GSTR 2014/3EC - Compendium

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Ruling Compendium – GSTR 2014/3

This is a compendium of responses to the issues raised by external parties to draft GSTR 2014/D3 *Goods and services tax: the GST implications of transactions involving bitcoin*

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

Summary of issues raised and responses

Issue No.	Issue raised	ATO Response/Action taken
Definition of 'money' in section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act)		
1.1	*Bitcoin should be treated as 'money' for the purposes of the GST Act* It was submitted that: • bitcoin is used in the same manner as money and should be treated in the same way under the GST Act; • the Commissioner should not take a strict and narrow interpretation of the definition of 'money' by restricting it in terms of something that is 'currency'; • in arriving at a definition of the word 'money' and how it should be read in the context of section 195-1 of the GST Act, the interpretation of the word 'currency' used in other Acts, while being relevant, should not displace this interpretation in the context of the GST Act, see *R v. Scott* (1990) 20 NSWLR 72. • the definition of 'money' should be interpreted to include concepts that take their value and recognisance by custom and commercial practice,	Bitcoin can be used to acquire goods and services and in this regard could be viewed as serving a similar function as money. However, serving a function similar to that as 'money' is not enough to make something 'money' for the purposes of the GST Act. The ATO's view is that in taking a purposive approach to the interpretation of the term 'money' in the GST Act, the broader legislative context which includes the Currency Act is critical. The Currency Act approach of permitting transactions and payments relating to money in Australia to only be undertaken with either Australian currency or currency of some other country (which the submission concedes bitcoin is neither), gives rise to a *concept* of 'currency' under the Currency Act that aligns with the State theory of money. There is no indication in the GST Act that Parliament intended to recognise as payments of money a category of dealings which fall outside of the Currency Act's framework for money transactions. It would be a peculiar and inconsistent outcome if the GST Act recognised something as money but that thing could not be legally used to fulfil monetary obligations in Australia as either Australian currency or foreign currency under the Currency Act. We have added explanation at paragraphs 98 to 108 to the final Ruling to

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	rather than by reference to the *Currency Act 1965* (Cth); • Bitcoin satisfies this ordinary meaning of money because it is widely used and a generally accepted medium of exchange; and • Bitcoin is functionally a currency, a store of value and a payment system. • a bitcoin transaction is a signed debit from one account resulting in credit to another and so should fall within the scope of subparagraph (e)(ii) of the definition of 'money'. It was further submitted that, based on the comments by Emmett J at paragraph 25 of *Travelex Ltd v. Commissioner of Taxation* [2008] FCA 1961, the ordinary concept of 'money' includes any medium which: • is generally accepted for the exchange of goods and services and payment of debts; • passes freely from hand to hand throughout the community in the final discharge of debts, being accepted equally; and • includes, but is not limited to, 'currency' and 'legal tender'. Under this interpretation 'money' would include bitcoin.	provide further explanation of our view as to the relevance of the Currency Act. Paragraph 100 has been amended to provide context to the quote by Emmett J in *Travelex.* Consistent with the view in TD 2014/D11, bitcoin does not meet the test in *Moss v. Hancock* considered by Emmett J in *Travelex* that the current use and acceptance of bitcoin in the community is sufficiently widespread, and that bitcoin is a generally accepted medium of exchange, to satisfy the ordinary meaning of 'money'. External evidence supports this position. The ATO's reasoning on subparagraph (e)(ii) of the definition of money in section 195-1 of the GST Act is at paragraphs 83 to 95 of the Ruling and has been expanded to take account of submissions received on the application of this part of the definition of 'money'.
1.3	*ATO's interpretation inconsistent with policy of GST Act* It was submitted that the intention of the GST Act supports bitcoin being interpreted as money because: • the definition of 'money' in the GST Act is intended to enlarge the ordinary meaning of the	It is acknowledged that the purpose of excluding money provided as consideration for a supply of goods or services from the definition of 'supply' is to ensure that it is not treated as a taxable supply. However, the thing that is being supplied as consideration must first fall within the definition of

