

WHEREVER YOU HANG YOUR HAT MAY BE HOME, BUT IS IT ‘RESIDENTIAL PREMISES’ FOR GST PURPOSES?

ROBIN WOELLNER*

I. INTRODUCTION

The concept of ‘residential premises’ is important in relation to Goods and Services Tax (‘GST’) liability¹ because it plays a key role in determining whether property usage and transfers — the latter being a particularly significant element of modern capitalist economies — will be GST-free, input taxed or fully taxable.

Recent cases have raised a number of interesting issues in relation to ‘residential premises’ under the GST legislation. Some of these issues have been resolved satisfactorily by court decisions, others have been ‘resolved’ in rather puzzling ways, while some remain unresolved.

It is useful to begin the discussion of GST treatment of residential premises with an overview of the relevant provisions.²

Underpinning the GST treatment of residential premises is the principle that persons selling or leasing real property should be treated in a comparable way to owner-occupiers.³

To achieve this outcome, where other requirements are satisfied:⁴

- in general, supplies of residential premises by lease, hiring, licence or sale are input taxed under Subdivisions 40-B and 40-C⁵ (which are generally in similar terms); that is, the supply of the items is not taxed, but the supplier cannot claim input tax credits incurred in the supply;⁶
- however, the supply of residential premises is only input taxed to the extent that the premises are to be used predominantly for residential accommodation⁷ — regardless of the length of occupation;

* Robin Woellner is Adjunct Professor in the Faculty of Law at James Cook University. Until his retirement at the end of 2010, Robin was Pro-Vice-Chancellor (Law, Business and the Creative Arts) at JCU.

1 Hill J provided an overview of the operation of the basic GST provisions in *HP Mercantile Pty Ltd v Federal Commissioner of Taxation* [2005] FCAFC 126; 2005 ATC 4571, 4573–4; 46 ATR 228; see also *Neutral Bay Pty Ltd v Deputy Commissioner of Taxation* 2008 ATC 20-006, 8066; Woellner et al, *Australian Taxation Law* (20th ed, 2010) 1766–7 and ff; cf Australian Tax Office (‘ATO’), *GST Ruling GSTR 2008/2* (7 May 2008) [27]-[34] (‘*GSTR 2008/2*’).

2 See ATO, *GST Ruling GSTR 2003/3* (5 March 2003) [9]-[26] (*GSTR 2003/3*).

3 *GSTR 2008/2* deals with the GST treatment of long-term leases with government agencies.

4 For example, there must be consideration; activities in the course or furtherance of an enterprise; and an appropriate link to Australia: see Woellner et al, above n 1, 1769–77.

5 All references to provisions of legislation in this article are to *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (‘the GST Act’).

6 *GSTR 2003/3*, [9].

7 *Ibid.* The example given is where there is a property consisting of a single title with a retail shop below and a separate residential flat above. See also ATO, *GST Ruling GSTR 2000/20* (21 June 2000) [22] (‘*GSTR 2000/20*’). This will be a mixed supply and the consideration will need to be apportioned: ATO, *GST Ruling GSTR 2001/8* (19 December 2001), cited in *GSTR 2003/3*, [9].

- the supply of new residential premises⁸ or commercial residential premises is an exception to the above rules and is not input taxed, but is subject to full GST taxation.⁹

The interplay of these factors creates an interesting but complex picture — particularly as the Courts have consistently indicated that the GST is a practical, business tax; that it is to be interpreted in a way that gives it a real-world effect;¹⁰ and that Division 165 gives the Commissioner wide powers to attack over-zealous tax planning arrangements.¹¹

The effect of these GST provisions can be represented diagrammatically by a flowchart, as shown in Figure 1.

The impact of the provisions affecting residential property was outlined by Perram J in *Sunchen Pty Ltd v Federal Commissioner of Taxation*,¹² who referred to the GST Act's 'confusing terminology' before noting that it relieves certain supplies from the GST in two ways.

Firstly, certain supplies are made 'GST-free', and no GST is collected by the revenue. While the suppliers are not obliged to collect GST from the consumer, they are still entitled to claim input tax credits on supplies leading to that supply. As Perram J noted:

The practical consequence of the tax not being collected from the consumer and the supplier being entitled to claim an input tax credit is that none of the inputs into the ultimate supply are taxed — GST is not collected from the ultimate consumer and each intermediate supplier obtains input tax credits which neutralise their own liability to GST.

Secondly, certain supplies are 'input taxed'. In these cases, the supply is not subject to GST, but the supplier cannot claim an input tax credit for supplies made to it which were inputs into the supply to the consumer:

The practical effect of this is to cast the ultimate economic burden of the tax not on the end user but on the immediately preceding supplier.

The practical effect of denying an input tax credit to the supplier [such as the owner of land who sells it, or a landlord who grants a residential lease to a tenant] on supplies which are inputs into the premises is to render those supplies subject to GST in the hands of the supplier. Put another way, the inputs into the supply of the premises are taxed which gives rise, no doubt, to the otherwise rather obscure expression 'input taxed'.¹³

II. SUPPLY BY LEASE, HIRE OR LICENCE (SUBDIVISION 40-B)

As illustrated in Figure 1 below, under Subdivision 40-B (s 40-35), the supply of premises¹⁴ by a way of lease, hire or licence (including a renewal or extension) is input taxed if the supply is of 'residential premises' other than commercial residential premises (or a supply of accommodation in commercial residential premises provided to an individual by the entity owning or controlling those premises).¹⁵

⁸ Except where the residential premises have been used for residential accommodation before 2 December 1998 (unless new residential premises have been created through substantial renovations or replacement of demolished premises) or residential premises are sold after five or more years of being rented continuously: *GSTR 2003/3*, [13], [14].

⁹ *Ibid* [9], [10].

¹⁰ See *Saga Holidays Ltd v Federal Commissioner of Taxation* (2006) 156 FCR 256; [2006] FCAFC 191; 2006 ATC 4841; 64 ATR 602 and *AGR Joint Venture v Federal Commission of Taxation* [2007] AATA 1870; 2007 ATC 2692; 70 ATR 466.

