



THE TRUSTEE FOR ANTHONY JAMES JONSSON AND ANTHONY RAYMOND BEVEN OF GRANT THORNTON AUSTRALIA AS ADMINISTRATORS OF THE APPLICANT'S SETTLEMENT DISTRIBUTION SCHEME HANS PEARSON VS STATE OF QUEENSLAND  
c/Grant Thornton  
Attention Jade Smith  
Level 17 383 Kent Street  
Sydney NSW 2000

**Our Reference:** 1051808553198  
**Contact Officer:** Matthew Fileman  
**Phone:** 13 28 69  
**Client ID:** [REDACTED]

5 July 2021

## We are notifying you of your private ruling

Dear Trustee,

**Authorisation number:** 1051808553198  
**Authorising officer:** Djurdja Gayler

On 27 November 2020, you applied for a private ruling relating to your activities as Administrators.

Please find:

- › below your private ruling and the reasons for our decision
- › attached a fact sheet giving information about private rulings including how to have the decision reviewed by objecting, and
- › attached an edited version of your ruling that we will publish on our website.

You have:

- › 60 days (longer in some cases) to object to the private ruling if you disagree with it. If you have an assessment to which the ruling relates, you should object to the assessment and not the ruling.
- › 28 days to comment on the edited version.

More information is included in the *Private rulings* fact sheet.

### Notice of private ruling

This ruling applies to:

**Client name**

The Trustee For Anthony James Jonsson And Anthony Raymond Beven Of Grant Thornton Australia As Administrators Of The Applicants Settlement Distribution Scheme Hans Pearson Vs State Of Queensland

This ruling applies to any future trustees, for as long as the ruling remains current.

#### NEED HELP?

If you have any questions, you can phone us on **13 28 69** between 8.00am and 5.00pm, Monday to Friday, and ask for Matthew Fileman on extension **38164**.

We need to know we're talking to the right person before we can discuss your tax affairs. We'll ask for details only you or someone you've authorised would know. An authorised person is someone who you've previously told us can act on your behalf.

It will help if you quote 'Our reference', which you will find at the top of this letter and have your tax file number or Australian business number handy.

#### HELP IS AVAILABLE

If you have been affected by COVID-19, bushfires or other disasters

- › visit [ato.gov.au/disasters](https://ato.gov.au/disasters)
- › phone our Emergency Support Infoline on **1800 806 218**.

## Issue 1. Enterprise

### Question 1

Is Anthony James Jonsson and Anthony Raymond Beven of Grant Thornton Australia as Administrators and Trustees of the Applicant's Settlement Distribution Scheme Hans Pearson Vs State of Queensland (the Administrators) carrying on an enterprise for the purposes of subsection 9-20 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) and thus entitled to claim input tax credits in respect of acquisitions made for a creditable purpose in carrying on the enterprise?

### Answer

No, the Administrator is not carrying on an enterprise for the purposes of section 9-20 of the GST Act. As a result, the Administrator is not entitled to claim input tax credits under section 11- 20 of the GST Act.

## Issue 2. Entitlement to input tax credits

### Question 2

Is the Administrator making a creditable acquisition of services from the Litigation Funder and entitled to claim input tax credits under section 11-20 of the GST Act?

### Answer

No, the Administrator is not making a creditable acquisition of services from the Litigation Funder and is not entitled to claim input tax credits under section 11-20 of the GST Act. The Administrator is not making an acquisition from the Litigation Funder, the Litigation Funder's supply is not a taxable supply and the Administrator is not carrying on an enterprise.

## Issue 3. Entitlement to input tax credits

### Question 3

Is the Administrator entitled to claim input tax credits on the reimbursement they make to the Litigation Funder for legal services incurred by it?

### Answer

No, the Administrator is not making a creditable acquisition when it reimburses the Litigation Funder for the legal services. The Administrator is not entitled to claim input tax credits. The Administrator is not making an acquisition from the Litigation Funder and the Administrator is not carrying on an enterprise.

## This ruling applies for the following periods:

17 January 2020 to 17 January 2024

## Relevant facts and circumstances

This ruling is based on the facts stated in the description of the scheme that is set out below. If your circumstances are materially different from these facts, this ruling has no effect and you cannot rely on it. The fact sheet has more information about relying on your private ruling.

1. The State of Queensland agreed to settle a class action brought against it for alleged wage theft in the matter of *Hans Pearson v State of Queensland* QUD714/2016 (the Proceedings) by paying \$190 million to members of a class estimated to number up to 14,000 people (Claimants).<sup>1</sup>

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<sup>1</sup> Grant Thornton Australia (GTAL) Private ruling request 25 November 2020 (**PBR Request**), pp 1-2; 9 July 2019, Media Release from LLS and the Lawyers regarding settlement of the Proceedings (**Media Release**), p 1-2; Class Action Settlement Notice to Claimants as approved by the Court on 4 September 2019

2. Mr Pearson (the Litigation Applicant) commenced the Proceedings in the Court during 2016 on behalf of Claimants that were Aboriginal and Torres Strait Islanders who resided in, and had wages controlled by the State, between 12 October 1939 and 4 December 1972 (Claim Period).<sup>2</sup> The Proceedings alleged that the State engaged in wilful default or neglect, and owed duties to the Claimants, which it breached by withholding their wages during the Claim Period.<sup>3</sup>
3. Anthony James Jonsson and Anthony Raymond Beven, as the Administrators of the Settlement Distribution Scheme Hans Pearson Vs State of Queensland, has lodged an application for an Australian Business Number and GST registration for the trust that is the Settlement Distribution Scheme.
4. The agreements, Court Orders and Deeds outlined below reflect the substance of the arrangements between the Litigation Applicant, the Litigation Funder, the Lawyers and the Administrators. The Court Orders, and Deeds established to give effect those orders, prevail over the Litigation Funding Agreement in relation to matters and arrangements associated with the management of the settlement fund.

### Litigation funding

5. Litigation Lending Services Ltd (ABN: 18 129 188 825) (LLS) was engaged to fund the Proceeding. Under this engagement, it was agreed that:
  - the Litigation Funder would provide funding for the Proceedings (subject to the terms of the agreement);
  - the Litigation Funder would appoint lawyers (the Lawyers) to provide legal services to the Litigation Applicant; and
  - the Litigation Funder would be entitled to a “success fee” or “Lender’s Commission” contingent on a successful outcome of the litigation.
6. By 21 April 2016, (LLS) and the Litigation Applicant had entered into the Litigation Funding Agreement (LFA). Under the LFA, the Litigation Applicant agreed to assign LLS a sum ranging from 15%-25% of any settlement payment in the Proceedings (the Settlement Payment), in consideration for LLS funding the Proceedings (the Commission).<sup>4</sup>
7. On 21 April 2016, LLS appointed Bottoms English Lawyers (the Lawyers) to represent and advise the Litigation Applicant in the Proceedings and to provide the Litigation Applicant with related project management and administrative services (Legal Work).<sup>5</sup> LLS agreed not to retain the Lawyers for any purpose connected with the LFA or connected with any proceedings to which this LFA applies.<sup>6</sup>
8. The Litigation Applicant consented to LLS communicating with the Lawyers about the Proceedings<sup>7</sup> and for LLS to access documents from the Lawyers in order to investigate evidence for the Proceedings, monitor their progress, develop settlement strategies, assess the State’s capacity to pay the Settlement Payment, and investigate any other matters LLS considered relevant to its financial interest in the Proceedings.<sup>8</sup>
9. The Litigation Applicant could instruct the Lawyers and make binding decisions about the Proceedings.<sup>9</sup> LLS could give day to day instructions to the Lawyers on all matters concerning the Proceedings.<sup>10</sup> Any final decisions LLS proposed about the Proceedings required the Litigation Applicant’s approval.<sup>11</sup> The Litigation Applicant’s instructions to the Lawyers prevailed over any inconsistent instructions from LLS.<sup>12</sup> In the case of conflict, the Lawyers’ obligations to the Litigation Applicant took precedence over any obligations they owed to LLS.<sup>13</sup>

<sup>2</sup> PBR Request, p 1; Settlement Notice, Sections 1 & 2, p 2

<sup>3</sup> PBR Request, p 2. LFA, Recital A.

<sup>4</sup> PBR Request, p 2; Appendix B, p 15; LFA, Recitals C & E, cl 5.4, 11.1(b).

<sup>5</sup> 21 April 2016 document entitled Terms of Engagement (**Engagement**) between LLS and the Lawyers reproduced as Schedule 1 to the LFA, cl 2(a).

<sup>6</sup> LFA, cl 3.10. Funding Terms, paragraph 13(c).

<sup>7</sup> LFA, cl 1.2(b).

<sup>8</sup> LFA, cl 1.2(a).

<sup>9</sup> LFA, cl 3.2

<sup>10</sup> LFA cl 3.5.

<sup>11</sup> LFA, cl 3.4

<sup>12</sup> LFA, cl 3.5.

<sup>13</sup> LFA, cl 3.7.

10. The LFA also required the Litigation Applicant to assign LLS an amount from the Settlement Payment equal to the legal costs and disbursements that LLS had incurred to fund the Legal Work up until the Settlement Payment date (Legal Costs).<sup>14</sup>
11. This amount was capped at the \$380,000 GST inclusive limit LLS placed on providing funding while it assessed whether to finance the Proceedings, and the \$5.3m GST inclusive limit LLS placed on funding the Proceedings thereafter.<sup>15</sup> Upon receipt of the Settlement Payment, the Lawyers became entitled to be paid any Legal Costs they had charged LLS for Legal Work exceeding the monetary limits (Remaining Costs).<sup>16</sup>
12. LLS and the Lawyers could agree to vary the appointment of the Lawyers to act for the Litigation Applicant.<sup>17</sup> LLS promised to notify the Litigation Applicant of any variations.<sup>18</sup> The appointment of the Lawyers could be terminated with notice to LLS and the Litigation Applicant, if among other things, the Lawyers terminated their agreement to provide legal services to the Litigation Applicant, LLS and the Lawyers agreed to the termination, the LFA was terminated (including by the Litigation Applicant where LLS defaulted in its obligation to provide litigation funding), LLS didn't pay for invoiced Legal Work within 30 days, or the Lawyers engaged in misconduct.<sup>19</sup>
13. Absent misconduct, the Lawyers could recover Legal Costs from LLS outstanding at termination up to the applicable funding limit, or otherwise as Remaining Costs from the Settlement Payment.<sup>20</sup>
14. The LFA was described as constituting the entire agreement between LLS and the Litigation Applicant.<sup>21</sup> LLS is in the business of providing litigation funding for class action proceedings across Australia.<sup>22</sup> It and the Lawyers were registered for GST at all material times.

