# *GSTR 2012/D1 - Goods and services tax: residential premises and commercial residential premises*

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# Draft Goods and Services Tax Ruling

## Goods and services tax: residential premises and commercial residential premises


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# What this Ruling is about

1. This draft Ruling considers how Subdivision 40-B, Subdivision 40-C, and Division 87 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) apply to supplies of residential premises, commercial residential premises, and accommodation in commercial residential premises.

2. The Ruling does not consider the issue of when a sale of real property is a sale of new residential premises. This issue is considered in *Goods and Services Tax Ruling GSTR 2003/3 Goods and services tax: when is a sale of real property a sale of new residential premises?*

3. Unless otherwise stated in the examples in this Ruling, it is assumed that the entities referred to satisfy all of the necessary requirements in section 9-5 of the GST Act for taxable supplies and section 11-20 of the GST Act for entitlement to input tax credits. It is also assumed that a sale of residential premises is not a sale of new residential premises unless otherwise stated. Nor is any reference to a lease of premises a reference to a long-term lease unless otherwise stated.

4. All legislative references in this Ruling are to the GST Act unless otherwise specified.

5. A general introduction to the GST legislation affecting residential premises and commercial residential premises can be found in the Background in Part A of Appendix 1 of this draft Ruling (paragraphs 122 to 133).

# Ruling

### Residential premises to be used predominantly for residential accommodation (regardless of the term of occupation)

#### *Definition of residential premises*

6. Premises,[1] comprising land or a building, are residential premises under paragraph (a) of the definition of residential premises in section 195-1 where the premises are occupied as a residence or for residential accommodation regardless of the term of occupation. The actual use of the premises as a residence or for residential accommodation is relevant to satisfying this limb of the definition.

7. Premises, comprising land or a building, are also residential premises under paragraph (b) of the definition of residential premises if the premises are intended to be occupied, and are capable of being occupied, as a residence or for residential accommodation regardless of the term of the intended occupation. This limb of the definition refers to premises that are designed, built or modified so as to be suitable to be occupied, and capable of, being occupied as a residence or for residential accommodation. This is demonstrated through the physical characteristics of the premises.

8. A supply of residential premises may consist of a single room or apartment, or a larger complex consisting of rooms or apartments.

#### *Residential premises to be used predominantly for residential accommodation (regardless of the term of occupation) – physical characteristics*

9. The requirement in sections 40-35, 40-65 and 40-70 that premises be 'residential premises to be used predominantly for residential accommodation (regardless of the term of occupation)' is to be interpreted as a single test that looks to the physical characteristics of the property to determine the premises' suitability and capability for residential accommodation.[2]

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[1] In this ruling, the 'premises' are whatever is supplied, whether this is the whole or any part of land or a building.

[2] Paragraph 40-35(a) varies this wording slightly, requiring that the premises '*are to be used* predominantly for residential accommodation (regardless of the term of occupation)' (emphasis added). It is considered, however, that this wording establishes the same requirement as that set out in subsection 40-65(1) and subsection 40-70(1).

10. The requirement for residential premises to be used predominantly for residential accommodation does not require an examination of the subjective intention of, or use by, any particular person. Premises that display physical characteristics evidencing their suitability and capability to provide residential accommodation are residential premises even if they are used for a purpose other than to provide residential accommodation (for example, where the premises are used as a business office).

11. In limited circumstances, a premises' physical characteristics may not conclusively demonstrate the premises' suitability or capability for occupation as a residence or for residential accommodation. In these circumstances, design or construction documents such as architectural plans may evidence whether the premises are suitable for, and capable of, being occupied as a residence or for residential accommodation. This additional evidence may assist when, for example, the character of the premises needs to be determined before construction of the premises is completed.

12. Premises that do not display physical characteristics demonstrating that they are suitable for, and capable of, being occupied as a residence or for residential accommodation are not residential premises to be used predominantly for residential accommodation, even if the premises are actually occupied as a residence or for residential accommodation. For example, someone might occupy premises that lack the physical characteristics of premises suitable for, or capable of, residential accommodation (such as a squatter residing in a disused factory). Although the premises may satisfy paragraph (a) of the definition of residential premises in section 195-1, the premises are not residential premises to be used predominantly for residential accommodation.

*Example 1 – purchaser's intention not to use premises for residential accommodation*

13. *John carries on an enterprise which involves leasing a house on property which he owns. Based on the physical characteristics of the house it is clearly residential premises to be used predominantly for residential accommodation. The area in which the house is located has recently been rezoned by the local Council to permit higher density residential apartments. Following the rezoning, a developer, Knock Them Down Co, approaches John and offers to purchase his property. Knock Them Down Co intends to demolish the house and redevelop the property into a new apartment building.*

14. *The fact that Knock Them Down Co does not intend to use the house to provide residential accommodation does not mean that the house is not residential premises to be used predominantly for residential accommodation. Knock Them Down Co's intention is not a relevant factor in determining the character of the premises. Based on its physical characteristics, the house is residential premises to be used predominantly for residential accommodation. The sale of the house by John to Knock Them Down Co is an input taxed supply under section 40-65.*

### *Living accommodation provided by shelter and basic living facilities*

15. 'Residential premises' are not limited to premises suited to extended or permanent occupation. Residential premises provide 'living accommodation', which does not require any degree of permanence. It includes lodging, sleeping or overnight accommodation.

16. To satisfy the definition of residential premises, premises must provide shelter and basic living facilities. Premises that do not have the physical characteristics to provide these are not residential premises to be used predominantly for residential accommodation.

17. A supply of a residential apartment in a building may include a garage, car-parking space, or storage area located within the building complex. The garage, car-parking space, or storage area is ancillary or incidental to the dominant component of the supply being the residential apartment. The supply is therefore a composite supply of residential premises to be used predominantly for residential accommodation.[3] This is still the outcome where the garage, car-parking space, or storage space is separately titled to the residential apartment, if it is physically located within the building complex.

### *Fit for human habitation*

18. Premises must be fit for human habitation in order to be suitable for, and capable of, being occupied as a residence or for residential accommodation. Residential premises are not fit for human habitation when they are in a dilapidated condition which prevents them being occupied for residential accommodation. Residential premises in a minor state of disrepair remain residential premises. A partially built building is not residential premises until it becomes fit for human habitation. Contractual or legal prohibitions against residential occupation do not prevent premises from being suitable for, and capable of, providing residential accommodation.

### *Other premises*

19. Not all premises that possess basic living facilities are residential premises to be used predominantly for residential accommodation. If it is clear from the physical characteristics of the premises that their suitability for living accommodation is ancillary to the premises' prevailing function, the premises are not residential premises to be used predominantly for residential accommodation.

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[3] The Commissioner's views on when a supply is characterised as a composite supply are set out in *Goods and Services Tax Ruling GSTR 2001/8: Goods and services tax: apportioning the consideration for a supply that includes taxable and non-taxable parts.*

*Example 2 – office building*

20. *Commercial Place is a five storey building. The ground floor has a foyer and reception area. All floors have been constructed with large open spaces for staff cubicles and desks, smaller office spaces, meeting rooms and areas for storage of documents. Each floor also contains a kitchen, amenities area and toilets. The ground floor also has showers provided with the toilet facilities.*

21. *While the office building provides shelter and basic living facilities including kitchens, toilets and shower facilities, the physical characteristics of the premises indicate that they are not residential premises to be used predominantly for residential accommodation. The physical characteristics indicate that the premises are a place for office workers to undertake tasks associated with a business. A supply of the premises would not be input taxed under Division 40.*

*Example 3 – private hospital*

22. *Maxwell Hospital is a privately operated hospital. The hospital contains wards to accommodate 150 patients, an entrance foyer, waiting areas, operating theatres, recovery areas, reception areas, nurses' stations, specialists' suites, storerooms, staff amenities, utility and disposal rooms, and ambulance bays. The design of the premises is based around the needs of patients and medical practitioners in providing medical and surgical treatment.*

23. *While Maxwell Hospital provides shelter and basic living facilities, its physical characteristics indicate that it is not residential premises to be used predominantly for residential accommodation. The physical characteristics indicate that these premises are a place where the sick or injured are given medical or surgical treatment. A supply of the premises would not be input taxed under Division 40.*

*Example 4 – residential care facility*

24. *Care-res is a developer that specialises in constructing and leasing aged care facilities. Care-res designs and builds these facilities to specifications that make these premises suitable for approval for use as a residential care facility under the Aged Care Act 1997.*

25. *Care-res constructs a facility designed to provide both personal and nursing care. The physical characteristics of this facility differ from the physical characteristics of premises for independent retirement living. This facility includes what is commonly known as a low care hostel and a nursing home. The facility meets all of the regulatory requirements of the relevant building legislation in the State in which it operates, including the applicable provisions of the Building Code of Australia for facilities of this type.*

26. *The facility includes private bed rooms and separate meal, living and entertainment areas, administration offices, and commercial kitchen and laundry. All functional areas for occupants, including those areas that provide living accommodation, have been designed for fittings, furniture and equipment used to provide care to persons with a condition of frailty or disability.*

27. *Overall, the physical characteristics that reflect suitability for the provision of care prevail over those which reflect suitability for the provision of residential accommodation. Although accommodation is necessary in the course of providing residential care, the premises' suitability for accommodation is ancillary to their suitability for providing care.*

28. *The facility is not residential premises to be used predominantly for residential accommodation. The physical characteristics evidence that the premises are to be used predominantly to provide care to the frail and disabled. A supply by Care-res by way of the lease of the facility is a taxable supply under section 9-5.*

### *Premises requiring apportionment*

29. The value of a supply of premises that includes residential premises to be used predominantly for residential accommodation needs to be apportioned to the extent that part of the premises is not residential premises to be used predominantly for residential accommodation.

*Example 5 – residential premises partly converted for business use*

30. *Shannon decides to partly modify her house to use in her profession as a doctor. She modifies an area of the house to provide office and consulting room space, an operating theatre, a waiting room and storage for the business. A sealed car park is also added to the property. Significant physical modifications are made to these areas, including removal and alteration of walls, lighting, hygiene facilities and security to meet industry standards. The existing lounge room is used as the patients' waiting room. An existing bedroom is used for storage. No physical modifications are made to the lounge or bedroom.*

31. *The modifications result in the part of the premises consisting of the office, consulting room, operating theatre and car park no longer being residential premises to be used predominantly for residential accommodation. Objectively, part of the house is still designed predominantly for residential accommodation, comprising bedrooms (including the bedroom used for storage), bathroom, kitchen, living room, lounge room and gardens.*

32. *If Shannon later sells or leases the house, she will need to apportion the value of the supply between the taxable and input taxed parts of the supply.*

*Example 6 – addition of furniture and minor fittings are not sufficient to modify the physical characteristics*

33. *Rebecca is a solicitor. She lives in a terrace house that is not new residential premises and decides to convert a room at the front of the house into an office for her practice. Rebecca arranges the installation of an electricity point and telephone line for the place in the room where she intends to set-up a printer and facsimile machine. She fits the room out with book shelves, filing cabinets, desk, office chairs, a table for the printer and facsimile machine, and suitable floor coverings. She also has an advertising sign placed outside the front door of her house. Rebecca does not modify any of the other rooms in the house.*

34. *These changes are not sufficient to modify the physical characteristics of the terrace house into premises other than residential premises to be used predominantly for residential accommodation. The furniture and fittings that Rebecca has brought into the room do not change the physical characteristics of the house itself. Also, the installation of an electricity point and telephone line, and the placement of a sign outside the house, are not sufficient modifications to alter the physical characteristics of the premises so that they are no longer residential premises to be used predominantly for residential accommodation. If Rebecca sells or leases the premises she will be making a wholly input taxed supply under section 40-65 or section 40-35 respectively.*

### *Land supplied with a building*

35. There is no specific restriction, in the definition of residential premises, on the area of land that can be included with a building. The extent to which land forms part of residential premises to be used predominantly for residential accommodation is a question of fact and degree in each case. A relevant factor in determining this is the extent to which the physical characteristics of the land and building as a whole indicate that the land is to be enjoyed in conjunction with the residential building. The use of the land is not a determining factor in deciding if the land forms part of the residential premises.

*Example 7 – residential premises supplied with farmland*

36. *Bob has carried on a dairy farming enterprise on land which he owns. The land is 80 hectares in area. One hectare is fenced off separately and contains a house, private tennis court, swimming pool and maintained gardens. There is a driveway for access to the public road from this part of the land.*

37. *The other 79 hectares of the land contain various sheds used in the farming enterprise. The property has two dams and an irrigation system. There is separate access to the public road from this part of the land. The remainder of the 79 hectares comprises fenced-off pastures for grazing.*

38. *Bob sells the property. The purchaser has no intention of carrying on a farming business on the land.*

39. *To determine the extent to which the property is residential premises to be used predominantly for residential accommodation it is necessary to consider its physical characteristics. The size of the land is not, by itself, a conclusive factor, although it is unlikely that such a large area would be residential premises.*

40. *Based on the physical characteristics of the premises, the house is residential premises to be used predominantly for residential accommodation. Additionally, based on the physical characteristics, the separately fenced-off one hectare of land containing the tennis court, swimming pool and maintained gardens is to be enjoyed with the house. However, the other 79 hectares are distinguishable on the basis of physical characteristics as land for farming rather than for enjoyment in conjunction with a residential building.*

41. *Bob's sale of the premises is input taxed under section 40-65 to the extent of the one hectare containing the house. It is a taxable supply to the extent of the other 79 hectares. Bob needs to determine the value of the taxable component using a fair and reasonable method of apportionment.*[4]

### *Vacant land*

42. Vacant land is not capable of being occupied as a residence or for residential accommodation as it does not provide shelter and basic living facilities. Vacant land is not residential premises.

### Used for residential accommodation before 2 December 1998

43. New residential premises as referred to in paragraphs 40-65(2)(b) and 40-70(2)(b) will only have been used for residential accommodation (regardless of the term of occupation) before 2 December 1998 where the premises at the time of use before 2 December 1998 were residential premises but not commercial residential premises. That is, the prior use for residential accommodation does not encompass prior use for making supplies of accommodation in commercial residential premises.

*Example 8 – hotel converted for sale as strata titled units*

44. *Alex's Enterprises purchases a motel in January 1997 and operates it as a motel. In December 2008, Alex's Enterprises ceases to operate the motel, strata titles the rooms located within the motel and sells one of the strata titled units to Tom.*

[4] See *Goods and Services Tax Ruling GSTR 2001/8 Goods and services tax: apportioning the consideration for a supply that includes taxable and non-taxable parts*.

45. *Although the motel was sold as commercial residential premises in 1997, the sale of the strata titled unit to Tom is a sale of new residential premises. This is because the premises have not previously been sold as residential premises (other than commercial residential premises).*[5]

46. *The motel was not used for residential accommodation for the purpose of paragraph 40-65(2)(b) as it was used to supply accommodation in commercial residential premises.*

### Commercial residential premises

47. The definition of 'commercial residential premises' in section 195-1 (the definition) contains the following seven paragraphs:

(a) a hotel, motel, inn, hostel or boarding house;

(b) premises used to provide accommodation in connection with a school;

(c) a ship that is mainly let out on hire in the ordinary course of a business of letting ships out on hire;

(d) a ship that is mainly used for entertainment or transport in the ordinary course of a business of providing ships for entertainment or transport;

(da) a marina at which one or more of the berths are occupied, by ships used as residences;

(e) a caravan park or camping ground; or

(f) anything similar to residential premises described in paragraphs (a) to (e).

48. The definition expressly excludes premises to the extent that they are used to provide accommodation to students in connection with an education institution that is not a school.

#### *Hotel, motel, inn, hostel or boarding house and residential premises similar to these*

49. The terms in paragraph (a) of the definition must be considered by reference to their ordinary meanings, and the context in which the term 'commercial residential premises' is used in the GST Act including Divisions 40 and 87. In this context, the Commissioner considers that the list of premises in paragraph (a) creates a class of premises that share common characteristics. These characteristics may be used to classify premises under paragraph (a) of the definition, and to identify premises 'similar to' these under paragraph (f). Some premises may be referred to by one of the terms in paragraph (a) without falling into this class because they have a mode of operation or physical characteristics that takes them out of the class of premises defined by paragraph (a).

[5] Subsection 40-75(1).

In the context of the GST Act, the terms 'hotel, motel, inn, hostel and boarding house' do not include premises that principally provide accommodation of a kind expected for those who own or rent a house or apartment.

50. While not an exhaustive list, the following are considered to be characteristics that are commonly found in operating hotels, motels, inns, hostels and boarding houses:

(i) commercial intention

The premises are operated on a commercial basis or in a business-like manner even if they are operated by a non-profit body.

(ii) accommodation is the main purpose

Providing accommodation is the main purpose of the premises.[6]

(iii) multiple occupancy

The premises have the capacity to provide accommodation to multiple, unrelated guests at once in separate rooms, or in a dormitory.

(iv) occupants have status as guests[7]

The premises are used to provide accommodation of a transient nature to guests. A guest is someone who is away from their usual home, or who has no other home. The accommodation may be of a short or long term nature. As a guest, a person has the right to occupy and enjoy the premises, but accepts as part of the hire of accommodation that the management maintains overall control of both their room, and the premises as a whole.

(v) holding out to the public

The premises offer accommodation for guests to the public or a segment of the public.

(vi) central management

The premises have central management to accept reservations, allocate rooms, receive payments and perform or arrange services. This can be provided through facilities on-site or off-site.

(vii) provision of, or arrangement for, services

Management provides guests with some services and facilities, or arranges for third parties to provide them.

[6] The main purpose of a hotel may include serving food and beverages as well as providing accommodation.
[7] In this draft Ruling we refer to guests, lodgers and boarders by the more common term 'guests'.

(viii) management offers accommodation in its own right

The entity operating the premises supplies accommodation in its own right rather than as an agent.

