Interpreting GST Law in Australia

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The Australian GST has been operating for a relatively short period of time, since 1 July 2000, and by its seventh year of operation we have experienced the usual trend of increasing litigation and issue complexity that occurs as a tax develops.

The approach to interpretation that has been taken to date by the Courts and Tribunals considers the words of the provision under consideration chosen by Parliament, their context within the Act in which the provision is found and the underlying policy of the law as gleaned from extrinsic materials. The Australian Taxation Office (Tax Office) approach to interpretation endeavours to be consistent with this judicial approach.

In my analysis, I include a brief discussion of the history of interpretation of taxation statutes in Australia followed by specific reference to a number of GST cases.

A brief history of statutory interpretation

In Australia, as mentioned, the modern approach to the interpretation of statutes includes, in conjunction, consideration of the words of the provision, the context of those words within the Act and the policy of the law as gleaned from extrinsic materials. In all cases, the search is for the intention of Parliament.

Although the intention of Parliament as the subject of inquiry is acknowledged much earlier in Australian jurisprudence,\(^2\) in the taxation context, the purposive approach may be seen as having its genesis in the income tax case of Cooper Brookes (Wollongong) Pty Ltd v. Commissioner of Taxation of the Commonwealth of Australia (Cooper Brookes)\(^3\) in which the legislative intent and natural meaning of the words were highlighted when interpreting the relevant provision.

\(^2\) For example see Amalgamated Society of Engineers v. Adelaide Steamship Company Ltd. & Ors.(1920) 28 CLR 129.
\(^3\) (1980) 147 CLR 297.
In forming its view, the High Court departed from the literal interpretation of the words to give effect to the legislative intent. In the joint judgment of Justices Mason and Wilson, their Honours commented that the literal interpretation would result in an operation of the provision that is ‘capricious and irrational’.4

The approach taken by Chief Justice Gibbs in *Cooper Brookes* sought to avoid an interpretation that would be inconvenient or unjust, if another more appropriate interpretation was available. Gibbs CJ stated:

… if the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, and can be intelligibly applied to the subject matter with which it deals, it must be given its ordinary and grammatical meaning, even if it leads to a result that may seem inconvenient or unjust. To say this is not to insist on too literal an interpretation, or to deny that the court should seek the real intention of the legislature… On the other hand, if two constructions are open, the court will obviously prefer that which will avoid what it considers to be inconvenience or injustice.5

As noted by Justices Mason and Wilson, in the past the literal construction rule was expressed more absolutely6 and their Honours referred to *Amalgamated Society of Engineers v. Adelaide Steamship Company Ltd. & Ors*, by way of example, where Higgins J stated:

The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty

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5 (1980) 147 CLR 297 at 305.
6 (1980) 147 CLR 297 at 319.
to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.  

In relation to Justice Higgins’ statement, Justices Mason and Wilson commented that it would have been better to omit the words ‘even if we think the result to be inconvenient or impolitic or improbable’ because the operation of the statute does contribute to deriving its meaning. Similar to Chief Justice Gibbs, their Honours stated that:

If the choice is between two strongly competing interpretations …the advantage may lie with that which produces the fairer and more convenient operation so long as it conforms to the legislative intention. If, however, one interpretation has a powerful advantage in ordinary meaning and grammatical sense, it will only be displaced if its operation is perceived to be unintended.

In more recent times, the courts have moved to an approach where the syntax, the legislative context and the evident policy are considered in every case regardless of whether there is any ambiguity in the relevant provision. The most commonly cited example of this is the joint judgment of Brennan CJ, Dawson, Toohey and Gummow JJ in CIC Insurance Ltd v. Bankstown Football Club Ltd (CIC Insurance), where their Honours said:

Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses “context” in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. …Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction

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7 (1920) 28 CLR 129 at 161-162.
8 (1980) 147 CLR 297 at 320.
which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent.\textsuperscript{11}

