ and that this was a financial supply (under r 40-5.09), not being a supply of an interest in or under a payment system (under r 40-5.12).
- 20 23. The controversy arises because the Amex/merchant part of the card system is treated by the respondent, correctly, as giving rise to taxable supplies by Amex to its merchants, while the Amex/cardholder part of the card system is treated by the respondent, incorrectly, as only giving rise to input taxed supplies by Amex. The effect of this inconsistent treatment is that GST imbedded in acquisitions in connection with recovering amounts from cardholders is not able to be set off by way of input tax credit against the GST payable by Amex on its supplies to merchants.⁴⁵
- 30 24. Amex accepts that where a credit cardholder chooses to defer payment of part of the monthly amount in accordance with the terms of his agreement with Amex and incur interest thereon, the interest is consideration for a financial supply. However, it contends that the GST component of the consideration it pays for acquisitions in connection with recovering amounts from cardholders reflecting the cost of goods and services acquired from merchants should be creditable against the GST payable on the commissions paid by the merchants.
25. The effect of the decision of the majority is to treat all revenue/consideration derived from the cardholder as being attributable to the making of financial supplies, while in truth the default fees relate to the making of taxable supplies to merchants or otherwise have no relationship to any supply at all.
- 40 26. This mismatch arises from the erroneous holding by the majority that the supply of “the right to present the card as payment for goods and services” did not involve the supply of an interest in a payment system but was instead to be treated wholly as a supply of a property interest in a right to credit. That conclusion was wrong in law and principle and leads to a loss of input tax credits when the costs of recovering amounts from cardholders are in truth part of the cost of earning merchant commissions in respect of which GST is payable.⁴⁶

⁴² See Attachment A to Commissioner’s Reasons for Objection Decision at __AB__.

⁴³ The respondent’s treatment of Amex’s supplies to merchants as a supply of an interest in a payment system and as such taxable is in accordance with GSTR 2002/2, Schedule 2, A100 and A104.

⁴⁴ FC [174] and see FC [155], [181].

⁴⁵ The GST payable on such supplies is 1/11th of the amount of the commissions received from merchants.

⁴⁶ Strictly it is the supply to the merchant which is taxable with the tax being 1/11th of the consideration for the supply, ie the commission.

10 Identification of the relevant supply by Amex

27. Amex supplies the right to present the card on the terms set out in the cardholder agreement. The corresponding obligation incurred by the cardholder for the “right to present the card” is to pay Amex on the due date. Amex does not supply the cardholder’s obligation to pay Amex.
28. What Amex supplies is as follows:
- (a) Amex supplies cards to cardholders which enable cardholders to purchase goods and services in accordance with the terms and conditions of the card.
- 20 (b) Amex supplies the cardholders and merchants with access to a payment system to facilitate the purchase of goods and services. Accordingly, when the cardholder presents a card to acquire goods or services from a merchant, Amex’s promise to pay the merchant the amount of the transaction, less a commission, is activated. (There is no dispute that the commission paid by the merchant is consideration for a taxable supply in respect of which Amex pays GST.) A fundamental part of the tripartite arrangements under which this supply to the merchant occurs is that the cardholder, rather than incurring a debt with the merchant, incurs a debt with Amex for the full amount of the relevant transaction. That debt is discharged on payment of the monthly charge card statement or on full payment of the monthly credit card statement. That payment does not include any amount of interest.
- 30 (c) In the case of a credit cardholder who chooses to defer payment, Amex supplies that cardholder with credit in consideration for the payment of interest. Apart from this circumstance, however, no interest is payable.

Payment System

29. It follows from the legislative overview above that, if the relevant supply falls within r 40-5.12, then the supply is not an input taxed supply but is a taxable supply, and it is not necessary to determine whether the supply is one contemplated by r 40-5.09: r 40-5.08(2).
30. Under r 40-5.12, “the supply of something, or an interest in or under something” that is mentioned in the table to the regulation is not a financial supply. Item 4 in the table is “a payment system”.
- 40 31. An “interest” is “anything that is recognised at law or in equity as property in any form”: r 40-5.02.⁴⁷ This was referred to by the majority as a “property interest”.
32. Importantly, the words “something, or an interest in or under something” in r 40-5.12 show that a supply of a payment system (as defined) is not limited to the supply of a property interest. This is consistent with the scheme of the Act which has a wide definition of “supply” not limited to property.⁴⁸
33. The phrase “payment system” is defined in the Dictionary to the Regulations to mean “a funds transfer system that facilitates the circulation of money, including any procedures that relate to the system”.

⁴⁷ This may be contrasted with s 108-5(1) of the *Income Tax Assessment Act 1997* which defines “asset” to mean “(a) any kind of property” or “(b) a legal or equitable right that is not property”.