51. In addition to these eight operating characteristics, other objective factors may be relevant to determining whether the premises are a hotel, motel, inn, hostel or boarding house. These additional objective factors include the overall physical character of the premises as well as government zoning and planning permissions.

52. These characteristics and objective factors can also be used to identify residential premises that are 'similar to' the class of premises in paragraph (a), and therefore commercial residential premises under paragraph (f) of that definition.

53. Paragraph 49 refers to the statutory context in which the terms 'hotel, motel, inn, hostel, or boarding house' do not relate to premises that provide the type of accommodation expected by those who own or rent residential premises. To be classified under paragraph (a) of the definition of commercial residential premises or under paragraph (f) for premises that are similar to those described in paragraph (a), it is necessary that the premises be principally used to provide accommodation to individuals who have the status of guests (as discussed in subparagraph 50(iv)). Other than this characteristic, it is not a requirement for all of the remaining operating characteristics or additional objective factors to be present. It is necessary to weigh up each of the other characteristics and the additional objective factors to determine whether the overall character of the premises satisfies either paragraph (a) or (f) of the definition.

54. A supply by way of sale or lease of premises that displays sufficient characteristics or objective factors so as to be characterised as commercial residential premises is a taxable supply.

*Example 9 – bed and breakfast accommodation*

55. *Bob operates a bed and breakfast accommodation business from his premises. The premises contain three bedrooms, communal dining and lounge areas and sealed car parking spaces for guests. The premises contain a room used as an office/reception as well as a kitchen that is suitable to prepare meals for guests. Bob lives on-site. He advertises the accommodation in a tourist magazine. The rooms are not self-contained and are cleaned daily during stays and after each stay. The daily cleaning includes replacing towels and making beds. Breakfast is provided in the dining room.*

56. *Bob operates the premises aimed at providing accommodation of a transient nature on a commercial basis to guests who are temporarily away from their usual homes. The premises provide accommodation on a multiple occupancy basis. The guests do not have overall control over their rooms. Bob provides central management, and services. The accommodation is supplied by Bob in his own right. Bob's bed and breakfast accommodation has the characteristics of commercial residential premises. Bob's supply of accommodation is a taxable supply of accommodation in commercial residential premises.*

*Example 10 – single room in a house available for short-term accommodation*

57. *Harrison lives in a house that has the physical character of residential premises to be used predominantly for residential accommodation. Harrison has a single furnished bedroom in his house which he advertises as being available for short-term accommodation. Harrison provides linen to guests.*

58. *Although the room is held out as accommodation for guests and limited services are included, the accommodation does not display sufficient characteristics of a hotel, motel, inn, hostel or boarding house to be characterised as accommodation in commercial residential premises. In particular, Harrison's activities are not of a sufficiently commercial nature when considered in the context of supplying accommodation in a single room within the house to be characterised as being similar to a hotel, motel, inn, hostel or boarding house. Harrison's supply of accommodation in his house is an input taxed supply of residential premises to be used predominantly for residential accommodation under section 40-35.*

*Example 11 – farm stays*

59. *Delta Farm Holidays is a farm stay business conducted in association with an adjacent alpaca farm. An on-site manager advertises the farm stays in national lifestyle magazines as 'eco-friendly' holidays.*

60. *Accommodation is offered as bed and breakfast, and suites are cleaned daily. Guests are invited to participate in the workings of the farm and stay in renovated farm buildings that sleep up to twelve guests in four separate suites.*

61. *The premises are being operated so as to provide accommodation of a transient nature on a commercial basis to guests who are temporarily away from their usual homes. The premises provide accommodation to multiple occupants. The guests do not have overall control over any part of the premises during their stay, including their own suites. The on-site manager provides central management and services to guests. The accommodation is supplied by Delta Farms Holidays in its own right. Delta Farm Holidays' premises have the characteristics of commercial residential premises. Their farm stays are taxable supplies of accommodation in commercial residential premises.*

*Example 12 – supply of whole of resort complex*

62. *JKL Pty Ltd operates an exclusive resort complex consisting of eight rooms, a restaurant and bar, a large function room, pool, gym and sauna. The resort caters for corporate and private functions. It is a condition for hiring the complex that the occupant hires all rooms within the complex. Guest rooms are cleaned daily. Staff are available on-site to manage and operate the resort complex.*

63. *The resort complex is being operated so as to provide accommodation of a transient nature on a commercial basis to guests who are temporarily away from their usual homes. The guests do not have overall control of any part of the premises during their stay. The on-site staff manage the complex and provide services to guests. Even though all of the accommodation in the resort complex is supplied under a single supply, the supply of accommodation is a taxable supply of accommodation in commercial residential premises.*

*Example 13 – house provided to an employee as a residence*

64. *XYZ Mining owns houses which it either leases or provides under licence to employees. The employees are responsible for the costs of utilities and grounds maintenance, while XYZ Mining is responsible for repairs and other maintenance. The supplies of the houses by way of lease or licence are input taxed supplies of residential premises to be used predominantly for residential accommodation under section 40-35.*

*Example 14 – camp-style accommodation for employees and contractors*

65. *XYZ Mining establishes camp-style accommodation consisting of 130 single person quarters at a mine site to accommodate employees and contractors of the mine.*

66. *Employees and contractors are provided accommodation in single person quarters when the workers are on site. Single person quarters consist of a separately keyed room with a bed, small wardrobe and separate bathroom.*

67. *XYZ Mining has a central office located at the site for the management of room allocation, maintenance and servicing. Cleaners are employed by XYZ Mining to service the rooms regularly, which includes changing sheets and towels. All meals are provided in a communal canteen. Communal laundry facilities are provided. Other services provided at the site include televisions and DVDs, and bar facilities.*

68. *Employees and contractors do not have the right to restrict management's access to their rooms during their stay at the mine site. Authorised mining company personnel are able to enter and inspect rooms without providing notice. Employees and contractors are required to abide by 'camp rules' which, among other things, place restrictions on fixtures and fittings being added to the single person quarters, and prohibit smoking and the keeping of pets.*

69. *The single person quarters are designed to provide living accommodation and are residential premises to be used predominantly for residential accommodation.*

70. *To determine whether the accommodation is accommodation in commercial residential premises, it is necessary to weigh-up the extent to which it satisfies the characteristics of hotels, motels, inns, hostels and boarding houses. The premises are being operated so as to provide accommodation of a transient nature on a commercial basis to guests who are temporarily away from their usual homes. The premises are also operated on a multiple occupancy basis similar to a hotel, motel, inn, hostel or boarding house. Employees and contractors do not obtain rights to restrict management's access to their rooms. The range of services offered is typical of the level of services often provided in some hotels, motels, inns, hostels or boarding houses. The premises are centrally managed by XYZ Mining and it offers the accommodation in its own right. However, XYZ Mining does not hold out or advertise the single person quarters as being available to the public generally. It is only available to its employees and contractors.*

71. *On balance, and despite the fact that the accommodation is not held out to the public generally, the premises are operated in a way that is similar to a hotel, motel, inn, hostel or boarding house and the premises fall within paragraph (f) of the definition of commercial residential premises.*

72. *Therefore, XYZ Mining's supply of accommodation in the single person quarters to employees and contractors is a taxable supply of accommodation in commercial residential premises where the requirements of section 9-5 are satisfied.*[8]

[8] The Commissioner considers that accommodation provided to employees and contractors on an offshore mobile drilling unit in similar circumstances to that set out in Example 20 is also a supply of accommodation in commercial residential premises to the extent that the premises consist of residential premises.

*Example 15 – accommodation supplied to employees and contractors by third parties*

73. *TPM Accommodation (TPM) built, owns and operates an accommodation village close to a major construction development. TPM aims to service the accommodation requirements of employees and contractors engaged at the construction development. The accommodation village has 200 single person rooms in detached dwellings each comprising eight rooms. Each room has a bed, wardrobe, desk and chair, television and an en suite. There is also a central kitchen, dining area and bar facilities. Services included in the daily room rate include meals and laundry, regular room cleaning, access to gyms, pay TV, broadband internet and sporting facilities. On-site management accepts reservations, allocates rooms to guests and arranges the provision of the various services. Occupants have the status of guests and do not obtain rights to restrict management's access to their rooms and therefore do not have overall control over their rooms.*

74. *TPM may contract with the construction company to provide accommodation to their employees or contractors. Alternatively, TPM may contract directly with employees or contractors. Tourists travelling through the area may also stay at the accommodation village.*

75. *TPM operates its business on a commercial basis and offers accommodation on a multiple occupancy basis. The premises are being operated so as to provide accommodation of a transient nature on a commercial basis to guests who are temporarily away from their usual homes. The occupants do not have overall control over their rooms. While the premises are marketed particularly at employees and contractors of nearby mines, they are still held out to the public as offering accommodation and related services to persons who are away from their home. The range of services offered by TPM is typical of those provided in hotels, motels and inns. TPM centrally manages the accommodation and provides the accommodation in its own right.*

76. *In weighing up the extent to which TPM's premises exhibit the characteristics of hotels, motels, inns, hostels and boarding houses in the manner usually expected in that class of premises, it is clear that the premises are commercial residential premises under paragraph (f) of the definition. TPM's supplies of accommodation are taxable supplies of accommodation provided in commercial residential premises.*

*Example 16 – individual holiday apartments*

77. *Gus owns an apartment in a block of strata titled holiday apartments. Gus's apartment is let out for short-term stays during the year through on-site managers (who act as Gus's agent). The on-site managers provide keys to guests, and clean the rooms between stays, refreshing items such as linen, towels and the tea and coffee making facilities. The body corporate maintains common areas but does not otherwise involve itself with occupants.*

78. *The premises are being operated so as to provide accommodation of a transient nature on a commercial basis to guests who are temporarily away from their usual homes. The managers operate the accommodation commercially providing central management and some services to guests. The managers do not supply the accommodation in their own right, but as agents of Gus and the other apartment owners.*

79. *While the accommodation provided through Gus's apartment does display some characteristics of commercial residential premises, the supply of the accommodation through the single apartment is not sufficiently similar to a hotel, motel, inn, hostel or boarding house to be characterised as accommodation provided in commercial residential premises. The fact that the manager operates several apartments in the block and offers accommodation to several parties at once is not sufficient to characterise the supply Gus makes to the guests through the manager as accommodation provided in commercial residential premises.*

80. *Gus's supply of his apartment by lease, hire or licence is an input taxed supply of residential premises to be used predominantly for residential accommodation under section 40-35.*

*Characterising premises that are not operating*

81. Premises may be characterised under paragraphs (a) or (f) of the definition of commercial residential premises even when they are not operating. Premises that are not being operated at the time of supply may be classified by their overall physical character, considered with other objective characteristics. Prior use, physical characteristics, plans, or council or other government planning and/or zoning restrictions may all be indicative of the premises' nature.

82. The supply of premises that were previously operated as a hotel, motel, inn, hostel or similar premises,[9] and have not been physically modified in any way that changed their character, is a supply of commercial residential premises. Equally, the fact that premises had been previously operated otherwise than as a hotel, motel, inn, hostel or similar premises (for example, as a retirement village), and supplied without any physical modifications that may have changed their character, objectively indicates that the premises are not a hotel, motel, inn or hostel.

83. Physical characteristics, plans, or council or other government planning and zoning restrictions may also objectively indicate whether the premises are a hotel, motel, inn, or hostel. These factors may be relevant where the premises have been newly constructed and not yet operated. Where these indicators reveal that the premises have been specifically constructed for a different purpose (for example, to be used as a retirement village) or not specifically designed as a hotel, motel, inn, hostel, or similar premises, the premises are not commercial residential premises.

[9] Boarding houses are discussed at paragraph 84.

84. Vacant premises may be characterised as a boarding house if the physical characteristics, plans, or council or other government planning and zoning restrictions reveal that the premises were designed, built or modified as a boarding house. A supply of a vacant house that was not designed, built or modified as a boarding house, but has previously been operated as a boarding house or similar premises (for example a premises that has provided bed and breakfast accommodation), is not a supply of commercial residential premises.

*Example 17 – sale of a vacant motel*

85. *Mallards Motel was designed and built 25 years ago as a motel. The owner is retiring and sells the land and buildings used in her motel business to Reno Specialists. The contract of sale requires that Mallards ceases trading as a motel prior to settlement and that all the furniture be removed from the premises. The owner has not made any modifications to the motel during her period of ownership. Reno Specialists has obtained development approval to re-develop the motel buildings into strata-titled residential apartments.*

86. *The sale of the land and buildings to Reno Specialists is the supply of a motel that is a taxable supply of commercial residential premises. The premises' use as a motel prior to the sale, and the fact that it was not modified so as to change its character, objectively indicate that the premises are a motel and therefore commercial residential premises.*

*Example 18 – supply of a hotel*

87. *Developer Pty Ltd (Developer) constructs a building complex that consists of 120 apartment rooms, and commercial infrastructure consisting of a large reception area, management offices, a bar and restaurant and conference facilities on the ground floor, and underground parking. The building is specifically designed to operate as a hotel.*

88. *Developer leases the whole complex to Sky Pty Ltd (Sky) under a single lease. Sky operates an accommodation business.*

89. *In this example, the supply by way of lease of the building complex by Developer to Sky is a supply of commercial residential premises.*

90. *When Sky supplies accommodation in the apartments to guests, it is a taxable supply of accommodation in commercial residential premises provided to an individual by the entity that controls the commercial residential premises.*

Separately titled rooms, apartments, cottages or villas

91. In addition to living accommodation areas, premises that are commercial residential premises include commercial infrastructure to support the commercial operation of the premises. This infrastructure includes (but is not limited to) reception areas, dining and bar areas, meeting/function areas, kitchens, laundry facilities, storage areas and car parks. This infrastructure is used to provide services to occupants. Premises described in paragraph (a) and similar premises under paragraph (f) of the definition contain some or all of these areas to some degree.

92. Separately titled rooms, apartments, or adjacent cottages or villas located on adjoining or abutting land can be combined with sufficient commercial infrastructure (as discussed in paragraph 91) so that, as a whole, it can be operated similarly to a hotel, motel, inn, hostel or boarding house. Supplies of accommodation in premises operated in this way are supplies of accommodation in commercial residential premises.

93. A supply by sale or lease of premises that contain rooms, apartments, cottages or villas as well as commercial infrastructure is a supply of commercial residential premises under paragraph (a) or (f) of the definition.

94. A supply by sale or lease of real property consisting of part of a building cannot be characterised by reference to another supply. A supply by sale or lease of strata titled rooms, apartments, cottages or villas is an input taxed supply of residential premises to be used predominantly for residential accommodation regardless of whether the building complex, or any part of it, is being operated as commercial residential premises. This characterisation does not change where an entity makes multiple supplies to another entity under an overarching agreement that together constitute a hotel or other commercial residential premises.

*Example 19 – apartments that are residential premises*

95. *Developer constructs a building consisting of 40 apartments and a reception area. The apartments are strata-titled. Developer sells the 40 apartments to individuals. Each lot owner obtains an interest in the common property of the building including the reception area, lifts, corridors, access areas and grounds.*

96. *Under the body corporate bylaws, the body corporate engages a firm to provide the services of a security person in the reception area.*

97. *Developer's sales of the 40 apartments are taxable supplies of new residential premises.*

*Example 20 – supplies of residential premises and commercial residential premises*

98. *Developer Pty Ltd (Developer) constructs a building complex that consists of 120 apartment rooms, and commercial infrastructure consisting of a large reception area, management offices, a bar and restaurant and conference facilities on the ground floor, and underground parking. The building is specifically designed to operate as a hotel. Upon completion Developer strata titles the building.*

99. *Developer has entered into an overarching agreement to lease the 90 rooms and the commercial infrastructure within the building. Developer subsequently enters into individual leases over 90 strata titled rooms and the commercial infrastructure with Cloud Pty Ltd (Cloud). Cloud combines the 90 rooms and commercial infrastructure to supply accommodation in commercial residential premises.*

100. *Developer sells the remaining 30 rooms to individuals.*

101. *Supplies by way of lease of each of the 90 strata titled rooms by Developer to Cloud are input taxed supplies of residential premises under subsection 40-35(1). The supply by way of lease of the commercial infrastructure is a taxable supply under section 9-5.*

102. *The sales of the 30 rooms by Developer to the individuals are taxable supplies of new residential premises under section 9-5.*[10]

103. *Supplies of accommodation made by Cloud to guests are taxable supplies of accommodation provided to individuals by the operator of commercial residential premises under section 9-5.*

### *A marina at which one or more of the berths are occupied, or are to be occupied, by ships used as residences*

104. In the context of marinas in paragraph (da) of the definition, it is necessary to establish that one or more berths are occupied, or are to be occupied, by ships used as residences. In this context, the ships must be used as a residence in the sense of being occupied on a permanent or long-term basis.

## Division 87 – long-term accommodation in commercial residential premises

### *Commercial accommodation*

105. For an entity to provide commercial accommodation to an individual, the individual must be provided with a right to occupy the whole or any part of the commercial residential premises for living accommodation (that is, in the sense of a right to stay).

[10] The Commissioners views on when a supply is a supply of new residential premises is set out in *Goods and Services Tax Ruling GSTR 2003/3 Goods and services tax: when is a sale of real property a sale of new residential premises?*

106. This right to occupy must be conferred at the time of the supply and must extend for the full duration of the relevant supply.

### *Provided to an individual as long-term accommodation*

107. Paragraphs 87-5(1)(b) and 87-10(1)(b) refer to commercial accommodation that is *provided* to an individual as long-term accommodation. These provisions do not require the *supply* of commercial accommodation be made to an individual.

108. For commercial accommodation to be provided to an individual as long-term accommodation, it is only necessary for the supply of commercial accommodation to be made to an entity for 28 days or more, and for the accommodation, under the terms of the agreement, to be able to be taken up by an individual. It is not necessary for the commercial accommodation to be actually provided to an individual.

### *Predominantly for long-term accommodation*

109. Commercial residential premises are predominantly for long-term accommodation under subsection 87-20(3) where at least 70% of the accommodation supplied in the commercial residential premises is for a continuous period of 28 days or more, and may, under the terms of the agreement, be taken up by an individual.

