GSTR 2000/16 - Goods and Services Tax: transitional arrangements - GST-free supplies under existing agreements

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Goods and Services Tax Ruling
Goods and services tax: transitional arrangements – GST-free supplies under existing agreements

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Preamble

*This document was published prior to 1 July 2010 and was a public ruling for the purposes of former section 37 of the **Taxation Administration Act 1953** and former section 105-60 of Schedule 1 to the **Taxation Administration Act 1953**.*

*From 1 July 2010, this document is taken to be a public ruling under Division 358 of Schedule 1 to the **Taxation Administration Act 1953**.*

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What this Ruling is about

1. This Ruling considers the extent to which a supply made on or after 1 July 2000, which is identified in a written agreement made before 8 July 1999, will be GST-free under section 13 of the *A New Tax System (Goods and Services Tax Transition) Act 1999* ('GST Transition Act'). All legislative references in this Ruling are to this Act unless otherwise stated.

2. The Ruling sets out our views on the criteria that an agreement must satisfy for section 13 to apply.

3. Where section 13 applies to an agreement, this Ruling considers whether a review opportunity arises under the agreement.

4. For agreements either made on or after 2 December 1998 but before 8 July 1999, or under which a review opportunity arises between those dates, the Ruling considers the requirement for the supplier to establish whether the recipient would be entitled to a full input tax credit for the supply.

4A. The Ruling also considers whether section 13 can continue to apply to a supply if there is no review opportunity arising under the agreement before 1 July 2005 but the consideration is changed for supplies to be made after 30 June 2005.

5. This Ruling does not examine the special transitional rules that apply to a supply of:

- a right granted for life;
- a funeral; or
- construction or civil engineering work.[1]

However, where those rules rely on the definition of review opportunity in section 13, this Ruling will be relevant in determining whether a review opportunity arises.

Background

6. Under the general transitional rule applying to arrangements spanning 1 July 2000, GST is only payable on a supply to the extent that it is made on or after that date.[2] The general rule applies whether or not consideration is provided or received or an invoice was issued prior to 1 July 2000.[3]

7. An agreement may be made before 1 July 2000 to supply goods, services, real property or any other thing after that date. Generally, the time of supply will be when goods are removed, real property is made available, services are performed or the thing is done or performed.[4]

[1] These special transitional rules are in sections 14, 15 and 19 respectively.
[2] Section 7.
[3] Section 10.
[4] Section 6.

8. An agreement may provide for a supply to be made for a period that begins before 1 July 2000 and ends on or after that date. In these cases, the supply is taken to be made continuously and uniformly throughout the period.[5] Examples are supplies by way of lease, maintenance agreement or sponsorship agreement for a defined period.

9. There are exceptions to the general transitional rule. Special rules in section 13 may apply to make a supply, when it is specifically identified in a written agreement, GST-free until the earlier of 1 July 2005 or when a review opportunity arises.[6] If not for these special rules, GST would be payable on a taxable supply made on or after 1 July 2000, but the supplier may not have the opportunity to conduct a general review, renegotiation or alteration of the consideration or to change the consideration because of the imposition of GST.

10. For section 13 to apply, if the recipient would be entitled to a full input tax credit for the supply, the written agreement must be made before 8 July 1999. This is the date the GST Transition Act received Royal Assent. Otherwise, the written agreement must be made before 2 December 1998, which is the date the A New Tax System (Goods and Services Tax Transition) Bill 1998 ('GST Transition Bill') was introduced into Parliament. The rationale for having a later date where the recipient is entitled to a full input tax credit is that the net tax result is nil.

11. A GST-free supply is not subject to GST. A supplier who makes a GST-free supply is generally entitled to claim an input tax credit for GST paid on acquisitions used in making the supply. A recipient of a GST-free supply is not entitled to an input tax credit for the supply because no GST is payable on that supply.

12. Section 13 may apply to an agreement for any type of supply including a supply that would otherwise be input taxed. An input taxed supply is not a taxable supply. A supplier who makes an input taxed supply will not pay GST on the supply. However, the supplier cannot claim input tax credits for GST included in the price of things acquired to make an input taxed supply.

13. It will be necessary to also apply sections 14, 15 and 19 respectively, in determining the GST consequences for the supply of:

- a right granted for life;
- a funeral; or
- construction or civil engineering work.

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[5] Section 12.

[6] A copy of section 13 can be found under the heading 'Definitions' in paragraph 205 of this Ruling.

Date of effect

14. This Ruling applies on and after 8 July 1999 (the date of Royal Assent to the GST legislation).

Note: The Addendum to this Ruling that issued on 11 May 2005 explains our view of the law as the law applied from 22 February 2005. For the purposes of section 37 of the Taxation Administration Act 1953, you can rely on GSTR 2000/16, as amended by this Addendum, on and from the date of issue of the Addendum.

Note: The Addendum to this Ruling that issued on 27 September 2006 applies on and from 8 July 1999. For the purposes of section 105-60 of Schedule 1 to the *Taxation Administration Act 1953* [formerly section 37],you can rely on GSTR 2000/16, as amended by this Addendum, on and from the date of issue of the Addendum.

Ruling with explanation

15. An agreement will satisfy subsection 13(1) if the agreement:

- is a written agreement;
- specifically identifies a supply;
- identifies the consideration in money, or a way of working out the consideration in money, for the supply; and
- was made before the relevant date.

The relevant date will be:

- 8 July 1999, if the recipient of the supply would be entitled to a full input tax credit for the supply; or
- 2 December 1998, if the recipient of the supply would not be entitled to a full input tax credit for the supply.[7]

16. If these conditions are satisfied, a supply identified in the agreement is GST-free where it is made[8] before the earlier of:

- 1 July 2005; or
- a review opportunity that arises on or after the relevant date.

[7] Subsections 13(1) and 13(4).
[8] Section 6 sets out how to determine when a supply is made for the purposes of the GST Transition Act.

However, a supply made on or after 1 July 2005 will be GST-free under section 13 if all the consideration was paid before 2 December 1998, and the supply is made before a review opportunity that arises on or after the relevant date.[9]

The agreement

17. An agreement to which section 13 applies must be an agreement which is legally binding on the parties to the agreement. This is implicit in section 13.

18. However, the section can apply if the agreement does not meet a particular statutory requirement as to enforceability, provided the supplier is locked into the agreement. For example, if a lease has not been stamped, the relevant State legislation may provide that the lease cannot be used for evidentiary purposes in court proceedings. The failure to stamp a document has no effect on whether an agreement was made for the purposes of section 13.

19. We consider that the word 'agreement' should not be limited to documents creating contractual relationships but may apply to instruments that create binding rights and obligations on the supplier. Certain documents such as trust deeds, wills and court orders appointing a trustee do not constitute a contractual agreement between a supplier and a recipient but do represent an offer which on acceptance locks in the supplier to specified rights and obligations. These are considered to be agreements for the purposes of section 13 where they create a legally binding obligation on the supplier to make a specifically identified supply of trustee services to the trust for identified consideration and the supplier is locked into those obligations. For example, a supply identified in a deed poll executed by a trustee of a trust setting out the trustee's powers, obligations and liabilities may be GST-free if the deed satisfies the elements in paragraph 15 of this Ruling and the supplier was bound before the relevant date to make the supply.

Written agreement made before the relevant date

20. The agreement must be a written agreement. For the purposes of section 13, an agreement will be considered to be a written agreement if all the essential terms of the agreement are in writing. For this purpose, the agreement must at least specifically identify the supply and identify the final consideration in money, or a way of working out the consideration in money, for the supply.[10]

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[9] Subsection 13(3).
[10] Paragraph 13(1)(a).

21. In the context of section 13, we consider that a written agreement is required for the purpose of ensuring that written evidence exists before the relevant date that the supplier was bound to make a specified supply for an identified consideration. Section 13 will not just apply to contracts executed by all parties before the relevant date. If the parties can demonstrate that they had a binding agreement that identified the supply, the consideration, and other essential terms and those elements of the agreement are evidenced in a written form, the requirement for a written agreement will be satisfied. It must be clear from that writing or other supporting writing that there was an agreement before the relevant date.

22. Written confirmation, before the relevant date, of the oral acceptance of a written offer is considered to be a written agreement for section 13 purposes, provided the documents contain the necessary details of the supply and the consideration. For this purpose, correspondence between the parties and receipts given by one party which can only be consistent with the existence of the agreement may be sufficient written evidence to prove the oral acceptance. We interpret the written requirement in this way because it best accords with the policy which is that there should be sufficient written evidence created before the relevant date to prove the existence of the agreement.

Example[11]

23. Vlad called for tenders, to be provided in a standard document, to carry out detailed services over a period of four years. The document specified that the work would be awarded verbally and on award the terms of the tender document would form the contract terms. Joe submits a tender to Vlad. The document specifically identified the supply Joe would make and specified the consideration in money. On 1 January 1999, the day after the tender period closed, Vlad telephoned Joe and awarded him the work. Joe started work immediately. On 30 January 1999 Joe sent Vlad a claim for payment for services completed. Vlad sent Joe a letter referring to Joe's claim enclosing a cheque as payment for the services on 15 February 1999.

[11] All entities in the Examples in this Ruling are registered or required to be registered for GST and the relevant date is 8 July 1999, unless otherwise stated.

24. Even though Joe and Vlad did not have an executed contract before the relevant date there was a written agreement for the purposes of section 13. This is because the essential terms of the agreement were contained in Joe's tender documents, acceptance of which was evidenced by the claim for payment, and all documents were created before the relevant date. Joe was bound before the relevant date to make a specified supply and has written evidence, created before the relevant date, of the agreement with Vlad.