¹¹ See, eg, ATO, *GST Ruling GSTR 2004/3* (7 April 2004) [43]–[56]; ATO, *GST Ruling GSTR 2005/5* (15 September 2005) ('*GSTR 2005/5*').

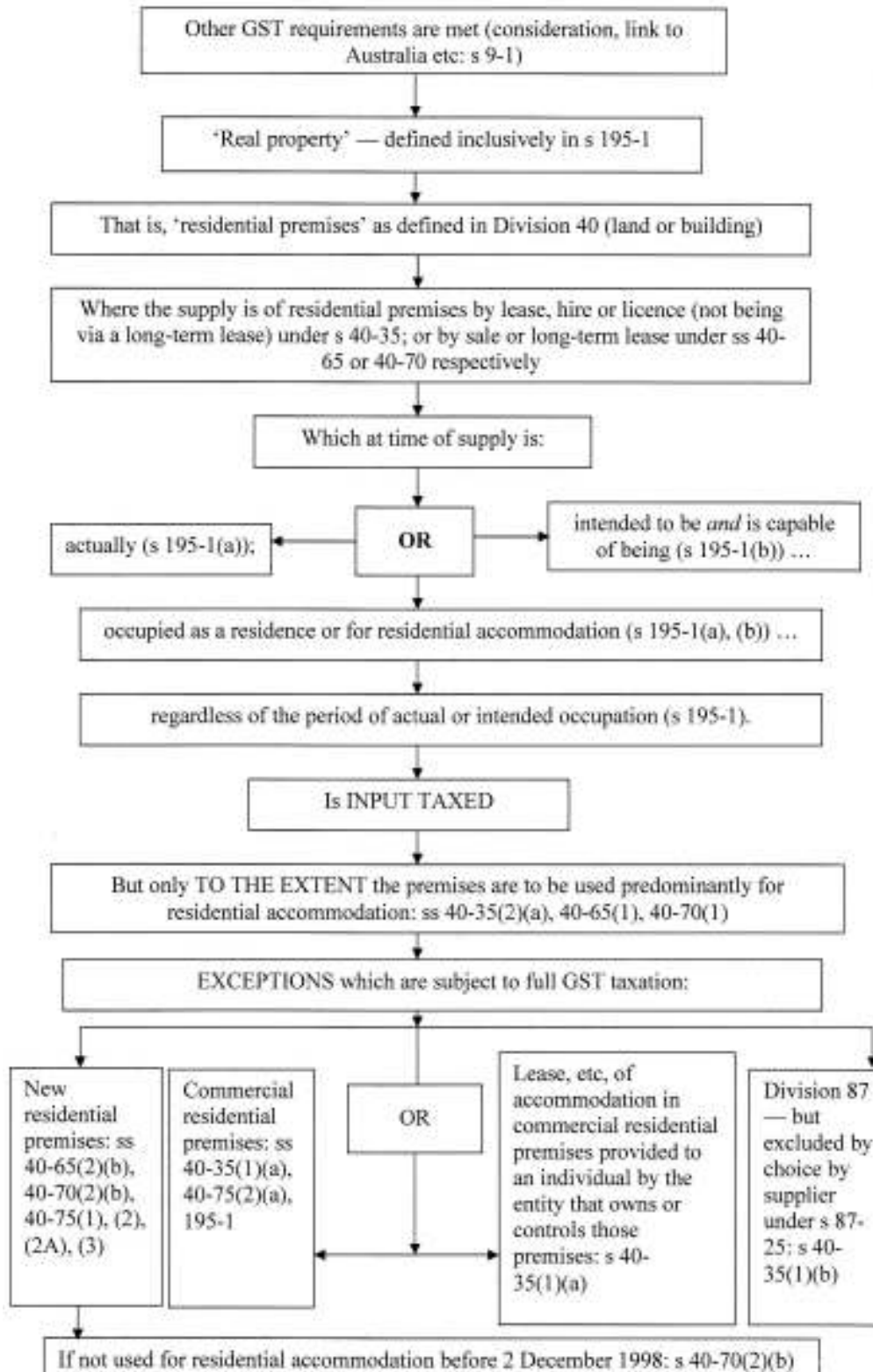
¹² 2010 ATC 20-161 ('*Sunchen*').

¹³ *Ibid* 10,626–67.

¹⁴ Section 40-35 (1A) makes similar provision for input taxation of supply of a berth at a marina.

¹⁵ Section 40-35(1)(b) provides that a supply will also be input taxed if the supply is of commercial accommodation to which Div 87 (long-term accommodation in commercial premises) would apply but for a choice made by the supplier under s 87-25(1) not to apply the Division.

Figure 1: GST Treatment of 'Residential Premises'



However, under s 40-35(2) (a) and (b), the supply is input taxed only to the extent that the premises are to be used ‘predominantly for residential accommodation (regardless of the term of occupation); and the supply is not of a long-term lease.’¹⁶

‘Residential premises’ are defined in turn under s 195-1 to mean land or a building that at the time of the relevant supply is either *actually* occupied or *intended to be* occupied (and capable of being occupied) as a residence or for residential accommodation.¹⁷ The duration of the actual/intended occupation is irrelevant.¹⁸

The application of these provisions arose in *South Steyne Hotel Pty Ltd v Federal Commissioner of Taxation*,¹⁹ which was run under the ATO test case funding program.

A. *South Steyne*

The facts in *South Steyne* were relatively complex, but can be summarised simplistically as involving four transactions related to the transfer of ownership of the Sebel Hotel:

1. the sale by South Steyne Ltd of the ‘management lot’ (the ‘common areas’ of the hotel, such as the reception area) to Mirvac Holdings Ltd (‘MHL’), and a formal agreement between South Steyne and MHL that MHL would manage the 83 units in the Sebel Hotel and the common areas as a ‘serviced apartment business’;
2. the lease of the 83 apartments in the Sebel Hotel to Mirvac Management Ltd (‘MML’);
3. the sale of three of the apartments in the Sebel Hotel to MBI Properties Pty Ltd (‘MBI’) subject to the leases to MML; and
4. the supply of overnight accommodation in the Sebel Hotel by MHL to Ms Young as a member of the public.²⁰

Only transactions 1 and 4 are directly relevant for present purposes, though it is important to outline all of the transactions in order to fully appreciate the arrangements in question. The arrangements could be represented diagrammatically shown below.