The High Court’s approach in \textit{CIC Insurance} was referred to by the late Justice Hill in the GST case \textit{HP Mercantile Pty Ltd v. Commissioner of Taxation (HP Mercantile)}\textsuperscript{12} that was heard before the Full Federal Court. There, the taxpayer obtained due diligence advice prior to acquiring debts for collection and debt recovery services. At issue was whether the taxpayer was entitled to input tax credits for the acquisitions under \textit{A New Tax System (Goods and Services Tax) Act 1999} (GST Act) and, in particular, whether the sequence of events, in terms of the acquisition and supply, affected the application of the provision relating to denial of input tax credits for acquisitions relating to supplies that ‘would be input taxed’.\textsuperscript{13}

In delivering the leading judgment, Hill J stated:

\begin{quote}
It is clear, both having regard to the modern principles of interpretation as enunciated by the High Court in cases such as \textit{CIC Insurance Ltd v. Bankstown Football Club Ltd} (1997) 187 CLR 384 and s 15AA of the \textit{Acts Interpretation Act 1901} (Cth) that the Court will prefer an interpretation of a statute which would give effect to the legislative purpose, as opposed to one that would not. This requires the Court to identify that purpose, both by reference to the language of the statute itself and also any extrinsic material which the Court is authorised to take into account.\textsuperscript{14}
\end{quote}

\textsuperscript{11} (1997) 187 CLR 384 at 408.

\textsuperscript{12} (2005) 143 FCR 553.

\textsuperscript{13} Referred to as ‘exempt supplies’ in other jurisdictions. The \textit{A New Tax System (Goods and Services Tax) Regulations 1999} provide for acquisition-supplies which are input taxed supplies. Briefly, consideration for a financial interest is something given for the provision, acquisition or disposal of the financial interest. The payment received is consideration for the provision or disposal of the financial interest and the payment made is consideration for the acquisition of the financial interest. The Tax Office view is contained in \textit{Goods and Services Tax Ruling GSTR 2002/2 Goods and services tax: GST treatment of financial supplies and related supplies and acquisitions}.

\textsuperscript{14} (2005) 143 FCR 553 at 564.
The approach taken in *HP Mercantile* was given tacit approval by the High Court in refusing the taxpayer’s application for special leave to appeal against the Full Federal Court’s decision. In particular, Gummow ACJ said:

> A purely textual analysis of section 11.15(5) of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) may give some support to the argument for the applicant. However, as Justice Hill showed in what was the leading judgment delivered in the Full Court, the statutory scheme and legislative context and purpose carry the day for the respondent Commissioner.\(^{15}\)

The importance of all three elements is also underlined by the High Court judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ in *Stevens v. Kabushiki Kaisha Sony Computer Entertainment*\(^{16}\) where their Honours said:

> No particular theory or “rule” of statutory interpretation, including that of “purposive” construction, can obviate the need for close attention to the text and structure of Div 2A [the relevant part of the legislation].\(^{17}\)

Ultimately, the task of the courts and the Commissioner is to construe the language of the statute.\(^{18}\)

As has aptly been noted by Kirby J in *The Queen v. Lavender*\(^{19}\) it is important to take a consistent approach to issues of statutory interpretation and not “…pluck out considerations of "context", "purpose" and "history" arbitrarily, so as to sustain the outcomes of interpretation … in some, but not other, cases.”\(^{20}\)

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16 [2005] HCA 58.
17 [2005] HCA 58 at [30].
In my view, this warning of the need for consistency applies equally to consideration of the syntax, the legislative policy and the legislative context.

This is what Justice Hill did in *HP Mercantile*, deciding the issue regarding debt recovery costs mainly by reference to the text of the provision and the issue regarding due diligence costs by reference to ‘the syntax, the policy and the surrounding legislative context’\(^{21}\), carrying out an extensive examination of other provisions in the GST Act in his search for the legislative policy and context.

