

RELIANCE CARPET CO PTY LTD: WAS THE FULL FEDERAL COURT RIGHT?

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The taxpayer granted an option to a prospective purchaser for the purchase by the latter of a property owned by the taxpayer. Under the option, the taxpayer received a security deposit from the prospective purchaser, subsequent to which the taxpayer entered into a contract with the prospective purchaser for the sale of the property. The purchase was not completed by the prospective purchaser, and the deposit was forfeited. The Commissioner assessed the taxpayer for GST payable on the forfeited deposit, but the taxpayer objected to the assessment, an objection which the Commissioner disallowed. The taxpayer then appealed to the Administrative Appeals Tribunal, which disallowed the appeal. The taxpayer then appealed to the Full Federal Court, which unanimously allowed the appeal. This article argues that the Full Federal Court's decision was wrong. It argues so on either of two grounds: the Full Federal Court erred on drawing the proper conclusion on applying the relevant legislative provisions to the facts; or it applied a method of statutory interpretation (under the purposive approach) which was not the best. The submissions made on behalf of the Commissioner to the Full Federal Court did not include the first of those two grounds. Those submissions did include the second, but not underpinned by the analysis articulated in this article. The Commissioner was granted special leave by the High Court to appeal the Full Federal Court's decision. It was subsequently announced that he would appeal to the High Court. In a postscript to this article it is noted that the High Court has since unanimously overturned the decision of the Full Federal Court in Reliance.

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I INTRODUCTION

This article argues that the decision of the Full Federal Court in *Reliance Carpet Co Pty Ltd v Commissioner of Taxation*¹ ('the *Reliance* case') was wrong.

A Facts

Reliance Carpet Co Pty Ltd ('the taxpayer') granted, for a price of \$25,000, 699 Burke Road Pty Ltd ('the prospective purchaser') an option ('the option') to buy a property that the taxpayer owned. The option required that, on the option being exercised, the prospective purchaser pays the taxpayer \$297,500, which was to be a deposit in respect of the purchase price of the property (\$3 million minus the option fee of \$25,000).

The prospective purchaser exercised the option, but failed to pay timely to the taxpayer the deposit of \$297,500. The prospective purchaser did eventually pay the deposit on being required by the taxpayer to do so. Thereafter, the taxpayer and the prospective purchaser entered into a contract for the sale of the property. The contract provided that the remainder of the purchase price of \$2,677,500 was payable to the taxpayer by the prospective purchaser on settlement.

The prospective purchaser failed to complete settlement on the due date (that due date being the date, as appointed in the contract, extended by some 6 months, on the prospective purchaser choosing such an extension, as the prospective purchaser was contractually entitled to). The taxpayer, then, as allowed under the contract, served on the prospective purchaser a rescission notice requiring completion of settlement within 14 days. The prospective purchaser failed to respond to that rescission notice. The contract was then, as allowed under the contract, on or about 26 July 2003, rescinded, and the deposit was forfeited to the taxpayer.

The prospective purchaser requested of the taxpayer a tax invoice in respect of the forfeited deposit, which the taxpayer refused to provide. The Commissioner assessed the taxpayer in respect of GST payable on the forfeited deposit for the tax period of three months ended 30 September 2003. The taxpayer objected to the assessment. The taxpayer's objection was disallowed by the Commissioner. The taxpayer appealed that decision to the Administrative Appeals Tribunal, which disallowed the appeal. The taxpayer then appealed to the Full Federal Court, which unanimously allowed the appeal.

II FULL FEDERAL COURT'S ANALYSIS

All legislative references below are, unless otherwise stated, to the GST Act.²

A Did the contract involve making some supplies until the transfer of the property?

The Full Federal Court, which delivered a single, joint judgement, did not accept the following analysis adopted by the Administrative Appeals Tribunal:

The ultimate obligation was of course to transfer title to the purchaser upon payment of the balance of purchase price. But there were other obligations, such as maintaining the property

¹*Reliance Carpet Co Pty Ltd v Commissioner of Taxation* [2007] FCAFC 99 (5 July 2007) ('*Reliance*').