Example

25. On 1 July 1999, Ian and Sally orally agreed that Ian would lease commercial premises to Sally for a period of three years for an annual rental to be paid monthly in advance. They agree that the lease is to start immediately. Sally pays Ian one month of rent in advance and begins occupancy of the premises. On 2 July 1999 Ian sends Sally a letter enclosing a lease agreement for her to sign and a receipt for the first month's rent. After the relevant date, on 1 October 1999, Ian receives the signed written lease agreement from Sally, signs the agreement and sends her a copy.

26. Section 13 will apply because there was evidence of the agreement in writing before the relevant date. Therefore, the supply made by Ian under the agreement will be GST-free under section 13 until the earlier of a review opportunity or the end of the lease period on 1 July 2002.

27. The parties must have been bound by a written agreement made before the relevant date. For a document such as a trust deed, court order or will there must be written evidence of the acceptance of the trusteeship in order for the supply of trustee services to be covered by section 13, for example, evidence in writing of dealings with the beneficiaries and trust property. Provided the written evidence was created before the relevant date, section 13 will be satisfied.

28. The question of whether the parties are bound by a written agreement before the relevant date will arise when a formal contract is to be drawn up and there is written documentation that could be a binding agreement. For the purposes of section 13, the question will be relevant in the following circumstances:

- there is written documentation signed by the parties **before the relevant date** which could be a binding agreement, but which indicates that the parties intend to draw up and execute a formal contract (for example, by the words 'subject to the preparation of a formal contract');

- the written documentation specifically identifies a supply and identifies the consideration in money or a way of working out the consideration in money for the supply; and
- a formal contract is not executed until **on or after the relevant date**.

29. Section 13 will not apply unless there was a binding agreement evidenced in writing pending the execution of the formal contract. Whether or not there was a binding agreement depends on the facts.

30. The parties may have finalised the details for a contract but wish to record their agreement in a formal document. A question arises as to whether the parties are bound immediately or whether they are bound only when the formal document is executed. If the words 'subject to contract' are used there is a presumption that there is no intention to be bound until formal contracts have been exchanged (see *Masters v. Cameron).*[12] This presumption may be displaced by a contrary intention disclosed by the words or actions of the parties.

31. If correspondence between the parties or other documents prepared before the relevant date constitutes a binding written agreement, section 13 can apply to the agreement even though it is contemplated that it will be recorded more formally later in a written contract.

32. Subsection 13(1) is not satisfied by:

- an agreement concluded on or after the relevant date;
- an oral agreement made before the relevant date and only evidenced in writing on or after that date;
- an oral acceptance of a written offer without supporting written documentation existing before the relevant date;
- an exchange of documentation, such as letters, which only amounts to negotiations; or
- an agreement which is only evidenced by performance without supporting written documentation existing before the relevant date.

[12] (1954) 91 CLR 353.

Example

33. Rough Pty Ltd and Ready Pty Ltd, in the course of negotiating an agreement for the supply of services for a five-year period from 1 July 1999, sign a draft contract. The draft contract specifically identifies the supply and identifies the consideration in money. The draft contract states that the terms are 'subject to a formal contract'. The formal contract is not made until 1 August 1999. The services are provided from this date.

34. Whether the draft contract constituted a binding agreement is a question of law. If in these circumstances the parties were not bound until the formal contract was executed, subsection 13(1) would not be satisfied.

35. However, it would be otherwise if the parties intended the draft contract to have immediate contractual force. This intention would be supported if the supplier actually began to supply the services from 1 July 1999.

Specifically identifies a supply

36. Subsection 13(1) requires the agreement to specifically identify a supply. An agreement will satisfy subsection 13(1) even if the agreement does not specify the quantity or volume of the units which the supplier will be bound to make under the agreement, provided the supply is specifically identified in terms of the type of supply in respect of a specific matter or time period.

Example

37. Consultant Ltd made a written agreement on 1 July 1998 to supply Big Ltd with engineering services in relation to a particular project. The agreement specifies the rate per hour Consultant will charge for the services. Consultant is bound under the agreement to supply the services for the project at this rate in the quantity requested by Big. There is no review opportunity under the agreement.

38. Although the number of hours to be provided by Consultant for the project is not specified, the agreement has specifically identified the supply because it provides a sufficient description of the supply. As the binding written agreement was made before 2 December 1998 and has identified a way of working out the consideration for the supply the agreement satisfies subsection 13(1). The supply identified in the agreement will be GST-free until the earlier of the end of the agreement or 30 June 2005.

39. If an agreement made before the relevant date does specify a quantity or volume of units, then any supply in addition to what is specified in that agreement cannot be GST-free under section 13.

40. The requirement that a supply be specifically identified can be satisfied where a supply is to be made for an indefinite period of time. Section 13 can apply where the supply and consideration during this period are identified in the agreement made before the relevant date. One example is a supply of property management services by a real estate agent to a lessor under an agreement which identifies the services to be provided at an identified consideration until either party gives notice to terminate or alter the specified terms. Another example is a holdover clause in a lease which provides for the supply of the premises after the expiration of a fixed period to continue to be made at the identified consideration for an indefinite period, subject to either party giving notice to terminate or alter the specified terms.

Identifies the consideration in money

41. Subsection 13(1) requires the agreement to identify the consideration in money or a way of working out the consideration in money for the supply.

42. One of the elements of a taxable supply as defined in the *A New Tax System (Goods and Services Tax) Act 1999* ('GST Act') is that the supply is made for consideration.[13] The requirement in section 13 is narrower than the definition of 'consideration' in the GST Act. Consideration for the purposes of defining a taxable supply includes any act or forbearance or a payment other than in money[14]. However, agreements that do not identify the consideration in money or a way of working out the consideration in money will not satisfy the requirements of section 13. Therefore, certain supplies cannot be GST-free under section 13 due to the consideration not being in money and the absence of a way of working it out in money.

43. If the consideration is in a form other than money, for example the granting of a right or the provision of goods, section 13 will only apply if the agreement identifies how to work out the consideration in money. We have adopted a broad concept of written agreement (see paragraphs 20 to 22 of this Ruling). It will be sufficient if the agreement or other documents created by either party in the formation of the agreement identify a way of working out the consideration in money.

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[13] Section 9-5 of the GST Act.
[14] Section 9-15 of the GST Act.

44. We consider that an agreement in which the consideration is identified as a particular monetary amount worth of non-monetary consideration has identified a way of working out the consideration in money for the purposes of section 13. For example, identification of the consideration as $1,000 worth of widgets is identification of a way of working out the consideration in money.

45. Unless the agreement indicates otherwise, we consider that, for the purposes of section 13, each side of the transaction will be for an equal amount in money. For example, where a supply of goods is made in return for a supply of rights and there is a way of working out the amount in money in respect of the goods, it is accepted that the consideration for those goods (i.e., the rights) is the same as the amount in money for the goods.

Example

46. Matthew and Verouska make a written agreement on 1 November 1998 that Verouska will maintain the grounds of Matthew's house for the next four years in consideration for Matthew supplying her with accounting services. The written agreement does not give a value for the consideration provided by either Matthew or Verouska.

47. Matthew and Verouska are both making a supply for consideration as defined in the GST Act. However, neither supply can be GST-free under section 13 because the agreement did not identify the consideration for either supply in money or a way of working it out in money.

48. However, if the agreement or other documents created by either party in the formation of the agreement had specified that either the consideration provided by Matthew (i.e., the accounting services) or the consideration provided by Verouska (i.e., the maintenance of the grounds) was worth a particular amount in money, the agreement would satisfy section 13.

Example

49. Under an agreement made before the relevant date, a television broadcaster acquires the rights to show a film produced by YZ Company. In exchange for the rights they agree to provide advertising to YZ Company in relation to another film being produced by YZ Company which is to be released for Christmas 2000. The advertising is stated in the contract to be provided under the broadcaster's 'Deluxe' advertising package, for a period of two months from 1 November 2000. The contract does not nominate a dollar value for either supply. The dollar value of the advertising provided under the Deluxe package was contained in brochures provided to YZ Company as part of their negotiations.

50. Although the contract does not identify the consideration in money or a way of working out that consideration in money, the documents used by the broadcaster in the formation of the agreement identified the monetary value of the consideration. Additionally, for the purposes of section 13, the consideration for the supply of advertising (i.e., the rights to show the film) is the same as the dollar value of the advertising services. Therefore, the requirement in section 13 that the agreement identifies the consideration in money or a way of working out the consideration in money, has been satisfied in respect of both supplies identified in the agreement.

51. If part of the consideration for a supply is not in money but it is merely incidental to the total consideration, subsection 13(1) will be satisfied even if the agreement does not identify a way of working out the consideration in money for the incidental component. However, if part of the consideration is not in money and it is a benefit of substantial value, but a way of working out the consideration in money is not specified in the agreement or other documents created by either party in the formation of the agreement, subsection 13(1) will not be satisfied.

Example

52. Sporting Team enters into written agreements with two different sponsors before the relevant date to provide specified advertising for a period of three years. In consideration, Sponsor A agreed to pay $10,000 per month and provide Sporting Team with some of its products which have a value, not specified in the agreement or other documents created by either party in the formation of the agreement, of approximately $100 per month. The value of the goods provided as consideration is merely incidental to the monetary payments, therefore section 13 can apply to the agreement.