The taxpayers sought directions on the issues raised by the four transactions above. On the facts, the Full Federal Court (Finn J, Emmett J; Edmonds J dissenting on some issues) held as follows.

1. *Transaction 1: Leases of Apartments by South Steyne to MML*

The Commissioner argued that these supplies were input taxed as they were ‘residential premises’ (but not ‘commercial residential premises’). The taxpayer argued that the supply was not input taxed, because it was a supply of commercial residential premises.

The Court referred to the provisions of Subdivision 40-B and held on the facts that the lease of the 83 apartments in the Sebel Hotel by South Steyne Ltd to MML was an input taxed supply²¹ because, in terms of ss 40-35(1)(a), (b), the units were occupied for residential

16 Under s 195-1, a ‘long-term lease’ means a supply by way of lease, hire or licence (including a renewal or extension) for at least 50 years where, at the time of supply, it was reasonable to expect that it would continue for at least 50 years; and, unless the supplier is an Australian government agency, the terms are substantially the same as those under which the supplier held the premises.

17 While the composite term ‘residential premises’ is defined in s 195-1, the term ‘premises’ is not separately defined. However, Arthur Delbridge et al (eds), *Macquarie Dictionary* (5th ed, 2009) defines ‘premise’ (so far as relevant) as ‘a. the property forming the subject of a conveyance. b. a tract of land. c. a house or building with the grounds etc belonging to it.’ The definition may therefore be somewhat tautologous.

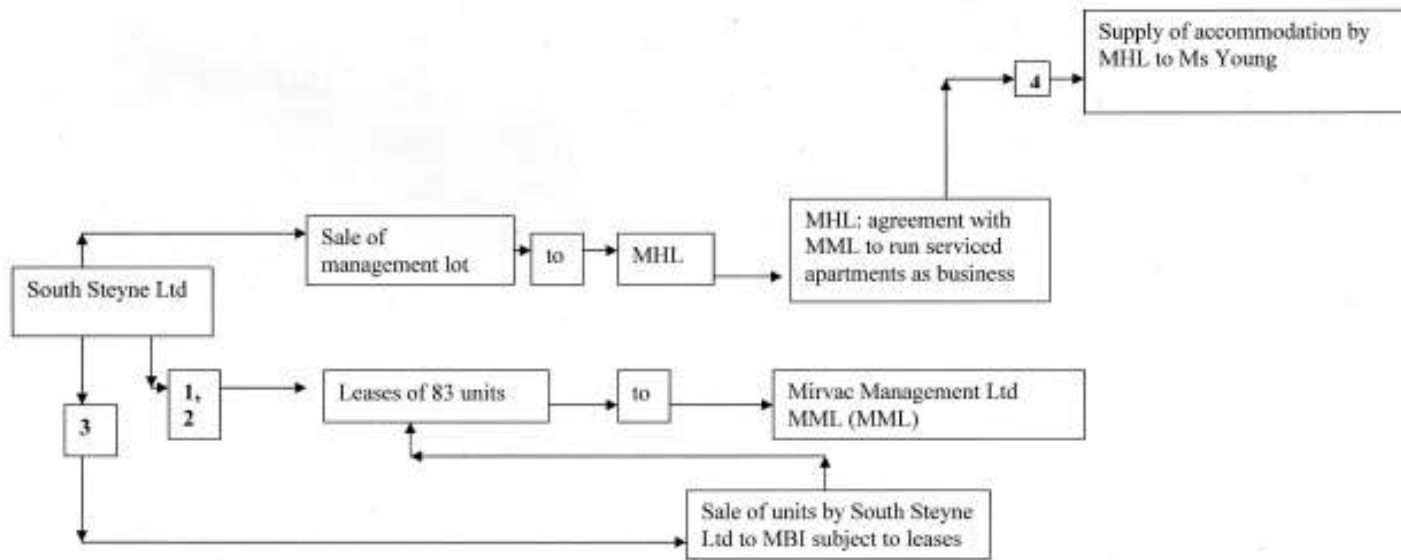
18 Section 195-1. In the ATO’s view, this means that the premises in question do not need to be a ‘home’ or permanent place of abode: *GSTR 2000/20*, [20]–[22].

19 [2009] FCAFC 155; 2009 ATC 20-145; 74 ATR 41 (‘*South Steyne*’).

20 Ms Young was also an employee of the taxpayer and it seems likely that the hiring of the room was set up to create a test situation on the taxation treatment of such arrangements.

21 *Gloxinia Investments Ltd as Trustee for Gloxinia Unit Trust v Federal Commissioner of Taxation* [2010] FCAFC 46; 2009 ATC 9,681.

Figure 2. Summary of Transactions in *South Steyne* 2009 ATC 20-145



accommodation purposes and were not commercial residential premises. The line of reasoning by which the Court reached these conclusions was as follows.

Firstly, the apartments were ‘residential premises’ within the meaning of s 195-1 because they were a land or building that was ‘occupied for residential accommodation’.²² In reaching this conclusion, the Court noted that the legislation now expressly states that the term of occupation or intended occupation is to be disregarded in determining the status of the premises.²³

Secondly, the Full Court held unanimously that the apartments were not ‘commercial residential premises’.²⁴

For these purposes, ‘commercial residential premises’ is defined — so far as relevant — as including ‘(a) a hotel, motel, inn, hostel or boarding house’, or ‘(f) anything similar to residential premises described in paragraphs (a) to (e)’.²⁵ The question of whether or not the hotel rooms were ‘similar’ to a hotel, motel or the like was therefore central to this aspect of the case.

