Inland Revenue
Te Tari Taake

PUBLIC RULINGS UNIT

ISSUES PAPER No. 7

Bodies Corporate – GST Registration

Office of the Chief Tax Counsel
Inland Revenue

ISSUES PAPERS

Inland Revenue's Public Rulings Unit is responsible for developing and publishing binding public rulings and other public statements on aspects of tax law.

Occasionally, the technical and practical issues involved in these are such that it is necessary or useful to seek comments and submissions from external parties prior to preparing a draft statement. This is done by researching and preparing an issues paper. An issues paper sets out the Commissioner's preliminary views on an issue and also sets out possible alternative views. The purpose of an issues paper is to stimulate discussion and invite submissions from interested parties. These submissions will be taken into account in determining Inland Revenue's future position on these issues. The purpose of this issues paper is set out in more detail in paragraphs [1.1] – [1.3] below. The matters considered in this issues paper may form the basis of a future Public Statement, which would be circulated for comment to interested parties in the usual manner.

STATUS OF ISSUES PAPERS

Draft items, including this issues paper, produced by the Office of the Chief Tax Counsel represent the preliminary, though considered, views of the Commissioner of Inland Revenue.

In draft form these items may not be relied on by taxation officers, taxpayers or practitioners. Only finalised items represent authoritative statements by Inland Revenue of its stance on the particular issues covered.

SUBMISSIONS

To assist our consideration of the complex and important issues involved, we are seeking submissions from interested parties. The Commissioner is interested in receiving written submissions on the interpretation, practical issues and policy outcomes raised in this paper. These will be considered by the Office of the Chief Tax Counsel, Technical Standards (Service Delivery) and Policy & Strategy.

Submissions can be made by email to PublicConsultation@ird.govt.nz

We would appreciate receiving any submissions or comments by **18 June 2013**.

Please quote reference: IRRUIP7

ISSUES PAPER: IRRUIP7

BODIES CORPORATE – GST REGISTRATION

All legislative references are to the Goods and Services Tax Act 1985 unless otherwise stated. Relevant legislative provisions are reproduced in the Appendix to this Issues Paper.

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1. INTRODUCTION

PURPOSE OF THIS PAPER

1.1 For some time, Inland Revenue has been considering issues relating to the GST registration of bodies corporate. More recently, Inland Revenue has been asked to reconsider whether a body corporate can register for GST. There are differing views as to whether a body corporate carries on a taxable activity such that it is able to (or required to) register for GST. Consequently, there have been differing practices regarding GST registration. The purpose of this issues paper is to seek comments on the issue of whether a body corporate can (or must) register for GST.

1.2 The Commissioner's preliminary view is that a body corporate makes supplies of services to owners of a unit title. Further, those owners provide consideration for those supplies in the form of body corporate levies. By making such supplies for a consideration a body corporate carries on a taxable activity. Consequently, a body corporate that makes supplies that exceed the $60,000 threshold is liable to be registered for GST. Similarly, a body corporate that makes supplies below the threshold may voluntarily register for GST. The reasons for this view are set out in detail in this paper. However, the conclusion reached is not entirely free from doubt.

1.3 Therefore, to assist our consideration of this issue, we are inviting submissions from interested parties. We are interested in receiving comments on the technical view taken in this paper. We are also interested in hearing about the practical implications of the view taken and whether it is considered that the outcome is an appropriate one. For information on the Commissioner's interim operational position, please see the accompanying statement *Commissioner's interim operational position on GST registration by bodies corporate* on the IR website (www.ird.govt.nz/public-consultation).

BACKGROUND

1.4 The issue of body corporate GST registration has only been considered once by a New Zealand court. The High Court considered it in 1997 in *Taupo Ika Nui Body Corporate v CIR* (1997) 18 NZTC 13,147. That case held that although the body corporate supplied something to the proprietors it did not do so for consideration. As such, there was no "taxable activity" and therefore the body corporate was not required to (or able to) register for GST. The High Court found that the supplies of collection, management and payment services were made gratuitously. The body corporate merely acted as a conduit - collecting the levies and passing them on to independent third parties who provided the services.

1.5 While, on the particular facts, the High Court concluded the Taupo Ika Nui Body Corporate was not carrying on a taxable activity, it held that the same conclusion would not apply to all bodies corporate. Rather, the reasoning in the case potentially requires distinctions to be drawn between different body corporate models. These are whether the body corporate employs staff (could be registered) or hires independent contractors (most likely not able to be registered), and whether the body corporate makes a margin on the supplies it provides (no margin means more likely not able to be registered).

1.6 The correctness of the reasoning and decisions in *Taupo Ika Nui* have been questioned (see, for example, Alastair McKenzie *GST – A Practical Guide* (9th ed, (CCH New Zealand Ltd, Auckland, 2012) at ¶1305). There are different views on the correct position and, consequently, there are different practices. More

recently, Inland Revenue has been asked to reconsider the circumstances in which a body corporate can (or must) register for GST. The Commissioner's preliminary views are set out in this issues paper.

SUMMARY OF REASONING

1.7 The various issues and arguments are canvassed in the body of this paper. In summary, the Commissioner considers the better view is that, in the normal course, a body corporate does make supplies for a consideration to its members (the owners of the unit title development). A body corporate, although comprised of the owners of the unit title development, is a separate legal entity from the owners. It makes supplies to them of a number of services, including the services of maintenance of common property, obtaining insurance for buildings, administration of the development and financial management of the development. The levies it receives in return are the consideration for such supplies.

1.8 It is acknowledged that the conclusion that a body corporate can (and, if over the registration threshold, must) register for GST is not completely free from doubt. There is no single decisive argument in favour of registration for a body corporate, and persuasive arguments can be made for the contrary view. Indeed, the decision of the High Court in *Taupo Ika Nui* would suggest that bodies corporate would not be able to register in some circumstances. However, the cumulative weight of argument and authority favours registration. The following paragraphs summarise the reasoning in this paper in more detail.

1.9 The *Taupo Ika Nui* case is the only New Zealand case to consider the area of body corporate GST registration. The High Court, overturning the decision of the Taxation Review Authority, concluded that although the body corporate supplied something to the proprietors it did not do so for consideration. As such, there was no "taxable activity" and therefore no ability or requirement for the body corporate to register for GST. The High Court found the body corporate was making supplies of collection, management and payment services gratuitously. The actual supplies of goods and services were made by independent contractors who received consideration for those supplies.

1.10 It is strongly arguable that the *Taupo Ika Nui* decision was wrongly decided. In the normal course of events, a body corporate will be making supplies to the proprietors of the development. It is not acting merely as a conduit in arranging for supplies to be made by third parties. This is due to the obligations imposed on bodies corporate by the Unit Titles Act 2010 and the very limited ability to delegate those obligations. This has the effect that even though the body corporate may buy in goods and services from third parties, the supply of such goods and services to the proprietors of developments remains the responsibility of the body corporate. It is noted that *Taupo Ika Nui* was decided under the Unit Titles Act 1972. However, the position under that legislation was the same. Bodies corporate do not merely arrange for others to make supplies to the proprietors or act as a conduit between the third parties and the proprietors.

1.11 It is acknowledged that the supplies by a body corporate are not made under the usual type of arrangement where parties voluntarily agree to provide goods and services for a consideration. Instead, a body corporate is obliged by law to undertake a number of functions. These functions involve it supplying services to the owners of the unit title development. In return, owners pay the amounts levied by the body corporate (calculated according to the expected and actual expenditure of the body corporate). The owners are statutorily obliged to pay the levies. Further, in substance, the relationship between the parties is a collective funding of the unit title development's common expenses.

1.12 For there to be a taxable activity and (subject to the registration threshold being met) an obligation on a body corporate to register for GST, the supplies must be made for consideration. The issue that needs to be addressed is whether there is significance in the statutory nature of the obligations on the body corporate to supply certain goods and services and on the proprietors to pay levies to the body corporate. That is, do the statutorily imposed obligations mean that the required reciprocity between supply and consideration is not present?

1.13 The statutory nature of the mutual obligations of the body corporate and the owners does not mean they are not making supplies for a consideration. That the duties are statutorily imposed does not alter the fact that the body corporate actually furnishes or supplies certain goods or services to the owners, it only affects why the supplies are being made. In any case, the decision to create a unit title development is a conscious and voluntary decision with certain consequences, so it is not truly a case of involuntary statutorily imposed obligations. This is even more so for each owner who elects to acquire an interest in the development. There is a sufficient connection or reciprocity between the services supplied by the body corporate and the levies paid by the owners to mean the levies are "consideration" for the supplies.

1.14 "Consideration" is a very widely defined term and includes payments made "in respect of" the supply of any goods and services. The words "in respect of" are words of the very widest meaning. Further, the definition of "consideration" makes it clear that supplies can be for a consideration even where the payment is not voluntary. There is a link between the goods and services supplied by the body corporate and the levy paid by the proprietors of the development. In particular, each proprietor pays their share of the budget of the body corporate (which reflects the supplies made by the body corporate).

1.15 It can be argued that the payment of levies by proprietors to the body corporate is analogous to funding a trust or company, which is not usually seen as involving taxable supplies being made to the person providing funds. However, it is not relevant that the levies could be described as funding for the body corporate. In a sense, all payments for supplies fund the supplier's taxable activity. The relevant question is not whether the amounts paid fund a business or taxable activity but whether the amounts are paid "in respect of, in response to, or for the inducement of, the supply of any goods and services" so as to amount to consideration.

1.16 It is difficult to assess whether the body corporate is carrying on an activity profitably because of the uncertainty over its expenses and also the uncertainty over the receipt of levies from proprietors. However, it is not relevant whether the body corporate carries on its activity for profit. The definition of "taxable activity" explicitly covers this by stating that it is any activity which is carried on continuously or regularly "whether or not for a pecuniary profit …".

1.17 With respect, the Commissioner considers the decision in *Taupo Ika Nui* is wrongly decided both in fact and in law. The legal points have been covered above. The decision also appears to wrongly construe the facts in the case. The High Court concluded the body corporate was just a "conduit" between the proprietors and the independent contractor suppliers of goods and services. However, in the TRA, and even to an extent in the High Court, the evidence presented was that the body corporate had employees and hence was not just a conduit but a supplier in its own right. Furthermore, the case appears to assume a body corporate is able to delegate its role and just be a conduit. This is arguably legally incorrect given the unit titles legislation.

2. ISSUES

2.1 A body corporate will be carrying on a "taxable activity" if the following requirements are met:

- there is an activity;
- the activity is carried on continuously or regularly;
- the activity involves making supplies of goods or services; and
- the supplies are made for a consideration.

2.2 It is accepted that a body corporate carrying out its legislative duties is carrying on an activity continuously or regularly. Therefore, the key issues considered in this paper are whether:

- the activity involves making supplies to the proprietors (and the nature of any supplies made); and
- a body corporate makes supplies for consideration.

2.3 If a body corporate does make supplies for consideration (and is, therefore, carrying on a taxable activity) it will be liable to be registered for GST if it exceeds the $60,000 registration threshold. Further, it may voluntarily register for GST if it is under the registration threshold.

3. REASONING IN DETAIL

3.1 To consider these issues, this paper will use the following structure:

- First, it will consider the two Unit Titles Acts. The aim is to properly understand the relationship between bodies corporate and the owners (also described as proprietors) of units in the unit title development.
- Second, it will consider the nature of any supply between the body corporate and the owners.
- Third, it will consider whether there is "consideration" provided by the owners to the body corporate for the identified supply of goods and services.

UNIT TITLES ACT LEGISLATION

3.2 The Unit Titles Act 2010 came into effect on 20 June 2011, replacing the Unit Titles Act 1972. There was a transitional period affecting s 37 and schs 2 and 3 of the Unit Titles Act 1972. This transitional period provided that those specified provisions would continue to have effect for 15 months from the first day of the month following the date of commencement of the 2010 Act. This 15 month period ended on 30 September 2012.