110. Any fair and reasonable method may be used to determine whether the 70% requirement is satisfied.

### *Option to input tax supplies of long-term accommodation*

111. If a choice is made under section 87-25 to not apply Division 87 to supplies of long-term accommodation in commercial residential premises other than a berth at a marina, paragraph 40-35(1)(b) applies, resulting in the supply of long-term accommodation being input taxed.

112. If a choice is made under section 87-25 to not apply Division 87 to supplies of long-term accommodation at a berth at a marina, subsection 40-35(1A) applies to make the supply input taxed where the berth is occupied, or is to be occupied, by a ship used as a residence. In this context, the ships must be used as a residence in the sense of being occupied on a permanent or long-term basis.

*Example 21 – caravan parks – Division 87*

113. *Florinda owns a caravan park where more than 70% of the occupants stay for longer than 28 days. The caravan owners are permitted to leave their caravans on site and occupy them whenever they choose. She charges a GST inclusive weekly rate for the sites of $110 ($100 plus $10 GST). She also hires linen, blankets and appliances like televisions and toasters for an additional charge.*

114. *To work out the GST applicable to Florinda's long-term site-hire rate (assuming that Division 87 applies), Florinda first takes 50% of what the price of the supply would be if Division 87 did not apply, that is, 50% of $110 or $55. The GST is 10% of this or $5.50. Florinda's long-term charge is $105.50 ($100 plus $5.50 GST). The GST for linen, blanket and appliance hire is 1/11 of the price she charges for these supplies, regardless of the period the site is occupied.*

**Further example**

*Example 22 – hotel accommodation supplied with tour package*

115. *Aussie Hotels Pty Ltd (Aussie Hotels) operates a hotel in Australia and sells rights to accommodation in its hotel to a tour provider, Quick Trips Pty Ltd (Quick Trips).*

116. *Quick Trips supplies the accommodation rights to Australian tourists as part of a holiday package. Aussie Hotels subsequently provides the accommodation to the tourists.*

117. *The supply made by Aussie Hotels to Quick Trips is a taxable supply. It is a supply of a right to accommodation in commercial residential premises that will be provided to an individual (that is, the tourist) by an entity that owns or controls the commercial residential premises (that is, Aussie Hotels).*

118. *The supply made by Quick Trips to the tourist is a taxable supply. It is a supply of a right to accommodation in commercial residential premises that will be provided to an individual (that is, the tourist) by an entity that owns or controls the commercial residential premises (that is, Aussie Hotels).*

# Date of effect.

119. When the final Ruling is issued, it is proposed to apply both before and after its date of issue. However, the Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

120. *Goods and Services Tax Ruling GSTR 2000/20 Goods and Services Tax: commercial residential premises* will be withdrawn when the final Ruling is issued. You may rely on GSTR 2000/20 for the purposes of section 357-60 of Schedule 1 to the *Taxation Administration Act 1953* until the Ruling is withdrawn.

**Commissioner of Taxation**
22 February 2012

# Appendix 1 – Explanation

***This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached. It does not form part of the proposed binding public ruling.***

121. The following explanation is divided into five parts:

- Part A provides relevant background;
- Part B explains the meaning of 'residential premises' and the principles relevant to supplies of 'residential premises' under Subdivision 40-B and Subdivision 40-C;
- Part C explains the meaning of 'commercial residential premises';
- Part D applies the principles to some common types of supplies; and
- Part E explains the operation of Division 87 for long-term accommodation in commercial residential premises.

## Part A: Background

### *Legislative context*

122. GST is payable on taxable supplies.[11] Section 9-5 sets out the criteria that must be satisfied for a supply to be a taxable supply. A supply is not a taxable supply to the extent that it is GST-free or input taxed.

123. The term 'residential premises' is defined in section 195-1 to mean land or a building that:

(a) is occupied as a residence or for residential accommodation; or

(b) is intended to be occupied, and is capable of being occupied, as a residence or for residential accommodation;

(regardless of the term of occupation or intended occupation) and includes a floating home.

124. 'Commercial residential premises' is defined in section 195-1 to mean:

(a) a hotel, motel, inn, hostel or boarding house;

(b) premises used to provide accommodation in connection with a school;

[11] Subsection 7-1(1).

(c) a ship that is mainly let out on hire in the ordinary course of a business of letting ships out on hire;

(d) a ship that is mainly used for entertainment or transport in the ordinary course of a business of providing ships for entertainment or transport;

(da) a marina at which one or more of the berths are occupied, or are to be occupied, by ships used as residences;

(e) a caravan park or camping ground; or

(f) anything similar to residential premises described in paragraphs (a) to (e).

However, it does not include premises to the extent that they are used to provide accommodation to students in connection with an education institution that is not a school.

125. The main provisions in the GST Act dealing with supplies of residential premises and commercial residential premises are:

(a) Subdivision 40-B, section 40-35 – Residential rent;

(b) Subdivision 40-C, section 40-65 – Sale of residential premises; section 40-70 – Supplies of residential premises by way of long-term lease; and section 40-75 – Meaning of *new residential premises*; and

(c) Division 87 – Long-term accommodation in commercial residential premises.

126. If a supply of premises is not input taxed under Subdivisions 40-B or 40-C and no other special rules apply, the basic rules determine whether the supply is taxable.[12]

127. In summary, a supply of residential premises may be:

(a) an input taxed supply by way of lease, hire or licence of residential premises (other than commercial residential premises) to the extent that the premises are to be used predominantly for residential accommodation (regardless of the term of occupation);

(b) a taxable supply by way of sale, or long-term lease,[13] of new residential premises other than those used for residential accommodation (regardless of the term of occupation) before 2 December 1998; or

(c) an input taxed supply by way of sale, or long-term lease, of real property to the extent that the property is residential premises (other than new residential premises or commercial residential premises) to be used predominantly for residential accommodation (regardless of the term of occupation).

[12] Other special rules may also be relevant, such as rules pertaining to 'associates' in Division 72.
[13] 'Long-term lease' is defined in section 195-1.

128. In summary, a supply of commercial residential premises by way of:

(a) lease, hire or licence; or

(b) sale, or a supply by long-term lease;

is a taxable supply.

129. A supply of accommodation in commercial residential premises provided to an individual by the entity that owns or controls the commercial residential premises is a taxable supply.

130. The special rules in Division 87 apply to taxable supplies of commercial accommodation[14] in commercial residential premises provided to individuals as long-term accommodation.[15] A supply of accommodation by way of lease, hire or licence to which Division 87 applies may be:

(a) a taxable supply, but the value of that supply is reduced; or

(b) an input taxed supply where the requirements of section 40-35 are satisfied and, under section 87-25, the supplier chooses not to apply Division 87 to any supplies of commercial accommodation that the supplier makes.

131. Thus, the definition of commercial residential premises in section 195-1 has three applications in the GST Act:

- Firstly, it describes premises for which a supply by way of lease, hire or licence is excluded from input taxed treatment by paragraph 40-35(1)(a).
- Secondly, it describes premises for which a supply by way of sale or long-term lease is excluded from input taxed treatment by paragraphs 40-65(2)(a) and 40-70(2)(a) respectively.
- Thirdly, it determines the classes of premises to which the special rules in Division 87 regarding long-term accommodation may be applied.

### *Legislative amendments*

132. The meanings of the terms 'residential premises' and 'commercial residential premises' were considered by the Full Federal Court in *Marana Holdings Pty Ltd v. Commissioner of Taxation*[16] (*Marana*). The Court also considered the expressions 'residential accommodation' and 'new residential premises'.

[14] 'Commercial accommodation' is defined in section 195-1 to have the meaning given by section 87-15.
[15] 'Long-term accommodation' is defined in section 195-1 to have the meaning given by subsection 87-20(1).
[16] (2004) 141 FCR 299; 2004 ATC 5068; (2004) 57 ATR 521.

133. Based on the ordinary meanings of the terms 'reside' and 'residence', the Full Federal Court in *Marana* considered that these terms connote a permanent or at least long-term commitment to dwelling in a particular place. However, this interpretation represented a significant departure from the intended GST treatment of certain supplies of real property.[17] To maintain the intended GST treatment of affected premises and give certainty, the GST Act was amended in 2006 with effect from 1 July 2000 (the *Marana* Amendments). The amendment to the definition of 'residential premises' was to confirm that the period of occupation or intended occupation of land or a building is not relevant in determining whether premises are residential premises. Further, the change was to ensure that premises that are occupied or are intended to be occupied for residential accommodation are residential premises and therefore generally subject to input taxed treatment upon sale or rental.[18]

## Part B: Residential premises

### *Residential premises to be used predominantly for residential accommodation (regardless of the term of occupation)*

*Definition of residential premises*

134. Premises, comprising land or a building, are residential premises under paragraph (a) of the definition of residential premises in section 195-1 where the premises are occupied as a residence or for residential accommodation regardless of the term of occupation. In this context, the use of the premises as a residence or for residential accommodation is relevant to satisfying this limb to the definition.

135. Premises, comprising land or a building, are also residential premises under paragraph (b) of the definition of residential premises if the premises are intended to be occupied, and are capable of being occupied, as a residence or for residential accommodation regardless of the term of the intended occupation.

[17] Paragraph 15.4 of the Revised Explanatory Memorandum to the Tax Laws Amendment (2006 Measures No. 3) Bill 2006.
[18] Paragraph 15.7 of the Revised Explanatory Memorandum to the Tax Laws Amendment (2006 Measures No. 3) Bill 2006.

136. In *Marana* the Full Federal Court considered the phrase 'intended to be occupied' in the definition of residential premises in section 195-1. The Court held that the intention to occupy is not the subjective intention of any particular entity but the objective intention with which the particular premises are designed, built or modified.[19] This intention is reflected, to a greater or lesser extent, in their suitability for occupation as a residence or for residential accommodation. The Court noted that this may also overlap with the further requirement that the premises be capable of such use.[20] Accordingly, it is necessary to consider the premises' physical characteristics to determine whether they are suitable for, and capable of, being occupied as a residence or for residential accommodation (regardless of the term of the occupation or intended occupation).

137. Paragraph (b) of the definition of residential premises refers to premises that are designed, built or modified so as to be suitable for, and capable of, being occupied as a residence or for residential accommodation. This is demonstrated through the physical characteristics of the premises.

*Residential premises to be used predominantly for residential accommodation (regardless of the term of occupation) – physical characteristics*

138. A supply is input taxed under sections 40-35, 40-65 or 40-70 only to the extent that it is a supply of real property or premises that are residential premises to be used predominantly for residential accommodation.

139. In *Sunchen Pty Ltd v. Federal Commissioner of Taxation*[21] (*Sunchen*) Edmonds and Gilmour JJ in a joint judgement considered the 'architecture' of subsection 40-65(1).[22] Their Honours referred to a view that there are two discrete elements of subsection 40-65(1): firstly, whether the property is residential premises, and secondly, whether the property is to be used predominantly for residential accommodation. Their Honours considered that the phrase 'intended to be occupied' in the definition of residential premises and the phrase 'to be used predominantly for residential accommodation' are both concerned with the characteristics of the property rather than the intended use of any person. Therefore, their Honours concluded that subsection 40-65(1) contains the single test of 'residential premises to be used predominantly for residential accommodation' which looks to the characteristics of the property. The Commissioner considers that this reasoning applies equally to sections 40-35 and 40-70 which contain similar wording.

[19] *Marana* (2004) 141 FCR 299 at 313, 2004 ATC 5068 at 5079; (2004) 57 ATR 521.
[20] See also comments of Perram J discussing the *Marana* decision in *Sunchen Pty Ltd v. FC of T* [2010] FCA 21 at [17]-[18]; 2010 ATC 20-161 at 10628-10629; (2010) 75 ATR 13 at 19.
[21] (2010) 190 FCR 38; 2010 ATC 20-229; (2010) 78 ATR 197.
[22] *Sunchen* (2010) 190 FCR 38 at 46-47; 2010 ATC 20-229, 656; (2010) 78 ATR 197 at 205-206.

140. In *Sunchen* Edmonds and Gilmour JJ noted at [26] that the critical features of the provision considered by the Full Federal Court in *Marana* also appear in section 40-65, that is:

- to the extent that section 40-65 incorporates a concept of intention, the person having the relevant intention is not identified; and
- the expression 'to be used' has as its grammatical subject the residential premises the subject of the sale.

141. Their Honours held that the phrase 'to be used predominantly for residential accommodation' does not refer to use by any particular person, but to the attributes of the property to which its use is suited.[23] That is, the phrase is concerned with the characteristics of the property in terms of its suitability for residential accommodation.[24] However, their Honours made the following observation:[25]

> …That is not to say that actual use of the property will necessarily be irrelevant; as the Full Court (Bowen CJ, Deane and Fisher JJ) said in the Hamilton Island Enterprises case: '[T]he use to which an item is actually put will ordinarily be illustrative of at least some aspects of its character.'

142. In *Hamilton Island Enterprises v. FC of T*[26] (*Hamilton Island Enterprises*), the Full Federal Court considered whether helicopters were 'plant or articles for use in, or primarily and principally in connection with, amusement or recreation' for the purposes of subparagraph 82AF(2)(f)(i) of the *Income Tax Assessment Act 1936*. The Court found that subparagraph 82AF(2)(f)(i) was constructed so as to describe the attributes of the property which the drafter was seeking to identify and did not, in its terms, introduce any notion of use by a particular person.[27] The character of the helicopters was that of machines of utility constructed and designed for use in supporting and transporting people and things in and through the air. Their character did not change according to how they were used.[28] The Court made the following observation:[29]

> The above comments of the Full Court should not be read as indicating that the use to which the relevant item of personal property is put will necessarily be irrelevant for the purposes of determining whether, for the purposes of s 82AF(2)(f)(i), the item answers the description 'plant or articles for use in, or primarily and principally in connection with, amusement or recreation'.

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[23] *Sunchen* (2010) 190 FCR 38 at 46; ATC 301,655; (2010) 78 ATR 197 at 205.
[24] *Sunchen* (2010) 190 FCR 38 at 47; ATC 301, 655-301, 656; (2010) 78 ATR 197 at 205-206. This position may be contrasted to the decision of White J in *Toyama Pty Ltd v. Landmark Building Developments Pty Ltd* 2006 ATC 4160; (2006) 62 ATR 73; [2006] NSWSC 83 which erected a test in which the intentions of the purchaser are relevant and important – see *Sunchen* at (2010) 190 FCR 38 at 42; ATC 301, 651; (2010) 78 ATR 197 at 201.
[25] *Sunchen* at (2010) 190 FCR 38 at 46; ATC 301, 655; (2010) 78 ATR 197 at 205.
[26] 82 ATC 4302; (1982) 13 ATR 220.
[27] 82 ATC 4302 at 4305; (1982) 13 ATR 220 at 224.
[28] 82 ATC 4302 at 4306; (1982) 13 ATR 220 at 225.
[29] 82 ATC 4302 at 4305; (1982) 13 ATR 220 at 224.

> It may, in a particular case, be common ground that the use to which the relevant item is put corresponds with the use which it is of its character to serve. In such a case, the examination of the actual use of the item could well be decisive of the question whether it was or was not of the designated character. Quite apart from such cases, the use to which an item is actually put will ordinarily be illustrative of at least some aspects of its character.

143. The Commissioner considers that the observation made by Edmonds and Gilmour JJ in *Sunchen* referred to in paragraph 141 of this draft Ruling recognises that in the majority of instances, premises that possess characteristics suitable for residential accommodation will be used for that purpose. However, the actual use of such premises for a purpose other than residential accommodation does not prevent the premises from being residential premises to be used predominantly for residential accommodation. This is consistent with the approach taken by the Full Federal Court in *Hamilton Island Enterprises*. The joint decision of the Full Federal Court in *Sunchen*, while making the observation set out above, did not place any weighting on how the premises were used in deciding that the premises were residential premises to be used predominantly for residential accommodation.

144. In the context of the definition of residential premises and sections 40-35, 40-65 and 40-70, suitability refers to the suitability of the premises by reference to their physical characteristics.[30] Premises are suitable for, and capable of, occupation as a residence or for residential accommodation if they possess the necessary features to provide residential accommodation and are able to be occupied as residential premises. Premises that display these physical characteristics are residential premises even if they are used for a purpose other than to provide residential accommodation (for example, where the premises are used as a business office).

145. In limited circumstances where the premises' physical characteristics do not conclusively demonstrate their suitability for occupation as a residence or for residential accommodation, design or construction documents such as architectural plans may evidence whether the premises are suitable for, and capable of, being occupied as a residence or for residential accommodation. This additional evidence may assist when, for example, the character of the premises needs to be determined before construction of the premises is completed.

146. The reference in *Marana* to premises being 'modified' recognises that the physical characteristics of premises may be altered after the premises are first designed and built. In each case it is necessary to determine the suitability of the premises by reference to their physical characteristics at the time the relevant supply is made.

[30] See Example one at paragraphs 13 and 14 of this draft Ruling.

147. Premises that do not display physical characteristics demonstrating that they are suitable for, and capable of, being occupied as a residence or for residential accommodation are not residential premises to be used predominantly for residential accommodation, even if the premises are actually occupied as a residence or for residential accommodation. For example, someone might occupy premises that lack the physical characteristics of premises suitable for, or capable of, residential accommodation (such as a squatter residing in a disused factory). Although the premises may satisfy paragraph (a) of the definition of residential premises in section 195-1, the premises are not residential premises to be used predominantly for residential accommodation.