53. Sponsor B agreed to pay $20,000 and in addition, to provide free drinks, refrigeration equipment, tables and chairs and umbrellas which have a combined value of approximately $10,000, but no value was specified in the agreement or documents created by either party in the formation of the agreement. The value of the goods as consideration is not merely incidental to the total consideration. Therefore subsection 13(1) is not satisfied.

54. If the consideration is not identified in money, the agreement must identify a way of working out the consideration in money. Examples of ways of working out the consideration in money are by use of a formula, or by nominating a monetary value for consideration which is other than in money. An agreement that provides for the recipient to pay the supplier an amount in money that can only be determined at a time after the agreement was made will also satisfy this requirement. For example, consideration identified as a specified dollar amount plus the cost of specified expenses, where the amount of those expenses will not be known until a date after the agreement is made, is a way of working out the consideration in money.

Example

55. Kim has an agreement with Richard to provide specifically identified consultancy services for a payment of $1,000 a month plus the cost of the information she purchases to provide the services.

56. Even though the total amount in money cannot be determined until she has performed the services, the agreement has identified a way of working out the consideration in money and therefore subsection 13(1) has been satisfied.

Supply is identified in another agreement made on or after the relevant date

57. Section 13 cannot apply to a supply that is identified in an agreement made on or after the relevant date unless:

- that supply was specifically identified in an earlier written agreement that meets the requirements of subsection 13(1) and the supply in the later agreement is the same;
- the supplier is bound by the earlier agreement to make the supply identified in the later agreement;
- the consideration in the later agreement is the same as in the earlier agreement; and
- there has been no variation to the earlier agreement such that a new agreement is created.

58. If the supply or the consideration is different in the later agreement from that identified in the earlier agreement, or if there is a difference in other essential terms, section 13 cannot apply to the supply made under the agreement made on or after the relevant date.

Example

59. Nathan & Garry Enterprises (N&G), a property developer, purchased a block of land to construct an office building. Hardworker Pty Ltd made a written agreement on 1 September 1998 with N&G for Hardworker to lease part of the building from 1 July 2000, subject to completion of the construction before that date. The agreement to lease includes a copy of the lease that the parties will execute and all the essential terms of the agreement. The agreement identifies the approximate area and location of the area leased and the amount of rent and all other payments to be made by the lessee in money. The lease is executed on 1 June 2000.

60. Although the supply is the subject of an agreement made after the relevant date, in this case the supply made under the lease was specifically identified and consideration identified in the agreement to lease, as required by subsection 13(1). The supply under the lease will be GST-free to the extent it is made before the earlier of the first review opportunity or 1 July 2005.

61. However, if the parties agreed at the time of executing the lease to include a further term in the agreement providing for annual Consumer Price Index ('CPI') increases in the rent, section 13 would not apply to the supply. This is because the final consideration under the lease was not identified in the agreement made before the relevant date.

61A. There is an exception to the principle in paragraphs 57 and 58. This is because of amendments of the GST Transition Act which took effect from 22 February 2005.[14A] If a review opportunity does not arise under the agreement before 1 July 2005, suppliers and recipients can negotiate (through arbitration, if necessary) GST-inclusive prices for supplies under existing agreements and have section 13 continue to apply to supplies made before 1 July 2005. Whether a supply is GST-free under section 13 is not affected by a later agreement which merely changes the consideration for supplies that are specifically identified in the earlier agreement if:

- the change is made on or after 22 February 2005 (whether it is agreed to or the negotiations commenced before, on or after 1 July 2005); and
- the change applies only to supplies made on or after 1 July 2005.[14B]

[14A] *Tax Laws Amendment (Long-term Non-reviewable Contracts) Act 2005*.
[14B] Subsection 13(4C).

Example

61B. *Bill and Ben Constructions (B & B), a property developer, and Chandra Canning Services (CCS) made a written agreement before 1 December 1998 for B & B to lease* a building to CCS from 1 July 2000, subject to completion of *construction before that date. The agreement to lease includes a copy of the lease that the parties will execute and all the essential terms of the agreement. The lease does not give rise to a review opportunity before 1 July 2005. The lease is executed on 15 June 2000 without any changes to the specific supply or consideration identified in the agreement to lease. On 20 May 2005 the parties replace the lease with a new lease that increases the rent for the supply to be made after 30 June 2005 but otherwise contains the same terms as the first lease.*

61C. *The supply made under the lease executed on 15 June 2000 is GST-free under section 13 to the extent it is made before 1 July 2005. This is because both the consideration and the supply made under the lease were specifically identified in the agreement to lease, as required by subsection 13(1).*

61D. *Section 13 also continues to apply to supplies made before 1 July 2005 under the replacement lease. This is because the only change to the terms of the lease is the increase in the rent. This is a change to the consideration, made on or after 22 February 2005, for supplies to be made on or after 1 July 2005.*[14C] *The parties remain bound by the original terms of their agreement to lease in all other respects. They have merely agreed to give effect to the change to the consideration by replacing the lease with a new lease that contains the change but is the same in all other respects.*

Renewal of agreement on or after the relevant date

62. Under some agreements, the recipient of a supply has the right to renew the agreement to receive the supply for a further period. Common examples are options to renew a commercial property lease or a franchise agreement.

63. If a supplier is bound to make a supply because of a written agreement made before the relevant date that specifically identifies the further supply and identifies the consideration in money or a way of working out the consideration in money, section 13 can apply to that supply. The critical requirements are that the earlier binding agreement specifically identifies the further supply and the consideration in money or a way of working out the consideration in money for that supply and locks in the supplier if the recipient exercises the option.

[14C] Subsection 13(4C).

Example

64. Ashantha has an agreement with Fred, a franchisor. The agreement is for a period of three years. It was made before the relevant date and meets the other requirements of subsection 13(1). The agreement expires on 31 December 1999. Ashantha has an option in the agreement to renew the franchise agreement for a further three years on the same terms by paying a renewal fee of $25,000. Ashantha exercises the option and renews the agreement on 15 December 1999.

65. The supply and consideration for the further period were identified in the agreement made before the relevant date. On the exercise of the option Fred is locked in to providing the supply on the terms and conditions outlined in the original agreement. The supply made by Fred for the further period will be GST-free to the extent it is made before a review opportunity arises.

66. If Ashantha had not exercised the option identified in the agreement made before the relevant date, but the parties continued on the same terms after the expiration of the initial period on 31 December 1999, the further period of supply will not be GST-free under section 13 because it was not specifically identified in the agreement.

67. In some cases the exercise of an option to renew an agreement or the making of a further supply under a holdover clause (see paragraph 40 of this Ruling), may provide the supplier with an opportunity to review the consideration. We consider whether this will be a review opportunity in paragraphs 94 to 184 of this Ruling.

Variation of an agreement

68. Generally, a variation on or after the relevant date to:

- the supply;
- the consideration (or the way of working out the consideration, for example a formula); or
- other essential terms,

will mean that, for the purposes of section 13, there is a new agreement and section 13 ceases to apply. This should be contrasted with a change or review of the consideration that was provided for under the agreement (rather than by a variation) which will result in section 13 ceasing to apply only if the change or review constitutes a review opportunity. (See paragraphs 94 to 184 of this Ruling.)

69. Where both parties agree that a supply identified in an agreement to which section 13 applies will be subject to GST, it is open to them to do this by entering into a new agreement or varying an existing agreement to achieve this result. Section 13 can cease to apply because the variation will result in a new agreement for purposes of section 13.

69A. If the variation occurs on or after 22 February 2005 and merely changes the consideration, then:

- if the change relates to supplies made before 1 July 2005, section 13 ceases to apply to those supplies from when the change takes effect;[14D] and
- if the change only relates to supplies made on or after 1 July 2005, section 13 does not cease to apply to supplies made before 1 July 2005.[14E]

69B. For the purposes of paragraph 69A, a change to the consideration for a supply means a change to that consideration (including a change to the method by which the consideration is worked out) not provided for in the agreement.[14F] Therefore, the rules set out in paragraph 69A do not apply if the agreement provides for a change to the consideration. However, such a provision to change the consideration might give rise to a review opportunity as defined by subsection 13(5), which can cause a supply to cease to be GST-free under section 13 (see paragraphs 94 to 184 of this Ruling).

69C. If a variation which changes the consideration was made before 22 February 2005 but was to take effect at some time after the variation was made, it remains our view that section 13 ceased to apply to the supplies from the date of the variation rather than the date on which the change takes effect. The new rule explained in paragraphs 69A and 69B of this Ruling applies only if the change is made on or after 22 February 2005.

69D. If the variation changes the character of the supply or other essential terms, section 13 ceases to apply from the date the variation was made (whether the variation was made before, on or after 22 February 2005). This is the case even if the variation, in addition, changes the consideration with effect from some time in the future.[14G]

[14D] Subsection 13(4B).
[14E] Subsection 13(4C).
[14F] Subsection 13(4D).
[14G] This is because there is a new agreement and the new rule explained in paragraphs 69A and 69B of this Ruling does not apply.

70. If a supplier is required to make variations to the specifications of a supply, under an agreement which contemplates that the specifications of the supply can be varied, section 13 will still apply provided the variation does not alter the essential character of the supply. Agreements which contemplate that the specifications of a supply can be varied are commonly used in the construction industry. Whether the essential character is altered in a particular case will be a question of fact and degree. The essential character of the identified supply is determined by reference to the specifications of the supply identified in the original agreement.

71. In addition, section 13 will still apply where such a variation to the supply results in a variation to the consideration in accordance with the terms of the agreement. However, if a review opportunity arises under the agreement for the supplier as a result of the variation, the supply would cease to be GST-free.

