

# HIGH COURT OF AUSTRALIA

FRENCH CJ,  
HAYNE, HEYDON, CRENNAN AND BELL JJ

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TRAVELEX LTD

APPELLANT

AND

COMMISSIONER OF TAXATION

RESPONDENT

*Travelex Ltd v Commissioner of Taxation* [2010] HCA 33  
29 September 2010  
S79/2010

## ORDER

1. *Appeal allowed with costs.*
2. *Set aside the order of the Full Court of the Federal Court of Australia made on 29 September 2009, and in its place order that:*
  - (a) *the appeal to that Court be allowed with costs; and*
  - (b) *the order of Emmett J made on 19 December 2008 be set aside, and in its place:*
    - (i) *there be a declaration that the sale by Travelex Ltd of 400 Fijian dollars to Geoffrey Urquhart on 25 November 2007 on the departures side of the Customs barrier at Sydney International Airport was a supply of or in relation to rights and a GST-free supply by reason of item 4(a) of the table in s 38-190(1) of A New Tax System (Goods and Services Tax) Act 1999 (Cth); and*
    - (ii) *it be ordered that the Commissioner of Taxation pay Travelex Ltd's costs of the proceedings.*

On appeal from the Federal Court of Australia



**Representation**

R C Cordara SC with J O Hmelnitsky and P P Parisi for the appellant (instructed by Mallesons Stephen Jaques)

S J Gageler SC, Solicitor-General of the Commonwealth with B C Kasep for the respondent (instructed by Australian Government Solicitor)

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## **CATCHWORDS**

### **Travelex Ltd v Commissioner of Taxation**

Taxes and duties – GST – Whether supply "GST-free" under s 38-190(1) of *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) – Foreign currency sold on departures side of customs barrier at Australian international airport – Acquired for use outside Australia – Whether an input taxed financial supply or a supply in relation to rights.

Words and phrases – "financial supply", "supply in relation to rights".

*A New Tax System (Goods and Services Tax) Act* 1999 (Cth), ss 9-5, 9-10, 9-30, Div 38.

*A New Tax System (Goods and Services Tax) Regulations* 1999 (Cth), Div 40.



1 FRENCH CJ AND HAYNE J. The appellant ("Travelex") buys and sells foreign currency. One of the places Travelex does that is on the departures side of the Customs barrier at Sydney International Airport. When Travelex sells foreign currency there, to a traveller who intends to use the currency overseas, is the supply "GST-free"?

2 The answer to that question depends upon the application of a number of interrelated provisions of *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) ("the Act") and Regulations made under the Act: *A New Tax System (Goods and Services Tax) Regulations* 1999 (Cth) ("the Regulations"). It is necessary to ask whether the supply is "GST-free" because Travelex submitted that, if the supply is GST-free, it could claim associated input tax credits which it could not claim if the supply is input taxed. (The validity of this submission was not in issue in the appeal.)

3 A supply is GST-free if it is (among other things) GST-free under Div 38 of the Act<sup>1</sup>. A supply is input taxed if it is (again, among other things) input taxed under Div 40 of the Act<sup>2</sup>. To the extent that a supply would, apart from s 9-30(3), be both GST-free and input taxed, it is treated<sup>3</sup> as GST-free and not input taxed.

4 Although the determinative issue in the appeal depends upon the construction and application of Div 38 (and, in particular, s 38-190(1))<sup>4</sup>, it is

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1 *A New Tax System (Goods and Services Tax) Act* 1999 (Cth), s 9-30(1).

2 s 9-30(2).

3 s 9-30(3). The provision is subject to a qualification which was not said to be engaged in the circumstances under consideration in this case.

4 Section 38-190(1), so far as presently relevant, provides:

(Footnote continues on next page)

important to begin by examining why the sale of foreign currency constitutes a supply. That examination shows that there is a supply because there is a transfer of ownership, the subject of which is money. Both of those observations are important in deciding the central question in the appeal: whether there is a supply "in relation to" rights.

- 5 The chain of provisions engaged in this matter is very long. It is desirable, therefore, to identify important links in that chain. When Travelex sells foreign currency, there is a species of what the Act refers to as a "supply". There is a "supply" because the sale of foreign currency is a "financial supply". There is a "financial supply" because there is a disposal (by Travelex) of an interest in the currency of a foreign country. There being a supply of the kind identified, the question which determines whether the supply is GST-free is posed by s 38-190. More particularly, in respect of a foreign currency transaction of the kind identified, does the supply have three characteristics: (a) it is not a supply of goods or real property; (b) it is a supply made "in relation to rights"; and (c) "the rights are for use outside Australia"? Argument in this Court was directed

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**"Supplies of things, other than goods or real property, for consumption outside Australia**

- (1) The third column of this table sets out supplies that are *GST-free* (except to the extent that they are supplies of goods or real property):

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**Supplies of things, other than goods or real property, for consumption outside Australia**

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Item	Topic	These supplies are GST-free (except to the extent that they are supplies of goods or real property) ...
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...

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|---|--------|---|
| 4 | Rights | a supply that is made in relation to rights if:<br><br>(a) the rights are for use outside Australia; or<br><br>(b) the supply is to an entity that is not an Australian resident and is outside Australia when the thing supplied is done." |
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principally to the second of those three characteristics. The Commissioner did not contend that the sale was a supply of goods. The Commissioner accepted that the currency sold was for use outside Australia. These reasons will show that the supply which is identified by the Act (the disposal of an interest in foreign currency) is a supply "in relation to" rights for use outside Australia.

6 Before setting out, and then examining, the relevant provisions of the Act and Regulations, it is as well to say something briefly about the proceedings and how they come to this Court.

#### Proceedings in the Federal Court

7 Travelex commenced proceedings in the Federal Court of Australia seeking a declaration about the application of the Act to "any sale of foreign currency by [Travelex] on the departures side of the Customs barrier at Australian international airports". Alternatively, Travelex sought a declaration in relation to a particular sale of Fijian currency which had been made on the departures side of the Customs barrier at Sydney International Airport to Mr Geoffrey Urquhart, the tax manager of the group of companies which includes Travelex. In this Court, Travelex did not pursue the wider declaration. It sought a declaration that the particular sale of Fijian currency was not subject to GST.

8 At first instance, Emmett J rejected Travelex's arguments and dismissed<sup>5</sup> the proceeding. Emmett J concluded<sup>6</sup> that there could be a supply "in relation to rights" only "if the essential character or substance of the supply, or of a separately identifiable part of the supply, is one of rights". There is not a supply "in relation to rights" "where the supply of rights is merely integral, ancillary or incidental to another dominant part of the supply, the supply being characterised by the dominant part"<sup>7</sup>.

9 Travelex appealed to the Full Court of the Federal Court of Australia. That Court, by majority (Stone and Edmonds JJ, Mansfield J dissenting), dismissed<sup>8</sup> the appeal. The majority agreed<sup>9</sup> with the primary judge that the

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5 *Travelex Ltd v Federal Commissioner of Taxation* (2008) 71 ATR 216.

6 (2008) 71 ATR 216 at 226-227 [49]-[50].

7 (2008) 71 ATR 216 at 226 [49].

8 *Travelex Ltd v Federal Commissioner of Taxation* (2009) 178 FCR 434.

9 (2009) 178 FCR 434 at 445 [51]-[54] per Stone J, Edmonds J agreeing at 446 [57].

relevant inquiry required identification of the "predominant" aspect of the supply as distinct from any rights "incidental to the supply of the bank notes".