#### Trusts & Assignments

15. The Litigation Applicant and LLS authorised the Lawyers to receive the Settlement Payment, and to pay LLS the Commission and Legal Costs from it, in performance of the Litigation Applicant's obligation to assign these amounts to LLS under the LFA.<sup>23</sup> LLS was entitled to be paid the amounts immediately upon receipt of the Settlement Payment.<sup>24</sup> The Litigation Applicant and LLS agreed for the Lawyers to hold these amounts on trust until they were paid.<sup>25</sup> The Litigation Applicant agreed not to assert any right over the Settlement Payment without LLS consent.<sup>26</sup>

#### Administration Expenses

16. The Litigation Applicant acknowledged that he would be bound by any Court order approving a settlement of the Proceedings.<sup>27</sup> He consented to the Lawyers, or any other persons the Lawyers advised, to be appointed as the administrators of a scheme for the distribution of the Settlement Payment (the Administrators).<sup>28</sup> The Litigation Applicant irrevocably instructed the Lawyers to take all steps necessary on his behalf to give full effect to, and enforce, any Court ordered settlement reached in accordance with the LFA's terms.<sup>29</sup>
17. The cost of administering the scheme, including the fees charged by the Administrators, and the expenses the Administrators paid in connection with the administration for court fees, barristers fees, external photocopying fees, IT project management fees, data processing fees, process server fees,

<sup>14</sup> LFA cl 11.1(a).

<sup>15</sup> LFA cl 9.1(c), 9.1(d), 11.1(a), 11.3(a).

<sup>16</sup> LFA cl 9.1(c), 9.1(d), 11.3(a).

<sup>17</sup> Engagement cl 13; LFA 2.4.

<sup>18</sup> LFA, 2.4.

<sup>19</sup> Engagement cl 11(a) & (b); LFA, cl 16.1(a).

<sup>20</sup> Engagement cl 11 (c).

<sup>21</sup> LFA, cl 18.1

<sup>22</sup> See <https://litigationlending.com.au/what-we-do/>.

<sup>23</sup> LFA, cl 10.1.

<sup>24</sup> LFA, cl 11.1, 11.2.

<sup>25</sup> LFA, cl 10.3

<sup>26</sup> LFA, cl 12.1.

<sup>27</sup> LFA, cl 3.9.

<sup>28</sup> LFA, 10.2(b).

<sup>29</sup> LFA, cl 6.8(d).

expert report fees, external consultants fees, interstate agent fees and travel and accommodation fees (Administration Expenses) were payable from the Settlement Payment.<sup>30</sup>

### Payment Directions

18. Subject to any contrary Court order, under the LFA, the Litigation Applicant authorised the Lawyers to pay the amounts owing from the Settlement Payment in the following way (the payment directions) (i) first to LLS, the Commission, (ii) second, to LLS, the Legal Costs, (iii) third, to the Lawyers, the Remaining Costs, (iv) fourth, to the Administrators, the Administration Expenses, and (v) fifth, to the Claimants, the balance of the Settlement Payment on a prorated basis determined by the Lawyers with assistance from the administrators.<sup>31</sup>
19. The Litigation Applicant had to pay the Lawyers any part of the Settlement Payment he received otherwise than by Court order or by distribution from the Administrators, so that it could be dealt with under the payment directions.<sup>32</sup> The Litigation Applicant was liable to account to LLS for payment of the Commission and Legal Costs from the Settlement Payment after exercising any right to exclude himself from the Proceedings.<sup>33</sup> If the Litigation Applicant ceased being a representative party for Claimants in the Proceedings, the Lawyers could, with Court approval, appoint a new representative party to be the Litigation Applicant.<sup>34</sup>
20. Unless terminated on grounds including serious breach, or the Litigation Applicant disagreeing with the appointment of new lawyers,<sup>35</sup> the LFA had continuing effect until the Settlement Payment was distributed according to the payment directions.<sup>36</sup>

### Legal Costs

21. The Lawyers had to tell LLS the name of their staff and any experts working on the Proceedings (this work being known as the Project),<sup>37</sup> the rates of barristers retained for that purpose, and give LLS an estimate of the Legal Costs.<sup>38</sup> The Lawyers had to keep LLS informed of all matters concerning the Proceedings, give LLS any document it reasonably requested, and ensure LLS and the Litigation Applicant received all information necessary to facilitate the provision of informed instructions.<sup>39</sup>
22. The Lawyers agreed to charge LLS for the Legal Work at GST inclusive hourly rates increasing with the seniority of staff working on the Project, and to limit any hourly rate increases to 5% p.a.<sup>40</sup> LLS would only pay Legal Costs charged by those staff, barristers and experts whose names were notified to it by the Lawyers, or who were otherwise briefed with LLS consent.<sup>41</sup>
23. LLS agreed to reimburse the Lawyers for disbursements reasonably incurred on travel, accommodation, photocopying, scanning or other expenditure connected with the Project as part of the Legal Costs.<sup>42</sup> The Lawyers had to issue LLS monthly invoices for the Legal Costs inclusive of any related invoices from barristers and experts.<sup>43</sup> LLS had to pay the Lawyers within a month of being invoiced.<sup>44</sup>
24. An experienced barrister unaffiliated with the Litigation Applicant, the Lawyers and LLS, was required to resolve any dispute about the Legal Costs between LLS and the Lawyers.<sup>45</sup> The Lawyers agreed to keep performing the Legal Work even if the LLS funding limits were exceeded. This was on the understanding

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<sup>30</sup> LFA cl 11.3(b), 23.1 (Administration Expenses definition).

<sup>31</sup> LFA, cl 11.4.

<sup>32</sup> LFA, cl 11.6, 11.7.

<sup>33</sup> LFA, cl 16.4.

<sup>34</sup> LFA, cl 3.3.

<sup>35</sup> LFA, cl 15, 16.

<sup>36</sup> LFA, cl 14.1(b).

<sup>37</sup> Engagement, cl 1, 3; LFA 23.1 (Project definition).

<sup>38</sup> Engagement, cl 3.

<sup>39</sup> Engagement, cl 4; Funding Terms, paragraph 12.

<sup>40</sup> Engagement, c 5(a).

<sup>41</sup> Engagement, cl 5(b).

<sup>42</sup> Engagement, cl 5(c).

<sup>43</sup> Engagement, cl 6(a) & (b).

<sup>44</sup> Engagement, cl 6(c).

<sup>45</sup> Engagement cl 6(e); LFA, 23.1 (Independent Counsel definition).

that LLS would pay for the Legal Costs up to its funding limits, and that the Lawyers would receive any Remaining Costs from the Settlement Payment.<sup>46</sup>

### The Fund Order

25. By orders dated 25 August 2017 (the Fund Order) made under sections 23 and 33ZF of the *Federal Court of Australia Act 1976* (FCAA) and rule 1.32 of the *Federal Court Rules 2011*, the Court fixed the Commission payable to LLS at 20% of the Settlement Payment.<sup>47</sup>
26. The Court ordered the Litigation Applicant to pay LLS the Commission so fixed, and the costs and expenses of the Proceedings, from the Settlement Payment, on the terms specified in Annexure 2 of the Fund Order (the Funding Terms).<sup>48</sup> The Litigation Applicant, LLS and the Lawyers undertook to comply with their obligations under the Funding Terms.<sup>49</sup>
27. The Funding Terms adopted conditions from the LFA and the Lawyers' appointment to act for the Litigation Applicant through requiring:
  - a. LLS to fund the Litigation Applicant's costs and expenses in prosecuting the Proceedings by paying the Lawyers the Legal Costs for their Legal Work on the Project up to the applicable LLS funding limit, paying any cost orders made against the Litigation Applicant in the Proceedings, and providing any security for costs in the Proceedings as ordered by the Court or agreed with the State;<sup>50</sup>
  - b. the Lawyers to receive and hold the Settlement Payment in a separate trust account;<sup>51</sup>
  - c. the Litigation Applicant to pay any money he received from the State in connection with a settlement of the Proceedings to the Lawyers, so that it could be dealt with as part of the Settlement Payment according to the payment directions;<sup>52</sup> and
  - d. the Lawyers to pay the Settlement Payment from the trust account in accordance with the payment directions,<sup>53</sup> subject to Court ordered modifications in the Funding Terms that:
    - i. LLS was entitled to an additional sum from the Settlement Payment on account of GST for any taxable supply it made under or in connection with the Funding Terms;<sup>54</sup> and
    - ii. the distribution of the Settlement Payment to Claimants after paying LLS the Commission and Legal Costs, the Lawyers any Remaining Costs and the Administrators the Administration Expenses, was to be in accordance with a Court approved settlement distribution scheme (SDS).<sup>55</sup>
28. The Funding Terms also clarified that the Lawyers owed professional duties to the Litigation Applicant and not LLS; that the Litigation Applicant could override any instructions from LLS to the Lawyers;<sup>56</sup> that the Funding Terms could only be terminated by Court order made on application by the Claimants or LLS;<sup>57</sup> that LLS would forgo the Commission if there was a termination on its application;<sup>58</sup> and that the Funding Terms prevailed to the extent of any inconsistency with the LFA and any legal costs agreement between the Litigation Applicant and the Lawyers.<sup>59</sup>

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<sup>46</sup> Engagement cl 10.

<sup>47</sup> Fund Order, Orders 2(b) & 3.

<sup>48</sup> Fund Order, Orders 2 & 3.

<sup>49</sup> Fund Order, Order 4; Settlement Order, Order 10. The undertaking was given on 12 September 2017.

<sup>50</sup> Funding Terms, paragraph 2.

<sup>51</sup> Funding Terms, paragraph 3.

<sup>52</sup> Funding Terms, paragraphs 3-5.

<sup>53</sup> Funding Terms, paragraphs 5, 6.

<sup>54</sup> Fund Order, Order 2(c); Funding Terms, paragraph 6 (c).

<sup>55</sup> Funding Terms, paragraph 5(b).

<sup>56</sup> Funding Terms, paragraphs 8-11.

<sup>57</sup> Funding Terms, paragraph 19.

<sup>58</sup> Funding Terms, paragraph 20(a).

<sup>59</sup> Funding Terms, paragraphs 22-23.