72. A variation to the supply, such that the essential character of the supply is different to that set out in the original agreement will, if this occurs on or after the relevant date, result in section 13 not applying to the varied agreement.

Example

73. On 1 June 1999 Bruce made an agreement with Kathleen that satisfies subsection 13(1). Under the agreement Bruce is to construct commercial premises to the specifications set out in the agreement. The agreement contemplates that variations to the supply can be made and provides for how the consideration is to be changed to reflect the variations.

74. On 1 May 2000 Kathleen told Bruce to install several extra light fittings in the showroom. The schedule to the agreement stipulates an agreed rate per fitting for extra light fittings. As the essential character of the supply did not change, section 13 can continue to apply to the supply under the varied agreement.

75. On 1 June 2000 Kathleen decided that she wanted a different type of floor covering. In accordance with the schedule to the agreement the type and price of the new floor covering was as agreed by the parties. As the essential character of the supply did not change, section 13 can continue to apply to the supply under the varied agreement.

Example

76. Assume in the above Example that on 1 September 1999, before construction commenced, Kathleen had decided that she wanted a different design for the premises and had new plans drawn and approved by the local authority, and Bruce had agreed to build according to the new plans. The variation would have resulted in section 13 ceasing to apply to the agreement. In this case, notwithstanding that the agreement was still for the provision of commercial premises, the specifications of the varied supply indicate that the essential character of the supply, as specified in the original agreement, has changed. These changes are considered to have created a new agreement for the purposes of section 13.

77. [Deleted]

Example

78. Alana has an agreement to lease premises to Bob until 31 December 2007. The agreement satisfies subsection 13(1). The parties agree on 1 March 2005 to vary the agreement so that the consideration payable by the recipient is increased by 10% from 1 July 2005.

79. As this is a variation of the consideration identified in the agreement on or after 22 February 2005, section 13 continues to apply to the supply made under the agreement from the date of the variation and before 1 July 2005.

80. Also, if the parties enter into a separate agreement to provide for the additional consideration from 1 July 2005, rather than varying the original agreement, section 13 would continue to apply to supplies made before 1 July 2005 under the original agreement.

Complying with ACCC requirements

81. The Australian Competition and Consumer Commission ('ACCC') has issued guidelines about when price exploitation occurs in a publication titled 'Price Exploitation and The New Tax System'. These guidelines have been drafted with reference to the requirements of the *Trade Practices Act 1974*. Paragraph 2.45 of the guidelines requires that when businesses benefit directly from tax reductions they should immediately adjust their prices to reflect these reductions. Paragraphs 2.43 and 2.55 deal specifically with long term contracts.[15]

[15] These paragraphs provide as follows:
'2.43 The existence of a long-term contract does not of itself exempt a supplier from passing on to consumers the net tax and cost savings arising from the New Tax System changes.'
'2.55 In considering whether there has been a contravention of s. 75AU, the ACCC will have regard to any exceptional circumstance that may affect the level

82. If parties have an agreement to which section 13 applies and the supplier reduces the consideration it charges the recipient for the sole purpose of complying with ACCC requirements relating to price exploitation, such as passing on the benefit of tax savings, or modifying the amount of an increase otherwise available under the agreement, section 13 will continue to apply to the agreement. However, a variation that changes the consideration to include GST payable by the supplier would create a new agreement, and section 13 will cease to apply to the agreement.

83. Under the ACCC guidelines the supplier may need to estimate the amount of savings and pass the estimated amount on to the recipient. If an adjustment is subsequently made to the estimated amount to reflect the actual cost savings, this further variation to the consideration will not result in section 13 ceasing to apply.

Change of parties to an agreement

84. One or more parties to an agreement may change on or after the relevant date. A party may assign its rights and obligations under the agreement to another person or entity or this can occur due to the operation of law. A common example is when the owner of leased premises sells the property and the rights and obligations under the lease agreement pass to the new owner. A change of parties can also be a result of a statutory subrogation or under succession law.

85. If an agreement that satisfies subsection 13(1) continues after the change of parties and the change of parties does not alter the supply or consideration identified, or provide a review opportunity, the mere change of parties, in itself, will not mean section 13 ceases to apply to the agreement. However, if the change of parties creates a new agreement section 13 will no longer apply.

86. A subrogation or assignment which does not disturb the existing agreement is different to a novation. A novation gives rise to a new agreement. If the new agreement is made on or after the relevant date, section 13 will not apply to the new agreement.

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of the tax changes passed through. Examples of such circumstances, that will be considered on a case-by-case basis, may include:

- where a business is operating in an industry that is subject to price regulation and is unable to adjust prices fully to reflect the impact of the GST;
- where goods or services are supplied under a long term non-reviewable contract and the price for that supply cannot be changed; and
- where goods or services are supplied under a long term reviewable contract but the review opportunity does not take place on or before 1 July 2000, savings must be passed through from date of first review opportunity.'

Example

87. Adam owns a commercial property. He enters into a lease agreement for a ten-year term with Ben on 1 November 1998. The lease meets the requirements of subsection 13(1) and does not have a review opportunity. On 1 November 2000, Adam sells the property to Anne and his rights and obligations under the lease pass to Anne by the operation of the law. The existing lease agreements remain in force.

88. The transfer will not result in section 13 ceasing to apply to the agreement.

Statutory subrogation

89. If an agreement satisfies subsection 13(1) before a statutory subrogation, the subrogation, in itself, will not result in section 13 ceasing to apply to the agreement because it does not create a new agreement.

Example

90. Changes to the laws affecting public managed investment schemes were introduced on 1 July 1998 by amendments made to the Corporations Law by the Managed Investments Act 1998. By virtue of sections 601FS and 1462 of the Corporations Law, on registration of a scheme, the rights, obligations and liabilities of the trustee company and the management company in relation to the scheme become the rights, obligations and liabilities of the new responsible entity.

91. Under section 601FT of the Corporations Law, if the responsible entity changes, a document to which the former responsible entity was a party or under which the former responsible entity has acquired or incurred a right, obligation or liability has effect as if the new responsible entity is a party or has acquired or incurred the right, obligation or liability. The same rights and duties which attached to the original person or entity attach to the substituted person or entity.

92. If a particular agreement which satisfies subsection 13(1) was made by the trustee before the changes to comply with the Managed Investments Act, replacement of the trustee by another party as the responsible entity will not result in section 13 ceasing to apply.

Other changes in parties

93. There will be other cases where the change of a party to an agreement is not required by legislation but is the result of a voluntary election by the party. Whether or not the changes to the agreement result in a new agreement can only be determined after an examination of those changes.

Review opportunity

94. If an agreement meets the requirements of subsection 13(1)[16], subsection 13(2) provides that the supply identified in the agreement is GST-free to the extent that it is made before the earlier of the following:

(a) 1 July 2005; or

(b) if a review opportunity arises on or after the relevant date - when that opportunity arises.

95. **Review opportunity** is defined in subsection 13(5) as:

'an opportunity that arises under the agreement:

(a) for the supplier under the agreement (acting either alone or with the agreement of one or more of the other parties to the agreement) to change the consideration directly or indirectly because of the imposition of GST; or

(b) for the supplier under the agreement (acting either alone or with the agreement of one or more of the other parties to the agreement) to conduct, on or after 1 July 2000, a general review, renegotiation or alteration of the consideration; or

(c) for the supplier under the agreement (acting either alone or with the agreement of one or more of the other parties to the agreement) to conduct, before 1 July 2000, a general review, renegotiation or alteration of the consideration that takes account of the imposition of the GST.'

96. A review opportunity will arise if the opportunity arises under one or more of the above paragraphs in subsection 13(5). In some circumstances, the supplier will have an opportunity to conduct a 'general review, renegotiation or alteration' under paragraph 13(5)(b) or 13(5)(c) as well as an opportunity to 'change the consideration … because of the imposition of GST' under paragraph 13(5)(a).

[16] See paragraph 15 of this Ruling.

97. A variation of the consideration or the entering into of a new agreement is a separate issue to a review opportunity which arises under an agreement. If the parties to an agreement agree to vary the consideration or the supply on or after the relevant date in a manner not provided for in the agreement, section 13 will cease to apply. See paragraphs 68 to 83 of this Ruling.

98. An opportunity for the supplier to terminate an agreement is not a review opportunity. Of course, if the agreement is terminated, section 13 will no longer apply once the agreement ends.

Example

99. Hal has an agreement to provide management services to Evangeline for an undefined period of time. The agreement meets the requirements of subsection 13(1). Under the agreement either party can terminate the agreement by giving 30 days written notice.

100. The opportunity to terminate is not a review opportunity because it does not give Hal an opportunity under the agreement to change the consideration because of the imposition of GST, or to conduct a general review, renegotiation or alteration of the consideration. If either party does terminate the agreement, section 13 will cease to apply when the agreement terminates.

101. Some common types of changes and reviews of consideration under agreements are considered in paragraphs 155 to 184 of this Ruling.

Opportunity

102. Section 13 operates on the basis that if a supplier has an opportunity to take GST into account, the supplier should do so. Therefore, provided a review opportunity arises, the supply will cease to be GST-free from the time the opportunity arises. It does not matter whether the supplier takes advantage of the opportunity. If the supplier decides not to change the consideration or undertake a review when there is an opportunity to do so or not to implement any change resulting from the review, an opportunity will still arise.

103. 'Opportunity' is not defined in the GST Transition Act or the GST Act. The *Macquarie Concise Dictionary (Third Edition)* defines 'opportunity' as:

- 'an appropriate or favourable time or occasion'.