*Living accommodation provided by shelter and basic living facilities*

148. The ordinary meaning of the word 'residence' connotes a degree of permanent or long-term commitment to the occupation of premises.[31] However, the *Marana* amendments broaden the definition of residential premises, ensuring that it is not limited to premises suited to extended or permanent occupation. The amendments included the words 'residential accommodation' and 'regardless of the term of occupation or intended occupation'. This gives 'residential premises' a broader meaning in the GST Act than they ordinarily have.[32]

149. Residential premises, as defined in the GST Act, provide living accommodation.[33] Living accommodation does not require any degree of permanence of occupation. It includes lodging, sleeping or overnight accommodation. In *South Steyne Hotel Pty Ltd v. FC of T*[34] (*South Steyne*), Stone J referred to a number of overseas decisions on this point including *Urdd Gobaith Cymru*[35] and *Owen*.[36] Her Honour noted:

> 37. … [In *Urdd Gobaith Cymru*] The Tribunal chairman agreed that 'a residence' clearly implied a building with a significant degree of permanence of occupation but added:
>
> However, the word loses that clear meaning when used as an adjective. In ordinary English 'residential accommodation' merely signifies lodging, sleeping or overnight accommodation. It does not suggest the need for such accommodation to be for any fixed or minimum period.

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[31] *Marana* (2004) 141 FCR 299 at 312; 2004 ATC 5068 at 5078; (2004) 57 ATR 521 at 533.
[32] *South Steyne Hotel Pty Ltd v. FC of T* [2009] FCA 13 at [34]; 2009 ATC 20-090 at 9331; (2009) 71 ATR 228 at 240; per Stone J; and the Full Federal Court decision in *South Steyne Hotel Pty Ltd v. Federal Commissioner of Taxation* (2009) 180 FCR 409 at 426; 2009 ATC 20-145 at 10345; (2009) 74 ATR 41 at 59; per Edmonds J.
[33] 'Living accommodation' is not a defined term in the GST Act.
[34] [2009] FCA 13; (2009); 2009 ATC 20-090; 71 ATR 228.
[35] *Urdd Gobaith Cymru v. Commissioner of Customs and Excise* [1997] V & DR 273.
[36] *Owen v. Elliott (Inspector of Taxes)* [1990] 1 CH 786.

> 38. … In *Owen* the Court of Appeal expressed a similar view as to the meaning of 'residential accommodation' used in the context of the *Capital Gains Tax Act 1979*. The position was put succinctly by Leggat LJ who said:
>
> > In my judgment the expression 'residential accommodation' does not directly or by association mean premises likely to be occupied as a home. It means living accommodation, by contrast, for example with office accommodation.

150. In *South Steyne* it was held that only the elements of shelter and basic living facilities are necessary for premises to satisfy the definition of residential premises.[37] This includes, for example, shelter and basic living facilities provided by a bedroom and bathroom.[38] However, premises may provide shelter and basic living facilities without necessarily having a conventional bedroom or bathroom.[39]

151. The premises may be in any form, including detached buildings, semi-detached buildings, strata title apartments, single rooms or suites of rooms within larger premises. Premises that lack the features of shelter and basic living facilities are not residential premises.

152. A supply of a residential apartment in a building may include a garage, car-parking space, or storage area located within the building complex. The garage, car-parking space, or storage area is ancillary or incidental to the dominant component of the supply being the residential apartment. The supply is therefore a composite supply of residential premises to be used predominantly for residential accommodation.[40] This is still the outcome where the garage, car-parking space, or storage space is separately titled to the residential apartment if it is physically located within the building complex.

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[37] *South Steyne* per Stone J at [2009] FCA 13 at [31]; 2009 ATC 20-090 at 9331; (2009) 71 ATR 228 at 239; accepted by the Full Federal Court per Emmett J (with whom Finn J agreed) at (2009) 180 FCR 409 at 416; 2009 ATC 20-145 at 10337; (2009) 74 ATR 41 at 49 and Edmonds J at FCR 427; ATC 10345; ATR 59; refer also to the Full Federal Court in *Vidler v. Federal Commissioner of Taxation* (2010) 183 FCR 440 at 445-446; 2010 ATC 20-186 at 20-22; (2010) 75 ATR 825 at 830-831.

[38] *South Steyne* per Stone J at [2009] FCA 13 at [31]; 2009 ATC 20-090 at 9331; (2009) 71 ATR 228 at 239.

[39] *Vidler v. FC of T* [2009] FCA 1426 at [12]; 2009 ATC 20-149 at 12; (2009) 74 ATR 520 at 523 per Stone J.

[40] The Commissioner's views on when a supply is characterised as a composite supply are set out in *Goods and Services Tax Ruling GSTR 2001/8 Goods and services tax: apportioning the consideration for a supply that includes taxable and non-taxable parts.*

*Fit for human habitation*

153. The condition of the premises supplied is relevant in deciding whether they are suitable for, and capable of, being occupied as a residence or for residential accommodation. To be residential premises as defined, premises must be fit for human habitation. Premises are not suitable for, or capable of, human habitation if they are in a dilapidated condition to the extent that it prevents occupation for residential accommodation (as may be evidenced by a demolition order issued by a relevant authority because of the premises' condition). In these circumstances, the condition of the premises indicates that the premises are no longer suitable for, or capable of, providing shelter and the basic living facilities. However, residential premises that are in a minor state of disrepair remain residential premises.

154. Conversely, a partially built building is not residential premises until the premises are fit for human habitation. It is a question of fact whether the physical characteristics of the building demonstrate that the premises are suitable for, and capable of, being occupied as a residence or for residential accommodation. An occupancy permit/certificate, a certificate of final inspection, or similar document issued by the relevant authorised person or authority may provide evidence that the premises are fit for human habitation. Where a certificate of final inspection, or similar document, has not been issued for the premises and the premises are supplied, it is still necessary to consider whether the physical characteristics of the premises demonstrate that the premises are suitable for, and capable of, being occupied as residential premises.

155. Contractual or legal prohibitions against long-term or short-term occupation as a residence do not prevent premises from being suitable for and capable of providing residential accommodation.

### *Applying the test of 'residential premises to be used predominantly for residential accommodation'*

*Identifying the premises*

156. Before considering whether a supply of premises consists of residential premises, commercial residential premises, or another type of premises, it is necessary to identify the premises subject to the supply.[41] In this context it is possible for premises to be part of larger land or a building. For example, if the subject of the supply is limited to a strata-titled room or apartment within a larger building, it is necessary to consider the character of that room or apartment, not the character of the larger building.

[41] *South Steyne* [2009] FCA 13 at [41]; 2009 ATC 20-090 at 9332; (2009) 71 ATR 228 at 241.

*Other premises*

157. A variety of buildings may include basic living facilities, including office buildings and hospitals. However, it does not follow that all premises that have these facilities are necessarily residential premises to be used predominantly for residential accommodation.

158. Although these premises have, in part, physical characteristics common to premises that provide living accommodation, they also have physical characteristics which reflect their suitability for another purpose. Where premises' suitability for the provision of living accommodation is ancillary to the premises' prevailing function, they are not residential premises to be used predominantly for residential accommodation.[42]

159. Even if an office worker eats and sleeps overnight in an office building for a period, it does not follow that the premises are residential premises to be used predominantly for residential accommodation. Rather, the physical characteristics of the premises reveal that the building is an office. Similarly, a squatter might eat and sleep in an otherwise vacant factory or warehouse but this does not make it residential premises to be used predominantly for residential accommodation.

160. These outcomes are consistent with the legislative policy. The legislative intention is that Subdivisions 40-B and 40-C operate so that those renting a house, flat or home unit are on the same footing as persons who own their own homes: neither is to bear the cost of GST in connection with such occupation.[43] There is nothing to suggest that the legislative intention is that a supply of non-residential structures (such as a factory, warehouse or office) should be input taxed simply because someone occupies the premises when they are supplied, even if that person could be said to be living there.

*Premises requiring apportionment*

161. In some circumstances, premises consist of two or more parts: one part residential premises to be used predominantly for residential accommodation, and the other part premises of another kind. As paragraph 40-35(2)(a), subsection 40-65(1), and paragraph 40-70(1)(a) refer to the *extent* that the premises or property are to be used predominantly for residential accommodation, it is necessary that the value of the supply of such premises be apportioned.

[42] See Examples two, three and four at paragraphs 20 to 28 of this draft Ruling.
[43] See *Marana* (2004) 141 FCR 299 at 306-307; 2004 ATC 5068 at 5074-5075; (2004) 57 ATR 521 at 528-529 and paragraphs 5.164 to 5.168 of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998.

162. This means that, if there is a single supply of the premises but only part of premises is residential premises to be used predominantly for residential accommodation, the supply is input taxed to the extent of that part. For example, if residential premises are designed, built or modified so that part of the premises is a house and part is for commercial purposes, such as a shop (based on its physical characteristics), a supply of the premises is a taxable supply to the extent that it relates to the shop. The supply of the premises is input taxed to the extent that it consists of the house.[44] See Examples five and six at paragraphs 30 to 34 of this draft Ruling.

*Land supplied with a building*

163. The GST Act does not restrict the area of land that can be included in residential premises. The extent to which land forms part of residential premises to be used predominantly for residential accommodation is a question of fact and degree in each case. A relevant factor in determining this is the extent to which the physical characteristics of the land and building as a whole indicate that the land is enjoyed in conjunction with the residential building. See Example seven at paragraphs 36 to 41 of this draft Ruling. Just because land is used privately does not mean that the land necessarily has the physical characteristics to indicate that the land is to be enjoyed in conjunction with the residential building.

*Vacant land*

164. Vacant land cannot be residential premises. In *Vidler v. Federal Commissioner of Taxation*,[45] Sundberg, Bennett and Nicholas JJ stated that 'vacant land is not land that is capable of being occupied as a residence or for residential accommodation'. This is because vacant land, of itself, does not provide shelter and basic living facilities, and cannot, therefore, be occupied as a residence or for residential accommodation.

***Used for residential accommodation before 2 December 1998 – paragraph 40-65(2)(b) and paragraph 40-70(2)(b)***

165. A supply by sale or long-term lease of residential premises is not input taxed to the extent that the residential premises are new residential premises other than those used for residential accommodation (regardless of the term of occupation) before 2 December 1998.[46] The meaning of 'new residential premises' is considered in Goods and Services Tax Ruling GSTR 2003/3.

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[44] This position is consistent with paragraph 5.164 of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998.
[45] *Vidler v. Federal Commissioner of Taxation* (2010) 183 FCR 440 at 448; 2010 ATC 20-186 at 38; (2010) 75 ATR 825 at 833.
[46] Paragraph 40-65(2)(b) and paragraph 40-70(2)(b).

166. The reference to prior use for residential accommodation in paragraphs 40-65(2)(b) and 40-70(2)(b) only applies where the premises at the time of use before 2 December 1998 were residential premises but not commercial residential premises. That is, the prior use referred to in paragraphs 40-65(2)(b) and 40-70(2)(b) does not encompass prior use for accommodation in commercial residential premises.[47] See Example eight at paragraphs 44 to 46 of this draft Ruling.

### *Floating homes and ships*

167. Floating homes are included in the definition of residential premises. 'Floating home' is defined in section 195-1 to mean a structure composed of a floating platform and a building designed to be occupied (regardless of the term of occupation) as a residence that is permanently affixed to the platform but does not include any structure that has means of, or is capable of being readily adapted for, self-propulsion.

168. The words 'regardless of the term of occupation' in the definition mean that floating homes are not limited to structures that are suited to extended or permanent occupation. To be a floating home, the structure must be designed to provide living accommodation. That is, it must provide basic living facilities, such as the facilities for sleeping and bathing.

169. In *Case 54/95*,[48] the Administrative Appeals Tribunal considered whether accommodation provided on an offshore mobile drilling unit (being a drilling rig capable of drilling holes at sea) was 'residential accommodation' for the purposes of paragraph 30(2)(c) of the *Fringe Benefits Tax Assessment Act 1986*. The Tribunal found that the accommodation was residential accommodation as the sleeping, mess and recreational quarters, together with food provided on board, provided the drill crew with a place to reside (or lodge) and meals.[49]

170. 'Floating home' does not include a structure capable of, or of being readily adapted for, self-propulsion. A vessel may be adapted for self-propulsion by the fitting of an outboard motor. Most houseboats are not residential premises because they are either self-propelled or readily adaptable for self-propulsion in this way.

171. A supply of a floating home by way of lease, hire or licence is an input taxed supply under section 40-35. However, as floating homes are not real property, they are subject to the basic rules for taxable supplies upon sale.[50] A sale of a floating home is not an input taxed supply unless subsection 9-30(4) applies. This subsection applies where the

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[47] *South Steyne* (2009) 180 FCR 409 at 429-430; 2009 ATC 20-145 at 10347-10348; (2009) 74 ATR 41 at 61-62.
[48] 95 ATC 447; (1995) 31 ATR 1264.
[49] At [37] – [38]. While the case was appealed to the Federal Court in *Maretech CMDL Pty v. FC of T* 97 ATC 4033; (1996) 34 ATR 459, this issue was not raised on appeal.
[50] Section 40-65 only applies to a sale of real property.

floating home was solely used by the supplier to make input taxed supplies.

## Part C: Commercial residential premises

172. 'Commercial residential premises' is defined in section 195-1.[51] The definition of commercial residential premises is relevant to the operation of Subdivisions 40-B and 40-C and also the special rules regarding long-term accommodation in Division 87.

### *Hotel, motel, inn, hostel or boarding house – paragraph (a) of the definition*

*Ordinary meanings*

173. Paragraph (a) of the definition of commercial residential premises includes a hotel, motel, inn, hostel, or boarding house. These terms are not defined in the GST Act and take their ordinary meanings in context. The *Macquarie Dictionary*[52] (*Macquarie)*, the *Shorter Oxford English Dictionary* (*Shorter Oxford*) and the *Oxford English Dictionary* (*OED*) provide the following relevant meanings for each of the terms in paragraph (a):

*Hotel*

> 1. a building in which accommodation and food, and alcoholic drinks are available. (*Macquarie*)
>
> 3. An establishment, esp. of a comfortable or luxurious kind, where paying visitors are provided with accommodation, meals, and other services. (*Shorter Oxford)*
>
> 3. A house for the entertainment of strangers and travellers, an inn; *esp.* one that is, or claims to be, of a superior kind. (*OED*)

*Motel*

> 1. a roadside hotel which provides accommodation for travellers in self-contained, serviced units, with parking for their vehicles. (*Macquarie*)
>
> A roadside hotel catering primarily for motorists; *spec.* one comprising self-contained accommodation with adjacent parking space. (*Shorter Oxford*)
>
> A hotel catering primarily for motorists, *spec.* one comprising self-contained accommodation with adjacent parking space. *(OED)*

*Inn*

> 1. a small hotel that provides lodging, food, etc., for travellers and others. *(Macquarie)*

[51] The definition is set out at paragraph 124 of this draft Ruling.
[52] The Macquarie Dictionary, [Multimedia], version 5.0.0, 1/10/01.

> 3. A public house providing accommodation, refreshments, etc., for payment, esp. for travellers. Now also, a public house serving alcoholic liquor for consumption on the premises, whether providing accommodation or not. *(Shorter Oxford*)
>
> 4. A public house kept for the lodging and entertainment of travellers, or of any who wish to use its accommodation; a hostelry or hotel; sometimes, erroneously, a tavern which does not provide lodging. (*OED*)

*Hostel*

> 1. A supervised place of accommodation, usually supplying board and lodging provided at a comparatively low cost, as one for students, nurses, or the like.
>
> 2. [cross reference] Youth hostel: a simple lodging place for young travellers. (*Macquarie*)
>
> 3. A public house of lodging and entertainment for strangers and travellers; an inn, a hotel. *Arch*
>
> [cross reference] Youth hostel: providing cheap accommodation for (orig. young) people, esp. on hiking or cycling holidays. (*Shorter Oxford*)
>
> 2. *spec.* a. A public house of lodging and entertainment for strangers and travellers; an inn, a hotel. b. = *youth hostel.* (*OED*)

*Boarding house*

> 1. a place, usually a home, at which board and lodging are provided. (*Macquarie*)
>
> A house offering board and lodging for paying guests. *(Shorter* Oxford)

*boarding, vbl.*

> 6. The supplying of stated meals; the obtaining of food, or food and lodging, at another person's house for a stipulated charge…boarding-house, a house in which persons board. (*OED*)

*Statutory context*

174. In their ordinary meanings, the terms 'hotel', 'motel', 'inn', 'hostel' and 'boarding house share the common attribute of providing accommodation to guests.[53] The meaning of each of these terms in the GST Act is derived from the context in which the term 'commercial residential premises' is used in the GST Act including Divisions 40 and 87.

175. This context includes commercial residential premises being excluded from the input taxation of supplies of residential premises in subsections 40-35(1), 40-65(2) and 40-70(2). As noted in

[53] 'Guests', in this ruling, including lodgers and boarders, see subparagraph 50 iv.

paragraph 160, residential premises are input taxed so that those renting a house, flat or home unit are on the same footing as those who own their own homes.

176. Although some premises may be referred to by one of the terms in paragraph (a) of the definition, these premises may have a mode of operation or overall physical character that takes them out of the class of premises referred to in paragraph (a).

177. In this context, the Commissioner construes the terms hotel, motel, inn, hostel and boarding house not to include premises that provide accommodation of a kind expected for those who own or rent a house or apartment.

### *Extended definition under paragraph (f) of the definition*

178. Paragraph (f) of the definition of commercial residential premises includes in the definition 'anything similar to residential premises described in paragraphs (a) to (e)'. Each of paragraphs (a) to (e) of the definition provides for a class of premises that is commercial residential premises. While paragraph (f) extends the scope of the definition, its operation is limited to premises that have some or all of the characteristics of both residential premises and one or other of the classes of premises listed in paragraphs (a) to (e) of the definition.[54]

179. In this Ruling, each of paragraphs (a) to (e) is considered separately. Paragraph (f) is most relevant to paragraph (a) and paragraph (e), so its operation is explained within the discussions of these two paragraphs.