To say the task is to establish what the policy is by referring to extrinsic materials such as the Explanatory Memorandum may seem trite, however in practice this can be a difficult and imprecise art. To illustrate, Justice Richard Edmonds, in his speech for the 2005 National GST Intensive, noted that in *ACP Publishing Pty Ltd v. Commissioner of Taxation (ACP Publishing)*,\(^{22}\) despite referring to the Explanatory Memorandum as support for the policy, two very well respected judges, Hill and Gyles JJ, made statements of policy, each with a different emphasis, that lead to opposite outcomes. This prompted Justice Edmonds to highlight an extra-judicial comment by Justice Hill that ‘one person’s policy will be the antithesis of another’s’.\(^{23}\)

The difficulty in achieving a uniform interpretation was recently reinforced by Justice Stone where her Honour postulated:

> There will, however, remain difficulties and irreconcilable differences in views that individual judges have about policy and its implications for the meaning of the language used in the statute.\(^{24}\)

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\(^{21}\) (2005) 143 FCR 553 at 568.
\(^{22}\) [2006] 152 FCR 437.
\(^{23}\) Justice Richmond Edmonds, ‘Five years of GST’, Taxation Institute of Australia 2005 National GST Intensive, Gold Coast, 13 October 2005 at paragraph 45. These remarks were also made by Justice Hill in his paper ‘To Interpret or Translate? The judicial role for GST cases’, Monash University Conference, 5 August 2005.
Therefore, as demonstrated in the above analysis, it is clear the courts’ approach is to balance the syntax, the legislative policy (as revealed by the Explanatory Memorandum and other extrinsic materials) and the legislative context of the provision within the Act.

My objective in highlighting the need for a balanced approach is not to detract from the importance of the legislative policy including the design of the GST as a value added tax. That importance is clearly established.

His Honour Justice Hill recognised the statutory scheme of Australia’s GST as a value added tax in *HP Mercantile* as follows:

> The genus [sic] of a system of value added taxation, of which the GST is an example, is that while tax is generally payable at each stage of commercial dealings (supplies) with goods, services or other “things”, there is allowed to an entity which acquires those goods, services or other things as a result of a taxable supply made to it, a credit for the tax borne by that entity by reference to the output tax payable as a result of the taxable supply... The system of input tax credits thus ensures that while GST is a multi-stage tax, there will ordinarily be no cascading of tax. It ensures also that the tax will be payable, by each supplier in a chain, only upon the value added by that supplier.25

Hill J also described the scheme of a value added tax generally in construing section 11-15 of the GST Act, Australia’s input tax credit provision, as follows:

> Where possible, GST is not to be found embedded in the price or consideration on which output tax is calculated when taxable supplies are made. However, in the case of a taxpayer which makes input taxed supplies, while that taxpayer will not be liable to output tax on the supplies it makes which satisfy the description

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25 (2005) 143 FCR 553 at 557.
of input taxed supplies, that taxpayer will be denied an input tax credit for the tax payable on acquisitions it makes where the necessary relationship exists.26

Tax Office approach

To achieve a coherent fabric of law, we need to take an approach that strikes a balance between the syntax, the legislative policy and context in interpreting the law.

We consider it is erroneous to focus on the syntax to the exclusion of the legislative policy and context, but it is equally erroneous for perceived policy to drive the interpretation without due regard for the words chosen by Parliament and their context within the Act.27 This has been the orthodox approach to interpretation in Australia for some years and was specifically endorsed and applied by Justice Hill.