⁴⁸ Section 9-5.

- 10 34. The word “money” has the broad meaning given in the Dictionary to the GST Act (in Part 6-3) and includes “whatever is supplied as payment by way of: (i) credit card or debit card; or (ii) crediting or debiting an account; or (iii) creation or a transfer of the debt”.
35. The majority fundamentally misunderstood the critical question posed by the legislation. They incorrectly perceived the question to be whether Amex “supplies cardholders with a property interest” in “a payment system”: FC [173]. This fundamental misunderstanding is perhaps explained by confusing what is required under r 40-5.09 with what is required under r 40-5.12. The former requires the supply of a property interest (with the result that the supply of the property interest which is a financial supply will not be a taxable supply), the latter does not *require* such a supply. If the thing supplied comes within the items described in the table to r 40-5.12 it will be a taxable supply regardless of whether it constitutes a property interest. This critical difference between the two clauses was simply not appreciated.
- 20 36. Regulation 40-5.12 does not require the supply of a property interest; it requires the supply of something, relevantly a payment system, *or* of a property interest in or under a payment system. In this regard, the majority erred in two respects:
- (a) First, the majority failed to consider whether there was a “supply of something [namely] ... a payment system”, as defined, and ought to have found that there was.
- 30 (b) Secondly, they erred in concluding that the relevant supply was not within r 40-5.12 because it was not a supply of a property interest in a payment system.
37. The Amex card system falls naturally within the definition of “a funds transfer system that facilitates the circulation of money”. A supply of “a payment system” is made where there is a supply of a funds transfer system or “any procedures that relate to the system”. The definition of “payment system” is broad, capturing the whole of a payment system and related procedures, not merely specific parts of the system.
38. The decision in *Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300 supports the conclusion that a “closed loop network system” (such as the present one) is regarded as a “payment system” for the purposes of the *Payment Systems (Regulation) Act 1988* (Cth) which is defined in materially identical terms.⁴⁹
- 40 39. Dowsett J (at FC [65]) and Emmett J (at J [70]) held that the Amex card system constituted a payment system. The majority were prepared to assume it was a payment system: FC [172].
40. The majority reasoned as follows:
- (a) at FC [174]: The relevant thing supplied by Amex was “the right to present a card as payment for goods or services and incur a corresponding obligation to pay Amex at a later date”.⁵⁰ This constituted a property interest in or under a credit arrangement for the purposes of r 40-5.09. However, the “GST scheme

⁴⁹ That Act defined “payment system” as “a funds transfer system that facilitates the circulation of money, and includes any instruments and procedures that relate to the system”. The Reserve Bank treats the system as a “payment system” – see: Reserve Bank of Australia, Payment Systems Board, Annual Report 2004 at 8 at AB; RBA Media Release dated 24 February 2005 at AB.

⁵⁰ See also: FC [148], [181].

10 does not evidence an intention that such an interest count as an interest in a payment system”.

(b) at FC [175]: The conclusion that such an interest does not count as an interest in a payment system was supported by the “examples of interests in a payment system provided in the [Schedule to the] Regulations”.

(c) at FC [176], [179]–[181]: All but one of the examples in Schedule 8 were explicitly phrased in terms of supplies by or to “participants” as opposed to “system operators”. These examples were “especially helpful” because they “provide concrete examples of the kinds of relationship to a payment system that have the character of a property interest in or under the system”. The examples indicated that one generally needed to be a “participant” to have a property interest. Cardholders were not “participants” and therefore did not have a relationship that had the character of a property interest.

41. This reasoning has a number of difficulties which are set out below:

(a) First, it is entirely premised on the erroneous conclusion that there needed to be a supply of a property interest under r 40-5.12. In fact, it was sufficient for there to be a supply of “something” or a property interest.

(b) Secondly, even on that misunderstanding of the scope of r 40-5.12, the question was whether there was a supply of a property interest in or under a payment system and its related procedures, not an analysis of the relationship between the cardholders and the payment system as a whole.