10 In dissent, Mansfield J made a number of references to the policy and purpose of the Act<sup>10</sup>, with which the Commissioner took issue in this Court. Having regard to what he identified as the purpose of the Act, to tax consumption within Australia, Mansfield J concluded<sup>11</sup> that the relationship between the rights to use the Fijian bank notes as legal tender in Fiji, and the supply of the notes, was sufficient to constitute a supply "in relation to" those rights.

11 By special leave, Travelex now appeals to this Court. The appeal should be allowed.

### The Act

12 Part 1-2 of the Act tells the reader how to use the Act. As s 2-1 says, the Act "begins (in Chapter 2) with the basic rules about the GST, and then sets out in Chapter 3 the exemptions from the GST and in Chapter 4 the special rules that can apply in particular cases". Section 2-1 points out that the Act "concludes with definitions and other interpretative material". As s 3-1(1) says, "[m]any of the terms used in the law relating to the GST are defined". Definition of a term used in the Act is often identified in the text of the Act by printing an asterisk before the term that is defined, but those marks are not reproduced in these reasons.

13 What the Act identifies as its "central provisions" are set out in ss 7-1 to 7-15. Section 7-1(1) provides that GST is payable on "taxable supplies" and "taxable importations". What is a taxable supply is stated in s 9-5. That provides:

"You make a *taxable supply* if:

- (a) you make the supply for consideration; and
- (b) the supply is made in the course or furtherance of an enterprise that you carry on; and
- (c) the supply is connected with Australia; and
- (d) you are registered, or required to be registered.

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10 For example, (2009) 178 FCR 434 at 439 [23], 440 [26].

11 (2009) 178 FCR 434 at 440 [26].

However, the supply is not a taxable supply to the extent that it is GST-free or input taxed."

### Supply

14 Section 9-10(1) provides that a "**supply** is any form of supply whatsoever". Section 9-10(2) amplifies the already general provision of s 9-10(1) by providing that "[w]ithout limiting subsection (1), **supply** includes" any of a number of specified matters, including "(f) a financial supply".

15 Section 9-10(4) deals separately with a supply of money. It provides that: "However, a supply does not include a supply of money unless the money is provided as consideration for a supply that is a supply of money." "[M]oney" is defined in s 195-1 as including "currency (whether of Australia or of any other country)" and "any negotiable instrument used or circulated, or intended for use or circulation, as currency (whether of Australia or of any other country)". The exceptions to the definition of "money" (which include such things as collectors' pieces, investment articles and items of numismatic interest) may be put aside as irrelevant for present purposes. A sale of foreign currency falls within the "unless" clause in s 9-10(4). In such a sale money is provided as consideration for a supply that is a supply of money (the foreign currency).

### Financial supply

16 As has already been noted, a "financial supply" is a species of supply. "[F]inancial supply" is defined in s 195-1 as having "the meaning given by the regulations made for the purposes of subsection 40-5(2)". Section 40-5(1) provides that a "financial supply is **input taxed**", and sub-s (2) provides that "[f]inancial supply has the meaning given by the regulations".

17 Division 40 of the Regulations deals with input taxed supplies, and subdiv 40-A deals particularly with financial supplies. Regulation 40-5.01 identifies the object of subdiv 40-A as being "to identify a supply that is or is not a financial supply". Regulation 40-5.09 states what supplies are financial supplies. It does that by requiring the identification of the "provision, acquisition or disposal" of certain interests. Regulation 40-5.02 provides that an "**interest** is anything that is recognised at law or in equity as property in any form". Regulation 40-5.09(1) provides that "[t]he provision, acquisition or disposal of an interest mentioned in subregulation (3) or (4) is a financial supply" if certain conditions are met. There being no dispute that those conditions were met when Travelex sold foreign currency to a traveller on the departures side of the Customs barrier at an Australian international airport, it is not necessary to set them out here. For present purposes, what is important is that reg 40-5.09(3) identifies a number of interests, the provision, acquisition or disposal of which

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may constitute a financial supply. So far as presently relevant, reg 40-5.09(3) provides that:

"For subregulation (1), the interest is an interest in or under the matter mentioned in an item in the following table:

Item	An interest in or under ...
...	
9	Australian currency, the currency of a foreign country, or an agreement to buy or sell currency of either kind".

Regulation 40-5.11 provides that examples of the financial supplies identified in items of the table in reg 40-5.09 are given in Sched 7. One example given for item 9 of the table in reg 40-5.09 is "[c]onversion of Australian currency into foreign currency and conversion of foreign currency into Australian currency".

- 18 Applying this chain of provisions to a sale of foreign currency, it can be seen that the sale is a "financial supply". It is a financial supply because there is a disposal (by Travelex) of an interest in (the ownership of) the currency of a foreign country. And neither Travelex nor the Commissioner contended to the contrary. Rather, as explained at the outset of these reasons, the debate in this appeal focused upon whether s 38-190 of the Act was engaged. It is important to approach that question with a clear recognition of why a foreign currency sale is a financial supply. It is a financial supply because there is a transfer of title to the subject matter of the sale: the foreign currency.

#### Section 38-190

- 19 Section 38-190 of the Act deals with what its heading describes as "[s]upplies of things, other than goods or real property, for consumption outside Australia"<sup>12</sup>. Sub-section (1) of that section contains a table of supplies that are GST-free. The table appears under the chapeau: "The third column of this table sets out supplies that are ***GST-free*** (except to the extent that they are supplies of goods or real property)". The columns in the table are headed, respectively, "Item", "Topic" and "These supplies are GST-free (except to the extent that they are supplies of goods or real property) ...". Item 4 of that table states, as its "Topic", "Rights". Against that entry the third column of the table says:

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12 The reference to "things", in the heading to s 38-190, must be read with reference to the definition given in s 195-1 of "thing" as "anything that can be supplied or imported".

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"a supply that is made in relation to rights if:

- (a) the rights are for use outside Australia; or
- (b) the supply is to an entity that is not an Australian resident and is outside Australia when the thing supplied is done."

20 It is important to observe that s 38-190(1) is concerned to identify supplies as GST-free "except to the extent that they are supplies of goods or real property". Thus, when the section speaks of "supplies of things" it must be understood as using the defined word "thing" as at least including, perhaps as distinct from, what the Act treats as "goods or real property". More particularly, although the sale of foreign currency to an intending traveller will be completed by delivery to the traveller of whatever physical tokens constitute the relevant currency, the supply that is at issue in the present case is the financial supply constituted by the disposal to the traveller of an *interest* in (here, the ownership of) the currency of the foreign country. Is that "a supply that is made in relation to rights ... for use outside Australia"?

Supply "in relation to rights"?

21 At first instance, Emmett J concluded<sup>13</sup> that the rights which are the incidents of being the holder or owner of bank notes issued by a foreign country "are not relevantly connected with the supply constituted by the ... currency transaction, such that it can be said that the supply of the bank notes was a supply made in relation to those so-called rights". Rather, as noted earlier, Emmett J identified<sup>14</sup> the supply as "a supply of the physical notes", and concluded that "[t]he incidents of being the holder or owner of those bank notes were simply the consequences of becoming holder or owner".

22 The majority in the Full Court substantially agreed with this analysis of the matter. As Stone J said<sup>15</sup>:

"Accepting that the ... bank notes are not goods avoids the express exclusion of supplies of goods from Item 4 of the table in s 38-190, however it does not avoid the conclusion that the rights consequent upon the bank notes being legal tender in [the country of issue] were incidental to the supply of the bank notes."

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13 (2008) 71 ATR 216 at 226 [48].

14 (2008) 71 ATR 216 at 226 [48].

15 (2009) 178 FCR 434 at 445 [53].