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	word and it modifies the general definition by including things used as money and excluding situations where money is not being used as money (for example, collectors' notes and coins); and • the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998 states at paragraph 3.7 that: 'money that is provided as consideration (payment) for a supply is not in itself a supply. Otherwise money supplied as payment for a supply could be a taxable supply in itself.'	'money' within the GST Act. The GST Act contemplates a difference between monetary and non-monetary consideration (see for example section 9-75) so there is a clear intention to treat the two differently. In circumstances where there is non-monetary consideration provided for a supply – that is, barter transactions - further, special rules were introduced to deal with the potentially anomalous outcomes. For example, foreign currency exchange transactions are treated as input taxed financial supplies and the potential for embedded or double taxation in the context of a business to consumer to business transaction involving second hand goods are specifically dealt with in Division 66.
1.4	*State Theory of Money* It was submitted that at paragraphs 67 to 73 of the draft Ruling the ATO has misinterpreted the comments in *Messenger Press Pty Ltd v. FCT* [2012] FCA 756 about the application of the *Moss* formulation of the definition of money. It was submitted that Perram J in *Messenger Press* noted only that the limitations of the *Moss* formulation were that it was not broad enough to capture all concepts of money, and that there is no express or implied endorsement of the 'state theory of money' to be found in *Messenger Press*. It was also submitted that it is doubtful whether *Mann on Money* goes as far as to advocate the 'state theory of money'.	We have inserted further detail at paragraphs 102 to 104 further explain our views.
1.5	*'Means' and 'includes'* The submission suggests that the ATO's approach of interpreting 'money' in terms of prescribing fiat currency only is not supported by law and the rules of statutory	The Ruling has been updated at paragraphs 104 to 105 to further explain the scope of the term 'money' and how this is informed by the fact that the inclusions in paragraphs (b) to (e) (of the definition of money) are each

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	interpretation. It was submitted that 'means' is used to restrict or explain what the meaning of a word is within the GST Act and 'includes' is used to either expand or clarify the meaning of a word where it may be ambiguous. To correctly apply this rule therefore, one must examine each paragraph used in the statute that is said to be included in the statutory definition of the word 'money' and determine whether or not that paragraph would fall within the ordinary meaning of the word 'money'. The ATO in contrast examines each paragraph of the statutory definition of the word 'money' with reference to whether a 'Bitcoin' would be included within that specific statutory paragraph or not. This analysis while it is critical in our view may be premature. We feel that before embarking upon this exercise, further consideration and thought should be directed to the statutory construction of the word 'money' itself. We note that there would be some doubt as to whether paragraph (d) and (e) of the statutory definition could rightly form part of the ordinary meaning of the word money, even in its widest sense. The term money is described in the *Encyclopaedic Australian Legal Dictionary* as: *Any generally accepted medium of exchange for goods, services, and the payment of debts. Examples are coin, banknotes, bills of exchange, promissory notes and claims on bank deposits.* Applying the rule in *Y.Z. Finance case* the term 'money order' as appears in subparagraph (d) of the definition of the word 'money' in the GST Act is defined in that	denominated in and reducible to fiat currency by their nature is a strong indication that 'money' generally for GST purposes cannot and does not extend beyond methods of payment that are denominated in and reducible to fiat currency.. Support for this view is also provided by the Currency Act which contemplates which contemplates that money is denominated in the fiat currency of Australia or some other country. The draft Ruling takes the approach that if bitcoin was to fall within any of the specific paragraphs listed in the definition of 'money' then there is no need to have recourse to the ordinary meaning of 'money'. Additional commentary has been added at paragraphs 98 to 99 and 104 to 105 of the Ruling to address this issue.

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	dictionary as follows: *An instrument used to remit money to the named payee, often used by persons who do not have a cheque account relationship with a financial institution, to pay bills or to transfer money to another person or to a company.* This suggests that perhaps the context in which the word 'money' is used in the GST Act is the ordinary meaning of the word. The context may also be ascertained by reference to the wider section in which the definition is placed.	
1.6	*'Money' interpreted over time* It is relevant to note the way in which the meaning of words changes over time. It is relevant to note that at the time the definition of the word 'money' was enacted in the GST Act 'bitcoins' did not exist and would not have been specifically contemplated by Parliament. *Lake Macquarie Shire Council v. Aberdare County Council* (1970) 123 CLR 327 ('*Lake Macquarie case*') at 331 is authority for the proposition that while the connotation of a word will remain fixed its denotation will change with changing technologies. In the *Lake Macquarie case* Barwick CJ states at 331: *I can see no reason why, whilst the connotation of the word 'gas' will be fixed, its denotation cannot change with changing technologies.* This analogy is undoubtedly useful in interpreting whether a 'Bitcoin' can be described as within the ordinary meaning of the word 'money' as it is used in section 195-1 GST Act. It is also, in our view, a good	We acknowledge that the meaning of a word may change over time. However, the relevant meaning ascribed to a term at a particular time must take into account the statutory context in which it appears. We have added explanation to paragraphs 83 to 97 of the Ruling to clarify the view taken on the scope of paragraph (e).