²*A New Tax System (Goods and Services Tax) Act 1999* (Cth).

in its present condition ..., to pay all rates, taxes, assessments, fire insurance premiums and other outgoings in respect of the land ... and to hold the existing policy of fire insurance for itself and in trust for the purchaser to the extent of their respective interests ... In the circumstances it may be fairly said that upon the execution of the contract the applicant made a supply in that, in terms of s 9-10(2)(g) of the GST Act, "it entered into an obligation" to do things it was bound to do under the contract and further that the deposit was consideration for a supply in that it was a "payment in connection with a supply" (s 9-15(1)(a))."³

The Full Federal Court described that analysis of the Administrative Appeals Tribunal as having 'an artificial resonance to it'.⁴ The Full Federal Court, in that respect, reasoned that:

When the applicant entered into the contract for sale with the purchaser it entered into a contract for the supply of real property; nothing more nothing less. ... That supply did not take place because the contract was rescinded. However, the fact that that supply did not take place is not a warrant to undertake some juristic dissection of the contract to find some other supply, in terms of the GST Act, at the time of entry into the contract. In our view, there was no supply of interim obligations either then or subsequently.⁵

The Full Federal Court cited as authority for that reasoning passages from *Hallstroms Pty Ltd v Commissioner of Taxation*⁶ and *Commissioner of Taxation v Raymor (NSW) Pty Ltd*.⁷

B *Were there supplies made on the rescission of the contract?*

The Full Federal Court concluded that '[t]he mere extinguishment of contractual rights would not ... fall within the ordinary meaning of "supply"'.⁸ The Full Federal Court cited as authority for that conclusion passages from *Westley Nominees Pty Ltd v Coles Supermarkets Australia Pty Ltd*.⁹ In that respect, the Full Federal Court reasoned:

...[O]n the breach of the contract by the purchaser, including its failure to pay the balance of the purchase price when due, the applicant did not have the right to elect to rescind the contract. Rather, the applicant had the right to issue a rescission notice which had the effect, upon the failure of the purchaser to remedy the default within the stated period, of determining the contract. By issuing the rescission notice, the applicant did not surrender any rights or release the purchaser from any obligations. Neither on the occasion of the issue of the notice nor on the effluxion of time in which to cure the default was there a "supply" by the applicant to the purchaser.¹⁰

C *Can Division 99 apply where there is no supply?*

While acknowledging that legislation must be interpreted purposively,¹¹ the Full Federal Court noted that '[t]he legislative purpose underlying Division 99 is not readily apparent from the language of the Division itself'.¹² After considering the

³ *Reliance Carpet Co Pty Ltd v Commissioner of Taxation* [2006] AATA 486 (5 June 2006), para 17.

⁴ *Reliance* [2007] FCAFC 99, para 16.

⁵ *Reliance* [2007] FCAFC 99, para 18.

⁶ *Hallstroms Pty Ltd v Commissioner of Taxation* (1946) 72 CLR 634, 648.

⁷ *Commissioner of Taxation v Raymor (NSW) Pty Ltd*. (1990) 24 FCR 90, 99.

⁸ *Reliance* [2007] FCAFC 99, para 20.

⁹ *Westley Nominees Pty Ltd v Coles Supermarkets Australia Pty Ltd*. (2006) 152 FCR 461, para 16.

¹⁰ *Reliance* [2007] FCAFC 99, para 21.

¹¹ *Reliance* [2007] FCAFC 99, para 22.

¹² *Reliance* [2007] FCAFC 99, para 23.

comments in the Explanatory Memorandum¹³ that relate to div 99, the Full Federal Court concluded that s 99-5 never operates so as to make a forfeited deposit liable to GST, since that forfeited deposit can never be consideration for a taxable supply.¹⁴ That is so, the Full Federal Court reasoned, as no supply had occurred because the contract for which that deposit was paid as security was not consummated.¹⁵

D Does the decision reached accord with the overall policy rationale of the GST?

The Full Federal Court concluded that the decision it thus reached—the taxpayer was not liable to GST on the forfeited deposit—was not ‘inconsistent with the legislative purpose’ of the GST,¹⁶ which was to be ‘a tax on private consumption in Australia’.¹⁷

III WHY THE FULL FEDERAL COURT’S ANALYSIS WAS WRONG

A On what grounds can the Full Federal Court’s analysis be found to be wrong?

The Full Federal Court’s analysis, and its decision, can be critiqued as being wrong on either of two grounds:

- the Full Federal Court erred on drawing the proper conclusion on applying the relevant legislative provisions to the facts; or
- it applied a method of statutory interpretation (under the purposive approach) which was not the best.