23 Edmonds J agreed with the reasons of Stone J but added some supplementary observations. His Honour rejected<sup>16</sup> the proposition that "from a practical and business point of view the transaction is to be characterised as a supply in relation to the right to use the currency as legal tender" because that characterisation involved "a juristic disaggregation and classification of rights inherent in the currency supplied which does not reflect the practical reality of what is in fact supplied". In that respect, Edmonds J placed some emphasis<sup>17</sup> upon what his Honour identified as "a quarantined status under the GST Act" given to a supply or acquisition of money. So much followed, in his Honour's opinion, from the fact that there was, in the circumstances of the transaction in question, a supply by Travelex only "by force of s 9-10(4) of the GST Act"<sup>18</sup>.

24 As is apparent from what was said in the reasons of the Full Court, both parties had appealed in argument to the need to approach the Act from a "practical and business point of view"<sup>19</sup>. And although those arguments were not repeated in this Court, the Solicitor-General of the Commonwealth submitted on behalf of the Commissioner that it was necessary to consider the legislative scheme that emerges from reading the Act with the Regulations. More particularly, the Solicitor-General submitted that it was important to recognise that a supply, wholly in Australia, of "money" (a term that, as earlier noted, includes foreign currency) is specifically treated within the legislative scheme as a financial supply which is input taxed under Div 40. But as the Solicitor-General also acknowledged, the fact that a supply is input taxed does not mean that it cannot also be GST-free. And if a supply would be both GST-free and input taxed, it is treated<sup>20</sup> as GST-free and not input taxed.

25 It may readily be accepted that "in relation to" is a phrase that can be used in a variety of contexts, in which the degree of connection that must be shown between the two subject matters joined by the expression may differ<sup>21</sup>. It may

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16 (2009) 178 FCR 434 at 446 [59].

17 (2009) 178 FCR 434 at 447 [61].

18 (2009) 178 FCR 434 at 447 [61].

19 (2009) 178 FCR 434 at 443 [45], 444 [47]. See also, for example, *Sterling Guardian Pty Ltd v Commissioner of Taxation* (2005) 220 ALR 550 at 562-563 [39]; *Saga Holidays Ltd v Commissioner of Taxation* (2006) 156 FCR 256 at 264 [30].

20 s 9-30(3).

21 *HP Mercantile Pty Ltd v Commissioner of Taxation* (2005) 143 FCR 553 at 563 [35] per Hill J.

also be accepted that "the subject matter of the enquiry, the legislative history, and the facts of the case"<sup>22</sup> are all matters that will bear upon the judgment of what relationship must be shown in order to conclude that there is a supply "in relation to" rights.

26 By the supply which is constituted by the sale and delivery of the foreign currency, the supplier supplies to the acquirer the rights that attach to the tokens (be they notes or coins) that are the foreign currency. The supply (by sale) is not sufficiently described as a sale of the particular tokens. Those tokens are valuable because they are currency in at least the country or area of issue. Because the tokens are currency, the holder of the tokens can use them as a medium of exchange and as a store of economic value<sup>23</sup>. Currency has value only because of the rights that attach to it.

27 When the supplier sells the foreign currency to the acquirer, the acquirer obtains the rights that attach to, or are constituted by, the ability to use the currency. Because the supply is a supply of property in the currency, the supply is a supply "in relation to" the rights that attach to the currency, without which property in the currency would be worthless.

28 At first instance, Emmett J distinguished between rights that are "the essential character or substance of the supply, or of a separately identifiable part of the supply" and those that are "merely integral, ancillary or incidental to another dominant part of the supply"<sup>24</sup>. The key to the distinction was identified by Emmett J as being whether the supply "binds" the parties in some way. A supply that does not bind the parties in some way was said<sup>25</sup> to be "not a supply that is made in relation to rights".

29 Two preliminary points may be made about this distinction. First, if the distinction is to be drawn, it is one which must be applied to the particular supply in question: the identified "financial supply" of disposing of an interest in the currency of a foreign country. Secondly, if the distinction is to be drawn, it is not one whose application would be confined to financial supplies.

30 If a distinction is to be made between supplies which "bind" the parties and those that do not, much turns upon what is meant in this context by saying

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22 (2005) 143 FCR 553 at 563 [35] per Hill J.

23 Fox, *Property Rights in Money*, (2008) at 6 [1.19].

24 (2008) 71 ATR 216 at 226 [49].

25 (2008) 71 ATR 216 at 226-227 [49].

that a supply "binds" the parties. The consequence of the distinction would appear to be that there could be a supply "in relation to" rights only where the supplier can, and does, transfer the rights in question to the acquirer. It is a distinction that might be made more readily if the requirement was that there be a supply "of" rights, as distinct from a supply "in relation to" rights.

31 Whether a distinction of the kind posited must always be made in deciding whether there is a supply "in relation to" rights may be a large question, but it is not one which must be decided in the present case. For present purposes, it is sufficient to observe that, when a seller of foreign currency transfers the currency to the acquirer, the seller transfers (that is, "disposes" of or "supplies") title to the currency tokens to the acquirer by delivering the tokens (be they notes or coins) to the acquirer. And the seller disposes of the rights that attach to the currency by transferring those rights to the acquirer. At least in that sense, the supply "binds" the parties. That the supplier does not create the rights that are transferred to the acquirer is not to the point, any more than that the rights in question are capable of best exploitation in a country that treats the particular currency as a form of legal tender. The sale and transfer is legally effective. By the supply (constituted by sale and delivery of currency) the supplier supplies to the acquirer the rights that attach to the currency tokens. And that conclusion is not denied by describing the rights which attach to bank notes and other forms of currency, as the Solicitor-General did in argument in this Court, as "at most, incidents of possession ... not separately capable of 'creation, grant, transfer, assignment or surrender'". Describing the rights which attach to currency as "incidents of possession" is a description of the negotiable characteristics of the tokens; it does not deny that rights attach to currency and are passed upon negotiation of the currency by delivery.

32 Observing that rights attach to currency, and pass upon negotiation of the currency by delivery, does not constitute any "juristic disaggregation and classification of rights" that fails to reflect "the practical reality of what is in fact supplied"<sup>26</sup>. On the contrary, recognising that a sale of foreign currency transfers to the purchaser the rights that attach to the notes does no more than recognise the evident purpose of the transaction. Further classification or identification of the rights that pass, whether as rights against an issuing central bank, or as rights akin to those of the holder of a promissory note, is not necessary. What the Act requires is that there be a supply "in relation to" rights; the operation of the Act does not call for attention to be given to the particular content of the rights.

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26 (2009) 178 FCR 434 at 446 [59].



33 It will be recalled that, in his concurring reasons in the Full Court, Edmonds J spoke<sup>27</sup> of supply of money as having "a quarantined status under the GST Act". As is apparent from the several provisions to which reference has been made earlier in these reasons, sale of foreign currency is a subject for distinct treatment in the Act. It by no means follows, however, that the transaction is properly identified as somehow "quarantined" from the application of other provisions of the Act, in accordance with their terms. More particularly, the application of s 38-190(1) must be approached on the understanding that a sale of foreign currency is a financial supply of a kind specifically identified in the Act. That being so, the separate treatment of money transactions in s 9-10(4) neither permits, nor requires, a different or narrower engagement of s 38-190(1) than its terms would otherwise require.

34 Contrary to the conclusions reached at first instance and on appeal in the Federal Court of Australia, it should be held that a supply constituted by a sale of foreign currency is a supply in relation to the rights that attend upon ownership of that currency.

Supply "made in relation to rights ... for use outside Australia"

35 Where it is evident that the currency is to be used overseas, the rights that attach to the currency are for use outside Australia.