The *New Shorter Oxford English Dictionary* defines 'opportunity' as:

- 'a time or condition favourable for a particular action or aim, occasion, chance'.

104. An opportunity does not have to be an event or incident. An agreement may give the supplier a review opportunity even if the agreement does not specify a particular date for the review. For example, the effect of an agreement may be to give the supplier an opportunity to change the consideration because of the imposition of GST from the time the GST is introduced.

105. If the agreement provides that circumstances which are beyond the supplier's control must exist before an opportunity to change or review the consideration arises, then a review opportunity will not arise until the circumstances exist.

Example

106. An agreement satisfies subsection 13(1). The agreement provides for the consideration to be reviewed to a market rate only if the $US exchange rate reaches a certain value.

107. A review opportunity cannot arise for this reason unless the exchange rate reaches the value.

When the opportunity arises

108. The review opportunity arises when the change or review of the consideration can first take effect, which may not be at the same time the review process takes place.

Example

109. Section 13 applies to a written agreement for the lease of premises. The agreement has the following clause:

> *'The landlord shall have the right to review the rent from 1 August 2000 for the balance of the term and to request the tenant to pay an increased rent for the remainder of the term, provided always that if there be no agreement between the tenant and the landlord as to the amount by which the rent is to be increased, the same shall be determined by arbitration pursuant to the Arbitration Act. The rent as so determined shall apply from 1 August 2000.'*

110. In this case the opportunity for the supplier to review the rent arises on 1 August 2000 because this is the date the reviewed consideration will take effect, whether or not the landlord and tenant can agree on the increase or the matter goes to arbitration.

Opportunity for the supplier (acting either alone or with the agreement of one or more of the other parties)

111. The opportunity must be an opportunity for the supplier. An opportunity for the recipient alone to change or review the consideration is not a review opportunity.

112. An agreement may provide an opportunity for the supplier and the recipient to negotiate a change in the consideration at a time determined by the agreement. If the agreement of the recipient is required before any change or review of the consideration can be made, a review opportunity will not arise if the recipient does not agree to a change or review. However, where the recipient does not agree but the agreement provides for a dispute resolution process to determine the consideration, a review opportunity will arise if the process would allow a review or change that satisfies subsection 13(5). An example of such a provision is in paragraph 109 of this Ruling.

113. An agreement which allows the parties to vary the terms by agreement at any time (for example, 'the parties may agree to vary the consideration from time to time') will not be an opportunity for the supplier to change the consideration or to conduct a general review, renegotiation or alteration of the consideration that satisfies subsection 13(5). The effect of such a clause is general in nature and does not constitute a review opportunity as it merely restates the position at general law as to the rights of the parties to seek to vary an agreement. However, if the consideration is changed under such a clause it will be a variation which gives rise to a new agreement (see paragraphs 68 to 83 of this Ruling).

114. An opportunity for the supplier can be initiated by another party to the agreement, provided the change to, or review of, the consideration requires the agreement of the supplier. For example, the agreement may allow the recipient of a supply to initiate a market review of the consideration at a time of his or her choice. An opportunity for the supplier will arise when the recipient initiates the market review. In this case, even though the supplier cannot initiate the opportunity, once initiated, it will be an opportunity for the supplier. In some cases where only the recipient can bring about a change in or a review of the consideration there will be no opportunity for the supplier to change or review the consideration because the recipient can unilaterally determine the new consideration, and the supplier does not have recourse to an arbitrator. If the change or review does not require the supplier's agreement, a review opportunity will not arise.

Example

115. Maree is a commission agent who has an agreement that satisfies subsection 13(1) to supply services to Sandy. Sandy has the ability to reduce the fee that Maree can charge, down to a specified minimum amount. Maree has no ability under the agreement to negotiate the changing of the fee with Sandy under this process. If Sandy chooses to impose a new fee under the terms of the agreement this will not be a review opportunity for Maree.

116. An agreement may give the supplier an opportunity at any time over a period to change the consideration because of GST or conduct a general review, renegotiation or alteration (that takes account of the imposition of GST if it is before 1 July 2000). In such cases, the opportunity will arise at the beginning of that period, i.e., when the supplier first has the opportunity.

Example

117. On 1 May 1999, Ling enters into an agreement with Zena to lease premises to Zena for a period of 5 years. Section 13 applies to the agreement. The agreement provides for a market review at any time during the last three years of the lease, i.e., at any time on or after 1 May 2001.

118. A review opportunity will arise on 1 May 2001 because Ling can conduct a general review within the meaning of paragraph 13(5)(b).

119. If a supply of trustee services is identified in a trust deed and the consideration for the supply can be amended at the discretion of the trustee, a review opportunity arises when circumstances permit the trustee to exercise the discretion.

120. An agreement may put a cap or limit on the amount by which the consideration can be changed after a review of the consideration. If the cap prevents the market rate (which takes account of the imposition of the GST if the review is before 1 July 2000) being reflected by the new consideration we will regard the supplier as not having had the opportunity to conduct a general review, renegotiation or alteration of the consideration, and a review opportunity will not arise.

Example

121. Harry supplies specified management services to Larry. Their agreement provides that the annual fee charged by Harry is to be reviewed to the market rate on 1 January 2002. It also provides that the annual fee cannot increase by more than 5% of the existing fee.

122. A review opportunity will arise on 1 January 2002 if the increase to the market rate is 5% or less of the existing fee. This is because Harry has the opportunity to conduct a general review or alteration of the consideration. If the market rate is more than a 5% increase to the existing fee, a review opportunity will not arise.

123. An agreement may provide for the consideration to be reviewed to the higher amount resulting from two alternative bases. If one of those bases is a review opportunity as explained in this Ruling and the other is not, a review opportunity will arise regardless of the method adopted because one possible outcome of the review meets the requirements for a review opportunity.

Example

124. Jess leases premises to Cleo under a lease agreement which satisfies subsection 13(1). On 1 September 2000 the rent can be adjusted to the higher of an increase based on the CPI or to the market rent. As the review to market satisfies paragraph 13(5)(b), a review opportunity will arise even if the market rate is lower than the CPI increased amount on 1 September 2000.

125. A supplier may be able to change the consideration because it has previously waived, before the relevant date, part of the consideration to which it was entitled. The amount by which the consideration can increase up to the agreed consideration will act as a cap or limit. A review opportunity will arise when the supplier can conduct a general review, renegotiation or alteration of the consideration which reflects the market rate for the supply (and which takes into account the imposition of GST for a review conducted before 1 July 2000).

Example

126. Trustee Ltd was entitled to charge 1% of the income earned by a fund for trustee services provided to the fund. Before the relevant date it waived part of its entitlement and advised the recipient that it would accept 0.5% until further written notice.

127. If Trustee Ltd has the opportunity to increase the consideration because of the imposition of GST on the supply of the trustee services, a review opportunity will arise. If Trustee Ltd reviews the consideration before 1 July 2000 a review opportunity will not arise unless it was to take account of the imposition of GST. It will not be a review opportunity if the cap prevents the consideration from reflecting the market rate (that takes account of the imposition of GST) for the supply. If Trustee Ltd reviews the consideration on or after 1 July 2000 it will not be a review opportunity if the cap prevents the consideration from reflecting the market rate for the supply.

128. An agreement may provide for a general review, renegotiation or alteration of the consideration, but prevent the consideration from decreasing if the reviewed amount is lower than the existing consideration. Such a provision is sometimes referred to as a 'ratchet clause'. This will still be an opportunity to conduct a general review, renegotiation or alteration of the consideration.

Example

129. Vicki made an agreement to lease premises to Garry. The agreement satisfies subsection 13(1). Under the agreement a market rent review is to be conducted on 1 September 2000. The agreement provides that if the reviewed rent is lower than the current rent, then the rent remains at its current level.

130. This is a review opportunity because it is an opportunity for Vicki to conduct a general review of the consideration. It does not prevent the full impact of market changes being incorporated into the consideration as could be the case with a cap.

Opportunity … under the agreement

131. The opportunity must arise 'under the agreement'. Whether a review opportunity arises will depend on the express and implied terms of the agreement. Relevant law may operate to imply terms into the agreement. If the opportunity arises because of a law which affects the operation of the agreement but which does not imply a term, no review opportunity arises under the agreement. However, it could be a variation to the agreement. (See paragraphs 68 to 83 of this Ruling.)

Example

132. A commercial lease provides for a rent review due on 1 September 2000 to be on the basis of either of two methods at the lessor's option. The State retail tenancies legislation which applies to the lease has the effect of making that provision void and implying a term for the rent review to be the rent as agreed between the parties, or, in the absence of agreement, the market rent as determined by a valuer.

133. Even though it is the legislation which specifies the form of the review, the opportunity arises 'under the agreement' because the legislation implies a term into the agreement.

Paragraph 13(5)(a): 'change the consideration directly or indirectly because of the imposition of GST'

134. An opportunity for the supplier 'to change the consideration directly or indirectly because of the imposition of GST' will be a review opportunity under paragraph 13(5)(a).

135. A change to only a part of the consideration because of the imposition of GST will not come within paragraph 13(5)(a) if it is merely incidental to the total consideration.

Example

136. Annette, a consultant, agreed to supply specified consultancy services to Lawrie under an agreement which satisfies subsection 13(1). The consideration is $500 per day plus $1 per page faxed to Lawrie. Under the agreement Annette can unilaterally make any reasonable change to the amount charged per page. This is an opportunity to change part of the consideration for the supply because of the imposition of GST. However, the consideration is merely incidental to the total consideration for the supply and will not give rise to a review opportunity under paragraph 13(5)(a).

