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GST ON BANKING SERVICES:
SOME INCIDENTAL ASPECTS

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As the lead paper in this section discloses, GST is not imposed on the provision of most banking services. That of course is not to say that GST does not have an impact on the cost, and thus indirectly on the price, of banking services: with one exception, nearly all a bank=s costs are subject to GST, which it is not irrational to suppose will be passed on in the price charged by suppliers to the bank, and to the extent that the costs relate to the banking services which are Ainput taxed@ no GST credit will be available to the bank. The only significant exception is the bank=s employee labour costs: those amounts outlaid by the bank which are subject to an obligation to deduct income tax instalments under sec 221C of the Income Tax Assessment Act 1936 (wages, salaries, director=s fees, benefits which are not Afringe benefits@ and taxed as such, and so forth) are excluded from GST because they are taken not to be supplied by an Aenterprise,@ see sec 9-20(2) of the proposed GST Act (the Bill for which is the nauseatingly entitled *A New Tax System (Goods & Services Tax) Bill 1998*).

This paper is concerned with two incidental aspects of the concept of input taxed Afinancial supplies@ dealt with in subdivision 40-A, sec 40-5, of the GST Act. The first is what might be called the Ainvestment@ aspects of financial supplies. The second is the GST liability in respect of taxes imposed upon bank transactions.

Investment Supplies

The first category of investment supplies is Item 4 in the table in sec 40-5(2), Aequity securities.@ What is taken to be a financial supply in this regard is Athe allotment, issue, transfer, assignment or receipt of, or any other dealing with, a security within the meaning of sec 92(1) of the Corporations Law, other than paragraph (ca) of that subsection.@ Omitting the excluded paragraph, sec 92(1) of the Corporations Law provides B

> ASubject to this Section, >securities= means:
> (a) debentures, stocks or bonds issued or proposed to be issued by a Government, or
> (b) shares in, or debentures of, a body, or
> (c) interests in a managed investment scheme, or ...
> (d) units of such shares, or
> (e) an option contract within the meaning of Chapter 7,
> but does not include a futures contract or an excluded security.@

Excluded securities are concerned with rights to participate in a retirement village scheme. Option contracts are, broadly, options over the first four types of securities listed above, or market traded options. Managed investment schemes are extensively defined in sec 9 of the Corporations Law, but in this forum may be sufficiently identified as being those in respect of which a prospectus is required.

The effect of sec 40-5 is that dealings in such securities (issues and redemptions, acquisitions and sales) do not give rise to a GST liability, but, as mentioned, correspondingly no GST credit is available in respect of the costs incurred in connection with such dealings.

For added caution, Item 5 in sec 40-5(2) specifically includes in input tax financial supplies Athe creation, issue, transfer, assignment or receipt of, or any other dealing with a unit trust, or an interest in or a right to or under, a unit trust.@ In addition, the supply of services in the management of a unit trust is expressly included as a Afinancial supply.@ Thus, a unit trust manager=s fees are not nominally subject to GST, although as with a bank, its costs other than PAYE labour costs will have to be met out of what is payable to it as management fees. Whether this results in the GST on those costs being borne by the manager or by the unitholders will depend upon the manager=s capacity to increase its fees by reference to additional costs incurred by it.

Investment through the medium of superannuation funds is treated similarly. Item 9 in the table in sec 40-5(2) defines Afinancial supplies@ to include Athe creation, transfer, assignment or receipt of, or any other dealing with, an interest in or a right under a superannuation fund.@ and further goes on to add to the category of financial supplies Athe management of a superannuation fund.@ The term Asuperannuation fund@ is referentially defined: sec 195-1 tells us that Asuperannuation fund@ has Athe meaning given by sec 995-1 of the Income Tax Assessment Act 1997,@ and that section in turn tells us that the expression Ahas the meaning given by sec 10 of the Superannuation Industry (Supervision) Act 1993.@ Passing on to the third mentioned Act brings one finally to a definition: A>Superannuation fund= means A(a) a fund that is an indefinitely continuing fund and is a provident, benefit, superannuation or retirement fund; or (b) a public sector superannuation scheme.@ A public sector superannuation scheme is one established by or under a law of, or under the authority of, the Commonwealth, a State or Territory, or a local government body.