3.3 Accordingly, the relevant legislation going forward is the Unit Titles Act 2010. However, the 1972 Act will also be considered, as it applied until relatively recently. In any case, although there are some differences, the two Acts are materially the same in many respects. Some discussion of the relevant differences is set out below from para 3.21.

Unit Titles Act 1972

3.4 Under the 1972 Act, there were three different types of property. First was the principal unit (for example, an individual apartment in an apartment building). Second was an accessory unit, which was designed for use with any principal unit (for example, a garage or storage cupboard in an apartment building). Finally, there was the common property, which was the part of the land not comprised in any unit (for example, lifts, lobbies, gardens, paths and commonly-held facilities like a swimming pool or tennis court).

3.5 Individual owners held individual titles to principal units. However, all the unit proprietors as tenants in common held common property (s 9).

3.6 Section 12 of the 1972 Act provided for a body corporate to exist for a unit title development and that the body corporate was made up of all the proprietors of the development. Section 12(4) provided that the body corporate had perpetual succession and a common seal.

3.7 Under s 13 of the 1972 Act, a body corporate could sue and be sued in its own name and do and suffer all that bodies corporate may do and suffer.

3.8 Section 15 of the 1972 Act provided for the mandatory duties or functions of a body corporate. These included insuring all the buildings of the unit title development, administration and maintenance of the common property. Section 15(2) required the body corporate to establish a fund sufficient to discharge its obligations, determine the amounts to be raised for these purposes and raise the amounts by levying contributions on the proprietors. Under s 16, the body corporate had all the powers of a natural person, except that it did not have the power to trade.

3.9 Under s 32 of the 1972 Act the body corporate could collect any unpaid levies as a recoverable debt from the proprietors. Section 51 of the 1972 Act gave unit holders and others the right to sue the body corporate for performance of their statutory obligations.

3.10 Overall the role of the body corporate was to facilitate the holding of property (by the owners) via unit title developments. This was achieved by having a separate legal entity that undertook the requirements of a property that was held in shared ownership. Rather than requiring decisions to be made by all individual owners acting in their personal capacities, the body corporate was a vehicle for this to be facilitated more efficiently. By the rules of a body corporate, the body corporate was run by a committee that would simplify the administration of the unit title development.

Unit Titles Act 2010

3.11 The Unit Titles Act 2010 is broadly similar to the 1972 Act, although it is structured quite differently.

3.12 Section 75 of the 2010 Act provides for the creation of a body corporate for a unit title development. Section 76 provides that the members of the body corporate are the owners of the units in the unit title development.

3.13 Section 77 sets out the powers of the body corporate. There is no express prohibition on trading specified in the 2010 Act, in contrast to the 1972 Act. A body corporate may do anything authorised by the 2010 Act or any other Act (s 77(1)) and anything a natural person of full age and capacity may do except as provided in the 2010 Act or any other Act (s 77(2)). However, a body corporate

doing an act allowed for under s 77 may only do so for the purpose of performing its duties or exercising its powers (s 78).

3.14 Another change is found in s 54(1) of the 2010 Act. This provides that the common property[1] of a unit title development is owned by the body corporate on behalf of the proprietors. In the 1972 Act, the proprietors owned the common property as tenants in common. Section 54(2) of the 2010 Act provides that the proprietors are beneficially entitled to the common property as tenants in common in shares proportional to their ownership interest. The change came about to allow for the better administration of common property. That is, the body corporate now owns the common property, rather than it being shared among multiple owners.

3.15 Section 79 of the 2010 Act provides for the rights of the body corporate's owners (the proprietors). Section 80 provides for the responsibilities of the owners in the unit title development. Importantly, in s 80(1)(f) there is a statutory obligation on the owners to pay various amounts, including body corporate levies.

3.16 Section 84 sets out the powers and duties of the body corporate itself. The body corporate may act through a committee. A committee is optional for developments of nine or fewer principal units (s 112(1)). A committee is mandatory for developments of 10 or more principal units (s 112(2)) unless the body corporate by special resolution decides not to form such a committee.

3.17 Sections 115-119 provide for the body corporate to have a number of funds and plans. Section 115 requires setting up an operating account for the daily business of the body corporate. Section 116 requires the setting up of a long-term maintenance plan, and s 117 requires the setting up of a long-term maintenance fund, unless the body corporate decides not to by special resolution. There are also optional funds that the body corporate can set up for unbudgeted expenditure and capital improvement.

3.18 Under s 121 the body corporate may determine the amount of funds to be raised and levy owners accordingly. This is the mechanism by which the funds set up in ss 115-119 are actually funded. The body corporate budgets for its expected expenditure and raises the amounts required proportionally from the owners.

3.19 Section 124 of the 2010 Act provides for the recovery of any unpaid levies from the proprietors of the unit title development.

3.20 Consistent with the 1972 Act, the body corporate is required to insure all buildings in the unit title development, not just the common property. However, the body corporate is only responsible for the maintenance of the common property in the development (s 38). This implies that individual owners are responsible for maintenance of their individual units and this is confirmed by s 80(1)(g). However, there are provisions in the legislation for the body corporate to undertake expenditure where required, and it may recover this from individual unit owners in specified circumstances.

Potentially relevant differences between the 1972 and 2010 Acts

3.21 There are two changes between the 1972 and 2010 Acts that are worth noting. The first is the change of ownership of common property. Under the 1972 Act, the proprietors owned it as tenants in common. Now, under the 2010 Act, the body corporate owns it on behalf of the proprietors. Arguably, however, this change is less substantial than it may at first appear on the face of the legislation.

[1] "Common property" is defined in s 5 of the 2010 Act as "all the land and associated fixtures that are part of the unit title development but are not contained in a principal unit, accessory unit, or future development unit".

The 2010 Act provides that the proprietors are beneficially entitled to the common property "as tenants in common". Further, s 79(b) provides that a proprietor holds a share in the common property in accordance with s 54(2). This is very similar to their ownership interest under the 1972 Act. The only difference appears to be that the body corporate is the legal owner of the common property. As mentioned earlier, this was a change to facilitate the more efficient administration of the common property.

3.22 The second difference is the current s 121, which provides that a body corporate "may" determine the amounts to be raised and then levy owners accordingly. Under the 1972 Act there was an obligation to raise funds by levying owners. The use of the word "may" could be argued to mean that a body corporate need not levy owners. However, the Commissioner does not consider that s 121 is a substantial change from the 1972 Act. The word "may" in the 2010 Act is not meant to express that levying contributions is optional. Rather, it is a statement of a power that the body corporate has (see s 84(1)(k)).

Key observations from the unit titles legislation

3.23 Some of the key observations from this review of the unit titles legislation are:

- The body corporate is a separate legal entity from the owners who are its members.
- The body corporate establishes funds to cover required and optional expenditure and levies the owners for the amounts it needs to raise for these funds.
- Common property is legally owned by the body corporate but beneficial ownership is with the owners.
- The legislation specifies the rights and duties of the owners and the body corporate for the property in the unit title development.
- As the contributions are presumably set to meet the anticipated costs of each fund, the contributions will rise or fall depending on the budget of the body corporate and anticipated expenditure. The budget should reflect the costs the body corporate incurs in undertaking its obligations under s 84.

3.24 Having considered the unit titles legislation, the next task is to identify the nature of the supply (if any) between a body corporate and an owner. To do this, this issues paper considers the decision in *Taupo Ika Nui* (although, on its face, this case was about consideration rather than supply). The decision of the House of Lords in *Nell Gwynn House Maintenance Fund Trustees v Customs and Excise Commissioners* [1999] 1 All ER 385 (HL) is then examined. The principles from these two cases are then considered in light of the unit titles legislation.

THE NATURE OF THE SUPPLY FROM A BODY CORPORATE TO AN OWNER

3.25 Although the matter is not without doubt, the Commissioner considers that a body corporate does supply services to the owners according to the duties in the Unit Titles Act 2010. It is not merely a supply of arranging services to be provided to the owners by a third party. The supply to the owners can be described as being the services undertaken by the body corporate, for the benefit of the owners, under s 84 of the Unit Titles Act 2010. The key supplies of services are the supplies of maintenance of the common property, obtaining insurance for buildings, administration of the development and financial management of the development. These services are similar to those that might be supplied by a property manager. However, this comparison does not, of itself, assist with determining the GST treatment of bodies corporate. The relevant

question concerns the nature of the services, if any, that the body corporate supplies to owners under the relevant unit titles legislation; not whether the arrangement is analogous to any other arrangement.

Taupo Ika Nui

3.26 The *Taupo Ika Nui* High Court case started as TRA decision *Case S34* (1995) 17 NZTC 7,228. The key facts were that the body corporate taxpayer operated a time share resort that was owned by approximately 850 proprietors. The resort comprised 28 units, and each unit was divided into 51 weeks. Prior to 1987, the resort was managed by an outside firm. This firm charged levies plus GST to the taxpayer and the proprietors, and accordingly the firm was a GST registered person. In December 1987, the taxpayer took over the functions previously performed by the outside firm and carried them out in-house. The taxpayer levied the proprietors for outgoings, maintenance and "capital replacement". It was found as a fact in the TRA that the taxpayer employed a number of staff for cleaning, gardening, managerial and secretarial responsibilities. When the taxpayer took over the administration it applied for deregistration for GST purposes, which was approved. Two years later, the Commissioner sought to reregister the taxpayer but the taxpayer objected.

3.27 In the TRA, Barber DJ observed that the proprietors elected a committee each year to manage the resort's affairs for the next year. An annual budget was prepared. Staff were employed by the taxpayer and were paid wages to ensure that the maintenance standards of the resort were met. The levies that were imposed on the proprietors had provision for a surplus for future refurbishment of the resort. In other words, the annual budget was not simply based on the current year's expenditure but was designed to build up a future fund for capital refurbishment.

3.28 The secretary/manager of the body corporate gave evidence that the body corporate employed fulltime staff. The body corporate rendered invoices to each proprietor for the annual maintenance contributions to maintain the fund that the taxpayer was required to have for administrative expenses under s 15(2)(a) of the Unit Titles Act 1972.

3.29 The TRA dealt with an argument that the body corporate was indistinguishable from the proprietors that made up the body corporate. The TRA concluded that the body corporate was a separate legal entity and by law was deemed to be a corporation.

3.30 The TRA was also able to conclude without too much difficulty that the taxpayer carried on an activity and the activity was carried on continuously or regularly. It was accepted that the activity was not carried on for a pecuniary profit but the TRA said that was not a requirement of a "taxable activity".

3.31 The analysis as to whether the body corporate made supplies to the proprietors for a consideration was dealt with very briefly by the TRA and, notably, did not address the relevance of the statutory nature of the mutual obligations. At 7,234 Barber DJ said:

> It seems to me that the objector's activity involves supplying services to each proprietor of a unit and to all the proprietors as a group. **The objector arranges the maintenance and operation of the timeshare resort and recovers the cost of so doing from each proprietor. This is clearly the supply of services by the objector to another person or persons for consideration.** As well as collecting sums needed for maintenance of the resort, a surplus is collected from proprietors so that funds are in hand for maintenance and remedial work. GST is a transaction based tax and the particular supply must be examined in

> order to determine whether or not GST is chargeable. It makes no difference whether the payment made is capital or revenue in the hands of either party. [Emphasis added]

3.32 The taxpayer appealed the decision that it was liable to register for GST. The High Court judgment in *Taupo Ika Nui* was delivered by Gallen J. There appears to be inconsistencies between the statement of facts in the TRA and the facts that were discussed by Gallen J in the High Court. Even the facts that were first discussed in the High Court judgment are not entirely consistent with some of the later comments of his Honour. For example, at 13,148 his Honour observed that the body corporate employed a secretary/manager to accept the organisational responsibilities of the body corporate. However, later in the judgment his Honour considered that the body corporate was, in essence, just a conduit passing through the invoices for supplies by third parties to the proprietors of the resort. It is not entirely clear how this is possible in a context where the body corporate had employed a staff member. It might be expected that the cost of an employed staff member would need to be passed on to the proprietors through the levies. This is even more inconsistent with the TRA finding that the body corporate employed a number of staff in a number of responsibilities.