180. Premises that fall within paragraph (f) may be described as something other than those premises listed in paragraphs (a) to (e), for example, a 'resort' or 'serviced apartments'.[55] These premises are commercial residential premises if they are used in a particular way.[56]

#### *Characteristics of operating hotels, motels, inns, hostels, boarding houses and residential premises similar to these*

181. While not an exhaustive list, the following are considered to be characteristics that are common to operating hotels, motels, inns, hostels and boarding houses:

(i) commercial intention

(ii) accommodation is the main purpose

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[54] *Marana* (2004) 141 FCR 299 at 311; 2004 ATC 5068 at 5078; (2004) 57 ATR 521 at 532-3.

[55] A reference to a 'serviced apartment' in this Ruling is to an apartment in a building complex in which all apartments provide for self-contained accommodation and where integrated reception, business and leisure facilities may be provided. These serviced apartments do not satisfy the definition of a 'serviced apartment' (in the context of residential care) contained in section 195-1.

[56] See paragraphs 50 to 51 and 181 to 218 of this draft Ruling.

(iii) multiple occupancy

(iv) occupants have the status of guests

(v) holding out to the public

(vi) central management

(vii) provision of, or arrangement for, services, and

(viii) management offers accommodation in its own right.

182. Paragraph 15.12 of the revised Explanatory Memorandum to the Tax Laws Amendment (2006 Measures No. 3) Bill 2006 refers to each of these eight characteristics as characteristics that may be exhibited by hotels, motels, inns, hostels and similar premises.

183. Also, while not needing to specifically decide the characteristics that identify premises that fall within the definition of commercial residential premises, Greenwood J observed in *Meridien Marinas*[57] that commercial residential premises exhibit particular characteristics normally including:

> …premises run by a controller for a commercial purpose; premises having multiple occupancy; premises so held out to the public; premises having central management; premises providing services in addition to commercial accommodation; and, premises normally used for the main purpose of accommodation…

184. In addition to these eight operating characteristics referred to at paragraph 181 of this draft Ruling, other objective factors may be relevant to determining whether the premises are a hotel, motel, inn, hostel or boarding house. These additional objective factors include the overall physical character of the premises as well as government zoning and/or planning permissions.

185. These characteristics and other objective factors also identify residential premises that are similar to the class of premises in paragraph (a), and therefore commercial residential premises under paragraph (f) of that definition.

[57] *Meridien Marinas Horizon Shores Pty Limited v. FC of T* [2009] FCA 1594; 2009 ATC 20-158; (2009) 74 ATR 787: at FCA [74], ATC 20-158; ATR 807.

186. The question of what are 'similar establishments' to hotels, inns and boarding houses has been examined on several occasions in the context of the relevant United Kingdom legislation[58] by the VAT Tribunal.[59] In *The Lord Mayor and Citizens of the City of Westminster*,[60] the Tribunal took the approach that a 'similar establishment' must have sufficient characteristics in common with the class of premises described, rather than with premises of another kind. To determine this, the Tribunal examined the characteristics of the premises and compared them with the characteristics it identified for the class 'hotel, inn, or boarding-house' as a whole.[61]

187. In the statutory context discussed at paragraphs 49 and 174 to 177 of this draft Ruling, it is necessary that the accommodation in the premises be provided to individuals who have the status of a guest in order to satisfy paragraph (a) of the definition of commercial residential premises or paragraph (f) for premises that are similar to those described in paragraph (a). Other than this characteristic, it is not a requirement for all of the remaining operating characteristics or additional objective factors to be present. It is necessary to weigh up each of the other characteristics and the additional objective factors to determine whether the overall character of the premises satisfies either paragraph (a) or (f) of the definition.

188. A supply by way of sale or lease of premises that displays sufficient characteristics or objective factors so as to be characterised as commercial residential premises is a taxable supply.

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[58] *Value Added Tax Act 1994* (UK), Schedule 9, Part II, Group 1, Item 1(d). There are some differences between the UK and Australian legislation. However, those provisions concerning 'similar' establishments in the UK legislation bear a sufficiently close resemblance to the provisions concerning 'similar' premises in the GST Act for the findings of the Tribunal to be relevant.

[59] See, for example, *Namecourt Ltd* [1984] 2 BVC 208,028; *The Lord Mayor and Citizens of the City of Westminster* (1988) 3 BVC 847; *McGrath* [1989] 4 BVC 779; *McGrath v. Customs and Excise Commissioners* [1992] BVC 51; *International Students House* [1996] BVC 2975; *Acorn Management Services Ltd* [2001] BVC 2388; *BJ Group* [2003] BVC 2614; *Leez Priory v. The Commissioners of Customs and Excise* VAT Decision 18185; *Asington Ltd v. The Commissioners of Customs and Excise* VAT Decision 18171; *Geoffrey Ross Holding and June Monica Holding v. The Commissioners for Her Majesty's Revenue & Customs* VAT Decision 19573; *Acrylux Limited v. Commissioners for Her Majesty's Revenue & Customs* [2009] UKFTT 223(TC).

[60] [1988] 3 BVC 847.

[61] See also *Geoffrey Ross Holding and June Monica Holding v. The Commissioners for Her Majesty's Revenue & Customs* VAT Decision 19573 at [33].

*Commercial intention*

189. Hotels, motels, inns, hostels and boarding houses offer accommodation on such a scale as to be operating on a commercial basis or in a business-like manner.[62]

190. Non-profit entities can also operate commercial residential premises. For example, various non-profit organisations operate hostels in a business-like manner.

*Accommodation is the main purpose*

191. A defining feature of commercial residential premises is that they are designed to provide accommodation as their main purpose. The provision of accommodation is the primary purpose of a hotel, motel, inn, hostel or boarding house and similar premises.

192. In addition to offering accommodation, the main purpose of a hotel may also include serving food and beverages to customers. This additional feature does not prevent the premises from being characterised as commercial residential premises.

193. Compliance with the necessary local and State or Territory regulatory requirements (for example, zoning, building code and health regulations) necessary to operate premises as a hotel, motel, inn, hostel or boarding house indicates that the main purpose of the premises is to provide accommodation.

194. Premises that provide accommodation subsidiary to, or as a consequence of, a different primary purpose of the premises do not display this characteristic. For example, accommodation provided as a consequence of providing high-level medical care, such as in a hospital or nursing home, do not have a main purpose of providing accommodation in the same sense as the premises listed in paragraph (a) of the definition.

*Multiple occupancy*

195. It is a common characteristic of hotels, motels, inns, hostels and boarding houses that they are available to the public, or a particular segment of the public, to be let on a multiple occupancy basis. The size of the premises or the scale of the activity is indicative of a commercial operation.

196. In *South Steyne*, Stone J considered whether a supply of an apartment in a complex was a supply of 'anything similar to' a hotel, motel, inn, hostel or boarding house under paragraph (f) of the definition. Her Honour commented:

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[62] For the indicators of carrying on a business, refer to *Taxation Ruling TR 97/11 Income tax: am I carrying on a business of primary production?* See also the Commissioner's views on the meaning of carrying on an enterprise in *Miscellaneous Taxation Ruling MT 2006/1 The New Tax System: the meaning of entity carrying on an enterprise for the purposes of entitlement to an Australian Business Number*.

> The definitions of motels, inns, hostels and boarding houses indicate that, in common with hotels, they provide accommodation, although of varying types. In addition to providing accommodation they also have in common that, large or small, they provide for multiple occupancies. The terms are not used where only one apartment, room or other space is provided.[63]

197. On appeal to the Full Federal Court,[64] Emmett J noted at [28]-[29]:

> 28. … The term hotel or motel would not be used, as a matter of ordinary English, where a single apartment, room or other space is supplied.
>
> 29. The fact that the use and occupation by guests of an apartment in the Sebel Hotel may be similar to the use and occupation by guests of a room in a hotel or motel does not make an individual apartment similar to a hotel or motel. It might be appropriate to describe an individual apartment as being similar to part of a hotel, namely a hotel room. It is not an ordinary use of English to describe a single or individual apartment as being similar to a hotel or motel.

198. Edmonds J also indicated agreement with Stone J's conclusion on the relevant issue 'generally for the reasons she has given'.[65] His Honour referred to and did not cast any doubt over Stone J's comments regarding the commonality between hotels, motels, inns, hostels and boarding houses being to provide for 'multiple occupancies'.

199. Greenwood J also made an observation about the relevance of multiple occupancy in *Meridien Marinas*.[66]

200. The scale of the premises, or their ability to provide for multiple occupancy, has been considered relevant in other jurisdictions. In *Case L75*,[67] Keane DJ considered scale in deciding whether premises were a 'boarding house' and hence a commercial dwelling under the New Zealand GST law.[68] Keane DJ determined that the larger the number of guests catered for, the more likely it is that premises are a commercial dwelling.

201. Premises that only offer accommodation to one person or a small group living or travelling together do not demonstrate the characteristic of multiple occupancy. Premises limited to single occupancy, even where they are regularly let for short-term stays, for example, a cottage let as a weekender, do not display this characteristic.

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[63] *South Steyne* at [2009] FCA 13 at [44]; 2009 ATC 20-090 at 9333; (2009) 71 ATR 228 at 241-242.
[64] *South Steyne Hotel Pty Ltd* v. *Federal Commissioner of Taxation* (2009) 180 FCR 409.
[65] *South Steyne Hotel Pty Ltd* v. *Federal Commissioner of Taxation* (2009) 180 FCR 409 at [85].
[66] *Meridien Marinas* [2009] FCA 1594 at [56]; 2009 ATC 20-158 at [56]; (2009) 74 ATR 787 at 801. Set out at paragraph 229 of this draft Ruling.
[67] (1989) 11 NZTC 1,435.
[68] Section 2 of the *Goods and Services Tax Act 1985* (NZ).

*Occupants have the status of guests*

202. Individuals occupying accommodation in hotels, motels, inns, hostels and boarding houses are commonly referred to as 'guests'. Commercial residential premises provide accommodation to those 'who are for varying periods away from their home, or who, for the time being have no home'.[69] In this latter group are those who are of 'a transient or floating, though not necessarily short-stay class' of occupant.[70] Generally, this is accommodation that people 'go to with a view to moving on from in due course'.[71]

203. The length the typical occupant's stay in premises does not govern whether the accommodation is provided in residential premises or commercial residential premises. Although commercial residential premises are aimed at people who are away from their home (or who have no permanent home), they can also provide long-term stays. This was pointed out by the United Kingdom VAT Tribunal in *McGrath* (1989) 4 BVC 779:

> Some hotels have long-stay residents who have no other place of residence. Such permanency may distinguish one guest from another but it does not affect the function and description of the establishment.

204. Division 87 recognises longer stays in commercial residential premises by providing concessional treatment for long-term commercial accommodation in such premises.

205. A second aspect of this characteristic is the guest's level of control over the premises they hire. When hiring a room in a hotel, a guest accepts that management retains general control over it, including, for example, the right to enter without, or with limited, notice. This contrasts with a tenant of premises, who has exclusive possession and control of the premises. This is usually effected under a residential tenancy agreement, or other agreement established in accordance with legislation which allows the tenant or occupant, subject to certain conditions, to restrict the landlord's or owner's entry to the premises.

206. Control over the premises, demonstrated by, but not limited to, the right to enter or to restrict entry, is a determining feature when classifying premises such as holiday accommodation, serviced apartments and rooming houses. If an occupant has an express or implied right to restrict the owner or their agent from accessing their hired premises, coupled with some control over, or responsibility for, the premises, the occupant is not a 'guest'.

207. This characteristic is consistent with the policy of input taxing supplies under residential rental arrangements.[72]

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[69] *The Lord Mayor and Citizens of the City of Westminster* (1988) 3 BVC 847.
[70] *Namecourt Ltd* (1984) 2 BVC 208,028.
[71] *Namecourt Ltd* (1984) 2 BVC 208,028. See also *Geoffrey Ross Holding and June Monica Holding v. HMRC* VAT Decision 19573 at [35]–[36].
[72] See paragraphs 160; 175 and 176 of this draft Ruling.

*Holding out to the public*

208. Commercial residential premises are held out to the public as offering accommodation and related services to guests, that is, people who are away from home, or who have no home. Commercial residential premises may be marketed directly to a particular segment of the public, or to a niche market.[73]

209. Holding accommodation in premises out for hire—by advertising or signage—also demonstrates a commercial intention.

210. Premises that accommodate several independent people under a private arrangement, such as a student share house, do not display this characteristic if the household does not offer guest accommodation to the public.

*Central management*

211. Commercial residential premises usually have central management to accept reservations, allocate rooms, receive payments, and arrange or provide services for guests.

212. Most hotels, motels, inns and hostels have management or employees on the premises, with some facility for guest reception. Premises that operate in a manner similar to a hotel, motel, inn, hostel or boarding house usually have an operator or manager present, or offsite but readily accessible, to manage the accommodation and arrange or provide services.

213. Because commercial residential premises offer accommodation to 'guests', the manager of the premises exercises a greater degree of control over the premises than arises with rented residential premises. For example, the operator or manager may have a duty to take reasonable care for the safety of any property brought by the occupant into the premises under the operator's or manager's control.

*Provision of, or arrangement for, services*

214. Hotels, motels, inns, hostels and boarding houses usually provide accommodation together with some services and facilities. This may simply consist of making facilities available, or arranging for services to be performed by others. Commercial residential premises usually provide the kind of services required by a clientele consisting of travellers who are away from their usual homes, as distinct from tenants in rented premises. The kinds of services typically provided to guests include regular cleaning (for example, daily or weekly), food service (for example, room service or a restaurant), the use of a telephone, television and internet access, laundry services, and other services, such as taxi and tour bookings. The tariff usually reflects the standard and range of services and facilities provided.

[73] See *Leez Priory v. The Commissioners of Customs and Excise* VAT Decision 18185 at [52]-[53].

215. Hotels, motels, inns, hostels and boarding houses and premises similar to these provide furnished accommodation, and the accommodation includes utilities such as electricity, gas, heating and air-conditioning.

216. Guests' expectations of service levels vary with the style of accommodation and, to some extent, the tariff charged. Services provided in some low-cost commercial residential premises are minimal.

*Management offers accommodation in its own right*

217. The entity operating the accommodation offers and supplies the accommodation as principal, rather than as an agent.

218. It is a question of fact whether an entity is acting as an agent or in its own right when supplying accommodation. The arrangement between the parties will reveal whether there is an agent-principal relationship. Agency is discussed in this Ruling at paragraphs 257 to 261 of this draft Ruling.

*Applying the characteristics to hostels and boarding houses*

219. The term 'hostel' can refer to a wide variety of accommodation, and hostels can take a number of forms.[74] Given the context in which the term is used in paragraph (a) of the definition, however, the comments made by McLauchlan J in *Noosa Shire Council v. Staley* [2002] QPEC 18 are apt. His Honour stated that the ordinary meaning:

> …implies budget accommodation involving shared sleeping arrangements and shared toilet and ablution facilities between people who are unrelated and who cannot be regarded as constituting a household.[75]

220. The meaning of the term 'boarding house' in the context of the definition of commercial residential premises was considered by the Administrative Appeals Tribunal (AAT) in *Re Karmel & Co Pty Ltd (as trustee for Urbanski Property Trust) v. FC of T* (*Karmel*).[76] In this case, a property owner rented out a dwelling's two garages which had been converted into accommodation units. The rent included utilities, and the use of facilities such as a clothes drier. The occupants were offered a choice of hiring furnishings or using their own.

[74] See, for example, *Keith Reginald Hamlin Brown and Austrust Limited v. The Commonwealth Bank of Australia* [1993] SASC 4232 at [36]-[39].
[75] [2002] QPEC 18 at [14].
[76] [2004] AATA 481; 2004 ATC 2075; (2004) 56 ATR 1012.

221. The AAT held that the garage premises were not a boarding house because the property owner was not required to provide meals to the occupants. The AAT cited with approval[77] the following passage from the judgment of Hope JA in *Roberts v. Waverley Municipal Council*:

> In ordinary parlance a boarding-house is a place where a business is carried on of providing food and lodging to the boarders, and the food comprises meals. It is a place where the boarders pay for their board and lodging, and the concept of a place where the boarders are not required to pay anything and do their own cooking is inconsistent with the natural meaning.[78]

222. This approach is consistent with the approach adopted by the London Tribunal Centre in *Geoffrey Ross Holding and June Monica Holding v. HMRC*[79] which considered the term 'boarding house' in the context of whether sleeping accommodation had been provided in a hotel, inn, boarding house or similar establishment. It stated at [43] to [44]:

> The Appellants pointed to the definition of a boarding house in the Shorter Oxford English Dictionary as a house 'in which persons board', and the meaning given to 'board' in the sense as 'to provide with daily meals; now generally to provide with both food and lodging at a fixed rate; to live with a family as one of its members for a stipulated charge.'
>
> It seems to us however that the natural meaning of board involves the daily provision of meals to the boarder. It suggests the sitting at a table and being fed for at least one meal a day. … In a boarding house dining in rather than eating out or making your own dinner (even if from materials provided by the owner) is the general rule.

223. Paragraphs 160, 175 and 176 of this draft Ruling discuss the policy of input taxing supplies under residential rental arrangements. It is consistent with this policy that premises that principally provide accommodation under conditions analogous to residential rental arrangements not be regarded as commercial residential premises. Therefore, premises are not commercial residential premises if they are principally used to provide accommodation where the occupant enters into an accommodation agreement that gives the occupant control over, or responsibility for, a part of premises (for example, a room or suite) including the right to restrict management's access to their room. This is so even when the premises are referred to as a 'hostel' or 'boarding house'.

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[77] *Karmel* [2004] AATA 481 at [19]; 2004 ATC 2075 at 2077; (2004) 56 ATR 1012 at 1015.

[78] (1988) 14 NSWLR 423 at 430. *Karmel* and *Roberts v. Waverley Municipal Council* have been referred to subsequently in *Warlam Pty Ltd v. Marrickville Council* [2009] NSWLEC 23. This case considered the term 'boarding house' in a planning law context and took into account the definition of the term in the *Marrickville Local Environment Plan 2001*. The Court considered that the provision of board was not required in a boarding house in the particular planning context and therefore distinguished *Roberts v. Waverley Municipal Council*. However, the Commissioner considers that the approach taken in *Karmel* is to be preferred in the context of the definition of commercial residential premises in the GST Act.