The question whether a fund meets these criteria has been the subject of extensive consideration in disputes between taxpayers and the Commissioner of Taxation. Although the issue is not one which is likely to arise in the context of dealings by a bank, it has been held that funds nominally constituted as superannuation funds but not conducted as such do not qualify. In *Scott v F C of T* (1966) 40 ALJR 265, 14 ATD 333 Windeyer J found it a requirement of qualification as a superannuation fund that the fund must be bona fide devoted as its sole purpose to providing for participating employees money benefits (or benefits having a money value) upon their reaching a prescribed age, and that the Afund@ should comprise money or investments set aside and invested, with the surplus income being capitalised. In *Mahoney v F C of T* (1967) 14 ATD 519 Kitto J pointed out that the descriptive words Aprovident,@ Abenefit@ and Asuperannuation@ must be taken to invoke a purpose narrower than that of conferring benefits in a general sense, and identified them as referring, respectively, to provision against contemplated contingencies, specific benefits (such as a funeral benefit), and the provision, to accrue on cessation of employment (by retirement, death or otherwise), of a subvention for the employee or his estate or for persons toward whom the employee may have stood in some kind of relation commonly giving rise to a legal or moral responsibility.

Merely asserting that a fund is a superannuation fund will not suffice; thus, for example, in *Bayton Cleaning Co Pty Ltd v F C of T* 91 ATC 4076, amounts paid to a fund ostensibly for the benefit Aunnamed employees@ who were not expected to be employed by the taxpayer for any significant period of time and whose benefits were, in consequence, expected as a matter of course to be forfeited, were held not to qualify as superannuation contributions; and similarly, in *Raymor Contractors Pty Ltd v F C of T* 91 ATC 4259 the court looked beyond the terms of the trust deed and examined the application by the trustee of the funds and the extent to which benefits were actually received by the nominal members, and concluded that, in light of a systematic process of excluding potential member beneficiaries from participation in the fund, the payments made to the trustee could not be characterised as having been made Afor the purpose of making provision for superannuation benefits@ for the employees or their dependants.

The inclusion of superannuation entitlements in input taxed financial supplies avoids a number of difficult questions which might otherwise have arisen: for example, the extent to which contributions made to a superannuation fund may be said to constitute the Acreation@ of an interest in the fund, the extent to which distributions from the fund may be said to be merely a realisation of entitlements rather than the supply of entitlements, and the extent to which nominations of beneficiaries might be said to be a supply by the person making the nomination to the nominee (a question the answer to which might vary according to the enforceability of the nomination).

An intriguing issue which arises from the terms of sec 40-5 is the interaction between Item 9 in subsec (2) and Item 1 in subsec (3). The former treats as an input tax financial supply Athe management of a superannuation fund,@ while the latter excludes from financial supply Aa supply of advice, including any advice in relation to a supply covered by@ inter alia Item 9 in subsec (2). Where the manager of a superannuation fund, as part of its duties as manager, provides advice to members as to the nature of their entitlements and, for example, as to the desirability of cashing out or leaving in superannuation entitlements, is what the manager does a Afinancial supply@ as Amanagement,@ or is it a taxable Asupply of advice@? Perhaps the need to answer this question is avoided by the circumstance that GST is payable only on the Avalue@ of a supply, which by sec 9-75 is taken to be the consideration for the supply, except in circumstances of non-arm=s length dealings between associates (see Division 72). If the only reward to the manager is for the overall service of managing the fund, presumably the consideration will be wholly allocated to Amanagement@ and it will be taken that there is no Avalue@ to the supply of any advice (at least for GST purposes, whatever the member may think the value to be).

A similarly interesting question arises where the manager of a superannuation fund is an accountant who performs the service in the course of his or her professional practice. By Item 4 in the table in sec 40-5(3), Aa supply of an accounting service by an accountant in the course of a professional practice@ is expressly excluded from being a financial supply; yet by Item 9 the management of a superannuation fund is expressly taken to comprise a financial supply. Is an accountant subject to GST on the fee which, for professional accounting services in the management of a client=s superannuation fund, he or she charges to the trustee? Perhaps the courts will resolve the question by concluding that, having regard to the terms of the legislation, Amanagement of a superannuation fund@ must be taken to be something done outside the course of a professional practice. (However, doubtless the accountant would maintain otherwise in dealings with his or her professional indemnity insurers.)

The third category of investment service which is included as a Afinancial supply@ is life insurance: Item 10 of the table in sec 45-5(2).

The GST Act draws a sharp distinction between life insurance, which is taken to be a financial supply (Athe provision, transfer or assignment of: (a) a *life insurance policy; or (b) reinsurance relating to a life insurance policy@), and other insurance, which is taken not to be a financial supply. Moreover, if a contract is not one of insurance at all, but one creating a debt obligation or a managed investment contract, it will be an equity security (see earlier) and so a financial supply. For this reason, it is necessary for GST purposes to ascertain the true nature of any contract described as insurance or as life insurance.