3.33 Gallen J did agree with the TRA that the body corporate had a separate legal existence from the proprietors and identified relevant provisions from the Unit Titles Act 1972 explaining why this was the case (at 13,149).

3.34 Again consistent with the TRA decision, the High Court agreed that the taxpayer carried on an activity continuously or regularly, and also that there were supplies made to the proprietors by the body corporate. Also consistent with the TRA, the High Court took issue only with the question of whether consideration was given for the supply made by the body corporate to the proprietors.[2] The High Court analysis on why there was not a supply for consideration is relatively brief. At 13,150 the High Court said the following:

> The definition contemplates consideration as a return for the services supplied. It seems to me that there is a distinction between the cost of the services and collecting the cost of those services. Counsel conceded that in this case, services are supplied by and charged for by the independent contractors who actually carry them out. **The appellant does not receive or obtain anything for its own benefit in respect of the organisation which it performs**. The whole of the sums supplied by the proprietors are used for the payment of the independent contractors either in respect of the immediate obligations, or accumulated for the provision of future obligations. **The services of collection, management and payment carried out by the appellant are gratuitous. The appellant receives nothing for what it does**. This may be contrasted with the situation when it employed a third party to perform those tasks, the third party being paid for what it did. In that situation, the obligation to pay GST clearly arose.
>
> The Authority did not give reasons for coming to the conclusion that the recovery of cost amounted to consideration for the purposes of the *Goods and Services Tax Act* 1985 so that I do not have the advantage of the views of an expert in the field, which the Authority clearly is. I imagine however his conclusion reflected the reference in the definition of "consideration" to a payment made "in respect" of services. Leaving aside the definition for a moment, the concept of consideration as used in the law of contract has been the subject of considerable academic discussion. **Whether it is defined in terms of benefit and detriment or bargain and price, there is an element of reciprocity**. There is no such element in a situation where a corporate body merely collects the contributions from its members and passes them on. The question arises therefore, whether the definition is so worded that there is no need for an element of reciprocity. With some hesitation I have come to the conclusion that it does not. The use of the term "consideration" imports the specialised meaning given to that term in a legal context, which would tell against a meaning involving a mere handling of the funds. [Emphasis added]

[2] Notwithstanding the concession of the supply point and the stated focus on consideration, as will be seen later when discussing *Nell Gwynn*, *Taupo Ika Nui* may have been more about the nature of the supply than about whether consideration was paid. This might explain some of the concern expressed about distinctions based on employees or independent contractors, or whether there was a profit margin for the body corporate. It is possible that these distinctions are in relation to the question of the nature of any supplies rather than "consideration".

3.35 Some observations can be made in relation to the High Court decision in *Taupo Ika Nui*:

- A finding that the services were supplied by and charged for by independent contractors who actually performed the services appears inconsistent with the factual findings in the TRA and (to a lesser extent) the High Court that the body corporate employed its own staff.

- Emphasis seemed to be put on the fact the taxpayer did not receive or obtain anything for its own benefit for the activities it performed. However, making supplies without a profit-making purpose is not a prohibition on having a taxable activity.

- The High Court's conclusion on the meaning of "consideration" seemed to be at least partly based on the contract law meaning rather than the definition in the GST Act. (This may be acceptable if his Honour was attempting to emphasise the requirement of reciprocity and nexus, but regard would still need to be had to the statutory definition provided for in the Act.)

- The final conclusion in the decision was expressed to have been arrived at "with some hesitation". Accordingly, the conclusion was not a particularly firm one.

3.36 Notwithstanding these observations about the case, the actual decision is understandable to the extent it reflects the court's misgivings about applying the normal "supply for consideration" analysis in the body corporate context. The relationship between a body corporate and its owners does not have the look of a normal supplier-recipient relationship for GST purposes. The required "reciprocity" between supply and consideration was not seen to be present. The body corporate is the amalgamation of the owners, albeit a separate legal person, and the owners have no real alternative to receiving the supplies from the body corporate. The owners cannot elect to receive the supplies from a completely different supplier because of the statutory regime in the Unit Titles Act 2010. However, although the relationship may not be the most typical for GST purposes, that does not necessarily make it fall outside of the GST net.

3.37 The concession by the High Court that the body corporate did make supplies to the owners is difficult to understand combined with the conclusion that such a supply was made for no consideration. However, it may be that the High Court was attempting to distinguish between a supply of arranging for services and a supply of services.

3.38 It is difficult to see how distinctions based on whether a body corporate hires staff or not, or charges a margin on its levies or not, are relevant in the context of "consideration". However, they may be more explicable in the context of determining the nature of the supply between the body corporate and the owners. Perhaps the High Court intended to draw a distinction between the body corporate providing services to the proprietors on the one hand, and the body corporate arranging for third parties to provide those services to the proprietors on the other. Whereas the TRA characterised the transaction on the basis that it was one where the body corporate supplied services, the High Court may have considered the transaction as one where the body corporate supplied the service of arranging for others to supply the services. Crucially, the argument would have to continue that the High Court also found that the supply of arranging services was supplied for no consideration. However, while this might be a more logical way of interpreting *Taupo Ika Nui*, it is not the way that Gallen J disposed of the issue on the face of it, as is evident from the extracts from his judgment quoted above. However, this alternative approach does have some support from

the *Nell Gwynn* case discussed next. This distinction would support the view that bodies corporate can and do make supplies to owners.

Nell Gwynn House

3.39 *Nell Gwynn House Maintenance Fund Trustees v Customs and Excise Commissioners* [1999] 1 All ER 385 (HL) involved an apartment building. The landlords had a building made up of 435 flats, 270 of which were let on long leases, and 165 of which the landlords retained for sub-letting on short leases under their own management. Under the leases, the tenants covenanted to pay annual contributions to a maintenance fund for the maintenance and upkeep of the block. The landlords paid a similar contribution in relation to the 165 flats they leased on short-term deals.

3.40 The maintenance fund's purpose was to employ staff to perform such services as the trustee thought necessary in or around the building. A firm of solicitors was the trustee and received a fee of up to £17,000 plus VAT. Eighteen staff were employed to maintain the block. Staff were paid out of the maintenance fund.

3.41 The taxpayer had conceded that if the relevant supply by it to the lessees and the landlord was the supply of arranging for services to be supplied by third parties, then the trustee's fee of £17,000 was the consideration for that supply. The issue was in relation to the balance of the maintenance contributions paid and whether they related to supplies made by the taxpayer.

3.42 The House of Lords found that the trustee made a supply to the tenants by supplying the services of staff and that maintenance contributions paid by the tenants amounted to consideration for the provision of services by the trustee to the tenants.

3.43 The House of Lords considered and contrasted two situations. The first was where a person (A) paid for services to be provided to them by another person (B) in which case the provision of services constituted a supply by B. The second situation was where a person (A) put another person (B) in funds for B to arrange for a third party (C) to provide the services to A. In this second case, the supply from B to A is the arranging for the services.

3.44 The distinction between these two situations reflects the different treatments of the TRA and the High Court in the *Taupo Ika Nui* litigation. The first situation reflects the TRA's interpretation, ie, that the body corporate engaged with the proprietors in supplying services to them. The second reflects the High Court's interpretation, ie, the proprietors essentially put the body corporate in funds to arrange for third parties to supply services to the proprietors (the supply of the "services of collection, management and payment"). In particular, on the basis the body corporate supplied the arranging for the services to the proprietors and that these arranging services were provided gratuitously, the High Court found there was no consideration for the supply. (Again, it is recognised that this is not the way the High Court expressed its analysis.)

3.45 The House of Lords observed that the maintenance trustee made a supply to the lessees by supplying the services of the staff, as provided for under the lease. The maintenance contributions paid by the long-term lessees amounted to consideration for the provision of those services. Likewise, the services of the staff had been supplied to the landlords (in respect of the 165 units they retained and used) in return for the landlord's contribution to the maintenance fund. It was considered important that the trustee entered into employment contracts with the staff. It did not contract with third parties; instead it employed and supplied the services of the staff. The staff could not be called independent

contractors or be said to be employed by the landlords or lessees, or to be the suppliers of the services. The trustee was not merely being reimbursed for expenses paid out in the name and for the account of the lessees and landlords as purchasers or customers.

3.46 This case establishes a number of propositions:

- Where a person pays another for services to be provided by the other person, that provision of services will be a supply for consideration.
- There is a third party supply and a supply of arranging services where funds are provided to another person for that other person to arrange for a third party to provide supplies. To the extent there is a fee for that arranging of services, this will be consideration for a taxable supply by that taxpayer.
- The employment of staff by the maintenance trustee meant it was not possible to argue that third parties were supplying services to the tenants and the landlord; instead the services were coming from the maintenance trustee.

Application of case law principles

3.47 In summary, the High Court decision in *Taupo Ika Nui* is not a convincing authority for the reasons discussed earlier in relation to the consideration issue. However, it may be argued that *Taupo Ika Nui* was (implicitly) attempting to use the distinction articulated in *Nell Gwynn.* That is, perhaps Gallen J was attempting to apply the distinction between a body corporate supplying services to its members and a body corporate arranging for services to be supplied by third parties to its members.

3.48 It is understandable why, in this context, the employment of employees by the body corporate may have been significant to the High Court. The presence of employees would make it difficult to argue the body corporate was not undertaking the activities itself. However, the absence of employees allows the argument that the body corporate is a conduit or an "arranger" between the third party suppliers and the proprietors.

3.49 However, even that attempted distinction would not appear to be justifiable in the context of *Taupo Ika Nui* and bodies corporate generally. The reason for this is that the body corporate cannot arrange for third parties to supply services to the owners (the second situation posed in *Nell Gwynn*) because the obligation is on the body corporate to provide services and not to act as the owners' agent in doing those things. The members do not devolve those responsibilities or contract for services with the body corporate or delegate the provision of those services to the body corporate.

3.50 The legislation imposes duties on the body corporate to undertake certain activities (s 84 of the 2010 Act), and there appears to be no scope to contract out of those obligations, except in the sense that a body corporate can use other entities to fulfil its role. What it cannot do is contract out of its role per se. It must fulfil that role. Even in *Taupo Ika Nui,* where the management of the body corporate was originally contracted out to a third party supplier, the body corporate itself was still registered. There is academic support for this view (see Rod Thomas *"Bodies corporate: third parties"* [2012] NZLJ 262).

3.51 Sections 108-110 of the Unit Titles Act 2010 set out the rules regarding the ability of a body corporate to delegate its powers and duties. These provisions indicate that bodies corporate have limited power to delegate and, in any case, only to a body corporate committee. There is no power for the body corporate to contract

out of its powers and duties to a third party. However, this does not prevent a body corporate from exercising its powers through employees and agents, as such an action is not a delegation in the prohibited sense (see Rod Thomas at 264):

> The actual performance of a body corporate "duty" can therefore be tasked to a third party, without offending the non-delegation principle, provided the agent is acting only in a ministerial or overseer capacity. Responsibility for the duty being properly discharged remains with the body corporate.

3.52 Therefore, it seems that a New Zealand body corporate acting under the authority of the Unit Titles Act 2010 will be able to perform its tasks by use of employees or independent contractors (indeed, as a non-natural person, it will have to use some form of human actor to undertake such tasks). However, it will not be able to act solely as the arranger of services (in the sense articulated in the *Nell Gwynn* case) or as a "conduit", as it will always have the responsibility for the services being supplied to the owners. In this regard it is considered irrelevant whether there is a formal delegation to a committee of the body corporate. Although the body corporate may be using third parties to actually carry out the services, as a matter of law it will be the person responsible for those services, and the relationship with the third parties will be its relationship and not that of the owners. The owners are in a relationship only with the body corporate.