137. If the agreement provides for a change in the consideration as a result of the existence of certain circumstances, and the imposition of GST is the predominant cause of that change, this will be an opportunity to change the consideration 'directly or indirectly because of the imposition of GST'. The change must be because of the imposition of GST on the supply identified in the agreement. There will not be a review opportunity if the change is because of the imposition of GST on another supply. See also paragraphs 178 to 180 of this Ruling.

Example

138. Liz, a real estate agent, enters into a property management agreement with Tom to manage the leasing of Tom's commercial building. The agreement meets the requirements of section 13. The consideration for Liz's supply is 7.5% of the rent received for the building. From 1 July 2000 the rent is increased to take account of the GST payable on the supply of the premises.

139. The change in the consideration for the supply of the property management services is not because of the imposition of GST on that supply. It is because of the imposition of GST on the supply under the lease of the commercial building. Therefore it does not give rise to a review opportunity under paragraph 13(5)(a).

140. 'Indirectly' in paragraph 13(5)(a) does not mean any change, however remote. In order for an opportunity to be a review opportunity under paragraph 13(5)(a), there should be a link between the imposition of GST on the supply identified in the agreement and the change in the consideration.

141. The change would need to be predominantly due to GST and not a range of factors. For example, a CPI increase does not satisfy paragraph 13(5)(a) because the increase may be the result of a combination of a range of factors, and not predominantly because of the imposition of GST on the particular supply. An example of an indirect change in the consideration is where the supply, rather than the consideration, is adjusted to take into account the imposition of GST.

Example

142. Chalk has an agreement to provide 500kg of widgets a month to Cheese for three years. Cheese pays Chalk $1,000 per month. The agreement provides that Chalk can reduce the amount of widgets it supplies for the same consideration if and when a GST is introduced.

143. This is a review opportunity because Chalk has an opportunity to change the consideration indirectly because of the imposition of GST, by changing the amount of widgets it supplies to Cheese.

144. There must be an opportunity to change the consideration. An agreement which provides that the consideration identified is inclusive of any GST will not give rise to a review opportunity.

Example

145. An agreement to which section 13 applies states that if a GST is imposed on the supply of the goods the consideration agreed by the parties will be deemed to be the tax inclusive price. This provision will not give rise to a review opportunity because there has been no change to the consideration, or general review, renegotiation or alteration of the consideration, on or after the relevant date. The supply will be GST-free to the extent it is made before the earlier of a review opportunity or 1 July 2005.

146. Where an agreement identifies a way of working out the consideration in money under a formula, a review opportunity will arise if the formula allows the consideration to change because of the imposition of GST on that supply. For example, a formula based on the supplier's current price list at the time the supply is made is an opportunity for the supplier to change the consideration because of the imposition of GST.

Paragraphs 13(5)(b) & 13(5)(c): 'general review, renegotiation or alteration of the consideration…'

147. Whether an opportunity 'to conduct a general review, renegotiation or alteration of the consideration' is a review opportunity will depend on whether that opportunity arises before 1 July 2000 or on or after that date. Where such an opportunity arises on or after 1 July 2000, it will constitute a review opportunity. Where the opportunity arises before 1 July 2000, it will only be a review opportunity if the imposition of GST can be taken into account.

148. Whether a general review gives an opportunity to take GST into account will depend on the terms of the agreement and, where the consideration is set by a valuer, the instructions given by the supplier to the valuer and the valuer's guidelines. Where the agreement does give the supplier an opportunity to take GST into account in conducting the general review, renegotiation or alteration, a failure to do so will not prevent the opportunity being a review opportunity. For the circumstances in which a market review before 1 July 2000 will give rise to a review opportunity see paragraphs 181 and 183 of this Ruling.

149. An opportunity to make a fixed increase to the consideration, either by a dollar or percentage amount or based on an economic indicator (for example the CPI) is not an opportunity to conduct a 'general review, renegotiation or alteration of the consideration'. However it will be a review opportunity if the increase is for purpose of taking account of the imposition of GST.

Example

150. Alan, an athlete, enters into a sponsorship agreement that satisfies subsection 13(1) with Sponsor Ltd. The agreement provides for monthly payments of $1,000. In the event that Alan wins an Olympic gold medal the agreement requires the monthly payment to increase to $5,000 per month for each medal.

151. The review of the consideration is not a 'general review, renegotiation or alteration of the consideration'. Therefore a review opportunity will not arise if Alan wins a gold medal.

152. In paragraphs 13(5)(b) and 13(5)(c) the word 'general' in the phrase 'general review, renegotiation or alteration' is considered to qualify all three terms, i.e., a renegotiation or alteration will only satisfy paragraphs 13(5)(b) and 13(5)(c) if it is a general renegotiation or a general alteration. An opportunity to conduct a 'general review, renegotiation or alteration of the consideration' arises only if the whole or nearly all of the consideration is capable of review.

153. In *FCT v. DB Rreef Funds Management Ltd*,[17] the Full Federal Court considered whether a lease agreement provided a lessor with the opportunity to conduct a general review of the consideration for the supply of commercial premises. The consideration for the supply comprised an annual rent amount together with the lessee's contribution to the lessor's outgoings. The lease agreement did not provide for any review, renegotiation or alteration of the contribution to the lessor's outgoings. Because the contribution to the lessor's outgoings amounted to about 17 per cent of the consideration for the supply and could not be reviewed, Edmonds J (with whose judgment the other Justices agreed) considered that the lease agreement did not provide for a 'general review' of the consideration.

154. Similarly, in *Westley Nominees Pty Ltd v. Coles Supermarkets Australia Pty Ltd*,[18] the Full Federal Court held that the lessor in that case did not have an opportunity to conduct a general review of the consideration for the supply because two components of the consideration (the annual percentage rent and the lessee's contribution to outgoings) could not be reviewed and together constituted more than 48 per cent of the whole of the consideration. However, the Full Court suggested that a 'general review' did not necessarily require the whole of the consideration to be reviewed. The Court commented as follows:

> Whether a general review of the (whole of the) consideration for the supply requires an opportunity to review the whole of that consideration may be doubted. For example, if all the elements of the consideration could be reviewed other than

[17] [2006] FCAFC 89.
[18] [2006] FCAFC 115.

> Coles' contribution to the promotion fund,[18A] then it would be open to conclude that the review was, nevertheless, a general review being a review of nearly all of the consideration: see *Case M58* (1990) 12 NZTC 2,333 at 2,338.[18B]

154A. In *DB Rreef* Sackville J at first instance found that no review opportunity arose for a different reason. The original rent was set at an amount to enable the lessor to recoup the cost of fitting out the leased premises at its own expense. But the lease agreement required the fit-out works to be ignored in reviewing the rent to market. Sackville J found that the opportunity to review the rent was limited because the valuer could not assess the value of that portion of the premises comprising the fit-out works. The value of the fit-out works was substantial. Hence no review opportunity arose. The Commissioner appealed but the Full Court dismissed the appeal, having identified no error in Sackville J's reasoning.

Common types of changes and reviews of consideration

Economic indicators

155. Where there is a fixed adjustment to the consideration on the basis of an indicator such as the CPI, the change may be partially referable to the impact of the imposition of the GST. This will not be a review opportunity under paragraphs 13(5)(b) or 13(5)(c) because it is not a general review, renegotiation or alteration.

156. To be a review opportunity under paragraph 13(5)(a), there must be an opportunity to change the consideration because of the imposition of GST on the supply identified in the agreement. Even if part of the CPI increase may be attributable to the GST, the change is not because of the imposition of GST on the supply but a range of economic factors. Even though paragraph 13(5)(a) states that the opportunity to change the consideration may arise indirectly because of the imposition of GST, an opportunity to change the consideration based on the CPI does not give an opportunity to change the consideration because of the imposition of GST on the particular supply identified in the agreement.

157. We consider that the connection between the GST and changes to the CPI is too remote to satisfy the paragraph. A change to the CPI is not necessarily related to the supply identified in the agreement.

158. By similar reasoning, an opportunity to change the consideration to reflect a change in an exchange rate would not, of itself, be a review opportunity.

[18A] The amount of Coles Supermarkets' contribution to the promotion fund represented about 0.5 per cent of the total consideration for the supply.
[18B] [2006] FCAFC 115, at 66.

Example

159. Rusty Pty Ltd entered into a written agreement to supply steel to a manufacturer on 1 April 1999 for a ten-year period. The consideration is calculated by a formula that allows adjustments to reflect exchange rates. No other adjustment to the consideration is possible.

160. An adjustment based on an exchange rate does not constitute a review opportunity and the supply of steel will be GST-free until 1 July 2005.

Recipient's turnover

161. The consideration for some supplies is based on the turnover of the recipient. Examples are supplies under commercial property leases, franchise agreements and sales commission agreements. A change to the consideration for a supply because of a change in the recipient's turnover is not a review opportunity because the opportunity to make the change is not 'because of the imposition of GST' on the supply being made under the agreement. The connection with the imposition of GST is too remote. The change is also not due to a general review, renegotiation or alteration.

162. Some agreements, under which the consideration is based on turnover, will contain a clause that allows the parties to renegotiate the level at which consideration is based on turnover, or the percentage of turnover on which consideration is calculated, in the event of a change in the tax system. This is the formula by which part of the consideration for the supply in the agreement is calculated. If the parties negotiate a change in the formula under such a clause, this is an opportunity for the supplier to change the consideration because of the imposition of GST. If the consideration in money based on the turnover formula is merely incidental to the total consideration, both before and after the change in that formula, a review opportunity will not arise.