(c) Thirdly, if the right to present a card and “access the receipt of something in the nature of credit” (FC [174] and [181]) was a property interest under r 40-5.09 it was also a property interest under r 40-5.12. It is implicit in the finding of the majority that what they described as a right to credit (or the ability to present the card and pay Amex on receipt of the monthly statement) was a critical part of the payment system. The same set of contractual rights or obligations cannot be “an interest” for the purpose of deciding whether it was a supply of a credit arrangement or a right to credit, but not an interest for the purpose of deciding whether it was an interest in a payment system. The same definition of “interest” applies throughout. The majority adopted an inconsistent approach in its treatment of this issue. Precisely the same criticisms which the majority adopted to conclude that the identified supply was not an “interest” within the meaning of r 40-5.12 could have been, but were not, deployed for the same question when it arose in respect of r 40-5.09:

(i) The majority concluded that a cardholder’s presentation of a card triggers the operation of the system but “a cardholder ... has no involvement in the system beyond this” and has “no real involvement with the system and probably no knowledge of its operation” and no “control over it” (at FC [180]). Those observations, if correct or relevant to the question of “interest”, could equally have been, but were not, made when dealing with r 40-5.09. They are, however, not correct: the system exists to facilitate the cardholder’s purchase; the cardholder controls what to purchase and triggers the system; the cardholder continues to participate in the system by receiving a monthly statement and then paying the relevant amount when required to do so.

- 10 (ii) At FC [181], the majority said that the matters in (i) above can be
 “contrasted with a merchant who can rightly be described as a participant
 in the system”. This is mere assertion. The cardholder is as obvious a
 participant as the merchant and Amex. Without the cardholder
 participating, the payment system is pointless.
- (iii) At FC [181], the majority said that even if Amex operates a “payment
 system”, it does not supply “cardholders with an interest, enforceable at
 law or equity, in or under that system”. As noted above, this was not the
 statutory question; it was sufficient under r 40-5.12 for there to be a
 supply of “something” and not necessarily a supply of a property interest.
 20 But even if it were necessary for there to be a supply of a property
 interest, the correct question was whether an interest was “recognised”,
 not whether the interest so recognised was capable of “enforcement”.⁵¹
 Their reasoning in this respect was different to and stricter than their
 reasoning as to what constitutes a property interest when that question
 arose under r 40-5.09.
- (d) Fourthly, contrary to FC [176] and [179], the examples set out in Part 2 of
 Schedule 8 are not examples “of [property] interests in a payment system” –
 they are examples of supplies of “something” or an interest in or under a
 payment system. The majority’s analysis (FC [176]–[179]) of the examples
 30 proceeded from a wrong starting point. Contrary to what they said, it was not
 necessary to “combine the amorphous notion of ‘payment system’ with the
 vagaries of ‘property’”, a task which the majority saw as by “no means
 straightforward”.
- (e) Fifthly, the examples cannot operate to alter the meaning of the regulation.
 There is no express statutory requirement for a supply of a payment system (or
 an interest in or under it) to be to a “participant” (nor is such a requirement to
 be implicitly divined from examples which are expressly subordinated⁵² to the
 actual definition). The examples are just that. The fact that four out of five of
 the examples included the word “participant” is not a sound basis for
 40 determining the meaning of the statutory provision.
- (f) Sixthly, even if it were relevant to determine whether cardholders were
 “participants” in the payment system, they clearly were. The majority took the
 view that cardholders were not “participants”, on the incorrect basis that their
 sole involvement in the system was to trigger its operation: FC [180]. The
 Dictionary to the Regulations defines a “participant, in a payment system” as
 “a person who is a participant in the system in accordance with the rules
 governing the operation of the system”. The relevant rules are contained in
 two sets of bilateral contracts: (1) the merchant agreements, and (2) the
 cardholder agreements⁵³. The participants in the payment system included the
 50 cardholders (the payers), the merchants (the payees), and Amex, which
 facilitates the payments (or the circulation of money as defined) by the payers
 to the payees.

⁵¹ See, for example, *National Trustees Executors and Agency Co of Australasia Ltd v FCT* (1954) 91 CLR 540 at 583, per Kitto J.

⁵² See: notes to Schedule 8; s 15AD of the *Acts Interpretation Act 1901*.

⁵³ *American Express International Inc v CSR (Vic)* (2004) 10 VR 145 at [11]; *In re Charge Card Services Ltd* [1989] Ch 497 at 509; *Customs and Excise Commissioners v Diners Club Ltd* [1989] 1 WLR 1196 at 1200-1

- 10 (g) Lastly, the majority asserted that their conclusion that the interest was not a property interest was “reinforced by statutory context”: FC [182]. The only matter of statutory context referred to was their conclusion that, if r 40.5-12 applied, there would be “no room for the operation of [r 40.5-09]”. That is incorrect. Regulation 40.5-09 applies to an interest in or under “a debt, credit arrangement or right to credit, including a letter of credit”. Thus it clearly applies, to take a simple and obvious example, to ordinary loan transactions.
42. The conclusions of Dowsett J at FC [65] and Emmett J at J [70] that the supply was one within r 40-5.12 was correct and will see the GST imbedded in the costs of recovering amounts from cardholders set off against the GST on the taxable consideration received from merchants.
- 20 43. Further, if the relevant supply was a supply of a property interest within the meaning of r 40-5.09 as the majority concluded (but which was wrong for the reasons set out below), the majority erred in reaching the conclusion that the same supply was not the supply of a property interest in a payment system, but of some lesser interest. The contractual rights in each case were the same. There was no sound basis for concluding it “did not count”⁵⁴ in respect of a payment system, but did in respect of a right to credit.