The terms ‘hotel, motel, inn, hostel or boarding house’ are not defined in the GST Act, and they accordingly bear their ordinary meaning. The ATO takes the view that the meaning of these terms is ‘largely synonymous’.²⁶

In determining whether premises are ‘similar to’ a hotel, motel or the like in s 195-1, the ATO focuses on what it sees as the ‘main characteristics’ of such premises; namely, whether:

- there is an intention to operate the premises commercially;
- there is multiple occupancy;
- the rooms are held out to the public as being available for public use;
- accommodation is the main purpose of the land or building;
- the premises are managed centrally;
- the management of the premises offers the accommodation in its own right;
- the services offered include accommodation; and
- the status of hirers is consistent with that of a hotel guest.²⁷

On the facts, the Court rejected the taxpayer’s argument that, because the 83 units were held subject to the requirement to operate them as a (single) serviced apartment business, the rooms were ‘similar to’ a hotel or motel. The Court instead took the view that each apartment had to be considered separately, and that a hotel or the like consists of more than the rooms and also necessarily includes the ‘common areas’ such as reception areas, dining areas, car parks and so on. In this case, therefore, the ‘supply’ only of a room providing individual accommodation space in a hotel complex, without the supply of the ‘common’ areas (the management lot), was not the supply of commercial residential premises.

As Emmett J observed:

An individual apartment is not similar to a hotel or motel. It does not resemble or have a likeness to a hotel and motel. ...

Paragraph (f) of the definition of commercial residential premises, in conjunction with paragraph (a), may cover a serviced apartment complex or other establishment that provides accommodation on a multi-occupancy basis to guests. However, the individual apartments supplied by South Steyne to Management are very different from a hotel or

²² Whether or not the premises were occupied ‘as a residence’ within the meaning of the definition of ‘residential premises’ in s 195-1. The factors which the ATO takes into account in determining the status of relevant premises are set out in *GSTR 2002/20*, [26]–[36].

The premises were not ‘new’ ‘residential premises’: see ATO, *GST Advice GSTA TPP 068* (30 November 2005); ATO, *GST Advice GSTA TPP 069* (30 November 2005).

²³ *South Steyne 2009 ATC 20-145*, 10,336 (Emmett J).

²⁴ See *GSTR 2000/20*, [11].

²⁵ The definition excludes premises to the extent that they are used to provide accommodation to students in connection with an educational institution that is not a school — this was not relevant to the facts in *South Steyne 2009 ATC 20-145*.

²⁶ *GSTR 2002/20*, [75]–[76].

²⁷ *GSTR 2002/20*, [83]–[133].

motel. The term hotel or motel would not be used, as a matter [sic] of ordinary English, where a single apartment, room or other space is supplied ...²⁸

It might be appropriate to describe an individual apartment as being similar to a part of a hotel, namely a hotel room. [But it] is not an ordinary use of English to describe a single individual apartment as being similar to a hotel or motel.²⁹

2. *Transactions 2 and 3: The Sale of Apartments to MBI and Purchase of Apartments by MBI Subject to the Leases to MML*

The majority of the Federal Court held that the sale of three apartments to MBI (subject to the leases to MML) was GST-free because it was the supply of a ‘going concern’ under s 38-325.³⁰

Though this aspect of the case raised interesting questions of statutory interpretation in relation to going concerns and the real estate margin scheme, these can be left for another time, as they does not relate centrally to the interpretation of ‘residential premises’ under Division 40.

In relation to the purchase of the three apartments by MBI, the Court held that the purchase of the reversionary interest in the three apartments (subject to the leases to MML) was not a new ‘supply’ by MBI to MML merely because it involved the continuation of the leases after the sale of the reversion.³¹

Instead, the situation fell within Division 156,³² so that the Division 156 attribution rules applied to the supply by South Steyne Ltd.³³

This conclusion seems correct, but it is not relevant to the current topic and therefore is not discussed further.

3 *Transaction 4: The Supply by MHL of Accommodation to Ms Young*

The supply by MHL of accommodation in the Sebel Hotel to Ms Young for two overnight stays raised interesting issues.³⁴ As noted above, so far as relevant here, under s 40-35(1) (a), a supply of accommodation in residential premises by hire, lease or licence is input taxed unless it is a supply of commercial residential premises or of accommodation in commercial residential premises provided to an individual by the entity that owns or controls the commercial residential premises — in which case, it is fully taxable.

On the facts in *South Steyne*, the Court held that the accommodation was provided to an individual (Ms Young)³⁵ and was clearly in ‘commercial residential premises’ (the Sebel Hotel).

Accordingly, the issue turned on whether the accommodation was provided by MHL as principal (in which case it would be fully taxable) or as the agent of MML (in which case it would be input taxed).³⁶

28 Section 40-35(2)(a) (footnote not in original).

29 *South Steyne* 2009 ATC 20-145, 10,337 (Emmett J), 10,333 (Finn J agreeing); Edmonds J agreed at 10,345 but noted:

I hesitate to go as far as her Honour [the trial judge] and conclude that the apartments are ‘residential premises’, ‘even without regard to the inclusion of “residential accommodation”’. In my view, whether accommodation is ‘settled’ or ‘established’ involves elements which go beyond mere duration of occupation. Nevertheless, I totally agree with her Honour that the inclusion of ‘residential accommodation’ puts the matter beyond doubt ... (citations omitted)

30 See, eg, ATO, *GST Ruling GSTR 2005/4* (14 September 2005); *GSTR 2005/5*, [150]. Edmonds J dissented on this point.

31 Cf ATO, *ATO Interpretative Decision ATO ID 2008/37* (8 February 2008).

32 *South Steyne* 2009 ATC 20-145, 10,337 (Emmett J).

33 *Ibid* 10,337–8 (Emmett J), 10,333 (Finn J agreeing), 10,342–3 (Edmonds J agreeing).

34 Ms Young was also an employee of a company involved in the arrangements — these stays were presumably arranged in order to test the application of GST to such arrangements.

35 *GSTR 2000/20*, [139] ff.

36 The ‘exceptions’ in s 40-35(2)(a), (b), discussed above, were not relevant on the facts.

The majority held that, although MML was the lessee of the apartment that Ms Young stayed in, it was MHL which had control of the premises for the purposes of s 40-35 and MHL had provided the accommodation in its capacity as the principal — not as agent for MML.