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	reference to assist in determining whether the generality of the ordinary meaning of the word 'money' is a preferable construction for the purposes of the GST Act. The ordinary meaning of the word 'money' seems to have been extended by the GST Act, this along with how the words 'include' and 'mean' are used in that Act support the use of the ordinary meaning of this word as this interpretation furthers the intended purpose of the Act. Furthermore, the inherent flexibility of the word over time is supported not only by the *Lake Macquarie case* but also by the inclusion of paragraph (e) within the statutory definition itself.	
1.7	*Issue - Business viability* It was submitted that if bitcoin is not treated as money it will have a detrimental effect on Australian businesses transacting in bitcoin or operating bitcoin businesses. It was also submitted that the effect of the ATO's view will be to drive business offshore.	Whether the current taxation law should be changed to encourage investment in this area is a policy question.
1.8	*Issue - Market valuation* It was submitted that if bitcoin is not treated as money it will result in issues around obtaining market valuation of bitcoin, particularly given the volatility of the value of bitcoins, for barter transactions.	As noted in the guidance material released with the draft GSTR when bitcoin is consideration for a taxable supply of goods and services the GST inclusive market value at the time of the supply will need to be determined. The Australian dollar value of the bitcoin at the time of the supply can be taken from a reputable online exchange.
1.9	*Issue - Increased GST liabilities* It was submitted that if bitcoin is not treated as money it will result in 2 separate GST liabilities for GST-	The ATO has included Example 7 that illustrates a consumer paying a business (who cannot claim input tax credit on acquiring the bitcoin from a

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	registered businesses that accept bitcoin as payment. This is because there will be GST on the receipt of bitcoin as consideration for the supply and again on conversion of bitcoin to fiat currency.	consumer), who then makes a taxable supply when converting to fiat currency.
1.10	*Issue – double taxation* It was submitted that the Commissioner's view will result in the imposition of an additional cost on business customers and/or double taxation in some instances.	The Commissioner acknowledges that the view that bitcoin is not money may lead to what has been described as 'double' taxation issues arising in business to consumer to business transactions. However, even if bitcoin were treated as 'money' for GST purposes, the double taxation issue remains for bitcoin for currency exchange transactions given bitcoin is not 'currency (of Australian or any other country') and hence is not a financial supply.
Overseas treatment of bitcoin		
2.1	Several of the comments received concerned how overseas jurisdictions are treating bitcoin for taxation purposes, particularly the United Kingdom and Germany. It was submitted that the UK VAT treatment of bitcoin transactions is more favourable than the Commissioner's approach and that Germany has recognised bitcoin as a financial instrument in the form of units of account (therefore bitcoin is foreign currency). It was submitted that Australia should adopt a similar approach to the UK so that GST applies to transactions where payment is made using bitcoin in the same way it applies to transactions where payment is provided in more traditional forms. It has also been submitted that the definition of 'bitcoin'	The UK has given provisional advice regarding the VAT treatment of bitcoin pending further developments, in particular the EU VAT position (Revenue & Customs Brief 09/14, *Tax treatment of activities involving Bitcoin and other similar cryptocurrencies,* 3 March 2014). For VAT purposes, the UK will treat bitcoin as exempt from VAT under article 135(1)(d) of the EU VAT Directive (as a payment service). Australia has a different tax system to the UK and the ATO has determined that bitcoin is neither money nor a financial supply for the purposes of the GST Act. As such, a transfer of bitcoin is a supply for GST purposes and a supply of bitcoin will be a taxable supply where the other requirements of section 9-5 are also met. Paragraph 57 of the Ruling states that 'currency of Australia' means the requisite monetary unit of exchange established by the Currency Act as a means of discharging monetary obligations for all transactions and payments in Australia. Germany's BaFin (the Federal Financial Supervisory Authority), in