It is important to acknowledge that the literal and purposive approaches are not in competition with each other. It is not, for example, a case of choosing a purposive approach over a literal approach. As discussed above, it is necessary to take a balanced approach. Justice Stone has made the following observation in relation to this orthodox approach:

It is important to remember that both the purposive and the literal approach are directed to interpreting the language of the statute. The difference is in the extent to which one may look to sources beyond the language for guidance in interpreting the language or must rely just on the language itself. The question is one of degree and requires the exercise of considerable judgment.28

26 (2005) 143 FCR 553 at 565.
27 Refer Michael D'Ascenzo and Steve Martin ‘A unique taxation partnership for the benefit of the Australian community’, ATO/AGS/Counsel Workshop, 3 April 2004 where the Tax Office approach was outlined.
The importance of a balanced approach was also underlined by the joint judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ in Stevens v. Kabushiki Kaisha Sony Computer Entertainment, as mentioned above.\textsuperscript{29}

It can be inferred from these statements by respected judges that the correct approach is not to take one approach over another, but that instead it is prudent to weigh up all the approaches to come to the correct interpretation of the law.

In developing and articulating official interpretations, we consider that, to the extent that the law is able to properly reflect the underlying policy of the Government, we should interpret the law in that way.

In forming our view, we obtain a good understanding of the different ways in which the words of the law might be interpreted, and of the commercial and business impacts of those interpretations. This is an especially important factor for GST, being a tax generally required to be self-assessed by practical business people. As such, where there are alternative interpretations and one is more practical than the other, then the more practical approach or the approach that minimises compliance costs is to be preferred (provided it does not lead to anomalies or unintended consequences).

Where the law is not reasonably capable of reflecting the underlying Government policy, the law must prevail. It is then that we bring that outcome to the Government’s attention through Treasury for the Government to consider whether to amend the law.

In instances where the law is ambiguous, the appropriate avenue for resolution may be to test the interpretation of the law through the courts to obtain judicial

\textsuperscript{29} [2005] HCA 58 at [30].
clarification of the law. Where it is in the public interest to litigate issues of importance, the taxpayer may be offered Test Case Funding.\(^{30}\)

If the outcome of litigation is that the law does not operate to give effect to the policy intent then the Government may wish to evaluate the merit of remedying any defects in the law.

**GST cases**

In the remainder of this paper I discuss some recent GST cases, in particular the factors considered by the courts in reaching their decisions.

*Sterling Guardian Pty Limited v. Commissioner of Taxation*

Shortly after the Full Federal Court decision in *HP Mercantile* discussed above, the Federal Court handed down a decision in *Sterling Guardian Pty Limited v. Commissioner of Taxation (Sterling Guardian)*,\(^{31}\) in which Justice Stone considered the evident policy and legislative context in interpreting the relevant GST provisions.\(^{32}\)

The issue in *Sterling Guardian* was the operation of the margin scheme, which generally seeks to only tax the value added to property on or after 1 July 2000,\(^{33}\) instead of taxing the full value of the supply. In doing so, the Commissioner’s view is that the cost of improvements is not added to the original purchase price for purposes of calculating the value added, that is, the margin.

In *Sterling Guardian*, Justice Stone considered it was necessary to establish whether the applicant’s analysis of the operation of the margin scheme provision

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\(^{30}\) For guidance on preparing applications for Test Case Funding refer to the booklet ‘Test Case Litigation Program’ on www.ato.gov.au.

\(^{31}\) [2005] FCA 1166.

\(^{32}\) [2005] FCA 1166 at [33] - [34].

\(^{33}\) This is the commencement date of the GST Act.
- that the cost of construction (upon which the applicant claimed input tax credits) formed part of the original acquisition cost - was consistent with the legislative scheme and context.  

Her Honour recognised the validity of the Commissioner's approach in interpreting the margin scheme provisions by commenting that it is 'supported by the role of the margin scheme and the context in which it operates' and that the Explanatory Memorandum makes this clear:

The EM ignores the fact that improvements may not only have added to the value of the real property but become, in law, part of the real property. It is not the juridical nature of the improvements that is critical but the fact that they have been brought about pursuant to a taxable supply. The clear thrust of the GST Act, both in its wording and as explained in the EM, is that of a practical business tax imposed with respect to elements of commerce.