## The Settlement Notice

29. On 9 July 2019, LLS and the Lawyers issued a media release welcoming an in-principle agreement with the State to settle the Proceedings for a \$190 million payment (Media Release). The Media Release noted that the settlement was subject to Court approval and that the State did not admit liability.<sup>60</sup>
30. On 4 September 2019, the Court approved a Class Action Settlement Notice to Claimants (Settlement Notice). The Settlement Notice gave Claimants information about the settlement proposal, explained the requirements for registering a claim to share in the Settlement Payment (which the Settlement Notice described as the settlement fund),<sup>61</sup> and explained how to opt out of the Proceedings or object to the settlement.<sup>62</sup>
31. The Settlement Notice stated that the Litigation Applicant agreed to forgo any further claims against the State for alleged wage theft on behalf of Claimants in exchange for the Settlement Payment.<sup>63</sup>
32. The Settlement Notice stated that the Litigation Applicant intended to apply for Court approval of the settlement, on terms that included deducting the following amounts from the Settlement Payment:
  - a. \$12.5 million for legal costs incurred in bringing the Proceedings and obtaining settlement approval;
  - b. up to \$38 million, being 20% of the Settlement Payment, for the litigation funding commission due to LLS in return for assuming the risk of, and paying the legal costs for, the Proceedings;
  - c. a deduction to meet the cost of administering the SDS; and
  - d. a deduction to compensate the Litigation Applicant for assisting with the Proceedings (the Litigation Applicant's Payment).<sup>64</sup>
33. The Settlement Notice estimated that approximately \$139.5 million worth of the \$190 million Settlement Payment would remain for distribution to Claimants after a Court approved settlement on these terms.<sup>65</sup>
34. The Settlement Notice stated that the Lawyers had developed an SDS for Court approval<sup>66</sup> and informed Claimants that the:
  - a. SDS would be run by an administrator,<sup>67</sup> who would manage distribution of the Settlement Payment and organise how and when Claimants would receive their share;<sup>68</sup>
  - b. Lawyers would advise and assist the administrator with the administration, unless the administrator decided to use different lawyers;<sup>69</sup>
  - c. Settlement Payment would be paid into a bank account and earn interest until its distribution;<sup>70</sup>
  - d. deductions from the Settlement Payment would cover the legal costs of the Lawyers, barristers and experts involved in the Proceedings, the costs of settling the Proceedings including preparing the Settlement Notice and obtaining settlement approval, and the costs of administering the SDS;<sup>71</sup>
  - e. Court's approval of these deductions from the Settlement Payment would enable the Claimants to share equally in meeting the legal costs of the Proceedings without having to pay any further costs;<sup>72</sup> and
  - f. estimated \$12.5 million in legal costs to be deducted from the Settlement Payment exceeded the funding limit and would be verified by an independent costs assessor (the Referee).<sup>73</sup>

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<sup>60</sup> Media Release, pp 1-2.

<sup>61</sup> Settlement Notice, Section B, p 3.

<sup>62</sup> Settlement Notice, Section B, p 2.

<sup>63</sup> Settlement Notice, Section B, p 3.

<sup>64</sup> Settlement Notice, Section B, p 3; [4], p 8; [5], p 8.

<sup>65</sup> Settlement Notice, Section B, p 3.

<sup>66</sup> Settlement Notice, Section E, p 6.

<sup>67</sup> Settlement Notice, [1], p 7.

<sup>68</sup> Settlement Notice, [1], p 7.

<sup>69</sup> Settlement Notice, [1], p 7.

<sup>70</sup> Settlement Notice, [2], p 7.

<sup>71</sup> Settlement Notice, [3], p 7.

<sup>72</sup> Settlement Notice, [3], p 7.

<sup>73</sup> Settlement Notice, [3], p 7.

35. The Settlement Notice stated that the administrator would calculate how much each Claimant would receive from the Settlement Payment after paying the legal fees (i.e. the Legal Costs and any Remaining Costs), the Commission, the Litigation Applicant's Payment and the Administration Expenses.<sup>74</sup>
36. The Claimants were informed that their entitlement to the Settlement Payment would differ based on their ethnicity, gender, age and whether they were living or deceased (the registration information).<sup>75</sup> The Settlement Notice requested Claimants, or their representatives give the administrator the registration information by completing a registration form attached to the Notice and returning it to the Lawyers by 8 November 2019.<sup>76</sup>
37. The Settlement Notice explained that the administrator would use the registration information to quantify Claimant entitlements using a formula under which Claimants that were living older male Aboriginals would receive more of the Settlement Payment compared to other Claimants, as they generally worked for longer and suffered greater loss in the Claim Period (the loss assessment formula).<sup>77</sup>
38. The Settlement Notice informed Claimants that they would receive a distribution statement from the administrator after the administrator had assessed their registration information.<sup>78</sup> The distribution statement would identify the Claimant's entitlement to the Settlement Payment and the information the administrator used to calculate it.<sup>79</sup> The Settlement Notice informed Claimants they could seek review of the distribution statement (distribution statement review).<sup>80</sup>
39. The Settlement Notice stated that the administrator would pay Claimants after finalising all distribution reviews.<sup>81</sup>

#### **Settlement Order**

40. On 17 January 2020 (the Settlement Approval Date), the Court made an order under sections 33V and 33ZF of the FCAA (the Settlement Order) approving and appointing:
  - a. the settlement of the Proceedings on the terms set out in the Settlement Deed annexed to an affidavit the Lawyers filed on 15 November 2019 (the Deed) and the SDS annexed to the Settlement Order;<sup>82</sup>
  - b. Anthony James Jonsson and Anthony Raymond Beven of GTAL as the administrators, i.e. the administrators to act in accordance with, and have the powers and immunities specified by the SDS;<sup>83</sup>
  - c. Ms Elizabeth Harris as the Referee, to report to the Court quarterly about the reasonableness of costs the Lawyers charged for any work they completed under the SDS;<sup>84</sup>
  - d. the amount of \$13,584,233.92 in legal costs rendered by the Lawyers, plus any further amount allowed or certified by the Referee, as the Litigation Applicant's Legal Costs and Disbursements for the purposes of the SDS;<sup>85</sup>
  - e. the amount of \$35,000 as the Litigation Applicant's Payment.<sup>86</sup>
41. The Settlement Order discharged LLS from its undertaking to pay the State any costs ordered against the Litigation Applicant in the Proceedings and discharged the Litigation Applicant,<sup>87</sup> the Lawyers and LLS from their undertaking to comply with the Funding Terms.<sup>88</sup> The Settlement Order required the Litigation Applicant to apply for dismissal of the Proceedings within 7 days after the Court was notified that the administration of the SDS was complete.

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<sup>74</sup> Settlement Notice, [6], p 8.

<sup>75</sup> Settlement Notice, [6], pp 8-9.

<sup>76</sup> Settlement Notice, Section B, p 4; [2], p 6, pp 9, 11.

<sup>77</sup> Settlement Notice, p 9.

<sup>78</sup> Settlement Notice, p 9.

<sup>79</sup> Settlement Notice, p 9.

<sup>80</sup> Settlement Notice, p 9.

<sup>81</sup> Settlement Notice, p 9.

<sup>82</sup> Settlement Order, Order 4.

<sup>83</sup> Settlement Order, Order 9.

<sup>84</sup> Settlement Order, Order 11; SDS, cl 7.

<sup>85</sup> Any added amount allowed or certified by a Referee was subject to contrary Court order; Settlement Order, Orders 6 & 7.

<sup>86</sup> Settlement Order, Order 8.

<sup>87</sup> Settlement Order, Order 12.

<sup>88</sup> Settlement Order, Order 10.



42. The Settlement Order prohibited Claimants from commencing further action against the State regarding the Proceedings but didn't prevent the Litigation Applicant or other Claimants from applying to the Court in connection with the administration of the SDS.<sup>89</sup> The Court ordered the State provide the Administrators with access to a database about State managed Indigenous employee wage reparation arrangements, for confidential use by the Administrators in verifying data they obtained in administering the SDS.<sup>90</sup>

### Further Court Orders

#### The April 2020 Court Order

43. By orders dated 2 April 2020 (April 2020 Court Order), the Court approved increasing the Litigation Applicant's Legal Costs and Disbursements under the SDS from \$13,584,233.92 to \$13,881,952.17, on account of barristers fees rendered to LLS by invoices dated 3 April 2019, and costs the Lawyers incurred in applying for settlement approval.<sup>91</sup> The orders noted that the Litigation Applicant's Legal Costs and Disbursements as increased, were payable from the SDS.<sup>92</sup>
44. By orders dated 8 September 2020, the Court approved SDS amendments with retrospective effect to the Settlement Approval Date (17 January 2020), on the terms set out in the amended SDS annexed to those orders (all subsequent references are to the SDS as amended).<sup>93</sup> These orders also extended to 9 October 2020, the date by which Claimants could provide the Administrators with registration or any other required information (the Settlement Notice originally indicated 8 November 2019).<sup>94</sup>

#### The SDS

45. The SDS stated that the Administrators held the Settlement Payment (plus any accrued interest on that sum less bank fees and tax) upon trust for all persons entitled to receive a part of the Settlement Payment.<sup>95</sup> It specified the terms on which the Settlement Payment would be distributed<sup>96</sup> and recited that:
- a. the Litigation Applicant had incurred legal costs and disbursements in conducting the Proceedings and had entered into the LFA with LLS;<sup>97</sup>
  - b. the Litigation Applicant had agreed to settle the Proceedings on behalf of Claimants for the Settlement Payment inclusive of costs;<sup>98</sup>
  - c. the Fund Order entitled LLS to be paid the Commission from the Settlement Payment;<sup>99</sup>
  - d. costs would also be incurred in administering the SDS<sup>100</sup>
  - e. the SDS provided for deducting the Commission, Court approved costs including those the Litigation Applicant incurred in obtaining or defending the settlement, and the Administration Expenses from the Settlement Payment;<sup>101</sup> and
  - f. the amount remaining after these deductions would be distributed to Claimants.<sup>102</sup>
46. The SDS noted that the Administrators were jointly and severally appointed to administer the scheme.<sup>103</sup> At conclusion of the administration, the SDS required the Administrators to report back to the Court about matters including the number of Claimants that applied for and received part of the Settlement Payment and the amount of the Administration Expenses.<sup>104</sup>

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<sup>89</sup> Settlement Order, Order 5(b).

<sup>90</sup> Settlement Order, Order 16.

<sup>91</sup> 2 April 2020 Court Orders, Order 1.

<sup>92</sup> 2 April 2020 Court Orders, Order 1.

<sup>93</sup> 8 September 2020 Court Orders, Order 1.

<sup>94</sup> 8 September 2020 Court Orders, Order 2.

<sup>95</sup> SDS, cl 60, 1 (Settlement Distribution Fund definition).

<sup>96</sup> SDS, Recital A.

<sup>97</sup> SDS, Recital C.

<sup>98</sup> SDS, Recital B.

<sup>99</sup> SDS, Recital D.

<sup>100</sup> SDS, Recital E.

<sup>101</sup> SDS, Recital F.

<sup>102</sup> SDS, Recital F.

<sup>103</sup> SDS, cl 4.

<sup>104</sup> SDS, cl 69.