In the majority's view, although the relationship of MML and MHL under the Serviced Apartment Agreement was 'unquestionably' that of principal and agent, the agreement gave MHL exclusive control of the serviced apartment business because:

- under the agreement, MML appointed MHL to manage and operate the serviced apartment business and to enter into contracts in its own name;
- MHL owned the management lot, which was an integral part of the operation of the serviced apartment business;
- MHL controlled the conduct of the restaurant, room service and service of alcohol throughout the complex; and
- MHL's name was on the tax invoice for the accommodation given to Ms Young.³⁷

In the majority's view, therefore, the 'exception' in s 40-35(1)(a) — above — was satisfied and the supply was fully taxable.³⁸

In dissenting on this point, Edmonds J focussed on the terms of the serviced apartments agreement of 30 November 2007 — including the requirement that all cash from the apartments was to be banked to the credit of MML's operating account — to conclude that the 'relationship so established is truly one of principal and agent'.³⁹ In Edmonds J's view, the supply of accommodation to Ms Young should therefore have been input taxed.⁴⁰

On balance, while either view is arguable, it is submitted that the view of the majority is to be preferred.

III. AN INTERESTING ISSUE ARISING OUT OF THE WORDING OF SUBDIVISION 40-C AND SECTION 195-1: CAN VACANT LAND BE 'RESIDENTIAL PREMISES' FOR GST PURPOSES?

An issue which arises from the case-law is whether vacant land without a building or other improvements can be 'residential premises' for GST purposes?

In *Vidler v Federal Commissioner of Taxation*,⁴¹ the taxpayer had sold two blocks of vacant land. The first block, in Gledson Street, was bought by the taxpayer in August 2004 for \$1 million and sold in December 2004 for \$2.35 million. The Gledson block was zoned residential low density, and was connected to the electricity supply — but not to the gas, water or sewerage, though connections to these services were available at the boundaries of the land.

The second block, in Gladstone Road, zoned mixed residential, was bought for \$175 000 in May 2004 and sold in April 2005 for \$285 000. This property had access available to electricity, water and sewerage, though these services were not actually connected.

The taxpayer argued that the blocks were input taxed under Subdivision 40-C as sales of residential premises, so that there was no GST imposed on the supply. However, the Commissioner disagreed and treated the sales as fully assessable.

In relation to the sale of residential premises, the provisions under Subdivision 40-C are similar to those applying to a lease, hire or licence, with some variations. Thus, a sale of the property is input taxed to the extent that it is 'residential premises to be used predominantly for residential accommodation, regardless of the term of occupation': s 40-65(1).

³⁷ *South Steyne* 2009 ATC 20-145, 10,333 (Finn J), 10,338-9 (Emmett J).

³⁸ *Ibid* 10,339.

³⁹ *Ibid* 20,352 (Edmonds J dissenting); see also 10,353 (Edmonds J disagreeing on the interpretation of cl 4(1)(b) of the agreement under which MML was required to allow Mirvac Hotels to have the benefit of any right of MML under the apartment leases to allow Mirvac Hotels to carry out the relevant duties and responsibilities).

⁴⁰ *Ibid* 10,353.

⁴¹ 2009 ATC 20-149 (at first instance); 2010 ATC 20-186 (Full Federal Court).

However, under s 40-65(2), the sale is not input taxed to the extent that the residential premises are commercial residential premises, or 'new residential premises' other than those used for residential accommodation (regardless of the term of occupation) before 2 December 1998.⁴²

'New residential premises' are defined in s 40-75(1)(a)–(c) as those which:

- (a) have not previously been sold as residential premises (other than commercial residential premises) and have not previously been the subject of a long-term lease; or
- (b) have been created through substantial renovations of a building; or
- (c) have been built, or contain a building that has been built, to replace demolished premises on the same land.⁴³

Applying the definition of 'residential premises' in s 195-1, Stone J at first instance in *Vidler* held that:

- (i) the test in s 195-1(a) was not satisfied, because neither of the vacant blocks was actually 'occupied' as residential premises at the relevant time — this was conceded by the taxpayer; and
- (ii) the issue therefore was whether either block was 'premises'⁴⁴ which were 'intended ... and capable of being occupied as a residence or for residential accommodation' (s 195-1(b)).⁴⁵

Stone J observed that the difference between the tests in sub-paras (a) and (b) of the definition

does not relate to capacity but only to whether the land (having that capacity) is actually being used (occupied) for the nominated purpose. The fact of actual use in sub-para (a) obviates any need to refer to capacity. The reference in sub-para (b) to being 'intended to be occupied' is an additional requirement and does not detract from the necessity for the land to be capable of being occupied.⁴⁶

Stone J was of the view that the definition refers to actual or intended physical occupation,⁴⁷ and that in order to be 'capable' of being 'residential' premises property must provide — *at the time of characterisation*⁴⁸ — some 'element of shelter and basic living facilities such as are provided by a bedroom and bathroom'.⁴⁹ Stone J stressed that her references to facilities such as a bedroom and bathroom were examples only, and it 'may be' that shelter and basic living facilities could exist without either of these;⁵⁰ although, her Honour did not provide any examples of other elements which might satisfy this requirement.

42 Section 40-70 makes similar provision for supplies of residential premises by way of long-term lease.

43 However, premises are not 'new residential premises' if, for the period of at least five years since the times specified in s 40-75(2)(a)–(c), they have only been used for making supplies which are input taxed as a supply of residential premises under s 40-35(1)(a): see above.

44 Though the term 'premises' is not defined in the GST Act: see above n 14.

45 The definition goes on to state that this applies: '(regardless of the term of the occupation or intended occupation) and includes a floating home'.

46 *Vidler* 2009 ATC 20-149, 10,460.

47 *Ibid* 10,459–50.

48 Stone J held that the key date for characterisation was when the taxpayer acquired the respective blocks, because s 195-1(b) is 'focussed on the capacity for land to be used at the relevant time, not on the potential for land to be developed to have that capacity' — for example, the potential for the land to be developed at some future date into residential premises through the erection of a building providing shelter or other facilities (*ibid*, 10,459-60).. The Full Federal Court endorsed this approach: 2010 ATC 20-186, [32]

49 *Ibid* 10,459. Her Honour commented that her formulation of this requirement had been approved by the Full Federal Court in *South Steyne* 2009 ATC 20-145, 10,337, 10,460 (the Full Federal Court on appeal in *Vidler* agreed: [2010] FCEFC 59; 2010 ATC 20-186 (Sundberg, Bennett and Nicholls JJ), [26]–[27].