If her Honour had instead followed a strict property law interpretation and the meaning of the words without guidance from the legislative scheme and context, then the outcome would have arguably not have been as intended by the legislature. This would be an inappropriate result that would have provided the applicant with a windfall gain. Indeed, this potential to undermine the integrity of the law was recognised in her Honour's conclusion, based upon the extrinsic material, that on the applicant's submission:

the effect of the margin scheme would not merely be to prevent an anomalous burden but to confer an additional benefit in respect of those acquisitions. This result is inconsistent with the purpose of the GST Act as evident in the statutory provisions and as explained in the EM. To my mind the position is clear: in calculating the margin for a supply a taxpayer cannot take into account the cost of a taxable supply 'on which the GST was worked out without applying the margin scheme', namely a taxable supply that yielded input tax credits for the

34 [2005] FCA 1166 at [33].
35 [2005] FCA 1166 at [39].
taxpayer. To hold otherwise would subvert the purpose for which the margin scheme was included in the GST Act.\textsuperscript{36}

The decision in \textit{Sterling Guardian} was upheld on appeal to the Full Federal Court.\textsuperscript{37}

Thus, Justice Stone considered the legislative policy and context, the Explanatory Memorandum and the natural meaning of the words – in alignment with the approach taken in \textit{CIC Insurance} as discussed above. Her Honour’s judgment, based on these factors also followed the statutory scheme of a GST/VAT.\textsuperscript{38}

In a recent speech, Justice Stone elaborated on her judgment stating that:

> Both at first instance and on appeal, the Federal Court refused to be drawn into narrow technical analyses of the law but focused on what it identified as the purpose of the margin scheme.

One of the strongest indicators that the GST Act did not intend that conventional analyses of property rights should prevail over the overall purposes of the Act, at least in relation to the margin scheme, is in the definition of ‘real property’ … The breadth of the definition indicates a rejection of a narrow technical approach in interpreting the provisions of the margin scheme and invites an interpretation that focuses on the practical concerns of the Act.\textsuperscript{39} [Footnote omitted.]

\textit{Marana Holdings Pty Ltd & Anor v. Commissioner of Taxation}

\textsuperscript{36} [2005] FCA 1166 at [45].
\textsuperscript{37} \textit{Sterling Guardian Pty Ltd v. Commissioner of Taxation} (2006) 149 FCR 255.
In Marana Holdings Pty Ltd & Anor v. Commissioner of Taxation (Marana)\(^{40}\) the issue was whether the sale of a home unit created from the conversion of a motel into strata titled units was the supply of new residential premises, which are subject to GST, or a supply of residential premises that had previously been sold as such and therefore an input taxed supply.

In reaching a decision on appeal in the Full Federal Court, Justices Dowsett, Hely and Conti, in their joint judgment, looked to the legislative policy contained within the Explanatory Memorandum to the GST Act, the context and to the natural meaning of the words to establish that the sale was of new residential premises, and not input taxed.

The decision was that a sale of a motel is the supply of commercial residential premises and not the sale of residential premises. If it were instead held that the sale was of residential premises, this would have been in conflict with the legislative policy that those who rent their homes are treated in a like manner to those that own their homes.\(^{41}\) The sale of the motel to the developer was a taxable supply and it was held the motel was not previously sold as residential premises\(^{42}\) and that the subsequent sale of the strata unit was new residential premises.\(^{43}\) The argument (rejected by the court) that, because ‘residential premises’ are referred to in the definition of ‘commercial residential premises’ the latter must be a subset of the former, may be seen as an example of giving undue weight to one aspect of the legislative context at the expense of considerations of policy and the actual words of the definition of residential premises.

\(^{40}\) (2004) 141 FCR 299.
\(^{41}\) Paragraph 5.164 of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998.
\(^{42}\) (2004) 141 FCR 299 at 312.
\(^{43}\) (2004) 141 FCR 299 at 313.
There has also been judicial consideration of the GST treatment of review opportunities, which are provided for in the Australian transitional provisions, of which there are two cases I would like to discuss.