36 It may be accepted that, as the Solicitor-General submitted, there may be practical difficulties in administering the relevant provisions of the Act where the use to be made of the rights turns on the recipient's intention. Those difficulties, however, do not provide any basis for reading down those provisions, or for reading the connecting expression "in relation to" in a way that departs from the construction which has been identified. Difficulties in deciding whether the supply is "for use outside Australia" do not bear upon what is meant by a supply "in relation to" rights.

37 It may also be observed that, as the Solicitor-General pointed out, the Act and Regulations contain elaborate provisions that deal with the circumstances in which a supply of goods becomes GST-free, when a traveller is seeking to take those goods out of Australia. But again, the absence of equivalent provisions in respect of the supply of rights for use outside Australia does not provide a basis for confining the operation that is to be given to the expression "in relation to".

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27 (2009) 178 FCR 434 at 447 [61].

Conclusion and orders

38 The appeal to this Court should be allowed with costs. The orders of the Full Court of the Federal Court of Australia made on 29 September 2009 should be set aside, and in their place the appeal to that Court should be allowed with costs. The orders of Emmett J made on 19 December 2008 should be set aside, and in their place there should be:

- (a) a declaration that the sale by Travelex Ltd of 400 Fijian dollars to Geoffrey Urquhart on 25 November 2007 on the departures side of the Customs barrier at Sydney International Airport was a supply of or in relation to rights and a GST-free supply by reason of item 4(a) of the table in s 38-190(1) of *A New Tax System (Goods and Services Tax) Act* 1999 (Cth); and
- (b) an order that the Commissioner of Taxation pay Travelex Ltd's costs of the proceedings.

39 HEYDON J. Was the sale of Fijian currency by Travelex Ltd to Mr Urquhart on the departures side of a Customs barrier at Sydney International Airport GST-free pursuant to item 4(a) of the table in s 38-190(1) of *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ("the Act")<sup>28</sup>? That provision raises five questions. First, if there was a supply, was it a supply of *goods*? Secondly, if there was a supply, was it a supply of *real property*? If the answer to both those questions is "No", the third question is: was there a *supply*? If so, fourthly, was the supply made *in relation to rights*? If so, fifthly, were those rights *for use outside Australia*? The submissions of the parties were very sophisticated and extensive, and it is desirable to decide only those issues which have to be decided, leaving others for later occasions. The questions are to be answered as follows.

40 First, the parties agreed that the answer to the first question is "No". The sale of Fijian currency was not a supply of goods.

41 Secondly, the answer to the second question is "No". The sale of Fijian currency was obviously not a supply of real property.

42 Turning to the third question, the parties agreed that the supply of foreign currency was a supply as defined in s 9-10 of the Act, being a financial supply as referred to in s 9-10(2)(f). But the third question is interlinked with the fourth question. The answers to both questions depend on the legal nature of the bank notes.

43 "A bank note is a promissory note issued by a bank payable on demand." So spoke Lord Atkin in *Banco de Portugal v Waterlow and Sons Ltd*<sup>29</sup>. One submission by the appellant was that the purchase by Mr Urquhart of the Fijian currency was the purchase of promissory notes. The rights represented by each promissory note included a chose in action – a right to proceed against the issuer of the currency for its face value – as well as a right to negotiate it as legal tender, whether simultaneously with and in return for the acquisition of goods or services, in payment of pre-existing debts which Mr Urquhart owed, or as a means of creating debts to Mr Urquhart by depositing or lending it. The Solicitor-General of the Commonwealth emphatically denied the validity of that argument.

44 The appellant, however, put an alternative submission: that whether or not the Fijian bank notes had the characteristics of promissory notes, the *Reserve*

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28 The text is set out at [4] n 4 above.

29 [1932] AC 452 at 487.

*Bank of Fiji Act* 1983 (Fiji), ss 22, 24, 26 and 27, endowed their possessors with equivalent rights<sup>30</sup>. The latter submission is correct.

45 When Mr Urquhart acquired the currency from Travelex, he acquired an interest in property (namely ownership of those statutory rights of action and negotiation). That interest in property was identical with, evidenced by, and not capable of disaggregation from, an "interest in or under ... the currency of a foreign country": reg 40-5.09(3)<sup>31</sup>. To acquire an interest in the currency was to acquire an interest in the intangible rights connected with it, and vice versa. Hence what was acquired was an interest within the meaning of reg 40-5.09(3). The acquisition was therefore a "financial supply" within the meaning of reg 40-5.09(1) and ss 40-5(2) and 195-1 of the Act. It was thus a "supply" within the meaning of s 9-10(2)(f)<sup>32</sup> and the parties' agreement in relation to the third question was correct.

46 Fourthly, the transfer of each Fijian bank note was a supply in relation to rights. The relevant question is one of characterisation. Questions of characterisation, like questions of construction, with which they are closely linked, can readily strike different minds differently.

47 The trial judge and the majority in the Full Court of the Federal Court treated the supply of the pieces of paper as being "the supply", and the rights as being merely a consequence or incident of that supply. The transaction should be characterised differently. The legal substance of the transaction was the supply of rights. The rights supplied were the rights enjoyed by the holder of the currency as created by the statute law of Fiji. The handing over of the pieces of paper constituted, evidenced, and was not capable of disaggregation from, the supply of rights. Apart from those rights, the pieces of paper had little value. They might have been used to stop an uneven table wobbling, or to jam shut a loose door, or to amuse small children, or to light a cigar. If the currency included coins, the coins might have been used to turn stiff screws or to lay on railway lines for the purpose of being flattened. But uses of that kind, which are very remote from their real purpose, would not prevent both the pieces of paper and the coins from being almost worthless. The supply of the currency was a

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30 See Emmett J's account in *Travelex Ltd v Federal Commissioner of Taxation* (2008) 71 ATR 216 at 223 [29], and see also reasons of Crennan and Bell JJ at [83] below.

31 References to regulations are references to A New Tax System (Goods and Services Tax) Regulations 1999 (Cth).

32 These provisions are set out above at [14]-[17].

supply in relation to the rights it gave because these rights constituted the pith and substance of the transaction.

48 The Solicitor-General of the Commonwealth referred to s 9-10(2)(e) of the Act. It provides that "supply" includes "a creation, grant, transfer, assignment or surrender of any right". He submitted that unless "a supply is one which involves the creation, grant, transfer, assignment or surrender of any right it is not one which is made in relation to rights for the purpose of item 4(a) of the table in s 38-190." He submitted that any supply of rights was incidental to the supply of the bank notes. This submission appealed to the trial judge, who said that the rights which the holder of the Fijian bank notes had could not be said<sup>33</sup>:

"to be the subject of any transfer or assignment by Travelex, merely because they are incidents that pass with ownership or possession of the bank notes. As the owner of a chattel, such as a book, a person is entitled to handle, read and deal with the book, something that the person, if not the owner, could not do without the consent or licence of the owner. A supply of a book would not be a supply that was made *in relation to* the right to handle or read the book. It would be a supply of goods. A supply in relation to rights must be something more than the supply of goods the ownership of which has incidents that might in some senses be described as rights. An incident that is the consequence of a supply, whether or not that incident can fairly be characterised as a right, is not something in relation to which the supply is made."

The majority in the Full Court accepted the conclusion, but not every step in the reasoning<sup>34</sup>. This state of affairs has the following difficulties.

49 One difficulty, as Mansfield J, dissenting in the Full Court, pointed out, with some force, is that the analysis based on the book example is not of much assistance because a book is goods, and the parties agreed that the bank notes were not goods<sup>35</sup>.

50 There is another difficulty in the book analogy. To transfer a book transfers no more than a right of ownership. But to transfer currency does more than transfer the right of ownership of the pieces of paper: it transfers the rights

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33 *Travelex Ltd v Federal Commissioner of Taxation* (2008) 71 ATR 216 at 226 [46] (emphasis in original).