50 *Vidler* 2009 ATC 20-149, 10,459; see above n 37.

On appeal, the Full Federal Court agreed with Stone J's decision but was more definite, commenting that:

... 'residence' connotes a dwelling ... namely a dwelling, abode or house in which a person may reside [and] the expression 'residential accommodation', added by the post-Marana amendments ... connotes 'lodging, sleeping or overnight accommodation'⁵¹

... the word 'occupied' in the phrase 'capable of being occupied' connotes living within or inhabiting a structure...⁵²

Stone J had also rejected the taxpayer's arguments that:

- 'occupied' in this context referred to the legal right to possession or occupation, so that (the taxpayer argued) vacant land could be 'residential premises' for GST purposes provided it was able to be connected to water and sewerage facilities, and
- the wording of the Explanatory Memorandum to the GST amending Act indicated that residential zoning was sufficient in itself to establish the land as 'residential accommodation' for GST purposes.⁵³

Stone J held that while residential zoning may be *necessary* for premises to be residential accommodation under the GST Act, residential zoning is not *sufficient* on its own to establish that status.

The Full Federal Court on appeal agreed with Stone J's analysis⁵⁴, commenting in relation to water and sewerage facilities that even if the land were actually connected to these services:

... it would be absurd if the mere existence of a tap in the middle of an acre of vacant land transforms the land into 'residential premises' for the purposes of the GST Act.⁵⁵

The Full Court accordingly seemed to be of the view that vacant land on which there was no habitable 'structure' could not be 'residential premises' for GST purposes.

IV. THE ATO VIEW: VACANT LAND CAN NEVER BE 'RESIDENTIAL PREMISES'

The ATO argued in *Vidler* that vacant land can never be 'residential premises' because it cannot provide essential 'residential' elements such as accommodation and sleeping quarters.

However, 'residential premises' is defined in s 195-1 to mean 'land or a building' that satisfies certain requirements. This might be seen as contemplating that, in appropriate circumstances, either land alone 'or' a building may each *in themselves* constitute residential premises for GST purposes. Certainly, it would have been easy enough for the definition to refer only to a 'building' (excluding the reference to 'land' altogether) or to refer expressly to 'land on which there is a building standing', and thus remove all doubt.

Not surprisingly, therefore, on appeal in *Vidler*, the taxpayer argued that the statutory definition (and the Explanatory Memorandum to the amending legislation) indicated that vacant land could satisfy the definition of 'residential premises' where — as in *Vidler* — it was or could be connected to water, power and/or sewerage facilities

In *Vidler*, Stone J *had* held⁵⁶ that even if the taxpayer was correct in arguing that the word 'land' should not be limited to land on which there is a building, 'it is still necessary ... for the land to meet the requirements of the definition, in this case, the criteria in sub-para (b)' [of being capable of being occupied as a residence or for residential accommodation].⁵⁷ Since the

51 'Each of the English cases this [post-*Marana*] amendment was designed to pick up involved premises in which lodging, sleeping or overnight accommodation took place — a study bedroom at a residential college, a building to accommodate students for short term courses and "living accommodation": 2010 ATC 20-186, paras 28,30.

52 2010 ATC 20-186, [28] (Full Federal Court – Sundberg Bennett, Nichols JJ).

53 *Vidler* 2009 ATC 20-149, 10,459.

54 *Ibid*, paras 30-31.

55 *Ibid*, [37]

56 2009 ATC 20-149, 10,458.

57 *Ibid* 10,458–59.

land did not provide any relevant facilities, in her Honour’s view it did not satisfy the sub-para 195-1 (b) requirement.

On appeal, the Full Federal Court dismissed the taxpayer’s argument summarily, commenting that:

... The definition is not concerned with ‘land’ in the abstract, but with ‘land that is capable of being occupied as a residence or for residential accommodation’. Thus the meaning of ‘land’, which in the abstract or in other contexts will include vacant land, may be modified by its context. For the reasons already given, vacant land is not land that is capable of being occupied as a residence or for residential accommodation⁵⁸... and

... It is ... quite artificial to speak of someone ‘occupying’ vacant land ‘as a residence or for residential accommodation.’⁵⁹

While the Full Court’s approach suggested that it would favour a view that vacant land is inherently not capable of being ‘occupied as a residence or for residential accommodation’,⁶⁰ its decision was (as always) limited by the facts it was considering. Thus, while situations where vacant land might be characterised realistically as ‘residential premises’ may not come easily to mind,⁶¹ the Courts in *Vidler* did not appear to consider a situation where a person had installed a caravan onto a block and used it at the relevant time as a home, erected a tent and lived in it, or slept there regularly in a sleeping bag?⁶²

It is significant that, while Stone J at first instance in *Vidler* expressed the view that she found it difficult to conceive of situations where vacant land could constitute ‘residential premises’, her Honour declined to rule that vacant land could *never* be residential premises.⁶³

It is respectfully submitted that, in light of the definition in s 195-1, Stone J’s approach of leaving the issue open is the preferable one.

V. WHEN CAN IT BE SAID THAT PROPERTY IS ‘TO BE USED’ PREDOMINANTLY FOR ‘RESIDENTIAL OCCUPATION’ UNDER SECTIONS 40-65(1) AND 40-70(1)?

In *Sunchen*,⁶⁴ the taxpayer was a property developer who had purchased a single-level property in September 2006 for \$525 000. At the time of purchase, the property had development approval for the construction of a five-storey block of units. However, by the time of the Administrative Appeals Tribunal (‘AAT’) hearing some two years after its acquisition, the taxpayer had not taken any steps to develop it. The property was leased to residential tenants and the taxpayer had not obtained a construction certificate, entered into a building contract, or sought development finance.