The leading authority on what constitutes Ainsurance@ is the judgment of Channell J in *Prudential Insurance Co v Commissioners of Inland Revenue* [1904] 2 KB 658, a stamp duty case, where the policy in question provided for the payment of a benefit to the insured on his attaining the age of 65 years, or a smaller sum in the event of his dying under that age. The question was whether the policy was properly to be characterised as a policy of insurance upon a contingency depending upon a life within the meaning of the then sec 98 of the Stamp Act 1891 (UK). The argument of the Inland Revenue Commissioners was not that the policy was not a policy of life insurance, but rather that it was not a policy of insurance at all. Channell J agreed that the only question in the case was whether the policy was a policy of insurance. If it were, his Lordship was of the view that it was free from doubt that it was a policy upon an event relating to or dependent upon a life. His Lordship continued (at 662-664):

> "The Attorney-General says that to constitute a contract of insurance it must be a provision against something - against some loss or disadvantageous event. Mr. Danckwerts says that may be true as regards marine and fire policies which are indemnities against loss, but it is not true as regards life policies, for a policy of life insurance is not a contract of indemnity. But the question is whether that makes any real difference, and it seems to me that we must inquire a little further into the nature of a contract of insurance. Where you insure a ship or a house you cannot insure that the ship shall not be lost or the house burnt, but what you do insure is that a sum of money shall be paid upon the happening of a certain event. That I think is the first requirement in a contract of insurance. It must be a contract whereby for some consideration, usually but not necessarily for periodical payments called premiums, you secure to yourself some benefit, usually but not necessarily the payment of a sum of money, upon the happening of some event. Then the next thing that is necessary is that the event should be one which involves some amount of uncertainty. There must be either uncertainty whether the event will ever happen or not, or if the event is one which must happen at some time there must be uncertainty as to the time at which it will happen. The remaining essential is that which was referred to by the Attorney-General when he said the insurance must be against something. A contract which would otherwise be a mere wager may become an insurance by reason of the assured having an interest in the subject matter -- that is to say, the uncertain event which is necessary to make the contract amount to an insurance must be an event which is prima facie adverse to the interest of the assured. The insurance is to provide for the payment of a sum of money to meet a loss or detriment which will or may be suffered upon the happening of the event ... Still, the necessity of there being an insurable interest at the time of the making of the contract shows that it is essential to the idea of a contract of insurance that the event upon which the money is to be paid shall prima facie be an adverse event ... A contract of insurance, then, must be a contract for the payment of a sum of money, or for some corresponding benefit such as the rebuilding of a house or the repairing of a ship, to become due on the happening of an event, which event must have some amount of uncertainty about it, and must be of a character more or less adverse to the interest of the person effecting the insurance.@

From these observations three elements of the notion of insurance may be elicited:

(i) a benefit on the happening of an event. Whether a refund of premiums paid is for this purpose a benefit is a question further considered below;

(ii) the event is one involving some amount of uncertainty;

(iii) insurance must be against something: the assured must have an interest in the subject matter.

In the case of life insurance, the prima facie requirement referred to by Channell J that the event be Aadverse to the interest of the assured@ is not applicable. For GST purposes, Alife insurance@ is a defined term: sec 195-1 provides that A***life insurance policy*** means a policy of insurance on the life of an individual.@ The concept of life insurance B insurance on the life of an individual B was considered by Windeyer J in delivering the leading judgment in *National Mutual Life Association Ltd v F C of T* (1959) 102 CLR 29, where the question at issue was whether moneys received as part of the premiums for certain policies issued were Apremiums received in respect of policies of life assurance@ within the meaning of the then sec 111 of the Income Tax Assessment Act 1936. The policies in question contained, in addition to benefits ordinarily to be found in policies of life insurance, additional benefits covering the assured in the event of death by accident or disablement. Windeyer J referred to Bunyan, *The Law of Life Insurance*, where it was said that --

> AThe contract of life insurance may be further defined to be that in which one party agrees to pay a given sum upon the happening of a particular event contingent upon the duration of human life in consideration of the immediate payment of a smaller sum or certain equivalent periodical payments by another,@

and to the three recognised forms of insurance: term insurance (Aan insurance limited for a specified period, the sum insured being payable if the life insured dies within the period, but nothing being payable if he survives@), whole of life (in which the sum insured is payable at death) and endowment insurance, of which his Honour said --