**Commissioner of Taxation v. DB Reef Funds Management Ltd**

The Tax Office’s view in relation to review opportunities was recently tested on appeal in the Federal Court in the case *Commissioner of Taxation v. DB Reef Funds Management Ltd* (*DB Reef*).

In this case, the taxpayer was a lessor of commercial premises. In 1998, the predecessor in title of the taxpayer leased commercial premises to a tenant for a term of two years effective from 24 January 1997. This lease contained an option to renew for a number of additional terms, each of two years. An unusual feature of the lease was that the nominal rental fixed under it in 1997 was considerably higher than the market rent at the time. This was because the original lessor undertook, at its own expense, an extensive fit-out of the premises costing $27 million and sought to amortise the cost over the expected period of the lease. Under the agreement, the lessor was able to invoke a ratchet clause to prevent the rental falling below its original level. The lessee was obliged to reimburse a proportion of the operating costs of the lessor.

Briefly, supplies made under certain contracts signed before GST was introduced were GST-free until the earlier of 1 July 2005 and when a ‘review opportunity’ arose under such contracts. The rationale for this concession was that businesses would otherwise have had to bear the burden of the GST with no opportunity to ‘pass on’ the GST to their customers, since they signed the

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46 This provision was based on section 85 of New Zealand’s *Goods and Services Tax Act 1985*. 
contracts before they could reasonably be expected to have anticipated the impact of GST in negotiating prices under those contracts.

The Tax Office wanted to give business clear guidance about section 13 of the GST Transition Act, and in particular about when a review opportunity occurred under their particular contracts. To this end, the Commissioner released a Public Ruling in June 2000.47

One question the Public Ruling addressed was whether a review opportunity arose under section 13 if only some of the consideration for a supply were reviewable on a particular occasion. The ruling took the view that it would be sufficient if most of the consideration were capable of review.48 The Commissioner considered that this struck a reasonable balance between the interests of the supplier and of the recipient in light of the object of section 13, was commercially realistic in the context of a practical business tax, was supportable as a matter of interpretation and was consistent with the limited overseas case law on a similar provision.

In particular, in Case M5849 the New Zealand Taxation Review Authority (TRA) considered whether an agreement to lease which provided the landlord with a right to review the rent on a specified day during the lease period and on renewal could be described as a ‘general review’ under the New Zealand legislation. The TRA found that the rent was to be reviewed, in the sense that it was to be renegotiated, within certain limits. It also found that the review could be described as ‘a general review of the consideration in money’ because it was a review of most or nearly all the consideration for the supply under the lease. It was stated:

A ‘general review’ means … a review generally, rather than of a specific part or parts of the consideration payable under the lease. A ‘general’ review is not the

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48 Paragraph 152 of GSTR 2000/16.
49 (1990) 12 NZTC 2333.
same as a ‘total’ review of all the consideration, nor is it in certain circumstances the same as a ‘partial’ review of some of the consideration.\textsuperscript{50}

The TRA considered that a review of a minor component of the consideration should be classified as a ‘special review’.

In the view adopted in our Public Ruling, the balance was considered to be reasonable because it would be detrimental to recipients to wholly deny them input tax credits if most of the price of a supply had been reviewed to a GST-inclusive level. Conversely, it would be detrimental to suppliers to impose GST on the whole of a supply if only a small part of the price could be reviewed to reflect the impact of GST.

In \textit{DB Reef}, the Commissioner concluded that the taxpayer was liable to pay GST in respect of the supply made by way of the lease for each of the renewed terms and assessed the taxpayer accordingly. The taxpayer objected and then subsequently appealed to the Federal Court against the Commissioner's disallowance of its objections.