34 *Travelex Ltd v Federal Commissioner of Taxation* (2009) 178 FCR 434 at 444-446 [49]-[54] per Stone J (Edmonds J concurring).

35 *Travelex Ltd v Federal Commissioner of Taxation* (2009) 178 FCR 434 at 439-440 [24].

associated with legal tender. To use currency is to employ it in discharging debts, acquiring goods or services, and creating new debts. For the transferee to "use" the legal tender is to exercise those rights – it is to discharge obligations owed by the transferee or create new obligations in others. To use a book is to read it and keep it without altering the owner's legal relations with anyone else. To use currency is to spend it or transfer it to others as a means of altering the owner's legal relations with others.

51 Another difficulty is that the majority in the Full Court considered that an assignment of the copyright in a book would be a supply "in relation to rights irrespective of whether ownership of the book had also been transferred to the assignee of the copyright."<sup>36</sup> Indeed, it is a supply that is made *of* rights. The transfer of bank notes is a supply *of* rights – and hence it falls within the wider expression "supply that is made *in relation to* rights".

52 A further difficulty is that it is not clear why recourse is had to s 9-10(2)(e) of the definition of "supply" when it is common ground that s 9-10(2)(f) of the definition applies, since the supply here was financial supply. There is no reason to narrow one limb of that definition by reference to another, or to narrow the meaning of "supply that is made in relation to rights" in item 4(a) of the table in s 38-190(1) by reference to one limb of the definition of "supply" when it is agreed that the supply in question falls within another.

53 Finally, Mansfield J correctly pointed out that the Solicitor-General's argument is flawed in that, if the argument were sound, the language of item 4(a) would have reflected the language of s 9-10(2)(e); but it does not<sup>37</sup>.

54 The Solicitor-General of the Commonwealth also submitted that a supply wholly of foreign currency was a financial supply which was input taxed under Div 40. However, this does not prevent the supply being GST-free, and a supply which is both GST-free and input taxed is treated as GST-free by reason of s 9-30(3). From one angle, the point of the Solicitor-General's submission was to illuminate policy aspects of the legislation. However, policy considerations, except so far as they emerge from the statutory language, must give way to the clear words of the Act discussed above. And if policy questions raised by the statutory language are to be considered, there is force in what Mansfield J, dissenting in the Full Court, said. He pointed out that if the bank notes had been goods, they would have been GST-exempt by reason of s 38-185(1), and asked rhetorically what legislative policy could be "behind a supply of bank notes in the

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36 *Travelex Ltd v Federal Commissioner of Taxation* (2009) 178 FCR 434 at 445 [51].

37 *Travelex Ltd v Federal Commissioner of Taxation* (2009) 178 FCR 434 at 439 [20].

17.

circumstances not being GST-free, when exported goods and services generally are GST-free."<sup>38</sup>

55 But from another angle the Solicitor-General's submission went further. The submission was that the supply of money was "an input taxed financial supply and not one capable of being transformed into a 'supply that is made in relation to rights'" within the meaning of item 4(a) of the table in s 38-190(1). The submission did not satisfactorily explain why this conclusion followed.

56 Fifthly, the rights evidenced by the currency were for use outside Australia: Mr Urquhart acquired the currency with the intention of spending it in Fiji, and that intention was confirmed by the fact that he did spend it there.

57 The appeal should be allowed, the orders made in the courts below should be set aside, the declaration sought by the appellant should be made, and the respondent should pay the appellant's costs in all courts.

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38 *Travelex Ltd v Federal Commissioner of Taxation* (2009) 178 FCR 434 at 439 [23].

58 CRENNAN AND BELL JJ. The issue before the Court is whether a supply of  
Fijian bank notes, by the appellant to a customer, on the departures side of the  
Customs barrier at Sydney International Airport was GST-free under *A New Tax  
System (Goods and Services Tax) Act 1999* (Cth) ("the GST Act"). A majority of  
the Full Court of the Federal Court of Australia (Stone and Edmonds JJ,  
Mansfield J dissenting) found that the supply was not GST-free.

The facts

59 The relevant facts in this matter are not in dispute.

60 The appellant is engaged in the business of foreign exchange transactions.  
It leases premises in the secure departures area of Sydney International Airport  
from Sydney Airport Corporation Limited and operates a currency exchange  
business there ("the Travelex counter"). Only people who have a valid boarding  
pass for an outgoing international flight and who have cleared the Customs  
barrier, or people who have arrived in Australia on an international flight and are  
awaiting an outward international flight, can have access to the Travelex counter.

61 On 25 November 2007 Mr Geoffrey Urquhart, an employee of the  
appellant, flew from Sydney to Fiji. After checking in with the airline with  
which he was flying to Fiji, he continued on to the secure area of the departures  
side of Sydney International Airport. After showing his departure form, boarding  
pass and passport at the Customs barrier, and following luggage inspection, he  
was allowed to go to the secure departures area to wait for his flight.

62 Having entered the departures area, Mr Urquhart went to the Travelex  
counter to purchase Fijian currency to use in Fiji. He purchased 400 Fijian  
dollars in bank notes for which he paid AU\$339.65, which included eight  
Australian dollars as commission.

63 At the time of purchasing the Fijian bank notes, it was Mr Urquhart's  
intention to have adequate Fijian cash on hand at the end of his visit to Fiji so  
that he could pay cash for a taxi to the airport and could make other purchases in  
the event that his flight was delayed. Mr Urquhart flew from Australia to Fiji  
shortly after purchasing the Fijian dollars at the Travelex counter. He carried the  
Fijian bank notes with him. While in Fiji, Mr Urquhart used the Fijian bank  
notes to pay for taxis, lunch, water and pre-dinner drinks, and to purchase office  
materials which he needed for the work that he was undertaking while he was in  
Fiji.



The GST Act

64 In *Federal Commissioner of Taxation v Reliance Carpet Co Pty Ltd*<sup>39</sup>, this Court approved the statement that under the GST Act "what generates the tax liability (and the obligations of recording and reporting), is not consumption but a particular form of transaction, namely supply"<sup>40</sup>.

65 Section 7-1 of the GST Act provides that GST is payable on taxable supplies. A supply takes "any form of supply whatsoever" (s 9-10(1)) and relevantly includes "a creation, grant, transfer, assignment or surrender of any right" (s 9-10(2)(e)) and "a financial supply" (s 9-10(2)(f)). A New Tax System (Goods and Services Tax) Regulations 1999 (Cth) ("the GST Regulations") set out the requirements for a financial supply (discussed below). Section 9-10(4) of the GST Act provides that "a supply does not include a supply of money unless the money is provided as consideration for a supply that is a supply of money". "Money" is defined in s 195-1 to include "currency (whether of Australia or of any other country)".

66 Section 9-5 of the GST Act, under the heading "Taxable supplies", provides:

"You make a *taxable supply* if:

- (a) you make the supply for \*consideration; and
- (b) the supply is made in the course or furtherance of an \*enterprise that you \*carry on; and
- (c) the supply is \*connected with Australia; and
- (d) you are \*registered, or \*required to be registered.

However, the supply is not a \*taxable supply to the extent that it is \*GST-free or \*input taxed."<sup>41</sup>

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39 (2008) 236 CLR 342 at 346 [3] per Gleeson CJ, Gummow, Heydon, Crennan and Kiefel JJ; [2008] HCA 22.

40 *Sterling Guardian Pty Ltd v Commissioner of Taxation* (2006) 149 FCR 255 at 258 [15] per Heerey, Dowsett and Conti JJ.