Property interest, being “a credit arrangement or right to credit”

- 30 44. The majority considered that the relevant supply was “the right to present a card as payment for goods or services and incur a corresponding obligation to pay Amex at a later date”: at FC [174].⁵⁵ They considered this constituted the supply of a property interest for the purposes of r 40-5.09, being a right to credit.
45. The supplies which are made by Amex are set out in paragraph 28 above. It is only in the context of a credit card that Amex provides credit, which it does in exchange for interest. Otherwise, no interest is paid and the full transaction amount is payable on the due date.
46. If the cardholder defaults in paying the full amount of the monthly charge card statement (or minimum amount of the monthly credit card statement), the default fees become payable. Those default fees are not consideration for the supply of the card, or of the right to participate in the system, or of the provision of credit. They are liquidated damages for breach of contract. There is a real distinction between a promise to pay an amount of liquidated damages by reason of a party not performing their obligations and a liability to pay by reason of default. The promise is made by all cardholders. The payment of liquidated damages is only made by those few who default.
- 40 47. As noted in paragraph 21 above, for the “right to present the card” to be a financial supply, the following conditions must be satisfied:
- (a) the right to present the card must be a property interest; and
- (b) the right to present the card must be a right to credit that is provided for
- 50 consideration.

⁵⁴ FC [174].

⁵⁵ See also FC [148].

- 10 48. Dealing with the second of these conditions first, if a cardholder chooses to use the card to acquire goods or services from a merchant with whom Amex has a merchant agreement:
- (a) a debt due by Amex to the merchant arises for the cost of the goods or services, less the agreed commission; and
 - (b) a debt is due by the cardholder to Amex.
- 20 49. A contractual obligation to pay Amex an amount on the due date (immediately on presentation of the monthly statement) is not traditionally regarded as credit. It involves no deferral of an obligation to pay.⁵⁶ Less still could it be said to involve forbearance carrying interest.⁵⁷ If the majority was correct that there was a provision of credit, then any sale of goods with payment due at the end of the month (or on receipt of an invoice) would at least in part be a supply of a right to credit which would be input taxed, and as such would not attract GST. Such arrangements are commonplace.
50. In any event, even if the ability to pay for the goods immediately upon receipt of the monthly account involves the provision of a right to credit, no consideration is paid for this convenience.⁵⁸ All that the cardholder pays Amex is the cost of the goods.
51. As to the first condition, the majority concluded that the supply was a supply of a property interest in or under “a credit arrangement or right to credit”: at FC [148].
- 30 52. Their reasoning hinged upon their view that “it is apparent that the term ‘interest’ is referable to a very broad conception of property”: FC [146]. This view was said to flow from:
- (a) the text of the GST Act (especially ss 9-10 and 11-10) and the Regulations: FC [146];
 - (b) the examples of financial supplies in the table in r 40-5.09(3) which “would not fit the narrower definition of property urged by the respondents” and the examples of interests attached to r 40-5.02: at FC [146];
 - (c) the definition of “real property” in the GST Act which includes purely personal rights that are not ordinarily considered proprietary at all: at FC [147].
- 40 53. However, a consideration of those matters does not lead to the conclusion that the definition of “interest” in r 40-5.02 is as broad as the majority thought, let alone that the right to present the card and incur an obligation to pay Amex was a property right supplied to the cardholder. The necessary effect of the majority’s decision is that the personal contractual rights to participate in the facility offered by Amex constituted interests “recognised at law or in equity as property” in some form. The decision of Dowsett J to the contrary is to be preferred.
54. As to the majority’s reasoning set out in paragraph 52 above:
- (a) The structure of the GST Act and Regulations (and the “text” of them) do not point to such a broad conception of property. The structure begins, in s 9-10,

⁵⁶ *Prime Wheat Association Ltd v Chief Commissioner of Stamp Duties* (1997) 42 NSWLR 505 at 512E, per Gleeson CJ; *American Express International Inc v CSR (Vic)* (2004) 10 VR 145 at [21], per Charles JA, with whom Chernov JA and Hansen AJA agreed.

⁵⁷ Cf: *UG Insurances Pty Ltd v Commissioner of Stamp Duties (NSW)* (1973) 128 CLR 353 at 360.6.

⁵⁸ Cf: r 40-5.09(1)(a)(i).