3.53 Based on the above, therefore, the Commissioner considers that a body corporate will not act as an agent of the proprietors in carrying out its duties under the Unit Titles Act 2010.

Can it be argued that no supply is made by a body corporate?

3.54 The previous discussion considered what type of supply a body corporate makes to the owners. There is also an issue as to whether the body corporate makes any supply to the owners, particularly as a result of the change in ownership of common property under the unit title legislation. There are different arguments as to the impact of the common property being held by either the proprietors as tenants in common (the 1972 Act), or the body corporate itself (the 2010 Act). One argument is that, to the extent a body corporate undertakes services in relation to the common property, it cannot make a supply in relation to that common property because it owns the property itself. The argument is that one cannot make a supply to oneself.

3.55 Another argument is that the body corporate makes a supply of the common property to the owners. A possible consequence of this view is that, where the common property is an appurtenance to residential accommodation, the supply could be exempt from GST. However, under the 2010 Act, owners retain joint beneficial ownership of the common property. Consequently, the Commissioner considers it unlikely that bodies corporate make supplies of the common property to owners. The body corporate's ownership of common property does, however, arguably further bolster the view that it can no longer be argued that the body corporate's only activity is collecting, managing and paying amounts of money. (See the discussion of *Taupo Ika Nui* below.)

3.56 Another matter to take into account is levies on owners for future services, such as capital refurbishment or improvement. It would seem difficult to argue that such payments relate to either a body corporate arranging services, or a third party supplying services for such a payment. Instead, such payments seem more consistent with an approach that bodies corporate supply a bundle of services to owners according to the duties in the 2010 Act, and the use of the funds by the bodies corporate is a separate GST issue.

3.57 The Commissioner's view is that the change in ownership of common property between the 1972 and 2010 Acts does not have any substantial effect. The change was intended to facilitate the efficient administration of the common property. Furthermore, the legal effect of the change is not as significant as it may first appear because, although the body corporate legally owns the common property, the owners still retain joint beneficial ownership (as tenants in common).

3.58 Even if the first argument were accepted, and no supply could be made in relation to the common property by the body corporate, this would not resolve the issue because the body corporate can still make supplies of services of obtaining insurance, administration and financial management.

3.59 Accordingly, although the matter is not without doubt given the decision in *Taupo Ika Nui,* the Commissioner concludes that a body corporate does supply services to the owners according to the duties in the Unit Titles Act 2010. It is not merely a supply of arranging services to be provided to the owners by a third party. The supply to the owners can be articulated as being the services undertaken by the body corporate, for the benefit of the owners, under s 84 of the Unit Titles Act 2010. The key supplies of services appear to be the supplies of maintenance of the common property, obtaining insurance for buildings, administration of the development and financial management of the development.

3.60 It is acknowledged that the body corporate's relationship with the owners does not look like a typical GST supplier-recipient relationship because:

- the body corporate is made up of all the owners, even though it is a separate legal entity;
- the owners do not have any real option but to receive supplies from the body corporate because of the Unit Titles Act 2010;
- the economic substance of the relationship between the parties is a collective funding of the unit title development's common expenses; and
- in economic substance, the body corporate might be seen as acting in the interests of the owners as the agents of the owners.

3.61 However, for the reasons discussed above, these features do not mean there is no supply from the body corporate to the owners. Those reasons are:

- The body corporate is a separate legal person with all the powers of a natural person (although it may only use them in fulfilling its function). It is a separate entity and is capable of supplying goods and services.
- The Unit Titles Act 2010 requires the body corporate to undertake certain tasks for the owners.
- Those tasks, when provided, amount to goods and services, which are furnished or supplied to the owners.

3.62 In the next section of this paper ("Whether there is "consideration" provided for the supplies to the owners"), there is extensive discussion of case law relating to the "consideration" issue. While that case law is not specifically focused on establishing the existence of a supply, it bolsters the conclusions in this part of the paper by either accepting or assuming that a supply has occurred.

WHETHER THERE IS "CONSIDERATION" PROVIDED FOR THE SUPPLIES TO THE OWNERS

3.63 It has been concluded that bodies corporate make supplies of a range of services to owners. Therefore, it is now necessary to determine whether the body corporate fees paid by owners can be "consideration" for those supplies when the obligation to make payment is a statutory obligation.

3.64 The Commissioner considers that, notwithstanding their statutory nature, the levies paid by owners to the body corporate are paid "in respect of" the services supplied by the body corporate. Therefore, they are consideration for the supplies made by the body corporate. The reasons for this are set out below.

3.65 Above it was concluded that the *Taupo Ika Nui* case law was not particularly useful or persuasive. Accordingly, a number of other relevant New Zealand cases must be considered. These cases may shed light on the appropriate principles to apply to determine whether bodies corporate can register for GST. This is to decide whether the owners of units in a unit title development are providing consideration to the body corporate for the supplies the body corporate makes to them. The first three cases discussed below are some of the core GST cases in New Zealand. The next two cases discussed involve facts analogous to that of a body corporate, in the sense of involving statutory obligations and a lack of voluntariness.

3.66 Before considering those cases though, the definition of "consideration" in s 2(1) of the GST Act should be noted. It provides:

> **consideration**, in relation to the supply of goods and services to any person, includes any payment made or any act or forbearance, whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods and services, whether by that person or by any other person; but does not include any payment made by any person as an unconditional gift to any non-profit body:

3.67 The two most relevant points for current purposes are:

- The payment made or any act or forbearance need not be voluntary.
- The payment, act or forbearance must be "in respect of", "in response to", or "for the inducement of" the supply. These are all terms of wide meaning with "in respect of" probably being the term with the widest meaning.

"Consideration" is therefore meant to be a broad term, with a wide interpretation.

New Zealand Case Law

Turakina Maori Girls College

3.68 The first relevant case is the Court of Appeal decision in *Turakina Maori Girls College Board of Trustees and others v CIR* (1993) 15 NZTC 10,032. McKay J delivered the judgment of the court. The taxpayers were various proprietors of land, buildings and other assets used by integrated schools. Students who attended the school were provided with education by the school, which was paid for by the Ministry of Education. However, the parents or guardians of the children at the school were obliged to pay various attendance dues to the proprietors as a condition of the children being enrolled at the integrated school. The question was what the proprietors provided to the parents in return for the attendance dues that the parents paid. The proprietors could only use the attendance dues they received for the payment of debts, for capital works and improvements, and for certain other charges.

3.69 The High Court considered that the service provided to the parents by the proprietors was the supply of school premises with the accompanying obligation to preserve the special character associated with the school.

3.70 The Court of Appeal considered that the attendance dues might be calculated by reference to the proprietors' debt obligations but they were not themselves interest, principal, dividends or other amounts. (This was in the context of an argument that the payments related to exempt supplies of financial services.) In other words, what the proprietors used the amounts for did not characterise the supply to the parents.

3.71 The Court of Appeal found that the attendance dues related only to the proprietors' obligations for the payment of debt, for capital works and improvements, and other charges associated with the land and buildings, such as insurance (s 36(3) of the Private Schools Conditional Integration Act 1975). In addition, the Court of Appeal found that the proprietors' obligations were not conditional upon the payment or non-payment of attendance dues.

3.72 It was also observed that proprietors could require an agreement to pay attendance dues as a condition of enrolment, subject to the integration agreement (s 36(1)). Section 36(6) of the same Act made it clear that attendance dues were recoverable as a debt from the parent or other person who was responsible for the child enrolled at the school.

3.73 The situation of the attendance dues being paid to the proprietors of the schools was similar in many ways to the levies imposed on unit title owners by bodies corporate. The obligation to pay was a legal obligation (to the extent it was made a condition of the integration agreement) and the contributions were limited to certain types of expenses incurred by the proprietors (s 36(3)). Like an owner of a unit in a unit title development who is only liable to body corporate levies when they choose to acquire a unit, a person would only be subject to the obligation to pay attendance dues for a school when they chose to enrol a child at that school. In both cases, once that voluntary decision is taken the statutory obligation follows.

3.74 There was quite some discussion in the Court of Appeal judgment trying to tie down what supply the proprietors actually made to the parents or children, if any. The proprietors' counsel argued the proprietors supplied nothing to students or parents; any supplies they made were to the Crown or to the school. The Court of Appeal considered this was not a relevant matter, as a supply did not need to be to the person paying the consideration. In that context, it was the Court's view that the proprietors made supplies of the buildings, contributed to ensuring the maintenance of the special character of the school, and entered into a contract with parents or guardians that entitled the pupils to attend the school. Some of these supplies were not necessarily <u>to</u> the parents or students (such as the supply of the buildings to the school). At the very least the proprietors supplied the service of securing enrolment in the school in return for the payment of attendance dues. As a result, the Court of Appeal concluded the attendance dues charged to the parents were subject to GST.

3.75 *Turakina* is not a perfect analogy to the body corporate situation. The proprietors of the schools were not in the same position as the body corporate of a unit title development. This is because the proprietors owned the buildings and land (with other assets) in their own right and did not act as a representative for the parents and students currently involved with the school. On the other hand, a body corporate acts on behalf of the individual proprietors of the unit title development. However, some relevant and important propositions that can be taken from this case are:

- The basis on which consideration is payable for a supply (the cost to the supplier of the supplies) is not determinative of whether there is

consideration for a supply. That is, just because the amount paid by a recipient of a supply is the same as, and directly related to, amounts payable by the supplier to a third party, does not mean the recipient is paying the third party or paying an amount of the same nature as the payment to the third party.

- A statutory obligation to pay attendance dues, where an integration agreement provided for it, was not a reason that attendance dues would not be consideration for a supply.

NZ Refining

3.76 Another relevant Court of Appeal decision is *CIR v NZ Refining Co Limited* (1997) 18 NZTC 13,187. The government wanted to deregulate the oil industry and remove the refinery's protected position. However, in the 1970s the taxpayer had been encouraged to expand production as part of a government policy programme and had been given guarantees of its return on assets by virtue of certain "support letters". To deregulate the industry it was necessary to unwind these arrangements. To do so the government agreed to repay the taxpayer's loans (incurred in the expansion) and in addition pay the taxpayer $85 million in three annual payments. This was a negotiated agreement, and the payment of $85 million was conditional on the refinery remaining operational.

3.77 The question before the court was whether the $85 million paid to the taxpayer was in return for a supply of services on which the taxpayer would have to return GST. The Court of Appeal concluded that it was not, on the basis that there was no link between any supply made by the taxpayer and the consideration received by it from the government. Effectively the payment was a subsidy to the taxpayer's taxable activity and an inducement to keep the refinery open for at least a three-year period. It was not a case of payments being made for a particular supply. (Note it was not argued that there was a supply being a surrender of the support letters or a forbearance to sue. If either of these arguments had been made, it is unclear what the Court of Appeal might have decided.)

3.78 Henry J in the High Court had found that the payments by the Crown to the taxpayer were not for the supplies made by the taxpayer to the oil companies, the taxpayer's actual customers. Those supplies were not in any way related to the $85 million that the taxpayer received.

3.79 The Court of Appeal saw it as essential that there be a link between the supply to the oil companies and the consideration received. The focus in the case on the relationship between the taxpayer and the oil companies was all about showing that there was no third party consideration for any particular supply. The court said that the relevant test to determine whether there was consideration for a supply required a practical necessity for a sufficient connection between the payment and the supply.

3.80 The relevant point to draw from this case is the focus on the practical necessity for a sufficient connection between the payment and the supply. In other words, the fact that there is a supply of something, and a receipt of money, does not necessarily answer the question of whether GST is chargeable.