Fixed increment

163. An adjustment to the consideration by way of a fixed increase, either on the basis of a set amount or a percentage of the existing consideration, will not constitute a review opportunity unless the purpose of the increase was to take into account the imposition of GST.

164. An adjustment to the consideration based on a formula of combining CPI with a fixed increase will also not constitute a review opportunity unless the purpose of the fixed increase alternative was to take into account the imposition of GST.

Recovery of taxes

165. A clause in an agreement may allow the supplier to recoup defined outgoings from the recipient. Amounts paid by the recipient of a supply under such a clause will be part of the consideration for the supply. This type of clause is common in commercial leases. The consideration for a supply by way of a lease includes, in addition to the rent, amounts paid by the lessee under the lease in respect of the lessor's outgoings.

166. The following discussion is in terms of agreements for the lease of premises but the principles apply to any agreement under which the supplier can recover from the recipient taxes for which the supplier is liable.

167. A clause allowing the recovery of taxes will only give rise to a review opportunity if it allows the consideration to be altered because of the imposition of GST on the supply identified in the agreement. In the case of a commercial lease, the clause will only be a review opportunity if it allows the consideration for the supply under the lease to change because of the imposition of GST on the supply of the premises.

168. The wording of such clauses varies substantially from lease to lease. Most clauses of this type relate only to the lessor's operating expenses and will not allow GST to be recovered in relation to the rent.

169. We take a narrower view of the effect of the clauses in the New Zealand cases *Case L29*[19] and *Smale v. Fletcher Homes Ltd*[20] than was taken in those cases. Those decisions were made in the context of the New Zealand legislation which, although similar, is not the same as the Australian GST legislation. Whilst the existence of a review opportunity will always remain to be determined by reference to the terms of the actual clause in the context of the particular agreement, our view is that the clauses considered in those cases will in general not give rise to a review opportunity. In other words, a clause using the formula of taxes imposed on, or payable by, a supplier 'in respect of' the premises demised under a lease will not, as a general rule, operate to enable a supplier to recover from a recipient GST payable on the supply of the premises.

170. In *Case L29* the covenants in one of the leases considered were expressed as follows:

> '… the lessee will pay all rates, taxes, charges, assessments, impositions and outgoings whatsoever which now are or which during the said term shall be taxed, rated, charged, assessed or imposed on the said premises, or on the landlord or tenant in respect thereof, by authority of Parliament, local authority or otherwise.'

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[19] (1989) 11 NZTC 1175.
[20] (1996) 17 NZTC 12662.

171. It was unsuccessfully argued in that case that the leases were 'non-reviewable' for the purposes of the New Zealand legislation because GST is a tax imposed on the leasing activity itself and is not a tax imposed on the premises or on the lessor in respect of the premises. It was found that in the scheme of the New Zealand legislation it was clear that GST is a liability 'taxed', or 'charged', or 'assessed' or 'imposed' on the landlord. The TRA decided the leasing activity and the taxable activity were identical, and the words 'in respect of' taken even in the narrowest sense relate both back to their source - the registered person or landlord. It held such clauses impose directly on the lessee or tenant a duty to pay GST from its inception to the landlord or to the government on the landlord's behalf.

172. In *Smale v. Fletcher Homes Ltd*, the New Zealand Court of Appeal considered an outgoings clause which provided that 'the Lessee … pay to the Lessor … all rates, taxes (but excluding the Lessor's Land Tax … and the Lessor's income tax), charges, assessments and outgoings of the Lessor … paid or payable or otherwise incurred in respect of the Land…'. The court observed that the breadth of these words was recognised by the express exclusion of the lessor's land tax and income tax. It said there would seem little doubt that GST on the rental under the lease would be payable by the lessee under the clause as being 'in respect of' the land.

173. As stated above we do not intend to follow this reasoning. Our view is that a clause would have to contemplate a tax in respect of the *supply* of the premises, and not just a tax in respect of the premises.

174. We take the view that a clause which covers taxes in general, such as an outgoings clause, should not be considered to be a review opportunity unless the wording of the clause clearly evidences an intention by the parties to cover a tax in the nature of a goods and services tax. Whilst it will always depend on the particular agreement whether the supplier has an opportunity to change the consideration for a supply because of the imposition of GST, our view is that the following examples from commercial leases will, in general, not give rise to a review opportunity unless it clearly allows GST to be covered:

- A lease where a building has more than one tenant (for example, a retail shopping centre lease) which requires that the lessor's outgoings are apportioned between lessees on the basis of the floor area occupied but the rent is not apportioned on this basis;
- A lease which states the lessee must pay all rates and taxes either 'in respect of', 'against' or 'on' the leased premises, rather than the supply of or the lessor's use of the premises; and

- A lease which states the lessee must pay future rates and taxes imposed upon the premises, rather than a future tax on the supply or the lessor's use of the premises.

175. Where the consideration can change under the agreement to include tax *on the supply to the recipient* payable by the supplier, there will be an opportunity for the supplier to change the consideration because of the imposition of GST, so a review opportunity will arise under paragraph 13(5)(a).

Example

176. An agreement for a supply by Hannah to Jessica contains the following clause: 'In the event that a GST is introduced, the consideration payable by Jessica under this agreement shall be increased by the amount of GST payable by Hannah on the supply to Jessica. The increased amount is payable from the date the GST is introduced.'

177. This is a review opportunity for Hannah. However, if the agreement had specified that the parties intended the supply to be GST-free under any applicable transitional provisions, the clause would not trigger a review opportunity because Hannah could not change the consideration until the supply ceased to be GST-free under section 13.

Recovery of supplier's inputs or expenses

178. A separate issue relating to 'outgoings' is where part of the consideration for a supply under an agreement is calculated by reference to particular outgoings, expenses or inputs of the supplier. The effect of such a term in an agreement may be that the GST-inclusive price for those outgoings, expenses or inputs will be able to be recouped by the supplier.

179. In the case of a supply that would be a taxable supply but for the operation of section 13, the ability to recoup GST included in the price of outgoings, expenses or inputs will not give rise to a review opportunity in respect of the supply. There has been no opportunity for the supplier to 'change the consideration … because of the imposition of GST' on that supply.

180. However, if a supply would be an input taxed supply but for the operation of section 13, the ability to recoup GST included in the price of inputs related to making the supply will give rise to a review opportunity. Although GST is not payable on the supply identified in the agreement, GST is imposed on the supply through denying entitlement to an input tax credit for anything acquired to make the supply. The supplier has the opportunity to change the consideration because of the imposition of GST if it can recover from the recipient GST included in its acquisitions related to making the supply.

Market review

181. An agreement may provide an opportunity for the supplier to adjust the consideration for a supply to the market rate for the supply. A review based on market rates - a 'market review' - is a 'general review, renegotiation or alteration of the consideration'. An opportunity to conduct a market review on or after 1 July 2000 is a review opportunity.[21]

182. If a supplier has an opportunity before 1 July 2000 to conduct a market review which does not give an opportunity to take account of the imposition of the GST, this will not be a review opportunity.[22] Whether or not the supplier has this opportunity will depend on the circumstances of the particular case. If the supplier is able to, but does not take advantage of an opportunity to take account of the imposition of the GST in conducting the market review, a review opportunity will still arise.

183. A market review before 1 July 2000 will constitute a review opportunity if the review can take account of the imposition of GST. We consider that a market review before 1 July 2000 can take account of the imposition of GST if:

- the agreement, instructions to the valuer or the valuer's practice guidelines requires GST to be taken into account in conducting the valuation; or
- the market review actually takes GST into account.

Otherwise, our view is that a market review before 1 July 2000 will not give rise to a review opportunity. This is because before 1 July 2000 the market may not take account of the imposition of the GST.

[21] Paragraph 13(5)(b).
[22] Paragraph 13(5)(c).

184. There is no requirement that an opportunity to review the consideration results in an increase of the consideration under a market review for section 13 to apply. In a case where GST is taken into account, other factors may cause the consideration to decrease, or remain the same.

Recipient's entitlement to a full input tax credit

Relevant date

185. The relevant date before which a written agreement must have been made depends on whether or not the recipient of the supply would be entitled to a full input tax credit for that supply. The requirement to establish the entitlement applies to agreements made on and after 2 December 1998 but before 8 July 1999. In addition, for agreements made before 2 December 1998, the supplier may need to establish whether the recipient would be entitled to a full input tax credit if a review opportunity arises on or after 2 December 1998 but before 8 July 1999.

186. The later date of 8 July 1999 is the relevant date if the recipient would be entitled to a full input tax credit for the supply. The earlier date of 2 December 1998 is the relevant date if the recipient would not be entitled to a full input tax credit for the supply.

Full input tax credit

187. The recipient would not be entitled to a full input tax credit for the supply if:

- the acquisition of the supply would be only partly creditable[23]; or
- the recipient would not be entitled to any input tax credit.

188. A recipient is entitled to an input tax credit for any creditable acquisition[24] it makes. The requirements for a creditable acquisition include the following:

- the acquisition must be for a creditable purpose, therefore the acquisition must not relate to the making of supplies by the recipient that would be input taxed, or be of a private or domestic nature;
- the supply must be a taxable supply but for the operation of section 13;

[23] Section 11-30 GST Act.
[24] Section 11-20 of the GST Act.