41 Asterisked terms are defined in the Dictionary in s 195-1.

The exception in the final sentence of s 9-5 is of particular relevance in this appeal because, as explained below, a "financial supply" is input taxed. It was common ground that the supply of foreign currency was a "supply" under s 9-10 of the GST Act, being a "financial supply", and that there was consideration in respect of that supply.

67 Section 9-30 sets out when a supply is GST-free or is input taxed. An input taxed supply carries no entitlement to an input tax credit on the part of the supplier for things acquired or imported to make the supply (ss 11-15(2)(a) and 15-10(2)(a)). Section 9-30(1)(a) relevantly states that a supply is GST-free if it falls under Div 38 of the GST Act. Section 9-30(2)(a) relevantly provides that a supply is input taxed if it is input taxed under Div 40. If a supply would be both GST-free and input taxed it is treated as GST-free (s 9-30(3)). Section 38-1, under the heading "What this Division is about", indicates that a supply that is GST-free attracts no GST but that an entitlement to an input tax credit for anything acquired to make the supply is not affected. Similarly, s 40-1 indicates that a supply that is input taxed is free of any obligation to pay GST but that there is no entitlement to any input tax credit for anything acquired or imported to make the supply.

68 Section 40-5(1) provides that a "financial supply" is "input taxed" and sub-s (2) provides that "**Financial supply** has the meaning given by the regulations." However, by virtue of s 9-30(3)(a), referred to above, a "financial supply" would not be input taxed to the extent that it is also GST-free. The rationale for and the effect of treating financial supplies as input taxed supplies have both been explained by Hill J in *HP Mercantile Pty Ltd v Commissioner of Taxation*<sup>42</sup>.

69 Regulation 40-5.02 provides that: "An **interest** is anything that is recognised at law or in equity as property in any form." Under the heading "Financial supply providers", reg 40-5.06 relevantly provides:

"(1) An entity, in relation to the supply of an interest that was:

- (a) immediately before the supply, the property of the entity; or
- (b) created by the entity in making the supply;

is the **financial supply provider** of the interest."

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42 (2005) 143 FCR 553 at 558 [16]-[17].

21.

Relevantly, reg 40-5.09, under the heading "What supplies are financial supplies", provides:

- "(1) The provision, acquisition or disposal of an interest mentioned in subregulation (3) or (4) is a financial supply if:
  - (a) the provision, acquisition or disposal is:
    - (i) for consideration; and
    - ..."

70 For the purpose of sub-reg (1) of reg 40-5.09, under item 9 of a table set out in sub-reg (3), an interest includes an interest in or under "Australian currency, the currency of a foreign country, or an agreement to buy or sell currency of either kind".

71 Division 38, subdiv 38-E of the GST Act deals with "Exports and other supplies for consumption outside Australia". Of particular relevance is s 38-190, which deals with "Supplies of things, other than goods or real property, for consumption outside Australia". A "thing" is defined in s 195-1 as meaning "anything that can be supplied or imported", thus the expression is not confined to tangible objects. References to a thing or things in these reasons follow that definition. Section 38-190(1) provides that items listed in the third column of the table set out in s 38-190(1) are GST-free "except to the extent that they are supplies of goods or real property". There are five "Items" and "Topics" addressed in s 38-190(1). Item 4 of the table in s 38-190(1), which is the "Topic" with which this matter is concerned, deals with "Rights". The GST-free supplies covered in the third column of item 4 relevantly include:

- "a supply that is made in relation to rights if:
  - (a) the rights are for use outside Australia; or
  - ..."

### The question

72 The question, posed at each level of the proceedings, is whether the supply of Fijian bank notes, in the circumstances of this case, was "a supply that is made in relation to rights" within the meaning of item 4(a) of the table in s 38-190(1) of the GST Act. It was common ground that the supply of bank notes was for use outside Australia and that that supply was not "a supply of goods" within the meaning of the GST Act.

73 The primary judge (Emmett J) refused to order a declaration that the Fijian currency transaction was "a supply that is made in relation to rights" within the meaning of item 4(a). After expressing the view that the transaction did not involve a right within the meaning of s 9-10(2)(e), his Honour then considered that, before a supply can be said to be made in relation to rights within item 4(a), "the right must bind the parties in some way."<sup>43</sup>

74 In the Full Court, Stone J and Edmonds J, for reasons which differed in some respects, agreed generally with the primary judge. Edmonds J essayed a view that a supply or acquisition of money is to be given "quarantined status under the GST Act"<sup>44</sup>. This view was not embraced by the Commissioner in this Court.

75 Mansfield J would have allowed the appeal. His Honour said that he attached significance to the fact that the purpose of the GST Act is to tax consumption in Australia<sup>45</sup>. In particular, his Honour rejected the Commissioner's contention that the phrase "supply that is made in relation to rights" should be construed by reference to the supply referred to in s 9-10(2)(e), so that item 4(a) of the table in s 38-190(1) could apply only if the particular supply fell within the terms of s 9-10(2)(e)<sup>46</sup>. His Honour asked rhetorically what would be the legislative policy behind a supply of bank notes in the circumstances not being GST-free when exported goods and services generally are GST-free<sup>47</sup>.

76 Although we do not agree with everything said by the majority members of the Full Court, for the reasons which follow, the majority was correct to uphold the primary judge in finding that the supply of Fijian bank notes made by the appellant was not "a supply that is made in relation to rights" within item 4(a).

77 The appellant contended that the first step for determining whether the supply of the Fijian bank notes was a "supply that is made in relation to rights" was to analyse the legal nature of a transaction in which bank notes were

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43 *Travelex Ltd v Federal Commissioner of Taxation* (2008) 71 ATR 216 at 226 [49].

44 *Travelex Ltd v Federal Commissioner of Taxation* (2009) 178 FCR 434 at 447 [61].

45 *Travelex Ltd v Federal Commissioner of Taxation* (2009) 178 FCR 434 at 436-437 [11]-[14].

46 *Travelex Ltd v Federal Commissioner of Taxation* (2009) 178 FCR 434 at 438 [19].

47 *Travelex Ltd v Federal Commissioner of Taxation* (2009) 178 FCR 434 at 439 [23].

negotiated and the rights of a holder of a bank note. Negotiability and the ability to use money as a medium of exchange were characterised as central to the value of a bank note and legal tender was described as an enhanced level of negotiability supported by the State. It was contended that, as a matter of law, bank notes and dealings with them involve or affect rights.

78 The second step in the appellant's argument was to observe that item 4(a) neither defines nor confines the kind of rights to which it refers. It followed, it was submitted, that item 4(a) can include public and private law rights as well as legal or equitable rights and rights arising under overseas legal systems.

79 As a third step in the argument, the appellant relied on policy considerations evidenced by the aim of subdiv 38-E (ss 38-185 to 38-190) to provide relief from both output and input taxation of supplies which are made in Australia, but consumed overseas.

80 The Commissioner relied on an affinity between item 4(a) and s 9-10(2)(e) of the GST Act and contended that, unless a supply is one which involves "a creation, grant, transfer, assignment or surrender of any right", it is not one made in relation to rights for the purposes of item 4(a). It was contended that the rights identified by the appellant in relation to bank notes are not rights for the purposes of item 4(a) because negotiability is a functional attribute of a bank note rather than a right and legal tender is an incident of the sovereignty of Fiji to regulate its own currency.

81 Alternatively, it was contended that such rights in respect of bank notes as were identified by the appellant were incidental to the actual supply of the bank notes. Finally, it was submitted that the appellant's supply to its customer was a supply of money as defined by s 195-1 of the GST Act, which, by virtue of ss 9-10(2)(f), 9-10(4) and 9-5 and item 9 of the table in reg 40-5.09(3), was an input taxed financial supply not capable of being transformed into a "supply that is made in relation to rights" for the purposes of item 4(a).