The submissions made on behalf of the Commissioner to the Full Federal Court did not include the first of those two grounds. Those submissions did include the second, but not underpinned by the analysis articulated in this article.

B Were the proper conclusions drawn on the application of the law to the facts?

Paying proper regard to the facts of the *Reliance* case, what would be the commonsensical answer to the straightforward question: why was the taxpayer paid a deposit of \$297,500 by the prospective purchaser? The answer comprises two parts: first, the deposit was paid because the prospective purchaser was required, under the option, to pay it to the taxpayer, so as to bind the taxpayer to enter into a contract for the sale of a property to the prospective purchaser; and, second, it was paid so on the understanding that it will be treated as a part payment of the price payable for the property.

The existence of the second part—that is, the deposit paid is to be treated as a part payment of the price payable for the property to be bought by the prospective purchaser—does not detract from the first part, that is, the deposit was also paid because the prospective purchaser was required, under the option, to pay it to the taxpayer so as to bind the taxpayer to enter into a contract for the sale of the property to the prospective purchaser. If the second part comes to pass, by the terms of the

¹³ Explanatory Memorandum, A New Tax System (Goods and Services Tax) Bill 1998 (Cth).

¹⁴ *Reliance* [2007] FCAFC 99, para 25.

¹⁵ *Reliance* [2007] FCAFC 99, para 26.

¹⁶ *Reliance* [2007] FCAFC 99, para 31.

¹⁷ *Ibid.*

contract, the deposit wholly becomes a part payment of the price payable for the property, with no part of the deposit made referable to anything else, including the first part. That, however, does not mean that the first part does not exist. It does; legally and substantively, it does.

In the rest of this article, those two parts are referred to respectively as ‘the first part’ and ‘the second part’, as those two expressions have been used in the two paragraphs just above.

Does the first part give rise to a ‘supply’ by the taxpayer? It does.

The expression ‘supply’ is defined in s 9-10 as:

- (1) A supply is any form of **supply** whatsoever.
- (2) Without limiting subsection (1), **supply** includes any of these:
 - ...
 - (g) an entry into, ... an obligation:
 - i) to do anything;
 - ...

The entry by the taxpayer into a contract for the sale of the property to the prospective purchaser is thus a ‘supply’ in terms of s 9-10(2)(g), if not s 9-10(1).

The deposit paid to the taxpayer by the prospective purchaser under the option is, correspondingly, ‘consideration’ received by the taxpayer for that supply. That is so as that deposit is captured by the definition of the expression ‘consideration’ in s 9-15(1)(a), a definition which includes, as ‘consideration’, ‘any payment ... in connection with a supply of anything’.

The position noted in the paragraph just above, however, is subject to div 99 (as canvassed below).

GST is payable on ‘taxable supplies’¹⁸. That is so as s 9-5 provides that a taxpayer makes a taxable supply if that taxpayer ‘make[s] [a] supply for consideration’ (not being either an input-taxed supply or a GST-free supply). Subject to div 99, therefore, under the first part, there is a taxable supply made by the taxpayer. That is because the taxpayer has entered into a contract for the sale of the property to the prospective purchaser (which amounts to the making of a ‘supply’ by the taxpayer) for ‘consideration’ (which is the receipt by the taxpayer of the deposit).

Given that the deposit is subject to the second part, div 99 become applicable. The applicability of div 99, however, is limited to the treatment of the deposit as ‘consideration’—specifically, to the circumstances in which the deposit can be treated as consideration, and the time at which the deposit can be so treated as consideration.

The two relevant sections of div 99 read:

99-5 Giving a deposit as security does not constitute consideration

- (1) A deposit held as security for the performance of an obligation is not treated as *consideration for a supply, unless the deposit:
 - (a) is forfeited because of a failure to perform the obligation; or
 - (b) is applied as all or part of the consideration for the supply.
- (2) This section has effect despite section 9-15 (which is about consideration).

¹⁸ *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 7-1(1).

99-10 Attributing the GST relating to deposits that are forfeited etc.

(1) The GST payable by you on a *taxable supply for which the consideration is a deposit that was held as security for the performance of an obligation is attributed to the tax period during which the deposit:

- (a) is forfeited because of a failure to perform the obligation; or
- (b) is applied as all or part of the consideration for a supply.

(3) This section has effect despite section 29-5 (which is about attributing GST for taxable supplies).