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	as money is supported by at least 2 decisions of courts in the United States: *Securities and Exchange Commission v. Trendon T Shavers and Bitcoin Savings and Trust* CASE NO. 4:13-CV-416 and *U.S. v. Faiella*, U.S. District Court, Southern District of New York, No. 14-cr-00243.	classifying bitcoin as units of account ('*Rechnungseinheiten*'), has not legally accepted bitcoin as a means for discharging monetary obligations in Germany. Rather this classification under German law simply means that bitcoin is a unit of value, not being legal tender, that serves as a private means of payment in barter transactions. This classification is for the purposes of German banking law to ensure that entities trading in Bitcoin or undertaking Bitcoin mining pools will be subject to regulation. Germany does not recognise bitcoin as legal tender, nor does it consider bitcoin is foreign currency. The United States (US) District Court decision in *Securities and Exchange Commissioner v. Trendon T. Shavers and Bitcoin Savings and Trust* related to non-tax legislation and has no relevance for determining the ordinary meaning of money or currency in the GST Act. The submission noted that the US Inland Revenue Service have published their view that bitcoin is not currency for tax purposes. It is important to note that in this context US law is not relevant to the interpretation of Australian tax law. It is further noted, that the US District Court decisions, which considered the concept of a transfer of funds in the context of money laundering, was not considered relevant for interpreting US tax law.
GST on wages		
3.1	The submission questioned whether, according to the preliminary view in the draft Ruling, there would be GST on wages if an employer was paid in bitcoin.	The ATO's preliminary view is that bitcoin is property and will receive taxation treatment similar to that of a barter transaction. TD 2014/D14 outlines the view that the provision of bitcoin by employer to employee in respect of their employment is a property fringe benefit, therefore FBT applies. There could also potentially be GST implications on the supply of bitcoin – see GSTR 2001/3: *GST and how it applies to fringe benefits.*

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		However, the policy intention of subsection 9-75(3) is that the supply of goods and services by an employer to an employee is not subject to GST if the supply is also a benefit that is subject to FBT rules (see the Explanatory memorandum to A New Tax System (Fringe Benefits) Bill 2000). Where an employer makes a taxable supply of a fringe benefit, they are only liable for GST to the extent of the consideration payable on the supply in the form of a recipient's payment or recipient's contribution (see paragraph 22 of GSTR 2001/3). Therefore, unless the employee is providing consideration in the form of a recipient's contribution (other than services as an employee), there will be no GST liability on the supply of the fringe benefit and only a fringe benefit tax liability will arise. Once the employee converts the bitcoin to Australian or foreign currency GST will apply to that supply (if the employee is registered for GST).
Cross-border supplies		
4.1	The submission requested further clarification as to the GST treatment of inbound bitcoin transactions (that is, where a non-resident supplies bitcoin to an Australian resident) including the application of Divisions 13, 83 and 84 of the GST Act.	With regards to the application of Division 13, our view is that bitcoin is not a taxable importation because it is not 'goods'. In terms of Divisions 83 and 84, our view is that these divisions would only apply if the recipient of the supply is registered or required to be registered. We have added paragraphs 126 to 127 in the final ruling to provide guidance on Division 13 and 84. Division 83 has not been included as it only applies at the option of the parties and hence is not considered to be of relevance to the majority of taxpayers in this context.
4.2	The submission queried whether, according to the view in the draft Ruling (particularly at paragraphs 81 and 82), an online bitcoin exchange based in Australia would have to charge GST on supplies of bitcoin if the customer's residency is unknown.	With regards to paragraphs 116 and 117 of the Ruling (previously paragraphs 81 and 82 of the draft Ruling), in order for a supply that you make to be GST-free under item 2 of the table in subsection 38-190(1) requires that the taxpayer demonstrate that the supply is for consumption outside Australia. If this cannot be demonstrated then the supply should not be treated as