3.81 However, the decision is distinguishable from the bodies corporate position. In *NZ Refining*, the court was struggling with the fact that consideration came from a third party to the taxpayer. The consideration appeared to have an insufficient relationship to the taxpayer's actual supplies to oil companies. Instead, the

consideration appeared to be a form of funding for the taxpayer's taxable activity rather than consideration for supplies to the Crown by the taxpayer.

3.82 On the basis of the economic substance of the body corporate fact situation, there is a superficial similarity between this and the funding of a body corporate by the payment of levies by the owners. However, in the case of a body corporate there are supplies of services going to the proprietors and a flow of consideration the other way. There appears to be the requisite reciprocity. There is no issue of a third party relationship obscuring the analysis. Neither is it just a case of the owners funding a taxable activity where the registered person makes supplies to third parties. The question is around the statutory nature of the parties' mutual obligations. There is still the need to link the consideration to the supplies, but the absence of a third party removes the possibility that the consideration provided to the taxpayer relates to a supply made to another person. There is also not the same problem in articulating a supply as there was with the Crown and the taxpayer in *NZ Refining*. Accordingly, it is arguably more difficult to say that the money flowing from the proprietors to the body corporate does not have that sufficient connection with the supply of the services.

Chatham Islands Enterprise Trust

3.83 The Court of Appeal again considered issues of consideration in the decision of *Chatham Islands Enterprise Trust v CIR* (1999) 19 NZTC 15,075. Keith and Blanchard JJ gave one judgment. Tipping J gave a separate judgment.

3.84 The Crown established the trust in 1991 and settled $4 million on it. The role of the trust was to promote the economic development and wellbeing of the Chatham Islands community. A further $4 million was settled on the trust later. The trust "procured" the transfer, lease or licence of relevant Crown assets, such as the port, airport, meat works and power company to its ownership. The Commissioner sought to impose GST on the money received by the trust on the basis that in return for the consideration it was providing supplies to the Crown.

3.85 The High Court found in favour of the Commissioner, saying that payments were for services to be supplied by the taxpayer. However, the Court of Appeal found for the taxpayer, concluding there was an insufficient link or nexus between the payment and the activity to which it gave rise so as to be subject to GST.

3.86 The Commissioner argued the trust was making a supply of services to the Crown of taking on the Crown's obligations. Alternatively, the supply by the trust was made to the people of the Chatham Islands, as the supply did not need to be to the person providing the consideration. Blanchard and Keith JJ thought the argument was ingenious but it had an unreal air about it. They pointed out that the settlement of moneys on a trust was really just the set-up of a trust. It was a receipt of an endowment to be held on the terms of the deed. Neither was it valid to say that the trustees were performing services for beneficiaries in return for a consideration provided by the settlor. The judges concluded that the $8 million could not properly be characterised as inducing the trust's functions or what the trust did with the money in response to the payment. There was an absence of reciprocity in the relationship.

3.87 Tipping J, in his judgment, asked the question of what the trustees supplied and to whom. He considered (at [29]-[30]) that it was conceptually unsound to say that the trustees of a voluntary settlement supply services to the settlor of the trust or to the beneficiaries of the trust when all they were doing was performing the terms of the trust. In his opinion, the concept of supplying services had a reciprocal connotation. It was not apt to catch the fulfilment by trustees of their

duties as such, albeit that such fulfilment will necessarily, in a direct or indirect way, be of benefit to the beneficiaries and settlors.

3.88 This decision is similar in a way to the decision in *NZ Refining*. Again, the payment of money by the Crown to the trust did not have a sufficient link with any supply that the trust was making. The nature of the payments to the trust as the settlement of the trust's "capital" or corpus complicated matters in the decision. Conventionally, this was not seen as relating to specific supplies that the trustees would be making to either the settlor or beneficiaries. Instead, the settlement gave rise to the fiduciary obligations that the trustees subsequently had to exercise, according to the law and to the provisions of the trust deed. In the absence of any specific link between the $8 million and the (assumed) supplies, it was not possible to find a sufficient link. The funding point should not be taken too far. In a sense all payments for supplies fund the supplier's taxable activity. The crucial question is not whether the consideration funds the supplier's taxable activity but whether the consideration is paid in respect of, in response to, or for the inducement of, the supply of goods and services.

3.89 Again, as with *NZ Refining*, the analogy with bodies corporate is not particularly strong. There is a superficial similarity around funding a taxable activity. In addition, at [29], Tipping J made the comment that the trustees were just fulfilling their duty and this did not mean that there were supplies. However, his later comments make it clearer that the critical factor in the case was the lack of the link between the consideration and any services provided by the trustees. Like *NZ Refining*, it was more a case of putting an entity in funds rather than paying for particular supplies by the taxpayer to either the payer or a third party.

3.90 Both the *NZ Refining* and *Chatham Islands Enterprise Trust* cases are a step removed from the situation of a body corporate. This is because those cases involve debate as to whether there is a supply to the person making the payment, rather than the debate being around whether the consideration relates to the supply (as is the case for the body corporate situation). The issue of sufficient connection is still a valid concern though. The next two cases provide insight as to what a sufficient connection might be in relatively analogous circumstances to a body corporate.

Pacific Trawling

3.91 This paper will now consider the two more specific GST cases that may be of relevance. The first is *Pacific Trawling Limited and another v Chief Executive of the Ministry of Fisheries and another* (2005) 22 NZTC 19,204. This was a declaratory judgment of the High Court.

3.92 The case related to the issue of by-catch by commercial fishers and the payment of deemed value payments to the Ministry by those fishers. The question was whether the Ministry should be issuing tax invoices to the fishers upon receipt of deemed value payments.

3.93 Under the quota management system a commercial fisher may only take and sell quota species if they hold a valid fishing permit and a share of the total allowable commercial catch for the relevant species. When fishing for species for which they hold quota, a fisher frequently catches other quota species for which they do not hold quota. These fish are called by-catch. The relevant Fisheries Acts (the 1983 Act and the 1996 Act) both recognised that by-catch was inevitable and sought to create incentives to minimise it and avoid wastage. Under the 1983 Act, by-catch could be dealt with by surrendering the by-catch, buying quota for it or paying deemed values to the Ministry. Under the 1996 Act, there is a general prohibition on taking fish other than under the quota system and the Act provides

for suspension of a fisher's permit if they do not pay deemed values when they catch by-catch. The deemed value payment is set at a level that makes by-catch unprofitable but still creates an incentive to land, process and sell it.

3.94 Under the 1983 Act, the fisher obtained the right to sell the by-catch on payment of a deemed value payment. In contrast, under the 1996 Act, a fisher received the continued right to use its fishing permit.

3.95 Miller J referred to the need for a nexus between consideration (deemed value payments) and a supply and also to the requirement for reciprocity. At [31]-[34], he considered that neither Fisheries Act conferred ownership of the fish on the fisher; they already had that by virtue of catching the fish. While his Honour concluded that the two Fisheries Acts conferred different rights on a fisher in return for deemed value payments, he also concluded that both Acts had the effect that the Ministry supplied something in return for the deemed value payments. Under the 1983 Act, the Ministry supplied the right to possess and sell by-catch; under the 1996 Act, the Ministry conferred a right on the fisher to continue to use their fishing permit.

3.96 The decision in *Pacific Trawling* is interesting for two reasons:

- The court drew a very wide link between the consideration paid by a commercial fisher to the Ministry and the supply of a service (essentially) from the Ministry to the fisher. In other words, the court demonstrated a desire to cast the GST net widely and to link supply and consideration.

- The case also shows that a statutory regime prescribing payments to be made, and supplies to be made, can still give rise to GST. In the case of the Ministry, it was the legislation that required it to make a supply, as it had no real choice in the matter. For the commercial fisher, the payment of deemed values was voluntary, at least theoretically. However, given that non-payment would lead to suspension of the fishing permit (under the 1996 Act), it was not commercially realistic not to make the deemed value payments. Notwithstanding the statutory obligations on the parties to, respectively, make a supply and pay an amount, the court still found that there was a supply with consideration for GST purposes.

3.97 This decision is a useful analogy to the body corporate situation where, similar to the Fisheries Acts, the relevant legislation requires the body corporate to make certain supplies and obliges the proprietors to make certain payments. On the analogy of *Pacific Trawling*, there is support for the view that the payment by the proprietors to the body corporate would be subject to GST. Indeed, it is arguable that the supply by the body corporate to the proprietors is more obviously a supply for GST purposes than was the supply by the Ministry of Fisheries to a fisher in *Pacific Trawling*. That supply to a fisher is very intangible, as can be seen by the amount of time taken by the court to articulate what was the supply by the Ministry. Another analogy that can be drawn between the two situations is that each of them involves a voluntary assumption of obligations that then involves certain statutory obligations and consequences. In the case of the fisher, this was the voluntary decision to enter commercial fishing and take on all the associated statutory obligations.

Rotorua Regional Airport

3.98 The next relevant case is the High Court decision in *Rotorua Regional Airport Ltd v CIR* (2010) 24 NZTC 23,979. This was a decision of Mallon J, again in relation to a declaratory judgment application. The taxpayer leased airport assets from the Rotorua District Council for which it paid a rental. The council continued to be

responsible for the development of those airport assets. To raise funds for the development of the facilities, the taxpayer charged passengers who used the airport facilities $5 per flight as a development levy. It was entitled to do this pursuant to s 4A of the Airport Authorities Act 1966. The net amount of the levy (gross amount less the taxpayer's costs) was passed on to the council for the development work.

3.99 The taxpayer had charged GST on the levy. However, in 2006 it sought a binding ruling from the Commissioner that the development levy was not consideration for a taxable supply. The Commissioner's view was that it was subject to GST and the taxpayer accordingly withdrew the ruling application and brought the declaratory judgment proceedings. The taxpayer's argument was that the levy was a charge authorised by legislation, was levied to fund future facilities and was not consideration paid by passengers for services.

3.100 Mallon J concluded that the levy was paid by passengers, as users of the facilities of the airport, to gain access to the plane on which they were to depart. They had to pay the levy to get access to the plane and so there was a nexus or reciprocity between the payment and the service/supply.

3.101 The court found that the use of funds by the taxpayer was not relevant. That is, it was not relevant that the taxpayer passed on the funds to the council, who used the levied funds to meet future obligations it had in terms of developing the airport. The fact of the matter was that for the $5 the passengers were allowed access to the airport facilities so that they could get to their planes. The High Court did not accept the taxpayer's argument that it had no right to prevent a passenger from boarding their flight. The court found that, as the lessee of private property, the taxpayer could deny a person access to the runway to board, and this was a means of enforcing the payment of the levy.

3.102 The court noted the decision in *Pacific Trawling* as an example of a situation where payment of a statutory obligation or statutory charge could be in respect of the supply of something so as to be consideration.

3.103 Her Honour distinguished the decisions of *NZ Refining* and *Chatham Islands*. These were cases where the Crown contributed funding that assisted or enabled the recipient of the funds to carry out its activities, but the recipients were not supplying services to the Crown. Her Honour also distinguished *Taupo Ika Nui* on the basis that in that case the body corporate simply collected funds and passed them on (although as mentioned earlier, it is not clear this was the actual fact situation in *Taupo Ika Nui*). While her Honour accepted that the same could be said in this case (that the taxpayer simply collected the charges and passed them onto the Rotorua District Council), she made the point that the collection of the charge here was from passengers to whom the taxpayer was supplying services.

3.104 The court considered that *Turakina* was a closer comparison. There the payments to the proprietors were for capital works and improvements and other charges associated with the schools, land and building. However, the attendance dues paid by parents were paid to secure the enrolment of their children in a school for which the proprietors ensured the special character. Accordingly, this was found to be a good analogy to the present case. The passengers paid a fee to secure their access to the facilities leased by the taxpayer.

3.105 The following relevant points can be taken from *Rotorua Regional Airport*:

- A fee imposed by statutory authority can still be consideration for a supply.