10 by casting the net as to what constitutes a “supply” very broadly. Next, for the
 supply to be a “taxable supply” it must, inter alia, be “for consideration”: s 9-5.
 That section specifically carves GST-free and input taxed supplies out of what
 would otherwise be taxable supplies. A “financial supply”, being an input
 taxed supply, is subject to a specific regime under which the relevant supply
 must be of an interest, recognised at law or in equity as property, in one of the
 specified matters in r 40-5.09. If the supply is a supply of “something” in r 40-
 5.12 (or a supply of a property interest in such a matter) the supply is an
 ordinary taxable supply; in that case it is not necessary (contrary to the
 majority’s understanding) for there to be any property interest. Nor is it
 20 necessary for it to be “for consideration”. The carve out is thus specifically
 directed at identifying supplies “for consideration” of particular interests which
 are interests recognised at law or in equity as property. That structure does not
 suggest that what would ordinarily be understood as personal contractual rights
 were intended to constitute property interests within the meaning of r 40-5.09.

(b) The majority’s assertion at FC [146] that the items in the table to r 40-5.09(3)
 are examples of financial supplies reveals another fundamental
 misunderstanding of the way in which the legislation operates. They are not
 examples of financial supplies at all. The table sets out matters in or under
 which there must be a supply of an interest which is recognised at law or in
 30 equity as property. The “items” themselves are not examples of a property
 interest; rather, the “items” serve to identify the subject matter in respect of
 which an interest recognised as property must exist in order for there to be a
 “financial supply”. As to the examples recorded at r 40-5.02, first, they cannot
 control the meaning of the section,⁵⁹ and secondly, they are examples of
 interests which are capable of being recognised at law or in equity as property
 interests. Thus:

- (i) a debt – may be described as property as noted by Dowsett J at
 FC [46].⁶⁰ A specifically enforceable right to credit, such as might arise
 under an agreement to lend, may also be capable of bearing the
 40 description “property”;
- (ii) an interest conferred under a public or private superannuation scheme –
 beneficiaries⁶¹ in trusts may have interests capable of the description
 “property”;⁶²
- (iii) a mortgage over land or premises – at common law a mortgage operates
 as a transfer of title in the land to the mortgagee⁶³ and under the Torrens
 Title legislation a mortgage has the effect of securing an interest in the
 land;⁶⁴

⁵⁹ Cf: s 15AD of the *Acts Interpretation Act 1901* (Cth).

⁶⁰ referring to *McCaughy v Commissioner of Stamp Duties* (1945) 46 SR (NSW) 192 per Jordan CJ at 201; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 per Brennan J at 176; and *FCT v Orica Ltd* (1998) 194 CLR 500, per Brennan CJ at 522. See also: *English Scottish and Australian Bank v Commissioners of Inland Revenue* [1932] AC 238.

⁶¹ Cf: s 10 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

⁶² Cf: *CPT Custodian Pty Ltd v Cmr of State Revenue* (2005) 224 CLR 98 (unit trust); *Kennon v Spry* (2008) 238 CLR 367 (discretionary trust).

⁶³ *Santley v Wilde* [1899] 2 Ch 474 per Lindley MR; *Waldron v Bird* [1974] VR 497 at 201 per Gillard J.

⁶⁴ See, for example, s 57 of the *Real Property Act 1900* (NSW) and s 74 of *Transfer of Land Act 1958* (Vic).

- 10 (iv) a right under a contract of insurance or guarantee – guarantees and indemnities, being contractual promises, are legal choses in action.⁶⁵ The benefit of them is generally assignable at law⁶⁶ and in equity.⁶⁷ Such rights are capable of bearing the description “property”⁶⁸;
- (v) a right to receive a payment under a derivative – “Derivative” is defined in the Dictionary to the *Regulations* as “an agreement or instrument the value of which depends on, or is derived from, the value of assets or liabilities, an index or rate”. A right to receive payment under such agreement or instrument is a chose in action, capable of assignment and capable of bearing the description “property”;
- 20 (vi) a right to future property – can be a species of property in equity, particularly where such a right is assignable in equity.⁶⁹
- (c) The meaning of the phrase “real property” is of no obvious assistance when interpreting what is meant by the word “property” in r 40-5.02. First, “real property” is specifically defined in the dictionary to the GST Act. That definition expressly contemplates that real property includes, inter alia, “any interest in or right over land” and a “personal right to call for or be granted any interest in or right over land”. It was, accordingly, wholly inappropriate to suggest that the meaning of “real property”, which is expressly defined to include personal rights, indicates that “property” recognised at law or in equity
- 30 in r 40-5.02 is used broadly to encompass matters which are not traditionally regarded as property. Secondly, “real property” is subject to a special regime in the GST Act which makes it unhelpful as a tool for determining the meaning of r 40-05.02.
55. The first inquiry thrown up by r 40-5.09 is an inquiry into what is supplied. For the interest to constitute property there must be a sufficient “degree of power that is recognised in law as power permissibly exercised over the thing”.⁷⁰ Where a number of rights and interests in a particular thing are supplied it may be that some are property interests and some are not; or it may be that the bundle of rights⁷¹ constitutes the thing supplied and the question is whether that bundle of rights constitutes a
- 40 property interest.
56. For an interest to be recognised as property, rather than a personal interest, it must generally: (1) be definable or identifiable; (2) be capable of transfer, assignment or assumption by third parties; (3) have some degree of permanence or stability.⁷² Other matters relevant to a consideration of whether a right or interest is recognised as property include: (4) the power to recover the property the subject of the interest (or the income from it) as opposed to the recovery of compensation; (5) the availability of