Division 99 does three things:

- it prescribes the manner in which the deposit must be dealt with by the taxpayer if the deposit were to be treated as consideration: s 99-5(1);
- it prescribes when (that is, in which tax period) the deposit is so treated as being consideration: s 99-10(1); and
- it prescribes that the deposit is so treated as being consideration only if the supply in relation to which the deposit was received is a taxable supply: s 99-10(1).

It thus follows (due to ss 99-5 and 99-10) that, when the deposit of \$297,500 is forfeited to the taxpayer, the taxpayer becomes liable to GST on that deposit in the tax period in which that forfeiture occurs. That is so as that forfeited deposit is consideration for a 'taxable supply', being the entry by the taxpayer into a contract for the sale of the property to the prospective purchaser (a supply which is neither an input-taxed supply nor a GST-free supply).

Section 99-5(1)(a) captures the deposit forfeited to the taxpayer as:

- the deposit is 'held as security for the performance of an obligation' (the 'obligation' being the prospective purchaser buying the property from the taxpayer); and
- the deposit 'is forfeited because of a failure to perform the obligation'.

Section 99-10(1)(a) also captures the deposit forfeited to the taxpayer as:

- there must be a 'taxable supply for which the consideration is a deposit': which there is, as the deposit is, under the first part, 'consideration' for a 'taxable supply' (being the entry by the taxpayer into a contract for the sale of the property to the prospective purchaser, for which the taxpayer received the deposit);
- the deposit is 'held as security for the performance of an obligation' (the 'obligation' being the prospective purchaser buying the property from the taxpayer); and

- the deposit ‘is forfeited because of a failure to perform the obligation’.

In formulating the analysis that has been just articulated, the expression ‘consideration’ used in s 99-10 cannot be taken as being controlled by the provision made in s 99-5 as to ‘consideration’. That is so as to reason otherwise would be circular.

The deposit was, as described earlier, under the first part, paid, as required by the option, to bind the taxpayer to enter into a contract for the sale of the property to the prospective purchaser. It was that circumstance (that is, the presence of the first part) which resulted in the analysis articulated above. It may, however, well happen that, in a different case, the first part may not be present, and all that is present will be the second part. Though that was, as will be clear from the description thus far, not so in the *Reliance* case, the case was seemingly argued before the Full Federal Court as if that had been so. However, even if that had been so, the taxpayer must be required to pay GST on the forfeited deposit, for the reasons canvassed below.

C Was the Full Federal Court’s approach to statutory interpretation the best?

As noted earlier, the Full Federal Court did acknowledge that legislation should be interpreted purposively. Did it, however, interpret so? It did not, as argued below.

Section 15AB of the Acts Interpretation Act¹⁹ provides:

(1)... in the interpretation of a provision in an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

...

(b) to determine the meaning of the provision when:

...

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

(2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes:

...

(e) any explanatory memorandum relating to the Bill containing the provision ... that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;

...

The Full Federal Court observed:

The legislative purpose underlying Division 99 is not readily apparent from the language of the Division itself. On the one hand, it seems clear enough that the legislature intended to defer the time at which a deposit (held as security for the performance of an obligation) could be taken to be all or part of the consideration for a supply until completion of the contract under which the deposit is paid; at that time, the deposit is actually applied as part of the consideration for the supply. In this way s 99-5(1)(b), in conjunction with s 99-10(1)(b), overcomes the general attribution rule in Division 29 which would, in the case of a taxable supply, trigger the vendor’s GST liability on the payment by the purchaser of the deposit. But where the deposit is forfeited because of a failure to perform the obligation, what does the language of the Division say about the underlying legislative policy or purpose? Is it to subject to GST all such forfeited deposits irrespective of whether or not the supply, which would have occurred if the contract had been completed, would be a taxable supply? Or is it to subject to

¹⁹Acts Interpretation Act 1901 (Cth) s 15AB.

GST only those forfeited deposits where the supply, which would have occurred had the contract been completed, would have been a taxable supply?²⁰

Accepting that the underlying legislative purpose was to subject to GST only those forfeited deposits where the supply, which would have occurred had the contract been completed, would have been a taxable supply, the question which arises is whether the language of s 99-5 permits a construction which accommodates that result. In our view, for the reasons set out below [reproduced later in this article], it does not.²¹

Those observations of the Full Federal Court amount to ‘the ordinary meaning conveyed by the text of the provision [s 99-5] taking into account its context in the Act and the purpose or object underlying the Act lead[ing] to a result that is manifestly absurd or is unreasonable’. That is so as ‘the purpose or object underlying the Act’ is to make a taxpayer that is required to register for GST liable to GST on only ‘taxable supplies’ made by that taxpayer. The Full Federal Court, then, on the authority of s 15AB of the Acts Interpretation Act, may have considered the comments in the relevant Explanatory Memorandum, which it did. That approach of the Full Federal court is evinced by the passages from its judgment quoted later.