> AEndowment policies, in their original form of >pure endowments=, are the exact opposite of term policies. In a term contract no payment is made unless death occurs within the stipulated term; in a pure endowment no payment is made unless the person whose life is insured survives the date when the policy matures. Endowment policies of this kind seem to have originated in the eighteenth century in schemes of insurance for the advancement in life of children ... As a rule an endowment policy at the present

day provides for payment of the sum insured at some future date (either a particular date or the attainment of some selected age) called the maturity date, or earlier death. That is now the usual meaning of the expression ...@

His Honour distinguished general insurance, which provides indemnity against loss from events which may or may not occur, from life insurance, which deals with death, a Acontingency@ which must occur and so not a risk but a certainty. The element of uncertainty about a policy of life insurance is when, rather than whether, death will occur. A consequence of the definition in sec 195-1 appears to be that the death in issue must be the death of one person, not of the survivor of a group, since a policy on a group would not be on the life of Aan individual@ unless it was proper to characterise it as on the life of the survivor of the group.

Windeyer J considered it appropriate to refer to endowment policies as a form of life policy, noting that A... it has been said that a whole of life policy is an insurance against dying too soon, an endowment policy an insurance against living too long.@

In *N M Superannuation Pty Ltd v Young* (1993) 41 FCR 182 Hill J considered whether Alife insurance@ for the purposes of the Bankruptcy Act extended to a policy held on the trusts of a superannuation fund which provided for benefits on retirement, death in employment, or termination of employment before retirement, the benefit in each case being an amount calculated by reference to premiums received together with Ainterest@ thereon. It was argued that the policy was no more than an investment with a guaranteed return, so that it fell outside the protection of the relevant provisions of the Bankruptcy Act. Hill J rejected this argument:

A... in the present case, the element of uncertainty, in the sense that that word is used by Channell J, is clearly there. The retirement benefit, payable under cl 11, is uncertain because the member may die before reaching the retirement date and thus receive no benefit under that clause. The death benefit, payable under cl 13, is equally uncertain, not in the sense that death is uncertain, but because the time of death is uncertain and that benefit will not be payable if the member retires before the event of death occurs. Equally, the benefit payable under cl 17 is uncertain because it will only be payable if death has not intervened. The fact that the quantum of the benefits is the same does not affect, in my view, the outcome.@

Similar views were expressed in *Fuji Finance Inc v Aetna Life Insurance Co Ltd* [1997] Ch 173; [1996] 4 All ER 608 and in *Jones v AMP Perpetual Trustee Co NZ Ltd* [1994] 1 NZLR

690.

However, not every contract to pay a sum of money on a contingency related to death is a contract of life insurance. In *Re Commonwealth Homes & Investment Co Ltd* [1943] SASR 211 the company issued bonds, on complex terms, in consideration of periodical payments called Apremiums@, and the question arose whether the bonds constituted life policies such that that company was carrying on a life insurance business contrary to the provisions of the Insurance Act 1932. The bonds provided for payment of a fixed sum to the holder at the date of maturity and for payment or refund of premiums paid if death previously occurred. Mayo J said (at 231):

> AIn so far as the bond contracts so provide they are not, I think, policies within the meaning of the statute. Doubtless the refund of premiums is >payment of money on death=, but an undertaking to make that payment, if death occurs, does not constitute a policy, or contract, >insuring= such payment, any more than a condition in a mortgage requiring the mortgagor to repay the principal sum on death to the mortgagee could be so described. To be a >policy insuring= payment of a sum of money there must be something more. To >insure= suggests an indemnity, or payment of an amount to cover loss or injury, where an element of risk, or what might be called of speculation, is present, which is insured against in consideration of a premium ... A life policy as ordinarily understood is the purchase of a reversionary sum payable at death in consideration of a present payment of money, or as is generally the case, on the payment of an annuity to the insurer during the life of the person insured ... The word >insure= is inept to describe an undertaking to refund, or acceleration of the repayment of a loan.@

By contrast, the obligation of the company to pay sums including bonuses on other contingencies related to death were, in his Honour=s view, obligations by way of life insurance. It was on this basis that the decision of Mayo J was distinguished in *N M Superannuation v Young*, where Hill J said:

> AWhether or not an engagement merely to repay the premiums on death would be a policy of insurance, it does not follow that an agreement by an insurer to pay a sum calculated by reference to the premiums together with an agreed interest component would not be a policy of insurance.@