The taxpayer claimed input tax credits of \$47,727, arguing that at the time of purchase, it had the intention of developing the property for sale in the future and that this intention should be the sole criterion in determining the eligibility for input tax credits. It argued that the court should exclude any consideration of actions (or inaction) after the acquisition of the property.

58 2010 ATC 20-186, [34], [31] — the Full Court also held that the taxpayer had misinterpreted the Explanatory Memorandum: *ibid*, [35]-[37]. In NSD 1480/2009, the ATO expressed the view that the Full Court decision in *Vidler* “confirms the Commissioner’s view, as expressed in GST Ruling 2000/20 [para 25] ... that vacant land of itself can never have sufficient physical characteristics to mark it out as being able to be, or intended to be, occupied as a residence or for residential accommodation”. Compare GST Ruling

59 2010 ATC 20-186, [31].

60 2010 ATC 20-186, [31], [34].

61 In *Vidler* at first instance, 2009 ATC 20-149, Stone J indicated that ‘it is difficult for me to envisage a scenario in which [the characterisation of vacant land as “residential premises”] would be feasible’: at 10,460.

62 A further issue may be whether the occupation of land or a building must be legal — what of the situation where squatters occupy premises?

63 *Ibid*

64 2010 ATC 20-161.

In the Federal Court, Perram J held:

1. The key issue in the *Sunchen* case was whether or not the premises satisfied the definition under s 40-65(1) of ‘residential premises to be used predominantly for residential accommodation’, in which case the premises would be input taxed.
2. The ‘somewhat obscure language’ of s 40-65(1)⁶⁵ made the link between the entitlement to an input tax credit and the concept of ‘premises to be used predominantly for residential accommodation’ rather ‘less than obvious’.⁶⁶
3. The concept of ‘residential premises’ is different to most other goods and services, in that the same premises may have the quality of residential accommodation at one time but subsequently lose it (or vice versa). For example, a private home might be sold to a doctor for use as a surgery (or vice versa)⁶⁷ and thus change its character.
4. In applying the s 40-65(1) definition, Perram J noted that in his view, the phrase ‘to be used’ in the definition is ‘not a verb in its infinitive form with an unarticulated subject’⁶⁸ but one which ‘uninstructed by authority’ would suggest an objective test of purpose⁶⁹ directing attention to the ‘objective circumstances of the premises and the use which can be divined therefrom’.⁷⁰

His Honour doubted the correctness of the decision of White J in *Toyama Pty Limited v Landmark Building and Developments Pty Ltd*⁷¹ in which White J had held, in relation to predicting the future use of property, that ‘the most important factor in such a prediction is the intention of the future owner or lessee’.⁷² Perram J regarded this view as being ‘grammatically unsound’, because the phrase ‘to be used’ connotes the ‘present objectively determined fitness for use not likely future use’.⁷³

Perram J also considered the Federal Court decision in *Marana*⁷⁴ where, on differently worded legislation (which used the phrase ‘intended to be used as a residence’), the Federal Court applied an objective test.

Perram J then observed that:

There is great force in the notion that the kinds of questions generated by s 40-65 ... about residential accommodation should be considered by reference only to the premises themselves and what their apparent purpose and use is. Once one moves away from what the premises are at the time of supply to what they will be, questions emerge which cannot readily be answered by reference to any part of the text of s 40-65. For example, how far into the future is the prediction required? ... what happens if there is no information at all about the likely future use of the premises?

⁶⁵ *Ibid* 10,627.

⁶⁶ *Ibid* 10,626.

⁶⁷ *Ibid* 10,627: the example given by Perram J.

⁶⁸ *Ibid* 10,628. Perram J noted that ‘[t]o say that food is to be eaten is to say nothing about the eater and is purely a description of the purpose which the food has ...’

⁶⁹ Drawing on the Full Federal Court reasoning in *Marana Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 307; 2004 ATC 5063 (‘*Marana*’); *South Steyne* 2009 ATC 20-145.

⁷⁰ *Sunchen* 2010 ATC 20-161, 10,629.

⁷¹ (2006) 197 FLR 74, 92; [2006] NSWSC 83; 2006 ATC 4160; 62 ATR 73; (‘*Toyama*’), quoted in *Sunchen* 2010 ATC 20-161, 10,627.

⁷² *Toyama* (2006) 197 FLR 74, 92, quoted in *Sunchen* 2010 ATC 20-161, 10,627. White J went on to say in the same paragraph that

in the case of a lease, the question of how the property is to be used in the future will usually be determined by the terms of the lease. In the case of a sale, the likely future use of the property will probably depend on the purchaser’s intentions, to be assessed having regard to objective circumstances such as the physical condition of the premises, the zoning or any restrictive covenants.

⁷³ *Sunchen* 2010 ATC 20-161, 10,629.

⁷⁴ 2004 ATC 5063.

... [Moreover] the person who bears the tax liability is the vendor as supplier [and it] is a curious result indeed that leaves the liability of the vendor as a function of the intention of the purchaser.⁷⁵

Accordingly, Perram J indicated that he disagreed with the subjective intention test applied by White J in *Toyama*⁷⁶ and preferred an objective test, commenting that his preferred approach was ‘consistent with ... but not required by’ the decision in *Marana*.⁷⁷

On the issue of whether he should follow his own preferred approach and apply an objective test of ‘to be used’, or apply the subjective test as applied in *Toyama*, Perram J noted:

- the well-established principle that he should depart from the test in *Toyama* (as a decision of a court of equal standing) only if he was of the view that the decision was ‘clearly’ or ‘plainly wrong’;⁷⁸ and
- the requirement that a finding that a decision is “clearly wrong” is not lightly to be adopted ...⁷⁹

His Honour indicated that on the facts of *Sunchen* ‘as with most difficult questions of statutory interpretation it [was] difficult to be dogmatic’ about this conclusion.⁸⁰ However, Perram J held, on balance, that while he did not agree with White J’s test, he was ‘by no means’ persuaded that it was clearly wrong. Accordingly, he applied the approach in *Toyama* and concluded that s 40-65(1) requires ‘a prediction as to future use [in which] intention is a significant element’.⁸¹

With all respect, Perram J made a convincing case for departing from the test in *Toyama* and it is perhaps unfortunate that he did not carry through and apply the objective test which he preferred — this might have invited clarification of the issues by the Full Federal Court or High Court.