82 Determining the question essentially involves the construction of item 4(a). As observed by this Court<sup>48</sup>, the surest guide to legislative intention is the language which has actually been employed in the text of the legislation. A decision on the meaning of the language employed must begin by examining the

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48 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; [2009] HCA 41.

context<sup>49</sup>, considered in its widest sense<sup>50</sup>, which will include the general purpose and policy of the provision<sup>51</sup>.

Bank notes and rights

83       Fijian bank notes are issued under the power conferred on the Reserve Bank of Fiji by s 22 of the *Reserve Bank of Fiji Act* 1983 (Fiji)<sup>52</sup> to issue currency in Fiji which, in the case of notes, "shall be legal tender in Fiji" under s 24 of that Act "for the payment of any amount". Under s 27, the Reserve Bank is required to issue, reissue and exchange on demand, without charge, currency which it has issued.

84       Money in the form of bank notes is essentially a medium of exchange whatever the currency in which it is circulated<sup>53</sup>. The Commissioner did not contend that the Fijian currency should be treated as a commodity. Legal tender is concerned with "the prescription of that which is, at any particular time, to be a lawful mode of payment within a polity."<sup>54</sup> The Fijian bank notes had the characteristic of negotiability and the status of legal tender in Fiji. There is no doubt that the bank notes issued to Mr Urquhart by the appellant could be used by him to discharge debts incurred in Fiji.

85       Leaving aside the possibility of tracing money received in bad faith or for no consideration, possession of money denotes ownership of money and a person

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49   *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28.

50   *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; [1997] HCA 2.

51   *Commissioner for Railways (NSW) v Agalinos* (1955) 92 CLR 390 at 397 per Dixon CJ; [1955] HCA 27, quoted with approval in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ.

52   Cf s 44 of the *Reserve Bank Act* 1959 (Cth).

53   *Camdex International Ltd v Bank of Zambia* [1997] CLC 714 at 732 per Phillips LJ. See also Proctor, *Mann on the Legal Aspect of Money*, 6th ed (2005) at 44-45 [1.61]. Cf *Caltex Ltd v Federal Commissioner of Taxation* (1960) 106 CLR 205 at 220 per Dixon CJ; [1960] HCA 17.

54   *Watson v Lee* (1979) 144 CLR 374 at 398 per Stephen J; [1979] HCA 53.

receiving money is under no duty to inquire into title<sup>55</sup>. The common law approach to title exemplified in the maxim *nemo dat quod non habet* does not apply to negotiable chattels and securities, as first recognised in respect of money and bank notes<sup>56</sup>.

86 It is possible to speak of a person having a proprietary right in money, as a medium of exchange, whether the money is in the form of coins, bank notes or an incorporeal bank balance<sup>57</sup>. In describing the distinguishing characteristics of money and negotiable instruments, as personal property, Sir Roy Goode has stated<sup>58</sup>:

"[P]ersonal property divides broadly into two groups: tangible movables (goods and money), and intangibles, often termed 'choses in action'. However, some intangibles are more concrete than others. These are rights to money, goods or securities which are locked up in a document to the extent that the document is considered to represent the right, which thus becomes transferable by transfer of the document itself. Rights so embodied may conveniently be termed 'documentary intangibles', and their significance lies in the fact that the document which manifests them is to most intents and purposes equated with goods and is susceptible to the same remedies of specific delivery, damages for conversion and the like."

87 The phrase "documentary intangible" encompasses the idea that the holder or owner of a bank note not only has a chattel but also has "rights of enforcement" which can include enforcing "its character as a chose in action by suing on the legal obligation which the note embodies."<sup>59</sup> As with a bond, property in bank notes passes by delivery so that "[w]hoever owns the paper owns the obligation"<sup>60</sup> embodied in the paper. Contemporary electronic arrangements are such that a transfer of money occurs with the entry of a credit

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55 *Sinclair v Brougham* [1914] AC 398 at 418 per Viscount Haldane LC.

56 *Miller v Race* (1758) 1 Burr 452 [97 ER 398]. See also *Banque Belge v Hambrouck* [1921] 1 KB 321 at 329 per Scrutton LJ.

57 Fox, *Property Rights in Money*, (2008) at 7 and 23.

58 Goode *on Commercial Law*, 4th ed (2009) at 32.

59 Fox, *Property Rights in Money*, (2008) at 23.

60 *Perpetual Trustee Co (Ltd) v Federal Commissioner of Taxation* (1932) 47 CLR 402 at 414 per Dixon J; [1932] HCA 19.

in the payee's account and the entry of a corresponding debit in the payor's account<sup>61</sup>.

88 The appellant is correct in the first step in its argument, namely in characterising the holder or the owner of the bank notes issued by the Reserve Bank of Fiji as having certain rights generally of the kind described above. In particular, the holder or owner of a Fijian bank note has an entitlement to negotiate the bank note and to rely on its status as legal tender in Fiji. It is not necessary to determine a disputed issue as to whether the Fijian bank notes were promissory notes separately giving rise to rights in that capacity<sup>62</sup>. They were not in evidence, therefore the Court was not in a position to know precisely what appears on them. The appellant's position was that its case did not depend on any decision about whether the bank notes have the characteristics of promissory notes. In any event, there was the statutory obligation under s 27 of the *Reserve Bank of Fiji Act*.

89 The Commissioner's description of the negotiability of bank notes and the ability to deploy them as legal tender in Fiji as functional attributes of a bank note rather than rights focuses insufficiently on the holder's or owner's entitlement to enforce obligations embodied in the bank notes. Such entitlements are accurately described as rights. However, that does not conclude the question of whether such rights are rights for the purposes of item 4(a).

90 Before turning to consider what is covered by the expression "a supply that is made in relation to rights" under item 4(a), it needs to be noted that the expression "made in relation to" is a wide one denoting a connection between "a supply" and the "rights". The precise relationship between the two will be governed by the context in which the expression is used.

91 The critical issue as framed by the parties is whether the expression "a supply that is made in relation to rights" is to be construed widely as a supply made in relation to any public or private law rights or legal or equitable rights or rights arising under an overseas legal system (the appellant's construction), or to be construed more narrowly as a supply made in relation to the "creation, grant, transfer, assignment or surrender of any right", which is the language of s 9-10(2)(e) (the Commissioner's construction).

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61 *Customs and Excise Commissioners v FDR Ltd* [2000] STC 672 at 686-687 [36] per Laws LJ. See also *Momm v Barclays Bank International Ltd* [1977] QB 790.

62 As to which see *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452. See also *Bank of Canada v Bank of Montreal* [1978] 1 SCR 1148.



Sections 9-10(2) and 38-190(1)

92 Because the GST Act imposes tax on taxable supplies, it is essential that liability be determined by reference to a clear intention to impose the tax<sup>63</sup>. It is just as important to determine a clear legislative intention to exempt a supply from taxation as it is to determine a clear intention to impose tax.

93 The table in s 38-190(1) refers at various points to "goods" (item 1), "real property" (item 1), "rights" (item 4(a)), and "services" (item 5). Elsewhere in the legislation each of those terms is deployed in the context of determining the meaning of supply (s 9-10(2)) and the meaning of acquisition (s 11-10). It is convenient to now set out fully s 9-10(1) and (2), which deal with the meaning of supply:

- "(1) A *supply* is any form of supply whatsoever.
- (2) Without limiting subsection (1), *supply* includes any of these:
  - (a) a supply of goods;
  - (b) a supply of services;
  - (c) a provision of advice or information;
  - (d) a grant, assignment or surrender of \*real property;
  - (e) a creation, grant, transfer, assignment or surrender of any right;
  - (f) a \*financial supply;
  - (g) an entry into, or release from, an obligation:
    - (i) to do anything; or
    - (ii) to refrain from an act; or
    - (iii) to tolerate and act or situation;
  - (h) any combination of any 2 or more of the matters referred to in paragraphs (a) to (g)."