[79] VAT Decision 19573.

### *Characterising premises that are not operating*

224. Premises may be characterised under paragraphs (a) or (f) of the definition of commercial residential premises even when they are not operating. Premises that are not being operated at the time of supply may be classified by their overall physical character, considered with other objective characteristics. Prior use, physical characteristics, plans, or council or other government planning and/or zoning restrictions may all be indicative of the premises' nature.

225. A supply of premises that were previously operated as a hotel, motel, inn or hostel[80] and have not been subject to any physical modifications that changed the character of the premises is a supply of commercial residential premises. Equally, the fact that premises had been previously operated otherwise than as a hotel, motel, inn or hostel (for example as a retirement village), and supplied without any physical modifications that may have changed their character, objectively indicates that the premises are not a hotel, motel, inn or hostel.

226. The physical characteristics, plans, or council or other government planning and zoning restrictions may also objectively indicate whether the premises are a hotel, motel, inn, or hostel. This factor may be relevant where the premises have been newly constructed and not yet operated. Where these indicators reveal that the premises have been specifically constructed for a different purpose (for example, to be used as a retirement village) or not specifically designed as a hotel, motel, inn, hostel, or similar premises, the premises are not commercial residential premises.

227. Vacant premises may be characterised as a boarding house if the physical characteristics, plans, or government planning and/or zoning restrictions reveal that the premises were designed, built or modified as a boarding house. A supply of a vacant house that was not designed, built or modified as a boarding house but has previously been operated as a boarding house or similar premises (for example, a premises that has provided bed and breakfast accommodation) is not a supply of commercial residential premises.

### *Separately titled rooms, apartments, cottages or villas*

228. There is a relationship between residential premises and some commercial residential premises in the GST Act. In some cases there may be an overlap in that some premises which fit within the definition of residential premises also fit within the definition of commercial residential premises.[81] However, some things listed in the definition of commercial residential premises do not also come within the definition of residential premises, such as ships referred to in paragraphs (c) and (d) of the definition.

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[80] Boarding houses are discussed at paragraph 227.

[81] *Marana* (2004) 141 FCR 299 at 310-311; 2004 ATC 5068 at 5077-5078; (2004) 57 ATR 521 at 532-533.

229. The primary function of premises that fit within both definitions is to provide various types of living accommodation. In *Meridien Marinas Horizon Shores Pty Limited v. FC of T* (*Meridien Marinas*) Greenwood J observed:

> Premises such as a hotel, motel, inn, hostel, boarding house, a caravan park or anything 'similar to residential premises' falling within (a) to (e) of the definition, comprehended premises incorporating a facility for residential occupation *associated with* some other activity on or in connection with the premises and in some cases included a multiplicity of places within the premises capable of residential occupation. The statutory characterisation of premises as commercial residential premises suggested residential use as part of a related commercial activity.[82]

230. As such, the living accommodation areas of these commercial residential premises exhibit the fundamental characteristics of residential premises in providing shelter and basic living facilities.

231. In addition to living accommodation areas, premises that are commercial residential premises include commercial infrastructure to support the commercial operation of the premises. This infrastructure includes (but is not limited to) reception areas, dining and bar areas, meeting/function areas, kitchens, laundry facilities, storage areas and car parks. This infrastructure is used to provide services to occupants. Premises described in paragraph (a) and similar premises under paragraph (f) of the definition contain some or all of these areas to some degree.

232. This position is supported by the following observation made by Emmett J in the Full Federal Court decision of *South Steyne*:[83]

> A hotel, motel, inn, hostel or boarding house consists of more than the rooms or apartments that are occupied by guests. It must also of necessity include common areas such as reception areas, dining areas, car parks and the like, such as were the subject of the management lot. The supply that consisted only of the rooms or apartments or accommodation units in a hotel complex is not, without those other areas, the supply of commercial residential premises. The management lot is an essential part of the Sebel Hotel.

233. A sale or lease of premises that includes the living accommodation areas with the commercial infrastructure referred to in paragraph 231 is a supply of commercial residential premises.

234. Separately titled rooms, apartments, or adjacent cottages or villas located on adjoining or abutting land (or living accommodation areas) can be combined with commercial infrastructure and operated similarly to a hotel, motel, inn, hostel or boarding house. Supplies of accommodation in premises operated in this way are supplies of accommodation in commercial residential premises.

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[82] *Meridien Marinas* [2009] FCA 1594 at [56]; 2009 ATC 20-158 at 56; 74 ATR 787 at 801.

[83] *South Steyne* (2009) 180 FCR 409 at 416; 2009 ATC 20-145 at 10337; (2009) 74 ATR 41 at 49. Finn J at [1] agreed with the reasoning of Emmett J.

235. A supply by sale or lease of real property consisting of part of a building cannot be characterised by reference to another supply. In considering the supply of 83 apartments under individual leases in the Full Federal Court decision of *South Steyne*, Emmett J stated:[84]

> …there is nothing in the GST Act or the policy underlining the GST Act that suggests that the characterisation of an individual supply can be approached by treating it as if it were the aggregate of that supply and other supplies. It is not possible, as the appellants contend, to treat the supply of an individual apartment as aggregated with the supply of all of the other apartments.
>
> Even if the individual leases of the 83 apartments were granted pursuant to a single agreement, the apartments by themselves do not amount to or constitute a hotel; nor do they amount to or constitute a motel, inn, hostel or boarding house.

236. A supply by sale or lease of a separately titled room, apartment, cottage or villa without commercial infrastructure referred to in paragraph 231 of this draft Ruling is an input taxed supply of residential premises to be used predominantly for residential accommodation regardless of whether the building complex, or any part of it, is being operated as commercial residential premises.[85] This characterisation does not change where an entity makes multiple supplies to another entity under an overarching agreement that together constitute a hotel or other commercial residential premises.

### *Premises used to provide accommodation in connection with a school – paragraph (b) of the definition*

237. Boarding facilities provided by schools, or by another organisation on behalf of or in connection with a school or schools, are commercial residential premises.

238. This does not necessarily mean that supplies of accommodation to students undertaking school courses are subject to GST. Section 38-105 makes supplies of student accommodation to those undertaking primary, secondary or special education courses GST-free where:

- the supplier of the accommodation also supplies the course; or
- the accommodation is provided in a hostel whose primary purpose is to supply such accommodation to students from rural or remote locations.

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[84] *South Steyne* at [24], (2009) 180 FCR 409 at 416; 2009 ATC 20-145 at 10336-10337; (2009) 74 ATR 41 at 48. Finn J at [1] agreed with the reasoning of Emmett J. Edmonds J at [85] agreed with the reasoning of Stone J at first instance that the lease of each apartment was the subject of a separate supply made under an individual lease agreement and was not a supply of a hotel, motel, inn, hostel or boarding house. Nor was it a supply of anything similar to a hotel, motel, inn, hostel or boarding house. See also paragraph 15.16 of the Revised Explanatory Memorandum to the Tax Laws Amendment (2006 Measures No. 3) Bill 2006.

[85] Assuming the sale of the premises is not a sale of new residential premises.

239. Other supplies of accommodation in boarding facilities that are made in connection with a school may be taxable supplies under section 9-5 or subject to the rules in Division 87. This includes supplies of accommodation made to teachers and staff.

### *A ship that is mainly let out on hire in the ordinary course of a business of letting ships out on hire – paragraph (c) of the definition*

240. If a ship, such as a charter vessel, is let out on a short-term or long-term basis, the supply is subject to GST. 'Ship' means any vessel used in navigation, other than air navigation.[86] The inclusion of this paragraph in the definition of commercial residential premises ensures that Division 87 may apply to a supply of commercial accommodation on such a ship.[87]

### *A ship that is mainly used for entertainment or transport in the ordinary course of a business of providing ships for entertainment or transport – paragraph (d) of the definition*

241. A supply of accommodation on board a ship that is mainly used for entertainment[88] or transport is a supply of accommodation in commercial residential premises. The inclusion of this paragraph in the definition of commercial residential premises ensures that Division 87 may apply to a supply of commercial accommodation on such a ship.[89]

### *A marina at which one or more of the berths are occupied, or are to be occupied, by ships used as residences – paragraph (da) of the definition*

242. Paragraph (da) of the definition requires that a marina that is commercial residential premises have one or more berths occupied or to be occupied by ships used as residences.

243. A marina is a place that provides berths for ships to dock and other services. While a marina is usually a place that provides multiple berths by means of pontoons, jetties, piers or similar structures, it may be a place that has only a single berth.

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[86] Section 195-1.
[87] See Part E of this draft Ruling from paragraph 288 for a discussion of Division 87.
[88] 'Entertainment' is defined in section 195-1 of the GST Act as having the meaning given by section 32-10 of the *Income Tax Assessment Act 1997* which provides that entertainment means (a) entertainment by way of food, drink or recreation; or (b) accommodation or travel to do with providing entertainment by way of food, drink or recreation.
[89] See Part E of this draft Ruling from paragraph 288 for a discussion of Division 87.

244. The reference to ships being used as residences requires that the ships must be used as a residence in the sense of a place for permanent or long-term occupation.[90] Vessels like a dinghy or a ski boat are not capable of use as a residence.

245. The requirements of any government or statutory authority such as the by-laws of a local council, may also be relevant, but not necessarily determinative, in working out whether a berth at a marina may be occupied by a ship used as a residence.

246. The inclusion of this paragraph in the definition of commercial residential premises ensures that Division 87 may apply to a supply of a berth at a marina.[91]

### *A caravan park or camping ground – paragraph (e) of the definition*

247. The terms 'caravan park' and 'camping ground' are not defined in the GST Act and take their ordinary meanings in context. Dictionaries provide the following meanings for each of these terms:

> *Caravan park:*
>
> > 1. a supervised area where caravans may park or may be hired (*Macquarie*)
> >
> > 4. a place where caravans may be parked as holiday accommodation or as more permanent dwellings (*Shorter Oxford*)
>
> *Caravan*
>
> > 4. A covered carriage or cart…Now freq. one able to be towed by a motor car and used as a stationary dwelling (esp. while on holiday). Also *attrib.,* as caravan park, site, a place where caravans are parked and used as dwellings (*OED*)
>
> *Camping ground*
>
> > 1. a supervised site, often with amenities, on which tents may be erected and caravans parked for holiday occupation (*Macquarie*)
> >
> > [cross reference] *camp-site* a place for camping (*Shorter Oxford*)
> >
> > *Camping* 1. Going into a camp, encamping; a lodging in tents, etc. 2. *attrib.,* as in *camping-place,-ground*. (*OED*)

[90] See the discussion of the meaning of 'residence' in *Marana* at (2004) 141 FCR 299 at 304-5; 2004 ATC 5068 at 5072-5073, (2004) 57 ATR 521 at 526-527.
[91] See Part E of this draft Ruling from paragraph 288 for a discussion of Division 87.

248. There are some differences between the way these premises operate and the operation of hotels and similar premises. Guests may stay in a caravan, a demountable home,[92] a permanent cabin or villa, or a tent provided by the operator on the site. Alternatively, guests may park their own caravan, motor home, camper trailer or the like on a site or pitch their own tent on a site. Such sites may be powered or un-powered. Accommodation in a caravan park or camping ground is held out to the public. Caravan parks and camping grounds are operated on a commercial basis or in a business-like manner.

249. Supplies of sites within a caravan park or camping ground are taxable under the basic rules. However, supplies of long term accommodation may be taxed at a concessionary rate or input taxed.[93]

### *Premises to the extent that they are used to provide accommodation to students in connection with an education institution that is not a school – expressly excluded from the definition*

250. The definition of commercial residential premises excludes premises to the extent that they are used to provide accommodation to students in connection with an education institution that is not a school.[94] The premises must satisfy one of the foregoing paragraphs of the definition before the exclusion to the definition applies. For example, where a university residential college is operated in a manner such that it falls within paragraph (a) of the definition of commercial residential premises, the accommodation would be excluded from being commercial residential premises because a university is an education institution that is not a school. These supplies are input taxed under paragraph 40-35(1)(a).

251. The exclusion may not apply to all supplies of accommodation a residential college makes. For example, a college may be used to provide accommodation, meals and services to non-students during recess periods, and based on this operation, it may fit within paragraph (f) of the definition of commercial residential premises. In such cases, the supplies of accommodation are not input taxed, unless it is a supply of long-term accommodation for the purposes of Division 87 and the operator chooses to make the supply input taxed under paragraph 40-35(1)(b).[95]

252. For further information on this exclusion to the definition, see paragraphs 146 to 157 of *Goods and Services Tax Ruling GSTR 2001/1 Goods and services tax: supplies that are GST-free for tertiary education courses*.

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[92] In this Ruling, the term 'demountable home' is used to cover moveable dwellings, such as pre-fabricated or relocatable homes.
[93] See Part E of this draft Ruling from paragraph 288 for a discussion of Division 87.
[94] Refer to the definition of 'school' in section 195-1.
[95] See Part E of this draft Ruling from paragraph 288 for a discussion of Division 87.

### *A supply of accommodation in commercial residential premises provided to an individual by the entity that owns or controls the commercial residential premises*

253. An exception applies in paragraph 40-35(1)(a) such that a supply of residential premises by way of lease, hire or licence is not input taxed if it is a supply of accommodation in commercial residential premises provided to an individual by the entity that owns or controls the commercial residential premises.

254. Accommodation in commercial residential premises is provided to individuals by the entity that operates the accommodation business of the premises. However, the supply of the accommodation by the operator of the accommodation business that is taxable under this exception need not be 'supplied to an individual'.[96]

255. This is because the supplies of the accommodation in commercial residential premises covered by this exception may be made to an entity other than the individual to whom the accommodation is provided. For example, the entity that owns or controls commercial residential premises may provide accommodation to an individual, such as an employee of a company, even though the supply of accommodation is made by the entity to the company itself.[97]

256. A supply of a right to accommodation[98] in commercial residential premises located in Australia that is supplied to an accommodation wholesaler who then on-supplies that right to an individual is a taxable supply. This is because the accommodation is provided to the individual by the entity that owns or controls the commercial residential premises. See Example 22 at paragraphs 115 to 118 of this draft Ruling.

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[96] See paragraphs 130-134 of *Goods and Services Tax Ruling GSTR 2006/9 Goods and services tax: supplies*. See also Greenwood J in *Meridien Marinas* at [2009] FCA 1594 at [88]; 2009 ATC 20-158; 74 ATR 787 at 810-811.

[97] Refer to paragraph 15.10 of the Revised Explanatory Memorandum to the Tax Laws Amendment (2006 Measures No. 3) Bill 2006.

[98] *Saga Holidays Ltd v. FC of T* [2005] FCA 1892; 2006 ATC 4001; 61 ATR 384 confirmed that a supply of hotel accommodation is a supply of real property as defined in section 195-1. See paragraphs 94 and 95 of *Goods and Services Tax Ruling GSTR 2003/7 Goods and Services Tax: what do the expressions 'directly connected with goods or real property' and 'a supply of work physically performed on goods' mean for the purposes of subsection 38-190(1) of the A New Tax System (Goods and Services Tax) Act 1999?* and *Goods and Services Tax Determination GSTD 2004/3 Goods and services tax: Is a supply of rights to accommodation a supply of real property for the purposes of the A New Tax System (Goods and Services Tax) Act 1999?*.

*Supplies made by an agent or principal*

257. The exception in paragraph 40-35(1)(a) applies to supplies of accommodation in commercial residential premises where the entity that owns or controls the commercial residential premises provides the accommodation to an individual. Different outcomes will arise depending upon whether the entity making the supply of accommodation has a sufficient interest in the premises to be characterised as making a supply of accommodation in commercial residential premises.

258. For example, an owner of a single apartment in a building complex will not be able to supply accommodation in commercial residential premises. This characterisation does not change where the owner engages the services of an agent in making the supply of accommodation, regardless of whether the agent has entered into similar agreements with other owners of individual apartments within the apartment complex so as to operate as an on-site manager. However, an entity that leases apartments in a building complex together with commercial infrastructure will be able to operate the premises so as to supply accommodation in commercial residential premises. It is therefore necessary to establish whether an entity is acting in the capacity as agent or principal to establish the correct treatment of the supply of accommodation.

259. An agent is a person who is authorised, either expressly or impliedly, by a principal to act for that principal so as to create or affect legal relations between the principal and third parties.[99] Whether an entity is an agent is a question of fact. A provision in an agreement that states that an agency relationship exists must be considered with all of the other terms of the agreement.[100] It is necessary to consider, within the context of the overall agreement, whether the entity is acting as an agent in respect to the supply of accommodation. While an entity may act as an agent for some purposes, it does not necessarily mean that the entity is an agent for all purposes.

260. An on-site agent or manager may contract with third parties to supply accommodation without disclosing that it is acting for a principal. In determining whether in so doing the agent is acting in its own capacity or on behalf of the principal, it is necessary to consider the relationships between principal, agent and customer having regard to the whole of the arrangement.

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[99] *International Harvester Company of Australia Proprietary Limited v. Carrigan's Hazeldene Pastoral Company* (1958) 100 CLR 644; for further guidance on agency relationships refer to *Goods and Services Tax Ruling GSTR 2000/37 Goods and services tax: agency relationships and the application of the law*.

[100] See paragraph 34 of GSTR 2000/37.

261. The focus of the analysis is on whether the entity is a principal or is acting as an agent in making the supply of accommodation is a supply of accommodation in commercial residential premises. The fact that an entity may be an agent for other aspects of the commercial operations is not determinative. For example, in *South Steyne*, the Full Federal Court concluded that the supply of the hotel room to a guest was a taxable supply as the hotel operator contracted as a principal in supplying the accommodation and could make that supply because it controlled the premises.[101] This conclusion was drawn despite the fact that the hotel operator was acting as agent for the lessee for some purposes.