The Explanatory Memorandum²² commented:

6.165 ... [S]ome security deposits later become incorporated in the consideration for a taxable supply. At some point the deposit ceases to be held as a security deposit and is offset against the remaining consideration that is payable. GST should be charged on such deposits if they become part of the consideration for the taxable supply.

6.166 Also if a security deposit made in relation to a taxable supply is forfeited, GST should be payable on the deposit.

Those two paragraphs in the Explanatory Memorandum, when read together, in a commonsensical manner, in the context of the *Reliance* case, can result in only one view: that is, that the taxpayer is liable to GST on the forfeited deposit, where that deposit was received by the taxpayer ‘in relation to a taxable supply’ had the taxpayer have had to make that supply. Perhaps, in order to reach that view, the Full Federal Court may have had to (but not necessarily) interpolate the words ‘actual or potential’ just before the word ‘taxable’ in para 6.166 of the Explanatory Memorandum. It did have ample warrant to do that interpolation (if it thought it necessarily had to).

Or, the Full Federal Court could have, on the authority of para 6.166 of the Explanatory Memorandum, interpolated the words ‘actual or potential’ just before the word ‘taxable’ in s 99-10(1). That interpolation, too, it did have ample warrant to do.

Any other view (such as the view reached by the Full Federal Court) will render para 6.166 of the Explanatory Memorandum largely (if not wholly) devoid of purpose.

The Full Federal Court justified its view thus:

At best, s 99-5 allows a forfeited deposit to be treated as consideration for an unidentified supply. But if a supply for which the forfeited deposit can be treated as consideration cannot be identified, s 99-5 has no work to do. The Commissioner’s submissions, in the alternative, that s 99-5 not only allows the forfeited deposits to be treated as consideration for a supply, but also deems there to be a supply is, in our view, not open on the language of the section. Even if it was, it would not go far enough to accommodate the legislative purposes identified

²⁰ *Reliance* [2007] FCAFC 99, para 23.

²¹ *Reliance* [2007] FCAFC 99, para 25.

²² Explanatory Memorandum, A New Tax System (Goods and Services Tax) Bill 1998 (Cth).

above—to tax forfeited deposits paid in relation to unconsummated taxable supplies but not tax them if paid in relation to unconsummated supplies which were not taxable supplies.²³

Moreover, if s 99-5(1) was intended to operate to deem a supply in addition to allowing the deposit to be treated as consideration for a supply, one would have expected that s 99-5(2) would have said: “This section has effect despite section 9-10 [which is about supply] and despite section 9-15 [which is about consideration.” It only refers to the latter.²⁴

That justification (by the Full Federal Court) loses relevance when one accepts that the better method of statutory interpretation (under a purposive approach) is to interpolate, on the authority of para 6.166 of the Explanatory Memorandum, the words ‘actual or potential’ just before the word ‘taxable’ in s 99-10(1). In order to do that interpolation, which the Full Federal Court did have ample warrant to do, the Full Federal Court may have had to (but not necessarily) interpolate the words ‘actual or potential’ just before the word ‘taxable’ in para 6.166 of the Explanatory Memorandum. The latter interpolation, too, is one which the Full Federal Court did have ample warrant to do.

The Full Federal Court supported its approach as to the interpretation of s 99-5 with reference to two authorities: *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd*²⁵, and a paper titled *To interpret or translate? The judicial role for GST case*.²⁶

Passages, which the Full Federal Court cited in support, from those two authorities are:

I accept wholeheartedly that the contemporary approach of this court to the interpretation of contested statutory language is the purposive approach. However, adopting that approach does not justify judicial neglect of the language of the statute, whether in preference for historical or other materials, perceived legal policy or any other reason. A purposive construction is supported by s 15AA of the Acts Interpretation Act 1901 (Cth). But that section also does not permit a court to ignore the words of the Act. Ultimately, in every case, statutory construction is a text-based activity. It cannot be otherwise.²⁷