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63 *Hepples v Commissioner of Taxation* (1990) 22 FCR 1 at 22 per Gummow J and the cases there referred to.

94           Reading s 9-5 (set out earlier) and s 9-10(1) and (2) together indicates that the meaning of supply in s 9-10 is relevant for the purposes of identifying a taxable supply, a GST-free supply or an input taxed supply.

95           Understanding the use of each of the terms "goods", "real property", "rights" and "services", in the table in s 38-190(1), requires consideration of the use of those same terms as set out in s 9-10(2), and consideration of any relevant statutory definitions in s 195-1. Both sections are contextually important for construing s 38-190. If the terms "goods", "real property", "rights" and "services" were to have different meanings in the legislation, depending on whether they were being used in the context of imposing tax, or in the context of indicating GST-free status, that fact would need to emerge clearly from the legislation. The overall structure of the legislation, in the absence of indications to the contrary, favours construing consistently terms which are repeated in the legislation.

96           The expression "rights" is not defined in the GST Act. The word "right", and its plural, "rights", are familiar in legal discourse and are capable of wide application. It is possible to speak of "the right to vote" or "the right of free speech". Such rights exist by operation of, or under, the law. No transaction is required for the bestowal or enjoyment of such rights. Well-understood distinctions are made between proprietary rights and personal rights, and between legal and equitable rights. Many rights are transmissible from one person to another. Generally speaking, for legal purposes, a right is an entitlement supported by the law.

97           The formula in s 9-10(2)(e) indicates that the supplier involved in such a supply has the legal capacity to "create, grant, transfer, assign or surrender" a right alone or, as provided in s 9-10(2)(h), in combination with other things. Therefore, to fall within s 9-10(2)(e) a right, whether it be legal or equitable, or could be otherwise described, must be transmissible by the supplier.

98           Section 9-10(2)(e) operates to distinguish a supply of any right from a supply of goods (s 9-10(2)(a)), or a supply of services (s 9-10(2)(b)), or a supply by provision of advice or information (s 9-10(2)(c)), or a supply by a grant, assignment or surrender of real property (s 9-10(2)(d)). A supply of any right under s 9-10(2)(e) is also distinguished from a financial supply under s 9-10(2)(f), which, by reference to the definition of financial supply in reg 40-5.09 (relevantly extracted above), covers "[t]he provision, acquisition or disposal of an interest mentioned in subregulation (3) or (4)" of reg 40-5.09 (reg 40-5.09(1)). That a supply under s 9-10(2) can include a combination of two or more matters distinguished in pars (a) to (g) of s 9-10(2) (s 9-10(2)(h)) does not rob the individual examples of supply of their distinctiveness.

99 From both the language of s 9-10(2)(e) and its placement in s 9-10(2), it is clear that a "right" for the purposes of the GST Act can exist independently of goods, services or other things or forms of supply. A right can be a "thing" within the meaning of the legislation and must itself be capable of "creation, grant, transfer, assignment or surrender". The language of s 9-10(2)(e) also indicates that a right which is created, granted, transferred, assigned or surrendered by a supplier is the direct object of the supply.

100 A paradigm example of "the supply of a right" as covered by s 9-10(2)(e) would be the supply of a right to credit. A right to credit might be regarded as a supply of a service. It is a particular service being a financial supply, included in item 2 of the table in sub-reg (3) of reg 40-5.09. It is a financial supply of a right. The supplier in that context must have the legal capacity to create or grant, or for that matter to transfer or assign, a right to credit. A right to credit can be the direct object of a supply. A right to credit is capable of existing as a thing for the purposes of the GST Act, independently of other things or forms of supply, and is capable of transfer or assignment alone or in combination with other things. Such a right, for use overseas, is capable of falling within item 4(a) of the table in s 38-190(1).

101 Not all rights can exist independently of other forms of supply. Just as a holder or owner of bank notes can be described as having certain rights, an owner of goods equally can be described as having certain rights. These include not only passive rights of ownership to enjoy or sell or give away the goods but also other rights. An owner and claimant in respect of goods may recover their value as damages, and an owner and claimant in respect of very special goods may obtain an order for specific delivery<sup>64</sup>. An owner of defective goods may have a right of action against a manufacturer. However, none of the rights that an owner of goods has converts "a supply of goods" under the GST Act into "a supply of rights", as identified in s 9-10(2)(e).

102 In each case, the holder or owner of bank notes, and the owner of goods, has certain rights which are the incidents of ownership of the corporeal item – the bank notes, the money, on the one hand, and the goods on the other. A supplier of such corporeal items will not necessarily know what incidents of ownership an acquirer will exercise. Rights which are the incidents of ownership of a thing are not themselves separate things, within the meaning of the GST Act, which can be transmitted independently of the supply of the thing owned.

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64 *Doulton Potteries Ltd v Bronotte* [1971] 1 NSWLR 591.

103 The construction of s 9-10(2)(e) explained above is fortified by noting some similarity of phrasing in s 9-10(2)(d), which covers "a grant, assignment or surrender of real property". "Real property" is defined in s 195-1 as including:

- "(a) any interest in or right over land; or
- (b) a personal right to call for or be granted any interest in or right over land; or
- (c) a licence to occupy land or any other contractual right exercisable over or in relation to land."

Insofar as rights are covered and distinguished from interests, it is plain that a supplier in respect of s 9-10(2)(d) must have the legal capacity to grant, assign or surrender the rights encompassed by the expression "real property" and such rights would necessarily be the direct object of the supply.

104 The word "rights" in the item 4(a) expression "a supply that is made in relation to rights" is capable of meaning public and private law rights, legal or equitable rights, or rights arising under overseas legal systems, as contended by the appellant in the second step in the argument. However, a "supply of rights" encompassed by s 9-10(2)(e), as construed above, would not include the right to negotiate bank notes or a right to rely on their status as legal tender in Fiji. These were described by the appellant as "the two core legal rights which holders of the notes possess." Both rights are incidents of ownership capable of transfer by delivery of the notes, but they are not rights which, for the purposes of the GST Act, can exist independently of the supply of bank notes and which themselves are separately capable of "creation, grant, transfer, assignment or surrender". In the item 4(a) expression under consideration, "rights" means rights which can exist independently of goods, services or other things or forms of supply and which are separately capable of "creation, grant, transfer, assignment or surrender". Such rights are capable of being the direct object of a supply.

105 In our view the expression "made in relation to" does not broaden the meaning of "rights" for the purposes of item 4(a), beyond what is encompassed by the words used in s 9-10(2)(e). Applying the reasoning above to this case, the fact that there are rights which are the incidents of ownership of bank notes does not convert a financial supply of foreign currency into a financial supply made in relation to rights. Accordingly, the supply of Fijian bank notes is an input taxed financial supply which does not fall within item 4(a) of the table in s 38-190(1).

106 It should be mentioned that the third point relied upon by the appellant, namely policy considerations which, it was argued, could be expected to lead to the equivalent treatment of goods for use overseas and bank notes for use overseas, is answered in part by the distinction between taxable supplies, which

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includes supplies of goods, and input taxed supplies, which includes financial supplies. It also has to be noted that the export of financial supplies of rights, such as a right to credit, would be GST-free.

107           The appeal should be dismissed with costs.