## Part D: Application of principles to some common types of supplies

262. The following sections apply the principles discussed in the context of Subdivisions 40-B and 40-C, to a range of common types of supplies.

### *Strata titled hotel rooms*

263. Strata titled hotel rooms are designed to provide residential accommodation as they provide shelter and basic living facilities. They are, therefore, residential premises, but may form part of commercial residential premises.

264. A single strata titled hotel room cannot, by itself, exhibit the characteristics of commercial residential premises. A supply by way of sale or lease of a hotel room or a number of hotel rooms without the commercial infrastructure to support the operation of the premises commercially and which is necessary to provide some level of services to guests is an input taxed supply of residential premises.

265. The accommodation provided to guests in an individual room is accommodation in commercial residential premises when the room forms part of commercial residential premises operated by the supplier.

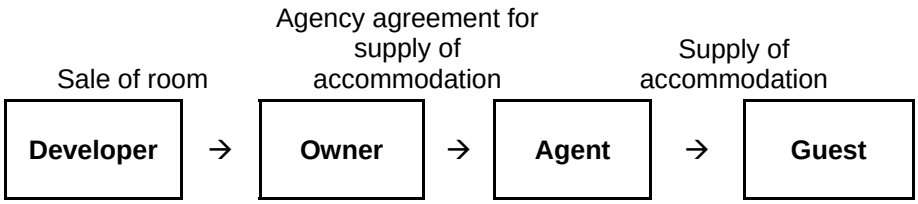
### *Agency agreements in strata titled premises*

266. Strata titled premises are commonly let by agents who are either real estate agents, or on-site agents/managers.

[101] *South Steyne* (2009) 180 FCR 409 at 411; 2009 ATC 20-145 at 10333; (2009) 74 ATR 41 at 44. Refer also to Stone J in *South Steyne* at [2009] FCA 13 at [89]; 2009 ATC 20-090 at 9340; (2009) 71 ATR 228 at 250.

267. A common arrangement for on-site agents or managers is for an entity to purchase the management rights from the developer and then enter into individual agreements with room or unit owners who want to let their properties. An agency relationship exists for the supply of accommodation in premises where the rights conferred under these arrangements are not sufficient to enable the on-site agent to let the rooms as principal in its own right. Under these arrangements, the agent may supply the accommodation in the premises on the owner's behalf.

268. The diagram below shows a series of transactions where a developer that has constructed a holiday complex sells a strata titled apartment in the complex to an investor.[102] The investor enters into an agency agreement with a local real estate agent to rent the apartment for holiday letting.



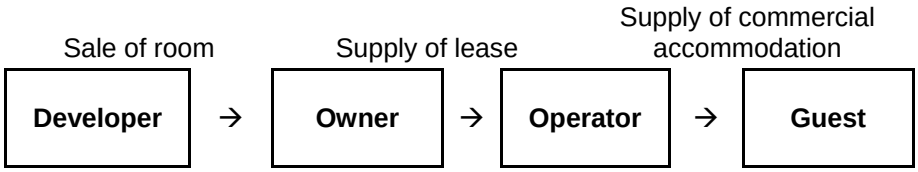

269. Where accommodation is supplied through an entity acting in the capacity as an agent, the treatment of each of the supplies in the arrangement (illustrated above) is as follows:

- The sale of the apartment from the Developer to the Owner is a taxable supply of new residential premises.
- The Owner is not entitled to input tax credits on the acquisition of the apartment as it relates to the Owner making input taxed supplies of residential premises (that is, the accommodation supplied to the guests).[103]
- The Agent is liable for GST on the supply of its services to the Owner. The Owner is not entitled to input tax credits on the acquisition of the agency services as these services relate to the Owner making input taxed supplies of residential premises.
- The supply of accommodation by the Owner, through the Agent to the Guest, is an input taxed supply of residential premises.

[102] This scenario assumes that subsection 40-75(2) does not apply.
[103] Sections 11-5, 11-15 and 11-20 and *Goods and Services Tax Ruling GSTR 2008/1 Goods and services tax: when do you acquire anything or import goods solely or partly for a creditable purpose?*

***Strata titled premises operated as commercial residential premises***

270. The diagram below shows a series of transactions where a developer that has constructed a hotel complex sells a strata titled hotel room to an investor who leases it to an operator.[104] The operator, which has also leased the commercial infrastructure of the hotel, then hires the room to guests:




271. The treatment of each of the supplies is as follows:

- The sale of the hotel room from the Developer to the Owner is a taxable supply of new residential premises. The sale of the hotel room is not an input taxed supply of residential premises[105] as this is the first sale of the room as residential premises.
- The Owner is not entitled to input tax credits on the acquisition of the hotel room from the Developer as the hotel room relates to the Owner making input taxed supplies of residential premises (that is, the supply of the hotel room by way of lease to the Operator).[106]
- The supply of the hotel room by way of lease by the Owner to the Operator is an input taxed supply of residential premises.
- The Operator is not entitled to input tax credits on the acquisition of the lease from the Owner, as the supply of the room to the Operator is not a taxable supply.
- The supply of commercial accommodation from the Operator to the Guest is a taxable supply.

[104] This scenario assumes that subsection 40-75(2) does not apply.
[105] Section 40-65.
[106] Sections 11-5, 11-15 and 11-20. See GSTR 2008/1.

### *Bed and breakfast and similar accommodation*

272. The term 'bed and breakfast accommodation' generally describes short-term holiday accommodation provided in a private home. A supply of accommodation provided in these premises is an input taxed supply of residential premises unless the premises are operated in a similar manner to a hotel, motel, inn, hostel or boarding house.[107] In these circumstances, parts of the premises may be commercial residential premises under paragraph (f) of the definition of commercial residential premises because the premises are used to provide accommodation similar to that provided in a hotel, motel, inn, hostel or boarding house. See Examples 9 to 11 at paragraphs 55 to 61 of this draft Ruling.

### *Display homes*

273. A purchaser of new residential premises may lease their premises back to the builder for use as a display home. The display home has the physical characteristics that enable it to be occupied as a residence. The lease of the display home is input taxed under section 40-35 being residential premises to be used predominantly for residential accommodation. The subsequent use by the builder is not a relevant consideration.

274. The contract for the sale and leaseback of the display home may contain a contractual prohibition relating to its use as a residence or for residential accommodation during the period of its leaseback. This prohibition does not change the character of the premises as a house designed for residential accommodation and fit for human habitation. The Commissioner's view is that the supply of the house by leaseback to the builder is an input taxed supply, despite the contractual prohibition.

### *Employee and contractor accommodation*

275. Premises in which accommodation is provided to employees and contractors are residential premises where they provide shelter and basic living facilities, and are designed and built primarily to provide living accommodation. These premises are occupied, or are intended to be, and are capable of being, occupied, as a residence or for residential accommodation. This accommodation includes accommodation supplied by the employer to an employee or contractor in houses and apartments. On their own, these houses and apartments do not display characteristics to satisfy the definition of commercial residential premises. Where these premises are supplied by way of lease, hire or licence, the supply is input taxed under

[107] See paragraphs 50 and 181 to 218 of this draft Ruling for the characteristics of these types of premises and premises that are similar to such premises.

section 40-35.[108] See Example 13 at paragraph 64 of this draft Ruling.

276. Premises designed and operated to provide accommodation to employees and contractors may be commercial residential premises. It is a matter of weighing up the eight characteristics and objective factors discussed in paragraphs 50 to 51 and 181 to 218 of this draft Ruling to determine whether the overall character of the premises are similar to the class of 'hotel, motel, inn, hostel or boarding house'. Where they are similar to this class, the premises are commercial residential premises under paragraph (f) of the definition. Accommodation provided to employees and contractors in a caravan park or similar premises may also be commercial residential premises under paragraph (e) of the definition. While it is necessary to consider the facts in each circumstance as to how the premises are operated, an example of commercial residential premises may include 'camp-style accommodation'. See Examples 14 and 15 at paragraphs 65 to 76 of this draft Ruling.

### *Holiday houses, apartments and units*

277. The physical characteristics of holiday houses, apartments and units indicate that they are residential premises to be used predominantly for residential accommodation. It is necessary to consider the characteristics and objective factors identified in paragraphs 50 to 51 and 181 to 218 of this draft Ruling to determine whether the premises are commercial residential premises. See Example 16 at paragraphs 77 to 80 of this draft Ruling.

### *Retirement village accommodation*

278. Retirement villages provide living accommodation in communal or semi-communal facilities[109] Retirement village living units are residential premises to be used predominantly for residential accommodation based on their physical characteristics. In addition, some of the buildings and facilities that residents can directly enjoy in conjunction with their residency form part of the residential premises. This includes, for example, barbeque areas, gardens, car-parks and driveways. This is consistent with the discussion of land supplied with a building.[110]

279. A retirement village may also include parts that are not residential premises to be used predominantly for residential accommodation. This includes, for example, site offices, staff rooms, medical centres, and commercial premises, such as hairdressing salons, golf courses, shops, and restaurants or cafes. These are

[108] Refer to paragraph 123 of GSTR 2008/1 regarding creditable purpose.
[109] Refer to the *Macquarie Dictionary*. While the term 'retirement village' is defined in section 195-1 for certain purposes, this draft Ruling refers to 'retirement villages' in accordance with the ordinary meaning of the expression.
[110] See paragraphs 35 and 163 of this draft Ruling.

commercial premises the value of which should be apportioned or treated as separate supplies under the basic rules, depending on the circumstances of the supply.

280. As noted in paragraph 187 of this draft Ruling, the Commissioner's view is that it is necessary for accommodation in the premises to be provided to a guest in order to satisfy paragraph (a) of the definition of commercial residential premises or paragraph (f) for premises that are similar to those described in paragraph (a). It is then necessary to weigh up the remaining characteristics and objective factors identified in paragraphs 50 to 51 and 181 to 218 of this draft Ruling to determine whether the premises are commercial residential premises. Accommodation in a retirement village will therefore not be provided in commercial residential premises where the occupants of the retirement village do not have the status of a guest. Occupants do not have a status of a guest where they are granted overall control over at least part of the premises including the right to restrict entry by the management of the retirement village to that part of the premises.

### *Rooming houses*

281. Legislation in a number of States and Territories deals with a class of premises often referred to as rooming houses or rooming accommodation. These premises in the main provide low-cost housing. Rooming houses usually provide single room, or small suite, accommodation with some shared facilities (such as bathroom, laundry and kitchen). State and Territory legislation may confer, or allow to be granted, the right to restrict entry by management to individual rooms within the premises. Subject to some restrictions, the occupant may also have responsibility for and control over these rooms.

282. As noted in paragraph 187 of this draft Ruling, the Commissioner's view is that it is necessary for accommodation in the premises to be provided to a guest in order to satisfy paragraph (a) of the definition of commercial residential premises or paragraph (f) for premises that are similar to those described in paragraph (a). It is then necessary to weigh up the remaining characteristics and objective factors identified in paragraphs 50 to 51 and 181 to 218 of this draft Ruling to determine whether the premises are commercial residential premises. Accommodation in a rooming house will therefore not be provided in commercial residential premises where the occupant of a rooming house does not have the status of a guest. An occupant does not have a status of a guest where the occupant is granted overall control over at least part of the premises including the a right to restrict entry by the management of the boarding house to at least that part of the premises – such as a bedroom.

### *Transportable buildings and houses*

283. Transportable buildings such as demountable dwellings and relocatable homes designed as a residence, or for residential accommodation, and placed on a site are residential premises where they are plumbed and wired in a similar way to a conventional house.

284. A transportable building, by itself, is not suitable for, or capable of, being occupied as a residence or for residential accommodation until affixed to land. Therefore, a supply of a transportable building is not input taxed under sections 40-35, 40-65 or 40-70.[111] Similarly, a supply of a house that has been removed from land is not input taxed under sections 40-35, 40-65 or 40-70.[112] Further, as a supply of a transportable building or house that is not affixed to land is not a supply of real property, it cannot be input taxed under sections 40-65 or 40-70.

285. Transportable buildings that are not designed to provide residential accommodation (for example, transportable buildings that lack basic living facilities such as facilities for sleeping and bathing) are not residential premises to be used predominantly for residential accommodation. Supplies of demountable buildings that are not residential premises to be used predominantly for residential accommodation are subject to GST under the basic rules.

### *Vehicles designed for road use*

286. Road vehicles, including motor homes, caravans and campervans, are not residential premises as they are not land or a building.

287. This includes caravans and other road vehicles, even if they are left on a site for permanent occupation. A supply of accommodation in a caravan is a supply of commercial accommodation in commercial residential premises if it is provided at a site in a caravan park by the park operator.[113]

## Part E: Division 87 – long-term accommodation in commercial residential premises

288. The GST payable on supplies of long-term commercial accommodation in commercial residential premises is calculated on a reduced value.[114] For the concession to apply, several conditions must be met:

- the supply must be a taxable supply;
- the premises in which the supply of accommodation takes place must be commercial residential premises;

[111] However, subsection 9-30(4) may apply.
[112] However, subsection 9-30(4) may apply.
[113] See paragraph (e) of the definition of 'commercial residential premises' in section 195-1.
[114] Sections 87-5 and 87-10.

- the supply must be of commercial accommodation;
- the supply of commercial accommodation must be for 28 days or more and the accommodation must be able to be taken up by an individual.[115]

289. Where premises are predominantly for long-term accommodation, the value of a supply of accommodation in the premises for 28 days or more, on which GST is calculated, is reduced to 50% of what would be the price of the supply if Division 87 did not apply.[116]

290. Where premises are not predominantly for long-term accommodation, the value on which GST is calculated for the 28th and additional days of a supply of long-term accommodation in the premises is reduced to 50% of what would be the price of the supply if Division 87 did not apply.[117]

### *Meaning of 'commercial accommodation'*

291. Section 87-15 provides that 'commercial accommodation' means the right to occupy the whole or any part of commercial residential premises, including, if it is provided as part of the right so to occupy, the supply of:

(a) cleaning and maintenance; or

(b) electricity, gas, air-conditioning or heating; or

(c) telephone, television, radio or any other similar thing.

292. In considering the meaning of 'commercial accommodation', Greenwood J stated in *Meridien Marinas*:[118]

> 73. The definition of commercial accommodation is not concerned with actual use or an act of occupation of the whole or any part of the range of premises falling within the definition of commercial residential premises. Commercial accommodation is defined as the 'right' to occupy the whole or any part of the premises which confers a right to stay as contemplated by s 87-1.
>
> 74. The right to occupy, however, is necessarily given meaning by the context in which the definition operates, in conjunction with the other defined terms within Division 87 and the GST Act more generally. The right to occupy the whole or any part of the marina or any other premises falling within the definition of commercial residential premises is not a right to occupy *at large*, for the purposes of the definition of 'commercial accommodation', in a way divorced from any corresponding purpose serving the statutory objectives of Division 87. …

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[115] See paragraphs 300 to 308 of this draft Ruling for further explanation to this requirement.
[116] Section 87-5.
[117] Section 87-10.
[118] *Meridien Marinas* at [2009] FCA 1594 at [73]-[74]; 2009 ATC 20-158; 74 ATR 787 at 807.

293. In applying section 87-15 within the context of a marina, Greenwood J found that:

> The 'right to occupy' contemplated by the definition of commercial accommodation in the context of the division is properly understood as a right to occupy the marina or a berth in the marina as a residence, in the sense of a right to stay rather than in any sense of permanent or long-term residence, which is consistent with the notion that a marina satisfying the description of commercial residential premises is a marina at which one or more of the berths are occupied, or to be occupied, by ships used as residences.[119]

294. The Commissioner considers that Greenwood J's reference to 'residence' in this context is consistent with how the term 'living accommodation' has been discussed in this Ruling.[120] Therefore, for an entity to provide commercial accommodation to an individual, the individual must be provided with a right to occupy the whole or any part of the commercial residential premises for living accommodation (that is, in the sense of a right to stay).

295. The definition of commercial residential premises in section 195-1 includes references to things which may not necessarily include facilities that allow for occupation by an individual in the sense articulated by Greenwood J. For example, the definition refers to:

(c) a ship that is mainly let out on hire in the ordinary course of a business of letting ships out on hire; or

(d) a ship that is mainly used for entertainment or transport in the ordinary course of a business of providing ships for entertainment or transport.

296. It is therefore necessary, for section 87-15 to be satisfied, that the ships referred to in paragraphs (c) and (d) have sufficient facilities such that the supplier can provide a right to occupy the whole or any part of the ships for living accommodation to individuals.

297. In the case of caravan parks and camping grounds,[121] the 'premises' are the grounds themselves, rather than any specific accommodation in buildings. Thus, an owner who places their caravan on a site for a fee is occupying the premises. Whether they are physically occupying their caravan is, in this particular case, immaterial.[122]

298. The right to occupy the whole or any part of the commercial residential premises for living accommodation must be conferred at the time of the taxable supply.[123]

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[119] *Meridien Marinas* at [2009] FCA 1594 at [75]; 2009 ATC 20-158; 74 ATR 787 at 807.
[120] See paragraph 149 of this draft Ruling.
[121] Paragraph (e) of the definition of commercial residential premises.
[122] See *Meridien Marinas* at [2009] FCA 1594 at [83]; 2009 ATC 20-158; 74 ATR 787 at 809-810.
[123] See *Meridien Marinas* at [2009] FCA 1594 at [83]; 2009 ATC 20-158; 74 ATR 787 at 809-810.

299. The Commissioner considers that this right to occupy must extend for the full duration of the relevant supply. This is supported by *Meridien Marinas* where Greenwood J referred to determining whether the lessees had obtained at the date of grant of each lease a right to occupy their berths as a residence at any time during the period of the 20-year lease.[124]

### *Meaning of 'provided to an individual as long-term accommodation'*

300. Paragraphs 87-5(1)(b) and 87-10(1)(b) refer to commercial accommodation that is provided to an individual as long-term accommodation. 'Individual' is defined to mean a natural person.[125] These provisions do not require the supply of commercial accommodation be made to an individual.