5. His Honour also held that, in applying the test of purpose in the definition of ‘residential premises’, it is legitimate to look at what the taxpayer had done (or not done) after acquiring the property in order to test whether the taxpayer in fact had the intention claimed.⁸² Here, the taxpayer had taken no discernable subsequent action at all towards developing the property, so that it was reasonable to conclude that the premises were ‘intended’ to be used as residential premises.

Applying these principles, Perram J held that the AAT had made no error of law in applying the *Toyama* test, and there was no basis for disturbing its finding that on the facts. It was likely — as at the date of acquisition — that the premises would continue to be used predominantly for residential accommodation.

As the definition of ‘residential premises’ was satisfied, the premises were input taxed under s 40-65 and no input tax credits were allowable.

⁷⁵ *Sunchen* 2010 ATC 20-161, 10,629.

⁷⁶ *Ibid.*

⁷⁷ *Ibid* 10,628; although his Honour could not resist an obiter grammatical correction of the Federal Court in *Marana* 2004 ATC 5063.

⁷⁸ *Sunchen* 2010 ATC 20-161, 10,629.

⁷⁹ *Ibid.*, quoting French J in *Nezovic v Minister for Immigration and Multicultural Affairs (No 2)* (2003) 133 FCR 190, 206.

⁸⁰ *Sunchen* 2010 ATC 20-161, 10,629.

⁸¹ *Ibid.*

⁸² *Ibid* 10,630.

VI. A SUMMARY OF PROPOSITIONS ESTABLISHED BY THE CASE-LAW IN RELATION TO
‘RESIDENTIAL PREMISES’ FOR GST PURPOSES

Bringing together the effect of the decisions considered above, the following propositions can be identified:

1. Purchase of a reversionary interest in leased property is not a new ‘supply’ merely because it involves the continuation of the leases.⁸³

In determining whether premises are commercial residential premises because they are ‘similar’ to a hotel or motel, etc, a holistic test is to be applied: the premises must be similar to a hotel, etc, as a whole.⁸⁴

2. In determining whether a person is acting as a principal or agent for the purposes of s 40-35(1)(a), a realistic approach is to be taken, emphasising substance rather than form.⁸⁵ However, the strong dissent on this point by Edmonds J in *South Steyne* indicates that opinions on a given set of facts may vary.

3. In order for particular ‘premises’ (a term which is not defined in the legislation) to be ‘residential premises’ for the purpose of Division 40, the premises must be capable of being occupied as a residence and must provide some element of shelter and basic living facilities at the time the premises were acquired — future potential to satisfy these requirements is not sufficient.⁸⁶ Bedroom and bathroom facilities are examples of such facilities, but there may be other examples which would satisfy the legislative requirements.⁸⁷ Zoning of premises as ‘residential’ is not conclusive.⁸⁸

4. Vacant land will only in rare circumstances — if ever — be capable of being occupied as ‘residential premises’, because in the Federal Court’s view vacant land does not (ordinarily) provide the shelter or basic living facilities required by the concept of ‘residential’ premises.

However, the question of whether or not vacant land can ever be residential premises, and, if so, the circumstances where it would satisfy these requirements have (technically) not been finally determined,⁸⁹ though the Full Court’s approach suggested that it would be very difficult to convince those judges that vacant land satisfied the definition of ‘residential premises’, though the Court did not appear to consider the situation where a caravan, for example, was used on the land as a home.

5. In determining whether property is or is intended to be ‘occupied as a residence or for residential accommodation’ within the meaning of s 195-1(a), (b), the issue relates to actual or physical occupation, not the legal right to occupy.⁹⁰

6. The applicability of the subjective purpose test applied in *Toyama*⁹¹ to determine whether premises are ‘to be used’ as ‘residential premises’ was seriously doubted by Perram J in *Sunchen*.⁹² Nevertheless, his Honour did not feel that the *Toyama* approach was so clearly wrong that he was justified in departing from it to apply the objective test which he preferred. It is respectfully suggested that Perram J made a convincing if unusual case for the view that the *Toyama* approach was incorrect, and could well have applied the objective test he preferred.

⁸³ *South Steyne* 2009 ATC 20-145.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Vidler* 2009 ATC 20-149; *South Steyne* 2009 ATC 20-145.

⁸⁷ *Vidler* 2009 ATC 20-149.

⁸⁸ *Ibid.*

⁸⁹ *Vidler* 2009 ATC 20-149.

⁹⁰ *Ibid.*

⁹¹ (2006) 197 FLR 74.

⁹² 2010 ATC 20-161.

7. In determining how property is 'to be used' for s 40-65(1) purposes, it is legitimate to look at what subsequent steps the taxpayer has taken in relation to the property, in order to test whether the intention claimed by the taxpayer in relation to the property did actually exist.⁹³

VII. CONCLUSION

As noted at the outset, the provisions dealing with the various aspects of potential GST liability for 'residential premises' create a complex and difficult landscape in which the correct answer is not always self-evident.

However, the developing case law in this area is beginning to create a 'map' through the wilderness and bringing a little clarity to (some of) the difficult issues thrown up by the provisions — for example, establishing that the purchase of a reversionary interest in leased property is not a new 'supply'.

Nevertheless, some issues have been clouded by the decisions (for example, the correct test of 'intended usage' in s 40-65), while many issues remain unresolved, including:

- the boundaries of the concepts of 'new' and 'commercial' residential premises;
- when a supply of accommodation in commercial residential premises will be provided 'by the entity that ... controls' those premises; and
- technically at least — whether vacant land can ever be 'used as a residence or for residential accommodation', though the Full Court in *Vidler* seemed very sceptical.

Hopefully, these and other conundrums will be clarified by future decisions. In the meantime, academics and practitioners will continue to examine the entrails of court decisions in order in the attempt to discern a coherent and principled approach to the interpretation of Division 40 and related provisions.

Hopefully, the analysis in this article will provide some assistance in this task.