The consequences of a provision for refund of premiums was also at issue in *General Accident Assurance Corporation Ltd v Inland Revenue Commissioners* [1906] 8 SC 477, where the policy was substantially an accident policy but provided for the return to the insured, or his legal personal representative, of a percentage of the premiums paid upon the insured reaching a certain age or dying before that time, so long as no claim had been made otherwise on the policy. The policy was liable to stamp duty as an accident policy, and the question was whether the policy was properly also to be characterised, and so also dutiable, as a policy of life insurance. It was not in dispute that the contract was one of insurance, and by reason of the nature of the charge to duty the question of apportionment of the premiums did not arise. There being no divisible premium it was held that the policy should be characterised only as an accident policy. The decision was distinguished on the ground that the premium was not divisible both in *N M Superannuation* and in *National Mutual Life Association.*

Stamp Duty

Stamp duty on insurance policies is not one of the State business taxes which has been nominated for repeal on the coming into effect of the GST system. As the Asupply@ of indemnity under a policy other than a life policy is to be subject to GST, the fiscal costs of general insurance business will rise significantly.

From the terms of Div 81 of the GST Act, it might at first be thought that an input credit is to be allowed for a portion of stamp duty costs. Sec 81-5 provides:

> **81-5 Payments of taxes can constitute consideration**
> (1) The payment of any *Australian tax (other than the GST) that you make, or the discharging of your liability to make such a payment, is to be treated as the provision of *consideration, to the entity to which the tax is payable, for a supply that the entity makes to you.
> (2) However, the payment of any *Australian tax that is specified in a written determination of the Treasurer, or the discharging of a liability to make such a payment, is not the provision of *consideration.

The term A Australian tax@ is defined in sec 195-1 to mean Aa tax (however described) imposed under an Australian law.@ An Aentity@ is defined to include a body politic.

However, for the credit allowed by sec 81-5 to be available, there must be Aa supply that the entity makes to you.@ It is of the essence of a tax B in the Constitutional sense B that it is not imposed as a return for a service or Asupply.@

The elements which go to make up the character of a tax were considered by the Privy Council in *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd* [1933] AC 168 in relation to a levy upon dairy farmers of a contribution to a fund which was to be distributed among dairy farmers. The levy was imposed in proportion to sales of fluid milk and the fund distributed in proportion to sales of manufactured milk products. The object of the legislation was to relieve congestion caused by an excess of supply over demand for fluid milk. Lord Thankerton said of this legislation (at 175-6)

> AIn the opinion of their Lordships. the adjustment levies are taxes. They are compulsorily imposed ... [and] ... are enforceable by law... . A dairy farmer who fails to comply with every determination. order or regulation made by a Committee under the Act is to be guilty of an offence against the Act (sec 13), and to be liable to taxation: *City of Halifax v Nova Scotia Car Works, Ld* [1914] AC 992, 998. Their Lordships are of opinion that the Committee is a public authority, and that the imposition of these levies is for public purposes. ... The fact that the moneys so recovered are distributed as a bonus among the traders in the manufactured products market does not. in their Lordships= opinion. affect the taxing character of the levies made.@

This decision was adverted to by Latham CJ in the High Court of Australia in *Matthews v Chicory Marketing Board* (1938) 60 CLR 263, where the dispute was over the question whether a State levy was an excise tax within the exclusive domain of the Commonwealth under sec 90 of the Constitution. Under the Victorian Marketing of Primary Products Act 1935, a levy was imposed upon chicory growers by reference to the cultivated area. The levy was directed to be applied in improvement of the quality of chicory grown, in insurance against natural catastrophes and toward other objects in the common interests of chicory producers. Latham CJ said (at 276) -

> AThe levy is, in my opinion, plainly a tax. It is a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered.@

More recently, in the context of the Taxation (Unpaid Companies Tax) Assessment Act the Full High Court held that Arecoupment tax@ imposed on the vendors of shares in certain companies which subsequently failed to pay income tax imposed upon their profits, was a tax within the scope of the Commonwealth=s power to make laws Awith respect to taxation.@ In *MacCormick v F C of T* (1984) 158 CLR 622 at 639 the Court said:

> AThe exactions in question answer the usual description of a tax. They are compulsory. They are to raise money for governmental purposes. They do not constitute payment for services rendered: see *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263, per Latham CJ; *Leake v Commissioner of State Taxation* (1934) 36 WALR 66, per Dwyer J. They are not penalties since the liability to pay the exactions does not arise from any failure to discharge antecedent obligations on the part of the persons upon whom the exactions fall: see *R v Barger* (1908) 6 CLR 41, per Isaacs J. They are not arbitrary. Liability is imposed by reference to criteria which are sufficiently general in their application and which mark out the object and subject-matter of the tax: see *F C of T v Hipsleys Ltd* (1926) 38 CLR 219.@

This conclusion was endorsed by another full court in *D F C of T v Truhold Benefit Pty Ltd* (1985) 158 CLR 678 at 684.