## Powers & Duties of The Administrators Under The SDS

47. In specifying their powers and duties (powers & duties), the SDS stated that the Administrators:
- were responsible for administering and distributing the Settlement Payment, at a reasonable and proportionate cost;<sup>105</sup>
  - would act independently and fairly in the interests of all Claimants;<sup>106</sup>
  - would determine the individual entitlement of Claimants calculated in accordance with a formula in the schedule to the SDS that reflected the loss assessment formula explained in the Settlement Notice (Settlement Entitlements);<sup>107</sup>
  - would perform obligations conscientiously;<sup>108</sup>
  - could appoint delegates to act for them regarding the SDS;<sup>109</sup>
  - could make decisions consistent with the SDS that benefited all Claimants;<sup>110</sup>
  - could obtain legal advice including from the Lawyers;<sup>111</sup>
  - could engage third party service providers such as lawyers, tax advisors, registry service providers and mailing houses;<sup>112</sup> and
  - could obtain advice in respect of tax matters arising from the administration or distribution of the Settlement Payment including by way of PBR.<sup>113</sup>
48. The Administrators were permitted to correct any error or omission occurring during their administration despite the terms of the SDS.<sup>114</sup> The Administrators were also permitted to extend the time for completing acts required by the SDS, refer issues arising in the administration to the Court for direction,<sup>115</sup> and apply for Court approval of SDS variations with notice to the Litigation Applicant and the State.<sup>116</sup>
49. The SDS contemplated that the Administrators would engage the Lawyers to assist them in communicating with Claimants, verifying Claimant eligibility in complex cases and resolving multiple or disputed claims when Claimants sought distribution statement reviews (SDS Legal Work).<sup>117</sup> The Referee had to assist the Administrators decide if the Lawyers' charges for the SDS Legal Work were reasonable.<sup>118</sup> The Lawyers were precluded from acting for Claimants in connection with performing SDS Legal Work.<sup>119</sup>
50. The Administrators were also required to consult the Lawyers about obtaining information required to determine Settlement Entitlements, completing distribution statement reviews or such other matters as the Administrator deemed appropriate.<sup>120</sup>

## Trustee & Investment Powers

51. The SDS required the Administrators to hold the Settlement Payment on trust until it was distributed,<sup>121</sup> to distribute the Settlement Payment as expediently as possible<sup>122</sup> and to hold shares in Stolen Wages Administrator (SWA) Pty Ltd (SWA) in their capacity as Administrators until SWA was wound up.<sup>123</sup>

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<sup>105</sup> SDS, cl 5(a), 1 (Settlement Distribution Fund definition).

<sup>106</sup> SDS, cl 5(c), 5(d).

<sup>107</sup> SDS, cl 5(i), 1 (Settlement Entitlements and Loss Assessment Formula definitions).

<sup>108</sup> SDS, cl 5(e).

<sup>109</sup> SDS, cl 5(b).

<sup>110</sup> SDS, cl 5(j).

<sup>111</sup> SDS, cl 5(f), 7, 1 (Advisor definition)

<sup>112</sup> SDS, cl 5(g).

<sup>113</sup> SDS, cl 5(h).

<sup>114</sup> SDS, cl 6.

<sup>115</sup> SDS, cl 59.

<sup>116</sup> SDS, cl 59A, 64, noting that cl 64 required a Court order for the Administrators to extend performing an act 45 days later than required by the SDS. Delays beyond the Administrators' control automatically extended the completion time; SDS, cl 65.

<sup>117</sup> SDS, cl 8A.

<sup>118</sup> SDS, cl 8A.

<sup>119</sup> SDS, cl 11(a).

<sup>120</sup> SDS, cl 7, 8.

<sup>121</sup> SDS, cl 11(a).

<sup>122</sup> SDS, cl 11(b).

<sup>123</sup> SDS, cl 11(c).

52. The SDS identified SWA as a private company with ACN 638 118 466 that was incorporated with the Administrators as sole director shareholders.<sup>124</sup> The shares in SWA were described as an asset of the SDS.<sup>125</sup> The SDS prevented the Administrators from transferring SWA shares, and required Court approval before SWA's directorship or constitution was changed.<sup>126</sup>
53. The SDS enabled the Administrators to transfer the Settlement Payment or any interest that accrued on it, to SWA, so that SWA could hold or invest the funds on behalf of the Administrators.<sup>127</sup> The interest transferred, or any further interest earned from its investment, could be used to meet the cost of Administration Expenses and SDS Legal Work.<sup>128</sup> Any interest remaining after meeting these costs, together with dividends or other distributions from SWA, formed part of the Settlement Payment available to Claimants.<sup>129</sup>
54. In the event they became unable to act, the Administrators had to transfer legal title to the Settlement Payment and any other property held on trust subject to the terms of the SDS, to the replacement administrator appointed by the Court.<sup>130</sup>

#### **Claim Data, Distributions & The Claimant Database**

55. The SDS required the Administrators to create and maintain a database (the Claimant Database) that included the registration information, documents verifying that information, the details of representatives for deceased Claimants, and the details of Claimant mailing address or bank accounts (Claim Data) to which Settlement Entitlements could be paid (Distributions).<sup>131</sup>
56. The Administrators were obliged to maintain the accuracy of the Claimant Database. To this end, they could obtain information and documents from any pre-existing database the Lawyers maintained about the Proceedings, or request the Lawyers obtain further information or documents from Claimants.<sup>132</sup> The Administrators could exclude Claimants from receiving Distributions if they didn't provide requested information within 28 days or calculate their Settlement Entitlements using existing Claim Data in the Claimant Database.<sup>133</sup>

#### **Payment Direction Variations Under The SDS**

57. The SDS varied the payment directions established under the LFA by requiring the Administrators to make payments from the Settlement Payment in the following way:
  - a. First, to the Lawyers, the Litigation Applicant's Legal Costs and Disbursements not already paid by LLS (i.e. Remaining Costs under the LFA);<sup>134</sup>
  - b. Second, to LLS, the Litigation Applicant's Legal Costs and Disbursements which LLS had already paid (i.e. Legal Costs under the LFA);<sup>135</sup>
  - c. Third, to LLS, the Commission (as contemplated in the Settlement Notice and fixed by the Fund Order, at \$38 million or 20%, of the Settlement Payment);<sup>136</sup>
  - d. Fourth, depending on which entity paid them, to the Lawyers or LLS, any outstanding legal costs and disbursements the Litigation Applicant incurred in obtaining Court approval of the settlement that weren't included in the Litigation Applicant's Legal Costs and Disbursements under the SDS;<sup>137</sup> and
  - e. Fifth, to the Litigation Applicant, the Litigation Applicant's Payment of \$35,000.<sup>138</sup>

<sup>124</sup> SDS, cl 34, 1 (Stolen Wages Administrator (SWA) Pty Ltd definition).

<sup>125</sup> SDS, cl 34(a).

<sup>126</sup> SDS, cl 34(b).

<sup>127</sup> SDS, cl 11(ab), 29.

<sup>128</sup> SDS, cl 30, 31, 32, 1 (Administration Costs definition).

<sup>129</sup> SDS, cl 32, 33. See also GTAL's 11 March 2021 email confirming the same in response to ATO 10 March 2021 email requesting clarification of SWA's role in the SDS administration.

<sup>130</sup> SDS, cl 12, 13.

<sup>131</sup> SDS, cl 14.

<sup>132</sup> SDS, cl 15, 17, 23(a).

<sup>133</sup> SDS, cl 18(b), 23(b).

<sup>134</sup> SDS, cl 35(a).

<sup>135</sup> SDS, cl 35(b).

<sup>136</sup> SDS, cl 35(c), cl 1 (Funding Costs definition).

<sup>137</sup> SDS, cl 35(d), 1 (Approval Costs definition).

<sup>138</sup> SDS, cl 35(e), 1 (Applicant's Reimbursement Payment definition).

58. The Administrators could pay Claimants the Settlement Payment that remained after deducting these amounts and the Administration Expenses inclusive of any costs for SDS Legal Work.<sup>139</sup> The Administrators' application of the loss assessment formula to the registration information and other Claim Data in the Claimant Database would determine the size of the Distribution each Claimant received.<sup>140</sup>
59. The SDS required the Administrators to send Claimants a distribution statement by 30 October 2020.<sup>141</sup> The SDS formalised the right of Claimants to seek distribution statement reviews as foreshadowed in the Settlement Notice.<sup>142</sup> The SDS obliged the Administrators to correct any error a review application revealed in quantifying a Distribution within 7 days, or otherwise refer the review application for determination by barristers nominated by the Lawyers.<sup>143</sup>
60. The Administrators had 2 weeks from finalising a distribution review or, otherwise, three months from mailing distribution statements, in which to pay Claimants their Distribution.<sup>144</sup> The Administrators could withhold from the Settlement Payment, any tax they owed as trustees arising from their SDS administration.<sup>145</sup>
61. The Administrators could pay Claimants preliminary distributions pending the finalisation of any tax to be withheld, the Court's approval of the Administration Expenses inclusive of SDS Legal Work, and the finalisation of distribution statement reviews, provided that disputed distributions represented less than 20% of the total funds available for distribution.<sup>146</sup> Claimants experiencing extreme hardship could also receive preliminary distributions.<sup>147</sup>

### **Administrator Immunities**

62. The payment of a Distribution satisfied all rights, claims and entitlements Claimants had under the SDS and in connection with the Proceedings.<sup>148</sup> The Administrators were immune from any demand, claim or suit Claimants made for loss or damage arising from any amount they paid in accordance with the SDS.<sup>149</sup> Any Distributions returned to the Administrator would be paid to remaining Claimants in accordance with the loss assessment formula.<sup>150</sup>
63. An ATO PBR dated 12 November 2020 (Authorisation No: 1051778892399) confirmed the income tax and withholding obligations of the Administrators arising from their administration and trusteeship of the trust comprised of the Settlement Payment. ATO Class Ruling CR 2020/47 confirmed the income tax consequences of receiving a Distribution for Claimants. According to CR 2020/47, [16]-[17], the State paid the Settlement Payment to the Administrators on 11 March 2020, and the Administrators held it on trust until Settlement Entitlements were determined and Distributions paid.

### **The Settlement Update – Update 21**

64. The Administrators used a Stolen Wages webpage accessible through Grant Thornton Australia Limited (GTAL), GTAL's website to update Claimants about the SDS administration. The last of several publicly available updates from the Administrators was Update 21 of 4 December 2020 (Update 21).
65. Update 21 stated that Claimants were sent distribution statements in October 2020. It advised Claimants that the Administrators had started paying Distributions in a staggered manner and had scheduled dates between 30 November 2020 and 7 December 2020 by which Claimants could expect to receive further payments.
66. Update 21 stated that the administration of the SDS would be concluded in January 2020 [sic 2021] following the lodgement of tax returns for the scheme. It advised Claimants that they may receive further

<sup>139</sup> SDS, cl 36, 51, 1 (Net Claimant Distribution Formula and Administration Costs definition). The Administration Expenses inclusive of any costs for SDS legal work fell within the definition of Administration costs in cl 1 of the SDS.