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		GST-free. The ATO has previously published some practical guidance for the e-commerce industry that may assist. This has been included as a reference in paragraph 112 of the Ruling. See: https://www.ato.gov.au/Business/Consultation--Business/In-detail/GST-issues-registers/Electronic-Commerce-Industry-Partnership---issues-register/?page=3#Chapter_1__Consumption_outside_Australia
Examples		
5.1	It was submitted that a further example should be included to cover the most common bitcoin transaction – where a non-GST registered individual purchases bitcoin from a GST registered exchange.	We have inserted new Example 3 to provide further clarification.
5.2	In regards to Example 1, it was submitted that 'Liam' should not be considered an exchange services provider. Rather, 'Liam' should be considered a trader who buys and sells bitcoins. A proper exchange does not take possession of the underlying bitcoin but instead matches buy and sell orders, charging a commission for facilitating each transaction.	In order to avoid perceived confusion about the use of the terms bitcoin exchange and market we have not used these terms (see paragraph 11 of the Ruling). We have added wording to Examples 1, 2, & 3 to make it clear that we are referring to a situation where a bitcoin business supplies and acquires bitcoin directly with its customers (as opposed to an online platform that facilitates exchanges between customers). We have also added Example 4 to the Ruling to describe the latter situation where an online platform facilitates entities buying and selling directly with each other.
5.3	It was submitted that some of the adverse outcomes resulting from the interpretation adopted by the Commissioner are not demonstrated by the examples included in the draft Ruling. It was recommended that the Commissioner include examples similar to these: ***Example 1*** For example, Payer Co is a GST registered company based in Australia. Payer Co wishes to purchase vacant	We have inserted new Example 7 to address these concerns and illustrate a business receiving bitcoin as payment from a consumer, and then converting the bitcoin to Australian currency.

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	land for the equivalent of $220,000 in Bitcoin. If Payer Co purchases this land from a GST-registered property developer (for example, Develop Co) the outcomes of the transaction will be similar to those outlined in Example 2 of the draft Ruling. If Payer Co instead were to purchase the land from an individual (for example, Mr Smith), the supply of the land by Mr Smith to Payer Co will not be subject to GST as Mr Smith is not making the supply in the course or furtherance of an enterprise nor is Mr Smith registered for GST. Mr Smith will receive $220,000 worth of bitcoin in exchange for the sale of his land. On the other hand, the payment of bitcoin by Payer Co to Mr Smith will be subject to GST under the interpretation provided in the draft Ruling. Payer Co supplies bitcoin to Mr Smith in Australia, for consideration (that is, the land), in the course of Payer Co's enterprise and Payer Co is registered for GST and thus, will make a taxable supply. Payer Co's payment of bitcoin (with equivalent value of $220,000) to Mr Smith will trigger a GST liability of $20,000. Payer Co will not be able to offset its GST liability with an input tax credit from the purchase of the land as the land sale was not subject to GST. Instead, Payer Co will have to bear the GST amount as a cost. This would not be the case had Payer Co paid for the land with cash. ***Example 2*** Assuming the same facts as those given in the draft	

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	Ruling's Example 2, Paul receives $7,700 worth of bitcoin for the sale of a server through his computer shop. Paul has a GST liability of $700 on that sale even though Paul received bitcoin rather than money as consideration for the sale. Paul remits $700 to the ATO. Following the sale, Paul decides to convert the $7,700 worth of bitcoins to Australian currency. Paul sells the bitcoin to a purchaser in Australia for $7,700. The sale of the bitcoins by Paul (through his business) would be treated as a taxable supply under the draft Ruling, triggering a second GST liability of $700 for Paul.	
Date of effect		
6.1	It was submitted that the ATO should consider taking a more accommodating approach to compliance and provide for: • default retrospective application (which will protect those taxpayers that have taken positions consistent with the rulings), or • optional prospective application (from the date of the final ruling/s) for taxpayers that have taken legitimate positions in the past, which should be appropriately protected. The ATO's proposed 'no compliance action' approach is not sufficient protection for taxpayers, as there still remains a potentially higher penalty exposure for taxpayers that have taken positions contrary to a public ruling.	We consider that the current date of effect provides certainty for entities that have made a genuine attempt to understand and satisfy their obligations.
Referral to Treasury		

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7.1	It was submitted that if the position in the draft Ruling prevails, the Commissioner should refer this matter to Treasury for legislative clarification.	The ATO consulted with Treasury very early on in addressing this issue given the broader regulatory and administrative impacts. The ATO has advised Treasury, the Assistant Treasurer and the Treasurer of the ATO view with respect to bitcoin and the alternative views and compliance issues being raised by the community. Treasury have not raised any concerns with the ATO view.
Solicitor-General's advice		
8.1	The submission requested that the ATO consider publishing the Solicitor-General's advice.	The ATO will not be publishing the Solicitor-General's advice.