⁶⁵ *Loxton v Moir* (1914) 18 CLR 360.

⁶⁶ *Conveyancing Act 1919* (NSW), s 12; *Property Law Act 1958* (Vic), s 134.

⁶⁷ *Holroyd v Marshall* (1862) 10 HL Cas 191; *Anning v Anning* (1907) 4 CLR 1049 at 1058.

⁶⁸ Cf: *CGU Insurance Ltd v One.Tel Ltd (in liq)* (2010) 268 ALR 439; (2010) 84 ALJR 576.

⁶⁹ See: Meagher, Heydon, Leeming, *Equity: Doctrines & Remedies*, 4th Ed (2002), at [6-195].

⁷⁰ *Yanner v Eaton* (1999) 201 CLR 351 at [17], per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

⁷¹ Cf: *Yanner v Eaton* (1999) 201 CLR 351 at [17].

⁷² See: *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1247-8, per Lord Wilberforce; *The Queen v Toohey; ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342, per Mason J (with whom Gibbs CJ and Brennan J agreed); *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 at [197], per Heydon J.

- 10 remedies in respect of the interest against third parties; (6) the extent to which the interest may be displaced in favour of competing interests or dealings.⁷³
57. The ability to present a card for the payment of goods or services and incur an obligation to pay the transaction amount to Amex at a later date is not a proprietary right in any form whatsoever. The right to use the card is determinable at will by Amex.⁷⁴ The cardholder has no contractual (or other) right to compel the merchant to accept the card as payment. Nor, assuming a cardholder and merchant agree with each other to transact by card, is Amex bound to facilitate that payment. In particular it is not contractually bound to the cardholder to do so. Automated procedures triggered at point of sale may result in the transaction being declined, either automatically or after request.⁷⁵ The holder may not transfer or assign the right to use the card. Whilst the cardholder has possession of the card, the card remains the “property” of Amex at all times.⁷⁶ A cardholder acquires no interest in the facility provided by Amex, but acquires a non-assignable personal contractual right to use the services provided in accordance with the agreed terms and conditions; the cardholder has access to the facility but does not control it.⁷⁷
58. The supply of a right to credit, which arises in the case of use of a credit card if a cardholder exercises his or her right to defer payment to Amex, is a quite separate supply, the consideration for which is the payment of interest. The majority characterised the supply by reference to the broader arrangements which exist between the parties, rather than acknowledging the existence of separate supplies and addressing them appropriately. Why the supplies should be so conflated was not explained.
59. Cardholders make three distinct categories of payment relevant for present purposes:
- (i) the annual fee which is paid for the issue of the card;
 - (ii) interest, which only arises in respect of credit cards in the event a cardholder chooses to defer payment, and is for an input taxed supply;
 - (iii) default fees which are not paid for any supply by Amex. These amounts become payable upon breach of contract by the cardholder and are liquidated damages. The default fees are not paid for the issue of the card but are paid separately as a consequence of default.
60. It is not sufficient that it can be said that the default fees (in issue in this case) were made in the context of a broader arrangement which may happen to include a “financial supply”. There are many examples in commerce where a transaction will involve both a taxable supply and a financial supply. These are commonly called mixed supplies.⁷⁸ For example, goods may be sold for a price payable at the end of the month with an option to the purchaser to defer the payment for a period and incur interest. The transaction whereby the goods are sold does not become a financial

⁷³ See: Meagher, Heydon, Leeming, *Equity Doctrines & Remedies*, 4th Ed (2002), at [4-015].

⁷⁴ Clause 7 (charge card) at ABB 87; Clause 11 (credit card) at ABB 100.

⁷⁵ Affidavit of Mr Horikawa 24.8.2007 at [24] at __AB__.

⁷⁶ Cl 9 of the Charge Card Terms and Conditions at __AB__; cl 13 of the Credit Card Terms and Conditions at __AB__.

⁷⁷ Cf the decision of Dowsett J at FC[39] at __AB__.