<sup>140</sup> SDS, cl 36, 37 (Final Settlement Entitlement definition).

<sup>141</sup> SDS, cl 39, 40.

<sup>142</sup> SDS, cl 41.

<sup>143</sup> SDS, cl 42-44.

<sup>144</sup> SDS, cl 49. Noting that by cl 49, the Administrators would have 30 days after the Court determined any dispute about a distribution statement review decision, in which to pay affected Claimants their Distributions.

<sup>145</sup> SDS, cl 51, 52.

<sup>146</sup> SDS, cl 53, 54.

<sup>147</sup> SDS, cl 55.

<sup>148</sup> SDS, cl 50.

<sup>149</sup> SDS, cl 61.

<sup>150</sup> SDS, cl 57.

payments from the Administrators if surplus funds remained after finalising the SDS, and to watch for more information on the Stolen Wages website.

67. Update 21 referred to the existence of a Stolen Wages Information Centre (SWIC), run by or with the contribution of the Administrators, which was staffed by people that assisted Claimants to understand their entitlements under the SDS, and who had received a large volume of calls on the Stolen Wages telephone number.
68. Update 21 stated that the SWIC would permanently close from 23 December 2020, as the SDS administration was nearing completion, and that the Stolen Wages telephone number would cease on that date. The Administrators provided a GTAL email address at [stolenwages@au.gt.com](mailto:stolenwages@au.gt.com) to which Claimants could direct questions after 23 December 2020. Update 21 stated that payments to more than 11,000 Claimants had been made in the administration of the SDS.

## Relevant legislative provision

Section 9-5 of the *A New Tax System (Goods and Services Tax) Act 1999*  
Section 9-20 of the *A New Tax System (Goods and Services Tax) Act 1999*  
Section 9-30 of the *A New Tax System (Goods and Services Tax) Act 1999*  
Section 11-5 of the *A New Tax System (Goods and Services Tax) Act 1999*  
Section 11-20 of the *A New Tax System (Goods and Services Tax) Act 1999*  
Section 40-5 of the *A New Tax System (Goods and Services Tax) Act 1999*  
Section 184-20 of the *A New Tax System (Goods and Services Tax) Act 1999*  
Section 357-120 of Schedule 1 *Taxation Administration Act 1953*  
Subsection 40-5.09(1) *A New Tax System (Goods and Services Tax) Regulations 2019*  
Subsection 40-5.09(3) *A New Tax System (Goods and Services Tax) Regulations 2019*  
Section 23 of the *Federal Court of Australia Act 1976*  
Section 33V of the *Federal Court of Australia Act 1976*  
Section 33ZF of the *Federal Court of Australia Act 1976*

## Your rights and obligations

For information about your rights and obligations go to [ato.gov.au/taxpayerscharter](https://ato.gov.au/taxpayerscharter)

Yours faithfully,

**Deborah Jenkins**

Deputy Commissioner of Taxation

Per

(Matthew Fileman)

## Reasons for Decision

These reasons for decision accompany the *Notice of private ruling* for The Trustee For Anthony James Jonsson And Anthony Raymond Beven Of Grant Thornton Australia As Administrators Of The Applicant's Settlement Distribution Scheme Hans Pearson Vs State Of Queensland.

*While these reasons are not part of the private ruling, we provide them to help you to understand how we reached our decision.*

### Detailed reasoning

#### Question 1 Enterprise

69. An entity that carries on an enterprise can register for GST and is entitled to input tax credits for the creditable acquisitions that it makes. Entity is defined in subsection 184-1(1) of the GST Act to include, amongst other things, trusts and the term enterprise is defined for GST purposes in section 9-20 of the GST Act to include, among other things, an activity or series of activities done in the form of a business (paragraph 9-20(1)(a)).
70. Miscellaneous Taxation Ruling MT 2006/1 *The A New Tax System: The meaning of an entity carrying on an enterprise for the purposes of entitlement to an Australian Business Number* (MT 2006/1) provides the Commissioner's view on the meaning of 'entity' and 'enterprise' for the purposes of entitlement to an Australian Business Number (ABN).
71. Goods and Services Tax Determination GSTD 2006/6 *Goods and Services Tax: does MT 2006/1 have equal application to the meaning of 'entity' and 'enterprise' for the purposes of the A New Tax System (Goods and Services Tax) Act 1999* provides that the discussion in MT 2006/1 applies equally to the term 'entity' and 'enterprise' as used in the GST Act and can be relied on for GST purposes.
72. While a trust itself is not a legal person, for GST, trusts are given statutory status as entities in themselves by paragraph 184-1(1)(g) of the GST Act. The Act does not create two separate entities (the trust and trustee) but rather the relevant entity is the trust, with the trustee standing as that entity where legal personality is required. This is recognised in subsection 184-1(2) which provides that the trustee in that capacity is taken to be the trust entity.
73. Therefore, Anthony James Jonsson and Anthony Raymond Beven as Administrators are the legal persons constituting the GST entity, the Settlement Distribution Scheme Hans Pearson Vs State of Queensland. References to the Administrator in this private ruling, is to the administrators in this capacity and the entity that is the trust.

#### Administrator contentions

74. The Administrators contend that their activities in administering the SDS satisfy the enterprise test as they are done in the form of a business.<sup>151</sup> The Administrators maintain the words *in the form of* that appear in the test support this conclusion, and according to *Toyama Pty Ltd v Landmark Building Developments Pty Ltd* [2006] NSWSC 83 (*Toyama*) extend enterprises to include activities that have the appearance or characteristics of a business without being a business per se.<sup>152</sup>
75. The judgment in *Rolls v Miller* (1884) 27 Ch D 71 (*Rolls*) is cited to contend that a business *means almost anything which is an occupation, as distinguished from a pleasure – anything which is an occupational duty which requires attention is a business - ....*<sup>153</sup> The Administrators assert that their compilation of Claim Data, maintenance of the Claimant Database, assessment of Settlement Entitlements, payment of Distributions and the exercise and performance of their powers & duties amounts to a business under *Rolls*.<sup>154</sup>

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<sup>151</sup> PBR Request, Appendix A, p 4.

<sup>152</sup> PBR Request, Appendix A, pp 4-5.

<sup>153</sup> PBR Request, Appendix A, p 6.

<sup>154</sup> PBR Request, Appendix A, p 6.

76. The Administrators state *Toyama* casts that their use of judgement and skill in managing trust property in exchange for remuneration, and the liaison with solicitors, counsel and accountants in administering the SDS, are commercial activities done if not as a business, then in its form.<sup>155</sup>
77. In addition, the Administrators contend their possession of the specific knowledge required to administer the SDS, regular and recurrent determination of Settlement Entitlements for Claimants on a significant scale, and conduct of the administration in a systematic, organised and businesslike manner (including by keeping records and reporting to the Court at conclusion of the administration), are factors from TR 97/11 that support satisfaction of the enterprise test.<sup>156</sup>

## Business

78. Section 195-1 of the GST Act defines 'business' to include any profession, trade, employment, vocation or calling, but does not include occupation as an employee. This is the same as the definition of 'business' in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936), and section 995-1 of the *Income Tax Assessment Act 1997* (ITAA 1997).
79. As the definition of 'business' is identical in the GST Act and the ITAAs, it is interpreted in a similar way (paragraph 176 of MT 2006/1). The Commissioner's view on meaning of 'business' is considered in Taxation Ruling TR 97/11 *Income tax: am I carrying on a business of primary production?*<sup>157</sup> (TR 97/11) and *Taxation Ruling TR 2019/1 Income Tax: when does a company carry on a business.*<sup>158</sup>

### Indicators of a business

80. In *Federal Commissioner of Taxation v Murry* [1998] HCA 42 (*Murry*) Gaudron, McHugh, Gummow and Hayne JJ observed:

..A business is not a thing or things. It is a course of conduct carried on for the purpose of profit and involves notions of continuity and repetition of actions.

81. In *Ferguson v. Federal Commissioner of Taxation* (1979) 79 ATC 4261 (*Ferguson*) Bowen CJ and Franki J outlined the key indicia to be considered in determining if a business is being carried on. TR 97/11 explains the main indicators at paragraph 13:
- a) a significant commercial activity
  - b) a purpose and intention of the taxpayer to engage in commercial activity
  - c) an intention to make a profit from the activity
  - d) the activity is or will be profitable
  - e) the recurrent or regular nature of the activity
  - f) the activity is carried on in a similar manner to that of other businesses in the same or similar trade
  - g) activity is systematic, organised and carried on in a businesslike manner and records are kept
  - h) the activities are of a reasonable size and scale
  - i) a business plan exists
  - j) commercial sales of product, and
  - k) the entity has relevant knowledge or skill.

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<sup>155</sup> PBR Request, Appendix A, p 6.

<sup>156</sup> PBR Request, Appendix A, pp 6-7.

<sup>157</sup> Although TR 97/11 deals with carrying on a primary production business, the principles discussed in that Ruling apply to any business.

<sup>158</sup> Although TR 2019/1 applies to companies incorporated under the Corporations Act and particular provisions in the income tax law, the general discussion on the meaning of 'business' as defined in section 995-1(1) of the ITAA 1997 applies.

82. There is no single test to determine whether a business is being carried on.<sup>159</sup> Whilst each case might turn on its own particular facts, the determination of the question is generally the result of a process of weighing all the relevant indicators. The indicators must be considered in combination and as a whole. Whether a business is being carried on depends on the 'large or general impression gained'<sup>160</sup> from looking at all the indicators, and whether these factors provide the operations with a 'commercial flavour'.<sup>161</sup>
83. The necessary commercial character for an activity to be a business is discussed in TR 2019/1. While activities of a company are more likely to have a commercial character and amount to a business, it is recognised that a company whose activities would not have a commercial nature or purpose of profit making would not carry on a business.<sup>162</sup> Examples include where the purpose is to serve a public function.