- The ultimate use of the amount received by the supplier (to pass on for development work) does not affect the fact that they have made a supply of a service to the recipient.

3.106 It is recognised that neither *Pacific Trawling* nor *Rotorua Regional Airport* have the other characteristics of the body corporate situation that call into question the application of the conventional GST supplier-recipient analysis. (Those characteristics are the close connection of identity between owners and body corporate and the payment funding the collective expenses. Although the cases share the characteristic of a lack of realistic options for receiving the supplies from a different supplier.) However, the cases are relevant to the extent they share common characteristics of the type identified above.

United Kingdom VAT Case Law

3.107 As well as the New Zealand case law discussed in detail above, there are a number of useful United Kingdom VAT cases that assist with determining the issue. In the United Kingdom the question that arises in analogous circumstances is slightly different to that arising in the New Zealand context. Broadly speaking, the question in the cases discussed below is whether the services carried out by the (potentially) registered person constitute a taxable supply in the course or furtherance of a "business" carried on by the taxpayer. (The relevant question in New Zealand, of course, being whether there is a "taxable activity".)

3.108 The cases discussed below relate to clubs, associations or organisations. This is important because there is a deeming provision under the VAT legislation that means that the provision by a club, association or organisation (for a subscription or other consideration) of the facilities or advantages available to its members is deemed to be the carrying on of a "business". While this deeming provision may appear to mean there is a significant distinction between the New Zealand and United Kingdom positions, the important point to observe is that the deeming provision just means that the club, association or organisation is deemed to be carrying on a business. It still has to be providing something to its members for a consideration to come within that deeming provision. Moreover, once there is a deemed "business", the VAT legislation still requires that the club, association or organisation is providing services that are a taxable supply in the course or furtherance of that business.

3.109 Accordingly, the cases are still potentially very relevant. The cases will assist with determining:

- whether an entity provides services for a "subscription or other consideration"; and
- whether there is a taxable supply made by an entity to its members.

Carlton Lodge Club

3.110 The first relevant case is the decision of the Queen's Bench Division in *Carlton Lodge Club v CEC* [1974] STC 507, a three judge decision of that court. The club was described as a drinking club and had 800-1000 members. Each member paid an annual subscription of £2.10. In return for this, the members were entitled to buy drinks at the club. The club was an unincorporated members club that was licenced under the Licensing Act and had formal rules.

3.111 The club had a bank account that was operated by an authorised officer and a club steward. The club also employed barmaids. The steward was authorised by the wine committee of the club to make purchases out of club funds. In other

words, the club employed staff to undertake the services that it had to undertake to supply drinks to its members.

3.112 The club registered for VAT but subsequently applied to be deregistered on the basis that serving liquor to members did not amount to a supply of goods and services. The club's argument was that the liquor served was the property of the club members and the payment made for a drink merely constituted the consideration for the release by other members of their share in the drink. Essentially, the argument was that the court should "look through" the club.

3.113 The court found that the "supply of goods or services" meant the furnishing or serving of goods or services, and it was not limited to the supply of goods and services by way of sale. In serving drinks to members the club was engaged in the supply of drinks to them and was liable to pay VAT on the supply. The activities were controlled by the club's constituent rules.

3.114 The relevance of this case is simply that the club was an unincorporated member's club, in which essentially the members were the club, and yet the court established that it was possible for the club to make supplies to its members. The club was not a separate legal entity. The relevant factors of particular interest are that the club was a non-profit making body that had a bank account and employees, and it had a series of rules fully regulating its affairs. In this sense it is analogous to a body corporate. The difference, ie the club not being a separate legal entity, suggests that the principles from the case would apply more firmly to an entity like a body corporate. On the other hand, the case involved a contractual arrangement and not statutory obligations. The case has been discussed in a number of the later relevant United Kingdom decisions.

Manor Forstal Residents Society

3.115 The closest case law analogy to the body corporate situation is the VAT Tribunal decision in *Manor Forstal Residents Society Limited v The Commissioners; New Ash Green Village Association Limited v The Commissioners* (1976) VATTR 63. The case involved a housing development of 2000 houses, a shopping centre and public service and amenity buildings. The development was made up of 18 separate neighbourhood areas. Each neighbourhood area included not just the houses but also roads, footpaths and amenity land. Each neighbourhood area required the establishment of a friendly society. The first taxpayer was the friendly society for the Manor Forstal area.

3.116 Each homeowner, when they contracted to purchase a home, undertook to become a member of the society and to accept a transfer of the house in terms of an approved "draft". By a deed of transfer in such draft, each purchaser covenanted to pay to the friendly society the annual contribution due from a member under its rules. The friendly society covenanted to maintain the Manor Forstal neighbourhood area and to perform certain obligations for the purchasers relating to the periodic external redecoration of the houses. Annual subscriptions were determined from year to year by the society in a general meeting and bore a close relationship to budgeted expenditure. The society argued it should not be registered for VAT.

3.117 The second taxpayer (the Village Association) was a company formed to maintain the village amenity land. All property owners in the overall development area paid an annual contribution to the association, and the association covenanted to maintain the village amenity land. The articles of the association limited its members to 48, of whom not more than 16 were to be consultant (professional) members, the remaining 32 being representative members. The representative members were the chairs of the friendly societies for the various neighbourhood

areas[3]. Again, as with the first taxpayer, the annual contribution was determined by the association at its annual general meeting. The association also argued that it should not be registered for VAT.

3.118 A three member VAT Tribunal gave the decision. The first taxpayer had argued it operated a common fund of monies belonging to its members. The Tribunal concluded that when the friendly society received the annual subscriptions, they became its property. The Tribunal also found that the society, in maintaining the Manor Forstal neighbourhood area and externally redecorating houses, provided facilities available to the members in return for their subscriptions such that the society was deemed to be carrying on a business.

3.119 The Tribunal noted that the society was a corporate body distinct in law from its members for the time being. Money that was paid to it as subscriptions became the society's property to be dealt with in the furtherance of its objects. The funds were not the common property of the house owners.

3.120 The Tribunal found, on the particular United Kingdom statutory wording, that the society provided facilities to its members and therefore carried on a "business". The society's activities enabled members to more easily use and enjoy the roads and paths to and from their houses and the rural settings in which their houses had been built. The Tribunal did not emphasise that the obligations on the members were regulated by covenants that they had to agree to in order to become a member of the society.

3.121 The second appeal was concluded in favour of the association. The VAT Tribunal found that the owners of the houses in the overall development, other than the 32 representative members, were neither members nor deemed members of the association. In terms of the question whether the association was providing facilities to its members, the problem was that the services were largely to non-members, ie the home owners in the housing development. Further, some of the consultant (professional) members didn't own land in the development. The representative members did own land, but 1982 owners were not members.

3.122 The Commissioners tried to argue that the owners must be regarded as members for tax purposes, but the VAT Tribunal did not agree. The liability to pay contributions to the association and the liability of the association to do things for the benefit of the owners arose under the covenants in the deed. They did not arise by virtue of membership of the association. Accordingly, there was no deemed "business" under s 45(1)(b) of the Finance Act 1972 (UK) and no liability to register for GST. In the absence of a business, the Tribunal did not need to address whether the levies were consideration for a supply.

3.123 The analogy between *Manor Forstal* and the body corporate situation is not perfect. In *Manor Forstal*, there was no discussion of the statutory regime under which the friendly society and the association were operating. Instead, the obligations on both sides came about because of various covenants in deeds that had been entered in to by the parties. However, the distinction, between obligations arising under statutory provisions and obligations arising under deeds, does not seem to be a qualitative difference justifying different treatment. This is particularly so given the definition of "consideration" in the New Zealand legislation.

3.124 The key conclusions from the friendly society case that are the most relevant to the body corporate context are that a friendly society provides something to its

[3] There does seem to be an inconsistency in this regard. The facts stated that there were 18 separate neighbourhood areas and yet the Village Association had 32 members who were the chairs of the various neighbourhood areas. Nothing turns on this.

members for some form of consideration, sufficient to require it to register for VAT. To draw out some key conclusions more fully, the case established:

- The friendly society was a separate legal entity.
- Funds provided to the friendly society by its members became the property of the friendly society.
- The friendly society did furnish supplies to its members.
- The members provided consideration (subscriptions) in return for the supplies it received.

Durham Aged Mineworkers'

3.125 Another relevant UK VAT decision, which illustrates when an entity does not supply services for consideration, is the Queen's Bench Division decision in *Durham Aged Mineworkers' Homes Association v CEC* [1994] STC 553. The taxpayer provided homes to retired miners, and a sister entity provided homes to working miners. The taxpayer, in conjunction with the other entity, rented office accommodation as a headquarters and employed staff. The taxpayer held the freehold of the office accommodation and paid all bills and overheads, and then charged 50% of that cost to the other entity. The other entity employed and paid all staff costs and charged 50% of headquarters staff costs and 100% of residential care staff costs to the taxpayer. The taxpayer also paid for all staff training and travel and then charged 50% of that to the other entity.

3.126 The Commissioners said that the taxpayer resupplied goods and services to the other entity for the 50% reimbursement and should be subject to VAT. The taxpayer said that supplies were made jointly to the two associations and that it had paid for them on its own behalf and as agent for the other entity.

3.127 The court looked at the contractual relationship between the parties. It found that there was an implied agreement between the two associations to share accommodation and administrative expenses. The court found that the taxpayer would pay the expenses as principal for its agreed share and as agent for the other entity for its share. There was no separate resupply of goods and services to the other entity.

3.128 This case has been subsequently referred to with approval in the United Kingdom as an example of a case where two parties simply agreed to share costs, or where one party acts as an agent for the other. The fact situation in this decision is very different to that of bodies corporate and proprietors. However, it is worth noting this case as an illustration that payments between parties, related to the use of property or staff costs, are not always supplies for a consideration.

Nell Gwynn

3.129 As discussed above, this case covered both the issue of identifying the relevant supply (the maintenance trustee either making a supply of arranging for others to provide services, or making a supply of the services itself) and the consequential issue of whether the recipient of the supply was providing consideration. The conclusion on the consideration issue essentially followed from the conclusion on the supply issue.

3.130 As already discussed earlier in this paper, once the House of Lords concluded that the maintenance trustee was providing supplies to the lessees and landlords, it was quickly concluded that the payments in return were consideration for these supplies. It is worth observing that the case arose in a contractual context and not in a statutory context. This is a distinction from the body corporate situation.

Eastbourne Town Radio

3.131 *Eastbourne Town Radio Cars Association v Customs and Excise Commissioners* [2001] UKHL 19, [2001] 2 All ER 597 involved an unincorporated body whose members were private hire car drivers. The members paid a joining fee and a proportion of the association's expenses. In return, services such as advertising and arranging jobs were provided to the members through salaried employees of the association. In 1994, the association's constitution was revised so that its objects could include the employment by the members of persons to provide services to them. This was in contrast to the previous constitution, which provided that the association would employ such persons. The employees' employment contracts were amended to this effect (ie, they were now employed by the members and not the association).

3.132 As a result of this change, the association wanted its VAT registration cancelled. The association argued that the arrangement now involved collective funding for the members' own employment of staff. Alternatively, it could be analysed as a quasi-contractual arrangement of jointly obtaining goods and services and sharing expenses as per the *Durham Aged Mineworkers'* case.

3.133 Lord Slynn gave one of the two opinions. At [19] he observed that a member's share of the expenses was not calculated on the basis of specific services rendered to the member but on the total expenses for the year divided among the members. Neither did the payments go to the other members who were said to provide the employees; the payments went to the association. Both these factors undermined the argument that drivers were paying for specific services provided to them by the employees they employed themselves.

3.134 At [21]-[22] Lord Slynn considered that the joining subscription and the share of expenses paid were consideration for what was done by the association in engaging staff and in providing services through those staff to the members. The same conclusion followed irrespective of whether the amounts paid by the members related to individual services or were just an annual share of expenses.