It is not often that the courts are given the opportunity of interpreting legislation providing for the implementation of an entirely new tax and especially one which is intended to operate broadly over the entire sphere of economic activity. The tools which permit judges to interpret in a purposive way with an eye to ensuring that the tax works as it may be assumed to be intended to work in the real world are there, but with one exception. There will obviously be unintended consequences which arise in the implementation of a new tax drafted in a way which in many respects differs from comparable legislation in other jurisdictions. While, in part, such unintended consequences can be dealt with by the ruling system that is not a satisfactory long-term solution to problems. There is a need for the legislature to cure defects from time to time. Yet there seems to be a refusal on the part of government to admit there are defects and to make amendments other than amendments which may be thought necessary to overcome avoidance. In some case, the courts may be able to resolve difficulties by applying a purposive construction but in the Australian constitutional context where there is a sharp separation of the legislative and judicial powers there is a limit to what one can expect of the courts. Ultimately the courts can not act as legislators. Parliament can not stand by and then blame the courts if a decision is one that does not favour the revenue when the problem lies not in how the legislation is to be interpreted in a common sense way, but in how it is written.²⁸

²³ *Reliance* [2007] FCAFC 99, para 26.

²⁴ *Reliance* [2007] FCAFC 99, para 27.

²⁵ *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273.

²⁶ Justice Graham Hill, ‘To interpret or translate? The judicial role for GST cases’ (Paper presented at a conference organised by Monash University on ‘Interpreting GST law’, Sydney, 5 August 2005).

²⁷ *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273, per Kirby J, 305-306.

²⁸ Hill, above n 26.

Both of those authorities, however, do not mandate a disregard for comments in a relevant explanatory memorandum as clear in their purported object (on a commonsensical view) as found in para 6.166 of the Explanatory Memorandum.

In any event, both of those authorities cannot, by any means, be taken as representing a definitive approach to statutory interpretation that has uniform application. There is copious authoritative literature which credibly demonstrates that, in practice, there is no single definitive approach to statutory interpretation. And that what happens in practice, when judges undertake statutory interpretation, is that judges choose, from a long menu of potential rationalisations, one or more rationalisations to support an interpretation those judges prefer.²⁹ The two authorities (as referred to above) relied upon by the Full Federal Court, therefore, represent no more than one of many such potential rationalisations that can be chosen by judges to support an interpretation they prefer.

The analysis articulated above, as noted earlier, is premised on the presence only of the second part (but not the first part). That was, as mentioned earlier, the premise on which the *Reliance* case was seemingly argued before the Full Federal Court. The proper analysis if the first part is present (as it was in the *Reliance* case) has already been articulated.

The approach advanced in this article as the proper approach to interpreting s 99-5 does, indeed, have rigorous, coherently articulated (and thus authoritative) literature in support of it, literature which is canvassed below.

In an article, well-argued with reference to judicial and legislative authorities, published in 2000,³⁰ the current Commissioner, Michael D'Ascenzo, who was a Second Commissioner of Taxation at the time of writing that article, observed:

Resignment to the proposition that effective implementation of the tax law is possible only with an all-knowing and infallible legislator (which does not exist in reality), ... is likely to lead to a sub-optimal, and in some cases dysfunctional operation of the community's tax laws.
...

There is also much to be said for the view that "[judges, as final arbiters in the implementation process, should thus assume responsibility for ensuring that legislation is as coherent as possible."³²

Understanding this reality, the courts have taken a purposive approaches to the interpretation of statutes or have intervened to fill a gap in the legislation, where they have considered there was good reason to do so, taking into account "considerations of logic, common-sense, and policy." ... Courts have preferred alternative constructions, or have had regard to underlying issues even where "incautious expression" does not appear to deal with them. ... This is particularly so where a literal approach would produce a result that would be "incongruous, contrary to the objects of the Act, capricious or irrational" ... or 'where the ordinary meaning is manifestly absurd, or unreasonable such that Parliament could hardly have intended that result, so that some other meaning should be preferred' ... or "where the literal or

²⁹ For a readily accessible analysis, see, for instance, Ruth Sullivan, 'The plain meaning rule and other ways to cheat at statutory interpretation', *Legal Drafting* <<http://aix1.uottawa.ca/~resulliv/legdr/pmr.html>> at 25 September 2006; and Karl N Llewellyn, 'Remarks on the theory of appellate decision and the rules or canons about how statutes are to be construed', (1950) 3 *Vanderbilt Law Review*, 395.