*Judicial guidance – Settlement Distribution Schemes*

84. In *Watson as trustee for the Murrindindi Bushfire Class Action Settlement Fund v FC of T* [2020] FCAFC 92 (*Watson*), the Full Federal Court considered whether the Murrindindi Bushfire Class Action Settlement Distribution Scheme was carrying on a business as scheme administrator for the purpose of claiming deductions for administration expenses. While it was not in dispute that the activities as a Scheme Activities were systematic, organised, repetitive and of a significant scale, the activities lacked commercial character and any profit making purpose, from interest earned on fund monies, was not in the ordinary commercial sense:

39. The primary judge was correct to conclude that the taxpayer's activities did not amount to the carrying on of a business. First, it is important to bear in mind the purpose for which the Distribution Scheme was established, namely to provide the procedure for the distribution of the money paid by the defendants under the settlement of the class action. The activities conducted by the taxpayer pursuant to the Distribution Scheme were conducted by him in implementing and administering the Distribution Scheme. Such activities lacked the character of activities conducted as a business. The fact that some of those activities were commercial in nature, such as engaging staff and third party contractors, and the investment of the Fund, does not imbue the activities with a business character when looked at overall. Nor does the fact that Mr Watson had considerable experience in the administration of settlement schemes of this kind lead to a different answer. Mr Watson had earlier been appointed as scheme administrator of the materially identical Kilmore East/Kinglake Bushfire Settlement Distribution Scheme and had previously managed or supervised more than 20 other settlement distribution schemes administered by Maurice Blackburn. It can be accepted that he turned his experience to account in discharging his functions and responsibilities under the Distribution Scheme, but he was doing so in the context of administering the Distribution Scheme in accordance with its terms. As the primary judge observed, at J[87], it is "important not to confuse Mr Watson's role as a principal of Maurice Blackburn and Mr Watson's other role as scheme administrator".

...  
41. Thirdly, the scale of activities does not have the consequence that the activities are properly to be characterised as the carrying on of a business. The scale and nature of the activities undertaken by the taxpayer was a function of the number of group members and the complex nature of the process required to assess the various claims. It does not lead to a conclusion that a business was being carried on.

...  
43. The activities undertaken by the taxpayer pursuant to the Distribution Scheme do not have the character of a business.

*Application to your circumstances*

85. In considering whether the Administrators are carrying on an enterprise for GST purposes, it important to bear in mind the purpose for which the Settlement Distribution Scheme (SDS) was established namely:

<sup>159</sup> *Evans v. FC of T* 89 ATC 4540

<sup>160</sup> *Martin v. FC of T* (1953) 90 CLR 470 at 474

<sup>161</sup> *Ferguson v. FC of T* 79 ATC 4261 at 4271

<sup>162</sup> At [36]



- Deduction from the Settlement Sum of Court approved costs, litigation funding commission, Court approved Approval Costs, administration costs and other costs; and
  - Distribution to Participating Claimants of the net amount remaining following such deductions.
86. The Administrators are responsible for administering and distributing the monies in the Settlement Distribution Fund and doing so at a cost which is reasonable and proportionate. The activities are very similar in nature and purpose to that carried on in *Watson*. The activities are systematic, organised, repetitive and of a significant scale. In addition, the administrators in their separate capacity possess the relevant knowledge and skill to appropriately administer the fund. However, similar to *Watson*, the activities undertaken in the context of a settlement distribution scheme, lack commercial character and profit-making purpose necessary for them to be considered a business. The fact that some of those activities are commercial in nature, such as engaging staff and third-party contractors, and the investment of the Fund, does not give the activities a business character when looked at overall.
87. Further, while Anthony James Jonsson and Anthony Raymond Beven possess the knowledge, skill and qualifications to carry out their duties and responsibilities as the administrators of the scheme, these factors are relevant to determining whether they, or Grant Thornton, would be carrying on an business in their separate capacity. The factors do not point to the Trust, Anthony James Jonsson and Anthony Raymond Beven of Grant Thornton Australia as Administrators and Trustees of the Litigation Applicant's Settlement Distribution Scheme *Hans Pearson Vs State of Queensland*, is carrying on a business.
88. You have contended that *Toyama* and *Rolls* supports that trustee or administrator activities will meet the business test. In *Toyama* trustees were appointed to arrange a property sale after a joint venture ruptured. In concluding that the trustees in *Toyama* were carrying on an enterprise, White J referred to Linley LJ statement that the word 'business'<sup>163</sup>:

means almost anything which is an occupation, as distinguished from a pleasure – anything which is an occupational duty which requires attention is a business...

89. However, the facts and circumstances, and activities being carried on by the trustees, in *Toyama*, are distinguishable from, and of a different nature to, the activities of the Administrators. The trustees in *Toyama* were appointed to realise property otherwise contemplated for sale at a profit after development by the joint venturers, after the joint venturer's early termination. The trustee's activities pursued a profit-making undertaking as part of a property development enterprise. That is, the underlying transaction, or activity of the sale of that property in a commercial context is a commercial transaction.
90. This can be contrasted with this Settlement Distribution Scheme. The activities and circumstances of the Administrators are very similar to *Watson*. The Full Federal Court in *Watson* found no business was being carried on by the administrator. In this case, the court appointed Administrators are tasked with distributing a sum of money to claimants. When you remove the court appointed public interest factors, which are relevant in determining that such class action settlement schemes are not businesses (per *Watson*), the underlying activity of distributing money to claimants is lacking commerciality. As a result, consistent with *Watson*, we do not consider that the Administrators are carrying on a business.
91. While the Administrators are not carrying on a business, it is necessary to consider the words '*in the form of a business*' in the definition of enterprise in paragraph 9-20(1)(a) of the GST Act.

#### **'In the form of a business'**

92. The ATO view on the words '*in the form of a business*' is provided in paragraphs 170, 170A and 170B of MT 2006/1. The phrase is broad and has as its foundation the longstanding concept of business. The meaning of the phrase has not been considered in significant detail by Australian Courts.
93. In *FCT v. Swansea Services Pty Ltd* [2009] FCA 402 McKerracher J. observed at [99] that the words 'in the form of' do not support a suggestion that form alone may prevail over substance. However, he said that they do 'have the effect of extending the reach of 'enterprise' to those activities which are in the form of a business but would not, in the ordinary meaning of 'business' be considered such. But the activity must still be reasonably intended to be profit making in the case of an individual and cannot for any entity simply be a private recreational pursuit or hobby.

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<sup>163</sup> At [69]

94. In *Davsa Forty-Ninth Pty Ltd* [2014] AATA 337 (*Davsa*) SM O'Loughlin considered what constitutes an enterprise<sup>164</sup>. SM O'Loughlin stated that the concept of enterprise includes activities *in the form of a business and/or in the form of an adventure in the nature of trade* 'which are wider than activities that constitute a business simpliciter'. However, while these concepts are wider, and therefore constitute a lower standard to be satisfied, 'it is still necessary for the activities to have the essence of business activities'.<sup>165</sup>
95. O'Loughlin further concluded that by including agencies of government in the definition of enterprise the legislature specifically brought these bodies within the GST system and the concepts of activities in the form of a business or in the form of an adventure or concern in the nature of trade are not meant to embrace merely activities of bodies such as government departments despite that they may operate in a business like way but are not businesses as such.<sup>166</sup> That is, the concepts in the form of a business or in the form of an adventure or concern in the nature of trade are intended to do other work. O'Loughlin concluded that.<sup>167</sup>

... a series of activities will constitute an enterprise if those activities constitute a business or, having the essential features or appearance of a business, the activities are at the margin of being characterised as a business but do not constitute a business.

96. The Commissioner accepts that the use of the phrase *'in the form of'* indicates a wider meaning than the word 'business' on its own. For example, in the case of non-profit entities, the Commissioner considers that not all of the main features of a business such as a capacity to earn and distribute profits need to be present before an activity has the form of a business.
97. However, it is considered that the activities must still have an overarching commercial flavour and the essence of business activities to be activities *'in the form of a business'*. That is, when you remove or look beyond the unique circumstance that caused an entity to fail the business test, there remains an underlying commercial or business transaction. In *Toyama* the trustees were appointed to arrange a property sale after a joint venture ruptured. When you remove the fact that they were court appointed and were therefore performing duties to the court, the underlying transaction of the sale of property in a commercial context is a commercial transaction.
98. Whilst the Administrators may undertake various activities that are also common in businesses, this does not mean that such activities are conducted *'in the form of a business'*. The underlying activity is to pay Court approved costs, litigation funding commission, Court approved Approval Costs, administration costs and other costs; and distribute to Participating Claimants the net amount remaining following such deductions. The Administrators' activities pursued a Court appointed function to ensure class action members were compensated for personal loss. While the way in which the Administrators performed that function had some commercial characteristics, the moving cause of their activities was the bringing of the class action for the personal loss suffered by the class action members. While we acknowledge the nature of judgement, skill and knowledge required to administer the fund, the scale of the activities, and the systematic, organised or businesslike conduct of the administration, in our view this is not sufficient to fall within the scope of *'in the form of'* a business.
99. In conclusion, the activities of the Administrator in capacity at trustee of the Settlement Distribution Scheme *Hans Pearson Vs State of Queensland* when viewed in their entirety, lack a commercial character and are not *'in the form of a business'*.

## Question 2 - The Commission Payment To LLS

100. Section 11-20 of the GST Act provides that you are entitled to an input tax credit (ITC) for any creditable acquisition that you make.
101. Section 11-5 of the GST Act defines the term creditable acquisition. You make a 'creditable acquisition' if:

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<sup>164</sup> *Davsa* at [18]–[30]

<sup>165</sup> *Davsa* at [18]

<sup>166</sup> *Davsa* at [19]

<sup>167</sup> *Davsa* at [30]