⁷⁸ See *Sea Containers Ltd v Customs and Excise Commissioners* [2000] BVC 60; cf *British Airways plc v Customs and Excise Commissioners* (1990) 5 BVC 97; GSTR 2001/8 at [40]ff; *FCT v Luxottica Retail Australia Pty Ltd* [2011] FCAFC 20.

10 supply because of the option to defer payment. It will be a taxable supply insofar as the purchase is concerned and a financial supply if the purchaser elects to defer payment.⁷⁹ This is in substance what occurs in the present case. Save where a credit cardholder elects to defer payment and incur interest, the system simply provides a method of paying for goods on receipt of each monthly statement.

61. Once it is recognised that the merchant fees are consideration for a taxable supply, it would be a result inconsistent with the object and structure of the GST law for the denial of input tax credits in connection with costs associated with recovering amounts from cardholders who are in default.

The Respondent's Amendment Application to the Full Court of the Federal Court

20 62. On 13 April 2006 the respondent issued a "Compliance Activity Report"⁸⁰ (which represented the final report arising from an audit conducted by the respondent) and Notices of Assessment.⁸¹ The principal issue dealt with in the audit was whether there had been a correct apportionment of acquisitions made in order to calculate the input tax credit entitlements of the Amex GST group.⁸² The Compliance Activity Report stated that the respondent considered that late payment and delinquency "fees represent consideration for an input taxed financial supply made by [Amex] and should be treated accordingly in any apportionment calculations".⁸³ Later in the report, this conclusion – that such fees were consideration for an input taxed supply – was noted to be "consistent with the [Commissioner's] rulings".⁸⁴

30 63. Understandably, Amex framed its objections to the Notices of Assessment by reference to the reasoning adopted by the respondent in the Compliance Activity Report. Thus, the principal ground was that the assessments were excessive because "the payments of liquidated damages ... and late payment fees ... were not consideration for any supply or were not consideration for an input taxed supply".⁸⁵

40 64. Both parties conducted the trial on the basis that the issue, insofar as the numerator in the formula was concerned, was whether the default fees were "consideration for" a supply, and, if so, whether they were consideration for an input taxed supply. The opening sentence of each party's written submissions at trial stated that the primary question for resolution by the trial judge was whether the default fees were consideration for an input taxed supply. In opening, Counsel for Amex expressly stated that the issue was whether the default fees were "consideration for an input taxed supply" and noted that the parties agreed "that the term 'consideration for an input tax[ed] supply' equated to the phrase 'revenue derived from input tax[ed] supplies' in the formula".⁸⁶ There was no demur. None of this was surprising given a supply cannot be a financial supply without it being made "for consideration".⁸⁷ Thus equating revenue with consideration for the relevant supply ensured its application was consistent with the scheme of the GST Act and Regulations.

⁷⁹ A hire purchase agreement is a classic example of a mixed supply.

⁸⁰ AB - .

⁸¹ AB - .

⁸² See Amex Reasons for Decision on Objection, page 2, at AB .

⁸³ Compliance Activity Report at page 5.2 at AB . See also page 8.1 at AB .

⁸⁴ Compliance Activity Report at page 7.7 at AB .

⁸⁵ See Amex Objection paragraph 9 at AB ; Amex Wholesale Objection paragraph 12 at AB .

⁸⁶ T2.40 at AB ; T3.5 at AB ; T5.44 at AB .

⁸⁷ See r 40-5.09(1)(a)(i) .

- 10 65. On appeal to the Full Court the respondent (the appellant before the Full Court) sought leave to amend his grounds of appeal in order to expand and change a fundamental basis upon which the parties had conducted themselves to that point. The majority granted that leave.⁸⁸
66. The respondent's argument in support of his application to amend his grounds of appeal that this "apparent misunderstanding" was brought about by the conduct of Amex was correctly described by Dowsett J (at FC [73]) as "patently incorrect". The respondent's Compliance Activity Report demonstrates that Dowsett J was correct in this respect. His Honour would have refused leave to amend.⁸⁹
- 20 67. If at any point prior to trial the respondent had contended that "revenue derived from" was used in a sense other than that which the parties had assumed and proceeded on, and upon which the assessments were issued, it was open to Amex to seek to prove that the assessments were excessive in a way other than that derived from the respondent's recently invented interpretation of the formula.⁹⁰ Permitting the respondent to amend on appeal ultimately operated to prevent Amex from ever having a real opportunity to challenge the excessiveness of the amended assessments (on the assumption that it is unsuccessful on the payment system and credit points). It has thus permitted the respondent to exact a tax which was not capable of real challenge.
- 30 68. Amex's objection was framed in response to the assessments issued on the basis disclosed in the respondent's Compliance Activity Report issued with those assessments, namely that the default fees represented "consideration for an input taxed financial supply ... and should be treated accordingly in any apportionment calculations". If the respondent had sought to change his case before trial so as to depart from the disclosed basis upon which the assessments were issued, it is unimaginable that Amex would not have been permitted to amend its grounds of objection.⁹¹ It is grossly unfair that the respondent should be permitted to amend his grounds on appeal and argue, as he did, that Amex was limited to the grounds in its objection which were, in turn, responsive to the respondent's basis for assessment. The reasoning of the majority (at FC [195]) that Amex could not have run an alternative case because its grounds of objection were limited to the formula highlights why it was unfair to permit the respondent's amendment application.
- 40 69. Part IVC of the *Taxation Administration Act 1953* is not designed to prevent challenges to assessments. It is designed to afford a proper opportunity for challenge, that is, to prevent taxes from being incontestable in light of provisions such as ss 175 and 177 of the *Income Tax Assessment Act 1936*.⁹²