³⁰ Michael D'Ascenzo, M, 'Along the road to Damascus: A framework for interpreting the tax law', *Journal of Australian Taxation* (November/ December 2000), 384.

³¹ *Ibid*, 385.

³² *Ibid*, 385.

grammatical meaning gives rise to an injustice, or even in some cases to an anomaly or inconvenience, which may mean that parliament did not intend that meaning to prevail; ... or where the words are susceptible to an alternative construction and the construction is “more consonant with good sense” and the “commercial realities” ... of the situation or more in accord with “logic and policy”.³³

Responsible and measured judicial approaches and interventions of this nature allow the tax system to operate with a sense of equity and efficiency, and promote substantive equality of treatment. ... They reflect an acceptance of the responsibility to ensure that if “the courts can identify the target of parliamentary legislation their proper function is to see that it is hit; not merely to record that it has been missed.”³⁴

A distinguished Canadian tax law professor, Neil Brooks, in two works, has developed an approach to interpreting tax laws largely consistent with that advocated by D’Ascenzo. Those two works are *The responsibility of judges in interpreting tax legislation*,³⁵ and *Statutory interpretation as incremental policy-making: Illustrated by reference to Canadian GST cases*.³⁶ In the latter, which builds on the former, Brooks advocates what he describes as a ‘consequentialist’ approach to statutory interpretation, an approach which he justifies thus:

clarifying what a consequentialist approach to statutory interpretation entails is to note that my position is that in filling a gap (or resolving any question in dispute) in the legislation judges should engage in the same reasoning process as by tax policy analysts in the treasury department have had engaged in if the Minister had asked them to clarify the meaning of the statute on the issue in dispute. Instead of attempting to divine the plain meaning of words, or the legislative intent or purpose, the judge should act as a tax policy analyst.³⁷

... [T]he commentator on statutory interpretation [who I have taken most comfort from is Richard Posner, the Chief Judge of the US Court of Appeals for the Seventh Circuit, pioneer of the law and economics movement, and prolific author on almost every subject and many public policy issues, including statutory interpretation. He is the leading advocate of the view that consequences should matter to a theory of legal interpretation. ... He has suggested that statutory interpretation might proceed by examining consequences alone: “Maybe the best thing to do when a statute is invoked is to examine the consequences of giving the invoker what he wants and then estimate whether those consequences will on the whole be good ones.” ...³⁸

The difference between what I am referring to as the consequentialist approach and the purposive approach is only a matter of degree. ... [U]nder the consequentialist approach the ... [judges] ... [i]nstead of purporting to deduce their conclusion from the discovered purpose of the legislation, judges weigh the consequences of the application of the statute. Purposivists search through the legislative record to attempt to find explicit references to the purposes and aims that the legislators had in mind; consequentialists are more likely to derive the purpose of the statute from the structure of the legislation and use of information from the legislative record to assist in analysing the consequences of alternative interpretations. The consequentialist approach places much more emphasis on facts and policy analysis in judicial decision-making. In deciding cases, judges have to consider not only the broad purposes of the legislation, but also all of the factors that would be considered by a policy analyst in the Revenue Department in formulating a rule to answer the adjudicated question: the ease with

³³ Ibid, 385 -386.

³⁴ Ibid, 386.

³⁵ Neil Brooks, ‘The responsibility of judges in interpreting tax legislation’, in Graeme S Cooper (ed) *Tax avoidance and the law* (Amsterdam: IBFD Publications BV, 1997), 93.

³⁶ Neil Brooks, ‘Statutory interpretation as incremental policy-making: Illustrated by reference to Canadian GST cases’ (Paper presented at a conference organised by Monash University on ‘Interpreting GST law’, Sydney, 5 August 2005).

³⁷ Ibid, 3.