In respect of the issue pertaining to the rent review, the Full Court found in favour of the taxpayer where it was held that there was no review opportunity due to the inability to review 17\% of the consideration for the supply, which was a quantitative component.\textsuperscript{51}

Justice Edmonds, in his leading judgment, considered the purpose of section 13, the context of the provision and the extrinsic materials. In doing so, his Honour also made reference to Justice Hill’s comments in \textit{ACP Publishing}.\textsuperscript{52} However, in contrast to the expansive consideration of Justice Hill in \textit{HP Mercantile}, it appears that Justice Edmonds placed less emphasis on the policy intent in

\textsuperscript{50} (1990) 12 NZTC 2333, at 2338.
\textsuperscript{51} [2006] 152 FCR 437 at 455.
\textsuperscript{52} [2006] 152 FCR 437 at 441.
comparison to the legislative context. In regard to this, the Commissioner also relied upon the policy intent, albeit to a greater degree, in our Public Ruling in taking the view that it was sufficient if most of the value of the consideration was subject to review by the supplier. However, we accept that our interpretation on this aspect of the transitional provision is incorrect and have amended our view accordingly.

**Westley Nominees Pty Ltd & Anor v. Coles Supermarkets Australia Pty Ltd & Anor**

In another recent Full Federal Court decision in relation to review opportunities, *Westley Nominees Pty Ltd & Anor v. Coles Supermarkets Australia Pty Ltd & Anor (Westley v. Coles)*, the Court held, in effect, that a review opportunity arises only if the whole or nearly all of the consideration for a supply is capable of review. An opportunity to review about 52% of the consideration for a supply was not a ‘review opportunity’ within the meaning of section 13.

The Court considered the statutory scheme and drew upon Justice Stone’s comment in *Sterling Guardian* that the GST is a tax on business transactions. Further, as in *DB Reef*, reference was made to Justice Hill’s comments in *ACP Publishing* in establishing the legislative intent of the provision.

Like policy, it seems that the practical business person’s view may depend upon the eye of the beholder. The decisions in both *DB Reef* and *Westley v. Coles* that a market review of rent, albeit not covering the outgoings clause, is not a general review of the consideration for a commercial lease might have surprised

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53 Paragraph 152 of GSTR 2000/16.
54 An Addendum to GSTR 2000/16 was issued on 27/09/2006. See Goods and Services Tax Ruling GSTR 2000/16A2 – Addendum Goods and services tax: transitional arrangements – GST-free supplies under existing arrangements.
55 (2006) 152 FCR 461. The Commissioner was joined as a party in this case. Refer to the Decision Impact Statement on www.ato.gov.au for our approach to the Court’s decision.
many practical business people – many would surely have thought that a market review of the rent is a general review.

On the other hand, the Full Court's conclusion on outgoings under a lease accords with the view taken in our Public Ruling that the outgoings are ‘part of the consideration for a single supply’.\(^57\) The Court noted that its conclusion is consistent with the approach of the English cases on composite and mixed supplies.\(^58\) The Tax Office's Public Ruling on this question also draws on the English cases.\(^59\) To that extent, it is reasonable for us to view the decision to be support for the principles expressed in our Public Ruling.\(^60\) The decision on outgoings might be regarded as one where, again, the correct answer is obtained by asking what, as a matter of substance from the perspective of a practical business person, is the consideration for the supply?

The final case I’d like to discuss concerns supplies of accommodation to non-residents.

**Saga Holidays Ltd v. Commissioner of Taxation**

The central issue in *Saga Holidays Ltd v. Commissioner of Taxation (Saga)*\(^61\) was whether Saga Holidays Limited made a taxable supply when it sold to its customers, being non-residents, the Australian accommodation component of its holiday or touring packages. It was common ground that each subsection of Australia’s taxable supply provision was satisfied except the requirement that the supply be one that is connected with Australia.\(^62\)