- (a) you acquire anything solely or partly for a creditable purpose; and
  - (b) the supply of the thing to you is a taxable supply; and
  - (c) you provide, or are liable to provide, consideration for the supply; and
  - (d) you are registered or required to be registered for GST.
102. The meaning of the term 'creditable purpose' is contained in section 11-15 of the GST Act. You will acquire a thing for a 'creditable purpose' to the extent you acquire it in carrying on your enterprise. However, you will not acquire the thing for a 'creditable purpose' to the extent that the acquisition relates to making input taxed supplies or is of a private or domestic nature.
  103. As concluded in Question 1 above, the Administrators are not carrying on an enterprise. Therefore, any acquisition the Administrators have made will not be an acquisition made in 'carrying on' an 'enterprise'.
  104. For completeness, the following paragraphs consider whether the Administrators have made any acquisition from LLS in connection with the Commission payments to LLS, and whether any supply from LLS would be a taxable supply.
  105. The SDS required the Administrators to pay LLS the Commission, fixed by the Fund Order at \$38 million (20% of the Settlement Payment), which the Litigation Applicant had agreed to assign from the Settlement Payment in consideration for LLS funding his prosecution of the Proceedings.
  106. The Administrators weren't party to the contract by which LLS agreed to and in fact provided the litigation funding to the Litigation Applicant (the LFA). LLS and the Litigation Applicant were the only parties to that contract. The Litigation Applicant received the funding, and by agreement with LLS, directed its application to meet the Legal Costs that the Lawyers charged in acting for the Litigation Applicant.<sup>168</sup>
  107. The supply of the funding predated the establishment of the entity constituted by the Administrators for GST purposes. That entity is the trust comprised of the Settlement Payment, personified by the Administrators as trustee.<sup>169</sup> The entity was created when the Settlement Order was made on 17 January 2020. This forecloses any privity of contract between the Administrators and LLS in relation to the supply of the litigation funding. It also establishes that the Administrators couldn't have acquired anything under the contract for the purposes of section 11-5 of the GST Act, as they didn't exist upon its execution, or otherwise when the funding was provided.<sup>170</sup>
  108. The SDS obliged the Administrators to pay LLS the Commission for supplying the Litigation Applicant litigation funding:
    - a. in order to perform the Litigation Applicant's pre-existing contractual obligation to pay LLS for this supply in the amount fixed by the Court;
    - b. as a condition to performing the Administrators' duty to distribute Claimants the remaining Settlement Payment; and
    - c. in accordance with the Litigation Applicant's irrevocable instructions that all necessary steps be taken on his behalf to give effect to that distribution on the terms of the SDS.
  109. LLS could seek to enforce its right to the Commission against the Litigation Applicant if it remained unpaid. The Litigation Applicant or other Claimants could apply for the Court's compulsion of the Administrators to pay LLS the Commission if the Administrators didn't do so<sup>171</sup> and resist any attempt by the Administrators to vary the SDS terms to exclude the payment.
  110. The Litigation Applicant's obligation to account to LLS for the Commission after exercising any right to exclude himself from the Proceedings, reinforces the conclusion that his was the liability under subsection 11-5(c) of the GST Act, to provide LLS the consideration for the litigation funding that he enjoyed.

<sup>168</sup> See e.g., Settlement Notice, [4], p 8, which explained that the Applicant couldn't have commenced the Proceedings without funding from LLS, and that LLS had paid most of the legal fees incurred in the Proceedings up until 4 September 2019 (the Settlement Notice date).

<sup>169</sup> Section 184-1; *Glennon v Federal Commissioner of Taxation* (1972) 127 CLR 503,511-2; *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 367-8. The income tax PBR (Authorisation Number 1051778892399) and class ruling for Claimants (CR 2020/47) also treated the Administrators as the trustees of a trust comprised of the Settlement Payment.

<sup>170</sup> *Simon Harland as Trustee for the PCS Global Discretionary Trust v Commissioner of Taxation* [2013] AATA 930, [68]-[70], [93].

<sup>171</sup> Settlement Order, cl 5(a).

111. Consequently, the circumstances differ from a tripartite arrangement covered in Part 3 of *Goods and Services Tax Ruling GSTR 2006/9 Goods and services tax: supplies* (GSTR 2006/9), where the one contract for the provision of litigation funding by LLS could result in the making of a supply to both the Litigation Applicant and the Administrators, or the making of a supply to the Administrators but its provision to the Litigation Applicant. The Administrators were strangers to the supply of the litigation funding and did not acquire its conferral or use in any way.

*Subsection 33ZA(3) of the FCAA*

112. Subsection 33ZA(3) of the FCAA forms part of Division 4 to Part IVA of the FCAA, which governs how the Court can determine class action proceedings.
113. It supplements section 33Z(2) of the FCAA, which if the Court exercises its power to determine class actions by awarding damages,<sup>172</sup> requires the Court to make provision for paying the damages to the class. In these circumstances, subsection 33ZA(3) of the FCAA enables the Court to make orders about administering the fund constituted by the damages and notifying class members of their entitlement.
114. You contend that as a result of the Settlement Order, the operation of subsection 33ZA(3) of the FCAA placed them in the Litigation Applicant's position as the recipient of the litigation funding that LLS supplied.<sup>173</sup> Subsection 33ZA(3) of the FCAA applies when class actions are resolved by awarding damages.
115. The Commissioner considers that didn't occur here. The Court didn't exercise any power under subsection 33ZA(3) of the FCAA when approving settlement of the Proceedings under the Settlement Order. There's nothing in the terms of subsection 33ZA(3) (or apparent elsewhere in the FCAA) that has this contended effect.
116. The Administrators' payment of the Commission to LLS therefore has the character of the:
- a. Completion of the Litigation Applicant's assignment of the Commission from the Settlement Payment to LLS under the LFA;<sup>174</sup>
  - b. Provision of consideration for the supply of litigation funding by LLS to the Litigation Applicant;<sup>175</sup> and/or
  - c. The discharge of the Administrators' duty to make payments from the trust constituted by the Settlement Payment on the terms of the SDS, in accordance with the Court ordered settlement of the Proceedings between the Litigation Applicant and the State, and on the Litigation Applicant's irrevocable instructions.
117. None of these available characterisations establish payment of the Commission as consideration the Administrators' provide or are liable to provide, for the making of a taxable supply to them by LLS.<sup>176</sup>
118. The Commissioner considers your remaining contentions about acquiring a litigation funding service from LLS<sup>177</sup>, receiving a tax invoice for the supply of litigation funding when the Fund Order or SDS was in place,<sup>178</sup> and the Fund Order's contemplation of LLS receiving an amount on account of GST in connection with providing the litigation funding,<sup>179</sup> don't point to input tax credit entitlement.

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<sup>172</sup> Under ss 33Z(1)(e) or (f) of the FCAA.

<sup>173</sup> PBR Request, Appendix B, p 12.

<sup>174</sup> No Settlement Payment existed when the Applicant agreed to assign LLS an amount from it equal to the Commission under the LFA. This made the Applicant's assignment to LLS, the equitable assignment of the right to an expected future payment or an agreement to assign property in future. The Administrators' payment of the Commission to LLS in administering the SDS will complete the Applicant's assignment or agreement to assign, by perfecting LLS' title to that amount; see GSTR 2004/4, [23]-[30], [145]. Before the payment, the Commission is held on trust for LLS; IT 2496, [2].

<sup>175</sup> Whether assessed contractually (in form) or from a practical perspective (in substance); cf PBR Request, Appendix B, p 13.

<sup>176</sup> Paragraph 11-5(b) of the GST Act.

<sup>177</sup> PBR Request, p 13.

<sup>178</sup> PBR Request, p 12.

<sup>179</sup> PBR Request, p 12.

119. Further, the receipt of a tax invoice stated to be for the supply of litigation funding, wouldn't conclusively evidence that a creditable acquisition was made.<sup>180</sup> Particularly if no taxable supply was in fact involved.<sup>181</sup> These contentions mischaracterise the provision of litigation funding as the supply of a service,<sup>182</sup> and attribute to the Fund Order and SDS, an effect not evident on their terms.
120. Under the Fund Order and Funding Terms, LLS would only receive an amount from the Settlement Payment on account of GST, to the extent it made a taxable supply in providing litigation funding. If there was no taxable supply, then no amount on account of GST was payable.
121. However, even if the Fund Order entitled LLS to an amount on account of GST for providing litigation funding, in circumstances where it didn't make a taxable supply, the Commissioner wouldn't be bound to accept an input tax credit claim for performing the Litigation Applicant's obligation to pay for that supply.<sup>183</sup>

#### *Input taxed supply*

122. The supply of the litigation funding by LLS is a financial supply within item 2 or 7A of the table to subsection 40-5.09(3) of the *A New Tax System (Goods and Services Tax) Regulations 2019*, to the extent it is an interest provided to the Litigation Applicant in or under a credit arrangement or a right to credit, or an indemnity to hold the Litigation Applicant harmless from any loss as a result of the Proceedings (an indemnity might also be found in LLS holding the Lawyers harmless from any loss in performing Legal Work for the Litigation Applicant up to the applicable funding limits). These supplies are input taxed by sections 9-5, 9-30 and 40-5 of the GST Act.
123. Consequently, payment of the Commission in consideration for the supply of litigation funding to the Litigation Applicant, or any other entity, would be incapable of producing input tax credit entitlements in accordance with paragraph 11-5(b) of the GST Act.<sup>184</sup>

#### **Question 3 - Legal Expenses Related to The Proceedings**

124. As concluded in Question 1 above, the Administrators are not carrying on an enterprise. Therefore, any acquisition the Administrators have made will not be an acquisition made in 'carrying on' an 'enterprise'.
125. For completeness, the following paragraphs consider whether the Administrators have made any acquisition in connection with the payments for legal and professional services.
126. You accept that the SDS requires you to pay for legal and professional services on behalf of the Litigation Applicant.<sup>185</sup> Nevertheless, you seek confirmation of ITC entitlements for performing their duty to pay the following amounts under the SDS:
  - a. To the Lawyers, the Litigation Applicant's Legal Costs and Disbursements not already paid by LLS (in effect Remaining Costs); and/or
  - b. To LLS, the Litigation Applicant's Legal Costs and Disbursements which LLS had already paid (in effect Legal Costs).
127. You describe both payments as a reimbursement of legal fees. The SDS defined the Litigation Applicant's Legal Costs and Disbursements as the legal costs and disbursements incurred by the Litigation Applicant in conducting the Proceedings in the amount approved by the Court. The April 2020 Court Order approved a \$13,881,952.17 total for this amount. You have provided a figure of \$13,257,644.
128. Contrastingly, the SDS defined the Administration Costs as the Court approved expenses of, and incidental to the administration of the SDS incurred by the Administrators, including the costs of the

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<sup>180</sup> *R.V. Investments (Aust) Pty Ltd as Trustee of the R.V. Unit Trust v Commissioner of Taxation* [2014] AATA 158, [72]; [2014] FCA 1169.

<sup>181</sup> *Bayconnection Property Developments Pty Ltd v Commissioner of Taxation* [2013] AATA 40, [86]; [2013] FCA 440.

<sup>182</sup> At [79] in *Professional Admin Services Centres*, the Court observed that it is important to distinguish between funding litigation on the one hand, and being paid to provide services on the other.

<sup>183</sup> The Administrators accept that they make payments on behalf of the Applicant in administering the SDS (PBR Request, Appendix B, p 15). See further *Federal Commissioner of Taxation v Thomas* [2018] HCA 31, [54]-[56], where the High Court confirmed the Commissioner wasn't bound by court orders about trust entitlements to which he wasn't a party, when assessing a trustee and beneficiaries.

<sup>184</sup> Paragraph 11-5(b) of the GST Act requires the acquisition for which an input tax credit is claimed to result from a taxable supply.

<sup>185</sup> PBR Request, Appendix B, p 15.