Were the default fees revenue from a financial supply?

70. This issue only arises if: (a) the relevant supply was not a "supply of something, or an interest in or under something" being a payment system as defined (r 40-5.12); (b) the relevant supply was the supply of a property interest in or under a "credit arrangement

⁸⁸ See: at FC [91] at __AB__, [137] at __AB__, [186]-[197] at __AB__ - __.

⁸⁹ FC [74] at __AB__.

⁹⁰ As to what Amex would have done had the matter been raised at first instance, see FC [72].

⁹¹ Cf: s 14ZZO(a) of the *Taxation Administration Act 1953* (Cth); *Lighthouse Philatelics Pty Ltd v FCT* (1991) 32 FCR 148.

⁹² Cf: *FCT v Futuris Corporation Ltd* (2008) 237 CLR 146 at [9].

10 or a right to credit"; (c) the default fees were not "consideration for" a financial supply; and (d) the majority was correct in permitting the amendment application.

71. As submitted in paragraph 46 above, the default fees are not paid for any supply by Amex. The default fees are liquidated damages payable by cardholders who have defaulted in their obligations. Amex does not supply a right to be in default; the agreements with cardholders require cardholders not to be in default and Amex actively discourages and seeks to avoid default⁹³. The default fees are, thus, not consideration for any supply by Amex. The payments arise as a consequence of default by the cardholder. Thus there is not the relevant connection between the supply of the right to present the card and the payment of the default fees for the
20 default fees to be consideration for the right to present the card.

72. For the same reasons, it cannot be said that the default fees are "revenue from" any financial supply.

Part VII: Legislative materials

73. See Annexure "A". The materials in Annexure "A" were in force, as they appear, at the date of these submissions except as otherwise noted in Annexure "A".

Part VIII: Orders sought

74. Special leave to appeal be granted.

75. Appeal allowed.

76. The judgment of the Full Court of the Federal Court be set aside and, in lieu thereof,
30 order:

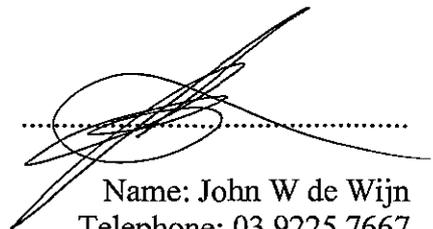
(a) the appeal to the Full Court of the Federal Court be dismissed;

(b) the appellant in the Full Court pay the respondent's costs of that appeal.

77. The respondent pay the applicants' costs.

Dated: 11 March 2011

40



Name: John W de Wijn
Telephone: 03 9225 7667
Facsimile: 03 9225 8307
Email: dewijn@vicbar.com.au

⁹³ Affidavit of Mr Rayner at [37] at __AB__.

**ANNEXURE "A"
TO APPLICANTS' SUBMISSIONS**

INDEX

No.	Description of Document	Date
Provisions at the relevant time:		
1.	Sections 9-5, 9-10, 9-15 (part only), 9-30, 9-40, 11-1, 11-5, 11-10, 11-15, 11-20, 11-25, 11-30 and 40-5 of the GST Act	As at 9 July 2004
2.	Regulations 40-5.01 to 40-5.13, Schedule 7 and Schedule 8 of the GST Regulations	As at 15 July 2004
3.	Section 14ZZO of <i>Taxation Administration Act 1953</i> (Cth)	As at 29 April 2004
The provisions above were in force, as they appear, at the date of the Applicants' Submissions except as noted below:		
4.	Section 11-25 of the GST Act (amended 2010)	As at 11 March 2011
5.	Regulation 40-5.09(4A) of the GST Regulations (introduced 2009)	As at 11 March 2011