The relationship between a Atax@ and a Apayment for services rendered@ was again considered by the High Court in *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462, in relation to an enactment imposing a fee on air passengers arriving in Australia, ostensibly to defray the costs of immigration clearance. The airline was required to pay the fee whether or not it was collected from the passenger. In a challenge to the imposition of the levy, the airlines argued that it was imposed by an act which, in contravention of sec 55 of the Commonwealth Constitution, dealt with both tax and other matters. In holding that the legislation infringed sec 55, the Full Court said (at 466-7):

> AIn *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy, Ld* [1933] AC 168 , at p 175, the Privy Council identified three features which sufficed to impart to the levies involved in that case the character of a >tax=. Those features were that the levies: were compulsory; were for public purposes; and were enforceable by law. In *Matthews v Chicory Marketing Board* (Vict) (1938) 60 CLR 263 , at p 276, Latham CJ adopted those three features as the basis of what has subsequently been recognized in this Court as an acceptable general statement of positive and negative attributes which, if they all be present, will suffice to stamp an exaction of money with the character of a tax-
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> > >a compulsory exaction of money by a public authority for public purposes, enforceable by law, and ... not a payment for services rendered=
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> (see, eg, *Browns Transport Pty Ltd v Kropp* (1958) 100 CLR 117, at p 129). More recently this Court has drawn attention to other criteria, namely, that a tax is not by way of penalty and that it is not arbitrary (see *MacCormick v F C of T* (1984) 158 CLR 622, at p 639; *Deputy F C of T v Truhold Benefit Pty Ltd* (1985) 158 CLR 678 , at p 684).

There are three comments which should be made in relation to the above general statement of Latham CJ The first is that it should not be seen as providing an exhaustive definition of a tax. Thus, there is no reason in principle why a tax should not take a form other than the exaction of money or why the compulsory exaction of money under statutory powers could not be properly seen as taxation notwithstanding that it was by a non-public authority or for purposes which could not properly be described as public.

The second is that, in *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59, at p 63, Gibbs J made explicit what was implicit in the reference by Latham CJ to >a payment for services rendered=, namely, that the services be >rendered to= - or (we would add) at the direction or request of - >the person required= to make the payment.

The third is that the negative attribute - >not a payment for services rendered= - should be seen as intended to be but an example of various special types of exaction which may not be taxes even though the positive attributes mentioned by Latham CJ are all present. Thus, a charge for the acquisition or use of property, a fee for a privilege and a fine or penalty imposed for criminal conduct or breach of statutory obligation are other examples of special types of exactions of money which are unlikely to be properly characterized as a tax notwithstanding that they exhibit those positive attributes. On the other hand, a compulsory and enforceable exaction of money by a public authority for public purposes will not necessarily be precluded from being properly seen as a tax merely because it is described as a >fee for services=. If the person required to pay the exaction is given no choice about whether or not he acquires the services and the amount of the exaction has no discernible relationship with the value of what is acquired, the circumstances may be such that the exaction is, at least to the extent that it exceeds that value, properly to be seen as a tax.@

Stamp duty cannot be characterised as a payment for services, even within the broad conception referred to by the High Court in *F C of T v Spotless Services Ltd* (1996) 186 CLR 404, where the majority cited Holmes J in *Compania de Tabacos v Collector of Internal Revenue* (1927) 275 US 87 at 100 for the observation that "[t]axes are what we pay for civilized society.@ It is a Acompulsory and enforceable exaction of money by a public authority for public purposes.@ not consideration for a supply. The State is not liable to GST on its payment, nor is the taxpayer entitled to a GST credit. So much is made clear by the Explanatory Memorandum to the GST Act=s Bill, which instances as a case to which Div 81 applies a park entrance fee called a tax by the legislation which imposes the obligation to pay it.

It follows that although a determination under sec 81-5(2) has been foreshadowed, it is not necessary. With or without it, insurance companies will bear the double impost unrelieved by a GST credit.