3.135 Lord Hoffman gave the other opinion. He held that a body like the association made a taxable supply to its members if two conditions were satisfied:

- There must be an association and not just a mere contractual arrangement for jointly obtaining goods and services and sharing their expenses (reference was made to the *Durham* case).
- The facility or service provided to the members had to be provided in accordance with the rules of the association and had to be in consideration for a payment into the funds of the association.

3.136 In relation to the second requirement, a member enjoyed the services from the association in return for the payment of a subscription into the funds of the association. It was found there was a supply by the association to the members for consideration.

3.137 Lord Hoffman was of the view that certain arrangements could be excluded from being supplies by an association to its members. He gave an example. If two members of a club asked for the wine steward to buy them a case of wine as part of the club's next order, undertaking to reimburse the cost, there is no supply to those members by the club. It is simply acting as their purchasing agent. On the other hand, if the club, acting in accordance with its rules, supplied wine out of its own stock to a member in return for payment into the funds of the club, that would be a supply by the club to the member. The authority for this view was the decision of *Carlton* discussed earlier. This is also consistent with the distinction in

Nell Gwynn and (implicitly) *Taupo Ika Nui* discussed earlier. That is, while *Taupo Ika Nui* did not draw such a distinction explicitly, the effect of the case can be read consistently with such a distinction.

3.138 Lord Hoffman expressly considered the argument of the taxpayer that the change in employment status of employees made a significant difference to the VAT treatment. Lord Hoffman did not consider that this feature altered the character of the transaction as a supply by the association to the members. What mattered was that, as between the members, the provision of the services to the members was governed by the rules and by-laws of the association. Whether or not a member was an employer in relation to an employee, he had no right to the services of that employee except such right as might be conferred by the rules and by-laws. It was also immaterial that subscriptions were fixed as a pro-rated share of the association's expenses (rather than, for example, by the actual use of the services, or on a per capita basis). What mattered, in Lord Hoffman's view, was that the consideration for the member's entitlement to services under the rules was a payment into the funds of the association in accordance with the rules.

3.139 Again, this House of Lords decision is support for the view that there is still a supply of services for consideration where:

- the amount paid by a member is a share of the expenses incurred by the entity unrelated to actual services received; and
- even if the members legally employed the staff who provided the services, the fact that the services were provided under the rules of the association means that the association was making the supplies.

3.140 The arrangement in the case did not involve statutory obligations, but instead was an example of contractual obligations. As previously mentioned, it is not clear that this is a reason for distinguishing the case given the wide definition of "consideration" in the New Zealand legislation.

Australian Case Law

3.141 There is a relevant Australian Administrative Appeals Tribunal decision, *Body Corporate, Villa Edgewater CTS 23092 v FCT* 2004 ATC 2056. The taxpayer seems to have been very similar to a body corporate in a New Zealand unit title development. It was a body corporate for an apartment complex in Queensland and members paid contributions into sinking and administration funds. The general functions of a body corporate were set out in the relevant Australian legislation. The body corporate was responsible for the common property owned by the owners as tenants in common.

3.142 The Commissioner said that the body corporate was subject to GST on its supplies to members, but the taxpayer disagreed. The taxpayer said that the body corporate was a legal artifice to organise the private affairs of members, and the arrangement was just an internal transfer of funds between the members.

3.143 The AAT concluded that a body corporate was a separate legal entity with independent existence. Contributions made by members to the body corporate were not internal transfers but were made because of the relationship between the body corporate and its members provided for in a statute.

3.144 The body corporate was obliged to perform a variety of tasks in the course of administering the common property and assets. These activities it performed were services for GST purposes.

3.145 The definition of "consideration" included any payment in connection with a supply of anything. Contributions by owners were clearly made in connection with the services provided by the body corporate. The connection was made through the budgets for the administration and sinking funds, which were completed each year.

3.146 The decision of the AAT reinforces the conclusions reached in the New Zealand and United Kingdom cases discussed above:

- That a body corporate is a separate legal entity.
- Contributions by owners to a body corporate are not internal transfers but are payments between two separate legal entities.
- The existence of statutory obligations on both parties does not prevent the supply of services from being services for GST purposes and the receipt of consideration from being "consideration" for GST purposes.

3.147 The AAT considered the decision of the High Court in *Taupo Ika Nui.* It took a different view to the relationship between the body corporate and its membership than Gallen J did in *Taupo Ika Nui*. The AAT also took support for its view from the decision in *Nell Gwynn*.

3.148 The AAT did not consider there was any distinction between the two funds that were established by the body corporate, namely the administration fund (which dealt with non-capital works) and the sinking fund (which paid for capital works). In each case, the lot owners were paying for services to be rendered and the only difference was the nature and timing of services.

Summary of principles from the cases

3.149 In the Commissioner's view, the following principles can be taken from the case law above:

- For an amount to be "consideration", there is a practical necessity for a sufficient connection or nexus or reciprocity between the payment and the supply (*NZ Refining, Chatham Islands, Pacific Trawling*).
- The fact that the making of supplies and payments are mandated by statute does not prevent the payment from being consideration for a supply (*Turakina, Pacific Trawling, Rotorua Regional Airport, Villa Edgewater,* definition of "consideration").
- Where a recipient pays an amount to a supplier calculated by reference to a share of the supplier's own costs, the amount paid does not have the same nature as the costs to the supplier (*Turakina, Rotorua Regional Airport*) and instead can be related solely to the supplies made by the supplier to the recipient (*Nell Gwynn, Eastbourne Town Radio*).
- Where a recipient pays an amount that is ultimately to be passed on and used to develop facilities in the future, the supplier's use of the funds does not affect whether they have made a supply to the recipient (*Rotorua Regional Airport, Turakina* (by implication)).
- When an entity like a body corporate receives funds from its members to fulfil its obligations, the funds become the property of the body corporate (*Manor Forstal*, cf *Taupo Ika Nui*) rather than having the status of collective funding based on the economic substance of the arrangement.

- A body corporate is a separate legal entity from the members of the body corporate (*Taupo Ika Nui, Manor Forstal, Villa Edgewater*).

- When an entity has a set of formal rules that regulate the conduct of the entity, it is most likely that the entity will be found to be making supplies to its members (*Carlton Lodge, Eastbourne Town Radio*), even where the members formally employ staff (*Eastbourne Town Radio*).

- There may be fact situations where the entity is paid by its members to arrange supplies from third parties to the members (*Nell Gwynn, Carlton Lodge*) in which case the consideration will only be relevant to the extent it relates to that supply of arranging.

- Paying a share of expenses pursuant to the entity's rules does not amount to collective funding by the members (*Eastbourne Town Radio, Manor Forstal, Villa Edgewater*) unless there is a clear agreement between persons to acquire goods and share costs together (*Durham*).

Application of principles to bodies corporate

3.150 The case law discussed above does not provide a clear answer to the question of whether bodies corporate can (or must) register for GST. There are conflicting authorities, where the most directly applicable (*Taupo Ika Nui*) would favour non-registration, while the majority of cases (*Nell Gwynn, Manor Forstal, Eastbourne Town Radio*) would favour registration. The highest level cases, the House of Lords in *Nell Gwynn* and *Eastbourne Town Radio*, favour registration too. However, different interpretive arguments are possible and it is acknowledged that at an intuitive level it might seem a somewhat unusual result for a body corporate to register for GST in respect of supplies to its own members.

3.151 Overall, the Commissioner considers that the case law, with the exception of *Taupo Ika Nui*, supports the view that where a body corporate or similar entity provides services to its members in return for the payment of an amount, that payment will have a sufficient connection with the supply so as to be consideration: *Manor Forstal, Villa Edgewater, Nell Gwynn, Eastbourne Town Radio.*

3.152 Bodies corporate are not analogous to the fact situations in *NZ Refining* or *Chatham Islands*, where it was not possible to link the consideration to individual supplies. Bodies corporate do not simply involve the provision of funding to an entity unrelated to supplies. It is not a case of a subsidy to a taxable activity (*NZ Refining*) or of the endowment of a trust (*Chatham Islands*). There is a direct link between the services supplied by a body corporate and the consideration provided by the owners, as is reflected by the link between the level of supplies made and the amount of levies imposed.

3.153 The mutual statutory obligations on a body corporate and its members do not alter this conclusion. Statutory obligations to pay for services have been found to be consistent with there being consideration for a taxable supply: *Pacific Trawling, Rotorua Regional Airport, Villa Edgewater, Turakina*. That the duties are statutorily imposed does not alter the fact that the body corporate actually furnishes or supplies certain goods or services to the owners. It only affects why the supplies are being made. In any case, the decision to create a unit title development, or to purchase an interest in a unit title development, is a conscious and voluntary decision with certain consequences, so it is not truly a case of involuntary, statutorily imposed obligations.

3.154 The only contrary authority is the High Court in *Taupo Ika Nui*. As concluded above, this decision is not strong authority, as the facts do not appear to support the legal conclusion. It may be argued that *Taupo Ika Nui* was attempting to use the distinction articulated in *Nell Gwynn.* That is, attempting to apply the distinction between a body corporate supplying services to its members and a body corporate arranging for services to be supplied by third parties to the members. However, even that attempted distinction would not be justifiable in the context of *Taupo Ika Nui* and bodies corporate generally for the reasons previously discussed.

3.155 It is also important to observe that the definition of "consideration" in the GST Act is extremely wide, covering any payment made in respect of or in relation to a supply, "whether or not voluntary". Hence the legislation also anticipates that payments that are required by statute can be consideration for a supply.

3.156 All of these matters support the view that when a body corporate supplies services to owners, pursuant to the Unit Titles Act 2010, there will be consideration for such a supply by virtue of the payment of levies to the body corporate.

3.157 For completeness, it is useful to also consider two alternative views as to what the amounts levied by the body corporate are for. The first of these is that the levies are in the nature of subscriptions paid to be a member of a body corporate. It is noted that the levies may resemble membership subscriptions in substance. However, under s 76 of the Unit Titles Act 2010 an owner of a unit in a unit title is automatically a member of a body corporate. The requirement to pay body corporate levies is a consequence of being a member, rather than the payment of levies giving membership rights. In any event, even if body corporate levies were properly characterised as consideration for body corporate membership, it would still be necessary to determine what rights are acquired as a consequence of that membership. Being a member of a body corporate entitles an owner to all of the services performed by the body corporate under s 84 of the 2010 Act. Therefore, whether body corporate levies are seen as consideration for services provided by the body corporate or as consideration for membership of the body corporate, the GST consequences are arguably the same.

3.158 A further alternative view is that body corporate levies are paid in consideration for establishing and maintaining the various funds under ss 115 – 119 of the 2010 Act. This is because s 121 provides that a body corporate can impose levies on the owners of principal units to establish and maintain each fund. This arguably suggests that the levies are paid to establish and maintain the funds, rather than for the services provided by the body corporate. Against this, however, it is noted that a body corporate levies amounts based on its expected expenditure for fulfilling its statutory duties. The establishing and maintaining of the various funds is a means to assist the body corporate with undertaking its statutory duties (ie the funds are expended by the body corporate to perform these duties). Establishing and maintaining these funds is not an end in itself.

4. CONCLUSIONS

4.1 On the basis of the above analysis, the Commissioner considers that the better view of the existing law is that:

- A body corporate does supply services to the body corporate's owners according to the duties in the Unit Titles Act 2010. It is not merely a supply of arranging services to be provided to the owners by a third party.

- The owners are providing consideration to the body corporate for those services.

4.2 On this basis, the requirements of a "taxable activity" would be met. Consequently, a body corporate that makes supplies that exceed the $60,000 threshold is liable to be registered for GST. Similarly, a body corporate who makes supplies below the threshold may voluntarily register for GST.