- the supply must be connected with Australia;
- the recipient must provide or be liable to provide consideration for the supply;
- the recipient must be registered or required to be registered; and
- the acquisition must not be specifically excluded from being a creditable acquisition, for example a non-deductible expense.

189. In addition, the acquisition must not be one in relation to which input tax credits are specifically reduced or not allowable, for example an acquisition of a motor vehicle to which section 20 of the GST Transition Act applies.

Example

190. Julie makes a written agreement on 1 March 1999 to supply services to a credit union for a period of three years. On 1 June 2000, Julie asks the credit union whether it would be entitled to a full input tax credit for the acquisition of the supply from 1 July 2000. The credit union advises Julie they would use her services to make financial supplies and, therefore, cannot claim an input tax credit for the acquisition.

191. As the recipient would not be entitled to a full input tax credit for the acquisition of the supply, the relevant date is 2 December 1998. The supply is not GST-free under section 13 because the agreement was made after the relevant date.

Supplier's responsibility

192. For agreements made on or after 2 December 1998 but before 8 July 1999, the supplier needs to ascertain whether the recipient would be entitled to a full input tax credit. This is because the entitlement affects whether the agreement satisfies subsection 13(1) and, therefore, whether the supply made is GST-free under section 13. In addition, for agreements made before 2 December 1998, if a review opportunity arises on or after 2 December 1998 but before 8 July 1999, it will be necessary for the supplier to establish the recipient's entitlement to a full input tax credit for the supply. This is because the entitlement determines the relevant date for the purposes of paragraph 13(2)(b) and therefore whether the review opportunity has arisen on or after the relevant date.

193. Subsection 13(4) does not specify a time at which the supplier is required to establish the recipient's entitlement to a full input tax credit for the supply. However, the words 'would be entitled' indicate that the test is to be applied to the position at the time of making the agreement. The supplier should establish whether the recipient would have been entitled to a full input tax credit for the supply if the law applying at the time the first supply is made on or after 1 July 2000 had applied at the time the agreement was made.

194. The supplier is only required to establish the recipient's entitlement to a full input tax credit on a once only basis. In the case of an agreement that provides for supplies to be made progressively or for a period, the supplier is not required to establish the entitlement of the recipient to a full input tax credit on an ongoing basis. It is sufficient if the supplier has established this by the time the first Business Activity Statement ('BAS') is made after 1 July 2000.

195. The supplier should take reasonable steps to ascertain whether the recipient would be entitled to a full input tax credit and have reasonable grounds for deciding the recipient is entitled to a full input tax credit. In a case where the recipient was not actually entitled to a full input tax credit, if a supplier can demonstrate it had reasonable grounds for concluding the recipient would be entitled to a full input tax credit, the Commissioner will not amend the supplier's liability for GST to the extent that the supply under the agreement has already been made.

196. What is reasonable will depend on all the circumstances. In most cases this will require the supplier to ask the recipient whether or not it would be entitled to a full input tax credit for the supply. If the supplier obtains a written statement from the recipient stating the recipient's entitlement to a full input tax credit, this will constitute reasonable grounds for deciding the application of section 13, unless the supplier has reason to believe the information is incorrect. If the supplier is unable to obtain this information from the recipient, the supplier will need to satisfy itself that the recipient is entitled to a full input tax credit for the supply before treating it as GST-free. In some situations, it may be possible to ascertain from the nature of the supply that the recipient is not entitled to an input tax credit e.g., a supply of residential premises by way of lease covered by section 40-35 of the GST Act is input taxed and not a taxable supply, therefore the recipient is not entitled to an input tax credit. Also, if not registered for GST, the recipient is not entitled to an input tax credit.

197. As the establishment of the recipient's entitlement to a full input tax credit is a once only test, a change of parties in circumstances where section 13 can still apply[25] will not have consequences for agreements made on or after 2 December 1998 and before 8 July 1999.

Example

198. Luke makes a written agreement with Douglas on 1 February 1999 for Douglas to supply commercial premises under a lease for a three-year period. The agreement does not contain a review opportunity. Under the circumstances which existed when the agreement was made, Luke will be entitled to a full input tax credit for the supply made on or after 1 July 2000 under the law which applies at the time the supply is made. Therefore section 13 will apply to the agreement.

199. On 1 August 2000 Luke assigns his rights and obligations under the agreement to Ebony who is not registered or required to be registered for GST and is therefore not entitled to an input tax credit for the supply. The assignment does not create a new agreement.

200. As establishment of the recipient's entitlement is a once only test relevant to the circumstances at the time of making the agreement, the supply to Ebony will continue to be GST-free.

Definitions

201. The following terms are defined for the purposes of this ruling. Terms with asterisks are defined in section 195-1 of the GST Act.

Creditable acquisition

202. You make a creditable acquisition if:

(a) you acquire anything solely or partly for a *__creditable purpose__ ; and

(b) the supply of the thing to you is a *taxable supply; and

(c) you provide, or are liable to provide, *consideration for the supply; and

(d) you are *registered, or *required to be registered.

[25] See paragraphs 84 to 93 of this Ruling.

Creditable purpose

203. You acquire a thing for a creditable purpose to the extent that you acquire it in *carrying on your *enterprise. However, you do not acquire the thing for a creditable purpose to the extent that:

(a) the acquisition relates to making supplies that would be *input taxed; or

(b) the acquisition is of a private or domestic nature.

Input tax credit

204. You are entitled to an input tax credit for any *creditable acquisition or *creditable importation that you make.

Section 13

205. Section 13 of the GST Transition Act provides:

Existing agreements: no opportunity to review

(1) This section applies if:

(a) a written agreement specifically identifies a supply and identifies the consideration in money, or a way of working out the consideration in money, for the supply; and

(b) the agreement was made before the day on which this Act received the Royal Assent.

(2) The supply is GST-free to the extent that it is made before the earlier of the following:

(a) 1 July 2005;

(b) if a review opportunity arises on or after the day of Royal Assent - when that opportunity arises.

(3) If all of the consideration was paid before 2 December 1998, the supply is also GST-free to the extent it is made on or after 1 July 2005 but before a review opportunity has arisen as mentioned in paragraph (2)(b).

(4) However, if the recipient of the supply would not be entitled to a full input tax credit for it, treat the references in paragraphs (1)(b) and (2)(b) to the day of Royal Assent as references instead to 2 December 1998.

(4A) For the purposes of this section, a Commonwealth entity is to be treated as if it were entitled or not entitled to a full input tax credit (whichever is relevant) if it would be so entitled or not entitled if it were an entity other than a Commonwealth entity.

(4B) If:

(a) a change is made to the consideration for supplies that are specifically identified by an agreement of the kind referred to in subsection (1);

(b) the change is made after the commencement of this subsection; and

(c) the change applies to supplies made before 1 July 2005;

supplies that are specifically identified by the agreement are not GST-free under this section to the extent that the supplies are made on or after the day on which the change takes effect.

(4C) Whether a supply made before 1 July 2005 is GST-free under this section is not affected by:

(a) a change (made after the commencement of this subsection), whether agreed to before, on or after 1 July 2005, to the consideration for supplies made on or after 1 July 2005 that are specifically identified by an agreement; or

(b) the carrying out, whether before, on or after 1 July 2005, of any of the processes referred to in Subdivision C of Division 2 in relation to supplies made on or after 1 July 2005 that are specifically identified by an agreement.

(4D) In subsections (4B) and (4C):

change, to the consideration for a supply, means a change to that consideration (including a change to the method by which the consideration is worked out) not provided for in an agreement of the kind referred to in subsection (1).

(5) In this section:

review opportunity, for an agreement to which this section applies, means an opportunity that arises under the agreement:

(a) for the supplier under the agreement (acting either alone or with the agreement of one or more of the other parties to the agreement) to change the consideration directly or indirectly because of the imposition of GST; or

(b) for the supplier under the agreement (acting either alone or with the agreement of one or more of the other parties to the agreement) to conduct, on or after 1 July 2000, a general review, renegotiation or alteration of the consideration; or

(c) for the supplier under the agreement (acting either alone or with the agreement of one or more of the other parties to the agreement) to conduct, before 1 July 2000, a general review, renegotiation or alteration of the consideration that takes account of the imposition of the GST.

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- goods and services tax
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- GST free
- GST supply
- GST transitional stream

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- ANTS(GSTT)A99 6
- ANTS(GSTT)A99 7
- ANTS(GSTT)A99 10
- ANTS(GSTT)A99 12
- ANTS(GSTT)A99 13
- ANTS(GSTT)A99 13(1)
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- ANTS(GSTT)A99 13(2)
- ANTS(GSTT)A99 13(3)
- ANTS(GSTT)A99 13(4)
- ANTS(GSTT)A99 13(4B)
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- ANTS(GSTT)A99 13(4D)
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- ANTS(GST)A99 9-5
- ANTS(GST)A99 9-15
- ANTS(GST)A99 11-20
- ANTS(GST)A99 11-30
- ANTS(GST)A99 40-35
- Tax Laws Amendment (Long-term Non-reviewable Contracts) Act 2005
- Trade Practices Act 1974
- Managed Investments Act 1998

Case references:
- Masters v. Cameron (1954) 91 CLR 353
- Smale v. Fletcher Homes Ltd (1996) 17 NZTC 12662
- Case L29 (1989) 11 NZTC 1175
- Case M58 (1990) 12 NZTC 2333
- FCT v. DB Rreef Funds Management Ltd [2006] FCAFC 89
- Westley Nominees Pty Ltd v. Coles Supermarkets Australia Pty Ltd [2006] FCAFC 115

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