Lawyers for any matters on which the SDS required or permitted them to consult with the Administrators (e.g. to contact Claimants to verify Claim Data or undertake distribution reviews).<sup>186</sup>

129. The SDS definitions substantially resolve the question. They distinguish the legal services provided to the Litigation Applicant for which the Litigation Applicant's Legal Costs and Disbursements are payable, from any legal services the Administrators acquired from the Lawyers in connection with the administration.<sup>187</sup> The latter legal services are referred to above, as the SDS Legal Work. Payment for that work was a liability of the Administrators falling within the Administration Costs definition.
130. Thus, the legal costs and disbursements for which you seek an ITC, were by definition incurred by the Litigation Applicant for his acquisition of Legal Work on the Proceedings from the Lawyers. You are not liable to provide consideration for that supply under paragraph 11-5(c) of the GST Act. Even if you were liable, you did not acquire or receive that supply in any sense under paragraph 11-5(a) of the GST Act.
131. Rather, the payment of the Litigation Applicant's Legal Costs and Disbursements is the discharge of an obligation which the Fund Order recognised belonged to the Litigation Applicant. This accords with how the Settlement Notice practically explained this deduction for Claimants; i.e. as payment for the legal costs the Litigation Applicant incurred in bringing the Proceedings and obtaining settlement approval, which Claimants were to share equally through deduction from the Settlement Payment.
132. The SDS bound the Administrators to make this payment as a condition to distributing Claimants the Settlement Payment. Before the Fund Order, this obligation had its origin in the Litigation Applicant's agreement under the LFA to:
  - a. assign LLS an amount from the Settlement Payment equal to what LLS had paid the Lawyers, within its funding limits, for work on the Proceedings until the date of the Settlement Payment<sup>188</sup> (i.e. Legal Costs); and
  - b. pay the Lawyers from the Settlement Payment, for any Legal Costs charged to LLS for Legal Work exceeding the funding limits (i.e. Remaining Costs;).<sup>189</sup>
133. As with the Commission, the Claimants could apply to the Court to compel the Administrators to make the payment or resist any attempt by the Administrators to vary the SDS terms to avoid the payment.
134. You contend their payment of the Litigation Applicant's Legal Costs and Disbursements is a reimbursement for a taxable supply of legal services the Lawyers made to LLS.<sup>190</sup> Consequently, you say that Goods and Services Tax Ruling *Goods and services tax: agency relationships and the application of the law* (GSTR 2000/37) [paragraph 49] characterises the reimbursement as a 'GST inclusive ITC generating payment' they make to LLS.<sup>191</sup>
135. The legal services for which the Litigation Applicant's Legal Costs and Disbursements are payable, are those provided to the Litigation Applicant in bringing a claim of wage theft against the State on behalf of Claimants in the Proceedings. Neither the Administrators nor LLS were parties to the Proceedings.
136. The appointment by LLS of the Lawyers to represent and advise the Litigation Applicant in the Proceedings, and to provide the Litigation Applicant with related project management and administrative services (i.e. the Legal Work)<sup>192</sup>, occurred in circumstances where:

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<sup>186</sup> SDS cl 7, 1 (Administration Costs & Advisor definitions).

<sup>187</sup> See also SDS, cl 31, 32, 35 & 53 which further cement the distinction between Administration Costs and the Applicant's Legal Costs and Disbursements.

<sup>188</sup> LFA cl 11.1(a).

<sup>189</sup> LFA cl 1.2(b), 9.1(c), 9.1(d), 11.3(a).

<sup>190</sup> PBR Request, Appendix C, pp 19-20.

<sup>191</sup> PBR Request, Appendix C, pp 19-20. According to GSTR 2000/37, [49] when a lawyer pays a third party as agent for their client, the lawyer isn't liable for any GST when the client reimburses them. GSTR 2000/37, [49] contrasts this to when a lawyer acquires goods or services to enable their servicing of the client. Here, GSTR 2000/37 [49] states that the lawyer is liable for GST on any client reimbursement for the lawyer's expense in acquiring the goods or services, as it forms part of the consideration the client pays the lawyer. In the present case, the Administrators will pay the Applicant's Legal Costs and Disbursements as consideration for the supply of legal services by the Lawyers to the Applicant. Even if the Administrators were regarded as in some way paying this amount as a reimbursement, it doesn't automatically follow that the entity obliged to pay the reimbursement (the Administrators) acquires the supply for which the amount is being reimbursed; *Professional Admin Service Centres*, [53], which also addresses the Administrators contentions about *Customs and Excise Commissioners v Redrow Group plc* [1999] 2 ALL ER 1 at PBR Request, Appendix B, pp 16-17.

<sup>192</sup> Engagement, cl 2(a).

- a. LLS agreed not to retain the Lawyers for any purpose connected with the Proceedings;<sup>193</sup>
  - b. Any final decisions LLS proposed about the Proceedings required the Litigation Applicant's approval;<sup>194</sup>
  - c. The Litigation Applicant's instructions to the Lawyers prevailed over any inconsistent instructions from LLS;<sup>195</sup>
  - d. The Litigation Applicant could instruct the Lawyers and make binding decisions about the Proceedings;<sup>196</sup>
  - e. The Lawyers had to ensure the Litigation Applicant received all information necessary to facilitate the provision of informed instructions;<sup>197</sup>
  - f. The Lawyers' obligations to the Litigation Applicant took precedence over any obligations they owed to LLS;<sup>198</sup>
  - g. The Court clarified that the Lawyers owed professional duties to the Litigation Applicant and not to LLS, and that the Litigation Applicant could override any instructions from LLS to the Lawyers;<sup>199</sup>
  - h. The Litigation Applicant could withhold consent to the appointment by LLS of new lawyers to represent him in the Proceedings;<sup>200</sup> and
  - i. The SDS acknowledged that it was the Litigation Applicant that had incurred the legal costs and disbursements in conducting the Proceedings.<sup>201</sup>
137. In these circumstances, the Litigation Applicant acquired the supply by which the Lawyers performed the Legal Work and for which the Litigation Applicant's Legal Costs and Disbursements were payable.
138. Ultimate power to instruct the Lawyers remained with the Litigation Applicant. Any influence LLS could exert by instructing the Lawyers was subject to this power. The Litigation Applicant's consent to LLS communicating with and accessing documents from the Lawyers, was for the purpose of his prosecution of the Proceedings, or otherwise for his receipt of litigation funding. It did not elevate LLS to become the acquirer of the supply of the Legal Work, even though LLS had agreed to meet the cost of its provision to the Litigation Applicant within the applicable funding limits.
139. The judgement in *Professional Admin Service Centres Pty Ltd v Commissioner of Taxation* [2013] FCA 1123 (*Professional Admin Service Centre*) supports this conclusion. There, the Court found that the defendant in criminal proceedings acquired and received the supply of legal services a litigation funder paid for in his defence.<sup>202</sup> You distinguish *Professional Admin Service Centres* on the basis that the defendant engaged the lawyers paid for by the litigation funder,<sup>203</sup> while here, the litigation funder (LLS) appointed and (partly)<sup>204</sup> paid the Lawyers to act for the Litigation Applicant in the Proceedings.<sup>205</sup>
140. This distinction is without a difference. In both *Professional Admin Service Centres*, and the present case, the terms on which the lawyers were appointed and the litigation funding advanced, prevented the lawyers from acting for the litigation funder in any way.<sup>206</sup> Here, the Court also prevented the Lawyers from acting as the solicitors for the litigation funder (LLS) for any purpose connected with the Proceedings.<sup>207</sup>

<sup>193</sup> LFA, cl 3.10. Funding Terms, paragraph 13(d).

<sup>194</sup> LFA, cl 3.4.

<sup>195</sup> LFA, cl 3.5.

<sup>196</sup> LFA, cl 3.2

<sup>197</sup> Engagement, cl 4; Funding Terms, paragraph 12.

<sup>198</sup> LFA, cl 3.7.

<sup>199</sup> Funding Terms, paragraphs 8-11.

<sup>200</sup> LFA, cl 14.1(b), 15, 16.

<sup>201</sup> SDS, Recital C.

<sup>202</sup> *Professional Admin Service Centres*, [42].

<sup>203</sup> *Professional Admin Service Centres*, [43], [44].

<sup>204</sup> (partly) because LLS only agreed to pay the Lawyers the Legal Costs for Legal Work provided to the Applicant in connection with the Proceedings up to its funding limits. The Applicant was liable to pay the Lawyers the cost of any Legal Work performed in excess of the funding limits. The cost of the Legal Work performed by the Lawyers exceeded the funding limits. This explains why the SDS required paying the Lawyers the legal costs not otherwise funded by LLS from the Settlement Payment.

<sup>205</sup> PBR Request, Appendix B, p 17.

<sup>206</sup> *Professional Admin Service Centres*, [43]-[45]. By cl 3.10 of the LFA, LLS agreed not to retain the Lawyers for any purpose connected with the Proceedings.

<sup>207</sup> Funding Terms, paragraph 13(c).

141. Thus, the current situation is analogous to *Professional Admin Service Centres*, where the lawyers were paid by the litigation funder but retained by the client, presently the Litigation Applicant.<sup>208</sup> Payments the litigation funder (LLS) made to the Litigation Applicant's legal representatives (the Lawyers) were consideration for legal services the Litigation Applicant acquired.<sup>209</sup> The Litigation Applicant had an arrangement (the LFA), where LLS would pay for invoices rendered for his acquisition of those legal services from the Lawyers (Legal Work), in consideration for part of the Settlement Payment.
142. The Litigation Applicant remained accountable to the Lawyers to pay for any legal services he acquired from the Lawyers which LLS did not fund (Remaining Costs). The Litigation Applicant contracted to meet this obligation by paying the Lawyers the Remaining Costs from the Settlement Payment. You, the Administrators, were bound to pay the Litigation Applicant's Legal Costs and Disbursements in order to discharge these obligations for the Litigation Applicant.<sup>210</sup>
143. You have no input tax credit entitlement in doing so,<sup>211</sup> and are unassisted by GSTR 2000/37, which deals with principal and agency relationships. If any such relationship exists, it is the Administrators that pay the Litigation Applicant's Legal Costs and Disbursements to LLS or the Lawyers, as agent for the Litigation Applicant, and not as the acquirer of any taxable supply.

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<sup>208</sup> *Professional Admin Service Centres*, [44].

<sup>209</sup> *Professional Admin Service Centres*, [46].

<sup>210</sup> This reasoning also addresses the Administrators contentions at PBR Request, Appendix B, p 15 about a tripartite arrangement between LLS, the Applicant and the Lawyers, where LLS receives the legal services and the Applicant acquires nothing.

<sup>211</sup> An entity does not make an acquisition merely by paying for a supply; GSTR 2006/9, [15].



## **Edited version of your private ruling**

**Authorisation Number: 1051808553198**

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### **Ruling**

**Subject: GST and Enterprise**

The Commissioner has ruled on the taxpayer's application for a private binding ruling in relation to existence of an enterprise.