\(^57\) Goods and Services Tax Determination GSTD 2000/10 Goods and Services Tax: are outgoings payable by a tenant under a commercial property lease part of the consideration for the supply of the premises?
\(^58\) (2006) 152 FCR 461 at 477.
\(^59\) Goods and Services Tax Ruling GSTR 2001/8 Goods and services tax: apportioning the consideration for a supply that includes taxable and non-taxable parts (GSTR 2001/8). See paragraphs 40 and 41 for English cases referred to.
\(^60\) GSTR 2001/8.
\(^61\) (2005) 149 FCR 41.
\(^62\) Paragraph 9-5(c) of the GST Act.
Saga Holiday Limited’s primary contention was that its supply to overseas tourists did not involve a supply of real property connected with Australia, irrespective of the expansive definition of real property in the GST Act. Saga Holidays Limited argued that the only supply it had made was a supply of a contractual right to services (a right to hotel accommodation upon arrival at each destination) and this contractual right was not created in Australia as provided for in the GST Act. An aspect of Saga’s submissions was focused on the analysis that it supplied a bundle of contractual rights.63

The Commissioner asserted that the proper approach in principle to analysing transactions required a consideration of the ‘substance and reality’ of the relevant supply or supplies – or ‘looking at the actual thing supplied’.64 In relation to this, Conti J stated in his conclusions:

> The interpretation of the GST Act in relation to the critical subject and notion of “taxable supply” requires a reasonably broad and comprehensive perspective to be taken, being a perspective which is also ambulatory in nature, having regard to the parameters of a supplier’s business activities and the transactions in issue. That requirement for a substantive and comprehensive approach, by paying regard to the entirety of a transaction addressed by the legislation, is evident from the judicial dicta appearing in the United Kingdom VAT authorities of Pippa-Dee, Diners Club, Plantifor and Sinclair Collis (in particular in the latter instance from the passage from the European Court of Justice’s reasons for judgment in Stockholm Lindopark that was cited with approval in the speech of Lord Slynn of Hadley) which I have cited. That approach is also apparent from judicial observations of principle appearing in the Australian authorities of HP Mercantile and Sterling Guardian which I have also earlier cited.65

Aside from the obvious reference to overseas jurisprudence to assist in interpreting the Australian GST Act with respect to the fundamental concept of

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63 (2005) 149 FCR 41 at 58.
64 (2005) 149 FCR 41 at 58.
65 (2005) 149 FCR 41 at 88-89.
analysing the substance and reality in light of business practices, Justice Conti’s remarks infer that the definition of supply transcends the boundaries of contract law. The Commissioner’s view in our Public Rulings also follows this approach, where for instance, although contractual matters are considered, in some cases they are not determinative in regard to characterising the supply.66

It might be thought that a trend was emerging in light of the Sterling Guardian and Saga cases of the need to, from the perspective of a practical business person, look to the substance of a transaction rather than focussing too closely on a technical legal analysis of the transaction. In Saga, after all, the tour operator was held to make supplies to travellers of licenses to occupy hotels in Australia notwithstanding it has no interest in any hotel in Australia nor any employees in Australia.

However, contrast the Full Federal Court's approach in Westley v. Coles to the argument that an entity that purchases the freehold interest in a property subject to a lease makes no supply to the tenant. There, the Court identified a supply by way of assumption of an obligation to tolerate an act or situation by the incoming landlord arising by operation of law as the new owner of the reversion.67 Another more straightforward way the Court could have decided the matter was on the basis that, as a matter of substance, the new owner became the lessor in the ongoing supply to the tenant. This would have been consistent with the approach in Sterling Guardian and Saga.

The decision in Saga was appealed to the Full Federal Court and the appeal was heard on 15 August 2006. The judgment on appeal, once available, may reveal more about this issue.

66 See GSTR 2006/9.
Conclusion

In conclusion, as the courts' process in interpreting the GST law illustrates, it is clear that the words chosen by Parliament, their context in the GST Act and the legislative policy must be considered together. The relative weight of these factors is yet to be fully reviewed in the Australian GST judicial system, but it is, I think, likely that the emphasis will vary from case to case as it does in other contexts.

It is also fair to observe that the concept of a practical business person's approach looking to the substance of a transaction rather than embarking upon artificial dissection is an important factor, as it is in overseas jurisprudence. The limits of that principle under Australian GST law are still emerging.