³⁸ Ibid, 7.

which the implicit rule can be administered; the consequences of the holding for the achievement of horizontal and vertical equity, the likely effect of the holding on individual incentives, the effect of the holding on the government's ability to raise revenue, and the effect of the rule on tax avoidance and evasion behaviour.³⁹

The approach to statutory interpretation advocated by D'Ascenzo is a purposive approach, an approach which the Full Federal Court did adopt (but, as reasoned above, not correctly). The approach to statutory interpretation advocated by Brooks is a consequentialist approach, which Brooks, in the quotation just above, distinguishes from a purposive approach. In distinguishing so, though, Brooks concedes that the distinction can, in circumstances, be subtle, so as to, as in the *Reliance* case, be nearly non-existent when judged by the ultimate interpretive outcome resulting from either approach. Under either of those approaches, s 99-5 should have been interpreted by the Full Federal Court such as to make the taxpayer liable to GST on the forfeited deposit. That is so as that is the interpretive outcome that accords with the overall policy rationale underpinning the GST, an interpretive outcome which is the same reached under either a purposive approach or a consequentialist approach.

GST essentially is a tax on private consumption. Thus, producers are allowed to deduct from GST payable by them on their outputs the GST included in the cost of their inputs. That is so as, otherwise, there will be cascading of GST as inputs pass through the value chain (involving one or more producers) before they reach the final consumers in the form of finished outputs.

For that overall policy rationale underpinning the GST to be efficacious, every producer must pay GST on all its receipts. As, otherwise, there will be no GST paid on all private consumption. The taxpayer, in the context, was a producer, not a private consumer. It should, therefore, pay GST on all its receipts, including the forfeited deposit.

The Full Federal Court, as noted earlier, did acknowledge that 'the legislative purpose' of the GST⁴⁰ was to be 'a tax on private consumption in Australia'.⁴¹ Remarkably, however, as noted earlier, it concluded that its decision was not 'inconsistent'⁴² with that 'legislative purpose', without reasoning how it reached that conclusion. Perhaps, if it did, it will have realised that its decision was not right.

One cannot counter the argument just outlined to the effect that many supplies by producers are explicitly not liable to GST: for instance, supplies of residential accommodation, supplies made by suppliers who are not registered for GST, and financial supplies. Those supplies are not liable to GST not because it is not the overall policy rationale underpinning GST that every producer must pay GST on all its receipts. Rather, those supplies are not liable to GST so as to accommodate other subsidiary policy rationales, such as (in order) ameliorating the otherwise regressive impact the GST may have on users of residential accommodation, reducing the administrative burden that may otherwise be cast upon small businesses if they are made liable to GST, and recognising the practical difficulty to reliably measure the "value-added" by those making financial supplies.

³⁹ *Ibid*, 17.

⁴⁰ *Reliance* [2007] FCAFC 99, para 31.

⁴¹ *Reliance* [2007] FCAFC 99, para 31.

⁴² *Reliance* [2007] FCAFC 99, para 31.

IV CONCLUSION

For the reasons canvassed in this article, in the *Reliance* case, the Full Federal Court surely erred badly. It erred so, this article has argued, on either of two grounds:

- it erred on drawing the proper conclusion on applying the relevant legislative provisions to the facts; or
- it applied a method of statutory interpretation (under the purposive approach) which was not the best.

The submissions made on behalf of the Commissioner to the Full Federal Court did not include the first of those two grounds. Those submissions did include the second, but not underpinned by the analysis articulated in this article. The Commissioner was granted special leave by the High Court to appeal the Full Federal Court's decision. It was subsequently announced that he would appeal to the High Court.

Postscript

The High Court has now unanimously overturned the decision of the Full Federal Court in *Reliance*.⁴³

The High Court concluded that, for GST purposes, there was a “supply” by the taxpayer [which] occurred before the forfeiture and thus before the provision of consideration ...’.⁴⁴ That ‘supply’, the High Court reasoned, was due to two reasons:

- *as correctly determined by the Administrative Appeals Tribunal, ‘upon execution of the contract the [taxpayer] made a supply in that, in terms of s 9-10(2)(g) ...it “entered into an obligation” to do the things it was bound to do under the contract’;*⁴⁵ and
- *‘within the meaning of par (d) of s 9-10(2) as extended by the definition of “real property”, there was upon exchange of contracts the grant by the taxpayer to the [prospective] purchaser of contractual rights exercisable over or in relation to land, in particular of the right to require in due course conveyance of the land to it upon completion of the sale’.*⁴⁶

⁴³ *Commissioner of Taxation v Reliance Carpet Co Pty Ltd* [2008] HCA 22 (22 May 2008) (*‘Reliance’*).

⁴⁴ *Reliance* [2008] HCA 22, para 37.

⁴⁵ *Reliance* [2008] HCA 22, para 37.

⁴⁶ *Reliance* [2008] HCA 22, para 37.