4.3 As set out in the Summary of Principles above, these conclusions are not undermined by the fact that:

- a recipient (the owner) pays an amount to a supplier (the body corporate) that is calculated on the basis of a share of the supplier's cost; or
- the funds received by a supplier for the supply are used to develop future facilities; or
- the amount of consideration paid by the recipient represents a share of the expenses of the body corporate.

4.4 Neither is the unusual nature of the relationship between the supplier of services and the recipient (body corporate and owners) enough to change these conclusions. That is, the following features are not sufficient to undermine the existence of a supply from the body corporate to the owners in return for consideration from the owners to the body corporate:

- The body corporate is made up of all the owners even though it is a separate legal entity.
- The owners do not have any real option other than to receive supplies from the body corporate because of the Unit Titles Act 2010.
- The substance of the relationship between the parties is a collective funding of the unit title development's common expenses.

4.5 The common identity of the parties is not conclusive. A body corporate, although comprised of the owners of the unit title development, is a separate legal entity from the owners. It makes supplies to them of a number of services, including the services of maintenance of common property, obtaining insurance for buildings, administration of the development and financial management of the development.

4.6 The supplies are not made under the usual type of arrangement where parties voluntarily agree to provide goods and services for a consideration. Instead, a body corporate is obliged by law to undertake a number of functions that involve it supplying services to the owners of the unit title development in return for the payment of levies by those owners, which the owners are statutorily obliged to pay.

4.7 The statutory nature of the mutual obligations of the body corporate and the owners does not mean they are not making supplies for a consideration. That the duties are statutorily imposed does not alter the fact that the body corporate actually furnishes or supplies certain goods or services to the owners. There is a sufficient connection or reciprocity between the services supplied by the body corporate and the levies paid by the owners to mean the levies are "consideration" for the supplies. "Consideration" is a very widely defined term and includes payments made "in respect of" the supply of any goods and services. The words "in respect of" are words of the very widest meaning. New Zealand and overseas case law supports these propositions, particularly the view that a body corporate makes supplies to the owners.

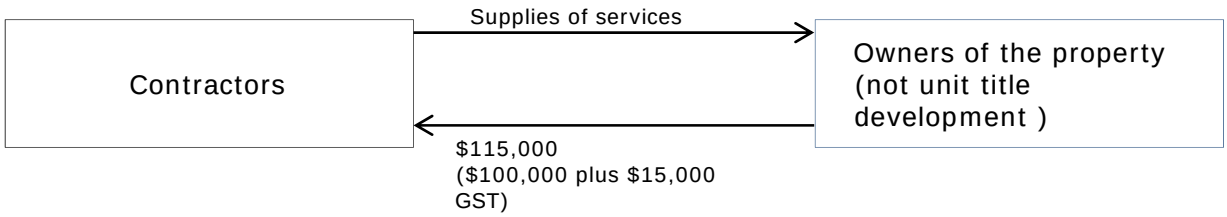
4.8 As has been stated above, these conclusions are not free from doubt. Another New Zealand court considering the issue may choose simply to apply the High Court decision in *Taupo Ika Nui*, or to adopt different reasoning but still conclude that bodies corporate are not carrying on a taxable activity or required to be GST registered. However, for the reasons set out in this paper, the Commissioner considers that, on balance, the decision in *Taupo Ika Nui* was wrongly decided both in fact and in law. The decision appears to construe the facts wrongly in the case. Furthermore, the case appears to allow the body corporate to delegate its role and be just a conduit, which is arguably legally incorrect.

4.9 The Commissioner is interested in receiving the views of interested taxpayers, practitioners and commentators on the issues canvassed in this paper. These views may relate to legal interpretation, practical aspects and/or the appropriate policy outcomes.

IMPLICATIONS OF THE CONCLUSIONS

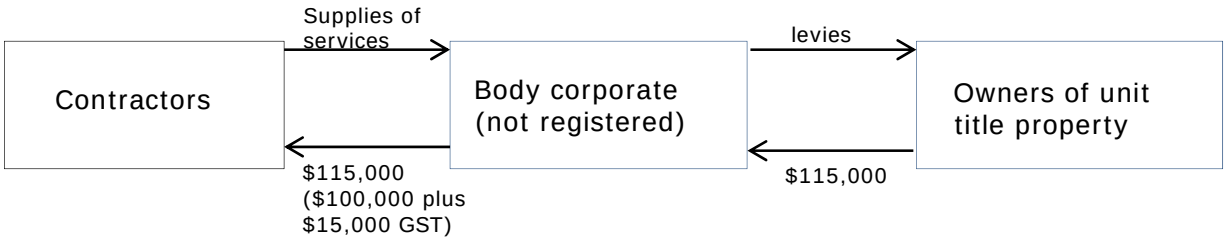
4.10 The following diagrams demonstrate the implications of the potential GST treatments of a body corporate. The first diagram sets out the GST treatment of a non-unit title development that receives services, assuming that the owners are not GST-registered. The next two diagrams demonstrate the treatment where there is a unit title development with a body corporate, in circumstances where the body corporate is not registered and is registered respectively.

1



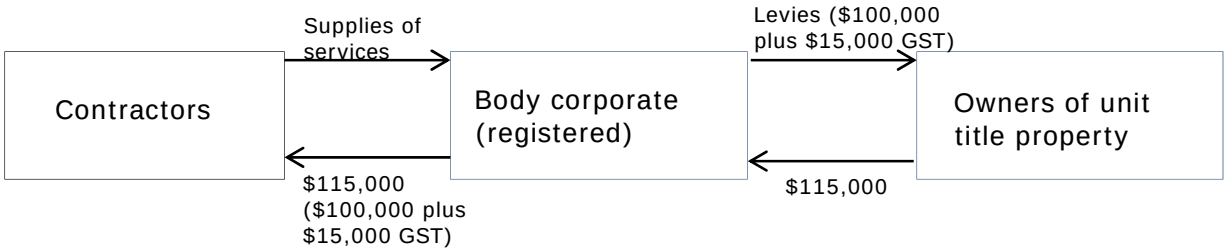
Net GST paid to Crown $15,000
No input tax deduction to Owners so net cost of services is $115,000

2



Net GST paid to Crown $15,000
No input tax deduction to Body Corporate so net cost of services is $115,000
(assuming the Owners are levied just the same amount to cover costs with no margin)

3



Net GST paid to Crown $15,000 ($15,000 paid by Contractors and $15,000 paid by the Body Corporate = $30,000, less $15,000 input tax claimed by the Body Corporate).

Body Corporate's net cost of the services received is $100,000 but to get $100,000 net from the Owners they need to levy gross $115,000 taking into account the GST liability they have.

APPENDIX – LEGISLATION

Goods and Services Tax Act 1985

1. Section 2(1) of the GST Act defines "consideration" as:

> **consideration**, in relation to the supply of goods and services to any person, includes any payment made or any act or forbearance, whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods and services, whether by that person or by any other person; but does not include any payment made by any person as an unconditional gift to any non-profit body:

2. Section 6(1) of the GST Act defines "taxable activity" as:

> **6. Meaning of term "taxable activity"**
>
> (1) For the purposes of this Act, the term taxable activity means—
>
> (a) any activity which is carried on continuously or regularly by any person, whether or not for a pecuniary profit, and involves or is intended to involve, in whole or in part, the supply of goods and services to any other person for a consideration; and includes any such activity carried on in the form of a business, trade, manufacture, profession, vocation, association, or club:
>
> (b) without limiting the generality of paragraph (a), the activities of any public authority or any local authority.
>
> ...

3. Section 8(1) of the GST provides:

> **8 Imposition of goods and services tax on supply**
>
> (1) Subject to this Act, a tax, to be known as goods and services tax, shall be charged in accordance with the provisions of this Act at the rate of 15% on the supply (but not including an exempt supply) in New Zealand of goods and services, on or after 1 October 1986, by a registered person in the course or furtherance of a taxable activity carried on by that person, by reference to the value of that supply.

Unit Titles Act 2010

4. Section 84(1) of the Unit Titles Act 2010 sets out the powers and duties of the body corporate itself. It provides:

> **84 Powers and duties of body corporate**
>
> (1) The body corporate has the powers and duties set out in—
>
> (a) sections 38 to 42 (which relate to the fixing and reassessment of the ownership interest and the utility interest):
>
> (b) section 81 (which permits the body corporate to act as an agent for the unit owners who lease or licence their principal unit and are absent for the purpose of enforcing the body corporate operational rules):
>
> (c) section 85 (which requires the body corporate to keep and maintain a register of all the owners of principal units and accessory units on the plan):
>
> (d) section 86 (which relates to the body corporate's power to sign documents on behalf of the owner):
>
> (e) section 87 (which requires the payment of ground rental to a lessor):
>
> (f) section 90 (which relates to the calling of general meetings):
>
> (g) section 105(3) (which requires the body corporate to comply with the body corporate operational rules):

(h) section 108 (which is the general power of delegation):

(i) sections 115 and 117 to 120 (which relate to the establishment and maintenance of the funds):

(j) section 116 (which requires the body corporate to establish and maintain a long-term maintenance plan):

(k) section 121 (which relates to the raising of amounts for each fund and the imposition of levies on the unit owners to establish and maintain each fund):

(l) sections 130 and 131 (which relate to the spending, borrowing, and investing of money and the distribution of surplus money and property):

(m) section 132 (which relates to the keeping of accounting records and submission of its yearly financial statements to an independent auditor):

(n) section 135 (which relates to insurance of the buildings and other improvements on the land):

(o) section 136(4) (which relates to the application of insurance moneys in or towards reinstatement of the development):

(p) section 138 (which relates to repair and maintenance of the common property, assets designed for use in connection with the common property, infrastructure, and building elements and access for those purposes):

(q) section 206 (which relates to the provision of records and documents on request from a unit owner):

(r) any other provisions of this Act, any other Act, or the regulations that confer powers or duties on the body corporate and subject to any limitations to those powers and duties in this Act, any other Act, or the regulations.

5. Sections 108–110 of the Unit Titles Act 2010 relate to the delegation of duties and powers by a body corporate. They provide:

108 Delegation of duties and powers

(1) Except as provided in subsection (2), a body corporate may delegate any of its duties or powers, either generally or specifically, to the body corporate committee by special resolution and written notice.

(2) The body corporate must not delegate any of the powers or duties set out in—

(a) subsection (1) (which is the general power of delegation):

(b) section 41 (which provides for the reassessment of ownership interests and utility interests):

(c) section 105(3) (which requires the body corporate to comply with the body corporate operational rules):

(d) section 136(4) (which relates to the application of insurance monies in or towards reinstatement of the development).

109 Delegated duties and powers of body corporate committee

(1) A body corporate committee to which any duties or powers are delegated under section 108(1) may, unless the delegation provides otherwise, perform the duties and exercise the powers in the same manner, subject to the same restrictions, and with the same effect as if it were the body corporate.

(2) The body corporate committee must not delegate any of its delegated duties or powers.

(3) The body corporate committee, when purporting to perform a duty or exercise a power under a delegation,—

(a) is, in the absence of proof to the contrary, presumed to do so in accordance with the terms of that delegation; and

(b) must produce evidence of the body corporate committee's authority to do so, if reasonably requested.

110 Effect of delegation on body corporate

No delegation affects or prevents the performance of any duty or the exercise of any power by a body corporate, or affects the responsibility of the body corporate for the actions of the body corporate committee acting under the delegation.

6. Section 121 of the Unit Titles Act 2010 gives a body corporate the power to impose levies on owners. Subsections (1) and (2) provide:

> **121 Contributions to be levied on unit owners**
>
> (1) A body corporate may determine from time to time the amounts to be raised for each fund and impose levies on the owners of principal units to establish and maintain each fund.
>
> (2) The levies must be calculated as follows:
>
> (a) in the case of the operating account, long-term maintenance fund, and any contingency fund, in proportion to each unit owner's utility interest; and
>
> (b) in the case of any capital improvement fund, in proportion to each unit owner's ownership interest.