301. A taxable supply of commercial accommodation may be provided to an individual in cases where that individual is not the recipient of the supply.[126] This allows corporate entities acquiring long-term accommodation for their employees to benefit from the concessionary treatment of long-term accommodation.

302. For example, where a corporation books and pays for long-term accommodation for an employee, the employee is being provided with the accommodation, while the company is the recipient of the supply. The company is entitled to the benefit of the concession in Division 87.

303. Subsection 87-20(1) sets out the meaning of 'long-term accommodation' which is provided to an individual if commercial accommodation is provided, for a continuous period of 28 days or more, in the same premises:

(a) to that individual alone; or

(b) to that individual, together with one or more other individuals who:

(i) are also provided with that commercial accommodation; and

(ii) are not provided with it at their own expense (whether incurred directly or indirectly).

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[124] See *Meridien Marinas* at [2009] FCA 1594 at [89]; 2009 ATC 20-158; 74 ATR 787 at 811.
[125] Section 195-1.
[126] See *Meridien Marinas* at [2009] FCA 1594 at [88]; 2009 ATC 20-158; 74 ATR 787 at 810-811.

304. In *Meridien Marinas*, Greenwood J made the following observations:

> Section 87-5(a) and particularly (b) are concerned with the provision of commercial accommodation to an individual in the sense that ultimately a person, that is, a natural person consistent with the definition of 'individual' in s 195-1 of the GST Act, will occupy the whole or a part of the commercial residential premises. One example is the common case where a mining company might take a lease of all of the rooms in a motel proximate to a mining site, to be used by its employees from time to time. Some of those rooms might be used, some might not. The rooms when used will be allocated to individuals employed by the company. The supply of commercial accommodation is a supply to the corporation yet the particular rooms will be provided to individuals as the company determines. That analogue explains the operation of the section.[127]

305. After determining that the terms of the leases made by the lessor to lessees (including non-individual entities) did not result in the lessor making a supply of commercial accommodation, his Honour observed:

> If each of the 118 lessees had obtained at the date of grant of each lease a right to occupy their berths as a residence at any time during the period of the 20-year lease, it would then be possible to use the proportion those leases bear to all leases conferring a right to occupy for residential purposes (short-term and long-term), to satisfy s 87-20(3), because Mr McCart's figures show that the 20-year leases constituted a consistently high proportion of total berth rentals, and they would therefore constitute an even higher proportion of residential berth rentals.[128]

306. In discussing the application of subsection 87-20(3), his Honour did not refer to any evidence showing that the commercial accommodation had been provided to individuals for a continuous period of 28 days or more.

307. When read together, it may be inferred from these passages that his Honour would have found that the requirements of subsection 87-20(1) would be satisfied where a supply of commercial accommodation is for 28 days or more and is able, under the terms of the agreement, to be taken up by an individual.

308. On this basis, to determine whether the commercial accommodation is provided to an individual as long-term accommodation, it is only necessary to establish that the supply of commercial accommodation made to an entity is for 28 days or more and the accommodation, under the terms of the agreement, is able to be taken up by an individual. It is not necessary for the commercial accommodation to be actually provided to an individual.

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[127] *Meridien Marinas* at [2009] FCA 1594 at [88]; 2009 ATC 20-158; 74 ATR 787 at 810-811.

[128] *Meridien Marinas* at [2009] FCA 1594 at [89]; 2009 ATC 20-158; ATR 74 ATR 787 at 810-811.

*Long-term accommodation in caravan parks and camping grounds*

309. Caravan owners may choose to leave their caravans at a caravan site for an extended period. For this, they pay site fees regularly and have the right to use their caravans whenever they choose, sometimes paying additional fees when occupying the caravan on the site.

310. In the case of a caravan park, the right to occupy is granted when a site is hired for a caravan, even if the caravan is left unoccupied for most of the time. This means that the special GST treatment for long-term stays applies to supplies made to those who leave their caravans on site for an extended period at a caravan park.

311. Where the operator for convenience moves a caravan from one site to another within the park, but maintains the booking, this is a continuous site rental. However, if the owner of a caravan and the park operator agree to 'store' the caravan in another area of the park which is not suitable for occupation, for an agreed fee, the continuity of the site rental ceases when the caravan is moved. The storage of the caravan is a separate supply, subject to the basic rules. The concession for long-term accommodation is not available in respect of the storage arrangement.

312. The concession in Division 87 applies to the base tariff the operator charges for the hire of a site. If the tariff usually includes items such as linen and electricity, then the whole of the tariff is subject to the concession in Division 87.[129] If, however, the operator makes a separate supply of these items for which the operator charges additional fees, the supply of these items are not provided as part of the right to occupy the commercial residential premises. In this case, the concession in Division 87 does not apply to them and they are subject to GST at the rate of 1/11$^{th}$ of the GST inclusive price.

313. See Example 21 at paragraphs 113 to 114 of this draft Ruling for an example on the application of Division 87 to supplies of long-term accommodation in a caravan park.

### *Meaning of 'predominantly for long-term accommodation'*

314. Based on the observation of Greenwood J in *Meridien Marinas* referred to above,[130] commercial residential premises are predominantly for long-term accommodation under subsection 87-20(3) where at least 70% of the accommodation supplied in the commercial residential premises is for a continuous period of 28 days or more, and may, under the terms of the agreement, be taken up by an individual.

[129] Section 87-15: these things are included in the supply of 'commercial accommodation', to which the concession applies.
[130] See paragraphs 304 to 307 of this draft Ruling.

315. Any fair and reasonable method may be used to determine whether the 70% requirement is satisfied. The Commissioner accepts that one of the following methods or a combination of both can be used in calculating the occupancy of individuals:

(a) the actual occupancy of the premises for the twelve months preceding the month for which the booking is made; or

(b) the projected occupancy for the twelve months following the month in which the booking is made.

316. If it is inappropriate to use either of these methods, a reasonable alternative may be adopted.

317. When looking at actual or projected occupancy, the number of supplies of accommodation, or the number of bookings that are for 28 days or more, rather than the number of people in each room, should be calculated. Bookings made by corporate entities for individuals can be included provided each booking is for a period of 28 or more days.

### *Option to input tax supplies of long-term accommodation*

318. Greenwood J summarised the interaction between Division 87 and section 40-35 as follows:

> …Rather than simply input tax the supply of commercial accommodation (in the same way as residential premises) which would require the supplier to attribute GST payments on inputs in an enterprise comprising the supply of commercial accommodation and other activities constituting taxable supplies, so as to isolate input tax credits referable to the other activities apart from the supply of accommodation, Division 87 seeks to avoid difficulty by a 'concessionary treatment of long-term accommodation'. Section 40-35(1)(b) treats that part of such a supply as input taxed, although the supplier may elect to avoid the difficulties of segmentation, attribution and calculation by applying Division 87 to reduce the value of the supply by 50%.[131]

319. Section 87-25 allows an entity to choose not to apply the special rules for reducing the value on which GST is calculated on supplies of commercial accommodation. If the supplier chooses not to apply the special rules, a supply of commercial accommodation (other than a berth at a marina) is input taxed under paragraph 40-35(1)(b) if it is also a supply of premises by way of lease, hire or licence. This includes the first 27 days of the supply, even if the supplies of the premises are not predominantly long-term accommodation. Any supplies of accommodation of 27 days or less are not subject to the Division 87 concession and are not input taxed – they are taxable supplies under the basic rules.

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[131] See *Meridien Marinas* at [2009] FCA 1594 at [61]; 2009 ATC 20-158; 74 ATR 787 at 804-805. It is noted that subsections 87-5(1) and 87-10(1) refer to 50% of what the price would be if the Division did not apply.

320. The choice not to apply Division 87 to supplies of commercial accommodation in marinas (being the supply of a berth at a marina that falls within the definition of commercial residential premises) results in the supply being input taxed only where the additional requirement in paragraph 40-35(1A)(a) is satisfied. This additional requirement is that the berth is occupied, or is to be occupied, by a ship used as a residence. Paragraph 40-35(1A)(a) differs from the requirements in section 87-5 in that the former is concerned with a berth occupied or to be occupied by a ship used as a residence in the sense of occupation of a permanent or long-term nature whereas the latter is concerned with the conferral of a right to occupy the berth for living accommodation.[132] Where the additional requirement contained in paragraph 40-35(1A)(a) is not satisfied, the supply of the commercial accommodation is a taxable supply. The GST on the taxable supply is calculated in accordance with section 9-70.

321. If the choice is made to input tax supplies of long-term accommodation, all supplies of commercial accommodation for 28 or more days must be input taxed where the requirements in section 40-35 are satisfied. The choice remains in force for at least 12 months after the day on which the choice was first made. However, the choice may be revoked after 12 months or more. All supplies of long-term accommodation must then be taxed under the special rules for at least the next 12 months after the day the choice was revoked. That is, a further choice cannot be made within 12 months of the revocation of the previous choice.

322. There is no requirement to advise the Australian Taxation Office about these choices.

[132] See *Meridien Marinas* at [2009] FCA 1594 at [77]; 2009 ATC 20-158; 74 ATR 787 at 808.

# Appendix 2 – Comparison with GSTR 2000/20

***This Appendix does not form part of the proposed binding public ruling.***

### Comparison between GSTR 2000/20 and GSTR 2012/D1

323. The following table lists each of the key issues/topics dealt with in this draft Ruling and cross-references the relevant paragraphs in this draft Ruling with the relevant paragraphs in GSTR 2000/20. The significant changes are also identified.

| Issue / Topic | Paragraph References | | Main Differences |
|---|---|---|---|
| | GSTR 2000/20 | GSTR 2012/D1 | |
| **Residential premises to be used predominantly for residential accommodation** | | | |
| Physical characteristics and objective intention | 19; 24-27; 31-36 | 9-12; 138-147 | Reference added to *Sunchen* to interpret 'residential premises to be used predominantly for residential accommodation' as a single test.<br>Largely equivalent in placing focus on physical characteristics.<br>Reference added to *Marana* and *Sunchen* regarding focus on objective intention with which the premises are designed, built or modified and the need to look at the premises' suitability for occupation as a residence or for residential accommodation.<br>GSTR 2000/20 made reference to services, status of occupant and zoning (paragraphs 27; 32-36) as relevant factors in addition to physical characteristics. There is no equivalent to these in GSTR 2012/D1. |
| Living accommodation provided by shelter and basic living facilities | 20; 26; 28-30 | 15-16; 148-151 | Largely equivalent.<br>Reference added to *South Steyne*. |

| | | | |
|---|---|---|---|
| Fit for human habitation | No equivalent | 18; 153-155 | New |
| Identifying the premises | No equivalent | 156 | New |
| Garages and car-parking spaces | No equivalent | 17; 152 | New |
| Other premises | No equivalent | 19-28; 157-160 | New |
| Premises requiring apportionment | 21-23 | 29-34; 161-162 | Additional explanation and examples |
| Land supplied with a building | No equivalent | 35-41; 163 | New |
| Vacant land | 25 | 42; 164 | Reference to *Vidler v. Federal Commissioner of Taxation* has been added. |
| Used for residential accommodation before 2 December 1998 | No equivalent | 43-46; 165-166 | New |
| Floating homes and ships | 40-43 | 167-171 | Additional explanation of the meaning of 'residence' in the context of the definition of a floating home. |
| **Commercial residential premises** | | | |
| Definition of commercial residential premises – each paragraph needs to be considered separately in context | No equivalent | 47-49; 178-180 | New |
| Extended definition under paragraph (f) of the definition | No equivalent (Serviced apartment complexes discussed at 118-121) | 49; 178-186 | New<br>The discussion of serviced apartments and the example from GSTR 2000/20 has been removed. |
| Hotel, motel, inn, hostel or boarding house – ordinary meanings | 75-76 | 49; 173 | Additional references to *Shorter Oxford* and *OED*. |
| Hotel, motel, inn, hostel or boarding house – statutory context | No equivalent | 49; 174-177 | New |

| | | | |
|---|---|---|---|
| Characteristics of operating hotels, motels, inns, hostels, boarding houses and residential premises similar to these | 78-109 | 49-54; 181-218 | The characteristics are discussed as being the common features of premises defined by paragraphs (a) and (f) of the definition. Additional objective factors are also identified in paragraphs 51 and 183 of this draft Ruling.<br>It is noted that, to be covered by paragraphs (a) or (f) premises must offer accommodation to 'guests'.<br>Reference to *South Steyne* has been added to the discussion of multiple occupancy.<br>It is noted that 'holding out to the public' can include a particular segment of the public or a niche market. |
| Applying the characteristics to hostels and boarding houses | No equivalent | 219-223 | New. Discusses the general application of the characteristics to hostels and boarding houses |
| Characterising premises that are not operating | No equivalent | 81-90; 224-227 | New. Discusses additional factors that can be considered when classifying premises that are not operating at the time it is supplied. |
| Separately titled rooms, apartments, cottages or villas | No equivalent | 91-103; 228-236 | New. Incorporates discussion of 'adjacent' premises – paragraph 124 of GSTR 2000/20. |
| Premises used to provide accommodation in connection with a school – paragraph (b) of the definition | 65-67 | 237-239 | Minor changes only |
| A ship that is mainly let out on hire in the ordinary course of a business of letting ships out on hire – paragraph (c) of the definition | 68-69 | 240 | Largely equivalent |

| | | | |
|---|---|---|---|
| A ship that is mainly used for entertainment or transport in the ordinary course of a business of providing ships for entertainment or transport – paragraph (d) of the definition | 70 | 241 | Largely equivalent |
| A marina at which one or more of the berths are occupied, or are to be occupied, by ships used as residences | No equivalent | 104; 242-246 | New |
| A caravan park or camping ground – paragraph (e) of the definition | 71; 129-133 | 247-249 | Addition of dictionary definitions.<br>It is noted that accommodation in a caravan park or camping ground is held out to the public and operated on a commercial basis.<br>The reference to 'home parks' appearing at paragraph 132 of GSTR 2000/20 has not been replicated. The ATO proposes to undertake further consultation on this issue. |
| Premises to the extent that they are used to provide accommodation to students in connection with an education institution that is not a school – expressly excluded from the definition | 74 | 250-252 | Additional explanation |

| | | | |
|---|---|---|---|
| A supply of accommodation in commercial residential premises provided to an individual by the entity that owns or controls the commercial residential premises | No equivalent | 115-118; 253-256 | New |
| Supplies made by an agent or principal | 56-61 | 257-261; 266-269 | The paragraph on the features of agency agreements based on Queensland State law has been removed.<br>The diagram and GST consequences have been clarified. |
| Strata titled premises operated as commercial residential premises | 51-55 | 270-271 | The diagram and GST consequences have been clarified. |
| Bed and breakfast and similar accommodation | 122-128 | 55-61; 272 | Clarification of the explanation and alternative examples. Discussion on 'adjacent' premises (paragraph 124 of GSTR 2000/20) has been moved. |
| Display homes | No equivalent | 273-274 | New |

| | | | |
|---|---|---|---|
| Employee and contractor accommodation | 37-39 | 64-76; 275-276 | Employee and contractor accommodation in premises that provide shelter and basic living facilities, and are designed and built primarily to provide living accommodation, are residential premises. However, they may be commercial residential premises depending on the extent and manner in which the characteristics and factors of such premises are exhibited.<br>New examples have been added.<br>Extended to cover accommodation provided to contractors. |
| Holiday houses, apartments and units | 116-117 | 77-80; 277 | Clarification of the explanation and alternative example. |
| Retirement village accommodation | No equivalent | 278-280 | New |
| Rooming houses | No equivalent | 281-282 | New |
| Transportable buildings and houses removed from land / Demountable housing | 44-47 | 283-285 | Clarification of the explanation.<br>The footnote in GSTR 2000/20 suggesting that it is possible for a building that is not affixed to land, such as a demountable, to fall within the definition of residential premises, has been removed. It has been made clear that a supply of a transportable building, by itself (which is not affixed to land) is a taxable supply (subject to subsection 9-30(4)). |
| Vehicles designed for road use | 48-50 | 286-287 | Minor changes only |
| **Division 87 – long-term accommodation in commercial residential premises** | | | |
| Long-term accommodation in commercial residential premises | 134-136 | 288-290 | Changed to reflect *Meridien Marinas*. |

| | | | |
|---|---|---|---|
| Meaning of commercial accommodation | 137-138 | 105-106; 291-299 | Changed to reflect *Meridien Marinas* on the meaning of commercial accommodation. |
| Meaning of provided to an individual as long-term accommodation | 139-145 | 107-108; 300-308 | Changed to reflect *Meridien Marinas*. The commercial accommodation is not required to be provided to an individual for 28 days or more. The commercial accommodation needs to be permitted to be taken up by an individual for a continuous period of 28 days or more. |
| Long-term accommodation in caravan parks and camping grounds | 146-149 | 113-114; 309-313 | Largely equivalent |
| Meaning of predominantly for long-term accommodation | 150-154 | 109-110; 314-317 | Changed to reflect *Meridien Marinas*.<br>Subsection 87-20(3) is satisfied where at least 70% of the accommodation supplied in the commercial residential premises is permitted to be provided to individuals for a continuous period of 28 days for more. |
| Option to input tax supplies of long-term accommodation | 155-157 | 111-112; 318-322 | Changed to discuss paragraph 40-35(1A)(a). |

# Appendix 3 – Your comments

324. You are invited to comment on this draft Ruling including the proposed date of effect. Please forward your comments to the contact officer by the due date.

325. A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- be published on the ATO website at www.ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

| | |
|---|---|
| **Due date:** | **6 April 2012** |
| **Contact officer:** | **Steve Iselin** |
| **Email address:** | **Steven.Iselin@ato.gov.au** |
| **Telephone:** | **(07) 3213 8417** |
| **Facsimile:** | **(07) 3213 8307** |
| **Address:** | **PO Box 9977**<br>**Chermside QLD 4032** |

# Appendix 4 – Detailed contents list

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